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

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Managing Editors

2018: THE CANADIAN ENERGY YEAR IN REVIEW

Each year when we write this Annual Review we face the same issues. The first issue on the list is always pipelines. In the 2016 Annual Review the first heading was "The Pipeline Delays are Over". Last year, the first heading of the review was "Pipeline Delays are Back". This year, the first heading is "Pipeline Delays Continue".

PIPELINE DELAYS CONTINUE

The events of 2018 regarding pipeline development in Canada are identical to 2017 except that there were new players. There were new players in the sense that there were different pipelines. But the regulator was the same – the *National Energy Board* (NEB).

In 2017, the pipeline at issue was the TransCanada Energy East pipeline. That was a $15.7 billion project to build a 4500 km pipeline from Alberta to the East Coast. The application was filed in April 2013. The argument was that Canada's East Coast refiners rely on imports for 80 per cent of the requirements and Alberta crude could replace that foreign crude. That argument seemed to have some merit.

Things went off the rails when the NEB suspended hearings until the Board could rule on a motion to remove two panel members on the grounds of an apprehension of bias. In the end, the NEB started over with three panel members and threw out all of the decisions the previous panel had made. To add insult to injury, following a change in government policy, the NEB panel issued a new decision allowing a consideration of greenhouse gas emissions including a ruling that, for the first time, the Board would consider the impact of upstream and downstream carbon emissions from the increased production and consumption oil resulting from the project. That was enough for TransCanada. In October 2017, the company threw in the towel and cancelled the project.

The events of 2018 were not much different, except the pipeline was different. In this case, it was the Kinder Morgan Trans Mountain pipeline. This was an application for approval of a $5.4 billion project to twin an existing pipeline from Edmonton Alberta to Burnaby, British Columbia. That application had also been first filed in 2013. The project was designed to increase capacity from 300,000 barrels per day to 890,000 per day and expand the tanker traffic in the Burrard Inlet from five tankers to 34 tankers per month.

That came to an end when the Federal Court of Appeal ruled there had been a failure to adequately consider the increased marine traffic (under the *Canadian Environmental Assessment Act*)[1] and a failure by the Crown in the constitutional requirement to adequately consult with the aboriginal bands affected.

Like TransCanada the year before, Kinder Morgan threw in the towel. But Kinder Morgan did it slightly different than TransCanada. The company gave the federal government a deadline to solve the problem.

The government's solution to the problem was to buy the pipeline for $5.4 billion. Whether that will solve the problem remains to be seen. There has been some good news however. On February 21 the NEB, on a re-hearing, approved the Trans Mountain project concluding that there were real environmental and aboriginal issues, but they were trumped by national concerns.

Just as important as the Federal Court's decision in Trans Mountain was the opposition from the Province of British Columbia. The new government in BC announced that it

[1] *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52.

was considering regulations to stop pipeline companies from shipping bitumen through the province. Alberta responded by saying it would no longer import BC wine or purchase electricity from BC's site C dam. In addition to the provincial government, Kinder Morgan had to contend with the Mayor of Burnaby just as TransCanada had to deal with the Mayor of Montréal. It turns out that big city mayors do not like pipelines either.

As this year's Annual Review goes to press, TransCanada announced it will remove the word "Canada" from the corporate name. Imagine that. This is the company that built Canada's first East-West pipeline more than 50 years ago. Now it will focus on the United States and Mexico where it can build facilities.

Alberta, the province whose population has paid significant income taxes to the federal government, now faces serious economic troubles with the decline in their energy industry. At 7a.m., it's still dark in Calgary during the winter. If you walk up from the hotel on the Bow River towards the city you face a line of gleaming buildings. The top half of most have no lights on. They are empty. It is called ghost space. The space is not even on the market. Their owners know that, in the current circumstance, the buildings are not rentable.

A NEW FEDERAL REGULATOR

Early in 2018 the federal government introduced Bill C-69[2], new legislation that would replace the NEB with the Canadian Energy Regulator or CER as it is now referred to. The CER is much more complex than the NEB. First, its scope is much greater. Its jurisdiction goes beyond federally regulated pipelines. The new regulatory reach includes offshore oil and gas exploration, production projects and potentially offshore renewable energy project.

Second, there are now three decision-makers. First is the Board of Directors that controls the CER. Then there are the members of the CER itself – the Commission members who will conduct hearings. Last, but not least, is the federal cabinet which has a veto on any decision of the CER.

To complicate matters, the factors that this new institution must consider are much wider than the NEB ever faced, or for that matter, any Canadian energy regulator currently faces. The new legislation requires that the review process must consider environmental, gender, and indigenous considerations or what is described as the intersection of sex and gender with other identity factors including Canada's ability to meet its environmental obligations and its commitments with respect to climate change. All that will keep the industry guessing for years.

Some argue that the new legislation creates investor uncertainty. But we cannot fault the government for trying. The NEB pipeline approval process had been under siege from all sides in recent times. In the new world, the fate of pipeline projects will no longer be decided by expert tribunals, instead the federal Cabinet will run the show.

TECHNOLOGY AND REGULATORS

The year 2018 saw the entire energy industry in Canada focus on technology and innovation. Every trade organization produced a conference or a study on the subject. The regulators also entered the game.

In Ontario, for example, the IESO established the Energy Storage Advisor Group. The goal of that organization is to identify the technology and other barriers to entry facing storage assets. The ability of storage to significantly lower electricity costs has long been recognized. Energy grids are necessarily built to handle the peak demand which is often reached less than ten per cent of the time.

In many respects the IESO initiative followed the Notice of Proposed Rulemaking the FERC in Washington issued a year earlier. The goal of that proceeding was to reduce barriers to energy storage and distributed energy resources. Ultimately the FERC directed the six regional system operators or RTO's to prepare plans dealing with the introduction of storage and DER resources in their respective marketplaces.

The IESO Energy Storage Advisor Group issued its report at the close of the year. It made a number of recommendations including a

[2] Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts,* 1st Sess, 42nd Parl, 2018.

request that regulators create a clear plan for the introduction of storage in the rate base of LDCs in the province. The Ontario initiative was followed up by a much broader inquiry by the *Alberta Utilities Commission* (AUC) into technology impacts on the electricity distribution system in Alberta.

The traditional scope of electric LDC's activities is also being questioned/pressured by new technology. Central generation is being replaced by local generation. Local Generation (and storage) can offer significant cost savings to consumers. If local distributors do not respond to these new market demands they could lose significant load. Customer owned generation is growing. Customers directly connected to generation do not need a distributor.

A generic inquiry into the role of the electric LDCs in deploying new technology is long overdue. The industry has long been concerned about the role of embedded generation and storage including the development of micro-grids. The question of where regulation starts and where it ends is on everyone's mind. The larger question is whether local distributors should become local generators and be in a position to take advantage of micro energy technology.

THE CARBON WARS

It is not just the provinces that were fighting each other in 2018. The provinces are also fighting the federal government when it comes to carbon taxes.

On October 31, 2018 the new Ontario government introduced the *Cap and Trade Cancellation Act*[3] which repealed the Ontario cap and trade regime brought in by the previous Liberal government. That legislation retired or cancelled emission allowances and offset credits held by Ontario participants under the regime.

The Canadian federal government then passed legislation indicating the provinces must enact a carbon regime acceptable to the federal government or the government would impose a tax. The proceeds from carbon pollution pricing would be returned to the federal government or the province the money came from.

Under the federal program, any provincial carbon pricing system to be determined compliant by the federal government must at a minimum establish a carbon price of $20 per ton of carbon dioxide equivalent by January 1, 2019. There must also be incremental increases in each year to reach $50 per ton by 2022. As indicated federal carbon pricing will apply to the provinces that have not implemented provincial carbon pricing system which meets the federal carbon pricing standard by January 1, 2019.

Currently Ontario, New Brunswick, and Saskatchewan are off side. In April 2018, the government of Saskatchewan commenced a reference case to Saskatchewan Court of Appeal to challenge the constitutionality of the federal carbon pricing regime. On October 14, 2018 the government Ontario followed suit in the Ontario Court of Appeal. The general wisdom from constitutional experts is that the federal government has jurisdiction.

It is worth noting that in November 2018 a class action suit was filed in Quebec seeking relief against the government of Quebec on the basis of its alleged inaction on climate change. The action was commenced by an environmental group that represents all Quebec citizens age 35 and under. This matter follows a number of class-action lawsuits in the United States in recent years.

The Quebec claim seeks a declaration that the government's behaviour contravenes the *Canadian Charter of Rights and Freedoms* (Canadian Charter)[4] and the Quebec *Charter of Human Rights and Freedoms* (Quebec Charter)[5]. In particular, the claim alleges that governments breach the section 7 right to life integrity and security the person and the section 15, right to equality, of the Canadian Charter and similar sections of the Quebec Charter.

The claim is in the procedural stage. In order to proceed it must be certified by the Quebec Superior Court. It is unclear at this point of the claim will be successful.

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[3] Bill 4, *Cap and Trade Cancellation Act (CTCA),* 1st Sess, 42nd Leg, Ontario, 2018.

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

[5] *Charter of Human Rights and Freedoms,* CQLR c C-12.

ONTARIO'S NEW ENERGY POLICY

In July 2018, the new Conservative government in Ontario enacted legislation that cancelled 559 wind and solar contracts. The government claimed this would save the Ontario taxpayers $790 million. Two of those contracts were wind contracts. The first was Otter Creek, a 15 MW wind project near Wallaceberg. The second was the Strong Breeze project, a 57 MW project near Belleville. The rest of the contracts were smaller solar contracts with the result that wind accounts for about 25 per cent of the cancellation capacity.

However, there was a third wind contract, the 18.5 MW White Plains project, in Prince Edward County that was singled out for special consideration and was subject to special legislation. That was because the project had received its notice to proceed (NTP). The only way this contract could be cancelled was to enact special legislation to design to do that. That is exactly what the new government did.

The cancelled wind projects had one thing in common. They were strongly opposed by the community which they were located. White Plains had an additional special feature in that its NTP had been granted by the previous government during the writ period. The new government argued that this was exceptional and unauthorized. The standard practice was that during the writ, the existing government should not enter into new contracts or make significant regulatory decisions which could bind the conduct of the future government.

While there was a great deal of publicity regarding these cancellations, they represent a small part of the capacity under FIT contracts in Ontario. At the end of 2017 the total wind capacity in Ontario was 2833 MW. The cancelled wind only amounted to 29 MW or 1 per cent of the total. In the case of solar, the total megawatts contracted for the IESO by the end of 2017 was 1659 MW. The cancelled solar was only 333 MW or 20 per cent. In short, the number contracts were large but the volume was small.

Of interest to many readers, in particular the developers, was the terms of compensation. These were established in the regulations and essentially provided for binding arbitration in the event dispute. It was noteworthy that most of these cancelled contracts had not reached the NTP and therefore the claimants were not entitled to lost profits. Compensation was largely limited to expenses incurred.

This was however, a major reversal in the trend across North America towards investment in renewable energy. The rational however was fairly simple. First, the new energy was expensive. Second, the province did not need the energy given that Ontario consumption has been declining for a number of years.

THE ALBERTA CAPACITY HEARING

Alberta is the second jurisdiction in Canada to abolish coal generation. This is not an exercise for the faint of heart. In Ontario, it led to an endorsement of FIT contracts based not on competitive bidding but on who arrived first at the doorstep of the IESO or the Minister.

In Alberta, the ISO recommended to the new government elected in 2015 that, given the proposed ban of coal-fired electricity generation, they should move to a capacity market to ensure that the lights would stay on. The government accepted this recommendation and charged the AESO with drafting the necessary rules. The AUC is charged with approving those rules and has 6 months from the date the application is filed to render its decision.

The application was filed January 31. The race is on. Intervenor evidence is due February 28. The hearing starts April 22 and finishes May 31. Final arguments are filed June 21.This is fast track regulation.

Capacity markets are not new. They are used in 25 U.S. states serving 150 million people. They are based on regular auctions for capacity by the RTO's with regulatory oversight of both independent market monitors and the national energy regulator, FERC.

There will be important lessons here for other Canadian jurisdictions. The Ontario IESO is said to be considering capacity market procurement for an incremental portion of its requirements. In Alberta however, the province is betting the farm and is moving to shift virtually all of its energy market to a capacity market. It will have some challenges but the Alberta Commission seems to be on top of it.

MERGERS AND ACQUISITIONS

2018 saw lots of utility mergers and acquisitions. Most were in Ontario. For the first time in

history, the acquisitions took place in both gas and electricity markets.

On March 18, 2018, the *Ontario Energy Board* (OEB) granted approval of the merger between Entegrus and St. Thomas, the acquisition of Midland by Newmarket on August 23, the acquisition of Collingwood by Epcor on October 1, the merger of Guelph and Alectra on October 18, the merger of Thunder Bay and Kenora on November 15 and the merger of Whitby and Veridian on December 20. It was a busy year.

One transaction was denied however. On April 12, the $41.3 million acquisition of Orillia by Hydro One was turned down. The OEB ruled that Hydro One had failed to provide sufficient evidence that the transaction would meet the no harm test. In coming to that conclusion the Board considered the rate increases Hydro was seeking in connection with three previously acquired utilities, Norfolk Power, Haldiman County Hydro and Woodstock Hydro. The intervenors argued that these rate increases were evidence that there were no cost savings for distributors previously acquired by Hydro one. Hydro One filed a motion for review but that was not successful. Hydro One subsequently filed a new application with additional evidence intended to meet the no harm test. The Board has yet to rule on that application.

For the first time in many years there has also been some activity in the gas sector. The big news was the amalgamation of Enbridge Gas Distribution and Union Gas, approved on October 30, creating a massive province wide monopoly in gas distribution. However, at the same time, there was a new entrant. That was Epcor, an Alberta company owned by the city of Edmonton, was successful in obtaining three natural gas franchises in Kincardine Ontario, in competition with Union Gas. Epcor also purchased a small gas utility in Aylmer, Ontario called Natural Gas Resources (NRG).

Hydro One faced other difficulties with respect to acquisitions. After a year of trying it failed in its attempt to purchase, at the cost of $4.4 billion, Avista, a large American utility in the Pacific Northwest. Hydro One ended up paying a $103 million termination fee when that deal for fell through. The two companies together would have had over 2 million customers and ranked among the 20th largest North American utilities.

The parties agreed to call off the merger based on opposition from U.S. regulators in the state of Washington. The state regulators were concerned about the undue influence by the Ontario government in the Hydro One operations. The Ontario government owns 47 per cent of Hydro One and the new Ontario Premier had just fired the chief executive officer of Hydro One on the grounds that his $6 million in annual compensation was too high. An excellent article in this issue by Scott Hempling outlines the colorful story.

IN THE COURTS

In the energy regulatory world, the courts have the last say. That was as true in 2018 as in any other year. It is also true of this Editorial.

No review of recent developments in the courts would be complete without a reference to the first article in this issue of the *ERQ*. That is the article on "2018 developments in administrative law relevant to energy Law and regulation". Regular readers will know that this article appears every year in the year-end edition. It is a classic. Carefully crafted by Canada's leading administrative lawyer David Mullan. It is required reading by all regulators and the counsel that appear before them.

This Annual Review will not repeat any of the David's work but there are few cases outside of the administrative law world that are noteworthy. Of course the biggest case of the year was the Federal Court of Appeal decision setting aside the Trans Mountain pipeline approval. That was dealt with above. No further discussion of that is required.

An interesting little case was that the decision of the Ontario Divisional Court on December 31, 2018, in a class action against Hydro One. It seems that Hydro One made some massive billing errors and overcharged some of its 1.3 million customers. Those customers brought class action claim of $100 million in damages relating to the overcharges. However, the motions judge in 2017 refused to certify the class citing two reasons. First, he said there were insufficient common issues noting that a number of individual trials would be required because each customer incurred different amounts of damages. The most important reason however was the second one. The motion judge ruled that there were administrative remedies and procedures that would be more efficient than a class action.

In particular, he noted that the OEB had a complaint process and one of its objectives was to protect the interests of customers with respect to prices. As a result, the justice found that the OEB could be expected to respond to the appropriate cases and provide the appropriate remedies. The Ontario Divisional Court agreed with motion judge's findings and dismissed the case. This may become an important principle in future cases.

The next decision of note was the *Capital Power*[6] decision by Mr. Justice O'Farrell of the Alberta Court of Appeal. That was a long-running battle on how to allocate the cost of line losses. In the end, the interesting thing was the degree of deference that the court granted the regulator. In finding the proper remedy, the AUC had in some sense engaged in retroactive ratemaking by making retroactive adjustments – something that is generally forbidden in utility cases.

Justice O'Farrell emphatically supported the principle that court should defer to expert tribunals making legal decisions within the special expertise including jurisdictional determination, such as the retroactive adjustment of rates saying that a deferential standard must be applied even true jurisdictional issues. Justice O'Farrell gave deference to the Commission's decision on its jurisdiction to adjust the line loss allocations retroactively because the Commission's essential function and expertise was ratemaking, stating:

> Where do the applicants think the common law prohibition against retroactive ratemaking came from? It came from roughly 100 years of public utility regulation and public utility board jurisprudence in this province and elsewhere in North America. Admittedly, the courts have contributed to the development of the prohibition, invoking concepts such as the presumption against retroactive application of legislation. But it is important to understand that the underlying rationales for the prohibition were not derived solely from the common law, or statute law for that matter. The prohibition against retroactive ratemaking was derived from general principles of fairness, reliance, certainty and finality, which the common law recognized, but which existed independent of the common law. These are values which gained currency, not because of the law, but because they made sense in a fair and orderly society. Courts have no monopoly or special expertise when it comes to the application of principles of fairness. And that is what the Commission did in this case: it applied principles of fairness to a function (i.e., ratemaking) in respect of which is has a special expertise.[7]

The decision in *Capital Power* is particularly interesting given recent developments in the United States. There concept of deference to administrative tribunals and regulators began with the 1984 decision of the United States Supreme Court in *Chevron.*[8] For over 30 years, Chevron has been applied in a number of cases by granting deference to the statutory interpretations of energy regulators. This lasted until May 2018 when the Supreme Court issued is decision in *Epic Systems.*[9] That decision essentially restricted the deference that courts grant regulators by limiting it to the interpretation of the home statute – a much narrower restriction than had applied before.

GOING FORWARD

2019 will be a year of major changes. Two major elections are on the horizon. Leaving those aside, we know this. We will likely have a new Federal Energy Regulator in Canada, a new Alberta capacity market, and a new OEB.

The wild card is what happens to the electricity LDC sector across Canada. The Alberta Inquiry may be instrumental. LDC's from outside the province have intervened and we understand

[6] *Capital Power v Alberta (Utilities Commission),* 2018 ABCA 437.

[7] *Ibid* at para 45.

[8] *Chevron USA Inc v Natural Resources Defense Council,* 467 US 837 (1984).

[9] *Epic Systems Corp v Lewis,* 584 US _ (2018).

have been welcomed. Imagine that. The first national inquiry into technology and regulatory change. The new AUC Chair has certainly picked up the mantle from Willie Grieve. Which is where we should end this year-end review. The first article in this edition of the *ERQ* is a Memorial to Willie. The words are well said. ■

IN MEMORIAM

Willie Grieve 1953-2018

On the morning of November 21st, energy lawyers and economists across Canada received some sad news - Willie Grieve, the longtime Chair of the *Alberta Utilities Commission* (AUC) had passed away the previous evening.

Willie was a force in the community. A big man with long white hair, he had in a short time become the gold standard of regulatory excellence. He was a first-class adjudicator. He sat on all the big cases. His decisions were the model of clarity and upheld by the highest courts in the land.

He was also a brilliant teacher. Every spring he would truck down to Queens and deliver his annual lecture on incentive regulation. The Queens CAMPUT Energy Regulation Course has a diverse collection of students that include young people just joining the profession and older people coming back as regulators. Each year they all sat spellbound as Willie gave them an unruly blend of energy Law, energy economics and practice tips from 20 years of litigating regulatory cases across Canada.

The Editors of the *Energy Regulation Quarterly* (*ERQ*) wanted to publish a memorial to Willie. We turned to his two closest friends, Bob Heggie and Mark Rodger, whose reflections follow.

WILLIE*

> *"I believe there is no higher calling than public service" - Willie Grieve*

Willie Grieve's passing was a devastating loss not only to the AUC, where Willie served as Chairman from 2008 to 2018, but to all of us who work in the field of regulation.

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* Bob Heggie is the Chief Operating Officer of the *Alberta Utilities Commission.*

The editors of this journal, which Willie enthusiastically contributed to and read, asked Mark Rodger and I to offer a remembrance tribute to Willie. We are, of course, honoured to do so. Having read Mark's wonderful tribute (Mark's tribute to follow) to Willie's personality and character, my focus will be on his professional accomplishments.

I was fortunate to work closely with Willie for a decade, and we spoke virtually every day during that time.

A lawyer by training, an economist by inclination and a scholar at heart, with a musician's soul, Willie was most happy when involved in conversation. Whether answering questions, discussing ideas, arguing, reviewing work or passing along his wisdom – almost everyone learned something new from Willie.

For those of you who knew Willie, you know that he would invoke the legend of the Magna Carta on almost any occasion. I've been present when he has referred to the spirit and clauses of the Magna Carta with Deputy Minsters, company executives, my family and even the security guard in our building lobby.

Willie considered himself blessed to be our Chair – it was his dream job. Willie loved to recount the story of his law school class sharing their career ambitions. He recalled his classmates indicating various aspirations including litigator, corporate deal maker or judge. When it came to his turn Willie announced that he wanted to be a "public utility regulator" to which his classmates collectively replied, "what's that?"

His path to us provided a breadth of experience that allowed him to fundamentally understand both the substance of our work and how an administrative agency should function in order to be successful within its unique operating environment.

Willie's experience included being general counsel of the Saskatchewan Public Utilities Review Commission, counsel to the CRTC, Stentor and AGT/Telus, special assistant to the federal minister of Energy, Mines and Resources and a decade in executive leadership roles in TELUS Regulatory.

In other words, prior to becoming our Chair, he had performed all of the various role and represented or acted for all of the diverse interests that make up the public interest.

As the AUC's first chair, he did the unthinkable; reforming, speaking freely about markets and technology, challenging the status quo, bristling at coded language and acronyms and championing economics in our decision-making.

His work at the Commission was impactful and enduring. The cases he sat on were critically important and the decisions he wrote are of a high quality, always with his signature insistence on simple, clear writing. More important and impressive was Willie's earnest, calm and commanding presence in a hearing room. It is a unique skill to provide a judicial air while ensuring all in the hearing room feel welcome and heard.

Willie was striking physically, standing six foot four with "the hair". He was always impeccably dressed – suit, buffed shoes and those spectacular hand-made ties from his tailor in Saskatoon. Seeing this image gave our staff comfort – a substantial, dependable, dignified leader – a rock to ground our growth towards stability and respectability.

When deliberating with his Commission colleagues in a case working group meeting, voices would only be tolerated if the advice was logical, theoretically sound, and without a hidden agenda. From his first case, he offered and expected a solid, principled approach, evidence based decisions and rational arguments in support of proposed solutions or ideas.

Willie's work ethic was legendary. The AUC has a business rule that its decisions will be issued no later than 90 days after the hearing is over. Given the number of decisions we issue, many cases come down to the wire. That means, in many cases, working to midnight on the 89th day.

For Willie, this never meant issuing orders from the bridge into the engine room. He would roll up his sleeves and work side by side with staff to meet the deadline. I can't count the number of times I'd be in his office at 5 or 6 at night and he would be packing up his laptop. I'd ask why and he'd respond "I'm going back to the 'cave' (his condo) to catch a couple of hours of sleep and them I'm getting up to write a section of the decision". Many at the AUC will recall date stamped emails from 3 a.m. He simply was not prepared to ask our staff to do something he was not prepared to do himself.

When I asked Willie which of his accomplishments he was most proud of,

as a reflection of his humility he refused to answer. When I pressed, he smiled and grudgingly responded that the introduction of performance-based ratemaking was more difficult and took more time than he had anticipated. It was an innovation I know his mentor and dear friend, Alfred Kahn, would have appreciated.

His accomplishments went beyond the work of regulation. For our staff, he was always approachable and demonstrated care and compassion, genuinely engaging them on a personal level. A delightful conversationalist with an enormous breadth of experience, regardless of the subject, he spoke to you as a friend. I know many of you reading this will echo that sentiment.

Willie often spoke of the future of regulation. He imagined a number of fascinating problems arising from technological change and competition. He said "It will be tough sledding and exciting and you will have to be nimble and able to react – it will be so much fun".

We at the AUC will miss Willie and we are substantially poorer for his passing. We will draw on Willie's wonderful example as we meet those challenges and continue to build the AUC on the foundation he created.

MY FRIEND: THE MUNIFICENT, WISE, WILLIE GRIEVE**

We in Canada's Energy Sector are very fortunate to work alongside many talented colleagues across a broad range of professional disciplines. Sometimes, one is lucky enough to receive an unexpected gift – the blossoming of a professional work relationship that evolves into a lasting and strong personal friendship. Such was my experience with the Gentle Giant, Willie Grieve.

Bob Heggie has provided a thoughtful, well-deserved tribute to Willie, focusing on his leadership and impressive achievements at the AUC. My remarks and recollections about him are aimed beyond the AUC and the hearing room. They are those of a close, personal friend.

Early influences are always instrumental in shaping the character of a man. Willie was born in British Columbia and spent his early years in Markham, Ontario, but the other loves of his life (next to his wonderful wife Barb) were the western cities in which he lived – Saskatoon, Saskatchewan, and Edmonton, Alberta. Before Willie became a lawyer, and then energy regulator, he was a professional trumpet player who toured with bands across Canada. Our mutual interest in music took us on our own adventures at various gigs and music festivals in Canada and the US over the past decade.

Willie could play, but he could also string a yarn together, and he recounted many interesting and often comical tales during his carefree but impecunious days as a travelling musician. After Willie graduated from University of Saskatchewan College of Law in 1984 the touring ceased, but he retained a passion for music that lasted his entire life and spanned generations. Willie leaves behind his brilliant son Rob, a virtuoso guitarist and songwriter who now records albums and plays before stadium crowds around the world. One of Willie's foremost points of pride near the end of his life was that Rob's musical accomplishments had clearly eclipsed his own.

Willie played his trumpet for the last time this July 2018 at our local pub in Port Medway, Nova Scotia. It was one of those magical, warm summer nights, with sea breezes sweeping in through the screen door, great friends, and porch lights twinkling everywhere. The house band opened the second set with Chicago's prescient *Does Anyone Really Know What Time It Is?* Willie joined in on cue with that yearning trumpet riff all of us know by heart and only wish we could play ourselves. He brought down the house. And then Willie proceeded to play the night away.

Random acts of generosity speak volumes about the nature of a person. A few years ago Willie and I were attending a Blues festival in Memphis, Tennessee. At around 2 a.m., we found ourselves in the midst of a very large crowd on Beale Street, the main Memphis music thoroughfare. We struck up a conversation with two young men from rural Mississippi. As it turned out, one of them was a successful US college football player who hadn't been lucky enough to make the NFL. Willie encouraged him to consider the CFL. By the end of our discussion, Willie had the young man's contact information and had promised to contact a couple of CFL teams to

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facilitate an introduction and possible try out. Willie and the young man communicated by email for some months and I believe the young man eventually established an opportunity with the CFL. These young kids told us that Willie and I were the first Canadians they had ever met. They were staggered that Willie, from a prairie town they'd never heard of and couldn't pronounce, took enough interest to reach out. But that kind of behavior was simply a matter of course for Willie Grieve, and it is one of his qualities that endeared him to so many.

Willie, though extremely accomplished, was humble. He never spoke of his achievements. They spoke for themselves. He believed that a career in the law was still a noble pursuit that could change lives, and indeed the world, for the better. His daughter Sarah, having already obtained a Masters degree, plans to follow in his footsteps and attend law school. Sarah is also a bass guitar player. Not surprisingly, Willie had a particular focus and interest in engaging with young people in the fledgling stages of their careers. With his easy, welcoming style and approachable demeanor, Willie made himself accessible to newly minted engineers, economists, lawyers and others. He provided them with many valuable insights and encouragement "to do better". These interactions promoted both a greater understanding of how the energy sector functions but also something less tangible but possibly more significant: how the next generation can pursue their careers to the fullest and make a meaningful contribution.

