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The mission of the Energy Regulation Quarterly 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. The Quarterly is intended to be balanced in its treatment of the issues. Authors are drawn principally from a roster of individuals with diverse backgrounds who are acknowledged leaders in the field of the regulated energy industries and whose contributions to the Quarterly will express their independent views on the issues.

EDITORIAL POLICY

The Quarterly is published by the Canadian Gas Association 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 contributors, and edit contributions to ensure consistency of style and quality.

The Quarterly 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 been representing or otherwise 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 the Quarterly 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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Rowland J. Harrison, Q.C. and Gordon E. Kaiser
Managing Editors

The challenges posed by the production, distribution and consumption of energy in today's world continue to escalate at a rapid pace that confutes any perception of energy regulation as dry and remote – somewhat stable and reasonably predictable. Stability and predictability are anything but the hallmarks of the current Canadian energy regulation scene, which is better described as being in a state of considerable, perhaps chaotic, uncertainty. Proposed interprovincial and international pipeline projects in particular are confronted by increasing policy, regulatory and judicial uncertainty. The underlying dynamics of this uncertainty include the interaction of federal and provincial responsibilities that are engaged by energy developments and the Crown's evolving duty to consult and accommodate where such developments have the potential to infringe on Aboriginal rights. Two contributions in this issue of *Energy Regulation Quarterly* address these overarching dynamics.

Federal-provincial tensions over interprovincial and export pipelines extend back many decades, to the early development of the western Canadian sedimentary basin. Throughout much of this history, it has been accepted that constitutional authority was ultimately federal and that such pipelines were generally beyond the reach of provincial laws. In today's environment, however, not all provincial (and municipal) authorities are prepared to accept that they have no legal (as distinct from political) authority to address local impacts. Daniel Gralnick's article on "Constitutional Implications of Quebec's Review of Energy East" illustrates that the issues may not be as straightforward as at first thought, particularly in light of current jurisprudence on interjurisdictional immunity and paramountcy – and what may be underlying judicial support for the concept of "cooperative federalism." At a minimum, the assertion of provincial authority with respect to local impacts (however extensive that authority might ultimately be held to be) compounds the unpredictability of the overall approval process.

That unpredictability has been exacerbated even further by the recent decision of the Federal Court of Appeal quashing the federal government's approval of the Northern Gateway project. The Court's decision is of fundamental significance on several grounds, in particular for its focus on the Crown's duty to consult with respect to the Governor in Council's responsibilities in the phase of the overall process for federal pipeline reviews that, since amendments to the *National Energy Board Act* in 2012, now follows after the hearing/review process itself. Keith Bergner's case comment analyzes the Court's decision.

The immediate challenges of uncertainty and unpredictability in approval processes for proposed pipeline projects are largely (although not entirely) a consequence of the regulatory implications of the broader, ongoing debate about climate change and carbon policy. Adonis Yatchew's article on "Rational vs. 'Feel-Good' Carbon Policy: Transferability, Subsidiarity and Separation" steps back from the ubiquitous commentary on specific policy and regulatory initiatives and provides thoughtful analysis of the issues, with a caution against a tendency for current events, circumstances and attitudes to shape views, noting that energy transitions take many years. He concludes that accelerated energy transition can occur, but would most likely be driven by technological innovation, while markets and incentives can provide powerful mechanisms for bringing about the transition.

Meanwhile, the regulated industry, regulators, policy-makers and various interest groups continue to grapple with other ongoing concerns, ranging from improving and enhancing regulatory processes to defining

and clarifying the role of competition within a regulated framework. In their article on "Consumer Advocacy and Ontario's Energy Sector," Adam Fremeth and Guy Holburn review recent developments in the representation of consumer interests in regulatory procedures in Ontario and contrast new proposals with approaches to consumer advocacy in other jurisdictions. Scott Hempling's article on "Transmission Competition in the United States: The New Reality" recounts the 50-year history in the U.S. of introducing competition into the monopolistic electricity transmission industry and reviews three recent losing court challenges by incumbents: "In baseball, three strikes and you're out. In utility regulation, not necessarily."

Finally in this issue of *ERQ*, two case comments review recent decisions of interest to the energy bar. From Nova Scotia, Sara Mahaney reports on two appeals to the Nova Scotia Utility and Review Board of wind energy projects being developed under Nova Scotia's Community Feed-In Tariff ("COMFIT") Program. The appeals highlighted that, notwithstanding their community-based nature, renewable energy projects can still be subject to opposition and challenge by members of the communities in which they are being developed.

In their case comment, Reena Goyal and James Hunter conclude that the Ontario Court of Appeal's treatment of contractual interpretation in *Iroquois Falls Power Corporation v Ontario Electricity Financial Corporation* suggests the bar for successfully appealing findings of contractual interpretation may be at its highest in the context of certain energy supply contracts. They add that the decision raises questions with respect to how adjudicators may apply the Supreme Court of Canada's landmark decision in *Sattva v Creston Moly* to other forms of contracts in the energy sector.

The range of topics in this issue of *ERQ* leaves no doubt that Canadian energy regulation in today's environment is anything but dry and remote – and anything but stable and predictable. ■

CONSTITUTIONAL IMPLICATIONS OF QUEBEC'S REVIEW OF ENERGY EAST

*Daniel Gralnick**

TransCanada's proposed Energy East pipeline ("the project") may experience yet another challenge as it will likely undergo an environmental impact assessment and review ("EIAR") by Quebec's *Bureau d'audience publique sur l'environnement* ("BAPE"), as required by the province's *Environment Quality Act* ("*EQA*").[1] The many challenges which Energy East has had to overcome in the province of Quebec have turned the project's application process into a thrilling saga, or rather, something akin to a horror story. While there is nothing unusual about pipelines having to undergo a series of assessments, reviews and consultations prior to beginning construction and eventually becoming operational, interprovincial pipelines which fall under federal jurisdiction have historically evaded the scrutiny of provincial administrative organs. The following article will examine the legal situation surrounding Energy East, by analyzing the constitutional validity, applicability and operability of provincial environmental protection legislation, to federally regulated pipelines.

Background

Energy East is a proposed 4,500 km pipeline which would bring 1.1 million barrels of crude oil a day from Alberta and Saskatchewan to refineries and export locations in eastern Canada. The original version of the project was filed to the National Energy Board ("NEB") in October 2014, but after numerous complaints that the application was incomplete and too difficult to understand, a consolidated and "user-friendly" project application replacing the original application was filed in May 2016.[2] Beginning in Hardisty, Alberta, the proposed pipeline would extend eastwards to Saint John, New Brunswick, where a marine terminal would allow for the crude to be exported to foreign markets in Europe and the United States. The project consists of three components; the construction of new pipeline segments, the conversion of existing natural gas pipeline to an oil transportation pipeline, and the construction of associated facilities such as pump stations and tank terminals which are necessary to transport the crude.[3]

Since the project's inception, it has faced ongoing turbulence in the province of Quebec given the sensitive geo-political situation and the fact that the majority of new pipeline construction would occur in that province.

In 2014, the original version of the project proposal had included an additional marine terminal on the St-Lawrence River at Cacouna, Quebec. The construction of the proposed terminal caused public uproar from environmental groups and concerned citizens due to its alleged impact on the

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1 *Environment Quality Act*, CQLR c Q-2 [*EQA*].

2 *Re Application for the Energy East Project and Asset Transfer* (17 May 2016) (NEB); see also TransCanada, Energy *East Consolidated Application*, online: TransCanada <http://www.energyeastpipeline.com/regulatory-filing/application/>.

3 National Energy Board, *Energy East and Eastern Mainline Projects,* online: NEB <https://www.neb-one.gc.ca/pplctnflng/mjrpp/nrgyst/index-eng.html#s2>.

beluga whale population. In September 2014, the environmental groups had successfully sought an interlocutory injunction from the Quebec Superior Court to temporarily suspend preliminary geotechnical work which TransCanada had lawfully been conducting under a certificate pursuant to sections 1, 20, 22 and 24 of the *EQA*.[4] This had been the environmental groups' second attempt to suspend geotechnical and drilling activities in the Saint-Lawrence River, having been denied a request for a safeguard order approximately two weeks earlier.[5]

Also, in February 2015, while the project's initial application process had been underway, the *Centre québécois du droit de l'environment* ("CQDE") applied to the Federal Court for an injunction to suspend the project's assessment by the NEB arguing that the English language of the documents filed before the National Energy Board allegedly contravened the *Official Languages Act*[6]. While TransCanada had made public French translated versions of all of the "essential documents," the CQDE and others took exception to the fact that there was not an official French version of the application, and that not all of the thirty-thousand page application's exhibits were translated. The CQDE alleged that this in effect prejudiced the French-speaking landowners in Quebec who did not have a firm grasp of the English language. The Federal Court rejected the motion for an injunction on the grounds that the first criterion of "rais[ing] a serious question" had not been met.[7] This incident incited Quebec nationalist movements to join the fight against TransCanada,[8] adding a layer of political tension and heightened social pressure on top of the legal challenges inherent to constructing a pipeline, that TransCanada would have to overcome.

While this is not atypical as a result of the passions which pipelines often provoke, for some, Energy East took on added significance given the internal tensions which exist between Quebec and English Canada. In a province where language rights are an extremely delicate subject, the incident provoked an "us versus them" mentality in Quebec that prevented the project from gaining a social licence to operate in the province. By April of 2015, TransCanada ultimately agreed not to build the marine terminal in Cacouna, a decision which in effect delayed the project's realization an additional year as result of the time needed to assess alternative options.[9]

But even as TransCanada amended the project in an effort to build support among Quebecers, it began to face more challenges in the province, some from the government itself. The *Ministère du Développement durable Environnement et Lutte contre les changement climatique* ("the Minister") as well as the CQDE brought pressure to have the project submitted to the BAPE for a provincial environmental assessment under s 31.1 *EQA*. TransCanada refused on the grounds that, as an interprovincial pipeline under federal jurisdiction, the project is not required to comply with provincial environmental assessment regimes. This led Quebec Environment Minister Heurtel to mandate the BAPE to undertake a Generic Assessment of the project under s 6.3 *EQA*, since a detailed assessment would not be possible without the cooperation of the proponent. Applications made under s 6.3 are of a generic nature, meaning they do not determine the rights of specific project proponents, but is still a mechanism used to examine controversial questions relating to the environment. Environmental impact assessment and reviews ("EIAR") under s 31.1 in contrast, are rigorous schemes where proponents are prohibited from realizing certain activities (i.e. pipeline construction and operation), unless and until the Government grants authorization pursuant to the Minister's evaluation.[10]

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4 *Centre québécois du droit de l'environnement c Oléoduc Énergie Est ltée*, 2014 QCCS 4398.
5 *Centre québécois du droit de l'environnement c Oléoduc Énergie Est ltée*, 2014 QCCS 4147.
6 *Official Languages Act,* RSC 1985, c 31 (4th Supp).
7 *Centre québecois de droit de l'environnement v National Energy Board*, 2015 FC 192 at p 13.
8 "Énergie-Est: la Cour fédérale refuse l'injonction réclamée par des écologistes", *Canadian Press* (16 February 2015) online: le Soleil <http://www.lapresse.ca/le-soleil/actualites/environnement/201502/16/01-4844701-energie-est-la-cour-federale-refuse-linjonction-reclamee-par-des-ecologistes.php?utm_categorieinterne=trafficdrivers&utm_contenuinterne=cyberpresse_vous_suggere_4842769_article_POS3> [French only].
9 Martin Ouellet & Julien Arsenault, "Pas de terminal à Cacouna, mais d'autres options sont à l'étude", *Le Devoir* (2 April 2015) online: Le Devoir <http://www.ledevoir.com/environnement/actualites-sur-l-environnement/436225/transcanada-pas-de-terminal-a-cacouna-mais-d-autres-options-sont-a-l-etude> [French only].
10 *EQA*, *supra* note 1, s 31.5.

TransCanada was also served with two injunctions, one from the Minister and one from a coalition of environmental groups, both attempting to force TransCanada to comply with environmental legal requirements of the *EQA* to file an EIAR under section 31.1.[11] The Minister was careful to clarify that the fact that he filed an injunction against TransCanada was not indicative of a particular stance on the project, but would rather allow the provincial government to gain information about the project in order to articulate its position as an intervener in the NEB hearing. [12] In other words, the province wanted TransCanada to undergo the arduous provincial environmental impact assessment as a means for the province to acquire pertinent information to be used at the NEB hearing.

Once the BAPE inquiry resumed, it became increasingly clear that a portion of Quebecers fiercely opposed the project. Following a series of riots which suspended the public hearing, Quebec's Premier publicly told Quebecers to appeal to reason rather than opting for more aggressive modes of interference.[13]

As tensions continued to increase, TransCanada submitted a notice of application in order to undergo an EIAR under s 31.1 *EQA*.[14] In return, the Minister ended the BAPE generic inquiry and agreed to withdraw its injunction once the study is approved.[15] However, notwithstanding that the notice of application has been submitted to the Minister, the drama is by no means over. The notice of application to the provincial authority specified that it was filed "voluntarily… in a spirit of cooperation," and remains "subject to any opinion that Energy East may have regarding the application of provincial law to Energy East, notably the environmental impact assessment provided by … the *Environment Quality Act*" [translation].[16] In contrast, the Minister still maintains that the company was required by law to file for the approval of the project and respect the terms of the *EQA*.[17]

In light of these opposing views, it is worth analyzing the extent to which provincial environmental protection legislation is constitutionality applicable and operable to pipelines which fall under federal jurisdiction.

Analysis

The issue at hand essentially amounts to determining whether section 31.1 of Quebec's *EQA* applies to interprovincial pipelines. Considering that the question is one which involves delimiting legislative heads of powers defined by the *Constitution Act, 1867*[18], the following analysis will apply the framework provided by the Supreme Court in *Canadian Western Bank v Alberta* [19] and the jurisprudence which emanates from that decision. Therefore, in order to assess the degree to which provincial environmental protection legislation can influence Energy East, it is necessary to examine the "pith and substance" doctrine, "interjurisdictional immunity", and the "paramountcy doctrine", bearing in mind that the modern state of Canadian federalism is of a cooperative nature which demands flexibility in answering such questions. [20]

Validity

The first step involved in resolving a question

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11 Alexandre Shields, "Le BAPE sur Énergie Est en sursis", *Le Devoir* (2 March 2016) online: Le Devoir <http://www.ledevoir.com/environnement/actualites-sur-l-environnement/464387/le-bape-sur-energie-est-en-sursis> [French only].

12 *Ibid*.

13 Alexandre Robillard, "Philippe Couillard lance un appel à la raison" *Le Devoir* (8 March 2016) online : Le Devoir <http://www.ledevoir.com/environnement/actualites-sur-l-environnement/464905/energie-est-philippe-couillard-lance-un-appel-a-la-raison> [French only].

14 TransCanada, Projet Oléoduc Énergie Est, *Avis de projet* (April 2016) (BAPE) online: MDDELCC <http://www.mddelcc.gouv.qc.ca/evaluations/transcanada/Avis-Projet201604.pdf> [*Notice of Application*].

15 Nia Williams, "Quebec halts injunction requestagainst TransCanada's Energy East pipeline", *Financial Post* (22 April 2016) online: Financial Post <http://business.financialpost.com/news/energy/transcanada-says-quebec-halting-pipeline-injunction-request-against-energy-east-pipeline?__lsa=df80-2ae6>.

16 *Notice of Application, supra* note 14 at p 5.

17 Martin Croteau "BAPE sur Énergie Est: TransCanada et Québec toujours en désaccord", *La Presse* (27 April 2016) online: La Presse <http://www.lapresse.ca/actualites/politique/politique-quebecoise/201604/26/01-4975309-bape-sur-energie-est-transcanada-et-quebec-toujours-en-desaccord.php> [French only].

18 *Constitution Act, 1867*, 30 & 31 Vict, c 3.

19 *Canadian Western Bank*, 2007 SCC 22, [2007] 2 SCR 3.

20 *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14, [2015] 1 SCR 693 at para 17; *Canadian Western Bank, supra* note 19 at 24.

with regard to the constitutionality of legislation must begin with an analysis under the "pith and substance" doctrine.[21] By examining the real purpose, and to a lesser degree the effects of the impugned legislation, the analysis involves assessing whether the dominant character of the legislation in question can be related to a matter that falls within the jurisdiction of the level of government that enacted the legislation.[22] Section 31.1 *EQA* reads as follows:

> **31.1.** No person may undertake any construction, work, activity or operation, or carry out work according to a plan or program, in the cases provided for by regulation of the Government without following the environmental impact assessment and review procedure and obtaining an authorization certificate from the Government.

While there has been tremendous discussion with regard to the applicability of the *EQA* to Energy East, up until now, there has not been discussion of whether the Environmental Impact Assessment and Review process provided by the *EQA* is valid. This is most likely because it would be highly farfetched to allege that the dominant character of the impugned legislation relates to regulating interprovincial pipelines rather than the protection of the environment. If the dominant purpose of the legislation falls within the level of government that enacted it, it is not problematic that it produces "incidental effects" on matters which relate to the jurisdiction of the other level of government.[23] "Incidental" in this context does not relate to the level of significance or importance of the legislation's effects, but rather implies that the effects must be collateral or secondary to the mandate of the enacting legislature.[24]

In this case, the impugned legislation would be judged valid if its pith and substance falls under the provincial government's jurisdiction to legislate under the shared subject of the environment. In *Friends of the Oldman River Society v Canada (Minister of Transport)*[25], the Supreme Court held that the environment is not a homogenous head of power which has been given to one level of government, but rather "cuts across many different areas of constitutional responsibility, some federal and others provincial.[26] The jurisdiction to regulate over matters relating to the environment is delineated by "looking at the catalogue the heads of powers and deciding how they may be employed to meet or avoid environmental concerns.[27] Once the dominant purpose falls within a head of power of the enacting level of government, for example, the widely used *property and civil rights* power,[28] the provision remains valid even if it intrudes into matters which fall under federal jurisdiction.

It is almost certain that by assessing evidence internal and external to the EIAR regime of the *EQA*, one would come to the finding that the dominant purpose of section 31.1 is protecting the quality of the environment. While the impugned legislation does produce effects on interprovincial pipelines, such effects are secondary to the dominant purpose of the provision which is clearly to protect the quality of the environment in the province. The impugned legislation is of general application and does not attempt to only target federal undertakings such as interprovincial pipelines. Therefore, there is no basis whatsoever to allege that the provision in reality serves to regulate the pipelines under the guise of environmental protection legislation.

Although it is highly difficult to imagine that a court would declare the EIAR regime as invalid, it is also possible for a pipeline proponent to attack the provision of the regulation which renders pipelines subject to the regime provided by s 31.1 of the *EQA*. As indicated in the wording of s 31.1, the rigorous EIAR process is only covered by "cases provided by regulation." Paragraph (j.1) of s 2 of the *Regulation Respecting Environmental Impact*

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21 *Ibid; Re Anti Inflation Act,* [1976] 2 SCR at 450.
22 *Canadian Western Bank, supra* note 19 at paras 26-27.
23 *Ibid* at para 28.
24 *Ibid; British Columbia v Imperial Tobacco*, 2005 SCC 49, [2005] 2 SCR 473, at para 28.
25 *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 [*Friends of the Oldman River*].
26 *Ibid* at p 63-64 , citing Gibson" Constitutional Jurisdiction over Environmental Management in Canada" (1973), 23 UTLJ 54 at p 85.
27 *Friends of the Oldman River, supra* note 25 at p 65.
28 *The Constitution Act, 1867, supra* note 18, s 92(13).

Assessment and Review[29] explicitly renders the construction of oil pipelines in a new right of way subject to the provincial regime. If a party would succeed in attacking the validity of this regulatory provision, Quebec would lose the legal mechanism to conduct the EIAR since the class of project would no longer be covered by regulation. While the Constitution only excludes pipelines which extend beyond the provincial boundaries from provincial jurisdiction,[30] it must not be overlooked that for a project to be able to undergo provincial scrutiny, the regulation which subjects it to the EIAR process must be able to withstand the pith and substance analysis as well.

Interjurisdictional Immunity

If TransCanada would fail to invalidate the impugned legislation, it can nevertheless attack the legislation on the basis that it is inapplicable to the federal undertaking. In other words, even if s 31 of the *EQA* is held to be valid, under certain circumstances, works or undertakings that are the subject of federal legislation can be protected from the effects of an otherwise valid provincial law. Known as the doctrine of interjurisdictional immunity, this doctrine serves as an exception to the principle discussed above that validly enacted legislation may produce effects on the level of government other than that which enacted the impugned legislation. It ensures that the basic and unassailable content of federal legislative heads of powers are immune from serious intrusions from validly enacted provincial laws.[31] In order to determine the likelihood of this doctrine protecting the Energy East pipeline from valid provincial environmental protection legislation, it is necessary to explore the Supreme Court's treatment of interjurisdictional immunity.

Although the origins of the doctrine of interjurisdictional immunity have been around for well over a century,[32] its modern restrictive application emanates from the principles laid out in *Canadian Western Bank*. In that case, one of the issues which the Court sought to resolve was whether the Alberta's *Insurance Act*[33] was applicable to the Canadian Western Bank, considering that banks fall under federal jurisdiction under s 91(15) of the *Constitution Act, 1867*. In its analysis, the Court acknowledged the doctrine's potentially dangerous impact on the Canadian federal structure,[34] and therefore favoured a more cooperative approach toward federalism.[35] The Court was clear that the dominant tide of federalism "puts greater emphasis on the legitimate interplay between federal and provincial powers ... and that the court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government."[36] In contrast to the logic of cooperative federalism, a liberal application of the doctrine of interjurisdictional immunity would promote a version of federalism which divides the legislative heads of powers into "watertight compartments."[37] Moreover, excessive reliance on the doctrine would also create unpredictability which goes against one of the goals of the Canadian Constitutional structure. Consequentially, the Court decided to generally reserve the doctrine's scope of application to situations which have previously been covered by precedent.[38]To be clear, interjurisdictional immunity continues to exist. However, it is essential to reiterate that it only applies in "rare circumstances."[39] It is not enough to rely on a literal interpretation of section 91 of the *Constitution Act, 1867* which grants "exclusive" jurisdiction to parliament over interprovincial works to justify the opinion that provincial environmental assessment legislation would not apply to an interprovincial pipeline. It would necessarily have to satisfy the modern analysis elaborated by the Supreme Court.

In concrete terms, interjurisdictional immunity renders a provincial law "inapplicable to the

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29 *Regulation Respecting Environmental Impact Assessment and Review,* c Q-2, r 23, s 2 (j.1).
30 *Constitution Act, 1867, supra* note 19, ss 91(29), 92(10)(a).
31 *Bell Canada v Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749, 51 DLR (4th) 161 at pp 839-840; *Canadian Western Bank*, *supra* note 19 at para 33.
32 *Ibid* at para 39.
33 *Insurance Act, RSA 2000,* c I-3.
34 *Canadian Western Bank, supra* note 19 at paras 35-38.
35 *Ibid.*
36 *Ibid* at para 37.
37 *OPSEU v Ontario (Attorney General),* [1987] 2 SCR 2 at p 17; *Canadian Western Bank* at 36.
38 *Ibid* at para 78.
39 *Bank of Montreal v Marcotte*, 2014 SCC 55, [2014] 2 SCR 725 at para 64 [*Marcotte*].

extent that its application would 'impair' the core of a federal power".[40] In order to assess whether the doctrine applies, it would first have to be demonstrated that the provincial law trenches on the core of federal power or a vital or essential part of the federal undertaking. It would then have to be demonstrated that the level of intrusion meets the test for it to be characterized as impairment.[41]

a) *Basic, minimal and unassailable content of the interprovincial pipeline undertaking*

As mentioned above, in order for the doctrine of interjurisdictional immunity to render a provincial law inapplicable, it must be the core of the federal competence, or a "vital or essential part of a federal undertaking" which has been placed in jeopardy.[42] In *Canadian Western Bank*, the Supreme Court interpreted the meaning of the *vital or essential part of an undertaking*. In that case, it was necessary to determine whether the promotion of insurance products constituted a vital or essential part of the federal competence over banking. Interpreting the words in their ordinary grammatical sense, the Court held that vital denotes being "[e]ssential to the existence of something; absolutely indispensable or necessary; extremely important, crucial … [and that] [t]he word "essential" has a similar meaning, e.g. '[a]bsolutely indispensable or necessary.'"[43] The argument that insurance activities were vital or essential to banking was rejected on the basis that it "inflates out of all proportion" what could reasonably be considered the absolutely indispensable or necessary content of the federal undertaking of banking. [44]

In the context of the present discussion, Parliament's jurisdiction over the Energy East derives from the authority over interprovincial works and undertakings provided at s 92(10)(a) of the *Constitution Act, 1867*[45]:

> **92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:
>
> […]
>
> 10. Local Works and Undertakings other than such as are of the following Classes:
>
> (*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province….

