



ENERGY REGULATION QUARTERLY

VOLUME 5, ISSUE 3 2017

MANAGING EDITORS

Mr. Rowland J. Harrison, Q.C., LLB, LLM, Energy Regulation Consultant

Mr. Gordon E. Kaiser, BA, MA, JD, Arbitrator, JAMS Toronto, Washington DC

2017 ROSTER

Mr. Tom Adams, BSc, MES, Energy Consultant, Tom Adams Energy

Ms. Héloïse Apestéguy-Reux, BA, LLB, BCL, Partner, McCarthy Tétrault, Toronto

Ms. Mariko Geronimo Aydin, BS, MA, Senior Associate, The Brattle Group, Cambridge

Ms. Nicole Bakker, BSc, JD, Associate, Blake, Cassels & Graydon LLP, Calgary

Mr. Nigel Bankes, BA, MA, LLM, Professor, Chair Natural Resources Law, University of Calgary

Mr. Jeremy Barretto, BSc, MEng (Env), JD, Associate, Osler, Hoskin & Harcourt LLP, Calgary

Mr. Keith B. Bergner, BA, LLB, Partner, Lawson Lundell LLP, Vancouver

Dr. Brian Bietz, BSc, PhD, P Biol President, Bietz Resources Ltd.

Ms. Lorelle Binnion, BSc, JD, Articling Student, BLG, Calgary

Justice David M. Brown, BA, JD, LLM, Justice, Court of Appeal for Ontario

Ms. Jessica-Ann Buchta, BIB, MBA, JD, Associate, Borden Ladner Gervais LLP, Toronto

Mr. David W. Bursey, BA, LLB, Partner, Bennett Jones, Vancouver

Dr. Neil Campbell, HBA, LLB, MA, SJD, Partner, McMillan, Toronto

Mr. Gaétan Caron, BSc, MBA, Executive Fellow, School of Public Policy, University of Calgary, BlueKite, Co-Founder

Ms. Judy Chang, BSc, MPP, Principal, The Brattle Group, Cambridge

Ms. Nardia Chernawsky, LLB, BCL, Associate, Blake, Cassels & Graydon LLP, Vancouver

Mr. Jeff Christian, BSc, LLB, Partner, Lawson Lundell LLP, Vancouver

Mr. Ron Clark, BA, LLB, LLM, Partner, Aird & Berlis LLP, Toronto

Mr. Michael Cleland, BA, MPL, Senior Fellow, University of Ottawa Collaboratory on Energy Research and Policy

Mr. Sean Conway, BA, MA, Public Policy Advisor, Gowling WLG, Toronto

Mr. David A. Crerar, BA, LLB, Partner, BLG, Vancouver

Mr. Tony Crossman, LLB, LLM, Partner, Blake, Cassels & Graydon LLP, Vancouver

Mr. Kalyan Dasgupta, MSc, Economic Consultant, Berkeley Research Group

Ms. Elizabeth DeMarco, BSc, MSc, LLB, MSEL, Partner, Demarco Allan LLP, Toronto

Ms. Anne Drost, LLB, BCL, LLM, Partner, Blake, Cassels & Graydon LLP, Montreal

Mr. Sam Dukesz, BA, Student-at-Law, Stikeman Elliott, Toronto

Mr. Simon Ede, BSc, MS, Director, Berkeley Research Group, London, UK

Ms. Jennifer Fairfax, BA, LLB, Partner, Osler Hoskin & Harcourt LLP, Toronto

Dr. Ahmad Faruqui, BA, MA, PhD, Principal, The Brattle Group, San Francisco

Mr. Robert S. Fleishman, BA, JD, Senior counsel litigation department, Morrison Foerster, USA

Mr. Justin Fontaine, BA, Articling Student, Osler Hoskin & Harcourt LLP, Calgary

Mr. Michael Fortier, BA, MES, LLB, Partner, Torys LLP, Toronto

Dr. Adam Fremeth, BA, MA, PhD, Assistant Professor, Richard Ivey School of Business, Western University

Mr. Jack Gibbons, BA, MA, Chair, Ontario Clean Air Alliance

Ms. Silke Goldberg, Counsel, Herbert, Smith Freehills LLP, London, Paris, Berlin

Ms. Reena Goyal, BA, JD, LLM, Senior Lawyer, Independent Electricity System Operator

Dr. Walter Graf, BS, BSE, MS, PhD, Associate, The Brattle Group, Cambridge

Mr. Daniel Gralnick, LLL, Legal Intern, Canadian Gas Association

Mr. Willie Grieve, Q.C., BA, JD, Chair, Alberta Utilities Commission

Ms. Rebecca Hall-McGuire, BComm, MES, JD, Associate, Osler Hoskin & Harcourt LLP, Toronto

Mr. Dufferin Harper, BSc, MSc, LLB, Partner, Blake, Cassels & Graydon LLP, Calgary

Mr. Scott Hempling, BA, JD, Adjunct Professor, Georgetown University Law Center

Ms. Lauren Heuser, BA, JD, Fellow, Munk School of Global Affairs, University of Toronto

Ms. Marie-Christine Hivon, BCL, LLB, Partner, Norton Rose Fulbright, Montreal

Dr. Guy Holburn, BA, MA, PhD, Director, Ivey Business School

Ms. Kimberly J. Howard, BA, LLB, MA, Associate, McCarthy Tétrault, Calgary

Mr. James Hunter, Legal Counsel, Independent Electricity System Operator

Mr. Martin Ignasiak, BComm, LLB, Partner, Osler Hoskin & Harcourt LLP, Calgary

Mr. Mark A. Jamison, BSc, MSc, PhD, Director, Public Utility Research Center, University of Florida

Ms. Michelle S. Jones, BSoc Sc, LLB, Associate, Lawson Lundell LLP, Vancouver

Ms. Jessica Kennedy, BSc, MBA, JD, Associate, Osler Hoskin & Harcourt LLP, Calgary

Ms. Donna Kennedy-Glans, Q.C., BA, LLB, Former energy executive and Associate Minister of Electricity and Renewable Energy

Mr. Richard King, BSc, MES, LLB LLM, Partner, Osler Hoskin & Harcourt LLP, Toronto

Ms. Venessa Korzan, Articling Student, DLA Piper, Edmonton

Mr. Jason Kroft, BA, LLB, LLM, Partner, Stikeman Elliott, T

Mr. William Lahey, BA, LLM, Professor, Schulich School of Law, Dalhousie University

Mr. Richard Laszlo, BEng, MES, Director, QUEST

Dr. Stephen Littlechild, BCom, PhD, Hon DSc, Hon D Civ Law, Emeritus Professor, University of Birmingham

Mr. Peter Love, BA, MBA, Chief Energy Conservation Officer, Love Energy Consultants, Toronto

Mr. Sylvain Lussier, BA, LLB, Partner, Osler Hoskin & Harcourt LLP, Montreal

Mr. David MacDougall, BSc, LLB, LLM, Partner, McInnes Cooper, Halifax

Ms. Sara Mahaney, BA, JD, Associate Lawyer, McInnes Cooper

Mr. Michael Marion, BComm, LLB, Partner, BLG, Calgary

Mr. Michael Massicotte, BComm, LLB, Partner, BLG, Calgary

Ms. Kalie N. McCrystal, BA, JD, Associate, BLG, Vancouver

Mr. Duncan Melville, MA, JD, CFA

Mr. Peter Miles, Retired Economist

Ms. Erica C. Miller, BBA, JD, Associate, Farris, Vancouver

Mr. Ian Mondrow, BA, LLB, Partner, Gowling WLG, Toronto

2017 ROSTER

Dr. Michael Moore, BS, MS, PhD, Professor, School of Public Policy, University of Calgary

Mr. David J. Mullan, LL.M., Professor Emeritus, Faculty of Law, Queens University

Mr. Gordon M. Nettleton, BComm, LLB, Partner, Calgary

Ms. Helen T. Newland, BSc, LLB, MA, Partner, Dentons Canada LLP, Toronto

Mr. Mathieu Nolin, LLB, LL.M., Articling Student, Blake, Cassels & Graydon LLP, Montreal

Ms. Sarah Nykolaishen, BA, MA, JD, Associate, Blakes, Calgary

Mr. Terri-Lee Oleniuk, BSc, JD, Partner, Osler Hoskin & Harcourt LLP, Calgary

Mr. Peter Ostergaard, BA, MA, Former Chair, BC Utilities Commission, Vancouver

Mr. Bruce Outhouse, Q.C., BA, LLB, Partner, Blois Nickerson and Bryson LLP, Halifax

Mr. Johannes P. Pfeifenberger, MS, MA, Principal, The Brattle Group, Cambridge

Mr. Gordon Pickering, BComm, BA, Director, Navigant Consulting, Sacramento

Mr. André Plourde, BA, MA, PhD, Professor, Dean, Faculty of Public Affairs, Carleton University

Mr. Erik Richer La Flèche, BCL, LLB, Partner, Stikeman Elliott

Mr. Mark Rodger, BA, LLB, Senior Partner, Borden Ladner Gervais LLP, Toronto

Ms. Hannah Roskey, BA, JD, Associate, Fasken Martineau, Calgary

Mr. Alan L. Ross, JD, MBA, Partner, BLG, Calgary

Mr. Chris Sanderson, Q.C., BA, LLB, Senior Counsel, Lawson Lundell LLP, Vancouver

Dr. Hugo Schotman, PhD, External consultant, Canadian Gas Association, Ottawa

Dr. Sanem Sergici, BS, PhD, Principal, The Brattle Group, Cambridge

Mr. Rick Smead, BSc, JD, Managing Director, RBN Energy LLC, Houston

Mr. James H. Smellie, BA, LLB, Partner, Gowling WLG, Calgary

Mr. Lawrence E. Smith, Q.C., BA, LLB, MA, Partner, Bennett Jones, Calgary

Dr. Kathleen Spees, BS, MS, PhD, Principal, The Brattle Group, Cambridge

Mr. David Stevens, BA, LLB, Partner, Aird & Berlis, Toronto

Mr. Doug Taylor, LLB, LL.M., Counsel, Blake, Cassels & Graydon LLP, Toronto

Dr. Ralf Thaeter, Dr. iur., LL.M., Managing Partner- Germany, Herbert Smith Freehills, Frankfurt, Berlin

Ms. Zoë Thoms, LLB, Avocate, Aird & Berlis LLP, Toronto

Mr. Philip Tunley, BA, LLB, Partner, Stockwoods LLP, Toronto

Mr. John Vellone, BA Sc, LLB, MBA, Partner, Borden Ladner Gervais LLP, Toronto

Dr. Leonard Waverman, BComm, MA, PhD, Dean, DeGroot School of Business, McMaster University

Mr. Patrick G. Welsh, Associate, Osler Hoskin & Harcourt LLP, Toronto

Mr. Adam White, BA, CEO, Powerconsumer Inc

Ms. Sharon Wong, LLB, Partner, Blake, Cassels & Graydon LLP, Toronto

Dr. Moin A. Yahya, BA, MA, JD, PhD, Associate Professor, Faculty of Law, University of Alberta

Mr. Jason K. Yamashita, BA, JD, Associate, Farris, Vancouver

Dr. Adonis Yatchew, BA, MA, PhD, Professor, Department of Economics, University of Toronto

Mr. C. Kemm Yates, Q.C., BA, JD, Partner, Blakes, Calgary

Mr. Glenn Zacher, BA, LLB, Partner, Stikeman Elliott, Toronto

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.

ENERGY REGULATION QUARTERLY

TABLE OF CONTENTS

EDITORIAL

Editorial	9
<i>Rowland J. Harrison, Q.C. and Gordon E. Kaiser</i>	

ARTICLES

The Report of the Expert Panel on the Modernization of the National Energy Board and the Response of the Government of Canada	11
<i>Nigel Bankes</i>	
Federal Environmental Assessment Reform: A Practitioner's Perspective	25
<i>Michael Fortier</i>	
The Mandate of the National Energy Board	29
<i>Peter Miles</i>	
Premier's Bane: A Folk History of Electricity Policy in Ontario	33
<i>Adam White</i>	
Ontario's "Fair Hydro Plan" Comes at a (Future) Cost.....	41
<i>David Stevens</i>	
Ontario's Fair Hydro Plan Act Upends Rate Administration and Finance.....	45
<i>Tom Adams</i>	

CASE COMMENTS

Contested Service Area Amendments: The Battle for New Electricity Customers	49
<i>John Vellone and Jessica-Ann Buchta</i>	
An Update on Natural Gas Expansion in Ontario.....	53
<i>John Vellone and Jessica-Ann Buchta</i>	

EDITORIAL

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

Legislation to reform, or “modernize”, the federal regulatory review process for major energy infrastructure projects is expected to be tabled in Parliament in the near future, perhaps as early as this fall. Regardless of how extensive any proposed changes may be, the legislation will establish a new regulatory framework and will seek to address challenges that have emerged in reviewing major projects in recent years, ranging from Northern Gateway to the expansion of the TransMountain pipeline and the reversal and expansion of Enbridge’s Line 9. The success, or otherwise, of the new framework will play a pivotal role in determining the extent to which future development of Canada’s hydrocarbon resources will proceed. The proposed legislation should, therefore, be carefully scrutinized by the energy regulation community.

Any changes proposed to the role of the National Energy Board (‘NEB’) must be considered in conjunction with changes proposed for the federal environmental assessment process, as is clear from the single Discussion Paper tabled by the federal government at the end of June titled “Environmental and Regulatory Reviews”. The Paper states the government’s commitment “to deliver environmental assessment and regulatory processes that regain public trust, protect the environment, introduce modern safeguards, advance reconciliation with Indigenous peoples, ensure good projects go

ahead, and resources get to market.”

This issue of *Energy Regulation Quarterly* includes three articles that we believe will be helpful in preparing for the coming debate. In his article on “The Report of the Expert Panel on the Modernization of the National Energy Board and the Response of the Government of Canada”, Professor Nigel Bankes reviews developments to date specifically as they relate to the NEB. Michael Fortier contributes with his article “Federal Environmental Assessment Reform: A Practitioner’s Perspective.” Together, the two articles provide a valuable foundation for assessing the merits and likely effectiveness of whatever specific changes are proposed when legislation is ultimately tabled.

To date, the discussion of federal environmental and regulatory review processes has largely focused on mandate, structural and procedural issues. Scant regard has been paid to the **purpose** of regulation in the context of energy infrastructure projects. The question has not, however, been ignored entirely. Earlier this year, the C. D. Howe Institute published a Commentary titled “Defining the Public Interest in Regulatory Decisions: The Case for Economic Efficiency”, by Jeffrey Church, in which the author argues that “[m]any of the concerns regarding regulatory decisions would vanish, or be minimized, if governments clearly articulated in law that regulators should base

1 Government of Alberta, *Climate Leadership Plan* (Edmonton: 22 November 2015), online: <<http://www.alberta.ca/climate-leadership-plan.cfm>>.

2 Ernest & Young LLP, “Alberta climate change leadership plan announcement” (Calgary: 2015), online: <[http://www.ey.com/Publication/vwLUAssets/Alberta-climate-change-leadership-plan-announcement/\\$FILE/Alberta-climate-change-leadership-plan-announcement.pdf](http://www.ey.com/Publication/vwLUAssets/Alberta-climate-change-leadership-plan-announcement/$FILE/Alberta-climate-change-leadership-plan-announcement.pdf)>.

3 See, for example, Rick McConnell, “Alberta’s climate-change plan selling point for pipelines, Rachel Notley says” *CBC News* (19 July 2016), online: <<http://www.cbc.ca/news/canada/edmonton/alberta-s-climate-change-plan-selling-point-for-pipelines-rachel-notley-says-1.3686055>>.

4 Bill 27, *Renewable Electricity Act*, 2nd Sess, 29th Leg, Alberta, 2016.

their decisions solely on economic efficiency grounds.” In “The Mandate of the National Energy Board”, Peter Miles, formerly senior economist at the NEB, responds to Church’s thesis, with particular reference to changes proposed to the objectives of regulation as outlined in the government’s Discussion Paper on “Environmental and Regulatory Reviews”.

Meanwhile, as federal energy regulatory reform looks forward, the challenges in implementing change – and “getting it right” – are illustrated by recent experience in implementing policy changes in Ontario. Adam White reviews the development of Ontario’s electricity policy in his article “Premier’s Bane: A Folk History of Electricity Policy in Ontario”. Challenges specific to implementation of the “Fair Hydro Plan” are addressed by David Stevens in “Ontario’s ‘Fair Hydro Plan’ Comes at a (Future) Cost” and by Tom Adams in “Ontario’s Fair Hydro Plan Act Upends Rate Administration and Finance”.

Finally, in the Case Comment in this issue of *ERQ*, John Vellone and Jessica-Ann Buchta discuss the recent decision of the Ontario Energy Board approving a contested application by ELK Energy Inc. to expand its licensed service area to supply electricity distribution services to a single customer. The authors conclude that the decision is significant in articulating the criteria the OEB will consider in similar applications in future.

In the second Case Comment, the same authors provide “An Update on Natural Gas Expansion in Ontario”. ■

THE REPORT OF THE EXPERT PANEL ON THE MODERNIZATION OF THE NATIONAL ENERGY BOARD AND THE RESPONSE OF THE GOVERNMENT OF CANADA

*Nigel Bankes**

1. Introduction

This article provides a summary of and preliminary comments on the Report of the Expert Panel on the Modernization of the National Energy Board¹ (NEB Expert Panel Report) which was released in May 2017.² This report is one of four recently released reports examining different aspects of how the federal government reviews and regulates major projects. The other three reports deal with a review of environmental assessment procedures,³ habitat protection under the *Fisheries Act*⁴ and, the role of the *Navigation Protection Act*.⁵ In June 2017, days after the comment period for the NEB Expert Report had closed, the Government of Canada released a discussion paper entitled, *Environmental and Regulatory Reviews*.⁶ That

discussion paper outlines the changes that the government is considering for federal assessment and regulatory processes in response to these different reports. Accordingly, this article also comments on that discussion paper insofar as it deals with proposed changes to the National Energy Board.

The NEB Expert Panel Report begins with an overview of “What the Panel Heard” and then articulates a set of five principles which underlie the Panel’s recommendations. The Panel follows this with a statement of its vision for Canada’s regulator of energy infrastructure and then a set of recommendations focused around six key themes for realizing the Panel’s vision. These recommendations constitute the meat of the report. The six key themes are: (1)

* Nigel Bankes, Professor of Law, The University of Calgary and Adjunct Professor, University of Tromsø. Thanks to Stéphanie Gagné, Legal Intern, Canadian Gas Association for her assistance with the footnotes.

1 Expert Panel on the Modernization of the National Energy Board, *Forward, Together: Enabling Canada’s Clean, Safe, and Secure Energy Future* (Ottawa: 2017), online: <<https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/NEB-Modernization-Report-EN-WebReady.pdf>> [Expert Panel Report].

