Canada

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1. OVERVIEW

Outline the regulatory regime that applies to oil and gas, comprising the following matters:

a) the key legislation (federal, state and/or provincial) governing oil and gas exploration;

b) a commentary on whether the regime is based on concessions granted by the state (eg, licences) or whether the state is a co-owner of the project (eg, through being a party to a production sharing contract);

c) ownership of oil and gas resources; and

d) the key oil and gas regulatory bodies.

Division of powers, the Canadian resource landscape and the province of Alberta

Canada is a federation of 10 provinces and three territories and, with the exception of Quebec, is a common law jurisdiction. Canada's constitution divides legislative authority between the federal Parliament (the federal Crown) – which has jurisdiction over matters of interprovincial, national and international scope – and the provincial legislatures (each a provincial Crown) – which have jurisdiction over matters of a more local nature. Participants in the oil and gas industry are often subject to both federal and provincial regulators because these levels of government have overlapping or shared legislative authority in the areas of natural resource development, transportation, marketing and the environment.

Canada is rich in oil and natural gas and currently has the world's third-largest proven reserves of crude oil. On a regional basis, Alberta, British Columbia, Saskatchewan and the Maritime Provinces all produce substantial quantities of oil and gas. However, the vast majority of Canada's proven oil and gas reserves and production facilities are located within the province of Alberta. Discoveries of oil and gas in Alberta (in particular, in the Athabasca oil sands) have made Alberta the largest producing region in North America. For example, in 2011, Alberta produced 1.7 million barrels of oil per day, and it is estimated that this figure will rise to over 3 million barrels per day by 2020.

Given this reality, the primary jurisdictional focus of this chapter will be on the development, ownership and operation of oil and gas in Alberta. Having said that, business enterprises that are interested in conducting oil and gas business in Canada's other provinces or territories should be aware that although the fundamental legal concepts and provincial legislation in these provinces are substantially similar, there are certain differences that should be taken into account; these differences are, however, beyond the limited scope of this chapter.

Ownership of oil and gas resources

Ownership of oil and gas in Alberta is split among the provincial Crown, the federal Crown, Aboriginal groups (whose interests are administered by the federal Crown) and the successors of the private corporations and individuals who were historically granted 'freehold estates' containing mines and minerals. The provincial Crown is the owner of approximately 81 per cent of the mineral rights in Alberta, including approximately 97 per cent of all oil sands rights.

Aboriginal groups in Canada have varying claims and interests with respect to land and natural resources. Such interests are constitutionally and statutorily protected (under the Indian Act, R.S.C. 1985, c. I-5), and companies that operate on Crown lands should be aware that these interests may give rise to obligations to consult with and accommodate Aboriginal groups affected by oil and gas operations.

Key legislation

The key Alberta statutes and regulations governing oil and gas exploration include the following:

- the Mines and Minerals Act (R.S.A. 2000, c. M-17), which applies to all mines and minerals owned by the provincial Crown and deals with exploration and drilling, oil and gas leases and royalties;
- the Petroleum and Natural Gas Tenure Regulation (Alta. Reg. 263/1997), which details the procedures for obtaining oil and gas concessions from the provincial Crown;
- the Oil and Gas Conservation Act (R.S.A. 2000, c. O-6) (OGCA), which sets out rules intended to prevent the waste of oil and gas and provide for the economic, orderly and efficient development of oil and gas through licensing and approval requirements for drilling and operating facilities and the regulation of oil field and pool developments;
- the Oil Sands Conservation Act (R.S.A. 2000, c. 0-7) (OSCA), which has a similar purpose and effect as the OGCA, but applies directly to oil sands;
- the Surface Rights Act (R.S.A. 2000, c. S-24) (SRA), which establishes the Surface Rights Board and outlines the rules for obtaining land access rights required for exploiting oil and gas;
- the Environmental Protection and Enhancement Act (R.S.A. 2000, c. E-12) (EPEA), which sets out rules intended to support and promote the protection, enhancement and wise use of the environment through sustainable development, including with respect to environmental impact assessments, the release and storage of hazardous substances and the remediation of contaminated lands;
- the Public Lands Act (R.S.A. 2000, c. P-40) (PLA), which deals with the administration of public lands held by the provincial Crown, including outlining the process for the disposition of public lands, access to public lands and the enforcement of penalties for violations; and

- the Water Act (R.S.A. 2000, c. W-3), which applies to any action that may disturb water resources, including the consumption, use and storage of water for any purpose.