As an operational pipeline which stretches across 45,000 km of various provincial boundaries, there is no doubt that Energy East falls within the scope of s 92(10)(a). The more difficult question, however, is to define the vital and necessary core of this power. In light of the above considerations, it has been held that the minimal and unassailable core of the power of interprovincial works and undertakings amounts to the selection of the proposed route of the pipelines.[46] In other words, the selection of the pipeline's routing falls within the most basic and unassailable content of s 92(10)(a). By analogy, the Supreme Court in *Rogers v Chateauguay* recently determined that the siting of a cellphone tower network, that is to say, the determination of its location, lies at the core of the power to regulate telecommunications.[47] Commentators have noted that the "rooting …, construction, maintenance, security, and the siting of infrastructure essential the interprovincial transport…" [translation] are components within the interprovincial pipeline undertaking.[48] In order for these elements to be protected by the

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40 *Ibid.*
41 *Ibid.*
42 *Canadian Western Bank, supra* note 19 at para 48; Peter W. Hogg, Constitutional Law of Canada, 2012 Student ed (Toronto: Carswell, 2012) at 15.8 (c) [*Hogg*].
43 *Canadian Western Bank, supra* note 19 at para 51.
44 *Ibid* at paras 50-51.
45 This must be read with s 91(29) which states that classes of subjects which are explicitly excluded from provincial jurisdiction (i.e. interprovincial works and undertakings) fall within exclusive federal jurisdiction.
46 Trans Mountain Pipeline ULC, Trans Mountain Notice of Motion and Notice of Constitutional Question (26 September 2014), Ruling No 40 (National Energy Board) [*Ruling No 40*] at 14, leave to appeal to the FCA refused.
47 *Rogers Communications Inc v Châteauguay (City),* 2016 SCC 23 at paras 60-68 [*Rogers*].
48 David Robitaille, Mémoire du Centre québècois du droit de l'environnement. "Consultation publique sur le projet d'oléoduc Énergie-Est de TransCanada", at 9 and note 24, online : CQDE <https://cqde.org/wp-content/uploads/2015/09/Mmoire-du-CQDE-Consultation-CMM-version-2.pdf> [French only] [*CQDE Memo*].

doctrine of interjurisdictional immunity, it would first have to be proven that they lie at most basic core of that head of power. This does not seem farfetched. Furthermore, critical aspects relating to the pipeline's operations would logically fall within the essence of pipelines. It seems obvious that by specifically withdrawing the provinces' jurisdiction to legislate over matters relating to interprovincial works connecting one province to another, the Fathers of Confederation intended that the federal government would retain the authority to control the construction, location, maintenance, and operation of those works. These elements of pipelines fall within the essential, minimal core of pipelines and should therefore be protected from serious intrusions from the provinces.

In the NEB's Trans Mountain Ruling No. 40, for the purposes of assessing the applicability of a by-law enacted by the City of Burnaby, the Board identified that the routing of the interprovincial pipeline is within the core of a federal power over interprovincial pipelines.[49] The Board supported its decision with the reasoning provided in *Canadian Owners and Pilots Association v Quebec ("COPA")*[50] where the Supreme Court confirmed that the location of aerodromes forms an essential and indivisible part of the federal power over aeronautics.[51] With respect to interprovincial pipelines, this principle should apply by analogy. By extension, within the context of the federal power of interprovincial pipelines, it is safe to say that the operations, routing , construction, maintenance, security, and the location of infrastructure essential to the interprovincial transport are elements of interprovincial pipelines which are vital, essential and indivisible to the legislative head of power.

b) Impairment

It is worth reiterating that the minimal threshold of intrusion on the core of a federal power which is necessary to invoke the doctrine of interjurisdictional immunity is that of *impairment* rather than *affects*.[52]In *COPA*, the Supreme Court confirmed that the impairment test applies, and specified that impairment entails that the federal power is "seriously or significantly trammel[led]."[53] The intrusion on the federal power "need not paralyze it, but it must be serious."[54] The level of intrusion which can be characterized as impairment marks the "midpoint between sterilization and mere effect."[55] For example, in *COPA*, a provincial law which prohibited the non-agricultural use of designated agricultural land was held to impair the core the federal power of aeronautics to the extent that it prevented private residents from constructing aerodromes in those locations. It was not necessary that the law totally paralyze the core content of the aeronautics power; however, it would be insufficient if the law merely affected that power. Similarly in *Ruling No. 40* the NEB panel held that a municipal by-law which had the effect of prohibiting surveying and investigations to be conducted on municipal land impaired the core of the federal government's jurisdiction to regulate interprovincial pipelines. In both these cases, the provincial legislation impaired, that is to say that it seriously or significantly trammeled the core federal government's legislative authority.

In order for Energy East to avoid the application of s 31(1) *EQA*, the impugned legislation would have to impair the core of the federal power over interprovincial pipelines, as defined above. The argument based on precedent alone is insufficient to the extent that it does not meet the threshold provided by the Supreme Court in recent years. While cases like *Campbell-Bennet v Cornstock Midwestern* [56] and the NEB's *Ruling No. 40* serve as relevant authorities to illustrate that interjurisdictional immunity may be applied to shield interprovincial pipelines from provincial legislation, previous rulings on the matter do not mean that a pipeline proponent would be entitled to disregard the criteria established by the Supreme Court. The

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49 *Ruling No 40, supra* note 46 at 14.
50 *Quebec (Attorney General) v Canadian Owners and Pilots Association,* 2010 SCC 39, [2010] 2 SCR 536 [*COPA*].
51 *Ibid* at paras 36-40.
52 *Canadian Western Bank, supra* note 19 at para 48; See also *COPA, supra* note 50 at paras 43-44; *Marcotte, supra* note 39 at para 54. Prior to *Canadian Western Bank*, there existed a stream of case law which allowed for interjurisdictional immunity to apply so long as the core of the federal power had merely been affected. See *Bell Canada v Quebec,* [1988] 1 SCR 749. In *Canadian Western Bank* and *COPA*, the Supreme Court explicitly rejected this approach because it did not properly reflect the modern federal scheme which prioritizes cooperation between both levels of government.
53 *COPA, supra* note 50 at para 45.
54 *Ibid.*
55 *Ibid* at para 44.
56 For example, in *Campbell-Bennett v Comstock Midwestern Ltd*, [1954] SCR 207, [1954] 3 DLR 481.

Canadian Western Bank, *COPA* and *Marcotte* decisions have unequivocally confirmed that the jurisprudence has evolved overtime. However, in order to accurately assess how the aforementioned principles would apply to the context of the present dispute, one must not lose sight of the fact that there are multiple scenarios which can occur before the provincial agency, which in turn would influence whether the provincial legislation remains applicable.

Scenario: BAPE rejects the project's application, or imposes burdensome conditions that would make the project no longer viable:

The solution to the question regarding the application of interjurisdictional immunity would be most apparent in the scenario where the BAPE rejected the application made under the *EQA*, or imposed arduous conditions upon the pipeline's construction or operation. Should the province make it unreasonably difficult or unviable for the proponent to follow through with the pipeline, or reject it altogether, it is likely the province would be held to be impairing the core of the federal interprovincial pipeline power. Even if the provincial restrictions sought to further legitimate environmental concerns, this would not merely affect the federal government's control over interprovincial pipelines. The effects of the BAPE rejecting an application to proceed with the project, whether directly or indirectly, would perhaps be better characterized as impairing or even paralyzing the federal government from controlling an area under its jurisdiction.

If s 31(1) *EQA* applied in such a scenario, it would undermine both the wording and the spirit of the Constitution. A provincial government which opposed the construction of an interprovincial pipeline on its territory would have appropriated a *de facto* veto right which would consequentially deprive the federal government of the core of its power to regulate interprovincial pipelines. Adopting the reasoning of the Supreme Court in *COPA* by analogy, if the *EQA* applied in such circumstances, it would "force the federal government to choose between accepting that the province can forbid the placement …on the one hand, or specifically legislating to override the provincial law on the other hand."[57] Consequently, "[t]his would impair the federal power over… [interprovincial pipelines], effectively forcing the federal Parliament to adopt a different and more burdensome scheme for establishing … [pipelines] than it has in fact chosen to do."[58] This conclusion is further supported by the majority's decision in *Rogers*. In that case, the municipality's decision to prevent the construction of a cellphone tower in a particular location was enough to trigger the doctrine of interjurisdictional immunity as it "compromised the orderly development and efficient operation of radiocommunication and impaired the core of the federal power over radiocommunication in Canada."[59] In the case that the BAPE imposes serious obstacles to the realization of a pipeline project, the situation would require the doctrine of interjurisdictional immunity to render s 31(1) *EQA* inapplicable in order to allow the federal government to retain the capacity to control the core of their constitutionally embedded jurisdiction over interprovincial pipelines.

Scenario: BAPE allows the project to proceed without imposing arduous conditions

The more difficult question is whether this reasoning would apply if the BAPE did not impose any conditions, or imposed minimal conditions. In other words, would interjurisdictional immunity justify TransCanada from evading an EIAR, even if it were guaranteed that the project would be approved without any conditions attached?[60] In support of the position that TransCanada is not bound to undergo the EIAR, it might be argued that the fact that s 31.1 *EQA* essentially amounts to a prohibition which would justify applying the reasoning of the paragraphs above (i.e. scenario 1). The provision clearly indicates that "[n]o person may undertake any construction, work, activity or operation, or carry out work according to a plan or program…without following the environmental impact assessment and review

57 COPA, *supra* note 50 at para 60.
58 *Ibid.*
59 *Rogers, supra* note 47 at para 71.
60 This is essentially the allegation of Minister Heurtel who claims that the motivation of the EIAR in the case of Energy East is simply so that the provincial government can acquire sufficient information to participate in the National Energy Board hearing.

procedure and obtaining an authorization certificate from the Government." It can be argued that the impugned provision enables the provincial government to prohibit the realization of projects which fall under federal authority, which for the reasons discussed in the paragraphs above, impairs the core of the federal power. Indeed, the fact that the legislation offers a mechanism to derogate from the prohibition may not mitigate the fact that s 31.1 prescribes a prohibition which unduly impairs the federal government from controlling a matter within its jurisdiction.

A close reading of *COPA* may justify this position. As mentioned above, the case involved a provincial law which designated areas in the province as agricultural zones, and prohibited all non-agriculture use of the designated land. The fact that the law prohibited building aerodromes in those locations impaired the core of the federal power over aeronautics, which included the capacity to decide the location of the aerodromes. It is quite apparent how the facts of *COPA* can apply *prima facie* to the case of Energy East on the basis that the prohibition to build aerodromes impaired the power over aeronautics in parallel to the fact that the s 31.1 *EQA* prohibits TransCanada from building pipelines unless the Government decides to allow it upon the minister's recommendation following an EIAR.

There are two aspects of the impugned legislation in the *COPA* case (*An Act Respecting the Preservation of Agricultural Land and Agricultural Activities,* or *"ARPALAA"*) that may specifically shed light on the question of whether Energy East must at least be submitted to the BAPE. Firstly, in *COPA*, it was not absolutely prohibited to build aerodromes in the province of Quebec. The scope of the prohibition only included designated agricultural lands. Quebecers were still free to build aerodromes outside of the protected agricultural zones.[61] In contrast, s 31(1) *EQA* is a general prohibition to build or operate works covered by regulation, which include pipelines. Considering that the scope of the prohibition provided by s 31.1 *EQA* is broader than the *ARPALAA* in *COPA,* and that the latter was sufficient to impair the core of the aeronautics power, *COPA* can serve as strong authority to support TransCanada's claim that it is not obliged to undergo the EIAR. Does the fact that sections 31.1 and 31.5 *EQA* provide a mechanism to derogate from the prohibition (by undergoing an EIAR followed by the Minister's recommendation to the Government) serve as grounds to distinguish *COPA* from the case at bar? No, it should not. In addition to the territorial limits of the prohibition in *COPA,* s 26 *ARPALAA* allowed for applicants to derogate from the prohibition by seeking authorization from the *Commission de protection du territoire agricole* (Commission of the protection of agriculture land of Quebec)*:*

> 26. Except in the cases and circumstances determined in a regulation under section 80, no person may, in a designated agricultural region, use a lot for any purpose other than agriculture without the authorization of the commission [emphasis added.]

The scope of the provision of the *COPA* case which had been held as inapplicable to aeronautics is similar to s 31.1 *EQA*. Both provisions allow for applicants to proceed before an administrative entity in order to proceed with the project. In *COPA*, the fact that the law offered a possibility to build aerodrome in conformity with the provincial legislation did not prevent the Court from concluding that the legislation impaired the core of the federal power over aeronautics. By extension, this reasoning applied to the case of Energy East may justify rendering s 31.1 inapplicable to Energy East. It should be mentioned, however, that in *COPA*, the applicant did in fact apply for exemption, and was refused one.[62] Nevertheless, the Supreme Court in its reasons, did not suggest that s 26 *ARPALAA* is only inapplicable to the extent that the Commission refuses to allow an aerodrome to be built on designated agriculture land, nor did the Court suggest that the Commission would be able to impose conditions or play any other type of role in the construction of aerodromes on designated lands.

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61 These considerations formed the basis of Deschamps J's dissenting motives at paras 87-90, as she held that the area in Quebec in which the construction of aerodromes may be permitted is sufficient to conclude that the impairment test could not be met.

62 *Laferrière c Québec (Procureur général)*, 2008 QCCA 427 at para 1.

The difficulty with the Energy East review in Quebec is that while the argument in support of TransCanada may hold water, the argument in favour of the position that Energy East should at least submit its project to the BAPE definitely has merit as well. Bearing in mind the evolution of interjurisdictional immunity as was discussed above, it is conceivable that merely following the process of an EIAR does not *impair* the core of the federal power over interprovincial pipelines.[63] As discussed above, it is true that it is no longer sufficient for the EIAR to *affect* the federal undertaking for it to be inapplicable.[64] Concretely, it would have to be argued that the fact of merely participating in an EIAR process does not seriously or significantly trammel the capacity to construct, determine the routing, and ultimately regulate pipelines.[65] Moreover, the fact that the BAPE process is officially being used as a mechanism for the province to acquire information to be used in the federal process further supports the argument that the hearing process would not impair federal power. The reasoning may even extend to support the position that Energy East would be bound to respect the provincial environmental laws in addition to conditions imposed by administrative entities which directly affect the pipeline's structure and construction, seeing how minor conditions may only *affect* the core of the federal head of power.[66] Accordingly, by relying on a restrictive application of interjurisdictional immunity, it is reasonable to allege that undergoing a review process and imposing certain conditions on the pipeline's construction or operation may be the legitimate exercise of provincial power.

While this argument is most compelling when assessing the applicability of an individual project to a specific provincial statute, a more holistic analysis reveals the argument's potential weaknesses. As discussed above, one may contemplate that Energy East undergoing an EIAR does not impair the federal head of power over interprovincial pipelines. The same may even be said about Energy East being forced to respect certain conditions imposed by Quebec for granting the project's authorization. However, Energy East is planned to be installed in six Canadian provinces, not just Quebec. Therefore, if the provincial environmental assessment regime is valid in Quebec, and if conditions of the pipeline's construction or operation may be imposed in Quebec, there is no reason why the five other provinces would not do the same. Forcing Energy East to participate in the environmental assessments in six provinces, and respect the conditions imposed by six provinces in addition to the federal regulator would be sufficiently strenuous to impair, and perhaps even paralyze the efficient realization of the project altogether. In such a case, every segment of the pipeline would have to be approved in the province which it is located in, and would be required to respect the conditions imposed by that province. This major difficulty would logically justify why the Fathers of Confederation opted to exclude such works from provincial jurisdiction. While the law is decided on individual cases, judges would be wise to consider the wider implications of their judgements.

The claim that provinces may impose conditions on interprovincial pipelines may be supported by recent authorities as well.[67] In *Burlington Airpark v Burlington (City)*,[68] the question at hand was whether a municipal by-law which required a permit to be obtained before placing fill on the ground was applicable to an aerodrome. Citing *COPA*, the airpark alleged that the by-law impairs the unassailable core of the federal head of power over aeronautics as it used the fill to build up the runways. The City on the other hand argued that regulating the quality of the fill does not impermissibly trench on the core jurisdiction over aeronautics. The Court of Appeal for Ontario held that regulating the use of fill which supports the

63 See David Robitaille, "Le transport interprovincial sur le territoire local : vers un nécessaire équilibre" (2015) 20:1 Review of Constitutional Studies 75 at section 2.2 [*Vers un nécessaire équilibre*]; *CQDE Memo*, *supra* note 48 at 13.
64 *Ibid.*
65 *Ibid.*
66 *Ibid* at 15; *Vers un nécessaire équilibre*, *supra* note 63 at 97-99; David Robitaille, "Opinion: Provinces can impose conditions", *Vancouver Sun* (16 December 2014); Julius Melnitzer, "The paramountcy doctrine: Can cities really say no to pipelines?" *Financial Post* (17 May 2016) online: Financial Post <http://business.financialpost.com/legal-post/the-paramountcy-doctrine-can-cities-really-say-no-to-pipelines>.
67 See *Vers un nécessaire équilibre*, *supra* note 63 and *CQDE Memo, supra* note 48 for detailed jurisprudential analysis of cases which have been used to support the argument.
68 *Burlington Airpark Inc v Burlington (City)*, 2014 ONCA 468, 23 MPLR (5th) 1.
69 *Ibid* at paras 12, 17.

runway does not impermissibly trench the unassailable core of the power over aeronautics. The Court supported its finding by stating that requiring the airpark to use clean fill "will not be permanently reflected in the structure of the finished product [ie the runway]."[69] The Court continued its reasoning by holding that it accepts that regulating the quality of the fill will "have an impact on the manner of carrying out a decision to build airport facilities in accordance with federal specifications, [however], such regulation will not have any direct effect upon the operational qualities or suitability of the finished product which will be used for the purposes of aeronautics. [emphasis added]"[70] Such an intrusion, the Court held, does not intrude, let alone impair "the authority absolutely necessary to enable Parliament 'to achieve the purpose for which exclusive legislative jurisdiction was conferred.'"

It is no surprise that this recent decision has been used to support the conclusion that interprovincial pipeline proponents must comply with provincial environmental legislation. There is merit to the argument that if airparks must comply with environmental protection legislation in the use of fill to support runways, then so must interprovincial pipelines proponents. However, upon analyzing the facts of this case, in addition to the Court's reasoning, the case is by no means detrimental to TransCanada's position. Regulating the quality of the fill of runways, as the Court stated, is "not permanently reflected in the finished product." The by-law was not an attempt to regulate slopes or surfaces of runways, runway shoulders or the slopes and strength of runway shoulders.[71] There exists a degree of separation between the matter which is being regulated, that is to say the fill which supports the runway, and the core of the aeronautics power. Back to the case of Energy East, would an EIAR and the conditions which it may impose on the project have "no direct effect upon the operational qualities or suitability of the finished product"? The regime under s 31.1 *EQA* imposes a prohibition to undertake the construction, work, activity or operation of the pipeline. Therefore, by authorizing a proposed pipeline project with amendments or conditions, it is totally conceivable that these conditions will pertain to the construction, work, activity or operation in a direct manner. The provincial legislation in such a case will have the capacity to shape the finished product, and influence the project's timeframe. Even if the conditions still served the purpose of protecting the environment, the *EQA* prescribes that the conditions can dictate how the pipeline is to be constructed and operated. Therefore, while the case is pertinent in that it reiterates the restrictive application of interjurisdictional immunity, the insignificant effect of the regulation of runway fill on the core of the aeronautics power should be distinguished from the direct impact which EIAR would have on Energy East as an operation pipeline.

More trouble may come from a recent decision from the British Columbia Supreme Court. In *Coastal First Nations v British Columbia (Environment)*[72], the case revolved around the constitutionality of an Equivalency Agreement concluded between British Columbia and the Federal Government. The governments agreed that all reviewable projects under the provincial *Environmental Assessment Act* ("*EAA*") which also required approval under the *National Energy Board Act* ("*NEBA*")[73] would only have to undergo a federal assessment, which was deemed to be an equivalent assessment process. Being an interprovincial pipeline project, Northern Gateway Pipeline ("NGP") required a Certificate of Public Convenience and Necessity under s 52 of the *NEBA,* as well as a federal environmental assessment under the *Canadian Environmental Assessment Act*.[74] The project also required an environmental assessment under the provincial *EAA*. The petitioners Coastal First Nation challenged the constitutional validity of s 3 of the Equivalency Agreement to the extent that it removed the provincial government's authority to conduct an environmental assessment, and consequently unlawfully abdicates its power.[75] NGP on the other hand asserted that the Equivalency Agreement is valid because since the project falls under federal jurisdiction, any requirement for statutory compliance under the province's

70 *Ibid.*
71 *Ibid.*
72 *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34 [*Coastal FN*].
73 *National Energy Board Act,* RSC 1985, c N-7.
74 *Canadian Environmental Assessment Act,* SC 1992, c 37.
75 *Coastal FN, supra* note 72 at para 6. The agreement was also attacked on the basis that concluding the agreement resulted in violating the duty to consult.

EAA is unconstitutional. [76] In other words, as a federal undertaking, the project would not be required to undergo a provincial environmental assessment anyway.

After finding that the law was validly enacted, the Court considered whether the doctrine of interjurisdictional immunity and federal paramountcy would apply. The Court held that it was premature to assess whether there has been an impairment or a conflict until there has actually been conditions imposed by the provincial authority, and that it would require an analysis on a case by case basis in order to conclude that the environmental assessment would be inapplicable.[77] Justice Koenigsberg however, did state in *obiter dicta* that she "agree[d] that the Province cannot go so far as to refuse to issue an EAC and attempt to block the Project from proceeding."[78] For now, the decision supports Minister Heurtel's position that it is not optional for TransCanada to submit Energy East for an assessment before the BAPE. As for the legality of imposing conditions the project to proceed, the uncertainty remains.

Federal Paramountcy

If it is not found that the provincial legislation impairs the core of the federal head power, pipeline proponents may allege that under the paramountcy doctrine, the law comes into conflict with a provincial statute, which would justify that the federal statute prevails. In order for a conflict to justify invoking the paramountcy doctrine, it either must be impossible to comply with both provincial and federal acts,[79] or the provincial law must frustrate the purpose of the federal law.[80]

a. *Impossibility of dual compliance*

The first form of conflict which would trigger the paramountcy doctrine is if one law expressly contradicts the other.[81] The explanation originally articulated by the Supreme Court in *Multiple Access*[82] continues to serve as the "fundamental test":

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. [Emphasis added][83]

Accordingly, there will be an operational conflict when it is impossible to comply with both federal and provincial laws as citizens would be in a situation where respecting one of the laws would necessarily result in violating the other. Professor Hogg discusses how the above notion of conflict of operation would manifest itself in the case of a project which requires authorization from both federal and provincial agencies:

> Is there an impossibility of dual compliance if a federal law requires the consent of a federal agency for a particular project and provincial law requires the consent of a provincial agency for the same project? In principle the answer is no…. Even if one level of government imposes stricter conditions on the project than the other one, compliance with the stricter conditions obviates any conflict. [Emphasis added] [84]

According to this logic, not only will it not result in an operational conflict for the project to undergo an examination from both the BAPE and the NEB, it may even be acceptable if the

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76 *Ibid* at paras 42.
77 *Ibid* at paras 61-62.
78 *Ibid* at para 55.
79 *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at p 191 [*Multiple Access*]; *14957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241 at para 34 [*Spraytech*]; *M & D Farm Ltd v Manitoba Agricultural Credit Corp*, [1999] 2 SCR 961 at para 17; *Canadian Western Bank, supra* note 19 at para 126; *Alberta (Attorney General) v Moloney*, 2015 SCC 51, [2015] 3 SCR 327 at 19 [*Moloney*].
80 *Bank of Montreal v Hall,* [1990] 1 SCR 121 at p 154-155; *Law Society of British Columbia v Mangat*, 2001 SCC 67, [2001] 3 SCR 113 at para 72; *Canadian Western Bank, supra* note 19 at para 73; *Moloney*, *supra* note 80 at para 25.
81 *Hogg, supra* note 42 at 16.2.
82 *Supra* note 79.
83 *Ibid* at p 191; *Moloney, supra* note 79 at para 19.
84 *Hogg, supra* note 42 at 16.2(a).