Willie was a lifetime learner who engaged in rigorous debate on a wide range of subjects. He was a devoted contributor to and lecturer at the CAMPUT Energy Regulation Course at Queen's University held annually in Kingston, Ontario. Willie was also a founder, and key, consistent supporter Canadian Energy Law Forum, now in its 13th year, and an active Program Committee Member of the Northwind Electricity Invitational Forum, in its 15th year. These unique Canadian forums represent invaluable opportunities for stakeholders to share information, and discuss critical, and often times sensitive issues in a constructive, respectful way. Neither forum would have achieved the success it has if Willie had not given his active support and encouragement.

Last but by no means least, a word about the love of Willie's life, Barbara (Barb). Hailing from hardy farming stock on the Saskatchewan prairie, Barb is a talented educator, craftsperson and seamstress. She got to know Willie through the lens of provincial politics, just over 30 years ago. They are both, first and foremost, family people – and secondly – devoted hockey fans. A few years ago, my wife Jane and I attended a World Junior Hockey Tournament game with them in Toronto over Christmas. Barb and Willie kept the party rolling, attending every Team Canada game in Toronto, and then doing the road trip to Montreal to polish off the series. Barb continues to play hockey in Edmonton. Willie also leaves behind his 97-year-old mother, Inger, and sister, Anne Jane, who both live in Saskatoon, and sister Barbara (Peter Gerber) who lives in Grand Blanc, Michigan.

So Willie, many thanks for the times we spent together. Thanks for inspiring so many of us. ■

2018 DEVELOPMENTS IN ADMINISTRATIVE LAW RELEVANT TO ENERGY LAW AND REGULATION

*David J. Mullan**

Introduction

2018 was in many ways a landmark year in the Supreme Court of Canada's Administrative Law jurisprudence. At a time marking the transition from the McLachlin to the Wagner Court, fissures continued to widen among the members of the Court with respect to not only the methodology for selection of the standard of review to be applied in judicial review of administrative decision-making but also the modalities by which predominant reasonableness review is conducted.[1] Even so, most observers were surprised by the Court's May 10th announcement, in giving leave on a trio of appeals ("the Trilogy"),[2] directing the parties to devote a significant portion of their submissions to a reevaluation of the "nature and scope of judicial review of administrative action as addressed in *Dunsmuir*…and subsequent cases." Obviously, this hearing held on December 4-6, which attracted twenty-seven intervenors as well as the appointing of two *amicus curiae*, has given rise to the strong possibility that some time in 2019 there will be fundamental recalibration of the principles respecting the conduct of judicial review of administrative action in Canada. Any such recalibration may have a profound impact on the approach developed in *Dunsmuir v New Brunswick*[3] and its progeny and render obsolete much of the standard of review elaboration and disputation contained in the judgments of the past ten years.

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[1] See *Delta Airlines Inc v Lukács,* 2018 SCC 2; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4; *West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal),* 2018 SCC 22; *Groia v Law Society of Upper Canada,* 2018 SCC 27; *Canada (Canadian Human Rights Commission) v Canada (Attorney General),* 2018 SCC 31; *Law Society of British Columbia v Trinity Western University,* 2018 SCC 32; *Trinity Western University v Law Society of Upper Canada,* 2018 SCC 33; and *Chagnon v Syndicat de la fonction publique et parapublique du Québec,* 2018 SCC 39.

[2] In reality, there are only two since *Bell Canada v Canada (Attorney General)* and *National Football League v Canada (Attorney General),* 2017 FCA 249 were consolidated as one proceeding in the Federal Court of Appeal. The other appeal is from the judgment of the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Vavilov,* 2017 FCA 132.

[3] 2008 SCC 9, [2008] 1 SCR 190.

None of the recent cases in which the Court has split on standard of review issues has involved energy law and regulation. Even so, it is surprising that energy regulators,[4] the energy industry, interested public interest groups, or indigenous communities did not feature among those who sought and obtained intervenor status in the Trilogy. I remain unsure as to the explanation for this lack of participation but perhaps it reflects general contentment with the current principles as they have been applied to energy regulators of all stripes or a sense that none of it matters all that much when it comes to review of energy regulatory decision-making in the courts. In any event, I will leave until next year's review further commentary on the state of the general principles respecting standard of review in Canada and how it affects judicial review of energy regulators.

Of the judgments during the year that implicated directly energy law and regulation, the one with the greatest economic impact was almost certainly the August decision of the Federal Court of Appeal in *Tsleil-Waututh Nation v Canada (Attorney General)* ("*Tsleil-Waututh*").[5] In holding that the process through which the Trans Mountain pipeline expansion application was approved was both substantively and procedurally flawed, the Federal Court of Appeal at least temporarily and perhaps permanently derailed a project of enormous significance to the province of Alberta and Canada as a whole. While the judgment does not contain any new principles with respect to review of the scope of such processes or even the duty to consult and, where appropriate, accommodate indigenous peoples, it does provide a highly significant example of the application of accepted principles to the legislative changes wrought in 2012 to the process of interprovincial pipeline approvals. It merits comment for that alone.

The Supreme Court of Canada also rendered a judgment on the duty to consult that had major implications for the effectuation of legislative change to energy regulatory processes. In *Mikisew Cree First Nation v Canada (Governor in Council)*,[6] the core issue was whether the duty to consult and, where appropriate, accommodate indigenous peoples extended to the process of preparing, introducing, and passing legislation which affected or had the potential to affect the rights and claims of indigenous peoples. I will also use my analysis of this judgment as a springboard to a discussion of a Federal Court judgment (not involving energy regulation) in which Kane J. elaborated on the extent, if at all to which the common law duty of procedural fairness and the doctrine of legitimate expectation could be invoked in the context of "legislative" decision-making below the level of primary legislation.

Still focusing on the duty to consult, I will also assess the judgment of Nixon J. in *Athabasca Chipewyan First Nation v Alberta (Minister of Aboriginal Relations, Aboriginal Consultation Office)*.[7] Among the issues raised in that case was the authority of the *Aboriginal Consultation Office* to determine whether a duty to consult was triggered, and, assuming that it was, whether the principles of procedural fairness applied to that determination.

Finally, I will return to the subject of participatory rights in energy regulatory proceedings, including applications for judicial review and statutory

[4] In the case of energy regulators, this may have reflected a considerable degree of sanguinity with the current state of the law as it affected their operations. Increasingly, in the domain of energy regulation, deference is dominant as reflected in both the selection and restrained application of the reasonableness standard of review, and an unwillingness to be seduced into classifying questions as ones of "true" jurisdiction requiring correctness review. During 2018, there were several examples of this posture of restraint: see *eg Tribute Resources Inc v Ontario (Energy Board),* 2018 ONSC 265 (Div Ct); *Colchester (County) Tatamagouche Water Utility v Wall,* 2018 NSCA 67; *Antigonish (Town) v Nova Scotia (Utility and Review Board),* 2018 NSCA 8; and *Fort Hills Energy Corp v Alberta (Ministry of Energy),* 2018 ABQB 905 (even though there was a partial quashing). It is also evidenced in the Alberta Court of Appeal's decisions on applications for leave to appeal from the *Alberta Utilities Commission* and the *Alberta Energy Regulator.* Indeed, it is in this context that one finds the most articulate defence in a long time of the centrality of the role of energy regulators and the exceptional nature of judicial intervention. This is the judgment of O'Ferrall J.A. in *Capital Power Corp v Alberta (Utilities Commission),* 2018 ABCA 437. This important judgment is the subject of a separate comment in this issue of the Quarterly. It also bears upon my previous commentary on standard of review and its relevance to applications for leave to appeal: David J. Mullan, "2016 Developments in Administrative Law Relevant to Energy Law and Regulation" (2017) 5 ERQ 15 at 29-30.

[5] 2018 FCA 153.

[6] 2018 SCC 40.

[7] 2018 ABQB 262.

appeals. Here, I will discuss two judgments, one dealing with intervention on an application for leave to appeal from a decision of the *Alberta Utilities Commission* (AUC), and the other involving public interest standing and interventions on an application for judicial review from a decision of the Canada-Newfoundland and Labrador Offshore Petroleum Board.

THE CONTENT OF THE DUTY TO CONSULT AND ACCOMMODATE

(A) Introduction

During 2018, the duty to consult continued to feature prominently in litigation in both the Federal Court system and the provincial superior courts. This litigation included some novel issues: a recognition of the obligation to engage in consultation with indigenous groups before taking enforcement action in the form of prosecution of indigenous persons for flaunting, in the name of constitutionally protected rights, federal fisheries legislation;[8] a rejection of the contention that the Crown was always an appropriate (and necessary) party to proceedings in which a failure to consult indigenous peoples was central to an application for judicial review or other form of challenge;[9] how to achieve reconciliation within the process of consultation and accommodation of competing indigenous rights, one traditional (though recognized in an agreement with the Crown), and the other the product of a Treaty entered into with the Crown;[10] and the extent to which the duty to consult applies to works related to preserving the integrity of an existing pipeline.[11] None of these cases involved the Federal or a provincial or territorial Court of Appeal and it therefore remains to be seen whether the principles adopted and applied will be endorsed at those higher levels.

For present purposes, I will do no more that note them as worthy of consideration. Instead, I will confine my discussion to two energy regulatory cases[12] in which the Federal Court of Appeal applied the consultation and accommodation principles laid down in that Court's precedential 2016 decision setting aside the Governor in Council's acceptance of the joint review panel's recommendation that the Northern Gateway pipeline application be approved: *Gitxaala Nation v Canada* ("*Gitxaala*").[13] I will also comment on the other substantive ground on which in *Tsleil-Waututh*,[14] the Federal Court of Appeal quashed the Governor in Council Order directing the *National Energy Board* to issue a certificate of public convenience and necessity in the context of Trans Mountain's application for approval of an expansion to its existing pipeline facilities.

(B) *Bigstone Cree Nation*

The first of the two judgments is *Bigstone Cree Nation v Nova Gas Transmission Ltd* ("*Bigstone Cree Nation*").[15] As in *Gitxaala*, it involved a

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[8] *R v Martin,* 2018 NSSC 141. The prosecution was launched under the umbrella of an agreement between the Crown and the relevant First Nation. However, Gogan J., in the context of the Crown's claim of constitutional justification for any infringement on the accuseds' rights, accepted the argument that the First Nation should have been consulted before the prosecution was launched.

[9] *Xeni Gwet'in First Nations v British Columbia (Chief Inspector of Mines),* 2018 BCSC 1425. Branch J. held (at paras 35-63) that just because the duty to consult involved the honour of the Crown, the Crown was not an appropriate party, substituting the Attorney General as defender of the actions of the official who made the relevant decision. See, however, *Adams Lake Indian Band v British Columbia (Lieutenant Governor in Council),* 2011 BCSC 266 (rev'd on other grounds: 2012 BCCA 333), accepting the Lieutenant Governor in Council was the appropriate respondent to an application to review and quash a decision taken by Order in Council.

[10] *Gamlaxyeltxw v British Columbia (Minister of Forests, Lands & Natural Resource Operations),* 2018 BCSC 440.

[11] *Aroland First Nation v Transcanada Pipelines Ltd.,* 2018 ONSC 4469, in which Matheson J. held that it was not appropriate to determine this issue in the context of a partial summary judgment process.

[12] *Bigstone Cree Nation v Nova Gas Transmission Ltd, supra* note 7, and *Tsleil-Waututh Nation v Canada (Attorney General)* 2018 FCA 153. These were part of the continuing flow of litigation in which courts have been called upon to interpret, develop and apply to the facts before them the duty to consult principles laid down in what is now a very extensive body of Supreme Court of Canada jurisprudence. Prominent among the 2018 examples are *Mi'kmaq of Prince Edward Island v Prince Edward Island,* 2018 PEISC 20, and *Eabametoong First Nation v Ontario (Minister of Northern Development and Mines),* 2018 ONSC 4316 (Div Ct).

[13] 2016 FCA 187. (I commented on this judgment in my 2016 survey: *supra* note 5 at 19-26.).

[14] *Supra* note 6.

[15] *Supra* note 13. (For other commentary, see David V. Wright, "Duty to Consult in the Bigstone Pipeline Case: A Northern Gateway Sequel and TMX Prequel?" (6 June 2018), online: Ablawg, <http://ablawg.ca/wp-content/uploads/2018/06/Blog_DVW_Bigstone_FCA.pdf>).

challenge to an Order in Council (based on the recommendations in a *National Energy Board* ("Board") report) and directing the Board to issue an environmental decision statement and a Certificate of Public Convenience and Necessity. The subject matter was one of five segments of an application to the Board by Nova for approval of a project expanding its existing gas transmission system in northern Alberta. The segment in question was located in the territory of the Bigstone Cree First Nation, and the First Nation's application for judicial review alleged a violation of the duty to consult under both common law and Section 35(1) of the *Constitution Act, 1982*.

Following a careful review of the various stages of the approval process[16] and with reference to the principles governing the duty to consult and, where appropriate, accommodate indigenous peoples and particularly the judgment of the Federal Court of Appeal in *Gitxaala*, de Montigny J.A., delivering the judgment of a panel consisting of himself, Gauthier and Near J.J.A., dismissed the application for judicial review. The Crown had fulfilled its responsibilities.

Perhaps significantly, the judgment of the Federal Court of Appeal in *Gitxaala* was released on June 23, 2016, just six days after the Governor in Council had extended the statutory time limits for the rendering of a final decision on the Nova Gas application. Consequently, the Governor in Council had an opportunity to evaluate the Federal Court of Appeal's judgment and, in particular, the critical deficiencies that Dawson and Stratas J.J.A. (delivering the judgment of the majority) identified in the Governor in Council phase of that project. Overall, they found that there had been insufficiently meaningful dialogue at that stage, a failure to address matters of real concern to the First Nation including new evidence and fresh arguments, a failure to consider whether an extension of time was necessary to enable fulfilment of the Crown's obligations, and the inadequacy of the reasons provided by the Governor in Council for rejecting the arguments of the First Nation and accepting the recommendations of the Joint Board.

In *Bigstone Cree Nation*, de Montigny J.A. held that the Board had avoided all these pitfalls. While the reasons provided by the Governor in Council were not all that much more detailed than those given in *Gitxaala*, the preamble to the Order in Council explicitly referred to not only the Board's report but also the Crown Consultation and Accommodation Report ("CCAR") prepared by the Major Projects Management Office ("MPMO") (located within Natural Resources Canada) and a formally recognized part of the overall process. Given that the Governor in Council was entitled to rely on other administrative actors in the fulfilment of its duty to consult and, where appropriate, accommodate, a simple reference in the Order in Council to that reliance was sufficient to incorporate the reports and interactions between the Board and the MPMO into the Governor in Council's own processes. Moreover, to the extent that the Governor in Council expressed its satisfaction that those processes had adequately fulfilled the Crown's responsibilities, that was sufficient indication of the Crown's attention to the issue and an acceptance that the duty to consult and accommodate had been met, a reasonable conclusion in this instance based on the consultations carried on throughout the process. Also, given that the Governor in Council in the Order in Council had specifically addressed one of the First Nation's critical concerns, protection of the Caribou, and endorsed the accommodating conditions recommended by the Board in furtherance of that objective, it could not be said that the Governor in Council had failed to consider or that the process was not alive to the project's potential impact on the Caribou.

There was also another critical factor in this case: the conduct of the First Nation. In the final paragraph of his assessment of the Governor in Council's phase of the process, de Montigny J.A. took the First Nation to task for its lack of engagement at important stages in the process:

[16] The early engagement process, the Board hearing phase, the Board recommendation phase, and the post-Board report phase.

> On the basis of the foregoing, combined with the fact that Bigstone did not proactively participate in the post-NEB consultation process, did not specifically raise the issue of the Project's potential impact on the Caribou at either meeting with the MPMO, and did not avail itself of the opportunity to provide comments on the draft CCAR, I am of the view that Bigstone failed to establish that its concerns were not heard and accommodated.[17]

Just as the Federal Court of Appeal in *Gitxaala* had lessons to learn about its responsibilities, so too in *Bigstone Cree Nation* did the First Nation receive instruction as to the need for engagement in and respect for the process.[18]

(C) *Tsleil-Waututh*[19] and the Trans Mountain Saga: So Near and Yet So Far.[20]

Following a lengthy and thorough examination of the process followed by the *National Energy Board* ("the Board") and the Governor in Council ("Canada") leading to the approval of Trans Mountain Pipeline ULC's ("Trans Mountain") application to expand its existing pipeline system, Dawson J.A., delivering the judgment of a panel of the Federal Court of Appeal that also included de Montigny and Woods J.J.A., held that there were two critical defects.

i. The Scoping Decision

First, the Board had erred in the scoping of the application in determining that project-related, marine shipping was not part of the "designated project". In terms of Section 2 of the *Canadian Environmental Assessment Act, 2012* ("*CEAA*"),[21] it was not "any physical activity that is incidental to" the other physical activities that were a component of the project.

The impact of this determination was that the Board was not required to conduct certain assessments under that Act, and, in so far as the marine shipping associated with or generated by the project had the potential to affect adversely the Southern resident killer whale population, assessments under the *Species at Risk Act* ("*SARA*").[22] Consequently, the Board's consideration of those matters was restricted to the general public interest provision in the *National Energy Board Act*[23] and a cumulative effects provision in the *CEAA*.

Dawson J.A. rejected the Board's conception of the meaning of Section 2 and its application to the facts. In part, her concerns were based on the failure of the Board to provide adequate reasons for its interpretation of the relevant term. And, to the extent that the Board had based its position on the proposition that it could not include within the scope of the "designated project" marine shipping because it was regulated elsewhere, the Board had erred. Indeed, it had not "grappled"[24] with this important issue but simply asserted. More generally, she was of the opinion that the Board had misinterpreted the critical term in the *CEAA*. To the extent that the Board had provided a rationale, it was "not supported by the statutory scheme."[25]

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[17] *Supra* note 13 at para 76. See also paras 39-43.

[18] For fuller elaboration of other aspects of the judgment, including the rejected claim that Bigstone Cree Nation should have received more funding, see David V. Wright's blog, *supra* note 16.

[19] *Supra* note 6. For other commentary, see Martin Olszynski, "Federal Court of Appeal Quashes Trans Mountain Pipeline Approval: The Good, the Bad, and the Ugly" (6 September 2018), online: Ablawg, <http://ablawg.ca/wp-content/uploads/2018/09/Blog_RH_TMX_Sept2018.pdf>; Robert Hamilton, "Uncertainty and Indigenous Consent: What the Trans-mountain decision tells us about the current state of the Duty to Consult" (10 September 2018), online: Ablawg, <http://ablawg.ca/wp-content/uploads/2018/09/Blog_RH_TMX_Sept2018.pdf>; and David V. Wright, *Tsleil-Waututh Nation v Canada:* A case of easier said than done" (11 September 2018), online: Ablawg, <http://ablawg.ca/wp-content/uploads/2018/09/Blog_RH_TMX_Sept2018.pdf>.

[20] Cole Porter, 1941, for the movie "You'll Never Get Rich", performed by Fred Astaire.

[21] SC 2012, c 19.

[22] SC 2012, c 29.

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

[24] *Supra* note 22 at para 399.

[25] *Ibid* at para 409.

However, she went on to consider whether the Board had effectively fulfilled its responsibilities under the relevant provisions of both Acts when it turned its attention to the general public interest provision of the *National Energy Board Act*,[26] and the cumulative effects section in the *CEAA*.[27] On careful review, she held that these elements of the Board's report were not an adequate surrogate for an evaluation under both the *CEAA*[28] and the *SARA*[29] on the basis that the impacts associated with marine shipping, including its effects on the whale population, were part of the designated project.

To the extent that the Governor in Council had based its decision ordering the Board to issue a certificate of public convenience and necessity on the Board's report and without questioning its position on these matters, that decision was infected by the Board's errors.[30] Putting it another way, the Board by reason of its errors had not provided the Governor in Council with a "report" which was a precondition to the Governor in Council making a decision.[31] In her conclusions, Dawson J.A. further explained the Court's conclusion in this way:

> The Board's finding that the Project was not likely to cause significant adverse environmental impacts was central to its report. The unjustified failure to assess the effects of the marine shipping under the *Canadian Environmental Assessment Act, 2012* and the resulting flawed conclusion about the effects of the Project was so critical that the Governor in Council could not functionally make the kind of assessment of the Project's environmental effects and the public interest that the legislation requires.[32]

It was therefore "unreasonable for the Governor in Council to rely upon" the report.[33]

ii. The Duty to Consult

Dawson J.A.'s analysis of whether the Crown failed in its duty to consult occupies 283 paragraphs of her judgment. She held that the general framework of the process[34] communicated to indigenous groups by Canada was adequate to meet the obligations imposed by the duty to consult and, where appropriate, accommodate the rights and claims of indigenous peoples. It established the ground rules for the conduct of Phase III of the process, the Governor in Council stage. These included a commitment by Canada to a Phase III consultative process that would focus on two questions:

a. Are there outstanding concerns with respect to Project-related impacts to potential or established Aboriginal or treaty rights?

and

b. Are there incremental accommodation measures that should be considered by the Crown to address any outstanding concerns?[35]

It was however in the implementation of Phase III of the process that deficiencies occurred. The Court's conception of the conduct of Phase III of the process centred in large measure on the centrality of "a meaningful two-way dialogue."[36] There should have been "responsive, considered and meaningful dialogue coming back from Canada in response to the concerns expressed by Indigenous applicants."[37] Instead, the Crown consultation team

[26] *Supra* note 23, s 52 (2) (e).
[27] Section 19(1)(a).
[28] As provided for in Section 52.
[29] As provided for in in Section 79.
[30] *Ibid* at para 439.
[31] *Ibid* at para 409.
[32] *Ibid* at para 470.
[33] *Ibid* at para 473.
[34] Set out *ibid* at paras 74-75.
[35] *Ibid* at para 75.
[36] *Ibid* at para 558.
[37] *Ibid* at para 559.

> …limited their mandate to listening to and recording the concerns of the Indigenous applicants and then communicating those concerns to the decision-makers.[38]

In short, they acted as "note-takers"[39] and not, with a few exceptions, as participants in a dialogue.

Dawson J.A. also identified two other impediments to meaningful consultation:

> Canada's reluctance to consider any departure from the Board's findings and recommended conditions, and Canada's erroneous view that it lacked the ability to impose further conditions on Trans Mountain.[40]

In terms of the framework for Phase III, she also faulted the lateness in the process of the Crown's assessment by way of a Crown Consultation Report of the Project's impact on the indigenous applicants. To the extent that the second draft of this report was to the effect that the Project would not have "a high level of impact on the exercise of the applicants' Aboriginal interests", Canada did not provide those applicants with sufficient time to provide detailed comments.[41]

iii. Remedies

The Court's conclusions on these two critical issues resulted in a quashing of the Order in Council containing the Governor in Council's decision accepting the Board's report and directing the issuance of a certificate of public convenience and necessity. As well, the matter was remitted to the Governor in Council for "prompt redetermination."[42]

As far as the first defect was concerned, the remission also included a direction to the effect that the Governor in Council in turn remit the scoping issue to the Board for reconsideration by reference to the various matters of concern identified by the Court as reiterated in the remedial order.[43] In terms of the failure to consult adequately, the Governor in Council was directed to "re-do its Phase III consultation."[44]

iv. Commentary

Dawson J.A.'s judgment in *Tsleil-Waututh* covered much territory. Particularly on the duty to consult, her analysis involved an intensive evaluation of how as a matter of fact the process evolved. Here is not the place for a detailed examination of that critical aspect of the judgment. One should not also overlook the fact that the Court rejected the vast of majority of the challenges to the substantive and procedural aspects of the process. Here too, space constraints do not permit a full examination of the grounds on which the various applicants failed. However, I have selected three Administrative Law dimensions of the judgment for brief comment.

- The Appropriate Target of an Application for Judicial Review

Tsleil-Waututh involved the consolidation of various applications for judicial review, some of which attacked the report of the Board and others of which sought a quashing of the Governor in Council's decision. As part of her judgment,[45] Dawson J.A. held that the only appropriate target of a judicial review application was the decision of the Governor in Council. Reaffirming the judgment of the Court (delivered by her and Stratas J.A. in *Gitxaala Nation*),[46] she characterized the report of the Board as "not justiciable."[47]

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[38] *Ibid* at para 558.
[39] *Ibid* at para 562.
[40] *Ibid*.
[41] *Ibid* at paras 562 and 761.
[42] *Ibid* at para 769.
[43] *Ibid* at paras 769-70.
[44] *Ibid* at para 771.
[45] *Ibid* at paras 170-202.
[46] *Supra* note 6.
[47] *Ibid* at para 202.

Judicial review (at least in terms of what constitutes a reviewable "matter" for the purposes of Section 18.1(1) of the *Federal Courts Act*)[48] was restricted to "decisions about legal and practical interests."[49] The report of the Board did not cross that threshold; it failed "to affect legal rights, impose legal obligations, or cause prejudicial effects."[50] The report did not carry any legal consequences.[51] It contained a set of recommendations that did not have any independent legal or practical effect.[52] Dawson J.A. also reinforced this characterization of the Board's role by pointing out that any defects in the Board's report and processes could be rectified by the Governor in Council,[53] and, if not corrected (as in this case), the failure to rectify would be subject to an application for judicial review of the Governor in Council's decision; if the Governor in Council's decision rested on a "materially deficient" Board report, it was subject to judicial review.[54] In short, according to Dawson J.A., *Gitxaala* had not been wrongly decided on this point.

In my review of the relevant case law of 2016,[55] I expressed concerns about this aspect of *Gitxaala*, and I remain unconvinced despite Dawson J.A.'s detailed reevaluation of the *Gitxaala* holding on this point.[56] While I have no quarrel with the Court's striking out of the nine applications for judicial review of the Board's report, I am uncomfortable with the justiciability justification for that course of action. In my opinion, this is not an issue about justiciability in the conventional sense of that term. Clearly, the issues in question in the challenges to the Board's report are issues that are suitable for resolution by a court; they are the standard fare of judicial review. Also, there is surely no sense in which the Board, either generally or in this particular situation, is immune from the processes of the courts as exemplified by parliamentary privilege. This is a remedial, not a justiciability issue.

The striking out of the applications for judicial review is far more appropriately characterized as an exercise of remedial discretion on the basis that the Governor in Council is **or** was in a position to correct the defects of the process below. It might, of course, be claimed that this is just a matter of terminology, and the difference between the *Gitxaala* approach and mine has no practical implications. However, the reality is that it can make a difference. The *Gitxaala* approach does not admit of exceptions; the Board itself can never under this particular statutory regime be a respondent to an application for judicial review. A finding of a lack of justiciability has that consequence. But there may well be situations in which a pre-emptive attack on the processes of the Board is appropriate as, for example, in the case of a reasonable apprehension of bias on the part of the Board or one of its members or an allegation of an absence of subject matter jurisdiction. Not recognizing those situations creates a remedial gap which could result in a substantial waste of time and resources before the opportunity to raise the issue at the Governor in Council stage of the process.

- The Components of the Reasons of the Governor in Council

The Attorney General of British Columbia sought review on the basis that the Governor in Council had failed to comply with the statutory obligation[57] to provide reasons for its decision. For these purposes, the Attorney General argued that the reasons had to located within the four corners of the Order in Council and nowhere else.

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[48] RSC 1985, c F-7.

[49] *Supra* note 5 at paras 175-178.

[50] *Ibid* at para 175, citing *Air Canada v Toronto Port Authority,* 2011 FCA 347, [2013] 3 SCR 605 at para 29.

[51] *Ibid* at para 179.

[52] *Ibid* at para 180.

[53] *Ibid* at para 82.

[54] *Ibid* at para 201.

[55] *Supra* note 4 at 21-23.

[56] Martin Olszynski in his Blog on the judgment (*supra* note 19) is scathingly critical of this aspect noting that, as early as 1998, the Federal Court of Appeal had allowed a challenge to a report under a similar legislative scheme within the context of an application for judicial review in the nature of prohibition to prevent the final decision-maker (a Minister) from acting on a report: Alberta Wilderness Assn v Canada (Minister of Fisheries and Oceans), [1999] 1 FC 483 (FCA).