The key federal statutes and regulations governing oil and gas exploration include the following:

- the National Energy Board Act (R.S.C. 1985, c. N-7) (NEB Act), which establishes the National Energy Board and deals with energy-related issues under the authority of the federal Crown, including the administration of oil and gas interests; production and conservation; construction and operation of pipelines; traffic, tolls and tariffs on pipelines; export and import of oil and gas; and the interprovincial trade of oil and gas;
- the Canadian Environmental Assessment Act (S.C. 1992, c. 37) (CEAA), which sets out rules intended to ensure that projects are reviewed in order to avoid adverse environmental effects and to encourage sustainable development, including the process for environmental assessments that are triggered under the CEAA if a federal authority proposes a project, provides funding for a project, grants an interest in land to a project or exercises regulatory jurisdiction over a project; and
- the Canadian Environmental Protection Act (S.C. 1999, c. 33) (CEPA), which is the primary instrument that provides for the protection of the Canadian environment and human health, including the prevention and management of risks posed by hazardous substances.

The key federal statutes and regulations governing oil and gas exploration on Indian lands are the Indian Act, Indian Oil and Gas Act (R.S.C. 1984 c. I-7) and Indian Oil and Gas Regulations (1995, S.O.R./94-753).

Regulatory bodies

The following are the key Alberta regulatory bodies governing oil and gas exploration:

- the Alberta Department of Energy, which is the department of the provincial Crown that is responsible for the administration of the provincial legislation governing the ownership of oil and gas;
- the Energy Resource Conservation Board (ERCB), which oversees the oil and gas industry in Alberta; acts as an independent quasi-judicial agency of the Alberta Crown; is responsible for regulating the development of oil and gas resources in a manner that is fair, responsible and in the public interest through the issuance of licences to drill wells; determines spacing units for mineral reservoirs; regulates production rates; determines and enforces safety procedures; and oversees certain environmental aspects of well-site operations;
- the Ministry of Environment and Sustainable Resource Development (ESRD), which administers certain approvals, permits and licences for oil and gas projects with the intention of promoting responsible and innovative resource management and conservation;
- the Alberta Surface Rights Board (SRB), which is an independent adjudicative tribunal established by the provincial Crown to manage

conflicts over surface access rights when an owner of mineral rights is unable to negotiate land access required to exploit oil and gas;
- the Alberta Utilities Commission (AUC), which serves a quasi-judicial function in managing contraventions, objections and complaints arising under certain utility-related legislation; and is responsible for regulating the routes, tolls and tariffs of natural gas transmission through pipelines and for approvals for construction of pipelines and distribution facilities; and
- Alberta Environment, which, under the authority of the EPEA and the Water Act, is responsible for the protection and management of the environment, water resources, climate change and waste management.

The following are the key federal regulatory bodies governing oil and gas exploration:
- the National Energy Board (NEB), which, under the authority of the NEB Act, regulates interprovincial and international trade and commerce, including the importation, exportation and transportation of natural resources;
- the Canadian Environmental Assessment Agency (CEA Agency), which provides environmental assessments in order to contribute to informed decision making in support of sustainable development; and
- the Department of Fisheries and Oceans (DFO), which, under the authority of the Fisheries Act (R.S.C. 1985, c. F-14), delivers programmes and services that support the sustainable use and development of Canada's waterways and aquatic resources, including monitoring pollution in waterways and conducting environmental assessments.

Concessions rather that direct participation

The oil and gas regime in Canada is concession-based and the Crown does not normally co-own or directly participate in oil and gas projects. The owner of the mineral rights, whether the Crown or the owners of freehold estates, will typically grant a company a lease that gives the lessee the right to explore and drill for, remove and dispose of minerals for a set term in exchange for a certain amount of consideration, rental fees and royalty interests on recovered minerals.

2. PERMIT RIGHTS

Outline the types of oil and gas permits that are offered by the state and the key rights and obligations of oil and gas permits for both exploration and production.

