



ENERGY REGULATION QUARTERLY

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MISSION STATEMENT

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

EDITORIAL POLICY

The Quarterly is published by the Canadian Gas Association to create a better understanding of energy regulatory issues and trends in Canada.

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

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

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

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

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EDITORIAL

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

Managing Editors

Public policy is all too often driven by a perceived need to respond urgently to a ‘crisis’ – to be seen to be doing ‘something’. Insufficient attention is sometimes paid to analyzing the real nature of the problem at hand, with the result that legislative and regulatory responses frequently overreach.

Time will tell whether this may prove to be the case with Bill C-69 currently before Parliament, which (assuming it becomes law) would abolish the National Energy Board (NEB) and replace it with a very different Canadian Energy Regulator. The primary responsibility for reviewing proposed federal energy infrastructure projects would rest with a new Impact Assessment Agency (in reality, a recast and expanded successor to the Canadian Environmental Assessment Agency), with final decisions to be made by the Minister or Governor in Council. Bill C-69 is the government’s response to its pledge to “modernize” the NEB, but it goes well beyond that. The underlying premise is that the existing regulatory framework and process under the NEB is “broken”.

The University of Ottawa’s Positive Energy Research Team does not think the system is broken, but does think that it is in need of “informed reform”. In the most recent of a series of articles to be published by *ERQ* emanating from the Positive Energy project, Louis Simard submits that three main concepts – “Engagement, Information and Capacity” – are at the centre of the objective of improving the decision-making process to achieve a higher level of public confidence, oriented particularly on a “what is working” perspective.

Adam Fremeth provides “A Historical and Comparative Perspective on Ontario’s Electricity Rates”. He concludes that, while there is no doubt that electricity rates in Ontario have appreciated significantly over the past decade, there have been multiple historical episodes of rapid short-term rate increases followed by periods of slower growth and that U.S. states

with similar generation profiles to Ontario have also experienced long-term rate increases.

Amid the well-publicized setbacks experienced by proposed pipeline projects, two encouraging developments have occurred in recent months. The first is the announcement by Equinor Canada Ltd. (formerly Statoil Canada Ltd.) and the Premier of Newfoundland and Labrador in July of a framework agreement for the potential development of the Bay du Nord oil discovery located approximately 270 nautical miles (500 kilometres) offshore. In “Offshore Oil Development in Uncharted Legal Waters”, Rowland Harrison (one of the editors of *ERQ*) explores whether yet another federal-provincial dispute over resources may be in the offing.

The second significant development was the announcement in October that a final investment decision had been taken to proceed with the \$40 billion LNG export project proposed for Kitimat, B.C. Gordon Kaiser, also an editor of *ERQ*, discusses this development in “LNG Canada Breaks the National Regulatory Roadblock”.

In “Union Enbridge Merger”, Patrick Duffy and colleagues review the recent decision of the Ontario Energy Board approving the proposed amalgamation on Enbridge Gas Distribution and Union Gas Limited. The authors comment that the decision is significant for affirming that the ‘no harm’ test, traditionally applied in the electricity sector, can be used to assess consolidation in the natural gas sector. In their view, the decision also indicates a willingness by the OEB to allow monopolization of the natural gas industry in Ontario.

The final offering in this issue of *ERQ* is a review by Rowland Harrison of the recently-published *PIPE DREAMS: The Fight for Canada’s Energy Future*, by Jacques Poitras. *PIPE DREAMS* focuses on the rise and fall of Energy East but also presents a sweeping review of the issues and offers valuable insights into the underlying dynamics that have made recent Canadian pipeline projects so controversial. ■

ENGAGEMENT, INFORMATION AND CAPACITY: A LONG TERM PERSPECTIVE FOR A DURABLE ENERGY DECISION MAKING SYSTEM IN CANADA

*Louis Simard**

INTRODUCTION

While questions related to policies, programs and energy projects have been common for many years, they remain and are perhaps more complicated than ever. It could be seen as a cliché to say that we are living during a historic turning point. The rapidity of technical and economic changes, the number of stakeholders and the diversity of interests concerned, the plurality of interrelated aspects, the amount of information being produced, and the level of politicisation create a very high degree of difficulty for all sorts of decision-making processes, from policies to projects. As we know,

energy decision-making can create controversy, opposition and take longer than originally planned. Many groups and stakeholders are asking for changes. Public confidence is fragile, demands for more engagement and information are recurrent and some processes are questioned or contested. The *Positive Energy Research Team*¹ does not think the system is broken, but does think that it is in need of ‘informed reform’ – reform that explicitly takes into consideration the policy, planning, regulatory, market and physical energy systems, along with the rise of municipal and Indigenous authorities in energy decision-making. So, when it comes to engagement, information and capacity, how

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¹ The University of Ottawa's Positive Energy project seeks to strengthen public confidence in Canadian energy policy, regulation and decision-making through evidence-based research and analysis, engagement and recommendations for action. See University of Ottawa, Positive Energy, online: <<https://www.uottawa.ca/positive-energy>>.

can we improve the process? At this particular moment in Canada, when we are dealing with the implementing stage of the regulation reform, this paper wants to concentrate on those three notions, especially at the upstream and downstream levels of decision-making, and notably for long term policy development and project implementation.²

The challenge addressed here is how to improve the decision-making process to achieve a higher level of public confidence. Three main concepts are at the centre of this objective: engagement, information and capacity. Oriented as much as possible on a “what is working” perspective, the paper explores and develops some processes, tools and practices that illustrate notions. All three sections propose avenues to pave the way for greater public confidence and better decision-making processes in the Canadian energy sector. Part 1 is dedicated to engagement by exploring the principles underpinning best-practices. Part 2 concerns collaborative policies and strategic environmental assessment (SEA) as means to improve upstream decision-making processes and favour clear and shared policy orientations and objectives. Part 3 is focused on a downstream organizational and project perspective and is devoted to implementation and management practices.

These suggested avenues must be developed within the Canadian context of balancing engagement, information and capacity with the realities of a market-based energy system,

where investors are looking for timeliness, predictability (in process, if not outcomes) and competitiveness with other jurisdictions. As the Positive Energy Research Team has stated, it is necessary to address the challenges by establishing a workable balance between key energy imperatives: (a) market, competitiveness and economic imperatives; (b) environmental, social, local and Indigenous imperatives; and (c) security, reliability and affordability imperatives.

1. Engagement as co-construction: principles

Things have changed since the 1990s. Public dissent regarding policies and projects is organized and systematic and especially strong in the environmental and energy sectors. We can observe a dynamic “market” of public engagement: a great variety of tools that have, to a certain degree, the objective, at least in appearance, to consult and invite civil society to discuss and influence decision-making for the development and implementation of policies and projects. Some specialists and academics called this the “deliberative turn”³ or “deliberative imperative”⁴ and whether we are fans or critics of those tools, they are here to stay. A real professionalization of public engagement⁵ is happening, which serves as an indicator of the institutionalization of the phenomena.

A panoply of approaches, processes and tools are now in use. We observe different sorts in different sectors. From town hall meetings to participatory budget, public hearings, follow-up

² The long version of this paper figures as a report produced as part of the *Positive Energy* initiative. See Michael Cleland & Monica Gattinger, *System Under Stress: Energy Decision-Making in Canada and the Need for Informed Reform*, (Ottawa: University of Ottawa (Positive Energy), 2017), which zeroed in on three core “stress points” in Canada’s energy decision-making system: (1) how to strengthen and clarify relationships and roles between policymakers and regulators; (2) how to balance local interests with higher-order regional, provincial, and national interests; and (3) how to strengthen engagement, information and capacity in energy decision-making. These stress points were the focus of three senior leaders’ workshops with diverse representation from government, Indigenous organizations, industry, ENGOs and academia. Workshop deliberations were informed by discussion papers and resulted in this and two additional interim reports: Stewart Fast, *Who Decides? Balancing and Bridging Local, Indigenous and Broader Societal Interests in Canadian Energy Decision-Making, System Under Stress – Interim Report #1* (Ottawa: Positive Energy, 2017), online: <http://www.uottawa.ca/positiveenergy/sites/www.uottawa.ca/positive-energy/files/positive_energy-who_decides_dec_2017.pdf>; Stephen Bird, *The Policy-Regulatory Nexus in Canada’s Energy Decision-Making, System Under Stress – Interim Report #2* (Ottawa: Positive Energy, 2017), online: <https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca/positive-energy/files/interim_best_practices_discussion_paper.pdf>. Readers are also directed to Michael Cleland & Monica Gattinger, *Durable Balance: Informed Reform of Energy Decision-Making in Canada*, (Ottawa: Positive Energy, 2018), online: <<https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca/positive-energy/files/180418-db-report-final.pdf>>, the final report for Phase 1 of Positive Energy. The author would like to thank Monica Gattinger, Mike Cleland, Stewart Fast, Stephen Bird, Rafael Aguirre, Laura Nourallah, Marisa Beck, Shawn Denstedt, Kim Scott and David Mullan for the comments and suggestions. The author, however, bears full responsibility for the article.

³ See John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, and Contestations* (Oxford: Oxford University Press, 2002); Simone Chambers, “Deliberative democratic theory” (2003) 6:1 Annual R of Political Science 307.

⁴ Loïc Blondiaux & Yves Sintomer, “L’impératif délibératif” (2002) 15:57 *Politix* 17.

⁵ Laurence Bherer, Maio Gauthier & Louis Simard, *The Professionalization of Public Participation Field*, 1st ed (New York: Routledge, 2017).

hybrid committees, concertation tables, online consultation, parliamentary commissions or referendums, there is a huge diversity of engagement processes. Those latter result from choices and affect the participative experience and outputs.

THE RECOGNIZED GENERAL PRINCIPLES OF PUBLIC ENGAGEMENT

Based on numerous works conducted on public engagement during the last 20 years⁶ on a theoretical or a practical perspective, we have identified a series of general principles which inform the implementation of those different processes. We propose eight (8) principles that in one way or another, and to different degrees, seem to be part of any rigorous process of public engagement. The underlying notion is *co-construction*, which occurs when a plurality of stakeholders are implicated in the production of a policy, a project, a category, a technical or knowledge dispositive⁷. Even if the capacity to participate in this co-construction depends in part on pre-existing power relations, which limits co-construction and how different points of view are taken into account,⁸ the main idea here is the relative continuity in the expertise and role of implicated stakeholders in articulating the different dimensions of projects and in specifying the possibilities. From this point of view, co-construction implies a type of engagement that is stronger than what is associated with concertation (cooperation) or consultation⁹.

8 PRINCIPLES FOR A RIGOROUS PROCESS OF PUBLIC ENGAGEMENT

1. *Upstream engagement:* consultation must start at the very beginning of the policy-making process or project investigation. Early engagement is important to build trust with stakeholders and to ensure that engagement outcomes can influence design. The screening of the options to resolve a problem or to develop an activity must be planned with the stakeholders and the affected groups/communities.

A necessary first step to support effective engagement is to establish a common definition and understanding of the issue or decision at hand. The problem definition should influence the choice of engagement tools. However, there are risks associated with initiating engagement processes too early when available information is still incomplete

2. *Inclusiveness:* the engagement process must include wide-ranging stakeholders. Exclusion is not well perceived or received and participants must be integrated at different stages, ideally with an open perspective. Imposing restrictions or basing the right to participate to an interpretative evaluation is poor engagement practices.¹⁰ Some stakeholders may have different status terms of legality and legitimacy, and

⁶ Notably, Loïc Blondiaux, *Le nouvel esprit de la démocratie. Actualité de la démocratie participative* (Paris : Seuil, 2008); Michel Callon, Pierre Lascoumes & Yannick Barthe, *Acting in an Uncertain World. An Essay on Technical Democracy* (Cambridge: MIT Press, 2009); Deloitte - Samson Bélair / Deloitte & Touche, "Ouvrir la porte à vos parties prenantes: la clé du développement durable", 2009, online: < http://globaldialogue.ca/doc/Ouvrir_la_porte_a_vos_parties_prenante.pdf> ; Thomas Dietz & Paul C. Stern (eds), *Public Participation in Environmental Assessment and Decision-Making* (Washington: The National Academies Press, 2008); IAIA, "Strategic environmental assessment performance criteria", (January 2002) International Association for Impact Assessment (IAIA) Special Publication Series No 1, online: <<http://www.iaia.org/uploads/pdf/sp1.pdf>>; Debra Sequeira & Michael Warner, "Dialogue avec les Parties Prenantes : le manuel des bonnes pratiques pour les entreprises réalisant des affaires sur les marchés en développement" (2007) International Finance Corporation Working Paper No 39916, online: < https://www.ifc.org/wps/wcm/connect/528c70804885c1e8b1cdb6a6515bb18/IFC_StakeholderEngagement_French.pdf?MOD=AJPERES>; Gene Rowe & Lynn J. Frewer, "The Concept and Enactment of Public Participation" (2005) *Science Technology Human Values* 30:2 251; Gene Rowe & Lynn J. Frewer, "Public Participation Methods: A Framework for Evaluation" (2000) *Science Technology Human Values* 25:1 3; Graham Smith, *Democratic Innovations: Designing Institutions for Citizen Participation*, 1st ed (Cambridge: Cambridge University Press, 2 July 2009).

⁷ Loose translation. Madeleine Akrih & al, *Dictionnaire critique et interdisciplinaire de la participation* (Paris : GIS Démocratie et Participation, 2013) *sub verbo* "co-construction".

⁸ Dominique Pestre, "Des sciences, des techniques et de l'ordre démocratique et participative"(2011) 1:1 *Participations* 210.

⁹ Loose translation. *Supra* note 7.

¹⁰ Some decision processes mandatory imply consultation activities, and in some cases, it is mandatory to consult specific stakeholders, as it is for Indigenous communities in line with the duty to consult.

qualifications may change over time. For example, the role of Indigenous communities and municipalities is increasing within decision-making for the Canadian energy sector.

3. **Information, transparency and clarity of the rules:** Access to reliable information is a prerequisite for effective and efficient energy decision-making by decision-makers in industry, policy and communities as well as by individual citizens. The rules of the process should be known in advance and must remain predictable. Opacity and improvisation must be avoided. Adaptability, however, can happen, by planning different options with clear conditions.
4. **Resources and access:** the participants must have the capacity to fully engage. They should have the resources and the time to really contribute to the process. Financing some activities or organizations/groups is an option that must be considered in some cases, even though different mechanisms can be used to assure access and engagement.¹¹
5. **Traceability and continuity:** it is important for the credibility of the engagement process that one can follow its timeline, retrace its steps and its results. Different synthetises must be produced to keep the process open and accessible in order to allow stakeholders to understand the decision result. It is a question of providing decision rationales – both at the sub-decision level, and at the overall decision level. Continuity in the process with follow-up activities/discussions will reinforce the relations between stakeholders and allow them to stay up to date on monitoring the effects of the policy/project.
6. **Influence, modification on the decision and the “no option”:** the engagement process has to be meaningful and show that it has some effect on the decision-making. It is a question of

trust, for now and for the future. For this reason, it is necessary to be able to see how the policy/project has been influenced and modified to one degree or another by the exercise and how the decision would be without it. Processes are not simply steps to follow or boxes to check, but rather real exercises in which modification or denial (if appropriate) is still a potential outcome. Expectations for any kind of pre-determined outcome are antithetical to the public trust needed for these processes.

7. **Negotiation and compensation:** In the last few years, the trend to incorporate negotiation and compensation has grown stronger, once the negative impact that a policy/project could have on specific groups/communities was recognized. The challenge here is to maintain the balance between local or regional stakeholders and public and national interest, even at the international level.¹² Identify the ‘win-win’ solutions is essential. An effective means for garnering support among diverse parties is to identify where their goals align.
8. **Efficiency:** What is the ‘workable balance’ between the appropriate breadth and depth of engagement? Limited resources require choices to be made. The costs and time of the process, including avoiding content repetition, are still important principles for engagement design. Technologies available must be mobilized so that efficiency can be achieved.

