ENERGY REGULATION QUARTERLY

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MISSION STATEMENT

The mission of Energy Regulation Quarterly (ERQ) is to provide a forum for debate and discussion on issues surrounding the regulated energy industries in Canada including decisions of regulatory tribunals, related legislative and policy actions and initiatives and actions by regulated companies and stakeholders. ERQ is intended to be balanced in its treatment of the issues. Authors are drawn from a roster of individuals with diverse backgrounds who are acknowledged leaders in the field of regulated energy industries and whose contributions to ERQ will express their independent views on the issues.

EDITORIAL POLICY

ERQ is published by the Canadian Gas Association (CGA) to create a better understanding of energy regulatory issues and trends in Canada.

The managing editors will work with CGA in the identification of themes and topics for each issue, they will author editorial opinions, select authors, and edit contributions to ensure consistency of style and quality.

ERQ will maintain a "roster of contributors" who have been invited by the managing editors to lend their names and their contributions to the publication. Individuals on the roster may be invited by the managing editors to author articles on particular topics or they may propose contributions at their own initiative. From time to time other individuals may also be invited to author articles. Some contributors may have represented or otherwise been associated with parties to a case on which they are providing comment. Where that is the case, notification to that effect will be provided by the editors in a footnote to the comment. The managing editors reserve to themselves responsibility for selecting items for publication.

The substantive content of individual articles is the sole responsibility of the contributors.

In the spirit of the intention to provide a forum for debate and discussion ERQ invites readers to offer commentary on published articles and invites contributors to offer rebuttals where appropriate. Commentaries and rebuttals will be posted on The Energy Regulation Quarterly website.

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EDITORIAL

Rowland J. Harrison, Q.C. and Gordon E. Kaiser, FCIArb
Managing Editors

This is the first issue of the *Energy Regulation Quarterly*. Readers may wonder why we need another energy journal. The answer is, simply, that this country does not have one, at least not one dedicated to energy regulation.

Lots of things are regulated in Canada - the environment, broadcasting, securities, zoning, taxicabs, lawyers, telephones and railways. Over the years energy regulation has climbed to the top of the pile.

There are energy regulators in every province as well as at the federal level. That's because the business of energy production, transportation and distribution is growing in importance, not just in Canada, but throughout the world. And it's a sector that is increasingly challenged by technological innovation, which as it happens is a dominant theme in many of the decisions reviewed in this first issue.

ERQ takes a unique approach. Each issue will feature an article or articles by a leading commentator. In this first issue it is David J. Mullan, Emeritus Professor of Law at Queen's University. David, who needs no introduction to the North American legal world, reviews 10 years of lectures he gave to energy regulators every summer at the CAMPUT energy regulation course hosted by his university.

Aside from bringing thought-provoking articles, each issue promises a series of case comments. Our goal here is to kick start a serious discussion on significant decisions by energy regulators. That rarely happens now.

This issue offers important case comments by Dr. Michal Moore of the University of Calgary, Glenn Zacher of Stikeman Elliott in Toronto, and Jeff Christian of Lawson Lundell in Vancouver, as well as a commentary on the recent National Energy Board TransCanada Mainline decision by Gordon Kaiser, and one on the Maritime Link decision of the Nova Scotia Utility and Review Board by Rowland Harrison.

The TransCanada Mainline decision, like many of the case comments, highlights the challenges that new technology brings to energy regulators. The technology at the root of the issues in that case was the combination of hydraulic fracturing and horizontal drilling – which in less than a decade has managed to transform the gas supply market with economic recovery of massive reserves of gas from shale deposits across North America.

That new production has changed the picture on affordability of natural gas - and with it the industry and the regulatory landscape. TransCanada as the operator of the Mainline and many of its principal distribution company customers are facing significant challenges in adjusting to the new market environment. New regulatory solutions are required.

The other case comments noted above highlight some other areas where innovation in the use of technology is at issue – be it green energy technology, electric cars, or opportunities to bring natural gas into the transportation market. All provide serious challenges to regulators.

Technological innovation is not the only new development being faced by energy regulators. A sometimes related challenge is the changing energy geography of North America and the need for new transmission – for liquid,

gaseous and electric energy. Be it oil pipelines to western, eastern or southern (US) coasts to move supply to new markets, gas, LNG and pipelines in western, eastern and central regions to ensure the economic delivery of supply, or electric transmission between markets never before connected, the movement of energy is a more public concern than arguably at any time in our history.

This issue of *ERQ* examines some of these issues through the lens of the recent Nova Scotia decision on Maritime Link. The project is intended to provide a new link for Newfoundland to the North American electricity market and to give Nova Scotia access to electricity from Labrador. Through a series of transactions, the power from Muskrat Falls on the Churchill River will move to mainland Newfoundland by the Labrador-Island Link, and then through the Maritime Link to Nova Scotia and on to New England. Rowland Harrison's comment offers interesting insights on the decision.

Case comments by authors are important. But so are comments by the readers. Each issue of *ERQ* going forward will devote a section to those comments. We invite you to participate in this dialogue.

We hope *ERQ* will not become a Canadian backwater publication. To address the non-Canadian side, we have conscripted Robert Fleishman, a well-known commentator from Washington, to provide an American Report in each issue. And in the second issue we will introduce the first of what we hope will be regular European commentaries.

We realize Canada is not an island in terms of energy regulation. Energy is an international product. Most energy companies operate worldwide. And Canadian regulatory procedures often borrow from those developed abroad.

In a way, *ERQ* is the third leg of a long-crafted stool. Ten years ago, Canadian energy regulators together with utilities and the Energy Bar started two important educational initiatives. The first was the above-noted annual CAMPUT summer course. Each year for the past decade, regulators from across Canada have shown up for a weeklong session that has produced lively discussion and instruction. A number of those who lectured came year after year in a fine gesture of public service.

At the same time, the Energy Law Forum was created. It meets every May at locations across Canada. So far it has stopped at Kelowna BC, Lake Louise Alberta, St. Andrews by-the-Sea New Brunswick, Val David Quebec, Salt Spring Island BC, La Malbaie Quebec and Toronto, Ontario.

In both of those initiatives, speakers often delivered first-class papers. There was always a concern that none were published. With Professor Mullan's piece here we demonstrate how the *ERQ* can provide a forum to remedy that shortcoming.

But *ERQ*'s real purpose is to provide timely public discussion on important regulatory decisions. And to that end, we have assembled a roster of contributors - leading practitioners, academics and other experts who will author the case comments and other articles. We appreciate their commitment. Some have contributed to this first issue, others have their names listed on the masthead and we look forward to their comments in subsequent issues.

We hope this publication will be self-sustaining, and we're running it as a pilot project for 5 issues through to the end of 2014 to see if we can make it work. Like any new venture, angel investors were necessary for the launch. In our case, first recognition needs to go to the Canadian Gas Association – involved in conceiving the idea, serving as ERQ publisher, and our first funder. The Canadian Electricity Association has

joined CGA in the effort, reflecting the balance between electricity and gas in the downstream regulated energy business. In addition, a series of distinguished law firms are being engaged. To all of these we extend our sincere thanks: without their support this important initiative would not have been realized.

Finally, there is one individual to whom we are continually indebted. Mike Cleland was for many years President of the Canadian Gas Association. In that position he was instrumental in directing and initiating a number of important programs that increased the degree of policy literacy in the energy community. Following his retirement, Mike was instrumental in founding this publication. Without his guidance and commitment *ERQ* would not have come into being. ■

REGULATORS AND THE COURTS: A TEN YEAR PERSPECTIVE[1]

*David J. Mullan**

Introduction

This paper has been ten years in the making in the sense that it represents the current evolutionary state of a background document to a presentation that I have been privileged to make at the annual CAMPUT Canada's Energy and Utility Regulators Energy Regulation Course. The nature of that presentation and the title to the paper are the inspiration of Gordon Kaiser at whose suggestion I have been focussing for most of those nine presentations on pitfalls that energy and public utilities regulators may encounter in the course of their regulatory work and their hearing processes in particular. It started out as a list of ten rules that should guide those regulators but that list has now grown to seventeen! However, that should not necessarily be read as an indicator that the potholes along the way have become more numerous and larger. Indeed, for most, if not all regulators, many of the precepts of this paper are now so engrained in their consciousness, work habits, and rules of practice and procedure as to constitute them as no more than a reminder not to become lackadaisical and, perhaps more significantly, as a record of how far the energy and utility regulatory process has advanced in sophistication and attention to best practices. That is not, however, to say that new problems have not emerged or that all areas of controversy and doubt have been resolved satisfactorily. Thus, for example, as this paper will make clear, there are still a number of outstanding issues respecting standing to participate at regulatory hearings and the impact on regulatory hearings of the duty to consult aboriginal peoples. Here, almost of necessity, some of my discussion and recommendations are tentative in the sense that clarification of the law, either internally or from the courts, is still awaited.

Let me start with the current list of precepts:

1. Pay careful attention to identifying the sectors of the public, industry and government to which you should give notice of an impending regulatory hearing.
2. Be aware of the principles and statutory provisions respecting party, intervener, and other forms of status at your hearings.
3. Err on the side of generosity when issues of disclosure arise.
4. Realise the potential, either by reason of your ability to control the proceedings before you or your rules of procedure or practice, for the sorting and refining of issues as well as the simplification of evidence presentation through various

* David J. Mullan is an Emeritus Professor of Law at Queen's University where he taught for over 25 years. Prof. Mullan was the first Integrity Commissioner for the City of Toronto and is now a consultant and researcher. He is the author of a number of articles and books in the area of administrative law and is currently a member of the NAFTA Chapter 19 Canadian Panel. He is a frequent speaker at continuing legal education seminars for members of courts, tribunals and agencies.

[1] Some parts of this paper also draw on "Administrative Law and Energy Regulation", a Chapter in Gordon Kaiser & Bob Heggie, eds, Energy Law and Policy (Toronto: Carswell, 2011) at 35.

forms of prehearing procedures.

5. Do not, however, fall into the trap of over-judicializing the proceedings – you are a regulator with a policy mandate, not a criminal court.

6. Without becoming too fast and loose, recognize the flexibility that comes with not generally being bound by the rules of evidence applicable in regular court proceedings.

7. More generally, do not allow the parties to take the conduct of the hearing into their own hands. Impose discipline. Nonetheless, behave at the hearing with decorum, and listen. Behind every testy exchange with counsel and witnesses lies the possibility of a challenge for a reasonable apprehension of bias.

8. Where bias and lack of independence challenges are raised, whether related to your prior involvements and associations, or your behaviour at a hearing, recognize that you are obliged to deal with them. However, conscious of the public interest in participation by experienced adjudicators and the capacity of parties to use bias challenges as a means of "forum shopping", do not disqualify yourself too readily.

9. Energy regulators are generally meant to be independent of the government that appoints them. As a consequence, be careful not to develop cozy relationships with the Minister or departmental staff, and, in particular, resist any encouragement to discuss pending matters with them.

10. Act preemptively when you are aware of prior involvements and associations that could give rise to concerns on the part of one or more of the participants. Reveal the full facts to the parties and ask whether anyone has objections to your participation.

11. Recognize that the standards respecting bias and a lack of independence may vary depending on the role that an Energy Regulator is exercising. In particular, those standards may be stricter in the case of enforcement or compliance proceedings than they are in the instance of broad public interest regulatory permission hearings.

12. As well as dealing with challenges to your participation based on a reasonable apprehension of bias, you may also have a legal obligation to deal with constitutional (including Charter or aboriginal rights) challenges to your jurisdiction and proceedings, and even to the statutory regime under which you function.

13. Do not hesitate to consult with other members of your agency as well as lawyers to the agency and other staff even in relation to matters that you are currently hearing, but recognize the constraints within which such consultations can take place legitimately.

14. Talking of consultation, be vigilant as to the extent to which your proceedings might affect aboriginal peoples' rights, interests and claims and the special procedural obligations that may arise in those situations, particularly when the Crown's constitutional duty to consult is engaged.

15. Pay careful attention to the statutory and common law requirements to provide reasons for your decisions.

16. In particular, take particular care to justify departures from your own previous case law or general principles of regulatory theory.

17. Only resort to the use of grand legal principles where it is absolutely necessary. Where possible, base your decision on a careful examination of the facts, the intricacies of your own statutory regime, and the law developed by your own tribunal or agency precedents. The courts will generally respect your expertise and apply a deferential standard of review if you remain

rooted in those issues.

I will now develop each of these seventeen propositions including references to many of the governing authorities and legislation.

1) Notice

At the outset of any regulatory initiative with the potential to affect a significant number of people, Energy Regulators will have to face up to the question of how to give notice that will satisfy the requirements of either or both of the common law, and their constitutive statutes and procedural rules.

The case law governing this area dates back almost thirty years to *Re Central Ontario Coalition and Ontario Hydro*.[2] There, the Ontario Divisional Court addressed the question of the adequacy of notice provided by a Joint Board (the Ontario Municipal Board and the Environmental Assessment Board) considering a proposal for a significant electricity transmission line project. The Joint Board, in recognition of the number of persons and groups potentially affected by the proposal and also the disparate nature of the impact of the proposal, provided for a combination of personal notice to some individuals and municipalities and notification through newspaper advertisements. While the choice of modalities did not cause any problems in the Divisional Court, nonetheless, the Court ruled that there had been a failure to provide adequate notice in the sense that the newspaper advertisement was not only misleading but also not sufficiently informative as to the siting of the proposed transmission lines.[3]
1657575 Ontario Ltd. v. Hamilton (City)[4] provides more recent reaffirmation of the dual aspects of the requirement to provide notice of pending hearings – make sure that the notice comes to the attention of those whose interests are significantly affected and also that the notice is sufficiently informative to alert those people as to the nature of what is proposed and its potential impact on their rights and interests. However, what is also clear is that, provided the notice is both accurate and sufficiently informative as to participatory rights, various time lines, and where additional information is available, it will pass muster.[5]

Nonetheless, as will be discussed in greater detail below, special obligations with respect to notice may arise when any application has the potential to affect aboriginal rights and interests, including those that are the subject of as yet unresolved claims. Situations such as this will almost invariably require the relevant Energy Regulator to provide "personal" and specific notice to the affected aboriginal peoples.

2) Parties, Intervenors, and Standing

Inextricably linked with the issue of notice is the question of who is entitled to status at any hearing as a party, intervenor, or other form of participant.

In Alberta, there has long been a legislated standard. Section 1 of the *Administrative Procedures and Jurisdiction Act*,[6] a general

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[2] *Central Ontario Coalition and Ontario Hydro* (1984), 46 OR (2d) 715, 10 DLR (4th) 341 (Div. Ct).

[3] For an example of a newspaper advertisement in relation to an application to the Ontario Energy Board that "will have an effect on all electricity consumers in Ontario", see, *inter alia*, "Ontario Energy Board, Notice of Application and Hearing – Hydro One Networks Inc. – Change to Electricity Transmission Revenue and Rates – EB-2010-002", *Kingston Whig-Standard*, Monday, June 14, 2010, at 11.

[4] *1657575 Ontario Ltd. v. Hamilton (City)* (2008), 92 OR (3d) 374 (CA).

[5] Contrast with *Central Ontario Coalition, supra* note 2 and *Re Joint Board under the Consolidated Hearings Act and Ontario Hydro* (1985), 51 OR (2d) 65, 19 DLR (4th) 193 (CA).

[6] *Administrative Procedures and Jurisdiction Act*, RSA, 2000, c A-3 (as amended). The *Responsible Energy Development Act*, SA 2012, c R-17.3 (proclaimed partially in force on June 4, 2013, effective June 17, 2013: OC 163/2013)

procedural statute still applicable to the Alberta Utilities Commission as well as the Surface Rights Board and the Natural Resources Conservation Board, defines as a party (and therefore entitled to notice and participatory rights) anyone

> …whose rights will be affected by the exercise of a statutory power or by an act or thing done pursuant to that power.

However, in the context of hearings that have an impact on the public at large, that definition obviously begs the question: What count as "rights"? The constitutive legislation of the province's two principal Energy Regulators attempts to give greater precision to this by requiring hearings or according intervenor status generally for those who are "directly and adversely affected" by proceedings before the Alberta Utilities Commission or the Alberta Energy Regulator.[7] This standard is one that mirrors the traditional test for standing to seek judicial review but, even so, it is not self-applying as the considerable jurisprudence on these provisions makes clear. Indeed, it may well be the most-litigated energy regulation issue in the province.

In *Dene Thá First Nation v. Alberta (Energy and Utilities Board)*,[8] the Alberta Court of Appeal divided the test into two parts:

> First is a legal test, and second is a factual one. The legal test asks whether the claim, right or interest being asserted by the person is one known to law. The second branch asks whether the Board has information, which shows that the application before the Board may directly and adversely affect those interests or rights. The second test is factual.[9]

This bifurcation is significant in that by classifying the second part of the exercise as factual, the Court denied itself the capacity to review the then Board's decision at this stage. The right to seek leave to appeal is confined to questions of law and jurisdiction. As a consequence, a major component of any determination of entitlement to notice and to participate is left to the virtually unreviewable discretion of the particular Energy Regulator. Indeed, this may also be the case where the issue of standing involves the determination of a question of mixed fact and law from which a significant legal issue is not readily extricable.[10]

As far as the "known to law" aspect of the test is concerned, the Court of Appeal has certainly recognized the rights of landowners whose property rights might be affected adversely by the matter before the Regulator.[11] Indeed, in such cases, the requirement may frequently extend to personal notice as opposed to simply notice through an advertisement in a newspaper

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replaced the Energy Resources Conservation Board with the Alberta Energy Regulator. Rule 10 of *Alberta Energy Regulator Rules of Practice*, AR 99/2013, seemed to assume amendment of the designation regulation: *Authorities Designation Regulation*, AR 64/2003, to substitute the new Regulator for the Board but, in fact, the amendment to the Regulation merely removed the Energy Resources Conservation Board and did not include the Alberta Energy Regulator. See AR 64/2003, s 1(e).

[7] See s 9 of the *Alberta Utilities Commission Act*, SA, c A-37.2 and s 32 and 34(3) of the Responsible Energy Development Act, SA 2012, c R-17.3. (See also s 9(2)(a)(i)(A) of the Alberta Energy Regulator Rules of Practice, supra note 6, dealing with interveners in similar terms.)

[8] *Dene Thá First Nation v. Alberta (Energy and Utilities Board)*, 2005 ABCA 68, 363 AR 234.

[9] *Ibid* at para 10.

[10] See *Prince v. Alberta (Energy Resources Conservation Board)*, 2010 ABCA 214, at para11. In the prior paragraph, Watson J.A. affirms Dene Thá First Nation, *supra* note 8, listing various subsequent Alberta Court of Appeal judgments to the same effect. For a very useful discussion of the link between the grounds of appeal and the common law principles governing standard of review, see H. Martin Kay, QC, "What Does Reasonableness Mean?" a paper delivered at the Energy Regulatory Forum, held in Calgary on May 10, 2011.

[11] See e.g. *Lavesta Area Group v. Alberta (Energy and Utilities Board),* 2007 ABCA 194 at para 37.

or other media.[12] Nonetheless, what precisely counts as a property right for these purposes is itself an open question. Certainly, exposure to expropriation in any form, including the creation of rights of way will qualify. Beyond this though, the previous Energy and Utilities Board recognized in EUB Directive 29 that it had a responsibility of specific notification to landowners on the basis of proximity to any proposed project.

The Alberta Court of Appeal has, however, accepted that there are limits on what constitutes a direct and adverse impact in the sense of an interest known to law. Long-term status as an environmental advocate, even one using the land in question for recreational purposes, is not enough.[13] Indeed, the fact that the regulator has required a proponent to consult with someone is not in itself sufficient to secure standing for the consultee.[14] More generally, the Court has ruled that there is no room for recognition of public interest standing either within the relevant standing provisions or as an overarching discretionary matter.[15] Beyond that, a generalized assertion of a potential downstream economic impact is insufficient.[16]

Also, when it comes to claims such as a potential impact on the health of those living in proximity to the proposed project,[17] the Court has ruled that this is a matter on which those seeking standing have to provide evidence, and that the assessment of that evidence is a question of fact for the regulator not subject to an application for leave to appeal.[18] However, more recently, in the context of another health-based claim to intervenor status before the previous Energy Resources Conservation Board, the Alberta Court of Appeal has signaled that it may be taking a rather more generous view of what constitutes a "direct and adverse effect." In *Kelly v. Alberta (Energy Resources Conservation Board)*,[19] the Court accepted that the issue of whether a "right" was at stake was not the only

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[12] *Ibid*.

[13] *Kostuch v. Alberta (Environmental Appeal Board)* (1996), 182 AR 384, 35 Admin LR (2d) 160 (CA).

[14] *SemCAMS ULC v. Alberta (Energy Resources Conservation Board)*, 2010 ABCA 397.

[15] *Friends of The Athabasca Environmental Assn. v. Alberta (Public Health Advisory and Appeal Board)* (1995), 181 AR 81, 34 Admin LR (2d) 167 (CA). In this regard, the Court specifically (at para 10) rejected the application of *Friends of the Island v. Canada (Minister of Public Works)*, [1993] 2 FC 229 (TD), in which, in **judicial review** proceedings, the Federal Court was prepared to accept that there was room to recognize public interest standing notwithstanding the provision of the *Federal Courts Act*, RSC 1985, c F-7, seemingly restricting an application for judicial review to persons who were "directly affected": s 18.1(1). See also *Alberta Wilderness Assn. v. Alberta (Environmental Appeal Board)*, 2013 ABQB 44, *Kostuch, supra* note 13 at paras 18-19*, and Canadian Union of Public Employees, Local 30 v. Alberta (Public Health Advisory and Appeal Board)* (1996), 178 AR 297, 34 Admin LR (3d) 862 (CA) at paras20-25.

[16] *ATCO Midstream Ltd. v. Energy Resources Conservation Board*, 2009 ABCA 41, 446 AR 326 at paras 9-11. See also *Westridge Utilities Inc. v. Alberta (Director of Environment, Southern Region),* 2012 ABQB 681. Compare *Cardinal River Coals Ltd. v. Alberta (Environmental Appeal Board)* (2004), 10 CELR (3d) 282 (Alta QB), refusing to interfere with the Board's according of status to a person operating wilderness tours in the area affected by an application.

[17] Obviously, this was a matter of concern at a hearing before the previous Energy Resources Conservation Board, in which, according to the *Globe and Mail*, the regulator controversially denied standing to several residents: "Residents warn energy regulator of health risks from refineries", *The Globe and Mail*, June 12, 2010, at A12.

[18] *Graff v. Alberta (Energy and Utilities Board)*, 2008 ABCA 119, at paras 20-27. See also *Sawyer v. Alberta (Energy and Utilities Board)*, 2007 ABCA 297, 422 AR 107. (For an example of where the Court held that the ERCB had erred in the legal test it applied to determining a claim to be directly affected based on health threats, see *Kelly v. Alberta (Energy Resources Conservation Board)*, 2009 ABCA 349, 464 AR 315. See also *Kelly v. Alberta (Energy Resources Conservation Board*, 2010 ABCA 307, the application for leave to appeal the denial of standing described in the previous footnote.) Indeed, this also applies to the extent that the determination of the right to be heard depends on the nature and magnitude of a potential economic impact (*ATCO Midstream Ltd., supra* note 16 at para 10; *SemCAMS ULC, supra* note 14), or whether there is a sufficient degree of physical proximity or connection between an asserted aboriginal right and the work proposed (*Dene Thá First Nation, supra* note 8 at para 14; *Prince, supra* note 10).

