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MISSION STATEMENT

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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The recent Alberta and federal elections, resulting in a change of political party at both levels of government, are likely to have significant implications for energy policy and regulation in Canada. Each of the predecessor federal and Alberta governments has, in the past three years, implemented extensive substantive and procedural changes to their relevant regulatory frameworks. The future of these changes may now be in doubt, but at the very least it seems inevitable that the debate around energy policy and regulation, both provincially and federally, will continue to intensify.

Against this background, the lead article in this issue of *Energy Regulation Quarterly* on "The View From Alberta – Recent Development in Provincial and Interprovincial Energy Policy" by Alan Ross and Lorelle Binnion is a timely contribution to the ongoing dialogue on an important national issue. We expect that the associated regulatory developments will be the subject of ongoing discussion in future issues of *ERQ*. And while we highlight Alberta here, we note the issues are relevant in many other jurisdictions as well.

Meanwhile, energy regulators and the energy regulation bar must continue to perform their roles within the existing regulatory framework, where the recent amendments to the *National Energy Board Act* have led to significant procedural changes to the way the NEB conducts its hearings. Specifically, as one measure intended to enable the Board to comply with newly-mandated time limits, the Board has largely eliminated oral cross-examination and imposed other restrictions on the participation rights of third parties. This was a dramatic change from the Board's past practice, which had generally been to allow oral cross-examination by all parties with intervenor status. Not surprisingly, the change was challenged, on the grounds, *inter alia*, of denial of procedural fairness and infringement of the Canadian *Charter of Rights and Freedoms*. With its recent denial of leave to appeal in one of these challenges, the Supreme Court of Canada appears to have put the matter to rest. In their Case Comment, Kemm Yates, Q.C. and Sarah Nykolaishen conclude that the effect of the Supreme Court's denial of leave to appeal is to uphold the Board's recent rulings limiting cross-examination; if any further challenge is to be pursued, "it will have to be in Parliament." This latter conclusion may foreshadow a further revision of the Board's role, given some of the pre-election comments by the new Prime Minister criticizing the changes to the NEB's role that had been enacted during the tenure of the outgoing government.

In another procedural decision, the Supreme Court of Canada ruled that it *would* hear an appeal relating to a claim for damages under section 24 of the *Charter*. The matter arose from an alleged breach of the plaintiff's *Charter* right to freedom of expression by the refusal of the Alberta Energy Regulator (established during the tenure of the outgoing provincial government and the role of which the new Premier has been quoted as suggesting may be reviewed) to accept further communications with respect to a coalbed methane shallow drilling program. The Case Comment by Michael Marion, Michael Massicotte and Alan Ross concludes that the Court's decision will be of interest to many regulatory and administrative tribunals, particularly with respect to the proper framework for addressing the interplay between statutory immunity provisions and *Charter* claims for damages against state actors.

Topics of interest to energy regulators and the energy bar are not, however, confined to issues arising from recent and potential future legislative changes. Gordon Kaiser's article on "Arbitrations Involving Regulated Utilities" provides a comprehensive review of the role

of arbitration in energy disputes, particularly its widespread use in commercial disputes compared to its more widely-known use in investor-state disputes. The article discusses the relationship between arbitration and the regulatory regimes to which the parties may be subject and which may give rise to parallel proceedings. The relevant North American jurisprudence is reviewed.

Moin Yahya's provides a valuable Case Comment on the two recent and much-anticipated decisions of the Supreme Court of Canada on the issue of prudency and reasonableness that is at the core of traditional utility regulation. Yahya concludes that the decisions (one appeal from Ontario and one from Alberta) make clear the Court's view that the standard of review for regulatory decisions dealing with operating costs is reasonableness and that no specific test is prescribed by the law to be applied by regulators in evaluating whether a utility's costs could be recovered in the revenue requirement. In Yahya's words: "Regulatory lawyers should not rely on mechanical tests and characterizations of various costs, but rather should focus on the bigger picture, namely how to achieve just and reasonable rates for all."

It has been noted in past issues of *ERQ* that technological developments play a critical role in the evolution of energy markets – and in challenging energy regulators and policy-makers. The emergence of Combined Heat and Power (CHP) technology is a case in point. Gordon Kaiser provides a Case Comment on the recent approval by the California Public Service Commission of the first Distributed Energy Resource Services Tariff. Kaiser concludes that the decision "is the kind of light-handed, efficient regulation required in competitive markets."

Erica Miller's Case Comment on a precedent-setting decision of British Columbia's Environmental Appeal Board granting an appeal overturning a decision to issue a commercial water licence to Nexen Inc. for use in Nexen's fracking operations in northeastern B.C. On appeal on behalf of members of a First Nation in the area, the Board cancelled the licence on the basis that the terms and conditions were "fundamentally flawed" and on the basis that the Crown had failed to consult in good faith with the First Nation.

This is a banner issue for case comments on Supreme Court of Canada decisions – the issue concludes with one on *Chevron v Yaiguaje* provided by David A. Crerar and Kalie McCrystal. It does not deal directly with energy regulatory issues. The decision is, however, of general significance for all lawyers advising multinational corporations with activities and assets in Canada (and that would mean many in the energy bar). The Comment describes the decision as confirming that Canadian courts should take a generous and liberal approach to the recognition and enforcement of foreign judgments and that there is no need for an applicant seeking to enforce a foreign judgment in Canada to prove a real and substantial connection between the province where the foreign judgment is sought to be registered and the original underlying dispute that led to the foreign judgment or between the province and the judgment debtor. ■

THE VIEW FROM ALBERTA: RECENT DEVELOPMENTS IN PROVINCIAL AND INTERPROVINCIAL ENERGY POLICY

Alan L. Ross and Lorelle Binnion***

Introduction

In May, 2015 Alberta elected - for the first time in the Province's history - a New Democratic Party ("NDP") majority government, replacing over 44 years of Progressive Conservative rule. This came shortly after a steep drop in oil prices in 2014 that threatened the viability of many Alberta companies who had grown accustomed to hundred-dollar per barrel oil. Provincial energy policy changes coincided with an embattled industry concerned over the scope of the NDP government's reforms.[1] Policy development would not, however, be limited to the Province of Alberta.

Shortly after the provincial election, the Council of the Federation ("COF") released the *Canadian Energy Strategy* at the 2015 COF meeting. The *Canadian Energy Strategy* is the collaborative effort of Canada's premiers to achieve consensus-based approaches to the country's energy resource development. The project was co-chaired by the premiers of Alberta, Manitoba, Newfoundland and Labrador, and New Brunswick, and has been in development since 2012. The *Canadian Energy Strategy* sets out a vision of how Canadian provinces and territories can "work together on energy issues and grow the economy, protect the environment, create new opportunities for individuals, organizations and businesses, and enhance the quality of life for all Canadians."[2] The document sets out ten focus areas that each represent an issue in Canadian energy development on which the provinces and territories can work in partnership.

Premier Notley's approach to energy and climate change is becoming clearer. So far, it appears that Alberta may further align its policies with the *Canadian Energy Strategy.* There is overlap in many of the areas of focus, such as emphasis on public involvement, technological development, emissions control and climate change, as well as acknowledgment of the need to build and improve energy transmission and transportation infrastructure and the desirability of building the refining and upgrading industries to promote market diversification. The government is waiting on the recommendations of two panels, the Royalty Review Panel ("Royalty Panel") and the Climate Change Advisory Panel ("Climate Change Panel"), established to conduct studies and solicit public opinion.[3] Both will make recommendations later this year,[4] although the Notley government is not

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** Lorelle Binnion, Student at Law, Borden Ladner Gervais, LLP.

1 Kyle Bakx, "Alberta oil industry wary of NDP government", *CBC News* (30 May 2015) online: CBC News <http://www.cbc.ca>; Claudia Cattaneo, "Alberta premier Rachel Notley didn't start the oil shock crisis, but she's making it worse", Financial Post (16 June 2015) online: *Financial Post* <http://www.financialpost.com>.

2 The Council of the Federation, *Canadian Energy Strategy*, July 2015 at 11 [*Canadian Energy Strategy*].

3 "Advisory panel: Climate leadership discussions" Alberta Government, online: Alberta Government <http://alberta.ca/climate-leadership.cfm>; "Alberta's Royalty Review Panel 2015", Alberta Government, online: Alberta Government <http://www.albertaroyaltyreview.ca>.

4 Jodie Sinnema, "Confused about Alberta's two new review panels for climate change and royalties? Here are some facts", *Edmonton Journal* (18 September 2015) online: Edmonton Journal <http://edmontonjournal.com/news/politics/confused-about-albertas-two-new-review-panels-for-climate-change-and-royalties-here-are-some-facts> [*New Review Panels for Climate Change and Royalties*].

bound to follow all or even some of the panels' recommendations.

The first part of this paper will summarize the current status of Alberta energy policies within provincial jurisdiction. The second part will provide an overview of the history and current status of the *Canadian Energy Strategy.* The third part will be a discussion of alignment between provincial and national policies, and an analysis of how these policies might affect the oil and gas industry in the short- and long-term.

I. Alberta Energy Policy

1. General Introduction and Overview

It is clear that Alberta's NDP government will take significant action in the areas of environmental responsibility and climate change. This was a major part of the NDP's campaign, and is unlikely to be abandoned. Understandably, many industry players are apprehensive about the possibility of change at a time when oil prices are low. The short-term financial effects of implementing such policy are likely to take a toll on an already struggling industry.

However, fresh regulatory reforms can also go a long way in improving the public opinion of the oil industry, and potentially help facilitate the social licence required for new energy infrastructure build. Premier Notley's choice to address climate change, even in the face of challenging economic times for Alberta, may ultimately enhance Alberta's reputation in the rest of Canada and the world on sustainability and the environment.

2. Alberta's Key Energy Policy Developments

The most significant energy policy changes anticipated from the new government include:

- a royalty review and possible changes to the royalty system;
- the implementation of a climate change policy to address emissions and likely impose carbon pricing;
- potential government support for the construction of more refineries and upgraders in Alberta; and
- support for the use of renewable resources for the electricity provision in Alberta.

These issues have been assigned to either the Royalty Panel or the Climate Change Panel for investigation and analysis. The Premier has placed significant emphasis on public engagement through information disclosure and open policy discussions. However, the final panel recommendations on Alberta energy policy are therefore currently unclear. This part will canvass more generally the types of policies that may be implemented.

a. Royalties

Premier Notley stated that her chief concern is Albertans not receiving a fair return for their resources,[5] and is conducting a royalty review to ensure that the province is benefitting from the oil and gas industry to an appropriate degree. Accordingly, the government established the Royalty Panel,[6] chaired by David Mowat, ATB Financial's president and Chief Executive Officer. Also on the panel is Peter Tertzakian, Calgary energy economist, Annette Trimbee, former deputy Minister of Finance, and Leona Hanson who is the mayor of Beaverlodge located west of Grande Prairie. The Royalty Panel must file a preliminary report to Energy Minister McCuaig-Boyd by the end of 2015. However, the government has promised that no changes will take place to the province's royalty structure until 2017.[7]

The Royalty Panel has focused on simplifying Alberta's complex royalty system. Alberta's royalty regime operates on a sliding rate formula which factors in elements such as price and production levels.[8] Currently, Alberta's royalty program "varies with commodity prices and contains a bewildering array of tax holidays and incentive plans introduced over time to moderate "unintended consequences" of the much-criticized last royalty review in 2007."[9]

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5 "Notley promotes value-added, fair resource royalties", online: Alberta NDP <http://www.albertandp.ca /notley_promotes_value_added_fair_resource_royaltiesold>.

6 *New Review Panels for Climate Change and Royalties*, *supra* note 4.

7 *Ibid.*

8 See e.g. "Alberta Royalty Framework Oil Calculator", online: Alberta Energy <http://www.energy.alberta.ca/Oil/2344.asp>.

9 Dan Healing, "Royalty review chair vows to consider C.D. Howe's simplification plan", *Calgary Herald (*23 September 2015) online: Calgary Herald <http://www.calgaryherald.com /business/energy/royalty-review-chair-vows-to-consider-c-d-howes-simplification-plan>.

Although the Royalty Panel has not yet made any decisions, Mr. Mowat indicated that it is considering a system based on a cash-flow tax calculated on gross revenue minus expenses.[10] Premier Notley has been clear that she will is "not pre-judging" and will wait for the panel's recommendations before she makes any decisions.[11]

b. Oil & Gas Infrastructure

Pipelines

Premier Notley has indicated that she is not opposed to pipelines, and recognizes that Alberta's ability to access new markets is essential.[12] The Premier has further indicated that she will not support pipelines that have little chance of realization, but will instead support the Energy East pipeline which would transport crude Alberta oil to refineries in Atlantic Canada and Kinder Morgan's TransMountain line to the west coast.[13]

Like the COF, the Alberta government's approach is that in order for a multi-jurisdictional pipeline to succeed, the interests of multiple provinces must be taken into consideration. Access to international markets necessarily means passing through one of British Columbia or Quebec, both of which are strongly opposed to the environmental impacts of the oil and gas industry.[14] Therefore, improving environmental standards and public support is essential to the viability of these projects.

Premier Notley has already met with Quebec Premier Philippe Couillard regarding Energy East. Premier Notley agreed with Premier Couillard that Alberta has an obligation to "show we're taking real action on climate change concerns and overall environmental protection."[15] This approach appeared to resonate with the Quebec Premier who said, "I am convinced that we have found a new ally in Ms. Notley," and agreed that a pipeline would be the best and safest way to transport crude oil to Eastern Canada.[16]

Upgrading and Refining

In her election campaign, Premier Notley supported building more refineries and upgraders in Alberta rather than shipping bitumen and crude for refining in the United States.[17] This would help address the "bitumen bubble" problem in Alberta, as well as diversify the Alberta economy to weather swings in oil prices.[18] However, many major extractors are not in favour of increasing refining activity in Alberta as opposed to the United States on the claim that it is uneconomic.[19]

There are five operating upgraders and four operating refineries in Alberta.[20] Currently, about half of the province's bitumen is processed in Alberta, compared to 70 per cent a decade ago. It is predicted to fall to about one third

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10 *Ibid.*

11 Matt Dykstra, "'Folks need to settle down': Alberta Premier Notley", *Edmonton Sun* (20 September 2015) online: Edmonton Sun <http://www.edmontonsun.com/2015/09/18/folks-need-to-settle-down-alberta-premier-notley>.

12 "Rachel Notley wants to see at least 1 'drama-free' pipeline project", The Canadian Press (24 September 2015), online: CBC news <http://www.cbc.ca/news/canada/calgary/rachel-notley-pipeline-support-1.3243106>.

13 Alberta NDP, News Release, "Reality Check: Rachel Notley and Pipelines" (25 April 2015) online: Alberta NDP <http://www.albertandp.ca/realitycheck_rachel_notley_and_pipelines>; Brent Patterson, "Notley government backs Energy East and Trans Mountain pipelines", *National Observer* (29 June 2015) online National Observer: <http://www.nationalobserver.com/2015/06/29/opinion/notley-government-backs-energy-east-and-trans-mountain-pipelines>.

14 Emma Gilchrist, "Five Public Opinion Headaches For Alberta Oil Execs" *The Tyee* (7 February 2015) online: The Tyee <http://thetyee.ca/Opinion/2015/02/07/Five_Public_Opinion_Headaches_Alberta_Oil_Execs/> [*Public Opinion Headaches*].

15 Jodie Sinnema, "Rachel Notley confident Quebec premier will support Energy East pipeline", *Edmonton Journal* (13 July 2015) online: Edmonton Journal <http://www.edmontonjournal.com>.

16 Jodie Sinnema, "Rachel Notley confident Quebec premier will support Energy East pipeline", *Edmonton Journal* (13 July 2015) online: Edmonton Journal <http://www.edmontonjournal.com/Rachel+Notley+confident+Quebec+premier+will+support+Energy+East+pipeline/11213255/story.html>.

17 Alberta NDP, News Release "Rachel Notley makes upgrading and refining jobs a top priority for NDP" (10 April 2015) online: Alberta NDP <http://www.albertandp.ca/rachel_notley_makes_upgrading_and_refining_jobs_a_top_priority_for_ndp>.

18 "Alberta's Refining Plans Panned as 'Dream' by Oil Executives", *Bloomberg* (1 June 2015) online: <http://www.bloomberg.com/news/articles/2015-06-01/alberta-s-refining-plans-panned-as-dream-by-energy-executives>.

19 Brent Jang, "Alberta's oil patch faces a refining moment – and B.C. wants in too", *The Globe and Mail* (14 August 2015) online: The Globe and Mail <http://www.theglobeandmail.com/news/alberta/oil-patch-faces-a-refining-moment/article25965077/>.

20 "Upgraders and Refineries: Facts and Stats", (September 2015), online: Alberta Government <http://www.energy.gov.ab.ca/Oil/pdfs/FSRefiningUpgrading.pdf>.

by 2023.[21] There is already one refinery project underway near Redwater, Alberta[22] which has faced significant criticism due to its reliance on government support. The issue of whether there would be a benefit to refining more oil locally is part of the Royalty Panel's mandate.[23]

c. Carbon Emissions and Greenhouse Gases

Alberta's current emission reduction policy is set out in the *Specified Gas Emitters Regulation.*[24] That regulation applies to large industrial emitters representing approximately 50 per cent of Alberta's emissions.[25] Under the current system, emitters must reduce their emissions intensity by 12 per cent below a historical baseline, but can pay into a fund for excess emission at $15 per tonne. If an emitter reduces emissions below the historical baseline, these can be banked or traded. This past summer, the provincial NDP government changed the thresholds from 12 per cent to 15 per cent in 2016, and 20 per cent in 2017. The price for excess emissions will rise to $30 per tonne in 2017.

Revamping Alberta's emissions control and climate change policy was a significant part of Premier Notley's campaign promises. In developing these new policies, she has created the Climate Change Panel which is tasked with providing advice on matters including:

- pricing carbon;
- growing the renewable energy sector;
- promoting energy efficiency for individuals and companies; and
- reducing the province's reliance on coal-fired electricity.[26]

The deadline for the Climate Change Panel to make its recommendations to Shannon Phillips, the Minister of Environment and Parks, is November, 2015. This schedule is to allow time to prepare the policy before the 2015 United Nations Climate Change Conference in Paris, which will be attended by Premier Notley. The Premier has expressed that she intends to attend the conference with a climate change policy that "Alberta can be proud of."[27]

The Climate Change Panel is chaired by Andrew Leach who is an energy and environmental economist, and is an Associate Professor and Academic Director of Energy Programs at the University of Alberta. Also on the panel is Linda Coady, an expert on corporate sustainability, Gordon Lambert who is the Suncor Sustainability Executive in Residence at the Ivey School of Business, Stephanie Cairns who works with Sustainable Prosperity, a national green economy research and policy institute, and Angela Adams, a former heavy equipment operator for Suncor and a member of one of Fort McMurray's Métis founding families. The Climate Change Panel will hold public meetings, and has made an online survey available. It is now in the process of engaging with the public and with aboriginal peoples to consider environmental, social and economic factors before making their recommendation.

In August, 2015, the Alberta Government published its *Climate Leadership Discussion Document ("Discussion Document")* which is a roadmap for the province's climate change policy development.[28] The *Discussion Document* emphasizes the importance of Alberta's economy

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21 Konrad Yakbuski, "Will Notley refine Alberta's oil royalty regime or her election promises?", *The Globe and Mail* (8 May 2015) online: The Globe and Mail <http://www.theglobeandmail.com/report-on-business/rob-commentary/will-rachel-notley-refine-albertas-oil-royalty-regime-or-her-election-promises/article24318228/>.

22 Brent Jang, "Alberta's oil patch faces a refining moment – and B.C. wants in too", *The Globe and Mail* (14 August 2015) online: The Globe and Mail <http://www.theglobeandmail.com/news/alberta/oil-patch-faces-a-refining-moment/article25965077/>.

23 *New Review Panels for Climate Change and Royalties, supra* note 4.

24 *Specified Gas Emitters Regulation,* Alta Reg 139/2007.

25 "Alberta: An Emissions Trading Case Study", *Environmental Defense Fund & International Emissions Trading Association* (April 2015) at page 4 online: <https://ieta.memberclicks.net/assets/CaseStudy2015/alberta_case_study-may2015.pdf.>

26 *Review Panels for Climate Change and Royalties, supra* note 4.

27 Graham Thomson, "Thomson: Rachel Notley hopes to turn Alberta into an environmental good guy", *Edmonton Journal* (5 July 2015) online: Edmonton Journal <http://www.edmontonjournal.com/opinion/thomson+rachel+notley+hopes+turn+alberta+into+environmental+good/11192808/story.html>; see also Nigel Bankes, "Province of Alberta Announces a Two-step Process for Developing a New Climate Change Policy" *ABlawg* (26 June 2015) online: ABlawg <http://ablawg.ca/2015/06/26/province-of-alberta-announces-a-two-step-process-for-developing-a-new-climate-change-policy/>.

28 Alberta, Minister of Environment and Parks, *Climate leadership Discussion Document* (Edmonton, Minister of Environment and Parks, August 2015) [*Discussion Document*].

to stay competitive in a lower-carbon world.[29] A key principle of the *Discussion Document*, which will likely be reflected in the Climate Change Panel's final report, is that "Alberta must grow its economy sustainably and in a way that is more responsive to a changing global market."[30] If there is a consistent criticism of the *Discussion Document*, however, is that is says relatively little about the role of oil sands in Alberta's energy supply mix.[31]

One of the ways that the province may achieve the *Discussion Document* goals is through the implementation of a carbon pricing scheme. The Climate Change Panel is tasked with making recommendations on how Alberta should implement such a system. When the Alberta government introduced the *Specified Gas Emitters Regulation* in 2007 it was the first GHG pricing policy in North America. Premier Notley's view is that Alberta's climate change regime needs updating. There are a number of models on offer. British Columbia imposes a tax per tonne of CO_2 equivalent emissions on the purchase or use of fuels.[32] Quebec launched a cap and trade system. Ontario established a mid-term GHG pollution reduction target, and is moving towards cap and trade. All three provinces support a Western Climate Initiative which, along with Manitoba and the State of California, is pursuing a broader regional cap and trade program.