Freehold leases

The relationship between the owners of freehold estates and oil and gas companies is typically governed by a freehold petroleum and natural gas lease (PNG Lease), which, for a set primary term, grants the lessee the right to explore and drill for, remove and dispose of mineral substances in exchange for a certain amount of consideration, rental fees and royalty interests on recovered minerals. This lease is automatically extended indefinitely if there is continuous production from the lands; however, if there is no production, the lease will typically expire at the end of the primary term.

Provincial crown leases and licences

The relationship between the provincial Crown and oil and gas companies is typically governed by a provincial Crown PNG Lease, which, for a set primary term of five years, grants the lessee the right to explore and drill for, remove and dispose of mineral substances in exchange for a certain amount of consideration, rental fees and royalty interests on recovered minerals. As in the case of the freehold PNG lease, this lease is automatically extended indefinitely if there is continuous production from the lands; however, if there is no production, the lease will typically expire at the end of the primary term.

An oil and gas company may also conduct exploration under a provincial Crown Petroleum and Natural Gas Licence, which is issued for an initial term of two to five years, depending on the geographic location of the licence area. This licence permits the licensee to drill for and recover the mineral rights granted under the licence. The licensee is obligated to drill a well to evaluate the mineral rights granted under the licence. Once a well has been drilled, the licence may be extended by the licensee for an intermediate term of five years. During the intermediate term of a licence, the licensee has essentially the same rights and obligations as a lessee in the primary term of a provincial Crown PNG Lease.

Provincial Crown oil sands leases and permits

The relationship between the government and oil and gas companies is governed by a provincial Crown oil sands permit or lease, which grants the right to explore, develop and extract oil sands. Two types of oil sands agreements can be issued under the Oil Sands Tenure Regulation (Alta. Reg. 50/2000). The first type is a permit that can later be converted into a lease. The second type is a lease that will be classified as primary or continued. A primary lease is issued to convert a permit or to extend a first-term oil sands lease. Primary leases are usually acquired through the public offering process and have 15-year terms. Continued leases are extensions of primary leases. Two criteria are used to approve the continuation of a primary lease: the first is the extent to which the lessee has evaluated the oil sands covered by the lease; the second is whether or not the lease is producing. If the evaluation criteria are met, the lease continuations will be granted for an indefinite period.

3. TAXATION

Outline the taxation regime that applies to oil and gas production, including

a) royalties and/or resources rents payable to the state;

b) income tax treatment of oil and gas companies, and differences (if any) from the taxation treatment enjoyed by other companies; and

c) withholding taxes and foreign exchange controls.

State royalties: conventional oil and gas

In Alberta, the current royalty regime for conventional oil creates a sliding scale (dependent on two components: price and quantity) to ascertain royalty rates. Standard rates start at 0 per cent and are capped at 40 per cent. Adjusted rates are available, as are royalty holidays and lower caps. These preferential rates are available in a number of circumstances, including for new wells, deep oil exploration, horizontal wells, enhanced oil recovery methods and wells using innovative technology.

State royalties: oil sands

The current regime in Alberta is described as 'generic' because the same royalty rates and rules apply equally to all oil sands projects. Projects are assessed according to the 'net revenue' principle, which means that a lower royalty rate applies to gross revenues and a higher rate applies to net revenues. This is to encourage development and innovation, and ensures that the Crown does not impose substantial taxes on an operator until its project is profitable.

Two considerations will determine whether a project is taxed at a higher or lower royalty rate: (i) whether the project is profitable, and (ii) the current price of oil.

Before a project has become profitable or 'reached payout', a royalty of 1 per cent to 9 per cent is paid on the gross revenue. After a project has become profitable, its net revenue is taxed at the net royalty rate of 25 per cent to 40 per cent.

The oil price will influence the royalty rates as follows: When the oil price is $55 per barrel or less, the base royalty rate of 1 per cent of gross income and 25 per cent of net income will apply. This will increase proportionately for every dollar increase in the price of oil until the price is $125 per barrel or above. At this point, the maximum royalty rate of 9 per cent of gross income and 40 per cent of net income will apply.