[19] *Kelly v. Alberta (Energy Resources Conservation Board)*, 2011 ABCA 325, 515 AR 201.

pure question of law at play for appeal purposes under the relevant provision.[20] It also went on to hold that the test for whether someone was directly and adversely affected was not whether he or she

> …would be affected in a different way or to a different degree that members of the public.[21]

The terms of the test did not establish that as the threshold. Moreover, it was not necessary for those seeking intervenor status to prove that they would necessarily be directly and adversely affected. Rather, the Board's assessment should be one in which it weighed the magnitude of the risk, and not whether the claimant had established that that risk was a certainty. To do otherwise was to not apply the correct legal test.[22] That legal test was based on the following principles:

> The right to intervene in the Act is designed to allow those with legitimate concerns to have input into the licensing of oil and gas wells that will have a recognizable impact on their rights, while screening out those who have only a generic interest in resource developments (but no "right" that is engaged), and true "busybodies".[23]

Indeed, this more generous conception of the role of the intervenors carried over to the issue of costs. The Board determined at the Court-ordered rehearing of the well licence applications that the intervenors had not demonstrated that their safety interests required the imposition of additional conditions on the grant of well operation licences. As a consequence, the Board also denied the intervenors costs on the basis that they were not directly and adversely affected. However, on appeal,[24] the Court of Appeal ruled that the right to costs was not contingent on the intervenors gaining some measure of success at the hearing. On this issue, in remitting the issue of intervenor costs to the Board, the Court summarized its conclusions as follows:

> For clarity, a potential adverse impact on the use and occupation of lands is sufficient to trigger entitlement to costs. Further, while the amount of costs lies within the discretion of the Board, the actual outcome of the hearing, and the absence, with hindsight, of any actual adverse effect does not of itself disentitle an applicant to costs.[25]

While, in Alberta, these issues have been determined in the context of a specific statutory regime, to the extent that that statutory regime reflects generally accepted common law principles governing the entitlement to be heard at regulatory proceedings,[26] there is every reason to believe that these precedents have relevance to other Energy Regulators across the country. It is also important to be mindful of the practical dimensions of this issue. There is a balance to be struck between allowing for meaningful participation particularly on the part of those whose rights and interests are affected immediately and directly by a proposal and also members of the public generally, on the one hand, and the importance of Energy Regulators carrying out their mandate in an efficient and timely manner, on the other. Thus,

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[20] *Ibid* at para 17.

[21] *Ibid* at para 19.

[22] *Ibid* at paras 22-26.

[23] *Ibid* at para 26.

[24] *Kelly v. Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19, 519 AR 284.

[25] *Ibid* at para 37.

[26] See e.g. *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5, [2006] 1 SCR 227, at paras 38ff., and, in the context of public participation in the decision-making process with respect to the proposal to construct a bridge between New Brunswick and Prince Edward Island and the *Federal Courts Act's, supra* note 15, "directly affected" test

it is not surprising that, where discretion exists with respect to standing, the Courts either by emphasizing the discretionary nature of the exercise, or, as in Alberta, by classifying part of the exercise as a determination of a question of fact, are deferential to the determinations of Energy Regulators.

This concern for the efficient conduct of regulatory hearings obviously motivated the new standing provisions found in the *Canadian Environmental Assessment Act, 2012,* enacted as part of the 2012 federal budget implementation legislation, the *Jobs, Growth and Long-Term Prosperity Act*.[27] The regime is complex and I will not go into all the details in this context. Suffice it to say, however, that the most controversial and potentially limiting aspect of the standing provisions in the new Act are those relating to hearings by the National Energy Board and Environmental Assessment Review Panels on certain designated projects including, for example, pipeline applications. In relation to such projects, "any interested party" is entitled to a participatory opportunity.[28] Critically, section 2(a) defines "interested party" as a person who in the "opinion" of the regulator is

> …directly affected by the carrying out of the designated project or … has relevant information or expertise.

Under the National Energy Board's *Section 55.2 Guidance – Participation in a Facilities Hearing*,[29] that now requires anyone wanting participatory rights at a hearing into such a designated project to complete a ten page application form providing information designed to establish that he or she comes within either of the two categories as defined in section 2(a).

While this new legislative regime was in part a response to the over 4000 registrations for participatory rights in relation to the Northern Gateway pipeline hearings, it does, however, remain to be seen whether the new requirements are as restrictive as many environmental groups have predicted. In this regard, three aspects are worth noting: 1. The according of standing is expressed in subjective terms; it will depend on the discretion of the regulator; 2. The first category, unlike the Alberta legislation, does not require the showing of an adverse effect, just a direct effect; arguably it is more generous; and, 3. And, perhaps most importantly, the second category in section 2(a) introduces a potentially expansive concept of participation in the novel (to both statutory regimes and the common law) form of those who have "relevant information or expertise." Perhaps, ultimately and contrary to what appeared to be the government's intentions, this statutory formula will expand, not contract participatory opportunities in relation to designated projects!

3) Discovery and Disclosure[30]

The common law on disclosure by administrative tribunals and agencies and, in particular, pre-hearing discovery and disclosure is, perhaps surprisingly, sparse. In the instance of regulatory agencies with a broad policy mandate and engaged in economic regulation, the common law was historically remarkably parsimonious as to the extent to which those kinds of tribunals have to provide pre-hearing disclosure of material under their control and, in particular, staff studies and

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for access to judicial review, *Friends of the Island Inc. v. Canada (Minister of Public Works)*, *supra* note 15.

[27] *Jobs, Growth and Long-Term Prosperity Act*, SC 2012, c19, s 52.

[28] Sections 28, 43(1)(c), 83 (inserting section 55.2 in the *National Energy Board Act*, RSC 1985, c N-7)

[29] National Energy board, *Section 55.2 Guidance – Participation in a Facilities Hearing*, online: NEB <http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtcptn/pblchrng/prtcptnthrhrnggdncs55_2-eng.pdf>.

[30] This section owes much to a presentation made by Gordon Kaiser at the 5th Canadian Energy Law Forum, held on Salt Spring Island on May 19, 2011.

other position papers.[31] Indeed, this was true even in the context of regulatory compliance or enforcement proceedings.[32] However, it is almost certainly the case that most major regulatory agencies have finessed issues around pre-hearing disclosure by the development of procedural rules and practices, often with the involvement of stakeholders and generally to the satisfaction of stakeholders.[33] I also assume that access to information requests may often force the issue when there is an initial reluctance to provide full disclosure.

I will therefore not belabour the point, save to point out that the Supreme Court, albeit in a very different context, has more recently taken a strong position on the importance of statutory authorities facilitating effective participation by providing parties with prehearing access to documents in the decision-maker's control which are critical in terms of the ability of the parties to address issues central to the tribunal's task. The case was *May v. Ferndale Institution*,[34] the setting a transfer decision within the penitentiary system, and the documentation in question a scoring chart used in determining an offender's classification and custodial conditions. While the Court rejected[35] the application of the very sweeping disclosure obligations placed on prosecutors in the context of criminal charges as established in *R. v. Stinchcombe*,[36] it sustained the contention that the offender was entitled as a component of procedural fairness to the relevant template. While this is a long way removed from regulatory agencies engaged in broad, polycentric decision-making or economic public interest regulation,[37] the Supreme Court's judgment reveals a generous attitude to disclosure rights.

It might also indicate a Court that would be less hospitable to the arguments that in 1980 prevailed in *Canada (Attorney General) v. Inuit Tapirisat*,[38] where, in the context of attempts to secure access to documents for the purposes of participating in a cabinet appeal, the Court seemed to hold that those involved in broadly-based policy making exercises were acting in a legislative capacity and not bound by the normal strictures of the procedural fairness principles. I suspect it would now be unwise to rely on that judgment save perhaps in the very specific context of cabinet appeals. What is also clear is that the Supreme Court is likely to be far more willing to recognize claims for more extensive disclosure where an Energy Regulator is engaged in enforcement or compliance roles leading to the possibility of sanctions, including monetary penalties and loss of licence.

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[31] See e.g. *Toshiba Corporation v. Anti-Dumping Tribunal* (1984), 8 Admin LR 173 (FCA); *Trans-Quebec & Maritimes Pipeline Inc. v. National Energy Board* (1984), 8 Admin LR 177 (FCA); and *CIBA-Geigy Ltd. v. Canada (Patented Medicine Prices Review Board)*, [1994] 3 FC 425 (CA), aff'g (1994), 77 FTR 197.

[32] See e.g. *CIBA-Geigy Ltd., ibid.*

[33] For a recent example of refusal of leave to appeal a disclosure order, see *Westridge Utilities Inc. v. Alberta (Utilities Commission)*, 2010 ABCA 160, 487 AR 205.

[34] *May v. Ferndale Institution* 2005 SCC 82, [2005] 3 SCR 809. See also *1657575 Ontario Ltd. v. Hamilton (City)*, *supra* note 4 at para 25 (per Rouleau J.A.):

Disclosure is a basic element of natural justice at common law and, in the administrative context, procedural fairness requires disclosure unless some competing interest prevails.

[35] *Ibid* at para 89 (per LeBel and Fish JJ.).

[36] *R. v. Stinchcombe*, [1991] 3 SCR 326.

[37] Though note in the context of Ontario Energy Board compliance proceedings, *Summitt Energy Management Inc. v. Ontario Energy Board,* 2013 ONSC 318 at paras 96-99, where the Ontario Divisional Court, after classifying the proceedings as not being truly penal in nature, deferred to the Board's assessment that the regulated utility's claim to even more disclosure beyond the already "extensive disclosure package" was not justified. This was a "reasonable decision."

[38] *Canada (Attorney General) v. Inuit Tapirisat*, [1980] 2 SCR 735.

While the issue becomes somewhat more complicated when the setting is the use by a regulatory agency of its power to compel the production of information (either on its own initiative or on the application of a party), and the access rights of the parties to that information (as opposed to information generated by the agency itself), nonetheless, the normal test for an order for the production of such information will be that of relevance.[39] Moreover, once that material has been produced, the general presumption will be that other parties and intervenors will be entitled to demand its production in the name of the principles of procedural fairness and access to potentially relevant information.[40]

Support for these propositions in an energy regulation context can be found in *Re Toronto Hydro-Electric System Ltd.*,[41] where the Ontario Energy Board reviewed the relevant law and, determined that, while Stinchcombe did not apply in the context of a compliance proceeding (not leading to the loss of a licence),[42] nonetheless, the target of the proceedings was entitled to disclosure of all documents in the Board's possession directly relevant to the matter and not just the documents Compliance Counsel intended to rely upon. The Board, however, refused an application by the target corporation for an order for the production of further information in the possession of third parties.[43] The request was wide ranging and lacked specificity. In so ruling, the Board stated:

> There is no question that the Board has jurisdiction to order third parties to produce documents but this is an unusual step to be taken only when the documents identified are clearly relevant and no prejudice or undue burden on the third parties results from the disclosure.[44]

In sum, the fulfillment of broad regulatory mandates will seldom be enhanced by sustained resistance to participant access to relevant documents, save where national security or other legitimate government and public interest reasons for preserving secrecy are in play or there is some other form of evidential privilege or need to protect the confidence of information provided by those subject to regulation (such as preventing competitors from access to critical data[45]). One should also add to the list of exceptions, attempts by parties to the proceedings to secure orders for production that are insufficiently precise or specific, and that, in effect, amount to "a fishing expedition."[46]

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[39] See e.g. *Westridge Utilities Inc. v. Alberta (Utilities Commission), supra* note 33 at para 27, with the Commission's assessment of relevance being reviewed on a reasonableness, not correctness basis.

[40] In the context of enforcement proceedings conducted by the Ontario Securities Commission, the Supreme Court not only applied *Stinchcombe* (*supra* note 36), but, on the basis of a Security Commission judgment as to relevance, was prepared to sustain on a reasonableness basis the Commission's determination that compelled evidence should be provided to the target of the enforcement proceedings: *Deloitte & Touche LLP v. Ontario (Securities Commission),* 2003 SCC 61, [2003] 2 SCR 713 at para 22. See also *Re Biovail Corp.*, 2008 LNONOSC 536, (2008), 31 OSCB 7161, in which the Commission ruled that its staff had not fulfilled its obligation to make meaningful disclosure by providing the subject of the proceedings with a massive database of documents without identifying in at least broad terms those on which it intended to rely and those it considered to be otherwise relevant.

[41] *Toronto Hydro-Electric System Ltd.*,2009 LNONOEB 46, EB-2009-0308.

[42] *Ibid* at para 24.

[43] *Ibid* at paras 28-34.

[44] *Ibid* at para 29. See also *Inter Pipeline Fund v. Alberta (Energy Resources Conservation Board)*, 2012 ABCA 208, 533 AR 331, in which the Court sustained the Board's rejection of a request for an order for the filing of further information by an applicant on the basis that the objectors already had enough disclosure to make their case, and, in any event, were in a position to lead their own evidence in support of their objection.

[45] See e.g. *McCain Foods Ltd. v. Canada (National Transportation Agency)*, [1993] 1 FC 583 (CA).

[46] *Ibid* at para 31.

4) Prehearing Procedures

Prehearing discovery and disclosure regimes are, of course, but one example of methods for facilitating the expeditious conduct of hearings. By virtue of explicit provisions in their empowering statutes and their Rules of Practice and Procedure, provisions in applicable general procedural statutes such as the *Ontario Statutory Powers Procedure Act*,[47] and their ability to control their own procedures, Energy Regulators possess the ability to engage in various forms of prehearing processes that can contribute to more efficient and more focussed hearings. Pre-filing of evidence and, in particular, experts' reports, conferences aimed at defining, narrowing and refining the facts and legal questions that are in issue, the settlement of agreed statements of facts, even informal attempts at prehearing resolution of some or all of the matters that are in contention, and setting limits on what is to occur at the hearing both in terms of scope and time – these and other devices can, if deployed judiciously, contribute massively to the effective discharge of a regulatory agency's mandate.

5) Over-Judicialization

It may seem somewhat disingenuous to in one breath advocate generosity in terms of disclosure obligations and then in the next to caution against over-judicialization. Nonetheless, there is a difference between providing liberal access to all relevant material prior to and during the course of the hearing and conducting a hearing in a way that recognizes that proceedings of the kind staged by Energy Regulators are not criminal or civil trials and that the issues at stake will often lend themselves to resolution by techniques other than traditional adjudicative-style evidential trials.

Here too, my assumption is that most Energy Regulators have recognized this reality and devised alternative hearing techniques in the context of notice and comment rule-making hearings. Failing that, these design issues are confronted in the course of prehearing planning processes for particular applications.

It may, however, be salutary to suggest that this represents an ongoing challenge particularly when new dimensions emerge such as the procedural entitlements of Aboriginal peoples when their rights and interests are affected by regulatory hearings. Creative, cooperative solutions will always be needed as the regulatory process continues to evolve and, in a very real sense, becomes more complex as different regimes more and more frequently intersect and pressures for intervenor involvement continue to be part of any major regulatory initiative.

6) Evidence

While it is difficult to generalize as to the evidential rules governing administrative tribunals and agencies, in *R. v. Deputy Industrial Injuries Commissioner*,[48] in a passage that has commended itself to the authors of one of Canada's leading administrative law texts,[49] Diplock L.J (as he then was) sets out a list of the principles that apply in most contexts:

i. Administrative tribunals are not bound by the rules of evidence applicable in a court of law;

ii. They are not confined to acting on only the "best" evidence;

iii. However, their decisions must be based

[47] *Statutory Powers Procedure Act*, RSO 1990, c S-22 (as amended). See in particular, s 4.8 (alternative dispute resolution) and section 5.3 (pre-hearing conferences). See also ss 22 and 23 of the *Alberta Energy Regulator Rules of Practice*, AR 99/2013, respecting pre-hearing interactions among expert witnesses and panels of witnesses.

[48] *R. v. Deputy Industrial Injuries Commissioner*, (1964), [1965] 1 QB 456 at 488-90 (CA).

[49] See David P. Jones &Anne S. de Villars, *Principles of Administrative Law*, 4th ed (Toronto: Carswell, 2004), ch 9 at 3(b).

on material that "tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant";

iv. Any evidence relied upon must have some probative value;

v. Provided it does not stray from the admonitions in iii and iv, the weight to be attributed to evidence is a matter for the decision-maker.

In practice, this means that, in comparison to the regular courts, administrative tribunals are entitled more readily to admit hearsay evidence, have a greater capacity for taking official notice of facts, are not so committed to the search for the very best or most exact evidence,[50] can be more flexible in the ways in which evidence is adduced or led, and have greater scope for the use of expert witnesses.

Moreover, while there might be situations, such as professional discipline, where the normal court rules of evidence will have much greater relevance or purchase, the Diplock principles are ones upon which Energy Regulators can almost certainly rely in most of what they do. On judicial review or statutory appeal, the courts generally treat evidential questions as matters for the relevant Energy Regulator. This is clear from the following statement from the judgment of Iacobucci J., delivering the judgment of the Supreme Court of Canada in *Quebec (Attorney General) v. Canada (National Energy Board)*:

> In carrying out its decision-making function, the Board has the discretion to determine what evidence is relevant to its decision. It has not been shown that, in this case, the discretion was improperly exercised so as to result in inadequate disclosure.[51]

Indeed, despite the fact that the Supreme Court of Canada normally takes the position that correctness is the standard for assessment of allegations of procedural unfairness,[52] it is clear that the Courts do not review the exercise of discretion on evidential issues by that standard. Rather, reasonableness will be the touchstone generally in the post-*Dunsmuir* world.[53]

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[50] See e.g. *Husky Oil Operations Ltd. v. Scriber*, 2013 ABQB 74 at paras 69-72.

[51] *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 SCR 159 at para 31. See also *Direct Energy Regulated Services v. Alberta (Energy and Utilities Board)*, 2007 ABCA 140, 404 A.R. 223 at para 12, stating that the relevant Alberta legislation gave the Board "very wide elbow room to decide what types of evidence it will act on." Similarly, see in relation to the Alberta Surface Rights Board: *Husky Oil Operations Ltd. v. Scriber, ibid*.

[52] However, see *Lavallee v. Alberta (Securities Commission)*, 2009 ABQB 17, 467 AR 152 (aff'd 2010 ABCA 48, 474 AR 295) at para 85, citing *Alberta Securities Commission v. Brost,* 2008 ABCA 326, 440 AR 7 and drawing a distinction for these purposes between correctness review in the case of issues of evidence that raise questions of natural justice, and reasonableness review for the review of exercise of discretion with respect to the admission of evidence. It is also noteworthy that, at the Court of Appeal in Lavallee at paras 6-18, the Court held that a statutory direction to "receive that evidence that is relevant to the matter being heard" did not interfere with the Securities Commission's overall discretion to exceptionally refuse to admit relevant evidence. See also *Nova Scotia (Director of Assessment) v. van Driel*, 2010 NSCA 87, 296 NSR (2d) 244 at para 14, a post-*Dunsmuir* judgment, maintaining the position that issues as to onus of proof in regulatory proceedings are to be reviewed on a correctness basis. *Cf Big Loop Cattle Co. v. Alberta (Energy Resources Conservation Board)*, 2010 ABCA 328, 490 AR 246 at para 29, where Rowbotham J.A. stated that the Board's refusal to respond to a request from a party to compel a witness to attend was "entitled to considerable appellate deference."; *Talisman Energy Ltd. v. Energy Resources Conservation Board*, 2010 ABCA 258, 487 AR 377 at para 23 (deference to ruling on refusal of opportunity to respond to new rebuttal evidence); *Judd v. Alberta (Energy Resources Conservation Board)*, 2011 ABCA 159, 513 AR 260 at para 27 (deference to discretionary ruling under explicit statutory provision refusing to allow the filing of evidence out of time under Rules of Practice); *Westridge Utilities Ltd. v. Alberta (Utilities Commission)*, supra note 33 at para 27 (reasonableness standard applied to Commission's disclosure order); and *Deloitte & Touche LLP v. Ontario (Securities Commission), supra* note 40, discussed above, in the section on disclosure and discovery.

[53] See e.g. V*ancouver Pile Driving Ltd. v. British Columbia (Assessor of Area No. 8 – Vancouver Sea to Sky Region)*, 2008 BCSC 810, 47 MPLR (4th) 106 at paras 117-18, in relation to the British Columbia Property Assessment Appeal

Moreover, review for unreasonableness does not mean that "the reviewing court [is] to reweigh the evidence."[54]

This kind of approach is also reinforced statutorily in some jurisdictions either generally or with specific reference to Energy Regulators. For example, under section 9 of the Alberta *Administrative Procedures and Jurisdiction Act*,[55] a statute that applies to most of the province's Energy Regulators (but not the new Energy Regulator), it is provided that evidence need not be given under oath and that decision-makers covered by the Act are not required to adhere to the rules of evidence applicable to criminal and civil proceedings. This is also reinforced by section 18 of the *Alberta Utilities Commission Act*[56] and section 47 of the *Responsible Energy Development Act*.[57] They provide that neither the Alberta Utilities Commission nor the Alberta Energy Regulator is bound by the rules of evidence that apply to judicial proceedings. In fact, the only other direct references to evidence in the *Administrative Procedures and Jurisdiction Act* come in section 4, which mandates the provision of a reasonable opportunity to furnish relevant evidence both at large[58] and in the context of responding to material in the possession of the decision-maker, and section 5 providing the opportunity for cross-examination where it is necessary to answer the case or otherwise deal with the evidence. These provisions aside, the legislature has conferred authority on both the Commission and the Energy Regulator, in sections 76(1)(e) and 61 respectively of their constitutive Acts, power to make rules of practice governing procedure and their hearings.[59] In exercising this power, the Commission in section 1 of its Rules of Practice, has stipulated that

> These rules must be liberally construed in the public interest to ensure the most fair, expeditious and efficient determination of the merits of every proceeding before the Commission.

In Ontario, the Ontario Energy Board is generally subject to the *Statutory Powers Procedure Act*,[60] and section 15 of that Act provides in part:

> (1) Subject to subsections (2) and (3), a etribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document or other thing, relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.
>
> (2) Nothing is admissible in evidence at a hearing,
>
> (a) that would be inadmissible in a court by reason of any privilege under the law of evidence;[61] or

Board. To the extent that the according of standing to participate in regulatory proceedings is an element of procedural fairness, this can also be seen in judicial review of standing decisions: *Westridge Utilities Inc. v. Alberta (Director of Environment, Southern Region), supra* note 16; *Syndicat des travailleuses et travailleurs de ADF - CSN c. Syndicat des employés de Au Dragon Forgé*, 2013 QCCA 793 at paras 46-47.

[54] *Canada (Citizenship and Immigration) v. Khosa,* 2009 SCC 12, [2009] 1 SCR 339 at para 61 (per Binnie J.).

[55] *Supra* note 6.

[56] *Supra* note 7.

[57] *Supra* note 6.

[58] For an example of a deferential approach to a regulator's exercise of power under this section, see *Talisman Energy Inc., supra* note 52.

[59] An authority shared with the Lieutenant Governor in Council in the case of the Energy Regulator. See sections 60 and 61 of the *Responsible Energy Development Act*.

[60] *Statutory Powers Procedure Act*, RSO 1990, c S-22 (as amended).

[61] It is almost certainly the case that this also applies to Alberta's Energy Regulators notwithstanding the absence of

(b) that is inadmissible by the statute under which the proceeding arises or any other statute.

(3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceeding.

All of this coalesces to produce a situation where Energy Regulators normally have a broad discretion with respect to matters of evidence, a discretion the exercise of which will generally attract deference from reviewing and appellate courts. Nonetheless, there are limits. Thus, there may be more constraints on a tribunal's discretion where the proceedings are of an enforcement or compliance nature leading to possible sanctions such as fines and loss of licences and privileges. Moreover, as Diplock L.J. makes clear, concepts such as relevance[62] and probative value will impose limits on tribunals generally and irrespective of their authority not to adhere to the full panoply of evidential principles and rules applicable in court proceedings. These limits may also come in a constitutional or *quasi*-constitutional form, as exemplified by the rules of evidential privilege,[63] and also by possible limitations imposed in the name of "due process", in sections 1(a) of both the *Alberta and Canadian Bills of Rights*, on statutory or common law rules that Energy Regulators are not bound by the normal rules of evidence.[64] More commonly, however, a reviewing court may review a tribunal's evidential rulings on the basis that they gave rise to a violation of the principles of procedural fairness or such other discrete administrative law wrongs as failing to take account of relevant considerations and taking account of irrelevant considerations.