This section has discussed principles of engagement and these considerations have to be integrated within the Canadian energy context, modernization schemes, and within the reality of a market based system and the globalized competition between countries. The next sections contemplate how engagement can be improved and with what degree of institutionalization in energy policy development and project implementation – two circumstances that could benefit from

¹¹ For recent application of no. 3 and 4, see the Supreme Court decisions in *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 SCR 1069; *Chippewas of the Thames First Nation v. Ebridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 SCR 1099.

¹² This point surely takes different forms depending if it is the policy level or the project level.

increased public confidence and improved decision-making processes.

2. The upstream decision-making process: revisiting policy development

As Bird indicates,¹³ the regulation phase faces important challenges to assess and decide on projects when the upstream portion, i.e. the policy choices, are not clear. It is a thin and fragile line that divides the policy and regulation dimensions. Clear political orientations and policy objectives are necessary to protect the independence of regulators and prevent conflicts in their roles. In that context, an integrated approach based on collaboration and openness could be a key for better acceptance of results and a stronger coordinated system of policy-making decisions. Best practices could be studied and diffused.

Regarding governance and accountability, the Organization for Economic Cooperation and Development (OECD) has offered a variety of suggestions to improve regulation.¹⁴ Several of these apply to the policy level, with clear articulation of policy goals and principles of open government: transparency, clarity, engagement, public interest, and plain language.

2.1 Co-construction and Collaborative policy

Problem complexity, limited resources and time, the omnipresence of the media and the plurality of perspectives and interests command collaboration. There are different ways to collaborate and collaboration takes different forms. The organization of this collaboration is governance that includes engagement at different moments of a decision-making

process, with a goal to pursue the public interest and sustainable development. This general principle of co-construction can be embodied through *collaborative policy*. “Collaborative policy-making is a process whereby one or more public agencies craft a solution to a policy issue using consensus-driven dialogue with diverse parties who will be affected by the solution or who can help implement it”.¹⁵ Particularly used to deal with hard issues or complex sectors like environment and energy,¹⁶ collaborative policy appears as a source of innovation and contributes to better informed politicians and creating new solutions. We observe a proliferation of literature on this approach, both from academics and practitioners especially at the local level and from the U.S. west coast. Collaborative process brings engagement and public involvement a degree farther on a series of points.¹⁷ In the collaborative process, the objective is to search for a single voice, rather than only hear from all parties involved, in order to focus on interests and not only take positions.¹⁸ The primary focus is to find common ground, more than advocate for a point of view. Participants act more as decision-makers, and negotiation, as a standard practice, is usually in open sessions and not behind closed doors. Finally, the outcome is reported in one decision or in a document (principles, orientation, and policy) and the timing is adapted to the object and the challenges.

Changing leadership models is an imperative within this approach. A current trend is to listen and design forums by using “soft political power”.¹⁹ More interactive political leadership is a new way to conceive the democratic mandate through a permanent dialogue with civil society and stakeholders.²⁰ A recent initiative, *Generation Energy. Moving Canada forward*,

¹³ Bird, *supra* note 1.

¹⁴ *Ibid.*

¹⁵ Sacramento State, Center for Collaborative Policy, online: <<http://www.csus.edu/ccp/policymaking/policies.html>>.

¹⁶ E. Sørensen & S. Boch Waldorff, “Collaborative Policy Innovation: Problems and Potential” (2014) 19:3, *The Innovation J* 1.

¹⁷ Oregon Public Policy Dispute Resolution Program, “Collaborative Approaches: A Handbook for Public Policy Decision-Making and Conflict Resolution” (2000) Oregon Public Policy Dispute Resolution Program Working Paper; Gerald Cormick, Norman Dale, Paul Emond, S. Glenn Sigurdson & Barry D. Stuart, *Building Consensus for a Sustainable Future: Putting Principles into Practice* (Ottawa: National Roundtable on the Environment and the Economy, 1996).

¹⁸ Like Weible and Sabatier (2009) have shown, collaborative policies increase the convergence of beliefs from rival coalitions. Christopher M. Weible & Paul A. Sabatier, “Coalitions, Science, and Belief Change: Comparing Adversarial and Collaborative Policy Subsystems” (2009) 37:2 *Policy Studies J* 195.

¹⁹ E Sorensen & Jacob Torfing, “Strengthening Interactive Political Leadership through Institutional Design of Arenas for Collaborative Policy Innovation: Theoretical reflections and empirical findings” (Paper delivered at the PMRA conference, WashingtonDC, 8-11 June 2017).

²⁰ Some examples of governance typology are proposed in Fast, *supra* note 2.

is an interesting and concrete example of important dialogue activities with civil society in proposing new policy bases and a better place for citizens and engagement. This kind of initiative must be recurrent, formalized, planned in a cyclical fashion and linked directly to energy decision-making processes.

As Ansell and Gash emphasize,²¹ collaborative governance is formal, public, multilateral and consensus-oriented, including responsibility from stakeholders. For collaboration to happen, a series of conditions must be in place: a complex problem, major implementation challenges, face-to-face interaction, representation/diversity, trust building, horizontal power structure, embeddedness, commitment to the process, shared understanding of issues and intermediates outcomes.²²

Usually, collaborative policies are elaborated in different steps. Depending on the approach, we observed three to six steps which overlap to a certain degree.²³ Based on the model developed by the *Handbook for Public Policy Decision-Making and Conflict Resolution*²⁴ we describe four (4) main steps of the process and their major elements,²⁵ as were discussed during the leaders' workshop based on participants' different experiences, institutions and processes.²⁶

The first phase is the **Assessment Phase**. It is ideally conducted by a neutral agency or commission, to identify issues and stakeholders. The assessor will identify the stakeholders, the issues, the resources and the time, and the

potential conflicts that a public policy exercise could face. Sharing control is a condition that the sponsor must accept for the collaborative process to be successful.

The model proposes an exploratory exercise using interviews with stakeholders to identify major issues, interests and any need for more information, openness to a collaborative process, the next steps, snowballing to identify additional participants to engage. Early engagement is important to build trust with the community and to ensure that engagement outcomes can actually influence project design. A necessary first step in the engagement process is to establish a common understanding of the issue or decision at hand. The established problem definition should influence the choice of engagement tools. The result of the assessment phase is a report summarizing the key findings.

The **Convening Phase** uses a facilitator (the assessor or a third party or even a hybrid committee that represent different interests) who will plan the process, provide a statement of purpose, an agreement on ground rules, and the need to gather information. Sometimes, this gathering of information means educating one another or bringing more facts to the dialogue. However, in our case, with complex issues and a multifaceted sector, this phase will produce information.²⁷ Agreement on the information to be produced is important and a "joint-fact finding" approach can be adopted. Studies by expert committees can also be done on specific topics. International expertise or visits to sites, infrastructure and institutions can be arranged.

²¹ Chris Ansell & Alison Gash, "Collaborative Governance in Theory and Practice" (2008) 18:4 J of Public Administration Research and Theory 543.

²² *Ibid*; Kirk Emerson, Tina Nabatchi & Stephen Balogh, "An Integrative Framework for Collaborative Governance" (2012) 22:1 J of Public Administration Research and Theory 1; Peter DeLeon & Danielle M. Varda, "Toward a Theory of Collaborative Policy Networks: Identifying Structural Tendencies" (2009) 37:1 Policy Studies J 59; J.E. Innes & D.E. Booher, *Planning with complexity: An introduction to collaborative rationality for public policy*, (New York: Routledge, 2010).

²³ Lawrence Susskind & J. Cruikshank, *Breaking the Impasse* (New York: Basic Books, 1987); Barbara Gray, *Collaborating: Finding common ground for multiparty problems* (San Francisco: Jossey-Bass, 1989); Jurian Edelenbos, "Institutional implications of interactive governance: Insights from Dutch practice" (2005) 18:1 Governance: An Intl J of Policy, Administration and Institutions 111.

²⁴ OPPDRP, *supra* note 17.

²⁵ This model is enriched in the paper by other recent models. In general, we find the same phases more or less developed, one phase can be divided into two others and so on. Since it is only a model, it has to be adjusted in all cases to the policy issues, the context and the stakeholders.

²⁶ For example, the development of the energy-policy cycle in Quebec includes selected steps every ten years. The Bureau d'audiences publiques sur l'environnement du Québec (BAPE), an independent environment-related consultation agency, is responsible for a diversity of processes that can be compared with the collaboration steps.

²⁷ Could correspond to the SEA process that will be presented in the next section.

The **Deliberation and Negotiation Phase** begins once the information is available (studies, reports); different forms of consultation and engagement processes can be organized. Deliberation operates as a *forum*, a space where issues are defined and knowledge may be explained through various epistemologies; a spectrum of possibilities²⁸ is discussed. Many tools are mobilised and public debate is documented: from open and inclusive public hearings organised across the country, diffused by the Internet, live and podcasted to electronic exchanges, to presentations from expert panels, by themes or by region. When positions are known, negotiations can start with an integrative bargaining perspective, a “positive-sum” exercise. Negotiations can be set as an *arena* where interests are arbitrated, with proposed adjustments and priorities, orientations and objectives for the policy. The result of the negotiation is tested and refined in draft agreements, eventually binding the parties to their commitments and ratified by the representatives.

Lastly, the **Decision Phase** connects the agreement and the formal decision. The official policy content could differ from the agreement for some elements or detailed formulations. Trying to identify ‘win-win’ solutions is the objective, where goals align and where interests overlap. If collaboration is desirable, trade-offs implicate the responsibility and the legitimacy of elected representatives in our representative democracy. That said, it is important to keep contact with the participants, to inform, communicate and explain the choices made by the public authority in the final formulation of the policy. Planning a committee or some tools

and resources to monitor and evaluate the policy in line with the agreement may also occur.

The important question that remains is how far should we go concerning the institutionalization of collaborative approaches? Are ad hoc initiatives sufficient? Should we encourage permanent, cyclic and compulsory processes and institutions? This issue is fundamental to important reforms happening in Canada now. Engagement could help formalize the policy development process, to inject more collaboration, predictability, transparency and accountability and identify clear orientations and concrete objectives for the energy system.

2.2 Co-construction of information and knowledge sharing: Strategic Environmental Assessment

Different types of energy decisions require different types of information. For example, energy project decisions require highly localized data. In contrast, energy policy-making requires aggregate information at the national, provincial, regional or local levels. On one hand, science is an important source of information even if for different reasons that go beyond the scope of this article, it is regularly contested throughout the decision-making process.²⁹ Indigenous, vernacular, and citizen groups and individual knowledge and information also have relevance and must be part of the decision-making process.³⁰

A concrete tool that can be used to support a collaborative policy approach by addressing the important question of information is the Strategic Environmental Assessment (SEA).³¹

²⁸ This might include important distinctions for centralisation or decentralisation of energy production and coordination issues that this kind of choice implies. Some think that the Canadian energy sector suffers from institutional inertia. The increasing rate of local ownership of energy facilities causes a decentralization of power in the energy decision-making system away from large companies and toward (Indigenous and other) communities. The changing ownership structure is understood by many to promote democracy in the energy system.

²⁹ See Cleland & Gattinger, *supra* note 2. Canadians’ trust in the objectivity of science is low. A poll among 1,514 from August 2017 shows that 43 percent of the respondents believe that scientific findings are a matter of opinion (“Legerweb online survey”, Legerweb.com, 15-16 August 2017). As a result, communication of scientific information requires building relationships with various audiences and information has to be translated and communicated differently to reach them.

³⁰ Fast, *supra* note 2.

³¹ The environment must be understood here in its large sense, not only the restricted biophysical dimension. Economic and social dimensions are included as Sustainability Development includes the three pillars.

For more than 25 years, the SEA has been recognized as a rapidly developing field of research and application to foster sustainable development.³² It is the “natural extension” of the more diffused and institutionalised “Environmental Impact Assessment” (EIA) for projects, where SEA extends assessment to policies, plans and programs. The SEA has been defined as:

“a systematic process for evaluating the environmental consequences of proposed policy, plan or programme initiatives in order to ensure they are fully included and appropriately addressed at the earliest appropriate stage of decision-making on par with economic and social considerations.”³³

This instrument developed steadily on a global basis through the 1990s and 2000s, especially in Europe. Canada was among the main countries to plan its institutionalization, alongside the United States, Western Australia, New Zealand, the Netherlands and the European

Commission, i.e., countries governed by the European Directive on the SEA. “The SEA is being used, both formally and informally, in an increasing number of countries and international organizations”,³⁴ in several fields such as fisheries, forestry, waste management, town and country planning and of course in the energy sector.³⁵

The SEA process follows a number of steps, from screening to follow-up activities. “Even when the SEA is a statutory requirement, as is the case in Canada, the preliminary screening phase that determines the need for a SEA relies on a discretionary mechanism. Decisions generally depend on a significant or major impact of a policy, plan or program (PPP) rather than on lists of inclusions or exclusions”.³⁶ If the PPP implies some significant or potentially important environmental impacts, the screening phase will identify the terms of reference - the reasons for the SEA and scale of considerations³⁷. The scoping phase then identifies what the SEA must take into account. This phase proposes a state of the current situation, the environmental, social and economic objectives and the limitations of the SEA, by framing the different options to be

³² J.J. De Boer, & B. Sadler, “Strategic Environmental Assessment: Environmental Assessment of Policies (Briefing papers on experience in selected countries)” (The Hague: Netherland, 1996), Ministry of Housing, Spatial Planning and the Environment and International Study of Effectiveness of Environmental Assessment; T.B Fischer, “Reviewing the quality of strategic environmental assessment reports for English spatial plan core strategies” (2010) 30:1 Environmental Impact Assessment Rev 62; R.B. Gibson, “Sustainability assessment: basic components of a practical approach” (2006) 24:3 Impact Assessment and Project Appraisal 170; N. Lee & F. Walsh, “Strategic environmental assessment: an overview” (1992) 7:3 Project Appraisal 126; M.R. Partidario, “Strategic environmental assessment: Key issues emerging from recent practice” (1996) 16:1 Environmental Impact Assessment Rev 31; B Sadler & R Verheem, “Strategic environmental assessment: status, challenges and future directions” (The Hague: Netherland, 1996), Ministry of Housing, Spatial Planning and the Environment; S.P. Smith & W.R. Sheate, “Sustainability appraisal of English regional plans: incorporating the requirements of the EU Strategic Environmental Assessment Directive” (2001) 19:4 Impact Assessment and Project Appraisal 263; R. Théritel, “Systems of strategic environmental assessment” (1993) 13:3 Environmental Impact Assessment Review 145; R. Théritel & M.R. Partidario (eds), *The Practice of Strategic Environmental Assessment* (London: Earthscan, 1996) at 206.

³³ Sadler and Verheem, *Ibid.*

³⁴ B. Sadler, “Taking stock of SEA” in B. Sadler & al, ed, *Handbook of strategic environmental assessment* (London: Earthscan, 2011) 1.

³⁵ See Simone Caschili & al, “The Strategic Environment Assessment bibliographic network: A quantitative literature review analysis” (2014) 47:1 Environmental Impact Assessment Rev 14; Monica Fundingsland Tetlowa & Marie Hanusch, “Strategic environmental assessment: the state of the art” (2012) 30:1 Impact Assessment and Project Appraisal 15; At the same time, there is an institutional and mythological pluralism for SEA. See Bram F. Noble, “Promise and dismay: The state of strategic environmental assessment systems and practices in Canada” (2009) 29:1 Environmental Impact Assessment Rev 66 : “Indeed, some of the better examples (in Canada) have neither carried the SEA name tag nor occurred under its formal requirements” (at p 66). Noble specifies: “‘SEA type’ practices are ongoing in Canada, many of which carry no SEA label but are based, purposefully or not, on relatively sound principles and methodology. This suggests that there must be some real benefits to the SEA; the problem is that very little is known about such applications as SEA exists nowhere in a formal context outside of the federal Directive” (at p 73).