BAPE's conditions are more severe than the NEB's because it is possible to comply with the laws of both levels of government by complying with the stricter conditions. Following that line of reasoning, one may conclude that in the case that the NEB authorizes Energy East to proceed, and the BAPE hearings concludes that it may only proceed if specific conditions attached to the recommendations, this would not justify rendering the *EQA* inoperable.[85] TransCanada in such a scenario would not be in a situation where it is impossible to comply with both the *EQA* and the *NEBA*. There is a strong argument that in the case that the NEB merely authorized (not required) the proponent to construct a pipeline or work, and the BAPE did not, there would be no conflict since it would not violate the *NEBA* if the proponent respected the more onerous provincial requirements.

It is well established that a conflict of operation will not arise if the provincial law is more restrictive than the federal law.[86] For example, if only the BAPE imposed the obligation for Energy East to be equipped with automatic emergency shutdown valves, TransCanada would be able to satisfy the conditions of both levels of government, unless the NEB would have hypothetically prohibited the use of such equipment. Likewise, if the provincial body imposed the requirement for a more sophisticated emergency response protocol that was omitted from the NEB's conditions, TransCanada would not find itself in a situation where complying with the more rigorous requirements would result in defying the federal law. This is consistent with the Supreme Court's recent decision *Saskatchewan v Lemare Lake Logging Ltd*[87] where the Court held that it "has been regularly considered not to constitute an operational conflict" when the "federal law is permissive and the provincial law [is] more restrictive."[88] In that case, a secured creditor appointed a receiver over the assets of a debtor farmer. The debtor challenged the action on the grounds that Part II of *The Saskatchewan Farm Security Act*[89] which requires that prior to beginning an action over farm land, the creditor must send a notice to the debtor and participate in mediation for up to 150 days. Section 243 of the *Bankruptcy and Insolvency Act*[90], however, allows for the court to appoint a receiver, without mentioning the requirement to undergo formalities provided by the provincial law. The Court cited numerous authorities to support the finding that by respecting the more arduous requirements of the provincial law, the creditor would be able to comply with both legislative schemes.[91]

Applying the Court's reasoning to Energy East would suggest that by respecting the more onerous requirements imposed by the provincial body, TransCanada would be able to comply with both provincial and federal authorities. It goes without saying, however, that certain conditions imposed by the NEB may be incompatible with conditions imposed by the BAPE. The answer to the question whether the provincial law is operable would most likely only be available once the conditions were imposed by both levels of government.[92] One can conceive of conditions that would be more likely to create a conflict. This is particularly true with questions of routing. If there are disagreements with respect to the pipeline's route, it would be impossible to simultaneously respect both route trajectories. In such a case, the route imposed by NEB would prevail.

The question is more difficult to answer if the provincial body were to block the project altogether. In theory, TransCanada may argue that it is possible to comply with both the provincial law and the federal law in the case that the BAPE does not allow the project to advance. Even if the NEB's recommendation would authorize the project's construction and operation, a proponent who has obtained authorization would not be violating the terms of the *NEBA* by not undertaking the project. This finding is in line with the Supreme Court in *COPA* where it did not constitute a conflict for the provincial law to prohibit aerodromes

85 See *Vers un nécessaire équilibre*, *supra* note 63 at 111-113.
86 *Moloney, supra* note 79 at para 26; *Saskatchewan v Lemare Lake Logging Ltd*, 2015 SCC 53, [2015] 3 SCR 419 at para 25 [*Lemare Lake Logging*].
87 *Ibid.*
88 *Ibid* at para 25.
89 *The Saskatchewan Farm Security Act*, SS 1988-89, c S-17.1.
90 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.
91 *Lemare Lake Logging, supra* note 86 at para 25.
92 This finding was recently held by the Supreme Court of British Columbia in *Coastal First Nations, supra* note 72 at paras 71-72.

on agricultural designated lands, even though such an activity was permitted under the federal scheme:

> Federal legislation says "yes, you can build an aerodrome" while provincial legislation says "no, you cannot". However, the federal legislation does not **require** the construction of an aerodrome. Thus, in Dickson J.'s formulation in *McCutcheon*, compliance with one is not defiance of the other. Here, it is possible to comply with both the provincial and federal legislation by demolishing the aerodrome.[93]

This argument can be understood as the logical progression of the argument that the province can impose conditions on the project without there being an operational conflict. If it is possible to comply with a permissive federal law and a provincial law which imposes more onerous conditions, it seems logically sound to suggest that it would be possible to comply to both laws in the case that the project were rejected by the provincial body, by omitting to construct the pipeline. Unfortunately for the 25,000 Quebecers who recently signed the petition denouncing the project,[94] the most authoritative constitutional law scholar in Canada does not share the same opinion. While Hogg, as discussed above, subscribes to the view that complying with the stricter provincial law does not result in a conflict, he does not extend his reasoning to the case that one authority were to approve the project and the other one rejects it:

> Even if one level of government imposes stricter conditions on the project than the other, compliance with the stricter conditions obviates any conflict. Only if one level of government denies consent and the other grants consent, is there an impossibility of dual compliance, which would cause the federal decision to prevail over the provincial decision in that particular case.[95]

The statement was supported with the 2007 Supreme Court decision *British Columbia v Lafarge Inc*.[96] In that case, the proponent wished to build a marine facility on the Vancouver Port. Accordingly, the project required federal approval from the Vancouver Port Authority. The question was whether the project also needed to respect the municipal land-use by-law. The majority held that the very act of submitting the project for municipal approval would create an operational conflict as it would deprive the federally constituted Port Authority of its decision making authority.[97] The *Lafarge* decision may serve as a useful authority by pipeline proponents; however, the decision is not overly persuasive in that it does not explicitly deal with the question of whether Lafarge would comply with both acts by not building the plant.[98] It can be argued that the majority goes too far by stating that it is impossible to comply with both federal and provincial levels of government by simply submitting the project for municipal authorization. Hogg states that Bastarache J's concurring opinion was "surely correct" to state that "until the city refuses a permit, dual compliance is not 'impossible' here." [99] However, as the present article discusses above, even that can be put to question since opting to not build the pipeline may allow the proponent to comply with both laws.

In November 2015, the majority of the Supreme Court in *Alberta v Moloney*[100] applied the paramountcy doctrine, and in doing so, explicitly confirmed the *Lafarge* decision.[101] While the Court's reasoning can serve as a useful authority for pipeline proponents

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93 *COPA*, *supra* note 50 at para 65.
94 Dominique La Haye, "Une pétition de 25 000 noms contre Énergie Est " *Journal de Québec* (14 June 2016) online: Journal de Québec <http://www.journaldequebec.com/2016/06/14/une-petition-de-25-000-noms-contre-energie-est>.
95 *Hogg, supra* note 42 at 16.3(a).
96 *British Columbia (Attorney General) v Lafarge Canada Inc,* 2007 SCC 23, [2007] 2 SCR 86.
97 *Ibid* at paras 75, 81-82.
98 The decision was criticized in Côte J's concurring reasons at paras 93, 106 in *Moloney*, *supra* note 79 who argued that the Court mistakenly conflated the "frustration of federal purpose test" with the "impossibility of dual compliance test."
99 *Hogg, supra* note 42 at 16.3(a), citing *Lafarge, supra* note 96 at para 113 (Bastarache J's concurring reasons).
100 *Supra* note 79.
101 The Court cited and confirmed the decision at paras 20, 21, 26, 53, 70, 71, 75.

who wish to render the provincial regime inoperable, a close reading of the decision may also be used to support the opposing position. The question which the Court sought to resolve was whether the *Bankruptcy and Insolvency Act* conflicted with s 54(4) of the *Alberta Traffic Safety Act*[102]. Moloney contravened the provincial Act by operating an automobile while he was uninsured and was involved in a roadside collision. In consequence, under s 54 of the Act, he was obliged to pay a fine to the province. However, he made an assignment in bankruptcy, and the debt was treated as a claims provable under the federal law. The province argued that there was no operational conflict since the bankrupt "can either opt not to drive or voluntarily pay the discharged debt."[103] The Court rejected the argument that an operational conflict can be avoided by omitting to take advantage of a right or privilege provided by the provincial Act, since the question is whether both laws can apply and operate concurrently: [104]

> In a case like this one, the test for operational conflict cannot be limited to asking whether the respondent can comply with both laws by renouncing the protection afforded to him or her under the federal law or the privilege he or she is otherwise entitled to under the provincial law. In that regard, the debtor's response to the suspension of his or her driving privileges is not determinative. In analyzing the operational conflict at issue in this case, we cannot disregard the fact that whether the debtor pays or not, the province, as a creditor, is still compelling payment of a provable claim that has been released, which is in direct contradiction with s. 178(2) of the BIA...
>
> Both laws cannot operate concurrently "apply concurrently" or "operate side by side without conflict". The facts of this appeal indeed show an actual conflict in operation of the two provisions. This is a case where the provincial law says "yes" ("Alberta can enforce this provable claim"), while the federal law says "no" ("Alberta cannot enforce this provable claim"). The provincial law gives the province a right that the federal law denies, and maintains a liability from which the debtor has been released under the federal law. [Emphasis added] [References omitted]

Neither can the question under the operational conflict branch of the paramountcy test be whether it is possible to refrain from applying the provincial law in order to avoid the alleged conflict with the federal law. To argue that the province is not required to use s. 102 in the context of bankruptcy, or that it can choose not to withhold the respondent's driving privileges, leads to a superficial application of the operational conflict test. To suggest that a conflict can be avoided by complying with the federal law to the exclusion of the provincial law cannot be a valid answer to the question whether there is "actual conflict in operation"... To so conclude would render the first branch of the paramountcy test meaningless, since it is virtually always possible to avoid the application of a provincial law so as not to cause a conflict with a federal law. [Emphasis added] [References omitted]

To find a possibility of dual compliance with the conflicting laws at issue — on the basis of hypotheticals that call for "single" compliance, by any one of the actors involved, with one law but not with the other — would be inconsistent with this

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102 *Alberta Traffic Safety Act*, RSA 2000, c T-6.
103 *Moloney, supra* note 79 at para 60.
104 *Ibid* at paras 60, 63, 69, 70, 73. Côté J (supported by McLachlin CJ) expressed her strong disaccord with the majority's finding that the dispute has given rise to an operational conflict.

Court's precedents on federal paramountcy.

The reasoning of the above passage can support the existence of an operational conflict if the NEB allows Energy East to proceed, and if the BAPE comes to an alternative finding. The decision supports the position that if the NEB says "yes" and the BAPE says "no," there would be a conflict considering that both laws would not be able to operate and apply simultaneously. Accordingly, the choice not to proceed with a project (in order to avoid a conflict) would deny the proponent a right that it has acquired under a valid federal law, and would thus result in a "superficial analysis." This interpretation of the paramountcy doctrine has been applied in disputes revolving pipelines in the past. In Trans Mountain's Ruling No. 40, the municipal by-law prohibited disturbing the land in parks by cutting trees, clearing vegetation and drilling boreholes.[105] However, s 73(a) of the *NEBA* states that a company "may" conduct activities necessary to fixing a pipeline, make examinations and survey the land. The wording permits such activities which are prohibited by the by-law, it does not require them. Notwithstanding that the companies could have opted to not perform the activities in the park, the NEB nevertheless held that it was impossible to comply with the by-law and the *NEBA*.[106]

The question then becomes whether *COPA*'s analysis of the paramountcy doctrine is still relevant. This can be answered in the affirmative, but it must be reconciled with *Moloney*. As discussed above, the Court held in *COPA* that there was no conflict since the provincial law prohibited the construction of an aerodrome whereas the federal law permitted, not required aerodromes on agricultural lands. At first glance, it seems difficult to reconcile the two decisions. Indeed, Côté J, in her concurring opinion, relied on the Court's reasoning in *COPA* to come to the finding that there was no operational conflict, and that "even a superficial possibility of dual compliance will suffice for a court to conclude that there is no operational conflict."[107] The majority's response to Côté J's concerns, which McLachlin CJ subscribed to, confirms that *COPA* continues to apply and can be used to support position that there is no operational conflict between the *EQA* and the *NEBA*.[108]

In *Moloney,* the majority distinguished that case with *COPA*, and in doing so, keeps the door open for Energy East to avoid the application of the paramountcy doctrine. This distinction was based on the fact that *COPA* was a situation where authorization to build an aerodrome could have been acquired by administrative authorization.[109] In other words, *COPA* was not a situation when one law said "yes" and the other said "no," but rather where one law said "yes" and another said "sometimes." On the other hand, in *Moloney*, the application of both laws directly resulted in conflicting outcomes. One says "yes" while the other says "no." The situation in *COPA* was therefore characterized as one where the provincial law was more restrictive than the federal law, not in conflict with it. This aspect of *COPA* is similar to the case of Energy East, where s 31.1 *EQA* allows for the authorization to construct of a pipeline if a certificate is provided by the Government. If the present issue ever makes it to the courts, it will be interesting to see whether *Moloney* will be used as an authority to justify the existence of an operational conflict, or conversely, that the laws of both levels of government may operate side by side in such situations.

b) *Frustration of Federal Purpose*

In addition to the operational conflict based on the impossibility of dual compliance, the paramountcy doctrine can render a provincial law invalid in the case that the provincial legislation is incompatible with the purpose of the federal legislation.[110] In this second branch of the paramountcy doctrine, the effect of a provincial law may frustrate the purpose of the federal law even though it does not entail a direct violation of the federal law's provision.[111] The courts must first interpret the purpose of the federal law, before demonstrating that the law's effect is incompatible with that purpose.[112] It is a high threshold to attack a law with this second

105 *Ruling No 40, supra* note 46 at 12.
106 *Ibid* at 12-13.
107 *Moloney, supra* note 79 at paras 101, 109.
108 *Ibid* at para 74.
109 *Ibid.*
110 See note 80.
111 *Canadian Western Bank, supra* note 19 at para 73; *Moloney, supra* note 79 at para 25.
112 *Hogg, supra* note 42 at 16.3(b); *COPA, supra* note 50 at para 66.

branch, which "requires clear proof of purpose; mere permissive federal legislation does not suffice."[113] Moreover, the Supreme Court has cautioned to limit the scope of application of this branch of the paramountcy doctrine.[114] "The mere fact parliament has legislated in an area does not preclude provincial legislation from operating in the same area...."[115]

The general purpose of the *NEBA* is to regulate the construction, operation and abandonment of interprovincial and international pipelines and power lines, as well as oil and gas exploration and production activities. With respect to Part III which governs applications for Certificates of Public Convenience and Necessity, its purpose is to assess whether a project is in the public interest of Canadians. This involves evaluating all considerations that "appear to be directly related to the pipeline" which include *inter alia* the availability of the energy source,[116] the existence of markets,[117] the economic feasibility of the project,[118] the extent to which Canadians benefit economically from the project,[119] and the environmental impact of designated projects.[120]

Accordingly, would the effect of s 31.1 *EQA*'s operation frustrate this purpose? The public assessment under sections 31.1-31.5 allows for intervenors and the proponents to present evidence on the nature of the project and its environmental effects so that the provincial government can be informed prior to deciding whether the project should come to fruition. If the provincial review were to allow the project, even with more rigorous conditions, the federal government would still be able to fulfil its purpose. In this regard, the provincial assessment may even be seen to further the aforementioned purpose.

That being said, a proponent that is attempting to attack the operability of the provincial law would emphasize that one of the purposes of the *NEBA* is to create a highly streamlined process to allow for pipeline applications to be treated in a timely manner. S 52(4) provides the NEB with a time limit of 15 months to complete the report. This delay may be extended by up to three months if ordered by the Minister, or may be extended by an additional period of time by the Governor in Council if recommended by the minister. Furthermore, the Act grants the Minister with the power to issue binding directives at different stages of the application process in order "[t]o ensure that the report is prepared and submitted in a timely manner."[121] Moreover, the Chairperson is vested with the power to take any measure which he considers appropriate to ensure that the time limit is met. [122] Upon reading the Act, it is clear that parliament intended that the approval process for interprovincial pipelines be conducted in a timely manner.[123] By extension, if the provincial EIAR were to seriously delay the approval process, the argument can be made that the operation of the *EQA* in such a scenario would not be compatible with one of the purposes of the *NEBA*.

In addition, it is probable that a project proponent would cite Ruling No. 40, where the NEB held that the municipal by-law discussed above frustrated the purpose of paragraph 73(a) *NEBA.* However, a closer look at the provisions in question distinguishes that case from the issue in discussion. The provision empowered proponents to access land for the ultimate purpose of collecting information which could be used to create an enlightened decision-making process. Therefore, the by-law which prevented cutting trees, clearing vegetation and drilling boreholes which were proven to be necessary to the exploration activities, frustrated the federal purpose of the federal law. This issue is distinct from the question of whether submitting a pipeline project to a provincial EIAR would frustrate the purpose of *NEBA.*

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113 *Ibid* at para 68.
114 *Marcotte, supra* note 39 at para 72; *Canadian Western Bank, supra* note 19 at para 74.
115 *Marcotte, supra* note 39 at para 72.
116 *NEBA, supra* note 73 s 52(2)(a).
117 *Ibid*, s 52(2)(b).
118 *Ibid*, s 52(2)(c).
119 *Ibid*, s 52(2)(d).
120 *Ibid*, s 52(3).
121 *Ibid*, s 52(8), (9).
122 *Ibid*, s 6 (2.2).
123 The law includes numerous other deadlines which govern the application process including *inter alia* s 34 (3),(4) which gives affected citizens up to 30 days from being served a notice to file a written statement which contains the grounds for opposing a route.

It is also worth examining whether it would frustrate the purpose of the *NEBA* if the BAPE were to conclude that the project should not proceed. As discussed above, the goal of Part III of the *NEBA* is to regulate interprovincial pipelines, and determine whether the proposed pipeline projects are in the public interest. In *COPA* the permissive federal regime generally permitted citizens to construct aerodrome without first acquiring approval. The Court rejected the argument that parliament deliberately implemented a permissive federal regime for the purpose of encouraging the widespread construction of aviation facilities.[124] The Court required clear proof to establish the Act's purpose.[125] In the absence of establishing a clear proof that parliament's purpose is being frustrated by the federal law, the doctrine will not apply.

Similarly, in *114957 Canada Ltée* (*Spraytech) v Hudson (City of)*[126], a law that restricted the use of pesticides, except to the extent permitted, was held to be permissive rather than exhaustive. The municipal by-law, however, more rigorously prohibited the use of pesticides. The Court held that the fact that the federal law was permissive in nature, as opposed to explicitly providing for a positive right made both schemes compatible.[127] In other words, interpreting the statutory scheme did not clearly indicate parliament's intention to grant Canadian with the positive right to use pesticides. Therefore, a federal regime which may permit the construction of pipelines does not necessarily indicate parliament's clear intention to allow such projects. This is to be distinguished with *Law Society of British Columbia v Mangat*[128] where provisions of the federal *Immigration Act*[129] explicitly provided non-lawyers with the positive right to appear on behalf of clients before the Immigration and Refugee Board which violated the terms of the B.C. *Legal Professional Act*[130]. The Court ruled that it would undermine the purpose of the federal Act by restricting who can represent an applicant before the board to a licensed lawyer, as the Act clearly allowed for lawyers to represent applicants in order to pursue the objective of rendering the process accessible and informal.[131] It was ruled that this objective would be frustrated if applicants were only permitted to attain the services of licensed counsel. Considering that Part III of the *NEBA* does not clearly indicate parliament's intention to allow pipelines to proceed, the case of Energy East would be more similar to *COPA* and *Spraytech* than *Mangat.* Accordingly, the EIAR process prescribed by the *EQA* does not frustrate parliament's intention for enacting the *NEBA*.

Conclusion

The degree to which Quebec's *EQA* can affect Energy East can be determined by analyzing the three essential Constitutional doctrines which are employed to solve problems relating to the division of legislative powers. With respect to the provincial Act's validity, there is little doubt that an analysis of the "pith and substance" doctrine would reveal that the *EQA*'s general EIAR process is in reality an attempt for the province to legislate over interprovincial pipelines. However, there is a better chance that the application of the *EQA* would be prevented by the doctrine of interjurisdictional immunity. In the event that the provincial authority were to impose burdensome conditions that affected the viability of the project, or if it were rejected altogether, it is likely that the provincial law would be held to be impairing the core of the federal power over interprovincial undertakings. It is less certain whether this doctrine would be able to justify TransCanada from omitting to file its project before the BAPE. If a court were to look at the situation *in abstracto* without considering the wider implications of the decision, it is understandable how merely submitting the project for a review would not necessarily impair the core of the federal power. However, it is easy to envision how the federal government can lose its capacity to regulate interprovincial pipelines upon considering the effects of submitting the project to six provinces in addition to the federal regulator. Finally, with respect to the paramountcy doctrine, it is unlikely that the fact of submitting the project before the provincial body creates a

124 *COPA, supra* note 50 at 68.
125 *Ibid.*
126 *Supra* note 79.
127 *Spraytech, supra* note 79 at para 35.
128 *Supra* note 80.
129 *Immigration Act*, RSC 1985, c. I-2.
130 *Legal Profession Act*, SBC 1987, c 25.
131 *Mangat, supra* note 79 at para 72.

situation where TransCanada would be in a position where complying with one law entails the defiance of the other. Only upon assessing specific conditions imposed by both administrative bodies would it be possible to truly weigh whether there is a conflict between the federal and provincial legislation.

The Energy East saga has effectively highlighted that federalism is an imperfect system of government. Inherent in the idea of federalism is the difficulty in balancing local interests with the broader interests of all Canadians. The courts are faced with the duty of ensuring that the division of powers provided by the Constitution is upheld, and have overtime increased the importance placed on local interests by favouring a federal order based on cooperation and flexibility. As important as it is for the Constitution to evolve with the times,[132] interpreting it in a manner that would allow the provinces to substantially interfere with an interprovincial pipeline would derogate from the abundantly clear text of the written constitution which was created to serve as a blueprint of how to handle such conflicts. Behind the written text lies a logic that there are a number of situations in which the federal government must be able to effectively make certain decisions to the benefit of Canadians from coast to coast. By explicitly excluding interprovincial works and undertakings from the legislative jurisdiction of the provinces, it is clear that the Fathers of Confederation envisioned the extremely grave impracticality which can result from provincial intrusions into such matters. *Too many cooks spoil the broth*. ■

132 This is known as the "living tree doctrine."

RATIONAL VS. "FEEL-GOOD" CARBON POLICY

TRANSFERABILITY, SUBSIDIARITY AND SEPARATION

*Adonis Yatchew**

Introduction[1]

Public policy on decarbonisation is driven to a large degree by specific carbon targets put forth by politicians and policy makers. In Western economies, this often involves targeted reductions of total output of atmospheric carbon, though such reductions are often delayed. Implementation usually involves a menu of approaches. Some are relatively decentralized, such as putting a price on carbon through taxes or emissions permits. Others, are more centralized, such as subsidies for non-carbon technologies (e.g., wind and solar). Still others seek to promote more efficient use of energy through conservation and demand side management.

The usual assessment criteria include: whether the scheme is likely to achieve carbon goals (efficacy); is it cost effective (static efficiency); can adverse impacts on jobs and industries be mitigated and is there potential for job creation (macroeconomic effects); does it promote innovation (dynamic efficiency); is it politically feasible and sustainable (public support).[2] Within this grouping, usually the first and the last i.e., efficacy and public support, are dominant in determining the choices. Public support is sometimes elicited through claims of job creation. The costs of achieving targets are often excessive, and resources specifically devoted to innovation are small compared to the costs of, for example, subsidies to existing technologies.

This paper has three central messages. First, costly carbon reduction initiatives that cannot be readily transferred (especially to the developing world) do not represent a rational allocation of climate change combatting resources, though they might make us feel good if we believe that we are doing our share. We argue that an increased focus on technological innovation is essential if the recently agreed global goals of "holding the increase in the global average temperature to well below 2° C above pre-industrial levels" are to be achievable.[3]

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1 Portions of this paper draw directly and heavily on previous writings of the author, in particular Adonis Yatchew, "Economics of Energy: Big Ideas for the Non-Economist" (2014)1:1 Energy Research and Social Science at 74-82 and the concluding section of "Energy Projects, Social Licence, Public Acceptance and Regulatory Systems In Canada: A White Paper" by John Colton, Kenneth Corscadden, Stewart Fast, Monica Gattinger, Joel Gehman, Martha Hall Findlay, Dylan Morgan, Judith Sayers, Jennifer Winter and Adonis Yatchew, University of Calgary, School of Public Policy May 2016.