In an Energy Regulatory context, *Sarg Oils Ltd. v. Alberta (Energy and Utilities Board)*[65] provides a good example. In granting leave to appeal from an order requiring Sarg Oils to abandon wells and other facilities, Hunt J.A. ruled that there was a "serious arguable point"[66] that the Board, by refusing to admit certain evidence, had misconceived the thrust of the applicant's motion and therefore denied procedural fairness.[67] In other words, there was a possibility that the Board's ruling transcended

any specific reference to it in either their constitutive statutes or the *Administrative Procedures and Jurisdiction Act, supra* note 6. This contention is supported by the Supreme Court of Canada's attribution of quasi-constitutional status to various forms of evidential privilege: *Goodis v. Ontario (Minister of Correctional Services),* 2006 SCC 31, [2006] 2 SCR 32 and *Canada (Privacy Commissioner) v. Blood Tribe Department of Health,* 2008 SCC 44, [2008] 2 SCR 574. For a recent discussion of evidential privileges in the administrative process, see Simon Ruel, "What Privileges Arise in the Administrative Context, and When?" (2013), 26 *Canadian Journal of Administrative Law & Practice* 141.

[62] In this respect, it is worth noting that section 4(a) of the Alberta *Administrative Procedures and Jurisdiction Act* provides that parties to proceedings have the right to adduce "relevant evidence". It is arguably implicit in this that tribunals governed by the Act are not entitled to admit irrelevant evidence or, at the very least, not to give any weight to irrelevant evidence.

[63] *Ibid*.

[64] As held in *Lavallee v. Alberta (Securities Commission)*, *supra* note 52.

[65] *Sarg Oils Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 198. (On the appeal, the Alberta Court of Appeal rejected the claim the Board misconceived the nature of the case that the appellant was advancing: *Sarg Oils Ltd. v. Alberta (Energy and Utilities Board*, 2011 ABCA 56). See also *Lavesta Area Group v. Alberta (Energy and Utilities Board)*, 2007 ABCA 194, and *Bur v. Alberta (Energy and Utilities Board),* 2007 ABCA 210, both also decisions on applications for leave to appeal.

[66] *Ibid* at para 3. This is the principal component of the test for leave to appeal in Energy matters in Alberta. For recent summaries of the various factors that go into that determination, see *Wood Buffalo (Regional Municipality) v. Alberta (Energy and Utilities Board)*, 2007 ABCA 192, 417 AR 222 at paras 4-5 (*per* Slatter J.A.) and *Atco Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 382 at para 10 (*per* Paperny J.A.).

[67] *Ibid* at para 8. For Supreme Court of Canada decisions to like effect, see T*oronto Newspaper Guild v. Globe Printing Co.*, [1953] 2 SCR 18, and *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 SCR 471.

its discretionary authority with respect to evidence and gave rise to both a misconception of the case and a failure to hear the applicant. Suffice it to say, however, that this is not always a bright line distinction and, as a result, the task of differentiating between a discretionary evidential ruling and other forms of error will be both difficult and frequently controversial.[68]

7) Unruly Counsel, Parties and Intervenors

Being sensitive to the pressures for judicialization and developing procedural techniques that serve as an antidote to those pressures can only take an administrative agency so far. In the movement from the devising of appropriate procedural rules to the actual dynamics of the hearing room, another dimension will frequently emerge: the capacity of lawyers particularly, but also witnesses, parties, and intervenors to consciously or unconsciously take over or change the appropriate complexion of the hearing. Without strong leadership and frequently decisive intervention especially on the part of the person chairing the panel, hearings can start to lose the plot in the sense of becoming bogged down in material of marginal or no relevance. One area in particular where there may need to be particular vigilance is in the qualification of experts and keeping expert testimony within appropriate limits. Panels also need to be conscious of the extent to which delays and distractions are the product of insufficient preparation on the part of counsel or, even worse, no particular concern about delays to the process. Here, as in proceedings before many other tribunals, there are the particular problems of dealing with unrepresented participants or participants represented by inexperienced lawyers. All of these are matters that need to be anticipated and strategies developed for dealing with them appropriately and keeping the hearing on the rails.

Dealing with unruly participants can, of course, test the patience of the most Job-like adjudicator.[69] However, it is equally important to resist the temptation to descend into the pit and take on unruly or unprofessional counsel, parties, intervenors or witnesses on their own terms. While the examples of successful applications for judicial review resulting from the conduct of adjudicators (or counsel to the tribunal, for that matter) at hearings are comparatively few,[70] nonetheless, courtesy coupled with firmness is almost invariably the best approach. While the odd intemperate outburst might find sympathy or understanding from a reviewing court, sustained hostility towards anyone involved in the hearing will probably not. It is also equally important not to allow lack of sympathy with a particular position or line of argument to show itself in the form of open displays of temper and even irritation and impatience. There is also the flip side of adjudicators whose improper conduct manifests itself in inappropriate forms of favouritism and obsequiousness, as opposed to manifest hostility. In sum, adjudicators have to strive to find an appropriate balance between the need to keep the hearing under control and moving forward at an appropriate pace, on the one hand, and behaving in a manner consonant with the best traditions of a dispassionate, alert, even-handed decision-maker, on the other.

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[68] See also *Transcanada Pipelines Ltd. v. Canada (National Energy Board)*, 2004 FCA 149, 319 NR 171, discussed at length by Robertson JA in *Enbridge Gas New Brunswick Ltd. v. New Brunswick Energy and Utilities Board*, 2011 NBCA 36 at paras 16-23.

[69] For cautionary tales in the context of the regular courts, see R. v. Felderhof, [2002] OJ No.4103, aff'd (2003), 68 OR (3d) 481, 235 DLR (4th) 131 (Ont CA), and *Sawridge Band v. Canada*, 2005 FC 607, 265 FTR1; 2006 FC 656, 293 FTR 175; and 2008 FC 322, 319 FTR 217.

[70] See e.g. *Gooliah v. Canada (Minister of Citizenship and Immigration)* (1967), 63 DLR (2d) 224 (Man CA); *Golomb v. Ontario (College of Physicians and Surgeons* (1976), 68 DLR (3d) 25 (Ont Div Ct); *Yusuf v. Canada (Minister of Citizenship and Immigration)* (1991), 7 Admin LR (2d) 86 (FCA); *Brett v. Ontario (Board of Directors of Physiotherapy)* (1993), 104 DLR (4th) 421 (Ont CA) (behaviour of the tribunal's lawyer); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (antagonism revealed in a paper hearing).

8) Bias Challenges – Whose Responsibility?

How tribunals deal with challenges to their proceedings based on a reasonable apprehension of bias, as the Newfoundland Court of Appeal pointed out in *Communications, Energy and Paperworkers Union of Canada, Local 60N v. Abitibi Consolidated Company of Canada*,[71] is a question on which the law has been remarkably uncertain.

In the context of Energy Regulators sitting in panels, there are two questions: Does the panel have jurisdiction to entertain a bias challenge, and, if so and if the challenge is to the participation of one member of the panel (as opposed to all members of the panel), who makes the determination: the panel or the challenged member?

On the first question, the Newfoundland Court of Appeal, in the context of a tripartite arbitral panel, reflected the balance of Canadian authority when it ruled not only that the tribunal has jurisdiction to determine the merits of the challenge but also that in general it should do so.[72] Thereafter, it is for the courts on judicial review to determine, on the basis of the record developed by the tribunal on this issue and supplementary affidavit material, whether any ruling of the tribunal (generally denying the recusal motion) should be set aside.[73]

More problematic for the Court of Appeal was the question of whether the decision should be taken by the panel collectively or by the individual subject to challenge. After considering competing authority and academic commentary, the Court determined that it was for the individual member to make the determination. It justified this in a labour arbitration context by reference to considerations of "efficiency and speedy resolution of employee/employer grievances."[74]

In my view, this is the preferred position for most, if not all tribunal and agency settings. The challenge in such cases is a personal one based on facts pertaining to and within the

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[71] *Communications, Energy and Paperworkers Union of Canada, Local 60N v. Abitibi Consolidated Company of Canada*, 2008 NCLA 4.

[72] This does not gainsay the fact that there may be difficult procedural issues as to how the challenge should be dealt with at the tribunal level. In most instances, however, the objecting party should be able to provide the facts and arguments on which he or she is relying in a statement or written submission to the tribunal. At that point, the challenged member may choose to make a statement of her or his own. Thereafter, after written or oral submissions, the determination can be made.

[73] For an example of an Energy Regulator ultimately taking responsibility for dealing with a challenge based on a reasonable apprehension of bias, see the saga of the Lavesta Area Group and the Alberta Energy and Utilities Board, where the Board's hearing was compromised by the improper conduct of security personnel hired by the Board in the wake of disruptions at a hearing. Ultimately, the Board itself declared that the hearing and related decisions were void on the basis of a reasonable apprehension of bias (Board Decision 2007-075), and this led to the Alberta Court of Appeal allowing appeals on that basis and in reliance on the Board's decision: *Lavesta Area Group v. Alberta (Energy and Utilities Board)*, 2007 ABCA 365. Note, however, *Lavesta Area Group v. Alberta (Energy and Utilities Board)*, 2009 ABCA 155, rejecting an argument that the Board could thereafter not deal with a costs issue arising out of the proceedings on the basis that there was institutional bias. The Court of Appeal held that it was proper for the issue to be dealt with by newly appointed Board members. Subsequently, there was yet another challenge arising out of this matter. At stake here was the meaning of a guideline that had been issued by the now Commission providing assurances that members involved in the earlier impugned decisions would not be assigned to any further panels concerning the relevant subject matter, and also, whether, in any event, the participation of such a member in any subsequent proceedings involving this project would give rise to a reasonable apprehension of bias. The Court of Appeal gave leave to appeal on the basis that these were both issues of law of significance: Lavesta Area Group Inc. v. Alberta (Energy and Utilities Board), 2011 ABCA 108, and, on the determination of that appeal, 2012 ABCA 84, 522 AR 88, the Court held that the impugned member had no connection with the hearing that gave rise to the initial bias allegations, that the connection between the current hearing and those proceedings was tenuous, and that sufficient time had passed to remove any taint. See paras 28-30.

[74] *Supra*, note 71 at para 35.

knowledge of the individual adjudicator, and it is appropriate that that person deal with it at first instance.

Moreover, as demonstrated by *SOS-Save Our St. Clair Inc. v. Toronto (City)*,[75] the other members of the panel may not be without recourse if they feel unable to go along with the individual member's ruling. There, in a case involving a challenge to a member of a three-judge panel of the Ontario Divisional Court, the impugned judge rejected the motion for recusal. While the other two members supported his entitlement to make that ruling on his own, because of their disagreement with him on this issue, they determined for conscientious reasons[76] that they could not continue to serve. The two therefore made an order granting the applicant's motion.

Absent this kind of disagreement among the members of a panel, any challenge to the decision of the individual adjudicator rests with the courts on judicial review. Moreover, there is no obligation on the tribunal to adjourn its proceedings simply because such an application is foreshadowed or even commenced.[77] However, as indicated by the facts of *Committee for Justice and Liberty v. National Energy Board*,[78] where the challenge is serious and comes at the beginning of a lengthy regulatory process, there may be strong practical reasons for not proceeding until the courts have dealt with the challenge.

In the determination of whether there should be recusal of a member of a panel or an entire panel, for that matter, it is, nonetheless, critical to keep in mind that the interests of administrative justice are not at all served by an overly sensitive approach to the task. The mere assertion that there is bias is clearly not enough, and the standard imposed on the party seeking recusal is a demanding one. The reasons for this are obvious. It is in the public interest that designated decision-makers not be disqualified from exercising their statutory roles on weak or dubious grounds. There is a public interest in members fulfilling the task for which they have been appointed. Moreover, too ready capitulation in the face of applications for recusal of a member or an entire panel plays into the hands of parties attempting to "forum shop."

The underlying principles on which these decisions should be taken emerge clearly from the final case involving the Lavesta Area Group and the predecessor of the Alberta Utilities Commission, the Alberta Energy and Utilities Board. Here, the Court of Appeal started off by emphasizing that

> [t]he test for an apprehension of bias is high. The standard is the reasonable observer, not one with a very sensitive or scrupulous conscience…. The grounds must be serious, substantial and based on a real likelihood or probability, not suspicion…. Bald assertions are not sufficient…. In light of its legislative mandate, there is a strong presumption that the Commission and its panels will properly discharge their duties and are not tainted by bias….[79]

The Court then went on to criticize the stance taken by the Chair of that Board:

> It should be noted that the predecessor Chair not only contemplated disqualifying from future panels those who had sat on previous panels on the subject. He actually contemplated not appointing any existing

[75] *SOS-Save Our St. Clair Inc. v. Toronto (City)* (2005), 78 OR (3d) 331 (Div Ct).

[76] *Id*. at para 21.

[77] See e.g. *Ontario College of Art v. Ontario (Human Rights Commission)* (1993), 11 OR (3d) 798 (Div Ct), and *Air Canada v. Lorenz*, [2000] 1 FC 494 (TD).

[78] *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369.

[79] *Lavesta Area Group (2012), supra* note 73 at para 24.

> members of the Board apparently whether they had been involved in any of the prior panels or not. That standard far exceeds any common law standard for a reasonable apprehension of bias.[80]

The implications of these statements for any panel or individual member facing a recusal motion are obvious!

9) Relationships with the Minister and Public Servants

One of the bedrock rules governing the conduct of hearings by tribunals and agencies is that those presiding should not have *ex parte* contact with any of the parties or intervenors outside of the confines of the hearing room. That rule takes on the added dimension of a threat to independence when the contact is with an interested Minister or, indeed, public servant, and especially the Minister responsible for the tribunal or agency. Contacts between a tribunal or agency and the responsible Minister especially in relation to a matter being heard or pending before the tribunal or agency raise the spectre of a lack of both institutional and individual independence as first outlined authoritatively by Le Dain J. for the Supreme Court of Canada in Valente v. R.[81]

This issue surfaced in *Shaw v. Alberta (Utilities Commission).*[82] There, Berger J.A. gave leave to appeal a decision of the Commission on the basis of communications between the responsible Minister and the Chair of and legal counsel to the Commission. These communications gave the appearance that intervention by the Minister may have dictated the Commission's suspension of its consideration of three projects. On the material before the Court, Berger J.A., in granting leave to appeal on a question of law, held that it was arguable that this

> …would cause a reasonable person to apprehend bias on the basis of interference or influence on the part of a member of the Alberta Cabinet, in this case one who recommends the appointment of persons to sit on the Commission and determines their salaries.[83]

On the hearing of the appeal, the Alberta Court of Appeal never reached this argument.[84] Nonetheless, the appropriate strategy is obvious. Absent explicit legislative sanctioning of such interactions between a regulatory agency and the executive branch, avoid communications with the Minister and, indeed, public servants that have the potential to compromise the integrity of a tribunal or agency hearing or, more generally, the independence of the tribunal or agency as a whole or that of individual members.

10) Revealing Circumstances that Could Form Basis for a Challenge

As noted in Proposition 8, from time to time, reviewing and appellate courts issue the admonition that adjudicators have a responsibility not to recuse themselves too readily. Nonetheless, members of tribunals and agencies should recognize the dangers of suppressing information that might give rise to a challenge on the basis of an apprehension of bias or lack of independence, even where they believe that the relevant information probably does not provide a basis for voluntary recusal. While it is appropriate for the person affected

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[80] *Ibid.* at 27.

[81] *Valente v. R.,* [1985] 2 SCR 673.

[82] *Shaw v. Alberta (Utilities Commission)*, 2012 ABCA 100.

[83] *Id.* at para 17.

[84] *Shaw v. Alberta (Utilities Commission)*, 2012 ABCA 378, 513 AR 315. The Court rejected Shaw's argument that, despite legislative conferral on the Minister of authority to determine whether there was a need for a transmission development project, the Commission still had authority as part of its public interest mandate to revisit the issue of need.

to make the initial determination whether he or she should recuse herself or himself, that should be done on the basis of exposure to the contending points of view. There should also be no encouragement given to adjudicators to take comfort in the failure of affected parties to come up with the information on which a possibly credible motion for recusal might be advanced. Often, that information will be within the peculiar knowledge of the adjudicator. However, even in situations where the information might be available on the basis of not too much investigation, it does nothing for the reputation of the member or the tribunal as a whole where the member adopts the attitude that it is the parties' fault if they do not do the digging and come up with the relevant information. Full and frank disclosure is the only sensible course of action.

Here too, the facts of *SOS-Save Our St. Clair Inc. v. Toronto (City)* are instructive. In effect, the failure on the part of the judge to provide full and frank disclosure ultimately compounded the problem and caused embarrassment for the other two judges of the Court.[85]

11) Varying Principles Respecting Unbiased and Independent Decision-making

Over twenty years ago, Cory J., delivering the judgment of the Supreme Court of Canada in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*,[86] confronted the issue of how the principles respecting unbiased decision-making applied in the domain of public utilities regulation. At the macro level, he accepted that the standards for such boards were not those that applied to strictly adjudicative boards where the appropriate evaluation standard was that of traditional judicial neutrality. Prior experience and strongly-held views on policy issues rather than being a basis for disqualification should be something to be valued in an appointee to such an agency. As a consequence, at least at the pre-hearing stage of regulatory proceedings, the normal test of a reasonable apprehension of bias should not be the standard. Rather, the test should be "much more lenient."[87]

> [A] challenging party must establish that there has been pre-judgment of the matter to such an extent that any representations to the contrary would be futile.[88]

Thereafter, once the matter reached the actual hearing stage, members of such regulatory agencies were expected to be somewhat more circumspect and comport themselves in a manner consistent with what was normally expected of those conducting hearings.[89]

There is no reason to believe that this conception of regulatory agencies has changed since Cory J. penned this judgment. What has changed, however, as in the domain of the requirements of procedural fairness with respect to disclosure, discovery, and the application of the normal rules of evidence, is the emergence of a sense that there is a difference between the rules and principles that apply when a regulatory agency is engaged in broad public interest regulation and when that same agency is acting in a compliance or enforcement capacity.

As exemplified by *Rowan v. Ontario Securities Commission*,[90] there will be few occasions

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[85] See *Report to the Canadian Judicial Committee of the Inquiry Committee appointed under section 63(3) of the Judges Act to conduct an investigation into the conduct of Mr. Justice Theodore Matlow, a Justice of the Ontario Superior Court of Justice*, issued May 28, 2008.

[86] *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623.

[87] *Id.* at para 27.

[88] *Ibid.*

[89] *Ibid.*

[90] *Rowan v. Ontario Securities Commission*, 2012 ONCA 208, 110 OR (3d) 492.

on which a regulatory agency's proceedings will be sufficiently penal in nature to engage the protections of section 11(d) of the *Canadian Charter of Rights and Freedoms*[91] and its guarantee of the right to a trial by an independent and impartial tribunal where someone is charged with an offence. Nonetheless, in the context of regulatory enforcement proceedings, the demands placed on adjudicators by the principles of unbiased and independent decision-making are likely to be somewhat more stringent and closely approximating the standards applicable to rights adjudicating bodies.

This will be reflected in the extent to which prior involvement with the respondents in regulatory enforcement proceedings and their counsel as well as any history of advocacy of enforcement policies with respect to the matter before the agency will be disqualifying.[92] However, perhaps more significantly, as the extent (either through legislation, such as the recently enacted Alberta Responsible Energy Development Act, or through agency rules or even practices) to which the enforcement and prosecutorial branches of regulatory agencies are separated from the adjudicative branch becomes more common or even routine, there will not surprisingly be an increased tendency on the part of the courts to treat instances of overlap between those functions as problematic.

The only appropriate conclusion to draw from this is that Energy Regulators on a going forward basis would be well-advised to create appropriate walls between their enforcement and prosecutorial branches, and their adjudicative personnel.

12) Dealing with Constitutional (including Charter) Questions

Not only are tribunals and agencies obliged to deal with challenges to their participation based on an allegation of a reasonable apprehension of bias or lack of independence, but also they are generally required to adjudicate on constitutional questions that arise in the course of proceedings before them. For these purposes, a constitutional question includes issues arising under the *Canadian Charter of Rights and Freedoms* and extends beyond issues of application and interpretation to challenges to the validity of a tribunal or agency's constitutive statute or other relevant legislation. It can also include questions of aboriginal rights and entitlements arising under section 35 of the *Constitution Act, 1982* and based on the honour of the Crown.[93]

The leading authority in this domain is *Nova Scotia (Workers' Compensation Board) v. Martin*.[94] There, the Supreme Court held that the Board and the Appeal Board above it had an obligation to deal with a constitutional challenge to the effect that the statutory rules governing a particular category of claimant were invalid as discriminatory in terms of section 15 of the *Charter*. Despite the fact that tribunals and agencies lack the constitutional competence to make binding declarations of constitutional invalidity, and despite the fact that their rulings on constitutional questions of law receive no deference in subsequent judicial review proceedings,[95] nonetheless, in most

[91] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11.

[92] Though see *Summitt Energy Management Ltd. v. Ontario Energy Board*, *supra* note 37, rejecting a bias challenge in enforcement proceedings to the participation of Independent Legal Counsel whose firm had acted for the respondent`s competitors in unrelated matters: "Given the Board`s need for expertise, it is likely that any ILC retained by a Board will have had prior practice experience in the energy sector" (at para 57).

[93] *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 SCR 585. This will be developed in more detail in this and Section 14.

[94] *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 SCR 504.

[95] At least, where the issue is a pure question of law. Where the setting is the exercise of a discretion implicating

situations, they have no choice but to deal with those questions.

The clearest indicator of an almost irrebuttable presumption of competence over constitutional questions is a provision in the tribunal or agency's empowering legislation giving it authority to deal with any question of law arising in proceedings that come before it. However, even absent that form of legislative signposting, the position after Martin is that this is a responsibility that devolves on almost all adjudicative tribunals, and there is no reason to believe that Energy Regulators are an exception

In 2010, in *R. v. Conway*,[96] the Supreme Court of Canada reinforced the competence of administrative tribunals and agencies in the constitutional realm by applying these same principles to the determination of whether a tribunal or agency is a "court of competent jurisdiction" for the purposes of awarding remedies under section 24(1) of the Charter. Absent legislative abrogation, if a tribunal or agency has the authority to consider constitutional questions, there is a strong presumption that it also has the capacity to award constitutional remedies by reference to section 24(1). However, this does not represent the recognition of an at large or unfettered conferral of remedial jurisdiction. The tribunal or agency will still be confined to those remedies that are part of its armoury under its constitutive statute. Thus, if a tribunal or agency does not have the capacity to award damages or costs under its empowering legislation, it does not acquire that capacity by reference to its status as a tribunal or agency with the power to award remedies by reference to section 24(1).

Martin did not, however, garner universal approval, and, in two provinces, Alberta and British Columbia, its holding has been modified. Under the Alberta *Administrative Procedures and Jurisdiction Act*,[97] only those tribunals designated by regulation under section 16 have the capacity to deal with constitutional questions[98] (other than the exclusion of evidence under section 24(2) of the *Charter*[99]). In fact, under the *Designation of Constitutional Decision Makers Regulation*, each of the Alberta Energy and Utilities Board, the Alberta Utilities Commission, and the Energy Resources Conservation Board were all given jurisdiction to deal with all constitutional questions, and this has now been extended to the Alberta Energy Regulator.[100] However, it is also the case that, as opposed to the situation under *Martin*, section 13 of the *Administrative Procedures and Jurisdiction Act* confers a discretion on an agency designated under

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constitutional guarantees and values, the Supreme Court of Canada has now recognized that deferential, reasonableness review may be appropriate in any review of the exercise of that discretion provided the decision-maker has identified the correct legal principles: see *Doré v. Barreau du Québec,* 2012 SCC 12, [2012] 1 SCR 395.

96 *R. v. Conway*, 2010 SCC 22, [2010] 1 SCR 765.

97 *Supra* note 6.

98 Section 10(b) defines "question of constitutional law" broadly to include not only challenges by reference to the Canadian Constitution and the *Alberta Bill of Rights* to the "applicability and validity" of federal and Alberta legislation but also "a determination of any right under" the Canadian Constitution and the *Alberta Bill of Rights*.

