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MISSION STATEMENT

The mission of Energy Regulation Quarterly (ERQ) 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 role of the ERQ is to provide analysis and context that go beyond day-to-day developments. It strives to be balanced in its treatment of issues.

Authors are drawn from a roster of individuals with diverse backgrounds who are acknowledged leaders in the field of energy regulation. Other authors are invited by the managing editors to submit contributions from time to time.

EDITORIAL POLICY

The ERQ is published online by the Canadian Gas Association (CGA) 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 managing editors have exclusive responsibility for selecting items for publication.

The ERQ will maintain a "roster" of contributors and supporters 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. Other individuals may also be invited by the managing editors to author articles on particular topics.

The substantive content of individual articles is the sole responsibility of the respective contributors. Where contributors have represented or otherwise been associated with parties to a case that is the subject of their contribution to ERQ, notification to that effect will be included in a footnote.

In addition to the regular quarterly publication of Issues of ERQ, comments or links to current developments may be posted to the website from time to time, particularly where timeliness is a consideration.

The ERQ invites readers to offer commentary on published articles and invites contributors to offer rebuttals where appropriate. Commentaries and rebuttals will be posted on the ERQ website (www.energyregulationquarterly.ca).

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Rowland J. Harrison QC and Gordon E. Kaiser

PIPELINE POLITICS

Canada may soon receive the worldwide prize for being the most difficult jurisdiction to build energy projects in. This is particularly the case with pipelines. In the last five years, investors have walked from four major projects. In total they accounted for over $50 billion[1] in investment. Those four projects were the TransCanada Energy East pipeline, the Enbridge Northern Gateway pipeline, Trans Mountain expansion and the Teck Frontier oilsands mine located between Fort McMurray and Fort Chipewyan.

Trans Mountain was saved at the last minute when the Government of Canada made the decision to buy the pipeline for $4.5 billion. Teck Resources has regulatory approval for its proposed Frontier oil sands project and a federal cabinet decision on the project was expected at the end of February. However, just a week before the expected cabinet decision, the company withdrew the application, no doubt influenced by the blockade that was ongoing at the time on the Canadian National Railway across the country by aboriginal groups opposed to the Coastal GasLink project.

The four projects still inching forward are the Trans Mountain Expansion project (TMX), Keystone XL, Coastal GasLink and Enbridge Line 3. Before we look at the current status of those four, it is useful to examine what happened in the two failed projects, Energy East and Northern Gateway.

THE FAILED PROJECTS

In April 2013, TransCanada filed an application to build the Energy East pipeline, a 4,500 km pipeline from Alberta to the east coast of Canada at a cost of $15.7 billion. The rationale was sound enough. Canada's east coast refiners relied on imported crude for 80 per cent of their requirements. Alberta crude could replace that foreign crude.

However, things went off the rails when the National Energy Board (NEB) suspended hearings in order to rule on a motion that two panel members hearing the case were biased. Eventually the NEB agreed and replaced the two panel members. The case started over with new panel members who threw out all the decisions the previous panel had made. The real nail in the coffin was a change in government policy. The new panel issued a decision indicating that for the first time, the panel would consider in its evaluation of the project, the cost of greenhouse gas emissions resulting from the increased production and consumption of oil caused by the project. That was enough for TransCanada. In October 2017 the company canceled the project.

The Enbridge Northern Gateway pipeline also ran into unexpected and unprecedented developments. That pipeline was to run 1,178 kilometers from Bruderheim, Alberta to a marine terminal in Kitimat, B.C. and cost $7.9 billion. There were two lines at issue. One would transport 525,000 barrels per day of

[1] $15.7 billion for Energy East, $7.9 billion for Enbridge Northern Gateway, $7.4 billion for Trans Mountain expansion and $20.6 billion for Teck Frontier oil sands project.

Alberta oil west to tidewater. The other would bring 93,000 barrels of condensate to Alberta used in processing Alberta bitumen.

The NEB joint review panel issued its report to the federal cabinet on December 19, 2013 and recommended approval subject to over 200 conditions. The federal cabinet accepted the panels' recommendations in June 2014 and ordered the NEB to issue the necessary Certificate of Public Convenience and Necessity to start construction.

One of the conditions of the joint review panel was that Enbridge engage in consultations with the First Nations. Those consultations inched along until the Federal Court of Appeal in June 2016,[2] in a 2-1 split decision, ruled that the consultations were inadequate. The Court's decision overturned the federal cabinet's June 14, 2013 approval of the Northern Gateway pipeline.

A second and even bigger problem resulted when the federal government decided in late 2015 to issue a moratorium on crude oil traffic off the B.C. north coast. The view by many was that the moratorium served only one purpose, namely to cancel the Northern Gateway project. It turned out they were right. Late in 2016, the federal government announced it would not approve Northern Gateway.

THE REMAINING PROJECTS

Four projects remain under various states of regulatory approval, Trans Mountain, Keystone XL, Coastal GasLink and Enbridge Line 3.

Trans Mountain Expansion

As indicated the federal government purchased the Trans Mountain expansion from Kinder Morgan for $4.5 billion. On February 22, 2019, the NEB released its reconsideration report on the project, recommending again that it proceed. The federal cabinet accepted that recommendation and approved the project. Construction of the project officially began on December 3, 2019. Shortly after that on January 16, 2020, the Supreme Court of Canada unanimously dismissed the B.C. attempt to claim jurisdiction on this project[3] upholding an earlier decision on B.C. Court of Appeal Decision.[4]

On February 4, a unanimous Federal Court of Appeal dismissed the most recent legal challenges to the project,[5] which is proceeding. The Court was clear, first, that Indigenous groups have no veto and, second, that courts should defer to the government that make the initial decision on whether the duty to consult has been met.

Keystone XL

The Keystone XL pipeline, a $5 billion project, was first proposed by TransCanada in 2008 to transport oil from Canada through the Midwest and Texas to the Gulf of Mexico. The U.S. Department of State reviewed the pipeline for nearly 7 years. The Canadian portion of the line obtained NEB approval in 2010. The U.S. approval was finally obtained in late 2019.

American approval was held up by a huge environmental lobby notwithstanding the U.S. State Department January 2014 Financial Environmental Assessment that concluded that the pipeline is unlikely to significantly increase the rate of oil sands drilling or heavy crude demand. The report also found that the pipeline is only one part of the larger global greenhouse gas emissions picture and that tar sands oil will likely be extracted whether or not the pipeline is built.

In May 2012, TransCanada filed a new application for a Presidential Permit with the U.S. Department of State. That review has been held up by ongoing litigation in the Nebraska courts. In 2012, Nebraska's governor signed into law a statute that enabled major oil pipeline carriers to obtain approval from the state's governor for pipeline route across the state rather than from state Public Service Commission. The governor then approved the route proposed by TransCanada allowing TransCanada to exercise eminent domain to acquire the necessary land. Nebraska

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

[3] *Reference re Environmental Management Act,* 2020 SCC 1.

[4] *Reference re Environmental Management Act (British Columbia),* 2019 BCCA 181.

[5] *Coldwater Indian Band v Canada (Attorney General),* 2020 FCA 34.

landowners then challenged the decision before the Commission.

In November 2014, the House of Representatives passed legislation and approved Keystone XL for the ninth time. That bill was subsequently defeated in the Senate by one vote. Midterm elections in November saw the Republicans regain a majority in both the House and Senate for the first time in 8 years. A January vote passed both the House and Senate but failed to get the 66-vote majority required to prevent a presidential veto. President Obama then exercised his veto to defeat the legislation.

TransCanada opposed the Obama veto with a constitutional challenge and a NAFTA claim. Before those could be heard, President Trump was elected. One of President Trump's first decisions in office was to approve Keystone XL. Further regulatory challenges along the pipeline route at the state level were largely resolved in 2019. It is now expected that the pipeline will be completed.[6]

Coastal GasLink

The Coastal GasLink pipeline is owned and operated by TC Energy. The $6.6 billion project starts near Dawson Creek and runs approximately 420 miles southwest to a liquefaction plant near Kitimat, B.C. The pipeline passed through the traditional territories of several First Nations. It has long been opposed by several Wet'suwet'en hereditary chiefs although a number of First Nations groups support the project. In fact, twenty elected bands along the pipeline route have endorsed the project and have an ownership interest in the project.

In December 2018, the Supreme Court of B.C. granted an injunction preventing blockades of the pipeline.[7] More recently, blockades have occurred across Canada led in part by Mohawks of the Bay of Quinte of Belleville in Ontario. The blockades across Canada have resulted in a nationwide stoppage of rail traffic. As a result, the pipeline has halted all construction and the Canadian National Railway has laid off 450 workers in eastern Canada and cancelled over 400 trains.

There has been one element of good news for the Coastal GasLink pipeline. In July 2019, the NEB released its decision ruling that the pipeline, including the export terminal in Kitimat, was under provincial not federal jurisdiction.[8] The NEB concluded that the pipeline would transport natural gas within B.C. although it would facilitate international exports providing some clarity to the earlier Supreme Court of Canada decision in *West Coast Energy.*[9]

In December 2019, the Alberta Investment Management Corp., the Alberta public pension manager, teamed up with one of the largest American investment companies to acquire majority stake in the Coastal GasLink. The blockade was finally removed and work on the line continues.

Enbridge Line 3

The Enbridge line 3 runs from Hardisty, Alberta to Superior, Wisconsin. It has been operating since 1968. Over the years, it became apparent that part of the pipeline had to be replaced if Enbridge wished to restore it to its historical capacity and move 800,000 barrels per day. The necessary authorization was obtained from regulatory bodies in Canada, North Dakota and Wisconsin. However, the project ran into problems in Minnesota where environmentalists and native groups opposed the project. Nevertheless, in June 2018, the Commission approved the route and granted the necessary permits. However, that decision was overturned a year later by the Minnesota Court of Appeal that found that the environmental impact statement placed before the Commission was inadequate.[10] On February 3, 2020, the Minnesota regulators

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[6] US, *In re Application No OP-0003 - (TransCanada),* 303 Neb 872 (Neb Sup Ct 2019), online: <https://www.nebraska.gov/apps-courts-epub/public/supreme>.

[7] *Coastal GasLink Pipeline Ltd v Huson,* 2018 BCSC 2343.

[8] *Jurisdiction over the Coastal GasLink Pipeline Project,* MH-053-2018 (2019) (National Energy Board).

[9] *Westcoast Energy Inc v Canada (National Energy Board),* [1998] 1 SCR 322.

[10] US, *In re Application of Enbridge Energy, Limited Partnership, for a Certificate of Need and a Routing Permit for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border,* (Minn App Ct 2019), online: <https://mn.gov/law-library-stat/archive/ctappub/2019/OPa181283-060319.pdf>.

approved a revised environmental review resolving the last regulatory hurdle for the project.[11]

OFFSHORE EXPLORATION DEVELOPMENTS

Amidst the challenging outlook for energy development projects, a significant decision allowing a proposed deep-water drilling project offshore from Newfoundland and Labrador to proceed came as welcome news late in the year. On December 17, 2019, the Minister of Environment issued his decision, subject to more than 100 conditions, that the project is not likely to cause significant adverse environmental effects. The CNOOC International Flemish Pass Exploration Drilling Project proposes drilling on two exploration licences. The proponent could drill up to 10 offshore wells between 2020 and 2028. Further approvals are required from the Canada-Newfoundland and Labrador Offshore Petroleum Board. The licences are located more than 200 nautical miles offshore and, therefore, any commercial production would trigger Canada's obligation under the *United Nations Convention on the Law of the Sea* (UNCLOS III) to make payments to the international community, commencing in the sixth year of production and rising annually to 7 per cent in the 12th year.[12]

Earlier in the year, however, the future of Canada's northern offshore oil and gas industry was cast in doubt by the passage of Bill C-88, which, *inter alia,* amended the *Canada Petroleum Resources Act*[13] to authorize the Governor in Council to prohibit certain works or activities on federal Crown lands in the North and in the Arctic offshore when in the national interest. The amendment followed from the joint U.S.-Canada announcement in December 2016 that offshore oil and gas activity in Canadian Arctic waters would not be authorized indefinitely, to be reviewed every five years with a science-based assessment. Holders of existing licences were not permitted to undertake activities and the government returned $430 million in security deposits. Although activities cannot be undertaken, the licences remain in place. The Mayor of Tuktoyaktuk described these developments as "put[ting] the nail in the coffin" of any further exploration in the Beaufort Sea.[14] Meanwhile, Russia is pushing ahead with an ambitious plan to develop Arctic oil worth more than $300 billion.[15]

REGULATORY REFORM

The Alberta Capacity Market

On November 23, 2016,[16] the Government of Alberta announced that Alberta would implement a capacity market. The Alberta Electric System Operator (AESO) filed an application for the approval of rules to implement the capacity market on January 31, 2019. An oral hearing was held by the Alberta Utilities Commission (AUC) from April 22, 2019 to June 11, 2019.

The opponents argued that the capacity market and the rules the AESO proposed to operate that market were not in the public interest and that the application should be rejected in its entirety. There were three main grounds to the arguments:

- The proposal was based on provisional rules, which do not create the certainty necessary to encourage investment.

- There is no need for a capacity market and the uncertainty of a new and complicated regulatory process would have been sure to bring. The analysis that the AESO presented in support of the initial capacity market recommendation was flawed.

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[11] US, *In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border,* PL9/CN-14-916, PL9/PPL-15-137, February 3, 2020.

[12] See Rowland J Harrison, "Offshore Oil Development in Uncharted Legal Waters: Will the Proposed Bay du Nord Project Precipitate Another Federal-Provincial Conflict?" (2018) 6:4 Energy Regulation Quarterly.

[13] *Canada Petroleum Resources Act,* RSC 1985, c 36 (2nd Supp).

[14] Kate Kyle, "Feds return $430M to oil and gas companies ahead of Arctic offshore exploration ban" *CBC News* (18 December 2019), online: <https://www.cbc.ca/news/canada/north/beaufort-sea-moratorium-deposits-nwt-1.5399157>.

[15] Atle Staalesen, "Moscow outlines a €210 billion incentive plan for Arctic Oil" *ArcticToday* (5 February 2020), online: <https://www.arctictoday.com/moscow-outlines-a-e210-billion-incentive-plan-for-arctic-oil/>.

[16] Government of Alberta, News Release, "Consumers to benefit from stable, reliable electricity market" (23 November 2016), online: <https://www.alberta.ca/release.cfm?xID=44880BD97DCDC-D465-4922-25225F9F43B302C9>.

- Improvements to the energy market, in particular the implementation of shortage pricing that was recommended by three experts in the AUC's proceeding, should be implemented instead.

On July 24, 2019, the Government of Alberta announced that Alberta would not be proceeding with a capacity market, and that the industry would remain with an energy-only design before the AUC could reach a decision. On the government's instructions, the AESO withdrew the application before the AUC.

In late July 2019, the AESO received direction from the Alberta Ministry of Energy:

> …to provide advice regarding market power and market power mitigation by November 29, 2019. Additionally the AESO was directed to provide any analysis and recommendations on whether any changes to the energy only market are needed, including changes to the price floor/ceiling and shortage pricing, by July 31, 2020. The AESO recognizes that there is a strong linkage between market power mitigation, the price floor/ceiling and shortage pricing, and will consider this connection as it undertakes its work.[17]

On October 8, 2019, the AESO issued a request for input from the Market Surveillance Administrator, market participants, and other interested parties on market power mitigation due by October 29, 2019. The AESO provided a report to the Minister by November 29, 2019, which has not been made public.

On February 12, 2020, the AESO held a stakeholder consultation. Comments are due by February 26, 2020 on the 10 questions listed in Appendix A. The AESO's objectives[18] are to:

> evaluate the ability of the current pricing framework in the energy market to maintain resource adequacy and economic efficiency in both the short and long term, and explore options to address deficiencies or increase efficiency in the current energy-only market pricing framework. Administrative price mechanisms, such as the current price cap, offer cap and price floor, must be set at levels to allow for efficient market outcomes while also protecting consumers from cost risk.[19]

A New Federal Regulator

Early in 2018, the federal government introduced Bill C-69,[20] new legislation that would replace the National Energy Board with the Canadian Energy Regulator ("CER"). The CER is much more complex than the NEB because its scope is much greater and its jurisdiction goes beyond federally regulated pipelines and includes potential offshore renewable energy projects.

There are now four institutional components to the regulatory framework. First is the Board of Directors of the CER that is responsible for providing strategic direction and advice. Second, is the Commission of the CER, the members of which will conduct hearings. Third, and most critically, is the Chief Executive Officer who is responsible for the management of the CER's day-to-day business and affairs. The CEO reports to the Minister, not the Board of Directors. Fourth, is the federal cabinet, which will make decisions based on the recommendations of the Commission of the CER.

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[17] AESO, "Request for Information regarding Market Power Mitigation" (8 October 2019), online: <https://www.aeso.ca/assets/Uploads/Mitigation-Stakeholder-Letter-v6.pdf>.

[18] AESO, "Market Efficiency – Pricing Framework", online: <https://www.aeso.ca/stakeholder-engagement/aeso-initiatives/market-related-initiatives/market-efficiency-pricing-framework/>.

[19] AESO, "AESO Initiatives Engagement" (2020), online: <https://www.aeso.ca/event/2020-02-12-review-of-price-cap-price-floor-and-shortage-pricing>.

[20] 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, 2019.

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.

Two articles in the Energy Regulation Quarterly have been very critical of the governance structure created by Bill C-69. The first article is by the current chief executive officer of the AUC.[21] The second article, in this issue of ERQ, is by the former chair of the Alberta Energy Resources and Conservation Board and two former members of the NEB.[22]

The first decision by the Canadian Energy Regulator was handed down on September 7, 2019. The decision concerns the Enbridge mainline system, the largest crude oil pipeline in Canada with the capacity of almost 3 million barrels per day. It connects Edmonton, Alberta with major markets in eastern Canada and US Midwest. This line is currently operated as a common carrier rather than on a contract carriage basis. Under the common carrier model, capacity is allocated on the basis of monthly nominations rather than long term contracts. Common carriage has, in effect, been required on federal oil pipelines since the NEB was established in 1959, subject to the ability of the NEB, and now the Commission, to grant exceptions.

At issue is the decision by Enbridge to change its operations from a common carrier model to a contract carriage model whereby 90 per cent of the capacity will be under long term contracts with the remaining 10 per cent allocated on the traditional basis. The Alberta shippers are split in their affiliation with some supporting the new regime and others opposed.

The main concern argued by opponents of the changes proposed by Enbridge is that Enbridge will be abusing its market power. The allegation is that there will be under the new regime a lack of transportation options for many shippers. The CER observed in its initial decision that the Enbridge system controlled 70 per cent of capacity out of Alberta and that it was concerned about the perception of abuse of Enbridge's market power.

On December 19, 2019, Enbridge filed a comprehensive "Canadian Mainline Contracting Application" with the CER for approval of a new service and tolling framework, to take effect on the expiration of the current service and tolling framework on June 30, 2021. The proposed new framework would convert 90 per cent of capacity to contract carriage, with 10 per cent reserved for uncommitted volumes. The Commission of the CER has announced that it will conduct an oral hearing on the application commencing on a date to be announced.[23]

The Ontario Energy Board

The province of Ontario elected a Conservative government on June 2018 replacing the Liberal government that had governed the province for 15 years. One of the major election issues was the Conservative Party's criticism of the Liberal government with respect to managing energy policy in the province largely based on the claim that Ontario's electricity prices had increased by 71 per cent between 2008 and 2016 while, during this period, the average increase across Canada was less than half of that amount, or 34 per cent. The new government concentrated on abolishing the green energy projects developed by the liberals including a number of renewable energy projects. In March of 2019, the new government turned its attention to reforming energy regulation in general and the Ontario Energy Board (OEB) in particular.

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[21] Bob Heggie, "Governance of Administrative Agencies" (2019) 7:3 Energy Regulation Quarterly.

[22] Rowland J Harrison QC, Neil McCrank QC, Dr Ron Wallace, "The structure of the Canadian energy regulator: A questionable new model for governance of energy regulation tribunals?" (2020) 8:1 Energy Regulation Quarterly.

[23] Canada Energy Regulator, "Enbridge Pipelines Inc. (Enbridge) Canadian Mainline Contracting Application (Application) Notice of Public Hearing and Registration to Participate Instructions" (24 February 2020), online: <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90465/92835/155829/3773831/3890507/3908468/3910006/C04811-1_CER_-_Notice_of_Public_Hearing_and_Registration_to_Participate_Instructions_%E2%80%93_Enbridge_Canadian_Mainline_Contracting_Application_-_A7D5Y6.pdf?nodeid=3910007&vernum=-2>.

On March 21, 2019, the Ontario government introduced the *Ontario Energy Board Act.*[24] Some of the changes were to be implemented through proposed legislative amendments set out in Bill 87.[25] Other changes were implemented through regulatory and policy updates. Bill 87 was passed by the Ontario government on May 9.[26] Among other things, it amended the OEB's governance structure and operations. These changes were based on the Ontario Energy Board Modernization Report.[27]

Like the federal reforms, the OEB will now be governed by a Board of Directors with a chief commissioner reporting directly to the chair of the Board. The report recommends necessary changes to ensure that the Board operates more effectively, in particular that it prioritizes its regulatory agenda and be evaluated against key performance indicators that relate to matters such as decision time cycle, stakeholder satisfaction and organizational excellence.

The concern is that the Board of Directors will be charged with "ensuring the independence…of the adjudication process." However, the President and the Board of Directors can be expected to have a close relationship with the government, and it is the government that is the source of challenges to independence.

The report does not address perhaps the largest problem in the sector, which is the lack of regulatory oversight of procurement of capacity. This problem and its financial consequences have been noted by the Auditor General. The Report does not address how the OEB's mandate should be changed to provide oversight. Ontario is one of the very few jurisdictions without oversight over procurement and the cost consequences have been devastating.

To date, the new government has appointed a board chair but is still searching for a chief commissioner. As in the case of the CER, there has been considerable criticism of the new structure, but only time will tell if it works. The main criticism of course is that the energy regulator is no longer independent of the government. Of course, others will argue it never was independent in any event.

DISTRIBUTED ENERGY RESOURCES

In 2019, regulatory commissions across Canada were struggling to define the regulatory treatment for Distributed Energy Resources or DERS. In Alberta, the subject is being reviewed by both the AUC and the AESO in parallel.[28]

Virtually all studies focus on at least three major issues: customer owned generation, energy storage and Electric Vehicle (EV) charging. Each are considered below.

On March 29, 2019, the AUC established a Distribution System Inquiry asking market participants to make submissions relating to:

> emerging trends in technology and innovation potentially affecting distribution systems, including distribution system design, operation, capital requirements and the cost of providing service. This module will also consider how innovation and technological change create the opportunity for new market entry within a monopoly franchise, including self-supply.[29]

This proceeding is ongoing. Future phases will consider the following questions:

- Is there under-investment in certain key technologies in the Alberta electricity distribution sector?
- Would additional investment make the Alberta electricity distribution sector more cost effective?

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[24] *Ontario Energy Board Act,* SO 1998, c 15, Schedule B.

[25] Bill 87, *Fixing the Hydro Mess Act,* 1st Sess, 42nd Leg, Ontario, 2019.

[26] *Ibid.*

[27] *Ontario Energy Board modernization Review Panel final report,* (October 2018), online: <https://files.ontario.ca/endm-oeb-report-en-2018-10-31.pdf>.

[28] In Alberta, see details on AESO's website including roadmap, online: <https://www.aeso.ca/market/current-market-initiatives/energy-storage>; Alberta Utilities Commission Distribution System Inquiry, online: <http://www.auc.ab.ca/Pages/distribution-system-inquiry.aspx>.

[29] Alberta Utilities Commission, "Distribution System Inquiry", Proceeding 24116, Exhibit 24116-X0106, para 12.

- Is the electricity local distribution company an important instrument of change?

- Are there regulatory barriers to innovation and new technologies? and

- How should the regulatory framework be transformed in order to increase investment and efficiency in the Alberta electricity distribution sector?