2 This article draws heavily on a previously published blog post: Nigel Bankes, “The NEB Modernization Report” (14 June, 2017), online: ABlawg <http://ablawg.ca/wp-content/uploads/2017/06/Blog_NB_NEB_panel_recommendations.pdf>.

3 Expert Panel Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (Ottawa: CEAA, 2017), online: <<https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html>>.

4 Standing Committee on Fisheries and Oceans, *Review of changes made in 2012 to the Fisheries Act: enhancing the protection of fish and fish habitat and the management of Canadian fisheries* (Ottawa: February 2017), online: <<http://www.ourcommons.ca/Committees/en/FOPO/StudyActivity?studyActivityId=9156509>>.

5 Report of the Standing Committee on Transport, Infrastructure and Communities, *A Study of the Navigation Protection Act* (Ottawa: March 2017), online: <<http://www.ourcommons.ca/DocumentViewer/en/42-1/TRAN/report-11>>.

6 Government of Canada, *Environmental and Regulatory Review*, Discussion Paper (Ottawa: June 2017), online: <<https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/share-your-views/proposed-approach/discussion-paper-june-2017-eng.pdf>> [Discussion Paper].

mandate, (2) relationships with Indigenous Peoples, (3) governance and decision-making, (4) public participation, (5) Î-kanatak Askiy Operations (Keeping the land pure), and (6) respect for landowners.

Volume II contains a set of annexes. Annex II of Volume II contains "Preliminary Findings Regarding Potential Legislative and Regulatory Changes". These draft provisions do little to supplement the discussion in Volume I.

The key changes proposed by the panel are as follows:

- Align the role of the national energy regulator with a clear articulation of national energy and climate policy;
- Replace the NEB with a new agency to be called the Canadian Energy Transmission Commission (CETC);
- Adopt a corporate governance model for the Commission and move the Board of Directors to Ottawa;
- Create a new Canadian Energy Information Agency;
- Establish a two-step decision-making process for new energy transmission projects:
 - Step one, under the authority of a body such as the Major Projects Office, will assess whether a proposed project is in the national interest;
 - Step two, under the authority of the CETC and the Canadian Environmental Assessment Agency, will engage in detailed regulatory approval;
- Create an Indigenous Major Projects Office;
- Provide greater emphasis on life-cycle regulation of projects and in this context

the panel adopts Indigenous language terms to help capture the importance of respecting Indigenous world views;

- Create a Public Intervenor Office;
- Create Regional Multi-Stakeholder Committees;
- Provide an enhanced role for municipalities in proceedings;
- Create a Landowners' Ombudsman;
- Establish stronger standards for land agents and review compensation rules for infrastructure rights of way; and
- Enhance the role of Indigenous Peoples throughout all elements of the process.

This is evidently an ambitious package of proposed reforms.

Three themes pervade the Panel's analysis. The first theme is the need to re-establish the trust of Canadians in the national energy regulator. The second theme is the importance of establishing a respectful relationship with Canada's Indigenous peoples. While this is clearly a large national project which extends far beyond national energy issues, the Panel attempts to articulate what a re-envisioned relationship might mean for a national energy regulator. And the third theme is that a national energy regulator cannot do it all and should not be expected to do so. We need a national energy strategy and furthermore we need to think carefully about those information and project approval functions that are best assumed by a national energy regulator and those which should be discharged by cabinet or by another office of government.

2. Background to the report

In June 2016, Minister Jim Carr announced his intention to establish an expert panel to advise on the "modernization" of the National Energy Board.⁷ He provided Draft terms of reference⁸

⁷ In doing so, Minister Carr was following the instructions contained in his mandate letter from Prime Minister Trudeau, Office of the Prime Minister, *Minister of Natural Resources Mandate Letter*, online: <<http://pm.gc.ca/eng/minister-natural-resources-mandate-letter>>.

⁸ Government of Canada, *National Energy Board (NEB) Modernization Expert Panel: Draft Terms of Reference*, online: <<https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/share-your-views/draft-terms-reference-neb.html>>.

for the expert panel which were finalized several months later.⁹ The terms of reference emphasised that the Panel was to “conduct a targeted review of the NEB’s structure, role, and mandate” with the goal of positioning the NEB as a “modern, efficient, and effective energy regulator and regain public trust”. Issues to be considered included: governance, mandate, decision-making roles, life-cycle regulation, indigenous engagement and public participation. Other matters were evidently out of scope including the economic (tolls and tariffs) regulation of pipelines under Part IV of the *National Energy Board Act*¹⁰ and the Board’s upstream oil and gas responsibilities under the *Canada Oil and Gas Operations Act*.¹¹

In considering the NEB’s structure, role and mandate, the Panel was specifically directed to consider “the relationship between NEB processes and the Aboriginal and treaty rights of Indigenous peoples, as well as the relationship between NEB processes and the principles outlined in the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*.”¹² The terms of reference made it plain that the Minister expected to see significant stakeholder engagement as well as direct engagement with Indigenous organizations and communities.

The following sections provide an overview of the Expert Panel’s Report following the main headings used by the Panel.

3. An Overview of What the Panel Heard

The Panel made four main points under this heading.¹³ First, the Panel indicated that it had heard broad agreement that NEB project hearings were being used as a *de facto* forum for debates about Canada’s energy policy and climate change but that nobody considered that this was a good idea. It was happening because there was no alternative and more suitable forum. Second, the Panel heard that there was a crisis of confidence in the NEB. Many

apparently regarded the Board as “captured” by the industry it regulated and many found its decision-making opaque. Third, the Panel heard that it was time to establish a new relationship with Indigenous peoples in Canada. And finally, the Panel emphasised that it had heard that creative win-win solutions should be possible in which “the interests and rights of the various parties involved [could] be acceptably accommodated in the interest of all Canadians.”¹⁴

4. The Five Principles

The Panel distilled “five fundamental principles” to guide its recommendations:¹⁵

1. Living the Nation-to-Nation Relationship
2. Alignment of NEB Activities to National Policy Goals
3. Transparency of Processes and Decision-Making and Restoring Confidence
4. Public Engagement throughout the Lifecycle
5. Results Matter: Regulatory Efficiency and Effectiveness

5. The Panel’s Vision

Prior to articulating specific recommendations, the Panel set out what it describes as “an overall vision of the future of energy transmission infrastructure regulation in Canada.” That “vision” seems to consist of four elements or building blocks.¹⁶

The first element is “policy and leadership”. Here the panel called for a “fully realized” Canadian energy strategy led by the Minister of Natural Resources but in partnership with Indigenous peoples, the provinces and the territories.¹⁷

⁹ National Energy Board Modernization Expert Panel, *Terms of Reference*, online: <<http://www.neb-modernization.ca/terms-of-reference>>.

¹⁰ *National Energy Board Act*, RSC 1985, c N-7.

¹¹ *Canada Oil and Gas Operations Act*, RSC 1985, c O-7.

¹² *United Nations Declaration on the Rights of Indigenous Peoples*, 107th plenary meeting, 2007, UN Doc A/ 61/ L.67, online: <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf> [UN Declaration].

¹³ Expert Panel Report, *supra* note 1 at 6-9.

¹⁴ Expert Panel Report, *ibid* at 9.

¹⁵ Expert Panel Report, *ibid* at 10-15.

¹⁶ Expert Panel Report, *ibid* at 16.

¹⁷ Expert Panel Report, *ibid* at 19-20.

A second element comprises “an enhanced government role for the collection, analysis, and dissemination of information about energy production, transmission, use, future trends, and associated carbon emissions, to inform policy-makers, industry, Indigenous peoples, academia, civil society, and Canadians.”¹⁸ The Panel considers that this function should be discharged by a new Canadian Energy Information Agency.

A third element involves enhanced pre-project “engagement” between project proponents and others “to establish stronger, good faith relationships between the regulator, the Crown, industry, Indigenous peoples, and interested parties.”¹⁹ Engagement is to be distinguished from consultation.

A fourth element involves splitting the project review and approval process into two.²⁰ The *first step* is an assessment of the alignment of the project with the national interest. This assessment would not be undertaken by the NEB or the proposed successor CETC but would be undertaken instead by something like the current Major Projects Management Office housed in Natural Resources Canada. The result of the review would be a recommendation by the Minister of Natural Resources to the Governor in Council. The Panel explicitly acknowledges that this step one decision is ultimately a political decision to be made by democratically elected and accountable government officers at the highest level. The *second step* is a more detailed project licensing review based on an assessment of technical considerations and risk mitigation. This assessment is to be undertaken by the new CETC in conjunction with the Canadian Environmental Assessment Agency (CEAA). A five-person joint review panels will be chaired by an “independent panel member” i.e. independent of either the CETC or CEAA.

A fourth element of the Panel’s vision emphasises the CETC’s responsibility for the subsequent operations of any approved infrastructure. To properly describe these responsibilities and to recognize the significance of Indigenous world views, the Panel adopted a Cree word Î-kanatak

Askiy Operations (meaning “keeping the land pure”). Under this heading the Panel referenced the adoption of best practices, proactive monitoring and preparedness (with greater transparency and accessibility) which should also extend to emergency and compliance response. A cycle of continuous improvement should pervade every aspect of the CETC.

6. The Detailed Recommendations of the Panel

Finally, the Panel laid out its specific recommendations (some 46 in all).²¹ I will not reproduce all of the recommendations here. Instead, I will summarize and comment on what seem to me to be some of the Expert Panel’s more significant recommendations under the following headings: (1) better alignment between energy policy and the role of a national energy regulator, (2) a new independent Canadian Energy Information Agency, (3) a new national energy regulator with a new governance model, (4) a two-step decision making process for new projects, and (5) relationships with Indigenous people.

6.1 Better alignment between energy policy and the role of a national energy regulator

The report contains a series of recommendations designed to ensure closer alignment between “a formal Canadian energy strategy which plots a course for the future of energy in Canada, balancing environmental, social, and economic objectives” and the role of a national regulator.²² The report contemplates that the Department of Natural Resources will play a leadership role in establishing such a strategy in conjunction with the provinces, territories and Indigenous peoples. There is also a suggestion that this will ensure better alignment between climate and energy policy.²³

I strongly agree with the goals of better alignment between climate and energy policy and between these policies and the roles and responsibilities of a national energy regulator. That said, the Panel gives the reader no sense of what a Herculean task it will be to secure

¹⁸ Expert Panel Report, *ibid* at 20.

¹⁹ Expert Panel Report, *ibid* at 21.

²⁰ Expert Panel Report, *ibid* at 21-26.

²¹ Expert Panel Report, *ibid* at 31-87.

²² Expert Panel Report, *ibid* at 33, Recommendation 1.1.1.

²³ Expert Panel Report, *ibid* at 35, Recommendation 1.2.1.

the agreement of the provinces and territories (and Indigenous peoples) on the elements of national energy strategy. Certainly, I don't find it particularly encouraging for the Panel to suggest²⁴ that the work initiated under the *Canadian Energy Strategy*²⁵ released by the Council of the Federation (i.e. the provinces and territories) has "great potential" for fulfilling what the Panel has in mind. In my view that *Strategy* (which operates at the level of the lowest common denominator) offers very little guidance to decision-makers and thus demonstrates how difficult it will be for the federal, provincial and territorial governments and Indigenous peoples to elaborate something more useful.

It might have made more sense for the Expert Panel to focus on those matters which are clearly within federal jurisdiction. The Panel might also have had more to say about just how we integrate energy policy and climate policy into decision making by the national energy regulator. This is not a trivial concern. An administrative tribunal cannot just apply policy (assuming that the policy is discernible) as if it were law – it needs to be told to do so. In the present context, the Panel might usefully have considered options for implementing this goal. One option would be to include a statutory requirement that the national energy regulator take into account Canada's obligations and commitments under international climate agreements. Another option would be to include a provision allowing the Minister (or the Governor in Council) to provide directions to the national energy regulator (either generally or specifically) with respect to the integration of energy and climate policy.²⁶

6.2 A new independent Canadian Energy Information Agency

The Panel recommended that the federal government should create a new independent Canadian Energy Information Agency, with a mandate that would include "collection and dissemination of energy data, as well as

the production of an annual public report on Canada's energy system, and quantitative analysis of the alignment with Canadian energy strategy goals."²⁷ The Agency would report to the Minister of Natural Resources.

In my opinion the Panel fails to offer a convincing argument for the creation of a separate information agency. I think that it would lead to a duplication of function and thus *inter alia* violate the principle of regulatory efficiency and effectiveness articulated by the Panel. A national energy regulator needs to be able to draw upon a rich range of data and resources. It needs to monitor and understand how the sector is operating and to identify and understand trends in costs, prices and technologies. To ask another agency to fulfil these and other functions will lead to duplication and inefficiency since the national energy regulator will still need its own in-house expertise in relation to these matters. The Panel suggests that a national energy regulator faces a conflict of interest in carrying out both an information function and a project regulation function but I cannot see where the conflict is. Why should the collection, organization, presentation and publication of energy data affect how the new energy regulator makes step 2 decisions about an energy transmission system (and *vice versa*). That said, I do agree that the national energy regulator needs much more guidance as to how to integrate climate change and greenhouse gas policy (and Canada's international legal obligations) into its information metrics, especially in relation to supply and demand projections. I think that the national energy regulator might also be encouraged to provide a broader range of information reports dealing, for example, with trends in the renewables sector²⁸ or with the generic energy challenges faced by isolated communities (both Indigenous and non-Indigenous).

6.3 A new national energy regulator with a new governance model

²⁴ Expert Panel Report, *ibid* at 34.

²⁵ Canadian's Premiers, *Canadian Energy Strategy* (Ottawa: July 2015), online: <https://www.canadaspremiers.ca/phocadownload/publications/canadian_energy_strategy_eng_fnl.pdf>.

²⁶ Examples include the provisions of the *Ontario Energy Board Act*, SO 1998 c 15, s 27 dealing with ministerial directions in relation to energy conservation programs, while s 3 of British Columbia's *Utilities Commission Act*, RSBC 1996, c 473 offers a more general example.

²⁷ Expert Panel Report, *supra* note 1 at 36.

²⁸ I acknowledge that the NEB has done some of this work. See, for example, National Energy Board, *Canada's Renewable Power Landscape: Energy Market Analysis* (Calgary: NEB, 2016), online: <<https://www.neb-one.gc.ca/nrg/ststc/lctrc/rprt/2016cndrnwblpwr/index-eng.html>>.

The Expert Review Panel proposes that the NEB should be replaced by a new national energy regulator to be known as the Canadian Energy Transmission Commission (CETC). The new CETC is to be governed by a board of directors with responsibility for “strategy and oversight” of the CETC’s activities.²⁹ “Hearing panels” and “regulatory decisions” would be the responsibility of “Hearing Commissioners”. The board of directors will be based in Ottawa; hearing commissioners may live anywhere in the country.³⁰

It is not clear to me that the Expert Review Panel ever justifies why it is necessary to change the name of the national energy regulator.³¹ It is perhaps simply a re-branding proposal to re-establish trust in the office of a national energy regulator much as the Province of Alberta decided to divide, re-vamp and re-name its energy regulatory authorities following the so-called “spy-scandal”.³² More important however are the proposals relating to the governance model and the geographical division of the regulator (board of directors in Ottawa, core staff in Calgary and commissioners spread out across the country). As for the governance model (which evidently draws some inspiration from the model of the Alberta Energy Regulator established by the *Responsible Energy Development Act*³³), the Panel again fails to justify its proposed change other than its observation that the Board members of the current NEB do “not operate as a traditional Board of Directors”.³⁴ That is hardly the point. It seems to me that the Panel has simply bought into the assumption that a corporate model of decision making is: (a) a good (or the best) model of governance and decision-making, and (b) an appropriate model for a body performing a regulatory function. But why is that? Is the language and structure of a corporations the best fit for a regulatory authority performing governmental functions? Nor is it clear why the Panel remains wedded to this approach even when it drops the name “Board” from the

proposed title of the new agency.

I also think that the proposal to split the new regulator geographically requires much more justification. For the first part of its life the NEB was located in Ottawa. The Board moved to Calgary in 1991. My own recollection is that part of the reason for the move was to share the benefits of government offices and employment more equally across the country rather than leaving all of those benefits to accrue to the Ottawa/Hull region and to Ontario and Quebec. Locating the Board in the energy capital of Canada also reduced the need for counsel and experts to travel to hearings in Ottawa (although the NEB has long scheduled project hearings in the location of the project). These (especially the first) are not trivial considerations within the context of the Canadian federation. The Panel’s proposal will unravel this objective and for reasons that are not fully worked through. For example, why does the board of directors need to be in Ottawa? Is it to makes its board be more amenable to government policy direction? The real issue as noted above is whether the national energy regulator receives adequate legal direction to do so.

Since the Panel proposes that hearing commissioners may live anywhere in the country, under the Panel’s proposals the real core of the regulator, including its staff, will come to be located sooner or later where the regulator’s board of directors is located i.e. Ottawa. It is hard to tell precisely what is embraced in the Panel’s “hearing commissioners” model of business and thus the implications of that model need much more exploration. Certainly the Panel intends that the commissioners will have a much more diverse background than the background of current Board members. It seems likely as well that there will be larger number of commissioners than that of current Board members. These new Commissioners will be called upon from time-to-time as their expertise and background fits the bill. This

²⁹ Expert Panel Report, *ibid* at 62, Recommendation 3.3.1.

³⁰ Expert Panel Report, *supra* note 1 at 64.

³¹ The Expert Panel Report does offer (*ibid* at 17) a quip by way of analogy with the famed Holy Roman Empire i.e. that none of the elements of its title are really true. The point is somewhat forced. The NEB is *national* in scope even though it deals only with a portion of energy infrastructure and trade. The NEB is concerned with *energy* even though it does not deal with the entirety of energy value chain. And the NEB is a *board*, at least as that term is understood in administrative law (where it is a synonym for tribunal).

³² The former provincial regulator, citing security concerns, hired a private security firm who then “listened in” on intervenors’ meetings. For detailed discussion see Alice Woolley, “Enemies of the State? The Alberta Energy and Utilities Board, Landowners, Spies, a 500kV Transmission Line and Why Procedure Matters” (2008) 26 *Journal of Energy and Natural Resources Law* 234.

³³ *Responsible Energy Development Act*, SA 2012, c R-17.3.

³⁴ Expert Panel Report, *supra* note 1 at 17.

begins to look more like an ad hoc model of commissioners rather than a standing tribunal in which a smaller number of commissioners\board members develop expertise through continued engagement.

This model prompts several observations. The first is that not all of the Board's work is project driven. A significant part of the Board's work deals with the economic regulation of pipelines. These pipelines are repeat customers before the Board, either in hearings or through negotiated settlements and regular reporting requirements. Familiarity with the different types of regulated pipelines and their different business models and contractual arrangements should improve the efficiency of the regulatory relationship. The model of "hearing commissioners" hardly seems suited to those elements of the Board's work that are not project related.