2 See, e.g., Richard Green and Adonis Yatchew, "Support Schemes for Renewable Energy: An Economic Analysis" (2012) 1 Economics of Energy & Environmental Policy at 83-98. For a recent evaluation of renewable electricity programs in Ontario, see Brian Rivard and Adonis Yatchew, "Integration of Renewables into the Ontario Electricity System", The Energy Journal [forthcoming in 2016].

3 *Paris Agreement*, UNFCCCOR, 21st Sess, Annex, Agenda Item 4(b), UN Doc CP/2015/L.9/ Rev.1 (December 2015), online: UNFCCC <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf>.

Second, a better balance between decentralized and centralized tools and approaches needs to be struck. This balance can be informed by the principle of subsidiarity. Third, the efficacy, efficiency and sustainability of decarbonisation programs would be improved if there is a clearer separation and an arms-length relationship between policy makers and regulators.

Stylized Facts

Of the many considerations that could conceivably be taken into account when formulating Federal, Provincial and Territorial carbon policies and regulations, we isolate a handful that we believe are especially important for our arguments.

First, **worldwide demand for energy continues to grow strongly.** This demand is driven by both population growth and increases in per capita GDP, particularly in developing countries. Energy demand and GDP are highly correlated: the more successful we are at reducing world poverty, the more voluminous the injection of carbon into the atmosphere, in turn leading to environmental impoverishment.

Second, **hydrocarbon supplies are bountiful and prices are likely to remain low for the foreseeable future.** The shale revolution has fundamentally altered oil markets.[4] Low or moderate hydrocarbon prices reduce the economic incentives to switch to alternative fuels. Canada is well endowed with vast reserves of unconventional oil resources, particularly bitumen. World-wide natural gas supplies are expanding (China is now investing in shale development) and coal supply is in effect unlimited.

Third, **history teaches us that energy transitions take many decades.** The prediction is that the transition from 80 per cent hydrocarbons (where we are today) to 20 per cent hydrocarbons will also extend over many years. The transition from biomass to coal took about 60 years (1840-1900). The transition away from coal to oil and natural gas, spanned 70 years (1900-1970).

Fourth, **the *need* for innovation can drive technological change.** Historical examples abound supporting the aphorism "necessity is the mother of invention." The Newcomen Engine, which was originally designed to allow pumping of water from coal mines, led to the Industrial Revolution; this is a particularly prominent example of *economic* motives driving innovation. On the other hand, the Manhattan Project was driven by *security* imperatives, the fear that the Nazis would develop devastating atomic weapons first.[5]

Historical Context

To situate our discussion of carbon policy in a broader political context, it is helpful to appreciate the historical perspective. During much of the 20th century, energy policy and regulation followed the overarching trajectories of societal views on the proper role of government. The Great Depression of the 1930's represented to many the ultimate *market failure* as markets, left to their own devices, were unable to provide sufficient employment. During the ensuing decades, the proverbial political pendulum swung to the left with ever increasing roles for governments at various levels, including in energy industries.

However, the stagflation of the 1970's constituted a major *government failure* -- macroeconomic policies could not resolve the twin scourges of inflation and unemployment, which had been exacerbated by oil price shocks.[6] This was not entirely, or perhaps even primarily a failure of macroeconomic monetary and fiscal policy. Regulatory burden had risen dramatically over the preceding decades, to the point where many industries were highly regulated. Growing evidence that regulation and government intervention had

4 OPEC's ability to exercise market power has been seriously undermined. In perhaps the most profound change in oil markets since 1973, extraction of unconventional oil has upturned oil markets not just because it provides a new source of supply, but more importantly because it is *scalable*. The cost of a shale well is a few million dollars (in comparison to billions for undersea fields). Saudi Arabia has altered its strategy to focus on market share rather than trying to influence market price. See, e.g., Adonis Yatchew, "Discerning Trends in Commodity Prices", Macroeconomic Dynamics [forthcoming in 2016].

5 Economists have developed a large literature along these lines under the rubric "endogenous technological change".

6 Inflation was eventually curbed quickly in the U.S. through the actions of an *independent and credible* monetary authority under the direction of Paul Volcker. Economic growth returned shortly after. If energy and climate policy are of such paramount importance, then greater independence of relevant regulators would be warranted.

over-reached resulted in calls for reducing the role of government. The political pendulum began to swing to the right with the election of Margaret Thatcher, then Ronald Reagan, and in Canada, Brian Mulroney. Various industries experienced deregulation, some with stunning success – for example, the telecommunications industry. There was increased reliance on market forces and privatization. The economic growth experienced in the ensuing decades was very much related to the deregulation that had occurred.

In energy, perhaps the most salient example is the shale revolution, which arguably would not have occurred in the absence of North American deregulation of natural gas. The spread of horizontal drilling and hydraulic fracturing (fracking) subsequently led to a momentous shift in oil markets, as we have argued earlier.

In areas where regulation continued to be required, forward thinking regulators shifted from comprehensive approaches to light-handed variants – "Competition where possible, regulation where necessary", as it were. In energy, the traditional "cost-of-service" regulatory model shifted to "incentive regulation", the most common variant of the latter being "price-cap regulation."

The verdict of the 20th century ideological drama that pitted societies based on market models against those based on central planning came out unequivocally in favour of the former.[7] The fundamental message of this competition of ideas was that market deficiencies merited correction and not replacement with bureaucratic central planning.

By the 21st century, it appeared that in some areas, deregulation had gone too far. The failure of Enron in 2001 was small in comparison to the financial precipice of 2008.

Today, energy industries face what some have argued is the ultimate market failure – the externalities caused by the combustion of hydrocarbons, which are the source of about 80 per cent of energy world-wide. Decarbonisation has become an increasingly prominent objective of policy makers, often with greater rather than lesser reliance on market forces. Cap-and-trade is an especially salient example whereby property rights in the form of emission permits are created and traded to reduce the costs of decarbonisation.[8]

Climate related imperatives may lead to a new era of increasing regulation. This path must not ignore the lessons of the previous century – regulation may be required, but it should be relied upon where it is necessary, and implemented in sensible ways.

A Balancing Act

In arriving at carbon policies, decision makers evaluate the economic, environmental and security consequences of a particular path, balancing considerations in each area against the others, the so-called "*energy trilemma."* (For the moment we will delay discussion of equity issues.)

Economic considerations, at a minimum, should involve a cost-benefit analysis to determine which policies and programs are the most cost effective in achieving objectives. There are also often broader economic issues to be considered, for example, impacts on job losses, job creation and overall economic growth.

Environmental considerations vary based on specific elements of a policy and they can be local, regional or national; they can also span multiple levels. For example, wind farms may have an adverse local environmental impact on inhabitants, but provide a clean and carbon-free supply of energy which benefit all.

Security considerations, in the first instance,

7 Liberalization, marketization and privatization were not limited to Western democracies.China's strong growth in this century can be traced to modest liberalization policies begun in the late 1970's. The dissolution of the Soviet Union resulted in a shift to market economics and multi-party democracy in a number of the previous Soviet satellites and republics. Certain South American countries also engaged the deregulation agenda, with varying degrees of success. This period of deregulation in less developed economies led not only to growth, but by many measures, to a *reduction* in global inequality as hundreds of millions were lifted out of the most extreme forms of poverty. See, e.g., Kenneth Rogoff, "Inequality, Immigration and Hypocrisy" (May 8 2015) Project Syndicate.

8 Cap-and-trade is based on the work of Nobel Prize winning economist, Ronald Coase. The Coase Theorem proposes that property rights to an externality be created, and shows that regardless of their distribution, optimal social benefits are achieved.

usually refer to a reliable supply of energy, availability of infrastructure and protection thereof. (Intermittent renewable energy sources, for example, have resulted in a host of challenging but not unmanageable system control issues.) Furthermore, energy security can also play an important role in promoting national security.[9]

There are also *interactions* amongst the three elements of the *trilemma*. Access to energy promotes economic growth and prosperity. Economic strength has been, and continues to be essential to maintaining national security. Today, climate change itself is seen increasingly as a security issue, especially if changing local climates lead to droughts, food and water shortages, or rising sea levels lead to flooding of heavily populated regions with consequent migration of peoples.

Once a certain level of economic prosperity is achieved, increased attention is devoted to environmental matters.[10] A country that finds it difficult to meet the basic needs of its population is not likely to devote major resources to switching from relatively cheap coal to more expensive but cleaner fuels, such as natural gas or renewables. Even advanced economies struggle to balance environmental goals against the economic needs and desires of their populations.

It is a fundamental tenet of economics that pricing mechanisms which reflect underlying costs lead to rational, socially optimal allocations of resources. Relatively efficient markets, with limited price distortions are socially desirable. Well-functioning markets also require sustained investment in capital assets, and in research and development to drive innovation. Recognizing that carbon policy follows an evolutionary path, predictable government decision-making with reasonable implementation lead times, efficient and efficacious regulatory processes, and simple protections that allow firms to conduct their business without undue obstruction, are all important contributory elements to economic efficiency and prosperity.

At the same time, carbon policies and the related energy decisions, with few exceptions, have differential impacts across various segments of the population. They are rarely Pareto-improving; in most circumstances there are individuals and groups that are adversely affected, and others who benefit. How does one deal with these distributional and equity impacts?

Conceptually, it is important to separate economic productivity and efficiency from distributional consequences. While suitable compensation *may* be appropriate for affected parties, one wants to achieve this with minimum price distortion or impact on productivity.[11] Mitigation of impacts is often a complex and delicate matter, and may involve political compromise. [12] Economists would argue that, to the extent possible, market mechanisms should not be distorted in order to deal with distributional impacts, particularly if the latter can be addressed through other mechanisms.[13]

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9 There are many instances throughout history where a reliable supply of energy has been paramount in considerations of national security. The West's interests in ensuring the free flow of oil through the Straits of Hormuz, and European dependency on Russian natural gas comprise two contemporary examples with wide geopolitical ramifications. During the Cold War, the world was divided into spheres of influence. Following the collapse of the Soviet Union, there was a brief respite from this model of world order. But recently an expansionist China and resurgent Russia have created new ideological fault lines. Just as many argue that Canada has a responsibility to do its share in mitigating climate change, and alleviating global poverty, it could also be argued that it has a duty to protect the ideals of liberal democracy upon which it is founded, and to support allies and similarly minded nascent democratic movements. Its ability to do so depends on its prosperity and energy independence.

10 The so-called 'Environmental Kuznets Curve'.

11 For example, increasing energy prices in a decarbonising world (e.g., as a result of higher costs of renewables or the pricing of carbon) can have significant impacts on lower income families, the so-called 'energy poverty' effect. Such circumstances, however, do not justify reducing electricity prices to *all* users. Instead, redistribution mechanisms which do not distort price signals, such as tax relief or direct transfers, are preferred to simply lowering prices for all consumers, regardless of income levels.

12 See, e.g., Michael J. Trebilcock, "Dealing with Losers: The Political Economy of Policy Transitions" (2014) Oxford University Press.

13 More recently, the idea of "social licence" has gained some currency. Amorphous as it is, the idea entails ongoing community support for projects, be they pipelines, transmission corridors, mines or other infrastructure. Social licence, on balance, would likely make rational carbon policy even more difficult, a tyranny of the minority, as it were. First, there are likely to be increased incentives for "rent-seeking behaviour." The threat of veto, or even obstruction, endows the affected group with leverage which can result in extraction of rents that are disproportionate to impacts. Second, a requirement of social licence increases regulatory and political uncertainty associated with a given project, discouraging investment, or requiring returns higher than are merited by the inherent riskiness of the proposed undertaking. In this case, prices in capital markets are distorted. Third, it has the potential for weakening property rights, thereby undermining the functioning of the marketplace. In this connection, the pursuit of environmental objectives, protection of the commons, can in important instances, be enhanced by strengthening rather than weakening property rights. The idea of social license has also been linked to notions of equity and social justice in the marketplace, in some cases rhetorically, in other cases substantively.

Subsidiarity and Separation

How does one who is not an expert in economics, political theory and government begin thinking in a sensible way about the proper division and allocation of roles when it comes to rational carbon policy? As a departure point, consider the principle of subsidiarity: Decisions should be taken and tasks should be performed at the lowest level at which they can competently be decided and completed. The government should undertake responsibilities only if individuals or groups of individuals cannot fulfill them competently on their own.

There is great room for debate on the meaning and precision of this statement, but the general thrust favours decentralization which promotes a variety of approaches to problem solving and hence innovation. It also suggests citizens should, as far as possible, take responsibility for themselves, lest their ability to do so in a 'nanny state' declines over time.[14] Centralization of control and decision-making concentrates power, which may require checks and balances to ensure that it is not abused. Unnecessary centralization can also lead to inefficient resource allocation.

The principle may be used to justify markets and to think rationally about regulatory boundaries. It is useful in delineating boundaries between local, provincial and federal government responsibilities. (Why is defense a federal responsibility while garbage collection is at the municipal level?) In a different variant, it is a cornerstone of the Maastricht Treaty which establishes the European Union – there, the principle limits infringement of national sovereignty.

On the heels of the "government failures" of the 1970's and the ensuing movement towards deregulation, a succinct dictum which echoed this principle was articulated as "competition where possible, regulation where necessary." This slogan, which is closely related to the idea of subsidiarity, is repeated in many settings, but particularly during deregulation of various industries in the United Kingdom.

A second and related concept is that of "separation" which is central in political science as a bedrock device that, *inter alia*, limits the concentration of power, improves transparency and potentially increases public confidence in decision-making.[15] In the context of energy and the environment, it can be used to inform the relationship between policy makers and regulators. [16]

How do these principles apply to decarbonisation policy?

As a first example, consider carbon pricing vs. feed-in-tariff programs. Carbon taxes and cap-and-trade approaches seek to restrict the production of carbon, but leave the choice of technology to individuals, firms and markets. For example, an electricity company seeking to reduce its cost of carbon might switch from coal to natural gas, hydraulic, wind or solar generation. This represents a relatively decentralized approach. Feed-in-tariff programs, as implemented to date, have typically required the government, through the regulator, to select the technologies it prefers, and to set prices and contractual terms for the electricity generated therefrom. This approach is more centralized. Are governments better qualified to place bets on technologies than firms? The principle of subsidiarity would suggest otherwise. Feed-in-tariffs *may* be justified if a more decentralized approach is politically infeasible, administratively too costly, or if there is some other market failure that cannot be readily overcome.

As a second example, consider innovation policies. Current technologies remain too expensive to address climate change. Developing economies are unlikely to adopt them in sufficient scale to reduce carbon injections to levels that would stabilize concentrations. Major breakthroughs (e.g., in electricity storage) and continued incremental improvements (e.g., in solar and wind technologies) are required. Should these be

14 In an unrelated setting, 'helicopter parents' are criticised for micro-managing their children's lives, thus thwarting normal development.

15 Think separation of powers, separation of "church and state" and separation of government from the economy (i.e., private ownership).

16 Contrast energy regulation to the regulation of the money supply. Central banks in Western democracies are largely immune to political pressure because voters correctly understand that their elected representatives cannot effectively influence monetary policy. On the other hand, fiscal policy, such as taxation and government expenditures, are under the control of elected governments; initiatives in these areas are often the very focal point of political contests.

left to the marketplace, or should the approach be more centralized? Innovations that can be monetized in a relatively short period of time, through patents and the creation of intellectual property, and through growth in sales and profits, are probably best left to company level decision making. On the other hand, basic research which does not directly lead to financial benefits (for example, because the results are not patentable) needs to be promoted and funded by governments. Firms cannot be expected to devote major resources to programs that are unlikely to bring profits, even if there are potentially very broad societal benefits. In this case, subsidiarity is helpful in determining the roles of markets and decentralization on the one hand, and governments and centralization.

As a third example, consider the distinction between policy and regulation. Assets in energy industries are long-lived. On the other hand, governments face election pressures which can result in policies that are sometimes driven more by short-term political realities than by longer term societal objectives. Difficult as it may be, this tension can be mitigated by a clear separation between policy-making and regulation.[17]

Visualizing the Challenge

Rational carbon policy requires an understanding of the sources and uses of energy, and the resulting carbon flows. Especially useful visual representations are contained in Energy Flow and Carbon Flow diagrams, such as those in Figures 1 and 2 (See pages 39 and 40). "Pipe" diameters are intended to be roughly proportional to energy and carbon flows. Even a cursory examination is fruitful.[18]

Total 2014 primary energy (at the top of the diagram) approaches 21,000 petajoules (PJ) but roughly half is exported (oil and natural gas). Somewhat less than 80 per cent of this consists of hydrocarbons (coal, oil and natural gas). Coal is predominantly used in the generation of electricity and represents less than 10 per cent of total domestic primary energy. Natural gas and petroleum shares each exceed 30 per cent of domestic energy. Renewable sources – hydraulic, wind, solar, geothermal -- comprise about 13 per cent of the total. The remaining 10 per cent is produced from nuclear sources.

Next, consider the demand side which is divided into residential, commercial, industrial and transportation uses. The energy in each sector either produces "energy services" or is lost in the form of "rejected energy," the latter comprising roughly 50 per cent of total energy. The least efficient sector is transportation where about 75 per cent of the energy is "rejected." The most efficient is the industrial sector where only 20 per cent is 'rejected'. Overall, it might appear that humans are woefully inefficient, "wasting" well over half of the energy we produce, but this is primarily a reflection of the state of technology and the Second Law of Thermodynamics which states that whenever energy is transformed from one form to another, some of it is dissipated. In fact, we have already come a long way. Fires used to heat and cook in the pre-industrial era "wasted" 95 per cent or more of the energy embodied in the wood they burned.

Figure 2 illustrates the levels of carbon dioxide emissions arising from the various energy sources depicted in Figure 1. One might think of the two diagrams as fraternal twins – the first mapping supply and demand in Canadian energy markets, the second illustrating an important corresponding externality. The twins reveal important information about each other.[19]

Compare coal and natural gas. Although considerably more natural gas is used than coal, natural gas produces much less carbon dioxide per unit of energy.[20] In fact natural gas has about half the carbon footprint of coal. Petroleum has about two thirds the carbon footprint of coal.

These figures suggest that switching from coal to natural gas in electricity generation can have

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17 See, e.g., Adonis Yatchew, "How to redeem Ontario's electricity industry", *The Globe and Mail* (15 December 2015).
18 Such diagrams have come to be known as Sankey diagrams. See in particular, those produced by Lawrence Livermore National Laboratories in the US, online: LLNL <https://flowcharts.llnl.gov/>.
19 The distribution of energy sources varies significantly by Province and Territory. Quebec, Manitoba and British Columbia are generously endowed with hydraulic resources. Alberta, on the other hand, has massive hydrocarbon resources, and unsurprisingly has relied on these resources not only for its own energy supply but for jobs and exports. Similar diagrams may be prepared for each Province and Territory, but do not appear to be available from public sources.
20 These figures do not incorporate the release of greenhouse gases during the extraction process. Methane molecules have over 20 times the greenhouse impact of carbon dioxide and methane which escapes into the atmosphere (so called fugitive methane) may substantially increase the overall carbon footprint of methane.

a material, perhaps dramatic impact on CO_2 emissions. Even switching from oil to natural gas in transportation may provide some carbon relief. The availability of shale gas, exploitable at low production costs, combined with its carbon advantage, would seem to herald a "golden age of gas." Some argue that natural gas is the bridge fuel that will take us from the hydrocarbon era to a future low-carbon world.[21]

The switch from coal to natural gas and renewables has taken place in the Ontario electricity industry and is in the planning framework for Alberta. In the U.S., the availability of cheap natural gas as well as government initiatives have led to a major shift from coal to gas in electricity generation.[22]

On a global scale, the picture is not encouraging. The coal share of global emissions from combustion is just below 50 per cent, oil is at about 30 per cent and natural gas is 20 per cent.[23] One would think that a large migration from coal to natural gas would dramatically slow emissions growth, but this would not be a long term solution as natural gas is of course a hydrocarbon. Furthermore, in China, where coal is abundant and cheaper than natural gas, the use of the former fuel dominates the latter by an order of magnitude;[24] a new coal-fired generation station is being completed every few weeks. As per capita Chinese incomes rise, hydrocarbon use in transportation will continue to grow rapidly.

Conclusions

Historians advise us that we suffer from "presentism," a condition where current events, circumstances and attitudes are paramount in shaping our views. Instead, they counsel an historical perspective. In the formulation of rational carbon policy, two critical lessons are ignored at our peril. The first is that energy transitions take many years. Thus, if decarbonisation is critical, then we need to be realistic about time-frames. Accelerated transition can occur, but it would be most likely driven by technological innovation. The second lesson is that markets and incentives can provide very powerful mechanisms for bringing about the transition.

Scientists and engineers typically have a different conception of what constitutes rational policy from those held by economists. For the former, expediency through problem solving is typically the focal point. Economists, often teased for assuming away the problem,[25] focus first and foremost on creating incentives that are compatible with socially desirable outcomes. Political scientists, recognizing that politics is the "art of the possible" constrain recommendations of economists and scientists by focussing on that which is feasible. Politicians, regulators and lawyers, must of course put the ideas into practice.

Given their scarcity, it is essential that resources -- whether they are channeled through subsidies, taxes, foregone economic productivity or other mechanisms -- be expended prudently. Prudence requires not just a local but a global perspective. Transferability to other jurisdictions is key and should be a part of the policy evaluation mechanism. A multi-billion dollar expenditure in Canada which reduces carbon output domestically but is not transferable needs to be weighed against the expenditure of these funds on research and development of technologies that are more likely to be adopted elsewhere, particularly in developing economies where energy demand is growing voraciously.[26]

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21 See, e.g., MIT Energy Initiative, *The Future of Natural Gas*, (Cambridge: June 2011).

22 The fuel cost of gas-fired generation has at times fallen below the coal cost on an equivalent BTU basis. See, e.g., US Energy Information Administration, *Electricity Monthly Update*, (26 July 2016) , online: <https://www.eia.gov/electricity/monthly/update/resource_use.cfm#tabs_spot-2 >.

23 International Energy Agency, *CO_2 Emissions from Fuel Combustion* (2015), online: <https://www.iea.org/publications/freepublications/publication/CO2EmissionsFromFuelCombustionHighlights2015.pdf >.

24 Accurate data on Chinese emissions is difficult to obtain. In 2012, 68 per cent of energy consumed was from coal and 90 per cent was from hydrocarbons. Zhu Liu, *China's Carbon Emissions Report 2015*, (Cambridge: Harvard Kennedy School Belfer Center, May 2015).

25 "Assume you have a can opener" is a well-known quip about an economist's solution to being marooned on an island with skids of canned food and no tools.

26 Solar costs have dropped very dramatically, but are not yet at the point where they are widely affordable in the developing world. Some argue that in the absence of tax credits, residential solar power residential solar power will remain "far above grid parity in most American states for years to come", (David Rotman,"Paying for Solar Power", MIT Technology Review, 17 August 2015). Prices of Tesla battery packs have also dropped significantly, at the same time that storage capacity has increased. (Kevin Bullis, "Why We Don't Have Battery Breakthroughs", MIT Technology Review, 10 February 2015.) But they are still too expensive for widespread residential use.

The architecture of our policy and regulatory structures, and their relationship to markets is critical. We suggest that subsidiarity is a useful departure point for assessing suitable roles and responsibilities, and determining which decisions should be centralized and which should be decentralized. In addition, subsidiarity is helpful in the articulation and evolution of rational innovation policy, most importantly, in determining what we might expect markets to generate and what requires government support and resources. We also suggest that a sharper separation between policy-setting and regulation would reduce adverse aspects of politicized decision-making.

Surprisingly, Provincial and Federal energy and carbon flow charts are not available on a common and comparable basis. Their wide availability would inform and facilitate public debate, discussion and policy development. "Feel-good" strategies that need rationalization include: those that are particularly costly; those that are likely to export domestic carbon production to other jurisdictions (so-called carbon leakage);[27] and those that are unlikely to be transferable elsewhere, or adopted on a large scale.

The carbon challenge places greater pressure on liberal democracies. We have already observed polarizing and potentially destabilizing political trends, mostly of a populist nature. Conventional wisdom suggests that these movements have their roots in globalization, or more accurately in the distribution of its fruits. If growth slows because of the carbon constraint, social tensions in liberal democracies are likely to increase with greater competition for the "economic pie."[28] Innovation, which is at the heart of the prosperity of liberal democracies, provides the most promising route to the ultimate resolution of the carbon challenge. ■

[27] For example, carbon constraints that result in the migration of manufacturing from Canada, which relies relatively little on coal, to say China where coal is the dominant fuel source, may increase global carbon output.

[28] Separately, liberal democracies are likely to come under greater pressure from so-called illiberal democracies (a problematic term, in and of itself), but that discussion and its relationship to carbon and energy policies merits a separate paper.