DERs are also under consideration by the OEB: [30]

- On March 15, 2019, the OEB announced that it was starting a consultation process to look at how the electricity sector in Ontario should respond to DERs and encourage utilities and regulated service providers to "embrace innovation" in their operations and customer service. The stated aims of the consultation were to drive lower costs, improve service and offer more consumer choice "by encouraging utilities and other service providers to embrace innovation," and to "secure the benefits of sector transformation and mitigate any adverse consequences."[31]

- On July 17, the OEB issued a letter explaining its "refreshed" approach to stakeholder engagement for its previously-announced consultation processes on Utility Remuneration and Responding to DERs. Among other things, the OEB's updated approach was intended to "enhance the opportunity for stakeholder perspectives to inform subsequent steps in relation to these initiatives following the OEB's transition to its new structure."[32]

- On August 13, the OEB issued a letter launching a review of the requirements for licensed electricity distributors to connect distributed energy resources (DER Connections Review). The DER Connections Review is a companion initiative to the OEB's ongoing Responding to DERS consultation.[33]

The OEB has heard from stakeholders about what should be addressed in the Responding to DERs consultation. OEB staff will provide a report describing stakeholder perspectives and setting out a proposal outlining objectives, issues and guiding principles for the Responding to DERs consultation to proceed. However, before that report is issued, OEB staff has convened an additional session (in February 2020) where they will outline and seek input on OEB staff's current thinking of the scope of the consultation.

Customer-Owned Generation

The last 10 years have seen a dramatic increase in local generation compared to central generation. New technology is made it possible to locate generation closer to the customers it serves reducing transmission costs including line losses. The technology at issue is mostly gas generation, known as CHP and solar generation. The attraction of both technologies is driven by a rapid reduction in cost over this timeframe. For example in 2019, the AUC grated approval for a 500 MW solar project, the largest of its kind in Canada. That facility once completed in 2021 will generate 400 MW, enough to supply power to over 100,000 homes.

The important regulatory issues faced in customer-owned generation are:

- Should community generation be limited to behind-the-fence operations?

- Should community generators have access to regulated electric Local Distribution Company (LDC) lines to distribute electricity within the LDC service area?

- Should regulated electric LDCs be allowed to offer local generation as a rate-based service? If so, what measures are necessary to protect competing suppliers?

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[30] Ontario Energy Board, "Re: Utility Remuneration and Responding to Distributed Energy Resources Consultation Initiation and Notice of Cost Awards Process Board File Numbers: EB-2018-0287 and EB-2018-0288" (15 March 2019).

[31] *Ibid*.

[32] Ontario Energy Board, "Utility Remuneration and Responding to Distributed Energy Resources Board File Numbers: EB-2018-0287 and EB-2018-0288" (17 July 2019).

[33] Ontario Energy Board, "Re: Board File Number: EB-2019-0207 Distributed Energy Resources Connections Review Initiative" (13 August 2019).

- Should community generators be allowed to sell excess power to the grid? If so, on what terms?

Under Alberta's Micro-generation Regulation, eligible alternative and renewable generators are allowed to receive credit for any power they send to the grid. In Alberta, micro-generation facilities are defined to be less than 5 MW in size.

The latest data from the AESO (May 2019) show that there is approximately 48.7 MW of micro-generation capacity installed in Alberta, about 89 per cent of which is solar. This is up from less than 6 MW five years earlier, an increase of approximately 8 times.

In Ontario, there has been substantial investment in distributed energy resources over the past 15 years. Much of this investment has been made by investors under contracts with a government entity, first the Ontario Power Authority and now the Independent Electricity System Operator. There are 33,671 contracts that have a total capacity of 3,588.8 MW that accounts for 13.4 per cent of total capacity as of March 31, 2019.[34] The prices in these contracts were set in a variety of ways, including competitive bidding, standard offers (for example, under Feed-in-Tariff programs), and negotiations. These data do not include more than 30,000 "microFIT" contracts (maximum of 10 kW capacity) that have a total capacity of about 260 MW, virtually all of which is solar.

In both Alberta and Ontario, the generic proceedings have to some degree been overtaken by more specific proceedings arising in rate cases and related matters. The leading example is Alberta where In September 2019, the AUC launched a consultation on generation self-supply and power export.[35] The consultation was prompted by three recent decisions[36] in which the AUC for the first time restricted the circumstances in which the owner of a generating unit is allowed to both consume electricity produced by that unit on its own property and export that electricity to the power pool. The existing exemptions that permit the self-supply and export of electricity to the power pool are related to (i) owners of industrial systems and (ii) micro-generators.[37] Currently, these type of generators account for approximately 5,000 MW[38] of generation capacity out of 15,570 MW of capacity in Alberta.[39] This is a significantly greater proportion than exists elsewhere in Canada.[40]

The Bulletin asked respondents to address three options:

- Option 1: Status Quo;
- Option 2: Limited self-supply and export; and
- Option 3: Unlimited self-supply and export.

The consultation attracted considerable interest; 33 stakeholders submitted comments in response. Most of them favoured Option 3.

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[34] Independent Electricity System Operator,"A Progress Report on Contracted Electricity Supply: First Quarter 2019" (2019) at 18.

[35] Alberta Utilities Commission, "AUC Bulletin 2019-16", online: <http://www.auc.ab.ca/News/2019/Bulletin%20 2019-16.pdf>.

[36] *EPCOR Water Services Inc re EL Smith Solar Power Plant,* Decision 23418-D01-2019 (20 February 2019); *Advantage Oil and Gas Ltd re Glacier Power Plant Alteration,* Decision 23756-D01-2019 (26 April 2019); *International Paper Canada Pulp Holdings ULC re Request for Permanent Connection for 48-Megawatt Plant,* Decision 24393-D01-2019 (6 June 2019).

[37] *EPCOR Water Services Inc re EL Smith Solar Power Plant, Supra* note 36 at para 101.

[38] AltaLink Management Ltd, "Re: Bulletin 2019-16 Consultation on the Issue of Power Plant Self-Supply and Export" (11 October 2019), at para 13, online: <http://www.auc.ab.ca/regulatory_documents/Consultations/2 019-10-11-SelfSupplyandExport-AltaLinkManagementLtd.pdf>.

[39] Market Surveillance Administrator, "2019 Market Share Offer Control" (24 September 2019), online: <https:// static1.squarespace.com/static/5d88e3016c6a183b1bcc861f/t/5d8cf795c3fa58146f1f13ad/1569519510719/2019 +Market+Share+Offer+Control+Report.pdf>.

[40] In Ontario, by way of example, this generation accounts for 10 per cent of total supply compared to 30 per cent in Alberta. Specifically, in Ontario at the end of 2019 there was approximately 3,400 MW of local, distribution-connected generation capacity and another 37,500 MW of transmission-connected generation capacity. See IESO, "Ontario's Supply Mix", online: <http://www.ieso.ca/en/Learn/Ontario-Supply-Mix/Ontario-Energy-Capacity>.

In January 2020, the AUC issued a second Bulletin[41] that requested parties to comment on submissions provided by two of the respondents, Capital Power and AltaLink.

The parties were asked in the Commission's January 9, 2020 Bulletin to respond to the concerns raised by Capital Power as follows:[42]

> Allowing an exemption for some energy reduces the amount of supply competing to be dispatched. Further, an expanded amount of self-supply and export reduces market visibility of both available supply and load to be served inhibiting price discovery. Exempting supply or some energy from pool participation reduces the effectiveness of and benefits from having a competitive market.

The MSA, one of the interveners, argued that in effect, there are two related markets: the self-supply market and the non-self-supply market. The latter is the Power Pool. Both have existed for some time.

If the Commission adopts option 3, "unlimited self-supply and export," it is likely that the self-supply market will expand. That will not necessarily reduce the size of the non-self-supply market or the degree of competition between those suppliers. It will, however, expand the options available to consumers in Alberta and that will increase competition in that segment of the market. Further, customer-owned generation that does not have a legislated exemption from participating in the power pool (e.g., industrial systems and micro-generation)[43] could easily be required to explicitly participate in the power pool by making offers and receiving dispatch. The MSA remains of the view that option 3 will increase competition not decrease it.

The MSA does not believe it is necessary that the generator be behind-the-fence. Nor should community generation be disadvantaged. The fact that the generator is owned by several customers as opposed to one customer should not matter if the cost allocation for rates is done correctly. There are cost allocation issues with respect to a single customer behind-the-fence generator. Those same issues exist where a community generator serves a number of customers.

Another question that should be addressed is whether the local generation facility must be owned by a consumer or whether it can be owned by a third-party. The MSA believes that the local generation market should be open to third parties. This will increase competition, which will support fair, efficient, and open competition.[44]

Local generation can bring a number of economies and benefits to the Alberta electricity system. They are, by definition, closer to the customer and transmission, and distribution costs are reduced.

Local generation is the product of new, more efficient technology that did not exist when much of the current regulatory framework was put in place. This new technology offers significant cost reductions. The Commission should remove, not create, artificial barriers to entry.

Local generation, including community generation, constitutes a form of market entry. New market entry has been central to the competitiveness of Alberta's electricity market. Entry not only constrains the exercise of market power in generation, but can also promote productivity improvements in the distribution industry.

New entry is particularly important in Alberta at the present time. The Power Purchase Arrangements will come to an end in one year, and it is generally agreed that their expiration will lead to increased concentration and market power in Alberta. New entry through customer-owned generation will reduce market concentration.

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[41] Alberta Utilities Commission, "Bulletin 2020-01" (9 January 2020), online: <http://www.auc.ab.ca/News/2020/Bulletin%202020-01.pdf>.

[42] Capital Power, "Re: Alberta Utilities Commission Consultation on the issue of power plant self-supply and export: Comments of Capital Power Corporation" (11 October 2019), online: <http://www.auc.ab.ca/regulatory_documents/Consultations/2019-10-11-SelfSupplyandExport-CapitalPower.pdf>.

[43] The Commission's Decision in *EPCOR Water Services Inc re EL Smith Solar Power Plant, supra* note 34 discusses all generator exemptions from power pool participation in extensive detail.

[44] *Electric Utilities Act,* SA 2003, c E-5.1, s 6(1); also see the *Fair, Efficient and Open Competition Regulation,* AR 159/2009.

The discussions concerning customer-owned generation can also lead to a similar analysis on customer-owned storage. In part, this is driven by the FERC decision in 2018 in Order 841, which ruled that storage is a generation asset. In the end, the real issue with respect to customer-owned generation is not whether it should be allowed but whether it should be restricted to behind-the-meter applications, generation owned by customers as opposed to third parties and what rates these generators should pay to transmitters and distributors who provide grid access when they wish to sell excess power to the grid.

All of those issues are currently in front of the Alberta Utilities Commission, which will provide a recommendation to the government by the end of March 2020.

Energy Storage

Regulatory agencies across Canada have all been trying to promote storage over the last few years. There is good reason for this: first energy infrastructure is built to handle peak loads. If the peaks can be reduced the related capital investments can be reduced with cost savings.

Secondly, the generation of electricity worldwide is moving from carbon based energy to green energy. One significant different between the two is green energy like wind and solar is highly variable. Not surprisingly, planners have discovered the advantage of marrying solar plus storage in particular as outlined in a recent Brattle study in December 2019.[45]

The other rationale that is stimulating demand is the growth of Behind-the-Meter (BTM) storage as customers attempt to curtail their costs. BTM energy storage today represents only 70 MW or 15 per cent of the U.S. energy storage market. By 2022, it will represent 1300 MW or 30 per cent of the market.[46] There are significant similarities between local generation and local storage. Both may be customer owned and can offer excess capacity to other customers. This service will increase efficiency in the Alberta energy sector and bring significant cost savings.

The next important factor driving this demand is recognition by utilities that storage can be an important grid asset to reduce costs. This was fueled at least in the US by the FERC order 841, which was confirmed in 2019 after it was appealed. The FERC in the U.S. in Order 841[47] confirmed in Order 841-A[48] ruled that storage is a generation asset.

BTM storage is an issue in the recent consultation initiated by the AUC.[49] It was also addressed in the recent Toronto hydro rate case,[50] where Toronto Hydro attempted to include storage in its rate base. That request was turned down by the Ontario Energy Board which concluded that the matter be deferred to the boards DERS consultation underway.[51]

Finally, it is important to recognize the significant decreased in cost that has taken place in the storage markets over the last few years. Between 2010 and 2018, the average price of a lithium ion battery pack dropped from $1,160 per kilowatt-hour to $176 per kilowatt-hour — an 85 per cent reduction in just eight years. Within the next few years, Bloomberg New Energy Finance predicts a further drop to $94 per kilowatt-hour in 2024 and $62 per kilowatt-hour in 2030.

It has been suggested by Bloomberg New Energy Finance that the global energy storage market will grow to 2,857 GWh by 2040 and attract over $620 billion in investment over

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[45] The Brattle Group, "Solar-Plus-Storage: The Future Market for Hybrid Resources" (December 2019), online: <https://brattlefiles.blob.core.windows.net/files/17741_solar_plus_storage_economics_-_final.pdf>.

[46] GTM Research and Energy Storage Association, "U.S. Energy Storage Monitor: Q4 2017 Full Report" (December 2017).

[47] *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators,* 162 FERC ¶ 61,127.

[48] *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators,* 18 CFR § 35.

[49] *Supra* note 41.

[50] *Toronto Hydro-Electric System Limited Application for Electricity Distribution Rates beginning January 1, 2020 until December 31, 2024,* EB-2018-0165, Decision and Order (19 December 2019).

[51] *Ibid.*

the next 20 years. In Ontario, the IESO has used a number of competitive processes to develop over 25 storage projects resulting in over 50 MW of capacity. In December 2018, the IESO published a report titled *Removing Obstacles for Storage Resources in Ontario.*[52] This was followed by an OEB initiative in March 2019 to similar effect and a study by Energy Storage Canada in May 2019 entitled *Maximizing Value and Efficiency through Energy Storage.*[53] This was in some respects similar to the Alberta Electric System Operator (AESO) study a year earlier called *Dispatchable Renewables and Energy storage.*[54]

Electric Vehicle Charging

The total number of Electric Vehicles (EVs) on the road globally reached 3.1 million in 2017, up 50 per cent from the previous year. China and the US had the highest sales volume in 2017. Norway is the world leader in terms of sales share with EVs accounting for more than 39 per cent of new sales in 2017. Nine countries, including France, the U.K., and Norway, have plans to phase out all gasoline-powered vehicles between 2025 and 2050.

Although just 2.2 per cent of the world's vehicles are electric, a record 2.2 million EV were sold last year. Bloomberg New Energy Finance (BNEF) predicts that EVs will reach 19 per cent of light vehicle sales in China by 2025 compared to 14 per cent in Europe and 11 per cent in the U.S. Currently, those numbers are 4 per cent in China, 2 per cent in Europe, and 2 per cent in the U.S. BNEF predicts that EVs will reach 55 per cent of global vehicle sales by 2040. It is estimated that by 2020, the price of EVs in Europe will be less than the price of internal combustion engine vehicles. That goal will be reached in China by 2023 and in the U.S. by 2025.

In United States, Edison Electric Institute (EEI) estimates that by 2030 the number of EVs in the U.S. will reach 18.7 million compared to 1 million at the end of 2018. It took 8 years to sell 1 million EVs in the U.S. and EEI predicts that the next 1 million will be sold in 3 years. It is predicted that the annual sales of EVs in the U.S. will exceed 3.5 million in 2030, accounting for more than 20 per cent of annual vehicle sales. It should also be noted that it is estimated that 9.6 million charging ports will be required to support the 18.7 million EVs in the U.S. in 2030.

Canada has experienced significant expansion in EVs with Ontario, Quebec, and British Columbia accounting for 97 per cent of all plug-in vehicles sold in Canada between 2013 and 2018. Between 2017 and 2018 sales increased by 80 per cent with the result that the national EV market share is now 2.5 per cent compared to less than 1 per cent in 2017. Sales in Ontario by the end of 2018 were more than 6,000, a 209 per cent increase over the same period in 2017. Ontario accounts for 44 per cent of all new EV sales in Canada.

The recent phase 2 report by the British Columbia Utilities Commission in its *Electric Vehicle Service Inquiry* (June 2019) sets out an excellent review of the current Canadian situation, stating:[55]

> Due to initiatives by the federal, provincial, and municipal governments, as well as utilities and private firms, public charging infrastructure is continuing to grow in Canada. By the end of December 2017, there were approximately 5,843 EV charging stations in Canada, of which 5,168 were Level 2, 483 DCFC, and 190 Tesla Superchargers. This represented a 38 per cent increase in public charging infrastructure

[52] IESO, "Removing Obstacles for Storage Resources in Ontario" (19 December 2019), online: <http://www.ieso.ca/en/Sector-Participants/IESO-News/2018/12/IESO-report-outlines-next-steps-to-leveling-playing-field-for-energy-storage>.

[53] Energy Storage Canada, "Maximizing Value and Efficiency for Ratepayers through Energy Storage: A Roadmap for Ontario" (May 2019), online: <https://energystoragecanada.org/highlights/2019/5/29/maximizing-value-and-efficiency-for-ratepayers-through-energy-storage-a-roadmap-for-ontario>.

[54] AESO, "Dispatchable Renewables and Energy Storage" (31 May 2018), online: <https://www.aeso.ca/assets/Uploads/AESO-Dispatchable-Renewables-Storage-Report-May2018.pdf>.

[55] See British Columbia Utilities Commission, "An Inquiry into the Regulation of Electric Vehicle Charging Station: Phase Two Report" (24 June 2019), online: <https://www.bcuc.com/Documents/Proceedings/2019/DOC_54345_BCUC%20EV%20Inquiry%20Phase%20Two%20Report-web.pdf>.

installations across Canada in 2017 compared to 2016.[56]

Recent private sector developments include the formation of Electrify Canada, a partnership formed by Electrify America in cooperation with Volkswagen Group Canada to build DCFC infrastructure, in July 2018. It plans to build 32 fast charging stations in southern B.C., Ontario, and Quebec, with operations expected to start mid-2019.[57] In February 2019, PetroCanada announced it is building a network of 50 DC fast chargers across Canada from Halifax, Nova Scotia, to Vancouver, with the first station opened in Ontario.[58]

Federal initiatives have been led by Natural Resources Canada (NRCan), in collaboration with a variety of other partners, which has supported the construction of more than 500 EV fast chargers to date.[59] In 2017, NRCan collaborated with three private companies in 2017 to install 34 fast-charging stations along the Trans-Canada Highway in Ontario and Manitoba.[60] NRCan's ongoing Electric Vehicle and Alternative Fuel Infrastructure Deployment Initiative (NRCan EV Initiative) offers repayable contributions to support the construction of a coast to coast EV fast charging network. The NRCan EV Initiative will pay up to 50 per cent of the total project costs to a maximum of fifty thousand dollars ($50,000) per charging unit.[61] BC Hydro received funding for 21 stations under its Phase 1 implementation, out of a national total of 102.

At the provincial level, the Governments of Ontario, Quebec and B.C. have actively supported the development of EV charging infrastructure.[62] Hydro-Quebec's Electric Circuit, launched in 2012, was Canada's first public charging network for EVs, offering both 240-volt and 400-volt charging stations. By early 2019, the Circuit included 1,700 stations, including 176 fast charging stations.[63] The stations are installed in the parking lots of the Circuit's numerous

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[56] See International Energy Agency Hybrid & Electric Vehicle, "2018 HEV TCP Annual Report" (2018), online: <http://www.ieahev.org/assets/1/7/Report2018_Canada.pdf>.

[57] See Electrify Canada, "About Electrify Canada", online:<https://www.electrify-canada.ca/about-us>; Electrify Canada, News Release, "Volkswagen Group Canada Forms Electrify Canada to Install Ultra-Fast Electric Vehicle Chargers" (19 July 2018), online: <https://elam-cms-assets.s3.amazonaws.com/inline-files/Volkswagen%20Group%20Canada%20Forms%20Electrify%20Canada%20to%20Install%20Ultra-Fast%20Electric%20Vehicle%20Chargers.pdf>.

[58] See Petro-Canada, "Introducing our EV fast charge", online: <https://www.petro-canada.ca/en/personal/fuel/alternative-fuels/ev-fast-charge-network>.

[59] See Transport Canada, "Zero-emission vehicles", online: <http://www.tc.gc.ca/en/services/road/innovative-technologies/zero-emission-vehicles.html>.

[60] See Natural Resources Canada, "EV Charging Stations across Trans-Canada Highway (TCH) – Ontario and Manitoba", online: <https://www.nrcan.gc.ca/energy/funding/icg/19851>; The project was funded by an $8-million "repayable contribution" from NRCan under the Canadian Energy Innovation Program, as well as private investment from eCAMION, a Toronto-based energy storage system developer, Leclanché, an energy storage provider, and Geneva-based power producer SGEM. "Fast-charging stations for electric vehicles coming to Trans-Canada Highway", (24 July 2017), online: <http://www.ecamion.com/fast-charging-stations-for-electric-vehicles-coming-to-trans-canada-highway/>.

[61] Natural Resources Canada, "Electric Vehicle and Alternative Fuel Infrastructure deployment Initiative" (2019), online: < https://www.nrcan.gc.ca/energy/alternative-fuels/fuel-facts/ecoenergy/18352>.

[62] While Ontario had pledged to take provide ZEV incentives and support infrastructure rollout by ensuring recharging capacity was integrated into designated parking facilities owned by the Ontario government and GO Transit parking facilities, they have since ended their vehicle and charging incentive programs; Government of Ontario, "About Low Carbon Vehicles", online: <http://www.mto.gov.on.ca/english/vehicles/electric/electric-vehicle-incentive-program.shtml>.

[63] Hydro-Quebec, Press Release, "Electric Circuit and Groupe Filgo-Sonic Inaugurate EV Charging Superstation in Saint-Apollinaire" (11 March 2019), online: <https://news.hydroquebec.com/en/press-releases/hq/1469/electric-circuit-and-groupe-filgo-sonic-inaugurate-ev-charging-superstation-in-saint-apollinaire/>.

> partners across Québec and in the North-East of Ontario, and operated by Hydro-Quebec. In 2019, Hydro Quebec announced it had received funding for 100 new stations from the Federal government to be installed before the end of 2019 and have long-term plans to build 1600 fast charging stations over the next 10 years.[64]
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> In Alberta, the NRCan EV Initiative supported an initial three EV fast charging stations at Canadian Tire locations in 2017,[65] while in February 2019 the Alberta Government announced plans to provide $1.2 million to co-fund the Peak to Prairies EV network, in collaboration with local partners, and the Federation of Canadian Municipalities. The network will consist of 20 fast charging stations that will be installed across southern Alberta by the end of 2019. Long-term ownership and operation of the charging infrastructure will be carried out by ATCO.[66]

A variety of regulatory models are used in other jurisdictions. Ontario, California, Washington, Oregon, New York, and a number of other U.S. states exempt EV charging from energy regulation. Re-sale of electricity is permitted without prior approval, and prices are set by the market. British Columbia and some other U.S. states require EV charging service providers to become public utilities, subject to all other aspects of energy regulation, including pricing.

Some jurisdictions allow public utilities to provide EV charging services and recover costs through rates. Other jurisdictions do not allow public utilities to deliver EV charging services or only allow them to deliver EV charging services as a non-rate-based venture.

The status of EV charging in a variety of North American jurisdictions is surveyed below.

British Columbia

On November 26, 2018, the British Columbia Utilities Commission (BCUC) issued its Phase I Report from its *Inquiry into the Regulation of Electric Vehicle Charging Service*.[67] In this Report, the BCUC found that the public EV charging market does not exhibit monopoly characteristics and economic regulation is not required to protect consumers. The BCUC recommends that the B.C. Government issue an exemption with respect to the BCUC's regulation of EV charging services, but retain oversight of safety.

The BCUC's Inquiry evolved out of an application by FortisBC Inc. for approval of an EV charging rate for service at FortisBC-owned charging stations. The BCUC approved the requested rate on an interim basis in January 2018, but also adjourned the FortisBC application in favour of conducting the general inquiry into whether and how EV charging in British Columbia should be regulated.