Second, a model of ad hoc hearing commissioners who are called upon less frequently may well increase the diversity of values taken into account in decision-making, but it may also make those same commissioners more dependent on the expertise of the staff. This may be especially the case insofar as the two-step model proposed by the Panel will necessarily result in the most significant policy issues being dealt with by a different body as part of step one of any project approval stage. Step two will necessarily be more technical in nature.

6.4 A two-step project decision-making process

As noted in the introduction and referenced in the last paragraph, the Expert Panel proposes a

two-step decision-making process for large new energy projects. The first step would involve a determination of whether the proposed project was in the national interest.³⁵ The national interest determination would be made by the Governor in Council based upon a recommendation of the Minister of Natural Resources "based on advice from a whole-of-government perspective". The review would not be undertaken by the new national energy regulator but by something like the current major projects office. Assuming that the project passes this hurdle the second step of the review would involve detailed project review and approval.³⁶ This step would generally be undertaken by a five person joint hearing panel - with at least one Indigenous member - and comprised of two Commissioners from the CETC, two from the Canadian Environmental Assessment Agency and "a final independent Commissioner".³⁷

Policy makers, lawyers, and academics concerned with major project decision-making, have long concerned themselves with the question of whether it is desirable and possible to separate out the "go-no go" decision from the more detailed technical assessment of a project. In principle, the idea is attractive insofar as it serves to focus on key issues from the outset and should, if it works, avoid considerable unnecessary investment. However, as a matter of practice I think that the idea will be difficult to implement, partly because of the challenges of providing a necessary information base for the first order decision and convincingly distinguishing between what is at stake at each of the two decision-making stages. Not only will it be difficult to get it right I also think that the outcome however conceived will generate a lot

³⁵ Expert Panel Report, *ibid* at 36-37, Recommendation 1.4.1 at 57-58 and Recommendation 3.1.1.

³⁶ Expert Panel Report, *ibid* at 38-39 and Recommendation 1.5.1.

³⁷ Expert Panel Report, *ibid* at 41, Recommendation 1.5.2. The concept of an "independent Commissioner" needs much more justification. What does "independence" mean in this context? The rule of law requires that any joint review panel discharge its statutory obligations within the framework of whatever combination of statutes under which it is operating. The independent Commissioner cannot be free of this obligation. And if all that the Panel means by this term is that the independent Commissioner should not have an institutional link with either CEAA or the national energy regulator it needs to articulate what additional value this proposal will add to the Panel's recommendations on the diversity of hearing Commissioners.

³⁸ And the opportunities for litigation in the current scheme in which the Board makes a recommendation to the Governor in Council are already legion. For two examples see *Gitsaala Nation v Canada*, 2016 FCA 187 (Northern Gateway Project) and the most recent case management decision in the ongoing challenges to the approval of the TransMountain expansion project: *Tsleil-Wautoth Nation v AG Canada*, 2017 FCA 128. In the latter decision Justice Stratas summarizes as follows at paras 2 and 5: Before the Court are fifteen applications for judicial review, now consolidated, in which, collectively, twenty-seven parties seek to quash certain administrative decisions approving the Trans Mountain Expansion Project. The decisions are a Report dated May 19, 2016 by the National Energy Board, purportedly acting under section 52 of the *National Energy Board Act*, RSC 1985, c N-7 and the Order in Council, PC 2016-1069, dated November 29, 2016 and made by the Governor in Council... These consolidated applications have been progressing quickly. In the space of roughly three months, counsel have worked hard getting the matter ready for hearing, guided by 3 sets of detailed reasons, 8 orders and 14 directions (including the reasons and order on these motions).

of litigation as parties argue about whether issues should be dealt with in step one or deferred to step two.³⁸

I think that this can perhaps best be illustrated in the present context by thinking about how to operationalize the duty to consult in a two stage decision-making process. The Panel clearly considers, and rightly so, that both stages in the process will require consultation with Indigenous communities and perhaps consent. But how will the consultation obligations be apportioned between these two stages of decision-making? For example, if an impact and benefit agreement serves in part to discharge the obligation to consult, or as evidence of consent, when would/should such agreement be negotiated? What level of project detail would be necessary to support such negotiations? What level of project detail would be necessary to support an assessment of national interest, especially if one or more of the Indigenous communities along the linear route remained opposed to the project?

The tension inherent in this last point is well illustrated by the following passage in the Panel's report in which the Panel explains why it uses the term "national interest" rather than "public interest":³⁹

We have used the term "national interest" here to mean something more inclusive than the conventional "public interest". Explained simply, a determination of whether any type of proposal is in the public interest involves trade-offs between factors like projected economic benefits, risks to the environment, and so on. Every project involves some degree of balancing these fundamental interests, and the art of sound decision-making is all about weighing these factors and judging appropriately on that basis. The critical distinction,

however, when it comes to Indigenous peoples, is that they do not simply bring interests to the table. Rather, Indigenous peoples retain a set of rights under the Constitution. While interests can be traded against each other, rights cannot.

The Panel went on to say:⁴⁰

It is for this reason that we conceive of the national interest consisting of both the typical public interest determination (informed by clear policy and assessed through extensive study and engagement with all stakeholders) and a specific determination of the impact of a project on Indigenous peoples based on nation-to-nation formal Consultation.

In sum, the national interest would appear to be the public interest plus an accommodation of the rights of Indigenous people. But even with this explanation I think that the question of the appropriate standard of consultation to be met at this stage of the decision-making is far from clear. Is the Panel suggesting that the concept of unjustifiable infringement (most recently endorsed by the Supreme Court of Canada in *Tsilhqot'in Nation v British Columbia*⁴¹) does not apply to linear projects? These are hard questions to answer, but it seems to me that the Panel ducks them both generally and in the specific context of the two-stage decision-making paradigm.

The difficulties may be equally apparent when we turn to consider other elements of a project proposal. As the Panel notes in passing⁴² the NEB also has, in addition to its project approval jurisdiction, tolls and tariffs responsibilities under Part IV of the *National Energy Board Act*, for interprovincial and international pipelines. In recent years the NEB has been persuaded that it needs to consider tolling

³⁹ Expert Panel Report, *ibid* at 36.

⁴⁰ Expert Panel Report, *ibid* at 36 (emphasis added).

⁴¹ *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.

⁴² Expert Panel Report, *supra* note 1 at 17 contains, I think, the only acknowledgement of the tolls and tariffs jurisdiction of the NEB.

⁴³ For the NEB Komie North report see National Energy Board, *NOVA Gas Transmission Ltd*, GH-001-2012, online: <<https://apps.neb-one.gc.ca/REGDOCS/Item/Filing/A50255>>.

methodology issues as part of its consideration of project approval (i.e. the recommendation of a certificate of public convenience and necessity). In some cases (e.g. Komie North⁴³ and North Montney⁴⁴) those issues have proven to be of fundamental importance. They are also issues which lie at the heart of the NEB's core competence. Where should these issues be dealt with in a bifurcated approval scheme? At the first level because they are crucial go-no go issues? Or at the second level because they are issues within the core competence of the NEB and also relate to the on-going economic regulation of the facility once built? There is much to be said for both views.

In sum, while I think that it is useful to have a discussion about a staged decision-making process I am sceptical as to whether such an approach is workable or, at the end of the day, that it will result in increased efficiency. I am however convinced that the final decision on public interest should be made at the highest political level for reasons of democratic accountability. Ultimately the assessment of public interest is not a technical issue but a political issue although it may (and indeed should be) informed by good science and good technical advice. These are various ways of structuring decision-making to achieve this result. The two main iterations of the *NEBA* (pre and post the 2012 amendments effected by the *Jobs, Growth and Long-term Prosperity Act*⁴⁵) offer two different models. I prefer the pre-*Jobs, Growth* model partly because the current model leads to duplicative litigation and partly because the final cabinet decision is cloaked by claims to cabinet confidentiality.⁴⁶ The pre-*Jobs, Growth* model would be improved were the national energy regulator to receive clear guidance (as suggested above) with respect to national energy and climate policy.

6.5 Relationships with Indigenous Peoples

As noted in the introduction, the Panel was specifically directed to consider “the relationship between NEB processes and the Aboriginal and treaty rights of Indigenous peoples, as well as the relationship between NEB processes and the principles outlined in the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*.” It is evident that the Panel took this responsibility very seriously although it also understood that a Ministerial Working Group led by Minister of Justice had been charged with providing “further direction in this area”.⁴⁷ In the end, the Panel had a lot to say about the relationship between Indigenous people and the national energy regulator and indeed national energy policy. Some of these recommendations operated at a fairly general level such as Recommendation 2.1.1 which indicated that “Indigenous peoples should have a nation-to-nation role in determining Canada’s national energy strategy, and we look to the Minister of Natural Resources to define how this commitment can be met ...”⁴⁸ Similarly there are recommendations dealing with early engagement (as opposed to consultation) with Indigenous communities.⁴⁹ Other recommendations however were much more specific such as the proposal (Recommendation 2.2.1) that the government fund an Indigenous Major Projects Office (IMPO)⁵⁰ and create an Elders External Advisory Council.⁵¹ Other recommendations dealt with the duty consult,⁵² the need for the incorporation of Indigenous knowledge in decision-making,⁵³ the involvement of Indigenous people in energy infrastructure monitoring,⁵⁴ and the recognition of Indigenous world views by using an Indigenous (Cree) language term to reference the ongoing responsibility to regulate infrastructure operations “to keep the land pure” (Î-kanatak Askiy Operations).⁵⁵

There is much to commend in these recommendations. For example, I think that the Panel’s recommendations with respect to

⁴⁴ For the NEB North Montney Report see National Energy Board, *NOVA Gas Transmission Ltd*, GH-001-2014, online: <<https://apps.neb-one.gc.ca/REGDOCS/Item/Filing/A69520>>.

⁴⁵ *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19.

⁴⁶ See *Gitxaala Nation v Canada*, *supra* note 37.

⁴⁷ Expert Panel Report, *supra* note 1 at 36 and Recommendation 1.4.1.

⁴⁸ Expert Panel Report, *ibid* at 37.

⁴⁹ Expert Panel Report, *ibid* at 54 and Recommendation 2.4.1.

⁵⁰ Expert Panel Report, *ibid* at 51.

⁵¹ Expert Panel Report, *ibid* at 66, Recommendation 3.4.3.

⁵² Expert Panel Report, *ibid* at 52-53 and Recommendation 2.3.1.

⁵³ Expert Panel Report, *ibid* at 64, Recommendation 3.4.1.

⁵⁴ Expert panel Report, *ibid* at 80 and Recommendation 5.2.2.

⁵⁵ Expert Panel Report, *ibid* at 76.

consultation (and specifically that the CETC should not itself have the duty to consult which should instead be discharged by the major projects management office) is sound. I think that the Major Projects Management Office is well suited for this role precisely because it should have all-of-government responsibility as well as the necessary authority and therefore it should be well placed to ensure that the honour of the Crown is maintained.⁵⁶

However, I think that other elements of the recommendations require further thought or elaboration and in one case the panel seems to have missed the opportunity to give its advice on the appropriate role of the CETC (or other national energy regulator) with respect to two related matters engaging the discharge of the duty to consult.

One set of recommendations that requires further reflection is the set of recommendations related to the IMPO. According to the Panel the responsibilities of the IMPO (which would be under the governance of Indigenous peoples, determined as they see fit) would include “defining clear processes, guidelines, and accountabilities for formal consultation by the government on energy transmission infrastructure, regulatory processes and assessing compliance with those guidelines.”⁵⁷ The Panel also contemplated that the IMPO would represent and support Indigenous communities “in the strategic and licensing decision phases of projects, and in facilitating Indigenous involvement in the full lifecycle of all projects, to the degree desired by the Indigenous communities in question.”⁵⁸ In addition, the Office would define and disseminate best practices, including coordinating and/or supporting Environmental Assessments and regulatory reviews, to help interested Indigenous communities enhance the quality of their participation in formal Consultation and engagement processes.⁵⁹

In sum, the Panel envisages that the IMPO should have at least three main roles: (1) developing consultation guidelines, (2)

advocacy and (3) advice on best practices. The first two roles are problematic. The proposed role of IMPO with respect to consultation guidelines is open to the objection that the design of consultation processes should be a collaborative exercise. While consultation guidelines might to this point have been a unilateral exercise of discretion or power by settler society governments, it hardly seems to be a solution to transfer this responsibility to the IMPO which takes its direction from Indigenous peoples – especially when such matters extend to questions of accountabilities. I think that the advocacy roles that the Panel contemplates for the IMPO may be equally problematic. Indigenous communities from coast to coast to coast (as the Report itself recognizes) have vastly different interests and governance structures and face differing resource development pressures (and economic opportunities). While I can imagine that there is value in developing resource materials that can be broadly shared between different communities (the third role), it will be much more challenging for such an Office to make decisions about how to allocate scarce resources which must necessarily involve that Office in deciding whether to represent community A rather than community B, or to take position X rather than position Y. The conflict of interest issues that may arise suggest that this proposal is more likely to be a source of conflict than reconciliation.

As for the missing elements in the Panel’s discussion, these are the issues of the Crown’s consultation responsibility if the proponent is not the Crown, and the responsibility of the regulator to determine (or not) whether Crown consultation responsibilities have been discharged. It is true that these issues are also before the Supreme Court of Canada in two pending appeals (*Chippewas of the Thames First Nation v Enbridge Pipelines Inc et al*⁶⁰ and *Hamlet of Clyde River et al v Petroleum Geo-Services Inc (PGS) et al*),⁶¹ but, regardless of the Court’s response to these questions, it would have been useful to have the Panel’s views on these two important matters. My own view

⁵⁶ It is difficult for a regulator to discharge both its quasi-judicial responsibilities as well the quasi-fiduciary duties associated with the honour of the Crown: *Quebec (Attorney General) v Canada (National Energy Board)*, [1994] 1 SCR 159.

⁵⁷ Expert Panel Report, *ibid* at 51.

⁵⁸ Expert Panel Report, *ibid* at 51.

⁵⁹ Expert Panel Report, *ibid* at 51.

⁶⁰ *Chippewas of the Thames First Nation v Enbridge Pipelines Inc et al*, 2015 FCA 222.

⁶¹ *Hamlet of Clyde River et al v Petroleum Geo-Services Inc (PGS) et al*, 2015 FCA 179.

is that where the national energy regulator has a decision-making role then it should, as part of discharging its responsibilities, act in accordance with law, and, if its authority extends to determining questions of law (this turns on the terms of the relevant statute(s)),⁶² then it must reach a conclusion as to whether or not the Crown has discharged its responsibilities before it makes its decision. And in doing so, it makes no difference whether the applicant for the approval is an agent of the Crown or a private party – each is seeking a statutory authorization to proceed with its project.⁶³

6.6 Final observations on the Expert Panel Report

Minister Carr gave this Expert Panel a challenging and difficult task and very little time within which to accomplish that task. Indeed, the original announcement of the decision to create the Panel in June 2016 would have had the Panel reporting out by January 31, 2017. In the end this was extended to May 15, 2017 due to delays in finalizing the composition of the Panel; but this was still a far too aggressive timeline within which to expect the Panel to develop a thoughtful and well-reasoned report while drawing on significant engagement with stakeholders and Indigenous communities.

I think that the Panel has offered useful recommendations both to the Government of Canada and more generally the people of Canada, and in particular to the Indigenous peoples of Canada. These recommendations merit debate. But not all of the Panel's recommendations are supported by comprehensive reasons justifying the Panel's specific conclusions and recommendations.

7. The Discussion Paper

As noted in the introduction, the Government of Canada has decided to respond to the four reports that it has received including that of the Expert Panel on the Modernization of the NEB by issuing a Discussion Paper. That Paper outlines the changes that the government is considering in order to “regain

public trust; protect the environment; advance reconciliation with Indigenous peoples; and, ensure good projects go ahead and resources get to market.”⁶⁴ The Paper emphasises that some elements of the overall regulatory process are working and should continue and in that context the Paper refers specifically to the continuing need for “a strong role for expert regulators in energy transmission, nuclear and offshore oil and gas.”⁶⁵ The Paper endorses five guiding principles and is organized around seven crosscutting areas of change. The five principles are as follows:⁶⁶

1. Fair, predictable and transparent environmental assessment and regulatory processes that build on what works.
2. Participation of Indigenous peoples in all phases that advances the Government's commitment to the *United Nations Declaration on the Rights of Indigenous Peoples and reconciliation*.
3. Inclusive and meaningful public engagement.
4. Timely, evidence-based decisions reflecting the best available science and Indigenous knowledge.
5. One project – one assessment, with the scale of assessment aligned with the scale and potential impacts of the project.

The seven crosscutting areas of change are (1) Addressing Cumulative Effects, (2) Early Engagement and Planning, (3) Transparency and Public Participation, (4) Science, Evidence and Indigenous Knowledge, (5) Impact Assessment (6) Partnering with Indigenous Peoples, and (7) Cooperation with Jurisdictions. The Discussion Paper does not directly engage with the various reports to which it is responding and there is no tabulated response in which the Discussion Paper summarizes the relevant recommendations and then provides the Government's proposed response.

⁶² *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43.

⁶³ See Nigel Bankes, “The Supreme Court of Canada Grants Leave in Two Cases Involving the National Energy Board and the Rights of Indigenous Communities” (2016) 4:2 Energy Regulation Quarterly.

⁶⁴ Discussion Paper, *supra* note 6 at 3.

⁶⁵ *Ibid* at 6.

⁶⁶ *Ibid* at 7.

I will not provide either a detailed overview or a critical assessment of the Discussion Paper but I will aim to touch upon the same key issues highlighted in my review of the NEB expert panel report: alignment between energy and climate policy; an independent energy information authority; governance; project decision making; and relationships with Indigenous people.⁶⁷

The Discussion Paper does not directly respond to the call for a better alignment between energy policy and the role of a national energy regulator. However, the section on “addressing cumulative effects” may seem to give a nod in this direction insofar as the Paper contemplates the use of national environmental frameworks, strategic environmental assessments (SEAs) and regional assessments as a way of addressing cumulative impacts. For example, the paper suggests that “a strategic assessment of the Pan-Canadian Framework [for Clean Growth and Climate Change] would provide guidance on how to determine how life-cycle greenhouse gas emissions associated with individual projects are assessed”.⁶⁸ What is missing however is any articulation of a clear link between Canada’s international GHG reduction obligations and the role of an energy regulator. I think that the greater use of SEAs is to be applauded⁶⁹ but it is not clear to me that the suite of measures referenced under the heading of cumulative impacts will lead to better alignment between energy policy and the role of a national energy regulator. In other words, from my perspective, the issues of energy and climate policy alignment and the alignment of policy with the decisions of a national energy regulator are different from the issues associated with landscape level cumulative impacts (which most of necessity deal with a range of ecological and economic issues that go far beyond climate change issues).

