



ENERGY REGULATION QUARTERLY

VOLUME 9, ISSUE 2 2021

MANAGING EDITORS

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

Mr. Gordon E. Kaiser, BA, MA, JD, Arbitrator & Counsel, Energy Arbitration LLP, Toronto, Calgary

SUPPORTERS

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

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

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

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

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

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

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

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

Mr. C. Kemm Yates, Q.C., BA, JD, Arbitrator & Counsel, Western Arbitration Chambers, Calgary

2021 CONTRIBUTORS

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

Mr. Kenneth A. Barry, former Chief Energy Counsel, Reynolds Metals Co., Richmond, VA, former Counsel, Energy Regulation, Hunton Andrews Kurth, Washington, DC

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

Mr. Robert S. Fleishman, BA, JD, Partner, Kirkland & Ellis, Washington, DC

Ms. Melanie Gillis, BA, JD, Lawyer, McInnes Cooper, Halifax

Mr. Bob Heggie, BA, LLB, Chief Executive, Alberta Utilities Commission

Dr. Patricia Larkin, BSc, MA, PhD, Senior Research Associate, Positive Energy, Ottawa

Dr. Andrew Leach, BSc, MA, LLM, PhD, Associate Professor, Alberta School of Business, University of Alberta

Mr. James MacDuff, BA, BComm, LLB, BCL, Partner, McInnes Cooper, Halifax

Mr. David Morton, Chair and CEO, British Columbia Utilities Commission

Mr. David J. Mullan, LLM, Emeritus Professor, Faculty of Law, Queen's University

Mr. Martin Olszynski, BSc, LLB, LLM, Associate Professor, Faculty of Law, University of Calgary

Mr. Agustin Ros, BA, MS, PhD, Principle, The Brattle Group; Adjunct Professor, Brandeis University, Boston

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

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

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).

ENERGY REGULATION QUARTERLY

TABLE OF CONTENTS

EDITORIAL

Editorial	5
<i>Rowland J. Harrison Q.C. and Gordon E. Kaiser</i>	

ARTICLES

Canadian Energy Regulators and New Technology: The Transition to a Low Carbon Economy	7
<i>Gordon E. Kaiser</i>	

The Battles Over Net Energy Metering.....	25
<i>Ahmad Faruqui, Agustin J. Ros and Gordon E. Kaiser</i>	
<i>Comments by: David Morton, David Stevens and Bob Heggie</i>	

What Can We Learn from Energy Regulatory Innovation? Case Studies of Formal Regulatory Agreements and Public Engagement Processes	41
<i>Patricia Larkin</i>	

The Expanded Role of The Political Executive in Reviewing Proposed Federal Pipeline Projects: <i>A Case Study</i>	46
<i>Rowland J. Harrison, Q.C.</i>	

COMMENT

Supreme Court of Canada Re-writes the National Concern Test and Upholds Federal Greenhouse Gas Legislation	56
<i>Nigel Bankes, Andrew Leach, and Martin Z. Olszynski</i>	

EDITORIAL

Managing Editors

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

Pursuing the overarching goal of many governments of transitioning to a low carbon economy depends heavily on innovation — innovation in technology, innovation in regulatory treatment of technological developments and innovation by regulators themselves in their approaches to emerging challenges. This issue of *Energy Regulation Quarterly* revolves around the theme.

In “Canadian Energy Regulators and New Technology,” Gordon Kaiser observes that Canadian energy regulators have been reluctant to fund through rates experimental or research projects, citing as an example the denial of applications to fund electric vehicle charging. In 2020, however, regulators in British Columbia, Ontario and Nova Scotia took steps to promote new technology using technology pilots. Kaiser reviews these developments. He notes that governments are turning to their energy regulators to “lead the way,” pointing to the recent amendment of the *Ontario Energy Board Act* to include among the objectives of the Ontario Energy Board “[t]o facilitate innovation in the electricity sector.”¹

Technological innovation in the form of the expanding installation of rooftop solar panels by consumers is also the source of the regulatory challenges addressed by Ahmad Faruqui *et al.* in “The Battles over Net Energy Metering” (NEM). While the body of the article discusses the topic in the context of the widespread implementation of NEM in the U.S., valuable Ontario, Alberta, and British Columbia perspectives are included.

In addition to the regulatory challenges presented by technological developments, innovation in regulators’ approaches to meeting these challenges will also be needed. The ongoing research of the Positive Energy

project at the University of Ottawa aims to support regulators, and others, in meeting these challenges. In particular, Positive Energy has undertaken a collaborative research project with the Canadian Association of Members of Public Utility Tribunals (CAMPUT) that has identified several successful innovations and opportunities “to scale up innovations in energy regulatory decision-making.” Two case studies that were undertaken in this project are reported in Patricia Larkin’s “What Can We Learn from Energy Regulatory Innovation? Case Studies of Formal Regulatory Agreements and Public Engagement Processes.”

The challenges presented by these technological and regulatory innovations arise within the broader policy/legal framework — the quest to get the right balance between the respective roles of policy-makers and regulators continues to present its own ongoing challenge. In “The Expanded Role of the Political Executive in Reviewing Proposed Federal Pipeline Projects: A Case Study,” Rowland Harrison examines a recent proceeding in which the federal cabinet added to its approval of a project a condition that had been expressly rejected by the Canada Energy Regulator (CER) in its recommendation to cabinet. Cabinet concluded that it could improve and strengthen the CER’s recommendations on an issue that did not appear to be a matter of overriding national interest and that was arguably within the CER’s expertise.

The Supreme Court of Canada’s recent reference opinion on challenges to the constitutionality of the federal government’s carbon tax legislation has obvious foundational implications for the ongoing development of policy and legislative initiatives aimed at transitioning to a low carbon economy. In their exhaustive analysis of the opinion in “Supreme Court of Canada Re-writes the National Concern Test and

¹SO 1998, c 15, Schedule B, s 1(1).

Upholds Federal Greenhouse Gas Legislation,” Nigel Bankes *et al.* conclude that the opinion is “particularly significant insofar as it recognizes a new matter of national concern in the context of developing appropriate legislative responses within the Canadian federation to an existential threat — global climate change.” The opinion confirms that “the federal parliament is not confined to the blunt instruments of the criminal law power and the taxation power and that it may also craft less intrusive backstop legislation, in this case in the form of selectively applied regulatory charges.” ■

CANADIAN ENERGY REGULATORS AND NEW TECHNOLOGY: THE TRANSITION TO A LOW CARBON ECONOMY

Gordon E. Kaiser

INTRODUCTION

In the past, Canadian energy regulators have been reluctant to fund new technology through rates because they were experimental or research in nature. For example, applications to both the Ontario and Nova Scotia regulators to fund electric vehicle (EV) charging were declined.¹ Things have changed. In 2020, energy regulators in British Columbia, Ontario, and Nova Scotia for the first time took steps to promote new technology using technology pilots.

This is a new line of work for Canada's energy regulators. Introducing new technology into the grid is important particularly in today's environment where carbon reduction is a major objective of all governments. The electricity grid is highly regulated and those regulations can block new technology. Energy regulators are in a unique position to address that problem. It will however require new regulatory procedures. This article reviews the relevant regulatory decisions that were made in 2020 to address new technology.

BACKGROUND

On December 11, 2020, the Canadian government announced new legislation entitled *A Healthy Environment and a Healthy Economy*, to accelerate climate change initiatives throughout the country.² The December 2020 plan included 64 different programs to cut pollution and build a clean economy at a cost of \$15 billion. The investments include \$2.5 billion for clean power projects over three years, \$1.5 billion to develop low carbon fuels, \$287 million over two years to promote zero emission vehicles, \$3 billion over five years to decarbonize large-scale emitters, \$2.6 billion over seven years to improve home energy efficiency, and \$3 billion over 10 years to plant 2 billion trees. In April 2021, the Biden administration announced that it would spend \$2 trillion on clean energy investment over the next four years.

On April 22, 2021 at an international climate summit Canada pledged that it would reduce carbon emissions by 40 to 45 per cent below

¹ *Re Toronto Hydro-Electric System Limited* (22 February 2012), EB-2010-0142, online: Ontario Energy Board <www.rds.oeb.ca/CMWebDrawer/Record/329716/File/document> [*Toronto Hydro-Electric*]; *Re Nova Scotia Power Incorporated* (4 January 2018), 2018 NSUARB 1, online: Nova Scotia Utility and Review Board <www.canlii.org/en/ns/nsuarb/doc/2018/2018nsuarb1/2018nsuarb1.html>.

² The Right Honourable Justin Trudeau, "Prime Minister Announces Canada's Strengthened climate plan to protect the environment, create jobs, and support communities" (11 December 2020), online: <pm.gc.ca/en/news/news-releases/2020/12/11/prime-minister-announces-canadas-strengthened-climate-plan-protect>.

2005 levels by 2030. The previous Canadian goal set at the Paris climate talks in 2015 was 30 per cent by 2030. At the same meeting the Biden administration committed to cutting US emissions by 50 to 52 per cent below 2005 levels by 2030. That was twice the level President Barack Obama had committed to for the same time period.

Global investment in renewable energy will reach a record high in 2021 and spike to \$16 trillion by 2030.

The year 2020 also saw an important shift in financial markets. Renewable energy now dominates capital markets in both Canada in the United States. Next Era Energy, the world's largest supplier of wind power, replaced Exxon Mobil and Chevron Corporation to become the world's most valuable energy company. In August 2020, Exxon Mobil disappeared from the Dow Jones industrial average. It had been a member since the company was Standard Oil of New Jersey in 1928.

Private corporations have also entered the renewable energy market in a significant fashion. In April 2020, BlackRock, one of America's largest venture firms, raised \$5 billion for its Global Energy Infrastructure fund. In January 2020, Microsoft launched a new climate innovation fund to invest \$1 billion over the next four years, while in June 2020, Amazon pledged an initial \$2 million in funding for its venture investment program.

Canadian pension plans have also been very active. By September 30, 2020 the Canada Pension Plan Investment Board had committed an investment of \$9 billion to renewable energy globally. In 2020, the fund closed the transaction to acquire all of the renewable assets of Pattern Energy for \$6 billion which included a portfolio of 28 renewable energy projects with an operating capacity of over 4 GW in the United States, Canada, and Japan.

THE NEW REGULATORY LANDSCAPE

In 2020, the British Columbia Utilities Commission heard two applications for ratepayer funding of new technology. The exact nature of the technology was left up to the utility to determine. One application was approved. The second was turned down.

In the same year, the Ontario regulator approved three technology pilots for two specific technologies. The first involved blending hydrogen into natural gas while the second involved blending bio-methane into natural gas. The Nova Scotia regulator approved a technology pilot for smart grid software.

The Ontario Energy Board (OEB) also introduced a new service called the Innovation Sandbox. This service provides Board staff opinions in the form of OEB Bulletins to address areas of regulatory uncertainty that may be preventing the introduction of new energy services that could improve energy efficiency and/or decarbonize the grid. In the first year 33 applications were received from utilities and non-utilities. These applications produced one Bulletin which allowed behind the meter energy storage.³

In June 2020, the British Columbia Utility Commission (BCUC) issued a decision in response to an application by FortisBC to establish a Clean Growth Innovation Fund.⁴ The evidence filed by the applicant included an article published in this publication a year ago.⁵ The utility actually proposed two funds — one for a gas utility and one for an electricity utility. The application by the electricity utility failed but the one by the gas utility succeeded.

The utility proposed a charge of \$0.30 per customer per month for the electric utility and \$0.40 per customer per month for the gas utility. The anticipated annual funding based on the number of forecasted customers was \$ 4.9 million for the gas utility and \$.5 million for the electric utility.

³ Ontario Energy Board, Bulletin, "Ownership and Operation of Behind-the-Meter Storage Assets for Remediating Reliability of Service" (6 August 2020), online (pdf): <www.oeb.ca/sites/default/files/OEB-Staff-Bulletin-owners-hip-of-BTM-storage-20200806.pdf>

⁴ *Re FortisBC Energy Inc. and FortisBC Inc.* (22 June 2020), G-165-20, G-166-20 at 148, 154, online: British Columbia Utilities Commission <www.bcuc.com/Documents/Decisions/2020/DOC_58466_2020-06-22-FortisBC-MRP-2020-2024-Decision.pdf> [*FortisBC*].

⁵ James Coyne et al, "Should ratepayers fund innovation?" (2018) 6:3 *Energy Regulation Q* 45.

The BCUC approved the innovation fund for the gas utility because it had “demonstrated it needs to accelerate its innovation activities...in light of increasing governmental climate policies aimed at decarbonization and electrification.” The Province of British Columbia had legislated a 40 per cent reduction GHG emissions over the next decade.”⁶

The decision represents a key milestone for innovation funding. Previous applications were directed at specific projects. This application however created a fund for projects that would be considered from time to time. The application also proposed a governance model to ensure that the funds were applied to innovations that would benefit customers. The decision also addressed accountability and annual reporting by the utility.

The starting point in the Board’s analysis was to determine the demand or need for funding. The Commission relied on the evidence from the utility that pointed to Canada’s commitment to reduce GHG emissions by 30 per cent between 2005 and 2030 and BC’s commitment to reduce the emissions 40 per cent by 2030 and 80 per cent by 2050. To this were added commitments the City of Vancouver. The panel concluded that the utility had demonstrated the need to accelerate its innovation activities in light of governmental climate policies with respect to decarbonization and electrification.

Three Technology Pilots

The British Columbia regulator was not alone in financing new technology in 2020. In December 2019, Nova Scotia Power submitted an application to the Nova Scotia Utility and Review Board to approve a \$7 million capital expenditures on a smart grid pilot. The purpose of the pilot was to determine if new software developed by Siemens could monitor and manage distributed energy resources (DERs) in a fashion that would increase grid reliability and reduce costs.

The project was driven the growing importance of distributed energy resources in the operations of Canadian electricity utilities. The DERs used in this project were solar generation, battery storage, and electric vehicle charging.

The overall cost of the pilot project was \$19 M. Of that amount nearly \$12 million was external funding leaving one third to be funded by Nova Scotia Power customers. The criteria the Board applied in determining whether this capital investment was justified was called the Innovation Justification Criteria (IJC). The IJC test was — can the project be reasonably expected to produce valuable data and learning to develop a business case prior to full-scale development?

One of the issues the Board had to contend with was a concern by interveners about the lack of competitive bidding in putting the project together. In particular, there was a significant reliance on Siemens with respect to software. This was discounted when it was explained that Siemens was largely responsible for obtaining the federal funding which was supporting the project. There was also some concern about potential cost overruns. The Board made it clear that its decision approving the pilot project was limited to the expenditure of \$7 million and recovery of any cost overruns would require Board approval.

This decision by the Nova Scotia Board⁷ is a rare but important example of ratepayer funding of new technology. The Board’s decision was clearly influenced by significant funding from outside sources such that only one third of the total capital cost was being borne by ratepayer as was the condition that the utility was at risk for any cost over runs. The Board also established a meaningful compliance and reporting structure that will be instructive to other regulators examining similar ventures. The extensive evidence from independent outside experts also provides some useful lessons for future applicants.

⁶ *Supra* note 4 at 154 (The Innovation for the Electric Utility was denied due to the lack of a business plan showing ratepayer benefits).

⁷ *Re Nova Scotia Power Incorporated* (7 May 2020), 2020 NSUARB 63, online: Nova Scotia Utility and Review Board <www.canlii.org/en/ns/nsuarb/doc/2020/2020nsuarb63/2020nsuarb63.html> [*Nova Scotia Power*].

On October 30, 2020 the Ontario Energy Board issued a decision⁸ approving an application from Enbridge Gas to construct a pilot project which blends hydrogen into conventional natural gas to be distributed in an area north of Toronto. The Board approved the application and allowed Enbridge to construct the necessary facilities and set rates related to the project. The rates were designed to ensure that the ratepayers that receive blended gas did not pay more than other Enbridge gas customers.

The objective in the pilot is to reduce the GHG emissions relating to the sale of natural gas. Hydrogen has no carbon emissions when it is burned. As a result, combining hydrogen with natural gas reduces the overall carbon footprint.

In this pilot 2 per cent of the total product will be hydrogen. Because hydrogen has a lower heating value than conventional natural gas it takes a greater volume of hydrogen to provide the same energy content. The result is that customers receiving blended gas must consume a higher volume than customers receiving conventional natural gas. This requires a price adjustment which the Board approved to compensate customers in the blended gas district for the cost of the extra gas.

The pilot project will deliver blended gas to approximately 3600 customers over five years. At the end of that period, Enbridge is required to file a detailed report to the regulator that will assess the costs and benefits of the project. Enbridge has indicated that it plans to apply for similar projects in other gas markets it is currently serving in Canada.

On March 31, 2020 Enbridge Gas Inc. applied to the OEB under section 36 of the *Ontario Energy Board Act* for approval to implement a pilot program that would inject bio methane into the natural gas. It will supply customers that volunteer for the project. The application asks the Board to approve a surcharge of \$2 per month on the rates of the customer that do volunteer.

The objective of the project is to lower the carbon content of regular natural gas. Bio methane has lower carbon content than regular natural gas and the injection therefore reduces GHG emissions. Enbridge proposed to fund the project through its regular operating costs which means there would be no rate increases for nonparticipating customers.

On September 24, 2020, the OEB released a decision approving the pilot project⁹. One of the issues in contention is whether all customers should pay. The OEB agreed with Enbridge that all customers would contribute to the increase in operating costs but only the customers that volunteered would pay the \$2 per month. The Board directed Enbridge to file a progress report at the time of its next rate rebasing application.

New Regulatory Guidance

On January 16, 2019 the Ontario Energy Board introduced a new consulting service that allows both utilities and non-utilities to obtain guidance from Board staff on regulatory issues relating to new energy services that have “a clear potential to benefit consumers.” The new service called an Innovation Sandbox is designed to address regulatory barriers to the introduction of new technology. There are however limits to this assistance. The Innovation Sandbox cannot:

- a. offer long term policy change
- b. provide funding for projects
- c. endorse specific technology
- d. provide relief not within its jurisdiction or
- e. support projects that shift costs between customers

While the OEB will consider proposals from both utilities and non utilities the Board has said that non-regulated companies should “keep in mind that in most cases a utility partner will be considered to be key for carrying out a trial in Ontario.”

⁸ *Re Enbridge Gas Inc.* (29 October 2020), EB-2019-0294, online: Ontario Energy Board <www.rds.oeb.ca/CMWebDrawer/Record/691859/File/document>.

⁹ *Re Enbridge Gas Inc.* (24 September 2020), EB-2020-0066, online: Ontario Energy Board <www.rds.oeb.ca/CMWebDrawer/Record/687754/File/document>.