The Phase 2 inquiry focused on non-exempt public utilities (BC Hydro and FortisBC) and found that there is no obligation on non-exempt utilities to build charging stations.

California

In 2018, California authorized the state's three investor-owned utilities to recover $738 million for EV charging infrastructure. San Diego Gas & Electric adopted a $137 million rebate program for 60,000 Level 2 home-based charging stations (240V chargers similar to an electric dryer or oven) and an EV-only variable hourly energy rate. Pacific Gas and Electric adopted a $22 million program supporting 234 fast-charging stations at 52 sites and make-ready infrastructure at a minimum of

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[64] Jacob Serebrin, "Federal government to fund 100 new electric car charging stations in Quebec" *Montreal Gazette* (23 January 2019), online: <https://montrealgazette.com/business/local-business/federal-government-to-fund-100-new-electric-car-charging-stations-in-quebec>.

[65] JWN, "Alberta is getting its first electric vehicle charging corridor" *JWN* (28 November 2017), online: <https://www.jwnenergy.com/article/2017/11/alberta-getting-its-first-electric-vehicle-charging-corridor/>.

[66] ATCO, "Peaks to Praises Electric Vehicle Charging Station" (1 February 2019), online: <https://www.atco.com/en-ca/projects/peaks-to-prairies-electric-vehicle-charging-station.html>.

[67] British Columbia Utilities Commission, "An Inquiry into the Regulation of Electric Vehicle Charging Service: Report Phase 1" (26 November 2018), online: < https://www.bcuc.com/Documents/Proceedings/2018/DOC_52916_2018-11-26-PhaseOne-Report.pdf>.

700 sites to support the electrification of at least 6,500 medium- or heavy-duty vehicles. Southern California Edison adopted a $343 million program to install the make-ready infrastructure at a minimum of 870 sites to support the electrification of at least 8,490 medium- or heavy-duty vehicles and three new time-of-use rates for commercial customers with EVs.

Nova Scotia

In Nova Scotia, the Utility and Review Board denied a request from Nova Scotia Power Incorporated to recover from ratepayers the cost of purchasing and installing 12 EV fast charging stations at locations across Nova Scotia, as the board found that EV charging stations are similar to other equipment on customers' premises and need not be ratepayer assets.[68]

Ontario

Ontario regulators have not been kind to EV charging. In 2012, the Ontario Energy Board denied a request for $600,000 to fund an electric vehicle pilot project.[69] The impetus for the application was the Ontario Government's 2009 pronouncement that 1 in 20 vehicles would be electric by 2020.[70] Toronto Hydro proposed that it would use the money to install and monitor between 30 and 40 EV charging stations in the city. The OEB allowed $200,000 in cost associated with this activity provided the money was not used to fund a provision of the service to the public. The Ontario Energy Board cautioned that policy development regarding ownership and operation of EV charging had yet to take place and it was premature to conclude the charging infrastructure should be included in Toronto Hydro's rate base.

That argument was repeated in 2019 in the Toronto Hydro application for 2020-2024 electric distribution rates and charges. Again, the OEB concluded that the decision[71] was premature and the matter should be deferred to the ongoing inquiry by the board with respect to distribution energy resources. It should be added that one of the things the new conservative government did when they came to power was to cancel electric vehicle incentive program and the rebates for EV purchases that the previous liberal government had implemented.

CYBER SECURITY CHALLENGES

Most Canadian energy regulators have some responsibility to monitor and penalize breaches of reliability standards. In Ontario, by way of example, those responsibilities fall to the Independent Electricity System Operator[72] although the Ontario Energy Board has some oversight.[73] In Alberta, it is the AESO's responsibility to propose the reliability standards for approval by the Alberta Utilities Commission based on standards set by the North American Electric Reliability Corporation (NERC). The AESO conducts audits on the market participants and refers suspected contraventions to the MSA, which can issue specified penalties defined by the AUC. The complexity of this regulatory regime increased more recently with the introduction of the Critical Infrastructure Protection standards or CIP[74] introduced by the NERC in 2010. They were adopted in Ontario in 2016 and in Alberta in 2017.

The CIP standards have introduced a new complexity and for the most part concern cyber security risks. The most recent example

[68] *In the Matter of an Application by Nova Scotia Power Incorporated for approval of its capital work order Cl# 50295, Electric Vehicle Charging Station Network Pilot Project, in the amount of $419,908,* 2018 NSUARB 1, at 13.

[69] *Decision and Order on Suite Metering Issues,* EB-2010-0142.

[70] Ontario, Ministry of Transportation, "A Plan for Ontario: 1 in 20 by 2020: The next steps towards greener vehicles in Ontario" (July 2009).

[71] *Supra* note 48.

[72] IESO, "Ontario Reliability Compliance Program", online: <http://www.ieso.ca/en/Sector-Participants/System-Reliability/Ontario-Reliability-Compliance-Program>.

[73] *Ontario Energy Board Act,* 1998, SO 1998, c 15, Sched B, s 59.

[74] North American Electric Reliability Corporation, "Critical Infrastructure Protection Standards", online: <https://www.nerc.com/pa/Stand/Pages/CIPStandards.aspx>.

is a closing of an unnamed American pipeline based on a cyber-attack.[75]

In 2017, for the first time, Canadian regulator established a regulatory hearing to deal with certain issues relating to these new cyber security standards. The proceeding was prompted by a submission by the MSA to the Commission in October 29, 2019 in connection to the Commission's 2019-2022 Strategic Plan. The particular issues raised concern with the use of guidelines that have been established by NERC but are not in use in Alberta, and the degree of publicity that should be attached to the penalties or fines awarded by the MSA with respect to breaches of the cyber security standards by market participants and the AESO. In Alberta, the MSA has the unique responsibility for auditing the AESO. The AUC Rules relating to these standards require the MSA to publicly post the specified penalties it issues. The MSA has refrained from doing so because of security risks. This same issue concerns American regulatory authorities. A joint staff white paper regarding penalty disclosures was released in 2019 by FERC and NERC.[76]

Critical Infrastructure Protection (CIP)

The Critical Infrastructure Protection (CIP) Standards were first introduced by the North American Electric Reliability Corporation (NERC) in 2010 and became effective in Alberta in 2017. Today, there are 11 CIP standards, which set out cyber security requirements to protect the bulk power system.

Canadian regulators have faced regulatory challenges under these new CIP standards. Compared to the traditional reliability standards that the market participants have been dealing with since 2010, the CIP standards are much more complicated and the security risks they address are more significant. As a result, there is a significant backlog in Alberta and other Canadian jurisdictions.

Cyber security is a rapidly evolving field in any industry, not just electricity. As a result, the NERC CIP standards are evolving at a pace that far exceeds the development pace of the other NERC Standards. Since 2010, NERC has moved from version 0 to version 6 which is currently in effect. Version 7 and 8 of some of the CIP standards will be effective in 2020.

Alberta adopted version 5 as its first version of the CIP Standards with an effective date of 2017. The AESO has chosen to adopt the CIP standards as close to "as is" as possible. However, there are certain elements that have been removed from the NERC CIP Standards in Alberta, for example the Table of Compliance Elements and the Guidelines and Technical Basis.

Across North America, the adoption of the first version of the CIP standards or significant changes to the content with new versions of the CIP standards has typically resulted in a significant increase in reported potential violations, either self-reported or determined through monitoring. This is generally attributed to the relatively new concepts that are being introduced to the electric industry through the standards and the complexity of the CIP standards.

The Alberta Consultation

In Alberta, the MSA proposed significant rule changes involving Sanction Guidelines developed by NERC that can reduce the cost and delays related to CIP standards being incurred by both the MSA and market participants. On October 29, 2019, the MSA asked the AUC to hold a consultation to resolve a number of outstanding issues. That submission was made in a proceeding the AUC established to review its 2019-2022 Strategic Plan.

The consultation asked market participants to respond to the following questions:[77]

- Should AUC Rule 027 be amended to allow the MSA to rely on NERC Sanction Guidelines in determining

[75] US Department of Homeland Security, CISA, "Ransomware Impacting Pipeline Operations" (18 February 2020), online: <https://www.us-cert.gov/ncas/alerts/aa20-049a>.

[76] Federal Energy Regulatory Commission, "Joint Staff White Paper on Notices of Penalty Pertaining to Violations of Critical Infrastructure Protection Reliability Standards" (27 August 2019), online: <https://www.ferc.gov/media/news-releases/2019/2019-3/AD19-18-000-Joint-White-Paper-NoFR.pdf>.

[77] Alberta Utilities Commission, "Rule 027: Specified Penalties for Contravention of Reliability Standards", online: <https://engage.auc.ab.ca/AUC_Rule_27>.

specified penalties for breaches of the CIP reliability standards?

- Should AUC Rule 027 be amended to allow the MSA to rely on NERC's Table of Compliance Elements to determine the severity of breaches of CIP reliability standards?

- Should the MSA be authorized to make preliminary determinations of breaches of CIP reliability standards to be followed by a review procedure conducted by the MSA before making a final determination?

This consultation was announced on January 31 and interested parties are expected to file their submissions by February 29.

The Disclosure Problem

AUC Rule 027 requires the MSA to publish any specified penalty issued for a contravention of a reliability standard no later than 45 days after the penalty has been issued and post the penalty to the MSA's website.

There is, however, a wide-ranging controversy in Canada and the United States about whether this provision is appropriate in the case of CIP penalties. The CIP penalties relate mainly to cyber security breaches, which can result from deliberate attempts by third parties to damage critical infrastructure. The question is whether the publication contemplated would assist those third parties in targeting certain facilities that have been found to have inadequate protection. The MSA has on previous occasions advised the AUC of its concerns in this regard. To date, the MSA has not published any CIP breaches on its website awaiting further clarification from the Commission.

More recently, a Joint Staff White Paper has been published by FERC and NERC.[78] Those agencies are currently carrying out a consultation on this matter. There may be merit in the Alberta approach on publication of CIP breaches complying with the U.S. approach that is ultimately determined.

The MSA has proposed that a consultation be held to address the following question:

- Should AUC Rule 027 be amended to limit the publication of breaches of CIP reliability standards to the publication standard proposed by the Joint FERC-NERC Staff White Paper?

The Commission has indicated that a process outlining a consultation to deal with this issue will be developed shortly.

IN THE COURTS

The B.C. Alberta Blockade

Earlier in this report, we discussed the opposition to the Trans Mountain expansion project to expand capacity by twinning the existing pipeline system with 987 kilometers of new pipe to transport oil sands production from Edmonton, Alberta to Burnaby, B.C. The project includes an expanded marine terminal in Burnaby with a significant increase in tanker traffic under the Lions Gate Bridge.

That led to fierce opposition from the Mayor of Burnaby and Premier of B.C. The province in an attempt to stop the project, proposed an amendment to the *Environmental Management Act.*[79] Alberta objected on the basis that the act was unconstitutional because it interfered with the federal government's exclusive jurisdiction over interprovincial pipelines. The British Columbia Court of Appeal agreed.[80] B.C. then appealed to the Supreme Court of Canada, which upheld the British Columbia Court of Appeal decision.[81] The Chief Justice read a unanimous decision from the bench dismissing the case on the same basis as the British Columbia Court of Appeal. It took the Court 10 minutes to reach this decision.

Before the court decisions, Alberta had struck back indicating that it was not going to buy B.C. wine or electricity from the new B.C. Site C hydro facility. Alberta was also going to stop supplying gas to heat B.C. homes. A temporary injunction was obtained. This blockage has

[78] *Supra* note 74.

[79] *Environmental Management Act,* SBC 2003, c 53.

[80] *Supra* note 4.

[81] *Supra* note 3.

also ceased with the recent Supreme Court of Canada decision on January 16, 2020.

The Carbon War

While the B.C. and Alberta governments were fighting with each other, the provinces of Alberta, Ontario, New Brunswick and Saskatchewan were fighting with the federal government regarding the federal government's proposed carbon tax. The federal government had enacted legislation requiring each province to legislate a carbon tax meeting certain standards. For those provinces that refused, the federal government would impose its own mandatory pricing carbon scheme on that province.

The opposition of the provinces was threefold; first, they did not believe the carbon tax would be effective. Second, they felt it imposed significant cost on commuters that drive to work every day. Third, they believed it was unconstitutional.

During 2019, the cases wound their ways through the courts. In May 2019, the Saskatchewan Court of Appeal issued a 3-2 majority decision[82] that found that the federal government did have the constitutional authority to implement a carbon tax. A month later, in June, the Ontario Court of Appeal, in a 4-1 majority decision, came to the same result. Both decisions found that the federal carbon tax legislation was a valid exercise of the federal governments' authority under the federal governments' peace, order and good government authority indicating constitution.

Ontario and Saskatchewan have both appealed those decisions to the Supreme Court of Canada, which will be likely heard in April 2020. To confuse matters, the Alberta Court of Appeal ruled on February 24, 2020 that the Carbon Tax was unconstitutional.[83]

This was a 4-1 decision led by the Chief Justice of the province. The Alberta decision does a good job of explaining the differences between the Alberta court and the courts in Ontario and Saskatchewan that found the legislation to be within federal jurisdiction. It turns out that it depends on how you define or characterize the carbon tax. The Alberta Court of Appeal understandably said the carbon tax was a policy instrument that regulated natural resources in the province. The Alberta Court of Appeal understandably relied on Section 92A, which provides that natural resources are exclusive provincial jurisdiction. The logic was straightforward; Alberta is a one-industry province. That industry relates to the exploration and development of the generation and transportation of oil and gas. The proposed federal tax was aimed only at that industry. The Ontario and Saskatchewan decisions have relied on the broad national concern doctrine under the federal parliament's peace, order and good government power. The Chief Justice found that the regulation of greenhouse gas emission does not fall within this doctrine and noted that the application of interjurisdictional immunity was rarely relied upon by the courts and had been used in only three cases in the entire history of constitutional litigation. Other justices argue that this legislation was a Trojan horse, which would allow the federal government to exercise control over virtually anything that traditionally fell within provincial jurisdiction. This matter will now go to the Supreme Court of Canada, which will hear all three cases together on March 24, 2020.

In the meantime, the provinces of New Brunswick and Prince Edward Island have struck a strange deal with the Federal government. They proposed that they would enact the federal government carbon tax but eliminate a tax in the same amount that each province currently had in place to pay for highways in the province.

It turns out that the federal government was going to give the provinces the money it received from the carbon tax, so the provinces were revenue neutral under this initiative. What this new scheme did to reduce carbon in these provinces may be a mystery to some.

Stranded Assets Revisited

In 2016, a wild fire destroyed most of Fort McMurray Alberta. In 2019, three companies, ATCO Gas, ATCO Electric Transmission and ATCO Electric Distribution, brought applications to the AUC to recover

[82] *Reference re Greenhouse Gas Pollution Pricing Act,* 2019 SKCA 40.

[83] *Reference re Greenhouse Gas Pollution Pricing Act,* 2020 ABCA 74, at 6.

approximately $5 million for assets destroyed in the fire. In the three decisions,[84] the Commission approved or disallowed recovery based upon the Commission's Utility Asset Disposition (UAD) principles related to stranded assets as set out in the Stores Block decision.[85] There were important descents and warnings about "the possible deleterious effects" of this principle with the commission calling for a "debate on the evolution of public utility regulation in Alberta".

This regulatory uncertainty has a long and interesting history. In 2013, the AUC issued what is known as Utility Asset Disposition decision.[86] It was one of several decisions building on and interpreting the Supreme Court of Canada's Stores Block decision.

The Stores Block case itself started in Alberta when TransAlta, a major Alberta Utility, sold an office building in downtown Calgary for significant profit. The utility wanted to keep all the profits. The Commission said the profits should be shared between the utility and the ratepayers. The Supreme Court of Canada disagreed that ratepayers had no property interest; they were simply entitled to service. However, as the Fort McMurray fires demonstrate, the flipside of this can create real problems for utilities. Put simply if the utility gets to keep all the profits from selling an asset, then presumably it gets to bear all the cost when an asset is destroyed.

This is not the first time Alberta has struggled with this issue. The problem appeared in 2013 when Southern Alberta faced unusual floods from the Bow and Elbow River. At that time, the Government proposed new legislation, which amended the impact of Stores Block in Alberta.

The principle at issue in this case affects all Canadian utilities and all Canadian regulators. It is worth repeating the findings of the Alberta Utilities Commission at paragraphs 129-132 of decision 21609 involving ATCO Electric:[87]

5.4.3.2 Future considerations

129. In the previous section of this decision, the Commission determined that in the circumstances of this proceeding the retirements resulting from the RMWB wildfire were extraordinary. Accordingly, the unrecovered capital investment in the retired assets is for the account of the shareholder of ATCO Electric.

130. The Commission's finding that costs of the retirement event should be allocated to shareholders results in just and reasonable rates. This finding is consistent with the governing legislation, the fundamental property and corporate law principles established by the courts and the guidance of the courts on the allocation of risk and benefits associated with property ownership. This guidance was reviewed by the Commission in the UAD decision and subsequently upheld on appeal. The guidance limits the Commission's flexibility in dealing with cost allocation upon the retirement of utility assets, both those reasonably anticipated and those that are unanticipated. The regulatory framework resulting from this guidance is bounded in part by the following findings by the courts:

> The argument that assets purchased are reflected in the rate base should not cloud the issue of determining who is the appropriate owner and risk bearer…the utility absorbs losses and gains, increases and decreases in the value of assets, based on economic conditions

[84] *Z Factor Application for Recovery of 2016 Regional Municipality of Wood Buffalo Wildfire Costs,* 21608-D01-2018; 2018-2019 *Transmission General Tariff Application,* 22742-D02-2019; *Z Factor Adjustment for the 2016 Regional Municipality of Wood Buffalo Wildfire,* 21609-D01-2019.

[85] *ATCO Gas and Pipelines Ltd v Alberta (Energy and Utilities Board),* [2006] 1 SCR 140.

[86] *Utility Asset Disposition,* Decision 2013-417, online: <http://www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2013/2013-417.pdf>.

[87] *Supra* note 82 at 30-32.

and occasional unexpected technical difficulties…

The concept of assets becoming "dedicated to service" and so remaining in the rate base forever is inconsistent with the decision in Stores Block (at para 69). Such an approach would fetter the discretion of the Board in dealing with changing circumstances. Previous inclusion in the rate base is not determinative or necessarily important; as the Court observed in Alberta Power Ltd. v. Alberta (Public Utilities Board) (1990), 72 Alta. L.R. (2d) 129, 102 A.R. 353 (C.A.) at p 151: "That was then, this is now."

Past or historical use of assets does not permit their inclusion in rate base unless they continue to be used in the system.

Since the authorities have established that ratepayers cannot share in any of the sales of assets, it follows that holding property within the rate base, once its use has expired, works to the detriment of the ratepayer…since ratepayers cannot share in sale proceeds of utility assets, their protection for fair treatment lies in excluding assets not required for utility operations from the rate base.

… the terms of the regulatory compact have always been subject to evolution and the re-balancing of competing interests of consumers and utility companies when times and circumstances change…There is no industry today that is immune to change. Or that enjoys a right to be protected from the consequences of change, whether those arise from legislative choices, deregulation or court decisions.

The Commission provided a reasonable rationale for its conclusion that there is and should be a distinction between ordinary depreciation and unforeseen loss or obsolescence of capital, which was characterized as a form of extraordinary depreciation. I am persuaded that it was reasonable for the Commission to conclude that the extraordinary depreciation situations were outside the definition of what would be a reasonable opportunity of return for utility investors. The Commission, in its expert and policy role, could reasonably conclude that the legislation indicated that whereas ordinary depreciation is a legitimate matter for a form of shared risk between utilities and ratepayers, these forms of extraordinary depreciation of prudently acquired capital are not risks to be shared with ratepayers.

…In the absence of Stores Block and the subsequent jurisprudence from this Court, other policy choices would have been open to the regulator. Although it would be tempting to confine the application of these decisions only to gas utilities, (to minimize what I consider to be deleterious effects on the regulation of utilities in Alberta), the legal

> principles in Stores Block remain good law.

131. Although the Court of Appeal emphasized that the Stores Block line of cases remains good law, it also noted that more than a decade of incremental litigation on individual, fact-specific Commission decisions, has arguably resulted in some "deleterious effects on regulation of utilities in Alberta." In making this observation, the Court indicated that the Commission would have greater flexibility to deal with UAD matters in the absence of this line of court decisions and reminded lawmakers that they have the ability to consider these issues from a broader public policy perspective should they wish to alter the status quo and provide the Commission with greater discretion in addressing UAD fact-specific issues as noted below:

> Absent the pronouncements in Stores Block, the Commission would likely have greater flexibility on the issue of who bears the undepreciated cost of assets rendered useless as the result of extraordinary events.
>
> The Commission, and this Court, are bound by Stores Block and the subsequent decisions from this Court. Only legislative amendment, reconsideration, or a reversal of Stores Block by the Supreme Court of Canada can change that.

132. The Commission appreciates the difficulty utilities face operating in an environment where they must anticipate reasonably foreseeable future events, not just to properly align depreciation parameters but also to reduce the risk of shareholder losses due to an extraordinary retirement. Notwithstanding these efforts, utilities recognize that shareholder losses are likely to occur despite having acted prudently in conducting their operations. Similarly, it is not in the interest of customers that they pay higher rates that reflect risk-adjusted returns or depreciation parameters and investment decisions which factor in every possible retirement contingency. It is also not in the interest of customers that utilities incur higher borrowing costs or that the delivery of safe and reliable service be compromised due to financial hardship resulting from an extraordinary retirement. Further, it is in the interest of neither utilities nor customers to engage in continual fractious debate in characterizing retirements. Again, no party benefits if utilities are compelled to respond to negative economic incentives by adopting risk-averse policies that impede regulatory efficiencies or improvements in service or reliability where prudent investment would otherwise occur. These are perhaps some of the possible deleterious effects on the regulation of utilities in Alberta noted by the courts.

Less Deference

Courts have often extended deference to energy regulators, particularly when they are interpreting their home statute. The high-water mark in Canada was the decision of Justice Brian O'Ferrall in *Capital Power v Alberta Utilities Commission*[88] that was the subject of an article in the Energy Regulation Quarterly.[89] Similar principles have been developed in the United States where it is called the *Chevron* doctrine,[90]

[88] *Capital Power Corporation v Alberta Utilities Commission,* 2018 ABCA 437; *McLean v British Columbia Securities Commission,* 2013 SCC 67 at paras 40-41; *Walton v Alberta Securities Commission,* 2014 ABCA 273 at para 17

[89] Gordon E Kaiser, "Capital Power Corporation: The Alberta Line Loss Debate" (2019) 7:1 Energy Regulation Quarterly, online: <http://www.energyregulationquarterly.ca/case-comments/capital-power-corporation-the-alberta-line-loss-debate#sthash.9cQcSMWB.dpbs>.

[90] *Chevron v Natural Resources Def Council,* 467 US 837.

which has been applied in U.S. cases[91] although that has been reduced in recent decisions.[92]

A decision of the Supreme Court of Canada, in December 2019, in *Vavilov*[93] appears to reduce the degree of deference in Canadian law as well. There are many Canadian energy regulators whose decisions are subject to review by the courts pursuant to express statutory rights of appeal. Other cases where there is no statutory right of appeal are nonetheless subject to judicial appeal by the courts. In either case, the regulatory decisions are reviewed by the courts with respect to the merits of the decision, as well as for breaches of procedural fairness or natural justice. In either case, the review on the merits turns on the application of the standard of review to be applied. It is either a non-deferential "correctness" standard or alternatively a deferential "reasonableness" standard. Tribunals, such as energy regulators, are usually granted the latter treatment.

Prior to *Vavilov*, the distinction between statutory appeals and judiciary reviews was blurred and often the review in courts would apply the same deferential approach to both. The Supreme Court's decision in *Vavilov* changes the law first developed in *Dunsmuir* in 2008[94] with respect to statutory appeals. Now there is a presumption that the standard of review will be reasonableness, unless there is a clear legislated direction that a different standard was intended. The court has indicated that there are five specific categories where derogation from the presumption of reasonableness is warranted. These are:

- A specific standard of review has been set out in the statute;
- A statutory right of appeal has been set out in the statute;
- Constitutional questions;
- General questions; and
- Questions regarding the jurisdictional boundaries between administrative bodies.