99 *Supra* note 91s 12(1).

100 Alta Reg. 69/2006, Schedule 1 [as amended by AR 89/2013, s 31]. In fact, as of January 1, 2007, the Alberta Energy and Utilities Board became two separate entities, the Alberta Utilities Commission and the Alberta Energy Resources Conservation Board. The Regulation has now been amended further to substitute the new Alberta Energy Regulator for the Energy Resources Conservation Board: see *Miscellaneous Corrections (Alberta Energy Regulator) Regulation*, AR 89/2013, section 31 (May 29, 2013, made effective on June 17, 2013 by section 49). However, it should be noted that section 21 of the *Responsible Energy Development Act* provides:

The Regulator has no jurisdiction with respect to assessing the adequacy of Crown consultation associated with rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act*.

Presumably, the intention of this provision is to make it clear that the new Energy Regulator has not only no authority

section 16 to refer any constitutional question to the Court of Queen's Bench.

In British Columbia, under the *Administrative Tribunals Act*,[101] for the purposes of determining constitutional questions, tribunals subject to that Act are placed in one of three categories: those with jurisdiction to decide all constitutional questions (section 43), those with no jurisdiction to decide constitutional questions (section 44), and those with jurisdiction to decide Charter questions (section 45). Both the Mediation and Arbitration Board, under the *Petroleum and Natural Gas Act*,[102] and the Utilities Commission under the *Utilities Commission Act*,[103] are designated as subject to section 44 and therefore have no jurisdiction to deal with constitutional questions. However, as opposed to the situation under the Alberta *Administrative Procedures and Jurisdiction Act*, the term "constitutional question" is defined more narrowly. By virtue of section 1, it is confined to

> …any question that requires notice under section 8 of the Constitutional Question Act.

Section 8[104] specifies that notice must be given where

> (a) the constitutional validity or constitutional applicability of any law is challenged, or
>
> (b) an application has been made for a constitutional remedy.

As opposed to the equivalent Alberta legislation, it does not extend to the "determination of any right."

In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*.[105] McLachlin C.J., delivering the judgment of a unanimous Supreme Court, held that this did not preclude the Utilities Commission from determining whether the Crown had fulfilled its constitutional obligation to consult aboriginal peoples in relation to an as yet undetermined claim that was potentially affected by a matter that had come before the Commission.

> The application to the Commission… for a rescoping order to address consultation issues does not fall within this definition. It is not a challenge to the constitutional validity or applicability of a law, nor a claim for a constitutional remedy under s. 24 of the *Charter* or s. 52 of the *Constitution Act,* 1982. In broad terms, consultation under s. 35 of the Constitution Act, 1982 is a constitutional question… However, the [relevant] provisions of [both Acts] do not indicate a clear intention on the part of the legislature to exclude from the Commission's jurisdiction the duty to consider whether the Crown has discharged its duty to consult with holders of relevant Aboriginal interests. It follows that, … the Commission has the constitutional jurisdiction to consider the adequacy of Crown consultation in relation to matters properly before it.[106]

In all other jurisdictions, *Martin* applies to Energy Regulators. As a consequence, there

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to independently conduct aboriginal consultation but also no authority to assess the Crown's efforts at consultation. It also contradicts and presumably partially overrides Schedule 1's conferral of jurisdiction on the Alberta Energy Regulator to determine all questions of constitutional law arising before it.

[101] *Administrative Tribunals Act*, SBC 2004, c 45, ss 43-45.

[102] *Petroleum and Natural Gas Act*, as amended by the *Administrative Tribunals Act,* RSBC 1996, c 361, s 13(6).

[103] *Utilities Commission Act*, as amended by the *Administrative Tribunals Act*, RSBC 1996, c-473, s 2(4).

[104] *Constitutional Question Act*, RSBC 1996, c68.

[105] *Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650.

[106] *Id*. at para 72.

is no choice but to deal with constitutional questions and, where appropriate, refuse to apply unconstitutional statutes. In this capacity, the boards in question (and indeed the designated Alberta regulators[107]) should be cognizant of the extent of the relevant provincial statutory obligations to serve notice of any constitutional question on the provincial Attorney General and the Attorney General of Canada.

It is also important to keep in mind one of the principal reasons behind the rule that tribunals and agencies have authority to deal with constitutional questions: to build an evidential record on the basis of which generally non-deferential, correctness judicial review will be facilitated. That suggests the wisdom of tribunals and agencies having special provisions in their procedural rules for conduct of hearings in which constitutional questions are raised. Absent that, individual members and panels should pay particular attention at the prehearing stage of any case in which constitutional questions will be in issue to the crafting of appropriate ways within the existing general procedural rules of the tribunal or agency for handling the resolution of the constitutional issues.

13) Consulting with Non-Panel Members

In 1993, the Supreme Court of Canada rejected the notion that inconsistency provided an independent or free-standing basis for judicial review of a tribunal or agency's decisions.[108] The Court of Appeal for Ontario has subsequently reaffirmed that principle[109]

However, this does not mean that the Supreme Court does not recognize the importance of consistent decision-making within administrative tribunals and agencies. Indeed, in her concurring judgment in *Dunsmuir v. New Brunswick,*[110] Deschamps J. stated, in a judicial review context, that "[c]onsistency of the law is of prime societal importance." Thus, while there is no formal system of precedent in the tribunal system[111] and while inconsistency does not give rise to a stand-alone basis for judicial review, the Supreme Court has given encouragement to tribunals and agencies in the devices and processes that they have developed to encourage consistent decision-making among their various members and panels.[112]

In fact, Domtar had been preceded in 1990 by *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging*

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[107] *Administrative Procedures and Jurisdiction Act*, *supra* note 6 s 12.

[108] *Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756.

[109] See particularly, *National Steel Car Ltd. v. United Steelworkers of America, Local* 7135, [2006] OJ No.4868, 218 OAC 207 (CA), at para 31 (per MacPherson J.A.).

[110] *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR190.

[111] For an argument that there can be no mature system of Public Utility law in Canada until there is a much greater recognition of the weight of precedents and at least limited judicial review for inconsistency, see George Vegh, "Is There a Doctrine of Canadian Public Utility Law?" (2007), 86 *Canadian Bar Review* 319.

[112] See the judgment of Feldman J.A. in *Investment Dealers Association of Canada v. Taub*, 2009 ONCA 628, 98 OR (3d) 169, at paras 61-67, speculating that for a future tribunal not to apply, in another case, an outcome that a reviewing court has previously found reasonable though not necessarily correct, creates a rule of law problem, and, in particular, the principle that the law should apply equally to all affected citizens. In so doing, she referred to similar musings by Juriansz J.A. in *Novaquest Finishing Inc. v. Abdoulrab,* 2009 ONCA 491, 95 OR (3d) 641, at para 48. However, that possible development has subsequently been squelched by the judgment of Fish J. for the Supreme Court of Canada in an Energy Regulation setting: *Smith v. Alliance Pipeline*, 2011 SCC 7, [2011] 1 SCR160. There, though without reference to the Ontario cases, at paras. 38-39, in response to an argument that the existence of inconsistent tribunal authority on an issue of law was a species of unreasonableness, he stated (at para 39):

Indeed, the standard of reasonableness, even prior to *Dunsmuir*, has always been "based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute" such that "courts ought not to interfere where the tribunal's decision is rationally supported" (*Dunsmuir*, at para 41).

Ltd.,[113] and in 1992 by *Tremblay v. Québec (Commission des affaires sociales)*.[114] In each of these, the Supreme Court endorsed the practice of full membership meetings of administrative tribunals to discuss particular matters in which decisions were pending before particular members or panels of the tribunal. The Court saw these practices as potentially contributing to a greater level of consistency in the decision-making of tribunals and agencies and as of particular value in the case of high volume jurisdiction tribunals. More recently, in 2001, in *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*,[115] the Court reaffirmed, even strengthened its recognition of the legitimacy of such practices. It also seems clear that consultations of this kind can take place not simply at the level of whole board or tribunal meetings but also among smaller groups of members, and between presiding members and staff including lawyers.

Nonetheless, the Court has always been conscious of the extent to which such practices can compromise the principles of procedural fairness. In particular, they can constitute a danger to the independence of those actually charged with deciding the particular matter (or, in terms of the old parlance, the principle that the person who hears the case must decide the case). Indeed, it was a failure of this kind in the form of inappropriate intervention by a non-sitting Chair that was part of the downfall of the process before the Court in *Tremblay*. As well, depending on the nature of the discussions that take place, they can constitute a violation of the principles of procedural fairness relating to notice and the participants' right to confront the proofs and arguments relevant to the determination of the particular matter.

To meet these concerns, the Supreme Court placed constraints on the conduct of these various forms of consultation. Therefore, while tribunals should be developing these consistency-encouraging practices, it is important that members and Chairs in their executive capacity particularly should be aware of the various constraints.

In terms of the decision-making independence of individual members and panels of tribunals, the Court has made it clear that, while bringing influence to bear is quite acceptable, compulsion is not. Best practices therefore mean that participation in these forms of consultation should be at the option of the presiding member or members, and the discussions should be informal and not involve compulsory attendance on the part of other members, minute taking, or voting. More generally, the Chair or counsel to the tribunal or agency should not exercise a dominant role. More problematic is the advisability of the discussions taking place against the backdrop of a draft decision. In any event, the process adopted should be calculated to allow the presiding member or members to arrive at their own final determination of the matter following the consultation. Finally, though it is not mentioned by the Supreme Court in any of the trilogy, in the context of enforcement and compliance proceedings, where there is a statutory or even a self-imposed separation of the decision-making arm of the Energy Regulator from the enforcement or prosecutorial functions of that Regulator, the discussions of a particular case should not involve those engaged in enforcement or prosecution.[116]

As for the preservation of the opportunity of the participants to participate effectively in the hearing, the Court has insisted that, if the

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[113] *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282.

[114] *Tremblay v. Québec (Commission des affaires sociales)*, [1992] 1 SCR 952.

[115] *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 SCR 221.

[116] In other words, recognize the principles laid down in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 SCR. 919, in the quasi-constitutional setting of the *Quebec Charter of Human Rights and Freedoms*. Even

consultations raise any new arguments of law and policy that will be relevant to the final determination, the member or panel is obliged to put those matters to the parties before relying on them in the final decision. The Court has also made it clear that discussions of this kind should never become a vehicle for the introduction of new facts or evidence. Indeed, in *Consolidated-Bathurst*, the Court went so far as to say that there should be no discussion of the facts. That seems excessive and now has to be read in light of *Ellis-Don*, where the majority appeared to hold that, at the very least, the consultations could involve discussion of what factual configurations could come within the parameters of a legal test or standard developed by the Labour Relations Board.

In short, consultation practices of this kind can be invaluable but there are natural justice or procedural fairness limits to their legitimacy, limits that tribunals and agencies should respect not only to avoid judicial review for procedural unfairness[117] but, more generally, out of consideration for the integrity of the hearing process.

14) Duty to Consult with Aboriginal Peoples [118]

Among the most significant developments in Canadian Administrative Law particularly for Energy Regulators over the past decade has been the evolution of the duty to consult Aboriginal peoples as part of regulatory processes. The Supreme Court has made it clear that this duty to consult applies not only where a regulatory decision may have an impact on a recognized or existing Aboriginal peoples' right, be it under treaty or otherwise, but also even where the right in question is inchoate in the sense of asserted but not yet recognized.[119]

The extent to which this duty to consult might affect Energy Regulators became clear in late 2006, when, in *Dene Tha' First Nation v. Canada (Minister of Environment)*,[120] Phelan J. of the Federal Court held that it applied to the Ministers involved in the creation of the regulatory and environmental review processes related to the proposed Mackenzie Gas Pipeline. Various regulatory bodies (including the National Energy Board) were involved in the setting up of a Joint Review Panel charged with an environmental assessment of the project. It was at the point of the setting up of that Panel that Phelan J. found that the Ministers had failed in their duty to consult. While the case was ultimately settled, the Federal Court of Appeal held that Phelan J. had made no errors in principle in reaching the conclusion that he did and that the judgment was an application of existing Supreme Court of Canada precedent in this field.[121]

While the obligation in this case formally rested with the relevant Ministers who were responsible for the design of the process,

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where constitutional or quasi-constitutional rights and freedoms are not engaged, the common law principles governing bias and lack of independence would almost certainly be marshalled against the participation of those involved in a particular case in an enforcement or prosecutorial capacity, especially in regimes where, in other respects, there is a separation within the Energy Regulator's operations of such functions.

[117] In reality, as *Ellis-Don* makes clear, the Court seems prepared to give tribunals and agencies a broad "presumption of innocence" in cases involving allegations that the *Consolidated-Bathurst* limits have been exceeded. This comes principally in the form of immunity from testimonial compulsion as to what actually took at the relevant consultation.

[118] This section of the paper owes much to discussions over a number of years with Keith Bergner and more recent discussions at the second Energy Regulatory Forum and the 5th Annual Canadian Energy Forum with Chris Sanderson and Patrick Keys among others. However, I should enter the qualification that I am not at all sure that we have reached common ground on the current state of the law!

[119] The leading authorities are *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550; and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388.

[120] *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, 303 FTR 106.

[121] *Canada (Ministry of Environment) v. Imperial Oil Resources Ventures Ltd.,* 2008 FCA 20, 378 NR 251.

the implications for Energy Regulators seemed obvious. Nonetheless, there remained controversy among regulators and the courts as to whether the duty to consult that is impressed on the Crown extended to independent, *quasi*-judicial bodies. For those who argued that independent quasi-judicial regulators were not impressed with the obligation to consult Aboriginal peoples, the governing authority was asserted to be *Quebec (Attorney General) v. Canada (National Energy Board)*,[122] where Iacobucci J., for the Court, rejected an argument to the effect that the Board owed a higher duty of procedural fairness to the affected First Nation than would normally be required by the common law. To the extent that this argument was based on the fiduciary duty owed by the Crown to Aboriginal peoples, the duty was not one that was impressed on independent, *quasi*-judicial agencies. To do so would impinge on their independence.

Nonetheless, given that the duty to consult and accommodate rests on a broader overarching concept of the honour of the Crown (of which the Crown's specific fiduciary obligations are just one component), there was some reason to believe that this aspect of the *National Energy Board* case could no longer be relied upon. What emerged was a body of jurisprudence that at the very least placed the obligation on Energy Regulators to assess whether the duty to consult and accommodate has been met by the Crown in relation to applications before them that have a potential impact on Aboriginal rights, interests, or yet to be established claims.[123]

In 2009, these two aspects of Energy Regulators' responsibility in relation to consulting and accommodating Aboriginal peoples' rights, interests, and claims coalesced in another judgment involving the National Energy Board. In *Brokenhead Ojibway Nation v. Canada (Attorney General)*,[124] Barnes J. of the Federal Court held that the National Energy Board was an appropriate location for assessing the adequacy of proponents' consultation with Aboriginal peoples and itself conducting consultation in the form of its hearings. This was in the context of applications involving the use and taking up of land for the purpose of pipeline projects subject to regulatory approval. In the particular circumstances of the matters before the Board and the Federal Court, this satisfied the honour of the Crown in the sense that there was no further obligation on the Governor in Council, in determining whether to approve the relevant projects, to do more. The critical paragraph in Barnes J.'s judgment states:

> In determining whether and to what extent the Crown has a duty to consult with Aboriginal peoples about projects or transactions that may affect their interests, the Crown may fairly consider the opportunities for Aboriginal consultation that are available within the existing processes for regulatory and environmental review…. Those review processes may be sufficient to address Aboriginal concerns, subject always to the Crown's overriding duty to consider their adequacy in any particular situation. This is not a delegation of the Crown's duty to consult but only one means by which the Crown may be satisfied that Aboriginal concerns have been heard and, where appropriate, accommodated,[125]

Subsequently, however, the Federal Court of Appeal, in the context of the same regulatory proceedings, this time on applications for judicial review of the National Energy Board's own decisions on these applications (as opposed

[122] *Supra* note 51 at 183.

[123] See Carrier Sekani, supra note 105, and *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68, 89 BCLR (4th) 273.

[124] *Brokenhead Ojibway Nation v. Canada (Attorney General)*, 2009 FC 484, 345 FTR 119.

[125] *Ibid. at para 25.*

to the Governor in Council's approval of those decisions) seemingly took a rather different view of the whole issue. This was in *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*[126] There, the affected Aboriginal peoples argued that it was incumbent on the Board to assess whether the Crown itself had consulted and accommodated sufficiently with respect to their outstanding claims. After noting that the Aboriginal peoples were not claiming that it was any part of the Board's obligation to itself engage in consultation, the Court not only agreed with the concession[127] but also rejected the Aboriginal peoples' arguments. Regulators were not implicated in the consultation and accommodation process.[128] Interestingly, Ryer J.A. (delivering the judgment of the Court) did go on to recognize (once again citing the Iacobucci judgment) that section 35 of the *Constitution Act, 1982* created a separate source of obligation to Aboriginal peoples. Recollect its provisions:

> 35. (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "Aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

However, in this instance, the proponent's consulting as directed by the Board and the Board's according of participatory rights to affected aboriginal peoples had satisfied the procedural aspects of that obligation.[129]

All of this led to considerable confusion. Did the duty to consult and, where appropriate, accommodate ever fall on Energy Regulators? What about an obligation to assess whether there has otherwise been adequate consultation and, where appropriate, accommodation? And, to the extent to which there is a separate obligation arising out of section 35, when is it triggered, what are its components, and to what extent does it vary from the duty to consult arising out of the honour of the Crown and any separate or coordinate responsibility to assess whether there has otherwise been adequate consultation?

A number of these matters came to a head in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*.[130] This was an appeal from one of two decisions[131] in which the British Columbia Court of Appeal held that the Commission had failed in the context of regulatory proceedings to assess whether there had been adequate consultation and accommodation by one of the parties to those proceedings, an agent of the Crown.

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[126] *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 FCR 500.

[127] *Ibid*. at para 34, relying on the 1994 National Energy Board judgment.

[128] *Ibid*. at paras 25-33.

[129] *Ibid*. at paras 36, 38 and 40. In light of this, the substantive issue in dispute in *Sweetgrass First Nation v. Canada (National Energy Board)*, 2010 FC 535, 365 FTR 254 is fascinating. The First Nation was attempting to prevent the Board from holding a hearing until the Crown had consulted the First Nation with respect to the aboriginal rights affected by the proceedings, to which the Crown's response was that it was entitled to rely on the processes of the Board to fulfill the consultation obligations. The Federal Court never reached the merits of that issue, concluding that the Federal Court did not have jurisdiction over such issues.

[130] *Supra* note 106.

[131] The other was *Kwikwetlem First Nation v. British Columbia (Utilities Commission), supra* note 123.

In delivering the judgment of the Supreme Court of Canada, McLachlin C.J. held that, while the legislature could impose a duty to consult on a regulatory agency or tribunal,[132] it would have to do so explicitly or by necessary implication, and that, unlike the duty to consider constitutional questions, could not simply arise out of the statutory conferral of an ability to deal with questions of law pertinent to the proceedings before it. As there was no such express or necessarily implicit conferral of power in this case, the Commission did not have any mandate or responsibility to itself engage in consultation with the affected Aboriginal peoples.[133] However, she then held that the Commission did have authority to consider whether or not the proceedings engaged the rights, interests, or undetermined claims of Aboriginal peoples, and, if so, whether the Crown had engaged in adequate consultation, and, where appropriate, accommodation. This arose out of the Commission's power to decide questions of law in the exercise of its authority, and also the requirement that the Commission take into account "any other factor that the Commission considers relevant in the public interest."[134] Whether either of these in isolation would have been sufficient to trigger this power (indeed, obligation) is uncertain.

It is also important to read this judgment in conjunction with the Court's subsequent decision in *Beckman v. Little Salmon/Carmacks First Nation*.[135] Among the issues raised in that case was the adequacy of consultation efforts engaged in by decision-makers acting under a departmental umbrella. Implicit in this evaluation is an acceptance that these bodies and officials constituted the Crown for these purposes and that they had not only the power (and responsibility) to engage in consultation (as well as the assessment of the consultation efforts of others) but also the ability to meet at least in part the Crown's overall duty to consult and accommodate. In other words, the holding in Carrier Sekani requiring an explicit or necessarily implicit conferral of power to engage in consultation is probably restricted to independent agencies and tribunals.

This, of course, does not resolve all questions respecting consultations and Energy Regulators. In fact, the Supreme Court seemed to pass up for the moment at least the opportunity to fill the remaining gaps when, shortly after Beckman was released, it denied leave to appeal in the *Standing Buffalo Dakota First Nation* case, a matter that had obviously been held in abeyance pending the disposition of the two other appeals.[136] However, it is possible to construct a plausible and reasonably comprehensive version of the relationship between regulatory tribunals and agencies and Aboriginal consultation rights on the basis of the two recent Supreme Court decisions, and the surviving parts of both *Brokenhead Ojibway Nation and Standing Buffalo Dakota First Nation*:

i. As opposed to public servants and bodies operating under the umbrella of a government department or agency, regulatory tribunals and agencies do not have the authority to engage in the consultation of Aboriginal peoples except where that power is conferred expressly or arises by necessary implication out of primary legislation. At present, there do not appear to be any such examples among Energy Regulators.

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[132] Implicitly, this seems to undercut the Iacobucci position in *Quebec (Attorney General) v. Canada (National Energy Board), supra* note 51, that any such power is incompatible with the independence of *quasi*-judicial regulatory agencies and tribunals.

[133] *Supra*, note 105 at paras 56, 60, and 74 particularly.

[134] *Id*. at paras 68-70 particularly.

[135] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103.

[136] *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, [2009] SCCA No. 499 (QL).

ii. In contrast, it appears as though they will have the power, indeed the duty to inquire in relation to matters before them whether the Crown has a duty to consult, and, if so, whether that duty to consult has been fulfilled.[137]

iii. However, it may well be that this power and duty is subject to explicit legislative exclusion as provided for in section 21 of the Alberta *Responsible Energy Development Act*, respecting the authority of the newly-minted Alberta Energy Regulator.[138]

iv. Despite 1, in the fulfillment of the Crown's duty to consult, the Crown can rely on the extent to which the procedures adopted by Energy Regulators (including the consultation requirements imposed on proponents) have sufficiently engaged Aboriginal peoples as to constitute at least a component of the meeting of that responsibility.

v. Irrespective of the Crown's duty to consult and, where appropriate, accommodate, the common law principles of procedural fairness and, more importantly, the rights recognized in section 35 of the *Constitution Act, 1982* impose on Energy Regulators special procedural responsibilities in relation to Aboriginal peoples when proceedings before those regulators affect the rights, interests, and as yet undetermined claims of Aboriginal peoples.[139] These responsibilities may in part be fulfilled by assigning responsibility for consultation to proponents.

More recently, in *Behn v. Moulton Contracting Ltd.*,[140] the Supreme Court affirmed another principle that is critical in not only the conduct of consultation by those regulatory agencies with authority to consult but also regulatory agency assessment of consultations by the Crown:

> The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature … But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights … .

Without such an authorization, regulators only have to concern themselves with identifying the affected Aboriginal people or peoples for the purposes of giving notice and engaging in consultation, and for assessing the consultative

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[137] However, in two decisions, the ECRB determined that it did not have this authority, referencing the terms of its empowering statute and distinguishing *Carrier Sekani, supra* note 105, on the basis that it involved a Crown agency as proponent, and not the evaluation of whether the Crown had fulfilled its duty to consult in the context of an application by a private sector proponent: ECRB, Reasons for July 17, 2012 Decision on Notice of Question of Constitutional Law, *Osum Oil Sands Corp., Taiga Project,* August 24, 2012 (application for leave to appeal denied on the basis that the issue was not ripe for determination: *Cold Lake First Nations v. Alberta (Energy Resources Conservation Board)*, 2012 ABCA 304), Joint Review Panel decision, Jackpine Mine Expansion Project, October 26, 2012 (application for leave to appeal denied on basis that it would serve no useful purpose: *Métis Nation of Alberta Region 1 v. Joint Review Panel,* 2012 ABCA 352, 539 AR 146). Moreover, as seen already, *supra* note 99, section 21 of the *Responsible Energy Development Act, 2012* specifically withdraws this capacity from the ECRB's successor, the Alberta Energy Regulator. As for the two ECRB decisions, Nigel Bankes has criticized them as misconceiving badly the Supreme Court's position in *Carrier Sekani*: see "Who decides if the Crown has met its duty to consult and accommodate?", ABlawg.ca, September 6, 2012.