Figure 1 - Canada Energy Flow

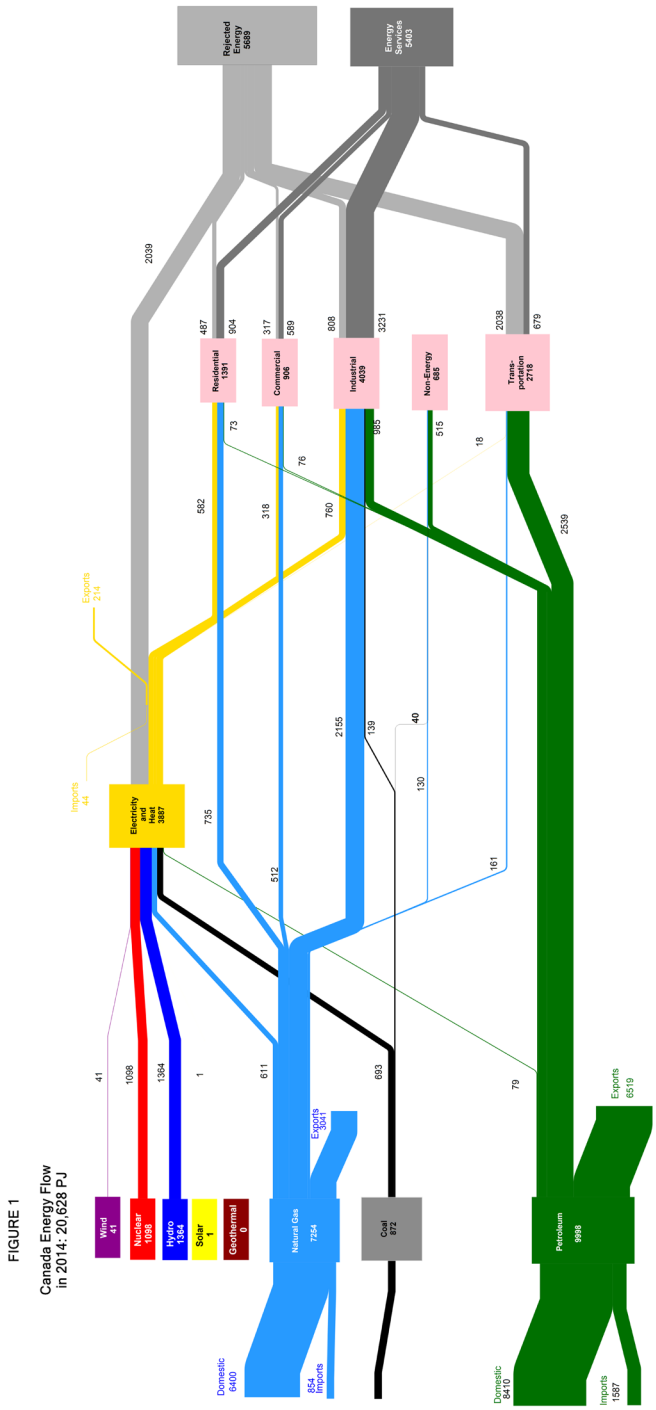

Figure 2 - Carbon Flow Emissions

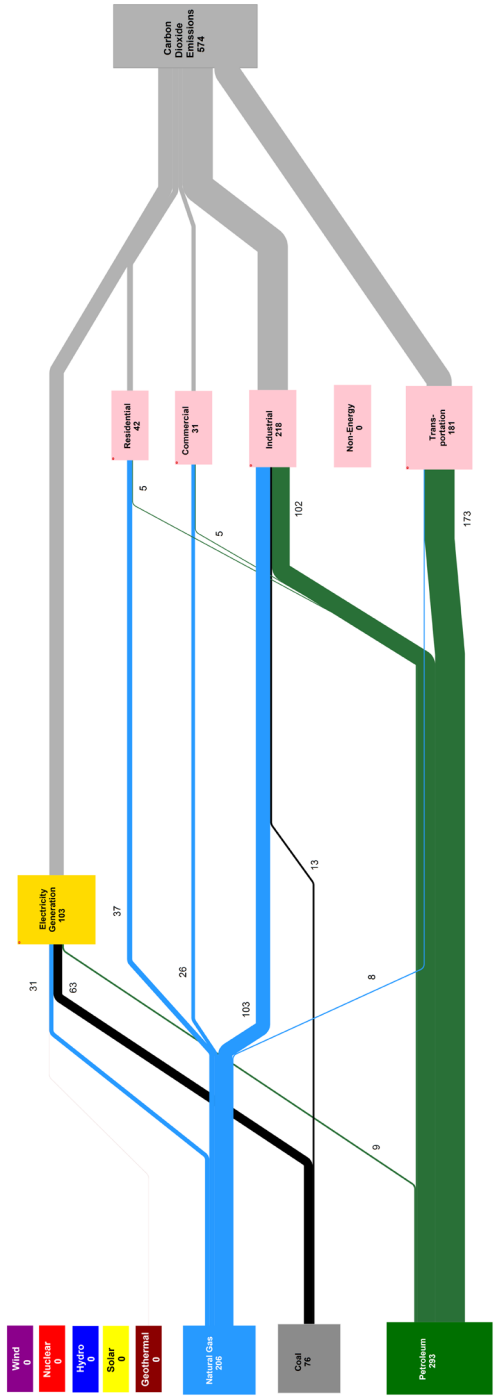

FIGURE 2
Canada Carbon Flow Emissions in 2014: 574 Million Metric Tons (Does not include other GHGs)

CONSUMER ADVOCACY IN ONTARIO'S ENERGY SECTOR: A NEW MODEL

*Adam Fremeth and Guy Holburn**

As energy costs in Ontario have continued to rise, the effective representation of consumers in regulatory rate-setting procedures and other hearings has become increasingly important. This Policy Brief reviews recent developments in the representation of consumer interests in regulatory procedures in Ontario, and contrasts new proposals with approaches to consumer advocacy in other jurisdictions.

In December 2015 the Government of Ontario passed Bill 112, titled "Strengthening Consumer Protection and Electricity System Oversight."[1] An important component of the Act requires the Ontario Energy Board (OEB) to assume responsibility for consumer representation, stating that "[t]he Board shall establish one or more processes by which the interests of consumers may be represented in proceedings before the Board, through advocacy and through any other modes of representation provided for by the Board."[2] This new requirement is consistent with the OEB's fundamental mandate to "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity services."[3]

In executing its role, the OEB both adjudicates on contested policy issues and participates as a party in hearings representing consumer interests, posing a potential conflict. OEB staff represent consumers in rate proceedings by submitting evidence, cross-examining witnesses, and making submissions. The dual set of responsibilities for the OEB came to attention in the 2015 Supreme Court case *Ontario Energy Board v Ontario Power Generation Inc* where Ontario Power Generation (OPG) appealed an OEB ruling that reduced allowed expenses relating to compensation and staffing at nuclear facilities. One element of the case hinged upon the tension between maintaining a tribunal's impartiality and having a fully informed adjudication of the issues, particularly in the case of judicial review. The OEB argued that, unlike in other jurisdictions that have an independent public consumer advocate with a statutory mandate, consumers in Ontario may not be adequately represented should it discontinue its advocacy role. Relying on prior jurisprudence, the Court provided guidance on striking the right balance between impartiality and informed adjudication. Of particular relevance for the OEB was the recognition by the Court that such impartiality concerns may weigh more heavily for adjudicatory tribunals which follow an adversarial process.[4] While the Supreme Court upheld the OEB's ruling, it brought to the forefront the challenges for consumer representation in Ontario's energy sector.

While Ontario does not have a public consumer advocate, energy consumer organizations are still active in OEB hearings. The OEB Act (1998) provides an opportunity for interested parties to participate in administrative hearings

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1 Bill 112, *An Act to amend the Energy Consumption Act, 2010 and the Ontario Energy Board Act, 1998,* 1st Sess, 41st Parl, Ontario, 2015 (assented to 3 December 2015), SO 2015, c 29.

2 *Ibid*, s 8.

3 *Energy Board Act*, SO 1998, c 15, s 1.

4 *Ibid* at para 59.

and processes by presenting arguments and evidence, providing expert witnesses, and by challenging utility arguments.[5] The OEB compensates such intervenors, funded through assessments levied on utilities, for expenses and professional fees. From April 2014 to March 2015 intervenor cost awards totaled $5.25 million, funded through regulated rates. Figure 1 lists the most active intervenors in order of cost awards received. They are mainly large purchasers of electricity or natural gas, power producers, environmental groups, vulnerable customer advocates, and commercial/rental property owners. Intervenors representing residential consumers account for a minority of overall intervenor cost awards.

Table 1. Intervenors in Ontario Energy Board Hearings (April 2014 – March 2015) - See table below.

Intervenors have argued that their involvement in regulatory procedures ensures utilities remain accountable to consumers, and that intervenor costs awards are needed to support engagement. The Public Interest Advocacy Centre (PIAC) states that the "current OEB regulatory process has saved millions of dollars for Ontario ratepayers by making the electricity distribution companies (EDCs) justify their claims for operating and capital expenses." PIAC claims that intervenors reduce utility rates by 3.8% on average, and argues that intervenor costs are minimal relative to the overall OEB budget.[6]

On the other hand, utilities have questioned the materiality of some intervenors' arguments and also whether they truly represent claimed constituent interests. In filings with the OEB for its review of the intervention process, Hydro One highlighted concern over a possible disconnect between some intervenors seeking awards and their constituents'

Table 1. Intervenors in Ontario Energy Board Hearings (April 2014 – March 2015)

Intervenor	Number of awards	Total cost awards
School Energy Coalition	27	$933,125.36
Vulnerable Energy Consumers Coalition	60	$701,177.58
Canadian Manufacturers & Exporters	25	$691,782.82
Energy Probe Research Foundation	38	$610,690.70
Building Owners & Managers Association	17	$438,548.66
Consumers Council of Canada	16	$328,779.15
Association of Major Power Consumers in Ontario	7	$285,982.09
Association of Power Producers of Ontario	8	$270,447.80
Federation of Rental-Housing Providers of Ontario	11	$227,440.12
Industrial Gas Users Association	15	$186,111.45
	Total	**$4,674,085.73**

Source: Ontario Energy Board, Cost Awards by Intervenor – April 1, 2014 – March 31, 2015, <http://www.ontarioenergyboard.ca/html/costawards/costawards_intervenor_2014.cfm>. Accessed: July 18 2016.

5 *Supra* note 3.

6 Public Interest Advocacy Centre, "Review of Framework Governing the Participation of Intervenors in Board Proceedings – Board File No. EB-2013-0301 Submissions of the Vulnerable Energy Consumers Coalition (VECC) and the Public Interest Advocacy Centre" (2013), online: <http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/411249/view/VECC_Comments_20130927.PDF>. In 2013 the OEB initiated a formal review of intervenor participation in regulatory proceedings (EB-2013-0301).

objectives. Hydro One sought documented filings (including policy statements, surveys, and minutes of consultation meetings) from intervening groups that demonstrated an intervenor understood the objectives of its constituency and was receiving direction from it.[7] Large electricity distributors have expressed particular concern with intervenors' duplication of positions, especially with that of OEB staff, arguing that cost awards should be directed only to intervenors who focus on issues with substantive implications for the case.[8]

CONSUMER ADVOCACY IN THE UNITED STATES AND IN CANADA

Other jurisdictions in the U.S. and elsewhere in Canada have adopted different approaches from Ontario to consumer representation in utility regulation. Since the early 1970s, 31 U.S. states and five Canadian provinces (Alberta, Manitoba, New Brunswick, Newfoundland and Labrador, and Nova Scotia) have created publicly-funded consumer advocates with mandates defined in legislation.[9] Common to these advocates is the mandate to represent residential or household consumers. Table 2 presents the list of U.S. states with consumer advocates along with information on budgets and staff. The typical state consumer advocacy office has a budget of $2.0 million and a staff of 15 employees.

Table 2. U.S. states with public consumer advocates - See table on following page.

Naturally there is considerable variation among consumer advocates in terms of their specific mandates, scope of authority, industries covered, and administrative resources. New Jersey and Alberta provide contrasting case study examples.

New Jersey Division of Rate Counsel

One of the strongest forms of public consumer advocate is found in New Jersey where the Division of Rate Counsel (DRC) advocates on behalf of ratepayers before the New Jersey Board of Public Utilities (BPU), the legislature, federal regulatory agencies and the courts. Consumer advocacy in the state dates back to the 1974 Department of the *Public Advocate Act,*[10] but the role has been broadened and empowered significantly since then. Its mission is to serve as an independent advocate and ensure that all classes of utility consumers receive safe, adequate and proper utility service at affordable rates that are just and nondiscriminatory. In addition, it works to ensure that consumers are knowledgeable about their ability to choose among utilities in a competitive power generation market.[11] New Jersey has a population of almost nine million, served by seven major electric and gas utilities.

The Director of the DRC is appointed by the state governor and operates within the Department of Treasury.[12] The current Director was appointed in 2007. The DRC budget, which is approved by the state legislature, is supported by annual assessments levied on utilities equal to a percentage of utilities' gross operating revenues. The 2015 budget was $7.8 million (18% increase from 2014), with a staff of 34 full-time employees, making it one of the largest state consumer advocacy organizations in the U.S.

The DRC has the authority to conduct investigations, initiate studies, conduct research, present comments and testimony before governmental bodies, issue reports, and produce and disseminate consumer guides.[13] It has the explicit authority to intervene in BPU

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7 *RE OEB Review of Framework Governing the Participation of Intervenors in Board Proceedings*, Hydro One Networks (Reponses to Board Questions), EB-2013-0301 (27 September 2013) (Ontario Energy Board), online: OEB <http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/412591/view/HONI_Comments_20130927.PDF>.

8 Large Electricity Distributors, *Re OEB Review of Framework Governing the Participation of Intervenors in Board Proceedings*, EB-2013-0301, Large Distributors (Phase One Submission) (27 September 2013) (OEB), online: OEB <http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/411246/view/Large%20Distributors_%20Phase%20One%20Comments_20130927.PDF>.

9 The states of Georgia, New York, and Wisconsin have dismantled utility consumer advocate institutions, while legislation has been proposed in Idaho but not yet passed into law. Other states and provinces offer consumer representation on an ad hoc basis through the Office of the Attorney General, consumer services offices, or by the staff of the regulatory commission.

10 NJ Rev Stat § 52:27EE-86 (2013).

11 US, State of New Jersey Division of the Rate Counsel, *About the New Jersey Division of Rate Counsel,* online: <http://www.nj.gov/rpa/about/>.

12 NJ Rev Stat § 52:27EE-47 (2013).

13 NJ Rev Stat § 52:27EE-48 (2013).

Table 2. U.S. states with public consumer advocates - See table on following page.

State	Office	Budget	Budget per State Capital	Full-Time Employees
Alabama	Consumer Interest Division	NA	NA	NA
Arizona	Residential Utility Consumer Office	1,335,000	0.196	8
Arkansas	Consumer Utility Rate Advocacy Division	419,129	NA	4
California	Office of Ratepayer Advocates	16,230,000	0.415	86
Colorado	Office of Consumer Council	1,735,576	0.318	7
Connecticut	Office of Consumer Counsel	2,618,000	0.729	13
Delaware	Division of Public Advocate	991,200	1.048	6
Florida	Office of Public Counsel	2,433,792	0.120	16.5
Hawaii	Consumer Advocate	3,031,508	2.118	23
Illinois	Citizens Utility Board	1,595,775	0.124	38
Indiana	Office of Utility Consumer Counsel	5,600,000	0.846	23
Iowa	Office of Consumer Advocate	3,137,588	1.004	16
Kansas	Citizens' Utility Ratepayer Board	876,129	0.301	6
Kentucky	Office of Rate Intervention	1,000,000	0.023	6
Maine	Office of the Public Advocate	1,676,000	1.261	8
Maryland	Office of Peoples' Counsel	3,793,805	0.632	19
Massachusetts	Office of Ratepayer Advocacy	2,353,721	0.346	19
Missouri	Office of Public Counsel	1,012,057	0.166	23
Montana	Montana Consumer Counsel	1,320,650	1.279	6
Nevada	Bureau of Consumer Protection	3,454,304	1.195	27
New Hampshire	Office of Consumer Advocate	700,789	0.527	5
New Jersey	Division of Rate Counsel	7,826,000	0.874	34
North Carolina	Division of the Public Staff	8,810,000	0.877	71
Ohio	Consumers' Counsel	5,600,000	0.482	35
Pennsylvania	Office of Consumer Advocate	5,533,000	0.432	28
Tennessee	Consumer Advocate and Protection Division	701,400	0.106	7
Texas	Office of Public Utility Counsel	2,201,622	0.080	25.5
Utah	Office of Consumer Services	1,000,200	0.334	8
Vermont	Public Advocacy Division	NA	NA	10
West Virginia	Consumer Advocate Division	1,034,376	0.561	6
Wyoming	Office of Consumer Advocate	2,038,778	3.479	5
	Average	**3,105,531**	**0.690**	**19.4**
	Median	**2,038,778**	**0.482**	**14.5**

Sources: Agency websites and communications, state budget documents.

NA – Not Available

rate hearings, and it automatically receives any petitions or filings that utilities submit to the BPU. When intervening in rate hearings, the DRC can access confidential utility or BPU information and employ the necessary resources to argue its position.[14]

The DRC has represented consumer interests in all 24 major electricity sector rate cases since 1990. The DRC was also involved in settlement negotiations in 17 cases that led to stipulated agreements, working with the BPU and other intervenors (who do not receive compensation from the BPU for their participation).

Unlike many other consumer advocates, the DRC has the authority to require the BPU to initiate rate proceedings for a utility when it "determines that a discontinuance or change in a required service or a rate, toll, fare, or charge for a product or service is in the public interest."[15]. The DRC acted on this authority in September 2011 when it requested that the BPU initiate a case to investigate the possibility of overearnings by Jersey Central Power & Light (BPU Docket D-EO-11090528).[16] In its petition for the rate case, the DRC argued that the utility had earned 3.9 percentage points in excess of its allowed rate of return. Ultimately, the BPU ordered a 20% decrease in the utility's allowed revenues, which lowered the average customer's monthly bill by $5.74.[17]

Alberta Utility Consumer Advocate

The Alberta Utility Consumer Advocate (UCA) is a weaker form institution than the New Jersey Division of Rate Counsel. It operates within a government department and does not have the same degree of arm's length independence as the DRC. As a result, the Director of the UCA responds to direction from, and reports to, a Deputy Minister. The UCA's powers are not clearly defined in legislation nor is it empowered to automatically access records or intervene in hearings. Legislative proposals and recommendations to strengthen the UCA have arisen several times but have not been implemented.[18]

The UCA represents consumer interests before the Alberta Utilities Commission (AUC) and other bodies. It was established by regulation in 2003 in response to a report by a government appointed advisory council that studied the state of electricity deregulation in the province, which highlighted how anticipated savings had not realized and how customer complaints had increased.[19] The UCA's responsibilities were statutorily defined in 2007.[20] Its mission since inception has been to ensure residential, farm and small business consumers have information and representation in the regulation of Alberta's electricity and natural gas energy industries.[21]

The UCA is situated in Service Alberta, whose Minister is responsible for appointing and overseeing the advocate. Its statutory responsibilities are sparsely defined, with few legislated details on its objectives, powers, access to necessary resources, or budget. The 2007 legislation, however, enables the Lieutenant Governor in Council to make regulations through Ministerial Orders that direct the activities of the UCA. Unlike the New Jersey DRC, the UCA is limited in its ability to participate in AUC hearings. For instance, it does not have the authority to obtain utility or regulatory information[22], nor is it granted automatic intervenor status in AUC hearings, which it must petition for. Further, the 2007 Alberta Utilities Commission Act and a 2008 rule by the AUC limit the ability for interested parties, such as municipalities and consumer groups, to intervene and claim compensation for their expenses in AUC hearings.[23]

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14 NJ Rev Stat § 52:27EE-47 (2013); NJ Rev Stat § 52:27EE-48(b) (2013).
15 NJ Rev Stat § 52:27EE-48 (2013)
16 *Re 2010 Base Rate Filing, Jersey Central Power and Light Co* (Order), Docket No EO11090528 (2012) (BPU).
17 *Re 2012 Base Rate Filing, Jersey Central Power and Light Co* (Order), Docket No ER12111052 (2015) (BPU).
18 In earlier versions of the 2007 Alberta Utilities Commission Act there were significant details outlining the responsibilities and administration of the UCA that were stripped away be amendments to the Act. A later attempt in 2010 to pass a Utilities Consumer Advocate Act that would have significantly empowered and insulated the UCA was defeated after the 2nd reading.
19 Alberta Advisory Council on Electricity Report to the Alberta Minister of Energy" (Edmonton: Alberta Energy 2002).
20 *Government Organization Act,* RSA 2000, c G-10, Schedule 13.1.
21 The original incarnation of the UCA was enacted without legislation by the Premier's office. At the time, the UCA was housed within the Ministry of Government Services and the head advocate held a deputy minister role.
22 *Utilities Consumer Advocate Regulation*, Alta Reg 190/2014.
23 *Alberta Utilities Commission Act,* SA 2007, c A-37.2, s 22. The *Alberta Utilities Commission Act* limited compensation for intervention to a "local intervener" who (a) has an interest in, and (b) is in actual occupation of or is entitled to occupy land

Legislative proposals to clarify the UCA's duties and empower it to more effectively represent consumer interests have failed to be enacted several times.[24] A 2012 study by an independent committee established by the Alberta Department of Energy recommended that the UCA be strengthened and re-established as an independent, arm's length agency, similar to that of the Alberta Utilities Commission or the Alberta Electric System Operator.[25]

Despite these structural limitations, the UCA has been active in its advocacy work. In 2015/16 it participated in 44 AUC proceedings and responded to over 30,000 inquiries from customers regarding their utility service.[26] It has also been active in appellate cases at the Alberta Court of Appeal and the Supreme Court of Canada. It is supported by a $7.6M budget, which is funded through government collection of fees included in electric and gas distribution rates.

THE IMPACT OF INDEPENDENT CONSUMER ADVOCATES

Consumer advocates often claim that they cause regulators to establish lower rates than otherwise, though evidence is typically anecdotal and difficult to verify in the absence of a well-defined counterfactual. For instance, the Alberta Utility Consumer Advocate argued that their interventions in 2013 led to $38.3M in savings, equivalent to a 400% return on investment on their annual budget. Similarly, the advocate in the state of Illinois has claimed that since its inception in 1984 it has saved ratepayers more than $20 billion, yielding a 300% return on investment.[27] A study by the American Association of Retired Persons (AARP) asserts even larger returns of several thousand percent to the budgets of consumer advocates in Maryland, Maine, Ohio and Pennsylvania.[28]

Academic research on the impact of consumer advocates provides some independent support for such claims, although on a more modest scale. An early study of a cross section of 12 U.S. states suggested that consumer advocates were more effective than grass roots citizen groups in providing representation at regulatory hearings.[29] A later study of regulatory rulings in Florida between 1972 and 2002 found that consumer advocates have been instrumental in driving innovation in regulatory processes, such as the adoption of negotiated or stipulated settlements.[30]

A 2014 academic study co-authored by Ivey Business School faculty provides the first large scale statistical analysis assessing the impact of consumer advocates on regulatory policy decisions for U.S. utilities.[31] Using data on all rate reviews conducted for U.S. utilities from 1980 to 2007, the paper found that regulators in states with independent consumer advocates established allowed financial rates of return that were on average 0.45 percentage points lower than utilities in states without advocates. For the average utility this effect equates to about a 0.56% decrease in revenue. The study also demonstrates that utilities in states with consumer advocates had substantially lower residential rates relative to commercial and industrial rates. On average, the residential to non-residential rate ratio was 0.12 percentage points lower for utilities in states with consumer

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that is or may be directly and adversely affected by a decision or order of the Commission in or as a result of a hearing or other proceeding of the Commission on an application to construct or operate a hydro development, power plant or transmission line under the Hydro and Electric Energy Act or a gas utility pipeline under the *Gas Utilities Act*, but unless otherwise authorized by the Commission does not include a person or group or association of persons whose business interest may include a hydro development, power plant or transmission line or a gas utility pipeline.

24 In 2007 amendments to the *Alberta Utilities Commission Ac*t stripped out an entire section that would have detailed the responsibilities and administration of the UCA. A later attempt in 2010 to pass a *Utilities Consumer Advocate Act* that would significantly empower and insulate the UCA was defeated after the 2nd reading.