The Supreme Court Decision in *Vavilov* is an important one. A detailed analysis is contained in David Mullan's Annual Review of Developments in Administrative Law relevant to Energy Law and Regulation in this issue of Energy Regulation Quarterly.

[91] *Cajun Electric Power Coop v FERC,* 1924 F (2d) 1132 (DC Cir 1991); *Koch Gateway Pipeline v FERC,* 135 F (2d) 810 (DC Cir 1998); *California Independent System Operator Inc v FERC,* 372 F (3d) 395 (DC Cir 2004); *Massachusetts v Environmental Protection Agency,* 549 US 497 (2007); *Assn. of Public Agency Customers v Bonnebille Power Admin,* 126 F (3d) 1158 (2009); *Michigan v Environmental Protection Agency,* 576 US 1 (2015); *FERC v Electric Power Supply Association,* 577 US 1 (2016); *Next Era Desert Centre Blythe v FERC,* 852 F (3d) 1118 (DC Cir 2017).

[92] *Epic Systems Corp v Lewis,* 584 US 1 (2018).

[93] *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65.

[94] *Dunsmuir v New Brunswick,* 2008 SCC 9.

APPENDIX A

AESO's request for feedback on pricing framework review, session 1 material asked the following questions:

1. At the session, the AESO outlined the objectives of the pricing framework, which includes ensuring both long term adequacy and ensuring efficient short-term market response. Do you have any comments on the objectives of the pricing framework?

2. Please provide your comments on the AESO's description of Alberta's Energy-Only Market Pricing Framework, and the administrative price levels, in particular the purpose of the *offer cap*. Is there anything you would change or add to this description?

3. Please provide your comments on the AESO's description of Alberta's Energy-Only Market Pricing Framework, and the administrative price levels, in particular the purpose of the *price cap*. Is there anything you would change or add to this description?

4. Please provide your comments on the AESO's description of Alberta's Energy-Only Market Pricing Framework, and the administrative price levels, in particular the purpose of the *price floor*. Is there anything you would change or add to this description?

5. The AESO's forward looking resource adequacy assessment indicates that the energy only market with the existing offer cap will provide reasonable financial returns while meeting the supply adequacy requirements. Do you agree with the AESO's conclusions? If no, please describe your concerns.

6. The AESO's historical revenue sufficiency assessment indicates that the energy only market with the existing offer cap has historically sent efficient and timely price signals to the market. Historically assets have been added when pricing signals indicated that profitable entry could occur. Do you agree with the AESO's conclusions? If no, please describe your concerns.

7. Are there foreseeable situations where asset variable costs would be greater than $999.99/MWh? If yes, please describe the situation.

8. The AESO has described the scope for this process, general agenda items and timing for upcoming stakeholder engagements, with the timing of the sessions aligned with the AESO's deliverable to the Government of Alberta Energy Minister. Please describe if you believe the scope is appropriate. If not, please describe/ provide your rationale.

9. Is the approach used for this engagement effective? If no, please provide specific feedback on how the AESO can make these sessions more constructive.

10. Please provide any other comments you have related to the pricing framework engagement. ■

2019 DEVELOPMENTS IN ADMINISTRATIVE LAW RELEVANT TO ENERGY LAW AND REGULATION

*David Mullan**

INTRODUCTION

Until the middle of December, 2019 had been an unusually quiet year for Administrative Law judgments of significance, especially from the Supreme Court of Canada. However, all that changed on December 19 when the Supreme Court delivered its long-awaited judgments in *Canada (Minister of Citizenship and Immigration) v Vavilov,*[1] and *Bell Canada v Canada (Attorney General)*.[2] These were the cases where, in granting leave to appeal, the Supreme Court had invited the parties to revisit *Dunsmuir v New Brunswick,*[3] with particular reference to the standard of review to be deployed by courts in conducting judicial review of administrative action.[4] The next day, the Supreme Court delivered another judgment, *Canada Post Corporation v Canadian Union of Postal Workers,*[5] in which the Court applied the new standard of review template that it had developed particularly in *Vavilov.*

This new template has particular significance not only for lower courts but also for front-line energy regulators. I will therefore devote most of my time in this annual survey to a discussion of the modified standard of review regime and its likely impact on the conduct of regulatory proceedings as well as subsequent judicial scrutiny of the outcomes of those proceedings. In addition, I will address remedial issues of relevance to Energy Law and Regulation dealt with by the Supreme Court of Canada during 2019. Finally, I deal with three issues arising out of the Trans Mountain Pipeline litigation, two of which are affected by the February 4, 2020 judgment of the Federal Court of Appeal in *Coldwater Indian Band v Canada (Attorney General),*[6] to which I will refer briefly.

THE RESHAPING OF STANDARD OF REVIEW

A) INTRODUCTION

For decades, the issue of standard of review has cast an exceptionally long shadow over the Canadian law of judicial review of administrative action. Finding the right balance between the roles of administrative decision-makers as the legislatively designated

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[1] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. (For a more substantive discussion on the impact of *Vavilov*, please review my paper scheduled to appear in The Advocates' Quarterly, which deals with some matters not canvassed in this annual review.)

[2] *Bell Canada v Canada (Attorney General)*, 2019 SCC 66.

[3] *Dunsmuir v New Brunswick,* 2008 SCC 9.

[4] See e.g. the leave to appeal judgment in *Canada (Citizenship and Immigration) v Vavilov*, 2018 CarswellNet 2127 and 2018 CarswellNet 2128.

[5] *Canada Post Corporation v Canadian Union of Postal Workers*, 2019 SCC 67.

[6] *Coldwater Indian Band v Canada (Attorney General),* 2020 FCA 34.

instruments of governance, on the one hand, and the courts as the protectors of the rule of law and agencies of accountability, on the other, has proved highly problematic. At the very least, the previous serious reconsideration of this issue in *Dunsmuir* had for most lower courts, counsel, administrative decision-makers themselves, and observers and commentators been incomplete and flawed in some of its prescriptions. Now, those involved in Canadian Administrative Law have another prescription with which to grapple. Whether it will be any more successful than its immediate predecessor remains to be seen. And, by successful, I mean the achievement of at least two objectives: first, the reconciliation of the tension between legislative choice of instrument and the rule of law, and, second, a reduction in the amount of time devoted to standard of review in the conduct of applications for judicial review of and statutory appeals to the courts from administrative action (including inaction).

For energy law and regulation, *Vavilov* might seem an unlikely case in which to develop a generalized prescription for standard of review selection and application of the appropriate standard of review. It concerned an application for judicial review of the revocation of the certificate of Canadian citizenship of the Canadian born son of Russian spies, a decision that hinged on the interpretation of provisions in the *Citizenship Act*.[7] However, *Bell Canada v Canada (Attorney General)*[8] involved a public interest regulator and issues somewhat closer to energy regulation regimes though still at some remove: a Canadian Radio-television and Telecommunications Commission ("**CRTC**") Order and Decision exempting football's Super Bowl from an Order requiring the simultaneous substitution of American commercials from the Canadian feed of American originating television programmes. As opposed to the situation in *Vavilov*, it entered the lists of the Federal Court of Appeal by way of appeal by leave on a question of law and jurisdiction.

B) CHOICE OF STANDARD OF REVIEW

i. Decisions Subject to Statutory Appeals

In the initial commentary on the new regime, and there has already been a great deal of it,[9] the most notable and controversial aspect of *Vavilov*, as applied simultaneously in *Bell Canada,* was the majority's recalibration of standard of review selection as it applied to matters coming to the courts by way of statutory appeal as opposed to a common law or statutory application for judicial review.[10] Henceforth, absent legislative specification to the contrary, courts hearing such appeals were to apply the *Housen v Nikolaisen*[11] template mandated for appeals from lower courts in civil law matters. On pure questions of law and questions of law that were readily extricable from mixed questions of law and fact, the standard of scrutiny was to be that of correctness. For questions of fact and mixed law and fact from which there were no readily extricable pure questions of law, the standard of review would be that of "palpable and overriding error."

Given that the majority of Canada's energy regulators (as with the CRTC) are located in a statutory scheme that provides for access to the courts from their decisions and orders by way of appeal, often only on leave and restricted to questions of law and jurisdiction,[12] this amounts to a very significant change. I will not

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[7] *Citizenship Act*, RSC 1985, c C-29, ss 22.1 to 22.4.

[8] *Supra* note 2. (Given this, it remains puzzling to me that there were no energy regulators or representatives of the energy sector among the numerous interveners participating in these two case. Given the impact of *Vavilov* on standard of review in the context of statutory appeals, there may now be some regret over decisions not to seek participatory rights.)

[9] See, for example, Paul Daly, "The *Vavilov* Framework and the Future of Canadian Administrative Law" (15 January 2020) on SSRN and building on earlier assessments of *Vavilov* posted to his blog *Administrative Law Matters*, and also Shaun Fluker, "*Vavilov* on Standard of Review in Canadian Administrative Law" (6 February 2020), online: *Ablawg* <http://ablawg.ca/wp-content/uploads/2020/02/Blog_SCF_Vavilov.pdf>.

[10] *Supra* note 1 at paras 36-52.

[11] *Housen v Nikolaisen*, 2002 SCC 33.

[12] See e.g. *Alberta Utilities Commission Act*, SA, c A-37.2, ss 29(1) and (2); *Responsible Energy Development Act*, SA, c R-17.3, ss 45(1) and (2); *Ontario Energy Board Act, 1998*, SO 1998, c 15, Sched B, s 33(2) (though not requiring leave); *Utility and Review Board Act*, SNS 1992, c 11, s 30(1) (though also not requiring leave); and *Canadian Energy Regulator Act*, SC 2019, c 28, ss 72(1) and (2).

dwell upon the merits of that change; Nigel Bankes has done so already and persuasively in his blog post entitled " Statutory Appeal Rights in Relation to Administrative Decision-Maker Now Attract an Appellate Standard of Review: A Possible Legislative Response."[13] What it does do, however, is to remove most energy regulators from a situation where, on pure questions of law, they were entitled to the benefit of a strong presumption of reasonableness review when interpreting their home or a closely related statute. While post-*Vavilov*, that presumption has become even stronger in the context of common law and statutory applications for judicial review, it has ceased to exist for energy regulators from which access to the courts is by way of appeal. In an appeal setting, absent **specific** legislative direction, there will be no deference on questions of law but just straight correctness review. Certainly, in the domains of questions of fact or mixed fact and law, they may be no practical difference between review on a reasonableness basis (the prior standard) and review for "palpable and overriding error." However, in the more generally important domain of pure questions of law, correctness review will now reign.

This was underscored by the majority judgment in *Bell Canada*.[14] Appellate review of the CRTC's Decision and Order was conducted on a *de novo* correctness basis with no focus on the reasons of the CTRC or other aspects of reasonableness scrutiny of administrative action. It was a standard exercise in statutory interpretation.

Leaving aside the question of whether this new regime for statutory appeals represents a wise or principled change, it at least has the merits of apparent simplicity. It seems self-applying at least as far as appeals on pure questions of law are concerned. The issue has been removed from the realm of contextual assessment, and, in particular, whether, as one of the elements in the *Dunsmuir* list of contextual considerations, a particular right of appeal might be a relevant or decisive factor in departing from the previous presumption of correctness review for pure questions of statutory interpretation. Henceforth, the standard will invariably be correctness.

However, this does not mean that the appropriation of the *Housen* standards of appellate scrutiny will be without problems. Nigel Bankes has identified some of those.[15] One issue in particular merits discussion in this context. In most instances, appeals from energy regulators to the courts are confined to questions of law or jurisdiction. In the context of applications for judicial review, the *Vavilov* court (unanimously) expunged the concept of jurisdiction from the rubric of standard of review selection.[16] It will no longer be one of the categories of issue that lead to the rebutting of the presumption of reasonableness review. That raises the question of the afterlife of "jurisdiction" as an appellate ground of review or, indeed, as a judicial review ground of review when explicitly spelled out, as in section 18.1(4)(a) of the *Federal Courts Act*.[17]

Indeed, in *Bell Canada*, the majority, despite its rejection in *Vavilov* of jurisdiction as an unworkable concept, seemed perfectly comfortable in viewing the critical interpretative issue in that case as "go[ing] directly to the limits of the CRTC's statutory grant of power."[18]This seems like a definition of a true question of jurisdiction, and later this is further underscored by the majority's reference to the "appellants' primary jurisdictional argument"[19] as well as to this being an issue about "the scope of its authority."[20]

Even admitting the irony of the majority's apparently easy movement into the rubric of jurisdictional review in an appeal setting, it might at first blush seem to be a matter of little moment. In the end, given the right of appeal on pure questions of law, it really does

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[13] Nigel Bankes, "Statutory Appeal Rights in Relation to Administrative Decision-Maker Now Attract an Appellate Standard of Review: A Possible Legislative Response", (3 January 2020), online: *Ablawg* <http://ablawg.ca/wp-content/uploads/2020/01/Blog_NB_Vavilov.pdf>.

[14] *Supra* note 2.

[15] *Supra* note 13.

[16] *Supra* note 1 at paras 65-68.

[17] *Federal Courts Act*, RSC 1985, c F-7.

[18] *Supra* note 2 at para 4.

[19] *Ibid* at para 33.

[20] *Ibid*.

not matter whether the appellate court deals with the issue as one of law or jurisdiction. The standard applied, that of correctness, will be the same in any event. However, traditionally, questions of jurisdiction were not always pure questions of law. They might well be fact-driven or involve inextricably mixed questions of law and fact. Should those questions of "authority" arise in the future in the context of a statutory appeal, will *Housen* prevail and dictate the application of the "palpable and overriding error" standard or will it be trumped by the *Dunsmuir* principle that "true" questions of jurisdiction are to be determined on a correctness basis?[21]

ii. Decisions Subject to Applications for Judicial Review

As for energy regulators such as the New Brunswick Energy and Utilities Board[22] and the Governor in Council as a final decision-maker on pipeline applications under section 186(1) of the *Canadian Energy Regulator Act*, given that their decisions are expressly stated to be reviewable by way of judicial review,[23] not statutory appeal, the *Vavilov* judicial review, not appeal reconfiguration will apply.

What does that involve? First, there is now a general presumption of reasonableness review for all their decisions.[24] Second, the four contextual factors that might previously have been deployed in rebuttal of that presumption (and, in particular, considerations of comparative expertise) no longer have purchase.[25] Third, the rebuttal of the presumption is now linked to three of the four *Dunsmuir* automatic correctness categories — constitutional questions, dueling or competing jurisdictions, and questions of fundamental importance to the legal system as a whole.[26]

As already noted, jurisdiction has been dropped from the original four categories. As well, the "fundamental importance" category has been modified by the exclusion of the qualification that the issue must also be one beyond the expertise of the administrative decision-maker; irrespective of expertise, correctness review is required. What is left dangling, however, is whether these three categories are constitutionally protected. In other words, while the majority also acknowledges that the standard of review can be modified and the general presumption overridden legislatively, it is unclear whether that is true of the three correctness categories.

Those doubts aside, here too, standard of review selection has been simplified. Moreover, given the relative infrequency of decisions that engage the three exceptional correctness categories, reasonableness will now be the almost invariable standard in common law or statutory judicial review (as opposed to appeal) whether the issue be one of law, mixed law and fact, or fact. Deference enthusiasts will assuredly take comfort from that.

C) APPLICATION OF THE REASONABLENESS STANDARD

i. A General Commitment to Deference?

However, it is in the second element of the *Vavilov* majority judgment that issues may arise. What are the badges of an unreasonable decision? How committed to deference as a defining principle are the majority judges in *Vavilov*?

At one level, despite the hiving off of review by way of statutory appeal, the majority appears committed to deference. At the standard of review selection stage, there is now a strong affirmation of a presumption of reasonableness review irrespective of grounds and the category of administrative decision-maker. Moreover, the derogation from that principle in the dropping of comparative expertise as a relevant consideration in the exceptional fundamental

[21] *Supra* note 3 at para 59.

[22] *Energy and Utilities Board Act*, SNB, c E-9.18, s 52(1), creating an unqualified right to seek judicial review. In contrast, applications for judicial review of decisions of the Quebec Régie de l'energie are limited to questions of jurisdiction: *Act respecting the Régie de l'énergie*, SQ, c R-6.01.

[23] *Canadian Energy Regulator Act*, SC 2019, c 18, s 188(1). See also s 70, respecting applications for judicial review of the decisions of the Pipeline Claims Tribunal.

[24] *Supra* note 1 at paras 10 and 23.

[25] *Ibid* at para 58.

[26] *Ibid* at paras 17 and 53.

importance category may not be the detractor from deferential review that the minority rails against.[27] Indeed, the majority are at pains to emphasize that lower courts should not regard any of this as inviting an expansion of the fundamental importance category beyond its currently constrained limits as reflected in the very limited number of precedents.[28]

ii. The Centrality of Reasons

When it comes to the application of the reasonableness standard, the majority insist that the starting point, at least for administrative decision-makers who are obliged to and do give reasons for their decisions, must be the reasons provided.[29] It is not to be prefaced by judicial evaluation of what decision the court would have reached were it the decision-maker followed by matching of the court's preconceived vision of the appropriate or correct answer against that provided by the decision-maker. Moreover, the majority's insistence that the burden of establishing unreasonableness rests with the challenger[30] reinforces commitment to a review process that is rooted in a principle of deference.

While insisting on the importance of reasons and adherence to *Dunsmuir's* call for "justification, transparency and intelligibility,"[31] the majority nonetheless recognizes that administrative decision-makers' reasons are not expected to partake of the archival, formal character expected of judicial decision-making.[32] The majority also reiterates the proposition that administrative decision-makers are not expected to cover each and every one of the arguments made or all the evidence submitted by the parties.[33] In this context, the majority is supportive, subject to constraints, of a search for elucidation in materials outside the formal record of the hearing such as precedents and factual background information in the possession of the decision-maker.[34] As for decision-makers not obliged to give reasons such as those charged with the making of subordinate legislation, legislative history including internal exchanges may provide acceptable surrogates.[35]

As well, the majority, having rejected formal consideration of comparative expertise as a factor in the standard of review selection process, nonetheless recognizes expertise as evidenced by the nature or quality of the reasons provided as supporting the extent to which reviewing courts should be deferential.[36] This too points towards a strong level of commitment to the deference project.

To be sure, administrative decision-makers have lost a possible avenue for resisting judicial review in the majority's insistence that decisions must be justified as opposed to justifiable,[37] and the supporting proposition that decisions should not generally be upheld as reasonable simply on the basis of outcome. However, it is hard to see this as a dilution of the commitment to deferential review. It represents a legitimate constraint on the extent to which there can be *ex post facto* reasons advanced in support of the conclusions reached. Deference simply loses its persuasive force when the reasoning and processes of an administrative decision-maker provide no contemporaneous basis for ascertaining why the decision-maker reached the decision that it did. More generally, there is also no reason to gainsay the majority's insistence that the administrative decision-maker provides a logical or internally rational justification for its conclusions.[38]

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[27] *Ibid* at para 244.

[28] *Ibid* at para 61.

[29] *Ibid* at para 84.

[30] *Ibid* at para 100.

[31] *Supra* note 3 at para 47

[32] *Supra* note 1 at paras 92 and 114.

[33] *Ibid* at paras 98 and 128.

[34] *Ibid* at para 94.

[35] *Ibid* at para 137.

[36] *Ibid* at para 93.

[37] *Ibid* at para 86.

[38] *Ibid* at paras 99ff.

iii. Contextual Considerations

However, there are aspects of the majority's judgment under the heading "Performing Reasonableness Review" which may be read by lower courts as heralding the arrival of a more "robust"[39] (the majority's term) form of judicial review in the sense of review that imposes a variegated range of constraints on decision-making by administrative decision-makers.

Notwithstanding that the Court repudiates the deployment of the long-established contextual factors in establishing the appropriate standard of review, the majority is strongly committed to a contextual approach in the delineation of an appropriate standard of reasonableness. They reiterate the post-*Dunsmuir* mantra that reasonableness is a single standard but one which "takes its colour from the context."[40] What is required of administrative decision-makers is that they reach conclusions and adopt solutions that respect the "contextual constraints"[41] arising out of "the legal and factual context of the decision under review."[42] What are these contextual constraints and to what extent might they aid and abet in a retreat from genuinely deferential review?

In the majority's elaboration of the requirements of a duty to give reasons, as noted already, they have reinsinuated expertise as a consideration. Expertise as demonstrated through the reasons provided is a factor to be taken into account in assessment of the "justification, transparency and intelligibility" of the reasons and the outcome.[43] Though the majority does not say so explicitly, the converse, reasons that speak to no particular or limited expertise might in future for some judges justify closer scrutiny in the name of reasonableness of the reasons and the outcome.

Subsequently, the majority identifies two "fundamental flaws"[44] that make a decision unreasonable. One of them, which in general terms cannot be questioned, is a decision which lacks "internally coherent reasoning."[45] In developing that concept, the majority does, however, use terminology that might too readily attract the attention of interventionist minded judges. Thus, for example, the assertion that a decision will be unreasonable "where the conclusion reached cannot follow from the analysis undertaken"[46] may be seen is inviting close inquiry into the merits of the decision-maker's reasoning and lead to in effect correctness review.

More significant, however, than the two examples just discussed is the majority's elaboration of the second "fundamental flaw;" the requirement that the decision must be "justified in light of the legal and factual constraints that bear on it."[47] In this context, the majority, as was the case with expertise, in effect reintroduces two now contextual considerations that were banished from the arena of standard of review selection: jurisdictional error and inconsistent decision-making. As seen already, the majority (supported by the minority[48]) removed "true questions of jurisdiction" as a category that displaced the general presumption of reasonableness review.[49] As for inconsistent decision-making, the Court refused to add this as a stand-alone ground for rebuttal of the presumption.[50]

Under the heading "Governing Statutory Scheme," the majority returns to the concept of jurisdiction and reiterates the demise of

[39] *Ibid* at para 13.

[40] *Ibid* at para 89, citing among other judgments *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 59.

[41] *Supra* note 1 at para 90.

[42] *Ibid*.

[43] *Ibid* at para 93.

[44] *Ibid* at para 101.

[45] *Ibid* at para 105.

[46] *Ibid* at para 103.

[47] *Ibid* at para 101.

[48] *Ibid* at para 282.

[49] *Ibid* at paras 65-68.

[50] *Ibid* at paras 71-72.

the "true question of jurisdiction" category.[51] However, after acknowledging that a "decision-maker's interpretation of its statutory grant of authority is generally entitled to deference,"[52] they go on to assert that:

> …[r]easonableness review does not allow administrative decision-makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it. [53]

Persuasively, the minority points to this as heralding the reintroduction within the concept of reasonableness of "jurisdictional error,"[54] and the majority's simple assertion that this is not the case[55] sounds very hollow indeed.

In what follows under this heading, there is also another potential invitation to intrusive review albeit under the rubric of "reasonableness." Not surprisingly, the majority refer to the accepted wisdom that there may be some questions of statutory interpretation that admit of only one reasonable answer.[56] Indeed, there can be no questioning of the general proposition. However, what is problematic lies in the identification of the circumstances which justify such a conclusion with the dangers to deference clearly indicated by a recent statement by a Federal Court of Appeal Justice to the effect that the vast majority of issues of statutory interpretation admit of only one answer.[57]

Even more generally, under the heading "Principles of Statutory Interpretation,"[58] the majority insists that administrative decision-makers respect the modern approach to questions of statutory interpretation:

> But whatever form the interpretive exercise takes, the merits of an administrative decision-maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision.[59]

This too invites what in effect is correctness review of questions of statutory interpretation albeit under the guise of reasonableness. It is just too easy to categorize a ruling on an issue of statutory interpretation with which the reviewing judge disagrees as based on an improper reading of the "text, context and purpose the provision."