[57] *Supra* note 23.

Dawson J.A. rejected this narrow conception of the reasons of the Governor in Council. Restricting an evaluation of the reasons to the terms of the Order in Council failed to recognize the inappropriateness of treating the Order in Council itself as the exclusive repository of the Governor in Council's given having regard to the "legislative nature and standard format of an Order in Council."[58] It was not a suitable vehicle for the provision of full reasons. Here, the reasons also included the Explanatory Note which was attached to and published in the Canada Gazette with the Order in Council. Also incorporated were the documents referred to in the Explanatory Note and the documents referenced in the Explanatory Note including the Crown Consultation Report and the report of the Board including appendices having regard to the fact that the Order in Council adopted the Board's public interest recommendations.[59] Once again applying *Gitxaala*,[60] and consistent with the Courts conclusions in *Bigstone Cree Nation*, Dawson J.A. found that, having regard to all this material, the Governor in Council had met the statutory obligation to "set out the reasons" in its Order. There can be little quarrel with this conclusion.

- Standard of Review for Administrative Law Issues

Not surprisingly, Dawson J.A. held that the appropriate standard of review for the various substantive components of the Governor in Council decision was that of reasonableness.[61] However, her articulation of what was involved in conducting reasonableness review contained one element that suggested a less than total commitment to the deferential approach which underpins reasonableness review. Referring to prior authority (including yet again *Gitxaala*), Dawson J.A. adopted a version of reasonableness review that included scrutiny of the decision under review for compliance "with the purview and rationale of the legislative scheme."[62] The reviewing court had to be sure that the decision of the Governor in Council had been exercised "within the bounds established by the statutory scheme."[63] Further on, Dawson J.A. continues with this theme. Reasonableness required that that "the decision had to be made in accordance with the terms of the statute."[64] Under reasonableness review, the decision-maker still remains "constrained in the outcomes that it may reach by the terms of the statute."[65]

It is relatively easy to see this articulation of the process of reasonableness review as in effect introducing a significant element of correctness at least in the discerning of the meaning of statutory provisions and even in the application to the facts of the relevant statutory provisions.

Indeed, this view of Dawson J.A.'s sense of what reasonableness review involves is confirmed by the way she goes about assessing the Board's interpretation and application of the statutory provisions respecting environmental and species of risk assessments in the context (discussed earlier) of the impact of marine shipping. Thus, she commences by describing the question as to whether Project-related marine shipping was part of the "designated project" as not one of pure statutory interpretation but rather a "mixed question of fact and law heavily suffused by evidence."[66] That categorization would normally mean that, except perhaps when there was a readily extricable pure question of law, a reviewing court would be deferential to the Board's determination of the relevant issues.

Nonetheless, throughout the discussion of this issue, Dawson JA certainly seems to be engaging on a correctness basis with the Board's reasoning and law/fact application process. It consists of a detailed consideration of how the Board approached these issues and the factual underpinnings of that discussion on which the Board's conclusions were based. In a situation where the articulation and application of the reasonableness standard of review may well have been critical, this is troubling.

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[58] *Supra* note 5 at para 478.
[59] *Ibid* at paras 478-479.
[60] *Ibid* at para 479.
[61] *Ibid* at paras 204-23.
[62] *Ibid* at para 214.
[63] *Ibid*, citing *Council of the Innu of Ekuanitshit v Canada (Attorney General),* 2015 FCA 189 at para 44.
[64] *Ibid* at para 217.
[65] *Ibid*.
[66] *Ibid* at para 391.

If justification is to be found, it may, however, rest in the failure of the Board to articulate why precisely, it accepted that, as a matter of statutory interpretation, the Project-related marine shipping was not a component of the "designated project" as defined in Section 2 of the *CEAA*. Indeed, some warrant for this can be discerned in the terms on which the Court remitted the matter to the Governor in Council with directions for a further remission to the Board. That remission called on the Board "to reconsider on a principled basis whether Project-related shipping is incidental to the Project."[67] It did not direct the Board to reconsider on the basis that Project-related shipping **was** incidental to the Project. In other words, the remission recognized implicitly the primary responsibility of the Board for determining the meaning of legislation as it related to the scoping decision. In terms of the Board's position on this issue, it downfall came about as a result of a combination of a failure in articulation and, to the extent that there was justification, adoption of a position that did not bear scrutiny on a reasonableness standard. The Board was now being given another chance to consider the question and justify any conclusion to the same effect.

PARLIAMENT AND THE LEGISLATIVE ASSEMBLIES, AND THE DUTY TO CONSULT

It is generally been taken as axiomatic that the Canadian courts will treat as non-justiciable any attempt to impose common law procedural fairness obligations on Parliament and the legislatures in respect of the introduction and passage of legislation.[68]

Thus, in 1991, in *Reference re Canada Assistance Plan*,[69] the Court rejected an attempt by British Columbia to invoke the doctrine of legitimate expectation as a basis for challenging the validity of amendments to the *Canada Assistance Plan*.[70] Notwithstanding the provisions of the Act and agreements entered into under that Act, the province could not plead on the basis of the doctrine that its consent was necessary before amending legislation could be introduced and passed. The Canadian version of legitimate expectation did not extend to recognition of substantive entitlements. Furthermore, British Columbia had no legally cognizable claim to even be consulted as part of the legislative process.

Subsequently, in 1999, in *Wells v Newfoundland*,[71] the Court reiterated this latter position in a different context. Wells had argued that the Newfoundland and Labrador House of Assembly owed him a duty of procedural fairness when passing legislation that in effect dismissed him from his position as a "consumer representative" on the Newfoundland Public Utilities Board by abolishing the position as part of a restructuring of that agency. After stating that the government's actions were not predicated on a personal animus towards Wells,[72] the Court again refused to subject the Assembly and its processes to an implied common law duty of procedural fairness.

The issue arose yet again in 2003 in *Authorson v Canada*.[73] There, invoking Section 1(a) of the *Canadian Bill of Rights*,[74] Authorson, a representative plaintiff, pleaded that Parliament owed a class of disabled veterans procedural fairness before the enactment of legislation withdrawing any claim that the veterans might have had for interest on moneys that the Department of Veterans Affairs held on their behalf. Despite Section 1(a)'s guarantee of "due process of law" when the "right of the individual to…enjoyment of property" was being withdrawn, this did not extend to the legislative process. Major J, delivering the judgment of the Court, expressed the conclusion pithily:

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[67] *Ibid* at para 769.

[68]Kate Glover, « The Principles and Practices of Procedural Fairness » in Colleen M. Flood and Lorne Sossin, *Administrative Law in Context,* Toronto, EMP Ltd., 2018 at 183-219.

[69] [1991] 2 SCR 525.

[70] RSC 1970, c C-1.

[71] [1999] 3 SCR 199.

[72] *Ibid* at para 58.

[73] 2003 SCC 39, [2003] 2 SCR 40.

[74] SC 1960, c 44; RSC 1985, App III.

> Due process protections cannot interfere with the right of the legislative branch to determines its own procedure. For the *Bill of Rights* to confer such a power would effectively amend the Canadian constitution, which, in the preamble to the *Constitution Act, 1867*, enshrines a constitution similar in principle to that of the United Kingdom. In the United Kingdom, no such pre-legislative procedural rights have existed. From that it follows that the *Bill of Rights* does not authorize such power.[75]

Nonetheless, this did not deter the *Mikisew Cree First Nation* from launching proceedings in which it asserted that the constitutional duty to consult and, where appropriate, accommodate applied to the development, introduction, and passage of legislation which affected First Nation rights and claims. The context was one with particular resonance in the energy sector: the Harper Government's 2012 omnibus legislation,[76] one important component of which was amendments to the federal environmental protection and fisheries legislation. The First Nation alleged that these amendments had the potential for an adverse effect on their indigenous rights, and that they should have been consulted as part of the legislative process and, more particularly, in terms of their application for judicial review, during the development stage of the legislation.

Indeed, the First Nation was successful in the Federal Court[77] but the Federal Court of Appeal reversed Hughes J. and dismissed the application for judicial review.[78] On appeal to the Supreme Court of Canada,[79] the First Nation was again unsuccessful. There were four separate judgments in which differing positions were staked out by the nine members of the Court. Given space limitations, a full examination of each of the four judgments is not feasible. However, the following summary of the salient points should provide an adequate explanation of why the First Nation did not prevail.

First, there was one issue on which all nine judges apparently agreed.[80] The application for judicial review, whether viewed under Section 17 or 18 and 18.1 of the *Federal Courts Act*,[81] was misconceived. While Section 17(1) conferred concurrent jurisdiction on the Federal Court "in all cases in which relief is claimed against the Crown" with the Crown defined in Section 2(1) as the Queen "in right of Canada", it did not extend to members of the executive when exercising "legislative power". For these purposes, legislative power encompassed the preparation and introduction of legislation as well as the process of its passage from introduction into Parliament through to Royal representative assent. As for an application for judicial review under Sections 18 and 18.1, the Federal Court's authority was restricted to a "federal board, commission or other tribunal". Under Section 2(2), "the Senate, the House of Commons, [and] any committee or member of either House" were excluded from the definition of "federal board, commission or other tribunal". This too resulted in the immunity of members of the executive from the reach of judicial review under Sections 18 and 18.1 when engaged in legislative functions.

In and of itself, this did not mean that the First Nation had no cause of action or grounds for judicial review based on the alleged violation of the Crown's consultative duties when engaged in decision-making that affected Indigenous rights and outstanding claims. It could have meant that the First Nation was simply in the wrong Court and should have in fact commenced its proceedings in an appropriate provincial superior court.

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[75] *Ibid* at para 41.

[76] *Jobs, Growth and Long-term Prosperity Act,* SC 2012, c 19.

[77] 2014 FC 1244, 470 FTR 243. I discussed this judgment in "2014 Developments in Administrative Law Relevant to Energy Law and Regulation" (2015) 3 ERQ 17 at 29-30.

[78] 2016 FCA 311, [2017] 3 FCR 298. I summarized this judgment in my review of 2016: *supra* note 5 at 16 n6.

[79] *Supra* note 7.

[80] See *eg* the judgment of Karakatsanis J., with which Wagner C.J. and Gascon J. concurred, *ibid* at paras 13-18.

[81] *Supra* note 48.

However, the Court went on to consider the allegation of a breach of the duty to consult on its merits and concluded by a majority of seven to two that the executive acting in its legislative capacity (and embracing the preparation,[82] introduction and passage of legislation) did not owe any enforceable duty of consultation to affected or potentially affected First Nations. This conclusion was explained variously in the three relevant judgments by reference to parliamentary privilege, separation of powers, parliamentary sovereignty, and the general principles of Canadian common law to the effect that implied procedural fairness protections do not attach to legislative functions.

In contrast to the majority, Abella J. (with whom Martin J. concurred),[83] distinguishing *Authorson* and *Reference re Canada Assistance Plan*,[84] held that the duty to consult founded in the honour of the Crown and rooted in Section 35 of the *Constitution Act, 1982*, trumped the normal immunity of the executive and legislative branches when engaged in the process of primary legislation. It was a transcendent constitutional principle. However, she also held that it would not be appropriate to grant relief until such time as the relevant legislation was in force[85] and, even then, it would be exceptional for the reviewing court to strike the legislation down as unconstitutional. Rather, the preferred course of action would be to make a declaration to the effect that the duty to consult had not been fulfilled.[86] Abella J. also expressed the opinion that the nature of the obligation of consultation should reflect the rather different setting at play when the duty was one that attached to the executive in a legislative as opposed to administrative capacity.[87]

In this sense, there was something of a coming together of the judgments of Karakatsanis J. and Abella J. to the extent that Karakatsanis J. speculated as to the possibility of a declaration that the Crown had failed to act honourably in enacting legislation without engaging in appropriate consultation.[88] Brown J. indicated exasperation with what he saw as an undercutting of the earlier part of her judgment where she (along with Wagner C.J. and Gascon J.) had rejected the application of the duty to consult to the legislative process.[89] Even Brown J., however, seemed prepared to accept that a failure to engage in consultation could be a factor in any evaluation at the justification stage of a challenge to the substance of legislation under Section 35 of the *Constitution Act, 1982*.[90] Rowe J. (with whom Côté and Moldaver J.J. concurred) expressed agreement with the judgment of Brown J.[91] and added with respect to the infringement/justification framework for evaluation Section 35 claims:

> Along with other factors, including compensation and minimizing the infringement, any prior consultation is considered in determining whether the infringement is justified.[92]

In other words, while there is no enforceable duty to consult as part of the legislative process, the actual presence, absence or extent of consultation can be a relevant factor in considering whether legislative infringements of Indigenous rights can be justified. In short, while there is a clear majority for the proposition that the duty to consult cannot be directly enforced as against the executive acting in a legislative capacity, the concept may still intrude indirectly as a component of actions alleging violations of Section 35. How precisely that works awaits further judicial elaboration or clarification.

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[82] In other words, the normal principles of non-justiciability and the inapplicability of common law procedural fairness obligations to the introduction and passage of primary legislation could not be circumvented by targeting the preparatory stages prior to a Bill's introduction.

[83] *Supra* note 7 at paras 55-98.

[84] *Ibid* at paras 89-90. Neither of these cases implicated formal constitutional rights. With specific reference to *Authorson,* Abella J. stated (at para 89) that, unlike the *Constitution Act, 1982,* the *Bill of Rights* "applies only to enacted legislation."

[85] *Ibid* at para 93.

[86] *Ibid* at paras 96-97.

[87] *Ibid* at para 92.

[88] *Ibid* at paras 48 and 82.

[89] *Ibid* at paras 103-104.

[90] *Ibid* at para 145.

[91] *Ibid* at para 148.

[92] *Ibid* at para 154.

Also looming is the prospect of the enactment of Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"),[93] to be named the *United Nations Declaration on the Rights of Indigenous Peoples Act*. This Bill was passed by the House of Commons on May 30, 2018 and, as of the end of 2018, was at Second Reading stage in the Senate. If passed in its present form, it will recognize UNDRIP as "a universal international human rights instrument with application in Canadian law."[94] Most saliently for present purposes, Article 19 of the *Declaration states*:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing **legislative** or administrative measures that may affect them [emphasis added].

To what extent will this change the legal landscape against which indigenous peoples' calls for engagement in legislative processes are made?[95]

THE DUTY TO CONSULT INDIGENOUS PEOPLES - PROCEDURAL FAIRNESS, LEGITIMATE EXPECTATION, AND SUBORDINATE LEGISLATION AND POLICY-MAKING[96]

(A) Background

As noted in the previous section, among the various justifications that the members of the Supreme Court provided for denying procedural fairness to the *Mikisew Cree* in the context of primary legislation was the general position that common law procedural fairness did not attach to any kind of legislative function. Thus, in *Reference re Canada Assistance Plan*,[97] Sopinka J. drew support from two of the then leading Supreme Court of Canada judgments to this effect: *Canada (Attorney General) v Inuit Tapirisat of Canada*,[98] and *Martineau v Matsqui Institution Disciplinary Board*.[99] In the first, the context was an appeal to the Governor in Council (Cabinet) from the decision of a regulatory agency, and Estey J., delivering the judgment of the Court, held that Cabinet appeals were not subject to any common law obligations of procedural fairness as Cabinet was acting in a legislative capacity. In the second, Dickson J. (as he then was) made his oft-quoted assertion:

> A purely ministerial decision, on grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded on abuse discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision.[100]

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[93] Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous People Act,* 1st Sess, 42th Parl, 2015-2016-2017-2018. For more detailed commentary, see Nigel Bankes, "Implementing UNDRIP: some reflections on Bill C-262" (22 November 2018), online: Ablawg, <http://ablawg.ca/wp-content/uploads/2018/11/Blog_NB_Bill_C-262_Legislative_Implementation_of_UNDRIP_November2018.pdf>.

[94] *Ibid*, s 1.

[95] For fuller discussion, see Sarah Morales, "Supreme Court of Canada should have recognized UNDRIP in *Mikisew Cree Nation v Canada*", *Canadian Lawyer Magazine,* (29 October 2018), online: <http://www.canadianlawyermag.com/author/sarah-morales/supreme-court-of-canada-should-have-recognized-undrip-in-mikisew-cree-nation-v-canada-16410>.

[96] It is, of course, important to keep in mind that there are a whole range of situations in which legislated, and government or agency adopted rule-making procedures are in place and which ensure that much legislative and policy-making activity is preceded by involvement on the part of affected constituencies. See Gus Van Harten, Gerald Heckman, David J. Mullan, and Janna Promislow, *Administrative Law: Cases, Text, and Materials* (Toronto: EMP, 7th ed., 2015) ("Van Harten, Heckman, Mullan, and Promislow") Chapter 7 for a sample of such provisions. Indeed, this extends to engagement with indigenous groups as exemplified by the March 2011 *Aboriginal Consultation and Accommodation, updated Guidelines for Federal Officials to Fulfill the Duty to Consult,* referenced by de Montigny J.A., delivering the judgment of the majority of the Federal Court of Appeal in *Mikisew Cree, supra* note 78 at para 61. However, see Zachary Davis, "The Duty to Consult and Legislative Action" (2016) 79 Sask L Rev 17, for a description of the patchwork of provincial policies on indigenous peoples consultation with respect to contemplated legislative action.

[97] *Supra* note 69.

[98] [1980] 2 SCR 735.

[99] [1980] 1 SCR 602.

[100] *Ibid* at 628.

Indeed, in *Canada Assistance Plan*, Sopinka J. appeared to accept that this exclusion of all legislative functions from the reach of common law procedural fairness could not be circumvented by reliance on the doctrine of legitimate expectation.

While *Inuit Tapirisat* has been marginalized to the extent that it held that Cabinet appeals were legislative in character,[101] the general proposition that procedural fairness obligations do not attach to purely legislative functions (as found in that case and *Reference re Canada Assistance Plan*) still appears to be an accepted part of Canadian law. This is reflected in Rowe J.'s judgment in *Mikisew Cree* where, with reference to both judgments, he states that the "general principles of judicial review"

> …do not allow for courts to review decisions of a legislative nature on grounds of procedural fairness…As a general rule, no duty of procedural fairness is owed by the government in the exercise of any legislative function.[102]

Indeed, the excluded zone may extend even more broadly than that in the sense that Dickson J. in *Martineau* spoke not just of legislative decision-making but also any "purely ministerial decision on broad grounds of public policy." There are further echoes of this in the judgment of Le Dain J. (for the Court) in 1985 in *Cardinal v Director of Kent Institution*,[103] where he described the threshold to the implication of an obligation of common law procedural fairness in the following terms:

> The Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature which affects the rights, privileges and interests of **an individual** [emphasis added].[104]

This can be read as reinforcing the sense that procedural fairness at common law is focussed on decision-making that implicates the rights, privileges and interests of an individual or a discrete group of individuals. It has no purchase with respect to the exercise of broad policy-making powers (whether formally legislative in character or not) which has an impact on the public generally or segments of the public in an undifferentiated manner.

In this section of the review, I will be focusing on two questions with respect to this aspect of the common law of procedural fairness. First, does it have any direct application to the duty to consult and, where appropriate, accommodate indigenous peoples? Secondly, does it still represent the common law with respect to legislative decision-making in contexts other than the development, introduction and passage of primary legislation? Both questions are highly relevant to the regulation-making and, more generally, policy development functions of those responsible for energy policy and regulation.

(B) The Duty to Consult and Subordinate Legislation and Policy-Making[105]

In contrast to the implications that might be read into Rowe J.'s statement above in *Mikisew Cree*, Karakatsanis J. was, however, quite clear. She emphasised that her judgment did not extend to consultation on subordinate legislation making; that involved executive, not legislative action.[106] Moreover, the fact that Abella J. (with whom Martin J. concurred) would have accepted that the duty attached to the processes of primary legislation, makes it obvious that she would have no quarrel with its application to other legislative and policy-making processes.

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[101] See the judgment of Rothstein J. in *Canadian National Railway Co. v Canada (Attorney General)*, [2014] 2 SCR 135 at para 39, stating that the Estey position on natural justice and Cabinet appeals "may not represent the current law." Given a Court that is extremely reluctant to ever say that one of its own previous decisions is no longer good law or was incorrectly decided, this is probably as good as it generally gets!

[102] *Supra* note 7 at para 168.

[103] [1985] 2 SCR 643.

[104] *Ibid* at 653.

[105] For further and more detailed discussion of this issue, see Zachary Davis, "The Duty to Consult and Legislative Action" (2016), 79 Sask L Rev 17; Andrew Green, "Delegation and Consultation: How the Administrative State Functions and the Importance of Rules", Chapter 8, in Flood and Sossin, *supra* note 68, 307 at 328-30; and Van Harten, Heckman, Mullan, and Promislow, *supra* note 96 at 609-11.

[106] *Supra* note 7 at para 51.

It is also worth noteing that de Montigny J.A., delivering the majority judgment of the Federal Court of Appeal in *Mikisew Cree*, took care to distinguish[107] the judgment of the Alberta Court of Appeal in *Tsuu T'ina First Nation v Alberta (Minister of Environment)*.[108] In that case, O'Brien J.A., delivering the judgment of the Court, had held that the duty to consult attached to the development of a water management plan that was approved and adopted by Order in Council.[109] While de Montigny J.A. did not go so far as to express an opinion as to the correctness of *Tsuu T'ina*, he clearly saw the fact situation as different from that before the Court in *Mikisew Cree*. *Tsuu T'ina* involved the actions of a "delegate [the Governor in Council] pursuant to legislative authority."[110]

Earlier, in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*,[111] the Supreme Court recognized that the application of the duty to consult in the context of "strategic, higher level decisions" or key points in the policy development process. This sense of the duty to consult applying across the spectrum of government decision-making including legislative action in the form of regulations, Orders in Council, and municipal by-laws also found favour in the judgment of Bruce J. of the British Columbia Supreme Court in *Adams Lake Indian Band v British Columbia (Lieutenant Governor in Council)*.[112] There, referencing *Tsuu T'ina*,[113] she held that the duty to consult could attach to the process of incorporating a municipality by way of Order in Council. While the judgment was reversed on other grounds, that reversal was in no way predicated on the inapplicability of the duty to consult to subordinate legislation.

Given this background, at the very least, the judgment of the Court in *Mikisew Cree* cannot and should not be read as authority for the proposition that the duty to consult does not extend to "legislative" action of any kind. In other words, there is no necessary connection between the generally accepted threshold to the common law duty of procedural fairness and the existence of a duty to consult. Moreover, the balance of authority to this point seems very much tilted in favour of restricting the reach of *Mikisew Cree* to the processes of primary legislation, thus creating the potential for the application of the duty to consult in all other legislative and policy-making settings.

The one reservation that I would enter, however, is on the matter of remedies particularly with respect to failures to consult indigenous peoples on Orders in Council. In both *Tsuu T'ina*[114] and *Adams Lake Indian Band*,[115] the Courts expressed concerns about whether quashing was an appropriate remedial response to an Order in Council on which there had been inadequate or no consultation. Without definitively resolving that question, both Courts preferred declaratory relief as an appropriate indication of any failure to consult as part of processes culminating in an Order in Council. For my part, I fail to see why quashing would not be an appropriate remedy in such cases though would concede that, as a matter of remedial discretion, a court might well confine itself to declaratory relief. (I return to this issue below in the context of challenges to subordinate legislation in the name of the common law duty of procedural fairness.)

(C) Procedural Fairness, and Subordinate Legislation and Policy Making

The duty to consult indigenous peoples and the common law principles of procedural fairness, while having much in common and while proceeding at times on parallel tracks, have different foundations. Most importantly, the duty to consult is a constitutional imperative; the common law duty of procedural fairness is just that, a duty that is generally subject to legislative override and without a formal constitutional status.[116] Thus, any recognition

[107] *Supra* note 78 at para 33.

[108] 2010 ABCA 137.

[109] *Ibid* at paras 48-57.

[110] *Supra* note 78 at para 33.

[111] 2010 SCC 43 at para 44.

[112] *Supra* note 10 at paras 119-29.

[113] *Ibid* at para 124.

[114] *Supra* note 108 at paras 52-56.

[115] *Supra* note 10 at paras 198-211.

[116] Unless, of course, an assertion of the right to procedural fairness can be located within a specific constitutional norm such as Section 7 of the *Canadian Charter of Rights and Freedoms* and its guarantee of the right to the principles of fundamental justice when decision-making affects the right to life, liberty and security of the person.

that the duty to consult extends to both subordinate legislation and policy-making has no necessary ramifications for the threshold to the application of common law principles of procedural fairness. That threshold remains a separate question.

Certainly, the common law threshold has been refined to some degree over the years. Thus, in 1980,[117] in the context of review of a municipal by-law, the Supreme Court held that, even though the by-law was legislative in format, its passage nevertheless demanded procedural fairness to the affected developer because it resolved an ongoing legal dispute between the municipality and the developer. While the end product was legislative in form, the substance of the process was a situation of individually targeted decision-making.[118] I have also noted already the Supreme Court's effective change in the categorization of Cabinet appeals from legislative to administrative or *quasi*-judicial for procedural fairness purposes. Nonetheless, the conventional wisdom has continued to prevail: truly legislative functions (including regulations and Orders in Council) and broadly-targeted policy- or rule-making do not attract common law procedural fairness protections.[119]

This is exemplified by the 2018 judgment of Kane J. in the Federal Court in *Canadian Union of Public Employees v Canada (Attorney General)* ("*CUPE*").[120] It also raised the contentious issue as to whether the doctrine of legitimate expectation could be deployed to circumvent the exclusion of legislative functions from the ambit of common law procedural fairness.

At stake in this case was the validity of amendments to regulations specifying the minimum number of flight attendants that had to deployed on commercial flights in proportion to the number of available seats. The *Canadian Union of Public Employees* ("the Union") representing flight attendants sought judicial review of this regulation on the basis of failure to adhere to the common law principles of procedural fairness and, more particularly, a failure to meet the Union's legitimate expectation of consultation.

After an extensive review of the arguments and the authorities, Kane J. summarized her conclusions as follows:

> There is no duty of procedural fairness owed, nor is the doctrine of legitimate expectations – whether viewed as a stand-alone doctrine or an element of the duty of procedural fairness – applicable in the regulation-making context. The legislative process, including delegated legislation, is exempt from the requirements of procedural fairness.[121]

In arguing against this conventional position, among many arguments, the Union had urged Kane J. to reclassify the passage of subordinate legislation as executive rather than legislative action. It was clear that the Court was not likely to take this step given the weight of authority. More credibly, however, the Union also argued that, even if legislative functions were still excluded generally from the ambit of procedural fairness obligations, that exclusion could be overcome if the normal preconditions for the invocation of a legitimate expectation of participatory rights could be satisfied.

The Canadian[122] judgment that the Union relied on most heavily to support this proposition was the concurring judgment of Evans J.A. in *Apotex v Canada (Attorney General)* ("*Apotex*")[123] in which he had argued for the recognition of the doctrine of legitimate expectation in the context of regulation-making. While accepting that such

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[117] *Homex Realty and Development Co v Wyoming (Village),* [1980] 2 SCR 1011.

[118] Indeed, this kind of analysis has also been applied to Orders in Council that are specific to particular individuals. See *eg Desjardins v Bouchard,* [1983] 2 FC 641 (CA) (Order in Council revoking pardon) and, more recently, *Oberlander v Canada (Attorney General),* 2004 FCA 2013, [2005] 1 FCR 3 (Order in Council revoking Canadian citizenship).

[119] See *eg Canadian Association of Regulated Importers v Canada (Attorney General),* [1994] 2 FCR 247 (CA) (Ministerial decision effecting change to quota policy) and *Canadian Doctors for Refugee Care v Canada (Attorney General),* 2014 FC 651 at paras 421-440 (Order-in-Council altering health care entitlements of refugee claimants). In the latter case, at paras 421-424, McTavish J. appears to have rejected a legitimate expectation argument on the facts as opposed to a principle that it could not apply to "legislative" action at least in the form of an Order in Council.

[120] 2018 FC 518.

[121] *Ibid* at para 157.

