

A close-up photograph of gold and silver coins. The top portion shows a gold coin with a maple leaf design and the words "FINE GOLD". The bottom portion shows a silver coin with the words "FINE SILVER". The background is a dark red gradient with a faint, larger-scale maple leaf pattern.

Canada: Energy and Natural Resources Law Overview

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Canada: Energy and Natural Resources Law Overview

Jurisdiction

Under the Canadian constitution, responsibility for the regulation of energy and natural resources, together with any associated environmental impacts, is shared by the federal and provincial governments. At the federal level, the principal regulatory bodies are the National Energy Board (NEB), the Canadian Nuclear Safety Commission (CNSC) and the Canadian Environmental Assessment Agency (CEA Agency). For their part, the country's ten provinces have established numerous bodies with mandates relating to energy and natural resources. The determination of which level of government has jurisdiction over a particular matter depends on a number of factors, including the location of the natural resource, the scope of the undertaking, the nature of the energy or natural resource development and the national importance of the resource. Often there is overlapping federal and provincial jurisdiction.

The federal government will normally be the relevant authority regarding energy issues of interprovincial or international significance. Provincial governments, in contrast, have basic responsibility for energy and natural resources within their own boundaries and, in most cases, are the owners of the resources in their natural state. The role of the provincial governments in energy and natural resources is therefore fundamental. In addition, the provinces regulate energy transportation, distribution and marketing contained solely within their borders. The provinces also have limited jurisdiction to regulate interprovincial exports of certain energy and other natural resources, subject to the constitutional "paramountcy" of any applicable federal laws with which they directly conflict.

Federal

The National Energy Board

The general responsibility of the NEB is to regulate defined aspects of the interprovincial and international movement of oil and gas and the import/export of electricity in the public interest, which includes but is not limited to technical, environmental, social and economic factors. The NEB grants certificates of public convenience and necessity for the construction of interprovincial and international pipelines and international power lines, issues licences or orders for exports of oil, gas, LNG, LPG or electricity and for imports of gas, and approves tolls and tariffs for interprovincial and international pipelines. The NEB maintains jurisdiction over all facility and export/import authorizations it issues for the life-cycle of the facility or activity.

The NEB also has the authority to hold inquiries into any aspect of energy matters under its jurisdiction and to issue reports for the information of the government and the general public.

The NEB generally does not regulate any of the following:

- hydrocarbon exploration, drilling or exploitation (except in Canada's three vast northern "territories" – which do not have the status of provinces – and certain offshore areas);
- generation of electric power; or
- construction or operation of pipelines that do not cross provincial or national boundaries.

NEB approval is required for the construction of interprovincial and international pipelines and international power lines. The approval process normally includes a public hearing and will involve consideration of the technical, environmental, social (including aboriginal) and financial aspects and impacts of the proposed project. Generally, to approve the construction of major interprovincial and international pipelines and international power lines, the NEB must first determine the project is in the public interest and that the project is not likely to cause significant adverse environmental effects or that the project is likely to cause significant adverse environmental effects that are justified in the circumstances. The NEB then makes a recommendation to the federal cabinet as to whether or not the project should be approved and under what conditions. The cabinet ultimately approves or does not approve the project on the basis of the NEB recommendation. (For simplicity, in the remainder of this section we refer to "Federal Government" rather than specifically to the cabinet, even where the cabinet is the part of the government that performs the action described.)

The long- or short-term export of oil, gas or electricity also requires NEB approval. Short-term approvals are issued for two years or less, have some quantity restrictions, and are routinely issued. When issuing long term approvals, the NEB will first have to be satisfied that the surplus criterion is met. That is that there will be an adequate supply of energy for Canadian requirements following the export of the proposed quantity. Additionally, the NEB will also consider all other relevant factors to make a public interest determination.

Many NEB decisions require Federal Government approval to take effect. Such decisions include the issuance of certificates for interprovincial and international pipelines and for international power lines and of licences for the long-term export of oil, gas or electricity.

The NEB is headquartered in Calgary, Alberta.

Planned changes to the NEB

On February 8, 2018, the Federal Government introduced proposed legislation (Bill C-69) that, if enacted by Parliament, will replace the NEB with a new agency known

as the Canadian Energy Regulator. The CER will largely have the same jurisdiction over energy infrastructure, tolling and exports/imports as the NEB has. However, the CER will have an expanded jurisdiction in respect of offshore renewable energy projects and offshore power lines. Unlike the NEB, the CER will have separate administrative and adjudicative functions. Administrative functions will be overseen by a Board of Directors and a Chief Executive Officer, while the adjudicative function will be conducted by a Commission.