Income Taxes

(i) Corporate Income Tax rates

The federal and provincial Crowns impose tax on the taxable income of corporations. The general federal corporate tax rate for 2012 is 15 per cent. The provincial corporate tax rates vary between 5 per cent and 16 per cent, depending upon the province and industry. Thus, the combined federal-provincial corporate tax rate is, in general, between 20 per cent and 31 per cent. The general corporate tax rate for income attributable to Alberta is 10 per cent, resulting in a combined rate of 25 per cent.

(ii) Resource-specific deductible expenses

In addition to the generic deductible expenses incurred to earn income that are applicable to corporations in all industries, there are provisions for deductible expenses that are applicable only to the resource sector. The Income Tax Act (R.S.C. 1985, c. 1 (5th Supp)) provides for the following deductible expenses:

- Capital Cost Allowance, in respect of depreciation for the cost of certain tangible capital; generally deductible at a rate of 25 per cent per year on a declining balance basis;

- Canadian Oil and Gas Property Expense, in respect of the acquisition cost of certain oil and gas resource properties; generally deductible at a rate of 10 per cent per year on a declining balance basis;
- Canadian Development Expense, in respect of certain developmental costs once production has commenced; generally deductible at a rate of 30 per cent per year on a declining balance basis; and
- Canadian Exploration Expense, in respect of certain exploratory costs incurred prior to bringing a resource into production; generally deductible at a rate of 100 per cent.

(iii) Canadian resident vs. non-resident

Corporations resident in Canada are taxed on worldwide income, subject to credits for some foreign taxes paid on income earned outside Canada. Generally, a corporation is resident in Canada for tax purposes if its central management and control are exercised in Canada or if it was incorporated in Canada. In most instances, the central management and control of a corporation are exercised by the corporation's board of directors.

A non-resident is generally subject to Canadian tax only on Canadian-source business income, employment income and certain capital gains. Canadian withholding taxes are imposed on certain Canadian-source investment income that is paid to non-residents of Canada.

(iv) Withholding tax

Dividends paid by a Canadian corporation to shareholders who are not resident in Canada are subject to withholding tax at a rate of 25 per cent (or lower in some cases as a result of relevant tax treaties). Certain amounts paid to shareholders by a Canadian corporation on redemption of shares, reduction of capital and winding-up are considered to be paid as dividends for tax purposes and are thus subject to withholding tax when paid to a non-resident shareholder. Withholding tax also applies to other specified amounts paid by a Canadian corporation to a non-resident – for example, interest, management fees, rent and royalties. Generally, non-participating interest paid to arm's-length non-resident lenders is exempt from withholding tax.

(v) Tax treaties

Canada has an extensive network of international tax treaties, including treaties with the United States of America, the United Kingdom and many European countries. The tax treaties generally reduce the rate of Canadian withholding tax otherwise imposed and contain other important provisions relevant to the Canadian taxation of Canadian-source business income of a non-resident.

Sales taxes

(i) GST

A goods and services tax (GST) is imposed by the federal Crown, with certain exceptions, on all goods and services purchased in or imported into Canada. The current rate of the GST is 5 per cent.

The GST is a value-added tax designed to be paid by the ultimate consumer and must be collected by vendors throughout the production and distribution chain. Each vendor of a taxable good or service must, as an agent of the federal Crown, collect the GST on its sales, deduct the GST credit to which it is entitled in respect of GST it pays on its purchases (the input tax credit) and remit the balance to the government. Any excess of input tax credits over GST collected is refundable.

(ii) Provincial retail sales taxes

With the exception of Alberta, all the provinces in Canada have a form of sales tax that is levied on the sale of goods and services. Depending on the province, the combined federal and provincial sales tax rates range between 10 per cent and 15 per cent. Alberta and the territories of Canada do not impose a sales tax, and the GST is the only sales tax that applies in those jurisdictions.

4. OWNERSHIP STRUCTURES

Describe a typical ownership structure for oil and gas assets.

In Canada, business is conducted and oil and gas assets are owned through various methods, structures, relationships and entities, the most common being Canadian branches of foreign corporations, limited liability corporations, unlimited liability companies, general partnerships, limited partnerships and joint ventures. The type of entity used to conduct business and own assets depends on a number of factors, such as the nature of the business, the significance of limited liability to the parties, and tax considerations. The corporation is by far the most common entity used to conduct business and own assets in Canada.