³⁶ M. Gauthier, L. Simard & J.-P. Waaub, “Public participation in strategic environmental assessment (SEA): critical review and the Quebec (Canada) approach” (2011) 31:1 Environmental Impact Assessment Rev 48.

³⁷ This general process is based, notably on M. Crowley & N. Risse, “L’évaluation environnementale stratégique : un outil pour aider les administrations publiques à mettre en œuvre le développement durable” (2011) 17:2 Telescope 1; Morten Bidstrup & Anne Merrild Hansen, “The paradox of strategic environmental assessment” (2014) 47: 1 Environmental Impact Assessment Review 29.

analysed, the implications for the projects linked with the PPP and the methodology to follow (data, epistemologies and consultations). The third phase consists of the evaluation of these options, their comparison and the solutions intended to reduce negative impacts and increase benefits. After that, the revision phase evaluates if the SEA is in accordance with the attempts and usually a consultation exercise is also planned to validate the information, the advice and propositions received and to be sure that the report and the conclusions are well-understood. Once conclusions are made and explained, the SEA report is sent to the public authority and usually released to the public.

From a good practices point of view, a successful SEA process must respect a number of criteria like the ones established in 2002 by the *International Association for Impact Assessment*: (1) integrated, (2) sustainably led, (3) focused, (4) accountable, (5) participative and (6) iterative.³⁸

The SEA, as a strategic and planning tool, involves a number of advantages and has the potential to contribute to a collaborative policy process. “The SEA can facilitate a proactive approach by ensuring that environmental and sustainability considerations are taken into account during early stages of strategic decision-making processes”,³⁹ by trickling-down sustainability and capturing large scale and cumulative effects⁴⁰ and with better consideration for alternatives.⁴¹ The SEA can improve planning transparency, including engagement of stakeholders by sharing information and interests to potentially decrease the risks of litigations, avoid delays and facilitate the acceptance and implementation of future projects.⁴² Cashmore et al.⁴³ also identified important benefits: learning outcomes – both

social and technical; governance outcomes – e.g. stakeholder engagement; and development outcomes – design choices, consent decisions; and attitudinal and value changes. Some authors also believe SEA helps to sensitize decision makers and enhance governance capacity.⁴⁴ In the current context of complex problems, pluralistic society and systematic dissent, the SEA appears more relevant than ever. As Lobos and Partidario mention: “it is believed that the dialogues enabled by the SEA could contribute to improve the quality of decision processes, leading stakeholders to work together collaboratively when making decisions”.⁴⁵ Furthermore, a coordinated SEA process with other levels of government (provinces, municipalities and Indigenous communities) can contribute to fill significant gaps in the availability of energy information given the way Canada’s constitution often generates problems of comparability of energy information across jurisdictions.

3. The downstream decision-making process: projects and co-management

At the other end of the decision-making process, we find the governance of individual projects. How can this part of the system be improved and as a result raise public confidence? Some management structures seem to be more efficient than others.⁴⁶ To reinforce information, capacity development and engagement, co-management can help tackle these issues. In this section, we define co-management at both the micro- and meso-levels in a long term perspective and at the downstream of the decision-making process.

Co-management is a notion that has been the object of a considerable research over the past few years, in different disciplines and on

³⁸ IAIA, “Strategic environmental assessment performance criteria” (2002) International Association for Impact Assessment (IAIA) Special Publication Series No 1, online: <<http://www.iaia.org/uploads/pdf/sp1.pdf>>.

³⁹ Tetlowa and Hanusch, *supra* note 35; A. Chaker, K. El-Fadl, L. Chamas & B. Hatjian, “A review of strategic environmental assessment in 12 selected countries” (2006) 26:1 Environmental Impact Assessment Rev 15.

⁴⁰ Lisa White & Bram F. Noble, “Strategic environmental assessment for sustainability: A review of a decade of academic research” (2013) 42:1 Environmental Impact Assessment Review 60.

⁴¹ Chaker, *supra* note 39; M. Crowley & N. Risse, *supra* note 37.

⁴² Crowley and Risse, *ibid*.

⁴³ M. Cashmore, A. Bond, and D. Cobb, “The role and functioning of environmental assessment: theoretical reflections upon an empirical investigation of causation” (2008) 88 J of Environmental Management 1233.

⁴⁴ G. Stoeglehner, “Effectiveness and Enhancing, S. E. A.: lessons learnt from Austrian experiences in spatial planning” (2010) 28:3 Impact Assessment and Project Appraisal 217.

⁴⁵ M. Partidario, W. Sheate, “Knowledge brokerage — potential for increased capacities and shared power in impact assessment” (2013) 39:1 Environmental Impact Assessment Rev 26.

⁴⁶ David Newell, Annica Sandström, Patrik Söderholm, “Network management and renewable energy development: An analytical framework with empirical illustrations” (2017) 23 Energy Research & Social Science 199.

different subjects. Co-management is usually defined as

“a situation in which two or more social actors negotiate, define and guarantee amongst themselves a fair sharing of the management functions, entitlements and responsibilities for a given territory, area or set of natural resources.”⁴⁷

Table 1 provides the principal characteristics attributed to co-management. Carlsson and Berkes⁴⁸ state that co-management can be situated on a continuum, from information exchange among the parties to full partnership. Two kind of specific tools are briefly presented. The first three tools count on long term relations with different kinds of stakeholders, sharing information, knowledge and expertise, activities that contribute to improved understandings, interests and values: long term general agreements; multi-level governance; and permanent relationships through organizational design. These must be considered as an investment and not as an expense or a waste

of time, signaling a cultural shift in the way we conceive relations between resources, communities, time and decisions. Three other co-management tools are project-related and based on engagement: impact and benefit agreements; partnership and ownership; and joint follow-up committees. They require production of information and imply capacity development. They have the potential to stimulate the learning process for stakeholders and could contribute to the project’s acceptability and raise public confidence.

3.1 Long term general agreement

This tool specifies the creation of a general agreement between the proponent and a specific group, a region, a territory or a large municipality. This long term option underpins a specific project, with a series of settlements associated with projects or specific activities. This kind of tool results from negotiation and solidifies better long-term relations between the proponent and a specific group of stakeholders. Subjected to review on a regular basis, it also informs future negotiations during a particular

Table 1 – Characteristics attributed to co-management

<ul style="list-style-type: none"> • A power sharing process; • A bridge between different types of stakeholders; • Integration of different forms of knowledge • Ongoing problem-solving process through a complex structure • Evolving process that implies negotiation and learning • Formulation of agreements 	<ul style="list-style-type: none"> • Time and resource consuming, taking longer to reach consensus • Certain disequilibrium of resources between parties • Adaptive communication tools • Third party “regulation” • Historical relations • Public confidence
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⁴⁷ This definition can also and will be applied to project management. G. Borrini-Feyerabend, M.T. Farvar, J.C. Nguingiri & V. Ndangang, *Co-management of Natural Resources: Organizing Negotiation and Learning by Doing* (Germany, Heidelberg: Kasperek, 2000).

⁴⁸ Lars Carlsson & Fikret Berkes, “Co-management: concepts and methodological implications” (2005) 75 J of Environmental Management 65.

project. A general agreement can also be made with a territory.

3.2 Multi-level governance capacity

In this co-management avenue, a variety of jurisdictions gather as a permanent standing committee to plan or perform activities at the regional level or on a specific territory, thereby creating a structure that regularly connects stakeholders. This tool could be particularly efficient to share understandings, interests and values and conducive to reach compromises or consensus.⁴⁹ Regarding natural resources, this approach could produce a regional integrated management plan.

3.3 Permanent relationships by organizational design

As mentioned for upstream policy development, building long-term relationships between decision-makers, communities and other groups is crucial to creating the 'safe space' that is necessary for the various parties to come together and openly discuss their views. In the perspective of organizational design, the proponent can create structures to stay in touch with the interests and concerns of different community organizations. The idea is to be present and aware of the issues and appear as a full partner for regional stakeholders. In that sense, the organization is not only the proponent of a project that could

face acceptability issues, but a development actor. The knowledge acquired by this indirect and long term co-management approach is very valuable, especially with time constraints.

3.4 Impact and Benefit Agreements (IBAs) and compensation

IBAs are usually defined in a document (agreement, convention, protocol), between the project proponent and individuals such as a landowner affected by new infrastructure (windfarm turbines, powerline pylons), or groups, located in an Indigenous community, a municipality or a region. The IBA may be required by law or agreed on a voluntary basis.⁵⁰ IBAs can be designed based on financial benefits, on contributions for specific projects (environmental protection, economic development) or on employment created directly and indirectly by the project. Other possibilities include the decrease of the electricity price or the municipality taxes.⁵¹ IBAs are seen nowadays as good practice⁵² and an integral part of projects, also helping improve acceptability.⁵³ The perception of inequality by civil society is an important factor that must be considered⁵⁴ and, in that sense, amounts of compensation and its fair distribution are sensible elements. For this reason, IBAs imply procedural justice issues,⁵⁵ such as who is receiving the compensation and how much it is.

⁴⁹ Salvatore Ruggiero, Tiina Onkila & Ville Kuitinen, "Realizing the social acceptance of community renewable energy: A process-outcome analysis of stakeholder influence" (2014) 4 Energy Research & Social Science 53; Nicolas Milot, "Institutionnaliser la collaboration : planifier le recours aux approches collaboratives en environnement" (2009) 9:1 Vertigo, online: <<https://vertigo.revues.org/8542#quotation>>; Joanne Heritz, "The multiplying nodes of Indigenous self-government and public administration" (2017) 60:2 Canadian Public Administration 289.

⁵⁰ For Indigenous communities, the Crown has the duty to consult and accommodate. See *supra* Fast (2018) concerning the differences between the Indigenous communities and municipalities.

⁵¹ See C. Walker & J. Baxter, "It's easy to throw rocks at a corporation": wind energy development and distributive justice in Canada" (2017) 19:6 J of Environmental Policy & Planning 754; MiningFacts.org (Fraser Institute) identifies six types of IBAs in the mining sector, signed with Indigenous communities: Labour provisions, Economic development provisions, Community provisions, Environmental provisions, financial provisions and commercial provisions. Online: <[http://www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-\(IBAs\)/>](http://www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-(IBAs)/>).

⁵² Jens Lüdeke, "Offshore Wind Energy: Good Practice in Impact Assessment, Mitigation and Compensation" (2017) 19:1 J of Environmental Assessment Policy and Management 1.

⁵³ Richard Cowell, Gill Bristow & Max Munday, "Acceptance, acceptability and environmental justice: the role of community benefits in wind energy development" (2011) 54:4 J of Environmental Planning and Management 539.

⁵⁴ T. Christidis, G. Lewis & P. Bigelow, "Understanding support and opposition to wind turbine development in Ontario, Canada and assessing possible steps for future development" (2017) 112 Renewable Energy 93.

⁵⁵ Walker, *supra* note 51.

3.5 Partnership and ownership

Another form of co-management tool consists of sharing the ownership of the project. In partnership with one Indigenous community or one or more municipalities, the proponent will approach the community as a full partner of the project, by sharing the benefits in a variety of ways. This is a higher level of co-management compared with IBAs. In the windfarm sector, research findings have been related to the level of public acceptance.⁵⁶ When local ownership is encouraged, there is a better perception towards the projects, due mainly to community engagement.⁵⁷ The ownership permits communities to get a better control of the decision-making process as they are included in the planning activities; trust, the base of a co-construction model, is generated.⁵⁸ Ownership appears to be the desirable way to enable a better use of project benefits that sometimes are dwarfed in the IBAs approach.⁵⁹ Indigenous ownership of energy project development has also become a force of reconciliation.

3.6 Joint follow-up committees

This tool creates a space for regular meetings and activities of stakeholders to implement and monitor follow-up programs regarding the environmental, economic and social impacts associated with a project. Committees may be established on a voluntary basis or because of conditions set forth by the public authority in authorizing the project. The members of the committees exchange information, knowledge and concerns. In Canada,

“Although the Act [Canadian Environmental Assessment Act] does not require the establishment of a follow-up monitoring and management

unit, such units would help to bridge the gap between data collection and decision-making. The “management” dimension of the unit’s mandate would make explicit its role as a catalyst for adaptive management.”⁶⁰

Issues related to this co-management option include stakeholders’ representation; the agenda definition; access to information; confidentiality; transparency; internal and external communication; and the freedom and resources at the committee disposal. The role of third parties is an interesting and real option to manage the relationship between the proponent, the community and the regulator.

This last element rings true to all the aforementioned co-management tools. Some of them are voluntary, others are mandatory. Either way, these tools depend on support of the elected representatives and the public authorities.

CONCLUSION

To face current and future challenges, the energy sector should opt for a co-construction perspective, by endorsing principles of engagement; activities should rely on inclusiveness, transparency and efficiency. Regulatory reform at the federal level is underway and important steps have already been taken. Some major principles have been adopted; some are consistent with a large number of recommendations made during consultation and discussion processes held by the government over the past two years and ones we propose in this article. However, the regulation phase is not the entire system, reason why this paper addresses other components of it.

⁵⁶ Rand & Ben Hoen, “Thirty years of North American wind energy acceptance research: What have we learned?” (2017) 29 Energy Research & Social Science, 135; Christidis, *supra* note 54; Jami, Anahita A & Philip R. Walsh, “From consultation to collaboration: A participatory framework for positive community engagement with wind energy projects in Ontario, Canada” (2017) 27 Energy Research & Social Science 14; Walker, *supra* note 51; C. Walker & J. Baxter, “Procedural justice in Canadian wind energy development: A comparison of community-based and technocratic siting processes” (2017) 29 Energy Research and Social Science 160.

⁵⁷ Jami and Walsh, *ibid.*

⁵⁸ Joel Krupa, Lindsay Galbraith & Sarah Burch, “Participatory and multi-level governance: applications to Aboriginal renewable energy projects” (2015) 20:1 Local Environment 81.

⁵⁹ Max Munday, Gill Bristow & Richard Cowell, “Wind farms in rural areas: How far do community benefits from wind farms represent a local economic development opportunity?” (2011) 27 J of Rural Studies 1.

⁶⁰ Government of Canada, “Community Engagement for Adaptive Management in Environmental Assessment Follow-up” by John F. Devlin, 2011, online: <http://publications.gc.ca/collections/collection_2011/ec/En106-99-2011-eng.pdf>.

The energy sector must reinforce the formalization of the policy-development process, in a collaborative way, based on an ambitious and productive process of assessment of possible options, informed by the principles of the SEA to identify orientations and objectives. Finally, it must develop co-management tools at the meso- and the micro-levels to harmonize the relationship among stakeholders on a long term perspective, by sharing not only the benefits of projects but also all gathered information; in short, the interests and the values of stakeholders of the energy system.

Inspired by three main themes, Engagement, Information and Capacity and their redeployment, choices have to be made. Ultimately, it is a question of how to create the political feasibility and trust for decision-making. This will depend on the degree of institutionalization developed for these avenues. As we have noted, efficiency and an acceptable balance must be found among stakeholders, taking into account current perceptions and the Canadian context of a market-based energy system. Limited resources require choices with regards to who should be engaged and to what depth. Assured timeliness, predictability and competitiveness is crucial. Key energy imperatives identified as (a) market, competitiveness and economic imperatives; (b) environmental, social, local and Indigenous imperatives, and (c) security, reliability and affordability imperatives must all be taken into account. ■

A HISTORICAL AND COMPARATIVE PERSPECTIVE ON ONTARIO'S ELECTRICITY RATES

*Adam Fremeth**

Changes in Ontario's electricity rates have been the subject of considerable public attention and discussion recently, with many analysts noting that residential rates have approximately doubled over the last decade.¹ But how do recent increases compare to previous decades and also to changes in rates in other jurisdictions? This Policy Brief provides a historical and comparative perspective on the development of Ontario's electricity rates from 1970 to 2015, the modern era of electricity in the province, which has seen the addition of commercial-scale nuclear generation capacity, creation of a wholesale power market, as well as newer initiatives to decarbonize generation and reduce consumption. Using statistical data from several sources, the Policy Brief finds evidence that (i) there have been multiple historic episodes of rapid short-term rate increases followed by periods of slower growth, (ii) U.S. states with similar generation profiles as Ontario have also experienced long-term rate increases, (iii) electricity costs in Ontario have risen at a more dramatic rate in the past decade than in prior decades, and (iv) the need to stimulate investment in new generation capacity after a significant decline in provincial capacity in the late 1990s was one contributing factor.