25 Retail Market Review Committee, "Power for the people" (2012), online: Energy Alberta <http://www.energy.alberta.ca/Electricity/pdfs/RMRCreport.pdf>.

26 Service Alberta, *Annual Report 2014/2015*, (Edmonton: Service Alberta, 2015) online: Service Alberta <https://www.servicealberta.ca/pdf/annual/SA_Annual_Report_14-15.pdf.>.

27 See the Illinois Citizens Utility Board website: http://www.citizensutilityboard.org/accompfull.html.

28 AARP, "AARP Report: David v. Goliath: Why Consumers are losing New York's utility game" (January 2014), online: AARP <http://states.aarp.org/aarp-report-why-new-york-consumers-are-losing-the-utility-rate-hike-game/>.

29 William Gormley, "Public Advocacy in Public Utility Commission Proceedings" (1981) 17:4 The Journal of Applied Behavioral Science 446.

30 Stephen Littlechild, "Stipulated Settlements, the Consumer Advocate, and Utility Regulation in Florida" (2009) 35:1 Journal of Regulatory Economics 96.

31 Adam Fremeth, Guy Holburn, and Pablo T. Spiller, 2014. "The Impact of Consumer Advocates on Regulatory Policy in the Electric Utility Sector" (2014) 161:1 Public Choice 157.

advocates. Overall, the authors find that states that helped organize residential consumers by creating publicly funded consumer advocates led regulators to weigh consumer interests, and especially residential consumers, more heavily in policy decisions.

Conclusions

For governments reviewing their approach to consumer representation in utility regulation, the various experiences of states and provinces in the U.S. and Canada over the last forty years can provide valuable guidance. The accumulated evidence from experience and academic research suggests that consumer interests can be robustly safeguarded in regulatory procedures when governments institutionalize independent consumer advocates with clear mandates, resources, and jurisdictional authority. The ability of advocates to effectively represent consumer interests and to shape policy depends on several elements:

- Institutional autonomy from ministries or other agencies, as established in legislation.
- A specific mandate to represent consumers in agency hearings, legislative forums, and before the courts, by presenting testimony and calling expert witnesses; the authority to obtain utility or agency documents and filings, and to cross examine other intervenors
- Sufficient budget to fund all activities of the consumer advocate office; the ability to hire independent staff and experts.
- The authority to initiate investigations or reviews of utility practices.
- A professional process for selection and appointment of the director of the office. ■

TRANSMISSION COMPETITION IN THE UNITED STATES: THE NEW REALITY

*Scott Hempling**

Readers of a certain age learned as infants that "transmission is a natural monopoly." If so, then "transmission competition" is an oxymoron, right? Wrong, said FERC. In Order 1000, FERC directed incumbent transmission owners to delete the contract clauses they wrote to block their competitors. Several still-resistant owners then challenged FERC's deletion directive on *Mobile-Sierra* grounds. Two appellate courts just upheld FERC. Is the path finally clear for true transmission competition? No. First, some history.

A Half-Century of Struggle

It's been nearly 50 years since Congress authorized the Nuclear Regulatory Commission to require nuclear plant operators to offer nondiscriminatory transmission access to their competitors.[1] It's been nearly 30 years since FERC first found that a regional merger would be anticompetitive unless conditioned on nondiscriminatory transmission access.[2] It's been almost 25 years since the Energy Policy Act of 1992 authorized FERC to order nondiscriminatory transmission access directly (albeit in only narrowly defined circumstances). It's been 20 years since FERC's landmark Orders 888 and 889 found that transmission "haves" routinely and unduly discriminated against "have-nots," and therefore required every investor-owned utility to file "open access transmission tariffs."[3] It's been 16 years since FERC found, in Order 2000, that regional transmission organizations can reduce discrimination.[4] It's been nearly 10 years since FERC held, in its Order 890, that the 100-page tariff required of the transmission "haves" was insufficient to prevent discrimination in access and pricing.[5] And it's been five years since FERC found, in Order 1000, that even with Orders 888, 889, 890 and 2000, transmission "haves" still could discriminate—unless there was a regional planning process in which buyers

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1 *See* Pub. L. 91-560, 84 Stat. 1472 (1970) (adding Section 105(c) to the Atomic Energy Act of 1954, requiring the NRC to conduct antitrust reviews of nuclear plant applicants and authorizing NRC to condition operating licenses to prevent anti-competitive conduct, including withholding access to an electricity source then viewed as "too cheap to meter"). The NRC imposed such conditions in *Consumers Power Co.*, 6 N.R.C. 887, 1036-44 (1977); *Toledo Edison Co. & Cleveland Elec. Illuminating Co.*, 10 N.R.C. 265, 327-34 (1979); and *Alabama Power Co.*, 13 N.R.C. 1027, 1061 (1981).

2 *Utah Power & Light & PacifiCorp*, 45 F.E.R.C. para. 61,095 (1988).

3 *Promoting Wholesale Competition through Open Access Non-Discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 75 F.E.R.C. para. 61,080 (1996).

4 *Regional Transmission Organizations*, Order No. 2000, 89 FERC 61,285 (1999).

5 *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, F.E.R.C. Stats. & Regs. para. 31,241, 72 Fed. Reg. para. 12,266 (2007).

could describe their needs and competitive transmission providers could offer solutions.[6]

But Order 1000 also found that all these Orders—888, 889, 890, 2000 and even 1000—were insufficient to ensure competition because of one large fly in the ointment: the incumbents' "right of first refusal." So Order 1000 ordered its removal. Still unwilling to accommodate competition, transmission incumbents fought back in three separate court cases—all losers. In baseball, three strikes and you're out. In utility regulation, not necessarily. Let's see why.

The ROFR Wall Comes Down

For newcomers to our field: A regional transmission organization (RTO) is a nonprofit organization, voluntarily formed by transmission owners but run by a board that is legally independent of those owners (and of all other market participants). The "region" covered by an RTO (sometimes called its "footprint") is defined by the service territories of the transmission owners that formed or joined the RTO. Within its region, the RTO is the legal provider of transmission service, controlling both operations and planning.

The RTO has control of operations and planning because each transmission owner signed standard contracts granting that control. Under those contracts, each transmission owner retains ownership of its facilities but must carry out directives issued by the RTO. Those RTO directives can include orders to build or expand transmission facilities, when and where the RTO deems it necessary.

The RTO contracts were drafted largely by the transmission owners, since it was their decision to form the RTOs. Like any rational actor, they drafted language to serve their interests. Transmission is a source of profit and, because of its natural monopoly features, a potential source of market power. ("Market power" is the ability to charge prices above competitive levels, for a sustained period of time, without an unacceptable loss of sales.) To keep those benefits to themselves, the initial transmission owners wrote into the contracts a "right of first refusal" (to industry insiders, a ROFR): If the RTO identified a need for a new transmission facility within an owner's service territory, the right to build and own the facility would lie with that owner, even if competitors were willing and able to do the job. (The ROFR applied only to facilities needed for "regional" purposes, as opposed to more "local" facilities.)

FERC initially approved these provisions. But by 2011 FERC realized that while transmission was a natural monopoly service, there could be competition to provide that service. Allowing the incumbent an automatic right to build, when others might do it better, faster and less expensively, was inconsistent with the Federal Power Act's consumer protection purpose. So in Order 1000, FERC held that the ROFR violated the statutory prohibition against "practices" that are "unjust and unreasonable" and/or "unduly discriminatory or preferential." The transmission owners had to delete the ROFR from the contracts.

FERC's goal was twofold: to "make it possible for non-incumbent developers to compete and propose more efficient or cost-effective [regional] transmission solutions," and "to eliminate practices that have the potential to undermine the identification and evaluation of more efficient or cost-effective alternatives to regional transmission needs." FERC's reasoning was straightforward: "[I]t is not in the economic self-interest of public utility transmission providers to expand the grid to permit access to competing sources of supply," or "to permit new entrants to develop transmission facilities, even if proposals submitted by new entrants would result in a more efficient or cost-effective solution to the region's needs." Indeed, why would a prospective entrant even offer a proposal, if the ROFR-armed incumbent could just copy it and carry it out? The ROFR thus both prevented competition and it reduced the flow of innovative ideas. As the D.C. Circuit said, upholding FERC: "Not only would non-incumbents be unlikely to recoup the full benefits of their proposal, but they would not even be able to recoup the costs of identifying the need and making a proposal that would address it."[7]

***Mobile-Sierra* Protection: Unavailable for Anti-Competitive Clauses**

The incumbents had one more shot. Order 1000 invited them to argue, in subsequent submissions, that eliminating the ROFR violated the *Mobile-Sierra* doctrine. A judicial

6 *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC para. 61,051 (2011).

7 *South Carolina Public Service Authority v. FERC*, No. 12-1232 (D.C. Cir. Aug. 15, 2014).

interpretation of the Federal Power Act, *Mobile-Sierra* limits FERC's authority to modify FERC-jurisdictional contracts without the contracting parties' consent. That limitation takes the form of a rebuttable presumption: When "sophisticated parties" freely negotiate a contract at arm's length, FERC must presume that the contract terms are "just and reasonable" and therefore lawful. The presumption can be rebutted (i.e., FERC can declare the contract unlawful) only if its terms cause "serious harm" to the public (or as the Supreme Court once stated, only in circumstances of "unequivocal public necessity").[8]

So the transmission owners argued *Mobile-Sierra*. In three separate court cases, they accused FERC of eliminating the ROFR without finding "serious harm." They lost. The D.C. Circuit upheld FERC's two key findings. *First*, the ROFR was not "the product of adversarial negotiations between sophisticated parties pursuing independent interests." (According to FERC, the "negotiations" were not arm's length; they were "among parties with the same interest, namely, protecting themselves from competition in transmission development.") *Second*, Mobile-Sierra contract protection "does not extend to anti-competitive measures"; specifically, "disincentives for nonincumbents to identify and commit resources to cost-effective solutions to transmission needs."[9]

That brings us to the Seventh Circuit opinion, bluntly presented by the venerable Judge Posner. "No one likes to be competed against. ... [Incumbents] don't want to have to bid down the prices at which they will build new facilities in order to remain competitive. ... [C] ontract rights are not sacred, especially when they curtail competition." Yes, Mobile-Sierra deference is due parties who are "sophisticated"; and yes, the incumbents were sophisticated—"sophisticated enough to understand the benefits of a contract that would give each party protection against competition in the creation of new facilities." Judge Posner concluded: "[A] contract in which the parties are seeking to protect themselves from competition from third parties (cartels are the classic example of such contracts)" does not deserve Mobile-Sierra deference.[10]

Legal Uncertainty: The States, Again

Two emphatic unanimous opinions. Has the path to transmission competition now been cleared? No. What the transmission incumbents lost at FERC, they could seek from the states. FERC has the power to delete anti-competitive language from FERC-jurisdictional contracts. FERC does not have the power to delete anti-competitive language from state statutes.

Crafting this next sentence took me only two minutes: "No transmission facility may be constructed and owned within a service territory except by a public utility obligated to serve retail customers in such service territory." By enacting these 26 words, a state would protect its in-state transmission monopolies from competition. The cost-increasing effects would fall on its own citizens (industrial, commercial and residential consumers), but also on customers throughout the region (because we are talking about regional facilities). If each state does the same thing, each state guarding its own utilities against competition from other states' utilities, the states will have, once again, formed a circular firing squad.[11]

A state law conflicting directly with FERC's policies would raise judicial eyebrows. How far, we don't know. The preemption analysis that felled New Jersey's and Maryland's actions (specifically, their financial support of chosen

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8 The doctrine is named after a pair of Supreme Court opinions issued in 1956—the same year Don Larsen pitched baseball's only World Series perfect game (on Oct. 8, 1956—the date on my driver's license). *See United Gas Pipe Line Co. v. Mobile Gas Corp*., 350 U.S. 332 (1956), and *FPC v. Sierra Pacific Power Co*., 350 U.S. 348 (1956). See also *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968) ("Setting aside a contract rate requires a finding of unequivocal public necessity"). The doctrine was restated, with more clarity, in *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527 (2008).

9 *Oklahoma Gas & Electric Co. v. FERC*, No. 14-1281, slip opinion at 10 (D.C. Cir. July 1, 2016).

10 *MISO Transmission Owners v. FERC*, No. 14-2153 (Apr. 6, 2016). In a separate case,affiliates of FirstEnergy, Public Service Electric & Gas, Exelon, and PPL Corp. also challenged FERC's decision. The D.C. Circuit dismissed that challenge for lack of jurisdiction, finding that the petitioners had failed to preserve their arguments before FERC. *American Transmission Systems, Inc., et al. v. Federal Energy Regulatory Commission*, Nos. 14-1085 and 14-1136 (D.C. Cir. July 1, 2016).

11 For other examples, see these essays: FPA "Power Grab": On Whose Foot is the Shoe? And Maryland's Supreme Court Loss: A Win for Consumers, Competition and States.

generators bidding into regional markets)[12] would not apply. Those states had entered FERC's domain, by effectively setting FERC-jurisdictional prices. Here, states would argue they are remaining within their own domain, by deciding who can own the facilities that serve their residents.

Let's hope that in this season of patriotism, we remember our Pledge of Allegiance: "one nation under all, indivisible." ■

12 *See* Maryland's Supreme Court Loss: A Win for Consumers, Competition and States.

THE NORTHERN GATEWAY PROJECT AND THE FEDERAL COURT OF APPEAL: THE REGULATORY PROCESS AND THE CROWN'S DUTY TO CONSULT

Keith B. Bergner[1]

In *Gitxaala Nation v Canada* ("*Northern Gateway",* or *"FCA decision")*[2], a 2-to-1 majority of the Federal Court of Appeal quashed the June 2014 Order in Council that required the National Energy Board ("NEB" or "Board") to issue Certificates of Public Convenience and Necessity ("CPCNs") for the Northern Gateway Project. The regulatory approval process and the decision of the then Governor in Council to approve the Northern Gateway Project had been challenged on a number of administrative grounds and on the basis that consultation with Aboriginal groups at various stages had been inadequate. All of the administrative law challenges and a majority of the consultation challenges were rejected. However, two judges (the "Majority") concluded that the Order in Council and the CPCNs should be quashed on the grounds that Canada had not discharged its duty to consult in the period following the regulatory process but prior to the Governor in Council decision. A dissenting judge of the Court would have upheld the approval.

The decision is important for the light it sheds on the interplay of the Crown's duty to consult Aboriginal groups and a regulatory review/ environmental assessment process. The decision brings into focus the legislative scheme arising from the 2012 changes to the *National Energy Board Act*[3] and the *Canadian Environmental Assessment Act, 2012*[4]. The Court focused on the Governor in Council as the "only meaningful decision-maker" and zeroed in on the government consultation process that preceded the Governor in Council decision. The approach reflected in this decision has important practical implications for participants in the review and decision-making processes for major projects in Canada.

The Project

The proposed Northern Gateway Project ("Project") consists of two pipelines (and associated facilities) between Bruderheim, Alberta and Kitimat, British Columbia. One 36-inch pipeline would transport an average of 525,000 barrels per day of petroleum west from Alberta to Kitimat—where it would be loaded onto tankers for delivery to export markets. The second 20-inch pipeline, in the same right of way, would carry an average of 193,000 barrels per day of

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1 Keith Bergner, a partner with the law firm of Lawson Lundell, LLP, practices Aboriginal and regulatory/energy law. http://www.lawsonlundell.com/team-Keith-Bergner.html
It is the policy of the *Energy Regulation Quarterly* to disclose when a contributor acted as counsel or co-counsel in court cases and/or regulatory hearings discussed in an article or case comment. In the spirit of full disclosure, it is noted that Keith B. Bergner of Lawson Lundell acted as counsel for the Canadian Association of Petroleum Producers as an Intervenor before the Joint Review Panel and Lewis L. Manning, Keith B. Bergner and Toby Kruger of Lawson Lundell acted as counsel for the Canadian Association of Petroleum Producers as an Intervenor before the Federal Court of Appeal.

2 *Gitxaala Nation v Canada,* 2016 FCA 187 [*FCA Decision*].

3 *National Energy Board Act*, RSC 1985, c N-7 [*NEBA*].

4 *Canadian Environmental Assessment Act, 2012,* SC 2012, c 19.

condensate east from Kitimat to Bruderheim. The associated facilities include storage tanks and marine terminals facilities.

The Regulatory Review and Hearing Process

The proposed Project triggered the federal environmental assessment process and the two inter-provincial pipelines triggered a requirement to obtain CPCNs. In 2006, the NEB and the Canadian Environmental Assessment Agency ("Agency") each referred the Project to a joint review panel ("JRP" or "Panel") to conduct a review under the *National Energy Board Act*, and an environmental assessment under the (then-current 1992 version of the) *Canadian Environmental Assessment Act*[5].

In 2009, the CEA Agency released a document that outlined the Government of Canada's "whole-of-government approach" to Aboriginal consultation. This framework laid out a five phase consultation process:

- *Phase I: Preliminary Phase* — The Agency consults on the JRP Agreement and the Agency and the NEB provide information on their respective mandates and the JRP process.

- *Phase II: Pre-Hearing* — The Agency and the NEB continue to provide information on the JRP process and encourage Aboriginal groups to participate in the JRP process.

- *Phase III: Hearing* — Aboriginal groups and federal agencies with regulatory responsibilities in the Project participate in the hearing.

- *Phase IV: Report/Decision* — Crown consultation carried out on the report of the JRP prior to consideration of the response by Governor in Council.

- *Phase V: Regulatory/Permitting* — Consultation on permits or authorizations which other federal departments are requested to issue.[6]

In 2010, the Proponent filed its application for the Project. In 2011, the JRP issued a Hearing Order that contemplated both "community hearings" and "final hearings". The community hearings got underway in early-2012. The Panel heard oral statements from 1,179 individuals in 17 communities.[7]

In mid-2012, the *Jobs, Growth and Long-Term Prosperity Act*[8] entered into force, enacting the *Canadian Environmental Assessment Act, 2012*, and amending the *National Energy Board Act*. (The impact of these amendments is discussed further below.)

In late-2012, the "final hearings" began. A total of 206 intervenors and 12 government participants registered for the formal hearing process. Final arguments were heard in Terrace, BC in June 2013. In addition to the Proponent, 56 parties submitted written final arguments.[9]

In December 2013, the JRP issued its two volume report recommending approval of the Project, subject to 209 conditions. The Panel concluded that the Project would be in the public interest and found that the "potential benefits for Canada and Canadians outweigh the potential burdens and risks."[10]

Starting in December 2013 and continuing into early 2014, Canada undertook "Phase IV" consultation with Aboriginal groups. (This process is discussed further below.)

On June 17, 2014, the Governor in Council issued its decision by Order in Council accepting "the Panel's finding that the Project, if constructed and operated in full compliance with the conditions …, is and will be required by the present and future public convenience and necessity" and that "the Project is not likely to cause significant environmental effects."[11]

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5 *Canadian Environmental Assessment Act*, SC 1992, c 37.
6 Canadian Environmental Assessment Agency, *Approach to Crown Consultation for the Northern Gateway Project,* (Ottawa: CEAA, February 2009), online: CEAA < http://www.ceaa.gc.ca/050/documents_staticpost/cearref_21799/83452/Vol1_-_Part07.pdf>.
7 National Energy Board & Canadian Environmental Assessment Agency, *Connections: Report of the Joint Review Panel for the Enbridge Northern Gateway Project*, vol 1 (Calgary: NEB, 2013) at 14 [*JRP Report*].
8 *Jobs, Growth and Long-Term Prosperity Act*, SC 2012, c 19.
9 *JRP Report, supra note 7* at 15.
10 *Ibid* at 71.
11 PC 2014-809, (2014) C Gaz I, 1645.

On June 18, 2014, the NEB issued two CPCNs—one for the oil pipeline and associated facilities and one for the condensate pipelines and associated facilities.

The Legal Proceedings

The above regulatory review and decision-making process led to 18 separate legal challenges[12]:

- Five notices of application for judicial review challenging the December 2013 Report of the Joint Review Panel;[13]
- Nine notices of application for judicial review challenging the June 2014 decision of the Governor in Council;[14] and
- Four notices of appeal against the National Energy Board's issuance of the Certificates.[15]

All of these separate proceedings were consolidated resulting in "one of the largest proceedings ever prosecuted" in the Federal Court of Appeal.[16]

The Majority Decision (Dawson and Stratas JJ.A.)

In broad terms, the Court considered: (i) whether the administrative decisions should be quashed under administrative law principles, and (ii) whether the Order in Council and the CPCNs should be quashed because Canada has not fulfilled its duty to consult with Aboriginal peoples.

The Administrative Law Issues

The Court reviewed in detail the legislative scheme arising from the *National Energy Board Act* and the *Canadian Environmental Assessment Act, 2012* and characterized it as "a complete code for decision-making regarding certificate applications."[17]

The Court concluded that "for the purposes of review the only meaningful decision-maker is the Governor in Council" and that, in this legislative scheme, "no one but the Governor in Council decides anything."[18]

The other administrative steps in the process (i.e. the JRP Report and the NEB decision) were not seen to be the focus of review.

- Regarding the Report of the Joint Review Panel, the Court concluded that applications for judicial review did not lie since "[n]o decisions about legal or practical interests had been made."[19] Accordingly, these five applications for judicial review were dismissed.
- Regarding the issuance of the CPCNs, the Court conclude that the NEB "also does not really decide anything, except in a formal sense" and "does not have an independent discretion to exercise or an independent decision to make after the Governor in Council has decided the matter."[20] Accordingly, since the Order in Council was quashed, the CPCNs were also quashed.

In the Court's view, under this legislative regime, "the primary attack must be against the Governor in Council's Order in Council."[21] Having narrowed the focus to the one decision, the Court then reviewed it on administrative law principles. The

12 There was a further legal proceeding commenced in the BC Supreme Court where the petitioners sought and obtained, by judicial review, a number of declarations setting aside, in part, the Equivalency Agreement entered into between the Province of British Columbia, by way of the Environmental Assessment Office and the National Energy Board. See: *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34. The implications of this decision are beyond the scope of the current case comment.

13 Filed by the Federation of British Columbia Naturalists (A-59-14), ForestEthics Advocacy Association et al. (A-56-14), Gitxaała Nation (A-64-14), Haisla Nation (A-63-14); and Gitga'at First Nation (A-67-14).

14 Filed by the Federation of British Columbia Naturalists (A-443-14), Gitxaała Nation (A-437-14), ForestEthics Advocacy Association (A-440-14), Gitga'at First Nation (A-445-14), The Council of the Haida Nation (A-446-14), Haisla Nation (A-447-14), Kitasoo Xai'Xais Band Council (A-448-14), Nadleh Whut'en Band (A-439-14), and Unifor (A-442-14).

15 Filed by ForestEthics Advocacy Association (A-514-14), Gitxaala Nation (A-520-14), Haisla Nation (A-522-14), and Unifor (A-517-14).

16 *FCA decision, supra* note 2 at para 71.

17 *Ibid* at para 119.

18 *Ibid* at paras 120-121.

19 *Ibid* at para 125.

20 *Ibid* at paras 126-127.

21 *Ibid* at para 127.

Court concluded that the standard of review for decisions such as this—discretionary decisions founded upon the widest considerations of policy and public interest—is reasonableness and that the Governor in Council is entitled to "a very broad margin of appreciation" in making its discretionary decision. [22] Given this conclusion and based on the record before the Governor in Council, the Court was ultimately not persuaded that the Governor in Council's decision was unreasonable on the basis of administrative law principles.[23]

The Duty to Consult Issues

Notwithstanding that it survived review on administrative law grounds, the Court found that, under this legislative scheme, the Governor in Council must consider whether Canada has fulfilled its duty to consult when considering a project under the *National Energy Board Act*. The Court reviewed the 'most salient' concerns about the nature of the consultation process.[24] In the interest of time and space, this comment will focus only on a limited number of these issues that most keenly highlight the interplay of the regulatory tribunal process and the Crown's duty to consult.