No model reflects the full costs of navigating GHG restrictions in an oil and gas-dependant province. Nor are they perfect in themselves. Carbon tax and cap and trade methodologies both add burdens for new facilities and barriers to investment with high net present value.[33]

The Climate Change Panel also will make recommendations on how Alberta should establish requirements related to technology or policies that reduce emissions and increase efficiency. Some examples may include:

- requiring that coal-fired plants must, at the end of their lifetime, be shut down or retrofitted to perform at an emissions intensity roughly equivalent to a natural gas-fired power plant;[34]
- the establishment of vehicle emissions regulations;
- establishing requirements for a minimum share of renewable electricity generation;
- bans or limits on certain products such as incandescent light bulbs, pesticides, or chlorofluorocarbons (CFCs); and
- developing building codes that require certain efficiency standards.

d. Renewables Policy

Alberta is the only province in the country that does not have a legislated renewable energy program.[35] It is also reliant upon coal for electricity.[36] Alberta's coal-driven energy sector generates nearly the same amount of carbon pollution as the oilsands.[37] A report by the Pembina Institute and Clean Energy Canada predicts that as Alberta further develops renewable energy resources such as solar, wind, geothermal, biomass and hydro, it will increasingly be able to phase out coal.[38] The province's NDP government appears to agree.

The Climate Change Panel has been tasked

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29 *Ibid* at 8.
30 *Ibid* at 9.
31 See e.g. Kenneth P Green, "How the Alberta government is trying to downgrade the oilsands", *Financial Post* (18 August 2015) online: Financial Post <http://business.financialpost.com/fp-comment/how-the-alberta-government-is-trying-to-downgrade-the-oil-sands>.
32 "How the Carbon Tax Works", British Columbia, online Ministry of Finance: <http://www.fin.gov.bc.ca/tbs/tp/climate/A4.htm>.
33 Alan L Ross, "Alberta NDP's Energy Initiatives Carry Risk and Opportunity", *The Globe and Mail* (13 July 2015) online: The Globe and Mail <http://www.theglobeandmail.com/report-on-business/rob-commentary/ndps-energy-initiatives-carry-risk-and-opportunity/article25484770/>.
34 In addition, and new policy aside, the end of certain coal-fired Power Purchase Agreements in Alberta by 2020, may accomplish significant de-carbonization in the province.
35 Graham Thomson, "Graham Thomson: Just who is the "Embarrassing Cousin", *Edmonton Journal* (17 September 2015) online: Edmonton Journal <http://edmontonjournal.com/news/politics/graham-thomson-just-who-is-the-embarrassing-cousin>.
36 Tracy Johnson, "Is it the end of coal?" *CBC News* (17 September 2015) online: CBC News <http://www.cbc.ca/news/business/is-it-the-end-of-coal-1.3230685>.
37 James Glave & Ben Thibault, "Power to Change: How Alberta can green its grid and embrace clean energy", *Pembina Institute, Clean Energy Canada*, May 2014 at 4 [*Power to Change*].
38 *Ibid* at 16.

with making recommendations on how Alberta should proceed regarding renewable energy, with a plan expected as part of its consideration of climate change policy. Suggested policy options to achieve a transition to renewable energy include making renewable sources more competitive by accounting for hidden pollution and greenhouse gas costs of fossil fuel generation, and providing long-term price certainty for renewable electricity.[39] The Climate Change Panel and the province are not acting alone on the development of renewables policy. Initiatives are also proceeding at the national level through the *Canadian Energy Strategy.*

II. Canadian Energy Strategy

1. Background to the *Canadian Energy Strategy*

The *Canadian Energy Strategy* is a joint effort of the provinces to collaborate on shaping energy development in Canada. It was developed by the COF, which is a group comprised of the premiers of all Canada's 13 provinces and territories that meets twice a year with the main goal of inter-provincial policy coordination. The *Canadian Energy Strategy* has been in development since 2007 when the COF released a document entitled *"A Shared Vision for Energy in Canada."*[40]

The 2007 *Shared Vision for Energy in Canada* document set out a seven point action plan that "strikes a balance between a secure energy supply, environmental and social responsibility, and continued economic growth and prosperity."[41] It highlighted the following:

- improving energy efficiency;
- developing new and innovated energy technologies;
- developing renewable resources;
- improving transmission and transportation infrastructure;
- improving inefficiencies and uncertainty in the regulatory approval process;
- addressing the skilled labour shortage; and
- formalizing the role of provinces and territories in international energy discussion.[42]

An interprovincial and collaborative approach to energy was also discussed at the 2011 Energy and Mines Ministers Conference in Kananaskis, Alberta with an *Action Plan* subsequently developed.[43] The Ministers "agreed to initiate voluntary collaborative work" in the areas of economic prosperity and responsible energy supply, efficient energy use, and knowledge and innovation.[44]

The premiers, with the exception of British Columbia, agreed to build on the *Shared Vision for Energy in Canada* at the 2012 COF meeting, to "advance the common goals of ensuring Canada is a recognized leader in sustainable and secure energy production, conservation, supply and transportation."[45] The *Canadian Energy Strategy* was to combine Alberta's interest in provincial collaboration on building pipelines with Ontario and Quebec's interest in developing a nation-wide agreement on climate change policy.[46]

Alberta Premier Alison Redford, Newfoundland and Labrador Premier Kathy Dunderdale, and Manitoba Premier Greg Selinger led a working group on energy. The working group developed the *Canadian Energy Strategy: Progress Report to the Council of the Federation* in July 2013.[47] The *Progress Report* identified activities advanced by the provinces and territories in accordance with the *Shared Vision for Energy in Canada*

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39 *Ibid* at 9.
40 The Council of the Federation, *A Shared Energy Vision for Canada,* (August 2007) [*A Shared Energy Vision for Canada*].
41 *Ibid* at 2.
42 *Ibid.*
43 "Action Plan – Collaborative Approach to Energy", *Canadian Intergovernmental Conference Secretariat* (Kanaskis, AB, 2011) online: CICS <http://www.scics.gc.ca/english/conferences.asp?a=viewdocument&id=1619> [*Action Plan 2011*].
44 *Ibid.*
45 The Council of the Federation, Canadian Energy Strategy Working Group, *Canadian Energy Strategy: Progress Report to the Council of the Federation*, (July 2013) at 3-4 [*Progress Report 2013*].
46 Adrian Morrow, "What you need to know about the Canadian Energy Strategy", *The Globe and Mail* (16 July 2015) online: The Globe and Mail <http://www.theglobeandmail.com/news/national/what-you-need-to-know-about-the-canadian-energy-strategy/article25522964/> [*What you need to know about the Canadian Energy Strategy*].
47 *Progress Report 2013* at 7.

from 2007,[48] and areas of challenges and opportunities. Those included infrastructure challenges, including transmission capability between jurisdictions, economic incentives for innovation, labour and human resources needs, access to markets other than the United States, intergovernmental collaboration, regulatory reform, awareness and education of the public, and reducing emissions and improving efficiency.[49]

The *Progress Report* was presented to the COF in July 2013. The *Canadian Energy Strategy* was discussed again in 2014 in Charlottetown PEI, and officially approved at the July 2015 COF meeting in St. John's Newfoundland and Labrador.[50]

2. Current Status

As described by the premiers in the *Canadian Energy Strategy*, the purpose of developing the Strategy is to "work together on energy issues and grow the economy, protect the environment, create new opportunities for individuals, organizations and businesses, and enhance the quality of life for all Canadians."[51] There is recognition at COF that Canada's energy sector is one of the primary drivers of the Canadian economy, but also the expectation that it to be developed "responsibly and with a focus on environmental protection and performance, and addressing climate change."[52]

The *Canadian Energy Strategy* addresses three themes: sustainability and conservation, technology and innovation, and delivering energy to people. The themes are divided into ten areas of focus, each of which had a working group team consisting of representatives from provinces and territories.[53] There was also a stakeholder engagement workshop in Edmonton in June 2013 which included participants from industry associations, environmental non-government organizations, members of the academic community, policy institutes and think tanks, research organizations, and provinces and territories.[54] The result is a strategy that defines common goals and actions to achieve meaningful progress in each area of focus, and that identifies energy-related initiatives for potential provincial and territorial collaboration.[55]

a. Carbon Emission and Greenhouse Gases

Four of the ten focus areas relate to reducing carbon emissions and greenhouse gases. They are: promoting energy efficiency and conservation, transitioning to a lower carbon economy, developing energy research and technology, and enhancing energy information and awareness.

Promote energy efficiency and conservation

This area of focus has been part of the *Canadian Energy Strategy* discussion since the 2007 *Shared Vision*. Improving energy efficiency and conservation is an important part of ensuring the country's energy demands can be met. Furthermore, increasing efficiency "decreases greenhouse gas emissions and pollutants, mitigates consumer vulnerability to price increases and supply disruptions and creates employment."[56] The *Canadian Energy Strategy* notes that Canada's total energy consumption continues to grow, and that even minor efficiency improvements can generate significant reductions of greenhouse gases. The strategy encourages consumers to make energy efficient choices and accelerate the adoption of products and technologies that support energy efficiency and conservation.[57]

Transition to a lower carbon economy

The provinces through the COF identified a need to develop more renewable sources of energy in the 2007 *Shared Vision*. This has carried forward into the Canadian Energy Strategy, which aims to transition to a lower carbon economy by doing three things.[58] The first is to develop complementary carbon management

48 *Ibid* at 8-13.
49 *Ibid* at 14-17.
50 The Council of the Federation, *Canadian Energy Strategy*, (July 2015) at 10 [*Canadian Energy Strategy*].
51 *Ibid* at 11.
52 *Ibid* at 3.
53 *Ibid* at 10.
54 *Ibid* at 10.
55 *Ibid* at 13.
56 *A Shared Energy Vision for Canada*, *supra* note 40 at 4.
57 *Canadian Energy Strategy*, *supra* note 50 at 14.
58 *Ibid* at 17.

mechanisms across Canada, such as efforts on measuring and reducing emissions. These will likely vary depending on the needs of the jurisdiction but could include carbon capture and storage technologies and the review of emissions reporting requirements.[59] The second is to create and review policies that encourage the marketplace to reduce or eliminate emissions to increase the efficiency and effectiveness of these programs such as a carbon tax or a cap and trade system.[60] The third is collaborating on the development of an integrated pan-Canadian approach to greenhouse gas reductions with "targets based on sound science."[61]

The role of the federal government remains critical, albeit to date limited. A 2013 "40/40 plan" – reducing emissions by 40 per cent per barrel of oil and charging companies exceeding emission limits a $40/tonne penalty – receded quickly. On May 15, 2015 Environment Minister Aglukkaq announced a reduction on Canada's GHG emissions to 70 per cent of the 2005 Canada-wide levels by the year 2030 - without placing regulations on the oil sands. At the time of writing, the results of the 2015 federal election and the approaches of each of the parties to climate change were uncertain.

Develop energy research and technology

The desirability of promoting technological development in the energy sector has also been a focus of the provinces since the 2007 *Shared Vision*. With current low oil prices, technological advances become highly critical for improving extraction efficiency and keeping projects economically viable. Technological advances are also important for commercializing new energy resources as well as reducing the environmental impacts of conventional resources, and expanding the use of cleaner sources of energy.[62]

Fostering greater innovation and technological development is important for enhancing the energy sector's environmental performance and Canada's global economic competitiveness. The *Canadian Energy Strategy* provides that focus should be on technologies that support safe and sustainable energy production, conversion, storage, transmission, distribution and consumption and that are resilient to climate change.[63] There should also be an emphasis on collaboration across provincial jurisdictions to share best practices related to the demonstration and implementation of technologies.

Enhance energy information and awareness

Improving access to information, and promoting energy awareness and education for Canadians was a focus included in the 2013 *Progress Report to the COF*.[64] The benefits of promoting energy literacy involve allowing individuals and industry to make more informed energy-related choices to increase energy saving and conservation from the consumer level,[65] as well as potentially increasing the social acceptability of the energy industry in Canada.

b. Energy Infrastructure

The focus areas related to the development of energy infrastructure are: the need to meet energy sector human resource requirements, develop and enhance Canada's energy transmission and transportation networks, improve and coordinate provincial regulatory systems, especially for interjurisdictional projects, and the need to promote market diversification away from the United States.

Develop and implement strategies to meet energy sector human resource needs

Meeting demand for a skilled and available workforce has been an area of focus since the 2007 *Shared Vision*. A range of skilled professionals and tradespeople are required to support Canada's energy industry, and shortages of skilled labour and human resource issues have been a problem in many sectors.[66] The *Canadian Energy Strategy* confirmed that is important to develop strategies to increase skill development, job training, and apprenticeship programs.[67] This is a factor related to other policy questions,

59 *Ibid* at 16-17.
60 *Ibid* at 16.
61 *Ibid* at 17.
62 *A Shared Energy Vision for Canada, supra* note 40 at 5.
63 *Canadian Energy Strategy, supra* note 50 at 21.
64 *Progress Report 2013, supra* note 45 at 17.
65 *Canadian Energy Strategy, supra* note 50 at 18.
66 *A Shared Energy Vision for Canada, supra* note 40 at 7.
67 *Canadian Energy Strategy, supra note* 50 at 22.

for example, when deciding whether Alberta should increase the amount of refining done in province. Of course, given the current economics, if oil prices do not recover, this could address some of the current employment and skills issues.

Develop and enhance a modern, reliable, environmentally safe, and efficient series of transmission and transportation networks

The *Canadian Energy Strategy* focused on the importance for provinces and territories to collaborate in the facilitation of efficient and safe movement of energy products between jurisdictions.[68] This featured prominently in the 2007 *Shared Vision* as well as the 2013 *Progress Report*. As Northern Gateway, Line 9 and other projects indicate, this is an important area because energy transmission and transportation infrastructure often cross jurisdictional borders, which necessarily requires provincial cooperation. The main areas identified as needing improvement are electricity transmission capability between jurisdictions, as well as the construction of West-East oil pipelines.[69] The goal is to sustain and improve transmission and transportation infrastructure for energy resources. This involves not only building new infrastructure, but also investing to maintain existing infrastructure to ensure its reliability, safety and security.[70]

Improve the timeliness and certainty of regulatory approval decision-making

One of the necessary results of provincial jurisdiction over natural resources is the development of a unique regulatory system in each province and territory. Regulation ensures the protection of the environment and public interest, but also has the potential to cause delays and inefficiencies in the context of interjurisdictional projects that must seek approval from several regulatory agencies.

Problems with duplication and overlap of regulatory functions were identified in the 2007 *Shared Vision*, and carried through to the Canadian Energy Strategy.[71] Streamlining regulation could help in the development of energy infrastructure by speeding up the process and therefore reducing costs. At the federal level, the need for streamlining regulatory processes for energy projects was addressed in Ottawa's *Responsible Resource Development Plan,* announced as part of *Economic Action Plan 2012*, and is the policy basis for recent federal regulatory energy reforms. These commenced in 2012 with amendments to the *National Energy Board Act*.[72] The status of those amendments may be subject to change after the 2015 federal election, with the federal NDP, for example, committed to removing them.

Promote Market Diversification

The *Canadian Energy Strategy* recognizes the need for Canada to focus on market diversification. This area of focus was not part of the 2007 *Shared Vision*, but featured prominently in the 2013 *Progress Report*. The *Progress Report* recognized the United States as an important export market. It also highlights the need for Canada to compete in new and emerging markets on a world scale, for all energy products including liquefied natural gas, clean energy and emission-mitigation technologies, environmental performance technologies and energy services.[73]

Market diversification will require an "interconnected energy transmission and transportation infrastructure" in order to move energy products. Furthermore, "[d]iversifying provincial and territorial energy products will require continued innovation, support for value-added processing, and the enhancement of public trust and confidence in energy development."[74] This suggests that the provinces – at least in the context of the *Canadian Energy Strategy* – are in agreement that more refining and upgrading should be done in Canada as opposed to the United States.

c. *Renewables Policy*

Facilitate the development of renewable, green and/or cleaner energy sources to meet future demand and contribute to environmental goals

68 *Ibid* at 26-27.
69 *Progress Report 2013, supra* note 45 at 14.
70 *Canadian Energy Strategy, supra* note 50 at 26.
71 *Ibid at 29; A Shared Vision for Canada, supra* note 40 at 7-10.
72 *National Energy Board Act,* RSC 1985, c N-7, as amended 6 July 2012.
73 *Progress Report 2013, supra* note 45 at 15.
74 *Canadian Energy Strategy, supra* note 50 at 30.

and priorities

The *Canadian Energy Strategy* specifically recognizes the promotion and development of renewable energy as a necessary area of focus for Canada. Shifting production and consumption to renewable and greener energy sources has been a focus since the 2007 *Shared Vision*. This was originally driven by increasing fossil fuel prices, and the concern - reflecting, of course the energy economics in 2007 rather than today - that eventually oil and gas would become too expensive for consumer use.[75]

The push towards clean energy sources still has traction even with low oil prices because of concerns regarding the environmental impact of the fossil fuel industry. The *Canadian Energy Strategy* supports the efficient deployment of clean and renewable energy sources across Canada, especially in off-grid areas that are currently dependent on diesel. The intended effect is to reduce environmental impact, as well as diversify Canada's energy sources to ensure the continuing security of energy.[76]

III. Analysis

1. National/Provincial Alignment

There are significant similarities between the *Canadian Energy Strategy* and Alberta's energy policy reforms. Prior to the election of Premier Notley, the COF largely reflected a compromise between Alberta's desire to facilitate the construction of interprovincial pipelines and Ontario and Quebec's desire to develop a national climate change policy.[77] Alberta's policies are now more in line with many of the areas of national and interprovincial focus set out in the *Canadian Energy Strategy*, such as investing in technology and innovation, energy efficiency and addressing climate change and the environment.

2. Public Opinion and the Viability of the Energy Industry

This convergence of Canada-wide energy policy and Alberta energy policy could ultimately be positive for the Alberta oil and gas industry. For many years, the oil and gas industry in Alberta has suffered from poor public opinion in the rest of Canada. For example, a national survey on energy literacy published in Alberta Oil magazine showed that for 57.3 per cent of Canadians the oil and gas sector brought to mind the words "wasteful" or "environmental disaster".[78] The figures were about the same in British Columbia (57.5 per cent), and much worse in Quebec (98.8 per cent). The number is slightly better in Alberta at 39 per cent.[79] The practical consequences of the industry's low public opinion are significant, and include everything from lawsuits from communities affected by individual extraction projects[80] to the obstruction of essential pipeline projects such as the Northern Gateway pipeline,[81] and even the province-wide moratorium on oil and gas extraction in Quebec.[82]

With oil prices at record lows, the oil and gas industry will not likely have the resources to continue fighting the public opinion battle, either by continuing its various ad campaigns,[83] or being able to support the expensive delays associated with opposition to projects. However, the Premier has the potential to change Canadian's minds about the oil and gas industry. The problem is, in working to gain the trust of individuals and organizations who are against the oil and gas industry, Premier Notley risks losing (or never gaining) the confidence of the industry itself. This is more than understandable. Many oil and gas companies are bankrupt or on the verge of bankruptcy[84] and probably will not recover if the price of oil does not increase soon.

Alberta's NDP government is therefore in a

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75 *A Shared Energy Vision for Canada, supra* note 40 at 5.
76 *Canadian Energy Strategy, supra* note 50 at 25.
77 *What you need to know about the Canadian Energy Strategy, supra* note 46.
78 *Public Opinion Headaches, supra* note 14.
79 *Ibid.*
80 "Alberta Oilsands facing aboriginal legal onslaught in 2014", *The Canadian Press* (2 January 2014) online: CBC News <http://www.cbc.ca/news/politics/alberta-oilsands-facing-aboriginal-legal-onslaught-in-2014-1.2481825>.
81 Tracy Johnson, "Is Northern Gateway quietly being shelved?", *CBC News* (20 February 2015) online: CBC News <http://www.cbc.ca/news/business/is-northern-gateway-quietly-being-shelved-1.2965355>.
82 "Quebec Premier Philippe Couillard says no to shale gas", *CBC News* (16 December 2014) online: CBC News <http://www.cbc.ca/news/canada/montreal/quebec-premier-philippe-couillard-says-no-to-shale-gas-1.2874976>.
83 Susan Krashinsky, "Oil companies seek to rebrand with friendly campaigns", *The Globe and Mail* (17 July 2015) online: The Globe and Mail <http://www.theglobeandmail.com/report-on-business/industry-news/marketing/oil-companies-seek-to-rebrand-with-friendly-campaigns/article25541810/>.
84 Rakteem Katakey & Luca Casiraghi, "Energy industry bankruptcies could rise as $500B of oilpatch debt comes due"

challenging position. They were elected on, among other things, a pro-environment mandate. Not acting now will undermine Premier Notley's credibility and jeopardize her ability to gain public trust for the oil and gas industry. However, every measure she takes that introduces uncertainty, or higher payment obligations on industry will be seen at worst as sabotaging the oil and gas industry, and at best as "the straw that broke the camel's back."

3. Practical Industry Impacts

Alberta's oil and gas industry is fragile at the moment, and there are predictions that low oil prices may be long-term because of new technologies that reduce the price of extraction, resulting in even more supply,[85] as well as the potential effects of potentially lifting the economic sanctions on Iran.[86] Further, world demand for cleaner energy especially in developed countries, and policies such as California's Low-Carbon Fuel Standard are increasingly putting emissions-intensive energy sources at a disadvantage.[87]

The industry is also dealing with obstacles imposed by the low public opinion of the oil and gas industry.[88] This is particularly debilitating for an economy dependent on exporting oil and gas. Canadian oil is currently exported to the already saturated United States market at subsidized rates, creating what has been referred to as the "bitumen bubble."[89] Alberta needs to connect its oil and gas network to new markets, which requires Alberta to develop a reputation both nationally and internationally as a responsible and environmentally-friendly producer of energy resources.

The complexion of the next federal government at the time of writing had not yet been determined. Irrespective of which party is in power nationally, provinces' co-ordination on energy issues generally, and climate change in particular, must acknowledge Ottawa's role. Pursuant to the division of powers provisions in the *Constitution Act, 1867*[90], this is an initiative that is at least partly under federal jurisdiction.

Section 92A of the *Constitution Act, 1867* provides that Parliament has the authority to make laws that will prevail over conflicting provincial laws in relation to the export of the primary production from non-renewable natural resources from a province.[91] Furthermore, Parliament has jurisdiction over railways, canals and other works and undertakings, which include interprovincial and international pipelines, as well as any works that are to be for the general advantage of Canada or for the advantage of two or more of the Provinces.[92] A weakness of the *Canadian Energy Strategy*, a cornerstone of previous interprovincial engagement on GHG and pipeline policy, is that it largely ignored the federal government.

From royalties to refineries, the Notley government is poised to substantially impact energy and environmental policy in Alberta and beyond its borders. A refreshed national engagement on climate change, potentially facilitated through the Canadian Energy Strategy and a significant, but not overbearing, federal role need not be a threat to the Alberta economy. A stable framework for GHG emissions - which many in the oil and gas industry themselves have asked for - may provide necessary clarity for investment and growth. It may also facilitate something more elusive, the social acceptance to develop energy infrastructure necessary for Canada to remain an international economic leader, rather than simply an energy superpower in waiting. ■

Calgary Herald (27 August 2015) online: Calgary Herald <http://calgaryherald.com/business/energy/energy-industry-bankruptcies-could-rise-as-550b-of-oilpatch-debt-comes-due>.