[122] The Union also invoked United Kingdom case law.

[123] [2000] 4 FC 264 (CA).

functions were normally excluded from the ambit of common law procedural fairness, he adopted a version of the legitimate expectation doctrine that created room for it to operate even when the function was legislative in both form and substance. However, the other two members of the Court expressed[124] considerable skepticism as to Evans J.A.'s position on this issue.

On the path to rejecting the argument based on Evans J.A.'s position, Kane J. did acknowledge that other judges[125] had not entirely rejected it. However, in treating the strong doubts of Décary and Sexton J.J.A. in *Apotex* as carrying the day, Kane J. also referred to the judgment of the Federal Court in *Association des Pilotes de Lignes Internationales v Urbino*.[126] There, Pinard J. had applied *Apotex* and stated that it had not changed the law with respect to the non-application of the doctrine of legitimate expectation in a regulation-making setting.[127] Also, a panel of the Ontario Divisional Court in *The Cash Store Financial Services Inc v Ontario (Consumer Services)*,[128] while expressly stating that it was not determining the matter, referred to the position espoused by Décary and Sexton J.J.A. in *Apotex*, "as certainly the dominant one in the case law."

What is also significant is that, in *Apotex*, Evans J.A. went on to hold that the doctrine of legitimate expectation was not otherwise triggered on the facts of the case. Moreover, he further ruled that, even if the company's legitimate expectations had not been met, nonetheless, it would not have been appropriate to quash or set aside the regulation. If Cabinet had approved the regulation in ignorance of undertakings as to procedure given by the Minister, there was no basis for intervention. And, in any event, considerations of Cabinet secrecy would preempt any effective probe into whether any or all the members of Cabinet were privy to the undertakings. In other words, the company should have taken a preemptive strike while the regulation was still being developed and evaluated at the ministerial level. Given these restrictions on the securing of relief, one is forced to ask whether the recognition that legitimate expectations could be triggered in the case of regulation-making would in most instances have been a hollow victory. It also raises the question of whether, even after the approval of the regulation, a ministerial failure to meet an applicant's legitimate expectation might be attacked, in a sense collaterally, as undermining the validity of the regulation.

What is also left dangling is the extent to which the judgment in this case (and other precedents involving regulations) apply in other contexts such as regulations made by regulatory bodies,[129] by-law making by municipalities, and the development of policies and guidelines by various government and regulatory bodies.

In the course of her judgment, Kane J. seems to place much store in the fact that the target of this application for judicial review is the Governor in Council (or Cabinet). In particular, she emphasises the reserve nature of review of regulations made by Cabinet. Citing the judgment of the Federal Court of Appeal in *Canadian Council for Refugees v Canada*,[130] she notes[131] how in that case the Court[132] equated the authority of the Governor in Council to make regulations with that of members of Parliament to enact legislation, and then went on to assert that review of regulations is available only for constitutional invalidity or *ultra vires*, not procedural unfairness.[133]

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[124] *Ibid* at paras 20-22.

[125] *Supra* note 120 at paras 150-151 (and including Binnie J. in *Mount Sinai Hospital Centre v Quebec (Minister of Health and Social Services),* 2001 SCC 41, [2001] 2 SCR 281, where at para 34, he referenced the Evans judgment but stated that "that issue remains open for another day.").

[126] 2004 FC 1387.

[127] *Ibid* at para 21.

[128] 2013 ONSC 6440, 117 OR (3d) 786 (Div Ct) at paras 24-25.

[129] See for context, *Bell Canada v Canada (Attorney General),* 2016 FCA 217.

[130] 2008 FCA 229, [2009] 3 FCR 136.

[131] *Supra* note 120 at para 121.

[132] *Supra* note 130 at para 53.

[133] *Supra* note 120 at para 123.

In support of his position in *Apotex* that the doctrine of legitimate expectation could be applied to regulation-making by the Governor in Council, Evans J.A. relied[134] in part on the Supreme Court majority judgment of Sopinka J. in *Old St. Boniface Residents Association Inc v Winnipeg (City)*.[135] There, Sopinka J. had declined to apply the doctrine of legitimate expectation on the basis that it was not appropriate to add further consultation obligations to a process that already provided for adequate participatory opportunities.[136] However, that holding followed a statement in which he had set out the principles of legitimate expectation in such a way as to suggest that they were in an appropriate case applicable to municipal councillors when determining whether to adopt or amend a zoning by-law.[137] In *CUPE*, Kane J. noted[138] this aspect of Evans J.A.'s judgment, though not in such a way as to raise doubts about his analysis of *Old St. Boniface Residents Association* but rather to rule that it was not applicable to Cabinet regulation-making.

Indeed, beyond the issue of legitimate expectation, *Old St. Boniface Residents' Association* is notable for the fact that it applied a modified test for bias to municipal councillors when determining whether to approve a zoning by-law amendment. This sense that procedural fairness can be triggered in cases of land use and zoning by-laws continues to this day as exemplified by the 2018 judgment of Gates J. of the Alberta Court of Queen's Bench in *Gruman v Canmore (Town)*.[139] There, he held that the duty of procedural fairness applied to a rezoning by-law with broad community impact. Even though the decision in this instance was more legislative than adjudicative, Gates J.[140] treated this as a factor relevant in determining the level or intensity of procedural fairness and not as precluding the Court from applying the common law principles of procedural fairness. Certainly, it can be argued that the normal rule that procedural fairness does not apply to legislative functions was displaced in this case by the provisions of the relevant Act. Nonetheless, it does provide another indicator of the breaking down of what has been seen as a clear dividing line for procedural fairness threshold purposes between legislative functions, on the one hand, and administrative and adjudicative processes, on the other.[141]

It is also worth recalling that, in the context of the duty to consult, Phelan J. of the Federal Court (in a judgment endorsed by the Court of Appeal) held that it applied to the procedural rule-making phase of a project (the Mackenzie Valley pipeline project) that adversely affected indigenous peoples.[142]

My sense, therefore, is that there is much to be said for the following observation by Professor Kate Glover:

> [I]n light of the jurisprudential movement away from the distinction between administrative, quasi-judicial, and judicial decisions, *Wells* and *Cardinal* should not likely be read as a categorical exemption from the duty of fairness for all legislative decisions. Rather, in every instance of decision-making, the nature of the decision being made should be closely examined to determine its true character and whether it is the type of decision that should be immune from the common law duty of fairness.[143]

However, what is also clear is that it will take a case such as the judgment of Kane J. in *CUPE* to proceed to the Supreme Court of Canada if that somewhat more fluid conception of the procedural fairness threshold is to be adopted.

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[134] *Supra* note 123 at paras 104-105.

[135] [1990] 3 SCR 1170.

[136] *Ibid* at 1204.

[137] *Ibid*.

[138] *Supra* note 120 at para 138.

[139] 2018 ABQB 507.

[140] *Ibid* at paras 97-98.

[141] For a comment criticizing this aspect of Gates J.'s judgment on the basis that it erred in not rejecting the arguments for common law procedural fairness with respect to a legislative decision and according procedural protection to an objector, see Shaun Fluker, "Peaks of Grassi Development in Canmore: Procedural Fairness and Municipal Bylaws?" (15 August 2018), online: Ablawg, <http://ablawg.ca/wp-content/uploads/2018/08/Blog_SF_Gruman_August2018.pdf>.

[142] *Dene Tha' First Nation v Canada (Minister of the Environment),* 2006 FC 1354, 303 FTR 106, affd 2008 FCA 20.

[143] *Supra* note 68 at 219.

At the very least, what is required is recognition that, even if one accepts that Cabinet appeals are no longer to be regarded as "legislative" in nature, that term covers a wide spectrum of variegated decision-making processes. They range from primary legislation to informal rule-making and policy statements. Given that, it is necessary to reevaluate whether in that realm a one size fits all regime should govern the crossing of the procedural fairness threshold, not to mention the intensity of any procedural fairness obligations should the threshold be crossed. Principled refinement is clearly necessary.

THE DUTY TO CONSULT AND THE *ALBERTA ABORIGINAL CONSULTATION OFFICE*

The *Alberta Aboriginal Consultation Office* ("ACO")[144] was established in 2013 not by primary or subordinate legislation but under *The Government of Alberta's Policy on Consultation with First Nations on Land and Resource Management, 2013.*[145] It is administered by and operates within the Ministry of Indigenous Relations. As part of its mandate, under ministerial order, it is responsible for assessing whether, in relation to energy applications, the Crown has a duty to consult an indigenous group, and, if so, whether it has fulfilled that obligation. This includes matters within the jurisdiction of the *Alberta Energy Regulator* ("AER"), which is explicitly excluded as part of the consideration of matters before it from "assessing the adequacy of Crown consultation associated with the rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*."[146]

In 2014, the ACO had determined that there was no duty to consult a First Nation with respect to a pipeline application before the AER.[147] The AER proceeded with its consideration of the application and it was approved in late 2014. (Interestingly, despite the ACO's determination that there was no duty to consult the First Nation, the proponent did engage in consultation and the First Nation was accorded standing before the AER.)

At that point, the First Nation applied for judicial review not of the AER's approval of the project but the ACO's decision that the duty to consult was not triggered. In that context, while seeking a quashing of that decision, it did not seek an order returning the matter to the ACO but rather various forms of declaratory relief.[148] Not surprisingly, this "novel"[149] judicial review proceeding was challenged on the ground of mootness. Suffice it to say that Nixon J. of the Alberta Court of Queen's Bench struck out a challenge to the merits of the ACO's determination that the duty to consult was not triggered. However, she did rule that four of the other issues raised by the First Nation involved "live controversies"[150] and allowed the application to proceed with respect to those matters. Two of those issues have administrative law dimensions:

1. Does the ACO have the authority to determine whether the Crown's ***duty to consult*** is triggered?

2. Is procedural fairness engaged in the determination of whether a ***duty to consult*** arises?

The First Nation's argument on the first question did not turn on an interpretation of the mandate of the ACO as spelled out in the relevant policy and the ministerial order. Rather, it was based on the use of these instruments as the means for conferring that authority on the ACO. The contention was that it should have been done by statute, not policy or ministerial order. Consequently, Nixon J. characterized this as an "issue of true jurisdiction" for which correctness was the appropriate standard of review.[151]

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[144] See "About Us", online: <www.indigenous.alberta.ca/573.cfm>.

[145] Extended to Metis on April 4, 2016 by *The Government of Alberta's Policy on Consultation with Metis Settlements on Land and Natural Resource Management, 2015.*

[146] *Responsible Energy Development Act,* SA 2012, c R-71.3, s 21.

[147] For a summary of the relevant protocols respecting the interaction between the AER and the ACO when the issue of consultation is relevant to an AER proceeding, see "Alberta Energy Regulator (AER) and the Aboriginal Consultation Office", online: <www.indigenous.alberta.ca/ACO-AER.cfm>.

[148] *Athabasca Chipewyan First Nation v Alberta (Minister of Aboriginal Relations, Aboriginal Consultation Office), supra* note 8.

[149] *Ibid* at para 4.

[150] *Ibid* at para 52.

[151] *Ibid* at para 61.

In advancing this argument, the First Nation relied primarily on *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*[152] and its supposed holding that whether a tribunal had jurisdiction to determine if a duty to consult existed depended on a statutory conferral of power. Irrespective of the accuracy of the First Nation's characterization of the relevant ruling in *Carrier Sekani*, Nixon J. held that that ruling was inapplicable in the current context. It applied to statutorily-created tribunals, not to decision-making within the structure of central government.[153] The Crown was responsible for the fulfilment of the duty to consult and, in this instance, the Crown was entitled to act through ministers and their departments. Operating within that context, the Crown could without legislation set up administrative schemes and policies for the fulfilment of its responsibilities including the designation of where, within the central governmental structure, consultaton would take place. Here, the terms of the creation of the ACO and the relevant ministerial policy and Ministerial order vested that authority, including the power to decide whether the duty to consult was triggered, in the ACO acting within the administrative framework of the Minister of Indigenous Relations. Nothing about this structure was constitutionally suspect.[154] This is little or no room to quarrel with this analysis.

The same applies to Nixon J.'s response to the second question. Whether viewed within the context of the extent of the overall obligations arising out of the duty to consult, or, as in this case, with primary reference to the common law procedural fairness threshold, the ACO owed the First Nation a duty of fairness in determining when the duty to consult was triggered.

In so holding,[155] Nixon J. relied upon two earlier judgments of the Alberta Court of Queen's Bench[156] and applied the test set out in *Baker v Canada (Minister of Citizenship and Immigration)*.[157] The ACO determination of whether the duty to consult was triggered was administrative in nature and affected the "rights, privileges or interests of an individual."[158] This was a decision that determined whether the First Nation had a right to consultation under Section 35 of the *Constitution Act, 1982*, and would be final (subject of course to judicial review) if the ACO determined that there was no duty to consult.

Nixon J. then proceeded to consider the extent of the ACO's procedural fairness obligations. In so doing, she expressed[159] some concerns about applying the formal *Baker* five-part procedural fairness intensity analysis. She wanted to avoid imposing a process that was "similar to the trial model of adjudicating rights." Such an adversarial context would derogate from the reconciliation objectives of the principles governing the duty to consult and, where appropriate, accommodate.

For Nixon J., the duty of procedural fairness for all practical purposes commenced once the ACO became aware that the First Nation would be contesting its tentative view that there was no duty to consult.[160] At that point, the ACO was obliged to give notice of its intention to make a final decision on the issue,[161] and to outline the procedure that it proposed to follow and the evidence that would be required to satisfy the test for triggering the duty to consult, along with relevant deadlines.[162] Thereafter, meaningful participation meant that the First Nation would have the opportunity and indeed responsibility to adduce evidence in support of its contention that the duty to consult had arisen.[163]

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[152] 2010 SCC 43, [2010] 2 SCR 650 at para 60. In fact, in para 60, McLachlin C.J. was concerned with distinguishing between whether a tribunal had the authority to engage in consultation, a capacity that depended on express or implicit statutory authorization, and the determination of whether a duty to consult existed, an authority which arises presumptively out of a tribunal's capacity to determine questions of law.

[153] *Supra* note 8 at para 66.

[154] *Ibid* at paras 60-69.

[155] *Ibid* at paras 102-109.

[156] *Fort Chipewyan Metis Nation of Alberta Local #125 v Alberta,* 2016 ABQB 713 and *Metis Nation of Alberta Association Fort McMurray Local 1935 v Alberta,* 2016 ABQB 712.

[157] [1999] 2 SCR 817.

[158] *Ibid* at para 20.

[159] *Supra* note 8 at para 110. This point was also reiterated at para 120.

[160] *Ibid* at paras 113-115.

[161] *Ibid* at para 115.

[162] *Ibid* at para 116.

[163] *Ibid.*

Nixon J. then moved to the end of the process and recognized that the ACO should provide reasons for its decision, reasons that showed that the ACO had "fully and fairly considered the information and evidence submitted by the First Nation."[164]

Earlier in her judgment,[165] Nixon J. had stated that, because the First Nation was not seeking a remission of the matter to the ACO for further consideration, she would not be considering "whether a duty of procedural fairness had been breached in this case." However, in what seemed to be a change of mind, after sketching the outline of the procedure that should be followed, she continued to the effect that the ACO had not adhered to these procedural requirements in this case.[166] Given that her ultimate declaration was confined to the proposition that the duty of procedural fairness applied to decisions on the duty to consult, one can assume that all the elaboration of the content of procedural fairness, including the observation that the proposed process should not impose "an overly high burden on the ACO",[167] was no more that advisory or *obiter dicta* in nature. Nonetheless, it may indeed serve as useful guidance to the ACO particularly when read along with Nixon J.'s further statement that, as recognized by the judgment of the Court of Queen's Bench, the ACO had adopted a compliant process on the facts of *Fort Chipewyan Metis Nation of Alberta Local #125 v Alberta.*[168]

PARTICIPATORY RIGHTS

In last year's Survey,[169] I cheated by including discussion of the second judgment released by the Supreme Court of Canada in 2018: *Delta Air Lines Inc v Lukács*.[170] It was an important judgment on the principles governing a regulatory agency's assessment of whether and, if so, under what circumstances someone could assert public interest standing to make a "complaint" about an airline's policies with respect to the carriage of obese persons.

During 2018, there were other developments[171] relevant to energy law and regulation in the law governing participatory rights.[172]

(A) Interventions in Applications for Leave or Permission to Appeal

Balancing Pool v ENMAX Energy Corporation[173] raised the question of the circumstances, if any under which the Alberta Court of Appeal will allow interventions or the addition of parties in an application for leave or permission to appeal on a question of law or jurisdiction from a decision of the *Alberta Utilities Commission* ("AUC").

Three energy companies had applied for permission to appeal to the Alberta Court of Appeal from a decision of the AUC, a decision that followed upon the regulator's earlier finding that a rule, the "line loss rule", adopted by the *Alberta Electric Systems Operator* ("AESO")

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[164] *Ibid* at para 117.

[165] *Ibid* at para 101.

[166] *Ibid* at para 118.

[167] *Ibid* at para 119.

[168] *Ibid*.

[169] David J. Mullan, "2017 Developments in Administrative Law Relevant to Energy Law and Regulation" (2018) 6 ERQ 19 at 19-24.

[170] *Supra* note 2.

[171] I have omitted from this survey consideration of the participatory provisions in Bill C-69, *An Act to enact the Impact Assessment Act and the Canada Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments.* As of December 12, the Bill had received Second Reading in the Senate and been referred to Committee. For the details and commentary, see Kristen van de Biezenbos, "Your Concerns Have Been Noted: Citizen Participation in Pipeline Regulatory Processes Under the Proposed *Impact Assessment Act*" (28 February 2018), online: Ablawg, <http://ablawg.ca/wp-content/uploads/2018/02/Blog_KvdB_BillC69.pdf>.

[172] For an energy related decision distinguishing *Lukács,* see *Normtek Radiation Services v Alberta (Environmental Appeal Board),* 2018 ABQB 911. Ashcroft J. held that a statutory restriction *(Environmental Protection and Enhancement Act,* RSA 2000, c E-12, s 91(1)(a)(i)) on the right to appeal a decision of the Appeal Board to those "directly affected" prevented someone asserting an entitlement to appeal based on public interest standing.

[173] 2018 ABCA 143. (For a more detailed commentary on this judgment, see Nigel Bankes, "Applications for Party Status in a Permission to Appeal Application" (24 April 2018), online: Ablawg, <https://ablawg.ca/2018/04/24/applications-for-party-status-in-a-permission-to-appeal-application>) Ultimately, the application for permission to appeal was denied: *Capital Power Corporation v Alberta (Utilities Commission), supra* note 5. Interestingly, the Balancing Pool is not listed as party to the application and presumably did not participate.

respecting the allocation of the costs of "loss" of electricity in the course of transmission was unlawful. As part of the remedial phase of the matter, the AUC directed the AESO to "re-issue invoices for line loss charges or credits to those to those parties that held Supply Transmission ["STS"] contracts when the charges or the credits were first incurred." This produced both winners and losers. Among the losers were the three companies seeking permission to appeal. The winners included Milner Power Inc., ATCO Power Corporation, Trans Alta Corporation, and the Balancing Pool, "a statutory entity funded by Alberta's energy consumers."[174] Milner Power, the original complainant, and ATCO were named respondents in the application for permission to appeal; Trans Alta and the Balancing Pool were not. Both applied to be added as either respondents or, in the alternative, intervenors.

The general principles respecting the addition of parties and recognition of intervenors on an application for permission to appeal had been outlined in the judgment of Hunt J.A. in *Carbon Development Partnership v Alberta (Energy and Utilities Board)*.[175] To be added as a party, it was necessary for an applicant to demonstrate "a legal interest in the outcome of the proceeding."[176] If that threshold was crossed, the applications judge then had to consider whether it was "just and convenient"[177] to add the applicant and whether the applicant's interest would be protected adequately only if it were granted party status.[178] Paperny J.A., the applications judge in this matter, again[179] citing *Carbon Development*,[180] emphasised that this was an inherent power that should be exercised sparingly.

> In the absence of permission to appeal being granted, there is no appeal and as such no interest, legal or economic, that can be directly affected by the application (at least immediately).[181]

She also noted that, given the narrowness of the Court's inquiry at the application for leave stage, it was rare that the Court would be assisted by representations from "multiple parties". Moreover, if permission to appeal was granted, it remained open to those claiming an interest to apply for and be granted status at that point.[182]

Nonetheless, Paperny J.A. held that the Balancing Pool had demonstrated that it was appropriate to afford it party status on the application for leave to appeal in the circumstances of this application. With reference to the first hurdle, demonstration of a legal interest, she explained that the Balancing Pool had not been a party at the outset of the proceedings but noted that this was because "its legal and financial interests at that point were either undetermined, unknown or non-existent."[183] However, all that changed when, much later in a process that had lasted many years, it acquired a large number of STS contracts and thereby emerged as a possible winner or loser at the remedial stage. At that point, the Balancing Pool became an active participant in the remedial stage of the proceedings. It was therefore a matter of how the proceedings unfolded "than a lack of legal interest or standing"[184] that had led to it not being named as a respondent on the application for permission to appeal from the outset.

As for the other requirements for meeting the severe test for joinder as a party respondent to an application for permission to appeal, the Balancing Pool was differently located than the existing respondents and Trans Alta. It had acquired its STS contracts not by commercial negotiation but by operation of its statutory role with respect to protection of the interests of consumers. It therefore represented "distinct and broad interests compared to the other named parties" and was in a position to provide a "unique perspective" in the context of the determination of the application for permission

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[174] *Ibid* at para 25.
[175] 2007 ABCA 231.
[176] *Ibid* at para 9.
[177] *Ibid.*
[178] *Ibid.*
[179] *Supra* note 173 at para 22.
[180] *Supra* note 175 at para 6.
[181] *Supra* note 173 at para 21.
[182] *Ibid.*
[183] *Ibid* at para 24.
[184] *Ibid.*

to appeal and its scope. Paperny J.A. also took account of the willingness of the Balancing Pool to abide by the existing timetable including page constraints.[185]

In contrast, while Trans Alta might be affected by the eventual outcome of any appeal, Paperny J.A. held that it had not established that it would offer a unique perspective with respect to the application for permission to appeal or the terms on which any such appeal might subsequently depend.[186] Its interests could be protected adequately by the further opportunity to seek party or intervenor status should the judge of the Court of Appeal grant the application for permission to appeal.[187]

Ultimately, the Balancing Pool's success on its application to be added as a respondent depended on what seems to be a most unusual set of facts. As such, while it provides an interesting and rare example of an exercise of judicial discretion to add a party or intervenor at the application for permission to appeal stage, it is unlikely that it will lead to a spike in success rates on such applications. In short, the overall integrity of the principles identified in *Carbon Development* is preserved and the exceptional nature of success on such applications underscored.

(B) Judicial Review of the Decisions of Energy Regulators – Public Interest Standing and Applications for Intervenor Status[188]

In *David Suzuki Foundation v Canada-Newfoundland and Labrador Offshore Petroleum Board* ("*David Suzuki*"),[189] five environmental protection organizations applied relying on public interest standing for judicial review of a decision of the Canada-Newfoundland and Labrador Offshore Petroleum Board ("Board"). By that decision, in December 2016, the Board allowed Corridor Resources ("Corridor") to surrender an existing oil and gas exploration licence which would have expired in early 2017 and replaced it with a new four-year licence. In effect, this meant that Corridor would have been a licence holder for the same site for a total of almost thirteen years. The environmental groups' challenge was based on a provision in the relevant legislation that restricted exploration licences to a term of nine years without the possibility of extension or renewal.[190] The critical issue was whether as a matter of law, that provision could be avoided by a surrender of an existing licence and the issuance of a new one.

In a very careful and useful judgment, Chaytor J. of the Newfoundland and Labrador Supreme Court, in the context of an application by the Board (supported by Corridor) for the pre-trial determination of a question of law, held that the five environmental protection groups should be allowed to proceed with their application for judicial review based on public interest standing. In doing so, she applied the current principles for public interest standing elaborated by Cromwell J. delivering the judgment of the Supreme Court of Canada in *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)* ("*Downtown Eastside*").[191]

At the outset, she appropriately resisted the argument of the groups that as the matter arose in the context of an application by the Board, the Board bore the onus of establishing that the groups should not have public interest standing. Irrespective of context, it was for the groups "to persuade the Court that standing should be granted."[192] However, she was ultimately persuaded that the groups had met that burden.

In *Downtown Eastside*, Cromwell J. had articulated the test for public interest standing in a way that modified or, perhaps more accurately, clarified the Court's previous approach to

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[185] *Ibid* at para 25.

[186] *Ibid* at para 26.

[187] *Ibid* at para 27.

[188] For further commentary, see Nigel Bankes, "Public Interest Standing for NGOs to Test Whether CNLOPD can Effect an End-Run Around Maximum Term Provisions" (17 July 2018), online: Ablawg, <http://ablawg.ca/wp-content/uploads/2018/07/Blog_NB_DavidSuzuki_July2018.pdf>.

[189] 2018 NLSC 146.

[190] *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act,* SC 1987 c 3, s 69(2).

[191] 2012 SCC 45, [2012] 2 SCR 524.

[192] *Supra* note 189 at para 15.

determining whether an applicant for judicial review qualified:

1. Whether a serious justiciable issue is raised;

2. Whether the party seeking standing has a real stake or genuine interest in the issue; and

3. Whether, in all circumstances, the proposed action is a reasonable and effective way to bring the issue before the courts.[193]

Previously, in *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*,[194] Cory J., delivering the judgment of the Supreme Court, had phrased the third element of the test somewhat differently. Was

> …there another reasonable and effective way to bring the issue before the court?

In the context of what he saw as "the need to approach discretionary standing generously", Cromwell J. also, as noted by Chaytor J.,[195] dictated that the three elements of the test were not to be taken as a "rigid checklist" but viewed as "interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes."[196] Both the rearticulation of the third limb and the elaboration of how to approach the three limbs were to prove of significance in what followed in both *Downtown Eastside* and *David Suzuki*.

On the first limb, Chaytor J. rejected the Board's argument that the matter was not appropriate for judicial determination because the groups' ultimate aim was the cessation of drilling in the Gulf of St. Lawrence and, within that overall objective, a condemning of the adequacy and timing of environmental assessment processes.[197] This mischaracterized the nature of the application for judicial review; it involved review of the Board's determination of a pure question of law. This description of the groups' application was also relevant to the second component of the first limb. Even if it was a justiciable issue, was it serious? First, Chaytor J. noted that the statutes in question (federal, and Newfoundland and Labrador) had a constitutional element in that they involved provincial/federal cooperation in the creation of a Board representing both interests but also the retention of jurisdiction over certain matters by each of the governmental parties.[198] Secondly, she distinguished between what was at stake here (an issue of statutory interpretation and whether the Board had acted within its statutory authority) and a challenge to the merits of a decision taken in the exercise of an established statutory authority.[199] Furthermore, this was a question that had not previously come before the courts and one that was not confined to the facts of this particular case; it would resolve for the future whether the Board could exercise its statutory powers in this manner. Moreover, this was all taking place "in the context of [delineating the Board's] role to manage offshore resources,…an issue that could have broad ramifications and impact on the citizens of this province and potentially beyond."[200]

On the second limb, the Board resisted the status of the groups on the basis that a genuine concern for the protection of the Gulf of St. Lawrence did not translate into a real stake or genuine interest in the determination of the issue that was at stake in their application for judicial review. Even if the Board had misinterpreted its empowering legislation as allowing a surrender and novation, the Board could still engage in a new call for bids process in relation to the area covered by Corridor's licence.[201]

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[193] *Supra* note 191 at para 37.

[194] [1992] 1 SCR 236 at 253.

[195] *Supra* note 189 at para 19.

[196] *Supra* note 191 at para 36.

[197] *Supra* note 189 at paras 21-22.

[198] *Ibid* at para 24. I would suggest, however, that the mere fact that a decision involves a discretionary exercise of authority reviewable on a deferential reasonableness standard does not mean that an issue cannot be serious for the purpose of the *Downtown Eastside* test. Moreover, to the extent that Chaytor J. might be seen as adopting that position, the two authorities cited (at paras 25-27) do not appear to go that far.

[199] *Ibid* at paras 25-27.