As of June 2020, the OEB had received 33 proposals from utility and non-utility companies. One of the proposals resulted in the Bulletin issued on August 6, 2020,¹⁰ which is attached as Appendix A. That Bulletin ruled that a local distribution company may own and operate behind the meter energy storage and treat the assets as part of regulated operations if the purpose is to remediate poor service reliability.

The Bulletin cautions that the Bulletin only expresses the opinion of Board staff and is not binding on Board members or Commissioners that will ultimately determine contested matters. The Bulletin states that the opinion was a response to an Innovation Sandbox proposal from a regulated electricity distributor that wanted to use behind-the-meter storage assets to improve service reliability. The Bulletin does not disclose who the applicant was but many speculate it was Toronto Hydro. That utility had previously applied to the Board for this type of relief and had been turned down.¹¹

It is not unusual for energy regulators to issue Bulletins from time to time. To date, the OEB has issued close to 50 Bulletins. Of those 29 were called Compliance Bulletins, 9 were called Information Bulletins and the last 8 were just called Bulletins.

Generally speaking, Bulletins issued by the regulators concern their enforcement policies and often reflect opinions on what the regulator can and cannot do under their legislation. Both the Ontario and Alberta Securities Commission make extensive use of Bulletins as does the federal Competition Bureau

The Competition Bureau has been issuing bulletins for 20 years.¹² The goal is to update the marketplace on the Bureau enforcement policies. Like the OEB Bulletins the Competition Bureau bulletins are not binding on the on the Commissioner of Competition. However, in all cases they reflect the policy of the Commissioner

and are changed before the Commissioner departs from that policy. If this were not the case, the Bulletins would not be very useful.

Bulletins can be an important policy instrument. They offer real time regulation that can prevent regulation from becoming a barrier to the introduction of new technology.

Regulatory Guidance Bulletins will become more important as energy regulators become more involved in the promotion of new technology. An earlier Bulletin of July 7, 2016¹³ falls into that category although it came before the Innovation Sandbox was introduced. That Bulletin sets out a finding by OEB staff that ownership and operation of an EV charging station and the selling of EV charging services from that facility does not constitute distribution or retailing of electricity. In other words, those activities would not be regulated by the OEB.

The EV Charging Bulletin indicates that electric vehicle charging service is not subject to OEB regulation because EV charging services including charging stations should be treated as competitive products and services for which no OEB license is required. OEB staff also noted that electricity distributors may be permitted to own and operate EV charging station because these are services that assist the government in achieving its electricity conservation goal.

The EV Charging Bulletin was apparently issued in response to a number of inquiries. As noted by OEB staff, the interest in EV charging is increasing in response to the parts of the Ontario Climate Change Action Plan that target significant increases in electricity vehicles in the coming years.

The EV Charging Bulletin is a good example of regulatory guidance that will promote the development of new carbon reduction technology. The British Columbia Utility Commission came to a similar conclusion

¹⁰ Ontario Energy Board, *supra* note 3.

¹¹ *Re Toronto Hydro-Electric System Limited* (19 December 2019), EB-2018-0165, online: Ontario Energy Board <www.rds.oeb.ca/CMWebDrawer/Record/663131/File/document> [*Toronto Hydro-Electric 2019*].

¹² All of the current Bulletins are set out in Brian A. Facey & Cassandra Brown, *Competition Act: Commentary and Annotation*, 2021 (Lexis Nexis Canada, 2021) at pp 339–57.

¹³ Ontario Energy Board, Bulletin, “Electric Vehicle Charging” (7 July 2016), online (pdf): <www.oeb.ca/oeb/_Documents/Documents/OEB_Bulletin_EV_Charging_20160707.pdf>.

but did so after an extensive consultation and report¹⁴ that led to changes in the regulations.

The EV Charging Bulletin is also a good example of a situation where regulatory ambiguity can create a barrier to entry. The Board noted that the provincial governments policy with promoting electric vehicles and carbon reduction required such a clarification because regulation this particular activity could deter investment by private parties in that sector.

This will not be the last case where utilities, developers and investors in Ontario requires clarification regarding the OEB jurisdiction or policy with respect to a particular activity that relates to carbon reduction technology. These Bulletins, whatever they are called, will become an important policy instrument in this initiative.

The Michigan Decision

Ontario and Nova Scotia are not the only jurisdictions struggling with technology pilots. On October 17, 2019, the Michigan Public Service Commission started an inquiry to review past and current Michigan pilot projects, pilot best practices, and future pilot issues. A 95-page report was published on September 30, 2020.¹⁵

The Commission directed that going forward any applicants seeking funding for a technology pilot must comply with the definition of a technology pilot and the criteria set out at page 12 of the decision.¹⁶ That finding is reproduced in Exhibit A of the decision. A link to Exhibit A is provided in Appendix B.

The definition of the technology pilot and the criteria on which it would be evaluated will not be the same in every jurisdiction. The Michigan decision is just one example. All provincial and state regulators will have to address question. What is important is to get it right in terms of the jurisdiction in which it has to operate.

THE REGULATORY ISSUES

This article examines three new policy instruments that will become essential to energy regulators as they attempt to increase the access to new technology that will help Canada meet its carbon reduction goals. This is an important exercise that will quickly become the responsibility of all Canadian energy regulators.

The three policy instruments are brand-new. They first arrived on the scene in 2020. This article reviews the first three decisions and the first year of operation for the new OEB Regulatory Guidance Bulletins. All three of these instruments will likely be implemented by Canadian energy regulators in the near future.

There may be some regulators that decide not to create an innovation fund but they will certainly conduct hearings for technology pilots. Technology pilots require active participation from the utility serving that area. It is likely that all Canadian regulators will start issuing Regulatory Guidance Bulletins. Regulations can be a barrier to entry particularly in the case of new technology. Long drawn-out hearings with appeals are not the best way to address regulatory uncertainty.

The goal of this article is not just to examine what happened in 2020. It also attempts to define the best practices. The following section examines the different regulatory issues that arose in the first Technology Pilot hearings.

The Threshold Test

Of the three Technology Pilot decisions examined in this article, the Nova Scotia decision is a textbook examination of the need to establish meaningful upfront criteria regarding the object and purpose of the technology pilot in question. In the Nova Scotia case,¹⁷ Nova Scotia Power applied for approval of a four-year pilot project at a cost of \$7 million. The purpose of the pilot was

¹⁴ British Columbia Utilities Commission, Report, “Inquiry into the Regulation of the Electric Vehicle Charging Service” (26 November 2018), online (pdf): <www.bcuc.com/Documents/Proceedings/2018/DOC_52916_2018-11-26-PhaseOne-Report.pdf>.

¹⁵ Michigan Public Service Commission, Report, “Utility Pilot Best Practices and Future Pilot Areas” (30 September 2020), online (pdf): <www.michigan.gov/documents/mpsc_old/MPG_Pilots_Report_Draft073120_698001_7.pdf>.

¹⁶ *In the Matter of The Commission's Own Motion to Establish MI Power Grid* (4 February 2021), U-20645, online: Michigan Public Service Commission <mi-psc.force.com/sfc/servlet.shepherd/version/download/068t000000J90K1AAJ>.

¹⁷ *Nova Scotia Power*, *supra* note 7.

to better understand how new software can be used to monitor and manage distributed energy resources to achieve customer benefits such as maintaining reliability and grid stability and reducing costs. The Nova Scotia Board has established a Capital Planning and Capital Expenditure Justification Criteria. Projects developed to pursue emerging issues were developed under the Innovation Justification Criteria and criteria of that standard stated as follows:

[5] Prior to commencing its analysis of the application, the Board considers it helpful to outline the basis for reviewing such capital projects, which is carried out under the Capital Planning and Capital Expenditure Justification Criteria (CEJC). More specifically, projects developed to pursue emerging issues are evaluated under the Innovation Justification Criteria of the CEJC. The Innovation Justification Criteria provides, in part, as follows:

17.2 Innovation

...Justification Criteria

Innovation capital projects are justified on the basis that there is a reasonable expectation that they will provide customer value in some or all of the areas of reducing upward pressure on revenue requirement, reliability and grid stability, government policy compliance, and customer experience, through the deployment of proven technologies in innovative ways. In addition, innovation capital investments may be justified on the basis that they are reasonably expected to allow for testing before deploying at scale, provide valuable data and learnings, or aid in the development of business cases where applicable.

Sub-Justification Criteria

Innovation capital projects may be justified under one or more of the following sub-criteria:

- reduce upward pressure on revenue requirement
- reliability and grid stability
- environmental and other compliance
- customer experience improvements
[Emphasis added]

The Nova Scotia Board retained an expert to evaluate the application and determine whether the application met the necessary criteria. Based on the evidence of its expert the Board found that it did not, stating as follows:

[6] In its application, NS Power asserted that the proposed pilot project is justified under the second branch of the test in the Innovation Justification Criteria. The project is the first capital project submitted under the Innovation Justification Criteria in the CEJC.

[7] A project falling under the Innovation Justification Criteria differs from the typical capital work order approval for projects usually undertaken by a utility. In most cases, under the latter type of applications, the approval is sought based on a business case to meet a normal operational requirement of the utility. Projects that are innovative in nature would generally fall outside what would normally be experienced in the everyday operations.

[8] However, for projects falling under the Innovation Justification Criteria, the Board still requires that rigor be applied to the supporting material filed with the application. In this case, the Board was not satisfied with the initial application filed in support of the capital work order. The Board expected greater

detail to support the application. Given that applications under the Innovation Justification Criteria are somewhat novel, the Board provides the following guidance for future applications.

[9] In the present case, the initial application filed with the Board lacked supporting material, particularly with respect to the benefits of the project. As canvassed in greater detail later in this Decision, Synapse stated that the initial proposal did not provide a complete pilot study design because it failed to:

- clearly describe the knowledge gaps that the proposed research is intended to address
- consider whether an alternative, less expensive pilot study design could achieve the same objectives
- describe how the proposed methodology is the best way to achieve the goals
- adequately show how the innovation justification criteria are met

[10] Further, Synapse suggested it was not clear whether the pilot will provide the information needed to decide whether to proceed with a full roll-out of the ESP. It noted it was not clear that NS Power presented a case that properly conveyed a plan that would compare the costs and benefits with and without the ESP, adding that NS Power was still considering the metrics to track during the pilot and various elements of the project were still under development.

[11] The Board shares Synapse's concerns with the quality of the initial application. Much of the initial filing was very general in nature, sparse in terms of details about the proposed project, and relied more on experience in other jurisdictions (much of it in the form of generic studies or reports) rather than an analysis of what was planned on the ground in

Nova Scotia and with NS Power's other partners. It may be tempting in some cases to adopt projects undertaken in other jurisdictions or utilities in their testing of emerging technologies, including distributed energy resources and their integration into an energy grid. However, useful resources and time may be wasted if specific measurable outcomes and success factors are not clearly identified for the Nova Scotia context. In terms of projects to be considered under the Innovation Justification Criteria, the Board expects that NS Power will outline in sufficient detail the scope and design of the project, and what specific data, learnings, and measures of success will be adopted to evaluate the project. Further, the Board cautions NS Power that it will not be sufficient to generally extrapolate certain isolated results of a pilot project to justify its subsequent full-scale deployment. Any standard capital expenditure application for full deployment will need to be detailed in every respect as to design, sourcing, implementation and benefit for customers, at the lowest cost.

[12] In the present case, various concerns of the Intervenor were addressed by NS Power when it filed its [information request] responses and Reply Evidence. However, the timing of the receipt of this information means that the Intervenor, Board staff and Board Counsel's consultants were unable to review and engage in a meaningful manner about this project with NS Power. In the view of the consultants, these shortcomings clearly jeopardized approval of this application. The engagement of NS Power's customer representatives and the Board is as important for innovative projects as it is for normal capital work orders. As noted later in this Decision, the ongoing work by NS Power on this project will likely result in delays in the implementation of some elements of the proposal and may lead to incomplete data or learnings at its completion.

[13] The Board trusts future applications under the Innovation Justification Criteria will be more comprehensive and better informed by the above guidelines.

The Nova Scotia Board asked Nova Scotia Power to amend and refile its application which is ultimately proved stating “The Board trusts future applications under the Innovation Justification Criteria will be more comprehensive and better informed by the above guidelines.”

It follows from this brief discussion that without a comprehensive upfront standard and criteria a technology pilot is likely to fail. We should also remember that for most utilities an application to fund the technology pilot is likely a new undertaking is important that the utility had some guidance as to what the application should contain and what standard the regulator will apply in assessing an application.

The Use of Experts

It is not unusual to have experts testifying in regulatory proceedings. In the two technology pilots we saw different approaches — a very extensive use of experts in the Nova Scotia case and virtually none in the Ontario case — despite the fact that there is brand-new technology at issue in both cases.

The main reason for that, however, is that Nova Scotia had a much higher threshold test — the application filled out on that test is resolved on the evidence of the expert. In the Ontario case, the regulator took a different view and found it was premature to get into a detailed examination of the technology or even how that technology compared to alternative technology. The feeling was that the technology pilot was a limited pilot and was based on the assumption that if a preliminary examination of the technology warranted it there would be further pilots with respect to the same technology on a more extensive basis.

The Nova Scotia case also underscores the importance of regulators retaining experts to assist in evaluating the feasibility of technology pilots. As the Nova Scotia Board states in paragraph 30 of the decision the analysis in an application for a pilot project can often be more complicated than a garden-variety application:

[30] While the Board recognizes that measuring the benefits of

pilot projects under the Innovation Justification Criteria may be more difficult than capital expenditure projects undertaken as part of a utility’s normal operations, it could be argued that the evaluation of an innovative initiative is even more critical. Since many projects under the Innovation Justification Criteria are likely destined for full-scale deployment, it is essential that NS Power, Intervenors and the Board understand the implications of that undertaking. Thus, it is important that NS Power be able to define the data it is seeking to collect, the learnings it wants to obtain, and specifically how success will be measured. Without these specifics and a clear baseline comparison against the pilot results, the anticipated benefits of moving towards full-scale deployment are nothing more than mere speculation.

[31] In the Board’s view, NS Power’s responses to NSUARB IR-25 to 29 do not provide sufficient specifics to determine how success will be determined. In its Reply Evidence, NS Power elaborated on those IR responses and provided some additional insight:

Finally, NS Power will be gathering baseline data under the Project to compare to outcomes with Energy System Platform (ESP) monitoring and management. Load profile and power quality information are currently being collected at potential commercial customer sites for the roof-top solar installations; available load information will be collected from the metering history of other customer sites as they are identified through the recruitment process. Further, once DERs are installed at customer sites, measurements will be taken before the application of utility control of the DERs dependent on the use

cases being tested and the capabilities of each DER. Comparison measurements will also be conducted in parallel during the Project with one control DER and one ESP DER at the same time under the same conditions.

[32] Any pilot project like the present application should contain sufficient baseline data which can be later used to compare the results of the pilot to the status quo. In the Board's opinion, such information would be invaluable to building a business case in support of full-scale deployment. However, it is not clear to the Board whether the baseline data in this project will be sufficiently complete in duration or robustness to provide a meaningful comparison against the pilot project results. This should be more clearly explained in a Compliance Filing.

A technology pilot application is important. A pilot project decision can lead to very significant capital expenditures. It is important to get the decision right. To do that, regulators need both the data and a carefully drafted criteria. The Nova Scotia decision is a good model.

The Reason for the Application

This article reviews four decisions. One considers an application for funding innovation generally. Three decisions relate to applications to fund specific technology known as technology pilots.

In each case the first question from the regulator hearing the application is this: What is the rationale for this expenditure? In all cases the answer was the same. We need to promote clean energy. It is not being adequately funded. And as a result, Canada and the province and municipalities we serve are not going to meet their carbon reduction goals.

The British Columbia case is an application to establish an innovation fund.¹⁸ No specific technology was nominated although the general

class was described as follows at page 145 of the decision:

...the fund is designed to address perceived gaps in FortisBC's current innovation activities. This fund will finance GHG reduction activities that:

- Cover the entire utility value chain;
- Are outside of DSM;
- Relate to pre-commercial and commercial activities (with the former likely to comprise the majority); and
- Are supported by predictable funding levels.

FortisBC anticipates that given the ambitious renewable gas target in the Clean BC Plan blending hydrogen and renewable gas will be high priorities for funding.

The technology would be nominated by a special committee established for that purpose. The applicant Fortis BC described the rationale for the new fund as follows at page 145 of the decision:

The Innovation Fund is required to accelerate the pace of clean energy innovation, to achieve performance breakthroughs and cost reductions, and to provide cost effective, safe and reliable solutions for customers. The Innovation Fund will assist FortisBC in addressing the expectation to reduce emissions, and forms part of FortisBC's proactive strategy to support the transition to a lower carbon economy, while maximizing the use of its energy delivery systems for its customers...The Innovation Fund is complementary and incremental to FortisBC's current innovative activities and is ultimately required to meet British Columbia's energy objectives.

¹⁸ FortisBC, *supra* note 4.

Fortis BC elaborated on the need for the fund at page 148 of the decision:

FortisBC notes that, provincially, the CleanBC Plan targets 25 million tonnes of GHG reductions by 2030, with 15 percent of that to come from renewable gas. However, at recent average gas throughput on FEI's system, 15 percent renewable gas would require approximately 30 petajoules (PJ) of renewable supply. FortisBC states that the current renewable supply in the FEI system only totals 0.03 PJ, which will necessitate a 100 times scaling of renewable gas supply to reach the 2030 CleanBC Plan target. To achieve the Province's target FEI will be required to quickly advance innovation and develop new renewable gas sources.

The Ontario rationale was similar, as set out at page 7 of the decision¹⁹:

However, there was also general acknowledgement by the parties that the reduction in carbon emissions targeted by the Provincial Government cannot be achieved without exploring a variety of approaches to achieve such reduction. Enbridge Gas has proposed a pilot to inject a controlled quantity of hydrogen into its natural gas system for a small number of customers. This Project is expected to provide detailed information on the impact of hydrogen blending on the level of carbon reduction, the risk to the distribution system and customers' equipment, the potential for the expansion of hydrogen blending into other areas of its distribution system, and details on the hydrogen gasification process. The OEB agrees that despite the apparent limited potential of hydrogen blending, the learning from the proposed Project would be beneficial and the Project should proceed.

Regulators in Ontario and Nova Scotia heard applications to allow funding for specific

technology. Nova Scotia Power described the rationale for its investment as follows:

[1] Nova Scotia Power Incorporated has applied for approval of a capital project entitled the Smart Grid Nova Scotia Project in the amount of \$7,053,622. The purpose of the four-year pilot project is to better understand how a centralized Energy System Platform (ESP) software can be used to monitor and manage Distributed Energy Resources (DERs) to achieve customer benefits such as maintaining reliability and grid stability, and reducing costs.