85 Chris Sorensen, "Awash in oil: Why the glut isn't going anywhere", *Maclean's* (2 September 2015) online: Maclean's <http://www.macleans.ca/economy/economicanalysis/awash-in-oil-why-the-glut-isnt-going-anywhere/>.

86 -3 Ajrun Kharpal, "Iran nuclear deal: This is what it means for oil", *CNBC* (14 July 2015) online: CNBC <http://www.cnbc.com>.

87 Climate Change Advisory Panel, *Climate Leadership Discussion Documen*t, available online: <http://alberta.ca/climate-leadership.cfm at 13 [*Climate Leadership Discussion Document*].

88 Gillian Steward, "Climate concerns present growing obstacle to oilsands development", *The Star* (4 September 2015) online: The Star <http://www.thestar.com>.

89 Kyle Bakx, "Oilpatch could lose $100B without new pipelines, researchers warn", *CBC News* (22 June 2015) online: CBC News <http://www.cbc.ca>.

90 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

91 *Ibid,* s 92A.

92 *Ibid,* s 92.

ARBITRATIONS INVOLVING REGULATED UTILITIES

*Gordon E. Kaiser, FCIArb**

Arbitration is the common dispute resolution procedure in the energy industry. The reasons differ depending on whether it is the upstream sector or the downstream sector. Most of the writing about energy arbitration relates to the upstream sector, which is where the exploration and development takes place. This sector is dominated by governments that control the rights to the assets in the ground, and the multinational oil companies that extract the oil and move it to market. This is the world of investor-state arbitration.

The attention the segment receives is not surprising. Investor-state arbitrations are the product of the rapid growth of treaties designed to protect the interests of investors– multilateral treaties such as the Energy Charter Treaty and the NAFTA agreement, but also a wide array of bilateral treaties between specific countries.

The investor-state cases are where the big dollars are – and the publicity. Many of the investor-state cases are public; few of the commercial cases are. The high watermark is the recent *Yukos* decision:[1] a claim of US$114 billion, an award of US$60 billion, and costs of US$70 million, a 10-day hearing on jurisdiction, a 21-day hearing on the merits with over 4,000 pages of written submissions, 8,800 exhibits and 2,700 pages of transcript. Many of these cases take 10 years to complete. They receive a lot of press and attention.

However, for every one of the investor-state cases there are 10 significant commercial arbitrations in the downstream energy sector. Here, the center of gravity is not London, Stockholm or Paris, it is Houston or Calgary. Over 90 energy companies have head offices in Calgary – Houston has three times that number. These are commercial arbitrations between companies.

In the investor state world, arbitrations offer a neutral court and the ability to enforce the award in 140 countries under the New York Convention.[2] In domestic energy arbitrations, enforcement or neutrality is not the issue. Instead parties seek the greater efficiency of arbitration, confidentiality, control of the schedule and an expert panel. But domestic arbitrations have an additional challenge not found in international arbitrations. Often one of the parties is regulated. And that regulator has an independent jurisdiction.

This is a world that concerns the generation of electricity that moves constantly across state, provincial and international boundaries. The same is true of gas. Each generator needs a transmitter to transmit that electricity to various markets, and within those markets, other companies distribute the energy to the end-user. Those three classes of parties – generators, transmitters and distributors – are all public utilities. Public utilities are regulated by the government, usually by an independent regulatory commission. Within North America, that Commission can be provincial, state or federal.

These public utilities can be privately owned

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1 *Yukos Universal Ltd (Isle of Man) v The Russian Federation,* UNCTRAL, PCA Case No 227, Final Award (18 July 2014) (Hon L Fortier, Chairman; Dr Charles Poncet; Judge Stephen M Schwebe).

2 *Chiron Corporation v Ortho Diagnostic Systems Inc,* 207F. 3d 1126 (9th Cir 2000); *John Hancock Mutual Life Insurance v Belco Petroleum Corp*, 88F.3D 129 (2nd Cir 1996) [*New York Convention*].

or owned by a government. Regardless of ownership, they are all regulated. That regulation includes the rates they charge customers, the quality of service, and investment in new assets.

The utility business also involves thousands of contracts with third parties for the construction and operation of generating facilities, pipeline and transmission assets, and the sale of electricity and gas. Many of those contracts have arbitration provisions. Often disputes involving regulated utilities present special problems for arbitrators. There can be conflicts in jurisdiction and parallel proceedings.

Divided Jurisdiction

In the United States and Canada, the courts grant deference to arbitrators. Similarly, in both countries, courts grant deference to regulators, particularly regulators involved in regulating complex industries with substantial national importance. This deference includes interpretation of the regulators home statute.

That leaves potential conflicts between regulators and arbitrators. Many regulated public utilities have arbitration clauses in contracts. Assume that a regulated utility that has a contract with a large commercial customer has an arbitration clause with respect to price, and assume that there is a dispute with respect to that price. Would that be resolved before the arbitration panel or before the regulator? If it is before an arbitration panel, will the principles of public utility law apply?

The regulator's jurisdiction

A tribunal only has the powers stated in its governing statute or those which arise by 'necessary implication' from the wording of the statute, its structure and its purpose. The Ontario Energy Board's jurisdiction to fix 'just and reasonable' rates is found in section 36(2) of the Ontario Energy Board Act, 1998:

> The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.

This is standard language in all public utility legislation. It is generally accepted that an energy regulator's jurisdiction is very broad. In *Union Gas Ltd v Township of Dawn*, the Ontario Divisional Court in 1977 stated:

> This statute make it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements, , are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal courts under the *Planning Act.*
>
> These are all matters that are to be considered in light of the general public interest and not local or parochial interests. The words 'in the public interest' which appear, for example, in s 40 (8), s 41 (3) and s 43 (3), which I have quoted, would seem to leave no room for doubt that it is broad public interest which must be served.[3]

The same Court in 2005 issued two important decisions. The Court stated in the *NRG* case:

> The Board's mandate to fix just and reasonable rates under section 36 (3) of the *Ontario Energy Board Act, 1998* is unconditioned by directed criteria and is broad; the Board is expressly allowed to adopt any method it considers appropriate.[4]

In the *Enbridge* case the Court stated that the Board in fixing just and reasonable rates can consider matters of 'broad public policy':

> the expertise of the tribunal in regulatory matters is unquestioned. This is a highly specialized and technical area of expertise. It is also recognized that the legislation involves economic regulation of energy resources, including setting prices for energy which are fair to the distributors and suppliers, while at the same time are a reasonable cost for the

3 *Union Gas Ltd v Township of Dawn, (1977) 15 OR (2nd) 722, OJ No 2223 at paras 28-29.*
4 *Natural Resource Gas Ltd v Ontario Energy Board, [2005] OJ No 1520 (Div Ct) at para 13.*
5 *Enbridge Gas Distribution Inc v Ontario Energy Board*, 75 OR (3d) 72, 26 Admin LR (4th) 233, [2005] OJ No 756 (QL) at para 24.

> consumer to pay. This will frequently engage the balancing of competing interests, as well as consideration of broad public policy.[5]

The arbitrator's jurisdiction

Arbitrators take their jurisdiction from the agreement between the parties. Absent some legislation there is no inherent jurisdiction in the tribunal. Depending on the scope of the arbitration agreement, the arbitrator is able to decide matters of tort, contract or equity, and has any commercial remedy available at law and equity or available to a court including the power to declare any provision of contract unconstitutional.

Under generally accepted principles, arbitrators have the power to rule on their own jurisdiction. This is sometimes referred to as a gateway issue or the competence-competence principle. A tribunal has the jurisdiction to determine its own jurisdiction.[6] This is acknowledged by the statute governing most arbitrations as well as the arbitration rules used by number of institutions. In the Ontario *Arbitration Act*[7] it is section 17. In the Alberta *Arbitration Act* it is also section 17.[8]

Not everything is subject to arbitration. Matters where there is a substantial public interest component may be excluded. The strongest examples would be criminal statutes or possibly fraud. Other areas such as competition law, intellectual property and securities law were originally held outside the ambit, but those restrictions have been largely overcome.

Primary jurisdiction

In dealing with arbitrators, the Federal Energy Regulatory Commission has developed the concepts of primary jurisdiction and exclusive jurisdiction. Unless the Commission is in a situation where it should exercise primary or exclusive jurisdiction, it will defer to an arbitrator.

This question arose in the Commission's 2007 decision regarding California Water Resources.[9] There, the California Department of Water Resources (California Water) was involved in a contract dispute with Sempra Generation relating to Sempra's failure to perform under a long-term energy purchase agreement. California Water claimed over US$100 million in false charges.

The matter went to arbitration. Sempra moved to set aside the claim on the ground that it was barred by federal preemption principles and the Filed Rate Doctrine.

The arbitration panel granted the Sempra motion to dismiss, concluding that the Commission had exclusive jurisdiction over the California Water claim. The panel concluded there was a conflict between California's claim and the tariff approved by the Commission. The panel referred to the Filed Rate Doctrine that holds that private agreements between utility customers cannot change the terms or conditions of approved tariffs. California Water responded that there was no conflict between its claims and the tariff.

In rendering its decision, the Commission stated first, at paragraph 32:

> As an initial matter, we emphasize that in this order we do not make a finding as to the validity of CDWR's interpretation of the Agreement, i.e., that Sempra may not knowingly schedule energy deliveries to CDWR at congested points. Both parties have agreed to binding arbitration to resolve their disputes regarding the Agreement and we believe this is appropriate. CDWR states that it does not, by the instant petition, seek to reverse or overturn the Panel's decision, nor is it the Commission's intent to purport to do so in this order.

The Commission further stated, at paragraphs 38 and 40:

> CDWR argues that the Commission asserts exclusive jurisdiction notwithstanding a binding arbitration in only two situations: (1) to ensure that the rates are just and reasonable; and (2) to ensure that rates are not unduly discriminatory. It argues that the dispute is over Sempra's compliance with the

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6 Ontario Medical Association v Willis Canada, 2013 ONCA 745; *BG Group PLC v Republic of Argentina*, 572 US (2014); *Dell Computer Corp v Union des consommateurs,* [2007] 2 SCR 801, 2007 SCC 34.
7 *Arbitration Act*, 1991, SO 1991, c 17.
8 *Arbitration Act*, RSA 2000, c K-43; see *Superior Energy Inc v Alberta,* 2013 ABQB 728.
9 *Re California Department of Water Resources,* 121 FERC 61,191, EL07-103-000 (19 November 2007) [*California Water*].

> terms of the Agreement and that it is not seeking to change the Agreement or change the rate under the Agreement and that it is not attacking any CAISO Tariff provisions. Thus, it argues, no exclusive Commission jurisdiction preempts the contract interpretation from proceeding in a non-Commission forum, i.e., the agreed-upon arbitration proceeding
>
> Having made the declaration above that CDWR's interpretation of the Agreement is not in conflict with the CAISO Tariff or Amendment No., we now address the jurisdictional questions posed by CDWR's petition. The Commission's exclusive jurisdiction covers matters that are clearly and solely within the Commission's statutory grant of authority. The parties' contractual dispute is not about the proper rate for service by Sempra to CDWR. Rather, it is about what, if any, adjustment is contemplated by the parties under their Agreement regarding CDWR's obligation for deliveries under the alleged circumstances. Such relief does not implicate the setting of a new just and reasonable rate under the Agreement or the CAISO Tariff. Thus, the parties' contractual dispute does not fall within the Commission's exclusive jurisdiction.

The Commission stated that it would not exercise primary jurisdiction over the dispute between California Water and Sempra Generation. Sempra argued that even if the Commission does find exclusive jurisdiction, it should exercise primary jurisdiction because California Water raised issues involving the Commission's expertise relating to congestion management. The Commission disagreed, stating at paragraphs 44 and 45:

> The dispute between CDWR and Sempra presents a question of contract interpretation, which we determined above is not within the Commission's exclusive jurisdiction. The decision whether to exercise the Commission's concurrent jurisdiction is within the Commission's discretion. As the Commission has discussed in prior orders, in deciding whether to entertain such a case, the Commission usually considers the following three factors: (a) whether the Commission possesses some special expertise that makes the case peculiarly appropriate for Commission decision; (b) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and (c) whether the case is important in relation to the regulatory responsibilities of the Commission. As discussed below, based on these three factors, we would not expect to assert primary jurisdiction over such a dispute.

The facts in dispute are unique to the parties. The resolution of this dispute is not important to the regulatory responsibilities of this Commission. The Commission has no special expertise in interpreting the Agreement or in divining how CDWR and Sempra intended to address dec'd generation. The ascertainment of parties' intent when they execute a contract is a matter of case-by-case adjudication that does not involve the considerations of uniformity or technical expertise that, in other circumstances, might call for the assertion of this Commission's jurisdiction. Further, the Commission's consistent policy has been to encourage arbitration when appropriate. [10]

This decision is a well-reasoned and clear description of the principles American regulators consider in determining whether they should take jurisdiction from an arbitration panel or whether they should step aside.

It turns out things are not much different in Canada. In *Storm Capital,*[11] a decision of the Ontario Superior Court of Justice, two companies had submitted an investment dispute to an arbitration panel. The matter dealt with the calculation of a finder's fee. The agreement provided that the finder should be registered with the *Ontario Securities Commission* (OSC).

The arbitrator found that Storm Capital was entitled to compensation. The opposing party brought an application to set aside the arbitration award claiming that the arbitrator made unreasonable errors of law and had decided matters beyond the scope of the arbitration agreement. The contract required that Storm Capital representative should be registered under

10 See *Indiana Michigan Power Co and Ohio Power Co*, 84 FERC 61,184 (1993).
11 *Advanced Explorations Inc v Storm Capital Association,* 2014 ONSC 3918.

the *Ontario Securities Act*. The arbitrator decided that issue. The applicant claimed the arbitrator lacked jurisdiction to rule on that issue because it was a matter of securities law under exclusive jurisdiction of the OSC.

The court stated in paragraph 57 and 58:

A privately-appointed arbitrator has no inherent jurisdiction. His or her jurisdiction comes only from the parties' agreement: see *Piazza Family Trust*, at para. 63. "The parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding": *Desputeaux v. Éditions Chouette (1987) Inc.*, 2003 2003 SCC 17 (CanLII), SCC 17, [2003] 1 S.C.R. 178, at para. 22. An arbitrator has the authority to decide not just the disputes that the parties submit to it, but also those matters that are closely or intrinsically related to the disputes: *Desputeaux*, at para 35.

Public policy in Ontario favours respect for the parties' decision to arbitrate. The *Arbitration Act, 1991* is "designed … to encourage parties to resort to arbitration as a method of resolving their disputes in commercial and other matters, and to require them to hold to that course once they have agreed to do so": *Ontario Hydro v. Denison Mines Ltd.*, [1992] O.J. No. 2948 (Gen. Div.), cited with approval in *Inforica Inc. v. CGI Information Systems & Management Consultants Inc.*, 2009 ONCA 642 (CanLII), 97 O.R. (3d) 161, at para. 14. As a result, the *Act* restricts the power of a court to interfere with the arbitration process or result: see e.g. *Arbitration Act, 1991*, ss. 6 (limiting the power of the court to intervene), 50(3) (requiring enforcement of an arbitration award unless a specific exception is met).

The Court further stated at paragraph 61 that if the Legislature wishes to preclude an issue from being subject to arbitration it must expressly state this intention. It is not enough that the subject matter on which the arbitration is sought is subject to regulation or concerns the public order. The Court relied on the decision of the Supreme Court of Canada in *Desputeaux*[12] for the principle that courts must be careful not to broadly construe areas as exempt from arbitration simply because they concern public order, as this would undermine the legislative policy of encouraging arbitration. The Ontario Court further noted that no provision in the *Ontario Securities Act* or any other statute was referred to that expressly precludes arbitration on matters of securities law.

The Court in *Storm Capital* also refused to follow the Ontario Divisional Court's decision in *Manning*[13] that the OSC has exclusive jurisdiction in some matters. That case involved the authority to remove an individual's exemption under the *Securities Act*. The Court in *Storm Capital* distinguished the *Manning* case because Storm Capital did not involve any exercise of the Commission's enforcement power. The *Storm Capital* arbitration involved a private dispute and was not binding on any third party including the Commission. Accordingly, the Court refused to set aside the arbitration.

The decision is a careful outline of the principles the Canadian courts will follow where there is an apparent conflict between the jurisdiction of an arbitration panel and the jurisdiction of the regulatory commission. The decision does not use the same terminology as the American cases, but it does come close to it in terms of principles. For example, the decision recognises that there are certain areas where the regulator would have primary jurisdiction, such as the case where an individual was subject to disbarment by the Commission.

On the other hand, in cases of purely private contractual matters, the arbitration panel is not infringing on a commission's jurisdiction. Moreover, the *Storm Capital decision* makes it clear that if a regulator's jurisdiction is to be preferred to an arbitrator's jurisdiction, there must be explicit legislative authority for that exclusive jurisdiction. This is an important point.

Deference to Regulators

The concept of deference to regulators is well understood. For years, courts in Canada[14] and in the United States[15] have ruled that antitrust and competition laws should not be enforced in regulated industries where that regulation is being

12 *Desputeaux v Éditions Chouette (1987) Inc*, [2003] 1 SCR 178, 2003 SCC 17.
13 *Manning v Ontario (Securities Commission)*, [1996] 94 OAC 15 (Div Ct).
14 *Canada (Attorney General) v Law Society of BC, [1982] 2 SCR 307.*
15 *Verizon Communications Inc v Law Offices of Curtis v Trinko LLP,* 540 US 398 [*Trinko*]; *Credit Suisse Securities (USA) LLC v Billing,* 551 US 264, 426 F 3d 130.

carried out by lawful government authority. In part the rationale was constitutional, but it also reflected the courts' policy of deferring to expert tribunals:

> The bottom line here, then, is that the Commission holds the interpretative upper hand: under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist. Because the legislature charged the administrative decision maker rather than the courts with "administer[ing] and apply[ing]" its home statute (*Pezim*, at p. 596), it is the decision maker, first and foremost, that has the discretion to resolve a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear. Judicial deference in such instances is itself a principle of modern statutory interpretation.
>
> Accordingly, the appellant's burden here is not only to show that her competing interpretation is reasonable, but also that the Commission's interpretation is *unreasonable*. And that she has not done. Here, the Commission, with the benefit of its expertise, chose the interpretation it did. And because that interpretation has not been shown to be an unreasonable one, there is no basis for us to interfere on judicial review — even in the face of a competing reasonable interpretation.

In 2013, the Supreme Court of Canada, in a case involving the British Columbia Securities Commission,[16]highlighted the deference that courts should grant to expert tribunals. The principle that antitrust authorities in North America will defer to regulators is a long-standing one but the most recent decision in *Trinko* is stark. There, the US Supreme Court said it doubted whether the Court had ever recognised the essential facilities doctrine in antitrust law, but in any case it should not be applicable where a regulatory body could mandate and control the terms and conditions of market entrance.

That case involved a public utility, Verizon Communications. While the case concerned deference to a sector specific regulator, a similar principle may well apply to a sector specific adjudicator. In North America, all electricity public utilities are subject to a sector specific adjudicator. That regulator licenses every generator, transmitter and distributor of electricity. In short, the regulator mandates and controls the terms and conditions of market entrance.

The concept of deference to administrative tribunals really began with the 1984 decision of the United States Supreme Court in *Chevron*.[17] The year following the *Mclean* decision, the Alberta Court of Appeal made a similar point with respect to the Alberta Securities Commission[18]:

> The Commission is an expert tribunal, charged with the administration of the *Act*. The standard of review of its decisions is presumptively reasonableness, particularly where the question relates to the interpretation of its enabling (or "home") statute. Its findings of fact, findings of mixed fact and law, and credibility findings are also entitled to deference, and will not be overruled on appeal unless they demonstrate palpable and overriding error:*Alberta (Securities Commission) v Workum*, 2010 ABCA 405 (CanLII) at paras. 26-7, 41 Alta LR (5th) 48, 493 AR 1; *Ironside v Alberta (Securities Commission)*, 2009 ABCA 134 (CanLII) at paras. 26-8, 11 Alta LR (5th) 27, 454 AR 285; *Smith v Alliance Pipeline Ltd.*, 2011 SCC 7 (CanLII) at para. 26, [2011] 1 SCR 160. However deference to fact findings is not the same thing as immunity from review: *H.L. v Canada (Attorney General)*, 2005 SCC 25 (CanLII) at paras. 73, 75, [2005] 1 SCR 401; *R. v Regan*, 2002 SCC 12 (CanLII) at para. 118, [2002] 1 SCR 297; *Wilde v Archean Energy Ltd.*, 2007 ABCA 385 (CanLII) at para. 102, 82 Alta LR (4th) 203, 422 AR 41; *General Motors of Canada Ltd. v Johnson*, 2013 ONCA 502 (CanLII) at para. 51,116 OR (3d) 457.

Deference to Arbitrators

The concept of deference to arbitrators can be

16 *Mclean v British Columbia Securities Commission*, 2013 SCC 67, [2013] 3 SCR 895.
17 *Chevron v Natural Resource Def Council,* 467 US 837.
18 *Walton v Alberta (Securities Commission)*, 2014 ABCA 273 at para 17.

traced back to the 1983 decision of the United States Supreme Court in *Mercury Construction*,[19] where the court stated simply that "any doubts concerning the scope of arbitration should be resolved in favour of arbitration." This was echoed by Canada's highest court in 2007 in *Dell Computers*.[20] In *Ontario Hydro*,[21] a Canadian energy arbitration case, the Ontario Superior Court stated:

> The Act encourages parties to resort to arbitration and requires them to hold to the course once they have agreed to so and entrenches the primacy of arbitration over judicial proceedings by directing the court generally to not intervene.