The Canadian Nuclear Safety Commission

The general responsibility of the CNSC is to regulate the development, production and use of nuclear energy and the production, possession and use of nuclear materials and equipment in Canada. The CNSC makes regulations and issues licences relating, but not limited, to:

- the development, production and use of nuclear energy; the mining, production, refinement, enrichment, processing, use, export, disposal of nuclear substances (e.g. deuterium, thorium, uranium, and elements with an atomic number greater than 92 and derivatives); and
- the location, design, construction, installation, operation, maintenance, decommissioning and abandonment of nuclear facilities.

The CNSC maintains jurisdiction over all facility and licenced activities for the life-cycle of the facility or activity.

The CNSC also has general authority to publish scientific, technical and regulatory information and reports concerning the development, production or use of nuclear energy or the production, possession or use of a nuclear materials and equipment.

The approval process for licences issued by the CNSC is dependent on the nature and scope of the regulated activity. The vast majority of licences issued by the CNSC are issued without a public hearing. The CNSC will hold public hearings in respect of licensing applications for major nuclear facilities. In considering whether to issue a licence, the CNSC will consider whether the applicant is qualified to carry on the activity for which the licence is to be issued and whether in doing so the applicant will make adequate provision for the protection of the environment and human health and safety. Additionally, when considering licence applications for major nuclear facilities the CNSC must determine if the construction and operation of the project is likely to cause significant adverse environmental effects. If the CNSC concludes that the project is not likely to cause significant adverse environmental effects then it can approve the project. If the CNSC determines that the project is likely to cause significant adverse environmental effects it must refer the project to the Federal Government. The Federal Government will then determine whether or not the significant adverse environmental effects the project is likely to cause are justified in the circumstances.

The CNSC is headquartered in Ottawa, Ontario.

The Canadian Environmental Assessment Agency

The CEA Agency is the responsible authority for conducting federal environmental assessments for specified natural resource, energy and industrial projects that do not fall within the purview of the NEB and the CNSC. Often the CEA Agency will conduct environmental assessments of projects that may require various forms of provincial approval. An environmental assessment within the purview of the CEA Agency can proceed by way of a CEA Agency review only, by way of an equivalent substituted provincial process, or by way of a review panel. The federal Minister of Environment and Climate Change (“Minister”) has the discretion to direct that a CEA Agency environmental assessment be conducted by way of either an equivalent substituted process or review panel.

Generally after an environmental assessment has been conducted by way of the CEA Agency, an equivalent substituted provincial process or a review panel, a report must be issued to the Minister. The Minister then makes a determination as to whether or not the project is likely to cause significant adverse environmental effects. If the Minister determines that the project is not likely to cause significant adverse effects, then the project is effectively approved from a federal environmental assessment perspective. If the Minister determines that the project is likely to cause significant adverse environmental effects it must refer the project to the Federal Government. The Federal Government will then determine whether or not the significant adverse environmental effects the project is likely to cause are justified in the circumstances.

The CEA Agency is headquartered in Ottawa, Ontario.

Under Bill 69, if enacted as legislation, the CEA Agency will become the Impact Assessment Agency of Canada.

Provincial

Canada’s ten provinces exercise significant authority over energy regulation. There is little consistency among the provinces in terms of how regulatory powers are divided among agencies or with respect to the names and precise powers of those agencies. As is always the case when doing business in Canada, it is important to remember that you will often be dealing with provincial governments and regulations rather than with nationally applicable regulations. Over the following pages, we consider the major regulators in the provinces of Alberta, British Columbia and Saskatchewan.

The Alberta Energy Regulator

The general responsibility of the AER is to regulate the development of oil, gas, oil sands and coal in Alberta, including many of the activities associated with such energy developments. The AER has the broad mandate of providing for the safe, efficient, orderly and environmentally responsible development of energy resources

in Alberta, including the jurisdiction to regulate energy resource production schemes and the construction and operation of facilities such as wells, intra-provincial pipelines, processing plants, mines, upgraders, refineries and ancillary facilities. The AER maintains jurisdiction over all facilities and associated activities it authorizes for the entire life-cycle of the facilities. It conducts inspections of licenced facilities and carries out compliance and enforcement activities where non-compliances are found. The AER also has the authority to grant public land dispositions, water use licences, environmental approvals and approvals respecting geophysical activities associated with energy developments.