On the specific issue of an energy information agency the government does seem to be receptive to the Expert’s panel’s recommendations insofar as the Paper suggests that the Government is considering a “a separate model to deliver timely and credible energy information to Canadians.”⁷⁰ The government is perhaps less impressed by the Expert Panel’s proposal for a new national energy regulator such as the CETC. Thus the Discussion Paper refers to amending *NEBA* rather than creating a new agency. However, the Paper does seem to favour many of the organizational and governance changes recommended by the Expert Panel including: separating the roles of Chief Executive Officer and Chairperson of the Board; creating a corporate-style executive board to lead and provide strategic direction to the NEB organization; creating separate Hearing Commissioners to review projects and provide regulatory authorizations; enhancing the diversity of the Board and Hearing Commissioners; increasing Indigenous representation among the Board and Hearing Commissioners and requiring expertise in Indigenous knowledge; and eliminating the residency requirement for Board and Hearing Commissioners.⁷¹ The Paper does not endorse the suggestion of splitting the Board and moving the executive of the Board to Ottawa.⁷²

Neither does the Paper seem to endorse the concept of a two-step project decision-making process although the paper does reference the need for “a new early planning phase led by proponents with clear direction from government” although perhaps this is better thought of as early engagement rather than a first step in in a two-step project review process.⁷³ The Paper does favour joint assessments for major energy transmission, nuclear and offshore oil and gas projects⁷⁴ as well as final political approval for major projects,⁷⁵ although it also contemplates that the NEB will have the authority to make final decisions on

⁶⁷ This section of the paper draws on Nigel Bankes “The Federal Response to the Report of the Expert Panel on the Modernization of the National Energy Board” (14 July 2017), online: ABLawg, <http://ablawg.ca/wpcontent/uploads/2017/07/Blog_NB_Discussion_Paper.pdf>.

⁶⁸ *Ibid* at 9.

⁶⁹ See Meinhard Doelle, Nigel Bankes & Louie Porta, “Using Strategic Environmental Assessments to Guide Oil and Gas Exploration Decisions in the Beaufort Sea: Lessons Learned from Atlantic Canada” (2013) 22:1 RECIEL 103 – 116.

⁷⁰ Discussion Paper, *supra* note 6 at 20.

⁷¹ *Ibid* at 20.

⁷² *Ibid* at 20.

⁷³ *Ibid* at 18. The paper also references a desire to identify an “initial list of issues” on which feedback should be sought.

⁷⁴ *Ibid* at 13.

⁷⁵ *Ibid* at 18: “Decision making retained by Minister(s) or Cabinet based on whether the project is in the public interest, to ensure accountable government”.

“certain functions such as import/export licenses, and variances or transfers to certificates and licenses” (presumably on the basis that these do not raise significant policy issues).

The Discussion Paper deals with relationships with Indigenous people under all/most of the headings. Thus, Indigenous knowledge is referenced under the heading of cumulative impacts and dealt with extensively in the section entitled “Science, Evidence and Indigenous Knowledge”⁷⁶ while the section on early engagement and planning refers to “direct engagement between Crown representatives and Indigenous peoples to discuss and understand potential project impacts to facilitate early planning and issue identification”.⁷⁷ This seems to be directly responsive to the recommendations of the NEB Expert Panel Report. The Discussion Paper anticipates that the relevant legislation will “explicitly require assessment of impacts on Indigenous peoples”⁷⁸ and, with respect to consultation, will establish “a single government agency responsible for impact assessment and for coordinating consultations with Indigenous peoples for federally designated projects”.⁷⁹ This proposition is re-framed a few pages later in subtly different terms as a statement to the effect that the Government is considering creating “A single government agency with increased capacity to coordinate consultation and accommodation for federally designated projects.”⁸⁰ While neither passage explains what is meant by the term “federally designated project” the proposal is similar to that advocated by the NEB Expert Panel Report⁸¹ as is the goal of “[c]larifying roles for consultation and accommodation in regulatory processes to ensure the honour of the Crown is respected”.⁸² Perhaps of most interest is the statement that

the Government will aim at early engagement and participation “based on recognition of Indigenous rights and interests from the outset, seeking to achieve free, prior and informed consent through processes based on mutual respect and dialogue”.⁸³ The language adopted here clearly owes something to the relevant articles of the *UN Declaration on the Rights of Indigenous Peoples*⁸⁴ although it is a softer version of FPIC than the formulations found in that text.⁸⁵ Much like the Expert Report however, the Discussion Paper seems to duck some of the hard issues such as the scope for the application of the doctrine of justifiable infringement in the context of linear projects, and the role of the NEB in assessing (or not) whether the Crown has discharged its obligation to consult and accommodate. Finally, the Discussion Paper does not specifically address the Expert Panel’s proposal to create an Indigenous Major Project office but it implicitly replaces that with the suggestion that the Government is considering “Strengthening the approach for Indigenous peoples to build capacity for participation in processes and help coordinate Crown consultations”.⁸⁶

8. Conclusions

The current federal government came to power committed to subjecting federal assessment and project review rules and regulations to scrutiny and reform. The government had already reached the conclusion that Canadians had lost faith in these processes including a loss of faith in the national energy regulator, the NEB. Yet, as the Discussion Paper concedes not all is broken, and indeed as the Expert Review Panel concedes, the NEB actually enjoys a world-class reputation as a regulator. Going forward therefore the challenge must

⁷⁶ *Ibid* at 12.

⁷⁷ *Ibid* at 10.

⁷⁸ *Ibid* at 13 and repeated at 18.

⁷⁹ *Ibid* at 13.

⁸⁰ *Ibid* at 15.

⁸¹ *Ibid* at 15. In the context of the duty to consult one would have thought that a federally designated project should be any project where the federal Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right or title and contemplates federal conduct that might adversely affect that right or title: *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 35. The decision of the BC Supreme Court in *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34 suggests that neither level of government will be able to pass off its consultation obligations to another level of government by, in this case “designating” a project as federal. A project is federal for this purpose if federal statutory powers are engaged.

⁸² *Ibid* at 15.

⁸³ *Ibid* at 15.

⁸⁴ UN Declaration, *supra* note 12.

⁸⁵ Compare the formulation here “seeking to achieve FPIC” with that found in Article 19 and 32(2) of the UN Declaration, *ibid*.

⁸⁶ Discussion Paper, *supra* note 6 at 20.

be to build on those elements that are working well and to strengthen or replace those parts that are broken. Seen in this light it is perhaps then not surprising that the Discussion Paper is considerably more cautious than the Expert Review Panel in its proposals. Thus the Discussion Paper does not suggest replacing the NEB with a new entity; it does not suggest adoption of a two-step project review; and neither does it endorse the significant number of new offices (including an Indigenous Major Projects Office, a Public Intervenor Office and a Landowners' Ombudsperson) recommended by the Expert Review Panel. Nor is it clear from the Paper how serious the government is about a closer integration between climate and energy policy and many of the details are missing with respect to important aspects of the envisaged relationship between government and indigenous peoples. Much work therefore still remains. But it does appear that the government is seriously considering others of the Panel's proposals with respect to matters such as an energy information office and the governance of the Board. I remain somewhat sceptical of some of these proposals absent more cogent argumentation. And that points to a final concern with respect to the Discussion Paper which is that it fails to provide supporting reasons for its choices as between those recommendations the government appears to be favouring and those that it seems more inclined to reject. It will be hard to regain the trust of Canadians in the proposed new assessment and review regime unless the

government's final decisions are accompanied by more robust and rigorous reasons for the choices that have been made. ■

FEDERAL ENVIRONMENTAL ASSESSMENT REFORM: A PRACTITIONER'S PERSPECTIVE

*Michael Fortier**

The Canadian federal government has spent the last 18 months considering environmental assessment (EA) reform. The Government has stated the goals of this reform as regaining public trust, protecting the environment, advancing reconciliation with Indigenous peoples and ensuring “good projects go ahead and resources get to market”.¹ To help achieve these goals, the Government has developed the “Environmental and Regulatory Reviews” discussion paper, which describes a proposed package of conceptual reforms that will significantly affect federal EAs.

Energy projects subject to the proposed regime will require, among other things, effective process implementation, especially since the assessments under the proposed regime are likely to be far more complex than under the current federal EA regime. This increased complexity underscores the importance of effective and efficient assessment process implementation. This article describes key implementation points related to the coordination of assessments, timelines and Indigenous peoples’ participation.

Background

To restore public trust in Canada’s EA regime, the federal Liberal Party’s 2015 election platform promised to review and reform this regime.² On August 15, 2016, Minister of Environment and Climate Change Catherine McKenna announced the appointment of an expert panel “to undertake the review of federal environmental assessment processes”.³ The panel received comments from more than 1,000 participants in-person (including almost 400 presentations) and more than 500 written submissions from Indigenous groups, individuals, academics, land claim organizations, non-governmental organizations, industry associations, companies, port authorities, provinces, territories and municipalities.⁴ Based on its work, the panel proposed a conceptual framework for a new and broader impact assessment (IA) regime.⁵

In developing its discussion paper, the Government considered the panel’s proposed framework, as well as the associated public comment and consultation, other engagement and “practical lessons learned [by the Government] over the past 18 months”.⁶ Like

*Michael Fortier is a partner at Torys LLP. His practice includes advising proponents and other clients regarding environmental assessment and Indigenous law issues relating to energy, infrastructure and mining projects.

¹ Canada, “Environmental and Regulatory Reviews”, Discussion paper (Ottawa: June 2017), at 3, online: <<https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/share-your-views/proposed-approach/discussion-paper-june-2017-eng.pdf>>.

² Liberal Party of Canada, “A New Plan for a Strong Middle Class” (24 July 2017), at 41-42 online: <<https://www.liberal.ca/wp-content/uploads/2015/10/New-plan-for-a-strong-middle-class.pdf>>.

³ Catherine McKenna, “Government of Canada Moving Forward with Environmental Assessment Review” *CISION* (15 August 2016) online: <<http://www.newswire.ca/news-releases/government-of-canada-moving-forward-with-environmental-assessment-review-590224291.html>>.

⁴ Johanne Gelhas *et al.*, “Building Common Ground – A New Vision for Impact Assessment in Canada” (Ottawa: 2017) at 87, online: <<https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/building-common-ground/building-common-ground.pdf>>.

⁵ *Ibid.*, at 48-85.

much of the discussion around EA reform, the discussion paper describes the proposed package of IA reforms—at a conceptual level. While such concepts are, of course, important, if improperly implemented, many good energy projects may ultimately not proceed, despite their merits.

After assessing the feedback on the discussion paper, the Government has indicated it plans to bring forward a “comprehensive suite of changes this fall”.⁷

One Project, One Assessment

The discussion paper supports the “one project, one assessment” principle. Its underlying goal is to avoid multiple assessments for a project, resulting in unnecessary delay and duplication. However, the effective implementation of a single assessment can be complicated due to reviewers from multiple jurisdictions being involved. For example, an energy project may be subject to federal and provincial review, as well as a review under Indigenous laws. In reality, this creates the potential for multiple IAs for a single energy project.

To avoid this, the Government will need to proactively engage with the relevant jurisdictions for a project (either on a project-by-project basis or otherwise) and offer a harmonized IA process that is more attractive to such jurisdictions than proceeding with their own IAs independently.

In theory, once a project has received the necessary IA approval(s), the other environmental permitting processes are intended to ensure that how the project is implemented complies with the applicable requirements. However, in practice, some of these processes can effectively become IAs, because these processes essentially transform from considering *how* the project should proceed to *whether* the project should proceed. A far too common example of this arises—when a regulator uses its discretion to issue a necessary permit—to insist on a fundamental change to an energy project that was not contemplated in the IA process and threatens the viability of the

project. When regulators effectively transform permitting processes that are intended to focus on how the project should proceed to whether it should proceed, such regulators are effectively subjecting the project to an additional IA.

Again, the solution requires the Government and other jurisdictions to ensure that the necessary considerations occur at the IA and the other permitting processes remain focused on how the project should proceed.

Timelines

The legislated timelines under the current federal EA regime often do not provide the timing certainty that energy project proponents and others require, because the legislated timelines or “EA clock” can be stopped. For example, the legislated timelines (i.e., the “EA clock”) can be stopped while the proponent responds to the regulator’s requests for further information or studies. Unfortunately, it is not uncommon for the “EA clock” to bear little resemblance to the actual time period from commencing the EA and receiving the EA approval.

In support of the Government’s objective of “seeking to attract and grow investment”, the discussion paper indicates the Government is considering, “Maintaining legislated project assessment timelines *to provide clarity and predictability*” [italics in the original].⁸ The discussion paper also suggests project-specific timelines may be used. To attract investment, legislated timelines must be reasonable and respected. For “project-specific” timelines to work in practice, they must be backstopped with legislated timelines that are reasonable and respected.

If implemented well, the Government’s proposed “early engagement and planning” phase prior to the IA should greatly reduce or eliminate the need for requests for further information and studies (after this phase). Early engagement and planning is intended “to support better-designed project proposals and more effective assessments and to **seek consensus** on the project assessment process” [boldface in the original].⁹ Thus, the legitimate

⁶ *Supra*, note 2 at 6. The discussion paper also proposes changes (not covered in this article) to the *National Energy Board Act*, the *Navigation Protection Act* and the *Fisheries Act*.

⁷ *Ibid.*

⁸ *Ibid.*, at 10.

⁹ *Ibid.*, at 10.

need for further information and studies beyond what is undertaken based on the early engagement and planning phase should be minimal, if any. Regardless, the practice of “stopping the EA clock” should be eliminated, since it undermines the credibility of the EA system (especially given most investors and proponents assess timeliness based on the commencement and completion of the EA process and not the EA clock).

Respecting timelines goes beyond the practice of “stopping the EA clock”. Respecting timelines includes coordinating and managing the IA with other jurisdictions, as well as minimizing extensions for ministers or Cabinet to make decisions (such extensions should be rare exceptions due to principled reasons for a short delay to achieve a better-quality decision).

Indigenous Participation

One of the most discussed aspects of IA reform is the mechanisms for increased involvement of Indigenous peoples. The Government’s actual plan for increased involvement is general and potentially far reaching. For example, the discussion paper quotes Prime Minister Justin Trudeau indicating, “The Government is committed to a renewed relationship with Indigenous peoples, nation-to-nation, Inuit to Crown, government-to-government. This renewed relationship is based on the recognition of rights, respect, co-operation, and partnership”.¹⁰ The discussion paper also notes, “Reconciliation must guide partnerships with Indigenous peoples, recognizing and respecting their rights and interests, their deep connection to their lands, territories and resources and their desire to participate as partners in the economic development of their territories”.¹¹

Unfortunately, the discussion paper does not describe in detail what the Government is considering in this regard nor how any related mechanism might work. Similarly, the

discussion paper indicates the Government is considering early and regular engagement and participation with Indigenous peoples, “seeking to achieve free, prior and informed consent through processes based on mutual respect and dialogue”.¹² More recently, the Government has reiterated its commitment to many of these concepts in its “Principles respecting the Government of Canada’s relationship with Indigenous peoples”.¹³

For many energy projects subject to the proposed federal IA regime, a key implementation issue will be how to effectively and efficiently facilitate Indigenous people’s participation in the applicable capacities for a particular project. Regardless of how Indigenous peoples are participating (e.g., as a proponent, as a reviewer, as a participant in the free, prior and informed consent process and the duty to consult process or as a participant in the IA process or some combination of these), effective and efficient facilitation will likely be required to meet the energy project’s timelines.

Such facilitation has no one-size-fits-all approach and is expected to require considerable tailoring and constructive dialogue to suit each scenario. However, helpful precedents and guidance already exist regarding such implementation. For example, the development and operation of the Peter Sutherland Sr. Generating Station is a partnership between Taykwa Tagamou Nation and Ontario Power Generation Inc. This project, which was subject to Ontario’s EA regime, was completed ahead of schedule and on budget earlier this year.¹⁴ Likewise, practical guidance on seeking free, prior and informed consent is already available.¹⁵ Similarly, considerable experience has been developed on effectively and efficiently facilitating the duty to consult. As a result, the Government’s approach to increased involvement of Indigenous peoples—whatever it turns out to be—may require significant change regarding how Indigenous peoples participation is

¹⁰ *Ibid.*, at 15.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Canada, Department of Justice, “Principles respecting the Government of Canada’s relationship with Indigenous peoples” (19 July 2017) online: <<http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>>.

¹⁴ Ontario Power Generation Inc, “Peter Sutherland Sr. Generating Station” (21 July 2017) online: <<http://www.opg.com/generating-power/hydro/projects/new-post-creek/Pages/new-post-creek.aspx>>.

¹⁵ See, for example, The Honorable Frank Iacobucci *et al.*, “Free, Prior and Informed Consent in Canada: Towards a New Relationship with Indigenous Peoples” Torys LLP (12 July 2016) online: <<http://www.torys.com/insights/publications/2016/07/free-prior-and-informed-consent-in-canada-towards-a-new-relationship-with-aboriginal-peoples>>, especially Part IV <<http://www.torys.com/insights/publications/2016/07/part-iv-towards-a-new-relationship-to-facilitate-reconciliation>>.

implemented for energy projects, but helpful guideposts exist for proponents.

Conclusion

Effective, efficient implementation of IAs is essential for the proposed regime to ensure that good energy projects receive the go ahead and resources get to market. Among other things, such implementation will likely require the following elements:

- conducting only one IA per project;
- respecting reasonable timelines; and
- facilitating the full participation of Indigenous peoples and governments in each relevant capacity on a project-by-project basis.

Without sufficient consideration and resources provided to effectively and efficiently implement the regime on a project-by-project basis, the proposed IA regime is unlikely to be successful. ■

THE MANDATE OF THE NATIONAL ENERGY BOARD

Peter Miles*

The National Energy Board (NEB) has been regulating interprovincial and international hydrocarbon pipelines and international power lines for almost 60 years.

Its enabling legislation, the *National Energy Board Act (NEB Act)*¹ instructs it to satisfy itself that, before approving facilities, it must take into account whether they are and will be “required in the public convenience and necessity”² and, on an ongoing basis, to satisfy itself that the prices charged for their services (tolls) are “just and reasonable, and shall always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate.”³

For much of its history interest in the Board’s activities and participation in its hearings was confined to energy producers and transporters and utilities serving processors and consumers of energy commodities. In recent years, however, the Board’s deliberative processes have become much more contentious.