[138] See also *Métis Nation of Alberta Region 1 v. Joint Review Panel, ibid.*, application for leave to appeal dismissed: [2013] SCCA No. 33 (April 11, 2013), upholding an agreement between the federal Crown and the Alberta Energy Resources Conservation Board to the effect that the Joint Review Panel would have no jurisdiction over the sufficiency of the Crown's consultations with Aboriginal peoples.

[139] Note, however, *Prince v. Alberta (Energy Resources Conservation Board), supra* note 10, refusing leave to appeal a Board decision that a matter did not have a direct and adverse effect on aboriginal interests.

[140] *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, at para 30

efforts of others. While that process of identification may itself be a complicated exercise where there are overlapping or contested (as between or among Aboriginal peoples) rights and claims, it at least narrows the field of those who can call the regulator to account.

Given all of this and, in particular, the obligations to assess the consultation efforts of others and the likely separate section 35 responsibilities of Energy Regulator, the most obvious way to avoid pitfalls in this area is for Energy Regulators to take proactive steps and put in place detailed policies on *consultation* with Aboriginal peoples.[141] It is also important not only to engage Aboriginal peoples in the development of those policies but also to recognize that the duty of consultation may not necessarily be met by simply ensuring that affected Aboriginal peoples have an equal opportunity to participate at any hearings in precisely the same way as all other parties and intervenors. The case law[142] recognizes that the honour of the Crown may very well involve individualized and specially tailored forms of consultation with affected Aboriginal peoples.

Absent the development of policies on consultation, it may fall on particular panels of Energy Regulators to be both alert to the possibility of the potential regulatory impact of proposals on Aboriginal peoples and attuned to the ways in which its own duties can be fulfilled. The potential for front-end failures to generate protracted judicial review proceedings and frustrate regulatory initiatives is enormous.[143]

15) Reasons

Canadian common law did not recognize the existence of a duty on the part of administrative tribunals and agencies to provide reasons for their decisions until comparatively recently. This came in 1999 in *Baker v. Canada (Minister of Citizenship and Immigration)*,[144] and, even then, the Court did not conceive of it as a universal requirement of administrative decision-making. However, before that, there were statutory obligations to provide reasons contained in the general administrative procedure statutes of at least two provinces: Alberta[145] and Ontario.[146] In each, those general procedural statutes applied to Energy Regulators. There is therefore a reasonably long history of Energy Regulators coping with the demands of a statutory obligation to give reasons. Indeed, as far as I am aware, with possibly one exception discussed in the next section, Energy Regulators have managed to avoid judicial review based on a failure to meet that obligation, whether imposed by the common law or by statute.[147]

However, that is no reason for complacency. At the end of the day, what matters most is not whether there is a document constituting the reasons of the agency or tribunal. Rather, it is the quality of the reasons that is critical. A lack of quality can give rise to a challenge

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[141] See the judgment of McLachlin C.J. in *Haida Nation, supra* note 119.

[142] And, in particular, *Mikisew Cree First Nation, supra* note 119.

[143] For recent examples of the complicated disputes that can arise as to whether there has been adequate consultation, see *Nlaka'pamuz Nation Tribal Council v. British Columbia (Project Assessment Director, Environmental Assessment Office)*, 2009 BCSC 1275, and *West Moberly First Nations v. British Columbia (Ministry of Energy, Mines and Petroleum Resources)*, 2010 BCSC 359, 6 BCLR (5th) 94, aff'd 2011 BCCA 247, 18 BCLR (5th) 234.

[144] *Supra* note 70.

[145] *Administrative Procedures and Jurisdiction Act*, RSA 2000, cA-3, s 7(1) and mandatory for tribunals subject to that Act when making a decision affects "the right of a party".

[146] *Statutory Powers Procedure Act*, RSO 1990, c S-22, s 17(1), and required when requested by a party of a decision-maker subject to that Act.

[147] For examples of unsuccessful challenges, see *Judd v. Alberta (Energy Resources Conservation Board), supra* note 52, and *Regional Electricity Transmission for Albertans Assn. v. Alberta (Infrastructure and Transportation),* 2013 ABQB 162.

to the substantive outcome of a hearing. The Supreme Court of Canada has made this clear recently in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*.[148] There, Abella J., delivering the judgment of the Court, settled a matter that had previously been unsettled: whether inadequate, as opposed to no reasons gave rise to a free-standing basis for judicial review founded on procedural unfairness. She held that it did not. Nonetheless, a decision not supported by adequate reasons in the sense of reasons that met the standards of "justification, transparency and intelligibility" specified in *Dunsmuir v. New Brunswick*[149] could expose the decision to review on the basis that the decision was unreasonable.

However, the courts have been conscious of the realities facing administrative agencies and tribunals. Thus, in *Judd v. Alberta (Energy Resources Conservation Board)*,[150] Conrad J.A. conceded:

> The requirement of reasons does not call for a tribunal to discuss every single piece of evidence that was before it and the basis for accepting or rejecting that evidence: *Johnston v. Alberta (Energy & Utilities Board)* (1997), 200 A.R. 321 at para 10. Taken as a whole, the reasons indicate what evidence the ECRB accepted in arriving at its decision.

Abella J. expressed similar sentiments in *Newfoundland and Labrador Nurses' Union*,[151] and also endorsing[152] an earlier statement by Evans J.A. of the Federal Court of Appeal that "perfection is not the standard."[153] Even more importantly, she also accepted that, on judicial review, the reasons should not be read in isolation from the evidence, the parties' submissions, and the process, all of which might provide justifications for a conclusion that appeared possibly unreasonable simply on the face of the reasons.[154] Indeed, this material as well as the reviewing courts' own evaluation of the outcome in light of the relevant statutory provisions and purposes might serve as a surrogate for fuller and more adequate reasons in sustaining the reasonableness of a decision under attack.[155]

Nonetheless, agencies and tribunals should not be overly sanguine on the basis of the Court's apparent willingness to fill in the gaps and discern justifications that are not readily, if at all apparent on a perusal of the reasons provided. Good public administration, including fairness to the parties in the sense of letting them know why the outcome was reached, provides an independent imperative for taking seriously the obligation to provide adequate reasons. Stratas J.A., of the Federal Court of Appeal, expressed it well in *Vancouver International Airport Authority v. Public Service Alliance of Canada* when he stated that the reasons

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[148] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708.

[149] *Supra* note 110 at para 47.

[150] *Supra* note 52 at para 23.

[151] *Supra* note 148 at para 16.

[152] *Ibid*. at para 18.

[153] In *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 FCR 221, at para 163.

[154] *Supra* note 128 at para 18, quoting the respondents' factum. See also the judgment of Rothstein J. in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654, at paras 52-56, as to review in situations where reasons are not required and none were given.

[155] In an Energy Regulation context, see *Responsible Electricity Transmission for Albertans Assn. v. Alberta (Infrastructure and Transportation), supra* note 146, absolving the Minister from the obligation to give reasons in permitting the commencement of a project, but going on to hold (at paras 32-42) that, even if reasons were required, they could be inferred from the record of the proceedings that was in evidence before the Court.

> …must provide an assurance to the parties that their submissions have been considered, enable the reviewing court to conduct a meaningful review, and be transparent so that regulatees can receive guidance.[156]

Moreover, even with the Abella qualifications on the need for comprehensible and comprehensive reasons, a reviewing and appellate court doing its own reconstruction exercise might actually not discern a reasonable basis for the decision where adequate reasons would have made that clear. Alternatively, where the discerning of whether the decision is reasonable is not possible even within the broader "evidential" context that Abella J. suggests, the end result will be a remission to the agency or tribunal to provide fuller and better reasons. Neither of these outcomes is in the interests of administrative justice and regulatory efficiency.

As a consequence, the following test developed by Iacobucci J. on behalf of a unanimous Supreme Court of Canada in *Law Society of New Brunswick v. Ryan*[157] for whether a decision passes muster under the unreasonableness standard of review continues to serve as general guidance to tribunals in evaluating whether their reasons suffice:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.[158]

This focus on the existence of a line of analysis in the context of the evidence on the record conveys an obvious message to administrative agencies and tribunals: Make sure your reasons flow logically and find a reference point in the material adduced at the hearing.

More specifically, the litmus test for a tribunal or agency concerned with the production of reasons that not only are technically bullet-proof but also respond to the policy imperatives behind the obligation to give adequate reasons is whether (1) the reasons are comprehensible, (2) address in sufficient detail all of the major issues raised in the course of a hearing, and (3) provide a basis on which (a) the parties can determine whether to exercise any right of appeal or apply for judicial review, and (b) the reviewing court can assess the correctness or reasonableness of the conclusions reached.

16) Departures from Precedents and General Regulatory Principles

In the context of the discussion of internal consultations,[159] I have already identified that Canadian judicial review law does not recognize inconsistency as a free-standing ground of judicial review. However, there is some evidence of a tendency on the part of the courts to regard the obligation to provide reasons as more onerous in situations where an agency is departing from its own precedents or general regulatory principles sometimes developed in tandem by a regulator and the courts on either judicial review or statutory appeal.

One of the clearest examples of this is to be found in the dissenting judgment of Rothstein and Moldaver JJ. in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*[160] There, they stated:

> Thus, while arbitrators are free to depart from relevant arbitral consensus and

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[156] *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158, [2011] 4 FCR 425, at para 14.

[157] *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 SCR 247.

[158] *Ibid*. at para 61.

[159] *Supra* notes 108-12 and accompanying text.

[160] *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*, 2013 SCC 34

> march to a different tune, it is incumbent on them to explain their basis for doing so. As this Court has stressed, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process" (*Dunsmuir*, [*supra*, note 109, at] para. 47). Because judges are not mind readers, without some explanation, whether implicit or explicit, for a board's departure from the arbitral consensus, it is difficult to see how a "reviewing [could] understand why the [board] made its decision" *(Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* [*supra*, note 147] at para. 16). Reasonableness review includes the ability of courts to question for consistency, where, in cases like this one, there is no apparent basis for implying a rationale for inconsistency.[161]

While this is a dissenting judgment, it is important to note that the majority and the minority in the Supreme Court disagreed as to whether the arbitral jurisprudence was consistent with the decision of the arbitration panel in this case, with the majority in part basing its holding that the decision under review was reasonable on its view that the arbitrator applied "a remarkably consistent arbitral jurisprudence."[162]

In an energy regulatory context, this sense of a heightened obligation with respect to reasons in cases of divergence from precedent or general regulatory theory emerges most clearly in *Power Workers' Union (Canadian Union of Public Employees, Local 1000) v. Ontario (Energy Board),*[163] a judgment delivered on June 4, 2013, just ten days before that of the Supreme Court in Irving Pulp & Paper Ltd. This case involved an appeal from a decision of the Ontario Energy Board on a general rate application by Ontario Power Generation in which the Board had reduced significantly Ontario Power Generation's projection of its revenue requirements to cover its nuclear compensation or wages costs. In so doing, the Board treated the compensation items as forecast costs subject to review, under the OEB's precedents and general regulatory theory, by reference to a range of considerations, and not as committed costs, presumptively, once again under the Board's precedents and general regulatory theory, not reducible without a prudence review. Notwithstanding the fact that the compensation costs in question had already been set in place by way of collective agreement, the Board refused to treat them as committed costs, possibly on the basis of a position that, for these purposes, committed costs were confined to capital costs, as opposed to operating costs. On appeal to the Divisional Court, this conclusion (and the reduction in revenue requirements) was sustained by a majority of the Court on the basis that it was reasonable.[164] In reversing that decision and setting aside the Board's holding on this issue as unreasonable, the Court of Appeal stated:

> We say this for two reasons. First, the Board's approach to these committed costs is contrary to the approach required by its own jurisprudence and accepted [[165]] by this court. Second, it is unreasonable to require the OPG to manage costs that, by law, it

(McLachlin C.J. concurring).

[161] *Ibid*. at para 79.

[162] *Ibid*. at para 16 (per Abella J., (LeBel, Fish, Cromwell, Karakatsanis, and Wagner JJ. concurring).

[163] *Power Workers' Union (Canadian Union of Public Employees, Local 1000) v. Ontario (Energy Board),* 2013 ONCA 359.

[164] *Ontario Power Generation Inc. v. Ontario (Energy Board)*, 2012 ONSC 729, 109 OR (3e) 576 (Div Ct) (per Hoy J. (as she then was) (Swinton J, concurring and Aitken J dissenting)).

[165] *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)* (2006), 210 OAC 4 (CA), leave to appeal to the SCC

cannot manage.[166]

While I would not necessarily go so far as to suggest that this is judicial review for inconsistency through the back door, what it clearly endorses is the sense that regulators have an obligation to grapple explicitly with their precedents and those of the courts before setting out in a new direction. If they fail to do so, reviewing and appellate courts are not going to be all that willing to listen to after-the-decision arguments in support of the departure from previous jurisprudence.

17) Avoiding Grand Statements of Principle

Ever since *Dunsmuir v. New Brunswick*,[167] the Supreme Court of Canada has, at the level of theory, been moving more and more in the direction of the predominance of the deferential reasonableness standard of review as the presumptive or default standard. Correctness review is becoming more and more exceptional. In a paper delivered at the Fifth Annual Energy Law Forum at La Malbaie on May 17, 2012, "Recent Developments in Administrative Law Relevant to Energy Law and Regulation", I detailed this evolution by reference to nine Supreme Court of Canada judgments starting in October 2011. The summary of my conclusions was as follows:

> *Dunsmuir* identified four situations where correctness review would be the norm. In all four instances, subsequent Supreme Court of Canada cases have made it clear that reviewing courts should be alert not to interpret their scope expansively[168]. This has contributed to a significant expansion of the situations in which deferential unreasonableness review is the requisite standard. Other refinements of *Dunsmuir* have contributed: the downplaying of expertise as a factor in the standard of review analysis, a willingness to revisit past jurisprudence on the standard of review where there are concerns about whether those precedents determined the standard of review satisfactorily, and acceptance that review should not necessarily become more expansive when a statutory or prerogative decision-maker does not give reasons for its decision especially in situations where there is no common law or statutory obligation to provide reasons. Indeed, even where such an obligation exists, the Court is prepared to look beyond the reasons for justifications for the outcome of the exercise of a statutory or prerogative power. Inadequacy of reasons is not a free-standing ground of judicial review. Most significantly, however, the Supreme Court has sent a very clear message to the lower courts, starting with *Smith v. Alliance Pipeline Ltd.*,[169] and reaffirmed with emphasis by Rothstein J. in *Alberta (Information and Privacy Commissioner)*:
>
> > [T]he interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.[170]
>
> Moreover, in what follows, Rothstein J.

refused, [2006] SCCA 208 (QL), and sustaining the notion that committed costs included operating costs.

166 *Supra* note 164 at para 37.

167 *Supra* note 129.

168 One of those instances was correctness review in the instance of jurisdictional error. In this regard, it is interesting that Energy Regulation law provides two of the most prominent and very few examples after *Dunsmuir* in which a Court of Appeal has classified an issue before a Tribunal as jurisdictional in nature and therefore subject to correctness review. See *Shaw v. Alberta (Utilities Commission), supra* note 84, and *Newfoundland and Labrador Hydro v. Newfoundland and Labrador (Board of Commissioners of Public Utilities),* 2012 NLCA 38, 323 Nfld. & PEIR 127.

169 *Supra* note 112.

170 *Supra* note 154 at para 34.

makes it clear that this is a presumption that is not easily rebutted.

However, I then went on to argue that, at the level of the actual assessment of whether a decision is unreasonable, the Supreme Court of Canada has on a number of occasions engaged in what one of my correspondents describes as "disguised correctness review." Indeed, a now retired member of the Supreme Court of Canada said as much in one of his final judgments, his concurrence in the result in *Alberta (Information and Privacy Commissioner*.[171] Binnie J.'s primary exhibit was the judgment of LeBel and Cromwell JJ. in *Canada (Canadian Human Rights Tribunal) v. Canada (Attorney General)*.[172]

I make this point here to draw attention to the fact that the promise of deference is not always as comforting to tribunals and agencies as it might be. Particularly on questions of law but even sometimes on questions of fact,[173] courts, while purporting to apply a deferential standard, will reach deeply into the merits of the decision under review.

What lessons are there in this for administrative tribunals and agencies?

First, recognize that, if you trespass into the domain of the Constitution, the common law, the *Civil Code*, and statutes with which you are not regularly in contact, the likelihood of correctness, or disguised correctness review inevitably increases.

Secondly, while there may be occasions where such incursions are unavoidable, always consider whether it is possible without violating your responsibilities to confine your decision to your home statute and, where feasible, with reference principally to the facts on which the decision is based.[174] Carried to extremes, of course, constantly delivering decisions that are based entirely or largely on facts will get in the way of the development of a coherent body of tribunal precedent. Nonetheless, the reality is that it is the particular facts that carry most cases, so avoid the temptations to make grand pronouncements on general law and indeed regulatory law and policy where factually-based findings will do.

Thirdly, and this is related to the whole issue of how to craft reasons, I believe it is important to take time to explain where there might be room for inappropriate classification of the nature of the question you are confronting; to make it clear that what could appear to be a question of common, civil or general law is in reality a highly context-sensitive issue with the relevant statutory terms taking their meaning from that context and not from common, civil, or general law.[175] ■

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[171] *Ibid.* at para 85.

[172] *Canada (Canadian Human Rights Tribunal) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471.

[173] See, for example, the judgment of Abella J. in *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 345, and the reaction that produced from Rothstein J. at paras 57-60.

[174] For an excellent post-*Dunsmuir* example of the difficulty of securing judicial review on a reasonableness standard of a decision that focuses on the relevant facts, see *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, 237 OAC 71.

[175] The decision of the United States Supreme Court in *National Labor Relations Board v. Hearst Publications Inc.*, 322 US 111 (1944) remains a wonderful example of this kind of approach.

BRITISH COLUMBIA UTILITIES COMMISSION NATURAL GAS VEHICLE DECISION

*Jeff Christian**

FortisBC is the dominant natural gas service provider in British Columbia, serving nearly a million customers in over 135 communities in the province.[1] It is a public utility regulated by the British Columbia Utilities Commission (BCUC), under the *Utilities Commission Act*.[2]

In a series of applications since 2009 FortisBC has sought BCUC orders allowing it to develop and expand service to natural gas-powered vehicles (NGVs).[3] The BCUC's responses to those applications have been marked by a consistent concern to ensure no incremental burden on FortisBC's non-bypass customers - those mostly smaller residential and commercial customers with no practical alternative to monopoly natural gas service. This concern has been maintained even as the province has expressed increasing levels of commitment to NGV fuel-switching as a means to further its greenhouse gas (GHG) reduction policies.[4] That is, subject to the specific requirements of recent enactments, the BCUC has not embraced the policy objective of expanding NGV service, at least at the potential cost to FortisBC's non-bypass customers. This case comment looks at recent NGV decisions of the BCUC against the backdrop of evolving NGV policy and concludes that it has done no more than apply the traditional regulatory framework, and that any failure to advance the provincial policy objectives beyond that framework was quite predictable.

BFI Canada Inc. Application

On February 29, 2012, FortisBC applied to the BCUC for approval to construct and operate a compressed natural gas fuelling station at the premises of a customer, BFI Canada Inc. (BFI). BFI operates a fleet of waste collection trucks powered by natural gas. FortisBC also applied for approval of the rates to be charged to the customer. After a short written process, the BCUC approved the construction of the facilities, but flatly refused to approve the proposed NGV rates on the basis that they failed to recover the full cost of service.[5] Of

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[1] Through three companies, FortisBC Energy Inc., FortisBC Energy (Vancouver Island) Inc., and FortisBC Energy (Whistler) Inc., collectively referred to in this case comment as FortisBC. A sister company also provides regulated electricity service in British Columbia.

[2] *Utilities Commission Act*, RSBC 1996, C-473, RSBC 1996, c. 473 (UCA).

[3] BCUC Order No. G-65-09 (4 June 2009) (regarding a pilot program to provide a liquefied natural gas service); BCUC Order No. G-128-11 (19 July 2011) (regarding the establishment of a compressed natural gas fuelling station); BCUC Order No. G-88-13 (4 June 2013), (regarding a proposal to establish the 2009 pilot on a permanent basis).

[4] Bill 17, *Clean Energy Act*, 2nd Sess, 39th Parl, BC, 2010, cl 18.

[5] BCUC Order No. C 6-12 (30 April 2012) and Reasons for Decision at Appendix A (BFI Decision).

particular import was the fact that under the UCA, the sale of compressed or liquefied natural gas is not a public utility service, except insofar as it is provided by an entity already a public utility.[6] Had FortisBC not already been a regulated public utility, it would not have needed any BCUC approvals to establish the new NGV service. In these circumstances, the BCUC's concern was to ensure that FortisBC's non-bypass customers faced no more cost or risk exposure than if FortisBC's NGV service had in fact been unregulated. A further apparent concern of the BCUC was fairness to unregulated would-be competitors of FortisBC.[7]

Provincial Natural Gas Policy and GHG Regulation

More or less contemporaneously with the hearing of the BFI application, British Columbia announced a new policy focus on the development of natural gas resources in British Columbia, which cites the substitution of natural gas for diesel fuel for fleet use.[8] Consistent with and further to the policy statement, the province also issued the *Greenhouse Gas Reduction (Clean Energy) Regulation* in May 2012 (GHG Regulation).[9] Among other things, the GHG Regulation describes four NGV initiatives that FortisBC may undertake and which, pursuant to section 18 of the *Clean Energy Act*, the BCUC may not interfere with. Further, the BCUC is obliged to allow FortisBC to recover the costs of those NGV initiatives in its regulated rates up to $104.5 million in a five-year period.[10] Each of the policy statement, section 18 of the *Clean Energy Act*, and the GHG Regulation are silent on the allocation between FortisBC's customers of those costs. However, the implicit effect of the enactments is to impose on non-bypass customers the risk that NGV customer revenue will be less than the cost of service.

Reconsideration of BFI Decision

Upon application by FortisBC, and in light of the newly expressed natural gas policy and the GHG Regulation, the BCUC reconsidered the BFI decision.[11] In doing so the BCUC considered and rejected the argument of FortisBC that the GHG Regulation was necessarily to be understood as a provincial policy favouring further subsidization by non-bypass customers in favour of FortisBC's would-be NGV customers: "However, a further intent of the Regulation is arguably to limit the potential subsidies provided by a utility's ratepayers to finance eligible natural gas vehicles and build CNG/LNG[12] fueling infrastructure…."[13] One argument that seems not to have been raised is that subsidies in favour of NGV customers would reduce the risk to bypass customers of NGV load not materializing. In the result, the BCUC re-affirmed its earlier conclusion that non-bypass customers should be kept whole from the costs of a service offering that could be provided in a competitive marketplace by non-regulated entities subject only to the mandated assumption of NGV revenue risk. It varied its earlier orders in minor ways, and allowed FortisBC to file a new rate proposal.

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[6] *Supra* note 2 s 1 (UCA) (see definitions of "public utility" and "petroleum industry").

[7] *Supra* note 5 at 18.

[8] Ministry of Energy and Mines and Responsible for Core Review, *British Columbia's Natural Gas Strategy* (3 February 2012), online: Government of BC <http://www.gov.bc.ca/ener/atural_gas_strategy.html> at 5.

[9] BC Reg 102/2012, pursuant to section 18 of the *Clean Energy Act*, SBC 2010, c 22.

[10] BCUC Order No G-201-12 (27 December 2012), at 51.

[11] BCUC Order No G-150-12 (17 October 2012), (Reasons for Decision at Appendix A (Reconsideration Decision).