The AER has the authority to hold inquiries into any aspect of energy matters under its jurisdiction and to issue reports for the information of the Provincial Government and the general public.

The AER generally does not regulate any of the following:

- gas utility or water utility pipelines;
- facilities for the production and transmission of electricity;
- land dispositions, water licences and environmental approvals not associated with energy development;
- oil and gas well and facilities located on federal lands; or
- the construction or operation of pipelines that cross provincial or national boundaries.

The AER's approval process typically involves consideration of, among other matters, the technical, environmental, public safety, resource conservation, social (including aboriginal) and financial aspects and impacts of a proposed project. Generally, to approve applications for larger scale activities and facilities, the AER must first determine that the project is in the public interest. The construction and operation of certain large facilities and operations also require the approval of the Provincial Government.

The AER is headquartered in Calgary, Alberta.

The Alberta Utilities Commission

The primary responsibility of the AUC is the regulation and oversight of electric, gas and water utilities in Alberta. This involves regulation of the construction and operation of utility infrastructure and the rates and terms and conditions of utility service.

When considering whether to approve the construction of facilities, the AUC applies a public interest test and takes into account, among other matters, technical, environmental, social (including aboriginal) and financial factors. Depending on the size and scale of a project and whether there is public opposition, the utility facility approval process may include a public hearing. The AUC has jurisdiction over routing and siting of electric transmission lines, power plants and natural gas pipelines. The AUC maintains jurisdiction over all facilities it authorizes for the life-cycle of the facilities.

The AUC has an obligation to ensure that utility rates are just and reasonable. The types of entities whose rates the AUC regulates are the Independent System Operator (the Alberta Electric System Operator or AESO) in respect of providing service on the transmission grid; the owners of transmission line facilities, electric distribution facilities, gas transmission pipelines, and gas distribution facilities; and default supply electricity and gas retailers. The AUC also adjudicates complaints and enforcement proceedings in respect of matters under its jurisdiction.

The AUC also has the authority, when directed by the Minister, to hold inquiries into any aspect of energy matters under its jurisdiction and to issue reports for the information of the Provincial Government and the general public.

The AUC generally does not regulate any of the following:

- the wholesale price of electricity;
- pipelines associated with hydrocarbon production activities;
- the construction or operation of pipelines and power lines that cross provincial or national boundaries; or
- sewer utility costs.

The AUC is headquartered in Calgary, Alberta.

The British Columbia Oil and Gas Commission

The BCOGC is the single-window regulator of the oil and gas industry in British Columbia, with oversight of land dispositions, and environmental, water and heritage conservation permitting associated with oil and gas operations. The BCOGC reviews applications for oil and gas facilities and activities to determine whether they are in the public interest. These reviews include but are not limited to technical, environmental, public safety, resource conservation, social (including aboriginal) and financial factors. The BCOGC grants authorizations and permits for oil and gas wells, pipelines, processing facilities and all other associated facilities and activities related to exploration for and production of oil and gas. The BCOGC maintains jurisdiction over all facilities and associated activities it authorizes for the life-cycle of the facilities.

The BCOGC also has the authority to establish advisory committees to hold inquiries into any aspect of energy matters under its jurisdiction and to issue reports for the information of the BCOGC and the general public.

The BCOGC generally does not regulate any of the following:

- tolls and tariffs for oil and gas pipelines;
- the construction or operation of pipelines that cross provincial or national boundaries;
- the construction or operation of electric facilities.

The approval process before the BCOGC is primarily a written process and will involve consideration of the engineering, technical, environmental, social (including

aboriginal) aspects and impacts of the proposed project. Generally, to approve oil and gas activities, the BCOGC conducts a wide range of consultations to ensure that concerns from affected stakeholders, including first nations, are addressed by the project proponent before issuing authorizations.

The BCOGC maintains offices in Dawson Creek, Fort Nelson, Fort St. John, Kelowna, and Victoria, British Columbia.