[200] *Ibid* at para 28.

[201] *Ibid* at para 30.

In rejecting this argument, Chaytor J. emphasised the importance of the Board exercising it authority within its "statutorily prescribed limits."[202] As organizations dedicated to protecting and preserving the Gulf, the groups had a greater interest in this matter than "most members of the public."[203] Chaytor J. then proceeded[204] to recount the groups' extensive involvement in the regulatory process and, in particular, its interventions with respect to this very issue. This established "a sustained and genuine interest."[205]

As for the critical in this case third limb of the *Downtown Eastside* test, Chaytor J. reiterated[206] the four non-exhaustive factors identified by Cromwell J.[207] as underpinning this limb:

1. The capacity of the applicant to advance the claim;

2. Whether the case is of sufficient public interest to transcend the interests of those most affected by the Board's decision;

3. Whether there are alternative ways of bringing the matter forward that would involve a more efficient and effective use of judicial resources and that involve a more suitable adversarial context; and

4. The potential and impact of the proceedings on the rights of others who are equally or more directly affected.[208]

The Board did not contest on the first of these considerations. The significance of the public interest had already been recognized as part of the Court's conclusion on the first limb. It was the third consideration that was the most contentious, but which tipped in the groups' favour under the Cromwell J. articulation of this limb. Other industry players, including Corridor's competitors may well have had a more direct interest in the proceeding than the First Nation communities. However, for whatever reason, though perhaps because they stood to benefit in the future from the Board's ruling in the conduct of their own businesses, they had chosen not to launch a challenge. Moreover,[209] the Supreme Court, had, early on in the evolution of the principles of public interest standing (albeit in a constitutional context), accepted that, where those most directly affected had not launched a challenge, it was appropriate for the Court to recognize the status of those less directly affected or representing the public interest.[210] As for the efficient use of judicial resources, this would settle the matter once and for all in an appropriate adjudicative context.[211] Indeed, some of these same factors formed part of the Court's elaboration of the fourth consideration – prejudice to those more directly affected. After reiterating that there were reasons why those more directly affected might not be interested in challenging the Board's ruling,[212] Chaytor J. recognized that the interests of some or all of those more directly affected in sustaining the Board's ruling would in fact be represented appropriately on the hearing of the application for judicial review by the appearance of Corridor which had been accorded intervenor status.[213]

Not surprisingly, Chaytor J., on the basis of her evaluation of the *Downtown Eastside* test, determined that the groups should be recognized as having public interest standing to bring the application for judicial review. However, in doing so,[214] she reiterated that their challenge must be confined to the specific issue of whether the Board could as a matter of interpretation or authority, to use the words of Nigel Bankes, "effect an end-run around the maximum terms provisions."[215]

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[202] *Ibid* at para 31.
[203] *Ibid.*
[204] *Ibid* at paras 32-34.
[205] *Ibid* at para 34.
[206] *Ibid* at para 37.
[207] *Supra* note 191 at para 51.
[208] This is my paraphrasing of Chaytor J.'s paraphrasing of the relevant extract of the Cromwell J. judgment.
[209] *Ibid* at para 45.
[210] *McNeil v Nova Scotia (Board of Censors),* [1976] 2 SCR 265.
[211] *Supra* note 189 at 46.
[212] *Ibid* at paras 47-50.
[213] *Ibid* at para 51.
[214] *Ibid* at para 54.
[215] *Supra* note 215.

This sense of the confines of the groups' judicial review application was critical with respect to the second part of the Chaytor judgment in which she evaluated the separate application of various First Nation communities for intervenor status.

While the indigenous groups had an interest in the matter as reflected by their participation in the regulatory process,[216] Chaytor J.[217] ruled that their interest was not sufficient to warrant an exercise of the Court's discretion in their favour. To the extent that they wanted to call into question the merits of the Board's decision and insinuate issues respecting the duty to consult, they were raising matters that were not germane to the litigation as it had been framed by the environmental protection groups. This expansion of the issues, despite the assurances of the indigenous groups to the contrary, had the potential for creating undue delay and prejudice to the efficient dispatch of the case and detracted from the entitlement of the actual parties to frame the scope of the litigation.[218] Chaytor J. also questioned whether the matters that the indigenous groups wanted to raise could be dealt with satisfactorily on the record that was currently before the Court despite the willingness of the groups to proceed on the basis of that record.[219] Moreover, in terms of the actual issue in the judicial review application, this was not one

> …that the Intended Intervenors seek to address. They acknowledge that they could not bring anything to the discussion on the issue of statutory interpretation that would be any different than the submissions of the Applicants. In this respect, the Intended Intervenors are missing the nexus justifying the sufficiency of their interest to the core issue before the Court.[220]

In short, in so far as the indigenous groups sought to expand the scope of the litigation, they did not meet the test for intervenor status. Moreover, given their concession that they had nothing different to add to the arguments of the public interest applicants on the precise issue before the Court, they had no claim to participatory rights even confined to that issue. ■

[216] *Supra* note 189 at para 65.
[217] *Ibid* at paras 66-68.
[218] *Ibid* at paras 70-72.
[219] *Ibid* at paras 73-76.
[220] *Ibid* at para 67.

NAFTA 2.0: DRILLING DOWN – THE IMPACT OF CUSMA/USMCA ON CANADIAN ENERGY STAKEHOLDERS

John M. Weekes, Darrel H. Pearson**, Lawrence E. Smith Q.C.*** and Margaret M. Kim*****

I. INTRODUCTION

> *"It does little good to forecast the future of semiconductors or energy, or the future of the family (even one's own family), if the forecast springs from the premise that everything else will remain unchanged. For nothing will remain unchanged. The future is fluid, not frozen."*
>
> *— Alvin Toffler, The Third Wave*

On November 30, 2018, after 14 months of heated negotiations, representatives of the United States, Mexico and Canada signed the NAFTA 2.0, known as the "United States-Mexico-Canada Agreement" **(USMCA)**, or as referred to officially by the Government of Canada, the Canada-United States-Mexico Agreement **(CUSMA)**.[1]

The CUSMA will supersede the quarter-century-old North American Free Trade Agreement **(NAFTA)** when the agreement comes into force. At the time of writing, however, there remain significant political hurdles to overcome before the newly negotiated CUSMA comes into force – most notably ratification by the U.S. Congress. Accordingly, for at least the next several months, the original NAFTA is the operative agreement unless President Trump makes good on his threat to withdraw from NAFTA,[2] or until each of the three countries implements the CUSMA by its adoption into their respective

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Bennett Jones LLP has been intimately involved in virtually every major energy development in Canada in the past 20 years and has served as a strategic partner to both private and public sector participants in Canada's energy industry for nearly a century. The strength and depth of our energy and trade experts have been widely acknowledged. With more leading energy lawyers than any other Canadian law firm (Lexpert®), and some of the country's pioneers in international trade and investment law, Bennett Jones is uniquely positioned to help clients in the energy sector deal with complex legal and regulatory matters across borders.

[1] Global Affairs Canada, "A new Canada-United States-Mexico Agreement", online: <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng>.

[2] Global News, "Trump says he will tell Congress soon to terminate NAFTA", (1 December 2018), Global News, *citing* Reuters, online: <https://globalnews.ca/news/4720022/donald-trump-nafta-termination-congress>.

domestic legislation. With these important reservations, January 1, 2020 is a likely target date for the new agreement to come into force.

The most visible change in the CUSMA is the absence of a specific chapter dealing with energy matters. Chapter 9 (Energy) of the original Canada-U.S. FTA and Chapter 6 (Energy and Basic Petrochemicals) of NAFTA which are no longer part of the framework governing trade among the North American countries. Accordingly, it is necessary to look at a variety of provisions in the new agreement to determine the rules that apply to trade and investment for the energy sector.

With respect to energy, which has been heralded as a "crown jewel of NAFTA nations",[3] CUSMA provides continuity and a solid framework for the energy sector. The regulations applying to the free flow of natural gas, oil and, for the most part, electricity, are "largely untouched".[4] While the CUSMA does not radically change the business landscape for the energy industry, it contains several significant changes that warrant the attention of Canadian energy stakeholders, such as oil and gas producers and service providers, power producers, pipeline operators, engineering/design, procurement and construction **(EPC)** companies, and their business advisors. These changes include removal of the energy proportionality requirement, phase-out of the Investor-State Dispute Settlement mechanism for Canadian investors, and a bilateral U.S.-Canada side letter on energy instead of a chapter on energy that binds all three CUSMA parties. In addition, Canada is not a party to the procurement chapter, leaving future Canadian bidders to navigate around the *World Trade Organization's Government Procurement Agreement* or the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership,* depending on whether the procurement opportunity is in the United States or Mexico.

This Article offers a snapshot of the political dynamic of the CUSMA negotiation, outlines the significant changes that the energy industry and its stakeholders should anticipate, and concludes by offering key takeaways to consider in navigating the new North American trade frontier.

(A) Political Dynamic of CUSMA Negotiation

Since the Office of the U.S. Trade Representative **(USTR)** issued the Trump administration's negotiation objectives for NAFTA in July 2017,[5] the respective political landscapes in the United States and Mexico have shifted, adding a layer of uncertainty to the repeal and replacement of the NAFTA by its successor agreement, CUSMA.

On the U.S. front, the 2018 midterm elections in November resulted in a divided Congress, with Democrats capturing the House of Representatives and the Republicans strengthening their Senate majority. Since December 22, 2018, a host of U.S. government agencies has shut down as the result of a standoff between President Trump and Congress arising from cross rejections of proposed spending packages for funding the federal government proposed by each of President Trump and Congress.[6]

Mexico's left leaning President Andreas Manuel Lopez Obrador assumed office on December 1, 2018. He has accepted the conclusion and signing of the CUSMA.[7] However, the Mexican relationship with the U.S. remains difficult, on both trade and more generally as witnessed by the fracas over President Trump's proposed border wall.

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[3] Patti Domm, "Energy is crown jewel of NAFTA nations and will bind them, even in a trade war", CNBC, (2 March 2018), online: <https://www.cnbc.com/2018/03/02/energy-is-crown-jewel-of-nafta-nations-and-will-tie-them-together-regardless-of-trade-deals-.html>.

[4] The Dialogue, "How Does the New USMCA Deal Affect the Energy Sector?" (4 October 2018), Energy Advisor, online: <https://www.thedialogue.org/analysis/how-does-the-new-usmca-deal-affect-the-energy-sector>.

[5] Office of the United States Trade Representative, "Summary of Objectives for the NAFTA Renegotiation", (17 July 2017), USTR, online: <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf>. This Article adopts the Canadian version of the agreement, CUSMA.

[6] President Trump insisted that any spending bill contain the US$5-billion for building the "wall" between the United States and Mexico. At the time of writing, the shutdown has been going on for 27 day, now the longest shutdown in U.S. history. See The Globe and Mail, "Is the U.S. government shutdown still on? A guide to the standoff between Trump and Congress", (8 January 2019), online: <https://www.theglobeandmail.com/world/us-politics/article-us-government-shutdown-trump-congress-wall-explainer>.

[7] The New York Times, "Mexico's New Leader, Once a Nafta Foe, Welcomes New Deal", (1 October 2018), N.Y. Times, online: <https://www.nytimes.com/2018/10/01/world/americas/nafta-mexico.html>.

(B) Ratification of CUSMA in Canada

When providing for the implementation of NAFTA in the *North American Free Trade Implementation Act,* the Canadian Parliament modified elements of federal law to give effect to NAFTA.[8] Currently, the *National Energy Board Act* requires the *National Energy Board* **(NEB)** to give effect to the NAFTA when it exercises its functions. If, and when, CUSMA is ratified, its implementing legislation is likely to contain a similar provision.[9] The Canadian government currently plans to ratify NAFTA and pass the necessary implementing legislation quickly after the U.S. does so. Therefore, this is expected to be a time sensitive endeavour, requiring Parliament to hold hearings and pass the legislation in an expeditious manner. Accordingly, energy stakeholders who may be affected by CUSMA are encouraged to take proactive steps to seek consultation on how they can meaningfully engage in discussions with government representatives to get a good understanding of how the implementing legislation will be drafted on matters of particular interest to their businesses. In addition stakeholders might want to make suggestions as to how the legislation should be worded.

(C) What Has Changed?

The CUSMA contains energy-related provisions in various parts of the agreement, and a very short separate chapter titled "Recognition of the Mexican State's Direct, Inalienable and Imprescriptible Ownership of Hydrocarbons". In addition, Canada and the United States agreed to the contents of an enforceable bilateral U.S.-Canada side letter on energy regulatory measures and regulatory transparency, which does not apply to Mexico.

1. Removal of the Proportionality Requirement

For Canada and the United States, one of the key changes in CUSMA is the removal of the "energy proportionality clause". This clause, which was part of Article 605 in NAFTA,[10] in effect requires Canada and the U.S. to provide national treatment to the domestic purchasers of energy products in the other country if action to restrict exports is taken in times of shortage as permitted under Article XI of the *General Agreement on Tariffs and Trade* **(GATT)**.[11] Under its terms, no government measure may reduce the proportion of the supply of an energy product to the other Party based on recent export levels. The obligation never operated to guarantee the supply of a specific quantity of product, rather it prevented governments from intervening in the market with the effect of reducing supply in a way that disproportionally impacts domestic purchasers in the other country. The NAFTA Parties have never invoked this clause, and concern in the U.S. about the reliability of energy supply has dissipated with the enormous growth in its own energy production.

2. Phase out of the Investor-State Dispute Settlement Provisions between Canada and the United States

NAFTA Chapter 11's investor-state dispute settlement provisions (known as **ISDS**) establish a mechanism to resolve disputes between the NAFTA Party states and their investors for the

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[8] See *North American Free Trade Agreement Implementation Act,* SC 1993, c 44.

[9] *Ibid*, s 10; See also *World Trade Organization Agreement Implementation Act,* SC 1994, c 47, s 8.

[10] *Ibid*, s 605: Other Export Measures reads:

"…a Party may adopt or maintain a restriction otherwise justifiedunder Articles XI:2(a) or XX(g), (i) or (j) of the GATT with respect to the export of an energy or basic petrochemical good to the territory of another Party, *only if:*

a) the restriction does not reduce the proportion of the total export shipments of the specific energy or basic petrochemical good made available to that other Party relative to the total supply of that good of the Party maintaining the restriction as compared to the *proportion prevailing in the most recent 36 month period* for which data are available prior to the imposition of the measure, or in such other representative period on which the Parties may agree;

b) the Party does not impose a higher price for exports of an energy or basic petrochemical good to that other Party than the price charged for such good when consumed domestically, by means of any measure such as licenses, fees, taxation and minimum price requirements. The foregoing provision does not apply to a higher price that may result from a measure taken pursuant to subparagraph (a) that only restricts the volume of exports; and

c) the restriction does not require the disruption of normal channels of supply to that other Party or normal proportions among specific or basic petrochemical goods supplied to that other Party, such as, for example, between crude oil and refined products and among different categories of crude oil and of refined products. [Emphasis added].

[11] GATT, 1994: *General Agreement on Tariffs and Trade 1994* (Apr. 15 1994), s XI General Elimination of Quantitative Restrictions.

investments covered by the agreement. From the perspective of oil and gas investors, NAFTA's ISDS mechanism has been critical in protecting against unfair treatment or expropriation by other host countries. Private investors were able to seek not just recovery of incurred costs but expected profits as well. It is clear investors had structured their investment proposals so as to take advantage of the potential Chapter 11 remedies. For instance, at the time of writing, four of the five ongoing NAFTA Chapter 11 arbitration cases filed against the Government of Canada are in the energy space, respectively involving a quarry and marine terminal project, oil and gas resources development and production (two cases), and a wind farm development.[12]

Crucially, the CUSMA will phase out the NAFTA ISDS provisions between Canada and the United States. According to CUSMA Chapter 14 on Investment, for three years after the termination of NAFTA,[13] existing "legacy investment claims and pending claims"[14] will be covered under what were formerly provisions of NAFTA Chapter 11. Thereafter, ISDS will not be available to protect investments of Canadian investors in the United States, or those of U.S. investors in Canada. This lack of private recourse to NAFTA-based arbitration will resonate in the energy space.

Canadian or U.S. investors must initiate any valid claims regarding investments established or acquired while NAFTA was in force within three years of NAFTA's termination. After the three-year window for legacy claims, Canadian and U.S. investors will no longer be able to invoke NAFTA-based ISDS remedies. As a strategy, Canadian investors who have potential investment disputes against the United States should consider retaining legal counsel to assess the merit of the case within the three-year window.

There is narrower but continued access to ISDS for U.S.-Mexico investments in key industries, which include oil and gas,[15] power generation services,[16] transportation,[17] the ownership or management of certain roads, railways, bridges or canals,[18] and telecommunications.[19] In these cases, U.S. or Mexican investors may bring claims based on most investor protections in CUSMA without first pursuing local remedies. For other sectors, CUSMA maintains U.S.-Mexico ISDS only if the claimant exhausts national remedies first. This means that the claimants cannot bypass Mexican courts; in fact, they must try to use local remedies for 30 months, and ISDS is then available if this recourse does not result in a conclusion.[20]

As the result of these changes, Canadian or American investors are limited to adjudicating future investment disputes in domestic courts or before other international arbitration tribunals.

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[12] Global Affairs Canada, "NAFTA – Chapter 11 – Investment – Cases filed against the Government of Canada; Ongoing arbitration to which Canada is a party", online: <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng>.

[13] Canada-United States-Mexico-Agreement, Ch 14, Annex 14-C, s 3 [CUSMA] ("A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994".).

[14] A "legacy investment" is defined as "an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry of force of this agreement". This means that an investment must have been "established or acquired" when the NAFTA is in force, and remain "in existence" on the date the CUSMA enters into force. See CUSMA, *supra* note 13, "Legacy Investment Claims and Pending Claims", s 6(a), available at: <https://international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/cusma-14.pdf>.

[15] CUSMA, Ch 14, Annex 14-C, s 6(b)(i) ("…activities with respect to oil and natural gas that a national authority of an Annex Party controls, such as exploration, extraction, refining, transportation, distribution, or sale").

[16] *Ibid*, s 6(b)(ii).

[17] *Ibid*, s 6(b)(iv).

[18] *Ibid*, s 6(b)(v) (the Annex restricts the ownership or management of roads, railways, bridges, or canals that are not for the exclusive or predominant use and benefit of the government of an Annex Party").

[19] *Ibid*, s 6(b)(iii).

[20] See CUSMA, *supra* note 13, s 14.D.5: Conditions and Limitations on Consent

[…]

(b) the claimant or the enterprise obtained a final decision from a court of last resort of the respondent or 30 months have elapsed from the date the proceeding in subparagraph (a) was initiated…

Footnote 25 states that this provision does not apply "to the extent recourse to domestic remedies was obviously futile". It remains to be seen how U.S. investors invoke this "obvious futility exception" when seeking an ISDS solution against the government of Mexico without first seeking domestically available legal recourse in Mexico.

On the other hand, Canadian energy investors in Mexico, and vice versa, benefit from ISDS protection through the Comprehensive and Progressive Agreement for Trans-Pacific Partnership **(CPTPP)** provisions, which came into force on December 30, 2018.[21] Investors from Mexico and Canada, therefore, still enjoy potential remedies for private investment disputes arising in the other country.

The Parties to CUSMA may nevertheless challenge violations of investment protections in the Agreement through state-to-state dispute settlement found under Chapter 31 of the CUSMA,[22] which is to the replacement for NAFTA Chapter 20, which allows the government of any NAFTA country to file a complaint when it believes another government is violating the agreement. State-to-state dispute settlement, however, may not provide redress for damage suffered by private investors due to violations of the CUSMA.

3. Elimination of Tariffs on Heavy Oil Containing Diluent

CUSMA includes a rule of origin amendment to allow up to 40 per cent of non-originating diluent in pipelines for transportation of crude oil without affecting the status of the oil as a product eligible for duty free treatment under the Agreement.[23] This has been a longstanding Canadian industry request. When producers blend bitumen and heavy crude oil with condensates or diluents to transport the oil by pipeline, the blended crude may no longer qualify as "wholly obtained or produced" in Canada if the diluent itself did not qualify as NAFTA originating. Some Canadian crude shipments did not qualify for duty free treatment under the NAFTA and were subject to American duty. This amendment will resolve this technical issue that resulted in upwards of $60 million a year in duties and other fees on Canadian crude exports to the United States.[24]

4. CUSMA Does Not Cover Government Procurement as between Canada and the United States

One of the most surprising features of the CUSMA is the omission of Canada from the procurement provisions of the Agreement.[25] The obligations of the procurement chapter apply only between the United States and Mexico.[26] Government procurement as between Canada and the United States is covered by the *Government Procurement Agreement* **(GPA)** of the *World Trade Organization* **(WTO)**, to which Canada and the United States are parties. Mexico is not a party to the GPA.

The current revised GPA came into force in 2014. It is an improved version of the original agreement and provides for more coverage than the earlier GPA or the NAFTA. Canada's coverage of entities under the GPA is broader as it binds the procurement of its provinces, while NAFTA has no sub-central coverage. Under both agreements, Canada covers the same federal government entities and government enterprises.[27] Under the GPA, 37 U.S. states are covered by the agreement as "Sub-Central (Federal) Government Entities."[28] In these states, Canadians are eligible to bid on contracts as provided for under the agreement.

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[21] See Government of Canada, "What is the CPTPP?" (Date modified: 8 January 2019) online: <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng>.

[22] The effectiveness of the state-to-state dispute settlement remains unresolved because each country can block appointment of panelists as an obstructive tactics.

[23] See CUSMA, *supra* note 13, Annex 4-B, "Product-Specific Rules of Origin", Note 4: For the purposes of determining whether or not a good of heading 27.09 is an originating good, the origin of diluent of heading 27.09 or 27.10 that is used to facilitate the transportation between Parties of crude petroleum oils and crude oils obtained from bituminous minerals of heading 27.09 is disregarded, provided that the diluent constitutes no more than 40 per cent by volume of the good".

[24] Government of Canada, "CUSMA Energy provisions summary", online: <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/energy-energie.aspx?lang=eng>.

[25] CUSMA, s 13.2.

[26] CUSMA, Ch 13: Government Procurement, s 13.2.3, online: <https://international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/cusma-13.pdf>.

[27] Jean Heilman Grier, "USMCA – Modernized NAFTA: Procurement" (5 October 2018), online: <https://trade.djaghe.com/?p=5174>.

[28] Annex 2, Sub-central Government Entities, United States' Commitment to the *World Trade Organization's Government Procurement Agreement,* online: <https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm>.

This is significant because while most procurement funding may come from the federal governments, in the majority of projects the procuring entity is at the state or local level. While these trade agreements do not apply to municipalities, open access to state level procurement is an important advantage offered by the GPA and presents significant opportunities for Canadian energy businesses.[29]

The most obvious differences are the higher thresholds (the monetary values at or above which procurement is open to foreign suppliers under the agreement) that apply to the covered procurement under the GPA compared to the NAFTA procurement provisions. This reduces the number of contracts that U.S. and Canadian firms are eligible to bid on in each government's respective procurement markets.[30]

On the other hand, the thresholds applicable under CUSMA to Mexico and the United States remain the same as those currently available under NAFTA. As in NAFTA, the CUSMA allows Mexico to set-aside a certain amount of its procurement for Mexican suppliers. It may set aside procurement contracts up to $2.328 billion each calendar year, with the amounts subject to annual adjustment for cumulative inflation.[31] These are allocable by all entities, including Petróleos Mexicanos (PEMEX) and Comisión Federal de Electricidad **(CFE)** (Federal Electricity Commission). However, the total value of the government contracts set aside by PEMEX and CFE may not exceed US$466 million each year.[32] There are also a range of set asides that the United States can use to frustrate foreign access to its procurement markets.

Finally, the CPTPP governs Canada's procurement relationship with Mexico. All Canadian provinces and territories made sub-national commitments on government procurement in the CPTPP that are comparable to those found in the GPA. Commitments at the sub-national level are limited to the procurement activities conducted by provincial/territorial departments and agencies; procurement activities of Canadian municipalities are not covered under the CPTPP.

Depending on the nature of the procurement and the entity doing the procurement, potential Canadian bidders will have to seek various provisions under the GPA or the newly-minted CPTPP. Below are the full access thresholds under the CPTPP, NAFTA and the GPA, for goods, services and construction of government entities (i.e., departments and agencies), and crown corporations and other government enterprises.

Table 1: thresholds on trade agreements
(CAN$ December 30, 2018, to December 31, 2019)

Free trade agreement	Entities (departments and agencies)			Crown corporations and other government enterprises		
	Goods	Services	Construction	Goods	Services	Construction
CPTPP	237,700	237,700	9,100,000	649,100	649,100	9,100,000
North American Free Trade Agreement (NAFTA)						
Canada/US	32,900	106,000	13,700,000	530,000	530,000	16,900,000
Canada/Mexico	106,000	106,000	13,700,000	530,000	530,000	16,900,000
World Trade Organization – Government Procurement Agreement (WTO-GPA)	237,700	237,700	9,100,000	649,100	649,100	9,100,000

Source: Treasury Board of Canada Secretariat, Contracting Policy Notice: 2018-01[33]

[29] The Canadian Trade Commissioner Service, "Trade Agreements – *World Trade Organization Government Procurement Agreements,*" online: <https://www.tradecommissioner.gc.ca/sell2usgov-vendreaugouvusa/procurement-marches/trade_agreem-acc_cciaux.aspx?lang=eng>.

[30] "Memorandum: The Proposed USMCA and U.S. Trade Relations with Mexico", Cong. Res. Serv. (30 October 2018), online: <https://cuellar.house.gov/uploadedfiles/usmca_comparison_and_mexico_released.pdf>.

[31] CUSMA, Ch 13, Annex 13-A, "Schedule of Mexico", s 4(a).

[32] *Ibid*, s 4(d).

[33] Online: <https://www.canada.ca/en/treasury-board-secretariat/services/policy-notice/contracting-policy-notice-2018-01.html>.

5. The Bilateral Canada-U.S. Side Letter on Energy

Canada and the United States negotiated a side letter to CUSMA on energy,[34] titled "Energy Regulatory Measures and Regulatory Transparency", in the final phase of the negotiation as a substitute for an energy chapter that had been negotiated but was dropped at the request of Mexico's incoming government during the bilateral U.S.-Mexico phase of the negotiations over the summer. When confronted with a fully concluded bilateral free trade agreement between the United States and Mexico in August 2018,[35] Canadian negotiators quickly took note that the energy chapter had disappeared and engaged with their American counterparts over the idea of including a bilateral side letter that would be enforceable and would form an integral part of the entire agreement. Canada and the United States agreed that the side letter "shall constitute an integral part of the Agreement."[36] Its provisions will come into effect when CUSMA comes into force. The side letter offers a fail-safe, binding guarantee that stakeholders will not be subject to treatment that is worse than what is now applied.

The salient features of the side letter are:

- ***The side letter applies only to energy regulatory measures at the central level of government (Article 2).***

- ***An article encouraging cooperation in the energy sector (Article 3).*** While the provision is largely symbolic, the language captures the Canadian and American commitments to cooperate on energy regulation in recognition of the importance of enhancing the integration of North American energy markets based on market principles.

- ***Provisions that require Canada and the United States to establish or maintain an independent regulatory authority, and the establishment of transparency requirements for the authorization process in the energy sector (Articles 4.1, 4.2, 4.3 and 4.4).*** This is an important substantive provision of the side letter and is particularly relevant for Canadian energy industry stakeholders. It addresses regulatory measures and the requirement for transparency. Paragraph 4.3 allows a Party to require an authorization to participate in energy-related activities in its territory. For example, the Government of Canada may require applicants to seek authorization to engage in activities such as operating a pipeline, something that the National Energy Board does.[37] Paragraph 4.4 includes notice requirements, which are important given the experiences that some Canadian firms have in the United States. Publishing information relevant to the authorization process, and establishing this requirement in law, are a prerequisite to requiring an authorization. Importantly paragraph 4.2 requires that each Party "endeavor to ensure that in the application of an energy regulatory measure, an energy regulatory authority within its territory avoids disruption of contractual relationships to the maximum extent practicable."