Canadian corporation

It is typically advisable to utilise the corporate structure to conduct business in Canada. The corporation has the advantage of having the capacity and rights of a natural person and is considered a distinct legal entity (with separate liability) from its shareholders. Business corporations may be incorporated federally under the Canada Business Corporations Act (R.S.C. 1985, c. C-44) or provincially (including under Alberta's Business Corporations Act, (R.S.A. 2000, c. B-9)). For both federal and provincial corporations: (i) Canadian shareholders are not required; (ii) at least 25 per cent of the directors must be Canadian residents; and (iii) Canadian income tax is imposed on the worldwide income of the corporation.

Joint ventures

Canadian corporations frequently take advantage of the joint venture organisational structure to own and operate oil and gas assets. Joint ventures of varying styles are often the structure of choice when the cost and risk of the development of assets are too great to be ideally developed by a single corporation. A typical joint venture is created when two or more parties agree to jointly own and operate certain assets by sharing capital, materials, equipment, personnel and technical expertise.

Partnerships

In Canada, corporations can enter into partnerships. Depending on factors such as the degree of management control desired by each partner, liability concerns and tax structuring, partnerships can be structured as either ‘general’ or ‘limited’. Typically, all partners in a general partnership are entitled to participate in ownership and management, and each assumes unlimited liability for the partnership’s debts and liabilities. In a limited partnership, there is a separation between the partners who manage the business (who are subject to unlimited liability) and those who contribute only capital (who are liable only to the extent of their contributions to the partnership).

5. STATE PARTICIPATION

Outline any project participation/buy-in rights in an oil and gas project that the State retains.

It is not typical for the Crown to retain any direct project participation/buy-in rights in oil and gas projects in Canada.

6. LAND ACCESS

In order to explore and exploit for oil and gas, outline the land access rights that are required, and provide a summary of how these are obtained.

Private land access

Under common law, the property rights to the surface of the land and the property rights to the minerals under the land are separate and distinct. As a result, one party can hold title to the surface rights while another party holds title to the oil and gas beneath the surface. This results in a split title over the lands in question. When a company holds only the mineral rights over a parcel of land, it must negotiate with the surface rights holder to gain access to the land to work and recover its minerals.

Access to private lands can normally be obtained by negotiation between the landowner and the company. When there is split title on private land between the surface and mineral rights, the surface owner’s Certificate of Title is subject to the mineral owner’s right to enter the land for the purpose of removing the minerals. There are two important limitations on the right to remove minerals. First, production methods must be in line with acceptable environmental and technical practices. Second, operations must be conducted in a way that minimises interference with the landowner’s use of the land.

Typically, when a company requires surface access to exercise its mineral rights, the company and the landowner will negotiate a surface lease. The surface lease will determine the exact location of the required facilities and the compensation paid to the landowner for inconvenience and losses due to the facilities. If lease negotiations fail, the company can apply to the Surface Rights Board, under the SRA, for a Right of Entry Order to gain access to the surface land for the purpose exercising its mineral rights.

Provincial Crown land access

In order to explore for and exploit oil and gas on provincial Crown lands, a company requires approval in the form of a PLA disposition from the ESRD for access to the surface of such lands. This disposition will typically take the form of a mineral surface lease, licence of occupation, pipeline agreement or pipeline installation lease. Two processes are available for obtaining approval from the ESRD, depending on the activities that will be occurring on the Crown lands. For conventional upstream oil and gas activities, the Enhanced Approval Process (EAP) applies. The EAP focuses on how other land users will be affected by the planned activities. The EAP does not cover unconventional gas developments (tight gas, shale gas, and liquid rich gas), thermal *in situ* oil sands operations and oil sands mines. These activities must be applied for and approved separately by submitting an Environmental Field Report to the ESRD. Under this process applicants must ensure that their land uses align with Integrated Land Management, which is the strategic planned approach employed by the ESRD to manage the environmental impact of oil and gas activities on public lands.

Federal Crown land access

Access to federal Crown lands is administered by the NEB under the NEB Act and the Canada Oil and Gas Operations Act (R.S.C. 1984, c. O-7). As in the case of the process administered by provincial authorities, no operations can commence on federal Crown lands until the NEB has granted proper authorisation.