[2] The DERs to be used in the project include a variety of newer technologies such as solar photovoltaic generation from a community solar garden and from commercial roof-top installations, distributed in-home or in-business battery storage, and in-home or in-business electric vehicle smart charging. The ESP will allow for the visibility, control and dispatch of the DERs.

Enbridge Gas in the Ontario technology pilot offered a rationale similar to that made by Nova Scotia Power to the Nova Scotia regulator, as set out at page 1 of the decision:

This first phase is a pilot undertaking designed to be of limited scope to determine if hydrogen blending should be pursued at a large scale. Enbridge Gas also applied to the OEB under section 97 of the OEB Act for approval of the form of a temporary land-use agreement and under section 36 of the OEB Act for approval of rate riders to compensate affected customers for costs associated with increased fuel consumption in the [blended gas area].

When combusted, hydrogen is a zero-carbon emission fuel source. As a result, the use of blended gas would produce less GHG emissions

¹⁹ *Enbridge Gas Inc.*, *supra* note 8.

relative to combusting standard natural gas. Enbridge Gas estimates that the GHG reductions associated with using blended gas having 2% hydrogen by volume in the BGA would be between 97-120 tonnes of carbon dioxide equivalent (tCO₂e) per year. The Project could potentially help Enbridge Gas comply with the requirements of the pending Federal Government's Clean Fuel Standard (CFS).

The Project would enable Enbridge Gas to study the effects of blended gas on its existing distribution system and consumers' end-use equipment. Based on the results of the Project, Enbridge Gas could seek OEB approval to discontinue, continue or expand its distribution of blended gas.

What is interesting is that in one year, 2020, we saw for the first time three provincial regulators in Canada approved ratepayer funding of new technology that would help the province meet its carbon reduction commitments. We can expect more of these applications.

Cost-sharing

One feature of these cases is that the regulators do have an interest in ensuring that someone other than the ratepayers has money on the table. The Nova Scotia Board took some comfort in the fact that funding was coming from government agencies stating that:

[40] Finally, the Board has taken into account the fact that this project has been obtained by NS Power at a significantly reduced cost to ratepayers through government support and cooperation with various private and governmental partnerships. These financial contributions effectively mean that ratepayers will only pay approximately 1/3 of the total project cost.

In the Ontario hydrogen blending case the regulator took some comfort from the fact that a \$221,000 grant from Sustainable Development Technology Canada would be covering part of the total project cost of \$5.23M. It will not be surprising if a principle develops in these cases that establishes a requirement that some financial contributions

come from outside parties. Regulators like to see that knowledgeable outside investors also see some merit in the exercise.

Who Pays?

As in all regulatory hearings, the issue arises as to who pays. Is that the ratepayers or the shareholder? Which customer should pay? In the British Columbia case some believed the shareholder should pay. The regulator dismissed that proposition but the shareholder was required to pay if the amount of expenditure went over the amount of the fund that the BCUC had approved. In the BC case all ratepayers paid as they did in the Ontario decision.

Intellectual Property Rights

As one might expect some interveners raised the question of who should benefit from any new intellectual property that is developed as a result of the investment being approved by the regulator. In the Enbridge hydrogen blending decision the Board stated at page 12 as follows:

The question of the potential for, and ownership of, intellectual property was raised by some intervenors. Enbridge Gas indicated that if any benefits materialize from the intellectual property gathered, the OEB may find it appropriate for customers to share in the benefits. The OEB expects Enbridge Gas to notify the OEB if any benefits arise from the intellectual property as part of the Project, for a determination by the OEB at its rebasing application on how these benefits will be treated. Enbridge Gas is also expected to comment on the proposed sharing of benefits from the intellectual property when it seeks any changes to, or expansion of, the Project.

The Board did however attach the following condition to its decision in Schedule B, section 5 as follows:

5. Enbridge Gas must notify the OEB if any benefits arise from the intellectual property as part of the Project, for a determination by the OEB at their rebasing application of how these benefits will be treated. Enbridge Gas is also expected to comment on the proposed sharing

of benefits from the intellectual property when it seeks any changes to, or expansion of, the Project.

Technology Options

In both of the Ontario decisions the Board faced arguments that the applicant may not have chosen the best technology and other technology might be better in terms of carbon reduction. The Board quite properly took the position as it does in merger and acquisition cases²⁰ that the Board was going to examine the proposal the applicant had put forward and not investigate other technologies that it had not proposed.

The Board explained that this was the proper approach in a technology pilot which is a unique application because the applicant is not quite sure what the merits of the technology are at the outset.

Reporting Requirements

In all three decisions the regulator granted the application subject to conditions. One of those conditions deals with the reporting requirements. In the Ontario case — after some debate between the utility and the interveners — the regulator agreed that reporting at the end of five years would be satisfactory.

The Ontario Board accepted reporting at the end of five years although the parties agreed there would be a review of the project at the next rate hearing. The Board also insisted on a regular report regarding communications with stakeholders including customers. Enbridge agreed that reporting with respect to the customers was appropriate in order to ensure that the Board had an accurate understanding of the customer experience regarding the new product.

The Report at the end the five-year period was to include an accounting of the cost of the project relative to the budget, any evidence of negative impacts on the distribution system, all communication with customers and a recommendation whether Enbridge should discontinue or expand the project. There was

also a discussion about confidentiality and Enbridge put the parties and the Board on notice that they may claim that portions of the final report is confidential because it represents very valuable information that third parties may be willing to pay for.

Five years was not satisfactory for the Ontario Energy Board. They insisted on annual reporting.

Customer Communication

The decisions to date often impose a requirement that involve customer communications. This was particularly the case in the two Enbridge cases that involved customer participation in the technology pilot. In the Enbridge case involving hydrogen blending, the Board made the following statement at page 14:

Enbridge Gas agreed with the reporting requirements proposed by OEB staff. Enbridge Gas agreed that some reporting will be appropriate in the context of the upcoming rebasing proceeding, providing the OEB and parties with interim information about the Project before full reporting is provided. Reporting on the ongoing customer communication is required to ensure that customers report on their experience with the blended gas and the performance of their equipment. The OEB makes these reporting commitments a condition of proceeding with the Project.

In the Enbridge bio-methane decision customer communication was particularly important because certain customers had volunteered and were paying a \$2 per month surcharge. The Board stated at page 17:

Enbridge Gas stated that it plans to provide annual communications to participating customers outlining information such as the total amount of RNG procured, related GHG emission reductions, future forecasts, Program participation, and/or other relevant metrics. A number of parties articulated their expectations

²⁰ See *Re Greater Sudbury Hydro* (31 August 2005), EB-2005-0234 at 6, online: Ontario Energy Board <www.oeb.ca/documents/cases/RP-2005-0018/decision_310805.pdf>.

that customer communications be accurate and complete, and provide customers with information sufficient to make an informed decision about whether to enroll in the Program.

The Board further commented at page 18:

This is a pilot program and the learnings about how to best communicate with customers remain with the utility to consider and reflect in any proposed changes to the Program. The OEB directs Enbridge Gas to provide accurate and sufficient information to its customers on an annual basis as proposed by Enbridge Gas, that will facilitate informed decisions by customers. Enbridge Gas is to remind customers in these annual communications that they can stop their participation in the Program or join the Program at any time.

Burden of Proof

The burden of proof varies depending on the regulator. In the Ontario hydrogen blending case the Board granted Enbridge considerable latitude because the project was experimental, stating at page 6 of the decision:

The OEB finds that Enbridge Gas has satisfied the evidentiary burden of proof in the value of proceeding with this Project as a first phase pilot. The proposed Project is a limited scope opportunity to determine if hydrogen blending should be pursued at a larger scale. The OEB supports innovation and recognizes that some initiatives might not produce the desired results but accepts that this Project will increase the learning on hydrogen fuel blending, and it should proceed.

Regulatory Jurisdiction

The British Columbia Utility Commission faced a major hurdle when one of the interveners argued that the Commission did not have jurisdiction to order rate increases to fund new technology. This is not a unique argument. In the past Canadian energy regulators have often faced objections regarding new rate classes including most recently special rates for Indigenous customers²¹ and previously rates for low-income consumers.²²

The BC regulator found that the innovation fund rates did not offend cost of service principles relying on section 59 of the *Utilities Commission Act*²³ that gave the BCUC broad discretion to use any mechanism or method for setting a rate that it considered advisable. The Commission concluded that a fixed rate adder to support the innovation fund was one such mechanism. The Ontario decisions — in both *Natural Resource Gas*²⁴ and *Waterfront Toronto*²⁵ — support a finding that if the funding is part of the Board's rate setting activities, it falls with the Board's jurisdiction.

The bottom line is that as long as the applications to fund technology pilot relate to rate applications there should be no difficulty. Ontario has an additional advantage. In October 2020, the Ontario Energy Board's objectives with respect to electricity changed by amendments to section 1 the *Ontario Energy Board Act* that added the objective to "facilitate innovation in the electricity sector."²⁶ That will help in the case of any jurisdictional disputes.

BEST PRACTICES

The increase in federal and provincial carbon reduction goals has created new challenges for Canadian energy regulators. The number of technology pilots will grow in the coming years. All Canadian energy regulators will be developing new practices and procedures that apply to this unique type of application.

²¹ *Manitoba Hydro Electric Board v Manitoba Public Utilities Board*, 2020 MBCA 60.

²² *Dalhousie Legal Aid Service v Nova Scotia Power*, 2006 NSCA 74.

²³ *Utilities Commission Act*, RSBC 1996, c 473, s 459.

²⁴ *Re Natural Resource Gas Limited* (7 February 2013), EB-2012-0396 at 4, online: Ontario Energy Board <www.rds.oeb.ca/CMWebDrawer/Record/382636/File/document>.

²⁵ *Re Enbridge Gas Inc.* (22 January 2021), EB-2020-0198, online: Ontario Energy Board <www.rds.oeb.ca/CMWebDrawer/Record/700885/File/document>.

²⁶ *Ontario Energy Board Act, 1998*, SO 1998, c 15, Schedule B, s 1(1).

The Importance of Regulators

There are those who argue that the regulator should not be picking winners and losers when it comes to technology.²⁷ There is some merit to that proposition. But we should recognize that in the case of *Technology Pilots* the regulator is not picking the winner or the loser. The regulator is simply trying to create a process that will allow a meaningful evaluation of new technology within the electric grid.

The words “electric grid” are critical. If new technology is to reduce carbon it has to work in the electric grid. The electric grid is highly regulated. The party controlling that regulation is the energy regulator. The main actor in the electric grid is the regulated utility. The regulated utility is regulated by the energy regulator. A close liaison between the utility and the regulator is essential to the introduction of any significant technology change.

Regulatory Barriers to Entry

We are all familiar with complaints that energy regulators were the reason for the slow growth of storage²⁸ and solar.²⁹ A recent Canadian government study³⁰ adds:

An agile and high-performance regulatory system will enable innovation and competition to grow the domestic market. We also need to create regulatory pathways for new clean technology that will often fall outside our current regulatory structure.

Because the energy sector is highly regulated existing regulations can create barriers to entry for new technology. In many cases the

regulations were put in place long before that new technology existed.

A recent study by the Canada West Foundation³¹ examined the barriers to energy innovation. They identified the major hurdles for both energy innovators and energy regulators. The following factors are relevant to this discussion.

8. Lack of communication between regulators and the industry

Two-way communication between the regulator and industry is critical. The regulator needs to help the industry understand what is required. At the same time industry needs to keep the regulator in the loop on what is coming up so it can prepare. Both need to have conversations about their respective roles in promoting innovative technology.

11. Need for more experimental spaces

Experimental spaces or sandboxes allow regulators to work closely with the project proponent on and unproven innovative technology to test its effectiveness and impacts. Right now the use of sandboxes appears to be the exception rather than the norm.

14. Political expectations of the regulator

Innovation should be a nonpartisan issue but it isn't always. Different governments have different

²⁷ Michael J. Trebilcock & James Wilson, “The Perils of Picking Technology Winners in Renewable Energy Policy” in Gordon Kaiser & Bob Heggie, eds, *Energy Law and Policy* (Carswell, 2011) at 343.

²⁸ Eric Wesoff, “Long-Duration Storage Makes Progress but Regulation Lags Technology”, *PV Magazine* (27 August 2020), online: <pv-magazine-usa.com/2020/08/27/long-duration-energy-storage-makes-progress-but-regulation-lags-technology/>.

²⁹ Joshua Pearce, “Solar is Being Held Back by Regulations not Technology”, *Harvard Business Review* (15 December 2016), online: <hbr.org/2016/12/solar-is-being-held-back-by-regulations-not-technology/>.

³⁰ Canada's Economic Strategy Tables, “Clean Technology” (2018) at 6, online (pdf): <www.ic.gc.ca/eic/site/098.nsf/vwapj/ISED_CleanTechnologies.pdf/\$file/ISED_CleanTechnologies.pdf>.

³¹ Maria Orenstein, “What Now? Innovation Meets Energy Regulation”, *Canada West Foundation – Policy Brief* (April 2019), online: <cwf.ca/research/publications/what-now-when-innovation-meets-energy-regulation/>.

expectations for regulators as well as different political preferences

15. Regulators mandates limit the ability to support the innovation

Regulators mandates are set out in legislation and unless innovation (or any desirable outcome such as reducing GHG emissions) is specifically supported, the way in which a regulator is required to operate may undercut its ability to possibly promote innovative approaches. Given resource constraints, it can be difficult for regulators to justify the deployment of resources to innovation efforts that are outside the defined regulatory jurisdiction over legislative scheme.

There is no doubt that the barriers described above have exist in Canada. However, a number have been removed. Today the regulatory mandate clearly includes innovation. In some cases, such as Ontario, the objectives of the legislation been changed to reflect that. In other provinces regulators are quite able to infer from government statements and clean energy objectives that carbon reduction is at the top priority for all governments. We do not need more goals. What we need is practices and procedures that will enable new technology. It is now evident that the provincial energy regulators across Canada have an important role in leading the effort.

Open competitive markets are designed to absorb new technology. That is not true of regulated markets. To meet Canada's new carbon goals new technology will be required at a much faster pace than it has been adopted in the past. We need to make it easier for new technology to become operational within the electric grid.

Regulatory Guidance Bulletins

The procedure introduced recently by the Ontario Energy Board is very important. In ordinary language it would be called a Regulatory Guidance Bulletin. In hipster language it is called the Innovation Sandbox. What that term points to is the need for open communication between the regulator and utilities and non-utilities.

The two Bulletin cited and reproduced in the Appendix represent a reversal of previous Board policy statements. The OEB told Toronto Hydro that they could not own and operate EV charging facilities³² only to reverse that by a Staff Bulletin four years later.³³ In the same manner the OEB told Toronto Hydro it could not own behind the meter storage³⁴, only to reverse it through a Staff Bulletin in the following year.³⁵

It may seem strange that Board staff would be reversing a Board ruling. There is nothing wrong with this procedure. The Board staff opinion is not binding on the Board. The Board has made that perfectly clear. Nor is this process unique. Other regulators often issue Bulletins to reflect updates on how they interpret and enforce their legislation. The advantage of this new procedure is that it offers real time regulation. This is what is needed to reduce carbon levels to the degree set out in the most recent goals established by the Government of Canada.

Other energy regulators in Canada will soon adopt this new process. The experience in Canada to date suggests that it would be best if regulators offered clear regulatory procedures for both Regulatory Guidance Bulletins and Technology pilots. In both cases the regulator has to clearly define what the application should contain and the criteria on which it will be judged. The other issue that regulators have to address is the degree of transparency of the process. We must remember that overall objective is to promote new technology that will help Canada meet its carbon reduction goals.

³² *Toronto Hydro-Electric*, *supra* note 1.

³³ Ontario Energy Board, *supra* note 12.

³⁴ *Toronto Hydro-Electric 2019*, *supra* note 11.

³⁵ Ontario Energy Board, *supra* note 3.

That will require full and detailed reporting by both the technology pilot applicants and the regulator.

Technology Pilots

In 2020, we saw three technology pilot decisions in Canada. A number of factors were considered by the two regulators in these applications. These applications are new. The process is never perfect in the first cases. As in the case of Regulatory Guidance Bulletins a number of questions come to mind.

The first question is: should there be a Technology Pilot Guideline that sets out what a successful application must contain? The next question is: what should it contain? For example, should it contain the following:

- a. a calculation of the estimated carbon reduction that the project is expected to achieve
- b. a capital contribution over an above the amount being committed by rate payers a participating technology partner
- c. a commitment to collect all relevant data and make that available to the public
- d. a commitment to develop a business case prior to full scale development

The Technology Pilot Guideline should also specify whether or not a detailed annual report will be required and, if so, what it should contain such as the following:

- a. an accounting of expenses compared to budget
- b. any communication with customers involved
- c. any evidence of harm to the network
- d. any communication with municipal partners
- e. a report on any intellectual property developed

The nature of these requirements will vary by regulator. The important thing is to define them and make sure applicants understand what has to be in the application and what the reporting requirements will be.

The Importance of the Threshold Test

This article reviews five decisions, including two decisions on innovation funding by the British Columbia Utilities Commission. There were also two decisions on technology pilots by the Ontario Energy Board. They both involved decarbonization of natural gas, one by injecting hydrogen and the other by injecting bio-methane. The one decision by the Nova Scotia regulator was a technology pilot decision that involved a proposal by Nova Scotia Power to test new software that could potentially increase the efficiency of distributed energy resources operated by the utility.

All of these decisions were extremely well written with careful analysis. The Nova Scotia Board however had a huge advantage. The Nova Scotia Board was able to rely on a 110-page document filed by Nova Scotia Power on November 5, 2018 called the Capital Planning and Capital Expenditure Justification Criteria. That document had been filed by Nova Scotia Power line before the application was filed for the technology pilot. It turned out to be very useful because it contained in section 17.2 a definition of the justification criteria for innovation capital investments. The Ontario regulator did not have the advantage of such a definition.

It turns out that this definition is very important for both the applicant and the decision maker. In this article it is referred to as the threshold test. The applicant needs to know what tests it needs to meet and the regulator needs to rely on the same test in order to determine if it has been met. In this section we identified all of the regulatory issue that arose in the three technology pilots. Different regulators will have different responses but those policy issues will likely have to be addressed in most cases.