Professor Jeffrey Church, in a recent C.D. Howe Institute Commentary “... attribute[s] the turmoil around regulation – both its institutions, processes and decisions – to a fundamental misunderstanding of the rationale for regulation and, hence, a failure to define, or correctly identify, the objectives of regulation. Many of the concerns regarding regulatory decisions and the regulatory process would

vanish, or be minimized, if governments clearly articulated in law that regulators should base their decisions solely on economic efficiency grounds. With this change in law, regulators would instead focus their efforts on economic efficiency rather than on the usual appeal to the public interest, which is typically undefined, and other vague objectives found in existing legislation, such as ‘just and reasonable tolls.’”⁴

That turmoil exists there can be no doubt:

- Environmentalists maintain, with respect to pipelines, that the NEB should take account of the environmental effects of the production of the commodities transported by regulated pipelines (upstream effects) and of the use of those commodities by households and industries downstream of pipelines.
- Aboriginal people object to pipelines’ use of land to which they either lay claim or use. Further they maintain that the judicially sanctioned consultations by governments have been either non-existent or inadequate.
- Landowners on proposed routes object to either or both of the environmental effects and the measures proposed to ensure safe operation of proposed pipelines.
- An Ekos Research poll⁵ conducted in

*Peter Miles is a retired economist. For several years he served on the staff of the NEB where he was responsible for overseeing economic analysis.

¹ *National Energy Board Act*, RSC 1985, c N-7.

² *Ibid*, ss 52.1, 58.16.

³ *Ibid*, s 62.

⁴ Jeffrey Church, *Defining the Public Interest in Regulatory Decisions: The Case for Economic Efficiency*, Commentary No. 478 (Toronto: CD Howe Institute, 2017) at 3, online: <https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Commentary_478.pdf>.

⁵ Ekos Research Associates, *Canadians Attitude towards Energy and Pipelines: Survey Findings* (Ottawa: Ekos Research, 2016), online: <<https://assets.documentcloud.org/documents/2764857/024-16-Survey-Findings.pdf>>.

early 2016 found, *inter alia*, that “just one in ten Canadians (10 per cent) express a great deal of confidence [in the NEB], while one-third say they have ‘some’ confidence (33 per cent) or a ‘little’ confidence (33 per cent). One in six (17 per cent) have no confidence at all.”⁶

- The Ekos findings were recently echoed and elaborated on in studies by the Canada West Foundation⁷ (CWF report) and in the Report of the Expert Panel on the Modernization of the National Energy Board⁸ (Expert Panel report) that was appointed by the Federal Government.

The CWF and Expert Panel reports both recommended a number of changes in the structure and *modus operandi* of the federal energy regulatory regime and the government has recently issued a Discussion Paper in response to the Expert Panel’s recommendations⁹.

The Discussion Paper proposes a number of changes to the governmental decision-making framework with respect to major energy projects. These changes have the effect of explicitly removing from the ambit of the NEB consideration of environmental matters not directly related to energy transmission projects and of consultations with Indigenous Peoples. Such considerations would be matters for Ministers and the Governor in Council and the proposed changes would have the desirable effect of ‘ring fencing’ the NEB from matters not properly within its mandate. As Church correctly notes, “regulators are not the appropriate bodies to consider environmental goals and the definition and scope of Aboriginal rights outside of the efficient allocation of resources”.

In addition, the Discussion Paper proposes two

legislative changes related to the objectives of regulation:

- With respect to the *Canadian Environmental Assessment Act 2012*¹⁰, it is proposed that the scope of assessment be broadened “to include environmental, **economic**, social and health impacts to support holistic and integrated decision making,”¹¹ and
- With respect to the NEB’s mandate under its enabling legislation, it is proposed to change “the wording to **determining public interest** to explicitly include environment, safety, social and health considerations.”¹²

In view of these developments the time is ripe for a reconsideration of the NEB’s mandate and Church’s Commentary provides an important contribution to the discussion. He argues that:

Many of the concerns regarding regulatory decisions and the regulatory process would vanish, or be minimized, if governments clearly articulated in law that regulators should base their decisions solely on economic efficiency grounds. With this change in law, regulators would instead focus their efforts on economic efficiency rather than on the usual appeal to the public interest, which is typically undefined, and other vague objectives found in existing legislation, such as ‘just and reasonable tolls’.

It is poor institutional design for legislatures to allocate responsibility for other important issues that may arise in regulatory decisions to the regulators, in particular a decision’s income-distribution implications... There should be an institutional division

⁶ *Ibid* at 16.

⁷ Michael Cleland *et al*, *A Matter of Trust: The role of communities in energy decision-making* (Calgary: Canada West Foundation & University of Ottawa, 2016), online: <<http://cwf.ca/research/publications/a-matter-of-trust-the-role-of-communities-in-energy-decision-making/>>.

⁸ Expert Panel on the Modernization of the National Energy Board, *Forward, Together: Enabling Canada’s Clean, Safe, and Secure Energy Future* (Ottawa: 2017), online: <<https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/NEB-Modernization-Report-EN-WebReady.pdf>>.

⁹ Government of Canada, *Environmental and Regulatory Review*, Discussion Paper (Ottawa: June 2017) online: <<https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/share-your-views/proposed-approach/discussion-paper-june-2017-eng.pdf>>.

¹⁰ *Canadian Environmental Assessment Act 2012*, SC 2012, c 19.

¹¹ *Supra* note 9 at 18, emphasis added.

¹² *Ibid* at 20.

of labour. Legislative branches should be responsible for determining public policy matters, such as appropriate income distribution, and implementing policy measures to that effect.¹³

This statement regarding the division of labour between legislatures and regulators is, in my view, correct. As I will argue below, however, it is one thing to limit regulators' *de jure* consideration of matters of income distribution; it is quite another for them – regulators – to avoid *de facto* distributional consequences of their decisions.

Environment, safety, social and health considerations directly related to a regulated entity are all legitimate matters of public concern and, therefore, must be considered by regulators. And this is recognized by economists generally and Church in particular. Were 'economic efficiency' to replace 'public interest' as the legislated criterion for regulatory decision-making, how would such non-economic factors be taken into account?

As Church states:

... the NEB is concerned with the exercise of monopoly power by pipelines, but its regulatory scope also extends to safety and environmental concerns associated with pipelines. These issues, and not whether tolls are too high, are more likely the concern of landowners and communities near proposed facilities regulated by the NEB. However, such a safety or environmental objection fundamentally misunderstands the nature of efficiency analysis. Efficiency analysis addresses differences in values over resource use by translating differences in preferences and intensity of preferences into dollars. Determining whether a pipeline should be permitted to cross a river or the appropriate thickness of a pipeline's walls should not be viewed as a 'clash of values' requiring mediation by regulators

or politicians. Instead these issues should be viewed as questions regarding resource allocation and resolved by the regulator determining efficient use.

Concerns over environmental impact often arise because of the imposition of costs on others through the use of resources that are not priced. But there is no reason why, in principle, these 'external costs' cannot be incorporated into a regulator's efficiency analysis. If, for example, the presence of high-voltage transmission lines reduces property values, then an efficiency mandate requires the regulator to take that loss into account in determining the social costs of those lines. And when it does so, it may be in a position to determine the compensation to those whose resources would be used, or whose value would be reduced, and require that compensation be paid, leaving both the proponents of the project and those harmed by its environmental consequences better off.¹⁴

This is the generally accepted method of dealing with 'externalities' in economic analysis.

One does wonder, however, whether, given the subjectivity involved in valuing such factors as health, safety and local environmental effects, it makes sense to attempt to put a monetary value on them as opposed to making a more qualitative judgment.¹⁵

In any event, it is at best naïve to think that, in practice, attempts to put a price on externalities removes *de facto* issues of income distribution from regulatory decision-making. Proponents of regulated entities will engage in 'rent seeking' – i.e. they will seek to maximize their income – as will other interested parties such as landowners along energy transmission routes. The evaluation of externalities is subject to much uncertainty and dispute and can verge as much on the subjective as the objective. This is not to say that regulators *should* be governed

¹³ *Supra* note 4 at 3.

¹⁴ *Supra* note 4 at 7-8. As Church also notes: "a focus on efficiency requires that those who benefit could compensate those made worse off, not that they must"; a proposition unlikely to sit well with 'losers' – or with regulators!

¹⁵ Indeed, one wonders how far one should go in attempting to put a monetary value on all amenities. For example Michael Sandel, in his book *What Money Can't Buy: the Moral Limits of Markets* (New York: Farrar, Strauss and Giroux, 2012) cites a case in which surveys indicated that support for location of a Swiss nuclear waste facility declined in a neighbouring community when citizens were offered monetary compensation as opposed to simply regarding acceptance as a civic duty!

by issues of income distribution, just that they will inevitably have to reckon with them, if only indirectly, as part of their decision-making process.

Moreover, it seems clear that the concept of 'externalities' and methods of accounting for them are not well understood by the general public. Thus any move to incorporate economic efficiency as the key objective of regulation would have to be accompanied by a clearly stated explanation of its meaning and methods of implementation.

With respect to the pricing of regulated utilities' services, application of the criterion of 'economic efficiency' is more straightforward and, arguably, should be the defining criterion. But, even here, analytical judgments can and will differ with respect, for example, to the appropriate rate of return on regulated entities' assets.

Church argues that a further "advantage to society of an economic-efficiency mandate for regulators is that it enhances the likelihood that the regulator will not hold up regulated companies who invest in sunk capital. That is, the regulator can more readily resist demands that, in the short run, have immediate benefits for some, but in the long run destroy the incentive for investment and wealth creation."¹⁶

As Church notes, a good example of so-called 'regulatory holdup' within the NEB's ambit occurred when the Board approved the Alliance natural gas pipeline. "The effect of this approval resulted in the transfer of large volumes of natural gas from TransCanada's mainline to the Alliance pipeline and the creation of substantial excess pipeline capacity. The result was an extended regulatory battle between the NEB and TransCanada over tolling changes to the mainline that would reduce the non-recovery of investments in the mainline."¹⁷

Whether an 'economic efficiency' mandate would reduce the probability of so-called regulatory holdup is debatable, as is the proposition that such holdup is necessarily economically inefficient. It is possible, as some would argue, that, in the Alliance/TransCanada case, such 'holdup' resulted in a long run improvement in dynamic efficiency in the

Canadian natural gas pipeline network.

Church's commentary makes a well-argued case for clarifying the mandates of regulatory agencies. It deserves discussion and serious consideration by regulated industries, governments and the general public. It is especially timely with respect to the NEB, the mandate of which is currently being reviewed by the Government of Canada. ■

¹⁶ *Supra* note 4 at 11.

¹⁷ *Ibid.*

PREMIER'S BANE: A FOLK HISTORY OF ELECTRICITY POLICY IN ONTARIO*

*Adam White*¹

Newspaper editors and industry pundits have panned energy policy decisions of the Government of Ontario.² They argue that weaknesses and structural failures, with respect to who should do what, lie at the root of what went wrong in Ontario: cyclical failures of will, decisions that pander to political acceptability, rather than rationality. Governance is what's wrong and we should put the problems back in grown-up hands.

Overly ambitious energy plans, failed experiments, nuclear expansion, higher and more volatile prices, the cost of green energy, and more, were predictable, could have been avoided, should have been prevented, and would be mitigated under a suitable governance model. Government should be constrained, restricted in its ability to “develop ambitious and costly experiments.” Government should be subject to oversight—independent, transparent, deliberative, and public review—to oversee generation procurements by system operators or utilities and that overseer should “be required to approve all expenditures”.

In opposition to that idea of institutionalized electricity industry governance, this article puts forward the simple thesis that: (1) on most energy and environmental matters, the constitution vests sovereign executive authority to a Premier holding a majority of seats in

parliament, (2) institutionalized processes, independent agencies, and integrated power plans are as likely to err in judgement and omission, suffer from bias and inertia, and are less accountable to customers, (3) serving customers' and Ontarians' interests in the long term requires a clear policy vision and plan for execution that can only come from strong political leadership, and (4) political success and social license for long-term investments go hand-in-hand; without one you cannot have the other.

Folk history is history as told by an observer to events, sometimes a participant; it owes no allegiance to the popular interpretation of events, or the totality of events and considerations one might account in a comprehensive factual review. This article is such a narrative, from the origins of Ontario Hydro in the late nineteenth century, skipping forward to the summer of 1990 and the surprise election of Bob Rae's New Democratic Party majority parliament in 1990, the legacy he inherited and the subsequent decisions and direction of the Government of Ontario since.

The article explains the current state of Ontario's market as a hybrid: part competitive, part regulated, public and private ownership. Costs are higher, for a number of reasons which are explained, including mistakes which were

* This article is based on a presentation by the author on “What went wrong in Ontario” for the Energy Law Forum in Vancouver, on May 11th, 2017.

¹ Adam White is the Founder and Chief Executive Officer at Powerconsumer Inc, a sustainable energy systems services advisory company based in Toronto, Ontario, and teaches a course in energy policy to undergraduate engineering students at the University of Toronto.

² Globe and Mail: “Coming soon: Ontario's green energy fiasco, the sequel” (April 29, 2016), “Buying Quebec hydro power a dim prospect for Ontarians” (January 12, 2017), “Will Kathleen Wynne's last-ditch hydro fix just add to the mess?” (March 1, 2017), “Don't fall for Premier Wynne's power move” (March 2, 2017), and “How Ontario can end the cycle of meddling in electricity markets” (April 5, 2017).

made. Conclusions are drawn, in the form of “do’s and don’ts” for policy leaders

1. Restructuring from Ontario Hydro to Today

Many forms of [electricity regulation] have been tried, and will be tried in this world of sin and woe. No one pretends that [Ontario’s hybrid market system] is perfect or all-wise. Indeed, it has been said that [Ontario has] the worst [form of market] except all those other forms that have been tried from time to time.³

Ontario has a strong sense of identity when it comes to its electricity system.⁴ Nikola Tesla and George Westinghouse built the first hydro-electric plant in 1895 in Niagara Falls. Ontario’s Hydro Electric Power Commission was created in 1906. Premier Whitney’s bill creating “the Hydro” expropriated private generation at Niagara Falls to extend power to the people, at cost, through municipal utilities. From its beginning, Ontario Hydro was an enterprise of strategic provincial importance: Crown corporation, municipal trust, department of Government and more, in the public mind. Sir Adam Beck was Chair of the Commission, a Mayor of London and a Minister of the Crown.

For decades Ontario Hydro was a Crown jewel growing in lock step with the economy; the need for more and more energy to fuel economic growth was obvious. Starting in the 1970s, however, the economic effects of oil price shocks, globalization, free trade, stricter environmental standards, and increased standards of living generally drove structural changes in Ontario’s economy, and drove down energy demand—even as the population grew. Economic growth no longer required ever increasing energy supplies.⁵ In the 1980s, massive investments and delays of nuclear projects started to drive up costs, meanwhile, demand flattened out.

Demand barely grew during the 1990s, grew less during the early 2000’s, and has been in steady decline since 2006.

By the mid-1990s, Ontario Hydro was done: too much debt, too much generation, not enough demand. As the Darlington Nuclear Generation Station was brought online from 1990 to 1993, electricity rates rose in real double-digit terms for three consecutive years. In 1993, Premier Bob Rae put in a price freeze that lasted through Premier Mike Harris’ two terms and Premier Eves’ tenure, except for six months in 2002 when the electricity market opened, and effectively has remained in place ever since. The price of power in Ontario is a policy choice; it always has been.

In 1995, Premier Harris appointed Donald MacDonald, former Trudeau Cabinet Minister, to head a commission on what to do with Ontario Hydro. In May 1996 the report of that advisory committee, “a Framework for Competition,” provided the reasoning, the policy and economic case for all that followed. Harris’ *Energy Competition Act*⁶ passed in 1998.

Premier Eves opened the market in May 2002. It was a hot summer and electricity prices were high, inducing another price fix, and not just in Ontario. Investigations into rolling blackouts and price spikes in California led to allegations of fraud, the collapse of Enron and the defrocking of the accounting and bond rating firms that hitherto had failed to alert investors to the risks of poor market design and unethical trading, financing, and marketing practices. Premier Eves’ price fix in November of 2002 made it, he said, so middle-class double income households in Mississauga could string incandescent Christmas bulbs without fear.

Premier McGuinty’s *Electricity Restructuring Act, 2004*⁷ was to fix that mess, to great accompanying political self-aggrandizement, but kept in place virtually all the significant structural reforms made by Premier Harris.⁸

³ With apologies to Sir Winston Churchill, paraphrasing his comments in parliament. United Kingdom, *House of Commons Debates*, Vol 444 (11 November 1947).

⁴ Hydro One, “Our History: 100 Years of Powering Ontario”, online: <<http://hydroone.com/OurCompany/Pages/OurHistory.aspx>>.

⁵ Every demand forecast since the 1980s has over-estimated energy demand and as a result recommended over-building. Every demand forecast in the past 20 years has underestimated the response of customers to increasing prices, and underestimated the potential for efficiency generally and across the economy.

⁶ *Energy Competition Act, 1998*, SO 1998, c 15.

⁷ *Electricity Restructuring Act, 2004*, SO 2004, c 23.

⁸ Including the actual regulation shutting down coal which was concluded while Elizabeth Witmer was Harris’ Minister of the Environment.

In Ontario, energy policy has become Liberal policy. The PC policy was laissez-faire; provide a competitive market, indifferent to sources of supply, willing to let the market decide. The PC policy framework, the market design, the role of the OEB, all remains in place, but the flash-bang-fizzle of the summer of 2002 (Enron etc.) discredited the PC's management acumen and tarnished their claim to the reforms. Ontario's current energy policy yet rests on that essential foundation—open access transmission, independent system/market operation, diversified and divested generation, arm's-length regulation—put in place with the legislative reforms of 1998.

In the interregnum between the fall of the PC's and the 2004 implementation of its first policy frame, after a campaign of heated debate and commitment on energy policy and prices, a new group came to the table. A committed gang of environmental NGO's with strong connections to the Office of the Premier, a broad alliance of pro-renewable energy proponents, and a resurrected conservation agenda abandoned by Ontario Hydro in the early 1990s. Minister Duncan's 2004 Act prescribed the Power Authority to plan and procure, changed "market" to "system" in the Independent Electricity System Operator's name, and set out an agenda to finance construction of generation, including specific planning commitments to phase out coal, installed megawatt targets for renewable energy capacity, and kilowatt-hour commitments to demand-side management.

The 2004 Act gave Ontario the Power Authority that the stakeholders wanted: the generators, conservation programmers, renewable developers, and environmentalists latched onto the nouveau regime. Less public but more successful perhaps were the big banks, investment houses and bond brokers. Breaking up Ontario Hydro was a good and necessary thing, but the boon for Bay Street had just begun.