[12] CNG refers to compressed natural gas; LNG refers to liquefied natural gas.

[13] *Supra* note 11 at 7, (emphasis added).

BFI Compliance Filing

In November 2012 FortisBC applied again for BCUC approval of its NGV rate for BFI. Once again the BCUC was critical of FortisBC arguments that supported relatively low cost allocations to NGV customers, and reiterated again its concern for the protection of non-NGV customers. With regard to the GHG Regulation, the BCUC wrote: "The *Greenhouse Gas Reduction Regulation* (GHG Regulation) specifically limits the amounts which can be spent on incentives, including incentives relating to safety practices, as well as costs related to administration, marketing, training and education. In the Panel's view, it is not reasonable to allocate the majority of general overhead costs relating to the NGT (NGV) market to non-bypass customers (non-NGV customers) without regard to specific activities. To the extent that any portion of such costs are sought to be borne by non-bypass customers, these costs should be specifically identified and accounted for as expenditures pursuant to the *Greenhouse Gas Reduction Regulation* and not buried in broader overhead."[14]

Discussion

The BCUC's NGV decisions can be understood, in part, as resistance to the argument that government policy statements, at least insofar as they are manifest in legislative exemptions from normal regulatory processes, ought to necessarily inform the BCUC's exercise of discretion. In the main, this seems appropriate, in circumstances where the legislative exemption is focussed and discrete and the BCUC's otherwise applicable scope of discretion is quite broad, as has been the case in the NGV proceedings. Under the UCA, and indeed the enabling statutes of many utility regulators, the BCUC does not simply approve rates, it determines and sets them.[15] Rather than simply an oversight function, rate-setting is a primary responsibility of the regulator, not the utility (or the province). Commensurate with that responsibility comes a broad discretion. Where that discretion is restricted by enactment in the narrow circumstances of a particular initiative – NGV rates, in this case – one would think that the independence that regulators enjoy does not simply allow but in fact requires them to read no more into the policy impetus underlying the enactment than is consistent with the exercise of its statutory obligations. In its NGV decisions the BCUC has not required bypass customers to subsidize NGV customers any more than required by law. In so doing it has given full effect to both the GHG Regulation and its over-arching statutory obligations in a foreseeable and even predicable way. ■

[14] *Supra* note 11; BCUC Order No. G-78-13 (14 May 2013) and Reasons for Decision at Appendix A at 6-7.

[15] *Supra* note 2 s 58.

THE TORONTO HYDRO ELECTRIC VEHICLE CHARGING DECISION

*Glenn Zacher**

The Ontario Energy Board's (OEB) 2011 decision[1] denying Toronto Hydro Electric System Limited's (Toronto Hydro) request for $600,000 to fund an electric vehicle (EV) pilot project raises the interesting issue of where energy regulators should draw the line between competitive and monopoly services. At a time when "smart grid" technologies are evolving and distributors are naturally adapting and leveraging their businesses to integrate these technologies and take advantage of the opportunities they present, this is an issue that will invariably continue to surface.

The impetus for Toronto Hydro's request was the Ontario government's 2009 pronouncement that one in every 20 vehicles in Ontario be electric by the year 2020.[2] The 2009 Green Energy and Green Economy Act (GEA)[3] also added as an object to the Ontario Energy Board Act (OEB Act)[4] that the OEB facilitate the implementation of a smart grid in Ontario, including the accommodation of emerging innovative and energy saving technologies. This was followed by new deemed license conditions requiring distributors to file plans for the development and implementation of the smart grid as part of their distribution systems and a subsequent 2010 ministerial directive[5] requiring the OEB to provide guidance to distributors on making expenditures to establish, implement and promote the smart grid.

Against this backdrop, Toronto Hydro applied in its 2011 rate case for approval of a $600,000 expenditure to fund an EV pilot project. Toronto Hydro proposed that it install and monitor approximately 30 to 40 EV charging stations across the city which would assist it in assessing upstream distribution system upgrades required to accommodate EVs, including understanding the real-time impacts of EVs on the distribution grid (e.g., loading, power quality). Toronto Hydro also advised the OEB that the pilot project would assist it in the development of safety, operating and control procedures and practices relating to EV charging infrastructures connected to its grid.

Toronto Hydro's request was relatively modest – $600,000 being a small fraction of its requested revenue requirement – and was limited to a pilot project. That said, the OEB largely refused the proposed expenditure. The OEB found merit in Toronto Hydro performing limited analytical work pertaining to the impact of EV charging on Toronto Hydro's distribution system and

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[1] *Toronto Hydro-Electric Ltd. (Re)* (22 February 2012), EB-2010-0142, online: OEB <http://www.ontarioenergyboard.ca>.

[2] Ministry of Transportation, *A plan for Ontario: 1 in 20 by 2020: The next steps towards greener vehicles in Ontario* (July 2009, online: Ontario <http://news.ontario.ca/mto/en/2009/07/a-plan-for-ontario-1-in-20-by-2020.html>.

[3] *Green Energy Act*, SO 2009, c 12, Schedule A.

[4] *Ontario Energy Board Act*, SO 1998, c 15, Schedule B.

[5] "Directives issued to the OEB by the Minister of Energy" (5 April 2011), online: OEB <http://www.ontarioenergyboard.ca/OEB/Industry/Regulatory+Proceedings/Directives+Issued+to+the+OEB>.

the OEB therefore allowed $200,000 in costs associated with this activity provided the money not be used to "fund the provision of a service to the public." The OEB, however, cautioned that policy development regarding ownership and operation of EV charging infrastructure had yet to take place and that it was premature to effectively determine that ownership of the charging infrastructure should fall within the monopoly business of Toronto Hydro (and other distributors). The OEB rejected Toronto Hydro's argument that the pilot project would not pre-determine this issue and that the results would be helpful to all parties in informing the public policy debate. The OEB expressed concern that vendors and purchasers of electric vehicles might rely upon such infrastructure and, in its decision, the OEB referenced evidence of communications between Toronto Hydro and the auto vendor sector regarding the most convenient sites for locating charging stations. The OEB averted to the policy consultation process[6] it had initiated on smart grid implementation, which included issues relating to electric vehicles, and the OEB ultimately concluded that it was premature for Toronto Hydro to proceed with a series of EV charging stations prior to completion of this policy consultation process.

In the two years since the Toronto Hydro decision, the OEB's views on EV infrastructure have evolved. To the extent the OEB's Toronto Hydro decision signaled a wait-and-see approach, it would appear the OEB now regards EV infrastructure, and other behind-the-meter technologies, as off-limits to regulated utility services.

Guelph Hydro also applied in 2012 for funding for an EV pilot project. The basis for its request was somewhat different than Toronto Hydro's. Nonetheless, the OEB rejected the request on largely the same basis.[7] The OEB noted that "the demarcation point between the rate-regulated entity and non-regulated service providers and the role of the distributor in non-monopoly activities have not yet been addressed by the Board".[8] Again, the OEB averted to the smart grid consultation process and the recently released November 2011 OEB Staff Discussion Paper: In Regards to *Establishment, Implementation and Promotion of a Smart Grid in Ontario*.[9]

OEB staff's November 2011 discussion paper – and its more recent Supplemental Report on Smart Grid[10] – do not definitively answer the question, but together, with the recently issued OEB Report on a Renewed Regulatory Framework for Electricity Distributors,[11] it would appear the OEB considers behind the meter activities, including EV infrastructure, as the domain of the private sector. In its 2011 discussion paper, OEB staff questioned the proper demarcation point between monopoly and utility services in relation to smart grid investments and, in particular, whether the meter was the appropriate demarcation point or whether a more flexible and functional approach was required. While the smart grid consultation process remains ongoing, the OEB, in its *Renewed Regulatory Framework for Electricity Distributors Report* acknowledged the

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[6] *Developing Guidance for the Implementation of Smart Grid in Ontario* (3 January 2011), EB-2011-0004, online: OEB <http://www.ontarioenergyboard.ca/OEB>.

[7] *Guelph Hydro Electric System inc.*, (22 February 2012), EB-2011-0123, online: OEB <http://www.ontarioenergyboard.ca>.

[8] *Ibid* at 23.

[9] Staff Discussion Paper: In Regards to Establishment, Implementation and Promotion of a Smart Grid in Ontario, (8 November 2011), EB-2011-0004, online: OEB <http://www.ontarioenergyboard.ca/OEB>.

[10] *Supplemental Report on Smart Grid* (11 February 2013), EB-2011-0004, online: OEB <http://www.ontarioenergyboard.ca/OEB>.

[11] *Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach*, (18 October 2012), EB-2011-0004, online: OEB <http://www.ontarioenergyboard.ca/OEB>.

importance of customer control in behind the meter activities and concluded that:

> The Board anticipates that distributors will continue to be engaged in the provision of behind the meter services and applications that fall within the parameters set out in section 71(2) or section 71(3) of the *OEB Act*. In so doing, they are engaging in a non-utility activity. That activity must be accounted for separately from utility activities and be undertaken on a full cost recovery basis (in other words, not covered in rates). There is no element of natural monopoly in the market for behind the meter services and, therefore, the Board has concluded that customer control would be best served by the forces of market competition. The Board expects that this policy conclusion will assist distributors in planning and organizing their and their affiliate's activities.[12]

The OEB does not reference how other regulators are addressing these issues, but it is certainly not alone. The California Public Utilities Commission (California PUC I) also concluded that companies that sell electric charging services will not be treated as public utilities and therefore not subject to regulation. The California PUC l found that the regulation of EV service providers would be contrary to the purpose of public utility regulation – the protection of consumers from monopoly abuses – and to California's goal of developing an electric vehicle infrastructure.[13]

The issue of the proper dividing line between competitive and utility service in the area of emerging technologies will continue to evolve and generate debate; and, no doubt there will be grey areas as to what constitutes behind the meter activities. Nonetheless, in Ontario it would appear that the OEB is firmly inclined towards restraining encroachment by utilities into new smart grid applications, including EVs, and leaving as much terrain as possible to be addressed by the private sector. ■

[12] *Ibid* at 49.

[13] *Decision in Phase 1 on Whether a Corporation or Person that Sells Electric Vehicle Charging Services to the Public is a Public Utility*, (29 July 2010), D1007044, online: CPUC <http://docs.cpuc.ca.gov/>.

ALBERTA UTILITIES DEMAND SIDE MANAGEMENT DECISION

*Dr. Michal C. Moore**

The Case

In December 2011 the Alberta Utilities Commission (AUC) issued a decision in the ATCO Gas 2010-2012 General Rate Application, Phase I, regarding ATCO's proposal to include a new demand side management (DSM) program in their rate base.[1] Strong arguments against this application were made by the Alberta Consumer Advocate and Climate Change Central, and in the end the AUC denied the application. Given the potential pivotal role of DSM in energy system management, it is worth reviewing that decision and the implications for future proposals and the integration of applied load management for system operators throughout Canada.

The AUC denied ATCO Gas' request to include all costs associated with the current (test period) and proposed DSM program in their revenue requirement. The test program consisted of a school education program, a pilot for energy consumption advice for consumers, a residential assessment program (with cost recovery), a renewable energy technology program and a research component. The AUC directed that all DSM related costs, both capital and operating, be removed from rate base and revenue requirement for so-called "test years". Further, the AUC directed that any associated capital expenditures incurred during the period 2008 to 2010 would be excluded from the opening rate base calculations.

At the heart of the decision, the AUC found that the proposed DSM programs for a gas utility do not relate to building, upgrading and improving the gas distribution system for the purpose of providing safe reliable and economic delivery of gas to customers and concluded that DSM was not intended by the legislature to be among the functions of a gas distributor. The AUC refrained from taking the strategic step of discussing future integration of DSM as a management tool for the entire energy system.

Demand Side Management

DSM programs are the result of a historically continuous series of debates about load management, future planning, congestion relief and ultimately consumer behavior. The range of topics included by the term DSM is very broad, including information flows, technology deployed for monitoring or load management, rewards and charges as well as the interactive role of the regulator and utility providing services. Goals for setting up DSM programs are broadly similar between most jurisdictions, but differ in practice, enforcement and the cost benefit calculations that underlie their creation.

Broadly, the belief and use of demand side management is grounded in the aphorism of value in capturing efficiently and cost effectively, the so-called *low-hanging fruit* of energy conservation. However, consumers are notably recidivist in their behavior in the face

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[1] *ATCO Gas (a Division of ATCO Gas and Pipelines Ltd.) 2011-2012 General Rate Application Phase I*, (5 December 2011), 2011-450, online: AUC <http://www.auc.ab.ca/Pages/Default.aspx>.

of these benefits, and the tendency to revert to higher use patterns in spite of incentives, disincentives, fines and public exhortation are legion.

The opportunities and potential gains, however, in terms of what Amory Lovins referred to as *negawatts* are attractive and represent real savings over time both in avoided capacity additions and fuel costs.[2] Consequently there remains a considerable, if periodic and inconsistent, public attraction for creating the DSM programs where easily integrated technology or management techniques can be adopted by consumers and form the basis of long term shifts or diminishment of demand.

Such program design and implementation may include consumer behavior information, incentives or subsidies for upgrading appliances and technology and clearer signals via meters, internet connections and media systems to reduce load. All this is important, especially in terms of flattening peak demand, but also in terms of rational planning and investment for new capacity based on seasonal and variable demand characteristics. Of course, there is also the obvious benefit to consumers of lower bills in a future world of variance in time of day pricing.

The Outcome

However, in the case of DSM, gas supply is generally of second-order importance. In general, most systems operators anticipate more dependence on natural gas as a fuel source, as its availability and access increases and costs decrease. Using gas as a primary fuel is attractive for water and space heating, but these are broad demands that are difficult for consumers to control generally. The upshot is that they don't lend themselves to point-of-use DSM, i.e., by consumers. By contrast, in the case of electric water heating, an important option for system operators is to be able to shut down electric demand for water heaters and buy back the storage value almost instantaneously. This is not useful for gas heating in either category.

In the case of the application by ATCO Gas, the AUC made the right decision, although some of the proposed program elements such as public education and whole house or business energy audits are valuable no matter where they originate. In the case of Alberta, peak demands are predictable and not dramatic; however, they are primarily visible in demands for electricity generation which in turn will spill over to the gas supply market. DSM can play an important role for managing grid operations and overall costs, although the benefit to consumers will be difficult to prove or justify until better meters and use-data is available in a form that leads to appropriate changes in behavior.

So why not acknowledge that there should be a DSM role for gas utilities? I suggest there should be. Not by themselves, though, and certainly not in competition, confusion or overlap with the broader energy system, specifically the electricity sector. And, there is a good reason why all of these changes and expected utility benefits uniquely describe electricity whether it is driven by coal, natural gas, renewables, nuclear fission or hydro. Our overall use increases all the time, for core as well as marginal demand. It is the power source that will be transformational for developing societies in the future.

The Lessons

I have no reason not to believe ATCO Gas's assertion that implementing and charging for DSM would improve service and offer a benefit to consumers as well as the company. While the AUC did not cite reasons, other than the

[2] Armory B. Lovins, "The Negawatt Revolution", *The Conference Board Magazine (Across the Board)*, XXVII:9 (September 1990) 18, 21-22.

technical and legal interpretation of the role of a gas-only utility, we can use the ruling to make several observations about the nature of this decision and the role of DSM in the future.

First, we have to acknowledge that DSM has a somewhat checkered history. For regulated utilities, there has been an opportunity to visit both sides of the ledger - meeting a perceived public policy goal of providing the incentives for intelligent load management by consumers and second, an opportunity to recover revenue lost from lower consumption. This is an obvious range of conflict that the utilities are unlikely to solve without direction from the regulator.

Additionally, these programs are dynamic and time sensitive; they have a limited shelf life for behavioral modification and have fixed benefits that don't expand for installed technologies such as appliances. If we want to take advantage of the long term benefits of DSM, we will need a comprehensive and strategic approach that pulls everyone together instead of piecemeal adoption of good intentioned ideas.

This highlights the difficulty the consumer, literally the customer of both the AUC and the utility, faces in trying to understand, support, refuse or stand neutral in the face of such a program. The low-hanging fruit are still in sight, but it will take a coordinated strategy to get at them. We will need continuing education programs built on expanding consumer energy literacy. We will need new installed technological systems, but they must incorporate flexibility into their design that will allow upgrades and, most of all, will be transparent enough to convey benefits to the consumer.

At the end of the day we will need comprehensive leadership by the regulator. Denying an incomplete or inappropriate application is only half the battle. We need to respond to a call for this generation of energy management tools and integrate them into the energy system of the future. ■

THE TRANSCANADA MAINLINE DECISION: TOWARD HYBRID REGULATION

*Gordon E. Kaiser, FCIArb**

Introduction

The theme for this issue of Energy Regulation Quarterly is the impact of new technology on the regulatory process. If ever there was a case that featured this issue, it's the March decision of the National Energy Board[1] on TransCanada's application to revise the toll structure of its mainline pipeline. The technology at issue is the horizontal drilling and hydraulic fracturing that released huge quantities of natural gas from shale deposits throughout North America. In recent years, the terms Bakken, Eagle Ford and Marcellus have grown to the same stature as Turner Valley in the old days.

Historically, the TransCanada Mainline system once carried 6 billion ft.³ of natural gas per day. However, increased gas production in the United States from fields such as Marcellus in New York and Utica in Pennsylvania has resulted in decreased throughput on the Mainline, resulting in increased tolls for shippers – something various participants in the NEB proceeding described as a death spiral. These new gas fields after all are next door to the major US markets, not thousands of miles away in Alberta.

In response, TransCanada filed a path breaking application to restructure tolls.The application proposed to shift $400 billion per year of costs to users of the Alberta system by extending the Alberta system to Saskatchewan and Manitoba. The application also proposed reallocating $1.2 billion of accumulated depreciation from the prairies and Eastern triangle segments to a northern Ontario segment that was underutilized and had a large undepreciated balance. This would reduce the book value of the northern Ontario line and shift costs to Western producers and Eastern consumers by increasing depreciation payments in the Prairie and Eastern segments of the Mainline.

The result was a 72 day hearing, 60 lawyers, 80 witnesses and a 257 page decision by the NEB. Most of the intervenors advocated a write-down of the mainline rate base by removing approximately $3 billion from the requested $5.8 billion rate base.

The Problem in a Nutshell

Before analyzing the decision, it may be helpful to better understand the circumstances that resulted in the application. The Mainline is one of largest natural gas systems in the North American continent. Conceived in 1950, it began its first full year of operation in 1959 and from that year until 1998 it served central Canadian and US markets largely without any

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[1] National Energy Board, *Re TransCanada Pipelines Limited* RH-003-2011 (March2013), (Reasons for Decision).

competition, operating at high load factors underpinned by long-term long-haul contracts.

However, the competitive landscape began to change in 2000 when the Alliance and Vector pipelines began moving gas from Western Canada to eastern markets in the United States. The development of West Coast liquid natural gas projects where WCSB gas was converted into liquids to be transported to Asian markets was also a factor- although much later. (For example, the proposed Kitimat LNG and Sasol projects were, respectively, 1.4 bcf/d and 1 bcf/d each.)

The dominant factor, however, was the growing supply of shale gas. In 2006, shale gas production was 3bcf/day. By 2013, it had reached 29 bcf/day and is forecast to be at least 49 bcf/day by 2020.

The TransCanada Mainline was designed to transport 7 bcf/d of gas. By the time the NEB hearing was held, the volume had declined to 1.5 bcf /d. The fixed costs on this pipeline were high and they now had to be charged to lower firm transportation volumes. As a result, tolls rose. Transportation from Empress to Dawn in 2006 was $.80/gj in 2006. TransCanada estimated in its application that tolls would be $2.74 for 2013.

The Decision

Most intervenors favored a write-down of the rate base. TransCanada rejected this on the ground that the Board had no statutory authority. The Board accepted TransCanada's position on this point and moved to a new model. This was a long term fixed competitive price which the Board believed would allow TransCanada to recover. Effective July 1, 2013, the Empress to Dawn toll would be $1.42/gj for 4 ½ years.

The Board recognized the possibility that these tolls might be insufficient to recover costs and directed TransCanada to forecast the revenue deficiency. TransCanada did the analysis and determined that a $95 million annual deferral of costs would keep TransCanada whole over the period. A deferral account was established to record any positive or negative balance. At the end of the toll period, disposition would be considered by the Board.

The Board also recognized the increased risk the company faced and increased the return on equity (ROE) to 11.5% The Board also established an incentive earnings mechanism in which shareholders had significant upside with no downside. More importantly, the Board allowed TransCanada to set minimum bid levels for its Interruptible Transportation (IT) service at any level it chose and minimum bid levels for the Short Term Firm Transportation (STFT) service at any level equal to or greater than the Firm Transportation (FT) toll for the relevant path.

An interesting hybrid regulatory model was born - fixed tolls for almost five years at rates that would not likely recover costs to be subsidised by deregulated rates in "competitive" markets. At least that is what some argued.

TransCanada appealed the decision not to the courts but back to the Board for a review and variance. The application asked the Board to increase the five-year Empress to Dawn toll from $1.42 to $1.52, which TransCanada believed would take care of the $95 million annual loss. The company also asked for a new methodology to recover future costs that could not be anticipated by the company. The company also wanted to change the implementation date of the decision from July 1, 2013 to November 20, 2013 because they had missed the important winter season.

The main argument for the review was that the decision model developed by the Board had not been proposed by TransCanada or any other party. As a result, TransCanada claimed

that they had not been given an opportunity to present evidence to counter this unique and what they believed was unprecedented regulatory model. TransCanada argued that under the rules of natural justice they were entitled to a reasonable opportunity to call this evidence.

TransCanada also objected to many of the legal rulings the Board made with respect to recovery of prudent investments and the right to a fair return. However, it elected not to proceed to the courts because it viewed those comments as obiter dicta, as the Board had not disallowed any costs. On June 12 the Board rejected the TransCanada review application in its entirety.

The Legal Principles

Two important but distinctive legal issues run throughout this decision. The first is the rulings that question traditional public utility law. The second concerns the scope of the Boards jurisdiction to deregulate services.

The NEB decision questions two established principles of public utility law. The first was the prudence doctrine. TransCanada argued that, having made prudent investments the utility was entitled to recover the investment. That principle was affirmed as recently as two months ago by the Ontario Court of Appeal[2] when it repeated that prudence must be determined without the benefit of hindsight. The issue is - was investment prudent at the time it was made. No one in the TransCanada case argued that was not the situation.

Nonetheless some parties argued, and the Board agreed, that there was a conflict between the traditional prudence test and the concept of "used and useful". The Board questioned-how could an investment be prudent if it was no longer used and useful?

In the end, the Board concluded that this inherent conflict made the prudence rule virtually useless and it should fall back on the general authority under its statute, to set rates which are just and reasonable.

The Board also appeared to question the long-established Canadian rule that utilities have a right to earn a fair rate of return.

In 1960, the Supreme Court of Canada clearly stated that the obligation to approve rates that will produce a fair return to a utility is absolute.[3] In U*nion Gas v. Ontario Energy Board*, the Ontario Divisional Court stated that the provision of a fair return is essential to the preservation of the financial integrity of the applicant, which is of mutual concern both to the company and its customers.[4] The NEB in the Mainline decision not only accepted these decisions[5] but noted that past Board decisions had endorsed them.[6]

Instead of applying the established rule, the Board relied on a 1944 U.S. Supreme Court decision in the *Market Railway case*[7], which held that a utility was not entitled to a guaranteed profit if the profit had declined as result of market forces. However, that case was based on a provision in the U.S. Constitution guaranteeing that the government cannott confiscate private property. Understandably the US Supreme Court said the Constitution, which was relied upon by *Market Street Railway*, did not protect the company from market forces; it protected the utility from government

[2] *Power Workers' Union (Canadian Union of Public Employees, Local 1000) v. Ontario (Energy Board)* 2013 ONCA 359.
[3] *British Columbia Electric Railway Co. v. Public Utilities Commission*, [1960] SCR 837 at 848.
[4] *Union Gas Ltd v. Ontario Energy Board 43* OR (2d) 489, 1 DLR (4th) 698.
[5] *Supra* note 1 at 147, (Reasons for Decision).
[6] National Energy Board, *Trans Québec and Maritimes Pipelines Inc*. RH-1-2008 (March 2009) (Reasons for Decision).
[7] *Market Street R. Co. v. Railroad Commission,* 324 US 548 (1945).

action. What relevance the case had in the case before the NEB is questionable.