ELECTRICITY PRICING IN ONTARIO

To compare electricity rates and trends in Ontario against other provinces, this analysis uses Statistics Canada data from an annual survey of utilities, "The Annual Electricity Supply and Disposition Survey", which has been compiled each year since 1955 under various titles. Although there are some limitations to the data, it is the only source of comparable electricity sales and generation data across all provinces.² The U.S. Energy Information Administration publishes an identical dataset on state-level electricity costs and rates, facilitating comparisons between Canadian and U.S. electricity rates.

The Statistics Canada survey data enables a close proxy for average electricity rates to be calculated for each province - average utility revenue per kilowatt hour (kWh) - based on utilities' electricity revenues and the quantity of electricity sold in a province.³ Figures 1 and 2 depict the average revenue per kilowatt hour (\$/kWh) in Ontario from 1970 to 2015 for both residential customers and for all customer classes in nominal and real terms. The trends in the two figures are qualitatively similar: rates increased gradually

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¹ For a detailed discussion and analysis of recent electricity rate trends in Ontario, see "The Economic Cost of Generation in Ontario", Ivey Energy Policy and Management Centre, 2017.

² The survey is administered as part of the Integrated Business Statistics Program, and completing it is mandatory for all utilities. Survey data is found in Statistics Canada Table 127-008. The Ontario Energy Board's Utility Yearbook has similar data yet this publication is available only since 2005, and comparable publications do not exist for other provinces. The Statistics Canada data differs from the OEB data in a number of ways. For instance, the Statistics Canada reporting rate varies during the survey period, and it defines certain customer classes differently from the OEB. Nevertheless, the two data series correlate at 88 per cent, suggesting that the Statistics Canada data is a reasonable representation of Ontario electricity costs.

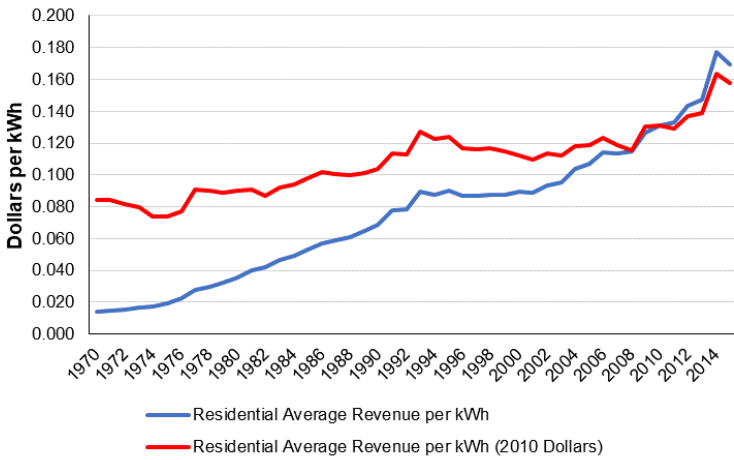
³ Data on electricity revenues and kWh sales has been included in each iteration of the Statistics Canada survey on the electricity sector and provide the longest cross-province proxy for electricity rates available in Canada. Utility electricity revenues are defined as the dollar amount of electric energy that is sold to all classes of final customers by distribution utilities. The survey asks, "What was the value of electricity delivered to the following types of end-use consumers?" and distinguishes between residential, farms, industrial, and other types of consumers. The survey asks an identical question with respect to the volume of electricity sold to end-use customers.

from the early 1970s to the early 1990s, remained relatively flat in real terms until around 2008, and then increased sharply after 2008. The compound annual growth rate (CAGR) for the residential and total electric utility revenue per kWh in real terms (2010 dollars) over the 1970-2015 period was 1.4 per cent and 1.7 per cent, respectively.

It is notable that prior decades have also witnessed episodes of rapid short-term real rate increases. Figure 3 charts the two-year moving average of

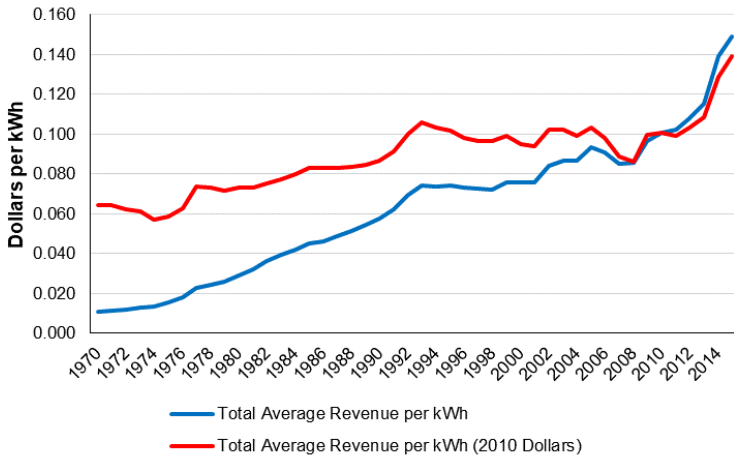
the annual percentage change in average electric utility revenue per kWh (in real terms), revealing episodes where rates have increased, decreased or remained relatively stable over time. The data indicate several periods of substantial annual real appreciation: the late 1970s, early 1990s, and the last decade. For instance, following the completion of Unit 2 at the Darlington Nuclear Power Station in 1990, utility revenue per kWh increased by 6 per cent in real terms on average each year from 1990 to 1993 – prompting the

Figure 1 Ontario Electric Utility Revenue per kWh for Residential Customers



Source: Statistics Canada: Electric Power Statistics, Volume 2 (1970-1996); Electric Power Generation, Transmission and Distributions (1997-2004); Supply and Disposition of Electric Power (2005-2015).

Figure 2 Ontario Electric Utility Revenue per kWh for all Customer Classes

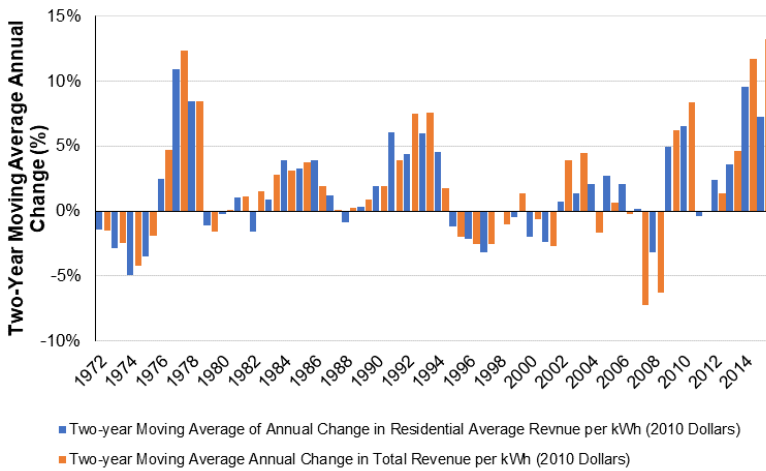


Source: Statistics Canada: Electric Power Statistics, Volume 2 (1970-1996); Electric Power Generation, Transmission and Distributions (1997-2004); Annual Electricity Supply and Disposition Survey (2005-2015).

government to institute a rate freeze that was continued for nearly a decade. The accumulation of significant electricity sector debt and the need to undertake infrastructure renewal eventually led a new government to lift the rate freeze in April 2004. There have also been intermittent episodes of decreases in average real electric utility revenue per kWh, partly driven by nominal rate reductions or freezes.

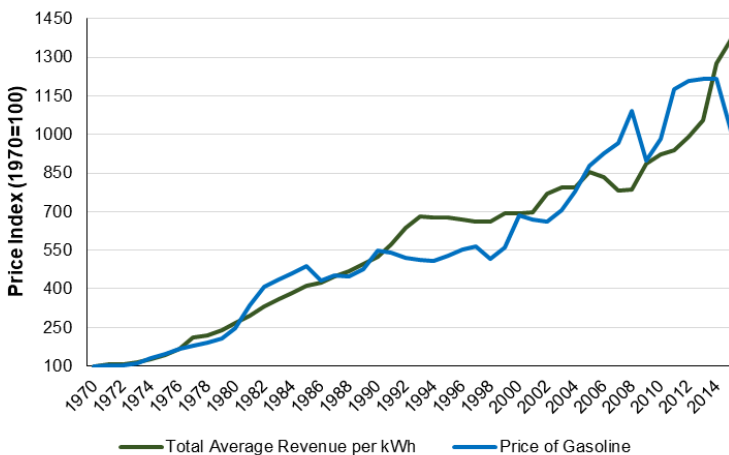
As a further benchmark comparison, Figure 4 compares the growth in real electric utility revenue per kWh to growth in gasoline prices since 1970. Growth in average utility revenue per kWh follows a steady and increasing trend for the bulk of the period of time. This trend becomes noticeably steeper following 2009, with a compound annual growth rate of 3.8 per cent. The price of gasoline, on the other hand, has also followed a similar rising, yet volatile, trend upwards, as is observed with the electricity measure.

Figure 3 Percentage Change in Ontario Electric Utility Revenue per kWh



Source: Authors calculation. Statistics Canada: Electric Power Statistics, Volume 2 (1970-1996); Electric Power Generation, Transmission and Distributions (1997-2004); Supply and Disposition of Electric Power (2005-2015); Cansim Table 326-0021.

Figure 4 Electric Utility Revenue per kWh, Gasoline Prices and Consumer Price Index (1970=100)



Source: Authors' calculation. Statistics Canada: Electric Power Statistics, Volume 2 (1970-1996); Electric Power Generation, Transmission and Distributions (1997-2004); Supply and Disposition of Electric Power (2005-2015); Cansim Table 326-0021.

ELECTRICITY PRICE TRENDS IN OTHER JURISDICTIONS

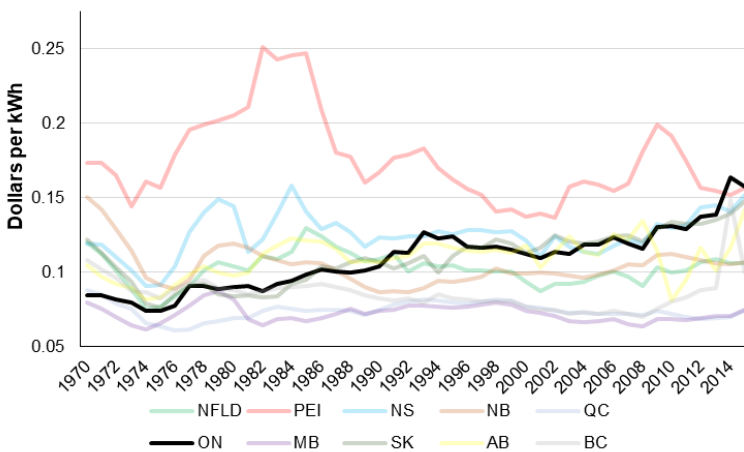
How does Ontario’s evolution of electricity rates compare to other provinces within Canada and to U.S. states? Figure 5 depicts average electric utility revenue per kWh for residential customers from 1970 to 2015 in real terms. At the beginning of the period, residential electricity rates in Ontario were on par with Canada’s two low-rate jurisdictions of Quebec and Manitoba, which have experienced very little growth in real terms over more than three decades. However, by 2015 Ontario had become one of the highest residential rate provinces, along with Prince Edward Island and Nova Scotia. Only Saskatchewan has undergone a similar transition from a relatively low-priced regime to a high-priced regime over the same period.

Figure 6 shows the growth rate of residential electricity rates for each province indexed to 1970 (in real terms). The majority of provinces have seen no significant growth in real residential electric utility revenue per kWh over the 1970-2015 period. In fact, some have experienced real reductions since 1970.

Besides Ontario, only Alberta, Nova Scotia and Saskatchewan – all of which have had significant coal-fired power generation - had residential electricity rates in 2015 that were higher than in 1970 in real terms.

Simple comparisons of electricity rates and trends across provinces can be misleading, however, since economic conditions and power generation resources and technologies vary dramatically. Ontario is the largest and most economically diverse province in the country, and its electric utility sector is the largest with employment over 35,000 workers. Ontario also has a unique generation supply mix which has changed substantially since 1970. Figure 7 illustrates electricity generation profiles across provinces at four points in time (1970, 1985, 2000 and 2015). Ontario’s generation fuel mix has evolved from a split between hydro and coal in 1970 to a more diverse mix of nuclear, hydro, renewables, and natural gas in 2015. Jurisdictions with a relatively low cost of electricity, such as Manitoba and Quebec, have had a stable supply mix dominated by low-cost hydro-electric generation.

Figure 5 Average Residential Electricity Revenue per kWh (2010 dollars)

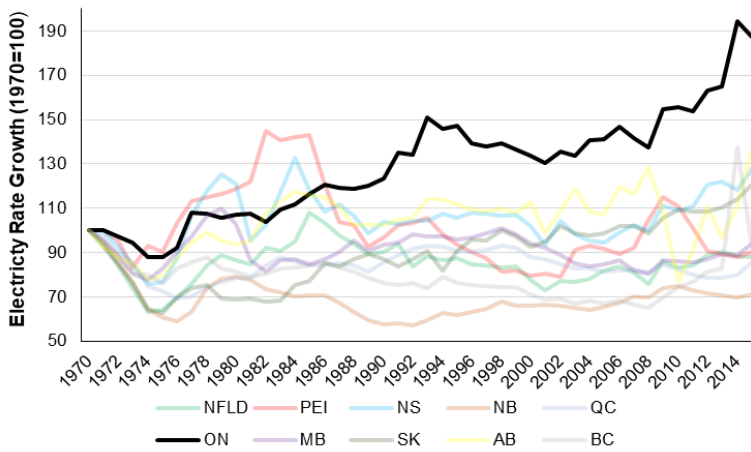


Source: Statistics Canada: Electric Power Statistics, Volume 2 (1970-1996); Electric Power Generation, Transmission and Distributions (1997-2004); Annual Electricity Supply and Disposition Survey (2005-2015).

While Ontario does not have an obvious comparator among the natural resource-based economies of other Canadian provinces, the composition of its economy with a focus on services and manufacturing is more comparable to some U.S. states. Likewise, the technology

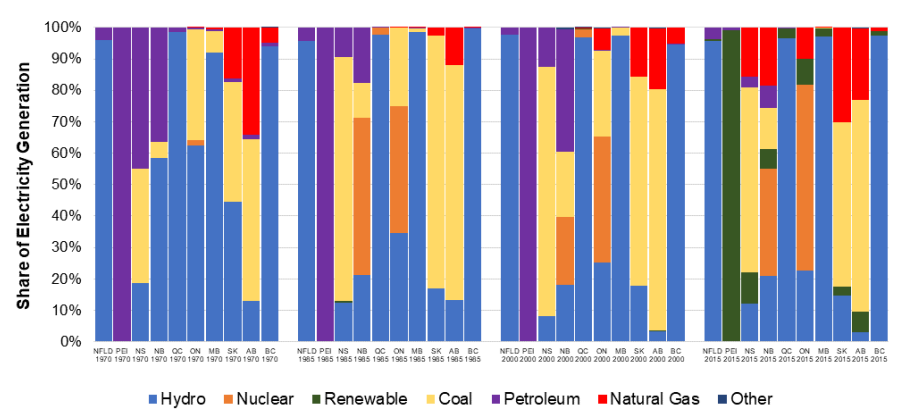
profile of electricity generation is more closely matched to some states than to other Canadian provinces. California, Michigan, New York and Ohio are similar to Ontario in terms of industrial composition and relative share of the national economy.