7. ACQUISITION APPROVALS

Set out regulatory or third-party approvals that are required to perfect an assignment of interests in an oil and gas project – such as the approval and registration by the state or its delegate or any acquisition.

Canada's Competition Act

Canada's Competition Act (Competition Act, R.S.C. 1984, c. C-34) contains criminal and civil provisions prohibiting a variety of anti-competitive conduct. It also establishes a pre-transaction notification and transaction review regime. The Competition Act confers broad powers on the Commissioner of Competition to investigate whether a transaction is likely to prevent or lessen competition substantially. If a transaction raises these concerns, the Commissioner may apply to the Competition Tribunal for a remedial order.

The Competition Act requires that the Commissioner be given prior notice of certain transactions that exceed specified size thresholds (which are adjusted annually). Essentially, notification for a transaction is required if: (i) the parties to the transaction, together with their affiliates, have assets in Canada or annual gross revenue from sales in, from or into Canada that exceed C$400 million; and (ii) the aggregate value of the subject assets in Canada or the annual gross revenues from sales in or from Canada generated from the target assets or the target corporation would exceed C$77 million. In addition to these thresholds, in respect of share transactions only, notification is required only if the transaction would result in the purchaser holding more than 20 per cent in the case of a public corporation or 35 per cent in the case of a private corporation (or, in both cases, if the purchaser already holds 20 per cent or 35 per cent, more than 50 per cent) of the votes attached to all outstanding voting shares of the corporation.

8. FOREIGN OWNERSHIP LIMITS

Outline any restrictions or limitations on a foreign person acquisition by foreigners, including:

a) any approval by the state;

b) local content requirements for oil and gas projects; and

c) requirements for ownership and control by local residents.

Notification and review of acquisitions under the Investment Canada Act

The Canadian government encourages foreign investment that contributes to economic growth and employment opportunities in Canada. However, foreign investments that exceed certain monetary thresholds (the current threshold for investors controlled by persons who are residents of World Trade Organisation member countries is C$330 million) must be reviewed under the federal Investment Canada Act (R.S.C. 1985, c. 28 (1st Supp)). Foreign investments that are reviewable will be approved if they meet a 'net benefit to Canada' test. Reviews in relation to investments in respect of the oil and gas industry are handled by Industry Canada. If a proposed investment is not reviewable, the non-Canadian is typically only required to file a two-page notification form within 30 days of the implementation of the investment.

The net benefit to Canada test considers whether the acquisition of the company or assets in question will provide a net benefit to Canada. The following considerations are taken into account: (i) the effect of the proposed acquisition on the level and nature of economic activity in Canada (including employment; resource processing; utilisation of parts, components and services produced in Canada; and exports from Canada); (ii) the degree and significance of participation by Canadians in the business to be acquired, as well as in the industry of which the business forms part; (iii) the effect of the proposed investment on productivity, industrial efficiency, technological development, product innovation and product variety; (iv) the effect of the proposed acquisition on competition within Canada; the compatibility of the proposed acquisition with national industrial, economic and cultural policies (taking into consideration the economic and cultural policy objectives of any province likely to be significantly affected); and (v) the effect of the investment on Canada's ability to compete in world markets.

To obtain the Minister's approval of a reviewed transaction, the investor will often negotiate a set of commitments in the form of undertakings which typically survive for three years after the closing of the transaction. Commitments provided to the Minister by a foreign investor may, among other things, (i) obligate the investor to keep the head office of the Canadian business in Canada; (ii) ensure that a majority of senior management of the Canadian business is composed of Canadians; (iii) maintain certain employment levels; (iv) make specified capital expenditures and conduct research and development activities based on specified budgets; and (v) make a certain level of charitable contributions.

Investments by foreign state-owned enterprises are subject to separate federal government guidelines designed to require such enterprises to satisfy criteria relating to governance, transparency and commercial orientation.

In addition, the government may review any transaction if there are reasonable grounds to believe the transaction 'could be injurious to national security.' The Investment Canada Act does not define 'national security' but the expectation is that it will be invoked sparingly.