- ***Requirements for Canada and the United States to provide a right of appeal or judicial review of certain decisions concerning these authorizations in accordance with each Party's law (Article 4.8).*** Corollary to the notice requirement, this paragraph provides a legal avenue for appeal or judicial review by an unsuccessful applicant. The right

[34] Government of Canada, "Annex: Energy Regulatory Measures and Regulatory Transparency to the Canada-U.S.-Mexico Agreement", (Letter on 30 November 2018), online: <https://international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/letter-energy.pdf>.

[35] Damian Paletta, Erica Werner & David J. Lynch, "Trump announces separate U.S.-Mexico trade agreement, says Canada may join later", (27 August 2018), Washington Post, online: <https://www.washingtonpost.com/business/2018/08/27/us-mexico-reach-partial-agreement-resolve-trade-conflict-step-towards-nafta-deal>.

[36] Letter from Robert E. Lighthizer, USTR Representative to the Honourable Chrystia Freeland, Minister of Foreign Affairs of Canada (dated November 30, 2018).

[37] In Canada, companies regulated by the *National Energy Board Act,* RSC, 1985, c N-7, *Canada Oil and Gas Operations Act,* RSC, 1985, c O-7, or *Canada Petroleum Resources Act* RSC, 1985, c 36 (2d Supp), are required to see National Energy Board authorization or approval for various activities. *See National Energy Board,* "Applications & filings", online: <https://www.neb-one.gc.ca/pplctnflng/index-eng.html>.

of judicial review currently exists in practice; thus this provision is considered a treaty "lock in" of existing domestic (non-treaty based) law. However, this right of appeal or review does not apply to authorizations for "the construction, connection, operation, or maintenance of cross-border infrastructure, including electric transmission facilities and pipeline networks, at international boundaries."[38]

- ***An obligation stating that measures governing access to or use of energy infrastructure must be "neither unduly discriminatory nor unduly preferential" (Article 5.1).*** This provision establishes non-discriminatory treatment regarding access to electric transmission facilities and pipeline networks. There have been issues of this kind in the past originated at the state level where the *California Public Utilities Commission* sought to upset the longstanding contractual framework governing the flow of natural gas from Alberta. Given the broad language employed it remains to be seen whether any additional protections have been afforded as a result of this provision, In that regard, Article 5.1 stipulates that the term "neither unduly discriminatory nor unduly preferential" is to be interpreted specifically in reference to trade related precedents which may differ from that interpretation employed under domestic utility laws.

- ***The longstanding U.S. commitment from the Canada-U.S. FTA ensuring that Bonneville Power Administration, a U.S. federal agency, afford BC Hydro "treatment that is no less favourable" than that afforded to utilities located outside of the Pacific Northwest (Article 5.2).*** This provision is a holdover from the original Canada-U.S. Free Trade Agreement and the NAFTA. Power trades freely within the market by *BC Hydro* and *Bonneville Power Authority* located in Washington in order to maintain stable prices and supply for all participants.

6. CUSMA has a Mexico specific chapter on recognition of Mexico's "Direct, Inalienable and Imprescriptible Ownership of Hydrocarbons"

Chapter 8 of CUSMA recognizes the sovereign right of Mexico to regulate and modify its domestic legal framework, including the Constitution. It also reaffirms Mexico's "direct, inalienable, and imprescriptible ownership of hydrocarbons" in Mexico's subsoil. The incoming government of the left leaning Mexican President, who has been a vocal opponent of Mexico's energy reform that started in December 2013, requested this chapter. It remains to be seen how the New Mexican President's administration might try to use this provision to augment its policy on energy, and further regulate investments and hydrocarbon production of foreign investors. On its face, the provision appears declaratory; it does not affect any of the specific provisions found elsewhere in the CUSMA. It may be that President Obrador sees this provision more as a statement to his domestic audience than as a provision giving Mexico new rights under CUSMA.

That said, the new administration's pursuit of Mexico's energy self-sufficiency may result in an increased priority to public investments while private and foreign investments are to play a "secondary role."[39]

For instance, in December 2018, at the request of Mexico's new administration, *Mexico's National Hydrocarbons Commission* **(CNH)**, which conducts the tenders and supervises contracts, cancelled two largest upstream auction rounds (auctions rounds 3.2 and 3.3),[40] and *Petroleos Mexicanos* **(PEMEX)** postponed the farmout of seven onshore clusters from by seven months. A joint venture named Tonalli Energia formed by a Canadian firm, *International Frontier Resources Corporation* **(IFR)**, in partnership with Mexican petrochemical company Grupo IDESA, had registered and was granted access to the data room for the second tender of Round 3.2 of

[38] *Supra* note 4, Canada-U.S. Side Letter on Energy.

[39] Isabelle Rousseau, "Mexico's Energy Reforms at Risk?" Edito Energie, December 2018, Institut Français des relations Internationales, (3 December 2018), online: <https://www.ifri.org/en/publications/editoriaux-de-lifri/edito-energie/mexicos-energy-reforms-risk>.

[40] Mexico's energy reform was enacted on December 20, 2013.

Mexico's oil and gas energy reform. As described by IFR, Round 3.2 encompasses "37 onshore conventional blocks". As of mid-May 2018, eight companies had initiated the prequalification process and 12 companies had expressed interest in participating in Round 3.2.[41]

It is important to note that CUSMA also includes a new chapter on state-owned enterprise,[42] which expands the definition of SOEs and largely mirrors language in the CPTPP. The modernized chapter obligates both SOEs and designated monopolies to operate "in accordance with commercial considerations", and buy and sell goods and services in a non-discriminatory manner.[43] From the perspective of Canadian or U.S. energy companies, these commitments are positive additions to the agreement that will help to ensure a level playing field and more predictability when dealing with any SOEs in Mexico, such as PEMEX and CFE.

7. "Non-Commercial Assistance" is allowed for the Trans Mountain Pipeline

Generally, the CUSMA forbids the Member states from providing non-commercial assistance to Crown corporations, meaning governments cannot assist corporations to restructure debt, rescue a corporation from bankruptcy, or offer services on terms more favourable than those commercially available.[44] Under CUSMA's Annex IV, however, the Canadian government has listed *Trans Mountain Corporation* **(TMC)** as an exception to the non-commercial assistance, "in circumstances that jeopardize the continued viability of [TMC], and for the sole purpose… to return (the enterprise) to viability and fulfill its mandate."[45] This clause indicates that the Canadian government is allowed to provide assistance to the Trans Mountain Pipeline until TMC is either privatized or ten years elapses from the date CUSMA enters into force, whichever is earlier. It is noteworthy that the Canadian government's ability to provide assistance has a time limit of ten years from the date on which CUSMA comes into effect, as that may be a factor in the Canadian Government's future decision to privatize TMC.

(D) What Has Not Changed?

1. **Most of NAFTA's provisions remain intact. Fundamentally, CUSMA maintains most of the NAFTA more or less as is: duty free treatment for almost all goods, strong disciplines on services, and investment and somewhat strengthened rules on intellectual property.**

2. **CUSMA retains the binational panel dispute settlement mechanism**

CUSMA preserves the bi-national panel "dispute settlement mechanism", which is found in NAFTA Chapter 19, and confers on all private parties the right to challenge anti-dumping and countervailing duty determinations before an independent binational expert panel.[46] NAFTA Chapter 19 became a red line issue for Canada during the negotiations, contested by U.S. negotiators who wanted to eliminate the system. Retention of the mechanism is a clear political win for Canada. Historically, Canadian businesses have used Chapter 19 dispute settlement panels to challenge U.S. trade remedy decisions, notably on softwood lumber.[47]

It is worth noting that there is a lengthy and growing list of trade remedy cases taken by Canada against foreign suppliers of goods, and that these are of considerable importance to the energy industry.

3. **U.S. Section 232 steel and aluminum tariffs remain**

CUSMA does not resolve the dispute over the tariffs applied pursuant to section 232 of the

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[41] International Frontier Resources Corporation, "Mexico: Projects", online: <http://www.internationalfrontier.com/s/Mexico.asp>.

[42] See CUSMA, *supra* note 13, Ch 22, "State-Owned Enterprises and Designated Monopolies", online: <https://international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/cusma-22.pdf>.

[43] *Ibid*, s 22.4: Non-Discriminatory Treatment and Commercial Consideration.

[44] *Ibid*, s 22.1: Definition of "non-commercial assistance".

[45] *Ibid*, Annex IV – Canada.

[46] *Ibid*, Ch 10: Trade Remedies, Annex 10-B.1 Establishment of binational panels, online: <https://international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/cusma-10.pdf>.

[47] Global Affairs Canada, "Softwood Lumber", online: <https://www.international.gc.ca/controls-controles/softwood-bois_oeuvre/index.aspx?lang=eng>.

U.S. Trade Expansion Act of 1962[48] on steel and aluminum imports from Canada and Mexico, or the retaliatory countermeasures that Canada and Mexico each put in place. Section 232 authorizes the U.S. President to restrict imports of goods that he concludes are "a threat to national security." Under this authority, the president has applied duties of 25 per cent and 10 per cent to a range of imports of steel and aluminum products from all countries, including Canada.

Eliminating these duties and Canadian countermeasures applied in retaliation is a top trade objective of Canada in the coming months. In the meantime, they constitute a major problem not only for Canadian steel and aluminum producers but also for the users of these products such as engineering, procurement and construction **(EPC)** companies and energy producers, pipeline and midstream companies. Fortunately, many American interests also attach importance to removing these American tariffs and the Canadian and Mexican countermeasures. Chuck Grassley, the veteran Republican Chair of the Senate Finance Committee, has identified addressing the President's use of Section 232 as a priority for his committee.

II. CONCLUSION

With many moving pieces and political hurdles, final content and implementation of CUSMA will remain uncertain for many months to come. If implemented, CUSMA will provide predictability and a solid framework for North American energy regulation. However, it also includes significant changes, identified in this Article that stakeholders must endeavour to understand fully to ensure a successful transition to the new post-NAFTA trade and investment regime for the energy industry. Firms should weigh the impact of these changes as they consider how to structure their businesses and investments. Changes include:

- amendments to rights of investors, including the phase-out of recourse to investor-state dispute settlement between Canada and the United States, and significantly weakened protection for American investors in Mexico;
- revised means of gaining access to government procurement contracts involving the three North American countries;
- elimination of customs duties on imports into the U.S. of Canadian heavy oil containing diluent; and,
- elimination of the proportionality clause on energy trade between Canada and the U.S.

In addition, stakeholders should monitor other trade developments beyond the immediate scope of the CUSMA. These include the American duties under Section 232 on steel and aluminum imports and the retaliatory countermeasures taken by Canada and Mexico in response. In the prevailing trade environment, energy businesses should consider utilizing the range of remedies available to mitigate the impact of these trade actions, including remission orders, duty drawback and duty relief.

The CPTPP provisions that apply only as between Mexico and Canada ironically offer a more business friendly and stable framework for investors than do the provisions of the CUSMA. Any analysis of the dynamics of the North American energy economy should account for use and impact of CPTPP provisions. Uncertainty surrounding trade rules and actions will persist at least until U.S. Congress determines the fate of the CUSMA, but there are steps that firms can take to mitigate their exposure to various risks. ■

[48] *Trade Expansion Act of 1962,* Pub L No 87–794, s 232, 76 Stat 872 (codified at 19 USC Ch 7).

ELECTRICITY STORAGE IN NORTH AMERICA

Paul Kraske, Milosz Zemanek**, Henry Ren and Tim Pavlov****

EDITORS' INTRODUCTION

Energy Storage is said by some to be the ''Holy Grail" of energy technology.[1] Energy grids are built to handle peak loads; if the peaks and the related capital investment can be reduced huge cost savings result. Some service offerings like electric vehicle (''ev") charging are impossible without it. The *ERQ* asked two of the leading experts in North American energy storage regulation to provide a current snapshot of the current situation.

ELECTRICITY STORAGE IN THE UNITED STATES: ARE WE THERE YET?[2]

In October 2015, employees at the Aliso Canyon natural gas facility in Los Angeles, California, discovered a methane leak that resulted in closure of the facility and California Gov. Jerry Brown issuing a state of emergency. In addition to the related environmental and health concerns, regulators worried about how the leak would impact availability of electricity for the region, and weeklong blackouts seemed inevitable. The solution to this problem was for utility Southern California Edison to rush energy storage projects online on an emergency basis. Within nine months, 60 MW of battery storage facilities were sited, constructed and operating, providing peak-demand energy at a time of concern and instability. Since then, developments in battery technology, state executive and legislative policies, and the recent *Federal Energy Regulatory Commission* (FERC) Order 841[3] have continued to push energy storage into the national spotlight, signaling its role as a pillar of energy policy in the U.S.

According to the Energy Information Administration (EIA)'s May 2018 report "U.S. Battery Storage Market Trends" (EIA Report),[4] at the end of 2017, 708 MW of power capacity representing 867 MWh of energy capacity of large-scale (greater than 1 MW) battery storage capacity was operational in the U.S. — two-thirds of which was installed in the past three years.[5] Approximately 90 per cent of large-scale battery storage is installed in regions covered by regional transmission organizations (RTOs) and independent system operators (ISOs). In fact, nearly 40 per cent of existing large-scale battery storage power capacity (and 31 per cent of energy capacity) lies in the Pennsylvania-New Jersey-Maryland Interconnection (PJM) region while another 18 per cent of existing large-scale battery storage power capacity (and 44 per cent of energy capacity) lies in the California Independent System Operator (CAISO) region. According to

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[1] David Schmitt and Glenn Sanford, "Energy Storage: Can We Get It Right?" (2018) 32 Energy LJ 447, online: <https://www.eba-net.org/assets/1/6/20-447-502-Schmitt_[FINAL].pdf>.

[2] The Electricity Storage in the United States section of this article is a republication : Paul Kraske "Electricity storage in the United States: Are We There Yet?", online : (22 June 2018) Skadden <https://www.skadden.com/insights/publications/2018/06/energy-storage-are-we-there-yet>.

[3] Order No. 841, *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators,* 162 FERC 61,127, 83 Fed Reg 9,580 (2018) (to be codified at 18 CFR § 35) [hereinafter Order No. 841].

[4] U.S. Department of Energy, ''U.S Battery Storage Market Trends", (May 2018), online: <https://www.eia.gov/analysis/studies/electricity/batterystorage/pdf/battery_storage.pdf>.

[5] *Ibid* at 4.

the EIA report, as of December 2017, 239 MW of planned large-scale battery storage is expected to become operational in the U.S. between 2018 and 2021, with California accounting for 77 per cent of that number.

Advances in Storage Technology

Over the last 20 years, the energy industry has tested many different types of energy storage technologies, but for the first time, a market-tested front-runner has emerged: lithium-ion batteries. While nickel-based, sodium-based, lead acid and flow batteries have been deployed in the U.S., lithium-ion batteries comprised over 80 per cent of all U.S. large-scale (greater than 1 MW) battery storage capacity by the end of 2016. Typically, lithium-ion batteries are designed to implement 365 cycles per year, with a four-hour capability per cycle, and have a lifetime of 20-30 years. As seen in the deployment of the California battery storage facilities, with a four-hour duration battery, a standard 20 MW lithium-ion energy storage facility can deliver 80 MWh of capacity to meet peak demand. One of the most attractive aspects of these batteries is that the cost of lithium-ion technology has been rapidly decreasing; between 2010 and 2016, the price of lithium-ion batteries dropped 73 per cent, a decrease primarily driven by Chinese electric vehicle demand. The total installation cost of lithium-ion battery storage (including inverters and balance of plant) was approximately $1,300-$1,500 per kilowatt in 2017, and Bloomberg New Energy Finance has predicted that these installation costs will continue to drop 6 per cent per year over the next 10 years.

Competitive Advantages

The most alluring proposition related to energy storage is that storage can serve multiple purposes. Typically, energy assets serve one purpose in the energy system, but energy storage can act as generation when connected to the grid and as transmission when it is transmitting power. This is in addition to alleviating load stresses, as needed. Overall, energy storage has capacity and grid-balancing capabilities, and can regulate frequency, provide voltage support and enact blackstart capability services. As evidenced in the Aliso Canyon leak, energy storage can be deployed quickly, making it an ideal solution under circumstances of natural resource shortage, weather or incident-related outage, natural disaster or necessary growth of distributed generation.

Within the context of renewables, energy storage also has other advantages over solar and wind technologies. Whereas solar and wind often are subject to fluctuating output and rapid ramp-up and ramp-down, energy storage is stable for grid purposes, as it often features short charge and discharge cycles and responds better to fluctuating outputs. Further, energy storage can reduce stress on the electric system by addressing "duck curve" issues, increasing demand off-peak and increasing supply during peak times. (For example, two utilities in California and Arizona are proceeding with battery storage systems offering peaking capacity, as in the case of San Diego Gas & Electric's 40 MW (160 MWh), four-hour duration battery storage facility in Fallbrook, California, and the Salt River Project (SRP)'s 10 MW (40 MWh), four-duration battery storage facility in Chandler, Arizona). Finally, under market environments with great load uncertainty driven by economic development, population shifts and expanded distributed energy needs, the employment of energy storage is ideal for policymakers who are concerned about making large investments that are both expensive and time-consuming. Energy storage can be used to avoid huge costs that would otherwise cause a plant or project to become an overbuild, as energy storage can be designed to meet exact offtake needs and help mitigate forecast error risk and costs.

Aggressive State Goals

State policymakers have recognized the technological advancements in energy storage as well as its competitive advantages and have in turn pursued executive and legislative policies to pursue front-of-the-meter energy storage. The nation's leader in forward-thinking energy storage policy is California, which in 2013 passed a collective mandate requiring its investor-owned utilities (IOUs) to procure 1,325 MW in energy storage by 2020. Last year, the *California Public Utilities Commission* implemented Assembly Bill 2868 and issued an order requiring the IOUs to procure up to an additional 500 MW of distributed energy storage. In 2015, Oregon passed a mandate to hit 5 MWh per utility by 2020.

Not to be left behind, states on the East Coast have pledged support for energy storage as well. Earlier this year, New York issued a deployment initiative to reach 1,500 MW in energy storage by 2025, and Gov. Andrew Cuomo proposed that the NY Green Bank commit $260 million for energy storage-related investments. At the

end of last year, Gov. Cuomo signed legislation that encourages the *New York Public Service Commission* to pursue and develop policies that will promote energy storage proliferation in the state. In June last year, the Massachusetts Department of Energy Resources announced a 200 MWh energy storage procurement target for electric distribution companies to be achieved by January 1, 2020.[6] This was in accordance with bipartisan energy diversification legislation passed last year. Earlier this year, a new clean energy bill was introduced in the Massachusetts Senate that had included an energy storage target of 1,766 MW by 2025. In Arizona, a proposed plan would require 3,000 MW in energy storage by 2030. In May this year, as part of new renewable energy legislation, New Jersey adopted energy storage targets of 600 MW of energy storage by 2021 and 2 GW of energy storage by 2030, among the most aggressive in the U.S. New Jersey's energy storage targets are the first to be set in a PJM region state. More states are expected to follow with announcements of energy storage targets and mandates. Some states are now also requiring utilities to include energy storage in their integrated resource plans.

Impact of FERC Order 841

As states set aggressive energy storage goals across the country, and battery technology became more accessible and common in the marketplace, critics still found that FERC's traditional rules surrounding energy storage left them "financially hobbled" due to burdensome technical requirements contained in many RTO/ISO market rules. FERC's limits on preventing energy storage from earning revenue from multiple streams also proved to be a roadblock for developers. Breaking this tradition and signaling a massive change in energy policy, in February this year, FERC issued Order 841, aiming to remove those market barriers that prevented "electric storage resources" from participating in wholesale energy markets.

Specifically, FERC Order 841 requires "each RTO and ISO to revise its tariff to establish a participation model consisting of market rules that, recognizing the physical and operational characteristics of electric storage resources,"[7] facilitate the participation of such resources in the RTO/ISO markets. The RTOs/ISOs are directed to accomplish four principal objectives: (i) make changes such that an electric storage provider can fully participate in all capacity, energy and ancillary services markets, (ii) ensure that electric storage resources can be dispatched and that an electric storage provider can set the wholesale market clearing price as both a wholesale seller and wholesale buyer, (iii) account for the "physical and operational characteristics of electric storage resources through bidding parameters or other means," and (iv) set a minimum size requirement for participation in the wholesale markets that does not exceed 100 kW.[8] FERC Order 841 marked the first time that the nation's leading energy regulatory body recognized that electric storage resources are different from other energy assets because such resources can deliver power into the grid and also withdraw it as both potential sellers and buyers. Additionally, prior to FERC Order 841, each electric storage provider was required to pay retail rates for electricity it took off the grid, making such participation prohibitive. Under FERC Order 841, each RTO/ISO has 270 days from the publication date of the order in the Federal Register to make a compliance filing and an additional 365 days to take action and implement the tariff revisions.[9] Most experts agree that these target dates will likely be pushed back due to related comment and hearing delays.

Energy storage proponents have praised FERC Order 841 for promoting energy storage projects in the U.S., though some critics are concerned that the order does not do enough for the industry. Some say that by issuing FERC Order 841, FERC "passed the buck" to the RTOs/ISOs, relying on them to drive the energy storage markets. In fact, most projections of energy storage growth are in transmission and distribution, sectors that are beyond FERC's immediate jurisdiction. Under FERC Order 841, states still have the flexibility and discretion to adapt rules to meet their particular energy needs, allowing grid operators to set minimum run time requirements, design

[6] Massachusetts Department of Energy Resources, ''State-of-Charge: Massachusetts Energy Storage Initiative Study", online: <http://www.mass.gov/eea/docs/doer/state-of-charge-report.pdf>.

[7] *Supra* note 2 at i.

[8] *Ibid*.

[9] *Ibid* at 222.

their own bid standards, set rules for charging policies and determine if energy storage projects are permitted to sell ancillary services without directly participating in the regulated energy markets. Evidently, FERC Order 841 has given the green light to states to engage and promote energy storage, but the states themselves will need to drive energy storage to the finish line.

Future of RFPs

Due to the various pro-energy storage state policies and goals described, we expect to see states, motivated by executive and legislative mandates, use their FERC-granted discretion to integrate energy storage into electricity requests for proposals (RFPs) in a meaningful way. RFPs that included energy storage prior to FERC Order 841 may have been open to bid packages that included energy storage, but they did not preference or tailor requirements to suit it.

For instance, Arizona's SRP power company issued an RFP earlier this year, before FERC Order 841 was released. The SRP RFP invited bids for 100 MW of capacity and stated, "Proposals with a battery storage component are also encouraged (as long as an alternative proposal without storage is also provided)"[10] and that "[bids with] a renewable energy project with a storage component must also include a separate bid without the storage component."[11] This RFP treated energy storage as ancillary to, and severable from, bid packages, and it did not acknowledge the multiuse or other positive benefits of energy storage.

It is interesting to note that last year, SRP signed a 20-year power purchase agreement with NextEra Energy Resources for the now-completed 20 MW Pinal Central Solar Energy Center photovoltaic solar project, paired with a 10 MW (40 MWh) lithium-ion battery storage system. In May this year, NextEra Energy Resources closed on a $45 million loan provided by prominent project financing institutions Mitsubishi UFJ Financial Group and Mizuho Bank for the project that is Arizona's largest utility-scale solar-plus-battery storage system.

Once FERC Order 841 is implemented by the RTOs/ISOs, we expect RFPs to be tailored to accommodate and, most likely, require energy storage as part of the bids. In addition, as the state-set goals for energy storage capacity approach, the RTOs/ISOs may feel pressure to issue RFPs that explicitly award preference for bid packages that substantively incorporate energy storage.

Electricity Storage Has Arrived

2018 has proven to be a major milestone and turning point for energy storage in the U.S.A perfect storm of more affordable, reliable batteries and ambitious, state-initiated capacity goals, along with FERC Order 841 has created an ideal environment for energy storage to grow at a fast rate and play an integral role in national energy policy. As the RTOs/ISOs begin to alter their approach to energy storage pursuant to FERC's directive, it is safe to say that energy storage has finally arrived. Lower costs, increased deployment and ever-growing regulatory support will make project financing energy storage, particularly for lithium-ion, a more viable proposition in the future.

ELECTRICITY STORAGE IN CANADA: A GEOGRAPHIC MOSAIC

Energy storage has long been a staple in certain regions across Canada. The rich hydro resources found in British Columbia, Quebec and along the eastern seaboard, amongst others, have enabled hydroelectric facilities located there to provide many of the touted benefits of energy storage (capacity, time shifting, and demand response) simply by loosening or tightening the taps, as it were. Consequently, geographic differences have played a significant role in how different power grids have developed in Canada over time and such effects have largely spilled over into energy storage.

On the regulatory front, Canada does not have a national energy regulator along the lines of the United States' FERC (Canada's National Energy Board is primarily concerned with oil, natural gas as well as international and inter-provincial transmission), which would allow for a common approach to both the generation and storage of electricity. As a result, individual Canadian provinces often have more power linkages with American states to their south than with their Canadian peers on an east-west axis.

[10] *Ibid* at 207.

[11] *Ibid* at 85-86.

It's perhaps no surprise that each of Canada's provinces and territories is approaching energy storage separately and that newer energy storage technologies (lithium-ion, compressed air, and flywheel), which are not dependent on geographic bounty, are primarily gaining momentum in central Canada, particularly Ontario and to some extent, Alberta.

As of this writing, Canada's energy storage is a patchwork of: (i) government procurement; (ii) behind-the-meter cost reduction opportunities; (iii) utility implementations and (iv) power-reliability solutions for remote communities, but given recent traction and trajectory, Canada is projected to be a 1.1 GW/2.5 GWh market by 2022.

Procurement/Assessment by Governmental Agencies

In Ontario, the Independent Electricity System Operator (IESO) has undertaken competitive processes that which have led to the procurement of over 20 storage projects since 2012 and will result in approximately 50MW of capacity when fully installed and commissioned. The current procurement framework reflects a two-phase approach, with phase 1 focused on storage capacity as part of a suite of ancillary services that promote system reliability, and phase 2 designed to address issues such as how storage can meet future system needs, allow for deferral of transmission investments, and enhance the value of renewable generation.[12] In addition, the IESO regularly runs frequency regulation and demand response RFPs, in which energy storage proponents are becoming increasing competitive.

These procurements, largely the result of the storage industry's (as represented by Energy Storage Canada) education and advocacy efforts, created a firm basis for the testing of a variety of technologies and the grid and/or utility-scale services which energy storage can provide, while steering clear of the public incentives and subsidies on which a significant portion of the renewable industry across Canada has relied and which are subject to the prevailing political winds (the new Ontario government has cancelled and/or repealed a number of the previous administration's renewable programs and regulations).

On the regulatory front, Ontario's 2017 Long-Term Energy Plan (LTEP)[13] recognized the need to address regulatory barriers to storage technologies. As a result, the IESO established the Energy Storage Advisory Group in April 2018 to identify potential obstacles to fair competition for energy storage and address related market issues and opportunities. In parallel, the *Ontario Energy Board* (OEB) issued an implementation plan that aims to, among other things, facilitate the development of distributed energy resources (including storage projects).

In addition, the IESO has concluded that energy storage technologies can be used to provide some of the services needed to reliably operate the power system (e.g., regulation services, voltage control, and operating reserve). Energy storage could also help improve the utilization of existing transmission and distribution assets by deferring some costs associated with their upgrades or refurbishments, as well as improve the quality of electricity supply in certain areas of the system by controlling local voltages. The IESO has further suggested that in order to utilize the full potential of energy storage, proponents should target those areas of the system where they can provide multiple services to the IESO-controlled grid, the IESO-administered markets and local market participants.

In Alberta, the Alberta Electric System Operator (AESO) has been studying the value of energy storage since 2012, when it began to formally examine storage technologies in relation to market rule issues and technical standards. Most recently, in May 2018, the AESO completed an assessment of dispatch-able renewable generation and energy storage in the context of grid reliability requirements and Alberta's transition toward 30 per cent renewable generation by 2030 and concluded that low-energy, short-duration applications, such as lithium-ions batteries, may be able to cost-effectively compete (primarily in the ancillary services market), provided that certain market rules and transmission tariff issues are addressed. As part of the AESO's plan for

[12] See Energy storage procurement (Phase 1 and 2), online: <http://www.ieso.ca/sector-participants/energy-procurement-programs-and-contracts/energy-storage>.