Figure 6 Index of Average Residential Electricity Revenue per kWh (2010 dollars) (1970=100)



Source: Authors calculation. Statistics Canada: Electric Power Statistics, Volume 2 (1970-1996); Electric Power Generation, Transmission and Distributions (1997-2004); Annual Electricity Supply and Disposition Survey (2005-2015).

Figure 7 Share of Provincial Electricity Generation by Fuel Type

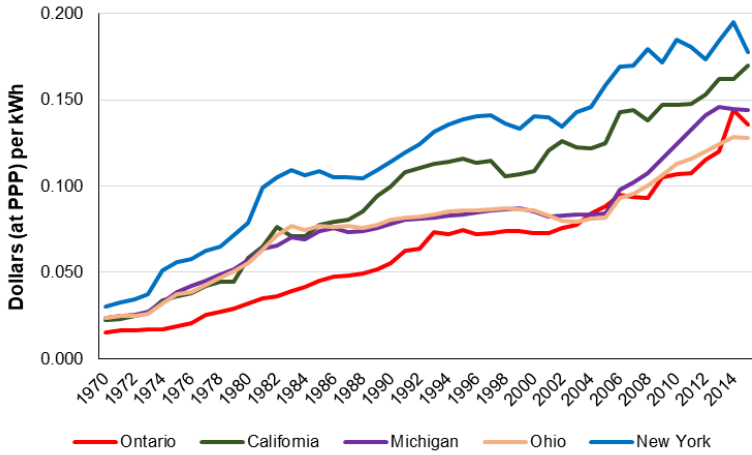


Source: Authors calculation. Statistics Canada: Electric Power Statistics, Volume 2 (1970, 1985); Electric Power Generation, Transmission and Distributions (2000); Annual Electricity Supply and Disposition Survey (2015).

Note: The renewable category includes electricity generated from wind, solar, tidal, and biogas sources.

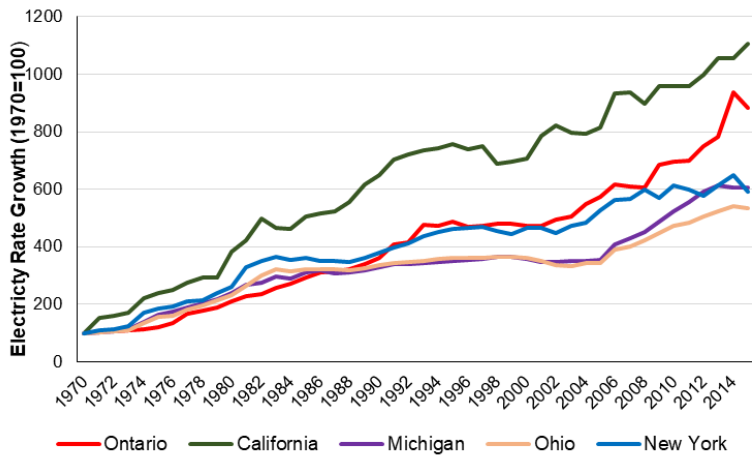
Figure 8a plots annual electric utility revenue per kWh for residential customers for these four states and for Ontario over the 1970-2015 period.⁴ They all depict an upward slope and, with the exception of the last two years, exceed Ontario's electricity revenue per kWh in each year. Compound annual growth rates for the four states range between 3.7 per cent and

Figure 8a Electric Utility Revenue per kWh for Residential Customers for Ontario and Selected States



Source: Statistics Canada: Electric Power Statistics, Volume 2 (1970-1996); Electric Power Generation, Transmission and Distributions (1997-2004); Annual Electricity Supply and Disposition Survey (2005-2015). Energy Information Administration: State Energy Data System (SEDS).

Figure 8b Index of Electric Utility Revenue per kWh for Residential Customers (Dollars adjusted for PPP, 1970=100) for Ontario and Selected States



Source: Author's calculation. Statistics Canada: Electric Power Statistics, Volume 2 (1970-1996); Electric Power Generation, Transmission and Distributions (1997-2004); Annual Electricity Supply and Disposition Survey (2005-2015). Energy Information Administration: State Energy Data System (SEDS).

⁴ Information on state average electricity rates is available from the U.S. Energy Information Administration's State Energy Data System. The data series is adjusted for purchasing power parity (PPP) using exchange rates from the Organization for Economic Cooperation and Development.

4.5 per cent, which is two to three times the growth rate for Ontario over this period. Figure 8b depicts the growth rates for Ontario and these four states since 1970. Ontario's growth rate closely matched that of New York State until around 2008, after which it diverged upwards. While electricity rates have grown more slowly in Michigan and Ohio, California's rates have generally grown faster than Ontario throughout the 45 year period. An alternative comparison examines U.S. states that have a similar electricity generation technology profile as Ontario. In 1990, Ontario had a fuel mix of generated electricity that included 46 per cent nuclear, 31 per cent hydro and 22 per cent coal. Arizona, New Hampshire, South Carolina, and Virginia had similar profiles with respect to fuel sources in 1990 (see Table 1). No state is

a perfect match for Ontario, but all four had a heavy reliance on coal and nuclear power.

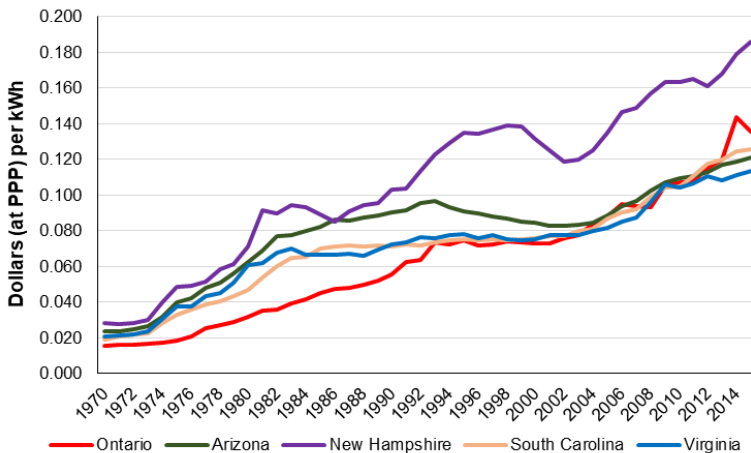
Figure 9a plots electric utility revenue per kWh for residential customers for these states, revealing a convergence in electricity rates (on a PPP exchange rate-calculated basis) with Ontario until 2012, with the exception of New Hampshire, which experienced a more rapid escalation. Figure 9b illustrates the trend growth pattern since 1970 for the same jurisdictions and shows how Ontario's growth was on par with these states until the mid-1990s, but then took on a distinctly steeper path after 2000.

By 2015, Ontario's fuel mix had changed substantially to 59 per cent nuclear, 23 per cent

Table 1 Share of Electricity Generation by Fuel Type in Ontario and Selected States in 1990

	Ontario	Arizona	New Hampshire	South Carolina	Virginia
Coal	22 per cent	51 per cent	24 per cent	33 per cent	45 per cent
Nuclear	46 per cent	33 per cent	33 per cent	60 per cent	45 per cent
Hydro	31 per cent	12 per cent	15 per cent	5 per cent	3 per cent
Natural Gas	0 per cent	4 per cent	0 per cent	1 per cent	2 per cent
Renewables	0 per cent	0 per cent	9 per cent	2 per cent	3 per cent

Figure 9a Electric Utility Revenue per kWh for Residential Customers for Ontario and Selected States



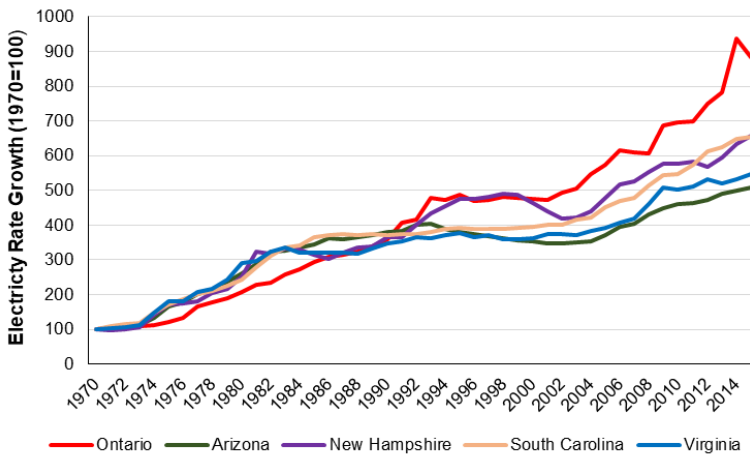
Source: Statistics Canada: Electric Power Statistics, Volume 2 (1970-1996); Electric Power Generation, Transmission and Distributions (1997-2004); Annual Electricity Supply and Disposition Survey (2005-2015). Energy Information Administration: State Energy Data System (SEDS).

hydro, 10 per cent natural gas, and 8 per cent renewable power (in terms of MWh generated) – similar to Connecticut, New Hampshire, New Jersey and New York. A key distinction for this set of comparators is that these states use little or no coal as a fuel for electricity generation. While they have not adopted coal moratoriums, as in Ontario, they have all seen dramatic decreases in the share of electricity generated from coal. For instance, Connecticut has reduced its share of coal from 24 per cent of electricity generated to less than 2 per cent in 2015. In addition, these states all rely on a significant amount of nuclear power, like Ontario (see Table 2 for a comparison of generation profiles).

Ontario’s average electric utility revenue per kWh (at PPP exchange rates) is the lowest among this comparator group over the whole period (see Figure 10a). In fact, New York had rates in 1970 that were double that of Ontario. Similar to Figure 9b, the growth trend depicted in Figure 10b is comparable to the four states until around the year 2003, after which Ontario’s growth rate accelerates when the rate freeze was lifted.

While much has been said about Ontario’s increasing electricity rates, the data presented here demonstrates how the selection of comparator jurisdictions is imperative for a proper analysis. Ontario does not have the highest electricity rates in North America,

Figure 9b Index of Electric Utility Revenue per kWh for Residential Customers for Ontario and Selected States (Dollars adjusted for PPP, 1970=100)



Source: Author’s calculation. Statistics Canada: Electric Power Statistics, Volume 2 (1970-1996); Electric Power Generation, Transmission and Distributions (1997-2004); Annual Electricity Supply and Disposition Survey (2005-2015). Energy Information Administration: State Energy Data System (SEDS).

Table 2 Share of Electricity Generation by Fuel Type in Ontario and Selected States in 2015

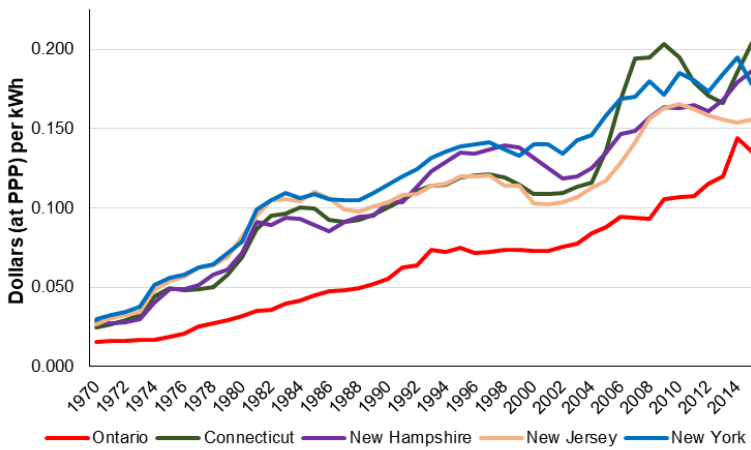
	Ontario	Connecticut	New Hampshire	New Jersey	New York
Coal	0 per cent	2 per cent	5 per cent	2 per cent	2 per cent
Nuclear	59 per cent	47 per cent	47 per cent	45 per cent	32 per cent
Hydro	23 per cent	1 per cent	6 per cent	0 per cent	19 per cent
Natural Gas	10 per cent	46 per cent	30 per cent	50 per cent	41 per cent
Renewables	8 per cent	4 per cent	11 per cent	3 per cent	5 per cent

despite having some of the highest rates in Canada. No province is like Ontario, and when one examines more comparable jurisdictions in the U.S., however, it becomes apparent how Ontario's rates and rate growth is on par with not only bordering jurisdictions that we compete with but also those that reflect the diverse generation portfolio of the province.

ELECTRICITY GENERATION CAPACITY TRENDS

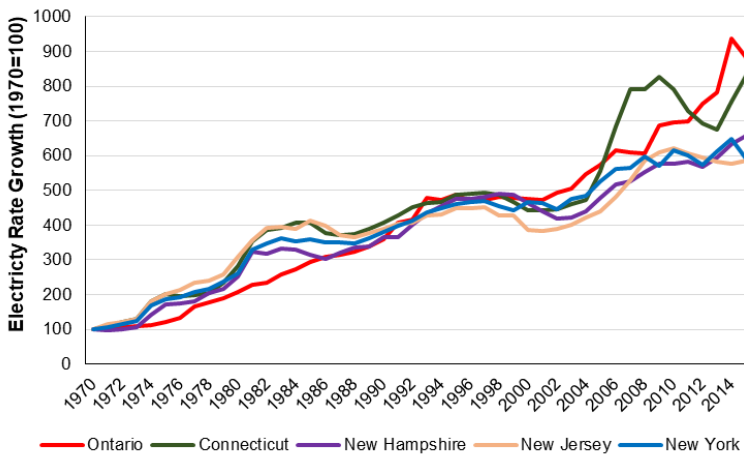
While the focus of this Policy Brief is on documenting trends in electricity rates, the Statistics Canada survey data also contains information on annual generation capacity in each province. Figures 11 and 12 show generation capacity and growth rates for

Figure 10a Electric Utility Revenue per kWh for Residential Customers for Ontario and Selected States



Source: Statistics Canada: Electric Power Statistics, Volume 2 (1970-1996); Electric Power Generation, Transmission and Distributions (1997-2004); Annual Electricity Supply and Disposition Survey (2005-2015). Energy Information Administration: State Energy Data System (SEDS).

Figure 10b Index of Electric Utility Revenue per kWh for Residential Customers for Ontario and Selected States (Dollars adjusted for PPP, 1970=100)

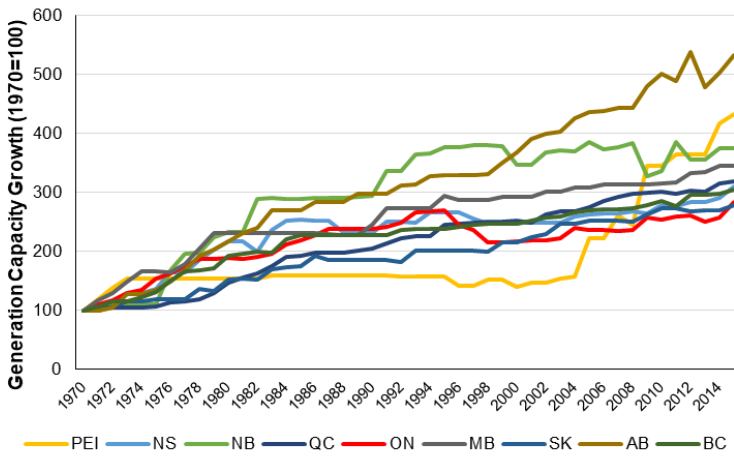


Source: Author's calculation. Statistics Canada: Electric Power Statistics, Volume 2 (1970-1996); Electric Power Generation, Transmission and Distributions (1997-2004); Annual Electricity Supply and Disposition Survey (2005-2015). Energy Information Administration: State Energy Data System (SEDS).