Conclusion

There is no shortage of capital chasing renewable energy projects in Canada. Nor is there any shortage of aggressive goals and commitments to reduce the amount of carbon in the atmosphere. Across Canada, governments are turning to their energy regulators and asking them to get moving and lead the way. That was the reason the Ontario government in October 2020 amended the *Ontario Energy Board Act* to make it clear to the OEB that it had a new objective — “to facilitate innovation in the electricity sector.” Other governments will soon follow. ■

APPENDIX A

Ontario Energy Board, Bulletin, *Electric Vehicle Charging*, July 7, 2016

https://www.oeb.ca/oeb/Documents/Documents/OEB_Bulletin_EV_Charging_20160707.pdf

Ontario Energy Board, Bulletin, *Ownership and Operation of Behind-the -Meter Storage Assets for Remediating Reliability of Service*, August 6, 2020

<https://www.oeb.ca/sites/default/files/OEB-Staff-Bulletin-ownership-of-BTM-storage-20200806.pdf>

APPENDIX B

Michigan Public Service Commission, *In the Matter of The Commission's Own Motion to Establish MI Power Grid*, Case No. U-20645, February 4, 2021

Exhibit A

<https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t000000J90K1AAJ>

APPENDIX C

Ontario Energy Board, *Enbridge Gas Inc.*, EB-2019-0294, Decision and Order, October 29, 2020 at p.15. *Condition of Proceeding with the Pilot Project*

<https://www.rds.oeb.ca/CMWebDrawer/Record/691859/File/document>

THE BATTLES OVER NET ENERGY METERING¹

*Ahmad Faruqui, Agustin J. Ros and Gordon E. Kaiser**

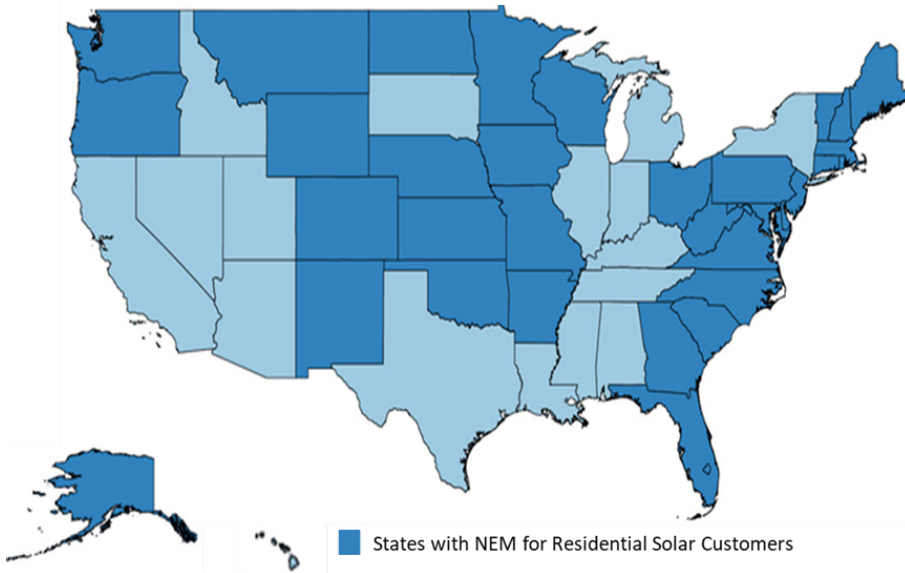
Comments by: David Morton, David Stevens and Bob Heggie

Under net energy metering (NEM), the buying and selling of electricity occurs at the same price. NEM is a pricing arrangement that applies to consumers of energy that have installed rooftop solar panels on their premise, allowing them to both buy power from the grid and to sell power to the grid. Such consumers

are often called prosumers. When they have paired battery storage with their solar panels, they are called prosumagers.

NEM is widespread in the US, as shown in Figure 1.

Figure 1: States with NEM Policy as of June 2020



Source: DSIRE NC Clean Energy Technology Center. States in dark blue indicate the presence of NEM for residential solar PV customers.

¹ We are grateful to Shivangi Pant for research assistance in the preparation of this paper. An earlier version was presented on March 29, 2021, to the Bank of America Securities Group.

* Ahmad Faruqui and Agustin J. Ros are economists with The Brattle Group where they serve as principals. Agustin J. Ros is also Adjunct Professor at Brandeis University. The views expressed here are entirely their own and not those of their employers. Gordon Kaiser is an arbitrator and counsel at Energy Arbitration LLP in Toronto and Washington DC. He is a former vice chair of the Ontario Energy Board. Please direct your comments to ahmad.faruqui@brattle.com.

The practice of NEM has evolved over the years. In most cases, the simplest form exists. It generally, although not always, applies in areas with relatively low saturation of solar panels. Dubbed as NEM 1.0, it refers to a situation where the utility compensates rooftop solar customers for their exports to the grid at the full retail rate on a one-on-one basis. Most residential rates are volumetric rates based upon embedded costs — not marginal costs — that do not vary with time, come with a modest fixed charge and are high in order to recover most of the fixed system costs. These high volumetric rates motivate some consumers to install solar panel. NEM shortens the payback on the investment in solar panels and helps accelerate the conversion of consumers into prosumers. According to utilities, NEM creates a cost shift from solar to non-solar customers and needs to be remedied. Consumer advocates and some environmental advocacy groups have also put forward this argument, while solar industry representatives believe no such cost shift occurs.

Attempts to reform NEM have been met with stiff opposition in every instance. Hawaii has succeeded in eliminating NEM in its entirety, saying the power system does not have the capacity to take on any more exports from solar panels. It has replaced NEM with self-supply or grid-supply. In the former, prosumers just use solar panels to meet their own needs. They do not supply power to the grid. Essentially, they behave like highly energy efficient consumers who drastically cut their purchases from the grid by installing efficient end use equipment. In the latter case, they supply their excess power to the grid but are only compensated for their power at the wholesale cost of power.

In other cases, such as Michigan, NEM has been replaced with an inflow/outflow model where purchases of electricity occur at the retail rate and exports occur at the wholesale rate. Still other states, such as Arizona, Nevada, Utah and Vermont have instituted net billing.

Some states have gone back and forth on the need to change NEM and decided in the end to leave things as they exist today. These states include Idaho, Kansas and Montana. In these cases, the solar industry argued that there was no cost shift between prosumers and consumers.

Finally, other states have left the general concept of NEM unchanged but have considered making changes to the underlying rate design by doing one or more of the following: raising the fixed charge, instituting a minimum bill, introducing a time-varying energy charge, introducing a demand charge or introducing a grid access charge. In these states, the solar industry has argued that charging different rates to prosumers from consumers is discriminatory and has no justification.

Most recently, in the state of South Carolina, one of the utilities has arrived at a settlement with the solar industry. The terms include a higher fixed charge, a time-of-use energy charge, a minimum bill, a grid access charge for panels that are above 15 kW in size. Customers will be provided an incentive of 39 cents per watt to install solar panels — approximately \$2,500 on a 6 kW panel — if they agree to sign on to a critical-peak pricing rate of 25 cents per kWh for up to 60 hours in the winter season if the customer also installs a smart thermostat. The details of the rate design are shown below.

As a rule, whenever changes are proposed to NEM, the intention is to extend the payback to potential future prosumers and to thus lower the probability that customers will become prosumers. The logic driving modifications to NEM is to reduce the cost shift that utilities say exists between NEM and non-NEM customers and to ensure that consumers receive good price signals for energy consumption and solar PV deployment.

Table 1: Duke Energy’s proposed rate design for NEM customers in South Carolina²

	R-STOU-61 Solar Time-of-Use	R-STOU (SC) Solar Time-of-Use
1 Basic Facilities Charge per month	\$ 14.630	\$ 13.090
2 Energy Charges		
Critical Peak (per kWh)	\$ 0.253	\$ 0.250
On-Peak (per kWh)	\$ 0.162	\$ 0.152
Off-Peak (per kWh)	\$ 0.099	\$ 0.088
Super-Off-Peak (per kWh)	\$ 0.073	\$ 0.060
3 Non-bypassable Charge per month	\$ 0.490	\$ 0.420
4 Grid Access Fee per month (per kW above 15 kW)	\$ 3.950	\$ 5.860
5 Customer and Distribution Energy Charges		
On-Peak (per kWh)	\$ 0.029	\$ 0.037
Off-Peak (per kWh)	\$ 0.023	\$ 0.025
Super-Off-Peak (per kWh)	\$ 0.019	\$ 0.018
6 Minimum bill	\$ 30.000	

The state of play in California

California is home to roughly half of the US’s 2.2 million rooftop solar installations. Since 2016, NEM 2.0 has been in effect. Under that policy, solar customers are on a mandatory TOU energy rate which is also accompanied by a minimum bill of roughly \$10 a month. The price at which they import power from the grid varies by time of day but it is the same price at which they export power to the grid. Financially, all that matters is net usage by pricing period. The peak period is late in the day, reflecting the duck curve phenomenon. On one of those rates, it runs from 4 pm to 9 pm, a period during which clean energy is generally not available from the grid.

By contrast, consumers who are not prosumers have until recently been on a flat volumetric rate for all three investor-owned utilities. For two of the three utilities, there has been no fixed charge at all. For the third one, the fixed

charge has been around a dollar per customer per month.

The California Public Utilities Commission (CPUC) has initiated a proceeding to consider replacing NEM 2.0 with NEM 3.0.³ Its staff has published a “Look Back Study” which has concluded that there is a cost shift of \$3 billion from prosumers to consumers. On March 15, 2021 several parties filed reports with the CPUC. The investor-owned utilities filed a joint report centered on the following points⁴:

- NEM 2.0 is too generous. Solar installation costs have gone down and thus NEM compensation has gone up. They contend that the payback period is now down to 3-4 years but the NEM compensation continues for 20 years.
- NEM 2.0 shifts cost to non-participants. Higher prices for non-participants leads to decreased electricity usage.

² Ahmad Faruqui, “Rebuttal Testimony of Ahmad Faruqui for Duke Energy Carolinas, LCC and Duke Energy Progress, LLC” (22 February 2021) at 18, online (pdf): *Public Service Commission of South Carolina* <dms.psc.sc.gov/Attachments/Matter/d16b5e79-5aa3-41fe-b69b-76580def3e14>.

³ *Re Order Instituting Rulemaking to Revisit Net Energy Metering Tariffs Pursuant to Decision D.16-01-044, and to Address Other Issues Related to Net Energy Metering* (3 September 2020), R.20-08-020, online (pdf): California Public Utilities Commission <docs.cpuc.ca.gov/PublishedDocs/Published/G000/M346/K286/346286700.PDF>.

⁴ “Joint Proposal of Pacific Gas and Electric Company (U 39-E), San Diego Gas & Electric Company (U 902-E) and Southern California Edison Company (U 338-E)” (15 March 2021), online (pdf): *California Public Utilities Commission* <docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M371/K711/371711892.PDF>.

- It is disproportionately high-income customers that adopt solar and it creates an affordability issue for income-qualified customers.
- NEM does not provide price signals to promote electrification.
- Promote solar-paired storage systems by providing higher compensation produced at higher value times of days.
- Provide neutrality among load serving entities by defining which credits and charges are set by the load serving entity and which by the distribution utility.

The utilities proposed a multi-pronged change to NEM 2.0 that would substantially reduce export compensation for prosumers and levy three new charges on them: a fixed charge, a higher minimum bill, and most notably a grid access charge. In comparison to proposals submitted by utilities elsewhere, this is the most far-reaching by far. It will adversely affect the economics of rooftop solar. According to the utilities' own computations, the payback period will likely be lengthened by ten years.⁵

NEM 3.0 in the utilities proposal will be designed to:

- Eliminate subsidies for new customers that do not need them.
- Encourage solar customers to pair the panels with battery storage.
- Eliminate cost shift to non-participants by basing export values on CPUC's calculation of avoided costs and having customers pay their share of customer costs, grid costs, and public purpose programs.
- Encourage distributed solar adoption among under-represented communities through transitional subsidies and a discount on the Grid Benefits Charge.
- Eliminate annual true-ups, provide transparency on export compensation and responsibility for grid maintenance.
- Provide an optional Value of Distributed Energy tariff compensation.
- Impose a uniform pricing structure across utilities.

- New distributed generation (DG) customers take service on default cost-based rates, based on elements such as non-tiered TOU rates and customer charges.

As expected, the solar industry and clean energy advocates are strongly contesting both the magnitude and at times even the existence of a "cost shift." The solar industry intends to show that the cost shift from the 10 GW of existing NEM 1.0 and 2.0 rooftop systems is no larger than the above-market costs of the utility-scale generation developed to date under the Renewable Portfolio Standard (RPS) program. So if California did not have a rooftop program, it would have been required to do more utility-scale RPS renewables that would have produced a comparable "cost shift" of above-market costs. Ratepayers would not have escaped these above market costs either way! These above market costs — for both RPS and rooftop solar — are largely the result of rapidly declining renewable technology costs over the last 15 years.

The solar industry is agreeable to dropping the export compensation by 50 per cent over five years and moving future NEM customers to TOU rates but not to making any additional changes. Specifically, they have proposed the following elements⁶:

- Under new proposed tariff, customers with renewable DG would pay a different rate for energy received from utility than for the excess generation exported to utilities.
- Customers of PG&E and SDG&E would be required to take service from one of the utility's available un-tiered

⁵The Natural Resources Defense Council has proposed reducing the export compensation to a level that would leave the payback period at 10 years.

⁶"Proposal of the Solar Energy Industries Association and Vote Solar for a Net Energy Metering Successor General Market Tariff" (15 March 2021), online (pdf): [California Public Utilities Commission <docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M371/K664/371664442.PDF>](https://www.cpuc.ca.gov/PublishedDocs/Efile/G000/M371/K664/371664442.PDF).

TOU rates, which will provide stronger incentive for customers to include storage. SCE customers can continue using the residential default TOU rates and the electrification rate.

- Five-year stepdown in compensation, focused on reducing the export rate.
- Use of TOU rates recently adopted by the Commission. Large differences between on- and off- rates closer to marginal costs resulting in lower compensation for solar-only systems which will encourage customers to include on-site storage.
- Incorporation of other types of distributed energy resources (DERs). Base program on a TOU rate platform that is not solar or NEM-specific.

- Continued application of secondary customer benefits. Exemption from departing load charges, standby charges, and interconnection upgrade costs.
- Terms and billing rules. Update the net surplus compensation rates to use a 12-month rolling average of the adopted Avoided Cost Calculator values. Customers allowed to oversize their solar systems by up to 50 per cent with excess output compensated at the avoided cost-based net surplus compensation (NSC) rates.
- Using monthly bill as a default with an annual true-up in April.

The solar industry contends that their analysis looks at the lifecycle costs and benefits of rooftop solar, unlike the investor-owned utilities proposal. A summary of the utility and solar industry proposals is provided in Table 2 and 3.

Table 2: PG&E Proposed Charges^{7,8}

Type of Rate	Summer			Winter			Grid Benefit Charge	Customer Charge	Net Surplus Cost
	On Peak	Part Peak	Off Peak	On Peak	Part Peak	Off Peak			
	\$/kWh	\$/kWh	\$/kWh	\$/kWh	\$/kWh	\$/kWh	\$/kWh/month	\$/month	\$/kWh
Export Compensation Rate	0.13	0.08	0.06	0.06	0.05	0.05	-	-	-
Residential Default Rate (E-DER)	0.40	0.27	0.22	0.23	0.21	0.20	-	-	-
Other Charges	-	-	-	-	-	-	10.93	20.66	0.03

Table 3: Vote Solar and SEIA Proposed Charges for PG&E Customers⁹

	Summer			Winter			California Climate	Delivery Minimum	Net Surplus Cost
	On Peak	Part Peak	Off Peak	On Peak	Part Peak	Off Peak			
	\$/kWh	\$/kWh	\$/kWh	\$/kWh	\$/kWh	\$/kWh	\$	\$/day	\$/kWh
Export Compensation Rate, 2023	0.50	0.39	0.18	0.37	0.35	0.18	-	-	-
Export Compensation Rate, 2027	0.25	0.19	0.09	0.18	0.18	0.09	-	-	-
Residential Default Rate (EV2A)	0.50	0.39	0.18	0.37	0.35	0.18	-	-	-
Other Charges	-	-	-	-	-	-	(17.20)	0.33	0.059

Note: The California Climate Credit is a semi-annual payment per household
The Delivery Minimum Bill Amount is charged per meter.

⁷ PG&E, “Electric Schedule EV2” (21 June 2019), (last accessed 5 May 2021), online (pdf): <www.pge.com/tariffs/assets/pdf/tariffbook/ELEC_SCHEDS_EV2%20(Sch).pdf>

⁸ “Joint Proposal of Pacific Gas and Electric Company (U 39-E) San Diego Gas & Electric Company (U 902-E) and Southern California Edison Company (U 338-E)” (15 March 2021), online (pdf): *California Public Utilities Commission* <docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M371/K711/371711892.PDF>

⁹ *Supra* note 6.

The CPUC held a two-day workshop on March 23–24 to review the proposals. Evidentiary hearings will be held in the late July, early August timeframe.

What will be the likely impact of the utilities' proposal on customer adoption of rooftop solar panels?

We have estimated econometric demand models for predicting solar adoption using data from 27 states over the 2008–2018 frame.¹⁰ We find that the cross-price elasticity of demand for solar installations with respect to the price of electricity is high. According to our analysis, a 10 per cent decrease in the price of electricity would reduce the demand for solar installations by anywhere between 10–20 per cent. We also find evidence of a high-income elasticity of demand for solar installations, and that the existence of NEM provides a significant boost to solar installations. In terms of payback, we find that a one-year increase in the payback period drops solar installations by 6 per cent. Thus, a 10-year increase in the payback period, such as that being proposed by the utilities, will drop solar installations by more than half.

Postscript

California spends \$1.5 billion annually on its energy efficiency programs. The money is provided in the form of financial incentives such as rebates and low interest financing to homeowners to lower the payback period on their potential adoption of energy efficient equipment. Once that equipment is installed, it reduces their energy consumption significantly. Since marginal costs are lower than average costs, such a reduction in energy consumption creates a cost shift from non-energy efficient customers to energy efficient customers. Surprisingly, no voices have been raised asking for a Look Back Study to be done to quantify the cost shift and to modify the states energy efficiency policies to reduce the incentive for customers to engage in energy efficiency.

THE CANADIAN EXPERIENCE

Net metering started in Canada on March 9, 2004, when the British Columbia Utility Commission established the first tariff¹¹. It was prompted by the publication by the BC government in November 2002 of its 2002 energy plan called *Energy for the Future*. That document stated in part that the British Columbia Hydro Power Authority known as BC Hydro will develop policies such as net metering to support the voluntary goal of acquiring 50 per cent of new electricity supply from clean sources in British Columbia over the next 10 years. Ontario followed two years later. Today all nine provinces and three territories in Canada offer net metering. In Alberta and the Yukon it is called microgeneration not net metering. In Alberta and Ontario, the program is fixed by provincial government regulations.

Generally, net metering is the same across the country. Customers can operate their own generation facility provided it is renewable energy and sell excess power to the grid at the same prices they buy it. The size of the generating equipment varies. In Manitoba it is limited to 200 kW, in Ontario to 500 kW and in Nunavut to 10 kW. There is one exception, however. In 2020 British Columbia broke rank and removed the quantity restriction after an extensive consultation and report. Prior to that the BC nameplate capacity restriction was 100 kW compared to 500 kW in Ontario.