[13] See online: <https://news.ontario.ca/mndmf/en/2017/10/2017-long-term-energy-plan.html>.

implementing a three-year capacity market by 2021, energy storage capacity that meets the minimum discharge requirements will be eligible for market participation.

Behind-the-Meter Storage Solutions

Behind-the-meter generation and/or storage solutions have historically been used to time-shift energy usage in order to take advantage of cheaper market windows and to provide increased reliability in areas where this was a challenge for the local power grid. In Ontario, this has taken on a new flavour as a result of the Industrial Conservation Initiative (ICI),[14] which rewards certain users for reducing their electricity demand during peaks and the way in which inherent and historical system costs and charges ("**Global Adjustment**") (as more fully explained below) are allocated among electricity users. Global Adjustment is designed to address the "missing money" problem (i.e., insufficient market revenue to cover certain fixed capacity costs) by recovering the difference between the total contracted cost and the market value of certain contracted generation. A decrease in the market price of electricity leads to an increase in Global Adjustment, and vice versa. Over the years, Ontario's Global Adjustment costs have grown significantly, from $700 million in 2006 (8 per cent of total electricity supply costs) to $11.9 billion in 2017 (over 80 per cent of total electricity supply costs).

Under the ICI, the allocation of Global Adjustment to certain large industrial consumers (i.e., Class A) is determined by their respective contribution to the province's top five peak demand hours in a twelve month period, while the remaining Global Adjustment costs are passed on to the other consumers (i.e., Class B) in proportion to their energy consumption. To minimize Global Adjustment charges – which can far exceed the commodity costs of electricity in some cases, Class A consumers are incentivized to shift consumption away from peak hours (or what they anticipate to be peak hours) by curtailing production or installing onsite supply (including energy storage). As a result, Ontario has experienced a bit of a behind-the-meter "gold rush" with a number of local and international energy storage players chasing commercial and industrial users with the largest Global Adjustment spend. A few publically available examples are noted below.[15]

Use of Electricity Storage by Electricity Utilities

Independent of the provincial procurement process, a number of Ontario utilities are piloting and assessing different storage technologies for a variety of uses. Their experiences to-date suggest that storage technologies have the potential of becoming integral tools for managing peak loads, regulating voltage frequency, ensuring reliability from renewable generation, and creating a more flexible transmission and distribution system. A number of utilities have also proposed that related costs become part of the rate base. For customers, energy storage might be a useful tool for reducing costs related to peak energy demand.

For example, Toronto Hydro has been working with its partners to amongst other things: (i) analyze the electrical grid benefits of underwater compressed air energy storage by running a pilot project which focuses on the technology's ability to provide reserve power, shift load and mitigate transmission and distribution congestion and (ii) develop a pole-mounted solution to store electricity during off-peak hours and release power to help improve reliability through an automatic response to smart meter data. Expected system benefits include load levelling, deferral of infrastructure upgrades, and increased reliability and operational flexibility.

[14] Market Surveillance Panel, ''The Industrial Conservation Initiative: Evaluating its Impact and Potential Alternative Approaches", (December 2018), online: <https://www.oeb.ca/sites/default/files/msp-ICI-report-20181218.pdf>.

[15] In November 2017, Convergent Energy + Power announced the completion of an 8.5 MWh energy storage project for *Husky Injection Molding Systems Ltd.* in Bolton, Ontario. The project is based on Lockheed Martin Energy's GridStar lithium battery system. In April 2018, the Enel Group's energy services division, Enel X, through its U.S. subsidiary EnerNOC, Inc., announced an agreement with Algoma Orchards to deploy a 1 MWh lithium-ion battery storage system, with the aim of reducing Global Adjustment and enhancing participation in the IESO's demand response program. In June 2018, NRStor and IHI Energy Storage entered into a memorandum of understanding for IHI to deliver 42 MWh of behind-the-meter (BTM) lithium ion battery solutions for eight of NRStor's commercial and industrial customers in Ontario. These storage projects are expected to be operational in 2019. In July 2018, Enel X announced an agreement with Amhil North America, a packaging company for the food services industry, to deploy a 4.7 MWh lithium-ion energy storage system at Amhil's facility in Mississauga. Similar to the Algoma Orchards project, the Amhil project will reduce peak demand and enhance demand response participation.

Similarly, Hydro One Networks has been operating a temporal flywheel system in Clear Creek, Ontario to regulate the large voltage swings caused by a 20 MW wind farm and Oshawa Power and its partners developed a pilot project to allow homes in the City of Oshawa to use solar energy at home and store it using a lithium-ion battery for shifting energy demand from on-peak to off-peak and provide backup power supply during power outages.

In Alberta, the *Alberta Utilities Commission* (AUC) approved a proposal from Turning Point Generation[16] to construct and operate the Canyon Creek Pumped Hydro Energy Storage Project. The project will utilize pumped hydro energy storage. When power requirements are low, water would be pumped from a lower reservoir to an upper reservoir. When power is needed, for instance during peak demand or periods of low wind to power the wind farms in southern Alberta, water would be allowed to flow back to the lower reservoir and drive the turbines to generate power.

Electricity Storage, Distributed Generation and Remote Communities

As distributed generation sources, energy storage deployments can enhance supply adequacy and respond to contingencies. For instance, in an islanding scenario (many of Canada's remote northern communities are effectively "islands"), battery storage can react quickly to maintain power supply when a portion of the system becomes disconnected from the main grid because of a planned or unplanned outage. Further, when stored electricity is injected into the grid at times of high demand, system peak loading (which underpins key planning criteria used by transmission and distribution system engineers) is reduced, thus relieving loading on critical substation components. This would potentially extend the useful lives of related assets and/or defer the need for capital upgrades which would otherwise be required sooner to meet forecast peak demand.

A successful example of energy storage being used for distributed generation purposes (and a welcome precedent showing that non-hydro energy storage can still have a place in locations which are lavishly endowed with hydro resources) is BC Hydro's 1 MW battery bank, which is sited in two remote mountain communities in British Columbia to store power from renewable sources.

Up until 2013, the two mountain communities of Golden and Field, in the East Kootenay region of British Columbia, had experienced significant power reliability issues. Both towns receive power from BC Hydro's Golden substation, which uses four radial distribution feeders to supply the town of Golden and surrounding areas. In early 2010, load forecast for the area predicted substation capacity would be exceeded by the winter peak of 2013-2014. In addition, the town of Field, located approximately 50 km to the east of Golden, is supplied by a single 25-kV feeder from Golden. This distribution line experiences frequent and prolonged outages because of the heavily forested environment and cold, snowy conditions of Yoho National Park, in which the town of Field is located. The feeder does not always follow the road, and the rugged terrain makes it especially difficult for crews to locate faults and restore power. BC Hydro partnered with Natural Resources Canada to install a battery storage system in the problematic areas which would address these issues and defer the cost of transformer upgrades at the substation for two years. Since being deployed in 2013, the battery system has helped to supply area load for up to seven hours, and reduce system load during peak demand periods.

In addition, many of Canada's far north indigenous communities are considering the benefits of renewable generation mated with energy storage as a way to reduce the use of diesel generators, the fuel for which is delivered by air, resulting in (i) high cost and (ii) reduced system reliability (due to outages).

CONCLUSION

Energy storage has the potential to play an important role in optimizing and modernizing the electricity grid. The costs of energy storage system prices (particularly batteries) have decreased significantly in the past two decades. The downward trend in costs is projected to continue (albeit at a slower rate) into the foreseeable future. The prospect of lower capital investment requirements, coupled with the potential mitigation of regulatory and market barriers, as well as the myriad of reliability

[16] See online: <https://turningpointgeneration.ca/the-canyon-creek-project>.

and customer benefits that energy storage can provide, has many betting on energy storage as the key missing component to a renewable-dominated, modernized and efficient power system: Grid 2.0.

However, in addition to the progress made to date, the effective integration of utility-scale storage systems will require regulators, utilities and industry to work together to address remaining obstacles and limitations, including technical barriers to market participation by storage resources and unclear rules regarding the treatment of an unconventional asset that is both a load and a resource. The devil will be in the details, as utilities bring the issue before regulators in the course of rate proceedings, which are occurring in real time.

Given current trends, Canada's energy storage market is projected to grow at 35 per cent per annum in each of the next four years. If pump storage is included (Ontario Power Generation's 174 MW Sir Adam Beck project and Northland Power's proposed (approx. 600 MW) Marmora project) the picture begins to look rosier still. As progress on multiple fronts begins to coalesce – including the evolution of technologies, removal of regulatory and market barriers, maturation of utility business and cost allocation models, as well as the continued reduction in capital investment requirements, a balanced and realistic optimism for energy storage in Canada may be the most sensible position going forward. ■

MERGER REJECTED: COMMON SENSE FROM WASHINGTON

*Scott Hempling**

Washington State, that is. The *Washington Utilities and Transportation Commission* has rejected the proposed acquisition of Avista (formerly Washington Water Power) by Hydro One, the government-controlled utility serving in Ontario, Canada. The Commission's December 2018 Order[1] emphasized two problems: (1) risks to Avista from political interference by Hydro One's 47 per cent owner, the Province of Ontario; and (2) benefit-lopsidedness, with Avista's shareholders getting 6-12 times what its ratepayers would get. The Commission has produced a fact-filled, logically reasoned model for analyzing corporate structure risks and benefit-cost mismatch.

But the Order has one odd aspect: it attributes Avista's risks entirely to Hydro One's government ownership. (The opinion often associates the noun "interference" with the adjective "political.") Interference is interference, whether the utility's holding company owner is controlled by a government entity or a for-profit entity. In the last 30 years, dozens of U.S. state commissions have allowed for-profit, risk-taking holding companies to take control of their states' local utilities. With these approvals, commissions have diminished their influence over the utility and its decision makers, while subjecting their utilities to unavoidable conflict — between the holding company's pecuniary aims and the utility's public service obligations.[2] Had these other commissions applied the Washington Commission's reasoning (minus its implication that for-profit interference is somehow less harmful than political interference), today's electric industry would be less concentrated, more diverse, less risky, safer for customers and conservative investors, and less labor-intensive for regulators.

PARENT-UTILITY CONFLICT

Hydro One's controlling shareholder was Ontario, so Ontario called the shots. (Hydro One has other shareholders, but under Hydro One's charter no other person can own more than 10 per cent.) Due to state commission approvals, most U.S. utilities also have a controlling shareholder — a holding company — so the holding company calls the shots. The utility must obey its owner's instructions. The central instruction: maximize earnings, then (1) use those earnings to finance utility capital expenditures that produce more earnings; or (2) dividend the earnings to the holding company, which then can either invest them in its other businesses or pay them out to its ultimate shareholders.

A utility's duty to its customers sits uncomfortably with its duty to the holding company. The utility must spend as necessary, and no more than necessary, to serve customers reliably and cost-effectively. But the holding company has no customer service obligation. So it is free to use the utility's earnings to support its other investments, rather than use its earnings

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[1] *Hydro One Limited v Avista Corporation,* (3 December 2018), U-170970, online : WUTC <https://www.utc.wa.gov/_layouts/15/CasesPublicWebsite/CaseItem.aspx?item=document&id=00164&year=2017&docketNumber=170970&resultSource=&page=1&query=170970&refiners=&isModal=false&omItem=false&doItem=false%5d>.

[2] I detail these problems, for the FERC context, in my recent article "Inconsistent with the Public Interest: FERC's Three Decades of Deference to Electricity Consolidation," Energy Law Journal (Fall 2018).

to support the utility's responsibilities. That legal freedom puts the utility at risk, because the typical U.S. holding company, as the 100 per cent owner of the utility's equity, is the utility's sole source of equity.

Of course, the holding company is not a lawless landlord, bleeding its properties while the residents suffer. The holding company wants its utility healthy. But the utility fills just one place in its owner's portfolio. Duty-bound to its ultimate shareholders, the holding company aims to maximize the total value of the portfolio, not the health of any one part of that portfolio. And so we have conflict — between the utility's specific obligation to its customers, and the holding company's general obligation to its ultimate shareholders. That conflict leads to the multiple problems discussed next — problems Washington's order exposed; problems most other commissions endure.

INTERFERENCE WITH THE UTILITY'S INDEPENDENCE

Hydro One had promised not to interfere with Avista's operations. But the Commission found that Ontario's political players undermined that promise "more or less completely." Even as the Avista application was pending, those players (1) forced the resignations of Hydro One's entire board and CEO; and (2) committed electorally to reducing Hydro One's rates, without considering effects on safety, reliability, and finance. The result: "significant losses of shareholder value at both corporations, downgrades to Hydro One's credit ratings, [and] downgrades by equity analysts." Another result: continuing uncertainty about whether Hydro One's new board and CEO, "whose identity remains unknown," would share the Washington Commission's values; or whether instead they would interfere with Avista—just like the Ontario politicians interfered with Hydro One.

The *Washington Commission* condemned Ontario's actions as "political interference." But Ontario's control over Hydro One is the same control every holding company has over its utilities. Holding company control covers every utility decision affecting holding company earnings: the types and timing of utility infrastructure investments, the magnitude and timing of rate increase requests, the tolerance or intolerance of competitive challenges to the utility's monopoly, the acceptance of or resistance to technologies that assist customer choice, and the use or misuse of the utility's monopoly franchise to advantage other holding company businesses. A standalone utility makes its own decisions, accountable only to its regulators. But a utility acquired by a holding company makes the decisions demanded by its holding company. Political or apolitical, interference is interference. By allowing holding companies to buy their local utilities, regulators introduce conflict — unavoidable, continuous conflict.

The problem does not disappear with "independent" directors. They are independent only of the utility's management, not of the utility's sole shareholder — the holding company. Indeed, independent directors are independent of management to ensure their sole allegiance to that sole shareholder. So if the independent director sees a conflict between the holding company's interest and the utility customers' interest, the holding company's interest prevails. That is how fiduciary duty works. Independent directors don't solve the problem; they entrench the problem.

UNKNOWN FUTURE INVESTMENTS

Unlike a government-owned holding company, an investor-owned company promises its shareholders "growth." Growth comes from increasing profits from existing customers, and taking risks to enter new markets and gain new customers. Regulators who allow a holding company to acquire their utility expose customers to those risks. These regulators cross a Rubicon, because most commissions have no statutory power over the holding company's future acquisitions. So the simplest transaction — a utility's executives placing a shell holding company above the utility — can transform a pure-play utility into a conglomerate's subsidiary, because that simple shell holding company can make unlimited acquisitions outside the state commission's jurisdiction. And those acquisitions bring risks, like the ones Exelon listed in its 2013 10-K Report to the Securities and Exchange Commission: "distraction of management from current operations, inadequate return on capital, and unidentified issues not discovered in the diligence performed prior to launching an initiative or entering a market."

This new kind of holding company attracts a new kind of investor. Historically, utilities had conservative, widow-and-orphan investors — individuals who buy-and-hold

patiently, seeking stable dividends and modest value growth. Nearly a hundred holding company acquisitions — all approved by state commissions — have shrunk this sector, leaving risk-averse utility investors with few options. Holding company investors seek higher-risk, higher-return opportunities; so they see the utility not as a conservative investment but as a source of financial support for, and a hedge against, those higher-risk opportunities. Less patient, less willing to accept modest returns, these new investors can pressure the holding company's leadership to seek more growth requiring more risks, thus — as Exelon said — "distract[ing] management from current operations."

GAPS IN RING-FENCING'S FENCE

This Commission statement deserves headline treatment: "Although the Stipulation [proposed by the applicants and intervenors] contained numerous features of modern ring-fencing… we must not miss the forest for the trees. We must consider at a high level the suitability of Hydro One as a potential new owner for Avista in light of everything we know today." Exactly. Why write gobs of words seeking to protect the utility from its new owner when what matters is that owner's character?

I'm referring to what acquirers call "ring-fencing" — dense legal language that attempts to reduce a utility's exposure to the holding company's business risks. These measures aim to prevent the holding company from (1) milking the utility for funds; (2) charging ratepayers for costs caused by the holding company's other businesses; (3) forcing the utility to financially support those other businesses; and (4) pulling the utility into the holding company's own bankruptcy proceeding. Ring-fencing's purposes make sense.

But ring-fencing aims only to reduce the probability of harm; it leaves in place the sources of harm: the holding company's character, its acquisition appetite, its incentives and opportunities to control the utility's decisions. "Ring-fencing" is a misnomer because the ring doesn't close and the fence has gaps. If the holding company's other business pressures disable it from supplying the utility sufficient funds, or distract utility management from their service responsibilities, ring-fencing offers no help. This problem attaches to any utility owned by a holding company, whether government-controlled or for-profit-controlled.

OFF-RAMPS UNCERTAIN

If the holding company misbehaves and the ring-fencing fails to ring-fence, can the regulator unscramble the acquisition? The Washington Commission called unscrambling "impossible," one Commissioner analogizing it to unringing a bell.

Impossible, no; uncertain, yes. Unscrambling means disaffiliating the utility from its holding company. Technically, disaffiliation can occur only if the holding company sells off its utility stock. But the commission has no authority over the holding company, so it can't directly order the holding company to sell its utility stock. The commission needs to reserve that disaffiliation power as a condition of approving the original holding company's acquisition. Yet dozens of commissions have approved nearly 100 holding company acquisitions without creating this off-ramp.

Alternatively, a commission could, on discovering holding company misbehavior, declare it will revoke the utility's franchise unless the holding company sells the utility off. Since a franchise-less utility would have little value to the holding company, the rational holding company will agree to disaffiliate. And if the commission makes clear that the new acquirer must be the best performer rather than the highest bidder, we get a public interest result. But again — no commission has ever taken this step. And a practical problem remains: What if, at the time of the disaffiliation, no appropriate acquirer appears — no one that satisfies the commission's criteria for excellence? Disaffiliation does allow a commission to unring a bell, but the uncertainties demand regulatory caution before ringing that bell. To mix the metaphor: If a plane lacks landing gear, the control tower should keep it on the runway.

BENEFIT LOPSIDEDNESS

The Commission criticized the benefit lopsidedness: customers, $74 million; shareholders, $450-900 million. Most mergers suffer from similar asymmetry. NextEra's acquisition of Hawaiian Electric (rejected by the Hawaii Commission), and Exelon's acquisition of Pepco and its affiliates (approved by the D.C. and Maryland Commissions) had shareholder-to-customer ratios of 10:1 and 12:1, respectively. (Using the applicants' numbers, I offered both calculations as an expert witness in those cases.) Selling control

of a government-granted franchise is lucrative for the acquired utility's shareholders, not for its customers. The Washington Commission recognized a bum deal. Most commissions don't.

GOVERNMENT OR FOR-PROFIT, HOLDING COMPANIES ARE HOLDING COMPANIES

Having described the negatives of a government-controlled holding company, the Washington Commission identified the positives of a for-profit holding company. The decisions of "private business people…would be driven fundamentally, if not exclusively, by commercial considerations of what would be in the best interests of the utility they wished to acquire…". This essay has argued otherwise. The holding company strives to maximize its portfolio value. Its utility is but one part of that value. The holding company's priorities conflict with the utility's obligations. If a commission wants the utility controlled by people "driven… exclusively…by…the best interests of the utility," then the commission should leave the utility be, not approve acquisitions that subordinate the utility to holding company priorities. And if the commission does permit those acquisitions, then instead of allowing the utility to choose acquirers based on the highest price (the common occurrence), it should require the utility to choose the acquirer that offers the best performance. That way, and only that way, will private and public interests align.

THE COMMISSION'S OMISSION

The Commission blamed Ontario and looked skeptically at Hydro One. But what about Avista? Hydro One could not have agreed to acquire Avista if Avista had not agreed to be acquired by Hydro One. The Commission Order thus omits the central question: Why did Avista even consider, let alone sign, an acquisition agreement with an entity so unsuitable? What Commission policy emboldened this utility to sell control of its government-granted franchise to the highest bidder rather than the best performer? (For a 24 per cent premium, who wouldn't sell out?) One hopes that the *Washington Commission,* having issued an excellent order blocking Avista's imprudent action, will now clarify its merger policy to correct Avista's misunderstanding. A utility franchise is a privilege and a responsibility. It belongs with those who offer the best performance, not those who seek the greatest gain. ■

CAPITAL POWER CORPORATION: THE ALBERTA LINE LOSS DEBATE

Gordon E. Kaiser

INTRODUCTION

The issue of the locational treatment of transmission line losses has a long history in Alberta. Indeed, when Alberta's electric system was deregulated in 1995, a key principle for the new, open access transmission system, was that generators would pay charges or receive credits based on the location of supply to ensure maximum efficiency of the system.

In the more than two decades since market opening, the issue of line loss calculation methodology has been the subject of ongoing (and seemingly never-ending) debate before policy makers, the *Alberta Utilities Commission* (AUC) (and its predecessors) and the courts.

The transmission of electricity results in a portion of energy being lost as heat. These losses are dependent on a number of variables, including the distance over which power is transmitted. Losses mean that in order to meet demand, more electricity has to be generated than consumed.

The regulatory framework in Alberta requires that the costs of lost energy associated with transmitting electricity be recovered from generators as opposed to transmission companies or the final consumers. In order to accomplish this, system-wide losses are measured during a chosen period.

The *Alberta Electric System Operator* (AESO) then takes these system-wide losses and determines what portion of the cost of total system-wide losses should be attributed and charged to each generating unit. By doing this, generating units are able to take into account the line losses assigned to them by the AESO when offering their electric energy into the power pool and making their decisions on where to locate their generating plant.

Due to the complexities, variables and interdependencies between all generators and loads on the system, it is impossible to observe or measure how much of any individual generator's output is lost in the process of transmitting electricity. As a result, the AESO developed a methodology to calculate the change in total system losses resulting from changes in each generating unit's output. A line loss factor for each generating unit and the methodology used to determine those factors are enshrined in an AESO rule.

At the risk of over simplifying the long debate over the AESO methodology, the crux of the issue was whether locational impacts of generator's actions were properly reflected in the charges or credits paid for losses.

A DECISION OF THE COURT OF APPEAL OF ALBERTA

Justice Brian O'Ferrall's recent decision in *Capital Power v Alberta Utilities Commission*[1] concludes at least one aspect of the methodology debate.

Briefly by way of background, in January of 2015 the AUC made a decision, as part of a series of decisions, which the AESO's 2005 line loss rule did not comply with Alberta legislation.

The issue came to the Commission as a result of a complaint by Milner Power Inc. in August 2005 with the Commission's predecessor, the *Alberta Energy and Utilities Board* (EUB).

The EUB had summarily dismissed Milner's complaint and indicated the AESO was free

[1] 2018 ABCA 437.

to implement the 2005 line loss rule effective January 1, 2006, which it did. Milner appealed that decision to the Alberta Court of Appeal and in July of 2010, the court agreed with Milner and sent the complaint back to the Commission to adjudicate the merits.

The hearing was divided into two phases. First, the Commission considered whether the 2005 line loss rule complied with the governing legislation, including the *Electric Utilities Act*[2] and *Transmission Regulation*[3]. Second, if the Commission found for Milner in Phase 1, what remedy could be awarded.

In 2012, the Commission determined that the 2005 line loss rule was non-compliant with the governing legislation. That decision was reviewed by the Commission and in 2014, the findings of the 2012 decision were confirmed.

The Commission then proceeded to the Phase 2 remedy proceeding and divided that hearing into 3 modules. For purposes of this brief, only module A will be discussed.

Module A addressed, among other things, whether the complaint could apply continuously from January 1, 2006 to the time of the Module A decision and whether the Commission had jurisdiction to change or replace an AESO Rule that was in effect and to order financial compensation from the period January 1, 2006 to the time of the module A decision.

In January of 2015 the Commission found that the Milner complaint continued uninterrupted from January 1, 2006 to the time of the decision. It also found that the line loss charges and credits were collected under the ISO tariff, which was found to be a negative disallowance scheme, and were therefore, interim. Lastly, the Commission determined that it is not impermissible retroactive ratemaking for the Commission to grant a tariff-based remedy to correct for the unlawful line loss charges and credits included in the tariff from January 1, 2006 to the time of the decision.

The impact of the decision was far reaching and material. In combination with other decisions, all market participants between 2006 and the time of the decision are impacted. Given the passage of time since 2006, many participants have left and entered the market resulting in a complicated settlement process to collect and refund differences. Lastly, the sums at issue are material with losses estimated over the period at $1.6B.

The decision was appealed. Under section 29 of the *Albert Utilities Commission Act*[4], a decision of the Commission may be appealed on a question of law or jurisdiction by way of a permission to appeal motion before a single justice of the Court of Appeal of Alberta. If the permission to appeal application is successful, the merits of the appeal are then heard by a three member panel of the Court of Appeal.

Justice O'Ferrall heard the motion on May 31, 2018 and dismissed it in an unusually lengthy 22 pages permission decision on December 20, 2018. He upheld the Commission's characterization of the line loss rule, as a negative disallowance scheme and subject to permissible retroactive rate making, finding that the law on impermissible retroactive ratemaking was clear and that the Commission's decision turned on the application of the law to the facts of the case. He stated that permission to appeal should be granted only if the application of the law to the facts was unreasonable.

There was a great deal of discussion on the nature of retroactive ratemaking, the exceptions to the prohibition against such ratemaking and the authority of the Commission to make a retroactive adjustment. The Court concluded that "…no court or public utilities board will ever be able to define precisely the circumstances in which retroactive ratemaking is permissible. Nor is it desirable that they should do so. And, presumably, it has been deemed even less desirable to enact a blanket prohibition."[5]

Perhaps more interestingly, Justice O'Ferrall made a number of comments about the test for a permission to appeal motion, the standard of review and crucial deference and the importance of the tribunal's role, not the court's, in determining the public interest.

[2] SC 2003, c E-5.1.

[3] Alta Reg 86/2007.

[4] SC 2007, c A-37.2, s 29.

[5] *Supra* note 1 at 64.

An applicant for permission to appeal must establish that there is a serious, arguable point before permission is granted. The tests to determine this threshold have been set out in numerous Alberta Court of Appeal decisions:

- whether the point on appeal is of significance to the practice;
- whether the point raised is of significance to the action itself;
- whether the appeal is *prima facie* meritorious or, on the other hand, is frivolous;
- whether the appeal will unduly hinder the progress of the action; and
- the standard of appellate review that would be applied if leave were granted.

Justice O'Ferrall questioned whether these were tests or simply considerations or factors to take into account given the nature of the decision and the legal or jurisdictional issues raised.[6] He reasoned that:

> A "question" connotes the raising of doubt. So a question of law or jurisdiction would be the raising of doubt about a proposition of law or the taking of jurisdiction. A "question" connotes a problem of some practical importance requiring a solution. So unless there is a question or problem of practical importance requiring an answer, permission to appeal ought not to be granted because there is no basis for an appeal. Unless there exists a question of law or jurisdiction which has not already been authoritatively answered, no appeal lies.[7]

The matter of whether the appeal is *prima facie* meritorious requires an assessment of the degree of crucial deference that would be applied. The likelihood of deference increases as the merits of the appeal decline.

Justice O'Ferrall accepted that the Commission's decision to retroactively re-allocate credits and charges raised a jurisdictional question going to the Commission's authority to order the adjustments. Although, he stated that the existence of a jurisdictional question did not automatically mean that the Commission's decision raised a question or doubt about its jurisdiction.[8]

He emphatically supported the principle that courts should show deference to expert tribunals, who make legal decisions within their special expertise, including jurisdictional determinations such as the retroactive adjustment of rates. He went as far as to say that a deferential standard must be applied to even the "true jurisdictional issues" on this permission to appeal application.[9]

He rejected the contention that only the courts are the source of authoritative public utility law, pointing out that the law related to the prohibition against retroactive rate making, was largely developed through public utility regulation, and public utility board jurisprudence. He wrote:

> Where do the applicants think the common law prohibition against retroactive ratemaking came from? It came from roughly 100 years of public utility regulation and public utility board jurisprudence in this province and elsewhere in North America. Admittedly the courts have contributed to the development of the prohibition, invoking concepts such as the presumption against retroactive application of legislation. But it is important to understand that the underlying rationales for the prohibition were not derived solely from the common law, or statute law for that matter. The prohibition against retroactive ratemaking was derived from general principles of fairness, reliance, certainty and finality, which the common law

[6] *Ibid* at 30-38.
[7] *Ibid* at 32.
[8] *Ibid* at 40.
[9] *Ibid* at 48.