There are other elements of the majority's discussion of the need for administrative decision-makers to operate within "the legal and factual constraints that bear on the decision" that may be read as expanding the opportunities for intervention and diminishing the commitment to truly deferential review.[60] However, let me conclude this discussion with reference to consistency as a contextual factor. In this context, the majority deals with consistency under two headings — "persistently discordant or contradictory legal interpretations within an administrative body's decisions"[61] and "depart[ure] from longstanding practices or established internal authority."[62] While the majority is not at all clear as to the appropriate judicial response to the former,[63] it is somewhat more specific with respect to the latter: the decision-maker's reasons must

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[51] *Ibid* at para 109.

[52] *Ibid*.

[53] *Ibid*.

[54] *Ibid* at para 285.

[55] *Ibid* at para 109.

[56] *Ibid* at para 110.

[57] Nadon JA in *Bell Canada v 7265921 Canada Ltd (dba Gusto TV),* 2018 FCA 174 at paras 194-196.

[58] *Supra* note 1 at paras 115ff.

[59] *Ibid* at para 120.

[60] For example, *ibid* at paras 133-35, under the category "Impact of the Decision on the Affected Individual", is the majority prescribing that reviewing courts take a much harder look or be less deferential when the interests at stake are by the reviewing court's lights significant?

[61] *Ibid* at para 132.

[62] *Ibid* at para 131.

[63] *Ibid* at para 132.

explain the reasons for the departure; without such an explanation the decision will be unreasonable.[64] I have no problem with such a prescription except that the majority does not explain what precisely it means by requiring that departures be justified. Is it enough that the decision-maker has provided a credible explanation of its failure to follow precedent, thereby preserving an element of deference, or does it mean that the reviewing court should review the justification on a correctness basis?

iv. Conclusions

In its elaboration of how lower courts should conduct reasonableness review, the majority certainly frames that exercise within an overall commitment to deference. However, in accepting that the exercise will always be a contextual one and providing an account of some of the factors that will provide that context, the majority calls into question the proposition that a contextual approach does not mean a commitment to varying standards or intensity of reasonableness review. This entire exercise is predicated on a sense that different scenarios involve different approaches and that, under the umbrella of the "reasonableness" label, there is now a range of possibilities that extend from what is in reality unadorned correctness review through to a very high level of deference.

As well as giving lie to the majority's rejection of the notion that reasonableness is a single, invariable standard, this raises serious theoretical questions as to the extent to which under this approach reasonableness is being overworked as a concept. Moreover, in a practical sense, the majority's elaboration of the various contextual factors contains statements that provide ample fodder for expansive judicial intervention in administrative decision-making, intervention that will retain few, if any elements that are deferential. It remains to be seen whether in making choice of standard of review less contentious, the majority has simply transferred the difficult standard of review issues to the delineation of what in any context are the badges of unreasonableness. Put bluntly, in this new world, has the Court handed to deference sceptics among the judiciary all the tools they need to engage in disguised correctness review?

Nonetheless, it must be said that in both *Vavilov* and especially *Canada Post*,[65] the Supreme Court for the most part leads by example. In each, at least in the majority judgments, the reasons for the decision are the starting point for judicial review. It is against those reasons that the contextual considerations are measured. Moreover, in *Canada Post*, Rowe J, in justification of reversing the judgment of the Federal Court of Appeal[66] and restoring the appeals officer's decision, approaches the decision of that officer with a disposition that is respectful of the reasoning process apparent in the reasons provided.[67] This holds considerable promise for the preservation of deferential review at least in cases of statutory interpretation which proceed to the courts by way of an application for judicial review, as opposed to a statutory appeal.

Perhaps of even more importance in this whole reconfiguration exercise is *Vavilov's* contribution as a manual on best practices for administrative decision-makers in the writing of decisions. It should become compulsory reading for all administrative decision-makers and their staff (including counsel). Not only does it provide a template for the structuring of reasons, but it also instructs administrative decision-makers in the range of considerations or contextual factors that they may have to address as part of their mandate and its underlying legal premises.

REMEDIES

A) INTRODUCTION

During 2019, most of the Supreme Court's quantitatively limited Administrative Law (in a very broad sense) caseload involved remedial issues.[68] In general, those remedial issues had little or no relevance to the work of energy regulators as exemplified by the subject matter of what was probably the most jurisprudentially

[64] *Ibid* at para 131.

[65] *Supra* note 5.

[66] *Canadian Union of Postal Workers v Canada Post Corporation*, 2017 FCA 153.

[67] *Supra* note 5 at paras 28ff.

[68] Aside from those mentioned in the text, *R v Myers*, 2019 SCC 18, *Bessette v British Columbia (Attorney General),* 2019 SCC 31, and *R v Penunsi*, 2019 SCC 39, all involved judicial review of summary criminal proceedings.

interesting of this group of cases: *Canada (Public Safety and Emergency Preparedness) v Chhina*.[69] It involved the extent of the provincial superior courts' *habeas corpus* jurisdiction with respect to detentions under the *Immigration and Refugee Protection Act*,[70] and whether it was precluded as a matter of either jurisdiction or discretion by that legislation's remedial regime or access to judicial review under the *Federal Courts Act*.[71] As is obvious, this is a question of little or no moment in the context of energy law and regulation.

B) COLLATERAL ATTACK

At first blush, equally of no moment would seem to be *R v Bird*,[72] a judgment concerning the availability of collateral attack in the context of a *Criminal Code*[73] prosecution for violation of a long-term supervision order issued the National Parole Board. However, to the extent that the availability of collateral attack on orders issued by agencies and government officials in an energy-based regulatory capacity is a matter of relevant interest, comment on this judgment is warranted. It also has links with the standard of review issues elaborated on in *Vavilov* and for that reason alone merits attention.

The Canadian principles with respect to collateral attack were established in 1998 in *R v Consolidated-Maybrun Mines Ltd*[74] and *R v Al Klippert Ltd*.[75] In general, collateral attack was frowned on provided there were adequate opportunities for direct attack on the relevant decision or order. More specifically, in those two precedents, the Court adopted a five criteria[76] discretionary approach to determining whether collateral attack would be allowed to proceed.

In *Bird*, in terms of the *Consolidated-Maybrun* criteria, two in particular warranted the attention of the Supreme Court — the challenge to the order was founded on section 7 of the *Canadian Charter of Rights and Freedoms*[77], and the *Criminal Code's* penalty for violation of a long term supervision order was imprisonment for up to ten years. The Court was not impressed by the argument that this was a case involving *Charter* rights. There were direct and adequate avenues available to Bird for challenging the order on *Charter* grounds.[78] With respect to the penalty provided for in the *Criminal Code*, the majority of the Court did treat this as the one of the five criteria that worked in Bird's favour.[79] However, it was not enough to offset the four counter indicators.[80] In particular, Moldaver J, delivering the judgment of the majority, saw any arguments stemming from the severity of the penalty as outweighed by the importance of not encouraging a culture of "Breach first; challenge later."[81]

Given that the apparently strong arguments in favour of permitting collateral attack failed in *Bird*, it is difficult to envisage many circumstances in which the Canadian courts would permit collateral attacks on orders made by energy regulators and officials. Nonetheless, in the arena of attacks on subordinate legislation, the possibility may still exist that defendants to enforcement proceedings will under certain conditions be permitted to raise the validity of the relevant by-law or regulation. After all, in *Consolidated-Maybrun*,[82] the Court referred to its precedents[83] recognizing collateral attacks on by-laws with apparent approval and

[69] *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29.

[70] *Immigration and Refugee Protection Act*, SC 2001, c 27.

[71] *Federal Courts Act*, RSC 1985, c F-7.

[72] *R v Bird*, 2019 SCC 7.

[73] *Criminal Code*, RSC 1985, c C-46.

[74] *R v Consolidated-Maybrun Mines Ltd*, [1998] 1 SCR 706.

[75] *R v Al Klippert Ltd*, [1998] 1 SCR 737.

[76] See *Consolidated-Maybrun*, *supra* note 74 at paras 45-49.

[77] *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.

[78] *Supra* note 74 at para 49.

[79] *Ibid* at para 82.

[80] *Ibid* at paras 83-85.

[81] *Ibid* at para 83.

[82] *Supra* note 74 at para 25.

[83] *R v Greenbaum*, [1993] 1 SCR 674; *R v Sharma*, [1993] 1 SCR 650.

certainly without explicitly questioning let alone overruling them.

Indeed, there may be factual configurations that would make it appropriate to permit a collateral attack to proceed in the context of a previously unchallenged regulatory order even if that regulatory order might at the time of issue been subject to appeal to a court. In that context, there could well be a *Vavilov* standard of review issue. In the mounting of a defence to enforcement proceedings, would the standard of review for the legality of the order be that of correctness as on the statutory appeal or would the order fall to be scrutinized within the framework of the general presumption of reasonableness review? As Nigel Bankes has pointed out,[84] this is an issue that may very well arise when there exist both appellate and judicial review opportunities for challenging the validity of an administrative decision for error on a pure question of law.

C) TO REMIT OR NOT TO REMIT

Frequently, where an administrative decision-maker, for example, fails to act in accordance with the rules of procedural fairness, the remedial consequence will be a quashing of the final decision and a remission of the matter to the decision-maker (or, in some instances, an alternative decision-maker) to be retaken, this time following the dictates of the rules of procedural fairness. However, that is not an invariable outcome. In many instances, the applicant for judicial review (and especially one who is the subject of sanctioning proceedings) will simply want the decision quashed; a remission for the purposes of reconsideration is something to be avoided.

In effect, this was the situation in *Vavilov*. When, on an application for judicial review, both the Federal Court of Appeal[85] and the Supreme Court of Canada determined that the appeals officer had unreasonably misinterpreted the relevant provision in the *Citizenship Act* and the Registrar had not identified, as an alternative, other bases on which Vavilov's citizenship should be revoked, there was no reason to remit the matter back for reconsideration this time in accordance with the law or the reviewing court's reasons for judgment. On the statutory interpretation issue, there was only one reasonable conclusion on the facts of this case. Moreover, Vavilov's Canadian citizenship had in effect been restored by the Court's quashing of the revocation. There was nothing more to be done. In such a case, the absence of a remission order for reconsideration of the matter would not in any way compromise the decision-making autonomy of the administrative official.

Nonetheless, as a general principle, the Supreme Court has recognized that, at the remedial stage, reviewing courts should not step inappropriately into the shoes of the administrative decision-maker. This is well illustrated by *Delta Air Lines Inc v Lukács*,[86] which I commented in the 2017 review.[87] There, the Supreme Court determined that the Canadian Transportation Agency had erred in principle in the test that it applied in denying Lukács standing to make a complaint. In dissent, Abella J, hadsupported the denial of status as reasonable on grounds not addressed in the Agency's reasons.[88] Among the reasons given by the Chief Justice for rejecting Abella J's affirmation of the outcome reached by the Agency was that it would have amounted to the Court inappropriately "assuming the role of the Agency"[89] by imposing on it a rationale for denying status that the Agency had not itself developed. In such cases, the appropriate remedial disposition was for the Court to remit the matter for reconsideration in accordance with the reasons of the Court. Thereafter, it was open to the Agency, in exercising its discretion over the determination of standing to make a complaint, to evaluate whether there were other legitimate grounds on which it should deny status to Lukács.

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[84] *Supra* note 13.

[85] *Vavilov v Canada (Citizenship and Immigration),* 2017 FCA 132.

[86] *Delta Air Lines Inc v Lukács,* 2018 SCC 2.

[87] David J Mullan, "2017 Developments in Administrative Law Relevant to Energy Law and Regulation" (2018) 6:1 ERQ 19-24.

[88] *Supra* note 86 at para 29.

[89] *Ibid* at para 28.

Subsequently, in *Vavilov*, the majority reinforced this conclusion by reference to *Lukács*.[90] It made it clear that, at least in the context of administrative decision-makers that provide reasons, it was not generally appropriate for courts to deny an application for judicial review on the basis that, irrespective of the reasons provided, the outcome itself could be supported on other grounds not identified by the decision-maker. Except in situations where there was only one reasonable outcome and not that reached by the administrative decision-maker, the generally appropriate remedial disposition was, as in *Lukács*, remission for reconsideration.

Nonetheless, the majority recognized that there could be exceptional circumstances in which remission would be inappropriate given:

> …concerns related to the proper administration of the justice system, the need to ensure access to justice, and "the goal of expedient and cost-efficient decision-making which often motivates the creation of specialized administrative tribunals in the first place."[91]

Among the situations identified by the majority were cases in which "a particular outcome is inevitable"[92] and remission would serve "no useful purpose."[93] Here, the primary authority cited was a case involving energy regulation, the 1994 decision of the Supreme Court of Canada in *Mobil Oil Canada Ltd v Canada Newfoundland Offshore Petroleum Board*.[94] While there had been a breach of the rules of procedural fairness, remission was not appropriate given that the substantive matter in the proceedings had already been resolved by a judgment on a counterclaim in the same proceedings.

Indeed, *Lukács* itself suggests another example. What if, on remission, the Agency again denied status, and this too was the subject of challenge on the basis that this decision was similarly tainted by unreasonableness albeit of a different variety? The *Vavilov* majority hints strongly that a subsequent reviewing court might in those circumstances legitimately step into the shoes of the administrative decision-maker. Appeals to deference and respect for legislative choice of the administrative decision-maker as the regulatory instrument:

> …cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations.[95]

Among other factors relevant to a reviewing court's exercise of remedial discretion on whether to remit, the majority lists:

> …concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision-maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources.[96]

The judgment of Stratas JA, for the Federal Court of Appeal in *D'Errico v Canada (Minister of Human Resources and Skills Development)*,[97] cited with approval by the majority in *Vavilov*,[98] provides a good example of a case in which some of the listed considerations were triggered. At stake was an application for judicial review of a decision denying a disability pension. In justification of not remitting an unreasonable decision but stepping into the shoes of the decision-makers and ordering the payment of the pension, Stratas JA took into account the following considerations:

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[90] *Supra* note 1 at paras 140-42.

[91] *Ibid* at para 140, quoting *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 55.

[92] *Ibid* at para 142

[93] *Ibid*.

[94] *Mobil Oil Canada Ltd v Canada Newfoundland Offshore Petroleum Board,* [1994] 1 SCR 202 at pp 228-30.

[95] *Supra* note 1 at para 142.

[96] *Ibid*.

[97] *D'Errico v Canada (Minister of Human Resources and Skills Development),* 2014 FCA 95.

[98] *Supra* note 1 at para 142.

1. In what was meant to be a rapid determination process, the application for the pension had been made six years previously;

2. If the matter were to be remitted and the new determination then be subject to an application for judicial review, a further two years were likely to elapse;

3. The pension in question was one that was meant to address very serious conditions and was of critical life-sustaining importance to those who were eligible; and

4. The record before the Court on the application for judicial review was sufficient to enable the Court to reach a conclusion on the merits.[99]

THE TRANS MOUNTAIN PIPELINE SAGA – THE BEGINNING OF THE END?

A) INTRODUCTION

Just as this paper was "going to press" on February 4, the Federal Court of Appeal handed down its judgment in *Coldwater Indian Band v Canada (Attorney General)*.[100] This was the application for judicial review in which various indigenous groups had been granted leave to challenge on limited grounds the Governor in Council's reconsideration decision approving the construction of the Trans Mountain Pipeline Expansion Project. In dismissing the application for judicial review, a panel of the Federal Court of Appeal, consisting of Noël CJ and Pelletier and Laskin JJA, held that the revised Order approving the Project had, with respect to the specific substantive (as opposed to remedial) issue on which leave to seek judicial review had been granted, met the standards of reasonableness set out in *Vavilov*. In granting leave to appeal,[101] Stratas JA had framed that issue as follows:

> [W]as the consultation with Indigenous peoples and First Nations adequate in law to address the shortcomings in the earlier consultation process that were summarized at paras. 557-563 of *Tsleil-Waututh Nation* [*v Canada (Attorney General)*[102]]?[103]

Much of the judgment consists of a careful assessment of the process followed by the Crown and the then National Energy Board in response to the earlier Federal Court of Appeal's remission of the matter for reconsideration. In this exercise, the Court paid particular attention to the reasons that the Governor in Council provided for its final Order.

Given the fact intensive nature of this application for judicial review and the consideration that the judgment is strictly outside the ambit of my mandate to review 2019 developments, I do not intend to spend much time endeavoring to provide a comprehensive analysis of this very important judgment. However, as it is one of the early applications of *Vavilov*, the principal focus of this annual review, I will venture some commentary on that aspect of the case. However, before that, let me pick up on two issues arising out of the application for leave to appeal judgment and one of the interlocutory motions that were part of the extensive case management exercise that was the background to the three day December hearing of the application for judicial review.

B) BIAS

Several applicants in applying for leave to seek judicial review of the reconsideration decision and Order had raised the issues of conflict of interest and bias. In the aftermath of the original approval decision, the Government of Canada had, through a corporate vehicle, purchased Trans Mountain. In those circumstances, it

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[99] *Supra* note 97 at paras 18-20.

[100] *Supra* note 6.

[101] *Raincoast Conservation Foundation v Canada (Attorney General),* 2019 FCA 224. For extensive commentary on this judgment, see Nigel Bankes, Martin Olszynski, and David Wright, "Federal Court of Appeal Provides Reasons in TMX Leave Applications" (11 September 2019), online: *Ablawg* <http://ablawg.ca/wp-content/uploads/2019/09/Blog_NB_MO_DW_Raincoast.pdf>.

[102] *Tsleil-Waututh Nation v Canada (Attorney General),* 2018 FCA 153.

[103] *Supra* note 101 at para 65. Stratas JA also stated two other questions: Whether "any defences or bars to the application for judicial review apply?" (at para 66), and, contingently: "[S]hould a remedy be granted and, if so, what remedy and on what terms?" (at para 66).

was argued that the Governor in Council would have both a conflict of interest and be subject to a reasonable apprehension of bias in redetermining the matter with reference to the flaws identified by the Federal Court of Appeal in *Tsleil-Waututh*.[104]

In the context of the application for leave to appeal and the test of whether there was "a fairly arguable"[105] case on these grounds, Stratas JA characterized the submission as "suffer[ing] from a fatal flaw."[106] The decision-maker, the Governor in Council, was a distinct entity from the Government of Canada and did not own the project. Given that the purchase of Trans Mountain and the structuring of the Government's ownership arrangements was accomplished through a series of Orders in Council,[107] this argument has obvious problems. On the other hand, Stratas JA's subsequent justification[108] based on statutory authorization is much more plausible. Assuming that there is a statutory or prerogative basis for the Governor in Council for both the approval of pipeline projects and the purchase of a pipeline asset, absent a constitutional argument, common law principles as to bias and conflict of interest must give way. As held by Stratas JA, the statute prevails over the common law.

It is also relevant that Stratas JA acknowledges[109] that any significant failure on the part of the Governor in Council in circumstances such as this to respect the requirements of consultation and accommodation might, with some evidential or on the record support, give rise to legitimate legal concerns. Was the Governor in Council in fact distracted from its responsibilities on behalf of the Crown to engage in good faith consultation and accommodation by its ownership of the project that was under scrutiny? However, in the context of this application for leave to appeal, there was not a "shred of evidence"[110] to support such a contention.

Indeed, while the issue of bias was not one on which leave to appeal had been given, nonetheless, the Federal Court of Appeal in *Coldwater Indian Band* indicated its agreement with this aspect of the Stratas judgment:

> [T]here is no evidence that the Governor in Council's decision was reached by reason of Canada's ownership interest rather than the Governor in Council's genuine belief that the Project was in the public interest. While the assessment that was ultimately made may benefit the Crown as owner of the Project, nothing suggests that the Governor in Council was not guided by the public interest throughout.[111]

C) TIMELINESS OF APPLICATIONS FOR JUDICIAL REVIEW OF PROJECT APPROVAL PROCESSES

In two previous iterations of this annual review,[112] I have been critical of the Federal Court of Appeal for its exclusion of any access to judicial review of the National Energy Board stage of a pipeline approval process in which the final decision-maker is the Governor in Council.[113] This outright ban on judicial review of the Board has been explained on various bases: rights are not affected at the Board stage; the Board's report is not justiciable; defects at the Board level can be cured at the Governor in Council stage; the legislative scheme justifies the implication that any challenge by way of

[104] *Supra* note 102.

[105] *Supra* note 101 at paras 14-16.

[106] *Ibid* at para 33.

[107] See Orders in Council, 2018-0635 (31 May 2019), 2018-0670 (1 June 2018) and 2018-0672 (1 June 2018).

[108] *Supra* note 101 at para 34, citing *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch),* 2001 SCC 52.

[109] *Ibid* at para 35.

[110] *Ibid*.

[111] *Supra* note 6 at para 23.

[112] David J Mullan, "2016 Developments in Administrative Law Relevant to Energy Law and Regulation" (2017) 5:1 ERQ 15 at 29-30, and David J Mullan, "2018 Developments in Administrative Law Relevant to Energy Law and Regulation" (2019) 7:1 ERQ.

[113] See the joint judgment of Dawson and Stratas JJA in *Gitxaala Nation v Canada,* 2016 FCA 187 and the judgment of Dawson JA for the Court in *Tsleil-Waututh Nation v Canada (Attorney General) supra* note 102 at paras 170-202.

judicial review should await the final decision of the Governor in Council.[114]

Not surprisingly, in the context of the leave to appeal application in *Coldwater Indian Band*,[115] and a separate application for judicial review filed by one of the affected First Nations in response to the restrictive terms on which leave to appeal had been granted,[116] Stratas JA sitting alone in both instances doubled down on the Federal Court of Appeal's position on this issue.

In the leave to appeal judgment, he described the project approvals process in the *National Energy Board Act* as "a complete code."[117] He then continued:

> As this process unfolds, recourse to the judicial system is forbidden; only at the end of the process, after the Governor in Council has decided the matters is recourse potentially available.[118]

For this proposition, he cited the foundational precedent, *Gitxaala Nation v Canada,*[119] in which he and Dawson JA had delivered the joint majority judgment of the Federal Court of Appeal, as well as *Tsleil-Waututh*.[120]

Thereafter in the second case, he held that the Nation's subsequent application for judicial review amounted to a violation of the terms of the order made in the leave to appeal application. In that context, again citing the same two judgments,[121] he rejected the Nation's argument that deficiencies in the National Energy Board's processes should be able to be addressed by an immediate application for judicial review; that review should not have to await the Governor in Council's decision at the end of the process:

> This Court has considered and rejected this argument multiple times because this particular legislative regime is not designed to permit a series of piece-meal judicial reviews. This renders cases under different legislative regimes irrelevant.[122]

In a blog on this second case,[123] Professors Wright, Olszynski, and Bankes accept that this aspect of the judgment was inevitable and that at this stage the only realistic venue for reversing the Federal Court of Appeal's position would be on an appeal in an appropriate case to the Supreme Court of Canada. However, they go on to question whether the rule itself was based on a misreading or misapplication of prior Federal Court of Appeal precedents.

I will not comment on whether the assertion about the prior precedents is justified. My point remains the same as it has been throughout. In terms of general Canadian judicial review principles, there is no longer any outright bar on the filing of applications for judicial review of non-binding reports.[124] However, as a matter of remedial discretion, courts should generally treat such applications for judicial review as premature because of the potential for the disruption of administrative processes and the likelihood that any defects can be rectified at later stages of the process. Under this regime, mid-process intervention will be an exceptional category.

In my view, this regime is ample to take care of most, if not all the concerns that have animated the Federal Court of Appeal. More generally,

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[114] *Supra* note 112 provides documentation.

[115] *Raincoast Conservation Foundation v Canada (Attorney General), supra* note 101.

[116] *Stk'emlupsemc te Secwepemc Nation v Canada (Attorney General),* 2019 FCA 239 (also known as *Ignace v Canada (Attorney General)*).

[117] *Supra* note 101 at para 10.

[118] *Ibid* at para 11.

[119] *Supra* note 113.

[120] *Supra* note 102.