The British Columbia Utilities Commission

The primary responsibility of the BCUC is the regulation and oversight of British Columbia's natural gas and electric utilities. It is responsible for considering applications for electric utility transmission and generation facilities and natural gas utility pipelines, and making a determination as to whether such facilities are in the public interest and that the project is aligned with British Columbia's energy objectives. The approval process normally includes a public hearing, which may be written or oral, and will involve consideration of, among other matters, the technical, environmental, social (including aboriginal) and financial aspects and impacts of the proposed project. If the BCUC approves a facility application, it grants a certificate of public convenience and necessity for the construction and operation of the facility. The BCUC maintains jurisdiction over all facilities and associated activities it authorizes for the life-cycle of the facility.

The BCUC is responsible for the regulation utility rates and terms and conditions of service, which must be just and reasonable.

The BCUC also has the authority to hold inquiries into any aspect of matters that may be applied for or complained of under its jurisdiction and to make decisions and make orders in respect of the same.

The BCUC does not regulate any of the following:

- hydrocarbon exploration, drilling or exploitation and facilities associated with such activities; or
- the construction or operation of pipelines and power lines that cross provincial or national boundaries.

In certain circumstances, decisions of the BCUC require Provincial Government approval to take effect. Such decisions include proposed consolidations, amalgamations, and mergers of public utilities, and requests for specific exemptions from certain requirements imposed on public utilities.

The BCUC is headquartered in Vancouver, British Columbia.

Saskatchewan Ministry of Energy and Resources

The Saskatchewan Ministry of Energy and Resources (SMER) is a department of the provincial government that administers the licensing and approval regime for oil and gas development in Saskatchewan. It also has responsibility for environmental

matters pertaining to oil and gas activities and with respect to the removal of natural gas from the province. It is responsible for deciding whether the approval of applications is in the public interest, which includes but is not limited to consideration of technical, environmental, social and financial factors. The SMER maintains jurisdiction over all facilities and associated activities it authorizes for the life-cycle of the facilities.

The approval process before the SMER is primarily a written procedure. Generally, before approving oil and gas developments and activities, the SMER reviews information provided by the proponent to ensure that concerns from affected stakeholders, including first nations, are reasonably addressed by the project proponent.

The SMER does not regulate the construction or operation of pipelines and power lines that cross provincial or national boundaries.

The SMER is headquartered in Regina, Saskatchewan. Until 2018, its functions were performed by the former Ministry of the Economy.

Effect of the North American Free Trade Agreement

NAFTA, like the FTA before it, has reduced the scope of regulatory intervention in the trade in energy, particularly between Canada and the United States. As a starting point, the FTA and NAFTA confirm that trade in electricity and other energy goods will be subject to GATT rights and obligations as well as to the provisions of the FTA and NAFTA agreements. The tariff elimination provisions of the agreements eliminated previously existing duties on energy imports and exports. Canada is also exempt from U.S. oil import fees. The parties agreed to lift most restrictions on energy imports and exports, subject to the conditions under which GATT allows restrictions (these include short supply, conservation of an exhaustible resource, national security or the imposition of price controls). No taxes, duties or charges on the export of any energy good from the U.S. to Canada or vice versa will be imposed unless such taxes, duties or charges are also imposed on such energy goods when destined for domestic consumption. The *National Energy Board Act* requires the NEB to give effect to the FTA and NAFTA when exercising its functions. A further discussion of the FTA and NAFTA is included in our section on free trade agreements.

About the Firm

When Heward Stikeman and Fraser Elliott first opened the firm's doors in 1952, they were united in their pledge to do things differently to help clients meet their business objectives.

In fact, they made it their mission to deliver only the highest quality counsel as well as the most efficient and innovative services in order to steadily advance client goals.

Stikeman Elliott's leadership, prominence and recognition have continued to grow both in Canada and around the globe. However, we have remained true to our core values.

These values are what guide us every day and they include:

- Partnering with clients – mutual goals ensure mutual success.
- Finding original solutions where others can't – but they must also be grounded in business realities.
- Providing clients with a deep bench of legal expertise – for clear, proactive counsel.
- Remaining passionate about what we do – we relish the process and the performance that results from teamwork.

A commitment to the pursuit of excellence – today, tomorrow and in the decades to come – is what distinguishes Stikeman Elliott when it comes to forging a workable path through complex issues. Our duty and dedication never waver.

This is what makes Stikeman Elliott the firm the world comes to when it counts the most.

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