However, the real rationale also emerged in the decision. The reference to *Market Street Railway* only confused it. First, the Board found that, unlike a gas utility such as Enbridge or Union, there was no guaranteed monopoly for TransCanada. In short, there was no franchise agreement.

But there was also a different and more substantial ground. The Board accepted the argument by a number of intervenors that over the years TransCanada had received from its regulator a ROE that rewarded it for bearing risk. In short, TransCanada was never a riskless enterprise. And while that risk had never materialized before, it had now.

There was also some discussion as to whether TransCanada had managed that risk properly. For example, should the company have increased its depreciation rates earlier? Whether that is true is difficult to say on the facts. But the general principle is set out - a utility has the obligation and the ability to manage its risk. Moreover, it has been compensated for that risk.

In the end, nothing in the decision turned on the Market Railway case. The Board had applied the fair rate of return in the past and would in the future. In fact, the decision recognized that competition had increased, as had the related risk. The Board therefore increased the ROE substantially.

The same can be said of the prudence test. Most would say that the Board got the prudence test wrong by introducing hindsight. It is likely that the only reason the Board developed this unique conflict between prudence and used and useful was because TransCanada was using the prudence principle to argue against a write-down of its rate base. In the end the Board avoided that problem by simply declaring that it lacked authority to engage in a write-down. No particular authority was referred to.

The Board clearly believed that it had considerable scope in setting just and reasonable rates. And not setting rates apparently can result in just and reasonable rates.

Did the Board have the legal authority to deregulate? We have seen this picture before. When the Canadian Radio-Television and Telecommunications Commission (CRTC) decided to deregulate long-distance service, the Federal Court of Appeal ruled that the Commission did not have the authority.[8] Parliament then amended the statute giving the Commission clear authority. The Ontario legislature added that exact wording into the Ontario Energy Board Act and that provision was used by the Ontario Board when it deregulated natural gas storage.[9]

However it is not clear that that the Federal Court ruling would be the same today. We live in a different world. Courts across the country from the Supreme Court of Canada down now grant regulatory agencies a much greater degree of deference- not just on the facts but also on the interpretation of their home statute.[10]

What's Down the Road?

The more important question that results from this decision is - what will happen in this new regulatory world?

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[8] *Telecommunication Workers' Union v. Canada (Canadian Radio-television and Telecommunication Commission),* (1989) 2 FC 280, (FCA).

[9] National Energy Board, *Natural Gas Electricity Interface Review* EB-2005-0551 (7 November 2006), (Decision with Reasons).

[10] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at para 22.

Already two LDC shippers have complained that TransCanada has rescinded prior agreements for incremental service requests for service that was initially to commence November 2014 from Dawn to Eastern Ontario and Québec markets and to build out the pipeline bottlenecks which were needed to accommodate that service. In addition,TransCanada has conditioned the market, through open seasons and regulatory filings, to expect a withdrawal of existing capacity on the already constrained Eastern Triangle to accommodate TransCanada's Energy East oil conversion project from Alberta to Saint John New Brunswick. Capacity could start to be removed from gas service in the 2015 to 2017 time frame.

None of this should be surprising. The NEB ruled that TransCanada was not a garden-variety monopoly utility. It had no franchise agreement and therefore no legal monopoly. And therefore no duty to serve. The Board also suggested that the company never had a monopoly in the first place. And even if it did it, the ROE granted by the regulator compensated the company for risk. Now that the risk had arrived, TransCanada could not complain and argue that the company should be free from any risk.

And even if it had a monopoly in the beginning times have changed. Competition has arrived. Not just from new pipelines. The market power of the Mainline was always linked to Alberta gas being the dominant supply source in North America. That has been replaced by shale gas now located next door to the key American customers

This decision creates a unique regulatory model. Deregulation has taken place in the past both in telecommunications and energy. That has been accompanied by a careful analysis of the state of competition in the proposed market. Even if we leave that issue aside and assume that the Board had jurisdiction and that the facts established growing competition, which does seem to be the case, deregulation usually brings with it structural rules to deal with cross subsidization between monopoly markets and competitive markets. Whether the NEB likes it or not, it's now in the business of regulating competition. That, most would agree, is a tricky business.

At some point, the NEB will have to determine the degree to which the Board should be involved in enforcement proceedings related to competition issues in the new regulatory framework. They will occur. And they can escalate in complexity. Often they have short timelines. That may require a Board proceeding designed to analyze the range of competitive issues as well as potential remedies and procedures.

It may be that the Board is not the only game in town. Where the degree of regulatory oversight is diminished, the exemption from *the Competition Act*[11] may also disappear. That presents parties with a much wider range of civil and criminal remedies and even the prospect of parallel proceedings. *The Competition Bureau* has the authority to intervene in regulatory proceedings where competition issues are at play, but it also has the option of proceeding through its own process where the relief is more extensive.

And of course private parties may elect to proceed with civil actions in the courts relating to a breach of *the Competition Act* seeking both damages and injunctive relief, possibly including class actions. And do not be surprised if well-schooled lawyers argue that the duty to serve does not require a franchise agreement and that a common law obligation exists where the utility enjoys monopoly power. It promises to be a colourful regulatory landscape.

[11] *Competition Act*, RSC 1985, c C-34.

Conclusion

It is easy to be critical of some aspects of the Mainline decision. To be fair, this was a difficult fact situation. There were serious economic consequences. This was a major piece of national infrastructure that when it was first built almost brought down the government of the day. This pipeline has been a major economic instrument in Canada for decades.

The solution advanced by many interveners - simply write down the rate base - had a host of consequences, none of which were pretty. A decade of litigation would have resulted. And shifting the costs to other customers in other areas, which TransCanada proposed, was even less attractive. It was also apparent that TransCanada customers had substituted short-term services for long-haul services for price reasons.

The reason those services were more attractive in financial terms had something to do with the level of competition in that marketplace. As a result the Board said let's give TransCanada the tools to meet that competition and recover some of the revenue shortfall that exists in the long-haul services. There may be nothing wrong with that analysis. And, it may have been the only practical option. ■

NOVA SCOTIA MARITIME LINK DECISION

*Rowland J. Harrison, Q.C.**

The Application

On July 22, 2013 the Nova Scotia Utility and Review Board (NSUARB or Board) conditionally approved the proposed Maritime Link Project (ML Project).[1] The Maritime Link would enable delivery of power from the Muskrat Falls Hydro Electric Project in Labrador to Nova Scotia and through New Brunswick to northeastern U.S. markets, likely resulting in significant market restructuring.

The Maritime Link would be constructed by NSP Maritime Link Incorporated (NSPML), a subsidiary of Emera Inc. (Emera), with a planned in-service date of 2017. The Muskrat Falls Project[2] is being developed by NALCOR, a Newfoundland and Labrador Crown corporation.

Under the contractual arrangements, NSPML would pay 20 per cent of the cost of the Muskrat Falls Project and the ML Project in return for which NSPML would receive 20 per cent of the output of Muskrat Falls for 35 years. This underpinning of the commercial arrangements between NSPML and NALCOR is described as the "20 for 20 principle."[3] In the first five years of operation of the Maritime Link, NSPML would receive an additional block of electrical energy, as described below. This additional block and NSPML's 20 per cent share of the output of Muskrat Falls are together defined as the "NS Block."

The NS Block would be delivered by NSPML to NS Power Inc. (NS Power) for distribution in Nova Scotia to NS Power's customers. NSPML's costs of the ML Project would be recovered from Nova Scotia consumers in the rates charged by NS Power. NS Power is also a subsidiary of Emera and an affiliate of NSPML.

On January 28, 2013, NSPML applied to the NSUARB for approval of the ML Project and the related commercial transactions, under the Nova Scotia *Maritime Link Act*[4] and the *Maritime Link Cost Recovery Process Regulations*[5] (the ML Regulations). Under subsection 5(1) of the ML Regulations, the Board was required to approve the ML Project if it was satisfied that:

> 1) the project represents the lowest long-term cost alternative for electricity for ratepayers in the Province; [and]

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[1] NSP Maritime Link Incorporated (Re) (22 July 2013), NSUARB 154, online: NSUARB <http://nsuarb.novascotia.ca/>. (For an overview of the ML Project, see: http://www.emeranl.com/en/home/ourbusiness/aboutthemaritimelink/informationcentre.aspx).

[2] For an overview of the Muskrat Falls Project, see: http://www.nalcorenergy.com/lower-churchill-project.asp.

[3] *Supra* note 1 at para 27.

[4] *Maritime Link Act*, SNS 2012, c 9.

[5] NS, Reg 189/2012.

> 2) the project is consistent with obligations under the *Electricity Act*[6], and any obligations governing the release of greenhouse gases and air pollutants under the *Environment Act*[7], the *Canadian Environmental Protection Act*[8] (Canada) and any associated agreements.

The Muskrat Falls Project

The Muskrat Falls Project, with a capacity of 824 megawatts (MW), is the first phase of the proposed development of the Lower Churchill Project in Labrador. With the later development of the Gull Island Project, the Lower Churchill Project would have a combined capacity of 3,000 MW and be able to provide 16.7 terawatt hours (TWh) of electricity a year. It is described by NALCOR as "the best undeveloped hydroelectric source in North America."[9]

In addition to the generating facility, the Muskrat Falls Project includes the Labrador-Island Link, which would transmit power from Labrador to mainland Newfoundland, and the ML Project from Newfoundland to Nova Scotia. With both links in place, Newfoundland would be interconnected with the North American transmission system, through the Nova Scotia-New Brunswick intertie and New Brunswick's interconnections into the U.S. The commercial arrangements between the parties provide for transmission access through Nova Scotia for NALCOR for a 50 year term. Emera is also required to provide a transmission path through New Brunswick into New England. Energy from Muskrat Falls could then be sold by NALCOR into markets in the northeastern U.S. Newfoundland's only existing interprovincial interconnection is with Hydro-Quebec. Its sales to Hydro-Quebec are governed by an agreement that extends to 2041.[10]

The Muskrat Falls project was sanctioned by the Government of Newfoundland and Labrador in December 2012.[11]

The Maritime Link Project

The physical Maritime Link would extend over a total distance of approximately 360 kilometres, including a 170 kilometres subsea section across the Cabot Strait. It would interconnect with the existing transmission systems at Bottom Brook Substation in Newfoundland and Woodbine Substation in Nova Scotia.

For purposes of the application before the NSUARB, however, the ML Project was defined to include, in addition to the design, construction, operation and maintenance of the physical Maritime Link itself:

> …the related transactions involving the delivery of energy, the provision of transmission services over the Maritime Link and the enabling of transmission service through [Nova Scotia], as set out in a term sheet between Emera Incorporated and Nalcor Energy dated November 18, 2010…[12]

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[6] *Electricity Act*, SNS 2004, c 25, (as amended).
[7] *Environment Act*, SNS 1994-95, c 1, (as amended).
[8] *Canadian Environmental Protection Act*, SC 1999, c 33.
[9] *Supra* note 2.
[10] *Supra* note 1 at para 456. It was reported on July 22, 2013 (the date of the NSUARB Decision on the Maritime Link) that Hydro-Quebec had commenced legal action against Newfoundland asserting that the Muskrat Falls Project would violate Hydro-Quebec's rights to determine the output of the existing Churchill Falls Project. The Churchill Falls Project is upstream of Muskrat Falls. See, http://thechronicleherald.ca/novascotia/1143721-hydro-quebec-challenge-could-endanger-muskrat-falls-project.
[11] *Supra* note 2.
[12] *Maritime Link Act*, *supra* note 4 at para 2 (c).

As already noted, the NSUARB was required to approve the ML Project if it was satisfied that the project would provide the lowest-cost alternative for Nova Scotia ratepayers and was consistent with obligations under specified legislation. Thus, while the Board's "Final Issues List" included the engineering and design details for the Maritime Link itself,[13] the central issues before the Board revolved around the overall structure and operation of the several contractual arrangements supporting the Maritime Link.

These contractual arrangements include a loan guarantee from Canada, which the Board noted would ensure a materially lower cost of debt for the entire project.[14]

Commercial Arrangements

As noted, the basic premise of the commercial arrangements supporting the ML Project is that NSPML will pay 20 per cent of the estimated capital cost and operating costs of the Muskrat Falls Project and the ML Project in exchange for 20 per cent of the energy and capacity from Muskrat Falls for 35 years – the "20 for 20 Principle."[15]

The Maritime Link facilities would have an expected service life of 50 years. NSPML would own the facilities during the 35 year period, at the end of which ownership would be transferred to NALCOR. To compensate for this 15 year differential, for the first five years of operation of the Maritime Link, NALCOR would supply NSPML with an additional approximately 240 gigawatt hours (GWh) per year, referred to as "supplemental energy."[16]

The Maritime Link would be capable of transmitting more than 4 TWh annually, whereas the NS Block of firm power (comprising the 20 per cent share of Muskrat Falls energy and capacity and the supplemental energy) would be less than 1 TWh. The additional capacity of the Maritime Link could be used for NALCOR to supply non-firm power to Nova Scotia ratepayers from any surplus energy available from Muskrat Falls, or from other sources. For purposes of NSPML's application, this non-firm power supplied to Nova Scotia from NALCOR or from other sources (including imports over the Nova Scotia-New Brunswick intertie) was referred to as "market-priced energy."[17] Whether such market-priced energy would in fact be available to Nova Scotia became the central issue before the NSUARB proceeding.

Issues and Decision

1) Lowest Long-Term Cost Alternative

As noted, the *ML Regulations* required the Board to approve the ML Project if the Board was satisfied that the project represented "the lowest long-term cost alternative for electricity for ratepayers in the Province…"[18] The Board stated that the applicant had the "burden of proof…on a balance of probabilities"[19] of showing that the Project met this requirement.

NSPML calculated the net present value (NPV) of the ML Project and other alternative scenarios and concluded that the NPV of the project was the lowest across a range of sensitivities. NSPML's conclusion was based on including volumes of Market-priced Energy

[13] *Supra* note 1 at para 73, issue 4.
[14] *Supra* note 1 at para 69.
[15] *Supra* note 3.
[16] *Supra* note 1 at para 31.
[17] *Supra* note 1 at para 36.
[18] *ML Regulations, supra* note 5, at para 5(1)(a).
[19] *Supra* note 1 at para 75.

(in addition to the NS Block) in the NPV calculation. The ability of NSPML to pass the lowest long-term cost test without the market-priced energy was challenged.[20]

Board counsel retained Synapse Energy Economics Inc. (Synapse) "to analyze the economics of the proposed Maritime Link Project in comparison to alternatives including but not limited to the specific alternatives" modeled by NSPML.[21] Synapse concluded that "the Maritime Link Project as proposed by NSPML…has not been demonstrated to be a definitive least-cost incremental supply resource for NSPI's system in comparison to other options to obtain renewable energy needed to meet [renewable energy requirements under provincial policy]."[22] Those other options included indigenous wind or some combination of indigenous wind and imports across the Nova Scotia-New Brunswick intertie.

The Board noted that the Maritime Link could potentially provide other benefits to Nova Scotia ratepayers, including access to market-priced energy and positioning Nova Scotia "in the middle of electricity markets, and no longer at the end of transmission lines with limited market access."[23] The Maritime Link would also increase reliability.[24]

However, "the test under the *ML Regulations* is not a qualitative assessment of the various benefits or risks of the ML Project" but, rather, is "a quantitative measurement of the Application."[25] The Board concluded:

> Taking into account all of the evidence, the Board finds, on the balance of probabilities, that the ML Project (with the market-priced energy factored in) represents the lowest long-term cost alternative for electricity for ratepayers in Nova Scotia. In the absence of Market-priced Energy, the ML Project is not the lowest long-term cost alternative.
>
> While the Board finds that the ML Project is the lowest long-term cost alternative, it is not on an overwhelming basis. There are various scenarios, within a range of reasonable assumptions that perform almost on an equivalent basis, or even better in a few cases, than the ML Project. Nevertheless the Board concludes that over the broadest range of assumptions for the ML Project it is slightly more robust than the various other alternatives. On this basis, the ML Project does edge out other alternatives and is deserving of approval under s. 5(1) of the *ML Regulations*.[26]

The Board observed, however, that the "fundamental assumption" underpinning NSPML's application was that Nova Scotia customers would receive a blended rate for electricity that would be a weighted average of the costs reflecting the NS Block and the projected amounts and prices for market-priced energy over the 35 year term.[27] It concluded that the availability of market-priced energy "is crucial to the viability of the ML Project proposal as against the other alternatives" and that "without some enforceable covenant about the availability of the Market-priced Energy, the ML Project does not represent the lowest long-term cost alternative for electricity for ratepayers in Nova Scotia."[28]

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[20] *Supra* note 1 at para 89.
[21] *Supra* note 1 at para 92.
[22] Nova Scotia's renewable energy policy is discussed in section 2, below.
[23] *Supra* note 1at para 159-60.
[24] *Supra* note 1 at para 164.
[25] *Supra* note 1 at para 169.
[26] *Supra* note 1 at para 452-3.
[27] *Supra* note 1 at para 455.
[28] *Supra* note 1 at para 457.

The Board's approval of the project was, therefore, subject to the condition that:

> …NSPML obtain from Nalcor the right to access Nalcor Market-priced Energy…when needed to economically serve NSPI and its ratepayers; or provide some other arrangement to ensure access to Market-priced Energy.
>
> In the Board's opinion, such a condition should not create any practical difficulty because it would simply codify what NSPML asserts is the effect of the arrangement in any case. It would also confirm what NSPML already states is Nalcor's view of their future relationship.[29]

The Board's view as to the effect of the condition may, however, have been ill-founded. In the wake of the release of its decision, the premier of Newfoundland and Labrador was quoted as saying that the Maritime Link would be built with or without the approval of the Board and that under no circumstances would Newfoundland and Labrador sign a long-term guarantee to sell market rate hydro-electric power to Nova Scotia.[30]

The premier of Nova Scotia was also quoted as agreeing that the project would go ahead and that it was never dependent on the Board's decision.[31] This position appears to be inconsistent with the *Maritime Link Act*[32] and the *ML Regulations*[33] and undermines the value of an independent review of the ML Project by the Board.

The premiers' views may, however, prove to be academic - on October 21, the NSUARB received a compliance filing addressing the Board's concerns reflected in the condition. It is expected that the Board will establish a process for considering the filing.

2) Consistency with Legislated Obligations

Before approving the ML Project, the Board was also required to be satisfied that it was consistent with obligations under the provincial *Electricity Act*[34] and any obligations governing the release of greenhouse gasses and air pollutants under the *Environment Act*,[35] the *Canadian Environmental Protection Act*[36] and "any associated agreements." This requirement is directed at determining whether the Project would be consistent with Nova Scotia's renewable electricity plan to move the province away from carbon-based electricity "towards greener, more local sources."[38] Under the Nova Scotia *Renewable Electricity Regulations*,[39] power and energy from Muskrat Falls is deemed to be renewable energy for the purposes of the *Regulations*.[40]

No party suggested that the ML Project was not consistent with the obligations described in

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[29] *Supra* note 1 at para 459.
[30] Paul McLeod, "Dunderdale: Link ever hinged on review board decision" *The Chronicle Herald* (26 July 2013), online: The Herald News <http://thechronicleherald.ca/novascotia/1144536-dunderdale-link-never-hinged-on-review-board-decision>.
[31] *Supra* note 27.
[32] *Supra* note 4.
[33] *Supra* note 5.
[34] *Supra* note 6.
[35] *Supra* note 7.
[36] *Supra* note 8.
[37] ML Regulations, *supra* note 5 at para. 5(1)(b).
[38] *Supra* note 1 at para 56. Currently, nearly 90 p.c. of Nova Scotia's electricity supply comes from fossil fuels, online: Government of Nova Scotia <http://www.gov.ns.ca/energy/renewables/renewable-electricity-plan>.
[39] NS Reg 155/2010, (as amended), s 6A (2)(c).
[40] *Supra* note 1 at para 235.

paragraph 5(1) (b) of the *ML Regulations* and the Board expressly found that it was consistent with those obligations.[41]

Mandatory Timeline

The NSUARB's experience in this proceeding also illustrates one of the potential negative consequences that mandatory time limits may have for regulators and participants in proceedings before them. Subsection 5(4) of the *ML Regulations*[42] required the Board to make a decision under paragraph 5(1) "no later than180 days after the date the applicant submits an application." NSPML's application was filed with the Board on January 28, 2013 and the Board's decision was released on July 22, 2013. The mandatory time limit was thus met.

However, the Board noted that NSPML had not modeled a hybrid option, combining "more modest amounts of energy from different sources such as indigenous wind imported energy over the Nova Scotia/New Brunswick interconnection, and combined cycle generation, among other sources."[43] In the Board's view, NSPML had not satisfactorily explained why such a scenario had not been pursued. The Board then observed:

> Given the tight timeline afforded to the Board and to the parties for this proceeding under the *ML Regulations*, Synapse attempted, but was unable, to successfully complete a Strategist run for a Hybrid option before the filing deadline of its prefiled evidence.[44]

While Synapse did successfully complete a run for a hybrid option in advance of the hearing and filed the results at the hearing, the experience illustrates the potential for unfairness to other parties and to regulatory authorities themselves when subjected to mandatory timelines that allow insufficient time for the compilation of a complete record. ■

[41] *Supra* note 1 at para 236.
[42] *Supra* note 5.
[43] *Supra* note 1 at para 147.
[44] *Supra* note 1 at para 148.

THE WASHINGTON REPORT

*Robert S. Fleishman**

Energy regulatory developments in the United States impact multiple sectors of the energy industry and cut across a broad range of policies and issues. Such developments arise at the federal level (such as the Federal Energy Regulatory Commission (FERC), the Department of Energy (DOE), Congress, and the federal courts) and the state level (at the public service/utility commissions or in the state courts.) Any report on what is happening in the energy regulatory space in America cannot, by its nature, be comprehensive. Instead, this report will highlight key developments expected to be of interest to readers of the Energy Regulation Quarterly.

Energy Sector Elements of President Obama's Climate Action Plan

In June 2013, President Obama issued the *President's Climate Action Plan* (Climate Plan) to reduce carbon emissions in the United States, prepare the nation for the impacts of climate change and other natural disasters, and participate in international efforts on climate change.[1] The Climate Plan sets a goal of reducing U.S. greenhouse gas emissions to seventeen percent below 2005 levels by 2020.

The Climate Plan contains thirty measures, none of which require Congressional action or approval. Four of these measures directly impact the energy sector: carbon emissions limits for new and existing power plants; promotion of renewable energy resources, investment in advanced energy technologies; and increased energy efficiency standards for appliances and federal buildings.

1) Carbon Emissions from Power Plants

The centerpiece of the carbon reduction strategy is the adoption of federal standards to limit carbon emissions from U.S. power plants. In conjunction with the release of the Climate Plan, President Obama issued a Presidential Memorandum to the Administrator of United States Environmental Protection Agency (USEPA) directing the Administrator to expeditiously adopt carbon emissions standards for new and existing power plants pursuant to sections 111(b) and 111(d) of the federal Clean Air Act (June 25, 2013 – *Power Sector Carbon Pollution Standards Executive*, Order No 13657, 78 Fed. Reg. 39533 (2013); 42 USC § 7411).

For new power plants, the Presidential Memorandum directed the Administrator to continue the rulemaking process initiated by the USEPA's April 13, 2012 Notice of Proposed Rulemaking entitled "Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility

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[1] Executive Office of the President, The President's Climate Action Plan, (11 September 2013) (Climate Plan) online: The White House Washington <http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf>

Generating Units."[2] That Notice of Proposed Rulemaking, which proposed an emissions standard of 1,000 pounds of carbon dioxide per megawatt hour on an annual or thirty-year average basis, had drawn criticism for proposing a fuel-neutral standard that would have departed from previous USEPA practice of adopting less stringent standards for coal-fired plants than for natural gas plants. The Presidential Memorandum directed the Administrator to issue a new proposal for limits on carbon emissions by September 20, 2013 and to adopt a final rule in a "timely fashion."[3] The USEPA issued the proposed rule on September 20, 2013, signaling how aggressive the Obama Administration will be in its efforts to address climate change through the regulatory process. Court challenges to any final rule are expected.