In 2008, former Minister of Health and Deputy Premier, George Smitherman, was appointed as Minister of Energy and Infrastructure; these previously were separate portfolios. In the fall of 2008, the US housing bubble burst and economic signs turned sharply negative. Minister Smitherman brought not only skill

and determination to his role, but a different political base, as well as a mandate from the Premier for change. Change came swiftly. New nuclear was cancelled as too expensive. The Integrated Power System Planning process was scrapped. Ministerial delegations to Europe returned with specific intent to implement a Feed-in-Tariff. These steps were strongly supported by ENGO communities and equally forcefully backed by investors, developers and manufacturers of renewable energy hardware and equipment. It is possible that nobody believed the Minister's claims of 50,000 jobs with minimal bill impacts, but everyone saw the business opportunity.

The *2009 Green Energy and Economy Act*⁹ was more about the economy than energy (to energy market purists' enduring chagrin). The Minister and Premier both said it was to drive investment; and it did. The Minister of Economic Development and Trade at the time, Michael Bryant, said at an Ontario Energy Association breakfast that the Liberals "were more Keynesian than Keynes".

Successive Liberal Ministers Duguid, Bentley, Chiarelli, and Thibeault all have had to navigate the off-ramp from that cycle of investment, "bending the curve" to relieve cost pressures on customers. The 2013 LTEP signalled the abandonment of new nuclear. The 2016 LTEP turned the corner on FIT, large renewable procurements were suspended, and the Government of Ontario, Ontario Power Generation, and Bruce Power agreed to arrangements which extend the commitment to nuclear refurbishment over 50 years. Premier Wynne's latest Fair Hydro Rate Plan is a further re-amortization of the asset base.

2. The Hybrid Ontario Electricity Market

Ontario has a hybrid energy system, a market and a regulated marketplace, with licensed franchised distributors, contracted, regulated and merchant generation, an ecosystem of metering service providers, contractors, equipment suppliers, manufacturers, engineers, marketers, and retailers, new entrants, new energy technology, and customer services.

The Independent Electricity System Operator operates markets in energy, operating reserves,

⁹ *Green Energy and Green Economy Act, 2009*, SO 2009, c 12.

demand response, and ancillary services. Ontario's real-time energy market is a pool market; everybody sells in, everybody buys out; the price is set where demand and supply meet. Ontario's Hourly Energy Price is the marginal cost index the IESO calculates each hour. Some people complain it's too low. The low price is a deceit, they say, it's not the true price. The costs are hidden in a "Global Adjustment".

The Global Adjustment is a separate fee that pays for the costs of nuclear plants, wind and solar generation, and new gas peaking plants to balance demand. GA also covers the costs needed to fund local conservation programs for customers and investments in research and development, etc. It takes all these big and little costs and bundles them under one heading. Together these are most of the costs of the system, and, as they say, they're "baked-in".

Ontario's hybrid system produces lots of energy at a low price. In most hours of most days, that electricity is primarily carbon-free. The gas plants must run to balance the system, but the system often doesn't need the energy; it's getting all that's needed from nuclear, hydro, wind and solar. Ontario's system can produce zero-fuel-cost carbon-free energy during many hours of the year for at least the next decade, and if it's done right, for decades into the future.

When demand peaks on a hot summer day in Toronto, energy prices rise dramatically because the system is burning natural gas, even oil sometimes, and paying the price of carbon, to meet peak.¹⁰ These marginal costs are invisible to residential consumers, who see only time-of-use rates which blend energy and capacity costs into stepped rates for peak, mid-peak and off-peak use based on six-month averages forecast and set in advance by the Ontario Energy Board. But for an expanding group of empowered commercial and industrial customers, energy costs are paid in real time based on actual marginal costs of production, and generation

capacity costs (Global Adjustment) are based on a customer's contribution to system peak demand. If these customers reduce demand in the highest peak days in a year, then they reduce their costs. It's a great incentive for energy efficiency and has businesses figuring out ways to reduce costs in ways that drive efficiencies and cost savings for the whole system.

Ontario's market might not be state-of-the-art, but it's up there with those that are, e.g., New York, Northeast US, Midwest, Texas, the UK. Alberta only now is going through the subsequent phase of restructuring that most of the other markets already have gone through, and the process through which Ontario has muddled through the last 15 years.

Back in the day, before the market opened, free market theologians and academics came from all over—New Zealand, Australia, the UK and California—preaching "energy-only" markets where generators competed on marginal cost, and recovered long term capital by bidding super-high "scarcity prices". Imagine that was ever going to work. Alberta held out but now the policy has changed, and there will be directives for investments in generation, renewable energy and targets for carbon.

3. The High Cost of Ontario's Energy Policy

Market restructuring in Ontario has not been pain-free. The changes have been profound; and mistakes have been made. Overall hydro bills are higher. Costs are higher because Ontario spent on nuclear, wind, hydro and solar and conservation. Costs are higher because Ontario phased out coal. Costs are higher because gas plants that the local community did not want were cancelled. Costs are high because Ontario needs to have massive generators standing by 24/7 to run in a 1:1000 system peak, to back-up nuclear (Ontario's largest and second-largest contingency at any given point in time) and to

¹⁰ Ontario has set an explicit price for carbon in all fossil fuel for thermal combustion. The Ontario Energy Board has established an initial price as an uplift on gas to be collected by gas distributors, indexed to the Intercontinental Exchange California Carbon Allowance price, subsequently to be determined at auction subject to the evolving terms of the Western Climate Initiative to which Ontario is a signatory. This uplift on the price of gas is passed through to gas-fired generators, and other gas users. The Hourly Ontario Energy Price, i.e., the marginal fuel cost, represents only a fraction, 10-20 per cent of the delivered retail cost of electricity, in Ontario. Overall, Ontario's gas generation fleet operates at less than 20 per cent capacity factor. Gas is a peaking, standby and swing resource. But gas generation is setting the marginal price in as many as 50 per cent of the hours depending on the weather and the state of baseload generation, e.g., more during nuclear outages. The application of the carbon price to gas-fired plants in the Ontario power market has a non-linear effect on average prices and cost allocation because it operates as an increasing uplift as the market moves up the supply curve during peak times. Because the merit order essentially is stacked by heat rate, with the lower heat rate plants dispatching first, the effect increases proportionally as prices rise.

balance renewables. Costs are higher because power workers are among the best paid trades in the province, and have better pensions.

Harold Lasswell¹¹ famously defined politics as “the art of who gets what”. A ledger tracking who actually got what out of Ontario’s electricity sector in the past would go far in explaining why things happened as they did.

The gas plant scandal, as they say, is this. Those gas peaking plants never should have been proposed. Contracts never should have been signed; and they should have been written to preserve the Premier’s privilege. (Such a hard lesson on all sides). The outright rejection by the local communities was entirely predictable from beginning to end.¹² The scandal, such as it is, originated in competitive tendering and independent planning. The Auditor General presumes perhaps we’d be better off if the OPA had steam-rolled residents and insisted those plants be built.¹³

Critics whinge about the accumulated costs of solar, wind, conservation, nuclear, and the system overall. Tot up all these no-value-for-money accounts and it’s a sizable sum.¹⁴ What a waste, they say. If they’d been in charge, one supposes, none of this would have happened. In most respects, they’re right. If left to technocrats it’s unlikely Ontario would have invested in solar at all, nor in wind much, no batteries, probably no conservation. They wouldn’t have gone for critical peak pricing. No carbon taxes. Phasing out coal would be a definite maybe but it’s so much cheaper, we might still be burning coal. We wouldn’t need to charge electric cars, since we wouldn’t have any. Making no investment might eliminate the risk of making a bad investment, but it also creates the risk of inaction, not making necessary investments. These “risks of omission” are not accounted in a

forensic review of what was done.

The much-criticized Feed-In-Tariff or “FIT” contract is a technology- and location-specific take-or-pay fixed price arrangement with escalation over a 20-year term, in contractual terms little different from Ontario’s Non-Utility Generators, built in the late 1980s and early 1990s. Issues taken are with the lack of competition in the procurement processes, unnecessarily generous incentives for investment and asset-holders, administrative floor prices set excessively high and low thresholds for applicant eligibility. The incentives were too high and the terms were too long; we know that now. Everyone said the bankers needed a 20-year contract; we know now they don’t. Performance was underestimated, and costs were exaggerated.

Minister Thibeault commented to the media. “We removed competition within the electricity sector...this made sense at the time and we drove significant investment in the province,” said Thibeault. “We know now that competitive tension within and among renewable energy developers could lead to much more attractive pricing.”¹⁵

The policy created a rush on land options and rights-of-way by many small developers. There was enough value in those options that many early, and most small contracts were subsequently sold, aggregated into substantial financial portfolios, and acquired by Canada’s leading utilities, asset managers and financial institutions. Ontario’s Feed-in-Tariff policy created a new class of contract-backed financial assets in fixed long-term, essentially risk-free, renewable energy power purchase agreements. This is not at all to say this outcome is inferior or, from a financial perspective, differentiable from any number of alternative procurement

11 Harold Lasswell and Abraham Kaplan, *Power and Society: A Framework for Political Inquiry* (New Haven: Yale University Press, 1950).

12 Kevin Flynn, Liberal MPP and member of the Executive Council, in his opposition to the plant: “I have a sense that were the premier in the same position that he’d do exactly the same thing. I really think it’s a decency issue. It’s really, ‘Who do you work for at the end of the day?’ It’s for the constituents.” Jim Coyle, “Coyle: MPP Kevin Flynn takes on Oakville gas plant” *The Star* (2 April 2010), online: <https://www.thestar.com/news/canada/2010/04/02/coyle_mpp_kevin_flynn_takes_on_oakville_gas_plant.html>.

13 Office of the Auditor General of Ontario, *2015 Annual Report* (Toronto: Office of the Auditor General of Ontario, 2015), c 3.05, online: <<http://www.auditor.on.ca/en/content/annualreports/arreports/en15/3.05en15.pdf>>.

14 The AG and IESO dispute each other’s choice of social discount rate. The IESO’s numbers use a 6 per cent rate, they say to reflect increased risk and uncertainty that comes with the nature of the generation contracts and technologies. The AG says 4 per cent is a better number. Neither adequately reflects the value of long-lived electricity assets for future generations.

15 Rob Ferguson, “Energy minister Glenn Thibeault admits Ontario messed up on hydro rates with bad decisions” *The Star* (24 February 2017), online: <<https://www.thestar.com/news/queenspark/2017/02/24/energy-minister-glenn-thibeault-admits-ontario-messed-up-on-hydro-rates-with-bad-decisions.html>>.

policies; the upshot of which would have resulted in the same '000s of contracts, megawatts and billions of dollars worth of operating assets on the ground.

The proliferation of small developers and the rapid optioning of the best sites made the policy highly visible in rural Ontario, as hundreds of acres of land were extensively developed with wind turbines and ground-mounted solar. This visibility, combined with the natural disinclination of the local communities to identify with Liberal 'big city' values served to accelerate the politicization of the policy along party lines. The policy and the tensions it aroused now will be 14 years in-the-making by the time of the next election in 2018.

4. Premiers' Prerogative and Social License - Lessons From Ontario

In most of the country, the electricity system is monopolized by vertically integrated Crown corporations. In Ontario, the power of monopolies is waning. New technologies and new business models are engaging energy customers in new ways. The wires are the network, but the customer service model is evolving past one-way flows of electrons, to giving people the package of energy services they want, in their homes, offices and businesses. Ontario customers have choices customers in other provinces do not have.

It's easy to suggest that government intervention means political intervention but that's too simplistic to be meaningful. No government is monolithic. Decision making is fractured across government, delegated inside government, distributed among players within government and the agencies. Many "government" decisions are apolitical, just as some "regulatory" decisions are entirely political.

Energy policy in Ontario has not materially gone wrong. Ontario's system is significantly evolved and sophisticated. Ontario can hold its system up to any other jurisdiction and be proud. The energy system, energy policy and public policy generally, serves more than the interests of shareholders and ratepayers; it must

serve the public interest overall, and it must serve the agenda of the government of the day, the mandate by which it was elected.

Political intervention arguably has driven more investment, in a shorter time frame, and driven rates higher than would have been the case. But that policy leadership also has generated more benefits and overall superior outcomes for the citizens of Ontario than otherwise would have been the case. Where things have gone wrong, it has often been a bloody-minded approach to planning, poorly scoped tendering and an insincere commitment to give people what they want. Rather than the problem it's too often made out to be, political intervention often has been necessary to fix problems coming from outside the political process, and to bring a dose of reality to the cozy nest the electricity industry otherwise would tend to make for itself.

The complaint that the Premier's actions make our children financially responsible ignores a fundamental basis of how we govern ourselves; as parents leave a legacy for our children, investing for future generations is the very definition of sustainable development.¹⁶ In any case, the argument about mortgaging the future is specious. Regulators routinely approve multi-generation investments; even a wooden power pole sometimes will last for many decades.

Fractured it may be, but at the technical level and among those that care, long term planning effectively has continued, at the IESO, in the Ministry and among the utilities. These long-term plans provide ongoing momentum for modes of thinking, consideration of alternatives, dominant time frames and narratives, and the literal means by which civil society and industry is engaged with government in making policy. Never has a plan provided a blueprint with any long-term viability, but all have framed issues in the day, driven specific solutions, and provided the technical rationale for political decisions.

The Ontario Attorney General's 2015 report¹⁷ focused on planning, planning it says "is managing and deciding various solutions." The complaint, about structural failures in "planning" and weaknesses in "governance",

¹⁶ United Nations World Commission on Environment and Development (Brundtland Commission), *Our Common Future* (1987) in which sustainable development is defined as that which meets the needs of the present generation without compromising the ability of future generations to meet their own needs.

¹⁷ *Supra* note 13.

is a two-part complaint: about the decisions themselves, and the process of how those decisions came about. The presumption, then, is that alternative ways of making decisions would yield different decisions, and more to the point that integrated planning processes would produce technically superior results.

There is a notion, perhaps, that there's a pure form of policy not subverted by politics, not subject to the tribal tendencies of political movements, not a platform for patronage. The root of the modern conception of policy is the Greek word *polis* meaning "the people [of the state]". Policy thus defined is never just the choices that are made; in the long run, the effect of policy depends more on the way in which we make those choices and how those processes reflect and respond to the will of the people.

In Canada's Constitution, the responsibility is clear¹⁸. The Canadian constitution vests absolute sovereignty in the Provinces, pursuant to section 92 of the *Constitution Act*, in non-renewable natural resources, forestry resources and electrical energy. The Westminster model of government vests executive power in the first among equals: of the Privy Council and Cabinet, the Premier, leader of the party winning the majority of seats in the first-past-the-post elected parliament. A Premier with a majority in parliament has the power of the Queen.

Politics, as a vocation or interest, may not be for everyone. Not everyone is fascinated by processes for winning elections and holding power, appointing cabinets, mandating ministers, responding to caucus, the party and the constituents, and policy. Yet, in the broadest sense, the operation of political models and processes in society is the machinery that narrows options, sets out choices and ways of choosing, manages and decides.

There is a lesson from Ontario: an essential energy policy "do's and don'ts" lesson for political leaders and energy regulators alike.

Don't ram things down people's throats; when you do, you will pay a high price; when you cave under pressure, and cancel the plants, you will pay a high price.

Do lead the narrative on basic needs, alternatives, and outcome. Do help and allow time for people come to the right conclusion.

Don't tell customers what they can and can't buy. Do offer choices. Do model solutions. Do make the right choice easy, safe and cheap as possible.

Do push your ministries, agencies, boards and commission to resist the temptation to regulate. Saying "it's before the Board" is to quash the public narrative.

Taken together, popular but misguided theories about policy conspiracies and political meddling offer a disturbing (and wrong-headed) prescription for the Province. In the new energy market, customers are knowledgeable and empowered. In the emerging distributed energy world in which Ontario is a leading example, we don't need central planners, utility monopolies or public utility tribunals to decide what customers want and need.

In one industry after another, the command and control functions of government and government agencies are finding themselves out of a job (and losing the ability to extract rents). In the emerging energy world the regulator is not driving the bus; the regulator is the bus and the customer is going to dictate the route taken.

People forget, but the best reason to shut down coal wasn't carbon, it was sulphur, nitrogen, fine particulates and heavy metals. From Windsor through Toronto to Quebec was a giant smog zone in summer. Ontarians' health literally was at stake. It took decades of work on both sides of the border to get the first controls on acid rain. It took more decades to finally quit burning coal altogether. The outcome has been extremely positive: fewer emergency room admissions from asthma, and not a single smog day in Ontario since the plants shut down.

Given Ontario's natural endowment, it hasn't the options of other provinces; it's had limited choices, and real challenges to face. Yet Ontario has a largely carbon-free system, serving a big chunk of the population and the economy of Canada. These are significant assets, held by leading financial institutions.

It's not just the fixed generation stock, poles

¹⁸ *Constitution Act, 1867 (UK), 30&31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.*

and wires that are important. Invention and innovation are driving sweeping technological and system changes across Ontario. This is true in manufacturing, medicine, communications and the energy system as well. Technologies that were scientific curiosities not long ago, now widely are being adopted by consumers across the spectrum: rooftop solar PV, energy storage batteries (for home and car), thermostats and appliances connected to the internet.

Ontario has experienced some regrettable outcomes, but this ought not to be conflated with “manner of governing,” as if handing over decision-making could somehow ever avoid mistakes being made, in an hypothetical, error-free, all-knowing process. There is no way of de-risking large long term capital with governance. Nobody should be under any illusion that regulatory agencies or anybody else in this country will be able to perpetrate any plans that are politically unacceptable. In the absence of social license, the authority of Premiers and their accountability to the polls always will override.

The art of politics is giving people what they want. Good politicians are good listeners. It's not the quasi-judicial mumbo jumbo some want, but it's real. Ontario's ambitions aren't just the Premier's, not this or any other Premier, but are a shared vision of the electorate. Future generations of Ontarians have skin in this. Let the politicians be accountable. Let the people decide. Social license and political success go hand in hand; without one you cannot have the other. ■

ONTARIO’S “FAIR HYDRO PLAN” COMES AT A (FUTURE) COST

David Stevens*

Ontario’s “Fair Hydro Plan” has reduced current electricity bills for Ontario consumers by 25 per cent, effective July 1, 2017.¹ This is being accomplished through a number of measures, including the removal of the provincial portion of HST from electricity bills, shifting the costs of the Ontario Electricity Support Program (OESP) and the Rural or Remote Rate Protection Program (RRRP) to the tax base and what the Government describes as “refinancing a portion of the Global Adjustment (GA)”, to be recovered over a longer term.² The implementation of the “Fair Hydro Plan” is being done through new legislation (the *Fair Hydro Plan Act, 2017*)³, supporting Regulations⁴ and new “rates” approved by the Ontario Energy Board (OEB) which reduce the commodity price paid by Regulated Price Plan (RPP) customers⁵. The “Fair Hydro Plan” is not intended to have any impact on payments to generators, distributors and transmitters.