In an American energy arbitration case, *Bangor Gas*,[22] the United States Court of Appeals for the First Circuit stated:

> We review the district court's decision de novo, but our review of the arbitration award itself is "extremely narrow and exceedingly deferential." Bull HN Info. Sys., Inc. v. Hutson, 229 F.3d 321, 330 (1st Cir. 2000) (quoting Wheelabrator Envirotech Operating Servs. Inc. v. Mass. Laborers Dist. Council Local 1144, 88 F.3d 40, 43 (1st Cir. 1996)). The FAA "embodies a national policy favoring arbitration," Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006), and provides only a narrow set of statutory grounds for a federal court to vacate an award:
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> (1) where the award was procured by corruption, fraud, or undue means;
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> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10(a).
>
> In addition, this court in the past recognized a common law ground for vacating arbitration awards that are in "manifest disregard of the law," McCarthy v. Citigroup Global Mkts. Inc., 463 F.3d 87, 91 (1st Cir. 2006) (quoting Wonderland Greyhound Park, -10- Inc. v. Autotote Sys., Inc., 274 F.3d 34, 35 (1st Cir. 2001), while limiting this notion primarily to cases where the award conflicts with the plain language of the contract or where "the arbitrator recognized the applicable law, but ignored it." Gupta v. Cisco Sys., Inc., 274 F.3d 1, 3 (1st Cir. 2001). The manifest-disregard doctrine has been thrown into doubt by Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008), where the Supreme Court "h[e]ld that [9 U.S.C. § 10] . . . provide[s] the FAA's exclusive grounds for expedited vacatur." Id. at 584 (emphasis added). This has caused a circuit split,3 with this court saying (albeit in dicta) that "manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the Federal Arbitration Act," Ramos-Santiago v. United Parcel Serv., 524 F.3d 120, 124 n.3 (1st Cir. 2008).
>
> Even if the manifest-disregard doctrine were assumed to survive and were applied in this case, the award neither conflicts Compare Wachovia Secs., LLC v. Brand, 671 F.3d 472, 480 (4th 3 Cir. 2012) (recognizing continuing validity of manifest disregard doctrine), Johnson v. Wells Fargo Home Mortgage, Inc., 635 F.3d 401, 415 n.11 (9th Cir. 2011) (same), Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 94 (2d Cir. 2008), rev'd on other grounds, 130 S. Ct. 1758 (2010) (same), and Coffee Beanery, Ltd. v. WW, L.L.C., 300 Fed. App'x 415, 418 (6th Cir. 2008) (unpublished opinion)

19 *Moses H Cone Memorial Hospital v Mercury Construction,* 460 US 1 (1983) at 24.
20 *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34, [2007] 2 SCR 801.
21 *Ontario Hydro v Dennison Mines Ltd, (1992 OJ 2848).*
22 *Bangor Gas Company LLC v HQ Energy Services Inc,* No 12-1386 (1st Cir 2012).

> (same), with Frazier v. CitiFinancial Corp., 604 F.3d 1313, 1324 (11th Cir. 2010) (rejecting manifest disregard doctrine as invalid), Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349, 350 (5th Cir. 2009) (same), and Crawford Grp., Inc. v. Holekamp, 543 F.3d 971, 976 (8th Cir. 2008) (same). -11- with the plain language of the Agreement nor did the arbitrators recognize the applicable law but ignore it. The panel resolved what is at best an argument about how a contract of questionable meaning should be read and harmonized with a FERC doctrine on leasing capacity. Under settled precedent, an FAA award cannot be overturned based on mere disagreement by the court with the panel on a debatable issue, Advest, Inc. v. McCarthy, 914 F.2d 6, 9 (1st Cir. 1990); and in this instance the panel's decision is in our view entirely reasonable.

In an Alberta energy arbitration, the Alberta Court of Appeal stated as follows:

> As a matter of law and policy, the role of the courts in relation to arbitration has been one of non-intervention. The objective of arbitration legislation and the jurisprudence interpreting it is to promote adherence to agreements, efficiency and fairness and to lend credibility to an important dispute resolution process. Courts are instructed to be mindful of this overarching purpose in any exercise of discretion.[23]

Parallel proceedings

The FERC decision in *California Water* discussed above makes it clear that regulators will defer to arbitrators unless the matter falls with the Commission's exclusive jurisdiction. In the Alberta Utilities Commission decision in *Central Alberta Rural Electrification*[24] discussed in the next section, the Commission exercised jurisdiction notwithstanding the fact that an arbitration decision had been issued. However, there the Commission concluded that the arbitrator had not addressed the impact of the legislation but only the terms of the contract. In the previous section we outlined the jurisdiction of both arbitrators and regulators.

Both have substantial jurisdiction and considerable flexibility. There are cases that proceed at the same time before both arbitrators and regulators dealing with substantially the same issues. In some cases one proceeding will commence first and the second panel will have to consider *res judicata* and sometimes deal with anti-suit or anti-arbitration injunctions.

As indicated earlier, courts have over the years developed a body of law that clearly establishes as a matter public policy that they will defer to arbitrators wherever that is possible. And to a slightly lesser degree, courts over the past 10 years have developed a policy of deferring to regulators with expertise in technical matters.

The two decisions examined below indicate that regulators have also developed a policy of deferring to arbitrators wherever possible.

Different procedures

The potential for parallel proceedings will be influenced by the differences in the procedures used by arbitrators compared to regulators. In many respects, the two tribunals operate in a similar fashion. Neither tribunal is bound by the rules of evidence. The main difference is that the regulatory tribunal receives its jurisdiction from legislation while the arbitral tribunal receives its jurisdiction from a contract.

The remedies both tribunals can offer are similar; the main difference is that an arbitral tribunal cannot award fines. Another major difference is the ability of third parties to intervene. In arbitrations these are primarily *amicus* briefs, which we have seen in a number of NAFTA tribunals.[25] These are largely limited to written submissions. Receipt of oral submissions and access to documents is not permitted. In regulatory hearings, it's a much different situation. Third parties can successfully intervene if they can establish they are directly affected.[26] In rare cases, the scope of intervention may be limited,[27] but generally all parties are treated the

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23 *EPCOR Power LP v Petrobank Energy and Resources Ltd*, 2010 ABCA 378 at para 16.
24 *Re Central Alberta Rural Electrification,* Decision 2012-181, 4 July 2012 (Alberta Utilities Commission) [*Central Alberta Rural Electrification*].
25 *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22.
26 *Kelly v Alberta Energy Resources Conservation Board*, 2009 ABCA 349; *Power Workers Union v Ontario Energy Board,* (2009) OJ No 2997 [*Power Workers*].
27 *Re Toronto Hydro Electric System*, EB-2009-0308 (27 January 2010) (Ontario Energy Board).

same.

A related difference is the scope of disclosure. It is very wide in case of regulatory hearings and limited in the case of arbitrations. Also, arbitrations are by their nature private and confidential. Regulatory hearings on the other hand are public and usually initiated by public notices in newspapers and online.[28] A regulator also has ability to consolidate different proceedings, something that is not available to arbitrators. The difference in procedure signals a difference in purpose. One process is designed to settle private disputes. The other public disputes.

The different process can create an incentive for parties in arbitrations to move their dispute to the regulator if they do not get the result they like in the arbitration. That leads to the question in the next section: are regulators bound by *res judicata*?

Res judicata

It is now accepted that arbitration awards have *res judicata* effect. The same is true of regulatory decisions.[29] In the United States, arbitral awards have *res judicata* effect including collateral estoppel.[30] The binding effect of arbitral awards is provided for in a number of institutional rules including Article 28 (6) of the ICC rules, Article 26.9 of the LCIA Rules and Article 32 (2) of the UNCITRAL Rules as well as Article III of the New York Convention.[31]

An arbitrator who renders an award in violation of res *judicata* may run the risk of the award being set aside because the arbitrator exceeded its mandate having become functus upon rendering the first award, or because its reasons contradict those of the first award.

This possibility was considered in the 2012 decision of the Alberta Utilities Commission in *Central Alberta Rural Electrification*,[32] where two parties claimed the right to serve electricity customers in the same geographical territory. The two parties had a contract which contained an arbitration clause and began an arbitration pursuant to that agreement. The arbitration was heard and the tribunal released its decision finding in favour of one of the parties. The losing party then brought a court application for leave to appeal the arbitration award.

The other party commenced an application before the Utilities Commission asking the Commission to rule on the matter. By the time the Commission came to release its decision, the Court had heard the motion for leave to appeal but had not released any decision. In the circumstances, the Alberta Commission considered whether *res judicata* or issue estoppel prevented the Commission releasing its decision.

The Commission noted that the Supreme Court of Canada in *Danyluk* held that *res judicata* may apply to administrative matters. The Commission went on to analyse the pre-conditions to the operation of issue estoppel, namely: that the same issue is to be decided; that the decision which creates estoppel was final; and that the parties in the two proceeding are the same parties. The Commission noted that the decision of whether to apply issue estoppel is always a matter of discretion, stating at paragraph 33:

> The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle*, *supra.* If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied: *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 1998 CanLII 6467 (BC CA), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32;*Schweneke v. Ontario* (2000), 2000 CanLII 5655 (ON CA), 47 O.R. (3d) 97 (C.A.), at paras. 38-39; *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 1999

28 *Re Hydro One Networks,* EB 2009 – 0096 (19 January 2010) (OntarioEnergy Board).
29 *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001], 2 SCR 460.
30 *Chiron Corporation v Ortho Diagnostic Systems Inc,* 207F. 3d 1126 (9th Cir 2000); *John Hancock Mutual Life Insurance v Belco Petroleum Corp*, 88F.3D 129 (2nd Cir 1996).
31 *New York Convention, supra* note 2.
32 *Central Alberta Rural Electrification*, *supra* note 24.

CanLII 4553 (NS CA), 176 N.S.R. (2d) 173 (C.A.), at para. 56.

The Alberta Commission concluded that the first two preconditions had not been satisfied. It was clear from the motion to appeal that the arbitrators, in determining the matter, did not focus on the legislative scheme. Rather, the Commission concluded that the arbitrators had focused entirely on the interpretation of the agreement. Accordingly, the Commission ruled that the issue before the Commission had not been determined by the arbitrators and that *res judicata* did not apply.

The Commission noted that the appeal was still at an early stage with no merits decided and one party had stressed the urgency of receiving a decision from the Commission.

Finally, the Commission referenced the British Columbia decision in *McKinley*[33] as authority for the proposition that different outcomes are not fatal.

Disallowance

The regulator has additional tools not available to arbitrators. A regulator is not bound by an arbitration decision and will often apply different test – a public interest test. For example, in determining costs, a regulator will consider the impact on ratepayers. An arbitration, on the other hand, would likely only consider the impact on the parties.

The best example of this principle is two recent decisions – one from Ontario[34] and one from Alberta[35] – where the regulator refused to accept as a cost for rate-making purposes the decision of an independent arbitrator.

In *Power Workers*, the Ontario Energy Board denied Ontario Power Corporation recovery of C$145 million of labour costs. Those costs were driven by a collective agreement the utility had entered into with the union two years earlier. In reaching that agreement, the parties had involved an independent arbitrator.

The union and the utility argued that the Board was required to presume the compensation costs were prudent. The Board disagreed and found it could rely on benchmarking studies comparing the OPG labour costs with the costs at other utilities. The benchmarking studies had been ordered by the Board in an earlier rate case. As a result of this analysis, the Board disallowed C$145 million in labour costs.

The Board recognised the constraints on OPG but nonetheless held that ratepayers were only required to bear reasonable costs. An appeal to the Ontario Divisional Court upheld the C$145 reduction, stating that the Board must have the freedom to reconsider current compensation arrangements in order to protect the public interest. That decision was overturned by the Ontario Court of Appeal, which held that the costs were committed costs fixed by collective agreements and the Board had violated a fundamental principle of the prudence test: namely, whether an investment or expenditure decision is prudent must be based on the facts available at the time. The Board cannot use hindsight.

The case in Alberta is similar to the *Power Workers* case. In the Alberta case, the utility had asked the Utilities Commission to approve a special charge to the ratepayers which would cover an unfunded pension liability of C$157 million. Those costs included a cost-of-living allowance that was set in advance each year by an independent administrator. The allowance was set at 100 per cent of the consumer price index. As in Power Workers, the Alberta utility argued that this was a committed cost set by an independent authority and was therefore a prudent expenditure by the utility. The Alberta Commission disagreed and reduced the cost-of-living allowance to 50 per cent of the consumer price index.

In disallowing part of the expense, the Commission relied on evidence that an escalator equal to 100 per cent of CPI was high by industry standards. The utility appealed to the Alberta Court of Appeal, which upheld the Commission's decision.

The *ATCO* decision and the *Power Workers* decision were both appealed to the Supreme Court of Canada.[36] They were heard jointly in

33 *McKinley v British Columbia Tel,* 2001 SCC 161, [2001] 2 SCR 161.
34 *Power Workers*, *supra* note 26.
35 *ATCO Gas Ltd v Alberta (Utilities Commission),* 2013 ABCA 310.
36 *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)*, 2015 SCC 45.

2015 and the Court upheld the regulator.

There is one ground of non-enforcement that is important in this area: there is a body of public utility law that governs much of what regulated utilities do. It can be argued that arbitrators should apply that law. If arbitrators do not apply that law, is it 'manifest disregard' for the law? That is a concept more common in the United States than in Canada.

The 2008 decision of the US Supreme Court in *Hall Street Associates*[37] suggests that the doctrine of manifest disregard is no longer relevant even in the United States. The question of whether Courts will review an arbitrator's award because the arbitrator failed to analyse the proper law has risen in competition law cases. At one time, courts were prepared to engage in the exercise; however, more recent cases such as *Baxter International*[38] and *Union Pacific Resources*[39] suggest that that is unlikely unless there is an obvious error or an arbitrary or capricious decision. In Canada, the recent decision of the Supreme Court of Canada in *Sattva Capital*[40] drastically limits the appeals of arbitral awards in general.

However the concern remains. There may be a special category of cases such as arbitrations involving regulated utilities that require special attention by courts. The general rule may not apply in all cases. The situation is not unlike that which faced the Federal Power Commission in *Gulf States*[41]. That case involved a utility's financing. The intervenors claimed that the financing would have an anti-competitive effect and the Commission should apply the antitrust laws. The Commission refused, saying that those laws were irrelevant.

The US Supreme Court reversed the Commission's decision, stating that the Commission could not deem those laws irrelevant because the Commission had broad authority to consider anti-competitive conduct if that touched on the public interest. That case concerned a regulator but there is no reason that the same principle would not apply to an arbitrator faced with a similar situation.

Similarly, the European Court of Justice in *Eco Swiss*[42] ruled that a national court must grant an application for annulment if it finds that an award is contrary to European competition law. This case is interpreted as meaning that arbitral tribunal is obligated to apply competition law and non-application can be regarded as a breach of public policy and grounds for non-enforcement. A similar approach was followed by the English courts in *ET Plus SA v Welter*.[43] Arbitrations involving regulated public utilities arguably fall into this category. Even if the courts won't intervene the regulators may.

Conclusion

The basic question this article raises is whether disputes involving a regulated utility should be subject to arbitration, and if so, to what degree? Is there a dividing line?

Over the past 10 years, courts throughout North America have consistently ruled that they should defer to both regulators and arbitrators. The rationale in both cases was increased efficiency. Courts recognise that legislatures have established regulators with special expertise to adjudicate on a narrow select range of matters. The highest courts in Canada and the United States have consistently stated that wherever possible the court should defer to these regulators, not just on matters of fact, but also on the interpretation of their home statute.

At the same time, courts in Canada and the United States have established that as a matter of public policy courts should wherever possible defer to arbitrators.

The challenge we face in the choice between energy regulators and arbitrators in energy disputes is that we have two specialised adjudicators both with a high level of expertise. In the energy world, the rationale for arbitration is different from in the downstream sector.

We have an interesting dilemma. We have two adjudicators: both have a high level of expertise, but we cannot say that one should defer to the other because of expertise, nor

37 *Hall Street Associates LLC v Mattel Inc,* 552 US 576 (2008).
38 *Baxter International v Abbot Laboratories*, 315 F. 3d 829 (7th Cir 2002).
39 *American Central Eastern Texas Gas v Union Pacific Resources Group*, 93 Fed Appx 1 (5th Cir 2004).
40 *Sattva Capital Corp v Creston Moly Corp,* 2014 SCC 53, [2014] 2SCR 633.
41 *Gulf States Utilities Co v FPC*, 411 US 774 (1973).
42 *Eco Swiss China Time Limited v Benetton International NV,* ECR 1 3055.
43 *ET Plus SA v Welter,* [2005] EWHC 2115 (Comm), [2006] Loyd's Rep 251 9E.

can we really say that one is more efficient than the other. Arbitration and regulation involve different procedures. Regulation is a more lengthy procedure but is tailored to meet the requirements of energy regulation in terms of obtaining a public interest viewpoint from different parties. That is not the case in arbitration. Arbitrations are essentially private disputes using a more streamlined process with little ability for third parties to intervene.

Everyone recognises that parallel proceedings are not in the public interest – they simply add to delay and produce conflicting decisions. To a degree, we have faced this question before. Over the past decade, courts have struggled with the question of whether arbitration should be permitted in competition law, securities law and intellectual property. The competition law issue was resolved by the US Supreme Court in the *Mitsubishi* case.[44] Subsequent courts applied the principle to securities and intellectual property.

These are all specialised areas of law with a substantial public interest component. Initially it was the public interest component that led the courts to take the view that these matters should not be subject to arbitration. That position has been set aside throughout North America.

It would be easy to say that if arbitration is possible in competition law then why not in energy regulation. There is, however, an important difference between the two legislative schemes. Competition law is a law of general application. It applies to all companies in the marketplace. Competition law was designed to eliminate monopoly power, whether that results from mergers, price-fixing or other practices.

Regulated companies are different. They are monopolies. They are exempt from competition law. But there is a trade-off: they become subject to special legislation and a special regulator. Of all the regulated segments in the economy today, energy has the most extensive regulation. Utilities are not just regulated, they are licenced by the regulator to operate.

There are very few subject matters that arbitrators are prohibited from dealing with – criminal law might be one. But there are areas where arbitrators should step carefully. In the United States, the federal energy regulator has taken the position that it has exclusive jurisdiction in certain areas and primary jurisdiction in others. There is a related question: where the jurisdiction is not exclusive, is the arbitrator under a special obligation to consider a particular body of law? In this case it would be public utility law.

However the recent Supreme Court of Canada decision in *Power Workers* suggests that law may not be binding on regulators let alone arbitrators. This question is more complicated in energy than in competition law. In energy regulation, it is clear that there are certain matters that should not be subject to arbitration.

American courts and regulators talk about the exclusive or primary jurisdiction of energy regulators. In American energy regulation this relates to the concept of the filed-rate doctrine, which we examined earlier in *California Water*. The doctrine simply means that if a Commission has approved a rate, then the utility cannot create another rate by private agreement. That is, a utility cannot contract out of regulation. In *California Water,* the Commission stepped aside in favour of the arbitrator because the Commission concluded that the matter before them was a private contract dispute that did not involve an approved tariff. But had there been a tariff, the result would have been different. The matter would have come within the exclusive jurisdiction of the regulator.

Every energy regulator in North America has, as a basic statutory mandate, the responsibility to set just and reasonable rates. These are government agencies carrying out a legislative mandate. Once that is done, private parties in arbitrations cannot set them aside. This principle applies even if a regulated public utility is not one of the parties to the arbitration.

On this question, the Canadian cases reach a slightly different result. In *Storm Capital*, the Ontario decision considered above, the court stated that the regulator would have exclusive jurisdiction only if the legislation specifically provided for that. The Supreme Court of Canada took this position in *Desputeaux*, where the defendant argued that the *Copyright Act* gave the court exclusive power to decide copyright issues. The Court rejected that argument on the ground that there were no specific statutory words to that effect.

The Alberta Commission in the *Rural*

44 *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614 (1985).

Electrification case held that the regulator could decide the matter notwithstanding the existence of an arbitration decision. The rationale was that the issue before the regulator was the interpretation of the regulatory statute. That issue was not before the arbitrator.

This really is just a reformulation of the American primary jurisdiction or exclusive jurisdiction rule. A regulatory statute is different from other statutes because a regulator has been specifically authorised by the legislature to enforce that particular statute. That is also the situation in competition law. But there is a difference: energy regulators have specific jurisdiction over specific companies. In most cases, the regulators license those companies to operate and their continuing operations are subject to the regulators oversight. In most cases the regulators will also establish by franchise agreement the exclusive territory that the monopoly can operate in. That is not the situation in competition law.

What, then, are the areas that fall under the exclusive jurisdiction of an energy regulator? The short answer might be that it would be those areas where the regulator has issued a specific order. That would involve the rates or the prices the utility can charge.

The dividing line is never clear and it requires case-by-case analysis.

One example is access to essential facilities. This is a basic principle of public utility law and a clear obligation of a regulated utility. But it is also a general principle of competition law. The issue often arises in merger cases in competition proceedings. In fact, in settling those cases by consent orders, the competition authorities have often provided for arbitration in the settlement agreement where there is a dispute as to whether access is being properly granted. The American antitrust authorities did this in the *El Paso Energy*[45] and *DTE Energy*[46] merger cases. The Canadian authorities did it in the *Air Canada*[47] and the *United Grain Growers*[48] merger. There is no reason why those disputes would not be within an arbitrator's jurisdiction.

One area where arbitrators are likely offside concerns disputes with respect to franchise agreements. These are often awarded by municipalities and approved by the regulator. Usually they have a 20-year term, but regulators can and have reduced the term where they felt the utility was not performing in terms of service quality. An arbitrator would have no authority to modify a franchise agreement given that it is subject to a specific order of the regulator unless the regulator had authorised arbitration as part of the approved agreement.

The second question is: if arbitrators exercise jurisdiction, do they have an obligation to apply the principles of public utility or regulatory law? And what happens if they do not apply those principles?

The short answer is that if arbitrators are going to deal with disputes involving regulated utilities, they have to apply the law that applies to those utilities. Those utilities have obligations established under legislation and court decisions interpreting that legislation. They are required to meet those standards.

Those standards will impact the manner in which the arbitrator deals with the parties. For example, under public utility law, regulated utilities have a duty to serve and an obligation not to discriminate between customers and competitors. Public utilities also have special rights. In most jurisdictions, regulated public utilities are not subject to the laws of negligence except to the extent of gross negligence.

The gross negligence provision is particularly interesting. While this was initially a common law rule, today most utilities have it in their governing statute or regulations. In *Kristian v Comcast*,[49] the US Court of Appeals held that the provisions in an arbitration decision that prevent the exercise of statutory rights under federal or state law are invalid.

Earlier in this article, we noted that even where courts elect to not review arbitration decisions involving regulated public utilities, the regulators may. If a public utility doesn't like an arbitration award, the first authority they will run to is not the courts but the energy regulator that controls

45 *Re El Paso Energy Corp,* No C-39-15, 2000 FTC Lexis 7 (FTC, 6 Jan 2000) (decision and order).
46 *Re DTE Energy Co,* [2001] 131 FTC 962 (decision and order).
47 *Canada (Director of Investigations and Research) v Air Canad,* [1989] 27 CPR (d) 476 (Competition Tribunal).
48 *Canada (Commissioner of Competition) v United Grain Growers Limited,* Competition Tribunal, CT-2002/01, Consent Order (17 October 2002).
49 *Kristian v Comcast Corp*, 446 F.3d 25 (1st Cir 2006).

most of their actions. This is particularly the case in two circumstances. First, if the dispute involves the interpretation of a regulatory statute or regulatory principle. And second, if the arbitrators have failed to consider those laws and jurisprudence.