Phase I – Consultation about the regulatory process

A key concern raised was that Canada's consultation framework was unilaterally imposed on the First Nations. The Court disagreed. It found that "from the outset Canada acknowledged its duty of deep consultation with all affected First Nations" and, in Phase I, provided information, sought and obtained comments on the proposed consultation process, and reasonably addressed concerns expressed by First Nations.[25]

Phase III – Over-delegation by reliance on the Joint Review Panel process

A further key concern was that the consultation process was "over-delegated" and that it was unreasonable for Canada to integrate the Joint Review Panel process into the Crown consultation process. It was argued that meaningful consultation requires a two-way dialogue whereas the Panel process was a quasi-judicial process and that the formalities of that process were not conducive to meaningful consultation. The Court disagreed. It found that "Canada did not inappropriately delegate its obligation to consult to the Joint Review Panel – as evidenced by the existence of Phase IV of the consultation process in which there was to be direct consultation between Canada and affected Aboriginal groups following the Joint Review Panel process and before the Governor in Council considered the Project."[26] This process "provided affected Aboriginal groups with the opportunity to learn in detail about the nature of the Project and its potential impact on their interests, while at the same time affording an opportunity to Aboriginal groups to voice their concerns."[27]

Thus, up to the issuance of the JRP report—essentially the end of the public hearing process—no member of the Court found flaws with the regulatory review and/or consultation process. However, when looking at the consultation process that followed the JRP report and leading up to the Governor in Council decision, the Majority and the dissenting judge took a different view of the adequacy of Canada's consultation process.

Phase IV – Consultation prior to the Governor in Council decision

While the concerns about the creation, structure and early stages of the regulatory process were dismissed, the Majority found that Canada's execution of the Phase IV consultation process was "unacceptably flawed and fell well short of the mark."[28] The Majority noted that Phase IV was "a very important part of the overall consultation framework"—especially given that the Report of the Joint Review Panel covered only some of the subjects on which consultation was required.[29] Phase IV was "Canada's first opportunity—and its last opportunity before the Governor in Council's

22 *Ibid* at paras 128-155.
23 *Ibid* at para 156.
24 *Ibid* at para 191(f).
25 *Ibid* at paras 201-208.
26 *Ibid* at para 215.
27 *Ibid* at para 216.
28 *Ibid* at para 230.
29 *Ibid* at paras 239-40.

decision—to engage in direct consultation and dialogue with affected First Nations on matters of substance, not procedure, concerning the Project."[30]

The Majority then reviewed Canada's execution of the process of consultation under Phase IV and characterized the process as "falling well short of the minimum standards prescribed by the Supreme Court in its jurisprudence."[31]

- *Timeline for Consultation*

The Majority was particularly critical of the timelines imposed for Phase IV consultation. 45 days were allotted to meet with all affected Aboriginal groups and affected First Nations were given 45 days to advise Canada in writing of their concerns by responding (in submissions that "must not exceed 2-3 pages in length.") to the following three questions:

- Does the Panel Report appropriately characterize the concerns you raised during the Joint Review Panel process?
- Do the recommendations and conditions in the Panel Report address some/all of your concerns?
- Are there any "outstanding" concerns that are not addressed in the Panel Report? If so, do you have recommendations (i.e., proposed accommodation measures) on how to address them?

While noting that the Governor in Council was subject to a deadline for its decision under subsection 54(3) of the *National Energy Board Act*, the Majority observed that the subsection allows the Governor in Council, by order, to extend that deadline: [32]

The importance and constitutional significance of the duty to consult provides ample reason for the Governor in Council, in appropriate circumstances, to extend the deadline. There is no evidence that Canada gave any thought to asking the Governor in Council to extend the deadline.

- *Inaccurate Information*

The Majority found that a further problem in Phase IV was that, in at least three instances, inaccurate information was put before the Governor in Council. "Canada was less than willing to hear the First Nations on this and to consider and, if necessary, correct the information."[33] In some cases, notice of the inaccurate information about the concerns of First Nations was conveyed to Canada, but was only received on the same date the decision to approve the Project was made. The Majority found that the record before it did not demonstrate that these errors were corrected or brought to the attention of the Governor in Council.

- *Lack of Meaningful Dialogue*

Given the focus on meeting timelines and information gathering, the Majority found that it was "no surprise" that a number of concerns raised by Aboriginal groups were left unconsidered and undiscussed:[34]

> Canada failed in Phase IV to engage, dialogue and grapple with the concerns expressed to it in good faith by all of the applicant/appellant First Nations. Missing was any indication of an intention to amend or supplement the conditions imposed by the Joint Review Panel, to correct any errors or omissions in its Report, or to provide meaningful feedback in response to the material concerns raised. Missing was a real and sustained effort to pursue meaningful two-way dialogue. Missing was someone from Canada's side empowered to do more than take notes, someone able to respond meaningfully at some point.[35]

The Majority found that two letters sent to each affected First Nation – one sent roughly a week before the Governor in Council approved the Project, the other after – were insufficient to discharge Canada's obligation to enter into a meaningful dialogue.[36]

30 *Ibid* at para 242.
31 *Ibid* at para 244.
32 *Ibid* para 251.
33 *Ibid* at para 255.
34 *Ibid* at para 265.
35 *Ibid* at para 279.
36 *Ibid* at para 280.

- *Failure to Disclose Strength of Claim Information*

Earlier in the decision, the Court had disagreed with the complaint that the Crown had not shared the *legal* assessment of the strength of the various claims to Aboriginal rights or title on the basis that such a legal assessment is subject to solicitor-client privilege.[37] However, the Majority differentiated the need to disclose necessary *information* the Crown had about the affected First Nations' strength of claims to rights and title:[38]

> First Nations were entitled to a meaningful dialogue about the strength of their claim. They were entitled to know Canada's information and views concerning the content and strength of their claims so they would know and would be able to discuss with Canada what was in play in the consultations, the subjects on which Canada might have to accommodate, and the extent to which Canada might have to accommodate.[39]

- *Inadequate Reasons*

The Majority found that "Canada was obliged at law to give reasons for its decision directing the National Energy Board to issue the Certificates." This obligation arose from both a common law obligation (where a requirement of deep consultation existed) and a statutory obligation (under subsection 54(2) of the *National Energy Board Act*).[40] The Majority found that the reasons set out by Canada were sufficient to comply with the statutory requirement, but "fell well short of the mark" in respect of the independent duty to consult.[41] (Notably, the information before the Governor in Council when it made its decision, was the subject of Canada's claim to Cabinet confidence under section 39 of the *Canada Evidence Act*[42] and thus did not form part of the record.) The Order in Council itself contained only a single recital indicating that a process of consultation was pursued, but did not state a conclusion on whether Canada had fulfilled the duty to consult. The Majority found that this raised the serious question whether the Governor in Council actually considered and concluded that it was satisfied that Canada had fulfilled its duty to consult, which the Majority found to be "a troubling and unacceptable gap."[43]

- *The Majority's Conclusion on Phase IV*

Summing up its view on the Phase IV consultation process, the Majority concluded:

> Canada offered only a brief, hurried and inadequate opportunity in Phase IV—a critical part of Canada's consultation framework—to exchange and discuss information and to dialogue. The inadequacies—more than just a handful and more than mere imperfections—left entire subjects of central interest to the affected First Nations, sometimes subjects affecting their subsistence and well-being, entirely ignored. Many impacts of the Project—some identified in the Report of the Joint Review Panel, some not—were left undisclosed, undiscussed and unconsidered.[44]

The Majority offered its view that a short extension of time–in the neighbourhood of four months—might have been enough to solve the problems faced in Phase IV.[45]

The Dissenting Opinion (Ryer J.A.)

In relatively brief dissenting reasons, Mr. Justice Ryer disagreed that the Order in Council should be set aside on the basis that the Crown's execution of the Phase IV consultations was

37 *Ibid* at paras 218-225.
38 *Ibid* at para 288.
39 *Ibid* at para 309.
40 *Ibid* at para 311.
41 *Ibid* at para 313.
42 *Canada Evidence Act*, RSC 1985, c C-5, s 39.
43 *Supra* note 2 at paras 320-23.
44 *Ibid* at para 325.
45 *Ibid* at paras 328-29.

inadequate. He listed the flaws reviewed by the Majority, but stated "even assuming that these imperfections have been established, it is my view that taken together, in the context of such a large and complex project that has taken over 18 years to reach the present stage, they are insufficient to render the Phase IV consultations inadequate."[46]

- In respect of the timelines for the Phase IV consultations, he noted that these were statutorily imposed and the Crown had no obligation to request an extension from the Governor in Council.[47]

- In respect of the inaccurate information, he noted that, given the claim of Cabinet confidence, the Court is unaware of the entirety of the materials that were before the Governor in Council. He expressed the view that any inaccuracies in the Crown Consultation Report were insufficient to render the Crown's Phase IV consultations inadequate.[48]

- In respect of the lack of meaningful dialogue, he opined that "the requested information, by and large, related to matters that were considered by the Joint Review Panel or, in some instances, matters that were never placed before the Joint Review Panel, but should have been."[49]

- In respect of the failure to disclose strength of claim information, he opined that "there is little, if anything, to distinguish between the Crown's 'legal' assessment of a First Nation's claim and 'information' the Crown has about the strength of such a claim" and that solicitor-client privilege extends to the Crown's information upon which its legal assessment is based.[50]

- In respect of the adequacy of the reasons, he opined that there was no error in the Governor in Council's reasons that would warrant the Court's intervention and that the Crown's reasons for concluding that it had met its duty to consult were "readily apparent."[51]

Remedy

Given the conclusion of the Majority, the Court quashed the Order in Council (and the CPCNs that followed) and remitted the matter to the Governor in Council for redetermination.[52] This presents the Governor in Council with the same three options it had before it first issued the Order in Council. As discussed by the Majority[53], the Governor in Council can:

1. "direct the Board to issue a certificate in respect of the pipeline or any part of it and to make the certificate subject to the terms and conditions set out in the report"[54];

2. "direct the Board to dismiss the application for a certificate"[55]; or

3. ask the Board to reconsider the recommendations in its report or any terms and conditions, or both.[56]

The Majority emphasized that the Governor in Council was entitled to make a "fresh" decision "on the basis of the information and recommendations before it based on its current views of the broad policies, public interests and other considerations that bear upon the matter."[57] However, if the Governor in Council decides to direct the Board to issue CPCNs, "it can only make that decision after Canada has fulfilled its duty to consult with Aboriginal peoples, in particular, at a minimum, only after Canada has re-done its Phase IV consultation."[58]

46 *Ibid* at para 354.
47 *Ibid* at para 355.
48 *Ibid* at para 356.
49 *Ibid* at para 357.
50 *Ibid* at para 358.
51 *Ibid* at paras 360-63.
52 *Ibid* at para 333.
53 *Ibid* at para 113.
54 *NEBA, supra* note 3, s 54(1)(a).
55 *Ibid,* s 54(1)(b).
56 *Ibid,* s 53(1).
57 *FCA decision, supra* note 2 at para 334.
58 *Ibid* at para 335.

Discussion/Comment

The Court's approach in the *Northern Gateway* decision underscores the significance of and the extent of the shift in the respective roles of the NEB and the Governor in Council resulting from the legislative amendments of 2012.

The table below compares the former version of section 52 and the revised version (considered by the Federal Court of Appeal in the *Northern Gateway* case) with the material changes highlighted.

The Majority's characterization of the legislative scheme places very considerable emphasis on the role of the Governor in Council—characterizing it as "the only meaningful decision-maker" for the purposes of review.[59] There would appear to be a direct connection between the Majority's characterization of the legislative scheme; and the heightened expectations on Canada's Phase IV consultation process.

This is a considerable change from the approach taken in judicial challenges under the former version of section 52 of the *National Energy Board Act* where there appeared to be much less emphasis on the consultation, if any, undertaken by Canada prior to the "approval" issued by the Governor in Council. For example, in the *Brokenhead Ojibway* decision,[60] the Federal Court dismissed judicial review proceedings brought by First Nations challenging the three Orders in Council (that approved the three NEB decisions) in respect of three interprovincial pipelines—the Keystone Pipeline Project[61]; the Southern Lights Pipeline Project[62]; and the Alberta Clipper Pipeline Expansion Project.[63] The Court in that case was prepared to consider "whether and to what extent the duty may be fulfilled by the NEB acting essentially as a surrogate for the Crown."[64] The Federal Court stated:

> "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 or environmental review: … Those review processes may be sufficient to address Aboriginal concerns, subject always to the Crown's overriding

Former and revised version of section 52

National Energy Board Act, R.S.C. 1985, c. N-7, section 52 (former version)	*National Energy Board Act*, R.S.C. 1985, c N-7, section 52 (as amended)
52. The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline if the Board is satisfied that the pipeline is and will be required by the present and future public convenience and necessity …	52. (1) If the Board is of the opinion that an application for a certificate in respect of a pipeline is complete, it shall prepare and submit to the Minister, and make public, a report setting out (a) its recommendation as to whether or not the certificate should be issued…

59 *Ibid* at para 120. While it is a split decision on the consultation issues, it is notable that the Court appears to be unanimous on the administrative law issues. Without commenting further, Mr. Justice Ryer states that he agrees that "the Order in Council is unimpeachable from an administrative law perspective." *Supra* note 2 at para 347.

60 *Brokenhead Ojibway First Nation v Canada (Attorney General),* 2009 FC 484 at para 16 [*Brokenhead Ojibway*].

61 *TransCanada Keystone Pipeline GP Ltd* (September 2007), OH-1-2007, online: NEB <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90550/554112/915551/1060220/2453041/2565524/B86-24__-21_OH-1-2007_Reasons_for_Decision_-_A4F3Z8.pdf?nodeid=2558001&vernum=-2> ; PC 2007-1786 dated November 22, 2007.

62 *Enbridge Southern Lights GP on behalf of Enbridge Southern Lights LP and Enbridge Pipeline Inc* (February 2008), OH-3-2007, online: NEB < http://publications.gc.ca/collections/collection_2008/neb-one/NE22-1-2008-1E.pdf>; PC 2008-856 dated May 8, 2008.

63 *Enbridge Pipeline Inc- Alberta Clipper Expansion Project* (February 2008), OH-4-2007; PC 2008-857 dated May 8, 2008.

64 *Brokenhead Ojibway, supra* note 60 at para 16.

> duty to consider their adequacy in any particular situation."[65]

The Federal Court found the NEB process alone to be sufficient, even in the absence of any separate Crown consultation to support the Order in Council.[66]

The increased focus on the role of the Governor in Council results in a de-emphasis on the role of the regulatory tribunal—in this case the JRP. Instead of viewing the NEB as "acting essentially as a surrogate for the Crown," the Court in *Northern Gateway* considered the Report of the Joint Review Panel as "nothing more than a guidance document"[67] under the current legislative scheme. The challenges to both the JRP report and the CPCNs were dealt with very shortly and the vast majority of the analysis focuses on the details of the action taken (or not taken) by Canada in the post-report consultation process.

Again this is a considerable change from the approach taken in judicial challenges under the former version of section 52 of the *National Energy Board Act* where the outcome of the NEB process generally formed the primary target of Aboriginal groups seeking to challenge pipeline approvals.[68] However, under the current legislative scheme—as interpreted by the Majority in Northern Gateway—this is no longer a "decision" that can be challenged.

Obviously, the approach taken by the Majority may have implications for other pending review processes such as the Trans Mountain Expansion Project. In May 2016, the NEB issued a report recommending that the Governor in Council approve the Trans Mountain Expansion Project, subject to 157 conditions.[69] In June, 2016, shortly after the Northern Gateway decision, various Aboriginal groups and other parties commenced judicial review seeking to challenge the "decision" of the NEB. In July 2016, Trans Mountain Pipeline ULC filed Notices of Motion seeking to strike the applications for judicial review.[70] At the time of writing, these motions are still pending.

Reframing the NEB/JRP report as a mere recommendation greatly diminishes the role of the regulator and importance of the regulatory hearing process. This seems regrettable. The regulatory processes for such major project typically occupy a lengthy period of time and require enormous effort from a large number of participants. In contrast, the consultation process that has (historically) followed the regulatory hearing/report process has been much shorter, with a narrower focus and involving far fewer participants in a less transparent process.

In the 2009 framework document outlining its approach to Crown consultation, Canada stated its intention that "the Crown will rely on the consultation efforts of the proponent and the Joint Review Panel (JRP) process, to the extent possible, to meet the duty to consult."[71] However, in the wake of the 2012 amendments, the Court scrutinized in great detail the Phase IV consultation process that followed the issuance of the JRP report. From the Federal Court of Appeal's decision in this case, it appears that Courts may be

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65 *Ibid* at para 25; emphasis added. This statement was adopted by the Alberta Court of Appeal in *Tsuu T'ina Nation v Alberta (Environment),* 2010 ABCA 137 at para 104.

66 The Court in *Brokenhead Ojibway* did state that the requirement may be different in other circumstances (that seem to reflect the circumstances in *Northern Gateway*): "I have no doubt, however, that had any of the Pipeline Projects crossed or significantly impacted areas of unallocated Crown land which formed a part of an outstanding land claim a much deeper duty to consult would have been triggered. Because this is also the type of issue that the NEB process is not designed to address, the Crown would almost certainly have had an independent obligation to consult in such a context." *Brokenhead Ojibway, supra* note 60 at para 44.

67 *FCA Decision, supra* note 2 para 317.

68 See for example *Standing Buffalo Dakota First Nation v Enbridge Pipelines Inc*, 2009 FCA 308, leave to appeal to the Supreme Court of Canada dismissed. See also the discussion of *Standing Buffalo* in the two judgements in *Chippewas of the Thames First Nation v Enbridge Pipelines Inc, 2015 FCA 222*, leave to appeal to the Supreme Court of Canada granted. See the case comment on the latter decision by Nigel Bankes, "The Supreme Court of Canada Grants Leave in Two Cases Involving the National Energy Board and the Rights of Indigenous Communities" (2016) 4:2 ERQ 35.

69 National Energy Board, *National Energy Board Report: Trans Mountain Expansion Project,* OH-001-2014. (Calgary: NEB, May 2016), online: NEB <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2969696/2969867/National_Energy_Board_Report_-_OH-001-2014_-_A5A9H1.pdf?nodeid=2969681&vernum=-2>.

70 See for example the Notice of Motion and Written Submissions (paras 22 and 23) dated July 5, 2015 filed Court File No. A-217-16 seeking to strike the notice of application for judicial review filed by the Squamish Nation.

71 *Supra* note 6 at 1.

reluctant to allow governments to place excessive reliance on the work done by an administrative tribunal when certain issues that arise during the consultation process may be beyond the mandate of the tribunal and, more importantly, the ultimate, meaningful decision-making authority is reserved to the government. The lesson appears to be that to the extent that decision-making power is going to be reserved to the Governor in Council, then the consultation processes put in place will have to be robust enough to adequately underpin and inform the Governor in Council decision. This will also have implications for the ongoing review of the regulatory process itself that has been initiated by the federal government. Regarding the Crown's duty to the consult, the Supreme Court of Canada has been clear that:

- it is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages;[72] and

- the duty on an administrative tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal.[73]

There would appear to be two routes forward:

(i) If the decision-making authority is to remain with the Governor in Council, then the consultation process employed by Canada will have to be enhanced (and likely lengthened).

(ii) Alternatively, if the Crown wishes to rely (to a greater extent) on the environmental assessment and regulatory review processes, then the role of the regulator must be more than a mere "guidance document."

In the *Northern Gateway* decision, the Majority observed: "It is not for us to opine on the appropriateness of the policy expressed and implemented in this legislative scheme. Rather, we are to read legislation as it is written."[74] However, the decision has laid out the implications of the current regulatory scheme. It remains to be seen what the current Governor in Council will do in terms of the Northern Gateway project specifically and/or what the government may propose in respect of the role of the regulatory process more generally. ■

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72 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 51.
73 *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 at para 55.
74 *FCA Decision, supra* note 2 at para 123.

RECENT REGULATORY DEVELOPMENTS IN ATLANTIC CANADA:

COMMUNITY CHALLENGES TO COMFIT WIND PROJECTS*

*Sara Mahaney***

Within the last year, the Nova Scotia Utility and Review Board ("UARB") decided two cases involving appeals to the UARB of wind energy projects being developed under Nova Scotia's Community Feed-In Tariff ("COMFIT") Program.

The COMFIT Program was established by the Province of Nova Scotia ("Province") in 2010 to assist the Province in achieving the renewable energy targets set out in Nova Scotia's Renewable Electricity Plan.[1] Under the *Renewable Electricity Regulations*[2] made pursuant to Nova Scotia's *Electricity Act*[3], generators that met certain community-based eligibility requirements could apply to the Minister of Energy ("Minister") for approval of certain renewable energy projects, including those that generate wind power.[4]

Friends of Harmony Decision

The UARB's decision in *Re Friends of Harmony, Camden, Greenfield and Surrounding Areas* upheld the Minister of Energy's granting of a COMFIT approval to Affinity Wind Limited Partnership ("Affinity") for a 3.2 MW wind project in Greenfield, Nova Scotia.

The Applicable Standard of Review

The appeal of the Minister's decision was filed with the UARB by the Friends of Harmony pursuant to the statutory appeal provision contained in the *Renewable Electricity Regulations*.[6] The UARB was required to consider the issue of what type of evidentiary hearing and standard of review should apply on an appeal to an appellate administrative tribunal (in this case, the UARB) of the decision of an administrative decision-maker of first instance (in this case, the Minister). That is, whether the hearing of the appeal of the Minister's decision by the UARB should be:

a) based on the record, akin to a judicial review, with the Minister's decision subject to deference and a reasonableness standard;

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1 *Nova Scotia Department of Energy, Renewable Electricity Plan: A Path to Good Jobs, Stable Prices, and a Cleaner Environment* (Halifax: NSDOE, April 2010), online: NSDOE <http://energy.novascotia.ca/sites/default/files/renewable-electricity-plan.pdf>.

2 *Renewable Electricity Regulations,* NS Reg 155/2010.

3 *Electricity Act,* SNS 2004, c 25.

4 *Ibid*, s 4A(7),- 4A(8); *Renewable Electricity Regulations, supra* note 2, ss 20, 23.

5 *Re Friends of Harmony, Camden, Greenfield and Surrounding Areas* , 2015 NSUARB 273 [*Friends of Harmony*].

6 *Supra* note 2, s 48.

b) a hearing *de novo* with extraneous evidence admissible and the Minister's decision subject to a correctness standard; or

c) something else, such as a hybrid approach "whereby the record before the Minister and the Minister's decision are given significant weight by the Board, but supplemented by any relevant and useful evidence which may be provided by the parties."[7]

Noting that this issue is "a developing area of case law",[8] the UARB concluded that the "hybrid approach" was appropriate,[9] referring to Canadian Court cases in which the hybrid approach has received support.[10]

The UARB considered that a number of factors indicated that deference should be given to the Minister's decision, including that the issue of approving a renewable energy project fell "squarely within the scope of matters which would normally be expected to fall within this ministerial mandate" and that "the Minister is in a more advantageous position than the Board in assessing the application."[11]

Therefore the UARB was of the view that "significant deference should be given to the Minister's decision and to the evidentiary record before him" and that "a 'reasonableness' standard of review should apply."[12] However, while the UARB did not consider that a *de novo* hearing was appropriate, it did consider that "it may be necessary to expand upon the evidentiary record in some instances in order to provide a greater context to make a finding on any particular issue".[13] Therefore, the UARB concluded that:

> [T]he Board will give significant weight to the evidentiary record before the Minister and to his decision. However, the Board will allow other evidence to be admitted where this may be necessary to provide further context for the Board's review.[14]

The UARB also pointed out that the burden of proof was on the appellants to establish, on a balance of probabilities, that the Minister was wrong in granting the COMFIT approval.[15]

The Requirement for "Community Support"

The primary ground of appeal advanced by the appellants in the *Friends of Harmony* case was that the Minister should not have approved the project because the evidence of "community support for the project" required under the *Renewable Electricity Regulations*[16] had not been provided to the Minister. The UARB considered the Department of Energy's ("Department") Community Support Policy[17] which set out a scoring system for determining whether a proposed project met the community support requirement under the *Regulations*.