[121] *Supra* note 115 at para 36. See also Stratas JA's further reiteration of this position in his judgment for a panel of three in *Raincoast Conservation Foundation v Canada (Attorney General),* 2019 FCA 259 at para 13.

[122] *Ibid*.

[123] David V Wright, Martin Olszynski, and Nigel Bankes, "TMX Litigation Takes an Unusual Turn at the Federal Court of Appeal" (5 October 2019), online: *Ablawg* <http://ablawg.ca/wp-content/uploads/2019/10/Blog_DW_MO_NB_Ignace.pdf>.

[124] See e.g. *Alberta Wilderness Assn v Canada (Minister of Fisheries and Oceans),* [1999] 1 FC 483 (CA).

I would argue that it is better to leave some room for exceptional cases than to create a new category of non-justiciable government action. I also question the proposition that the Court's position flows automatically from the terms of the relevant legislation and the classification of those provisions as a legislatively intended complete code. The legislative message can be read in a somewhat less draconian fashion with the concerns about disruption seen as amply taken care of by reading into the relevant portions of the legislation an implicit endorsement of the common law's remedial discretion principles.

D) THE DUTY TO CONSULT AND, WHERE APPROPRIATE, ACCOMMODATE — STANDARD OF REVIEW

In the foundational duty to consult Supreme Court judgment, *Haida Nation v British Columbia (Minister of Forests)*,[125] McLachlin CJ addressed the issue of standard of review. After accepting that on pure questions of law such as the "existence or extent of the duty to consult or accommodate is a legal question" on which the standard of review is that of correctness,[126] she continued to the effect that those engaged in the process were entitled to deference in the form of reasonableness review with respect to the factual assessment components of the exercise.[127] Thereafter, in a separate paragraph, the Chief Justice moved to consider the "process itself."[128] It too fell to be evaluated "on a standard of reasonableness."[129] She continued:

> What is required is not perfection, but reasonableness.[130]

This discussion of standard of review raises at least one question. Obviously, in the first paragraph, McLachlin CJ is discussing the standard to be applied to the review of decision-making by statutory authorities,and accepts differing standards of review for determinations on questions of law and questions of fact. However, it may be that in the second paragraph, the focus is changed. In this context, she may not be deploying reasonableness in the sense of a standard of review to be applied to scrutiny of the reasons for decision provided by a statutory decision-maker. Rather, in the context of the process followed by the decision-maker, reasonableness becomes a **ground** of review as opposed to a **standard** against which to measure the decision-maker's reasons. Irrespective of the decision-maker's reasons, if any for following a certain process, the task of the reviewing court is to determine by reference to its own lights whether the process is substantively reasonable.

One might ask: What difference does it make? And, maybe, in a practical sense, it does not. However, for the judicial review of energy regulators who are engaged in the assessment of whether the Crown has met its consultation and accommodation obligations, the matter may have some relevance. In conducting review of a regulator's determination on whether the Crown's obligations have been fulfilled, should the reviewing court's focal point, particularly after *Vavilov*, be an assessment of whether the regulator's reasons as to the adequacy of consultation and accommodation have met the test or standard of reasonableness? Or, should the court make its own, independent or correctness determination of whether the process of consultation and accommodation was reasonable? And, I want to suggest that they might be very different tasks and, as a matter bearing on the court's rules of procedure, dealt with in rather different ways. Thus, for example, the first approach might be one that is generally confined to the record of the proceedings under review while the second might allow for a ready introduction of extra-record material and argumentation.

In granting leave to appeal in the *Coldwater Indian Band* case,[131] Stratas JA added a rider to the primary question on which leave was

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[125] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73.

[126] *Ibid* at para 61.

[127] *Ibid*.

[128] *Ibid* at para 62.

[129] *Ibid*.

[130] *Ibid*.

[131] *Supra* note 101.

granted. In dealing with the issue of whether the shortcoming of the previous process had been remedies, the parties should "include submissions on the standard of review, margin of appreciation or leeway that applies in law."[132] Subsequently, in one of his interlocutory judgments as case manager of the litigation, he in fact referred to this very issue in suggesting "some of the questions that might usefully be explored"[133] under this rider.

> [I]n its Order in Council, the Governor in Council stated that it had considered the issue of consultation and had concluded that Canada fulfilled its duty to consult. This is a decision by an administrative decision-maker. Normally, such decisions are reviewed using the reasonableness standard of review…[134]
>
> […]
>
> Is the following irrelevant because compliance with the duty to consult, subject to leeway, is mandatory regardless of whether the Governor in Council thinks it has been complied with or not?[135]

In its judgment in *Coldwater Indian Band*,[136] the Court in fact responded to this invitation and provided a definitive answer: post-*Vavilov*, the focal point for the conduct of review should be the reasons of the Governor in Council:

> The existence and depth of the duty to consult are not in issue. All parties agree that the duty is one of deep consultation. The fundamental issue to be decided is whether taking this into account, the Governor in Council could reasonably conclude that the flaws identified…were adequately remedied by the renewed consultation process. This is a narrow issue primarily based on the Governor in Council's evaluation of the adequacy of the consultation that took place during the second consultation process, an assessment that is fact intensive and that calls for deference.[137]

Indeed, in two further paragraphs,[138] the Court continued to emphasise that its focus "must be on the reasonableness of the Governor in Council's decision." The Court also expressed its exasperation with the applicants' approach to the proceedings:

> At an early stage in these proceedings, the applicants were twice invited to focus on the Governor in Council's decision and to address the standard of review…Instead, they chose to focus on the merits of the decision.[139]

From this, it can be assumed safely that the Federal Court of Appeal sees judicial review of administrative decision-maker assessments of the adequacy of consultation with and accommodation of Indigenous Peoples as subject to the review standard of reasonableness. Moreover, following *Vavilov*, the focus of review must be the reasons provided the administrative decision-maker. Presumably, however, where the decision-maker has not addressed specifically the adequacy of Crown consultation and accommodation (by reason of oversight or a lack of authority to do so), reviewing courts will engage in an independent or *de novo* assessment of the "reasonableness" not of the decision but of the extent of the consultation and accommodation. ■

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[132] *Ibid* at para 65.

[133] *Stk'emlupsemc te Secwepemc Nation v Canada (Attorney General),* 2019 FCA 266 at para 13.

[134] *Ibid* at para 15.

[135] *Ibid* at para 18.

[136] *Supra* note 6.

[137] *Ibid* at para 16.

[138] *Ibid* at paras 29 and 79.

[139] *Ibid* at para 80.

INDIGENOUS PEOPLES' OWNERSHIP OF ENERGY PROJECTS[1]

Chrysten Perry, Keith Chatwin** and Ben Hudy****

Federal and provincial governments are required to consult with and accommodate Indigenous peoples whose rights may be affected by proposed energy projects. These requirements have led to the now standard practice of developers entering into benefit agreements with Indigenous communities for the supply of some of the work required to construct and operate these projects. These kinds of arrangements have created opportunities for Indigenous people to share in the economic benefits from these projects. They have also been instrumental in securing Indigenous peoples' support for these projects.

However, Canada's Indigenous peoples are now more than ever looking not just for benefit agreements in relation to major energy projects, but also opportunities to own all or part of those undertakings and to participate in the decisions required in their development and management.

Ownership interests in long-life energy infrastructure assets and the reliable financial returns that they can produce are seen by Indigenous peoples as a way to participate in the broader economy and generate own sourced revenues to provide improved socio-economic, healthcare and education outcomes for their communities. And more importantly as a necessary part of the spirit of economic reconciliation contemplated by Call to Action No. 92 of the Truth and Reconciliation Commission's Report.[2]

EARLY EQUITY POSITIONS

There have been numerous examples of Indigenous peoples' equity participation in energy projects.

[1] This article is based on, and has been updated from, an item originally published in Stikeman Elliott's Energy blog, online: <https://www.stikeman.com/en-ca/kh/canadian-energy-law/Indigenous-Peoples-Ownership-of-Energy-Projects>.

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[2] Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (2015) at 10.

In some cases ownership positions resulted from the strategic location of Indigenous peoples' lands and natural resources:

- the Haisla Nation's traditional territory being near Kitimat resulted in them partnering in several proposed LNG export projects on the West Coast including Kitimat LNG, LNG Canada, the Pacific Trails Pipeline and the Douglas Channel Energy Project. The Haisla's option to acquire equity in Kitimat LNG was sold for $50 million. And the lease they granted of the site required by Kitimat LNG for its project will, if it proceeds, generate substantial annual revenues for the Haisla over the 40 year life of that project;

- the Keeyask Hydropower LP between the province of Manitoba (75 per cent) and four Manitoba First Nations (25 per cent) and related agreements provided options to those First Nations groups in respect of the construction, ownership and operation of the 695 MW Keeyask Dam project in Manitoba. These agreements were the culmination of arrangements between the province and First Nations communities living in proximity to this power project that dated back to the 1970s; and

- access to the Frog Lake First Nation's lands in Alberta allowed Frog Lake Energy to joint venture with participants in the oil and gas industry to explore and develop those lands. Frog Lake Energy now produces over 3,000 barrels of oil per day.

In other cases, ownership of energy projects has evolved from the not insignificant amounts paid by project developers to Indigenous peoples through benefit agreements, adverse impact arrangements and other programs. These payments have spawned successful businesses in the energy sector for Indigenous groups and given them the financial capacity to acquire equity interests in energy assets. An example of that is the Fort McKay and Mikisew Cree First Nations' purchase of an aggregate 49 per cent interest in the East Tank Farm from Suncor in 2017 for $503 million.

THE GROWING TREND

Recent events confirm that Indigenous peoples are increasingly active in pursuing opportunities for ownership of energy projects.

Various Indigenous groups have expressed interest in acquiring all or parts of the Trans Mountain Pipeline. The federal government has published four principles for Indigenous ownership in that regard and has held discussions with Indigenous groups to sell the pipeline to them when construction of the expansion project has been de-risked. After approving the expansion of Trans Mountain the government initiated an engagement process with a broad number of Indigenous groups regarding their interest in ownership of the pipeline.

Interested investors include:

- The Western Indigenous Pipeline Group, representing First Nations along Trans Mountain's pipeline route in BC;

- Project Reconciliation, a proposed coalition of 200 First Nations and Métis communities in Western Canada who are looking to acquire a 51 per cent share. Project Reconciliation plans to fund that acquisition by issuing debt backed by shipping contracts on the line;

- The Iron Coalition who wants between 50 per cent and 100 per cent of Trans Mountain. The Iron Coalition says that it should be the preferred bidder as only First Nations and Métis communities in Alberta and BC in which this pipeline runs through will be invited to join that group; and

- The Indian Resource Council (IRC) who are working on a proposal to Ottawa to acquire the project and make the pipeline 100 per cent owned and operated by Indigenous peoples. IRC represents 134 First Nations that have either oil and gas resources on their lands or that would see their territories crossed by the Trans Mountain expansion.

The Coastal GasLink pipeline is another project in which Indigenous groups are interested in acquiring equity ownership. That pipeline is being constructed by TC Energy to deliver natural gas to the LNG Canada project on the West Coast. Recently TC Energy sold 65 per cent of the pipeline to a consortium of AIMCO and KKR and confirmed its desire to sell a further 10 per cent interest to Indigenous investors.

Equity in these projects would give participating Indigenous groups a stake in their success and may yield more support for these projects among

the Indigenous peoples affected by them and with other Indigenous peoples across the country.

Most recently:

- the federal government agreed to sell Ridley Terminals Inc. to Riverstone Holdings and AMCI Group (90 per cent) and the Lax Kw'alaams Band and the Metlakatla First Nation (10 per cent). Ridley Terminals operates a coal export terminal in northern British Columbia;

- the Tahltan First Nation purchased a 5 per cent interest in three run-of-river hydroelectric projects located in their traditional territories in BC for an aggregate price of $124 million; and

- 24 First Nations communities (51 per cent) partnered with Fortis Inc. and other private investors (49 per cent) in Wataynikaneyap Power that will develop, own and operate approximately 1,800 kilometers of transmission lines providing electricity service to First Nations communities and businesses in northwestern Ontario.

OTHER PROPOSED PROJECTS

Indigenous groups are not only interested in buying into existing energy projects. They are also participating in new undertakings.

Eagle Spirit Energy has proposed a pipeline that would carry up to 2 million barrels a day of medium to heavy crude oil from Fort McMurray across northern BC and terminating on Lax Kw'alaams lands in Grassy Point near Prince Rupert. Eagle Spirit has indicated that it will redirect the pipeline to a port terminal in Alaska to bypass the tanker ban that will result from the *Oil Tanker Moratorium Act* being passed.[3] The CEO of Eagle Spirit is a member of the Lax Kw'alaams Band. The project is expected to cost $16 billion. Financial backing has been provided by Vancouver's Aquilini family and AltaCorp Capital (partly owned by the Alberta government) has been hired to raise the first $12 billion that will be required.[4] The project has the support of major energy producers including Suncor, Cenovus and MEG Energy. Although the Lax Kw'alaams are in favour of the project, the band's hereditary chiefs supported the *Oil Tanker Moratorium Act* and have not yet given their consent to the pipeline. And while Eagle Spirit indicated that the bands along the route support the pipeline, it remains to be seen if final agreements will actually be signed by them.

In addition, two private investor groups, Generating for Seven Generations and Alberta Alaska Rail Development Corp. are proposing to build railways that would run from Alberta's oil sands to Alaska.

Equity interests in those proposed projects have been offered to various Indigenous communities.

GOVERNMENT SUPPORT

While private sector initiatives are rewriting the script on Indigenous participation in Canadian energy and energy infrastructure projects, Canadian governments are also fostering the involvement of Indigenous groups in this part of the Canadian economy.

Ontario Power Generation's calls for renewable power proposals, the second round of Alberta's Renewable Electricity Program and Alberta Infrastructure's solar RFP all required that bidders have minimum levels of Indigenous participation. Those requirements resulted in numerous projects where developers partnered with First Nations and Métis communities.

In addition a significant step in support of Indigenous commercial activity has recently been taken by the Province of Alberta. It formed the Indigenous Opportunities Corporation, the goal of which is to facilitate Indigenous communities' financial participation in major resource projects, including pipelines. The IOC will assist those communities in assessing opportunities to invest in energy projects and will provide guidance in how to finance those investments. Alberta will invest $24 million in IOC over four years and will earmark $1 billion to facilitate and backstop that financing.

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[3] *Oil Tanker Moratorium Act*, SC 2019, c 26.

[4] Eagle Spirit is modelled after the Alyeska pipeline between Alaska's Prudhoe Bay and Valdez. That project was built and is operated with involvement from the State's Indigenous peoples.

CONCLUSION

There may be skepticism about the ultimate extent of Indigenous participation in Canadian commerce and whether these proposed equity investments by Indigenous peoples will actually occur. Major energy projects in particular are difficult to execute. Financing investments in them will be challenging. Expertise in the construction and operation of energy projects will have to be arranged by Indigenous investors either directly or through strategic partnerships. And Indigenous peoples' equity positions in these kinds of projects will not necessarily guarantee that opposition to them, including from other Indigenous peoples, will disappear.

However, the levels of participation and successful results Indigenous peoples have experienced in the energy sector to date, are encouraging. That sector employs twice as many Indigenous people as the national average, including in hundreds of Indigenous businesses in communities all over Western Canada.

Importantly, federal and provincial governments also strongly support Indigenous ownership as furthering reconciliation and as a step towards Indigenous peoples' economic self-sufficiency. And given the current environment of increasing opposition to proposed energy projects the model going forward of involving Indigenous peoples as equity participants in these projects may be an effective way of securing their support and mitigating completion risks. ■

THE STRUCTURE OF THE CANADIAN ENERGY REGULATOR: A QUESTIONABLE NEW MODEL FOR GOVERNANCE OF ENERGY REGULATION TRIBUNALS?

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INTRODUCTION

With the coming into force on August 28, 2019 of Bill C-69[1] enacting the *Canadian Energy Regulator Act*[2] ("***CER Act***") and the *Impact Assessment Act*[3] ("***IA Act***"), the federal assessment process for energy infrastructure projects was fundamentally restructured. Bill C-69 was highly controversial, referred to by many of its opponents, including by some provincial government leaders, as "the no more pipelines Bill."[4]

The changes implemented with the proclamation of Bill C-69 included the abolition, after 60 years, of the National Energy Board ("**NEB**") and established its replacement, the Canadian Energy Regulator ("**CER**").[5] At the same time, primary responsibility for the impact assessment of designated projects that had previously been within the jurisdiction of the NEB was assigned to the newly-established Impact Assessment Agency of Canada.

Under the new regime, decisions to approve or reject proposed major energy infrastructure

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[1] 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, 2019.

[2] *Canadian Energy Regulator Act*, SC 2019, c 28, s 10 [*CER Act*].

[3] *Impact Assessment Act*, SC 2019, c 28, s 1.

[4] See for example, Josh K Elliott, "Why critics fear Bill C-69 will be a 'pipeline killer'", *Global News* (21 June 2019), online: <https://globalnews.ca/news/5416659/what-is-bill-c69-pipelines>.

[5] Notwithstanding that subsection 10(1) of the *CER Act* expressly establishes the CER as a corporation "to be called the Canadian Energy Regulator", the agency opened for business as the "Canada Energy Regulator". See online: <https://www.cer-rec.gc.ca/bts/nws/vds/intdcnghcr-eng.html>.

projects will be made at the political level of government (practically speaking, by the federal cabinet) rather than by an independent quasi-judicial tribunal (formerly, until 2012, the NEB). As the Minister of Environment and Climate Change stated in the House of Commons on February 14, 2018:

> "[T]he final decision on major projects will rest with me or with the federal cabinet…"[6]

The role of the review process is to make **recommendations** to government, which can be accepted or rejected without further review.[7]

The changes implemented by the *CER Act*, however, extend beyond entrenching a redefined role for the regulator. The Act also introduced a significant **structural** change that is a radical departure from the model that has generally, and until recently,[8] been adopted for quasi-judicial energy regulatory tribunals in Canada.

Under the *National Energy Board Act* (***NEB Act***), the NEB's regulatory and other functions were vested in a single board, the members of which were appointed by the Governor in Council.[9] The Board was not overseen by any supervisory body and answered only to its statutory mandate, subject to limited judicial appeals and review. Indeed, the unitary structure of the Board was integral to maintaining its position as a fully independent quasi-judicial tribunal.

One of the members of the Board was designated as Chairperson. The Chairperson was also defined to be the "chief executive officer" of the Board, with authority to apportion work among the members and to supervise and direct the work of the Board's **staff**.[10] As will be discussed further, until 2012 the Chairperson did not have any authority to direct the work of Board members. As a Board member, the Chairperson was in effect "a first among equals."

The model implemented under the *CER Act* trifurcates the roles of regulatory decision-making (vested in a "**Commission**"), executive management (vested in a "**Chief Executive Officer**") and "governance" (vested in a "**board of directors**"). The pivotal role within this structure is that of the Chief Executive Officer, who is neither a commissioner nor a member of the board of directors. The Chief Executive Officer is not directly accountable to the board of directors but, rather, to the responsible Minister.

The model raises obvious questions about the relationship between, on the one hand, the quasi-judicial Commission and, on the other hand, the Chief Executive Officer and the board of directors, in particular with respect to the independence of the Commission. The accountability of the Chief Executive Officer (the pivotal function in the tripartite structure) to the political level could also be seen as undermining the independence of the CER overall.

Under this tripartite structure, the CER cannot be said to be as independent of government as was the NEB, which, with its unitary structure, was not subject to any external influences. When combined with the consolidation of decision-making at the political level of government, the change represents a significant retreat from past reliance on decision-making by independent, quasi-judicial, expert, regulatory agencies. The consequences of this paradigm shift will only become apparent with experience.

This tripartite structure appears to have been first introduced in Alberta with the enactment in 2012 of the *Responsible Energy Development Act* ("***RED Act***")[11] and the establishment in 2013 of the Alberta Energy Regulator ("**AER**"), as successor to the Energy Resources Conservation Board. A similar model is also

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[6] 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, 2nd Reading, *House of Commons Debates*, 42-1, No 264 (14 February 2018) at 17202-3.

[7] The change in the NEB's role from decision-maker to making a recommendation was made in 2012 and is discussed further below.

[8] See further discussion below.

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

[10] *Ibid*, s 6(2).

[11] *Responsible Energy Development Act*, SA 2012, c R-17.3.

being implemented in Ontario,[12] based on the recommendations in the Final Report of the Ontario Energy Board Modernization Panel.[13]

Remarkably, a clear rationale for the model has not been articulated in Alberta, Ontario or by the federal government. Indeed, the fact that such a fundamental change was proposed under Bill C-69 was not even mentioned in the responsible Minister's second reading speech.

This article analyzes the new structural model and its implications for the management and operation of the CER. It also analyzes provisions in the *CER Act* that are aimed at protecting the independence of the Commission from direction by the Chief Executive Officer (executive function) or the board of directors (governance function).

STRUCTURE AND INDEPENDENCE OF THE NEB PRIOR TO 2012

The National Energy Board was established in 1959 in the wake of what is known as the "Great Pipeline Debate," which arose from the government's support of a proposed Crown corporation to build the Ontario section of what would become the natural gas pipeline system owned and operated by TransCanada PipeLines Limited (now TC Energy), over a competing proposal to build a pipeline from Alberta to the east by way of a southern route through the U.S.[14] On May 14, 1956, due to concerns that the financing of the project would be jeopardized if the proposed legislation was not passed quickly, the government invoked closure in Parliament and the legislation was passed on June 6. However, the government was defeated in the general election the following year; its use of closure was widely accepted at the time as the single most significant contributor to that defeat. The episode has been described as "one of the most famous confrontations in parliamentary history."[15]

Against this background, the overriding purpose of Parliament in establishing the NEB in 1959 was to entrench an independent, quasi-judicial, expert tribunal that would be insulated from political influence. In debate on the proposed *National Energy Board Act* in May 1959, the Prime Minister assured Parliament that the Board would "operate beyond any suggestion of control in any way."[16] Decisions on future pipeline projects would be made outside the political realm.

This intention was reflected in several features of the *NEB Act* as originally enacted and as largely continued until 2012.[17] For example, the Board was established as a court of record and its members could only be removed by the Governor in Council ("**GIC**") "on address of the Senate and House of Commons."[18]

Further, the Board's decisions were indeed decisions and not mere recommendations. Decisions to deny an application for a facilities certificate were final and were not reviewable by cabinet. Board decisions to grant a certificate were subject to the approval of the GIC but the GIC could only approve, or deny approval of, the Board's decision; the GIC had no authority to modify the decision or even to refer it back to the Board for further consideration.[19]

In an analysis of the independence of the NEB prior to 2012, one of the present writers concluded that, while an absolute guarantee of entrenched independence for a regulatory tribunal is not possible (such tribunals are often

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[12] See David Stevens, "Ontario Government Takes Steps to Reform the Ontario Energy Board" (2019) 7:3 Energy Regulation Quarterly, online: <http://www.energyregulationquarterly.ca/articles/ontario-government-takes-steps-to-reform-the-ontario-energy-board#sthash.CEVLwvNt.dpbs>.

[13] *Ontario Energy Board Modernization Review Panel Final Report* (Toronto: Ontario Energy Board, 2018), online: <https://www.ontario.ca/document/ontario-energy-board-modernization-review-panel-final-report>.

[14] See Earle Gray, *Forty Years in the Public Interest: A History of the National Energy Board* (Toronto: Douglas & McIntyre, 2000) at 9.

[15] Robert Bothwell, "Pipeline Debate" (2012), online: *The Canadian Encyclopedia* <https://thecanadianencyclopedia.ca/en/article/pipeline-debate>.

[16] *House of Commons Debates*, 24-2, Vol IV (26 May 1959) at 4020.

[17] The 2012 amendments to the *NEB Act* are discussed further below.

[18] *NEB Act, supra* note 9 at s 3(2). Members of the Commission of the CER can be removed by the Governor in Council "for cause", without having to resort to Parliament, as discussed further below.