Local content and ownership

There are generally no specific local content requirements that apply to oil and gas projects other than: (a) undertakings that may be given by a foreign entity in accordance with an Investment Canada Act review (discussed above); (b) the requirement under both the federal Canada Business Corporations Act and the Business Corporations Act (Alberta) that at least 25 per cent of the directors must be Canadian residents; (c) the federal government's policy (in accordance with the Immigration and Refugee Protection Act (S.C. 2001, c. 27)), which provides that employment opportunities in Canada belong first to Canadian citizens and to permanent residents of Canada; and (d) certain employment and benefit obligations owed to Aboriginals in respect of projects within, upon or under Aboriginal land.

9. THIRD-PARTY ACCESS

In relation to oil and gas pipelines, set out the rights (if any) to obtain access to pipeline capacity.

Federal regulation

Operators requiring access to interprovincial and international pipelines have enshrined rights that will generally enable them to obtain access to pipeline capacity by appealing to the NEB. All federally regulated oil pipelines in Canada operate as common carriers under section 71 of the NEB Act, which provides that all pipeline companies are under a duty to receive, transport and deliver all oil offered by means of its pipeline. If there is no remaining capacity on the pipeline, the NEB can order a company to expand its facilities to meet capacity requirements.

Unlike oil pipelines, gas pipelines are contract carriers, which means that they are not required by statute to accept all gas offered to it by a supplier. However, the NEB is authorised to direct a pipeline company to offer pipeline capacity to an operator.

Provincial regulation

On application to the ERCB, pipeline access rights are available for pipelines that do not cross Alberta's borders. According to the OGCA, every producer has the right to obtain its share of production of oil or gas from any pool, and the ERCB can order any oil and gas pipeline owner to operate as a common carrier so that a producer may access existing pipeline capacity.

Four requirements must be met for the ERCB to grant a common carrier order: (i) producible reserves must be available for transportation through an existing pipeline; (ii) there must be a reasonable expectation of a market for the oil or gas to be transported by the pipeline; (iii) the applicant was unable to negotiate a reasonable arrangement with the pipeline owner; and (iv) the proposed common carrier operation is the only feasible way to economically transport the oil or gas or is clearly environmentally superior.

10. ENVIRONMENTAL

Provide an overview of the nature and level of environmental regulation pertaining to oil and gas projects.

Responsibility for environmental regulation in Alberta is divided between the provincial and federal governments. Environmental regulation in Canada is extensive and, as a result, numerous regulatory bodies and legislative provisions govern the activities of oil and gas companies. The most prominent issues relate to air, water, waste and contaminated property, as well as the enforcement of laws through charges and orders. Because of the size and scope of oil and gas projects, activities such as exploration, extraction and refining will usually trigger both federal and provincial oversight.

Generally, government orders may be issued against a broad range of persons, including those who are, who are deemed to be or who have been in control of a source of contamination or contaminated property. In certain cases, the Alberta government will perform the remedial work and charge the costs of this work to the person responsible for remediation. Liability can potentially be joint and several, as well as retrospective. Legislation also creates offences for discharging contaminants into the natural environment, failing to comply with orders and engaging in certain activities (eg, waste management) without first obtaining approval.

Planning and approval

Environmental regulations are initially triggered in the planning stages of a project. Before a company can begin construction on an oil and gas project, it must go through separate provincial and federal environmental assessment processes; however, a large-scale oil and gas project will normally require both federal and provincial approval. A project can gain approval under a provincial or federal environmental assessment or these separate processes can be combined under a single Joint-Review Panel (JRP). Most large projects are generally assessed under the CEAA by way of a JRP, which is designed to consider a project's impact on the environment, society and resource sustainability. The current timeline for a JRP is limited to 24 months and can be extended by three months if circumstances require.

Provincial licences and approvals will also have to be obtained under the Water Act before a project can proceed. Approval is required for any activity that could have adverse impacts on the province's water resources.

Monitoring and reporting

There are ongoing monitoring and reporting obligations that are triggered once a project has been constructed. On the federal level, Environment Canada and the DFO monitor, manage and control toxic substances, pollution and waste, under the CEPA and the Fisheries Act. On the provincial level, the ERSD is responsible for the protection of Alberta's environment and the management of Alberta's water resources. This is done in accordance with the EPEA, which (i) provides rules and requirements that are applicable to the release, storage and handling of harmful substances; (ii) outlines the procedures for waste management; and (iii) outlines the enforcement provisions and penalties for violating environmental regulations.