Despite challenge by the appellants of the Department's Community Support Policy, the UARB upheld the Policy as being permissible under the *Renewable Electricity Regulations* and was satisfied on the evidence that the project "easily exceeded" the minimum scoring threshold for the project under the Policy.[18]

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7 *Supra* note 5, *Friends of Harmony* at para. 28.
8 *Ibid* at para 27.
9 *Ibid* at para 41.
10 Including *Newton v Criminal Trial Lawyers' Association*, 2010 ABCA 399 and *British Columbia Society for the Prevention of Cruelty to Animals v British Columbia (Farm Industry Review Board)*, 2013 BCSC 2331.
11 *Supra* note 5 at paras 36-37.
12 *Ibid* at para 38.
13 *Ibid* at para 39.
14 *Ibid* at para 41.
15 *Ibid* at paras 22, 49. While the Board's use of the term "wrong" in this regard may imply a correctness standard of review, it is clear from the decision that the Board determined that a reasonableness standard applied and that the Board did in fact apply a reasonableness standard of review to the Minister's decision. See, for example, para 74 where the Board concludes that "…the Minister's decision to approve Project #183 was a decision available to him on the basis of a reasonable interpretation of the *Regulations…*".
16 *Supra* note 2 s 24(g).
17 Nova Scotia Department of Energy, "Community Support and Consultation for COMFIT Projects" (Halifax: NSDOE, March 2014), online: NSDOE <http://energy.novascotia.ca/sites/default/files/a_community_support_policy_comfit_mar2014.pdf>.
18 *Supra* note 5 at paras 58-71. It may be of particular interest to readers to note that the Policy defines "community" as meaning "the Municipality where the project is located" and that the scoring system awards 2 points per letter for

The UARB noted that, at the time the Minister granted the COMFIT approval, both the Minister and Department staff were "acutely aware" of the opposition to the project by the appellants, some of whom had written to and/or met with the Minister and/or the Department staff.[19] The UARB stated:

> [T]here is nothing in the legislation that requires that the application be refused by the Minister if there is community opposition to the proposed COMFIT project, nor is there any indication that community support must outweigh any community opposition in order for a project to warrant the Minister's approval. In the Board's view, the Minister adopted a reasonable interpretation of the *Regulations*, such that if the proposed project garners some community support, then that is sufficient, for the purposes of the *Regulations*, to allow the Minister to approve the project. The Board finds that this was an interpretation that the *Regulations* could reasonable bear.[20]

These comments from the Board are particularly apt as the issue of "social license" is increasingly coming to the fore in respect of proposed energy projects throughout Atlantic Canada and elsewhere.

Friends of River Road Decision

More recently, the UARB decided *Re Friends of River Road*[21] ("*Friends of River Road*"). The UARB dismissed the appeal by the Friends of River Road of the Minister's decision to grant an extension of the in-service date for Chebucto Terence Bay Windfield Limited's ("Chebucto") 7.05 MW wind project on the basis that the appeal was moot.

Following a review of the COMFIT Program, in August, 2015 the Province announced that the COMFIT Program would no longer be accepting applications for new projects.[22] This policy change was implemented by way of the *Electricity Plan Implementation (2015) Act*[23] which added certain subsections to Section 4A of the *Electricity Act*, one of which states as follows:

> (14) Notwithstanding the terms or conditions of any community feed-in tariff approval given to a generator by the Minister pursuant to this Section and the regulations before or after the coming into force of this subsection, the approval expires if the generator is not constructed and ready for electrification within
>
> (a) three years from the date of issuance of a community feed-in tariff approval for wind-power generation facilities; […]

The Minister's decision to grant the extension of Chebucto's in-service date was made on November 3, 2015. Between that date and the date the Friends of River Road's appeal was filed with the UARB on December 4, 2015, the Province had tabled on December 1, 2015 the *Electricity Plan Implementation (2015) Act* for first reading.[24] The *Electricity Plan Implementation (2015) Act* received Royal Assent on December 18, 2015.

Chebucto argued that the term and condition of Chebucto's COMFIT approval requiring that the project be in-service by a certain date, as extended by the Minister, had been superseded by Section 4A(14)(a) of the *Electricity Act*.[25] As a result, Chebucto argued, the in-service date for the project, being fixed by legislation, was not a decision made by the Minister that was appealable under the *Renewable Electricity Regulations*.[26] Both Chebucto and the Province argued that the Minister's decision to extend the in-service date was rendered moot by the

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letters of support from residents within 5 km of the project, and 1 point per letter for letters of support from residents within the municipality where the project is located.

19 *Supra* note 5 at para 72.

20 *Ibid* at para 67.

21 *Re Friends of the River Road*, 2016 NSUARB 36 [*Friends of the River Road*].

22 Nova Scotia Department of Energy, News Release, "Minister Announces COMFIT Review Results, End to Program" (Halifax: 6 August 2015), online: <http://novascotia.ca/news/release/?id=20150806001>.

23 *Electricity Plan Implementation (2015) Act*, SNS 2015, c 31.

24 Bill 141, Electricity *Plan Implementation (2015) Act*, 2nd Sess, 62nd Leg.

25 *Friends of River Road, supra* note 21 at para 11.

26 *Ibid* at para 12.

subsequent amendments to the *Electricity Act*.[27]

The UARB considered whether the date from which the three-year time period for the purposes of Section 4A(14)(a) of the *Electricity Act* should be calculated was from the date of Chebucto's original March, 2012 COMFIT approval or from the date Chebucto's COMFIT approval was re-issued on June 10, 2015. The UARB had previously considered a similar re-application and re-issuance of COMFIT approvals in a preliminary decision in the *Friends of Harmony* case.[28] In that preliminary decision, the UARB determined that Affinity's re-issued approval was in fact a new approval which was appealable under the *Renewable Electricity Regulations*, which ultimately led to the decision on the merits discussed earlier in this article.

On the basis of the *Friends of Harmony* preliminary decision, the UARB concluded in the *Friends of River Road* case that "the original 2012 approval was superseded by the Minister's new June 10, 2015 approval," which was not appealed by the Friends of River Road.[29] Therefore, the UARB held, "the in-service date for Chebucto's Project is now deemed by the legislation to be June 10, 2018" and is "no longer based on the decision of the Minister under the *Regulations*."[30] The UARB considered that it "has not been granted jurisdiction under the *Regulations* to hear an appeal of the legislatively proclaimed in-service date that now applies" and found that "there is no further issue to be determined in this appeal as between the parties."[31]

It is worth noting that this appeal by the Friends of River Road was in fact the second challenge of Chebucto's project by the Friends of River Road, as the group had previously brought an appeal against Chebucto's project in 2013, with respect to the issuance of Chebucto's original March, 2012 COMFIT approval, which the UARB had dismissed for being filed outside of the statutory appeal period.[32]

Conclusion

Regulators, project proponents and their legal advisors should be aware of these recent developments as these kinds of legal challenges, though unsuccessful in both of these cases, can pose a significant hurdle for projects to overcome. As the *Friends of River Road* case demonstrates, even projects that have received approval and have successfully avoided an initial challenge may be subject to further challenge during the development stage of the project if the applicable regulatory official subsequently makes what may be considered under the applicable statutory appeal provision to be an "appealable decision" in respect of the project.

The line of cases discussed in this article demonstrates that, notwithstanding their community-based nature, these renewable energy projects can still be subject to opposition and challenge by some members of the communities in which they are being developed. These cases highlight how important the legislative and regulatory regime can be in governing how and when these types of energy projects may proceed. This includes setting out the parameters of the type and level of support that such projects must obtain from the "communities" (however defined) in which those projects are to be located, as well as the avenues that are available to those in opposition to challenge those projects.

While the COMFIT program in Nova Scotia is no longer open to new applicants and the *Friends of Harmony* and *Friends of River Road* decisions were based on Nova Scotia's own unique legislative regime, the considerations in these cases, including issues around standard of review and community support, will undoubtedly be relevant considerations as other energy projects being developed across the Atlantic region and elsewhere inevitably face legal challenges. ■

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27 *Ibid* paras 12, 14.
28 See *Friends of Harmony, Camden, Greenfield and Surrounding Areas,* 2015 NSUARB 65. Both Affinity and Chebucto had had their COMFIT approvals re-issued by the Minister in order to address an issue around the effective date of the power purchase agreement with Nova Scotia Power Inc.
29 *Friends of River Road*, *supra* note 21 at paras 22-23.
30 *Ibid* at paras 25-26.
31 *Ibid* at paras 26, 28.
32 See *Re Friends of River Road (Re)*, 2013 NSUARB 236.

IROQUOIS FALLS POWER CORPORATION v ONTARIO ELECTRICITY FINANCIAL CORPORATION AND THE TREATMENT OF CONTRACTUAL INTERPRETATION

Reena Goyal and James Hunter[1]

Overview

The Ontario Court of Appeal's decision in *Iroquois Falls Power Corporation v Ontario Electricity Financial Corporation*[2] ("*Iroquois Falls*") suggests that the bar for successfully appealing findings of contractual interpretation may be at its highest in the context of certain energy supply contracts. The decision also raises questions with respect to how adjudicators may apply the Supreme Court of Canada's landmark decision in *Sattva v Creston Moly*[3] *("Sattva")* to other forms of contracts in the energy sector.

Background

In *Iroquois Falls*, certain non-utility generators ("NUGs") challenged the Ontario Electricity Financial Corporation's ("OEFC's") calculation of amounts payable under their long-term power supply contracts ("Power Purchase Agreements", or "PPAs").[4] The PPAs contained an annual price adjustment index based on rates charged to (what was then) Ontario Hydro's Direct Industrial Customers. Hence the rate upon which the price adjustment index was based was referred to in the PPAs as the "Direct Customer Rate" or "DCR."[5] The DCR, including any variations therein, were reflected in the price adjustment index, which was in turn used to calculate the annual payments to the NUGs under the PPAs.[6]

With the late 1990's restructuring of Ontario Hydro and the introduction of the Ontario wholesale electricity market, the DCR became obsolete.[7] Various stakeholders, including the parties in *Iroquois Falls*, set out to find an appropriate replacement for the DCR.[8] That stakeholder initiative resulted in, among other things, a Working Paper in June 2002 (the "Working Paper") which proposed a new price adjustment index based on "Total Market Costs" ("TMC").[9] More specifically,

1 Reena Goyal and James Hunter are counsel at the Independent Electricity System Operator ("IESO") in Ontario. The views expressed in this article are those of the authors alone, and do not necessarily represent those of the IESO.
2 *Iroquois Falls Power Corporation v Ontario Electricity Financial Corporation*, 2016 ONCA 271 [*Iroquois Falls*].
3 *Sattva Capital Corp v Creston Moly Corp,* 2014 SCC 53 [*Sattva*].
4 *Iroquois Falls, supra* note 2 at paras 1-2.
5 *Ibid* at para 18.
6 *Ibid.*
7 *Ibid* at paras 23-24.
8 *Ibid* at para 25.
9 *Ibid.*

TMC was the aggregate of several individual costs, including Global Adjustment ("GA")[10], associated with the production, delivery and use of electricity to a proxy customer with 100% firm load factor at a specified voltage.[11] TMC was incorporated into the PPAs by way of Term Sheets heavily negotiated and agreed to by the parties in 2003 ("Term Sheets").[12] Fundamental to the agreement surrounding the Term Sheets was that TMC was to replace and replicate DCR to the fullest extent possible.[13]

The advent of Ontario Regulation 429/04, commonly referred to as the "GA Reallocation Regulation", in 2004 reapportioned GA costs so as to decrease the overall GA costs among Class A customers[14] and increase them among Class B consumers[15]. Hydro One[16] subsequently assumed, for the purpose of calculating the price adjustment index based on TMC, that the proxy customer was a Class A consumer. This had the effect of reducing GA as a variable in the price adjustment index calculation under the PPAs, ultimately reducing the amounts payable to the NUGs.[17]

In *Iroquois Falls*, the NUGs argued that the reapportionment of GA costs between Class A and Class B consumers under the GA Reallocation Regulation caused GA to no longer comprise one of the components of TMC, as the GA changes did not pertain to the direct or indirect costs associated with the production or delivery of electricity.[18] The OEFC, in response, took the position that TMC had been defined to reflect the price of electricity to certain customers, and that therefore the newly applicable definition of GA still fell within its ambit.[19] The application judge favored the NUGs' interpretation of the meaning of TMC, and found in their favour.

The OEFC appealed to the Ontario Court of Appeal on three grounds. First, the application judge determined the application on a basis other than what either of the parties had argued.[20] Second, the application judge made several findings of fact that were either unsupported by the evidence or were otherwise based on a misapprehension of the evidence.[21] Third, the application judge erred in his interpretation of certain provisions of the PPAs.[22]

The Court of Appeal rejected the first ground of appeal, finding that the application judge did not decide the application on an issue not raised by the NUGs.[23] The appellate court also rejected the second ground of appeal, finding that the application judge's findings were supported by the evidence and did not reveal any material misapprehension of the evidence.[24] With respect to the third ground of appeal, the Court of Appeal found that all but one of the contractual misinterpretations alleged by the OEFC raised a question of law alone (and all others were questions of mixed fact and law). In particular, the OEFC argued that the application judge erroneously implied a term into the PPAs by requiring that TMC reflect costs as allocated on a *pro rata* consumption basis.[25] The Court of Appeal nevertheless rejected this argument by finding that the application judge did not in fact imply a term into the definition of TMC.[26]

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10 *Ibid* at para 34.
11 *Ibid* at para 26.
12 *Ibid* at para 28.
13 *Ibid* at para 25.
14 Generally speaking, Class A consumers are defined under the GA Reallocation Regulation as those LDC-connected consumers that exceed an average monthly hourly demand in excess of 5MW for the applicable 12-month base period. (This initiative was expanded in 2015 to include customers with a peak demand greater than 3MW but less than 5MW, so long as they have one of the requisite classifications under the North American Industry Classification System (NAICS)).
15 Generally speaking, Class B consumers are defined under the GA Reallocation Regulation as those LDC-connected consumers who are not Class A consumers, i.e. who have an average monthly hourly demand of less than 5MW for the applicable 12-month base period.
16 Through OEFC`s consultant Navigant Consulting Inc.
17 *Iroquois Falls, supra* note 2 at para 35.
18 *Ibid* at para 2.
19 *Ibid* at para 3.
20 *Ibid* at para 5.
21 *Ibid* at para 6.
22 *Ibid* at para 7.
23 *Ibid* at para 10.
24 *Ibid.*
25 *Ibid* at para 106.
26 *Ibid* at para 110.

With respect to the remainder of the OEFC`s allegations of contractual misinterpretation, the appellate court found that they did not demonstrate that the application judge misapplied a legal principle, i.e. failed to read the PPAs (as amended by the Term Sheets) as a whole or give the contractual terms their ordinary and grammatical meaning. Rather, the appellant essentially took issue merely with the way the application judge interpreted the relevant provisions.[27]

As such, the Court of Appeal held that the majority of the contractual interpretation issues raised by the OEFC were actually questions of mixed fact and law. Because the OEFC had presented them as questions of law, no arguments were offered as to if or how the alleged contractual misinterpretations met the requisite threshold of palpable and overriding errors of law.[28] The OEFC`s appeals were dismissed.[29]

Treatment of contractual interpretation by appellate courts

In its reasons for rejecting the OEFC`s challenge to the application judge's interpretation of TMC, the appeal court considered the applicable standards of review for each of questions of law and questions of mixed fact and law, as set out in *Sattva*.[30]

Sattva clarified that issues of contractual interpretation may raise (i) questions of law alone to be reviewed by an appellate court on a "correctness" standard, or (ii) questions of fact or of mixed fact and law, to be reviewed by an appellate court on a more stringent "palpable and overriding error" standard of review.[31] Because questions of law alone elicit a lower standard of review, appellants will often seek to frame their respective grounds for appeal as questions of law. S*attva* cautioned that appellate courts should, however, exercise care before determining that a proposed ground of appeal has been properly characterized as a question of law.[32] Heeding this caution, the appellate court in *Iroquois Falls* found that the OEFC's challenges to the application judge's interpretation of TMC, framed as questions of law, were more properly characterized as questions of mixed fact and law.[33]

As the Court of Appeal in *Iroquois Falls* cited from *Sattva*, a central purpose for applying a higher standard of review to questions of fact, and of mixed fact and law, is to limit the intervention of appellate courts in cases where the issue has limited precedential value beyond the litigating parties.[34] Indeed, given that contractual interpretation will involve particular words of the agreement in dispute between the parties, *Sattva* effectively limits cases where questions of contractual interpretation will be deemed questions of law to those where there has been a demonstrable application of an incorrect principle, a failure to consider a required element of a legal test, a failure to consider a relevant factor, or the like.[35]

But it is a rare occurrence where a case demonstrates that the trier of fact has applied an incorrect principle, failed to consider a required element of a legal test, or failed to consider a relevant factor in the manner contemplated by *Sattva*. Oftentimes the mere reference to the correct legal principle in the underlying decision will be sufficient to demonstrate to an appellate court that the trier of fact did not incorrectly fail to consider or apply that legal principle. For example, in *Sattva*, the appellant argued that the arbitrator made an error in law in interpreting the term "market price" in the contract between the parties.[36] More particularly, the appellant in *Sattva* argued that in failing to consider the term "market price" in relation to the "maximum amount" proviso in the associated capital markets policy document, the arbitrator failed to interpret "market price" in the context of the agreement as a whole (and as such, failed to apply that interpretive legal principle). There, the mere fact that the arbitrator made reference to the maximum

27 *Ibid* at paras 103-104.
28 *Ibid* at para 105.
29 *Ibid* at paras 120-121.
30 *Ibid* at para 93.
31 *Ibid.*
32 *Sattva, supra* note 3 at para 54.
33 *Iroquois Falls, supra* note 2 at para 105.
34 *Ibid* at para 96 (citing *Sattva, supra* note 3 at para 50).
35 *Ibid* at para 100 (citing *Sattva, supra* note 3 at para 53).
36 *Sattva, supra* note 3 at para 64.

amount proviso was sufficient for the Supreme Court of Canada to find that the arbitrator did not fail to consider the agreement as a whole.[37] This in spite of the Supreme Court's acknowledgment that "the arbitrator provided no express indication that he considered *how* the "maximum amount" proviso interacted with the Market Price definition."[38] The Supreme Court of Canada instead found that "such consideration is implicit in his decision."[39]

Similarly, in *Iroquois Falls*, the OEFC tried to argue that the application judge failed to properly consider all of the relevant provisions in the Term Sheets as a whole when interpreting the critical word "cost" in the definition of TMC.[40] The thrust of the OEFC`s argument was that the application judge should have relied on the specific wording used in the various parts of the Term Sheets, such as the definition of TMC, and that the application judge failed to address these provisions when interpreting the word "cost" to mean the cost of producing and distributing electricity to consumers instead of as the price of electricity to purchasers.[41]

Yet the Court of Appeal described the OEFC`s argument as follows:

> For example, [the OEFC] maintains that the application judge wrongly defined the word "cost" …. These arguments are not the stuff from which questions of law are made. They raise questions of mixed fact and law, if not pure questions of fact. One example makes my point. The appellant submits that while the word "cost" may refer to cost to the seller or cost to the purchaser, the phrase "market cost" must refer to cost to the purchaser. Clearly, there is no "extricable" question of law in this argument.[42]

Further, to the extent the definition of TMC could not be ascertained within the four corners of the PPAs (together with the Term Sheets), the OEFC argued that the application judge erred in not properly considering the surrounding circumstances of the Working Paper including the description of DCR therein.[43] As in *Sattva*, consideration of *other* parts of the Working Paper was sufficient for the Court of Appeal to find that the application judge properly satisfied the legal principle of considering the relevant surrounding circumstances, even though the application judge did not expressly address or explain *how* the Working Paper provisions raised by the OEFC influenced or impacted the arbitral award.[44]

Misapplication of legal principles as questions of law

While the Court of Appeal in *Iroquois Falls* acknowledged that an "extricable question of law" could be extracted from a challenge to an interpretation of a contractual term[45], its dismissal of the OEFC`s appeals underscores the practical challenges of successfully doing so. For example, *Sattva* clarified the legal principle that a "decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, *consistent with the surrounding circumstances known to the parties* at the time of formation of the contract."[46] Given this guidance, appellants are compelled to rely on the factual matrix at hand to demonstrate that a misapplication of the legal principle has occurred.

Yet, as exhibited in *Iroquois Falls*, it is almost always the case that the only way to demonstrate that a trier of fact has failed to consider all the relevant surrounding circumstances such as other relevant documentary provisions, and that therefore there is an appealable question of law, is to point to the way in which the other provisions are relevant and were not applied or misapplied *in the factual circumstances at hand*. As such, many appellants, like the OEFC

37 *Ibid* at para 65.
38 *Ibid* at para 83 (emphasis added).
39 *Ibid* at para 83.
40 *Supra* note 2 at para 104.
41 *Ibid* at paras 45, 69.
42 *Ibid* at para 103.
43 *Ibid* at paras 82-83.
44 *Ibid* at para 104.
45 *Ibid* at para 103.
46 *Sattva, supra* note 3 at para 47 (emphasis added).

in *Iroquois Falls*, inevitably find themselves stuck within the confines of the post-*Sattva* paradigm where arguments of contractual misinterpretation are deemed to raise questions of mixed fact and law, rather than of law alone, and therefore subject to a palpable and overriding error standard of review.

Appellants framing their challenge to an interpretation of a contractual term as a question of law should therefore be prepared to contend with the increasingly crystalizing precedent in which appellate courts will presume that the decision maker properly applied relevant principles of legal interpretation where it can be shown that the decision maker at least made reference to them.

This is so even though it seems incorrect to find, for example, that the mere reference to a related provision is tantamount to giving consideration to that related provision by explaining how it informs the interpretation of the disputed provision, which is surely what is required by the legal principle that a contract be read as a whole. That is, without expressly setting out *how* the surrounding and relevant documentary provisions have been interpreted, including *how* those interpretations influenced or impacted the ultimate decision, it is arguable that an adjudicator has not properly applied the legal principle of reading the contract as a whole consistent with the surrounding circumstances known to the parties at the time. This is precisely what the OEFC attempted, but failed, to demonstrate in *Iroquois Falls*. Would-be appellants should take note.

Concluding remarks

The Court of Appeal in *Iroquois Falls* showed considerable deference to the application judge`s findings with respect to contractual interpretation. In doing so, the appellate court emphasized that the PPAs (and Term Sheets) "were the product of extensive and careful negotiations and consultations among sophisticated commercial entities" with a "longstanding and ongoing relationship in a unique market place."[47] It further emphasized that the contested definition of TMC had to be considered "in the context of the extensive and detailed discussions and negotiations that produced" it, and that it would be "difficult to imagine an exercise in contractual interpretation that would be more fact-specific" or "that could have less precedential value" than this one.[48] Given such caveats, and in light of the jurisprudence on the division of responsibilities between trial and appellate courts as espoused in *Sattva*[49], it is not surprising that the appellate court in *Iroquois Falls* was highly deferential to the findings of the underlying application judge with respect to matters of contractual interpretation.

But the Court of Appeal also noted that the strong reasons for such deference will not apply in every case of contractual interpretation, citing its 2015 decision in *MacDonald v Chicago Title Insurance Company of Canada* ("*MacDonald*").[50] In *MacDonald*, the Court of Appeal held that, notwithstanding *Sattva*, the higher standard of review of palpable and overriding error did not apply in the case of standard form insurance contracts.[51] Standard form insurance contracts, the appellate court explained, have more general applicability than some other forms of agreement, and are not genuinely negotiated by the parties.[52] Therefore the Court of Appeal held that the *Sattva* reasons for using a palpable and overriding error standard of review did not apply to standard form contracts, and that it was instead more appropriate to apply a correctness standard of review.[53]

Ontario has a number of standard form energy supply contracts. It remains to be seen, then, how appellate courts will apply *Sattva* to disputes arising from such contracts. That is, it is unclear whether appellate courts will render findings more akin to *MacDonald* or otherwise to *Iroquois Falls*, on the spectrum of interpretive deference for standard form energy supply contracts. Likewise, it is unclear how courts will treat the interpretation of a term used in a negotiated contract which could have a precedential impact on the interpretation of

47 *Iroquois Falls, supra* note 2 at para 98.
48 *Ibid* at para 99.
49 *Sattva, supra* note 3 at paras 51-52.
50 *MacDonald v Chicago Title Insurance Company of Canada*, 2015 ONCA 842 [*MacDonald*]; *Iroquois Falls, supra* note 2 at para 97.
51 *MacDonald, supra* note 50 at para 35.
52 *Ibid* at paras 33-37.
53 *Ibid* at para 41.

the same term used in standard form contracts, or the interpretation of the term in the context of a tailored energy supply contract where that same term is widely used in other agreements between other parties.[54] Creating an interpretive precedent for a term in an energy supply contract could also have significant implications for the public ratepayers and therefore have ramifications beyond the litigating parties.

What is clear is that due to the oftentimes dense and technical nature of energy supply contracts, it is difficult for energy industry litigants to frame alleged misapplications of legal principles independent from the factual matrix at hand. Moreover, industry contracts are also often the product of lengthy and detailed stakeholder initiatives. As such, energy industry litigants are especially vulnerable to having possible grounds for appeal classified by appellate courts as questions of fact alone or questions of mixed fact and law, post-*Sattva*. This requires industry appellants and their respective lawyers to always be prepared, even if in the form of alternative arguments, to meet a higher palpable and overriding error standard of review, as is demonstrated by the decision in *Iroquois Falls*. ■

[54] For instance, interpreting "cost" to exclude the price of electricity to purchasers could arguably have significant ramifications to the interpretation of other long-term energy supply contracts procured on behalf of the Province.