Set out below is a detailed description of the net metering programs in British Columbia, Ontario, and Alberta written by experts in those jurisdictions. These three provinces account for 95 per cent of the solar generation in Canada. Ontario itself, accounts for 85 per cent.

A British Columbia Perspective¹²

The British Columbia Utilities Commission (BCUC) has significant experience in Net Metering (NM), having approved its first NM program in 2004. Prior to that date, on warm sunny days when a customer's rooftop solar

¹⁰ The results we cite in this sections is from consulting work performed to date as well as a working paper entitled, "Residential Rooftop Solar Demand and the Impact of NEM Compensation and Residential Electricity Prices." Please contact the author for a copy of the paper.

¹¹ *Re British Columbia Hydro and Power Authority* (10 March 2004), G-26-04, online: British Columbia Utilities Commission <www.ordersdecisions.bcuc.com/bcuc/orders/en/115431/1/document.do> [*BC Hydro*].

¹² David Morton, Chair and CEO, British Columbia Utilities Commission.

panels were generating more electricity than the customer needed, the customer received no compensation for energy fed back into the grid (it was, in effect, 'gifted' to the utility). This obviously put small-scale distributed generation (DG) at a disadvantage compared to larger grid-connected generation and was a problem that we wanted to address.

A NM rate offered a simple solution to this problem — energy fed into the grid by a customer would be offset against volumes they purchased from the utility, and the customer would only be charged for the net difference. This simplified billing approach did not result in a subsidy as the residential retail rate (6.05 c/kWh) at this time approximated the market value of generation (5.4 c/kWh). In addition, under the NM rate, if a customer generated more electricity than they had used in the year, they were compensated at the price value (5.4 c/kWh) for the excess.

The BCUC recognized that these key inputs could change over time, and so stated that the NM rate was conditional on development and implementation that does not incur any substantial cost on the utility, and that does not impose any inordinate barrier to ratepayers seeking to Net Meter. Generator size to participate in the program was capped at 50 KW.¹³

A few years later, in 2009, the BCUC considered a request by an intervenor to increase the price paid to customers under the NM rate to further encourage investment in distributed generation. This request was denied as it was considered within the scope of Government policy:

The Province has not yet issued a directive to the Commission with respect to incentive pricing and the specific role of the Net Metering program in achieving conservation objectives. Until the time that such a direction is issued, the Commission cannot presume the

details of potential Government policy. The Commission is therefore not persuaded that it should order BC Hydro to include an incentive component into the Net Metering price at this time.¹⁴

In 2012, British Columbia Hydro and Power Authority (BC Hydro) filed an application to amend the NM rate. The BCUC reconfirmed the objectives for the program in the resulting decision, stating:

In order for the Net Metering program to contribute in a more meaningful way to help BC Hydro meet its obligations, there should be clear objectives for the program that focus on economic effectiveness and efficiency... The Panel considers it to be important to clearly define success in order to evaluate progress and make necessary changes... [T]he Panel is of the view that unnecessary economic and other barriers to investment in small-scale clean DG should be mitigated, provided that to do so does not incur a substantial cost on the utility or unnecessarily shift costs to other ratepayers.¹⁵

By 2012, there had been changes in both the estimated wholesale value of energy and the retail rate. The wholesale value of energy had increased from 5.4 c/kWh to 9.99 c/kWh (based on BC Hydro's Standard Offer Program (SOP)¹⁶). The NM rate was therefore updated to use this higher value to compensate customers for any generation fed into the grid in excess of their annual consumption.

However, the residential retail rate (previously 6.05 c/kWh) had also increased — it was now a stepped rate, with the first block at 6.67 c/kWh and the second block expected to increase to 12.96 c/kWh. It was therefore not clear whether the NM program was over or undercompensating the 116 customers on

¹³ *BC Hydro*, *supra* note 11.

¹⁴ *Re British Columbia Hydro and Power Authority* (29 January 2009), G-4-09, Appendix A at 2, online: British Columbia Utilities Commission <www.ordersdecisions.bcuc.com/bcuc/orders/en/117003/1/document.do>.

¹⁵ *Re British Columbia Hydro and Power Authority* (14 May 2012), G-57-12, Appendix A at 12, 20–21, online: British Columbia Utilities Commission <www.ordersdecisions.bcuc.com/bcuc/orders/en/118517/1/document.do> [*BC Hydro 2*].

¹⁶ The Sanding Offer Program (SOP) provides a simplified energy purchase contract for eligible clean generators between 100 kW to 15 MW. The program was suspended in 2019.

the NM program for energy fed into the grid and used to offset against a customer's own consumption. The Decision stated:

This gives rise to two concerns for the Panel. The first is that paying a price that is higher than the SOP price [the price paid to larger generators] to Net Metering customers means that potentially the price paid for energy under the Net Metering program may be unduly preferential, and in contravention of section 59 of the Act. Why should Net Metering customers receive a greater rate for their energy than SOP producers? However, in this regard, the Commission stated in Order G-26-04 that "limited cost-shifting to non-participating customers was warranted to support the implementation of Net Metering for distributed renewable generation."¹⁷ The second concern is that customers receiving a price that is lower than the SOP are subsidizing the energy that they supply to BC Hydro, thereby facing a disincentive, compared to other DG producers that are not in the same situation.¹⁷

To address this concern, the BCUC directed BC Hydro to provide an analysis of the estimated Energy Credit paid to NM customers in its next Net Metering Evaluation Report.

In addition, the BCUC considered a request by a customer to increase the generator size limit from 50 kW to 100 kW, so that these larger generators could also be compensated for energy fed into the grid. The BCUC recognized that the NM program was not the only potential solution to this problem, and therefore directed BC Hydro to consult with affected market participants to identify barriers to entry for small-scale clean distributed generation less than 2 MW, develop and evaluate options to address those barriers and provide the result of

this consultation in their next Net Metering Evaluation Report.¹⁸

BC Hydro subsequently increased the size of generators that could participate in the net metering program from 50 kW to 100 kW.¹⁹

A more recent development to the NM program occurred in 2020 — by this time the market had fundamentally changed. BC now expects to be in a surplus energy position for many years and so the NM price paid for generation in excess of annual consumption was adjusted to reflect the annual value of BC Hydro's energy exports (4.0 c/kWh in 201), with a 5-year phase in for existing NM customers. The BCUC also directed BC Hydro to submit an updated Net Metering Evaluation Report to estimate, amongst other things, cost shifting between participants and non-participants and to provide options to address the cost shifting.²⁰

The BCUC also considered a request by BC Hydro to limit the size of the generation facility to the customers' annual consumption. This request was rejected, with the BCUC finding that the proposed restriction could prevent customers from installing the most economically efficient sized generator and that the market-based energy price paid for generation in excess of annual consumption would sufficiently mitigate any cost-shifting concerns.

This 2020 NM Evaluation report recently filed by BC Hydro shows that the value of energy fed into the grid has now dropped from 9.99 c/kWh in 2012 to 3.2 c/kWh for F2020, while the average retail rate received by customers under the NM program for this energy has increased to 10.71 c/kWh (F2019). In addition, there had been a substantial decline in the cost of solar PV Panels over the past decade, and participation in the NM program had grown substantially — from 116 customers in 2011 to over 2,600 in 2021. BC Hydro's NM report concluded that, as participation in the NM program is expected to grow, there

¹⁷ *BC Hydro 2*, *supra* note 15, Appendix A at 7, 44, 48, 50.

¹⁸ *Ibid*, Appendix A at 43–50.

¹⁹ *Re British Columbia Hydro And Power Authority* (23 June 2020), G-168-20 at 7, online: British Columbia Utilities <www.ordersdecisions.bcuc.com/bcuc/decisions/en/481549/1/document.do> [*BC Hydro and Power*].

²⁰ *Ibid* at 29, 32, 35, 47, 53.

is a need to change the NM rate to address cross-subsidization and set an economically efficient rate.²¹

In summary, the NM program has changed over time as the fundamental inputs have changed — there have been changes in retail rates, the value of generation fed into the grid, the number of individuals on the net metering program, and the maturity of the DG industry. In addition, metering and billing improvements have also mitigated the simplicity benefits achieved when the program was first put in place.

However, in reviewing the history of BC's NM program since its inception in 2004, it can be seen that the key objective of the rate remained unchanged — to provide efficient pricing signals to customers looking to invest in distributed generation.

It should therefore not be surprising that different jurisdictions have different approaches to Net Metering — the situation in Hawaii or Ontario is different than in BC. It should also not be surprising that a NM program changes over time, and there may be further changes as the industry develops.

Throughout these changes, the BCUC remains committed to its role as an economic regulator — policy and technology neutral — with a focus on the benefits to ratepayers. To promote economic efficiency, distributed generation should be on a level playing field with other options such as grid-connected generation and energy efficiency, and the NM rate was put in place to help us achieve this. Our aim is to continue to identify and address market barriers and support innovation so that all customers can benefit from the energy market transformation.

An Ontario Perspective²²

Ontario's net metering program came into force in 2006 with enactment of the *Net Metering Regulation*.²³ The Regulation required electricity distributors to allow eligible customers to generate and deliver electricity to the distributor and receive a refund. The customer would only pay for his or her net consumption of electricity commodity. In this way, the compensation for electricity delivered to the grid would be the same as the cost to receive electricity from the grid. Participants would not be compensated for generated power supplied to the grid in excess of the amount received from the grid at other times. Eligible customers were those producing electricity solely from renewable sources (solar, hydro, biomass or wind) for the purpose of the customer's own consumption with a capacity of less than 500kW.

A second — and more popular — option for consumer generators was the microFIT program. The microFIT program was launched in 2009, following the passage of the *Green Energy and Green Economy Act*. Under the microFIT program, consumer generators are compensated under a tariff system where all electricity generated by the participating consumer is sold to the electricity grid. The program's popularity could be explained by the generous pricing (as high as \$0.80.2/kwh for rooftop solar and \$0.44.3/kwh for ground mounted at program inception).²⁴ The consumer does not directly use any electricity generated. The microFIT program, like the existing net metering program, is for small-scale projects (less than 10kW) which rely solely on renewable sources. The microFIT program was closed to new participants in 2017, however, those with ongoing microFIT contracts (which have terms of up to 20 years) continue to be compensated for electricity generated.

After the end of the microFIT program, Ontario indicated that it would expand and enhance its net metering program. Several

²¹ BC Hydro, "Net Metering Evaluation Report No. 5" (30 October 2020) at 4, 18, 42, 64; *BC Hydro 2, supra* note 15, Appendix A at 16.

²² David Stevens, Partner, Aird & Berlis, Toronto

²³ O Reg 541/05 under the *Ontario Energy Board Act, 1998*, SO 1998, c 15, Schedule B.

²⁴ This pricing is substantially higher than the amount credited for net metering, which is based on a system-wide price for all electricity (including relatively low-cost hydroelectric and nuclear generation).

changes have been made in amendments to the *Net Metering Regulation* implemented in recent years.²⁵ Among the key items of note are the following:

- The capacity restriction of 500 kW has been eliminated to enable larger customers to “right-size” their renewable energy systems to their load. To be eligible for net metering, customers are still required to generate power primarily for their own use.
- Net metering generators continue to be compensated at the same rate that they are charged for consumption of electricity as consumers. While consideration had been given about crediting consumers at a “value-based” compensation rate, stakeholders expressed concern that such a rate would not be as transparent as using retail rates.²⁶
- Net metering program participants will be permitted to carry forward credits, for up to one year, where the amount of electricity sent to the grid exceeds consumption from the grid in a given billing period. In the result, a participant cannot generate more than its own consumption in a year, but can do that during periods of the year.
- A net metering program participant can use energy storage in combination with renewable generation, and can convey electricity from either the generator or the storage device to the grid.

Recent proposed changes to the *Net Metering Regulation* posed by the Ontario Ministry of Energy would, if enacted, allow for “community net metering demonstration projects.”²⁷ Community net metering would be an arrangement allowing the transfer or sharing of credits from generation facilities

within a community across multiple metered accounts. Embedded renewable generation and potentially energy storage facilities would be used to supply the community as well as send any generation that exceeds the community’s needs to the grid. The supply to the grid would result in electricity bill credits for participating accounts in the community, which could be used to offset costs of electricity consumption from the grid.

At this time, there is no indication about whether or when Ontario will proceed with community net metering demonstration projects, or about the specific rules and requirements that will apply.

Net Billing in Alberta²⁸

Under the provisions of the *Micro-generation Regulation*²⁹, the net billing method, rather than net metering, is used to calculate energy credits and delivery charges. Net billing is the method prescribed by Alberta legislation for compensating customers for excess electrical energy delivered to the distribution system and for charging customer for consumption of electrical energy from the system.

The *Micro-generation Regulation* enables a customer to receive a credit on its electricity bill for the electrical energy it delivers to the distribution system (generation) during their billing period (usually one month). The credit is equal to the amount of electrical energy delivered to the distribution system minus the amount of electrical energy used by the customer over the billing period, multiplied by the customer’s energy rate. This rate may vary depending on whether the customer is on a regulated retail rate or a competitive contract provided by its retailer.

To facilitate the calculation, a bi-directional meter having two separate register is required; the first register measures the total amount of

²⁵ See Environmental Registry of Ontario, “Proposed amendment of Ontario Regulation 541/05: Net metering, or a new regulation (to be determined), to be made under the Ontario Energy Board Act, 1998” (8 May 2018), online: <ero.ontario.ca/notice/013-1913>.

²⁶ See e.g. Ontario Sustainable Energy Association (OSEA), “RE: Feedback to the Ministry of Energy’s Consultation on Net Metering/Self-Consumption Concept Proposal” (23 October 2015), online (pdf): <ontario-sea.org/resources/Documents/Old%20Website%20Files/7465_OSEA_Feedback_Net_Metering_Self-Consumption_FIN.pdf>.

²⁷ See Environmental Registry of Ontario, “Changes to Ontario’s Net Metering Regulation to Support Community-Based Energy Systems” (8 October 2020), online: <ero.ontario.ca/notice/019-2531>.

²⁸ Bob Heggie, Chief Executive, Alberta Utilities Commission.

²⁹ *Micro-generation Regulation*, Alta Reg 27/2008.

electrical energy delivered to the customer from the distribution system, the second measures the total amount of electrical energy delivered to the distribution system from the customer's site during the billing period. The delivery charges are calculated using the total amount of energy measured in the first register.

After the retailer provides the credit to the customer, the *Micro-generation Regulation* obligates the Alberta System Operator (AESO) to compensate the retailers for credits provided to the retailers' customers. In turn the AESO collects the amount paid out in compensation to retailers through its transmission tariff. In this way, all ratepayers provide the funding for net billing credits.

Net billing is in contrast to net metering which would allow a customer to reduce the meter's measurement of the customer's consumption by the amount of generation supplied to the distribution system, resulting in greater savings of both energy and delivery charges.

According to the Alberta Electric System Operator, who collects the provincial micro-generation data, there were approximately 6,700 sites with micro-generation of which 95 per cent were solar. The total installed capacity was approximately 103,000 kW. The *Micro-generation Regulation* sets the limit at 5 MW. However, the micro-generation unit must be sized to meet all or a portion of the customer's total annual energy consumption at the customer's site, i.e., the total nameplate capacity cannot exceed the lesser of 5 MW or the customer's annual consumption. There is no limit as to the amount of energy that the micro-generation can sell to the grid provided the micro-generation unit was properly sized at the time of approval and construction.

The maximum capacity is 5 MW, and it has to be sized to the consumption of the site (i.e., it cannot be oversized, so it is constantly spilling onto the grid). Technically, a home solar panel could sell up to 5 MW if that is the consumption that happens at the site. There is no hard limit to the maximum power. There is a difference in how it is compensated depending on the size of the microgeneration. For a unit less than 150 kW, the site gets a bi-directional cumulative meter and gets the retail energy rate. For sites 150 kW

and greater, the site gets a bi-directional interval meter and receives the pool price applicable to the billing period. The installed capacity for the 6,630 solar sites is 94,572 kW. This works out to be 14 kW per site. Accordingly, many of the residential sites are less than 150 kW in size.

The National Picture

Net metering in Canada has not been a roaring success. A recent decision of the BCUC³⁰ states at page 13 that between 2004 and 2014 only 400 customers were signed up with an installed capacity of 2.5 MW. As of March 1, 2019, total participation had increased to 1850 customers with an installed capacity of 13 MW.

BC Hydro on its website explains, in part, the reason for the slow growth. A typical British Columbia residential customer consumes 11,000 kWh per year. A typical solar installation on a residential roof is 4 kW in size with 16 panels which in BC generates 4400 kWh of electricity over a year. An average solar system this size costs \$14,500 which, under the BC rate structure, yields a payback on the investment that takes 23 years.

At the end of 2020 there were 43,000 solar installations in Canada compared with 2 million in the United States in the same year. The US had an installed capacity of 75,000 MW in 2020 compared to 3000 MW in Canada.

Over half of the American installations were in the state of California while 90 per cent of the Canadian installations were in the province of Ontario. The Ontario numbers were driven by the FIT program that the government of Ontario introduced in 2009 and continued until discontinued in 2016.

When the FIT program first started in Ontario, Ontario was a world leader in wind. In October 2010, the largest solar farm in the world with 97 MW was located in Sarnia, Ontario. In recent years the Canadian solar production has been fairly stagnant. In 2018 the Canadian solar capacity was 3115 MW which crept up to 3325 MW by 2020. The United States by comparison had a solar capacity of 53,184 MW in 2018 which rose to 75,572 MW in 2020. By 2019 Canada had fallen to 19th in the world in solar capacity.

³⁰ BC Hydro and Power, *supra* note 19.

The Reform Efforts

Regulators in both Canada and the United States have tried to reform net metering. A major objective was to determine if net metering could be expanded from a single customer to a group of customers. The political attraction to net metering was that it could promote renewable energy and reduce the cost of electricity to ratepayers at the same time. The opposition came from utilities that were not eager to lose demand or customers.

The most ambitious program took place in British Columbia. On April 20, 2019, BC Hydro submitted an application to the British Columbia Utilities Commission (BCUC) to amend its net metering program. This resulted in interventions by 14 parties, over 200 letters of comment, and a 52-page final decision a year later in June 2020.³¹ The most contentious part from the preceding was BC Hydro's request to limit the size of the generation facility to the customers' annual load. Utilities throughout North America have long argued that customers engaging in net metering should not be able to generate a profit. The basic concept was that customers should be able to offset the cost of electricity they bought from the utility with the revenue they received from selling electricity to the utility. The BC evidence was that some customers were making a significant profit, but it was a small percentage of the total. In the end the BCUC rejected the BC Hydro proposal and refused to adopt a maximum generation volume.