[19] See Rowland J Harrison, "The Elusive Goal of Regulatory Independence and the National Energy Board" (2013) 50 Alta L Rev 757.

and tellingly described as "subordinate" agencies), the *NEB Act* prior to 2012 "provided as much of a guarantee [of independence] as is possible within the framework of Parliamentary supremacy."[20]

In the present context, it is to be emphasized that, prior to 2012 the NEB was unquestionably the master of its own procedure — a defining measure of a tribunal's degree of independence. The Board (and its members) answered only to its mandate under the *NEB Act*, free from any external influence, direct or indirect. The unitary structure of the Board was an integral element of this independence.

THE 2012 AMENDMENTS TO THE *NEB ACT*

In 2012, the role of the NEB in reviewing proposed energy infrastructure projects was changed from that of decision-maker to instead making a recommendation to the GIC, which was empowered to make a final decision, rather than merely approve a decision by the Board. After the adoption of these amendments, the GIC could ultimately make a decision that was contrary to the Board's recommendation.

The 2012 amendments to the *NEB Act* also introduced requirements with respect to time limits for the Board's proceedings, some of which empowered the Chairperson, to ensure that a specific application was dealt with in a timely manner, to give directives to the members of individual Board panels in specific proceedings "regarding the manner in which they are to do so."[21] Thereafter, Board panels could not be said to be masters of their own procedure, at least not to the same extent as they had been previously.

These changes had clear implications for the independence of the NEB, at least as that independence had been entrenched up until that point.[22] However, the **structure** of the Board remained as it had been before, with the Board (and its members) being responsible only to its mandate under the *NEB Act*, without any non-judicial oversight.

THE TRIPARTITE STRUCTURE OF THE CER

The *CER Act* establishes the Canadian Energy Regulator as a corporation, referred to throughout the Act as "the **Regulator**." However, unlike the *NEB Act* that defined the Board to consist of the members appointed by the GIC,[23] the *CER Act* separately establishes three constituent entities — a Chief Executive Officer, a part-time board of directors and a Commission. There are no overlapping memberships; members of the Board of Directors are not members of the Commission and the Chief Executive Officer is not a member of either the Board or the Commission.

The Chief Executive Officer

The key official in this tripartite structure is the Chief Executive Officer ("**CEO**"), whose role is defined as follows:

> The Chief Executive Officer is responsible for the management of the Regulator's day-to-day business and affairs, including the supervision of its employees and their work. The Chief Executive Officer must not however give directions with respect to any particular decision, order or recommendation by the Commission or a commissioner.[24]

The CEO is appointed by the GIC, on the recommendation of the Minister after the Minister has consulted the directors, and is to hold office on a full-time basis during pleasure for a term of up to six years.[25] The CEO can be reappointed but is to serve no more than 10 years in office in total.[26] The CEO has the rank and powers of a deputy head of a department,[27]

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[20] *Ibid* at 770.

[21] *NEB Act, supra* note 9 at s 6(2.1).

[22] See further discussion in Harrison, *supra* note 19.

[23] *NEB Act, supra* note 9 at s 3(1).

[24] *CER Act, supra* note 2 at s 23(1).

[25] *Ibid* at s 28(1).

[26] *Ibid* s 21(3).

[27] *Ibid* s 23(2).

as defined under the *Financial Administration Act*[28] and other federal legislation.

The *CER Act* does not provide that the CEO is accountable to the board of directors. As is discussed in the next section, the board is responsible only for "governance functions including providing strategic direction and advice." Further, the board is not responsible for the management of the CER's day-to-day business and affairs.

Rather, given that the CEO is appointed by the GIC on the advice of the Minister, and serves "at pleasure," the CEO appears to be accountable to the political level of government, meaning in practical terms the responsible Minister.[29] This central feature of the structure of the CER appears to run counter to the statement in the Preamble to the *CER Act* that the government "is establishing an independent energy regulatory body…"

The Board of Directors

The board of directors of the Regulator is to consist of at least five but not more than nine part-time directors, including a Chairperson and a Vice-Chairperson. At least one of the directors must be an Indigenous person. The Chief Executive Officer, members of the Commission or employees of the Regulator are not eligible to be a director. Directors are to hold office on a part-time basis and during pleasure for a term of five years and may be reappointed.

The role of the board is defined as follows:

> The board of directors is responsible for the governance of the Regulator and its governance functions include providing strategic direction and advice to the Regulator. The board of directors must not however give directions or provide advice with respect to any particular decision, order or recommendation that is made by the Commission or a commissioner.[30]

The board of directors is also charged with submitting an annual report on the Regulator's activities to the Minister who must cause the report to be laid before Parliament.[31]

The respective roles of the board of directors and the CEO are discussed further below.

The Commission

The Commission of the Regulator is to consist of up to seven full-time commissioners, at least one of whom must be an Indigenous person. There may also be a complement of part-time commissioners. Generally, three commissioners constitute a quorum. Commissioners are to be appointed by the GIC to hold office "during good behaviour" for a term not exceeding six years.[32] A commissioner may be reappointed but is to serve no more than 10 years in office in total.

Many of the institutional elements of the Commission are similar to those of the former NEB. For example, the Commission is a court of record with the same powers and jurisdiction to inquire into, hear and determine matters and issue orders and prohibitions as the former NEB.[33] It is to be noted, however, that commissioners do not have the same security of tenure as did members of the NEB, who could only be removed by the GIC on address of the Senate and House of Commons;[34] commissioners can be removed by the GIC "for cause," without address to Parliament.[35]

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[28] *Financial Administration Act,* RSC 1985, c F-11.

[29] Under the *NEB Act*, while the designation of the Chairperson (and chief executive officer) could be revoked at any time by the GIC, that individual's status as a Board member could only be revoked by the GIC on joint address to Parliament.

[30] *CER Act, supra* note 2 at s 17(1).

[31] *Ibid* at s 18(1).

[32] *Ibid* at s 28(1).

[33] *Ibid* at ss 31-32.

[34] *NEB Act, supra* note 9 at s 3(2).

[35] *CER Act, supra* note 2 at s 28(3). As noted above, directors and the Chief Executive Officer serve "during pleasure", rather than "during good behavior."

Some of the responsibilities of the Chairperson of the former NEB are now conferred on a Lead Commissioner, whose role is defined as follows:

> The Lead Commissioner is responsible for the business and affairs of the Commission and, in particular, is responsible for apportioning the Commission's work among the commissioners and for establishing panels — of at least three commissioners — to exercise the powers of the Commission and perform its duties and functions in relation to a matter before it.[36]

This provision appears to be a necessary, and reasonable, means by which the work of the Commission with respect to individual matters can be assigned, without itself introducing any risk that the Lead Commissioner could interfere in an individual panel's proceedings. It is a similar authority to that of a chief justice in the courts.

However, additional authorizations in the *CER Act* for the Lead Commissioner to intervene in individual proceedings clearly could impinge upon the independence of the commissioners designated to conduct those proceedings and are discussed further below.

SEPARATION OF COMMISSION AND EXECUTIVE FUNCTIONS

The tripartite structure of the CER is fundamentally different from the unitary structure of the former NEB. Under the *NEB Act*, the NEB was itself responsible for all aspects of its mandate, with the exception of executive functions which were vested in the Chairperson. It is to be emphasized, however, that combining the dual functions of the Chairperson — as chief executive officer and as a Board member — in a single appointee ensured that the executive function was fully informed of, and responsive to, the needs of the Board in exercising its quasi-judicial and other responsibilities.

Under the *CER Act*, responsibility for the executive function within the CER resides solely with the CEO and, as a result, the Commission is wholly dependent for financial, administrative and staff support on the CEO who, in turn, has a clear reporting function to the Minister. Section 25 of the *CER Act* is clear:

> For greater certainty, the Chief Executive Officer is responsible for the provision of the support services and the facilities that are needed by the Commission to exercise its powers and perform its duties and functions in accordance with the rules that apply to its work.[37]

As already noted, the CEO is not a member of the Commission. There may, therefore, be a potential for indirect constraints on the Commission's ability to meet its responsibilities, resulting from resource allocation decisions over which the Commission has no control.

It is interesting to note here how executive responsibilities are dealt with in the *Supreme Court Act*[38] under which the Court Registrar is responsible for various administrative support and management functions. While defining the Registrar's functions in this regard, that Act prescribes the Registrar's authority as being "[s]ubject to the direction of the Chief Justice,"[39] "under the supervision of the Chief Justice"[40] or "as the Chief Justice directs."[41] These provisions recognize that the proper role of management of judicial bodies is to support the substantive work of such bodies. In this context, a failure to provide adequate resources to support the performance of a judicial body's substantive responsibilities could directly undermine the independence of that body.

Under the *CER Act*, the provision of support services and facilities to the Commission is

[36] *CER Act, supra* note 2 at s 38.

[37] *Ibid* at s 25.

[38] *Supreme Court Act*, RSC 1985, c S-26.

[39] *Ibid* at s 15.

[40] *Ibid* at s 16.

[41] *Ibid* at s 17.

exclusively within the authority of the CEO, who is not accountable to the Commission.[42] Under the *NEB Act*, while the Chairperson was not accountable to the Board as chief executive officer, the link that existed by virtue of the dual roles of the Chairperson and chief executive officer being vested in the same person no doubt mitigated the risk of the Board's work being impeded by its dependence on resources allocated by a third party.

ADVISORY FUNCTIONS

Under Part II of the *NEB Act*, in addition to its regulatory decision-making responsibilities, the NEB also had "advisory functions," to study and keep under review certain specified energy matters.[43] Further, the Minister could request advice from the Board and call on it to prepare studies and reports.[44] This inclusion of advisory functions in the responsibilities of an independent quasi-judicial tribunal was anomalous, and sometimes was questioned on the ground that it arguably impinged upon the Board's independence from government.[45]

These advisory functions have been carried forward in the *CER Act* but are now assigned to the Regulator, rather than to the quasi-judicial Commission.[46] When considered in the context of the overall structure of the CER, the result is that functions of the CER, other than those assigned to the Commission, will be carried out under the immediate direction of the CEO, as overseen by the board of directors. This separation of advisory functions from the Commission's quasi-judicial responsibilities has removed at least part of the basis for past criticism, although the appropriateness of combining advisory functions in the same agency in which the regulatory function is found might still be questioned by some.

INDEPENDENCE OF THE CER

The Preamble to the *CER Act* states that "the Government of Canada is establishing an independent energy regulatory body…" Measures are included in the *Act* aimed at ensuring the independence of the **Commission** of the CER and these are reviewed in the next section. However, the degree of independence of the CER as a whole might be questioned, particularly in light of an acknowledgement by the CER itself of an ongoing role for the Minister:

> The Minister may exercise substantial discretion regarding the extent of personal engagement with the CER, and also regarding the role of the portfolio deputy, but in all cases communication with the senior leadership of the CER, specifically the Chairperson of the Board and the CEO is important.[47]

This suggests that the word "independent" is used in the Preamble to the *CER Act* in a qualified sense.

INDEPENDENCE OF THE COMMISSION

The tripartite structure of the CER warrants separate discussion of whether the independence of the Commission, in the exercise of its quasi-judicial functions, might potentially be undermined by the exercise of the functions of either the board of directors (responsible for "governance") or the CEO (responsible for "management").

The *CER Act* includes provisions directly aimed at minimizing this risk. In defining the role of the board of directors, it is provided that the board must not "give directions or provide advice with respect to any particular decision, order or recommendation that is made by the

[42] Nor, as is discussed further below, is the CEO accountable to the Board of Directors, which is responsible for "the governance of the Regulator and its governance functions…" (*CER Act, supra* note 2 at s 17(1)).

[43] *NEB Act, supra* note 9 at Part II.

[44] *Ibid* at s 26(2).

[45] See for example, Alastair R Lucas & Trevor Bell, *The National Energy Board: Policy, Procedure and Practice* (Ottawa: Law Reform Commission of Canada, 1977) at 35.

[46] *CER Act, supra* note 2 at ss 80-86.

[47] See Canada Energy Regulator, "Governance of the Canada Energy Regulator – Mandate, Roles and Responsibilities" (2019), online: <https://www.cer-rec.gc.ca/bts/whwr/gvrnnc/mndtrlsrspnsblts/index-eng.html>.

Commission or a commissioner."[48] It is also provided that the CEO shall not give directions with respect to any particular matter before the Commission.[49] Surprisingly, however, the CEO is not explicitly prohibited from providing "advice," as is the board of directors.

It must also be noted in this context that the GIC may "give to the Regulator directions of general application on broad policy matters with respect to the Regulator's mandate."[50] Such directions are to be given by "binding" order.[51]

These provisions are probably sufficient to guard against any direct impingement on the Commission's independence. Their effectiveness in preserving the **perception** of the Commission's independence must, however, remain to be assessed on the basis of experience.

INDEPENDENCE OF COMMISSION PROCEEDINGS

However, while the *CER Act* includes measures intended to guard the Commission's independence from the board of directors and the CEO, the Act also includes provisions that could seriously undermine the Commission's independence from within, arising from the imposition of binding time limits within which certain specified steps must be taken by the Commission. These include reports to the Minister on the issuance of a certificate of public convenience and necessity for a pipeline,[52] orders for leave to open pipelines[53] and the issuance of certificates for power lines.[54]

The very imposition of time limits may have some impact on the independence of a tribunal's proceedings.[55] The immediate concern under the *CER Act*, however, arises from section 41, which provides:

> To ensure that an application before the Commission is dealt with in a timely manner, the Lead Commissioner may give instructions to the commissioners authorized to deal with the application respecting the manner in which they are to do so.[56]

Furthermore, section 42 provides that, where the Lead Commissioner is satisfied that any of the specified time limits is not likely to be met, the Lead Commissioner may take "any measure that he or she considers appropriate to ensure that the time limit is met," including removing any or all commissioners, authorizing one or more commissioners to deal with the application and increasing or decreasing the number of commissioners dealing with the application. For greater certainty, it is added that the Lead Commissioner may designate himself or herself as the sole commissioner to deal with an application to ensure that a time limit will be met.[57]

These provisions — broadly similar to provisions introduced into the *NEB Act* in 2012 — directly undermine the independence of the Commission as measured by the degree to which Commission panels are masters of their own procedure.[58]

THE NEB MODERNIZATION PANEL REPORT

As discussed further below, Alberta had adopted a similar tripartite model when it established the Alberta Energy Regulator ("**AER**") in

[48] *CER Act, supra* note 2 at s 17(1).
[49] *Ibid* at s 23(1).
[50] *Ibid* at s 13(1).
[51] *Ibid* at s 13(2).
[52] *Ibid* at s 183(4).
[53] *Ibid* at s 214(3).
[54] *Ibid* at s 262(4).
[55] See further discussion in Harrison, *supra* note 19.
[56] *CER Act, supra* note 2 at s 41.
[57] *Ibid* at s 42(2).
[58] See further discussion in Harrison, *supra* note 19.

2013.[59] The adoption of the model for the CER, however, can be directly linked to the 2017 Report of the Expert Panel on the Modernization of the National Energy Board.[60] The Panel noted that the NEB did not operate as a traditional corporate board of directors and described it as being "more akin to a group of commissioners or judges."[61] Apparently based only on this self-evident observation, the Panel then concluded that "we can already see the seeds of dissonance between what the NEB is organized to do and what might reasonably be expected of it by a broad range of players."[62]

The Panel observed:

> [T]he NEB has a Board which performs some of the functions of a traditional board of directors, but without formal accountability for governance except for the Chair, but the Board also represents the pool of Board members who may sit on hearing panels overseeing projects. What's more, the Chief Executive Officer of the NEB (the organization) is also the Chair of its Board. This creates an unenviable situation whereby the very people who oversee the NEB's performance are the same people who make its major decisions as members of hearing panels. What's more, this arrangement generates the contorted linguistic situation of having to distinguish between the National Energy Board, and the National Energy Board's Board.[63]

The validity of these observations is questionable. Indeed, it is submitted that they reflect a misreading of the *NEB Act* under which **the members were the Board,**[64] the members were not responsible for overseeing their own performance and there was no need "to distinguish between the National Energy Board and the National Energy Board's Board." Nevertheless, in spite of these contradictions and misreading of the *NEB Act*, the Panel proceeded to recommend the three-tiered structure.

The Panel specifically recommended that the Chief Executive Officer not be a hearing commissioner. However, it also recommended that the Chief Executive Officer not be a board member, which, as already discussed, has been incorporated into the *CER Act*. No reason for this particular recommendation was given and it is puzzling in light of the Panel's apparent reliance on the corporate model for a governing board of directors. It noted:

> Most corporations and government entities with a "Board" are governed by a board of directors responsible for setting strategic direction and conducting broad oversight of the organization's operations. These types of organizations are managed on a day-to-day basis by a Chief Executive Officer or equivalent, responsible for implementing the vision and strategy of the board of directors.[65]

What these observations overlook is that corporate CEOs are directly accountable to a board of directors that has the authority to hire and fire them. As discussed above, the CEO of the CER is not directly accountable to its board of directors but, instead, is accountable to political entities who may remove the CEO "at pleasure." Further, as noted, the CER board has only to be "consulted" in the CEO's appointment.

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[59] See further discussion below.

[60] Canada, Expert Panel on the Modernization of the National Energy Board, "Forward, Together: Enabling Canada's Clean, Safe, and Secure Energy Future" (15 May 2017), online: <https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/NEB-Modernization-Report-EN-WebReady.pdf>; Also see Nigel Bankes, "The Report of the Expert Panel on the Modernization of the National Energy Board and the Response of the Government of Canada" (2017) 5:3 Energy Regulation Quarterly, online: <http://www.energyregulationquarterly.ca/articles/the-report-of-the-expert-panel-on-the-modernization-of-the-national-energy-board-and-the-response-of-the-government-of-canada#sthash.0S5O4Jow.dpbs>.

[61] *Ibid* at 17.

[62] *Ibid*.

[63] *Ibid* at 61.

[64] *NEB Act, supra* note 9 at s3(1).

[65] *Supra* note 60 at 61.

THE AER PRECEDENT

As noted earlier, Alberta adopted the tripartite model when it established the Alberta Energy Regulator ("**AER**").[66] There are, however, significant differences with respect to the role of the board of directors and the status of the Chief Executive Officer of the AER compared to the CER. First, the AER board of directors (the members of which are appointed by the Lieutenant Governor in Council[67]) "is responsible for the general management of the business and affairs of the Regulator,"[68] whereas the board of directors of the CER is responsible for "governance, includ[ing] providing strategic direction and advice..."[69] Second, the CEO of the AER is appointed by the board (subject to the approval of the Minister),[70] whereas the CEO of the CER is appointed by the GIC on the recommendation of the Minister who, as noted, is required only to consult the directors. Further, the AER board determines the CEO's remuneration.[71]

The AER model resembles a corporate sector model more closely than does the CER model. It is clear from the details of the AER structure that the board of directors has overall responsibility, not just for governance functions, but for "the **general management** of the business and affairs of the Regulator" and that the CEO is accountable to the board for **day-to-day operations**.

Recent experience with the AER, however, illustrates that governance and executive management structures do not themselves provide any guarantees against abuse.[72] On October 3, 2019, separate reports were released by the Alberta Auditor General,[73] the Public Interest Commissioner[74] and the Office of the Ethics Commissioner[75] concluding that the AER had wrongfully used its resources to establish an international regulation centre ("**ICORE**") outside the AER's mandate and that the CEO had displayed "reckless and wilful disregard"[76] for the proper management of public funds. The report of the Office of the Ethics Commissioner concluded that the CEO had breached the *Conflicts of Interest Act*[77] in making decisions that furthered his private interests and in failing to appropriately or adequately disclose a real or apparent conflict of interest to the board of directors of the AER.[78]

None of the three reports suggested that the **institutional** relationship between the board of directors and the CEO had contributed to the respective findings. Two of the reports, however, did comment on the absence of proper oversight by the board. The report of the Auditor General concluded that the board had been overly reliant on management and, further, had not received complete and accurate information about ICORE.[79] Board oversight was "ineffective."[80] The report of the Public Interest Commissioner found that the board

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[66] The Alberta Energy Regulator is established by the *Responsible Energy Development Act* (*RED Act*), *supra* note 11.

[67] *Ibid* at s 5(1).

[68] *Ibid* at s 6(1).

[69] *CER Act, supra* note 2 at s 17(1).

[70] *Supra* note 11 at s 7(1)(a).

[71] *Ibid* at s 7(1)(b).

[72] See Bob Heggie, "Governance of Administrative Agencies" (2019) 7:3 Energy Regulation Quarterly: "People are the key. Effective agencies depend on behaviours and relationships more than procedures and structures." online: <http://www.energyregulationquarterly.ca/articles/governance-of-administrative-agencies#sthash.uypkrcyZ.dpbs>.

[73] Auditor General of Alberta, "An Examination of the International Centre of Regulatory Excellence (ICORE)", October 2019, online: <https://www.oag.ab.ca/reports/aer_icore-oct_2019>.

[74] Alberta, Public Interest Commissioner, *A report of the Public Interest Commissioner in relation to wrongdoings within the Alberta Energy Regulator*, (Edmonton: Public Interest Commissioner, 2019), online: <https://yourvoiceprotected.ca/wp-content/uploads/2019/10/2019Oct3-Public-Interest-Commissioners-Report-AER-ICORE.pdf>.

[75] Ethics Commissioner, "Report of the Investigation by the Ethics Commissioner into allegations involving Jim Ellis", June 14, 2019, online: <https://open.alberta.ca/publications/report-of-ethics-commissioner-into-allegations-involving-jim-ellis>.

[76] *Supra* note 74 at 3.

[77] *Conflicts of Interest Act*, RSA 2000, c C-23.

[78] *Supra* note 75 at 28.

[79] *Supra* note 73 at 8.

[80] *Ibid* at 1.

did not appear to have the expertise, focus or detachment required to oversee the CEO.[81] The board was replaced soon after the release of these findings.[82]

As noted, the board of directors of the AER is expressly charged with responsibility for "the general management of the business and affairs of the Regulator." However, apparently the CEO of the AER did not agree with what appears to be the clear meaning of these words. In his interview with the Ethics Commissioner, the CEO stated that the board was "purely a governance board and not an operational board."[83] It seems clear that this (apparently mistaken) view of the respective roles of the board and the CEO was a significant factor in leading to the serious findings of each of the three critical reports.

The AER experience suggests, therefore, that a structure with "purely a governance board and not an operational board" should be avoided. That is, however, precisely the model that has been adopted for the CER. Under the *CER Act*, it is clear that the board is a "governance" board only and that "management of the Regulator's day-to-day business and affairs" resides exclusively with the CEO. Furthermore, the CEO of the CER is not directly accountable to the board of directors, which is all the more concerning given that the serious issues with the AER experience arose notwithstanding that the CEO was appointed by, and could be dismissed by the board. It is to be recalled in this context that the CEO of the CER is appointed by the GIC (on the recommendation of the Minister, after merely consulting with the board of directors) and serves "at pleasure." The CEO's accountability, *de facto*, is to the Minister, which is to say, to the political level of government.

The view expressed by the CEO of the AER that the board of directors was "purely a governance board" appears to have been mistaken in light of the statutory wording of the board's mandate. However, the view accords with the relevant wording in the *CER Act* and suggests the need for a cautionary note about the respective roles of the board of directors and the CEO of the CER. The responsibility of the CER board is expressly described as "governance [including] providing strategic direction and advice…" and not "management of the Regulator's day-to-day business and affairs…" which is entirely the responsibility of the CEO.

In sum, the *CER Act* has, in effect, enshrined a relationship between the board of directors and the CEO in which the CEO is not clearly accountable to the board. The experience with the AER suggests the potential for problems to arise within the CER.

RATIONALE FOR THE TRIPARTITE STRUCTURE

Given the fundamental change imposed by the tripartite structure (compared to the unitary board structure that has been commonplace in Canada until recently), it is surprising, to say the least, that no clear rationale for adoption of the model has been put forward. In a recent article, Bob Heggie (who has extensive experience in energy regulation agencies and has been the Executive Director of the Alberta Utilities Commission for more than 10 years) concluded:

> The recent movement to a three-legged governance model for adjudicative agencies seems largely based on theoretical corporate governance, with little consideration for the existing governance, accountability mechanisms and complexities of operating a quasi-judicial agency in the parliamentary system. Nor does it seem to consider whether this new structure would improve the agency objective of delivering its

[81] *Ibid* at 19.