Oil and gas companies also have reporting obligations whenever environmental accidents and spills occur. For example, the EPEA requires that any release of a substance into the environment that could cause an adverse effect should be reported to ESRD. Additional reporting requirements apply with respect to industrial air emissions and are mandatory under the EPEA.

End of life cycle/project abandonment

When an oil and gas project has reached the end of its life cycle, the participants have a number of environmental responsibilities to appropriately abandon, decommission and possibly remediate or reclaim the worksite. Abandonment requirements are generally administered by the ERCB, and guidance on these procedures can be found under Directive 013 suspension of wells; Directive 020 well abandonment; and IL 98-02 suspension, abandonment, decontamination and surface land reclamation.

Another project abandonment requirement is to obtain a Reclamation and Remediation Certificate from ESRD. If a Reclamation Certificate is required, the company will have to ensure that the worksite has met 'equivalent land capability', which is the ability, after reclamation, to support various land uses that existed prior to oil and gas activities. If a Reclamation Certificate is not required, a Remediation Certificate must be obtained under the EPEA that certifies that contamination has been adequately addressed on the worksite.

Wildlife

Oil and gas companies should also be aware of their responsibilities under federal and provincial wildlife Acts. Federal responsibility for wildlife is governed by the Canada Wildlife Act (R.S.C. 1985, c. W-9) and the Wildlife Area Regulations (C.R.C., c. 1609). Under the regulations, companies must obtain a permit to conduct activities in wildlife areas. With respect to the provincial requirements, wildlife considerations are usually streamlined into the EAP; separate approvals are not needed. However, if a proposed project is not utilising the EAP, separate approvals for activities that affect wildlife will be necessary. The provincial approval process is governed by the Wildlife Act (R.S.A. 2000, c. W-10) and the Wildlife Regulation (Alta. Reg. 143/1997).

11. SAFETY

Provide an overview of the nature and level of occupational health and safety regulation pertaining to oil and gas projects.

Industrial and commercial activities involving the workplace are subject to comprehensive provincial and federal regulatory controls concerning workplace health and safety issues that are designed to minimise the risk of workplace accidents.

The Canada Labour Code (R.S.C. 1985, c. L-2) is the principal federal workplace health and safety legislation. It applies to federal government employees and to certain federally regulated industries such as interprovincial and international transportation.

All the provinces and territories have workplace health and safety legislation. In Alberta, the provincial Occupational Health and Safety Act (R.S.A. 2000, c. O-2) (OHS Act) governs all oil and gas projects. All the technical rules governing health and safety in Alberta are outlined in the Occupational Health and Safety Code 2009 (OHS Code) and cover areas such as general safety, chemical hazards and first aid requirements. There is also a specific section governing oil and gas wells under Part 37 of the OHS Code.

Under the OHS Act all employers are required to do everything that they reasonably can to protect the health and safety of their employees. Accordingly, the OHS Act outlines a number of obligations that employers must meet to ensure that they have done everything to protect their workers. For example, employers are required to assess their worksite and identify existing or potential hazards before work has begun. Employers must also ensure that equipment on their worksite is adequate for the job at hand. Chemicals and harmful substances on the worksite must be stored correctly, and the OHS Code outlines exposure limitations to harmful and hazardous substances. In addition, employers are responsible for ensuring that employees know how to use controlled substances properly and that appropriate protective measures are implemented in the case of an emergency.

Breaching the OHS Act leads to serious consequences. The OHS Act is enforced by occupational health and safety officers from Immigration, Workplace Health and Safety (WHS). They have the right to enter and inspect worksites, and if WHS officers believe that a worksite is unsafe, they can order an immediate work stoppage. Individuals who fail to follow an order or violate the OHS Act can face a fine of up to $500,000 or a prison term of six months for their first offence, or a fine of up to $1 million and/or a prison term of up to 12 months for a second offence.

REFERENCE DISCLAIMER

Certain portions of this chapter have been adapted by the authors from information made available through or published on the websites of the ERCB, the ESRD, the AUC and Alberta Energy.

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