For modified, reconstructed, and existing power plants, the USEPA Administrator was directed to issue a proposed rule by June 15, 2014 and to adopt a final rule by no later than June 15, 2015.[4] Under the Clean Air Act, states are responsible for implementation and enforcement of the federal standards. The Presidential Memorandum stated that the final carbon emissions regulations must require states to submit implementation plans by June 2016.

2) Renewable Energy

The Climate Plan set a goal of doubling renewable energy generation in the United States by 2020.[5] According to a report by the Congressional Research Service, non-hydroelectric renewable generation in the United States was 219 million megawatt hours in 2011.[6] To implement this goal, President Obama directed the Department of the Interior to accelerate its permitting process and permit an additional ten gigawatts of renewable generation on federal lands by 2020. The Climate Plan also directed the Department of Defense to install three gigawatts of renewable energy on military installations by 2025 and set a goal for federal agencies to install 100 megawatts of renewable energy in federally subsidized housing by 2020.

3) Conventional Generation Resources

The Climate Plan promoted investment in clean energy technologies including clean coal and emerging nuclear technologies.[7] In accordance with the Climate Plan, the Department of Energy (DOE) issued a draft potential solicitation for up to eight billion dollars in loan guarantees for a wide array of advanced fossil fuel technology projects that reduce emissions of greenhouse gases.[8] The DOE plans to issue the final solicitation this fall. In the international sector, the Climate Plan proposed to end United States government support for financing of new coal plants overseas, unless there is no feasible alternative or if the facility uses carbon capture and sequestration technologies.[9]

4) Energy Efficiency

The Climate Plan set a goal of reducing

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[2] Notice of Proposed Rulemaking, *Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units*, 77 Fed Reg 22392 (2012).

[3] 78 Fed Reg 39533 (2013).

[4] *Id*. at 39536.

[5] *Climate Plan, supra* note 1 at 6-7.

[6] Jane A. Leggett, Cong. Research Serv., R43120, *President Obama's Climate Action Plan* at 3-4 (2013).

[7] *Climate Plan, supra* note 1 at 7.

[8] *Notice of Agency Request for Comments on Draft Solicitation*, 78 Fed Reg 41046 (2013).

[9] *Climate Plan, supra* note 1 at 20.

carbon emissions by three billion metric tons by 2030 through implementing new efficiency standards for appliances and federal buildings during President Obama's two terms in office.[10] In accordance with the Climate Plan, the Department of Agriculture will finalize an update to its Energy Efficiency and Conservation Loan Program to provide up to $250 million for efficiency investments by rural utilities.

FERC Enforcement and Alleged Market Manipulation

The FERC has a robust enforcement program and recently issued several important decisions which reflect its continued focus on investigating alleged unlawful activities in electricity and natural gas markets. Three significant orders in the last quarter focused on alleged manipulation in markets subject to FERC's jurisdiction. The agency has authority under the Federal Power Act (FPA) and the Natural Gas Act (NGA) to determine that market participants engaged in market manipulation or fraud,[11] and impose civil penalties of up to $1 million per day.

1) Barclays Bank PLC et al.

On July 16, 2013 FERC issued an order assessing civil penalties on Barclays Bank PLC (Barclays), Daniel Brin, Scott Connelly, Karen Levine, and Ryan Smith (Individual Traders) (Barclays and Individual Traders, collectively, Respondents).[12] This was proceeded by an earlier order directing the Respondents to show cause why they should not be found to have violated section 1c.2 of the Commission's regulations by manipulating the electricity markets in and around California from November 2006 to December 2008 and why they should not be assessed civil penalties as a result of their violations.[13] Given the seriousness of these violations and the lack of any effort by the Respondents to remedy their violations, FERC determined that Barclays should be assed $435 million in civil penalties and each of the traders individually should be assessed at least $1 million in civil penalties pursuant to section 316A of the FPA, and Barclays should disgorge unjust profits of approximately $35 million pursuant to section 309 of the FPA.[14]

The Commission found that Respondents violated the Commission's Anti-Manipulation Rule through the use of a coordinated, fraudulent scheme to manipulate prices in the FERC-regulated physical markets at the four most liquid trading points in the western United States. FERC found that Respondents conducted the manipulation by building substantial monthly physical index positions in the opposite direction of the financial swap positions they assembled at the same points and then trading a next-day fixed price, or "cash," product at those points to "flatten" their physical index obligations in a manner intentionally designed to increase or lower the daily index at that point. FERC found that by intentionally increasing or decreasing the index, Respondents benefited Barclays' financial swap positions whose value was ultimately determined by the same index.[15]

2) BP America Inc. et al.

On August 5, 2013, the FERC directed *BP America Inc., BP Corporation North America*

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[10] *Id.* at 9.

[11] 16 USC § 824v (a) (2006); 15 USC § 717c-1 (2006).

[12] *Barclays Bank PLC*, 144 FERC ¶ 61,041 (2013).

[13] Order to Show Cause, *Barclays Bank PLC*, 141 FERC ¶ 61,084 (2012).

[14] If the respondents do not pay the penalties, FERC's next step would be to institute an action in federal district court to affirm the penalty assessment. In this order, we find that Respondents violated section 222 of the FPA and the Anti-Manipulation Rule.

[15] *Supra* note 12 at 3.

Inc., BP America Production Company, and *BP Energy Company* (collectively "BP" or "Respondent") to show cause why it should not be found to have violated section 1c.1 of the Commission's regulations and section 4A of the Natural Gas Act. Respondent is alleged to have violated section 1c.1 and section 4A of the NGA by manipulating the next-day, fixed-price gas market at Houston Ship Channel from mid-September 2008 through November 30, 2008.[16] The Commission directed BP to show cause why it should not be assessed a civil penalty in the amount of $28 million and disgorge $800,000 plus interest, or a modification to these amounts as warranted.

The Enforcement Staff Report alleged that traders on the "Texas team" of BP's Southeast Gas Trading (SEGT) desk traded physical natural gas at Houston Ship Channel (HSC) to increase the value of BP's financial position at HSC. Specifically, staff alleged that the Texas team traders uneconomically used BP's transportation capacity between Katy and HSC, made repeated early uneconomic sales at HSC, and took steps to increase BP's market concentration at HSC as part of a manipulative scheme. In doing so, staff alleged, the Texas team traders suppressed the HSC Gas Daily index with the goal of increasing the value of BP's financial position at HSC from mid-September 2008 through November 2008.[17]

3) JP Morgan Ventures Energy Corporation

On July 31, 2013 FERC approved a Stipulation and Consent Agreement (Agreement) between its Office of Enforcement (Enforcement) and JP Morgan Ventures Energy Corporation (JPMVEC)[18] resolving allegations of JMVEC's bidding and offering (collectively "bidding") of power plants into the markets operated by the California Independent System Operator Corporation (CAISO) and the Midwest Independent Transmission System Operator, Inc. (MISO) between September 2010 and November 2012. Enforcement investigated potential violations of the Commission's Anti-Manipulation Rule, 18 C-F-R §1c.2, and of tariff provisions.

Among other things, Enforcement alleged that JPMVEC submitted certain bids that falsely appeared economic to CAISO and MISO automated market software and that were intended to, and did, lead CAISO and MISO to pay it at rates far above market prices.[19] JPMVEC admitted certain facts as set forth in the Agreement, neither admitted nor denied the violations set forth in the agreement, agreed to: 1) pay a civil penalty of $285,000,000; 2) disgorge alleged unjust profits of $125,000,000; 3) waive claims for additional Bid Cost Recovery and Exceptional Dispatch payments from CAISO; and 4) implement additional compliance measures. This was the largest settlement in FERC enforcement history.

Key Developments in Energy Storage Technologies

FERC and the California Public Utilities Commission (CPUC) recently took actions that could significantly open the market for energy storage technologies. In July, the FERC issued a Final Rule designed to encourage the participation of energy storage technologies in electricity markets. In September, CPUC Commissioner Carla Peterman issued a proposed decision that would adopt an energy storage procurement requirement for the state's retail providers.

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[16] 144 FERC ¶ 61,000 (2013).

[17] *Id.* at 2.

[18] In Re Make-Whole Payments, 144 FERC ¶ 61,068 (2013).

[19] *Id.* at 14.

1) FERC Order 784

On July 18, 2013 the FERC issued a final rule designed to foster competition and transparency in ancillary services markets and to enable transmission customers to self-supply regulation and frequency response service requirements through energy storage technologies.[20] The final rule, Order 784, revised market-based rate regulations, ancillary services requirements under the pro forma Open-Access Transmission Tariff (OATT), and accounting and reporting requirements for public utility owned energy storage assets.

Order 784 revised the FERC's Avista policy, which placed limits on the ability of third parties to provide ancillary services at market-based rates to public utility transmission providers for the purpose of satisfying its own OATT requirements to offer ancillary services to its own customers.[21] Under Order 784, generators with market-based rate authority for sales of energy and capacity are permitted to sell imbalance services and operating reserves services at market-based rates to transmission providers in the same balancing authority area, or a different balancing authority area, provided those areas have adopted intra-hour scheduling for transmission service. Generators may also sell reactive supply and voltage control service and regulation and frequency response service at rates that do not exceed the utility's OATT rate or at market-based rates if the services are acquired through a competitive solicitation.

The rule also implemented reforms to regulation service self-supply options for transmission customers by requiring transmission providers to add a statement to their OATT Schedule 3 that the provider "will take into account the speed and accuracy of regulation resources in its determination of reserve requirements for Regulation and Frequency Response service."[22] Before this reform, a transmission customer could self-supply regulation and frequency response services; however, the customer was still required to purchase a volume of regulation and frequency response service that was based on the mix of regulation resources used by the transmission provider. As a result, there was little incentive to the customer to self-supply resources that were faster and/or more accurate and which could provide the same level of service at lower volumes.[23]

Finally, to enhance transparency FERC revised accounting and reporting requirements under its "Uniform System of Accounts" for public utilities to track and report use and cost allocation for energy storage assets which can perform multiple functions. The final rule will take effect on November 27, 2013.

2) CPUC's Proposed Decision on Energy Storage Procurement Targets

On September 3, 2013, the CPUC issued a proposed decision that would adopt procurement requirements for California's three largest investor owned utilities, Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE) and San Diego Gas & Electric Company (SDG&E) (collectively, IOUs), as well as the state's retail electric service providers and community choice aggregators.[24]

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[20] Order No. 784, *Third-Party Provision of Ancillary Services; Accounting and Financial Reporting for New Electric Storage Technologies*, 144 FERC ¶ 61,056 (2013) (to be codified at 18 CFR §§ 35, 101, 141).

[21] *Id.* at 20-22.

[22] *Id.* at 50.

[23] *Id.* at 49-51.

[24] CPUC, *Proposed Decision of Commissioner Peterman Adopting Energy Storage Procurement Framework and Design Program* (11 September 2013), online: CPUC <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M076/K387/76387254.PDF> (hereinafter, Proposed Decision). Retail electricity service providers and community choice

The proposed decision implemented a state law that required the CPUC to consider whether to adopt targets for the procurement of "viable and cost-effective energy storage systems," defined as "commercially available technology that is capable of absorbing energy, storing it for a period of time, and thereafter dispatching the energy."[25] The procurement targets are guided by three policy goals: (1) grid optimization including reliability, peak reduction and deferred transmission and distribution system upgrades, (2) integration of renewable energy, and (3) the State's goal of reduction of greenhouse gas emissions to eighty percent below 1990 levels by 2050.[26]

The proposed decision adopted a 1,325 gigawatt procurement requirement by 2020 for the IOUs allocated among three points of grid interconnection. This target excluded pumped storage projects larger than fifty megawatts on the basis that a single project could fulfill the entire procurement target for an IOU and thwart the goal of market transformation for energy storage applications.[27]

The proposed decision directed the IOUs to conduct all source solicitations every two years with the initial solicitation in December 2014. The proposed decision allows for a significant amount of flexibility in meeting the targets for the purpose of cost containment. The IOUs may shift up to eighty percent of the biannual targets between the transmission and distribution grid domains and may defer up to eighty percent of the targets to the subsequent solicitation if the IOU can demonstrate that the costs of the energy storage bids are unreasonable or a lack of an operationally viable number of bids in the solicitation.[28]

The proposed decision is scheduled to be voted on by the CPUC at its October 3, 2013 business meeting. If the CPUC adopts the proposed decision, each IOU will be required to file an application with the CPUC for approval of that IOU's energy storage solicitation proposal, including operational requirements, a proposed methodology for a "least-cost, best-fit" analysis of the bids, draft agreements, and a schedule for the solicitation.[29]

New York's Highest Court to Consider Hydraulic Fracking Preemption Issues

In August 2013, the Court of Appeals for New York, the state's highest court, agreed to hear an appeal in *Norse Energy Corp. v. Town of Dryden*,[30] setting up a long-anticipated decision concerning the ability of local municipalities to enact zoning laws that prohibit oil and gas mining and drilling. Potentially at issue are over 60 permanent hydraulic fracking bans and 111 temporary moratoria enacted by New York municipalities, including major population centers such as Buffalo, Rochester, Syracuse, Binghamton, Union, Utica, and Albany.[31] The bans and moratoria serve to prevent access to

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aggregators are lightly regulated by the CPUC and are often subject to different rules and requirements than the IOUs. The Proposed Decision requires retail electricity service providers and community choice aggregators to procure energy storage equivalent to one percent of the entity's peak load by 2020.

[25] *California Public Utilities Code* 1 ca pub util §§ 2835, 2836 (2010).

[26] Proposed Decision, *supra* note 24 at Appendix A .

[27] *Id.* at 33.

[28] *Id.* at Appendix A at 3, 7.

[29] *Id.* at Appendix A at 5-7.

[30] *Norse Energy Corp. USA v. Town of Dryden*, 964 NYS (2d) 714 (NY App div 2013) . The appeal is case number 515227 in the Third Department of the New York State Supreme Court's Appellate Division. Several groups have already requested, and been granted, leave to file amicus curiae briefs.

[31] Karen Edelstein, *NY State Hydraulic Fracturing Bans Relative to Population* (4 July 2013), online: Fractracker <http://www.fractracker.org/maps/ny-moratoria/>; see also Jarit C. Polley, *Uncertainty for the Energy Industry: A Fractured Look at Home Rule*, (2013) 34 Energy LJ 261, 281 (stating that "New York . . . is a hotbed for municipal bans on fracing.").

the Marcellus Shale formation in New York, which some geologists estimate could contain from 168 trillion to over 500 trillion cubic feet of natural gas.[32]

Unlike other precedent-setting decisions that weighed in favor of state law preemption over local ordinances banning fracking,[33] New York has a longstanding tradition of upholding the rights of local governments to control land use within their boundaries.[34] Those rights, which derive from both the state's constitution[35] and various statutes, have empowered municipalities to enact ordinances banning fracking. For example, in *Norse Energy Corp*., the Town of Dryden amended its zoning ordinance to "ban all activities related to the exploration for, and the production or storage of, natural gas and petroleum."[36]

While the local ordinances might differ slightly, their effect is the same: stopping fracking within a municipality's boundaries. Consequently, New York state courts consistently confront a similar question in challenges brought against these ordinances: do state laws preempt and therefore take precedence over local ordinances? State law preemption over local ordinances can occur either via conflict or field preemption. Conflict preemption arises when a local ordinance directly conflicts with a state law and field preemption occurs when the state has assumed sole responsibility for the regulation of a particular field. To date, New York municipalities have been successful at defending their zoning ordinances in state courts.[37]

Specifically, in three cases – *Anschutz Exploration Corp. v. Town of Dryden, Cooperstown Holstein Corp. v. Town of Middlefield, and Norse Energy Corp.* – New York courts upheld local ordinances that banned hyrdrofracking. In *Anschutz Exploration Corp. v. Town of Dryden*, the court held that the state Oil, Gas and Solution Mining Law (OGSML) did not preempt local restrictions banning gas drilling within boundary of the town. Similarly, the court in *Cooperstown Holstein Corp. v. Town of Middlefield*, ruled that a municipality is empowered to allow or disallow gas drilling within the powers granted to it by the state constitution and that OGSML did not preempt a municipality from enacting a land use regulation within its geographic jurisdiction. Finally, in *Norse Energy Corp.*, the court concluded that "the OGSML does not preempt, either expressly or impliedly, a municipality's power to enact a local zoning ordinance banning all activities related to the exploration for, and the production or storage of, natural gas and petroleum within its borders."[38]

Hydropower Regulatory Efficiency Act Of 2013

On August 9, 2013, President Obama signed into law H.R. 267, the Hydropower Regulatory Efficiency Act of 2013. The Act is intended to facilitate the development of new domestic hydropower resources by streamlining federal licensing requirements for small hydropower projects and qualifying conduit hydropower facilities. Additionally, the Act requires the

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[32] Eileen D. Millett, *Will Fracking Become the Exception to the Rule of Local Zoning Control in New York State?*(2013), 33 26 WESTLAW J. ENVTLat 4 (WL).

[33] See e.g., Trial Order, *Northeast Natural Energy, LLC v. City of Morgantown*, 2011 WL 3584376 (W Va Cir Ct)

[34] Millet, *supra* note 32 at 1.

[35] *Id*. at 1,3.

[36] *Supra* note 30 at 716.

[37] See e.g., *Cooperstown Holstein Corp. v. Town of Middlefield*, 943 NY (2d) 722 (Sup Ct 2012) (holding that New York State's Environmental Conservation Law (ECL) does not preempt local municipalities from enacting legislation that impacts the oil and gas industries); *Anschutz Exploration Corp. v. Town of Dryden*, 940 NYS (2d) 458 (Sup Ct 2012).

[38] *Supra* note 30 at 724.

FERC to study avenues to improve, and potentially shorten, federal hydropower licensing for non-powered dams and closed-loop pumped storage facilities.

The Act made several reforms to existing energy laws, including the FPA and the Public Utility Regulatory Policies Act (PURPA), with an intended goal to increase hydropower capacity and create jobs. Specifically, it:

(1) Raised the generation capacity threshold from 5 MW to 10 MW for a proposed project to remain eligible to receive a licensing exemption under Part I of the FPA;

(2) Exempted qualifying conduit projects from federal licensing requirements upon showing that the project meets the Act's qualifying criteria: (a) uses the hydropower potential of a non-federally owned conduit; (b) is not otherwise subject to a FERC license or exemption; and (c) will have an installed capacity of less than 5 MW. To discourage project mischaracterizations intended to circumvent federal licensing requirements, the Act requires developers to file a notice with FERC, which will make a determination within 15 days as to whether the project meets the qualifying criteria. Following FERC's determination, there is a 45-day notice period during which the public can contest whether the project meets the qualifying criteria; and

(3) Directed FERC to hold workshops and conduct pilots to investigate the feasibility of implementing a two-year licensing process to "improve the regulatory process and reduce delays and costs for hydropower development at non-powered dams and closed loop pumped storage projects."

In compliance with section 6 of the Act, FERC announced that it will hold a public workshop in October 2013 to investigate the feasibility of a two-year process for licensing hydropower development at non-powered dams and closed-loop pumped storage projects. Workshop topics include the feasibility of a two-year licensing process, potential criteria for identifying projects appropriate for a two-year licensing process, and recommendations for potential pilot projects to test a two-year licensing process.

DOE and Certain Exports of LNG

In the second quarter of 2013, DOE issued its first ruling in more than two years on an application for authorization to export liquefied natural gas (LNG) from the United States to countries with which the United States does not have a free trade agreement (FTA). The DOE ruling conditionally authorized *Freeport LNG Expansion, L.P.* and *FLNG Liquefaction, LLC* (collectively, Freeport) to export domestically produced LNG from the Freeport LNG terminal on Quintana Island, Texas, to non-FTA countries (Freeport Order). DOE followed this action by issuing similar, conditional authorizations in August and September 2013 to *Lake Charles Exports, LLC and Dominion Cove Point LNG, L.P.*, respectively, to export LNG to non-FTA countries.

In 2011, DOE had granted Sabine Pass Liquefaction, LLC, authorization to export LNG to non-FTA countries from its Sabine Pass terminal, the first such authorization issued to a facility that would export LNG from the "lower-48" states. Thereafter, however, DOE delayed further action on applications to export natural gas to non-FTA countries until it received and reviewed studies performed by its Energy Information Administration, and by the NERA Economic Consulting firm, that would

assess the economic effects of increased LNG exports from the United States (DOE Study). The DOE Study was published in December 2012 and received a large number of public comments on its analysis and conclusions.[39]

Under the NGA, exports of natural gas to FTA countries are presumed to be in the public interest. While DOE must authorize exports to FTA countries, applications for exports to FTA countries are typically expedited. For LNG exports to non-FTA countries, the NGA provides that the agency will grant the export authorization unless the agency determines whether the export authorization will not be consistent with the public interest. In reviewing an application to export natural gas to a non-FTA country, the DOE considers, among other factors, the potential economic, security, and environmental consequences.

The Freeport Order, issued on May 17, 2013, is a "Conditional Order," in which DOE granted Freeport authorization to export up to 511 bcf/year to non-FTA countries, subject to satisfactory completion of the environmental review under the *National Environmental Policy Act* (NEPA) of the construction and operation of the liquefaction project and related facilities that Freeport will install to produce the LNG for export, and issuance by DOE of a record of decision pursuant to NEPA. The Freeport Order noted that FERC is the lead agency to conduct the environmental review and directed parties to raise questions and concerns regarding environmental matters to FERC. Because DOE is required by NEPA to give appropriate consideration to the environmental effects of its proposed decisions, DOE will not issue a final order on an export authorization to non-FTA countries until it has "met its NEPA responsibilities." DOE will be a cooperating agency in the environmental review being conducted by FERC Staff. DOE will not be a forum for environmental issues absent a showing of good cause for not bringing an issue to FERC's attention. The Freeport Order reserved the right, once FERC has completed its environmental review, to address any claims that FERC did not address issues raised by the parties.

DOE granted Freeport a 20 year export authorization, rather than a 25 year authorization as the application requested. DOE stated that it granted the 20 year authorization because the DOE Study had examined the economic effects of increased LNG exports for a 20 year period.

The Freeport Order spelled out several conditions to the export authorization that can be expected to appear in the final order. These include a requirement that the parties commence export operations commence no later than seven years from the issuance of the Freeport Order; a detailed summary of reporting requirements that the parties must satisfy (and which must also be satisfied by persons on whose behalf the Freeport parties, as agent, export LNG). Those persons that will hold title to LNG, and for whom the Freeport parties, as agent, will export LNG, will need to be registered with DOE according to specifications laid out in the Freeport Order.

On July 12, 2013, Freeport filed a "Request for Clarification" with DOE, requesting that it issue a further order clarifying certain aspects of the Freeport Order. In its conditional authorizations for LNG exports by Lake Charles and Dominion Cove Point, DOE substantially followed the approach taken in the Freeport Order. In reviewing the evidence in the record, including the DOE Study and the public comments filed in response to the DOE Study, DOE determined that it has not found adequate basis to conclude that the request export of LNG to non-FTA countries will be inconsistent with the public interest.

[39] Department of Energy 2012 LNG Export Study, 77 Fed Reg 73,627 (2012).

In the Dominion Cove Point order, issued September 11, 2013, DOE highlighted that it has considered the cumulative impacts of its export authorizations to non-FTA countries. DOE further noted that the most recent order, issued to Dominion Cove Point, conditionally authorizes only up to the maximum liquefaction capacity of the planned LNG facility, which in that case is less than the volume requested in Dominion Cove Point's application. The total volume of exports of natural gas authorized in DOE's rulings to date is 6.37 Bcf/day of natural gas. ■