In 2014 the Ontario Energy Board began a consultation to determine if all residential distribution rates should be change to a fixed charge. Previously that had been divided between a fixed charge and a variable charge. The rationale was that the growing desire for customers to generate their own electricity could create problems for electricity distributors. The Board made it clear that it supported the new self generation technology that customers wanted to use.

After the decision to move all residential distribution rates to a fixed charge on April 2, 2015 the Ontario Energy Board started a process to move net metering to community net metering. On August 19, 2016, the Ontario government proposed a form of community

net metering or virtual net metering. This arose from the government's 2013 Long-term Energy Plan where the government indicated it would examine the potential for the micro generation program to evolve from a generation purchasing program to a net metering program. The August 19 proposal included the following:

- The requirement that the equipment used to generate electricity be no greater than 500 KW based on the rated maximum capacity of equipment **will be removed**.
- Storage and remittance of electricity from the electricity distributions system and from a renewable energy system **will be permitted**.
- Generators will be compensated on **the same basis** as they are charged for consumption of electricity as consumers.
- Single entity virtual net metering credit transfers between multiple electricity accounts held by the same person or corporation **will be allowed** subject to the account leaders being located within the same electricity distributors service territory and within a maximum distance of a 3 km radius.

The government stated that the proposed revised regulation would come into force on July 1, 2017. However, on December 22, 2016, the government decided to remove the community net metering proposal.

On October 8, 2020, the Ontario government again started a consultation to consider virtual net metering stating:

We are proposing amendments to Ontario net metering regulation that will allow for demonstration for community net metering project building on the current net metering framework. Community net metering will support the development of innovative projects such as net zero communities using distributed energy resources.

The government asked interested parties to make submissions by November 22, 2020,

³¹ *Ibid.*

addressing such questions as: What constitutes a community? How should the credits be structured? and How should utilities recover any costs incurred? To date no report has been issued by the government or the Ontario Energy Board.

A Wake-Up Call

On April 22, 2021 at an international climate summit Canada pledged that it would reduce carbon emissions by 40 to 45 per cent below 2005 levels by 2030. The previous Canadian goal set at the Paris climate talks in 2015 was 30 per cent by 2030. At the same meeting the Biden administration committed to cutting US emissions by 50 to 52 per cent below 2005 levels by 2030. That was twice the level President Barack Obama had committed to for the same time period.

In December 2020 Canada had announced a new climate plan entitled *A Healthy Environment and a Healthy Economy*, to accelerate climate change initiatives throughout the country.³² The plan included 64 different programs to cut pollution and build a clean economy at a cost of \$15 billion. In April 2021, the Biden administration announced that it would spend \$2 trillion on clean energy investment over the next four years.

Global investment in renewable energy will reach a record high in 2021 and spike to \$16 trillion by 2030. What does this mean for net metering? The short answer is that it means the days of delay are over. Provincial regulators and the government's those regulators report to will focus on original rationale for this policy instrument — carbon reduction. They will abandon the artificial restrictions put in place over the last decade.

On May 18, 2021, the International Energy Agency or IEA released a major Report³³ called *Net Zero by 2050: A Roadmap for the Global Energy Sector*. It outlined what the world has to do to get to zero emissions by 2050. It conveys

a strong message which is this: It is not going to be easy. It is harder than most people think. With respect to solar electricity generation the Report had this to say in part:

In the near term the report describes a net zero pathway that requires the immediate and massive deployment of all available clean and efficient energy technologies combined with a major global push to accelerate innovation. The pathway calls for annual additions of solar PV to reach 630 gigawatts by 2030 and those of wind power to reach 390 gigawatts. Together this is four times the record level set in 2020. For solar PV it is equivalent to installing the world's current largest solar park every day.

The Real Solution

If the IEA is correct and a rapid increase in solar generation is critical if Canada hopes to meet its decarbonization target, we need a new solar strategy. Community generation is not going to get us there. What could get us there is LDC solar. Why not let local electricity distributors provide solar generation. Not all generation — just solar generation. For the last hundred years there has been a hard line between generation and distribution. That is because in the beginning generation was a natural monopoly. It consisted of huge hydro plants and later huge nuclear plants.

Solar generation is not a natural monopoly. It is local generation. It does require local distribution network but it does not, for the most part, require transmission. The local electric distributors have extensive resources in their communities. If LDCs were allowed to own and operate solar generation, they will put capital to work. Just recently the Ontario Energy Board agreed to let LDCs put electric vehicle charging into rate base. That was because they declared it to be a competitive offering.³⁴ Solar generation is equally competitive.

³²The Right Honorable Justin Trudeau, "Prime Minister Announces Canada's Strengthened climate plan to protect the environment, create jobs, and support communities" (11 December 2020), online: <pm.gc.ca/en/news/news-releases/2020/12/11/prime-minister-announces-canadas-strengthened-climate-plan-protect>.

³³International Energy Agency, "Net Zero by 2050: A Road Map for the Global Energy Sector" (May 2021), online (pdf): <[iea.blob.core.windows.net/assets/4482cac7-edd6-4c03-b6a2-8e79792d16d9/NetZeroBy2050-ARoadmapfortheGlobalEnergySector.pdf](https://www.iea.org/assets/44/482cac7-edd6-4c03-b6a2-8e79792d16d9/NetZeroBy2050-ARoadmapfortheGlobalEnergySector.pdf)>.

³⁴Ontario Energy Board, Bulletin, "Electric Vehicle Charging" (7 July 2016), online (pdf): <www.oeb.ca/oeb/_Documents/Documents/OEB_Bulletin_EV_Charging_20160707.pdf>.

A National Solar Policy

The fragmented approach resulting from the net metering policies across Canada has not been successful. Canada continues to fall behind other countries in solar production. If Canada wants to increase its solar generated electricity it will require a consistent national policy. That is not that difficult. It must however address four issues — Who are the major customers? Who are the potential suppliers? What are the regulatory barriers and what are the financial barriers?

The four strategic customers for solar generated electricity are the residential and commercial roof top owners, the EV charging stations, corporate power purchase agreements, and local public utilities.

Rooftop solar: There is nothing wrong with rooftop solar. It is not a bad concept. The roofs are already there and underneath them is a customer. What is missing is the proper financial support. Net metering is clearly not doing the trick. There are too many regulatory restrictions and not enough financial return.

EV charging: No one questions the rapid move to electric vehicles. Gasoline burning cars, buses, and trucks contribute significantly to the amount of carbon in the atmosphere. EV charging stations are being built across the nation. They will need electricity. That electricity can be provided by solar generation.

Power purchase agreements: Large companies are now making commitments to purchase their electricity from renewable energy sources within 10 or 20 years. These are 20 year power purchase agreements. These companies whether it is Bloomberg, Amazon, or Microsoft do not want to own or operate a wind farm or solar farm. They would like to purchase solar energy under a long term contract from a reputable supplier.

Public utilities: In every market in Canada there is a public utility that distributes electricity. It is called a LDC or local distribution company. In every province they are regulated by a provincial energy regulator. Soon the shareholders that own these utilities,

whether they are provincial governments or municipalities or private investors, will issue directions to the utilities that they should purchase most of their electricity from renewable energy sources. Why not let those utilities own and operate their own solar electricity generation?

The next question a national solar policy must address is — who is going to be the supplier of the solar generation? One possibility is the LDC serving the territory where a customer resides. Today that is prohibited by regulation.

The next question is what are the regulatory barriers? The regulatory barrier to solar generation is that the logical supplier, the local distribution company or LDC, is prohibited from providing the service. This is based on the age-old view that there is a red line between distribution and generation.

Solar generation requires a different treatment. Unlike large hydro or nuclear facilities, solar generation is not a natural monopoly. It is small, local generation offered in a competitive market. That competition in fact could be increased with the new policy.

The Regulatory Barriers

The production of electricity by solar power would increase dramatically in Canada if two regulatory barriers were removed. The first is the prohibition on LDCs owning and operating solar generation and the related storage facilities. The second is the refusal of the LDCs to provide access to their local distribution network to other solar electricity generators at a fair and reasonable access charge.

Provincial energy regulators have refused to remove these barriers over the last 20 years. They are unlikely to change in the near future. They would likely change their policy however if the LDCs were allowed to own and operate solar generation facilities themselves and supply that electricity not only to themselves but to other third parties.

There is nothing new about access charges. In the Ontario electricity sector we have long experience them in the form of pole access

charges. First it was a cable TV companies.³⁵ Then came the cellular telephone companies.³⁶ The first decision in Ontario relied on a competition law principle that first took place in the electricity industry. It is called the essential facilities principle as set down in *Otter Tail Power* decision³⁷ of the Supreme Court of the United States. The principle is that those that control essential facilities must provide access at just and reasonable prices.

This is not a question of allowing competitors to the LDCs into their market. The LDCs never provided cable television or cellular service. The same issue arose in telecommunications when competitive private line services developed in both Canada and the United States. The regulator granted access to the local distribution network of the monopoly carrier, whether that was Bell Canada³⁸ or AT&T³⁹. There is not much difference between local telephone company and a local electricity distributor.

The existing solar installation companies may complain about unfair competition. But that can be addressed by the regulator. The California Public Service Commission decision in 2015⁴⁰ created that regime when they enacted the first Distributed Energy Resource Services tariff. The utility, Southern California Gas, known as SoCal, was allowed under this tariff to own and operate a generation technology called combined heat and power or CHP on or near customer premise.

The utility was also allowed to provide the output to customers at a regulated rate.⁴¹ The SoCal gas application began by referring to a

California policy that established a target for new CHP installations of 4000 MW statewide by 2020.⁴² The utility pointed to the California Energy Commission study which concluded that CHP development in California had been stagnant for some time and state was expected develop less than half of the goal originally set. Using various reporting and rate setting requirements the regulator made sure that SoCal was not going to engage in predatory pricing that would give SoCal an unfair competitive advantage. This is not a difficult model to duplicate.

Financial Barriers

Regulatory barriers are one thing but there are also financial barriers. Any attempt to reach Canada's carbon reduction goal will require the federal government to spend a lot of money. No one questions that significant investment to reduce the amount of carbon in the atmosphere is in the public interest.

While net metering has not been successful in Canada there is no doubt that the solar FIT contracts in Ontario and Alberta were. Financial support can produce more solar generation.

A national solar policy should consider underwriting some of the construction costs of solar panels on roofs, solar panels and storage in EV charging stations, and solar farms that can serve both major customers and public utilities. The public utilities are important. Utility scale solar generation is one of the most efficient forms of solar generation. The regulator in the state of Georgia has been able to significantly

³⁵ *Re Canadian Cable Television Association* (7 March 2005), RP-2003-0249, online: Ontario Energy Board <www.oeb.ca/documents/communications/pressreleases/2005/press_release_ccta_decision_080305.pdf>; *In re Ottawa Cablevision Ltd. et al. and Bell Canada*, (1973) CTC 522 leave to appeal refused (1974) 1 FC 373; *Re Bell Canada, Tariff for Use of Support Structures by Cable Television Licensees* (27 May 1997), Telecom decision CRTC 77-6.

³⁶ "Report of the Ontario Energy Board Wireline Pole Attachment Charges" (22 March 2018), EB-2015-0304, online: Ontario Energy Board <www.rds.oeb.ca/CMWebDrawer/Record/603122/File/document>; *Rogers Communication Canada Inc. v Ontario Energy Board*, 2020 ONSC 6549.

³⁷ *Otter Tail Power Co. v United States*, 410 US 366 (1973); see also *United States v Terminal Railroad Association* 224 US 383 (1912).

³⁸ *Re CNCP Telecommunications, Interconnection with Bell Canada* (1979), CRTC 79-11 at 277-78.

³⁹ *MCI Communications v AT&T*, 708 F.2d 1081 at 1132-33 (7th Cir) Cert. denied 464 US 891 (1983).

⁴⁰ *Re Application of Southern California Gas Company, Distributed Energy Resource Tariff* (22 October 2015), A.14-08-007, online: California Public Utilities Commission <docs.cpuc.ca.gov/PublishedDocs/Published/G000/M155/K368/155368743.PDF>.

⁴¹ See Gordon Kaiser, "The Southern California Gas Decision: The First Distributed Energy Resource Service Tariff" (2015) 3:4 Energy Regulation Q 55.

⁴² ICF International, Inc., "Combined Heat and Power: Policy Analysis, and 2011-2030 Market Assessment" (February 2012), online (pdf): <www.ourenergypolicy.org/wp-content/uploads/2014/05/icf.pdf>.

reduce energy costs by encouraging the utility, Georgia Power, to move to large scale solar generation.

A NEW STRATEGY

The IEA rightly suggests that solar is the “go to” renewable energy to address the new climate goals. New technology has an important role. But it takes time and is not certain. Solar generation costs have fallen dramatically. Recent studies show that 34 per cent of new solar installations are now paired with battery storage which significantly increases its efficiency.⁴³

Solar is local generation and for the most part does not require the expensive and difficult to build transmission that wind does. Most important, the solar market has shifted to utility scale solar which is 20 per cent more cost-effective than rooftop solar.

What is necessary is a new strategy. There is no reason why rooftop solar cannot continue. But roof top solar is not growing and that is not going to change. It is important to address the solar market that is growing. That is utility scale solar. That product is now by far the dominant solar generation in the United States. The federal government should focus on utility scale solar generation.

The federal government should create an incentive for the local distribution companies in Canada to invest in utility scale solar. The LDCs are in every Canadian market. They are largely owned by municipal and provincial governments. Those governments will shortly establish aggressive requirements that these local utilities purchase only renewable energy as some US states have done.⁴⁴ It should be added if the municipal and provincial owners of the LDCs join forces in purchasing capital equipment there would be substantial economies.

In the United States the federal tax credit has been instrumental in developing solar installations. A similar policy could be developed in Canada. An alternative would

be federal contributions to initial construction costs. This would be a much more cost effective strategy than the FIT contracts in Ontario and Alberta. They produced a lot of solar but they were very expensive.

A national commitment by the federal government to finance the construction of a national solar generation network will not only help Canada meet its carbon reduction goals, it will also help restore employment to pre-Covid levels. ■

⁴³ At the end of 2020 462 GW of solar generation had applied for interconnection to the bulk power system along with 200 GW of storage capacity. 34% of the solar (159 GW) was paired with storage in a hybrid application. A year earlier 28% of the proposed solar generation was paired with storage; Joseph Rand et al, “Characteristics of Power Plants Seeking Transmission Interconnection at the End of 2020” (May 2021), online (pdf): < https://escholarship.org/content/qt5jd5x0q9/qt5jd5x0q9_noSplash_b3df6e4c091ce068e60a195dc94e3271.pdf.

⁴⁴ The *Clean Energy Transformation Act* passed by the State of Washington requires all electric utilities in the state to be carbon neutral by 2030 and to source electricity that is 100% clean by 2045.

WHAT CAN WE LEARN FROM ENERGY REGULATORY INNOVATION? CASE STUDIES OF FORMAL REGULATORY AGREEMENTS AND PUBLIC ENGAGEMENT PROCESSES

*Patricia Larkin**

Strengthening public confidence in Canada's public authorities is no easy task, but the need has never been clearer. Rapid social and policy change demand it. Clearly articulating the roles and responsibilities between and among regulatory actors is one of the most pivotal but understudied factors shaping Canada's ability to successfully chart its energy and greenhouse gas emissions future. Regulators must modernize and reinvent the ways they engage with stakeholders and policymakers alike. This is easier said than done, but there is a growing body of examples in the Canadian context that regulators can draw and learn from.

Collaborative research project between Positive Energy and CAMPUT

The findings from a collaborative research project between the University of Ottawa's Positive Energy program and the non-profit association of Canada's Energy and Utility Regulators (CAMPUT) has identified several successful innovations and opportunities to scale up innovations in energy regulatory

decision-making. Through this project, energy regulators across Canada are supported through improved understanding of shared challenges and opportunities and suggested actions to enhance policymaker-regulator relationships and public engagement approaches.

In a December article for ERQ, we reported on the first phase of this research: findings from an online survey targeting people who work for or with regulators and focused on the drivers of regulatory innovation¹. Among respondents, 50 per cent said evolving social and environmental goals or values are driving the need for regulatory innovation; 42 per cent said the need for operational decision-making efficiency; 42 per cent identified economic interests; 34 per cent said rapid technological change; 34 per cent said demands for enhanced communication and stakeholder engagement; and 22 per cent said concerns for democratic relationships.

In this article, we are going to dive into the second phase of the project: detailed case

* Dr. Patricia Larkin is Senior Research Associate at the University of Ottawa's Positive Energy program.

¹ See Patricia Larkin & Brendan Frank, "What Drives Energy Regulatory Innovation? An Online Survey from Positive Energy and CAMPUT" (2020) 8:4 Energy Regulation Q 48.

studies of specific regulatory innovations. These in-depth, qualitative case studies included background document analysis and semi-structured telephone interviews in late 2020. Interviewees represented organizations that created, implemented, use, or are affected by various regulatory innovations. Questions considered benefits and barriers for the innovation, intended and unintended consequences, as well as key success factors for process and outcomes.

Case #1: Quasi-judicial regulators' use of formal agreements

The first case examined two-way interactions by keying in on five formal agreements implemented in provincial and federal jurisdictions. A good relationship pre-existed each formal agreement, with parties well aware of the rules of engagement and how to work together. The agreements examined include:

- The Memorandum of Understanding between the British Columbia Ministry of Energy, Mines and Petroleum Resources (MEMPR) and the British Columbia Oil and Gas Commission (BCOGC)
- Roles and Responsibilities of Alberta Environment and Parks (AEP) and the Alberta Utilities Commission (AUC) Re: Applications to construct and operate wind and solar power plants
- Federal Major Project Management Agreements, using the case of the National Energy Board (NEB) and the Major Projects Management Office (MPMO)
- The Memorandum of Understanding concerning Integrated Impact Assessments under the Impact Assessment Act between the Impact Assessment Agency of Canada (IAAC) and the Canada Energy Regulator (CER)
- Terms of Reference for Ongoing Engagement between an Indigenous government and the Canadian Nuclear Safety Commission²

By definition, when parties negotiate an agreement, this creates an opportunity to discuss and confirm roles and responsibilities to the mutual benefit of all involved. The agreement itself provides the added benefit of regular opportunities for both groups to discuss a range of issues: from communication protocols to public policy initiatives. Working through the nuances of interactions proactively, rather than waiting for tensions to arise under decision-making timeline constraints, is also beneficial for proponents and other stakeholders, especially in the project context, because the rules, boundaries, and interactions are known prior to an application and review process getting underway.

We identified four clear benefits in the negotiation and use of the agreements: the demonstrated commitment and understanding of the parties; development of mutual assistance and support mechanisms; improved communication; and greater attention to stakeholder interests.

