

Alberta to expedite and de-politicize oil sands approvals: Bill 22, Red Tape Reduction Implementation Act, 2020

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On June 11, 2020, the Government of Alberta introduced [Bill 22, Red Tape Reduction Implementation Act, 2020](#) [PDF] in the Legislative Assembly. Bill 22 is the Government of Alberta's latest attempt to "remove red tape" within government processes and, more specifically, in processes required for the approval of new oil sands projects. Bill 22 has been characterized by the Government of Alberta as reducing regulatory burden, speeding up approvals, encouraging investment, increasing Alberta's competitiveness and helping to restart the economy amidst the ongoing COVID-19 pandemic.

In this Update, we provide a summary of the key amendments proposed in Bill 22 that are of interest to project proponents – namely, the removal of Cabinet's role in oil sands project approvals – and examine their potential implications, including in the context of Aboriginal law and the duty to consult.

Overall, the proposed amendments in Bill 22 are a welcome effort to create greater efficiency and expedience in regulatory processes and the proposed amendments may reduce the overall time required to obtain approvals for oil sands developments. However, recent judicial developments regarding the Crown's duty to consult with Aboriginal communities and uphold the honour of the Crown suggest that uncertainty in regulatory review processes is likely to persist.

Bill 22: an overview

Bill 22 is an omnibus bill that proposes amendments to 14 pieces of legislation that are administered by six different ministries. The amendments proposed in Bill 22 are part of the Government of Alberta's efforts to "cut red tape" in government processes to increase efficiency, speed up regulatory approvals and attract investment. Bill 22, if passed, will amend the following legislation:

- *Oil Sands Conservation Act*
- *Mines and Minerals Act*
- *Surface Rights Act*
- *Public Lands Act*
- *Energy Efficiency Alberta Act*
- *Marketing of Agricultural Products Act*
- *Companies Act*
- *Partnership Act*

- *Business Corporations Act*
- *Vital Statistics Act*
- *Recreation Development Act*
- *Wills and Succession Act*
- *Municipal Government Act*
- *Safety Codes Act*

This Update focuses on the amendments to the *Oil Sands Conservation Act*.

Oil Sands Conservation Act

Section 12 of Bill 22 amends the *Oil Sands Conservation Act* (the OSCA) by removing the requirement for the Alberta Energy Regulator (the AER) to obtain authorization from the Lieutenant Governor in Council (the Cabinet) prior to issuing final approval for new oil sands projects in Alberta. Section 12 of Bill 22 further amends the OSCA by removing Cabinet's authority to impose terms and conditions on an oil sands development approval. The result of this amendment is that the AER will become the final decision-maker under the OSCA for new oil sands projects in Alberta.

Considerations for project proponents

Project approval timeliness

The requirement to obtain Cabinet authorization has historically resulted in delays of varying degree for project proponents. As discussed in our prior [Update](#) regarding the requirement for Cabinet to issue a decision under the OSCA within a reasonable time, Cabinet authorizations issued under the OSCA have taken, on average, four months following an AER hearing, but in one recent case, had given rise to exceptional delay. Therefore, by removing the requirement for Cabinet sign-off, Bill 22 should shorten regulatory timelines. The Government of Alberta has stated that it anticipates the OSCA amendments will reduce the overall regulatory review process by up to 10 months. While that claim appears to be on the high end, what is clear is that after completing a (sometimes very lengthy) regulatory process before an expert tribunal (the AER), proponents will no longer need to wait for Cabinet to authorize their projects.

However, for oil sands mines (as opposed to Steam Assisted Gravity Drainage (SAGD) or other *in situ* oil sands projects), proponents will still be subject to the federal impact assessment regime under the *Impact Assessment Act* (Canada) and corresponding cabinet authorization requirements at the federal level. For those projects, the change proposed under Bill 22 is unlikely to provide many, if any, benefits from a timing perspective. Still, it is one less hurdle to surmount.

Reduced political uncertainty

Under the OSCA, the AER must assess whether a proposed oil sands project is in the public interest. However, it is no secret that upstream development projects – perhaps oil sands projects most significantly – have become subject to significant public scrutiny and debate from within and beyond Alberta's borders. This means that any proposed project could be subject to opposition by members of the public, regardless of its size or potential to cause significant impacts. Under the current legislation, this opposition can translate to public pressure and lobbying efforts to influence Cabinet that, in many cases, include discussions

with and among Cabinet officials that do not involve all affected parties (including the proponent) and are not available publicly. This framework creates uncertainty and procedural fairness concerns.

By removing the requirement to obtain Cabinet authorization for oil sands projects, the regulatory review process may become less politicized and more transparent, as the ultimate decision-making authority will be placed in the hands of the expert tribunal, which generally follows predictable processes and applies evidence-based measures to minimize environmental, stakeholder and Indigenous impacts – all in an open and transparent forum.