This is what happened in *Central Alberta Rural Electrification*. There, the arbitration award had been issued. One of the parties went to the regulator. The regulator decided the issue, stating that the regulator was not bound by *res judicata* because the arbitrator had not considered the regulatory statute which was the issue before the regulator. Next, an application was made to the court for leave to appeal the arbitration award. The court refused to grant leave because it recognised that the regulator had intervened and deference should be accorded. It was pretty clear that the Canadian court was deferring to the regulator and essentially adopted an American primary jurisdiction rule.

There is no reason why the arbitrator could not have dealt with the regulatory legislation. The arbitrator did not and the regulator moved in. The interesting question is whether regulators will insist that they have exclusive jurisdiction.

It is likely that regulators will defer to arbitrators on public policy grounds. It will, however, be a more cautious deference than courts grant, particularly if their home statute is at issue. And if it is, and the arbitrators have not considered the legislation or have considered it wrongly, the regulator will likely exercise primary jurisdiction.

In the end, this simply means that where arbitrators move into areas of public law, particularly regulatory law, and one of the parties before them is a regulated utility, then they should be aware of the special laws that apply to the industry and publicly regulated utilities in particular. It also means that this type of arbitration is more reviewable than most. If not by the court then certainly by the regulator. And if a court has to pick between an arbitrator and a regulator in these cases, the regulator will likely get the nod.

There is no bright line in this world. But if the subject is an area in which the regulator has a record of exercising jurisdiction and in particular has issued orders directed at the utility in question, a red light should flash. ■

NATIONAL ENERGY BOARD PROCEDURAL REFORM - ROUND 2 GOES TO THE REGULATOR[1]

C. Kemm Yates, Q.C.[2] and Sarah Nykolaishen[3]

"High court won't hear challenge

> *The National Energy Board has the right to limit evidence or exclude participants from the Kinder Morgan pipeline hearing, or any other hearing it conducts. That's the effect of a Supreme Court of Canada decision not to hear a constitutional challenge of federal government revisions to the National Energy Board Act. Vancouver based ForestEthics Advocacy and several interveners had hoped the high court would allow a challenge of section 55.2 of the Act, arguing the section limits Canadians' right to free speech. ForestEthics spokesman Sven Biggs says the fight will now move to Parliament. He pledges critics will redouble their efforts to ensure the next federal government creates a fair process for the review of pipeline proposals."*
>
> *-Calgary Herald September 11, 2015*

The short newspaper clipping refers to a decision by the Supreme Court of Canada (SCC)[4] that dismissed an application by the ForestEthics Advocacy Association (ForestEthics) and eight residents of the Greater Vancouver area[5] for leave to appeal from rulings of the National Energy Board[6] (NEB or Board) in the proceeding relating to the Trans Mountain Pipe Line Expansion Project (TMX).

TMX is a proposed $5.4 billion expansion of the existing Trans Mountain pipeline between Edmonton, Alberta and Vancouver, British Columbia[7] for the purpose of opening new markets in Asia for crude oil production from the Alberta oil sands. The NEB rulings in question related to participatory rights in the proceeding, in the context of its determination that climate change issues were irrelevant to the proceeding. Board Ruling 34[8] dismissed a motion by

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1 The views expressed in this comment are those of the authors alone and do not represent positions or opinions of Blakes, Cassels & Graydon LLP (Blakes), any other lawyer of Blakes, or any client of Blakes.

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4 *Quarmby v Canada (Attorney General),* [2015] SCCA No 113, September 10, 2015. McLachlin C.J. and Wagner and Gascon JJ. Application for leave to appeal dismissed without reasons.

5 Lynne M. Quarmby, Eric Doherty, Ruth Walmsley, John Vissers, Shirley Samples, Tzeporah Berman, John Clarke and Bradley Shende (together, Quarmby).

6 More precisely, the SCC denied an application by Quarmby, ForestEthics and others for leave to appeal from the denial by the Federal Court of Appeal (FCA) of their application for leave to appeal the NEB rulings to the FCA: *Lynne M. Quarmby and others v National Energy Board and others,* Court Number 14-A-62, January 23, 2015. Nadon, Ryer and Webb JJ.A. Application for leave to appeal dismissed without reasons.

7 Trans Mountain applied to the NEB pursuant to sections 52 and 58 of the NEB Act for a certificate of public convenience and necessity (and related orders) approving the project which involves construction of 987 kilometres of new pipeline in British Columbia and Alberta, the reactivation of 193 kilometres of existing pipeline, new and modified facilities (including pump stations and tanks), and expansion of the Westridge Marine Terminal.

8 Hearing Order OH-001-2014, Trans Mountain Pipeline ULC Application for the Trans Mountain Expansion Project, Notices of Motion dated 6 and 15 May 2014 by Lynne M. Quarmby, Eric Doherty, Ruth Walmsley, John

ForestEthics and Quarmby (Charter Motion) that asserted that either the standing test in section 55.2 of the *National Energy Board Act* (*NEB Act*) or the Board's participation decisions in the TMX hearing infringed the freedom of expression guarantee in section 2(b) of the *Canadian Charter of Rights and Freedoms* (Charter).[9]

The SCC dismissal of the ForestEthics/Quarmby leave application is the latest (and perhaps last) in a series of decisions relating to implementation by the NEB of procedural reforms that were initiated by amendments to the *NEB Act* in 2012. Given that the standard for leave to appeal is an arguable question of law or jurisdiction, the effect of the denial of leave can be viewed as confirmation of the Board's rulings and validation of the Board's interpretation of the Charter and its procedural powers under its recently amended legislation.

Background

In 2012, the Federal government legislated amendments to the *NEB Act*[10] that effected fundamental changes to the role of the NEB in reviewing applications for certificates of public convenience and necessity (CPCNs) for interprovincial and international pipelines. The catalysts for the legislative changes included the delays experienced in the regulatory reviews of the Mackenzie Gas and Northern Gateway projects. The legislative changes, both substantive and procedural, were made to ensure ultimate political accountability for pipeline decisions and to enhance the efficiency of the review process.[11]

The Board's role in the pipeline approval process changed from "decider" to "recommender" (to the Governor in Council). Time limits were imposed on the NEB's review of applications for CPCNs. Germane to the current case were the amendments that were made with a view to increasing efficiency by limiting participation in CPCN proceedings. While previously, a party only had to be an "interested person"—a relatively low threshold—to participate, section 55.2 of the amended *NEB Act* requires the Board to consider representations of persons who are "directly affected by the granting or refusing of the application", and permits it to consider the representations of persons who "in its opinion, [have] relevant information or expertise."

Section 52 reads in its entirety:

> 55.2. On an application for a certificate, the Board shall consider the representations of any person who, in the Board's opinion, is directly affected by the granting or refusing of the application, and it may consider the representations of any person who, in its opinion, has relevant information or expertise. A decision of the Board as to whether it will consider the representations of any person is conclusive.

The NEB issued guidance for the application of section 55.2.[12] The Board decides who may be "directly affected" on a case-by-case basis. It allows participation by persons whose interests are "specific and detailed…rather than a general public interest". The determination of whether a person has relevant information or expertise includes consideration of "how much value the information will add to the NEB's decision or recommendation".

Round 1—The Enbridge Line 9 Reversal Case

The TMX proceeding is the second time that the Board's application of section 55.2 has been challenged in the courts. The first occasion arose out of the Enbridge Line 9 Reversal proceeding.[13] In *ForestEthics Advocacy Association v National*

Vissers, Shirley Samples, ForestEthics Advocacy Association, Tzeporah Berman, John Clark, and Bradley Shende (Applicants), National Energy Board Ruling No. 34, October 2, 2014 [*Ruling 34 or Ruling*].

9 Quarmby also served a Notice of Constitutional Question and brought a procedural motion (Procedural Motion) requesting an oral hearing of the Charter Motion. The Procedural Motion was also dismissed in Ruling 34 and will not be discussed in this comment.

10 *Jobs, Growth and Long-term Prosperity Act*, SC 2012.

11 The changes to the NEB regulatory regime are discussedin detail in Rowland J. Harrison, Q.C., Lars Olthafer and Katie Slipp, "Federal and Alberta Energy Project Regulation Reform—at What Cost Efficiency?", (2013) 51 Alta L Rev 249, particularly at 251-267,

12 *Applying to Participate in a Hearing,* online: NEB <http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtcptn/pblchrng/pblchrng-eng.html>.

13 *Enbridge Pipelines Inc.* Application for the Line 9B Reversal and Line 9 Capacity Expansion Project under section 58 and Part IV of the National Energy Board Act, Hearing Order OH-002-2013.

14 *Forest Ethics Advocacy Association v National Energy Board,* 2014 FCA 245 [*ForestEthics*].

Energy Board,[14] the FCA upheld the NEB's rulings on the scope of that proceeding and the establishment of participatory rights. The *ForestEthics* decision, which has been discussed in detail in previous editions of this journal,[15] reflects the concept of respect for the decision-making imperatives of the Board and its specialized jurisdiction and expertise. In dealing with participatory rights, the Court commented that:

> "Board hearings are not an open-line radio show where anyone can dial in and participate. Nor are they a drop-in center for anyone to raise anything, no matter how remote it may be to the Board's task of regulating the construction and operation of oil and gas pipelines."[16]

It went on to say that section 55.2 was enacted to make Board hearings more focused and efficient, and requires that persons who are not directly affected provide a "rigorous demonstration" that they have "relevant information or expertise" relating to the matter under consideration by the regulator.[17]

The Court stated that the Board's decisions on process, including the establishment and utilization of the Application to Participate form, are procedural in nature, and that the standard of review on procedural decisions is "correctness with some deference to the Board's choice of procedure."[18] The Court endorsed a "'significant margin of appreciation"[19] for the Board in establishing processes and principles for the determination of participatory entitlements in proceedings subject to section 55.2,[20] a conclusion that was supported by several factors:

- The Board is master of its own procedure
- The Board has considerable experience and expertise in conducting its own hearings and determining who should not participate, who should participate, and how and to what extent. It also has considerable experience and expertise in ensuring that its hearings deal with the issues mandated by the Act in a timely and efficient way.
- The Board's procedural choices are entitled to deference.
- Finally…the Board must follow the criteria set out in section 55.2 of the Act – whether "in [its] opinion" a person is "directly affected" by the granting or refusing of the application and whether the person has "relevant information or expertise." But these are broad terms that afford the Board a measure of latitude, and so in obtaining information from interested parties concerning these criteria, it should be also given a measure of latitude.
- the Board's decisions are protected by a privative clause.[21]

The Court also held that the Board's decision to exclude climate change issues— upstream and downstream environmental and socio-economic effects associated with the development of the Alberta oil sands and the downstream use of oil transported by the pipeline—was reasonable in that it was within a range of acceptability and defensibility on the facts and the law—within the margin of appreciation.[22]

What the FCA did not do in *ForestEthics,* however, was deal with the Charter argument. ForestEthics only raised the 2(b) question on judicial review, a tactic that earned it a rebuke from the Court and a ruling that it was barred from invoking that argument for the first time on judicial review.[23] The FCA relied on the

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15 See, e.g. Rowland J. Harrison, Q.C., Case Comment, "Enbridge Line 9 Reversal", (2014) 2 ERQ 129; David J. Mullan, 2014 "Developments in Administrative Law Relevant to Energy Law and Regulation", March 2015—Volume 3, issue 1 2015 [*Mullan*].
16 *ForestEthics, supra* note 14 at para 76.
17 *Ibid* at para 77.
18 *Ibid* at para 70.
19 *Ibid* at e.g. para 72.
20 See *Mullan, supra* note 15 at 7 and 12.
21 *ForestEthics, supra,* note 14 at para 72.
22 *ForestEthics, supra* note 14 at para 69.
23 *Ibid* at para 58.
24 *Okwuobi v Lester B Pearson School Board; Casimir v Quebec (Attorney General); Zorrilla v Quebec (Attorney General),*

SCC decision in *Okwuobi*[24] for the proposition that, where an administrative decision-maker can hear and decide constitutional issues, that jurisdiction should not be bypassed by raising the constitutional issues for the first time on judicial review.[25] The result was that ForestEthics and Quarmby brought the Charter argument to the NEB in the TMX proceeding.

Round 2 - The Charter Motion

The Charter Motion asserted that either the standing test contained in section 55.2 or the Board's participation decisions in the TMX hearing infringed the freedom of expression guarantee in section 2(b) of the Charter.

Describing themselves as a "sampling of Canadians who were denied full participatory rights in the Project hearing by virtue of [section] 55.2 of the NEB Act and decisions made by [the] Board in furtherance of [section] 55.2",[26] the Applicants brought four constitutional challenges to the Board. The first (Legislation Challenge) sought a declaration that section 55.2 is of no force and effect since it violates the freedom of expression guarantee in section 2(b) of the Charter. Alternatively, the Applicants claimed that the Board had interpreted the otherwise-constitutional section 55.2 in a section 2(b)-infringing and unreasonable manner. They alleged that the Board created an unduly complex Application to Participate process (Application Process Challenge), that it adopted an "extremely limited" interpretation of the "directly affected" standard in its Ruling on Participation (Participation Ruling Challenge), and that the Board unreasonably excluded consideration of upstream and downstream environmental and socio-economic effects from the hearing (List of Issues Challenge).[27]

Participation Ruling

Early in the TMX proceeding, the Board established the procedure for Applications to Participate (ATP). The ATP form indicated that applicants to participate must clearly describe their interest in relation to the List of Issues that the Board had previously issued on July 29, 2013 and which was replicated in the form.[28] The List of Issues included such matters as "the need for the proposed project" and "the economic feasibility of the proposed project," but expressly excluded "the environmental and socio-economic effects associated with upstream activities, the development of oil sands, or the downstream use of the oil transported by the pipeline."

The participation decisions that were challenged by the Applicants were contained in an April 2014 ruling of the Board (Participation Ruling).

The Participation Ruling sets out the Board's interpretation of section 55.2 which establishes two categories of persons who may make representations to the Board in relation to an application for a CPCN: those who are directly affected by the granting or refusing of the application (Category 1), and those who have relevant information or expertise (Category 2). With regard to Category 1, the Participation Ruling states that the Board considers how the applicant uses the area where the project will be located, how the project will affect the environment, and how the effect on the environment will affect the applicant's use of the area. The closer these elements are connected, the more likely the person is directly affected. The Participation Ruling also notes that the Board considers interests and direct effects that are commercial or financial as well as uses of land and resources for traditional Aboriginal purposes.[29]

The individual Applicants, all of whom resided in the Vancouver and surrounding area, sought status under Category 1. The NEB declined to grant intervenor status to any of the Applicants, with the exception of ForestEthics, which was told that it could not comment on the upstream and downstream effects of the development of the oil sands and climate change.[30]

The Charter Arguments

Section 2(b) of the Charter states:

> 2. Everyone has the following

2005 SCC 16, [2005] 1 SCR 257.
25 *Forest Ethics, supra* note 14 at para 46.
26 Charter Motion at para 35.
27 *Ruling 34*, *supra* note 8 at pp 5-6.
28 *Trans Mountain Pipeline ULC (Ruling on Participation)* (2 April 2014) OH-001-2014 (NEB) at 3.
29 *Ibid* at 4.
30 Charter Motion at para 35.
31 *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927.

> fundamental freedoms:
>
> …
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

The Applicants argued that the proper test to be applied in relation to section 2(b) was established by the SCC in *Irwin Toy Ltd v Quebec (Attorney General)*[31] and *Montreal (City) v 2952-1366 Québec Inc*.[32] As stated by the Applicants, the "*Irwin Toy/Montreal City* test" requires a decision-maker to consider three factors to determine whether the impugned law unjustifiably infringes the claimant's section 2(b) rights: (1) whether the claimant's proposed speech has expressive content that brings it within the *prima facie* protection of section 2(b); (2) whether the nature of the forum in question removes that protection; and (3) whether the impugned provision denies that protection.[33]

The Charter Motion argues that the submissions that the Applicants wanted to make before the NEB constituted a form of political expression such that they fell within the *prima facie* protection of section 2(b).[34] To the second part of the *Irwin Toy/Montreal City* test, the Charter Motion points to certain comments on the NEB's website—that public participation in the NEB process lies at the core of its mandate—in support of the assertion that the NEB is "intended for expression." To the question of whether section 55.2 of the NEB Act denies the protection guaranteed by section 2(b) of the Charter, the Charter Motion argues "yes" because the section was enacted to limit who could participate in NEB hearings (to those who are "directly affected" and those who have "relevant information or expertise"). The Charter Motion goes on to consider the justification analysis established under *R v Oakes*[35] and argues that the infringement of section 2(b) of the Charter by section 55.2 of the NEB Act cannot be justified under section 1 because section 55.2 is overbroad in relation to its goal of making the NEB process more efficient, and because the deleterious effects associated with section 55.2 outweigh the salutary effect.[36]

In addition to the *Irwin Toy/Montreal City* test the Charter Motion also discusses the test established by the SCC in relation to section 2(b) of the Charter in *Dunmore v Ontario*[37] and *Baier v Alberta*.[38] The *Baier* test applies in circumstances where a "positive rights" claim is advanced or where the claimant is seeking access to a statutory platform that might afford them a unique form of expression. "Positive rights" are at issue where a claim is made that the government "must legislate or otherwise act to support or enable an expressive activity."[39] The conditions for finding a Charter violation in these circumstances are as follows:

> (1) that the claim is grounded in a fundamental freedom of expression rather than in access to a particular statutory regime;
>
> (2) that the claimant has demonstrated that exclusion from a statutory regime has the effect of a substantial interference with s. 2(b) freedom of expression, or has the purpose of infringing freedom of expression under s. 2(b); and
>
> (3) that the government is responsible for the inability to exercise the fundamental freedom.[40]

The Charter Motion argues that the *Baier* test does not apply in the circumstances of the Applicants' claim because the Applicants were not claiming positive rights—instead, the Applicants are said to have been "simply seeking to express themselves before [the] Board without having the content of their expression unduly curtailed.

Ruling 34

The Board dismissed the Charter Motion.

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32 *Montreal (City) v 2952-1366 Quebec Inc,*[2005] 3 SCR 141, 2005 SCC 62 [*"Montreal City"*].
33 Charter Motion at para 46.
34 *Ibid* at para 47.
35 *R v Oakes,* [1986] I SCR 103.
36 Charter Motion, pages 26-29.
37 *Dunmore v Ontario*, 2001 SCC 94, [2001] 3 SCR 1016.
38 *Baier v Alberta*, 2007 SCC 31, [2007] 2 SCR 673 [*Baier*].
39 *Ibid* at para 35, as stated in *Ruling 34* at page 8.
40 *Ibid* at para 30, as summarized in *Ruling 34* at page 7.
41 *Ruling 34, supra* note 8, at p 8.

With respect to the Legislative Challenge, it determined that the Charter Motion represented a positive rights claim. This conclusion was based on the fact that section 55.2 places limits on who can make representations before the Board in connection with the issuance of a certificate—i.e. those who are "directly affected" or who have relevant information or expertise—whereas the Applicants argued that "all persons interested in and affected by" the Project should be able to participate in the hearing.[41] Having made this determination, the Board went on to apply the *Baier* test, which was found not to have been satisfied because the Charter Motion revolved around a claimed right to participate in the Board's process, not the exercise of a fundamental freedom.[42] In this regard, the Board noted that the Applicants had expressed themselves vigorously outside the Board's process on the matters that they wanted to bring to the Board's attention, including in panel discussions, newspaper editorials, online blog posts, articles and reports, Twitter, town hall meetings, public protests and petitions.[43]

Ruling 34 goes on to note that the Applicants' preferred test (i.e. *Irwin Toy/Montreal City* test) would not be satisfied, either, because an untrammeled right of the public to "open public expression" at the Board would come at the expense of the Board's statutory objectives.[44] As stated in Ruling 34:

> "[t]he Board cannot efficiently, effectively, or fairly hear the evidence it needs to assess the public interest in a project if it must hear from any and all persons wishing to express an opinion on it."[45]

It also said:

> "Quasi-judicial tribunals like the Board invariably establish expression-limiting rules of procedure, relevance and decorum. They have never been forums for free, open-ended expression. Like in a court, one cannot simply "intrude and present one's message."[46]

The Ruling concludes that none of the Applicants' other three challenges engage section 2(b) Charter rights. It found that its *Baier* analysis that formed the basis for rejection of the Legislative Challenge also applied to challenges to the Board's decisions.[47]

The Application Process Challenge (the claim that the Board ATP process was "inordinately complex") was dismissed as centering on the terms of access to the Board's hearing, not freedom of expression. Any "diminished" ability to convey a message did not measure up to the substantial infringement required to engage section 2(b).[48] In *ForestEthics,* the FCA had previously dismissed this "ATP is too complicated" argument on non-2(b) grounds, saying that "[t]he Board is entitled to take the position that, consistent with the tenor of section 55.2, it only wants parties before it who are willing to exert some effort."[49]

The Participation Ruling Challenge (the claim that the Board adopted an unduly narrow interpretation of "directly affected" in section 55.2) was also rejected on a *Baier* analysis, with the Board going on to express its view that its application of section 55.2 "represents a reasonable balancing of the expressive interests of potential hearing participants against its statutory objectives."[50] The Applicants' sweeping position that any resident of the Greater Vancouver area was directly affected by TMX was rejected as frustrating the ability of any person to engage in meaningful participation in the hearing, and frustrating one of the "shared aims of section 2(b) and the Board's statutory mandate—the search for truth—by rendering the timing and logistics of the hearing functionally unmanageable."[51]

The List of Issues Challenge (the claim that

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42 *Ibid.*
43 *Ibid* at p 9.
44 *Ibid* at p 11.
45 *Ibid.*
46 *Ibid* at p 10.
47 *Ibid* at p 13.
48 *Ibid* at p 13, citing *Longley v. Canada (Attorney General)*, 2007 ONCA 852 at para 109.
49 *ForestEthics, supra* note 14 at para 75.
50 *Ruling 34*, *supra* note 8 at page 13.
51 *Ibid.*
52 *Ibid* at pages 13-14.

the exclusion of upstream and downstream environmental and socio-economic effects from the List of Issues violated the Applicants' expressive rights) was rejected as a content restriction that did not infringe section 2(b). Content restrictions are indispensable to the just and efficient management of a tribunal hearing.[52] As noted earlier, in *ForestEthics*, the FCA found that the Board's exclusion of the climate change issue as irrelevant was a reasonable decision, in that it reaches an outcome within a range of acceptability and defensibility on the facts and the law—within the margin of appreciation.[53]

Implications of the NEB Rulings and the Courts' Denial of Leave to Appeal

In *ForestEthics,* the FCA applied administrative law principles to endorse the Board's interpretation of its amended legislation and its development and application of procedural reforms to its process. In Ruling 34, the Board determined that neither section 55.2 nor its decisions exercising its jurisdiction under the amended legislation violated the Charter. The effect of the denials of leave to appeal by the FCA and the SCC is to endorse the Board's views in Ruling 34.