Benefits of formal agreements

The development and implementation of a formal agreement between a quasi-judicial regulator and policymaker provides opportunities for both organizations to demonstrate an ongoing commitment to engagement, relationship building, and working together in comparison to ad hoc approaches. As one interviewee put it, “The rigour of an agreement puts attention and value on relationship building.” Our findings suggest that the benefit of the agreement development process is arguably as important as the outcome. A formal agreement creates clarity and certainty for respective roles and responsibilities, while internal consultation processes provide an opportunity to highlight to staff the structures and responsibilities of the working relationship. Formal bilateral negotiations raise awareness and understanding for how two organizations, with two cultures, will work together.

An agreement also creates the opportunity for mutual assistance. Creating an agreement permits both parties to highlight their respective needs

² We recognize that the Terms of Reference between an Indigenous government and the CNSC is not a policymaker-regulator agreement because Indigenous groups are not the CNSC's associated public authority. However, this formal agreement is an example of a regulator entering into a longer-term agreement to foster long-term relationship building and clarity in roles and responsibilities, as compared with ad hoc engagement during a consultation or project application.

and expectations, ensuring the two organizations are on the same page with respect to principles and objectives. For project-based agreements, parties can work out details for regulatory requirements under different pieces of legislation. This could include full lifecycle integration, from pre-application, to construction and monitoring, with enforcement also potentially facilitated. This can reduce duplication, particularly when an overarching agreement is in place instead of one-off arrangements.

A key aspect of formal agreements is the crystallization of expectations for communications, which supports a ‘No surprises’ approach for internal day-to-day activities. In the short and long term, regular contact at all levels results in earlier discussions and problem solving. Interviewees further pointed out that an agreement can help avoid difficulties and pitfalls with new staff appointments because timelines and expectations are clear. The agreement can also ensure the policymaker and regulator to move along the ‘interaction’ continuum sooner — from basic information sharing and coordination to discussions of more substantive policy issues.

Lastly, agreements can clarify stakeholder interests, which is always of concern to proponents and stakeholders alike. A formal agreement can outline the criteria, related deliverables, and timelines for responsible authorities to follow during a project review. Where public authority roles and responsibilities are made known in an open and transparent manner, evolution in these matters can be followed, endorsed, or debated by stakeholder groups. A related benefit concerns multi-agency interactions with the same stakeholder groups. As engagement proceeds, parties can inform each other, with a potential positive effect on stakeholder relationships if both authorities demonstrate an equal commitment to transparency and building trust through engagement processes.

Barriers to effective policymaker-regulator agreements

Our findings suggest that the barriers to effective agreement development and implementation originate in two areas. The first relates to organizational leadership. The second focuses on discrepancies in priorities, capacity, and resources between the two organizations.

It is important for senior leaders entering into a formal agreement to demonstrate an interest in

its development or renewal, and then following through. If negotiations start at the working level, senior executives may be less engaged in the early phases. In these instances, questions may arise concerning the commitment to collaboration. A second concern deals with the relations at all levels of the organizations. People build relationships. When staff changes at any level, implementation can be negatively affected because relationship building must begin anew. Senior leadership in both parties can help to address this concern with regular review and evaluation of agreements, incorporating input from all departments.

Key success factors that help realize benefits and address barriers are within the control of each party to a negotiation. First is the role of senior leadership in signalling commitment to the agreement. The prior experience and length of tenure among key staff and, in turn, the participation and buy-in of all departments are crucial. So are efforts to adhere to schedules and commitment, and adequate funding and resources to support implementation.

Additional success factors include mutually signalling the importance and commitment to the agreement, both to each other and within their own organizations; common intention and goal setting; clarity and understanding for what is important to each party; demonstrated flexibility and respect; and clarity of roles and responsibilities.

Case #2: Regulators’ public engagement regarding distributed energy resources

The second case study focused on public engagement processes related to distributed energy resources in two jurisdictions: the recently completed AUC hearings-based *Distribution System Inquiry* and the ongoing OEB consultation process, *Responding to Distributed Energy Resources*.

Results from this analysis illustrate trade-offs in engagement:

- The benefit of open processes vs. greater uncertainty and longer timelines
- The benefit of taking a systems-based perspective vs. reduced clarity for the purpose of the process
- The benefit of having diverse participants vs. discrepancies in their capacity and resources

Findings from the interviews suggest key success factors that could address these trade-offs, some of which are being implemented by one or both regulatory bodies and all of which could be considered by the regulatory community.

We identified the following options to strengthen engagement *processes*: provide a vision and an objective for the engagement; provide a “process roadmap,” schedule and timelines in advance while keeping some room for flexibility; coordinate with other public authorities engaged in the same issue; use a third party facilitator with process expertise (more so than content); let stakeholders speak and hear each other directly; and leverage stakeholder expertise and connections to broaden reach.

We also identified key actions to strengthen engagement *content*: start with the viewpoint of the customer/consumer; provide explicit opportunities to talk about benefits, not just risks and costs; encourage openness and transparency; and link engagement with what is evolving in other policy or regulatory processes. This latter issue concerns the challenge of concurrent engagement processes related to the same issue, some of which were being completed by more than one provincial regulator. Participants suggested that better interaction would increase the potential for coherent outcomes.

With respect to *participant representation*, the research underscored the importance of ensuring stakeholder inclusivity and diversity. This includes utility, customer, non-government organizations, and, importantly, the associated policymaking authority. After all, some innovations need to be integrated into the regulatory framework developed by policymakers. For this reason, it can be beneficial to invite policymakers to a consultation in order to build mutual understanding of how the stakeholder discussions unfold. Of course this needs to be done in a way that respects the independence and autonomy of the regulator. It is also important to provide opportunity for consensus building amongst participants, such that stakeholders begin to bridge historic differences. Adequate funding, including helping to support organizational capacity, is also key.

Lastly, with respect to *reporting*, success stems from identifying areas with more or less agreement among participants; demonstrating how information garnered in the engagement

was used (or not) in reaching conclusions; and providing clear agendas and timelines for next steps.

What Works? Questions Regulators Might Ask Themselves

Based on these benefits, barriers, trade-offs, and success factors, the research identifies a set of questions regulators might ask themselves during a planning process or review of innovative practices in the two issue areas studied. Presented as a tool, the questions may be reviewed and enhanced to suit a regulator’s needs. Questions related to formal agreements include:

- Have we signalled a commitment to work together?
- If so, do we have a formal agreement in hand?
- If not, are we paying adequate attention to the relationship?
- If not, to what extent might a formal agreement address current challenges in the relationship?

And with respect to regulators’ public engagement:

- Can concurrent public engagement processes, including those involving multiple authorities, be better coordinated or aligned?
- Does the legislative framework prescribe the approach to regulators’ public engagement or are there additional options to investigate?
- Are we using workshops to kickoff events? If so, are they facilitated by third parties?
- Do we evaluate the engagement process? Do others?

The results of our study point to further research opportunities, including: considering whether success factors are similar in other jurisdictions or contexts, for example, under a federal-provincial formal agreement or engagement process; identifying the frequency and reasons why some stakeholders, most notably Indigenous groups, are sometimes missing from public engagement processes, as well as identifying ways to address this.

Moreover, there may be ways to incorporate the views of non-government participants into decision-making on a more regular basis.

We uncovered other areas that merit further exploration. For instance, our exchanges with numerous Canadian regulators did not identify many formal instances of program or project evaluation for engagement processes or policy-regulatory interaction. The proposed series of questions could be integrated into new and existing evaluations. As well, research could identify criteria or performance metrics that can be used to measure progress, including impacts on process efficiency and effectiveness of decision-making outcomes.

A Final Word

Over the past five years, Positive Energy has identified two key principles that regulators should consider when innovating. The first is “informed reform.” Energy decision-making is an ever-changing, organic system of numerous component parts operating within market-based, regulatory, and physical energy systems. Innovations in energy decision-making that do not carefully consider both the short and long-term, or decisions that do not account for intended and unintended consequences, are likely to fail. Second, innovations must strike a “durable balance” between economic, environmental, social and security imperatives that stands the test of time. These imperatives often entail trade-offs and working to align diverse objectives. Innovations must achieve a durable balance or they are likely to fail.

These research results can help regulators and policymakers alike harness the power of these concepts by building improved understanding of shared challenges and opportunities. Progress towards informed reform and durable balance could include incorporating these concepts into strategic plans, results frameworks, and annual reports.

The path forward for Canada’s current and emerging energy and climate imperatives will be paved in part by innovation in the policy-regulatory nexus. We hope that decision-makers can use and build upon the successful innovations highlighted in this study and scale them across the country. This will help to strengthen public confidence in decision-making about Canada’s energy future.

For more information on the study click [here](#). ■

THE EXPANDED ROLE OF THE POLITICAL EXECUTIVE IN REVIEWING PROPOSED FEDERAL PIPELINE PROJECTS: *A CASE STUDY*¹

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

INTRODUCTION

Two developments in the past decade have fundamentally transformed the federal Canadian framework for reviewing proposals for interprovincial and international pipeline projects. In 2012, the role of the National Energy Board (NEB) was changed from that of making a **decision**² on proposed pipeline projects to making a **recommendation**.³ Thenceforth, decisions whether to approve or reject such projects were to be made by the Governor in Council (cabinet), after considering the NEB's recommendation; in making its own decisions, cabinet could

accept, reject or modify⁴ the recommendation of the NEB.

In 2019, the NEB was abolished and the Canada Energy Regulator (CER)⁵ was established. While the structure of the CER is significantly different from that of the former NEB,⁶ its role with respect to the review of proposed federal pipeline projects is similar to what had been the role of the NEB in the period 2012 to 2019. Specifically, the Commission of the CER (CER Commission) is to make recommendations to cabinet. Cabinet continues to have the direct authority that it had been assigned in 2012 to make decisions to

¹ This article draws on a study published by Positive Energy at the University of Ottawa: Rowland J. Harrison, "The Expanded Role of the Federal Cabinet in Pipeline Projects: A Case Study of TC Energy's 2021 NGTL System Expansion" (May 2021), online (pdf): <www.uottawa.ca/positive-energy/sites/www.uottawa.ca.positive-energy/files/the_expanded_role_final_web.pdf>. The author is a Positive Energy Faculty Affiliate.

* Positive Energy Faculty. Mr. Harrison was a member of the National Energy Board for 14 years, one of the longest serving members in the Board's history.

² Subject to the approval of the Governor in Council (GIC). The writer is aware of only one instance in which a decision by the NEB to issue a certificate of public convenience and necessity was not approved by the GIC: see Rowland J. Harrison, "The Elusive Goal of Regulatory Independence and the National Energy Board" (2013) 50:4 *Alta L Rev* 757 at 764.

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

⁴ As is discussed further below at notes 50-51, the source of cabinet's authority to modify recommendations (as opposed to rejecting a recommendation) is not explicit.

⁵ *Canadian Energy Regulator Act*, SC 2019, c 28, s 10 [*CER Act*]. While the *CER Act* establishes the CER as the **Canadian** Energy Regulator, the agency conducts business as the **Canada** Energy Regulator.

⁶ See Rowland J. Harrison, Neil McCrank & Ron Wallace, "The Structure of the Canadian Energy Regulator: A Questionable New Model for Governance of Energy Regulation Tribunals?" (2020) 8:1 *Energy Regulation Q* 48.

approve or reject such projects.⁷ That this was the intention is clear from the statement of the Minister on 2nd reading of the Bill to amend the *NEB Act* in 2012:

We are also ensuring that there is clear accountability in the system. The federal cabinet will make the go, no-go decisions on all major pipeline projects, informed by the recommendations of the National Energy Board...

We believe that for major projects that could have a significant economic and environmental impact, the ultimate decision-making should rest with elected members who are accountable to the people rather than with unelected officials. Canadians will know who made the decision, why the decision was made and whom to hold accountable.⁸

The transfer of decision-making authority to cabinet — and the relegation of the role of the NEB (post-2012) and the CER Commission (since 2019) to making a recommendation on proposed pipeline projects — immediately presented several questions:

- What process would (should) cabinet follow in moving from the regulator's recommendation to cabinet's decision?⁹
- Would cabinet consider additional information?

- Would cabinet undertake further consultations?
- If so, what are the implications for the transparency and integrity of the overall regulatory framework?
- What are the implications for respecting the principles of procedural fairness?

The challenge in addressing these questions is compounded by the second recent development, namely, further clarification in two seminal decisions of the Federal Court of Appeal on the Crown's duty to consult and, where appropriate, accommodate Indigenous People.¹⁰ These decisions clearly establish that the Crown's duty in this regard continues throughout the cabinet process for considering the recommendation of either the NEB or the CER Commission. Indeed, one of the Federal Court decisions explicitly invites cabinet to give "serious consideration...to whether any of the [National Energy] Board's findings were unreasonable or wrong"¹¹ — to, in effect, second guess the regulator.

The significance of the questions that obviously arise is graphically illustrated by analyzing the process leading to the recent approval by the federal government of a large expansion of TC Energy's NGTL System. The NGTL System connects most of the natural gas production in western Canada to domestic and export markets.¹²

⁷In the case of a negative recommendation (that is to say, a recommendation by the CER Commission to reject an application), the Governor in Council can accept the recommendation, and direct the CER to deny the application, or it can refer the matter back to the Commission for reconsideration; cabinet cannot directly "overrule" a negative recommendation. *CER Act*, *supra* note 5, s 186(1)(b).

⁸"Bill C-38, An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures", 2nd Reading, *House of Commons Debates*, 41-1, No 115 (2 May 2012) at 7471 (Hon Joe Oliver). See also "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 (Hon Catherine McKenna) (the Minister said: "[T]he final decision on major projects will rest with me or with the federal cabinet, because our government is ultimately accountable to Canadians for the decisions we make in the national interest.")

⁹And what are the implications for the timelines for project reviews? See the further discussion below at note 14.

¹⁰See Government of Canada, "Government of Canada and the duty to consult" (last modified 16 April 2019), online: <www.rcaanc-cirmac.gc.ca/eng/1331832510888/1609421255810>.

¹¹*Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at para 757 [*Tsleil-Waututh First Nation*]. See further discussion below at notes 44–51.

¹²TC Energy, "NGTL System" (last visited 1 May 2021), online: <www.tcenergy.com/operations/natural-gas/ngtl-system/>.

THE NGTL 2021 SYSTEM EXPANSION PROJECT

The NGTL 2021 System Expansion Project (Project) is a \$2.3 billion project beginning in northwest Alberta along the west path of the NGTL System, from approximately Grande Prairie to north of Calgary, on land that is mostly adjacent to existing right-of-ways and facilities.¹³ The Project will add approximately 344 kilometers of newly-built 48-inch pipe, with associated facilities including three additional compressor stations. NGTL has stated that the Project is needed to transport natural gas from areas of increasing production in northwestern Alberta and northeastern British Columbia to intra-Alberta and export markets. NGTL originally planned to begin operating the Project by April 2021. However, due to delays in securing the necessary approvals,¹⁴ the anticipated in-service date for all facilities is now the 2nd quarter of 2022.¹⁵

THE CER COMMISSION'S REVIEW OF NGTL'S APPLICATIONS

NGTL filed its applications for the Project with the NEB on June 28, 2018, prior to the coming into force of the *CER Act* and the establishment of the CER on August 28, 2019. Pursuant to the transitional provisions of the *CER Act*, the CER was required to process the applications as though the *NEB Act* (as amended in 2012) were still in force.¹⁶ As noted above, for present purposes, the role of the CER Commission under the *CER Act* is substantively similar to the role of the NEB in the period 2012 to 2019 and, therefore, while the following analysis proceeds within the framework of the post-2012 *NEB Act*, and references are

to specific provisions of the *NEB Act*, the analysis would be expected to apply equally to the processing of similar applications that originated *ab initio* under the *CER Act*.

THE CER COMMISSION'S RECOMMENDATION REPORT

After an extensive review process, the CER Commission released its 330-page Report on February 19, 2020 recommending that the federal cabinet approve the Project (Recommendation Report).¹⁷ The Commission noted:

The benefits and burdens of any Project are never distributed evenly across the country. In light of these circumstances, reasonable people can and will disagree on what the best balance and outcome is for Canadians.¹⁸

However, on balance:

[T]he Commission is of the view that the Project is in the public interest, is consistent with the requirements of the NEB Act and recommends that a Certificate be issued for the construction and operation of the Section 52 Pipeline and Related Facilities.¹⁹

The Commission recommended 34 conditions and concluded:

[O]verall, with the implementation of NGTL's environmental protection procedures and mitigation measures

¹³ TC Energy, "2021 NGTL System Expansion" (last visited 1 May 2021), online: <www.tcenergy.com/operations/natural-gas/2021-ngtl-system-expansion/>.

¹⁴ In particular, extensions by cabinet of the original statutory time limit for cabinet to consider the Project. See further, Geoffrey Morgan, "Natural gas producers frustrated by Ottawa's delay to TC Energy's biggest pipeline expansion", *Financial Post* (30 September 2020), online: <financialpost.com/commodities/energy/natural-gas-producers-frustrated-by-ottawas-delay-to-tc-energys-biggest-pipeline-expansion>. See also Ron Wallace, "Opinion: Ottawa's delay of Alberta's gas pipeline: Building back slower", *Financial Post* (8 October 2020), online: <financialpost.com/opinion/opinion-ottawas-delay-of-albertas-gas-pipeline-building-back-slower>.

¹⁵ TC Energy, *supra* note 13.

¹⁶ *CER Act*, *supra* note 5, s 36 (Transitional Provisions).

¹⁷ *Re NOVA Gas Transmission Ltd. Application dated 20 June 2018 for the 2021 NGTL System Expansion Project* (February 2020), GH-003-2018, online: *NEB* <docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90550/554112/3422050/3575553/3575989/3905746/C04761-1_Canada_Energy_Regulator_Report_-_NOVA_Gas_Transmission_Ltd._GH-003-2018_-_A7D5G0.pdf?nodeid=3905626&vernum=-2>.

¹⁸ *Ibid* at 2.

¹⁹ *Ibid* at 18.

and the Commission's recommended conditions, the Project is not likely to cause significant adverse environmental effects.²⁰

CABINET'S APPROVAL OF THE PROJECT

On October 19, 2020 the Governor in Council (cabinet) exercised its authority under subsection 54(1) of the *NEB Act* and directed the CER to issue a certificate of public convenience and necessity for the Project.²¹ Cabinet also found, pursuant subsection 31(1) of the *Canadian Environmental Assessment Act, 2012*,²² that, taking into account the mitigation measures set out in the conditions, the Project "is not likely to cause significant adverse environmental effects..."²³

CABINET'S AMENDED/ ADDITIONAL CONDITIONS

Cabinet did not, however, accept the Commission's recommendation unconditionally. Rather, it amended certain of the conditions recommended in the CER Commission's Report and added a further condition. The news release announcing the government's approval of the Project stated:

[T]he Government of Canada has made amendments to the Canada Energy Regulator's conditions for approval related to caribou and Indigenous engagement. In particular, we strengthened five conditions proposed by the regulator and added one new condition in order to better address impacts to section 35 [of the *Constitution Act, 1982*] Indigenous rights and help mitigate the disruption of the project's construction on caribou habitat.²⁴

The news release also stated:

This decision was based on facts, science, Indigenous knowledge, the public interest and careful consideration of the concerns of potentially impacted communities and about wildlife.