Aboriginal consultation and the honour of the Crown

In Alberta, in addition to any proponent-driven consultation, three government entities have a role to play in discharging the Crown's duty to consult with potentially affected Indigenous communities regarding proposed oil sands projects:

1. **The Aboriginal Consultation Office** (the ACO) is responsible for determining whether and with whom consultation is required, establishing the process for consultation and assessing the adequacy of consultation prior to a decision being made on an AER-regulated project. The ACO also has a role in recommending mitigation measures to address potential impacts to Aboriginal and treaty rights.
2. **The AER** (which assumed the responsibilities of the prior Energy Resources Conservation Board in 2013) is Alberta's lifecycle regulator for energy projects – i.e., it is responsible for reviewing, assessing, imposing conditions on, approving and overseeing the development and compliance of energy resource development projects, including oil sands projects. The AER is responsible for assessing a project's impacts on Aboriginal and treaty rights, ensuring impacts are reasonably avoided or minimized, and determining whether a project is in the overall public interest of Alberta. The AER's review processes (including oral hearings, where held) may also be relied upon to discharge the Crown's duty to consult. The AER holds no jurisdiction in respect of assessing the adequacy of such consultation. Rather, that power rests with the ACO, which is responsible for advising the AER on these matters. The AER cannot approve a project unless the ACO has deemed Indigenous consultation to be adequate.
3. Under the OSCA, **Cabinet** has largely refrained from interfering in oil sands projects that have otherwise been found to be in the public interest by the AER (or its predecessor). However, it has always had the authority to examine a proposed project in light of its potential impacts and relevant public interest considerations, and to assess whether approval would be consistent with the honour of the Crown in view of its obligations to Indigenous groups. Cabinet currently has the authority to deny or impose terms and conditions on project approvals to remedy any outstanding concerns, although it rarely (if ever) does. If Bill 22 passes, Cabinet will no longer hold this statutory authority.

The proposed amendments to the OSCA in Bill 22 are coloured by recent developments in the courts as discussed in our prior [Update](#). In particular, the Alberta Court of Appeal recently held that the AER's mandate to consider the public interest included an obligation to consider relevant issues of constitutional law, such as the honour of the Crown, which the Court found to be distinct and separate from the AER's express absence of jurisdiction to

assess the adequacy of Crown consultation.^[1] In essence, the Court found it was not in keeping with the AER's statutory duties to defer questions regarding the honour of the Crown for Cabinet to consider. This finding appears to be in line with the proposal in Bill 22, which would remove Cabinet's role in the decision-making process and thus any uncertainty regarding whether the AER or Cabinet is best suited to address constitutional issues (beyond adequacy of consultation) raised by Indigenous groups: this would become the sole responsibility of the AER.

However, from an Aboriginal law perspective, the proposed framework under Bill 22 is unique. We are not aware of any other regulatory regime where the final decision-maker (the AER in this case) is expressly deprived of the jurisdiction to consider the adequacy of Crown consultation. Although governments are able to rely on expert tribunals to discharge their constitutional duties to Indigenous peoples, those tribunals must be properly equipped to do so.^[2] By carving out the question of consultation adequacy, assigning that assessment to a separate entity (the ACO) and removing the final oversight role that Cabinet could otherwise play, Bill 22 introduces some uncertainty as to whether the resulting regime would satisfy Canada's constitutional requirements towards Indigenous groups and could result in appeal risk for proponents. We note that two First Nations in the Alberta oil sands region recently commenced litigation against the Province alleging that the current AER/ACO regime undermines effective consultation and is unconstitutional.^[3]

For these same reasons, although the removal of Cabinet's ultimate decision-making authority will eliminate one step in the review process and may reduce regulatory review timelines, it may result in the AER and ACO taking additional precautions (and time) when considering a proposed project to ensure that the duty to consult has been discharged and the honour of the Crown upheld.

Finally, if an affected Indigenous group is not satisfied with the ultimate outcome, its ability to challenge the "Crown" decision on a single project is twofold: an application for judicial review of the ACO's decision on consultation adequacy before the Alberta Court of Queen's Bench and an appeal of the AER's decision before the Alberta Court of Appeal. This undesirable situation is present under the current legislative regime and has often resulted in multiple court actions dealing with the same underlying complaint. Bill 22 as proposed would do nothing to change this existing issue and, if anything, could give rise to additional litigation by Aboriginal groups for the reasons noted above.

[1] *Fort McKay First Nation v. Prosper Petroleum Ltd.*, 2020 ABCA 163.

[2] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40.

[3] *Mikisew Cree First Nation and Athabasca Chipewyan First Nation v. Her Majesty the Queen in Right of Alberta* as represented by the Minister of Indigenous Relations: Statement of Claim dated March 23, 2020 and Originating Application for Judicial Review dated March 25, 2020 (Court of Queen's Bench of Alberta).