> recognized, but which existed independent of the common law. These are values which gained currency, not because of the law, but because they made sense in a fair and orderly society. Courts have no monopoly or special expertise when it comes to the application of principles of fairness. And that is what the Commission did in this case: it applied principles of fairness to a function (i.e., ratemaking) in respect of which is has a special expertise.[10]

Justice O'Ferrall further commented that commissions are not inferior tribunals governed or supervised by the courts. The court's function is to assist the Commission and those it regulates when they need the court to answer questions. In this context, the court's role, he stated, is to correct obvious errors of law and serve as a check on the Commission's exercise of its powers but it is not to regulate utilities.[11]

Justice O'Ferrall gave deference to the Commission's decision on its jurisdiction to adjust line loss allocations retroactively because the Commission's essential function and expertise was ratemaking. He cited the Supreme Court decision[12] in support of this view and that a standard of reasonableness is presumptively applied to the Commission's interpretation of its home statutes.

Justice O'Ferrall found that the Commission's assessment of the interests at play and whether compliance with the line loss rule produced a fair result and met the objectives of relevant legislation were not the kind of assessments that the Court was capable of making. He described the Commission's analysis of permissible retroactive rate making based on the negative disallowance scheme in place as "certainly defensible logic", although its correctness could be debated. He was not prepared on a permission to appeal application to hold that there was a serious question as to the correctness of the Commission's decision.[13]

He went further in justifying the court's deference on a jurisdictional question by elevating the overriding importance of the public interest component of Commission decisions over questions of law and jurisdiction. He held that the Commission was best able to determine the public interest. He stated that:

> In deciding whether permission to appeal ought to be granted, one must begin with an understanding that there is much more to the impugned Commission decision than questions of law or jurisdiction. The Commission's first and foremost mandate is to make decisions which are in the public interest. It must make policy choices it considers necessary to achieve the objectives of utility regulation. The Commission has a much better understanding of what those objectives are, but they would presumably include objectives such as setting just, reasonable and lawful utility rates for utility services, balancing the interests of ratepayers and the owners of the utilities, encouraging efficiencies in the provision of utility services, encouraging a competitive market to the extent possible and ensuring that transmission line loss costs are shared appropriately by energy generators in accordance with legislated directive as to how those costs should be shared. Questions of law or jurisdiction, while important, are incidental to the achievement of the Commission's public interest objectives.[14]

CONCLUSION

Although the Court was dealing with a permission to appeal application, decisions which are often brief with spare reasoning, this particular decision stands out for its thorough analysis of the retroactive ratemaking principles

[10] *Ibid* at 45.
[11] *Ibid* at 46.
[12] *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission),* 2015 SCC 45.
[13] *Supra* note 1 at 54.
[14] *Ibid* at 52.

raised by Commission's decision, the paramount importance of the public interest component of tribunal decisions and the decision's strong support of curial deference to expert tribunals on legal and jurisdictional questions. ■

CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED AND HYDRO-QUÉBEC 2018 SCC 46

*David MacDougall**

BACKGROUND

This Decision[1] is in relation to the 1969 contract between *Churchill Falls (Labrador) Corporation Limited* ("CFL Co.") and Hydro-Québec which set out the legal and financial framework for the construction and operation of the *Upper Churchill hydroelectric plant* on the Churchill River in Labrador. Pursuant to the contract, Hydro-Québec undertook to purchase, over a 65-year period, most of the electricity produced by the generating plant which supported the debt financing for the facility's construction. In exchange, Hydro-Québec obtained the right to purchase the electricity at fixed prices for the entire term of the contract.

In the subsequent years, there were changes in the electricity market and the purchase price for electricity set out in the contract became well below market prices. Hydro-Québec was able to sell electricity from the facility to third parties at market prices generating substantial profits. In light of these changed circumstances, CFL Co. petitioned the courts to order that the contract be renegotiated and its benefits be reallocated. CFL Co. sought to have a new rate put in place so as to ensure that the contract, in its view, reflected the equilibrium of the initial agreement and to enforce Hydro-Québec's alleged duty to co-operate with CFL Co. on the basis of a general duty of good faith.

The Québec Superior Court[2] concluded that the intervention sought by CFL Co. was not warranted, and the Québec Court of Appeal[3] dismissed CFL Co.'s appeal. The Supreme Court of Canada (the "Court") dismissed CFL Co.'s appeal by a measure of 7 Justices to 1, with the single dissenting judge being Justice Rowe from the Province of Newfoundland and Labrador, and with Chief Justice McLachlin taking no part in the Judgement.

DECISION

CFL Co. argued that given the nature of the contract and the parties' duties of good faith, and equity that Hydro-Québec had a duty to renegotiate the contract when it proved to be an unanticipated source of substantial profits for Hydro-Québec. CFL Co.'s position was that the contract must be renegotiated so as to allocate the profits more equitably between the parties.[4]

CHARACTERIZATION OF THE CONTRACT

In support of its position, CFL Co. began by raising arguments relating to the characterization, content and interpretation of the contract. It submitted that the contract was a relational one akin to a joint venture.[5] Its view was that the parties had always intended to prioritize cooperation and the equitable sharing of the risks and benefits associated with the project,

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[1] *Churchill Falls (Labrador) Corporation Ltd c Hydro-Québec,* 2018 SCC 46.

[2] *Churchill Falls (Labrador) Corporation Ltd c Hydro-Québec,* 2014 QCCS 3590.

[3] *Churchill Falls (Labrador) Corporation Ltd c Hydro-Québec,* 2016 QCCA 1229.

[4] *Supra* note 1 at para 40.

[5] *Ibid* at para 41.

and that the contract could not be considered to have dealt with the risk of electricity price fluctuations as radical as the ones that have occurred since the 1980s, such fluctuations being impossible to foresee in 1969.[6]

The Court however concluded that the contract could not be characterized as a joint venture or a relational contract. With respect to the potential of a joint venture, the Court found that the evidence did not show that the parties intended to enter into a partnership or to jointly assume financial or logistical responsibility for the development of the project beyond the simple cooperation required to perform their respective obligations.[7] The Court thus found that the relationship of the parties lacked the characteristics generally associated with a joint venture.[8]

As for the contract being relational, the Court noted that in general a relational contract sets out the rules for close cooperation between the parties who wish to maintain such over the long-term, and puts an emphasis on the parties' relationship and on their ability to agree and cooperate, and does not define their respective obligations and benefits in significant detail. The Court noted that such relationships require a cooperation that is more active than the cooperation that is required by transaction-based contracts.[9]

With respect to the contract in issue, the Court found that the parties had set out a series of defined and detailed obligations and benefits as opposed to providing for flexible economic coordination.[10] The Court noted that each party's participation was clearly quantified and defined and that this showed that they intended the project to proceed according to the words of the contract and not on the basis of their ability to agree and co-operate from day to day to fill in the gaps in the contract. The Court noted that the long-term interdependent nature of the contract did not in itself imply that the contract was relational.[11] The Court specifically noted that the Court of Appeal was correct in finding that the trial judge made no palpable and overriding error that might warrant intervention, and that his determinative finding concerning the paradigm of the contract, mainly that its fixed prices and long-term were precisely the benefits Hydro-Québec was seeking in 1969, was strongly supported by the evidence he considered.[12]

GOOD FAITH, EQUITY AND UNFORESEEABILITY

CFL Co. also submitted that, as a matter of law, Hydro-Québec could not receive such profits without being required to distribute part of them to CFL Co., relying in support of this argument in part on the general duty of good faith[13] that is recognized in Québec civil law and in part on implied duties under the contract based on equity.[14] Hydro-Québec noted, and the Court accepted, that CFL Co. was essentially asserting the right to require the renegotiation of the contract on the basis of unforeseeability.[15]

With respect to the matter of a potential implied duty, the Court found that although an implied duty may, within the meaning of article 1434 of the *Civil Code of Québec*[16], be incident to a contract if the duty is consistent with the general scheme of that contract and its coherency appears to require such a duty, that such an implied clause must not merely add duties to the contract that might enhance it, but must fill a gap. The Court then concluded that there was no gap or omission in the scheme of the contract that required an implied duty to co-operate and to renegotiate the agreed upon prices be read into the contract in order to make it coherent.[17]

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[6] *Ibid.*
[7] *Ibid* at para 42.
[8] *Ibid* at para 46.
[9] *Ibid* at para 66.
[10] *Ibid* at para 71.
[11] *Ibid.*
[12] *Ibid* at para 42.
[13] *Civil Code of Quebec,* LQ 1991, c 64, art 6.
[14] *Supra* note 1 at para 43.
[15] *Ibid* at para 37.
[16] *Supra* note 13 art 1434.
[17] *Supra* note 1 at para 75

In dealing with this issue of an implied renegotiation clause, the Court specifically noted that the interpretations proposed by CFL Co. could not override the judge's findings on the allocation of risks between the parties as stipulated in the contract and on the benefits flowing from it, particularly for Hydro-Québec.[18] The majority also noted that the application of Justice Rowe's conception (in dissent) of the relational nature of the contract amounted to a summary reassessment of what the parties intended the central paradigm of the contract to be that was based on an interpretation of the evidence, both intrinsic and extrinsic, that the trial judge did not accept.[19]

With respect to the application of the doctrine of unforeseeability, the Court concluded that a cursory review of the contract's clauses and their context was enough to justify a conclusion that the parties intended to fix the price of electricity for the entire term of the contract,[20] and importantly that the trial judge found from the evidence that the parties intended to allocate the risk of price fluctuations and that there was an agreement of wills on that specific point.[21] In the Court's view, the risk of price fluctuations, a known variable, was allocated by the contract.[22] The Court stated that the parties agreed that it was a variable whose value was, by definition, unknown,[23] and the parties being fully aware of this reality nonetheless made a firm commitment without including a price adjustment clause, which confirmed to the majority of the Court, that the contract was to apply regardless of the magnitude of price fluctuations.[24] The majority could not find any palpable and overriding error in the trial judge's findings on this point.[25]

Essentially, the Court found that the nature of the contract was that the parties undertaking was definite and firm, and for the long-term.[26] The Court was of the view that all of the requisite findings of fact were strongly supported by the evidence.[27] Since the majority of the Court found that the parties had intentionally allocated the risk of price fluctuations, the circumstances in which the doctrine of unforeseeability could potentially be recognized did not correspond to the circumstances of the parties in the instant case. The Court also noted that the doctrine was not explicitly recognized in *Québec civil law* at the present time[28] and any development of a concept analogous to unforeseeability in *Québec civil* law must take account of the legislature's choice not to turn such doctrine into a universal rule.[29]

The Court also noted that CFL Co. claimed that it was not specifically pleading the doctrine of unforeseeability.[30] However, in the majority's view, CFL Co.'s submissions closely resembled that doctrine and echoed its central theme – although the contract was originally fair and reflected the parties' intention, it no longer reflected that original intention and had not done so since major unforeseen changes appeared in the electricity market.[31] The Court noted that CFL Co.'s general position essentially revolved around its key argument that the difference between the electricity market of the late 1960's and the electricity market of the present day was so significant and so radical that it would be appropriate to describe the transition from one to the other as a true paradigm shift.[32]

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[18] *Ibid* at para 76.
[19] *Ibid.*
[20] *Ibid* at para 79.
[21] *Ibid* at para 80.
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid* at para 81.
[26] *Ibid* at para 82.
[27] *Ibid.*
[28] *Ibid* at para 93.
[29] *Ibid* at para 96.
[30] *Ibid* at para 84.
[31] *Ibid.*
[32] *Ibid* at para 45.

CFL Co. submitted that its argument was based not on unforeseeability but rather on the concepts of good faith and equity that govern the performance of contractual obligations in *Québec civil law*.[33] With respect to the issue of the general duty of good faith, the Court noted that while such duty serves as a basis for courts to intervene and to impose on contracting parties obligations based on the notion of contractual fairness[34], the duty can also temper formalistic interpretations of the words of certain contracts and serves to maximize the meaningful effect of a contract and of the obligations and benefits that are for the parties the object of that contract.[35]

The Court noted that where the concept of unforeseeability itself had been rejected by the Québec legislature refusing to incorporate that doctrine into the province's civil law, a protection analogous to it that would be linked only to changes in circumstances without regard for the core conditions of the doctrine as recognized in other civil law jurisdictions could not become the rule in *Québec civil law*.[36] The Court specifically found that nothing about the relationship between CFL Co. and Hydro-Québec would justify an intervention in the circumstances of the instant case as there was neither inequality nor vulnerability in their relationship.[37] Both parties to the contract were experienced, and they negotiated its clauses at length.[38] The Court concluded that they bound themselves knowing full well what they were doing, and their conduct showed that they intended one of them to bear the risk of fluctuation of electricity prices.[39]

The Court found that the duty of good faith does not negate a party's right to rely on the words of the contract unless insistence on that right is unreasonable in the circumstances.[40] In the instant case, Hydro-Québec's refusal to forego the advantages flowing to it from the contract was not a departure from the standard of reasonable conduct that could rebut the presumption that a party is acting in good faith.[41] Nor, the Court found, did Hydro-Québec's insistence on adhering to the contract, despite the alleged unforeseen change in circumstances, constitute unreasonable conduct in the absence of other breaches of the duty of fair play or that of collaboration or cooperation.[42]

The Court further found that Hydro-Québec had done nothing that threatened to disrupt the contractual equilibrium and therefore had no duty to co-operate with CFL Co. to mitigate the effects of the contract.[43] The Court found that the evidence did not show that Hydro-Québec was acting in bad faith or refusing to accommodate CFL Co.'s situation, rather it was refusing only to give CFL Co. the benefit itself derived from the contract, which is not a breach of the requirement that it conduct itself reasonably and in accordance with fair play.[44] The Court noted that Hydro-Québec does indeed benefit from the contract insofar as it is able to earn a profit as a result of its having participated in the Churchill Falls project rather than undertaking a similar project in Québec in the 1960's, but that it obtained this benefit in exchange for making substantial investments and assuming significant risks.[45] Similarly, the Court found that as for CFL Co., it received what it expected to receive under the contract, mainly the ability to use debt financing for the plant, and a return on its investment that it considered reasonable at the time of the signing of the contract.[46]

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[33] *Ibid* at para 85.
[34] *Ibid* at para 103.
[35] *Ibid*.
[36] *Ibid* at para 106.
[37] *Ibid* at para 109.
[38] *Ibid*.
[39] *Ibid*.
[40] *Ibid* at para 118.
[41] *Ibid* at para 119.
[42] *Ibid*.
[43] *Ibid* at para 123.
[44] *Ibid* at para 124.
[45] *Ibid*.
[46] *Ibid*.

Finally, the Court found that the situation in the instant case did not constitute a breach of an ongoing duty or a continuing fault that is not subject to prescription,[47] and considering that the most recent event to have disrupted the electricity market occurred in 1997 at the latest, it was at that time that CFL Co.'s right of action arose.[48] Thus, the Court concluded that it had therefore been prescribed since the end of 2000 at the latest. The most recent action being the action taken by the *United States Federal Energy Regulatory Commission* to effectively require that the market be open to all producers, occurring in 1997 at the latest.[49] The Court did not accept CLF Co.'s argument that Hydro-Québec's breach of its duty of good faith was a continuing fault, but rather found that the right of action in question arose when the events that gave rise to it occurred.

Overall, the Court concluded that the trial judge had properly defined the nature of the relationship between the parties and the paradigm of the contract, and that they never intended to allocate the project's risks and benefits equally.[50] On the contrary, it found that the original intention was that Hydro-Québec would assume most of the risks associated with the construction of the plant owned by CFL Co.[51] The Court's view was that the benefit that CFL Co. characterized as disproportionate, namely to guarantee a fixed price for the purchase of electricity, was seen as a way to have Hydro-Québec assume a risk that CFL Co. did not want to assume. In return, Hydro-Québec was to obtain low fixed prices and a long-term contract.[52] The Court concluded the fact that the electricity market had changed significantly since the parties entered into the contract did not on its own justify disregarding the terms of the contract and its nature.[53] In its view, CFL Co. was seeking not to protect the equilibrium of the contract but to replace the contract with a new agreement by undoing certain aspects of it while keeping the ones that suited CFL Co. In the majority's view neither good faith nor equity justified granting those requests.

The Court also interestingly noted that in its view, CFL Co. was asking it to limit the contract's temporal scope so that it could more quickly enjoy the benefits. It will eventually receive at the end of the contract in 2041, that being a facility estimated to be worth more than $20 billion that it will be able to operate for its own benefit starting September 2041 for many more years to follow.[54]

DISSENT

On the other hand, Justice Rowe was of the view that the trial judge erred in not finding the contract relational rather than transactional, and that the contract did establish a long-term relationship between the parties premised on cooperation and the promise of mutual benefit.[55] Justice Rowe's view was that since the contract contained no specific mechanism for the allocation of profits that were beyond what was envisioned at the time of the agreement, the parties had an implied obligation to cooperate in defining the terms of their allocation and Hydro-Québec had breached this duty.[56] Justice Rowe's view was that in considering the overall framework of the parties' rights and obligations set out in the contract, that the true nature of the arrangement was relational rather than transactional.[57] He also noted that he did not share the view that relational contracts should be limited to those that leave certain obligations to be defined by the parties at a later date.

[47] *Ibid* at para 135.
[48] *Ibid*.
[49] *Ibid* at para 134.
[50] *Ibid* at para 136.
[51] *Ibid*.
[52] *Ibid*.
[53] *Ibid* at para 137.
[54] *Ibid*.
[55] *Ibid* at para 142.
[56] *Ibid* at para 145.
[57] *Ibid* at para 167.

In Justice Rowe's view, based on his finding of the relational nature of the contract, the parties had an implied obligation to cooperate in establishing a mechanism for the allocation of extraordinary profits.[58] Furthermore, he found that where a fault continues in time and causes continuing damages, prescription starts running anew each day.[59] Therefore, by refusing to enter into negotiations to establish a mechanism for allocating unforeseen profits, Hydro-Québec had been in continuous breach of its obligation to cooperate and CFL Co.'s action was not prescribed.[60]

CONCLUSION

This Decision is the latest chapter in the long running dispute over the allocation of benefits deriving from the *Upper Churchill hydroelectric project,* and provides further guidance for energy and natural resources practitioners who are often called upon to put in place long-term agreements to support project developments. The Supreme Court of Canada has clearly stated that where the evidence, including the language of the contract, supports a finding that the parties clearly put their mind to allocation of a certain risk, even where the valuation of the risk at the time was not clearly known, the contractual commitments in this regard should generally be upheld. Over the long-term, many things can change dramatically in the energy and natural resources markets, and long-term contractual arrangements should be clearly articulated to reflect how the parties have agreed to address the allocation of pricing and other potential changes in such markets. The Supreme Court of Canada, while acknowledging the existence of good faith and equitable arguments in certain circumstances, reconfirmed the sanctity of contracts where the parties have put their minds to and allocated obligations and benefits. ■

[58] *Ibid* at para 180.
[59] *Ibid* at para 185.
[60] *Ibid* at para 186.

NAVIGANT REPORT OVERVIEW: "STARTING A CONVERSATION: IS THERE FLEXIBILITY TO ADAPT CANADA'S CURRENT UTILITY REGULATION LANDSCAPE?"

*Francis Bradley**

Ensuring that the lights stay on and Canadian businesses can operate 24/7 is an essential public good provided by the country's electricity sector. However, as with other sectors, electric utilities must innovate to meet the requirements of the modern age.

Specifically, more than ever, environmental considerations are factoring into Federal, Provincial and Territorial governments' expectations of electric utilities. And with over 80 per cent non-emitting generation and growing, the sector has responded to these concerns. However, it is also facing a number of disruptive forces. Declining average end-use consumption, the proliferation of distributed energy resources, and rising levels of competition all pose challenges for the electricity sector.

In adapting to these challenges legislative roles and responsibilities exist for many regulators, but the tools available to address the changes and disruption vary widely across jurisdictions. And in sum, there is the feeling that the regulatory environment that electricity companies operate under has been slow to promote the level of innovation that is necessary to meet current and emerging challenges.

Indeed, there are regulatory tests that seek to balance these competing interests (i.e. benefit-cost analysis frameworks), which exist today within the industry and provide a potential template. However, the devil is in the details when it comes to defining the benefits and costs that are included when cross-jurisdictional imperatives exist.

It is also equally true that regulators are facing contrasting pressures of their own. For instance, I have yet to meet a regulator that does not recognize the public good that could result from utility innovation. Or, a regulator that does not realize we will need to adjust regulatory models and practices in order for utilities to overcome the challenges of the day. However, regulators also express being confronted by pressures to focus on ensuring that costs for utility consumers remain as low as possible. And given the tendency for this latter directive to contain political dimensions, there results a tendency for regulators not to approve or incent innovative or "outside of the box" thinking; and rather, to direct utilities to replace like for like, at the lowest possible cost. Thus, there is the feeling by many in the sector that there needs to be a longer term holistic view adopted that includes the impact of the status-quo on costs to consumers.

In consideration of these discussions, in 2017 the *Canadian Electricity Association* commissioned *Navigant Consulting* (Navigant) to undertake research, with the goal being starting a conversation with regulators on how they can utilize specific regulatory tools to promote

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utility innovation and modernization. Navigant identified eleven levers and actions identified in *Figure 1* below for regulators to consider when looking to address the technological disruption facing our sector. Navigant broke these into two broad categories: process reforms and framework reforms. A third category, "competition", was also identified.

Navigant then evaluated the regulatory permissibility of the toolkit options within each of the thirteen Canadian provinces and territories under the current statutory framework (See *Figure 2*). Regulator permissibility for each of the thirteen regulatory levers varies widely throughout Canada, ranging from Saskatchewan and Nunavut with minimal permissibility; to Quebec, Alberta, and Nova Scotia with considerable permissibility. Permissibility is represented graphically using shaded circles, where the extent of the shading represents the extent of the regulator's discretion under existing legislation.

It is evident from Navigant's research that regulators have the most flexibility in actions and levers in the process category, followed by framework and competition. Additionally, most regulators also appear to have substantial flexibility in rate design and tariff structure areas in terms of introducing and changing policies. In short, there is some flexibility within the current

Figure 1: Regulatory Levers and Actions[1]

	Levers	Description
Process Reforms	Optimize compliance and reporting obligations	Reduce regulatory burden by eliminating low value and low risk compliance and reporting requirements.
	Streamline regulatory proceedings	Promote negotiated settlements, adopt proportional reviews, strictly limit the scope of reviews and interventions where appropriate.
	Implement mandatory recurring policy reviews	Impose mandatory reviews or sunset clauses for major policies.
Framework Reforms	Adopt alternative forms of regulation	Introduce and evolve models of performance-based regulation.
	Restructure rates and charges	Adjust rates structures to reflect current trends and usage patterns and to be responsive to changing technology.
	Mandate flexible customer arrangements	Allow for flexibility in terms of how utilities classify and provide services to different customers.
	Change the interconnection and compensation regime for distributed energy resources	Change the way in which grid-connected and behind the meter distributed energy resources are interconnected and compensated.
	Establish alternative treatment for stranded assets	Establish alternatives forms of treatment for stranded assets, for example, accelerated depreciation, separate deferral and recovery accounts, and cost sharing mechanisms.
	Relax the treatment of affiliates	Eliminate low value and low risk affiliate compliance obligations, use penalties and policing to and adopt technology solutions to protect against anti-competitive behaviour.
	Encourage / incentivize applied R&D and technology demonstration	Promote applied R&D and technology demonstration through specific programs and the evolution of the regulatory and utility business model.
Competition	Deem services eligible for full, partial or conditional deregulation	Deem certain activities as competitive, forebear on elements of the utility franchise where appropriate levels of competition exist.

[1] The Canadian Electricity Association, ''Starting a conversation: Is there flexibility to adapt Canada's current utility regulation landscape?" (2018), Online: <https://electricity.ca/wp-content/uploads/2018/10/Navigant-Flexibility-to-Adapt-Regulation.pdf> at i-ii.

legislation in most provinces and territories for regulators to adapt in the face of disruptions to the energy sector. Given the variances in the specific circumstances of each jurisdiction, options for adaption and evolution should be evaluated more thoroughly going forward.

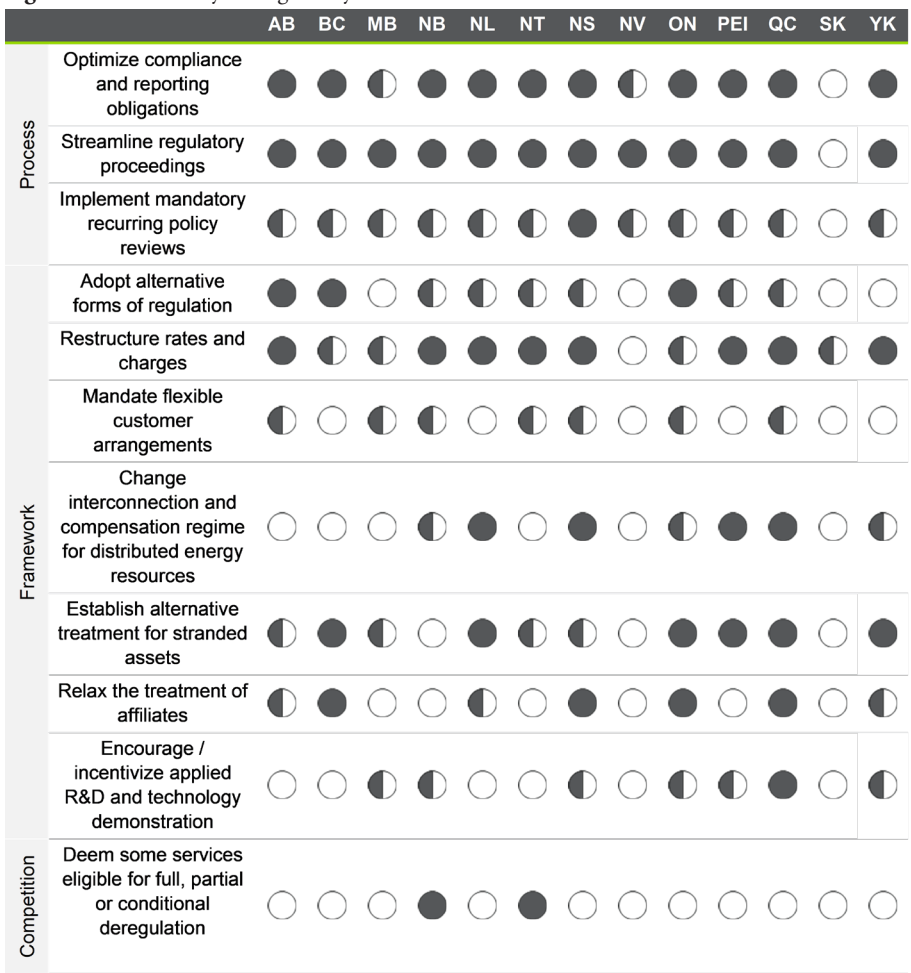
By releasing this research, the electricity sector aims to start a conversation on how electric utilities can be both incentivized to bring forward the non-traditional investments and activities necessary to adapt to the pressures discussed above. And also how regulators can utilize their full regulatory toolkits in order to enable the electricity sector to meet the challenges of the day.

Navigant's research, predictably, did not uncover a "silver bullet" uniformly available to regulators across the country to enable utility innovation and modernization. However, the report does show that there are at least some tools available to most provinces and territories, which vary by jurisdiction, that can be utilized by regulators towards these ends.

CEA hopes that this work helps to further the conversation regarding how regulators can fully utilize these tools to enable the innovation and modernization that so many energy stakeholders recognize to be in the best interests of Canadians.

By starting this conversation, we hope to find a solution; and begin to embark upon the Canadian energy future! ■

Figure 2: Permissibility of Regulatory Levers[2]



[2] *Ibid* at ii-iii.