Ontario and other provinces since 1970. It is notable that Ontario experienced a significant 19.8 per cent decline in capacity - from a peak of approximately 37,000 MW in 1995 to 30,000 MW by 2000 - following the closure of eight nuclear generating units at the Pickering Nuclear Generating Station and the Bruce Nuclear Generating Station. This led to an overall capacity shortfall in the province, which motivated a subsequent push to rapidly develop new capacity, notably in gas-fired

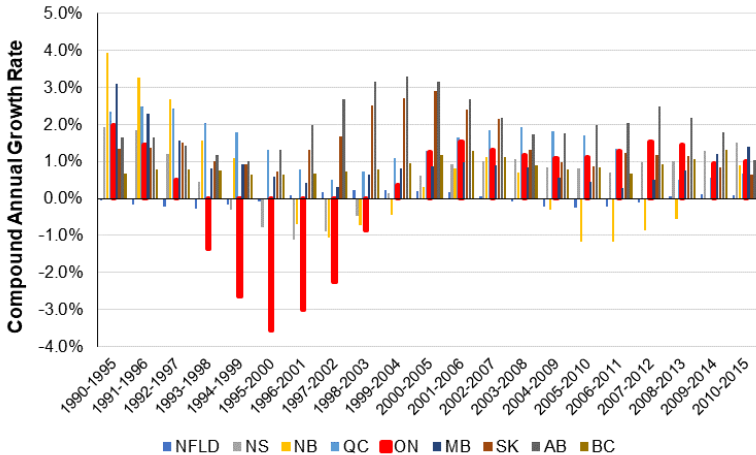
generation and later in renewable energy, reflected in above average annual capacity growth rates after 2000. The U.S. northeast and southern Canada blackout in 2003 further reinforced policies directed at stimulating private sector investment in new generation capacity. The rapid escalation in Ontario's rates after the mid 2000's, when much of this new capacity was completed and included in rates, reflects the economic impact of these prior capacity-building policies.

Figure 11 Provincial Power Generation Capacity (1970=100)



Source: Statistics Canada: Electric Power Statistics, Volume 2 (1990-1996); Electric Power Generation, Transmission and Distributions (1997-2004); Annual Electricity Supply and Disposition Survey (2005-2015).

Figure 12 Compound Annual Five-Year Growth Rates in Provincial Generating Capacity



Source: Statistics Canada: Electric Power Statistics, Volume 2 (1990-1996); Electric Power Generation, Transmission and Distributions (1997-2004); Annual Electricity Supply and Disposition Survey (2005-2015)

CONCLUSION

There is no doubt that electricity rates in Ontario have appreciated significantly over the past decade, yet simple comparisons can be misleading. Ontario's mix of power generation technologies, natural resource endowments, and economy are unique, making other provinces poor comparators. Comparisons with similar U.S. states can be more informative, and these suggest that while rates have increased they remain relatively moderate. Finally, the need to add generating capacity, replace old coal-fired generation capacity with cleaner burning natural gas plants, and upgrade ageing transmission infrastructure, were also important drivers. ■

OFFSHORE OIL DEVELOPMENT IN UNCHARTED LEGAL WATERS: WILL THE PROPOSED BAY DU NORD PROJECT PRECIPITATE ANOTHER FEDERAL-PROVINCIAL CONFLICT?

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

INTRODUCTION

In late July, 2018 Equinor Canada Ltd. (formerly Statoil Canada Ltd.) and the Premier of Newfoundland and Labrador announced a framework agreement for the potential development of the Bay du Nord oil discovery located approximately 270 nautical miles (500 kilometres) offshore.¹ Coming in the face of the impasse confronting proposed federally-regulated pipelines, and amidst widespread concern about the flight of capital from the Canadian oil and gas sector,² the announcement was greeted as a rare piece of good news for Canada's resources industries. It was heralded by the Premier as the first step into a new frontier, as well as a new era of deep-water exploration in a new basin, the Flemish Pass: "The future of our offshore begins today."³

The Bay du Nord discovery, together with the nearby Baccalieu discovery that would be included in the project, is estimated to have recoverable reserves of approximately 300 million barrels.⁴ Production rates are estimated to range from 90,000 to 188,000 barrels per day over 20 years, with first oil in 2025. Pre-development and development expenditures are estimated at \$6.8 billion. A final investment decision (project sanction) by Equinor and its project partner Husky Oil Operations Limited is expected in 2020. The province would hold a 10 per cent equity interest in the project.

Apart from its importance for the future of the Newfoundland and Labrador offshore oil industry, the project would also be significant in legal terms; it would likely be the first oil and gas development to be undertaken anywhere in the world beyond 200 nautical miles from shore.

* Energy Regulation Consultant, Calgary; Co-Managing Editor, *Energy Regulation Quarterly*. This article draws on research previously published as Harrison, "Article 82 of UNCLOS: The day of reckoning approaches", (2017) 10 *Journal of World Energy Law and Business* 488.

¹ Executive Council, Natural Resources, News Release, "Premier Ball Marks First Step into New Frontier for Oil and Gas Industry" (26 July 2018), online: <<http://www.releases.gov.nl.ca/releases/2018/exec/0726n01.aspx>>.

² See, for example, Canadian Association of Petroleum Producers, News Release, "CAPP Report: Canada falling behind" (26 February 2018), online: <https://context.capp.ca/articles/2018/feature_capp-economic-report>.

³ News release, *supra* note 1.

⁴ A detailed project description is found in the Project Description Summary filed by Equinor Canada Ltd. with the Canadian Environmental Assessment Agency, June 2018, online: <<https://www.ceaa.gc.ca/050/documents/p80154/123011E.pdf>>; See also Newfoundland and Labrador, Department of Natural Resources, *Bay du Nord Framework Agreement: Technical Briefing*, (Newfoundland and Labrador: Department of Natural Resources, July 2018), online: <<https://www.nr.gov.nl.ca/nr/energy/petroleum/offshore/projects/Final%20BdN%20Framework%20Agreement%20Technical%20Briefing%20July%202018.pdf>>.

As such, production from the Bay du Nord oil field would trigger Canada's obligation under Article 82 of the United Nations Convention on the Law of the Sea (UNCLOS)⁵ to make payments to the international community based on production. While the overall legal framework for exploring for and developing seabed resources on Canada's continental shelf beyond 200 nautical miles is well-established, Canada has yet to make any provision for meeting this particular obligation.

In developing its approach to the issue, Canada will be confronted by two challenging questions:

1. Who, as between government and industry, should ultimately bear the financial cost of meeting Canada's Article 82 obligation?
2. Having regard to the provisions of the Atlantic Accord⁶, under which Newfoundland and Labrador is entitled to "100 per cent of offshore resource revenues as if these resources were on land...", how would the fiscal burden be borne as between the federal and provincial governments?

UNCLOS – CONTINENTAL SHELF RIGHTS

Under Article 77 of UNCLOS, coastal states exercise "sovereign rights for the purpose of

exploring and exploiting" the natural resources of the adjacent continental shelf. Article 76 defines the continental shelf as comprising the sea-bed and subsoil in areas beyond the territorial sea "throughout the natural prolongation of [a coastal state's] land territory to the outer edge of the continental margin" to a **minimum** distance of 200 nautical miles. Where the continental margin in fact extends beyond 200 nautical miles, the outer edge is to be determined in accordance with a complex formula combining the thickness of sediments and distances out to 350 nautical miles – and potentially beyond in the case of certain natural components of the continental margin.⁷ Areas of the continental shelf beyond 200 nautical miles are referred to as the extended continental shelf, or 'ECS'.

Continental shelf rights are independent of the exclusive economic zone (EEZ) established under Part V of UNCLOS, frequently referred to as the "200-mile limit." While the location of the Bay du Nord discovery lies beyond the outer limit of Canada's EEZ, it is clearly within the outer limits of Canada's continental shelf rights under UNCLOS. Canada's claims in this regard are not disputed.

Canada has incorporated these rights into domestic law, particularly under the *Oceans Act*⁸ and various Acts that apply to the disposition of offshore petroleum rights and the conduct of operations in exercise of those rights.⁹

⁵ *Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 397 (entered into force as the "United Nations Convention on the Law of the Sea" on 1 November 1994), online: <http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf>.

⁶ Memorandum of the Agreement between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Oil and Gas Resource Management and Revenue Sharing ("Atlantic Accord") (11 February 1985), online: <https://www.servicenl.gov.nl.ca/printer/publications/aa_mou.pdf>; See also Arrangement between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Revenues ("Atlantic Accord 2005") (14 February 2005), online: <<https://www.gov.nl.ca/atlantiaccord/agreement.htm>>.

⁷ Paragraph 6 of Article 76 of UNCLOS establishes a general outer limit of the continental shelf of 350 nautical miles, but then provides that this limit does not apply "to natural submarine elevations that are natural components of the continental margin, such as plateaux, rises, caps, banks and spurs." Canada relies on this proviso to extend its continental shelf claim to include the Flemish Cap, which extends in places well beyond 350 nautical miles.

⁸ *Oceans Act*, SC 1996, c 31.

⁹ See also *Canada Petroleum Resources Act*, RSC 1985, c 36 (2nd Supp); *Canada Oil and Gas Operations Act*, RSC 1985, c O-7.

ARTICLE 82

Article 82 of UNCLOS requires the coastal state to make payments or contributions in kind in respect of the production of non-living resources beyond 200 nautical miles. Such payments must be made annually, commencing at 1 per cent in the 6th year of production and increasing by 1 per cent per year until the 12th year. Thereafter, the payments or contributions remain at 7 per cent. Payments or contributions are to be made through¹⁰ the International Seabed Authority to states parties to UNCLOS “on the basis of equitable sharing criteria...”¹¹

To date, Canada has not adopted any mechanism to actualize its obligation under Article 82. However, for some years, the Canada-Newfoundland and Labrador Offshore Petroleum Board (CNLOPB) has issued notices for parcels that include areas beyond 200 nautical miles that the holders of production licences may be required “to make payments or contributions in order for Canada to satisfy obligations under Article 82” of UNCLOS.¹² These notices state that such a requirement may be imposed “through legislation, regulation, licence terms and conditions, or otherwise...” The notices provide no further details.

WHO SHOULD PAY?

The international obligation under Article 82 is imposed directly on Canada (that is to say, the federal government), as the state party to UNCLOS.¹³ However, it is for Canada to decide

as a matter of domestic policy how it will meet its obligation – and specifically whether it will bear the financial cost itself or pass it on to industry. As will be discussed further below, it appears that passing the cost on to industry would not be possible within the framework of the Atlantic Accord as it currently exists and would negatively affect Newfoundland and Labrador’s fiscal return from any production beyond 200 nautical miles.

TWO VIEWS OF ARTICLE 82

The Quid Pro Quo View

Article 82 is often argued to have been the result of a *quid pro quo* settlement of an issue that permeated the negotiation of UNCLOS.¹⁴ According to this view, the payment to the international community that is required by Article 82 was the price paid for coastal states with wide continental margins (including Canada) being granted sovereign rights over the continental shelf beyond 200 nautical miles. Industry, as the primary and direct beneficiary of the exercise of those rights, so the argument goes, should pay that price.

Canada has not publicly subscribed to this view of Article 82. However, several reports in 2014 quoted a spokesman for the Department of Foreign Affairs, Trade and Development as writing in an email that “article 82 payments should be sourced from the benefits stemming from the associated offshore activity.”¹⁵

¹⁰ The word ‘to’ was used in early drafts of Article 82 and was intentionally changed to ‘through’. See “Issues Associated with the Implementation of Article 82 of the United Nations Convention on the Law of the Sea”, ISA Technical Study No. 4, International Seabed Authority, Kingston, Jamaica, 2009, at p 20, online, <<https://www.isa.org.jm/sites/default/files/files/documents/tstudy4.pdf>>; See also the discussion in “Implementation of Article 82 of the United Nations Convention on the Law of the Sea”, ISA Technical Study No. 12, International Seabed Authority, Kingston, Jamaica, 2012, at p 27, online: <<http://www.isa.org.jm/files/documents/EN/Pubs/TS12-web.pdf>>.

¹¹ The main role of the International Seabed Authority under UNCLOS is with respect to the exploitation of seabed resources in the area beyond the limits of national jurisdiction, that is to say, the area beyond the outer limit of the continental shelf. See in particular UNCLOS, *supra* note 5, PART XI, Section 4. The Authority’s only responsibility with respect to Article 82 is to identify the recipients of payments or contributions that are made under Article 82 and to serve as the vehicle through which such payments or contributions are made. To date, no recipients of payments or contributions made under Article 82 have been identified.

¹² Most recently in Call for Nominations No. NL18-CFN03 issued in August, 2018, online: <<https://www.cnlopb.ca/wp-content/uploads/landissuance/cfn03legal.pdf>>, at para 6. The practice of publishing such a notice appears to have begun with Call for Bids NL13-01 in May 2013.

¹³ The fact that the obligation under Article 82 rests with the federal government is acknowledged in the notices issued by the CNLOPB, *supra* note 12, which state that payments or contributions may be required “in order for Canada to satisfy obligations under Article 82...”

¹⁴ See, for example, Aldo Chircop, “Equity on the extended continental shelf? How an obscure provision in UNCLOS provides new challenges for the ocean governance”, *Sustainable Oceans: Reconciling Economic Use and Protection*, Dräger Foundation, 2013.

¹⁵ *Daily Oil Bulletin*, 12 August 2014.

THE ALTERNATIVE VIEW

This *quid pro quo* view of Article 82 is not, however, supported by the historical record and is directly contradicted by official positions tabled by Canada throughout the negotiation of UNCLOS. Canada consistently maintained that it had already acquired and exercised sovereign rights to the outer limits of its continental margin long before negotiations for UNCLOS even began in 1973.

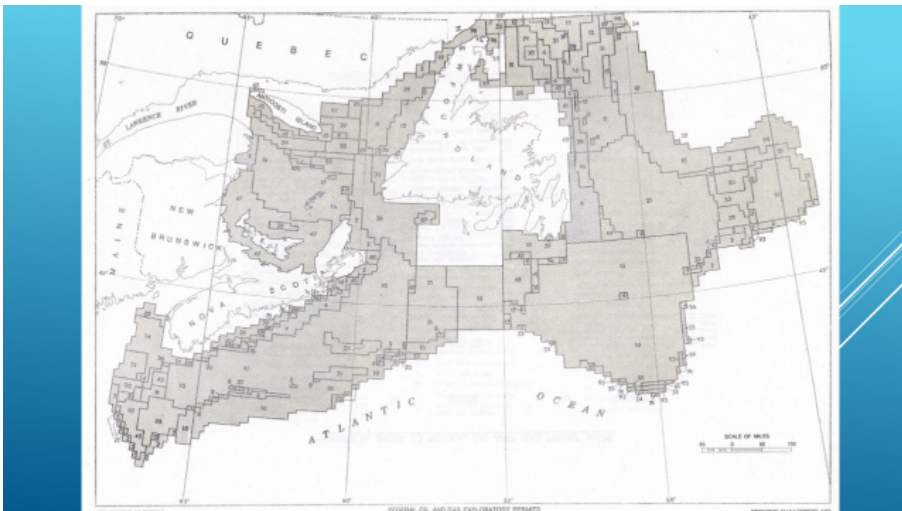
Indeed, Canada had begun exercising sovereign rights over areas well beyond 200 nautical miles by granting exploration permits beginning in the 1960s. By 1970, permits had been issued for virtually all prospective areas off the east coast out to a distance of more than 350 nautical miles. Figure 1 is the map, published by the federal Department of Energy, Mines and Resources, of “Federal Oil and Gas Exploratory Permits” for the Gulf of St. Lawrence and Atlantic as at January 1, 1970.