[82] See Amanda Stephenson, "UCP cans AER board, launches promised review of regulator's mandate", *Calgary Herald* (6 September 2019), online: <https;//calgaryherald.com/business/[ocal-business/ucp-cans-aer-board-launches-promised-review-of-regulatorsmandate>; Both the AER itself and the Alberta government have launched comprehensive reviews of the AER and, in January, several dozen senior staff were laid off, see Geoffrey Morgan, "AER lays off dozens of senior staff as board and Alberta government review embattled regulator", *Financial Post* (22 January 2020), online: <https://business.financialpost.com/commodities/aer-la.ys-offdozens-of-senior-staff-as-board-and-alberta-government-review-embattled-regulator>. While it is not apparent that the tripartite structure of the AER is explicitly part of either review, it will likely be part of the government's review.

[83] *Supra* note 75 at 6.

> responsibilities in the most effective manner.[84]

We agree. Nevertheless, the *CER Act* has fully embraced the model.

Furthermore, in light of the experience in Alberta with the AER, the specific version instituted by the *CER Act* appears to be flawed in providing that the Chief Executive Officer is not accountable to the board of directors, but rather to the Minister.

CONCLUSIONS

As was the case with the former NEB, the CER has a range of responsibilities that extend beyond purely quasi-judicial decision-making. In principle, the separation of the quasi-judicial function from the governance and management functions may be appropriate, provided that the quasi-judicial function is insulated from any risk of interference, direct or indirect. The provisions in the *CER Act* that expressly restrict the board of directors and the CEO from giving directions with respect to any particular matter before the Commission may prove to be adequate in this regard.[85] However, the dependence of the Commission on the CEO (who in turn is accountable, in practical terms, to the Minister) for matters including resource allocation could potentially interfere with the Commission's ability to meet its responsibilities and thereby indirectly undermine its independence.

The relationship between the board of directors and the CEO of the CER is potentially problematic. The board of directors is expressly a "governance" board only, with no responsibility for "management," which is exclusively the role of the CEO. The *CER Act* has enshrined the very relationship that existed *de facto* between the board of directors of the AER and its CEO — a relationship that was a major factor leading to the serious ethical and statutory breaches in that organization.[86]

Further, the accountability of the key figure in the tripartite structure — the Chief Executive Officer — to the political level of government arguably undermines the goal stated in the Preamble to the *CER Act* of establishing "an independent energy regulatory body…"[87]

Whatever the theoretical merits of this new model (and they have nowhere been clearly articulated), it is clear that the CER is a very different entity from the NEB established in 1959 to ensure that decisions would be made outside the political realm, "beyond any suggestion of control in any way."[88] ■

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[84] *Supra* note 72.

[85] Curiously, however, as noted above, while the board of directors is also prohibited from "provid[ing] advice", no such prohibition expressly applies to the CEO.

[86] Although the three official reports on wrongdoing in the AER were not released until after the enactment of the CER Act, problems in the management of the AER had become known well before then and presumably were known to the federal government.

[87] *CER Act, supra* note 2 at Preamble.

[88] *Supra* note 16.

NATIONAL STEEL CAR: A CONSTITUTIONAL CHALLENGE TO THE ONTARIO GLOBAL ADJUSTMENT CHARGE TO ELECTRICITY CONSUMERS

Glenn Zacher and Daniel Gralnick***

In legislative committee hearings that were part of the fallout from Ontario's 2010 gas plant scandal, one of the more charged — some might say naïve — observations was offered by an expert witness who, when asked for his opinion on remedying Ontario's continuing electricity woes, recommended that politicians "swear a blood oath to not meddle in electricity policy." This observation was made in the wake of Ontario's Liberal government having cancelled construction of a controversial gas plant on the eve of a provincial election — a decision which ultimately cost hundreds of millions of dollars. However, it might just as easily have been made in response to other notable government electricity policy initiatives over the previous decades which likewise caused economic uncertainty and imposed substantial costs on electricity ratepayers. These government initiatives — which have included the opening and then shuttering of the deregulated electricity market, electricity price freezes, suspensions of regulatory hearings[1] and, of course, the *Green Energy and Green Economy Act, 2009* (the "***Green Energy Act***")[2] — have entailed intervening in the market, overriding the authority of independent agencies and regulators and, ultimately, using electricity policy to further broader socioeconomic objectives. Ratepayer groups, regulators, academics and others have at times all railed against government intervention, but for the most part to little avail.

National Steel Car Limited v Independent Electricity System Operator ("***National Steel Car***")[3] represents a bolder approach — employing litigation to challenge the authority of the provincial government to use electricity policy to pursue ulterior objectives. In this case, challenging the Ontario government's use of the *Green Energy Act's* Feed-in Tariff ("**FIT**") program to promote jobs and subsidize indigenous and local communities, all at the

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[1] Notably, the Liberal government suspended and ultimately brought to a halt the former Ontario Power Authority's ("**OPA**") Integrated Power System Plan application before the Ontario Energy Board.

[2] *Green Energy Act, 2009,* SO 2009, c 12, Sched A.

[3] *National Steel Car Limited v Independent Electricity System Operator,* 2019 ONCA 929 (the "***National Steel Car***").

expense of Ontario ratepayers through the "Global Adjustment."

The Ontario Attorney General, supported by the Independent Electricity System Operator ("**IESO**"), was initially successful on a pleadings motion in having National Steel Car's ("**NSC**") applications struck as disclosing no cause of action.[4] However, late last year the Ontario Court of Appeal allowed NSC's appeal finding that NSC's claim that the Global Adjustment was a "colourable attempt to disguise a tax as a regulatory charge with the purpose of funding the costs of [ulterior policy initiatives was]…sufficiently plausible on the evidentiary record it put forward [such] that the applications should not have been dismissed on a pleadings motion before the development of a full record."[5] The case and the Court of Appeal's decision is briefly summarized below.

GLOBAL ADJUSTMENT AND THE FEED-IN TARIFF (FIT) PROGRAM

The litigation centred on the FIT program which was enabled by the now repealed *Green Energy Act*,[6] and spurred by the then-Liberal government's commitment to reducing Ontario's environmental footprint through the promotion of renewable energy, protecting the health of Ontarians by eliminating harmful emissions, creating green energy jobs and attracting necessary investment capital. The *Act* authorized the Minister to direct the former Ontario Power Authority ("**OPA**"), since amalgamated with the IESO, to develop a FIT program to foster these goals, as well as goals with respect to aboriginal peoples and local communities involved in renewable energy.[7] The *Act* specifically authorized the Minister of Energy to direct the OPA to enter into FIT procurement contracts and to recover the costs through the Global Adjustment charge authorized by section 25.33 of the *Electricity Act*.[8] The Global Adjustment is an out-of-market charge under which the IESO tops-up FIT contracted renewable generators (and all other contracted electricity suppliers) to the extent they do not recover their full contract payments through the IESO-administered wholesale market.[9] The Global Adjustment is inversely related to the wholesale market price and over time, as Ontario has procured more generation (and other electricity resources), the Global Adjustment has come to dwarf all other electricity costs. Today, it constitutes the substantial majority of the charges on an average retail customer's bill. In the case of NSC, it claimed that between 2008 and 2019, the Global Adjustment charge on its electricity bills had increased by over 1300 per cent as compared to the electricity commodity charge which had increased by just over 20 per cent.[10] NSC accordingly alleged that the portion of the Global Adjustment that funded the FIT program was a colourable attempt to disguise what is in essence a tax as a regulatory charge to achieve non-regulatory objectives, including to redress the economic harm perceived by the government suffered by the preferred aboriginal and communities (the "**Policy Goals**"):

> Overall, the appellant submits that these facts demonstrate that the FIT program component of the Global Adjustment was not truly related to the purposes of the Electricity Act or the regulation of electricity, and had nothing to do with the true costs of generating electricity. Rather, the FIT program component was intended to support the Policy Goals by conferring a financial benefit on the Preferred Communities.[11]

PROCEDURAL HISTORY

NSC filed two applications before the Ontario Superior Court to "seek a declaration that part of the amount that it has paid for electricity is an

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[4] *National Steel Car Limited v Independent Electricity System Operator,* 2018 ONSC 3845 (the "***Superior Court Decision***").

[5] *National Steel Car, supra* note 3, paras 9-10.

[6] See *Energy Statute Law Amendment Act, 2016,* SO 2016, c 10.

[7] Under the FIT program rules, applicants who included participation by "preferred communities" (i.e., indigenous and local communities were entitled to a price "adder."

[8] *Electricity Act, 1998,* SO 1998, c 15, Sched A ("***Electricity Act***").

[9] The Global Adjustment also compensates Ontario Power Generation to the extent it does not recover its full Ontario energy Board ("**OEB**") rate through market revenues.

[10] Note that the rate of inflation during the relevant time period was approximately 13 per cent.

[11] *National Steel Car, supra* note 3, para 18.

unconstitutional tax rather than a valid regulatory charge…and that section 25.33 of the *Electricity Act*…which authorizes the Global Adjustment is *ultra vires* as of the enacted of the *Green Energy Act* and it's policy-driven goals."[12] Rather than filing responding material, the Ontario Attorney General, supported by the IESO, moved under rule 21.01(b) of the *Rules of Civil Procedure*[13] to strike out the applications on the ground that they disclosed no reasonable cause of action.

The motion judge found in favour of the Attorney General and struck the applications on the basis that it was "plain, obvious and beyond doubt" that they could not succeed.[14] She added that even if the Global Adjustment or the challenged FIT component of it was a tax, it nevertheless complied with section 53 of the *Constitution Act, 1867.*[15]

ANALYSIS

The Court of Appeal allowed the appeal and held that based on the evidentiary record, NSC's claim that the Global Adjustment's inclusion of FIT contract payments is a "colourable attempt to disguise a tax as a regulatory charge with the purpose of funding the costs of the Policy Goals" is "sufficiently plausible" and that the respondents' position is "not plain, obvious and beyond doubt."[16] Furthermore, the Court held that the motion judge's treatment of whether the Global Adjustment would violate section 53 of the *Constitution Act, 1867* — which regulates how to properly exercise the taxation power in the event that it is found to be a tax — "deserves more robust development."[17] The Court of Appeal expressed the view that the motion judge's decision on the merits of the application was premature because the record required additional argument and evidence to determine whether the levy was a proper regulatory charge or a tax.

Distinguishing a regulatory charge from a tax

To determine whether the IESO's power to collect the Global Adjustment is a valid government levy as opposed to a tax, the Court of Appeal stated that it is necessary to consider whether its pith and substance (i.e. its dominant purpose) is a tax to raise revenue for a general purpose, or to finance or constitute a regulatory scheme. For a regulatory charge to constitute a valid government levy, it must be sufficiently connected to or adhesive to the scheme in question or be a charge for services directly rendered.[18] The Supreme Court of Canada stated in *Westbank First Nation v British Columbia Hydro and Power Authority* ("***Westbank***")[19] and *620 Connaught Ltd v Canada (Attorney General)* ("***620 Connaught***")[20] that the underlying inquiry is whether the charge in question is closely connected to a regulatory scheme and articulated the applicable analytical framework.

In this regard, the first step of the analysis is to "identify the existence of a relevant regulatory scheme."[21] This step involves considering the following indicia:

1. a complete, complex and detailed code of regulation;
2. a regulatory purpose which seeks to affect some behaviour;
3. the presence of actual or properly estimated costs of the regulation; and
4. a relationship between the person being regulated and the regulation, where the

[12] *Superior Court Decision, supra* note 4 at para 15.

[13] *Rules of Civil Procedure,* RRO 1990, Reg 194.

[14] *Superior Court Decision, supra* note 4 at para 84.

[15] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.

[16] *National Steel Car, supra* note 3 at paras 9-10; An application for leave to appeal was filed before the Supreme Court of Canada in January of 2020. At the time of writing, a ruling on the application for leave has not yet been issued.

[17] *Ibid* at para 75; Note that NSC also alleged that if the Global Adjustment was a tax, it would be invalid as a result of violating the *Taxpayer Protection Act, 1999,* SO 1999, c 7, Sched A. This argument was not substantially addressed by either court.

[18] *Ibid* at paras 30-31; *Westbank First Nation v British Columbia Hydro and Power Authority,* [1999] 3 SCR 134, at para 30 ("***Westbank***").

[19] *Ibid*.

[20] *620 Connaught Ltd v Canada (Attorney General),* 2008 SCC 7 ("**620 Connaught**").

[21] *National Steel Car, supra* note 3 at para 33; *620 Connaught, supra* note 20 at para 25.

> person being regulated either benefits from, or causes the need for, the regulation.[22]

After the court has identified the existence of a regulatory scheme, the second step is "to find a relationship between the charge and the scheme itself…This [relationship] will exist when the revenues are tied to the costs of the regulatory scheme or [where] the charges themselves have a regulatory purpose, such as the regulation of certain behaviour."[23] At this stage of the analysis, proponents of the charge should demonstrate reasonably close correspondence between the administrative costs of the regulatory scheme and the revenues generated by the charge in question. A charge that systemically or significantly generates a surplus of revenues above what is needed would militate in favour of the position that the levy in question is in pith and substance a tax.[24]

Court of Appeal's Decision

The Court of Appeal held that the motion judge was correct in finding that "the electricity regulatory scheme is a complete, complex and detailed code of regulation,"[25] but found that in conducting the second step of the analysis that the motion judge did not address the relevant questions.[26] In particular, the Court of Appeal held that the motion judge "sidestepped the appellant's colourability challenge and the evidence" by failing to undergo a careful assessment of the legislation and the underlying intent thereof.[27] The colourability doctrine "is invoked when a statute bears the formal trappings of a matter within [a public body's] jurisdiction, but in reality is addressed to a matter outside [its] jurisdiction."[28] This doctrine is built on the notion that the essential character of legislation governs the validity of legislation as opposed to its surface-level form and that "a legislative body cannot do indirectly what it cannot do directly."[29] To this end, NSC had argued that the pricing formula is a tax because it was included in the regulatory scheme to achieve the collateral purpose to generate a significant revenue surplus for the benefit of the aboriginal and local communities.[30] The Court of Appeal observed that the fact that the Global Adjustment is expressly authorized under the *Electricity Act* and regulations "does not immunize the program from challenge."[31] Rather, the Court stated that it is within the reviewing court's role to determine whether the evidence of the mechanics and accounting of the scheme in question are consistent with the position that the Global Adjustment is not a colourable attempt to tax (and provide an economic stimulus to the Preferred Communities) under the disguise of regulating the generation, transmission, delivery and use of electricity in Ontario.[32]

The Court directed that the relevant inquiry must entail analyzing whether the "dominant purpose" of the FIT program is to generate useful electricity, or rather, to produce a substantial revenue surplus for redistribution to the preferred aboriginal and local communities.[33] To this end the Court highlighted that "much of the electricity generated under the FIT program is both very expensive and useless.[34] However, the motion judge failed to address the critical questions of whether the cause of the excess electricity was predicted and planned or unexpected and incidental; and whether IESO purposefully incurred excessively inflated liabilities through the FIT Program and similar programs to create

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[22] *Westbank, supra* note 18 at para 44; *National Steel Car, supra* note 3 at para 33.

[23] *Westbank, supra* note 18 at para 44; *National Steel Car, supra* note 3 at para 35.

[24] *620 Connaught, supra* note 20 at para 40; *National Steel Car, supra* note 3 at para 40.

[25] *National Steel Car, supra* note 3 at para 59.

[26] *Ibid* at paras 64, 67, 71.

[27] *Ibid* at para 55; Peter Hogg, *Constitutional Law of Canada,* loose-leaf (2018-Rel 1), 5th ed (Toronto: Thomson Reuters Canada Ltd, 2007), vol 1, at para 15.5(g).

[28] *National Steel Car, supra* note 3 at para 43; *Ibid*.

[29] *National Steel Car, supra* note 3 at para 44; *Ibid*.

[30] *Ibid* at para 42.

[31] *Ibid* at para 57.

[32] *Ibid* at para 58.

[33] *Ibid* at paras 61-62.

[34] *Ibid* at para 61.

an indirect economic benefit to the preferred communities to achieve the Policy Goals.[35]

Notably, the Court of Appeal also rejected the motion judge's finding that the Global Adjustment was not a tax because the pricing formula was constructed as a "closed system." The Court observed that the motion judge's findings did "not address the Appellant's colourability argument that the electricity pricing formula was manipulated to provide a windfall surplus to the preferred communities at the expense of all Ontario electricity consumers."[36] Even if the Global Adjustment operates within a "closed system" in the sense that the funds collected from the Global Adjustment are paid directly to generators as opposed to entering the Province's coffers, the Court of Appeal held that the existence of a closed system does not mitigate the possibility that preferred communities can become the beneficiaries of "off-book wealth transfer[s]" made under the guise of a regulatory charge.[37] The motion judge's reasoning failed to resolve the concern that a cost recovery mechanism under a closed system can nevertheless serve the primary — and illegitimate — purpose of conferring an economic stimulus to the preferred communities.

CONCLUSION

The threshold for success on a motion to strike is high. The moving party — in this case the Attorney General — was required to show it was plain, obvious and beyond doubt that NSC's applications could not succeed. The Court of Appeal in allowing the appeal did not pronounce on the merits. It simply found that the Attorney General had not met the high burden for striking the applications and that the motion judge had erred by prematurely dismissing the applications without the development of a full evidentiary record. In this regard, the Court's ruling may be narrowly construed as limited to matters of civil procedure. On the other hand, the Court of Appeal's reasons were not solely limited to pronouncing on matters of procedure. The Court stated that the law on colourability extends beyond the face of legislation and that "sometimes [legislative] intent is more difficult to ferret out and requires more evidence than the words of the legislation itself, including evidence put forward by the [parties] accompanied by cross-examination."[38] In this case, the Court observed that the fact that the legislation expressly authorized the FIT Program did not immunize it from challenge. At a minimum, the Court of Appeal's determination raises the prospect of further proceedings in which the Attorney General may have to defend the legislation and FIT Program on the merits including, as the Court of Appeal suggested, by adducing evidence of "the legislation and underlying intent" so that the application judge may discern whether "the effects of the law diverge substantially from the stated aim, or whether the stated aim was permissible as part of a regulatory scheme."[39] ■

[35] *Ibid* at para 64.

[36] *Ibid* at paras 69, 71.

[37] *Ibid*.

[38] *Ibid* at para 58.

[39] *Ibid* at para 57.

TORONTO HYDRO RATE DECISION PUNTS THE REGULATORY TREATMENT OF STORAGE TO THE OEB DERS CONSULTATION

*David Stevens**

In its December 19, 2019 decision[1] in Toronto Hydro's "Custom IR" rate application, the Ontario Energy Board ("**OEB**") ruled that utilities wishing to include behind-the-meter storage in their regulated operations should seek policy changes in the OEB's ongoing Distributed Energy Resources (**DER**) consultation.[2] In response to a proposal by Toronto Hydro to use customer-funded behind-the-meter battery storage, the OEB held that current policies do not provide that behind-the-meter storage is a regulated utility activity. The Board stated that "the DERs consultation is the appropriate forum to consider the role of distributors for customer-specific energy storage systems and whether any regulatory policies should be amended."[3] The OEB stated that:

> Toronto Hydro argued that the distinction of the meter being a demarcation point between the distribution system and the customers' equipment is antiquated and not relevant because the technology can provide the same distribution benefits and services regardless of where it is placed relative to the meter.[4]

* * *

The Responding to DERs consultation is well underway, and the OEB concludes that it is the appropriate forum to consider the role of distributors for customer-specific ESS and whether any regulatory policies should be amended. Given the current policies, the OEB concludes that it is not

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[1] OEB, *Toronto Hydro-Electric System Limited Application for Electricity Distribution Rates beginning January 1, until December 31, 2024* (19 December 2019), EB-2018-0165, online: *Ontario Energy Board* <http://www.rds.oeb.ca/HPECMWebDrawer/Record/663131/File/document>.

[2] The consultation documents can be found online: *Ontario Energy Board* <https://www.oeb.ca/industry/policy-initiatives-and-consultations/responding-distributed-energy-resources-ders>.

[3] *Supra* note 1 at 115.

[4] *Ibid*.

> appropriate to consider these projects distribution activities.[5]

The OEB rendered a similar decision in response to a proposal in by the Distributed Resource Coalition (**DRC**) to have the OEB consider electrified transportation DERs (EV Charging) as eligible distribution investments "where they are economic, prudent and facilitate long-term customer efficiency."[6]

The DERs consultation[7] is examining how the electricity sector in Ontario should respond to DERs and how utilities can embrace innovation in their operations.[8] The consultation aims "to develop a more comprehensive regulatory framework that facilitates investment and operation of DERs on the basis of value to consumers and supports effective DER integration so the benefits of sector evolution can be realized."[9]

In September 2019, the OEB hosted a three-day stakeholder meeting for the Responding to DERs consultation, to hear stakeholder input on "foundational questions," such as the problems or issues to be addressed and the objectives that the consultation should aim to achieve. The OEB made clear that the objective of the stakeholder meeting was not to find solutions, but instead to discuss and identify the questions that need to be defined and addressed by the OEB in future proceedings. More than twenty parties made submissions during the stakeholder meeting.

A Facilitation Report published on the OEB website summarizes "interrelated trends and themes [that] emerged during the stakeholder meeting that reflect a general alignment on the issues and questions that need to be addressed as part of the consultation process on DERs and utility remuneration."[10]

One of the noted "themes" in the Facilitation Report was the role of LDCs (local distribution companies) in DERs, specifically "what activities should distributors be permitted to be engaged in?"[11] Parties have agreed that the role of LDCs (including affiliates) in competitive activities needs clarity and have proposed a number of issues to be addressed. Presumably, the issues related to these questions will determine what policies, if any, should be changed to support LDCs involvement in behind-the-meter storage activities.

Following the September 2019 stakeholder meeting, parties filed written comments.[12] According to the OEB's process letter,[13] the next step is for OEB staff to provide a report describing stakeholder perspectives and setting out a proposal outlining objectives, issues, and guiding principles for the DERs consultation to proceed. OEB staff convened a session on February 20, 2020 to describe the input received from stakeholders and set out staff's current thinking on objectives, issues and guiding principles.[14] At the session, OEB staff indicated that they will place the information received before the new OEB leadership once the OEB's transition to its new governance structure is complete. Subsequent steps for the Responding to DERs consultation will be identified after that. ■

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[5] *Ibid*.

[6] *Ibid* at 121.

[7] *Supra* note 2.

[8] David Stevens, "OEB Taking a Refreshed Approach to Its DER and Utility Remuneration Consultation" (24 July 2019), online: *Energy Insider* <https://www.airdberlis.com/insights/blogs/energyinsider/post/ei-item/oeb-taking-a-refreshed-approach-to-its-der-and-utility-remuneration-consultation>.

[9] *Supra* note 2.

[10] StrategyCorp, *Facilitation Report: September 17-19, 2019* (9 October 2019), online: *Ontario Energy Board* <http://www.rds.oeb.ca/HPECMWebDrawer/Record/654847/File/document>.

[11] *Ibid* at 8-9.

[12] The comments filed by stakeholders (21 in total) are available on the OEB website, online: *Ontario Energy Board* <https://www.oeb.ca/industry/policy-initiatives-and-consultations/responding-distributed-energy-resources-ders>.

[13] OEB, "Re: Utility Remuneration and Responding to Distributed Energy Resources Board File Numbers: EB-2018-0287 and EB-2018-0288", online: *Ontario Energy Board* <https://www.oeb.ca/sites/default/files/Ltr-UR-RDER-Refreshed-Consultation-20190717.pdf>.

[14] Materials and transcript from the February 20, 2020 session can be found on the OEB website, online: *Ontario Energy Board* <https://www.oeb.ca/industry/policy-initiatives-and-consultations/responding-distributed-energy-resources-ders>.