Rounds 1 and 2 have gone to the regulator. The *Calgary Herald* report is essentially correct—the effect of the decisions of the FCA and the SCC is that, under the amended *NEB Act*, the Board may limit evidence or exclude participants from its hearings. Its decisions on those issues are consistent with administrative law principles and do not violate the Charter. The *ForestEthics* decision and Ruling 34 clearly articulate the legal basis for future action by the Board in respect of infrastructure proposals. If ForestEthics wants to pursue a Round 3, it will have to be in Parliament. ■

53 *ForestEthics, supra* note 14 at para 69.

SUPREME COURT OF CANADA WILL HEAR "CHARTER DAMAGES" CASE AGAINST ALBERTA'S ENERGY REGULATOR

Alan L. Ross, Michael Marion** and Michael Massicotte****

On April 30, 2015, the Supreme Court of Canada granted leave to appeal to Jessica Ernst in her ongoing claim against the Energy Resources Conservation Board (predecessor to the Alberta Energy Regulator)(the "Board") and others relating to the damages allegedly caused to Ms. Ernst and her property by a coal bed methane shallow drilling program.

Ms. Ernst sought leave to appeal to the Supreme Court of Canada only with respect to her claim for damages under section 24 of the *Canadian Charter of Rights and Freedoms*[1] (the "*Charter*"), which is based on her allegation that the Board breached her *Charter* right to freedom of expression by failing to accept further communications from her. In granting leave to appeal (without reasons), the Supreme Court of Canada has indicated that it will address the issue of whether or to what extent a legislative provision protecting the Board from civil actions and remedies is constitutional if it purports to limit Ms. Ernst's remedies under section 24 for breach of *Charter* rights. This decision will have significant impact on the Board, the Alberta Energy Regulator, any other regulatory tribunal that has statutory protection from civil liability or actions, and any potential future claimants who may consider bringing an action against a statutory body that has legislative protection.

Background

Ms. Ernst ("Ernst") owned land near Rosebud, Alberta and sued the defendant EnCana Corporation ("EnCana") for damage to her fresh water supply allegedly caused by hydraulic fracturing and other related activities by EnCana in the region. Ernst also sued the Board a) for "negligent administration of a regulatory regime" related to her claims against EnCana (the "Negligence Claim"); and b) for breach of her right to freedom of expression under s. 2(b) of the *Charter* as a result of the refusal by the Board to accept further communications from her (the "Charter Claim"). Although not relevant to this appeal, Ernst also sued Her Majesty the Queen in right of Alberta, alleging that Alberta Environment and Sustainable Resource Development ("AESRD") owed her a duty to protect her water supply, and that it failed to respond adequately to her complaints about EnCana's activities. Ernst claimed damages from EnCana, the Board and AESRD totaling in excess of $33 million.

Queen's Bench Decision[2]

In the Alberta Court of Queen's Bench, the Board successfully applied to strike certain portions of Ernst's pleading for failing to disclose a reasonable cause of action. The case

* Alan L. Ross, Partner, Borden Ladner Gervais LLP.
**Michael Marion, Partner, Borden Ladner Gervais LLP.
***Michael Massicotte, Partner, Borden Ladner Gervais LLP .
1 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (UK), 1982, c 11.
2 *Ernst v EnCana Corporation*, 2014 ABQB 672.

management judge who heard the Board's application, Chief Justice Wittmann, found that the Negligence Claim was unsupportable at law, since no private law duty of care was owed by the Board to Ernst. Alternatively, he found that any claim against the Board was barred by section 43 of the *Energy Resources Conservation Act*[3] (the "*ERCA*"), which stated, in part, that "No action…may be brought against the Board…in respect of any act or thing done purportedly in pursuance of this Act...". Section 43 has since been repealed and replaced by section 27 of the *Responsible Energy Development Act* ("REDA")[4], which has similar wording.

Although the Chief Justice concluded that the Charter Claim was not so unsustainable that it could be struck out summarily, he found that this claim was also barred by section 43 of the *ERCA*. It is this finding that is the basis for the Supreme Court of Canada deciding to hear the appeal.

Court Of Appeal Decision[5]

The Court of Appeal dismissed Ernst's appeal.

The Negligence Claim

With respect to the Negligence Claim, in finding that the Chief Justice correctly concluded that the Board did not owe a private law duty of care to Ernst, the Court of Appeal stated that the regulatory duties of the Board are owed to the public, and not to any individual, and (at para 16) that there exist "strong policy considerations against finding regulators essentially to be insurers of last resort for everything that happens in a regulated industry".

The Board had argued, in the alternative, that even if there existed a private law duty of care, any action was foreclosed by section 43 of the *ERCA*. Interestingly, Ernst argued that section 43 should only protect the Board from claims arising from "any act or thing done", and not from "omissions"; something which is now specifically mentioned in section 27 of *REDA*. In agreeing with the Board, the Court of Appeal found (at para 21) that the Chief Justice correctly concluded that "such a narrow interpretation of the section is inconsistent with its broader purpose within the legislation" and that "the distinction between acts and omissions is, in any event, illusory." The Court of Appeal held (at para 22) that the inclusion of "omissions" in *REDA* "should be seen as an effort to provide certainty in this area, and does not declare the previous state of the law: *Interpretation Act*, RSA 2000, c. I-8, s. 37."

The Charter Claim

With respect to the Charter Claim, the Chief Justice declined to strike out the related portions of the claim, finding that this area of the law was sufficiently novel and undeveloped. He went on, however, to conclude that even if such a claim was potentially available, it too was barred by section 43 of the *ERCA*.

On appeal, Ernst argued that section 43 cannot bar a claim under the *Charter*. In dismissing this argument, the Court of Appeal held that in determining whether a *Charter* remedy is "appropriate and just" in accordance with section 24 of the *Charter*, the court will have regard to traditional limits on remedies, including limitation periods and requirements for leave to appeal or to seek judicial review. The Court further held (at para 28) that the legislatures have a legitimate role in specifying the broad parameters of remedies that are available, on the following basis:

> *Having well established statutory rules about the availability of remedies is much more desirable than leaving the decision to the discretion of individual judges. Any such ad hoc regime would be so fraught with unpredictability as to be constitutionally undesirable. If the availability of a remedy were only known at the conclusion of a trial, it would defeat the whole point of protecting administrative tribunals from the distraction of litigation over their actions, and the consequent testimonial immunity.*

The Court referred (at para 29) to *Vancouver (City) v Ward*[6] at para 20:

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3 *Energy Resources Conservation Act*, RSA 200, c E-10 [*ERCA*].
4 *Responsible Energy Development Act*, SA 2012, c R-17.3.
5 *Ernst v Alberta (Energy Resources Conservation Board)*, 2014 ABCA 285.
6 *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28.

> *…the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform. Legislative and policy-making functions are one such area of state activity. The immunity is justified because the law does not wish to chill the exercise of policy-making discretion.*

The Court went on to find that limits on *Charter* remedies do not offend the rule of law, so long as there remain some effective avenues of redress. The long standing remedy for improper administrative action has been judicial review, and there is nothing in section 43 that would have prevented Ernst from seeking an order in the nature of *mandamus* or *certiorari* to compel the Board to receive communications from her. Further, she could have appealed any decisions of the Board to the Court of Appeal, with leave.

The Court of Appeal concluded that section 43 of the ERCA barred Ernst's Charter Claim.

The Leave to Appeal Decision

Ernst sought leave to appeal on these two issues, both related to the Charter Claim:

1. Can a general "protection from action" clause contained within legislation bar a *Charter* claim for a personal remedy made pursuant to section 24(1) of the *Charter?*

2. Can legislation constrain what is considered to be a "just and appropriate" remedy under section 24(1) of the *Charter*?

The Supreme Court of Canada granted leave.

Implications

It is important to note that Ernst did not seek leave to appeal the dismissal of the Negligence Claim, so the decision of the Court of Appeal on that issue remains, and will continue to provide certainty and protection to the Alberta Energy Regulator in the future. It is also important to note that Ernst has not yet established that her *Charter* rights have been breached.

The Supreme Court of Canada's decision to hear this matter illustrates its desire to further develop the law surrounding claims for damages under section 24(1) of the *Charter*, something that is ongoing, topical, and will be of interest to many regulatory and administrative tribunals. We note that earlier this year the Supreme Court of Canada rendered its decision in *Henry v British Columbia*[7], which addressed the question as to whether malice was required in order to establish a claim of *Charter* damages against a Crown prosecutor for wrongfully failing to disclose information to an accused in a criminal case. We look forward to the guidance from the Supreme Court as to the proper framework for addressing the interplay between statutory immunity provisions and *Charter* damages claims against state actors. ■

[7] *Henry v British Columbia*, 2015 SCC 24.

ATCO PENSIONS, ONTARIO HYDRO, PRUDENCY, AND REASONABLENESS: A CASE COMMENT ON ONTARIO (ENERGY BOARD) V ONTARIO POWER GENERATION INC. & ATCO GAS AND PIPELINES LTD. V ALBERTA (UTILITIES COMMISSION)

Moin A. Yahya[1]

I. Introduction

Two cases decided by the Supreme Court on September 25th, 2015 paved the way for utility regulators to address utility costs without fear of formalism. The Court clarified that the standard of review for regulatory decisions dealing with operating costs was reasonableness, and that the law prescribed no specific test that regulators had to use in order to evaluate whether a utility's costs could be recovered in the revenue requirement or not.

II. Background

1. ATCO Gas and Pipelines Ltd. ("ATCO Utilities")

Pension plans can be divided into two categories: defined benefit plans and defined contribution plans. In a defined contribution plan, generally speaking, the employee and employer each contribute an amount that equals a pre-set percentage of the employee's income to a pension plan administrator who invests these amounts over time. By the time the employee retires, the investments, hopefully, can generate a stable income for the rest of the retiree's life. The exact amount of income will be determined at the time of retirement based on the value of the investments at the time of retirement. In contrast, a defined benefit pension plan, again generally speaking, guarantees the retiree a certain amount of income (usually based on some formula that relates retirement income to the employee's income and years of service). In order to have enough money to pay out this guaranteed income, the administered investments must be equal to a certain amount at the time of the employee's retirement. This requires the pension plan administrator to calculate backwards the amount of contributions both the employer and employee must make in order for the total amounts projected out to the employee's retirement to be sufficient to fund the employee's retirement. The value of the investments at the time of retirement will depend on the amount of contributions and how well the various financial investment vehicles are performing. Typically, such contributions are invested in a mix of stocks and bonds. When stocks are well-performing,

[1] Faculty of Law, University of Alberta and acting member of the Alberta Utilities Commission (AUC). The author was a member of the AUC's panel that issued AUC Decision 2011-391, which is the decision that was appealed in *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)*. The comment is from an academic's perspective, and no comment here should be construed as a commentary on the merits of the original decision.

usually there is enough money to fund the retirement obligations the employer has to its employees. A drop in the value of the stocks or bonds in which the pension investments were made will mean that there is now less to pay the pension obligations, and if the value of the investments drop below what can fund the future payments, the pension plan is deemed to be under-funded. At this stage, in order to be in compliance with the various laws regulating the funding and solvency of pension plans, the employer and employee must increase their contributions in order to make the value of the investments return to a level that will fund the retirement obligations.

If the company were unregulated, the employer would have to generate the extra payments from the pension plan by raising prices, lowering costs, or lowering profits. A regulated utility, on the other hand, can ask the regulator to allow it to raise its prices charged to customers in order for it to recover the anticipated rise in costs it will face, namely the increased pension contributions. In other words, the fall in the value of the pension plan portfolio will result in a higher revenue requirement for the upcoming test period (or periods).

Additional to the pension commitments, employers may also guarantee or promise some sort of cost of living allowance (COLA) in order to insulate the pensioners from the impact of inflation. Some employers will match the actual rate of inflation, while others will only match a certain portion of the rise in prices. Obviously, the more the employer wishes to pay in terms of COLA, the more the funding the employer needs either from raised prices, lower costs, or lower profits. In the case of a regulated utility, the higher the revenue requirement will be for the upcoming test period(s).

Hence, the revenue requirement for a regulated utility that is obligated to pay pensions under a defined benefit scheme will be the sum of the employer payments required to keep the pension plan solvent and the payments that are adjusted for the COLA. In the case of the ATCO Gas and Pipelines Ltd. and ATCO Electric Ltd. ("the ATCO Utilities"), their pension plans are administered by Canadian Utilities Ltd. ("CUL"), their parent company. Some of the ATCO Utilities employees were in the defined benefit pension plan, and they had typically received a COLA equal to inflation up to three per cent a year.

From 1996 to 2009, the pension plan was in a surplus, which meant that ATCO Utilities neither had to make any employer contributions nor request such payments in their revenue requirements. Then the financial crisis hit in 2008. This caused the market value of the various pension plans administered by CUL, including the ATCO Utilities' defined benefit plans to be greatly underfunded. ATCO Utilities was therefore required to resume making employer payments starting in 2010. As such, the ATCO Utilities filed an application with the AUC in 2009 to address the revenue requirements stemming from all its pension obligations. The revenue requirements were for the years 2010, 2011, and 2012. The proposed payments to the pension plans covered the current payouts to pensioners, special payments needed to keep the defined benefit pension plans solvent, as well as payments to reflect a COLA equal to inflation up to three per cent as had been past practice. AUC Decision 2010-189 allowed ATCO Utilities to increase its revenue requirement by the amount needed to fully fund the pension plan and it allowed ATCO Utilities to continue its COLA policy for one more year.[2]

One of the interveners, the Utilities Consumer Advocate of Alberta ("UCA") argued that much of the shortfall in the pension plan could be solved by only funding an annual COLA of 50 per cent of the rate of inflation up to 3 per cent. The AUC felt that there had not been enough evidence presented at the 2010 hearing, and decided to revisit the question of the COLA policy in a hearing the following year. In the following year's decision, AUC Decision 2011-391, the AUC accepted the UCA's recommendation and ordered that the revenue requirement only include a COLA of 50 per cent of annual inflation up to three per cent.[3]

ATCO Utilities appealed at the AUC (through what is known as a review and variance process),

2 *Re ATCO Utilities* (20 April 2010), Decision 2010-189 (Alberta Utilities Commission), online: AUC <http://www.auc.ab.ca/applications/decisions/Decisions/2010/2010-189.pdf>.
3 *Re ATCO Utilities* (27 September 2011), Decision 2011-391 (Alberta Utilities Commission), online, AUC: <http://www.auc.ab.ca/applications/decisions/Decisions/2011/2011-391.pdf>.

but the AUC upheld the previous decision. ATCO Utilities then appealed to the Court of Appeal of Alberta, which upheld the AUC's decisions under a reasonableness standard of review.[4] ATCO Utilities ultimately sought and received leave to appeal to the Supreme Court.

2. Ontario Power Generation Inc. ("OPG")

OPG is Ontario's largest energy generator employing almost 10,000 people, approximately 90 per cent of whom are unionized. The OEB had, in a prior rate hearing, warned OPG that it needed to get a handle on its labor costs, especially the unionized salaries. It specifically directed OPG to prepare a benchmarking study that would allow the OEB to see where OPG fit in with respect to other major employers and their wage structures. Notwithstanding the admonition, OPG continued to negotiate contracts with its unions that the OEB was to find to be too generous when analyzed under the benchmarking study that OPG prepared. The OEB found that OPG's salaries were not only higher than what the OEB thought were justified, but that there were also many positions that could be eliminated. Accordingly, the OEB disallowed $145 million of salaries from OPG's $6.9 billion revenue requirement.

OPG appealed to the Ontario Superior Court of Justice, Divisional Court, which upheld the OEB's decision,[5] which was subsequently reversed by the Court of Appeal for Ontario.[6] It held that the OEB had not analyzed the union contracts through the lens of the prudent investment test, which required committed or incurred costs be analyzed with no benefit of hindsight. Specifically the prudent investment test requires that the prudence of costs incurred be analyzed based on only information that was available to the utility at the time the decision was made. The Court of Appeal found that the OEB treated the union contracts as forecasted costs and not committed incurred costs, and that the OEB used the benchmarking study that contained data collected after the contracts were signed. Hence, the Court of Appeal concluded that the OEB did not use the proper test and it wrongfully used hindsight to assess the prudence of the costs. The OEB sought and obtained leave to appeal to the Supreme Court.

Indeed, the OEB case was granted leave first and then the AUC case was also granted leave a few days later to be heard jointly.

III. Common Issues on Appeal

The gravamen of both ATCO Utilities' and OPG's argument is that the regulator in both cases should have included in the revenue requirements of both utilities prudently incurred or committed costs. By focusing on the COLA costs and the union contracts as having been pre-committed prior to the hearing, ATCO Utilities, OPG and its unions focused their cases on the distinction between backward looking costs (or committed or already incurred) versus forward or forecasted costs (usually to be incurred in the test period) that have not been yet incurred. The suggestion was that committed costs should be analyzed through the prism of the prudent investment test, a test ATCO Utilities and OPG argued requires the presumption of prudence. Forward looking costs, on the other hand, analyzed through the reasonableness test, which places the onus of proof on the utility.

The AUC and the OEB (as well as the UCA) argued that there is no single methodology to which public utility regulators are bound, but rather what matters is that the regulator must set a just and reasonable rate that allows utilities' shareholders the opportunity to recover a fair rate of return while giving consumers access to service at reasonable rates.

IV. The Supreme Court's ruling on the Common Issues[7]

Although ATCO Utilities argued that the standard of review of the AUC's decision should have been correctness, none of the other parties including OPG and its unions took that position. Rather, the AUC, UCA, OEB, and all other parties argued or conceded that the standard of review was reasonableness. Needless to say, especially in light of the Supreme Court's *Dunsmuir*[8] judgment and its progeny, the Supreme Court held that the

4 ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission), 2013 ABCA 310.
5 *Ontario Power Generation Inc v Ontario Energy Board*, 2012 ONSC 729.
6 Power *Workers' Union (Canadian Union of Public Employees, Local 1000) v Ontario (Energy Board)*, 2013 ONCA 359.
7 *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)*, 2015 SCC 45 [*ATCO Utilities*].
8 *Dunsmuir v New Brunswick*, 2008 SCC 9.

standard of review for both cases was indeed reasonableness.

The Court then canvassed the applicable legislation to the Alberta case, namely *Alberta Electric Utilities Act*[9] and the *Alberta Gas Utilities Act*[10], as well as an associated regulation, the *Roles, Relationships and Responsibilities Regulation*[11]. For the Ontario case, the Court canvassed the *Ontario Energy Board Act*[12] and the *Payments Under Section 78.1 of the Act* regulation[13]. In looking at the various acts and regulations, the Court was looking for what exactly the law, as written, was with respect to what the AUC and OEB had to do when deciding on revenue requirements for regulated utilities.

In both provinces, the Court determined that although the word prudent appeared in the legislation or regulation, its appearance did not dictate a particular methodology that the AUC or the OEB were obligated to follow. In Alberta's acts and regulation, the word prudent or the phrase "prudently incurred" appears quite often, but the Court took a common usage approach to the word, namely that it meant reasonable. Hence, the simple appearance of the word prudent (or prudence) did not necessarily implicate or trigger the usage of the prudent investment test, first made famous by Justice Brandeis in his concurrence in *Southwestern Bell Tel. Co. v Public Service Commission of Missouri*.[14] In Ontario's act and regulation, 'prudently' appears only a few times, and the act and regulation prescribed no particular methodology for how to evaluate prudence. All of this led the Court to conclude that at best prudent was just another word for 'just and reasonable'. Furthermore, no methodology, such as the prudent investment test or otherwise, could be mandated from the various acts and regulations. Finally, the burden of establishing that the costs incurred were prudent or reasonable was on the utility, and the presumption of prudence was not a legal principle public utilities could rely on.

Turning then to the specific cases before the Court, Justice Rothstein quickly dispensed with ATCO Utilities' argument that the AUC had improperly used hindsight and improperly taken into account customers when lowering the revenue requirement by lowering the annual COLA that could be awarded. Because the COLA payments were to be paid out in the future and because there was no binding contract between ATCO Utilities and its employees (unlike the OPG situation), the COLA costs were definitely forward looking costs and not committed at all. This meant that when looking at other firm practices at the time of the hearing, hindsight was not being used at all, since the future costs were being compared to current practice.

The Court also dismissed ATCO Utilities claim that lowering the allowed COLA increases meant that (because the revenue requirement would be lowered and hence rates would be lower) the impact on customers was being taken into account when setting ultimate rates payable by customers. The Court made it clear that while "[r]egulators may not justify a disallowance of prudent costs solely because they would lead to higher rates for consumers", "that does not mean a regulator cannot give any consideration to the magnitude of a particular cost in considering whether the amount of that cost is prudent."[15]

The case of OPG and its union contracts was slightly more difficult to analyze than ATCO Utilities. After all, in ATCO Utilities, the Court found that all of the COLA costs were forward looking costs. In contrast, while the negotiated union contracts seemed like committed or incurred costs (something the Court of Appeal for Ontario picked up on), the Court nonetheless decided that the OEB was reasonable in its disallowance of $145 million dollars from OPG's requested revenue requirements.

The Court found the OEB's decision reasonable for many reasons. First, it found that not all the costs were truly committed. OPG had some flexibility in eliminating positions and managing staffing levels through attrition. That being said, the Court then assumed that some

9 *Electric Utlities Act*, SA 2003, c E-5.1.
10 *Gas Utilities Act*, RSA 2000, c G-5.
11 *Roles, Relationships and Responsabilities Regulation*, Alta Reg 169/2003.
12 *Ontario Energy Board Act,* 1998, SO 1998, c 15, Sch B.
13 *Payments under Section 78.1 of the Act*, O Reg 53/05.
14 *Southwestern Bell Tel Co v Public Service Commission of Missouri,* 262 US 276 (1923).
15 *ATCO Utilities*, *supra* note 7 at para 62.

of the disallowed costs were committed and not forecasted. It then looked at the prudent investment test in order to determine how incurred costs should be analyzed. Looking at past American and Canadian jurisprudence on the subject, the Court concluded that the prudent investment test was but one tool available to regulators to be used when appropriate but not mandated by any practice or legislation.

Then the Court looked at the labor costs, some of which the court conceded could be committed. The Court noted that disallowing incurred operating costs does not create the same disincentives for shareholders as disallowing incurred capital costs. Disallowing capital costs can create disincentives for the utility's shareholders dissuading future investment in capital and equipment. Disallowing operating costs, on the other hand, creates an incentive for the utility to manage its costs more efficiently. The reader should note that the former is detrimental for customers, while the latter is beneficial. By focusing on past and future costs, instead of worrying about a no-hindsight rule, the Court suggested that utilities can be incentivized to better manage their costs through repeated interaction with its employees and other sources of costs. Indeed, the Court intimated that to create airtight compartments of forecasted and incurred costs whereby incurred costs could never be questioned would create what economists call 'moral hazard.' Utilities would seek to have all their costs characterized as incurred if they knew that was what immunized such costs from regulatory scrutiny.