Throughout the UNCLOS negotiations, Canada consistently, and repeatedly, asserted that it

already held sovereign rights; Canada made it crystal clear that it was not looking to **acquire** such rights through UNCLOS. For example, on the eve of the third session of UNCLOS III in Geneva in 1975, the Secretary of State for External Affairs announced:

We are prepared to explore that possibility [of revenue sharing] and we are prepared to support that principle in order to promote an accommodation. The two conditions – and **I am underlining this** – on the basis of which Canada would be prepared to support such a principle would be: first, that **any agreement worked out would in no way derogate from our established sovereign rights out to the edge of the margin**; and secondly, that the financial contributions would go primarily to the developing countries, particularly the least-developed among them.¹⁶

Figure 1 shows that, by January 1, 1970, Canada claimed and was actively exercising sovereign rights over wide areas that extended more than 200 nautical miles offshore.



¹⁶ Statement by the Secretary of State for External Affairs, at a Press Conference in Geneva, May 1975 (emphasis added).

The basis of Canada's position was outlined in a paper tabled by Canada on the eve of the first session of UNCLOS III in December 1973:

The Canadian position regarding the limits of the continental shelf is based on the 1958 Convention itself, on the 1969 decisions of the International Court of Justice in the North Sea Continental Shelf cases (which defined the continental shelf as the submerged natural prolongation of the continental land mass) and on state practice. On the basis of these three legal foundations Canada claims and exercises rights over the whole of the continental margin comprising not only the physical continental shelf but the continental slope and rise as well.¹⁷

Clearly Canada was not looking to UNCLOS to acquire sovereign rights over the Extended Continental Shelf.¹⁸

This suggests that something more was at stake for Canada in reaching a successful conclusion to the negotiation of UNCLOS. Canada's other material, and arguably more immediate, interests throughout the period during which UNCLOS was being negotiated (1973 to 1982) included protection of the Canadian onshore nickel mining industry,¹⁹ management of its coastal fisheries, freedom of navigation, Arctic sovereignty and protection of the marine environment. Had UNCLOS not been concluded successfully, Canada's costs to protect its interests, including defense expenditures,²⁰ would likely have increased; in avoiding such

costs, the government of Canada itself was a direct beneficiary of UNCLOS.

From this perspective, Article 82 was but one of the prices paid, not for the acquisition of sovereign rights over the extended continental shelf, but for all of the benefits that flow to Canada from UNCLOS as a package. In this view, the cost of complying with Article 82 should be paid by Canada, on behalf of all beneficiaries.

This alternative view of Article 82 is also supported by the fact that UNCLOS was always regarded as a package deal that could not be teased apart into a series of specific trade-offs. For example, in the Introduction to the first publication of the official text of UNCLOS in 1983, the Special Representative of the Secretary-General of the United Nations for the Law of the Sea wrote:

The concept of the package pervaded all work on the elaboration of the Convention and was not limited to consideration of substance alone. It became the *leit-motiv* of the Conference and in fact permeates the law of the sea as it exists today.²¹

Canada consistently supported this conceptual view of the Convention, as reflected in numerous statements by Ministers and officials, both over the course of the UNCLOS negotiations and in the wake of the successful conclusion of the Convention.²²

THE ATLANTIC ACCORD

Should Canada nevertheless decide that the cost Article 82 should be passed on to industry as a

¹⁷ The position paper was published as Appendix H to the proceedings of the Standing Parliamentary Committee on External Affairs and National Defense, 6 November 1973.

¹⁸ From Canada's perspective, UNCLOS might, at most, **affirm** Canada's established rights.

¹⁹ At the time, Canada was the largest nickel producer/exporter in the world and the potential for deep seabed mining raised the specter of significant market disruptions. The Canadian nickel industry was also interested in itself participating in seabed mining exploration and development ventures. See further, Ontario, *The Future of Nickel and the Law of the Sea*, Mineral Policy Background Paper No 10, (Toronto: Ontario Ministry of Natural Resources, February 1980); See also Barry G. Buzan and Barbara Johnson, *Canada at the Third Law of the Sea Conference: Policy, Role, and Prospects*, Occasional Paper Series no 29 (Kingston: Law of the Sea Institute, University of Rhode Island, December 1975). Exploration and development activities for seabed minerals in areas beyond national jurisdiction has not in fact materialized as expected during UNCLOS III.

²⁰ In a 1979 interview for CBC Radio, J.A. Beesley, Head of the Canadian Delegation to UNCLOS III, referring to the potential for disputes if agreement was not reached, spoke of "the kinds of disputes that will almost certainly lead to force."

²¹ *The Law of the Sea: United Nations Convention on the Law of the Sea*, United Nations, New York, 1983, at p xix.

²² See, for example, speech by the Secretary of State for External Affairs to the Halifax Board of Trade, 25 February 1975.

component of the fiscal terms for oil and gas development on the extended continental shelf, it will be confronted by the terms of the Atlantic Accord, under which Newfoundland and Labrador is granted authority over establishing such fiscal terms and the right to 100 per cent of the revenues therefrom.

The purposes of the 1985 Atlantic Accord include providing “that the Government of Newfoundland and Labrador can establish and collect resource revenues as if these resources were on land, within the province...”²³ Under paragraph 2 of the Atlantic Accord 2005,²⁴ Newfoundland and Labrador “will continue to receive 100 per cent of offshore resource revenues as if these resources were on land...” The federal and provincial legislation implementing the Accord gives statutory effect to these provisions.²⁵

It is clear from these provisions that Canada could not flow the cost of meeting its obligation under Article 82 through to industry without the agreement of Newfoundland and Labrador. Furthermore, the province, not Canada, would have to implement such a proposal, through its fiscal arrangements with industry.

The question that immediately arises is: Why would Newfoundland and Labrador agree? In fact, there is an obvious reason why it would be reluctant to do so.

The gross revenue generated by any offshore oil development is determined by market prices, beyond the control of governments or developers. The portion of that revenue available for sharing between governments and developers (after allowing for the costs of development and a reasonable return on capital) is, therefore, fixed. If the cost of the Article 82 obligation were imposed directly on industry, the result would be a commensurate reduction in the portion of revenue available to be shared with the province. The Article 82 funds would be diverted from funds otherwise available for capture by the province; imposing the cost of the Article 82 obligation on industry would result

in Newfoundland and Labrador bearing at least part of that cost.

Any suggestion that this result could be avoided by simply requiring industry to absorb 100 per cent of the Article 82 cost ignores economic reality. The cost of offshore operations is directly affected by distance from shore. If anything, fiscal arrangements for operations beyond 200 nautical miles from shore should be less, rather than more, burdensome than for operations closer to shore than 200 nautical miles.

A further consideration points to why Newfoundland and Labrador might be reluctant to accept any proposal by Ottawa that could result in negative financial implications for the province. UNCLOS was signed by Canada on December 10, 1982 and the likelihood that it would come into force and be ratified by Canada was clear by the time the Atlantic Accord was agreed to in 1985. The Accord is, however, silent with respect to any possibility that the cost of Canada’s Article 82 obligation would be borne, directly or indirectly, by Newfoundland and Labrador. On the contrary, the Accord is explicit that the province “can establish and collect resource revenues as if these resources were on land, within the province...” Canada had the opportunity in 1985 to address the question of who would bear the ultimate cost of the Article 82 obligation and did not do so.

The province has a strong argument that any proposed pass-through by the federal government of the cost of Article 82 would be barred by the Atlantic Accord.

REVIEW OF THE ATLANTIC ACCORD

The Atlantic Accord 2005 provides that the agreement is to be reviewed no later than March 31, 2019.²⁶ On February 13, 2018, Premier Dwight Ball told the annual meeting of the Newfoundland and Labrador Oil and Gas Industries Association that the province had written to the Prime Minister initiating the review process with a view to improving the benefits to the province from offshore activities.

²³ *Supra* note 6 at para 2(e).

²⁴ *Ibid.*

²⁵ See *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*, SC 1987, c 3; *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*, RSNL 1990, c C-2.

²⁶ *Supra* note 6 at para 8.

Premier Ball was reported to have said that the review was being sought to try to extract more money for the province.²⁷ It is unlikely, therefore, that the province would be amenable to any proposal that it should assume, directly or indirectly, any part of the cost of complying with Article 82.

The Premier and the Prime Minister met subsequently but the only public information that followed from that meeting was a statement attributed to the Premier that the Accord “was being given the necessary attention at the highest levels in both the provincial and federal governments.”²⁸

INTERNATIONAL PRECEDENTS

Two jurisdictions²⁹ with extensive offshore oil and gas activities have established frameworks for the potential application of Article 82. Both pass the cost of the Article 82 obligation through to operators. However, each recognizes that the financial burden must ultimately be borne out of revenues that would otherwise accrue directly to government.

NORWAY

In the most recent licensing round in Norway for areas in the Barents Sea, announced on June 22, 2017, a notice stated that a licensee “may be required” to cover the expense of Norway’s obligation under Article 82. The notice also stated that “the cost can be deducted under the petroleum taxation.”³⁰ The paragraph does not provide that the cost of complying with Article

82 will be passed on, but merely that “the licensee **may be required** to cover this expense.”

U.S.

The U.S. is not a party to UNCLOS.³¹ The possibility of future accession to the Convention has nevertheless been acknowledged in recent lease sales that include areas beyond 200 nautical miles in the Gulf of Mexico.

Most recently, in February 2018, the Secretary of the Interior announced proposed Lease Sale 250, scheduled for August 16, 2018, for areas in the Gulf of Mexico.³² Lease Stipulation No. 6 in the Proposed Notice of Sale prescribes provisions that would apply if the U.S. becomes a party to UNCLOS “prior to or during the life of a lease issued by the United States on a block or portion of a block located beyond its EEZ as defined in UNCLOS...”³³ These provisions require the lessee to pay to the U.S. government an amount that corresponds to the value of the payments required by Article 82.³⁴ It is then provided that the lessee “will receive royalty credit [against royalties otherwise payable] in the amount of the UNCLOS-related royalty payment...”³⁵

COMMON FEATURE

Both the Norway and U.S. regimes provide that the respective lessees or licensees will receive credit for the amount of any Article 82 related payments, as a deduction in the calculation of petroleum taxation in the case of Norway and towards royalties otherwise payable in the U.S. In both cases, the clear intention is that any Article 82 related payment will not result in an

²⁷ CBC News, “Dwight Ball wants Trudeau to review Atlantic Accord”, *CBC News* (13 February 2018), online: <<https://www.cbc.ca/news/canada/newfoundland-labrador/dwight-ball-wants-sit-down-with-trudeau-1.4534195>>.

²⁸ Ashley Fitzpatrick, “Meeting with PM about more than Atlantic Accord: N.L. premier”, *The Telegram* (11 April 2018), online: <<http://www.thetelegram.com/news/meeting-with-pm-about-more-than-atlantic-accord-nl-premier-201151/>>.

²⁹ New Zealand’s *Continental Shelf Act*, 1964 requires the Minister to specify royalties in permits and licences for areas on the continental shelf beyond 200 nautical miles “at the rate specified” in the permit or licence. In specifying the rate, the Minister “shall have regard to New Zealand’s rights and obligations under article 82 of [UNCLOS].” 1964 No 28, section 5A, inserted on 1 August 1996 by section 4 of the *Continental Shelf Amendment Act 1996* (1996 No 71), as amended by subsections 7(1) and (2) of the *Continental Shelf Amendment Act 2013* (2013 No 16).

³⁰ Norwegian Petroleum Directorate, News Release, “24th licensing round – announcement” (22 June 2017), online: <<http://www.npd.no/en/Licensing-rounds/Licensing-rounds/24th-Licensing-round/Announcement/>>.

³¹ The issue of whether the U.S. should join UNCLOS has generated widespread controversy. See, for example, Stewart M Patrick, “(Almost) Everyone Agrees: The U.S. Should Ratify the Law of the Sea Treaty”, *The Atlantic* (10 June 2012).

³² Bureau of Energy Management, “Lease Sale 250”, online: <<https://www.boem.gov/Sale-250/>>.

³³ US, Department of the Interior Bureau of Ocean Energy Management, Gulf of Mexico OCS Region, *Lease Stipulations, Gulf of Mexico, Region-wide Oil and Gas Lease Sale 250: Final Notice of Sale*, online: <<https://www.boem.gov/Sale-250-Lease-Stipulations/>>.

³⁴ *Ibid.*, at para E.

³⁵ *Ibid.*, at para J.

additional cost to industry, except where that payment would be greater than any amount otherwise payable under the lease or licence. This feature recognizes that, ultimately, any Article 82 related payment must be treated as a component of government take and not as an incremental cost to industry.

CONCLUSION

The framework agreement for the development of the Bay du Nord project announced on July 26, 2018 appears to be silent on the question of who will bear the cost of implementing Article 82. This could suggest Newfoundland and Labrador will take the position that the issue is not one to be resolved between the province and the project developers, leaving Canada alone to absorb that cost.

If so, yet another federal-provincial stand-off over resource development would seem to be inevitable. ■

LNG CANADA BREAKS THE NATIONAL REGULATORY ROADBLOCK

*Gordon E. Kaiser**

INTRODUCTION

Just as world oil prices reached a four year high (as did the discount on Alberta oil) good news came from Vancouver. A joint venture of five international companies announced a \$40 billion investment in a liquefied natural gas project being built in Kitimat, British Columbia, the single largest private capital investment in Canadian history.¹

THE JOINT VENTURE

An impressive group of companies came together led by Shell Canada, Petro China, Malaysia's energy giant, Petronas, Japan's Mitsubishi Corporation and South Korea's Kogas. Shell owns 40 per cent, Petronas 25 per cent, PetroChina 15 per cent, Mitsubishi 15 per cent, and Korean Gas Corporation 5 per cent.

Each joint venture partner is responsible for bringing its natural gas supply and will individually offtake and market its LNG. TransCanada will build and operate the \$4.7 billion Coastal GasLink pipeline to connect the upstream gas supply to the LNG plant. The project will be constructed by a joint venture between Fluor Corporation of California and JGC Corporation of Japan, companies with extensive experience building LNG trains globally.²

THE REGULATORY APPROVALS

Coming on the heels of the Trans Mountain mess, it is welcome to hear that this project has a forty-year export license in place and all major environmental permits including approvals from the National Energy Board, Department of Fisheries and Ocean, BC Hydro as well as 25 First Nations. At the announcement, Crystal Smith, chief councilor of the Haisla First Nations, stated "On behalf of our entire nation we extend our gratitude for the investment being made in Haisla territory."³

What a refreshing comment. Amazing how 5 foreign multinationals could come to terms with 25 Canadian First Nations. It turns out they gave the landowners a share of the project yielding significant benefits over the project life.

THE GRAVEYARD

The new project comes on the heels not just of the Trans Mountain disaster, but also of the failures of Northern Gateway, Energy East, Pacific Northwest LNG and Aurora LNG. The difference is the strong support from 25 first Nations led by Haisla First Nation that thanked the Consortium for building the project on its lands and offering them a long-term revenue share.

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¹ LNG Canada, Press Release, "LNG Canada Announces a Positive Final Investment Decision: First large-scale LNG export facility in Canada receives a green light" (1 October 2018), online: <<https://www.lngcanada.ca/wp-content/uploads/2018/10/LNG-Canada-Takes-FID-Media-Release-October-1-2018.pdf>>.

² *Ibid.*

³ Levon Sevunts, "Ottawa, British Columbia and First Nations hail \$40B LNG investment", *Radio Canada International* (2 October 2018), online: <<http://www.rcinet.ca/en/2018/10/02/lng-canada-investment-ottawa-british-columbia-haisla-nation/>>.

This should signal some hope to Justice Frank Iacobucci as he addresses the mess in Trans Mountain after the Federal Court found the National Energy Board decision should be set aside.⁴ There is no reason that the landowners should not have significant participation in these projects.