On May 24, 2017, Ontario’s Financial Accountability Office (FAO) published its Assessment of the Fiscal Impact of the Province’s Fair Hydro Plan⁶. This Assessment reviews how Ontario’s “Fair Hydro Plan” will impact electricity ratepayers and Provincial finances

based on the plan parameters indicated by the Government. As set out in its media release, the FAO estimates that the “Fair Hydro Plan” will cost the Province \$45 billion while providing overall savings to electricity ratepayers of \$24 billion. This results in a net cost to Ontarians of \$21 billion.⁷

The FAO’s Assessment of the “Fair Hydro Plan”⁸ was prepared in response to a request from a member of the Ontario Legislature. It reviews the FAO’s estimate of the fiscal impact on the Province and electricity ratepayers over 30 years.

The FAO calculates that under the “Fair Hydro Plan”, ratepayers will save \$24 billion versus the status quo over 30 years. This amount is the difference between savings from removing part of HST and the cost of support programs from electricity bills compared to the costs to ratepayers of refinancing the GA.⁹ The FAO confirms what is already known, which is that the refinancing of the GA will save money for current ratepayers, but will cost future ratepayers more (because they will have to pay deferred GA costs, along with financing costs). As noted by the FAO, average electricity bills

* David Stevens is a partner at Aird & Berlis LLP, and is an editor and contributor for EnergyInsider.ca.

¹ Ontario Government, “Ontario’s Fair Hydro Plan” (2017), online: <<https://www.ontario.ca/page/ontarios-fair-hydro-plan>>.

² Ontario, Ministry of Energy, “Ontario’s Fair Hydro Act, 2017” (11 May 2017), online: <<https://news.ontario.ca/mei/en/2017/05/ontarios-fair-hydro-act-2017.html>>.

³ *Ontario Fair Hydro 2017*, SO 2017, c 16, Schedule 1.

⁴ For example, *Fair Adjustment under Part II of the Act*, O Reg 195/17.

⁵ Ontario Energy Board, News Release, “Electricity prices are dropping again on July 1” (22 June 2017), online: <<https://www.oeb.ca/sites/default/files/rpp-newsrelease-20170622.pdf>> – note that for consumers not subject to the RPP (for example, those with electricity retailer contracts), the impact of the “Fair Hydro Plan” is seen through a reduction to GA charges.

⁶ Financial Accountability Office of Ontario, *An Assessment of the Fiscal Impact of the Province’s Fair Hydro Plan* (Toronto: FAO, 2017), online: <<http://www.fao-on.org/web/default/files/publications/Fair%20Hydro/Fair%20Hydro%20Plan.pdf>> [“FAO Assessment”].

⁷ Financial Accountability Office of Ontario, Media Release, “Fair Hydro Plan Provides Temporary Electricity Bill Relief but Higher Bills by 2028” (24 May 2017), online: <http://www.fao-on.org/en/Blog/media/Fair_hydro_MR>.

⁸ FAO Assessment, *supra* note 6.

⁹ The impact of the “Fair Hydro Plan” on ratepayers is discussed in FAO Assessment, *ibid* at 3-5.

are projected to decrease by 25 per cent in 2017 and will only increase by inflation until 2021. However, after that time, electricity bills are projected to increase by an average of 6.8 per cent annually until the end of 2027 and then after 2027, electricity bills are projected to be an average of 4 per cent higher under the “Fair Hydro Plan” than the status quo. The FAO’s illustration of the drivers of the changes in electricity bills is reproduced in the table below.¹⁰

From the Province’s perspective, the FAO concludes that the “Fair Hydro Plan” will cost Ontarians (taxpayers) \$45 billion.¹¹ This represents the foregone revenue from removing the provincial portion of HST from electricity bills (\$42 billion) and the costs of funding electricity relief programs (\$3 billion). In coming to this conclusion, the FAO notes that while ratepayers will benefit from not paying HST or electricity relief program costs, this does not represent a true savings to Ontarians since tax revenues will be reduced and relief programs will be funded from other tax revenues.

In total, the FAO concludes that the net cost of the “Fair Hydro Plan” is \$21 billion, which

represents the difference between the ratepayer benefits and the costs to the Province.¹²

The FAO’s Assessment includes a caution that the costs of the “Fair Hydro Plan” may turn out to be higher than forecast.¹³ This could happen where interest rates are higher than expected (increasing the GA refinancing costs), or where the Government has to borrow (and incur interest costs) to replace the foregone revenues from removing provincial HST from electricity bills. Where these things occur, the net costs of the “Fair Hydro Plan” will be higher.

One section of the FAO Assessment addresses the “Fair Hydro Plan’s” potential impact on the provincial debt.¹⁴ The FAO Assessment notes that while the plan involves a complicated accounting structure that will increase gross public debt, the Government intends to create a regulatory asset (in expectation of future recoveries from ratepayers) to offset the accumulating borrowing in order to shield the Province’s net debt from an unfavourable impact. The FAO responds to this aspect of the “Fair Hydro Plan” by indicating, “[d]ue to the nature of the proposed financing transaction, the FAO recommends that Members of Provincial Parliament obtain assurance from

Table 3-1: Breakdown of FAO Estimate of FHP Impact on Eligible Electricity Ratepayers

Time Period	Province’s FHP Proposal	FAO’s Analysis of FHP	Description
2017-2021	Reduce bills by 25%. Cap bill increases at rate of inflation for 4 years. Province funds and expands assistance for rural and low income ratepayers.	Average bill will be reduced by 25%. Bill increases will be capped at rate of inflation for four years.	Savings to ratepayers of \$17.7 billion achieved as follows: HST Rebate - \$4.1 billion Electricity Cost Refinancing - \$10.6 billion Adjusting Electricity Relief Programs - \$3.0 billion
2021-2027	Continue Electricity Cost Refinancing.	Bills to remain lower than status quo due to refinancing and HST rebate. Bills projected to increase by 6.8% annually as financing costs accumulate.	Savings to ratepayers of \$15.5 billion achieved as follows: HST Rebate - \$7.7 billion Electricity Cost Refinancing - \$7.8 billion
2028-2045	Ratepayer repays refinancing.	Bills will be higher than status quo despite HST rebate.	Net cost to ratepayers of \$9.3 billion as follows: Electricity Cost Refinancing – cost of \$39.4 billion HST Rebate – savings of \$30.1 billion

Note: includes impact of HST rebate starting January 1, 2017.
Source: FAO analysis of Provincial information.

¹⁰ FAO Assessment, *ibid* at 4.

¹¹ The impact of the “Fair Hydro Plan” on the Province’s finances is discussed in FAO Assessment, *ibid* at 6-7.

¹² FAO Assessment, *ibid* at 9.

¹³ FAO Assessment, *ibid* at 7.

¹⁴ FAO Assessment, *ibid* at 8.

the Office of the Auditor General of Ontario that the Province's proposed accounting treatment for the electricity cost refinancing meets public sector accounting standards and will not impact the Province's annual surplus / deficit and net debt."

On the same day that the FAO Assessment was released, Ontario's Auditor General (Bonnie Lysyk) appeared before the Standing Committee on Justice Policy, which was reviewing the then-proposed *Fair Hydro Plan Act, 2017*.¹⁵ Drawing upon a historical case from 2000 (also in the electricity sector), the Auditor General disagreed with the Government's plan to convert deferred rate recovery into a regulatory asset. The Auditor General concluded that, "borrowings are debt; unearned revenue is not an asset today; and when your expenses exceed your revenues, you incur a deficit." To date, there has been no substantive reply from the Government to the comments from the Auditor General. ■

¹⁵ Legislative Assembly of Ontario, "Committee Documents: Standing Committee on Justice Policy" (24 May 2017), which includes Ms. Lysyk's testimony, online: <http://www.ontla.on.ca/web/committee-proceedings/committee_transcripts_details.do?locale=en&Date=2017-05-24&ParlCommID=9000&DocumentID=32287#P400_83203>.

ONTARIO'S FAIR HYDRO PLAN ACT UPENDS RATE ADMINISTRATION AND FINANCE

Tom Adams*

Ontario's new *Fair Hydro Plan Act, 2017*¹ ("*FHP Act*"), which received Royal Assent June 1, 2017, upends Ontario Energy Board (OEB) oversight over rates paid by households, small businesses, and farm consumers, restructures the financial architecture of Ontario's power system, and commingles taxpayer and ratepayer interests more than ever, but leaves question marks about how the massive cost deferral it creates will be recovered.

Rate-making Reforms

While under Sections 7 and 8 of the new legislation, residential rates for the commodity portion of the bill will still be communicated by the OEB to LDCs, submetering providers, and the public, these same sections of the *FHP Act* have removed from the OEB any discretion with respect to rates and severed any relationship between costs and rates. Instead, now the overall rate levels paid by households will be whatever the Minister deems to be appropriate (see Annex I).

Section 11 of the legislation extends the Minister's rate making authority into the indefinite future but provides no clarity as to the process that the Minister will follow in making such determinations (see Annex I).

The *FHP Act* also replaces the traditional administrative process for rate-making centered on Board Orders. Instead, pursuant to Section 44 of the *FHP Act*, LDCs and submetering providers

are required to comply with the new FHP rates as a condition of license.

Nothing in the *FHP Act* changes the Board's jurisdiction with respect to distribution and transmission wires rates. However, since the escalation of the overall billing rate to small customers is now fixed at inflation, if distribution and transmission rates rise faster than inflation, the financial effect will be to push more commodity cost into the FHP deferral account than would otherwise be the case. Distribution and transmission rate changes will have no immediate impact on billing rates for small customers, although those wires charges remain a real interest of customers larger than the threshold for FHP rates.

New Financial Architecture

The historical link between costs and rates -- a link that had been central to the design of Ontario's power system continuously since the beginning of Ontario Hydro, and only briefly interrupted during the Ernie Eves rate freeze that applied in 2003 and early 2004 -- is gone.

As specified in the *FHP Act*, final total rates to most household customers are indexed to the total rates that would have been charged by Toronto Hydro on May 1, 2017 had commodity rate adjustments related to the FHP not been made. The overall rate level in the first year of the FHP is determined by the requirement for an initial 25

* Mr. Tom Adams is an independent energy and environmental advisor and researcher focused on energy consumer concerns, mostly in Eastern Canada. He has worked for several environmental organizations and served on the Ontario Independent Electricity Market Operator Board of Directors and the Ontario Centre for Excellence for Energy Board of Management. He is a media commentator and guest newspaper columnist. He has published peer-reviewed papers in a range of fields. He has presented expert testimony before many legislative committees and regulatory tribunals in Canada.

¹ *Fair Hydro Plan Act, 2017*, SO 2017, c 16, Schedule 1.

per cent cut, adjusted in future years with annual inflationary increases.²

Based on analysis from the Ontario legislature's Financial Accountability Officer (FAO), the scale of the gap between costs and rates, leaving aside rate reductions arising from costs transferred from ratepayers to taxpayer, is the order of \$2.6 billion per year for the initial four years of the Plan.³

The gap the FHP creates between costs and rates is being made up with borrowing either by OPG or some other "Financial Services Manager" yet to be named by the government.

Taxpayer Exposure

The FHP marks an unprecedented commingling of taxpayers and ratepayer interests.

The FHP increases payouts under the Ontario Electricity Support Program aimed at low-income consumers and shifts funding responsibility from ratepayers to taxpayers but leaves the OEB in charge of administering this additional electricity-related social program.

The FHP also shifts most funding responsibility for the existing but expanded Rural and Remote Rate Protection program from ratepayers to taxpayers and establishes two new taxpayer-funded programs, a Distribution Rate Protection (DRP) program reducing rates for distribution rate-protected residential consumers and a First Nations On-reserve Delivery Credit which refunds 100 per cent of the delivery charge for on-reserve consumers.

The combined impact of these programs will result in an annual taxpayer cost of \$1.8 billion per year according to the FAO.⁴

One upshot is that much of Hydro One's Ontario distribution income will now flow from taxpayers, rather than ratepayers.

Future Recovery of the Revenue Shortfall

The longer the FHP stays in place, the bigger the

financial challenges will be for future ratepayers and taxpayers. When the time comes to clear the massive deferral account created by the FHP, the government of the day will face very limited options.

Recovering costs for the FHP will take place when ratepayers are already burdened by a massive revenue requirement. Taxing electricity to recover the cost would result in a rate shock, risking further consumer bypass from self-generation and demand erosion.

The Act includes measures related to the eventual cost recovery phase of the plan. Two separate clauses of the Act include prohibitions preventing customers from bypassing -- avoiding repayment using sources of electricity other than grid supply. While the Act does not specify the customer types to be targeted for cost recovery, one might presume that since only small volume customers benefitted from the FHP, it would be inappropriate to shift the cost recovery onto other classes. Since bypass in today's environment is normally associated with larger users, it appears that the drafters of the Act may have contemplated either shifting recovery of some deferred costs to larger users or technology changes that might someday make home-supplied power a realistic option and thereby threaten the recovery of deferred costs from small consumers.

The FHP signals a change in policy direction with respect to bypass. Current conservation programs provide cost-shifting and direct subsidy incentives for industrial customers to install behind-the-fence generation. Many policy efforts in recent years have pushed toward distributed generation, including smart meters and smart grid.

Another potential complication for future recovery of deferred costs is that some of the deferred costs appear to have arisen without a sound legal foundation. In the immediate run-up to the new *FHP Act* regime, the government's rate initiative directly conflicted with existing laws and regulations⁵ but was implemented by the OEB regardless. Notwithstanding prevailing requirements, the RPP rate for May 2017, recovered less than the full commodity cost of electricity.

² *Ibid.*, s 7.

³ Financial Accountability Office of Ontario, *Fair Hydro Plan: An Assessment of the Fiscal Impact of the Province's Fair Hydro Plan* (Toronto: FAO, 2017).

⁴ *Ibid.*

⁵ Before the *FHP Act*, then current law, as reflected in Section 79.16 of the *Ontario Energy Board Act, 1998*, SO 1998, c 15, Schedule B and O Reg 95/05, and as articulated in the OEB's Standard Supply Service Code, the OEB's Regulated Price Plan (RPP) Manual, and the OEB's Retail Settlement Code all required the OEB to set the commodity portion of household power rates to recover the full cost of electricity through something called the Regulated Price Plan.

In an April 10 letter, the Minister appears to have encouraged the OEB to adjust downward the RPP in anticipation of the *FHP Act* but did not order the Board to do so.

These proposed details are being set out for the OEB at this time so that they can be considered as inputs into the OEB's review of the Regulated Price Plan (RPP) prices for May 1, 2017, as the OEB considers appropriate and in keeping with its normal forecasting activities.⁶

In a public statement addressing the OEB's April 20th announcement of the RPP rate reduction, Energy Minister Glenn Thibeault praised the agency for acting "with the anticipated implementation of our government's proposed legislation".⁷

O. Reg. 206/17 pursuant to the *FHP Act* contains a provision at Section 16 that seeks to create an opportunity to recover the IESO's revenue shortfall created by the OEB's RPP Order for May 1, 2017. The regulation allows the IESO to recover:

Any variance account balances in variance accounts established and maintained under subsection 25.33 (5) of the *Electricity Act*, 1998 and costs incurred in relation to the balances.⁸

While it appears that no complaints about illegal billing arose specific to the May 2017 charges, an open question remains about the legitimacy of eventual charges required to recover deferral account balances arising from that period although it is possible that retroactivity provisions may be argued.

Conclusion

The *Fair Hydro Plan Act* arises from a political and policy context of increasing government intervention in the sector and decreasing agency authority. From the perspective of small volume

customers, final rates are now determined by the Minister and OEB processes are a sideshow.

Long gone are the days when Ontario's policy was that consumers must pay what former Energy Minister Dwight Duncan once called the "real price for electricity" based on a transparent breakdown of all component bill charges.

While Ontario Hydro's insolvency was managed without taxpayer funding, the shift to taxpayer-funded electricity already begun with the Fair Hydro Plan may become a much larger burden on future provincial budgets. Only time will tell, but increased commingling of ratepayer and taxpayer interests might portend more extensive political intervention in Ontario's power system decision-making than is the case today.

Now, the overall cost of power for households, small businesses, and farms is determined by ministerial fiat without any defined public process and below cost but with the problem of figuring out how the deferred principal and interest costs are to be disposed of left for future determination.

ANNEX I

Here are the sections where the Minister's new jurisdiction to set the overall billing rate for specified customers is created:

Regulated rate consumers, first adjustments

7 (1) Despite clause 79.16 (1) (b) of the *Ontario Energy Board Act, 1998*, the electricity rates payable by regulated rate consumers for the period beginning on July 1, 2017 and ending on April 30, 2018 are the rates determined by the Board under this section and in accordance with the regulations.

Other specified consumers, first adjustments

8 (1) For the period beginning on July 1, 2017 and ending on April 30, 2018, the adjustments made under section 25.33 of the *Electricity Act, 1998* shall, with respect to specified consumers who are not regulated rate consumers, be further adjusted by electricity vendors in accordance

⁶ Letter from Energy Minister Glenn Thibeault to OEB Chair Rosemarie Leclair (10 April, 2017), online: <<https://www.oeb.ca/newsroom/2017/fair-hydro-act-2017>>.

⁷ Ontario Ministry of Energy, Press Release, "Statement from the Minister of Energy on the Ontario Energy Board's New Regulated Price Plan (RPP) Electricity Rate Announcement" (20 April 2017), online: <<https://news.ontario.ca/mei/en/2017/04/statement-from-the-minister-of-energy-on-the-ontario-energy-boards-new-regulated-price-plan-rpp-elec.html>>.

⁸ O Reg 206/17, s 16.

with the regulations and in accordance with the determinations made by the Board in accordance with the regulations.

Regulations

(2) The regulations may specify different adjustments, or methods of determining the adjustments, to be made in respect of prescribed classes of specified consumers who are not regulated rate consumers.

Subsequent adjustments

11 (1) Despite clause 79.16 (1) (b) of the *Ontario Energy Board Act, 1998* and subject to subsection (2), the Lieutenant Governor in Council may prescribe methodologies to be applied by the Board after April 30, 2018 for the purpose of determining,

- a) electricity rates for regulated rate consumers; or
- b) further adjustments to be applied by electricity vendors, in accordance with the regulations and in accordance with the Board's determinations, to the adjustments made under section 25.33 of the *Electricity Act, 1998* in respect of specified consumers who are not regulated rate consumers.

Regulations

(2) The Lieutenant Governor in Council shall have regard to the following in making the regulations:

1. The purposes of this Act.
2. The clean energy costs borne by specified consumers over time.
3. Such other matters as may be prescribed.