The Court also focused on the fact that the OEB had warned OPG to get its costs down. The decision to disallow was therefore not unreasonable. This logic was also alluded to by the Court (and explicitly by the Alberta Court of Appeal) in the ATCO Utilities case. This, the Court stated, creates the proper incentives for regulated utilities to optimally manage their costs.

V. The Role of Agency Counsel

One of the issues that arose in the OPG case was the proper role of board or commission counsel on appeal. The Court relaxed the strict rule first announced in *Northwestern Utilities Ltd. v City of Edmonton*,[16] effectively prohibiting the administrative agency's counsel from full participation in the appeal. The Court relaxed the old rule to allow agency administrative counsel to participate more fully in the appeal process, as long as they do not cross the line of advocacy to an after-the-fact defense of the agency's decision. Adversarial advocacy, the Court held, was fine, but bootstrapping or supplementing the agency's decision on appeal is not.

VI. Concluding Thoughts

The two judgments will undoubtedly free up regulators from being bound by formal tests, a deviation from which could prove fatal for the regulator. Almost a hundred years ago, Judge Cardozo of the New York Court of Appeals (as he was then) stated that "The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal."[17] The prudent investment test never was (according to the Court) and is not the law of the land when it comes to analyzing incurred costs. Rather, what needs to be analyzed is whether the rates allowed to the utility are just and reasonable. No specific method for this evaluation is prescribed by law, and regulators are free to pursue "methodological pluralism."[18] It also confirms the observation that there is no true public utility law in Canada.[19]

Characterizing costs as past and incurred as opposed to future and forecasted is not helpful for the regulatory endeavor. Rather, the Court stressed that the overall goal is to have consumers receive proper service at just and reasonable rates while allowing utilities the opportunity to recover a fair rate of return on their investments. Regulatory lawyers should not rely on mechanical tests and characterizations of various costs, but rather should focus on the bigger picture, namely how to achieve just and reasonable rates for all. ■

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16 Northwestern Utilities Ltd v Edmonton (City of), [1979] 1 SCR 684.
17 *Wood v Duff-Gordon*, 222 N.Y. 88 (1917).
18 Nigel Bankes, Methodological Pluralism: Canadian Utility Law Does Not Prescribe any Particular Prudent Expenditure or Prudent Investment that a Regulator Must Apply, October 9, 2015, available at http://ablawg.ca/2015/10/09/6476/.
19 George Vegh, "Is there a Doctrine of Canadian Public Utility Law?" (2007), 86 Can Bar Review 319.

THE SOUTHERN CALIFORNIA GAS DECISION: THE FIRST DISTRIBUTED ENERGY RESOURCE SERVICE TARIFF

*Gordon E. Kaiser, FCIArb**

In today's world it is rare that a public utility gets any good news. Recently the Alberta Court of Appeal ruled that the cost of stranded assets is for the account of the shareholder not the ratepayer[1] confirming three earlier decisions by regulators.[2]

Stranded assets are the challenge of the decade if not the century. Regulated public utilities in both electricity and gas have been facing declining demand for their product. That means declining revenue. In an industry with high fixed costs that is bad news.

Everyone understands the reason that is happening. Customers want lower prices. There is nothing new about that. What is new is that customers have discovered how to get lower prices. It turns out that customers can generate electricity closer to the premise that uses the electricity and eliminate costly transmission and distribution charges. It also turns out that cost of generating that electricity may be cheaper than buying it from a distant monopoly generator.

This scenario has been playing out in North America over the last decade. As the technology improves, local generation becomes even more attractive.

While everyone may understand the reason this is happening there has been a real shortage of solutions. The most popular solution- fixed charges- may create more problems than benefits. Fixed charge will generate more revenue for utilities. But more revenue from the same volume of electricity means some consumer mustl pay a higher price. That, many economists argue, will cause some consumers to desert the grid earlier.

The DERS Tariff

One part of the solution to declining utility demand arrived on October 23 2015.

On that date the California Public Service Commission issued its first "Distributed Energy Resource Services Tariff[3]." The tariff allows Southern California Gas, (SoCalGas) to provide a new service called Distributed Energy Resources to their customers. Under this tariff the utility is allowed to own and operate a technology facility called Combined Heat and Power (CHP) on or near a customer premise. The utility is also allowed to provide the output to the customer at a regulated rate.

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1 *Fortis Alberta v. Alberta Utilities Commisssion*, 2014 ABCA 295.

2 *Re TransCanada Pipelines Limited* (March 2013), RH-003-2011 (National Energy Board); *Re Utility Asset Disposition* (26 November 2013), 2013-47 (Alberta Utilities Commission); *Re Generic Cost of Capital Decision* (8 December,2011) 2011-474 (Alberta Utilities Commission).

3 *Re Application of Southern California Gas Company to Establish a Distributed Energy Resource Tariff* (1 October 2015), A.14-08-007 (California Public Utilities Commission)[*Southern California Gas Decision*].

The new tariff creates the regulatory framework for competitive micro grids. A micro grid functions within a larger utility grid. The micro grid is dedicated to serving the unique energy requirements of a specific customer or group of customers. The center of the micro grid is local generation or on site generation. The generation technology is usually CHP or cogeneration. Micro grids are usually competitive.

Customers opt for micro grids because they offer lower energy costs. The lower costs are the product of new generation technology, reduced distribution and transmission costs and competition between suppliers.

Micro grids are the new engine of growth in the electricity sector. The DERS Tariff is a major step forward. The new tariff allows regulated utilities to enter this new market. This does two things. First, it increases competition, increases consumer choice and reduces customer costs. Second, it provides much needed new income for the utility- an important asset for utilities fighting declining revenue.

The DERS Tariff is one of those rare initiatives where both the consumer and the utility benefit. SoCal described the proposed tariff as a "fully elective, operational, non-discriminatory tariff service which would provide its customers an opportunity to employ distribute energy resources."

The Technology

The technology at issue, known as CHP, is a form of "cogeneration." The Commission defined the technology as follows: "CHP generates electricity at a customer facility and recovers and utilizes waste heat to generate hot water, steam and process heat."

SoCalGas set the stage for its application by referring to a California policy that established a target for new CHP installations at 4000 megawatts (MW) statewide by 2020. The utility then pointed to a recent California Energy Commission study[4] which concluded that CHP adoption in California had been stagnant for some time and the state was expected to develop less than half of the goal originally set.

In its original testimony SoCalGas argued that most of the untapped potential in the CHP market is in the small less than 20 MW size range. SoCalGas projected that the under 20 MW segment represented 16 per cent of the existing CHP market but 90 per cent of the potential for tariff adoption. The utility said that the DERS tariff was designed to address some of the obstacles that this market segment faced including high equipment capital costs, lack of on-site resources and expertise, technology risk and unwillingness to operate energy systems. The utility noted that the primary market for smaller CHP systems lies in facilities such as commercial buildings, hospitals, university campuses and prisons.

The Commission in approving a DERS tariff agreed that there were barriers to entry to this important market segment which did not exist in the case of larger systems. The Commission also agreed that larger customers have the capital and energy management capabilities to install and operate those systems.

Issues before the Commission

The Commission authorized SoCalGas to offer the DERS Tariff for a 10 year period stating:

> The DERS tariff is in the public interest because it meets untapped demand in underserved markets for smaller customers that would benefit from CHP, offers additional choices to customers, and supports innovative business partnerships. The adopted DERS Tariff also guards against unfair competition and protects ratepayer interests consistent with the Commissions Affiliate Transaction Rules.[5]

The hearing was complex. The process took more than a year and involved questions of pricing methodology, cost and accounting controls, and the impact on competition. There were also broader policy issues: was SoCalGas acting as an electricity distributor? Should owners of the facility be able to sell excess power to the grid?

4 California Energy Commission, *Combined Heat and Power: Policy Analysis and 2011-2030 Market Assessment,* prepared by ICF International, CEC-20002-12-002 (Sacramento: CEC, February 2012).
5 *Southern California Gas Decision, supra* note 3 at 2.

The Pricing Methodology

SoCalGas initially proposed that the new tariff use market-based pricing set through negotiations with customers. SoCalGas also proposed to include a risk adder to cover the risk of customer default. A number of intervenors strongly objected to the concept of market-based pricing. The Commission noted that while it had considerable discretion in terms of the pricing approach it could adopt, SoCalGas must use a cost of service methodology stating.

Southern California Gas shall price the Distributed Energy. Services Tariff through a service contract that includes costs and rate components, adjustments, performance requirements and payment terms agreed upon in advance by the customer and SoCalGas. SoCalGas must use pricing methodologies identical to those used for general rate cases.[6]

The Commission concluded that a cost based pricing methodology will assure reasonable rates for the smaller customers that constitute the primary target for the service. The Commission further stated that all costs of providing the tariffed service should be included in the cost the tariff including standby charges paid to the electric utility. The Commission also ruled that SoCal could not use a risk adder that places the burden of financial risk on customers rather than SoCalGas shareholders.

Cost and Accounting Controls

The Commission established a detailed cost reporting cost control system for the new service. The cost were to include litigation and other costs related to the development of the DERS Tariff. The Commission was concerned that ratepayers had already borne part of the cost of developing this new tariff and found the SoCalGas had not been forthcoming about the embedded costs associated with the development of the service stating that including development costs was an inappropriate use of ratepayer funds.

The decision required SoCalGas to create an internal order number for each specific DERS project once the customer signed the feasibility agreement. Under that tracking number SoCalGas must track all costs and revenues associated with that customer project to that particular order number rather than using the general accounting number. In addition the Commission ordered SoCalGas to create an internal order number to track all employee time and resources associated with developing or litigating the tariff to ensure that these cost are borne by shareholders and not ratepayers.

Gas Utility Ownership of Electricity Generation

A major controversy in this proceeding was whether a gas utility should own, operate and maintain electric generation facilities on or adjacent to a customer's premises. The proposed tariff allowed SoCalGas to design, install, own, operate and maintain the energy systems. In its original application SoCalGas said that it did not intend to become an electric utility. The issue before the Commission was whether the new service required SoCalGas to obtain a new Certificate of Public Convenience and Necessity (CPCN) to allow it to construct and own electricity generation facilities.

The Commission ruled that given the unique business model that the tariff represented, the Commission was not convinced that a CPCN to own facilities on the customer's premises was necessary because SoCalGas did not plan to distribute electricity from the customer owned facility for sale to external retail customers; nor did SoCalGas intend to own the energy produced by the system.

The Commission ruled that the provision of gas for electricity on a specific customer property especially on such a small scale does not make SoCalGas an electric utility. The Commission did say however that they were allowing SoCalGas to design, own, install and operate electric facilities on customer premises on a limited basis only in order to facilitate the adoption of CHP service.

Impact on Competition

The California Commission was concerned that the new service might reduce competition in this marketplace. In California micro grids are competitive services.

To avoid anti-competitive impact, the Commission limited the tariff service to markets using systems with a capacity below 20 MW. The Commission was convinced that this was the underserved market and participation by utilities

6 *Ibid* at 71.

in a range above 20 MW was not necessary.

The Commission also ruled that the new tariff services must be promoted on a neutral basis through the SoCalGas website through the use of competitively neutral scripts. In addition, the information on the SoCal website was required to outline other service providers who offered similar services. SoCalGas was also required to deliver periodic market development reports to provide the Commission with information needed for its ongoing oversight.

Of particular interest was the requirement that SoCalGas not tie the provision of DERS Tariff to any other SoCalGas service. In addition, there was a specific requirement that customers could if they wished supply their own gas.

The Commission also introduced technology limitations. The new service was limited to CHP or cogeneration which the Commission defined as producing electricity and useful thermal energy in an integrated system. Technologies that do not produce both electricity and thermal energy do not qualify and cannot be provided under the tariff.

Finally, the decision sets a ten-year program sunset on the tariff. This recognizes that the service was in the nature of a pilot program. SoCalGas objected to the sunset date. The Commission ruled that they did not have adequate evidence to support a program longer than 10 years and the time limit would help to Commission determine if there had been any anticompetitive impact from the new service.

Some parties also wished to place capital limits on the program The Commission concluded that because SoCalGas was using shareholder funds, it was unnecessary to limit the capital amount given the ten-year term and the 20 MW cap.

Selling Power to the Grid

Another issue that arose was the extent to which tariff customers could sell excess power to the grid. California had existing programs that provided this option. SoCalGas argued that each installation should adhere to the Commission's existing Rule 21 standards and each customer should be eligible under state programs that permit the sale of power to the grid.

Under the California programs only facilities under 20 MW are eligible for the CHP feed in tariff.[7] In order to be eligible for that, tariff CHP systems must achieve an energy conservation efficiency of 62 per cent for topping cycle CHP and 60 per cent for bottom cycle CHP.[8] To date only a few facilities have signed CHP feed in tariffs in California.

Under the California program customers are permitted to export 25 per cent of their output to the grid on an annual basis. The Commission in this decision adopted the existing standard.

What's Down the Road?

The California decision in SoCalGas represents an important turning point in the continuing utility death spiral controversy. The California Commission saw an underserved market and a utility prepared to serve that market.

The California Commission understands, as most regulators do, that traditional energy regulation requires some innovation to meet the changing market demands and the new technology now available to customers. Technology offers important economies to customers. But technology also offers important opportunities to utilities.

The California Commission adopted a measured approach. SoCalGas certainly did not get everything they wanted but they did get the essential part - a tariff offering.

There will of course be future issues. This is one of the first micro grid regulatory decisions. Micro grids are the new engine of growth in energy markets and new market models are important. In California micro grids are competitive markets. That in itself is an important policy decision. California took steps to preserve that competition but it also resisted the temptation to exclude the utility.

It turns out that utilities are often the early adopters of technology. They have substantial

7 *Waste Heat Recovery and Carbon Emissions Reduction Act*, AB 1613,Chapter 713, Statutes of 2007.
8 California Energy Commission, *Guidelines for Certification of Combined Heat and Power Systems Pursuant to the Waste Heat and Carbon Emissions Reduction Act, Public Utilities Code*, Section 2840 et seq. at 7, CEC-200-2015-001-CMF (Sacramento, CEC, February 2015).

financial resources, technical expertise and market connections. There is no reason why regulators cannot harness those capabilities to develop emerging markets.

This initiative is also a pleasant departure from the practice of governments making technology choices through crack cocaine of energy policy feed-in tariffs. Here there is no guaranteed buyer. The market will determine the utility of this new technology. And shareholders not ratepayers will bear the financial risk.

There will be new challenges. This decision is clearly limited to facilities on or near a specific customer premise. The next decisions will likely concern situations where there is a group of customers Microgrids are not by definition limited to single customers.

The next decision may also face the situation where an electricity distributor wants to provide a similar service. We might call it a reverse SoCalGas. There is no apparent reason why that initiative should be resisted.

Finally, it is important to recognize the importance of a tariff. The existence of a tariff was important to the utility, but it is also important to the customer. A tariff creates a clear and well defined service offering for all customers. There can be no discrimination between customers. There can be no predatory pricing. This tariff, like all tariffs, is under the close supervision of a regulator. That offers customer's the additional security that is often critical in the deployment of new technology.

At the end of the day the California Commission had one goal - how to best overcome the barriers to entry this technology faced. The DERS Tariff may be the solution. To be fair, the tariff was also driven by California's goal to reduce greenhouse gas emissions. SoCalGas estimated that the program would result in a $60 million investment in CHP by 2020 reducing GHG by 32,000 metric tons.

The ratemaking technique is also innovative. This is really ratemaking by contract. But the basic ratemaking principles under cost of service regulation apply. There is no reason why specific services like this cannot be priced on the administered basis proposed here. This is the kind of light handed and efficient regulation required in competitive markets.

Allowing regulated utilities to participate in competitive markets is a necessary but delicate balancing act. The SoCalGas decision is a major step in the development of an important technology and an important business model. Widespread adoption of micro grids will transform the electricity marketplace bringing significant cost reductions to consumers and new income opportunities to utilities. ■

BC'S ENVIRONMENTAL APPEAL BOARD OVERTURNS NEXEN WATER LICENCE ON APPEAL BY FORT NELSON FIRST NATION

*Erica C. Miller**

Overview

On September 3, 2015, British Columbia's Environmental Appeal Board ("EAB") issued a precedent-setting decision (the "Decision")[1] granting an appeal brought on behalf of the members of the Fort Nelson First Nations (the "FNFN") from a decision of the Assistant Regional Water Manager (the "Manager") to issue a commercial water licence (the "Licence"). The Licence had been issued by the Manager to Nexen Inc. ("Nexen"), an oil and gas company based in Calgary. It allowed for the withdrawal of up to 2.5 million cubic meters of water per year from the Tsea River watershed in northeastern British Columbia for use in Nexen's fracking operations. In a lengthy decision, the EAB cancelled the Licence on the basis that the terms and conditions of the Licence were "fundamentally flawed" and lacking in technical merit, and on the basis that the Crown had failed to consult in good faith with the FNFN regarding the Licence.

Throughout its Decision, the EAB provides helpful commentary for industry, particularly for applicants seeking water licences from the Ministry (even noting that its discussion is intended to "provide general guidance, should Nexen apply for a new water licence"),[2] or those seeking to oppose the issuance of a licence. For example, in assessing the technical merits of the Licence, the EAB provides guidance on the type, scope and reliability of information required to support an application for a water licence, having regard for the purposes served by the licensing framework in the *Water Act*, RSBC 1996, c 483. As it concludes that the necessary data can vary significantly depending on surrounding circumstances (including factors such as the size of the water withdrawals and the water source, the cultural importance of the area and the surrounding wildlife), this guidance provides industry with a useful framework to consider when gathering sufficient information to support the issuance of a licence (or, conversely, arsenal to challenge the adequacy of the supporting information). The Decision also provides helpful recommendations regarding procedural aspects of the consultation process, including emphasizing the importance for all parties involved to actively supply information. It also makes suggestions to ensure transparency and clarity of roles in the consultation process, which are important to applicants engaging in consultation as a delegate of a provincial Crown.

Due to the lengthy nature of the Decision, a summary of the background facts is set out

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1 *Chief Gale v Assistant Regional Water Manager & Nexen (*3 September 2013), Decision No 2012-WAT-013(c) (BC Environmental Appeal Board) online: EAB <http://www.eab.gov.bc.ca/water/2012wat013c.pdf> [*Gale*].

2 *Ibid* at para 339.

below, followed by a discussion of the key issues and findings of the EAB.

Background

The Tsea River watershed is a series of rivers and lakes located in northeastern BC, approximately 90km northeast of Fort Nelson, within the FNFN's traditional territory.[3] As of 2009, Nexen, a wholly-owned subsidiary of the China National Offshore Oil Corporation, held a short-term approval from the Oil and Gas Commission pursuant to section 8 of the *Water Act*. This approval allowed Nexen to withdraw surface water from five locations within the Tsea River watershed, which it stored and used in its natural gas hydraulic fracturing ("fracking") operations.[4] However, the approval was short-term (one year) and it limited the change in the lakes' surface level to a maximum of 0.1 meters.[5]

In April 2009, Nexen sought to extend its water withdrawal rights by applying to the Ministry of Forests, Lands and Natural Resource Operations (the "Ministry") for the issuance of a licence under section 12 of the *Water Act*.[6] After some amendments, Nexen's Application sought authorization to withdraw up to 2.5 million cubic meters of water per year from North Tsea Lake.[7] In support of its Application, Nexen submitted various reports that analyzed data from the Tsea River watershed (and to the extent that was not available, data from another creek located approximately 150km south of the North Tsea watershed) and used various models to estimate the volume of water available for diversion by Nexen.[8]

Representatives of the Ministry, the FNFN and Nexen spent the next three years exchanging communications and holding meetings regarding the Application.[9] A summary of many of these communications are set out in the Decision.[10] Towards the end of these communications, in late January 2012, the Ministry sent a letter to the FNFN, advising that it had completed its preliminary review. The letter set out the Ministry's preliminary findings that the Licence's potential for adverse impact on fish, fish habitat and the surrounding environment impact was minimal, as well as the Ministry's belief that the proposed Licence would not have an appreciable adverse effect on the FNFN's ability to exercise their treaty rights in the area. The correspondence sought the FNFN's input on these preliminary conclusions before the Licence was to be issued.[11]

There was some disagreement between the FNFN and the Ministry regarding when this January 2012 correspondence was received, and over the next three months, representatives of the Ministry and the FNFN exchanged correspondence trying to arrange a time to meet to discuss the Ministry's preliminary conclusions. This ultimately did not occur and, on May 11, 2012, the Manager issued the Licence authorizing Nexen to withdraw up to 2.5 million cubic meters of water per year from North Tsea Lake, for a period until December 31, 2017.[12] Having issued the Licence, the Manager sent a letter to the FNFN setting out the rationale for his decision, including reiterating his findings that any adverse impacts of the Licence on the FNFN's treaty rights and fish habitat would be minimal, as well as his opinion that consultation with the FNFN had been adequate.[13]

The Appeal

Shortly thereafter, the FNFN appealed the Manager's decision to issue the Licence on the following grounds:

1. the Manager failed to adequately assess the potential direct and cumulative

3 *Ibid* at paras 3 and 7.
4 *Ibid* at paras 18-19.
5 *Ibid* at para 19.
6 *Ibid* at paras 18-19.
7 *Ibid* at para 31.
8 *Ibid* at paras 20-26.
9 *Ibid* at para 33.
10 *Ibid* at paras 33-86.
11 *Ibid* at paras 65-66.
12 *Ibid* at paras 87-88.
13 *Ibid* at para 90.

impacts of the Licence on the Tsea River watershed; and

2. the Manager failed to uphold the honour of the Crown through meaningful consultation with the FNFN before issuing the Licence.[14]

Subsequent to the issuance of the Licence and the commencement of the appeal, there were drought conditions in northeastern BC in the summer of 2012, and the FNFN raised concerns to the Ministry that Nexen continued to withdrawal water during this period. When Nexen's data was subsequently reviewed, the Ministry found that it had breached the Licence by allowing water output levels in the North Tsea River to fall below allowed levels.[15] As a result, in April 2013, the Ministry issued an order (the "Order") requiring Nexen to implement six remedial measures to prevent future breaches of the Licence, prior to starting water withdrawals in the summer of 2013. These measures were implemented by Nexen.[16]

The Decision

On September 3, 2015, almost 20 months after the oral hearing concluded in January 2014, a three-member panel of the EAB issued its lengthy (115 pages) Decision. The hearing of the appeal had encompassed 19 days of oral evidence and extensive documentary evidence.[17] In reaching its conclusion that the Manager's decision to issue the Licence should be overturned and Nexen's licence cancelled, the EAB extensively considered several important issues, including:

- the Jurisdiction of the EAB to consider decisions not expressly appealed from;
- the role of the EAB in hearing an appeal from a decision to issue a water licence;
- the technical merits of the Licence, taking into consideration the purposes of the *Water Act*, as well as the type and accuracy of information required to support a Licence; and
- the adequacy of the consultation process between the provincial Crown and the FNFN, including an emphasis on procedural aspects.