The long term demand for LNG to serve Asia and Europe is very promising. Demand increased 50 per cent last year alone. With any luck Canada is about to leave a decade of failed energy projects behind.■

THE COMPETITIVE ADVANTAGE

The project has some unique competitive advantages. First it has access to low cost natural gas from British Columbia's vast resources. Second it enjoys a relatively short shipping distance to North Asia, which is about 50 per cent shorter than from the US Gulf of Mexico and avoids the Panama Canal. Kitimat is within 10 Shipping days of Tokyo and Shanghai compared to 24 days to Asia from the US Gulf Coast.⁵

The US Gulf Coast has another problem. US president Donald Trump decided to start a trade war with China and China in response slapped tariffs of 10 per cent on LNG leaving the Gulf Coast, a pleasant bonus for the Canadians.⁶

Asia is certainly the real target .The demand for natural gas is growing dramatically. This interestingly provides the project with a new environmental argument. This gas is being used in Asia to produce electricity. The gas fired facilities are replacing coal fired generation reducing carbon emissions by 50 per cent.⁷

THE PATH TO THE FUTURE

The LNG Canada approval has sparked an interest in related projects in Canada. Chevron has its own Kitimat project that is ready to go as is Bear Head LNG on the Straight of Canso between Nova Scotia and Cape Breton. Then there is Goldsboro LNG on Nova Scotia's Eastern shore which has already secured a major German customer to buy half of Goldsboro's permitted output under a 20 year contract.

⁴ John Paul Tasker, "Frank Iacobucci hailed as right pick to rescue 'failed' Trans Mountain process" *CBC News* (3 October 2018), online: < <https://www.cbc.ca/news/politics/tasker-trans-mountain-frank-iacobucci-indigenous-consultation-1.4849012>>.

⁵ Geoffrey MorGan, "LNG Deal Signals Revival of Mega Projects" *National Post* (3 October 2018).

⁶ Donna Borak, Katie Lobosco and Kevin Liptak, "Trump administration will impose tariffs on \$200 billion in Chinese goods" *CNN* (18 September 2018), online: <<https://www.cnn.com/2018/09/17/politics/us-china-tariff-trade-war/index.html>>.

⁷ Canada, Department of Environment and Department of Health, *Regulations Limiting Carbon Dioxide Emissions from Natural Gas-fired Generation of Electricity*, vol 152, iss 7 (Ottawa: Government of Canada, 17 February 2018).

UNION ENBRIDGE MERGER

Patrick Duffy, Patrick Corney and Sam Dukesz*

On August 30, 2018, a panel (the “**Panel**”) of the Ontario Energy Board (the “**OEB**”) approved a proposed amalgamation of Enbridge Gas Distribution (“Enbridge”) and Union Gas Limited (“Union Gas”) (together, the “**Applicants**”), pursuant to s. 43(1) of the Ontario Energy Board Act, (1998)¹ (the “**Act**”).² The Act requires a gas utility to obtain the OEB’s leave prior to amalgamating with any other corporation. In addition to hearing submissions from the Applications, the Panel heard from 23 intervenors.

The Panel’s decision is notable because the Applicants prepared their application on the basis of the OEB’s Handbook to Electricity Distributor and Transmitter Consolidations³ (the “**MAAD’s Handbook**”). As a result, the Panel provides clarity on how the MAAD’s Handbook will be applied to an amalgamation of natural gas distributors. In a related preliminary decision released earlier this spring, the Panel determined that the MAAD’s Handbook did not apply to the entirety of the issues before it, given that it had been tailored for the electricity industry. However, the Panel still relied on various elements of the MAAD’s Handbook to arrive at some of its decisions in the main proceeding, suggesting a willingness to incorporate principles from the electricity sector into the natural gas sector where it deems reasonable.

The amalgamation question was a gating issue. If the amalgamation was approved, a variety

of other issues governing the potentially newly amalgamated entity would have to be considered, including the length of its “rebasement period” (the period in which a utility is required to review their costs and revenues in order to ensure that their OEB approved rate pricing is not overly profitable to the detriment of consumers); and an earnings sharing mechanism related to profits earned by the amalgamated entity, among other issues. The Panel’s decision on rebasing and earnings sharing required a delicate balancing of consumer protection and business efficiency. This case comment will focus on how the Panel struck that balance in approving the amalgamation, imposing an accelerated ‘rebasement period’ and setting a conservative earnings sharing mechanism.

APPROVING THE AMALGAMATION

When considering whether to approve the proposed amalgamation, the Panel applied the ‘no harm’ test, which has been consistently used to assess mergers in the electricity sector since 2005. The ‘no harm’ test considers if the proposed amalgamation will adversely affect the six statutory objectives of the OEB, as delineated in s. 2 of the Act.⁴

In this case, the Applicants, OEB Staff and nearly all intervenors agreed that the amalgamation met the ‘no harm’ test and should therefore be approved. The Panel agreed, finding that the amalgamation would not negatively impact the reliability or quality of service from either

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¹ *Ontario Energy Board Act, 1998*, SO 1998, c 15, Schedule B, s 43(1).

² *Enbridge Gas Distribution Inc. and Union Gas Limited Application for Amalgamation and Rate-Setting Mechanism*, EB-2017-0306 & EB-2017-0307 (OEB).

³ Ontario Energy Board, “Handbook to Electricity Distributor and Transmitter Consolidations”, (Ontario: OEB, 19 January 2016).

⁴ *Supra* note 1, s 2.

entity, would not put the financial viability of the amalgamated entity in question and would not result in costs of service that are greater than they would be should the two entities continue to operate separately. The Panel's analysis focused exclusively on the aforementioned factors, which together comprise only two of the six statutory objectives of the OEB. By focusing on the transaction's impact on two of the six available statutory objectives, the Panel confirmed that an adjudicator may choose to focus on the statutory objectives it believes to be most directly relevant to the impacts of the proposed transaction.

Having approved the amalgamation in principle, the Panel then considered various issues that would govern the amalgamated company.

THE REBASING PERIOD

The Applicants asked that their next rebasing period begin in 2029. The Applicants argued that this 10 year deferral was necessary to ensure that the costs and savings related to the amalgamation were recorded prior to new rates being set. In support of their proposal, the Applicants noted that the MAAD's Handbook allowed consolidating electricity distributors to defer rebasing for 10 years without providing justificatory evidence.

In response, a number of intervenors noted that the costs and revenues of Enbridge and Union Gas were last examined a half decade ago, and that a 10 year deferred rebasing period would effectively decouple the Applicants' revenues from their costs for 15 years. Moreover, the intervenors argued that the MAAD's Handbook allowance did not apply, as it was intended to incent consolidation in the electricity sector, and that said consolidation was not a necessary incentive in a natural gas sector that only has three utilities.

The Panel agreed that the decade-long rebasing period allowance under the MAAD's Handbook did not apply because it was specifically adopted to incent the consolidation of electricity distributors. The Panel further found that 10 years was "too long to go without a full review" of the Applicants' costs and performance, especially in light of the lack of historical benchmarks by which to assess outcomes in the natural gas sector. Ultimately, the Panel approved a deferring the rebasing period for five years, finding that such a deferral would provide the Applicants with a reasonable opportunity to record the financial effects of the amalgamation while maintaining a rebasing period that was consistent with previous applications.

The Panel's decision would suggest that, in arriving at the term of a deferred rebasing period for a newly consolidated entity, future OEB Panels may distinguish between the electricity sector, with its proven benchmarks and consolidation incentives, and the natural gas sector, which contains few historical benchmarks and no consolidation incentives. Consequently, newly consolidated entities in the natural gas sector should not expect to be afforded the same latitude in choosing a deferred rebasing period as their cousins in the electricity sector.

PROFIT SHARING

The Applicants had proposed that, starting in 2024, any profits that were 3.00 per cent greater than the return on equity ("ROE") would be equally split between the entity and ratepayers. This proposal was crafted to align with the MAAD's Handbook, but was opposed by intervenors (and OEB Staff) for not sufficiently sharing profits with ratepayers. The Panel again agreed with the intervenors, and approved a mechanism that would equally and immediately split between the Applicants and ratepayers all profits in excess of 1.50 per cent from the OEB approved ROE. The Panel found that splitting any profits that were more than 1.50 per cent above ROE was a reasonable mechanism that functioned as a rough average of the existing profit sharing mechanisms employed by Union Gas and Enbridge.

CONCLUSION

Assuming Enbridge and Union Gas proceed with the amalgamation, the Panel's decision bestows regulatory approval on a near monopoly in the natural gas utility sector. The decision affirms that the 'no harm' test, traditionally applied in the electricity sector, can be used to assess consolidation in the natural gas sector, and that, where the adjudicator considers it reasonable, the principles of OEB guidance in the electricity sector can be imported to applications in the natural gas sector. It further suggests that, in applying the 'no harm' test, an adjudicator may focus on the statutory objectives of the Act that it believes will be most impacted by the proposed transaction. More broadly, the Panel's decision indicates a willingness by the OEB to allow monopolization of the natural gas industry in Ontario. However, while the OEB is seemingly open to that monopolization, the conservative rebasing period and profit sharing mechanism adopted by the Panel imply an increasing regulatory focus on consumer protection in the age of monopolization. ■

PIPE DREAMS: THE FIGHT FOR CANADA'S ENERGY FUTURE

Reviewed by Rowland J. Harrison, Q.C

As this issue of *Energy Regulation Quarterly* goes to press, the political and regulatory framework governing federal pipelines is in turmoil, resulting directly from the late-August decision of the Federal Court of Appeal quashing approval of the proposed expansion of the Trans Mountain Pipeline (TMX). Construction of TMX had begun and was immediately halted by order of the National Energy Board (NEB). The project faces a serious – possibly fatal – delay.

TMX is but one federal pipeline project that, since 2012, has been confronted by deep, divisive controversy in the regulatory, political and judicial arenas. The approval of Enbridge's proposed Northern Gateway was later quashed by the Federal Court of Appeal and the federal government then abandoned the project. TransCanada's Keystone XL was denied by President Obama, but later approved by President Trump. However, Keystone continues to face regulatory and legal challenges in the U.S. TransCanada's application for approval of its proposed Energy East project was withdrawn in the face of changed circumstances, including particularly an unanticipated broadening of issues that the National Energy Board proposed to consider in its review.

Jacques Poitras' *PIPE DREAMS* is a comprehensive account of the rise and fall of Energy East. It is, however, much more than the story of just one of these embattled pipelines. While focused on Energy East, *PIPE DREAMS* presents a sweeping review of the issues and offers valuable insights into the underlying dynamics that have made these projects so controversial. The real scope and value of *PIPE*

DREAMS are captured in its sub-title: *The Fight for Canada's Energy Future*.

Poitras' approach to his subject is novel; he personally drove the length of the proposed Energy East project, from Hardisty, Alberta to Saint John, New Brunswick. Along the way, he engaged – in the trenches, so to speak – with numerous individuals and groups, ranging from individual landowners (some of whom had had a long history with TransCanada's mainline on their properties), to municipal politicians, to Indigenous peoples (some of whom, particularly Carry the Kettle First Nation in Saskatchewan, supported the project¹) and others. He heard myriad views, ranging from concerns about potential specific impacts to the role of the project as a 21st century version of the national railway.

PIPE DREAMS is, however, more than a travelogue of Poitras' cross-country journey focused on issues specific to Energy East. He also describes the broader societal issues at the core of much of the controversy – climate change, Indigenous rights, regional aspirations and tensions, etc. He provides valuable insights into why many protesters focus on pipeline projects while their real concerns are much broader: "Stopping a pipeline wasn't going to stop climate change, of course, but it might shift the debate."²

Prior to TransCanada's withdrawal of its application to the National Energy Board, the Board's process for reviewing the Energy East project had been confronted by several challenges, particularly recusals by a number of Board members (including the chair and vice-chair) that necessitated the appointment of a new panel to

¹ Poitras offers a fascinating account of the history of this First Nation and its ancestral territory in the Cypress Hills, including the 1873 massacre recounted in the novel and movie *The Englishman's Boy*.

² Jacques Poitras, *Pipe Dreams: The Fight For Canada's Energy Future* (Toronto: Penguin Canada, 2018) at 125.

deal with the application. Poitras offers a valuable account of the events that led to the recusals.³

The recusals necessitated the appointment of a new NEB panel for the Energy East project, comprising members who had only recently been appointed to the Board. This new panel issued a revised draft List of Issues that included consideration of downstream emissions – a decision that, in Poitras’ words, “shocked the pipeline world.”⁴ After the Board later confirmed that it would indeed consider downstream emissions, TransCanada immediately suspended its application and, on October 5, 2017 announced that the application was formally withdrawn.

Poitras provides an objective discussion of whether the change in the scope of the Board’s criteria was the only factor that led to TransCanada’s decision. Other factors may have included the intervening approvals of TMX in Canada and of KXL in the U.S., arguably undermining the need for Energy East. There can be no doubt, however, that the Board’s decision to include consideration of downstream emissions was the immediate trigger for the decision. As Poitras notes, without the recusals resulting in the appointment of a new NEB panel, the processing of TransCanada’s application would have continued on the basis of criteria that had been established by the previous Board panel, rather than the broader criteria adopted by the newly-appointed panel.

There is another dimension to this saga that will interest energy regulatory lawyers: what might be learned about the role of developments in government policy during a tribunal’s **independent** review of specific applications? In Poitras’ view, the appointment of a new NEB panel following the recusal of the original panel gave the Board “a second chance...to adjust to a changing political context.” Indeed, the panel directly attributed its new criteria to, *inter alia*, “the federal government’s stated interest in

assessing upstream GHG emissions associated with major pipelines.”⁵

Poitras writes:

...TransCanada’s halting of its application was a reflection of an entire industry wondering what the future held. Was a new fossil fuel infrastructure possible in the rough-and-tumble collision of opinions inherent in a democracy, and was it even viable in a world grappling with climate change and a possible peak in oil demand?⁶

The question is a variation of that asked by Dennis McConaghy in his account of the denial of KXL by President Obama, *DYSFUNCTION: Canada after Keystone XL*:

Does Canada really share the fundamental conviction that developing its hydrocarbon resources is in their public interest? Since KXL’s demise, Canada has shown itself profoundly equivocal to that proposition.⁷

Indeed, the question is at the very core of the controversial debate around these and future energy infrastructure projects in Canada.

PIPE DREAMS is a highly informative account of the Energy East saga that makes a valuable contribution to understanding Canada’s current existential debate about the future of its oil and gas industry. It is also “a good read”, sprinkled with historical background and engaging accounts of some of the behind-the-scenes dynamics at play, such as corporate tensions encountered along the way between TransCanada and the Irving interests in New Brunswick. ■

³ See also Ron Wallace, “The Tortuous Path to NEB ‘Modernization’” (2018) 6:2 Energy Regulation Q 23, online: <<http://www.energyregulationquarterly.ca/articles/the-tortuous-path-to-neb-modernization#sthash.uJryw0EW.dpbs>>.

⁴ *Supra* note 2, at 227.

⁵ Letter from the National Energy Board to Interested Parties (23 August 2017), online : <<https://apps.neb-one.gc.ca/REGDOCS/File/Download/3320560>>.

⁶ *Supra* note 2, at 6.

⁷ Dennis McConaghy, *Dysfunction: Canada after Keystone XL* (Toronto: Dundurn 2017) at 137; See review Rowland J. Harrison, Q.C., “DYSFUNCTION: Canada after Keystone XL, Dennis McConaghy, Dundurn Toronto, 2017” (2017) 5:2 Energy Regulation Q 43, online : <<http://www.energyregulationquarterly.ca/book-reviews/dysfunction-canada-after-keystone-xl-dennis-mcconaghy-dundurn-toronto-2017#sthash.wx8ERJ4U.dpbs>>.