(3) The regulations may prescribe,

- a) different methodologies for different prescribed classes of specified consumers and in respect of different periods of time; and
- b) different adjustments to be applied in respect of prescribed classes of specified consumers who are not regulated rate consumers and in respect of different periods of time. ■

CONTESTED SERVICE AREA AMENDMENTS: THE BATTLE FOR NEW ELECTRICITY CUSTOMERS

John Vellone and Jessica-Ann Buchta***

On June 21, 2016, E.L.K. Energy Inc. (“ELK”) filed a service area amendment application under Section 74 of the *Ontario Energy Board Act*¹, to amend its service area in its electricity distribution licence ED-2003-0015 to include, *inter alia*, lands associated with a proposed commercial development by Sellick Equipment Limited (the “Customer”) currently located within the licensed service area of Hydro One Networks Inc. (“HONI”) (the “Application”).²

The Application was contested by HONI, which disputed many of the facts led by ELK in support of the Application.

The OEB approved ELK’s application to expand its licensed service area to supply electricity distribution services to the Customer in its Decision and Order dated April 27, 2017 (the “Decision”).³

Although the Application related to a service area amendment for a single customer, the Decision articulates how the OEB will review similar applications and the criteria it will consider in making its determination.

Principles Articulated in RP-2003-0044

In its Decision with Reasons in the combined service amendments proceeding RP-2003-

0044 (the “Combined Proceeding”)⁴, the OEB examined the guiding principles in evaluating different types of service area amendments. In connection with service area amendments at the borders between contiguous distribution companies, the OEB stated:

*The Board finds that amendments that involve contiguous distribution companies, but that are opposed by the incumbent distributor, may be in the public interest where the amendment results in the most effective use of existing distribution infrastructure, and a lower incremental cost of connection for the customer or group of customers.*⁵

The OEB held that applications for service area amendments ought to be in conformity with the following five principles, the last three of which apply to contiguous distribution companies, as was the case in the Application:

1. Overlapping service areas will not generally be found to be in the public interest. Applicants for service area amendments that propose overlap should provide clear evidence that in the particular case, the advantages of overlap

*John Vellone is a partner in the Toronto office of Borden Ladner Gervais LLP and is a member of the Electricity Markets and IT Groups. Mr. Vellone acted for E.L.K. Energy Inc. in the service area amendment proceeding.

**Jessica-Ann Buchta is an associate at Borden Ladner Gervais LLP in the Electricity Markets Group, practicing corporate/commercial and regulatory law with a focus on energy law and matters relating to the electricity sector.

¹ *Ontario Energy Board Act, 1998*, SO 1998, c 15, Schedule B.

² ELK Energy Inc, *Application to amend licensed service area in Schedule 1 of electricity distribution licence ED-2003-0015*, EB-2016-0155 (21 June 2016).

³ Ontario Energy Board, *Decision and Order*, EB-2016-0155 (27 April 2017).

⁴ Ontario Energy Board, *Decision with Reasons*, RP-2003-0044 (27 February 2004).

⁵ *Ibid* at para 197.

outweigh the disadvantages.

2. New embedded service areas will not generally be found to be in the public interest. Applicants for service area amendments that propose embedding should provide clear evidence that in the particular case, the advantages of embedding outweigh the disadvantages.
3. Amendments to service areas at the border of contiguous distributors may be in the public interest. Applicants should file evidence demonstrating that the proposed amendment is in the public interest, addressing economic efficiency, the impacts on the distributors involved and their customers, both inside and outside the amendment area, the mitigation of these impacts, and customer preference.
4. Applicants for service area amendments are encouraged to obtain the consent of all affected parties before filing the application. Consent applications will be expeditiously processed, and the evidence required will be less than for an opposed application.
5. Economic efficiency is a primary consideration in assessing a service area amendment application. All applicants should address the effects of the proposed amendment on economic efficiency.⁶

In contested applications, the onus falls on the applicant to demonstrate that the amendment is in the public interest.⁷

At the same time, the Board expects incumbent distributors to give proper consideration to rational and efficient service area realignment, even where it results in the loss of some territory. Amendments should not be resisted where the proponent is clearly the most efficient service provider for the affected customer. The distributors affected by a proposed amendment should

*evaluate a proposal in light of the principles in this decision, and respond in a reasonable fashion.*⁸

The OEB cited the example of discouraging the creation of new points of supply to facilitate the distribution of electricity to an existing or new customer by an incumbent distributor, when a contiguous distributor can provide the same distribution service more efficiently. In these circumstances, a service area amendment could facilitate the more efficient use of existing infrastructure, and avoid passing on to the customer the additional metering costs.

Customer Preference vs Cost Efficiency

In its decision in RP-2003-0044, the OEB stated that its duty is to protect the interests of consumers and that the interest of any particular market participant must cede to the system's requirements where these interests conflict.

*Insofar as the Board has indicated elsewhere in this decision that it does not generally support the fostering of competition in the distribution activity, in its consideration of service area amendments, it will favour those applications which show that a given connection proposal represents the most economically efficient use of existing resources within the distribution system.*⁹

In addressing the weighing to be attributed to various principles articulated above, the OEB held that while significant weight should be given to economic efficiency, customer preference is generally not an overriding consideration in the decision-making process:

... the Board finds that customer preference is an important, but not overriding consideration when assessing the merits of an application for a service area amendment. Customer choice may become a determining factor where competing offers to the customer(s)

⁶ *Supra* note 3 at paras 204-208.

⁷ *Ibid* at paras 198-199.

⁸ *Ibid* at para 200.

⁹ *Ibid* at para 229.

*are comparable in terms of economic efficiency, system planning and safety and reliability, demonstrably neutral in terms of price impacts on customers of the incumbent and applicant distributor, and where stranding issues are addressed.*¹⁰

[...]

*... the Board finds that significant weight should be given to economic efficiency when assessing an application for a service area amendment. Failure on the part of an applicant to adequately demonstrate the economic efficiency of a service area amendment application will generally constitute sufficient grounds for the Board to turn down the application.*¹¹

The ELK Decision

The OEB approved ELK's Application to expand its licensed service territory.

In its Decision, the OEB used the principles it has articulated in the Combined Proceeding to guide its decision-making process, focusing on the following four factors in reaching its decision:

1. The distribution infrastructure required to serve the new load;
2. Safety, service quality and reliability;
3. Economic efficiency; and
4. Customer preference.

In making its decision, the OEB held that "economic efficiency is a key factor to consider with regard to the service area amendment application."¹² Conversely, following the weighing attributed to customer preference in the Combined Proceeding, the OEB stated that "although customer preference was considered, it was not a deciding factor in granting the

service area amendment".¹³

Although the OEB did not discuss quantitatively the weighing it ascribed to each criterion, the OEB determined that the effect on (1) distribution infrastructure required to serve the new load and (2) safety, service quality and reliability had little to no difference whether ELK or HONI served the Customer.

The OEB determined that while both ELK and HONI were well situated to provide the distribution infrastructure to serve the Customer, ELK had a slight advantage as far as the location of its existing pole. Other incremental distribution infrastructure resources and costs associated with either distributor serving the Customer and costs associated with operating, maintaining, inspecting, repairing and replacing the services provided to connect the Customer to the distributor's network were considered minimal for both distributors.¹⁴ As far as safety, service quality and reliability considerations, the OEB determined that the difference between ELK and HONI was not significant and that, as a practical matter, all parties are likely to become accustomed to the service area amendment and any confusion and additional costs would be minimal and not be a factor over the longer term.¹⁵

The decision to approve the license amendment came down to (3) ELK proving to be the most economically efficient provider for the Customer and (4) the Customer preferring to have ELK provide it with electricity distribution service. Specifically, the OEB determined that ELK would suffer a revenue shortfall if HONI were the provider rather than ELK and ELK's customer base would, therefore, be better off if ELK served the Customer.

During the oral hearing, the OEB undertook a comparative review of the following issues between ELK and HONI as service providers: (i) Fully-loaded connection costs; (ii) Embedded distribution charges to the Customer; and (iii) Revenue shortfall and implications for other HONI and ELK customers. The OEB concluded that (i) ELK's one-time cost to

¹⁰ *Ibid* at para 233.

¹¹ *Ibid* at para 249.

¹² *Supra* note 2 at 8.

¹³ *Ibid* at 18.

¹⁴ *Ibid* at 6-7.

¹⁵ *Ibid* at 8.

connect the Customer was lower than HONI's, and that the costs to relocate the pole should not be charged to the Customer nor considered in the economic efficiency evaluation; (ii) the embedded distribution charges to the Customer would not be materially different whether ELK or HONI became the service provider; and (iii) in terms of customer rate implications, ELK would be the preferred distributor to serve the Customer.¹⁶ Although it was not disputed by HONI that the Customer preferred ELK as its electricity distribution service provider, the OEB maintained that this criterion was not a deciding factor in granting the service area amendment.¹⁷

Conclusion

The ELK Decision articulates how the OEB will evaluate service area amendments, emphasizing the criteria outlined by the OEB in the Combined Proceeding. The Decision, issued almost one year following the filing of the Application, demonstrates the need for balancing sound regulatory decision-making against the need for expediency and timeliness in connection with service area amendment requests. Although the OEB has indicated the importance of decision criteria relative to one another, a quantitative weighing of the factors identified remains to be presented. ■

¹⁶ *Ibid* at 8-17.

¹⁷ *Ibid* at 18.

AN UPDATE ON NATURAL GAS EXPANSION IN ONTARIO

John Vellone and Jessica-Ann Buchta***

In March of 2015, the Municipality of Arran-Elderslie, Municipality of Kincardine and the Township of Huron-Kinloss (collectively, “Southern Bruce”) conducted a competitive Request for Information (RFI) process to canvass the market for potential suppliers of natural gas distribution services. After receiving proposals from a number of respondents (from both the United States and Canada, Southern Bruce selected EPCOR as the preferred proponent and entered into franchise agreements with EPCOR on February 22, 2016.

On March 24, 2016, EPCOR filed applications with the Ontario Energy Board (the “OEB”) under Sections 8 and 9 of the *Municipal Franchises Act*¹ (the “Act”), seeking approval of these franchise agreements and Certificates of Public Convenience and Necessity (“CPCNs”) for Southern Bruce (the “EPCOR Applications”).

In the interim period, on January 20, 2016 the OEB initiated a generic proceeding to review opportunities for natural gas expansion in the province and establish a common framework for the expansion of natural gas service to Ontario communities not currently serviced by natural gas (EB-2016-0004) (the “Generic Proceeding”). Since the EPCOR Applications related to expansion of natural

gas service to new areas, they were placed on hold pending the outcome of the Generic Proceeding. Following a hearing from May 5th to 13th, 2016, the OEB issued its Decision with Reasons (the “Expansion Decision”) on natural gas expansion on November 17, 2016.²

In the Expansion Decision, the OEB held that the existing framework under which utilities were required to charge customers that are in the same rate class the same rate was a primary barrier to natural gas expansion and resolved to allow utilities to charge “stand alone” rates to new expansion communities rather than imposing an onerous capital contribution requirement on affected municipalities; the OEB rejected requests from certain parties to the proceeding to subsidize the development of natural gas infrastructure into new communities by requiring existing ratepayers to bear a portion of the costs.³

On January 5, 2017, the OEB issued the first procedural order in EB-2016-0137/EB-2016-0138/EB-2016-0139 (the “EPCOR Proceeding”) in which the OEB canvassed whether any other parties to the Generic Proceeding, as defined and discussed below, were interested in serving the areas covered by the EPCOR Applications. Union Gas Limited (“Union”) notified the OEB of its interest in serving the areas covered by the EPCOR

* John Vellone is a partner in the Toronto office of Borden Ladner Gervais LLP and is a member of the Electricity Markets and IT Groups. Mr. Vellone acted for the South Bruce municipalities during the natural gas expansion hearing.

** Jessica-Ann Buchta is an associate at Borden Ladner Gervais LLP in the Electricity Markets Group, practicing corporate/commercial and regulatory law with a focus on energy law and matters relating to the electricity sector. The views and opinions expressed in this article are those of the authors and do not necessarily reflect the official policy or position of any client, municipality, government or agency.

¹ *Municipal Franchises Act*, RSO 1990, c M.55.

² Ontario Energy Board, Decision with Reasons, *Ontario Energy Board Generic Proceeding on Community Expansion*, EB-2016-0004, (17 November 2016).

³ For a more detailed overview of the Expansion Decision, please refer to: John Vellone and Jessica-Ann Buchta, “Ontario Energy Board Decision Introduces Competitive Bidding for Natural Gas Franchises” (2017) 5:1 Energy Regulation Quarterly 49.

Applications. In Procedural Order No. 2 in the EPCOR Proceeding, the OEB determined that it would hear the applications to serve Southern Bruce in two phases: The OEB would first receive submissions on the preliminary threshold issues related to the criteria and the filing requirements for the supply and rate proposals that it expects to require from EPCOR and Union (“Phase 1”) and then hear the competing proposals to be filed by EPCOR and Union in an oral hearing (“Phase 2”).⁴

The EPCOR Applications: Implications of Procedural Order No. 6

On June 27, 2017, the OEB released its Partial Decision on the Issues List and Procedural Order No. 6 in respect of the EPCOR Proceeding (“PO No. 6”)⁵ in which the OEB determined that the ultimate authority to approve gas franchises and CPCNs rests with the OEB and that the provisions of the Act do not make allowance for a municipality to arrange for construction or operation of natural gas infrastructure without the OEB’s express approval. The OEB further held that municipal preference, although a factor in the OEB’s selection of a gas distributor to serve a given municipality, cannot represent the sole determinative factor or restrict the OEB’s authority to set the terms and conditions pursuant to which natural gas infrastructure is put in place and operated in Ontario.

In PO No. 6, the OEB also determined that, in the EPCOR Proceeding, it is appropriate to grant CPCNs on a conditional basis, subject to subsequent technical and financial acceptance, to the proponent that “demonstrates it has the lowest overall revenue requirement to provide an identified distribution service in the municipalities seeking that service”.⁶

The OEB cited the discipline related to cost control and the search for efficiencies in system expansion and operation as the primary benefit of the introduction of competition identified in the Expansion Decision:

All other matters related to cost allocation, rate design and the general management of the utility are ongoing concerns of the OEB which it manages as a matter of course with all regulated entities. The selection criteria can therefore be restricted to a comparison of revenues required for a specific identified service.⁷

This is not the first time that the OEB has engaged in a cost comparison of two utilities seeking to serve a new market.

In its Decision with Reasons in the combined service amendments proceeding RP-2003-0044 (the “Combined Proceeding”), the OEB examined the guiding principles in evaluating service area amendments to an electricity distributor’s license.⁸

The OEB stated that applicants should file evidence demonstrating that the proposed amendment is in the public interest, addressing economic efficiency, the impacts on the distributors involved and their customers, both inside and outside the amendment area, the mitigation of these impacts, and customer preference. Similar to the approach set out in PO No. 6, economic efficiency was identified as a primary consideration in assessing an electricity service area amendment application.⁹

Insofar as the weighing to be attributed to these criteria, the OEB determined in the Combined Proceeding that:

... the Board finds that customer preference is an important, but not overriding consideration when assessing the merits of an application for a service area amendment. Customer choice may become a determining factor where competing offers to the customer(s) are comparable in terms of economic efficiency, system planning and

⁴ Ontario Energy Board, Procedural Order No 2, *South Bruce Expansion Applications*, EB-2016-0137/EB-2016-0138/EB-2016-0139 (3 March 2017).

⁵ Ontario Energy Board, Partial Decision on the Issues List and Procedural Order No 6, *South Bruce Expansion Applications*, EB-2016-0137/EB-2016-0138/EB-2016-0139 (27 June 2017).

⁶ *Ibid* at 3.

⁷ *Supra* note 5 at 3.

⁸ OEB, *Decision with Reasons*, RP-2003-0044 (27 February 2004).

⁹ *Ibid* at paras 204-208.

safety and reliability, demonstrably neutral in terms of price impacts on customers of the incumbent and applicant distributor, and where stranding issues are addressed.¹⁰

[...]

... the Board finds that significant weight should be given to economic efficiency when assessing an application for a service area amendment. Failure on the part of an applicant to adequately demonstrate the economic efficiency of a service area amendment application will generally constitute sufficient grounds for the Board to turn down the application.¹¹

It is reasonable in light of PO No. 6 to anticipate that the OEB will adopt a similar approach to weighing economic efficiency and municipal preference in the EPCOR Application.

Establishing a Rate Stability Period Common Format for Applications

In PO No. 6, the OEB reached a partial decision on two of the issues in its Preliminary Issues List for Phase 1, namely the approval of a ten-year rate stability period for the expansion of natural gas into Southern Bruce and the establishment of a common format for applications proponents may use in determining their revenue requirements.

The OEB defined the “rate stability period” as the period of time that the proponent can expect to have its stated revenue requirement available from ratepayers to furnish all the capital and operating requirements that the identified service requires; during this period customers can expect relative rate stability since the proponent’s revenues relative to its controllable costs will be capped at a proposed level. The OEB added that rate stability period may include an allowance for externally driven, unforeseen events and annual financial allowance updates.¹²

The OEB will establish a rate

stability period of ten years for the expansion into South Bruce, as the OEB believes this structure and period of time would best serve customers through the benefits of completion discussed earlier. A standard period eliminates a potential variable between the proponents’ applications that could not be accurately quantified in monetary terms for comparison purposes. A rate stability period places the onus on the proponent to project its potential revenues and bear the risk for the 10-year period if customers do not attach to the system as forecast. The probability of customers switching away from their existing service is inversely impacted by the costs to serve that customer and its ensuing rates and tariffs. A function of the rate stability period is the downward pressure it places on costs due to the potential to increase the overall revenues of the utility.

[...]

At this juncture and in this case, the OEB sees merit in establishing common parameters for the proponents to use in determining their respective revenue requirements. The OEB will establish a Common Infrastructure Plan (CIP) as the basis for the proponents to determine their respective revenue requirements. Full consensus between the proponents on the plan’s “fit for purpose” design attributes is not required as the CIP will act as a relative proxy or sample plan to allow the OEB to undertake a comparison of the stated revenue requirements on a set of common parameters. The CIP will be used as the basis for the revenue requirement submissions.¹³

¹⁰ *Supra* note 8 at para 233.

¹¹ *Supra* note 8 at para 249.

¹² *Supra* note 5 at 4.

¹³ *Supra* note 5 at 4.

Next Steps

Pursuant to PO No. 6, EPCOR Southern Bruce Gas Inc. and Union Gas Limited were ordered to participate in a joint session with OEB staff to determine the technical parameters of the Common Infrastructure Plan for the area covered by the EPCOR Applications on July 13, 2017, with an update progress made to be provided to the OEB by OEB Staff on July 20, 2017.

While PO No. 6 confirms the OEB's view of its authority to approve CPCNs and gas franchise by-laws, the effects and ramifications of the emphasis on revenue requirement as the primary driver in granting CPCNs on a conditional basis in this case remain to be determined. ■