These issues are discussed in more detail next.

Preliminary Issue: Jurisdiction & Nature of the Appeal Process

Before turning to the merits of the appeal in the Decision, the EAB considered a preliminary issue related to the remedial measures Order made by the Ministry in 2013. In considering its jurisdiction to assess the validity of the Order as part of the appeal, the EAB found that the Order was a standalone Ministry decision, separate and apart from the decision to grant the Licence. As the FNFN had not appealed from the granting of the Order (only the Licence) the EAB found that an assessment of the merits of the Order was beyond its jurisdiction.[18] This serves as a reminder of the importance of considering all related decisions that may be brought before the EAB when contemplating an appeal.

The EAB also provided some useful commentary on the wide scope of its role on an appeal, confirming that it is not limited to reviewing the appealed decision or decision-making process for errors and that it is not limited to the evidence before the original decision-maker. Instead, it is empowered by section 92(7) of the *Water Act* to conduct the appeal as a *de novo* hearing and by section 92(8) to make any appropriate decision that the Manager could have made in considering Nexen's Application.[19] By way of these two sections of the *Water Act*, the EAB is empowered to itself assess the technical merits of the Licence on the basis of all the evidence before the EAB.[20] However, with respect to the FNFN's appeal on consultations, the EAB

14 *Ibid* at para 93.
15 *Ibid* at paras 108-113.
16 *Ibid* at paras 115-117.
17 *Ibid* at para 157.
18 *Ibid* at para 127.
19 *Ibid* at paras 157-158.
20 *Ibid* at para 158.

serves a more limited role. It confirmed that, as a quasi-judicial tribunal, it does not directly engage in consultations with First Nations, and that the appeal process could not be a substitute for consultations.[21] Instead, the EAB's role is to review whether the Ministry discharged its duty to consult with the FNFN.[22] This may be contrast with the role of other bodies (such as the Oil and Gas Commission) that serve as administrative decision-makers and have an obligation to engage in consultations.[23]

Issue 1: Technical Merits of the Licence

Turning to the first major issue being considered on appeal, the EAB considered the technical merits of the Licence and whether it should be reversed on the basis it is "inconsistent with the purposes of the *Water Act*, there is inadequate data to properly assess its impacts, and/or it is based on flawed design." In considering this issue, the EAB provided important clarifications on several topics, including with respect to the purposes served by the *Water Act,* and the amount and certainty of information required in support of an application for a Licence.

Purposes of Water Act

The parties rooted their opposing arguments on the merits of the Licence on the purpose of the *Water Act* and the role that it serves in the licensing process. While all parties agreed that the legislation's primary purpose was the allocation of water rights, there was disagreement on the extent to which the *Water Act* also served an environmental purpose. The EAB clarified this issue describing the "main purpose" of the *Water Act's* licensing scheme as being the allocation and regulation of private rights to use water,[24] but that environmental factors may be relevant considerations in deciding whether to issue a licence.[25]

On a related issue, the Decision also considered the extent to which the Ministry may consider the cumulative impact of activities on the environment in deciding whether to issue the Licence. The EAB found that it was consistent with the purposes of the *Water Act* for the Manager to consider the total demand on the water source and the impact of that total demand on stream flow and the surrounding habitat. However, it found that the legislation did not require the Manager to consider environmental impacts not arising from the Licence itself, such as the cumulative environmental impacts of broader oil and gas development (such as the development of roads, pipelines or wells) on the watershed, as those activities were regulated under other legislation.[26] This suggests that an applicant for a water licence should ensure that it adequately addresses all withdrawal demands on the water source, including the cumulative impact of these withdrawals. However, there is not the same need for an applicant to expand its cumulative impact assessment to take into account other types of activities not covered by a water licence, as there is no basis for the Manager to consider the effect of those activities.

Supporting Information & Degree of Certainty

With the purposes of the *Water Act* in mind, the EAB turned to assess the documentation supplied in support of the Application, considering in particular the amount and type of information, and the degree of certainty of that information, required before the Manager may decide to grant the Licence. The FNFN strongly contended that the information considered by the Manager was "insufficient and inadequate to understand the potential impacts of the Licence" on the environment, particularly the hydrological impacts on the watershed and the wildlife in the area.[27] It also argued that the Licence failed to comply with the precautionary principle,[28] a doctrine rooted in international environmental law that provides that where an action threatens harm to the public or the

21 *Ibid* at para 159.
22 *Ibid* at para 428.
23 See *Saulteau First Nations v Oil and Gas Commission*, 2004 BCSC 92 at paras 130-138, aff'd 2004 BCCA 286
24 *Gale, supra* note 1 at para 162.
25 *Ibid* at para 163.
26 *Ibid* at paras 168-170.
27 *Ibid* at para 172.
28 *Ibid* at para 179.

environment, the burden of establishing that there will not be harm falls on those wishing to undertake the action (in this case, Nexen).

As a starting point, the EAB noted that the *Water Act* does not directly require an applicant to provide *any* information about the potential environmental impacts of the Application. However, the Manager has a broad discretion to require further information under the legislation, including environmental information, particularly in light of its finding that environmental factors may be a relevant consideration.[29] As each water licence must be considered in the context of its own circumstances (including factors such as the characteristics of the water source, the quantity of water to be licensed, other demands on the water source and any associated works),[30] the amount and type of data required may also vary with the circumstances. As an example, the Decision contrasts an application to divert 500 gallons of water per day for domestic use with an application to divert 2.5 million cubic meters of water per year for industrial use to emphasize that the information requirements of each would differ drastically.[31] Accordingly, in assessing the supporting information required for an application, an applicant would be advisable to consider proportionality and to tailor the scope and precision of its documentation to fit the circumstances.

On the facts of the case before it, the EAB noted that Nexen sought to use a large volume of water from a relatively small lake. This was contrasted with the limited data available with respect to the Tsea River watershed and the fact that there was no history of similar licences being granted in the area that could be used as guidance.[32] These circumstances pointed towards the Manager needing to seek a larger amount of information about the potential environmental impacts of the Licence. However, the EAB recognized the impracticality of requiring the Manager to obtain too high of a degree of certainty on such issues:

> While it is prudent in such circumstances to ask an applicant to provide further information about the water source and the potential impacts of the proposed licence, the Panel finds that it is impractical, and inconsistent with the objective of the licensing provisions of the *Water Act,* to expect applicants to delay developments indefinitely pending studies that attempt to conclusively predict impacts.[33]

The EAB also expressed a concern that making the licensing process too onerous could result in oil and gas companies seeking multiple short-term approvals under section 8 of the *Water Act*, as opposed to undertaking the process of gathering the data and studies necessary to obtain a multi-year licence, a result that would be undesirable from a water management perspective.[34]

Further, while a larger amount of more reliable data could reduce the uncertainty associated with issuing a Licence, the EAB recognized that some degree of environmental uncertainty would always remain.[35] It rejected the adoption of the precautionary principle, finding that there was "no indication that the Legislature intended this principle to apply to water licensing decisions."[36] Despite this, the EAB very clearly emphasized the need for the Manager to have taken a conservative or cautious approach in making his decision to issue the Licence, particularly in light of the considerable uncertainty existing in the circumstances.[37] Accordingly, while an applicant does not have to conclusively predict the impacts of a licence or rebut all risks of harm, it will increase its chances of obtaining a licence where it adequately addresses the uncertainties

29 *Ibid* at para 176.
30 *Ibid* at para 177.
31 *Ibid* at para 177.
32 *Ibid* at para 178.
33 *Ibid* at para 178 [*Emphasis Added*].
34 *Ibid* at para 180.
35 *Ibid* at para 182.
36 *Ibid* at para 179.
37 *Ibid* at para 183.

associated with the licence by taking a cautious approach in proposing the terms and scope of the licence.

The Technical Merits of Licence

Acknowledging that conclusive, site-specific information was not a requirement of obtaining any type of licence, the EAB identified the key issue as being "[h]ow to proceed cautiously with less than perfect data",[38] in applying the above principles to assess the technical merits of the Licence. While it had refused to find that applicants must provide certain types of environmental information or establish certainty in order to obtain a licence, it took a relatively strict approach in assessing whether the Manager had been sufficiently responsive to the various environmental concerns and uncertainties identified by the FNFN.

The EAB's assessment of the merits of the Licence makes up a large portion of the Decision. It is technical in nature and quite specific to the data relied upon by Nexen and the terms of the Licence sought by Nexen. However, for a party seeking to obtain persuasive studies in support of a water application (or to challenge the validity of studies prepared by another), the EAB's critique of the various methodologies and modelling used, as well as the technical terms of the Licence applied, would be well worth a careful review to avoid similar pitfalls.[39]

As a summary, the EAB found that there were many errors and inadequacies in the studies submitted by Nexen, and that these deficiencies had not been resolved by the subsequent data provided on the appeal.[40] From a hydrological perspective, it found that Licence was "poorly rationalized" in that it was based on insufficient data.[41] With respect to wildlife, it disagreed with the Manager's conclusion that there would be no impact on fish or fish habitat, instead finding that the Manager had no information before him on these impacts. Further, based on the information available on appeal, the EAB found that there was, in fact, a real concern of adverse effects.[42] The EAB also held that the Manager improperly failed to consider the potential impacts of the Licence on the beaver (a "keystone" species in the area) and surrounding vegetation.[43] The data did not support a conclusion that the Licence would adequately protect against detrimental impacts on the aquatic and riparian environments.[44] As a result, the EAB concluded that "the Licence should be reversed because it is fundamentally flawed in concept and operation".[45]

Issue 2: Consultation

The second major issue raised by the FNFN in appealing from the issuance of the Licence was that the provincial Crown's consultation had been inadequate, as it "failed to ascertain the nature and scope of the [FNFN's] treaty rights, failed to properly assess the potential impact of the licence on those rights, and/or failed to properly discharge the duty to consult."[46]

Level of Consultation Required

The EAB first considered the level of consultation that was required in the situation. In order for the Manager to determine the appropriate level, the EAB found that it needed to understand the nature and scope of the treaty rights that could be adversely affected by the Licence,[47] and that the Manager had failed to do this. This failure was found to partially be the responsibility of the provincial Crown, as the Ministry had failed to consider certain relevant information that was known to the provincial Crown and had relied on other irrelevant and incorrect information.[48] However, the EAB also attributed part of the blame to the FNFN, as it had failed to disclose

38 *Ibid* at para 193.
39 See *Gale, supra* note 1 at paras 185-339.
40 *Gale, supra* note 1 at para 296.
41 *Ibid* at para 297.
42 *Ibid* at paras 302, 321.
43 *Ibid* at para 327.
44 *Ibid* at para 338.
45 *Ibid* at para 337.
46 *Ibid* at para 337.
47 *Ibid* at para 449.
48 *Ibid* at para 451.

relevant information about the exercise of its treaty rights to the Ministry.[49] Later in the Decision, this finding formed part of the basis of the EAB's denial of the FNFN's application for costs, emphasizing the importance for all parties, including the First Nations, to ensure that they are actively and adequately exchanging information during consultation.

The importance of fully understanding the impacted treaty rights before determining the required scope of consultation is highlighted by the factors considered by the EAB. It found that the area around the Tsea River watershed was less developed than other areas in the FNFN's traditional territory, and that it may have a higher importance to the FNFN for the exercise of its treaty rights, than other, more developed areas in the territory.[50] This factor appears to have weighed heavily in the EAB's conclusion on scope of consultation. It also considered the fact that the water use by Nexen was consumptive in nature (in that it would not be returned to the watershed after it was used), as well as its finding that the potential adverse impacts of the Licence were not merely speculative in nature and that there was a real risk that withdrawals in accordance with the Licence could have an adverse impact on riparian vegetation, fish and other species in the area.[51] However, it weighed this information with the fact that there was no evidence to suggest that the Licence had actually resulted in the FNFN being unable to continue conduct their traditional activities in the area, or that this would occur in the future.[52] Balancing these factors, the EAB concluded that the level of consultation required was in the mid-range of the spectrum.[53]

The Consultation Process

With respect to the consultation process itself, the EAB emphasized the need for flexibility as well as a sufficient degree of transparency for "each party to understand the other parties' needs and expectations, particularly in terms of informational needs and the expected timelines for responses and decisions."[54] While it confirmed that a standard of perfection was not required from the parties, the EAB described the process as having suffered from a lack of understanding and clarity regarding the parties' needs and expectations. This finding extended to the role of Nexen, which had played an active role in discussions with the FNFN through the Application process. However, as the Ministry had never clearly delegated any aspects of the consultation process to Nexen, the EAB was concerned that the FNFN may have believed that Nexen was only engaging to further its own interests, as opposed to consulting with the FNFN was a delegate of the Crown.[55] The EAB found that the Ministry should have made greater efforts to discuss the parties' roles and expectations to ensure the process was transparent.[56]

The Decision demonstrates how a consultation process can go awry as a result of an unclear process. The EAB provided parties with an important takeaway to prevent similar future problems, suggesting that the Ministry should have negotiated a consultation agreement with the FNFN or at least proposed a clear framework or process for the consultations at the outset.[57] From an applicant's perspective, it would be advisable to ensure that this process or agreement clearly describes any aspects of the consultation process that have been delegated to the applicant.

Duty to Consult in Good Faith

Regardless of the level of consultation required, the EAB confirmed that the provincial Crown must always consult in good faith, "with the intention of substantially addressing the concerns of the aboriginal peoples whose land is in issue..."[58] While the EAB found that the provincial Crown had done so for the majority of the Application process, this changed in early 2012, around the time the January 2012

49 *Ibid* at para 452.
50 *Ibid* at para 435.
51 *Ibid* at para 435.
52 *Ibid* at para 439.
53 *Ibid* at para 440.
54 *Ibid* at para 441.
55 *Ibid* at para 447.
56 *Ibid* at para 448.
57 *Ibid* at paras 443-444.
58 *Ibid* at para 468, citing *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 168.

correspondence was sent to the FNFN. The EAB described the Ministry, during this period, as having "an intention to bring the consultation process to an end and issue the Licence" and as taking the view that further consultation would "simply delay the inevitable issuance of the Licence."[59] Its close-mindedness to new information was found by the EAB not to be in good faith or consistent with the honour of the Crown and the overall objective of reconciliation.[60] This was particularly the case due to the lack of urgency for a decision, as Nexen had continued to operate under its short-term section 8 approval, and therefore would not suffer great prejudice from further delay.[61] As a result of the Ministry's failure to consult in good faith, the EAB found that the consultation process had been "inadequate and fundamentally flawed."[62]

This finding demonstrates the need of the provincial Crown (and, to the extent applicable, an applicant as a delegate to the Crown) to be willing to keep an open mind through the entire consultation process, and to be willing to consider and act upon information that arises even very late in the consultation process.

Decision & Aftermath

Having concluded that both the Licence and the consultation process had been "fundamentally flawed" the EAB turned to the appropriate remedy.[63] While the FNFN sought to have the issuance of the Licence reversed, Nexen argued that it would suffer significant prejudice from this result.[64]

In balancing these arguments, the EAB emphasized the large amount of water being diverted from a small water source, based on a Licence that was fundamentally flawed and lacking in technical merit and that this gave rise to a considerable risk of harm to the area. It also noted the seriously flawed consultation process.[65] On the other hand, it recognized the prejudice that Nexen could suffer from the cancellation of the Licence. However, it found that this prejudice was minimized by the fact that many of Nexen's works had been constructed during a time when Nexen was still operating under its short-term approval, such that it would have incurred those expenses regardless of whether it received the Licence. Further, despite all of the flaws with the Licence, the EAB noted that Nexen had enjoyed the benefits of the Licence for more than half of its term.[66] In all of the circumstances, the EAB found that the Manager's decision to issue the Licence should be reversed based on both its serious technical flaws as well as the flawed consultation process.[67] ■

59 *Gale, supra* note 1 at para 474.
60 *Ibid* at para 484.
61 *Ibid* at para 483.
62 *Ibid* at para 485.
63 *Ibid* at paras 337, 485.
64 *Ibid* at para 486.
65 *Ibid* at para 490.
66 *Ibid* at paras 491-492.
67 *Ibid* at para 494.

SUPREME COURT OF CANADA CONFIRMS GENEROUS AND LIBERAL APPROACH TO THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

David A. Crerar and Kalie N. McCrystal***

In *Chevron Corp. v Yaiguaje*,[1] the Supreme Court of Canada confirms that Canadian courts should take a generous and liberal approach to the recognition and enforcement of foreign judgments. Although such process was once technical and challenging, the last twenty years has seen significant streamlining of, and openness towards, the process of enforcing foreign judgments in Canada. Yaiguaje continues this trend, and offers great assistance to parties who wish to seek to enforce a foreign judgment in Canada, whether or not:

- the judgment debtor/defendant is located in Canada;
- the judgment debtor/defendant has assets in Canada; or
- the original underlying dispute that led to the foreign judgment has any connection to Canada.

There is no need for the applicant to prove a real and substantial connection between the Canadian province where the foreign judgment is sought to be registered and the original underlying dispute that led to the foreign judgment, or between the Canadian province and the judgment debtor/defendant. So long as a real and substantial connection existed between the foreign court and the original action, and so long as the defendants were properly served with the original claim, the enforcing Canadian court has jurisdiction to recognize and enforce the judgment.

The decision further reiterates Canadian courts' commitment to the principles of comity to and respect of foreign legal systems, and upholds the principles outlined in previous authorities, including *Club Resorts Ltd v Van Breda*[2], and *Beals v Saldanha*[3]. By taking a strong position with respect to the rights of the plaintiffs, the Court confirmed that there are few circumstances in which a Canadian court will not have jurisdiction to recognize and enforce a foreign judgment.

Facts of the Case

From 1972 until 1990, Texaco (which was later acquired by Chevron) was involved in the exploration and extraction of oil from the Lago Agrio region of Ecuador. Indigenous

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1 *Chevron Corp v Yaiguaje*, 2015 SCC 42.
2 *Club Resorts Ltd v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572.
3 *Beals v Saldanha*, 2003 SCC 72, [2003] 3 SCR 416.

Ecuadorian villagers claimed that Texaco's operations had caused severe environmental damage to the region, and brought an action against Chevron Corp. in Ecuador. The trial judge awarded the villagers $17.2 billion in damages, which was reduced to $9.51 billion by Ecuador's Court of Cassation. After finding that Chevron Corp. had no assets left in Ecuador, the villagers sought to have the judgment recognized and enforced in Ontario against both Chevron Corp. (based in the United States) and its subsidiary, Chevron Canada Limited ("Chevron Canada") (which was not a defendant in the Ecuadorian action).

The Rule for Jurisdiction in Enforcement Proceedings

After being served with an Ontario statement of claim in the enforcement proceedings, Chevron Corp. applied to set aside the service on the basis that Ontario courts had no jurisdiction to hear the action because there was no "real and substantial connection" between the subject matter of the dispute, or Chevron Corp. itself, and the province of Ontario.

The "real and substantial connection" test is the usual standard for establishing a Canadian court's jurisdiction to hear an action; however, previous decisions of the Supreme Court of Canada suggest the test might be different in an action to enforce a foreign judgment.

The Supreme Court of Canada found that Ontario courts had jurisdiction over the enforcement action: the real and substantial connection test only applied to hearings on the merits, not to an action for recognition and enforcement of foreign judgments. In an action to enforce a foreign judgment, the only prerequisite is that the foreign court properly took jurisdiction over the original dispute. Accordingly, as long as the defendants were properly served on the basis of the foreign judgment, Ontario courts could properly adjudicate the dispute.

The Court explained that in an enforcement action, there are no concerns about jurisdiction because the court is merely facilitating the payment of a debt; the facts underlying the original dispute are irrelevant. Reasoning that Chevron Corp.'s failure to satisfy the judgment was reason enough to call upon them to fulfill those obligations in Canada, the Court concluded that the principle of comity, which directs courts to respect legitimate actions taken by foreign states, was too important to allow Chevron Corp.'s arguments to succeed.

The Court also rejected Chevron Corp.'s argument that the plaintiffs were required to prove that a defendant has assets in the enforcing jurisdiction. Acknowledging that modern commerce was fast-moving and largely electronic, the Court held that such a rule would only assist debtors trying to escape their liabilities.

Enforcement Proceeding does not End with a Finding of Jurisdiction

The Court emphasized that its analysis only goes to the gatekeeper issue of whether the court has jurisdiction to hear an application for recognition and enforcement. Establishing jurisdiction merely means that the alleged debt merits the assistance and attention of the Canadian court. Once the parties move past the jurisdiction hearing, it may still be open to the defendant to argue that the enforcement and recognition order not be granted. The defendant may argue, for example, that the proper use of judicial resources justifies a stay of the enforcement proceeding. The defendant may also argue that recognition and enforcement should be denied because the original foreign judgment was obtained through fraud or denial of natural justice, or that the foreign judgment is contrary to public policy. But the case law has confirmed that such defences are to be applied narrowly, and in rare circumstances.

Jurisdiction over a Defendant's Subsidiary

Chevron Canada argued that a company carrying on business in Ontario, as opposed to a company headquartered in Ontario, cannot be brought before the courts unless there is a relationship between the claim and that province.

The Supreme Court of Canada disagreed, holding that jurisdiction over Chevron Canada was established simply because it has a business presence in Ontario. Notably, however, the Court declined to opine on whether Chevron Canada's assets would ultimately be available to the plaintiffs to satisfy the debt of its parent Chevron Corp., or the extent to which, if at all, a future court might cut through the corporate veil to allow collection on the registered judgment against the affiliated Canadian company. The eventual decision on these points will be an important one for clients with complicated corporate structures.

Importance of the Decision

With this decision, the Supreme Court has made it clear that judgment creditors are entitled to commence proceedings to enforce foreign judgments in Canada regardless of whether or not the underlying dispute has any connection to Canada, the defendant operates in Canada, or the defendant has assets in Canada. Further, although it remains to be seen whether their assets will be available to satisfy a judgment, judgment creditors are entitled to join local subsidiaries of their creditors to such an action.

For companies operating internationally, this decision signals the willingness of Canadian courts to enforce foreign judgments. It should also, however, serve as a warning that obligations incurred in foreign states cannot be avoided simply by segregating assets in other jurisdictions. ■