Cabinet's changes were imposed unilaterally, without any "on the record" public or formal process.

In the absence of a public or formal process for cabinet's consideration of the Recommendation Report, it is reasonable to ask how the veracity of the above statement with respect to the basis for cabinet's decision is to be judged — what facts, what science, what Indigenous knowledge, what concerns about potentially impacted communities and about wildlife? What of procedural fairness?

CABINET'S REASONS

It is apparent from a reading as a whole of the Order in Council (OIC) approving the Project that the underlying reasons for cabinet's changes arose from the Crown's duty to consult and, where appropriate, accommodate Indigenous groups. For example, the OIC states:

Whereas, in response to Project-related concerns and potential impacts to established and asserted Aboriginal or treaty rights, raised by Indigenous groups and in response to proposals from Indigenous groups, and seeking to further accommodate outstanding Indigenous concerns raised during consultations, and consistent with the Government's commitment to reconciliation with Indigenous peoples, the Governor in Council is of the opinion that

²⁰ *Ibid* at 211.

²¹ *Certificate of Public Convenience and Necessity GC-129 to NOVA Gas Transmission Ltd. in respect of the construction and operation of the 2021 NGTL System Expansion Project*, PC 2020-0811, C Gaz 1, 3025, online (pdf): <www.gazette.gc.ca/rp-pr/p1/2020/2020-10-31/pdf/g1-15444.pdf>.

²² SC 2012, c 19.

²³ *Supra* note 21.

²⁴ Natural Resources Canada, News release, "Government of Canada Approves the NOVA Gas Transmission Ltd. 2021 System Expansion Project", online: <www.canada.ca/en/natural-resources-canada/news/2020/10/governor-in-council-of-canada-approves-the-nova-gas-transmission-ltd-2021-system-expansion-project.html>.

the addition to and amendment of the conditions set out in Appendix I of the Commission’s Report...is appropriate...²⁵

The Preamble to the OIC also refers to “independent submissions by certain Indigenous groups...” The first paragraph of the OIC itself states:

(a) in order to adequately discharge Canada’s duty to consult and to accommodate any outstanding concerns of Indigenous groups, [the GIC] adds to and amends certain conditions set out in Appendix I [of the Recommendation Report] ...²⁶

Cabinet appears to have concluded that the CER Commission’s proposed conditions fell short of what cabinet determined was necessary to satisfy the Crown’s duty to consult and accommodate.

As an aside, it is to be noted that the Governor in Council must set out reasons for its decision **in** the relevant OIC itself.²⁷ In this case, these are found mostly in the Preamble (the “Whereas” clauses). While the Preamble includes 34 Whereas clauses, arguably as few as six of these clauses refer to matters relevant to the conditions that were amended or added by cabinet. Even these six clauses state conclusions more than **reasons** for cabinet’s changes. They provide an inadequate basis for assessing the justification for, and soundness of, cabinet’s changes.

THE CROWN CONSULTATION AND ACCOMMODATION REPORT

While not referred to in the OIC, the basis for cabinet’s conclusion is in fact to be found in a report prepared within the federal government, subsequently to the submission of the Recommendation Report: *Crown Consultation*

and Accommodation Report for the NOVA Gas Transmission Ltd. 2021 System Expansion Project (GH-00302018) (CCAR), prepared by Natural Resources Canada (NRCan).²⁸ The CCAR (that is to say NRCan) proposed the condition amendments and the additional condition that were in fact adopted by cabinet in the OIC. The CCAR states:

This CCAR was developed based on consideration of all information obtained from the CER; **supplemental consultations** between the Crown and potentially affected Indigenous groups; and, **independent submissions** made by Indigenous groups.²⁹

Development of the CCAR did not involve any public consultation. Nor, so far as is known, was NGTL provided an opportunity to comment on the amended and additional conditions to which it was bound by cabinet’s approval of the Project.

THE CHANGES IMPOSED BY CABINET

It is beyond the scope of this case study to consider the merits of the changes made to the CER Commission’s recommended conditions (or the additional condition) imposed by cabinet. It is to be observed, however, that the subject-matter of the particular conditions — the potential loss of caribou habitat that might arise from the Project — was addressed extensively during the CER Commission’s review process and in its Recommendation Report. The Recommendation Report identified “the adverse effects that are likely to be caused by increased disturbance in the Little Smoky Caribou Range” as a burden associated with the Project³⁰ and included extensive discussion of the matter in its assessment of “Potential Project-related Cumulative Effects.”³¹ Nevertheless, the CER

²⁵ *Supra* note 21.

²⁶ *Ibid.*

²⁷ *NEB Act, supra* note 3, s 54(2).

²⁸ Natural Resources Canada, “Crown Consultation and Accommodation Report for the NOVA Gas Transmission Ltd. 2021 System Expansion Project (GH-003-2018)” (October 2020) [CCAR Report], online (pdf): <mpmo.gc.ca/sites/mpmo.gc.ca/files/NGTL2021-CCAR-EN.pdf>.

²⁹ *Ibid* at 5 (section 1.1; emphasis added).

³⁰ Recommendation Report, *supra* note 17 at 2.

³¹ *Ibid* at 113–16 (Section 7.4.7.4).

Commission concluded that “the conditions recommended and imposed are sufficient for the Project to be in the public interest [and] that the effects of the Project on the Little Smoky caribou herd can be mitigated through the conditions recommended and imposed...”³²

The CER Commission, however, was not unanimous on one particular issue, namely, whether it should recommend a condition requiring NGTL to establish an Indigenous Working Group (IWG) to provide for the direct involvement of Indigenous Peoples in the finalization of the caribou measures for the Project. The majority of the CER Commission concluded that an IWG condition was not warranted.³³ Further, “the creation and implementation of an IWG of this scope poses demands in terms of processes and resources, including time, which may in turn pose a risk both to the Project and to other efforts being made to improve the state of the Little Smoky caribou Project and to other efforts being made to improve the state of the Little Smoky Caribou Range.”³⁴

In a dissenting view on the imposition of an IWG condition, another commissioner noted that he agreed with “the conclusion of the Majority that the applied-for Project is in the public interest, and...that the conditions related to restoration and offsets measures for caribou in the Little Smoky Caribou Range are acceptable...”³⁵ This commissioner, however, would have included an additional condition “related to collaboration with Indigenous peoples on those measures.”³⁶

The proposed terms of such an IWG condition were included in the Commissioner’s dissenting view.³⁷ The terms of the additional condition subsequently imposed by cabinet are substantively the same as those proposed in the dissenting view, with the result that cabinet rejected the CER Commission majority on this issue and implemented the proposal recommended by NRCan, which essentially

adopted the condition that had been proposed by the dissenting commissioner.

SUMMARY

To summarize, in approving NGTL’s 2021 System Expansion Project, cabinet made significant amendments to five of the conditions proposed in the Recommendation Report. These conditions addressed an issue that had been reviewed extensively during the CER Commission’s review in an open and comprehensive process. Further, the subject-matter of the conditions — the protection of caribou habitat — might reasonably be considered to be within the broad expertise of the CER Commission, as being concerned with wildlife management. Cabinet, however, was clearly of the view that the conditions as proposed by the CER Commission were not good enough and saw fit to “strengthen” them,³⁸ in effect rejecting the advice of a specialist tribunal established for the very purpose of considering such matters.

Cabinet also added a condition that had been considered and explicitly rejected by a majority of the CER Commission. Cabinet rejected the recommendation of the majority and instead adopted the view of and condition proposed by the dissenting commissioner.

These condition amendments and the addition of a further condition were made by cabinet without adopting any public review process. Furthermore, the burden of the additional requirements was imposed directly on NGTL, as the Project proponent. So far as is known, NGTL was not provided an opportunity to make any submission subsequent to the release of the Recommendation Report and prior to cabinet’s decision.

To this point, it might be considered that the legitimacy of cabinet’s changes to the recommendations of the CER Commission was questionable — on substantive, procedural

³² *Ibid* at 206.

³³ *Ibid*.

³⁴ *Ibid*.

³⁵ *Ibid*.

³⁶ *Ibid*.

³⁷ *Ibid* at 208–10.

³⁸ Natural Resources Canada, *supra* note 24.

and policy grounds relating to maintaining the integrity and transparency of the regulatory process.

THE FEDERAL COURT OF APPEAL DECISIONS

However, in proceeding as it did, cabinet was (with one critical exception that is discussed below) merely following the guidance of two Federal Court of Appeal decisions dealing specifically with the duty of the Crown to consult and accommodate in the context of cabinet's consideration of the recommendations arising from a regulatory review process.

In *Gitxaala Nation v Canada (Gitxaala)*,³⁹ the Court considered several challenges to cabinet's approval of the proposed Northern Gateway Project. The approval had been recommended in the report of a Joint Review Panel acting under the *Canadian Environmental Assessment Act, 2012*⁴⁰ and the *National Energy Board Act* (post-2012).⁴¹ In *Tsleil-Waututh Nation v Canada (Attorney General) (Tsleil-Waututh First Nation)*,⁴² the Court considered several challenges to cabinet's approval of the proposed expansion of the Trans Mountain Pipeline (referred to as TMX) based on the recommendation of the National Energy Board. Both decisions were concerned with (among other issues) the Crown's duty to consult following completion of the respective regulatory review processes and prior to cabinet's consideration of the regulatory recommendations. The Court noted in *Tsleil-Waututh Nation* that when the two consultation frameworks were compared "there is little to distinguish them."⁴³ In both cases, the

Court found that the Crown had not satisfied its obligation to consult.

The Court concluded that consultation at the stage immediately prior to cabinet's consideration of the respective recommendations required "meaningful two-way dialogue"⁴⁴ that was more than "simply to allow Aboriginal Peoples 'to blow off steam'..."⁴⁵ Rather, consultation at that stage was "an opportunity to address errors and omissions in the Report on subjects of vital concern to Aboriginal Peoples"⁴⁶ and "to fill the gaps."⁴⁷ Canada had the responsibility "to dialogue about the asserted flaws in the Board's process and recommendations," which it failed to do.⁴⁸ The Crown had not given serious consideration to whether "any of the Board's findings were unreasonable or wrong [or] to amending or supplementing the Board's recommended conditions."⁴⁹

Canada had initially taken the position that it did not have authority to amend conditions that had been recommended or to add new conditions at the stage of cabinet's decision. In both cases, the Federal Court of Appeal concluded otherwise,⁵⁰ however, and by the time of argument in *Tsleil-Waututh Nation*, Canada had conceded the point.⁵¹ Further, the Court assumed that such amended or additional conditions would bind the project proponent.

In its consideration of the NGTL Recommendation Report, cabinet, not unreasonably, appears to have read these various *dicta* as requiring it to carefully review the Recommendation Report, with a view to "strengthening" it,⁵² or, it might be said,

³⁹ 2016 FCA 187 [*Gitxaala*].

⁴⁰ *Supra* note 22.

⁴¹ *Supra* note 3.

⁴² *Supra* note 11.

⁴³ *Ibid* at para 518. The consultation phases that the court was concerned with were identified as Phase IV in the Northern Gateway process and Phase III in the TMX process.

⁴⁴ *Tsleil-Waututh Nation*, *supra* note 11 at para 558.

⁴⁵ *Gitxaala*, *supra* note 39 at para 233.

⁴⁶ *Ibid* at para 274.

⁴⁷ *Ibid* at para 326.

⁴⁸ *Tsleil-Waututh Nation*, *supra* note 11 at para 628.

⁴⁹ *Ibid* at para 757.

⁵⁰ See *Gitxaala*, *supra* note 39 at paras 163–68; See also *Tsleil-Waututh Nation*, *supra* note 11 at paras 633–34.

⁵¹ *Tsleil-Waututh Nation*, *supra* note 11 at para 635.

⁵² Natural Resources Canada, *supra* note 24.

“improving” on the recommendations of the CER Commission. The CCR itself noted:

In considering whether, and the extent to which amendments could be made to the conditions recommended by the Commission, NRCan took into account the interpretation and guidance provided by the Federal Court of Appeal in *Gitxaala...and Tsleil-Waututh Nation*.⁵³

However, cabinet overlooked an important caveat in *Gitxaala*, namely, that a project proponent that would be bound by proposed condition amendments or additional conditions would have an opportunity to comment. After dialogue in the Phase IV consultation process (after submission of the Joint Review Panel Report), the Court said “recommendations, including any new proposed conditions, needed to be formulated **and shared with Northern Gateway for input**”⁵⁴ before being placed before the Governor in Council. No such sharing with NGTL appears to have occurred before the CCR was put before cabinet — an apparent fundamental breach of procedural fairness.

This requirement, for an opportunity for a proponent to provide input on proposed condition changes or additions, was not referred to in *Tsleil-Waututh Nation*, presumably because, as had been noted in *Gitxaala*, “[i]t goes without saying...as a matter of procedural fairness...”⁵⁵

RECONSIDERATION PROCESS

It is important to emphasize here that the *NEB Act* (post-2012) established a formal process by which cabinet could refer the NEB’s recommendation or any of the recommended

terms and conditions back to the Board “for reconsideration taking into account any factor specified in the [GIC’s] order...”⁵⁶ The *NEB Act* does not prescribe the process to be followed in undertaking such a reconsideration but it would have been open to the CER Commission to establish a process that would have at the least provided NGTL with an opportunity to comment on the proposed condition amendments and the additional condition.

It can only be speculated that cabinet chose not to invoke the reconsideration process out of concern about the additional time that would be required — delays in the regulatory process had already caused a delay of a year in the commencement of the Project.⁵⁷

It is to be noted here that, in quashing cabinet’s approval of the TMX Project in *Tsleil-Waututh Nation*, the Federal Court of Appeal remitted the matter back to the GIC “for prompt redetermination.”

In that redetermination the Governor in Council must refer the Board’s recommendations and its terms and conditions back to the [National Energy] Board, or its successor, for reconsideration. Pursuant to section 53 of the *National Energy Board Act*, the Governor in Council may direct the Board to conduct that reconsideration taking into account any factor specified by the Governor in Council.⁵⁸

The NEB was so directed by cabinet.⁵⁹ After a formal open process, in which the proponent was a full participant (along with other interested parties), the NEB submitted its reconsideration report to cabinet, recommending a second approval of the project.⁶⁰ On June 18, 2019

⁵³ CCAR Report, *supra* note 28 at 50.

⁵⁴ *Supra* note 39, at paras 327, 337.

⁵⁵ *Ibid* at para 337.

⁵⁶ *NEB Act*, *supra* note 3, s 53(1). A similar process is provided for in section 184 of the *CER Act*, *supra* note 5.

⁵⁷ Morgan, *supra* note 14.

⁵⁸ *Supra* note 11 at paras 768–69.

⁵⁹ *Trans Mountain Expansion Project Reconsideration*, PC 2018-1177, C Gaz I, 3274, online (pdf): <www.gazette.gc.ca/rp-pr/p1/2018/2018-09-29/pdf/g1-15239.pdf>.

⁶⁰ With modifications: *Re National Energy Board reconsideration of aspects of its OH-001-2014 Report as directed by Order in Council P.C. 2018-1177* (February 2019), MH-052-2018, online: *NEB* <ceaa-gca.gc.ca/050/documents/p80061/126868E.pdf>.

cabinet adopted the NEB's recommendations and approved the project.⁶¹

CONCLUSIONS

Analysis of cabinet's review and ultimate disposition of the CER Commission's Recommendation Report on the NGTL 2021 System Expansion Project suggests that tension may arise between two fundamental public responsibilities in the context of reviewing proposals for major resource development projects. The first of these is to fulfill, and respect, the requirements of the constitutional duty of the Crown to consult and, where appropriate, accommodate Indigenous Peoples. The second is to maintain the integrity and effectiveness of the applicable regulatory framework, particularly by being transparent, and by complying with the requirements of procedural fairness.

When considered exclusively in terms of maintaining the integrity of the regulatory process, the NGTL case raises several serious concerns, particularly with respect to a lack of transparency. Transparency is a bedrock principle for maintaining a robust, effective regulatory framework. Without transparency, there is no effective means of holding decision-makers to account.

Cabinet's changes in approving the NGTL 2021 System Expansion Project were based on a re-evaluation of the CER Commission's Recommendation Report by an internal government process that produced the Crown Consultation Report. The CCR second-guessed — in cabinet's view, "strengthened" — the findings of the Recommendation Report, based on bilateral consultations with affected Indigenous interests, in effect rejecting the findings of the CER Commission on a matter that the Commission had reviewed comprehensively in a comprehensive, and transparent, process. Furthermore, cabinet's additional condition directly rejected the relevant recommendation of the CER Commission and adopted instead the recommendation of a dissenting

commissioner, again on the basis of the internal report prepared by NRCan. Parties who had participated in the CER Commission process but whose views had not been adopted by the CER Commission in its Recommendation Report succeeded in rearguing their case during the cabinet review phase of the process, a process that was not transparent.

It also appears that cabinet simply disregarded the requirements of procedural fairness, particularly with respect to the interests of NGTL, notwithstanding the admonition by the Federal Court of Appeal in *Gitxaala* that an applicant should be provided with an opportunity for input with respect to any proposed changes to conditions resulting from the Crown consultation process undertaken after completion of a regulator's review of a proposed project.⁶²

However, while the cabinet review process might be challenged for its disregard of general principles that support the integrity of the regulatory process, cabinet acted throughout in accordance with the guidance of the Federal Court of Appeal in *Gitxaala* and *Tsleil-Waututh Nation*, with one notable exception: cabinet failed to provide NGTL with an opportunity for input on the condition changes that had been proposed in the CCR, notwithstanding that a formal process for seeking such input was available.

The Crown's duty to consult and, where appropriate, accommodate is a duty owed to a specific class of persons, grounded in the honor of the Crown; fulfillment of the duty may not necessarily involve a public, transparent process. As illustrated by this case study, there is therefore the possibility that transparency may be compromised in specific cases.

However, the requirements of procedural fairness must still be respected. As noted earlier, the Federal Court of Appeal was clear in *Gitxaala*:

It goes without saying that as a matter of procedural fairness,

⁶¹ *Order approving the ISSUANCE by the National Energy Board to TRANS MOUNTAIN PIPELINE ULC of Amending Order AO-007-OC-065, authorizing the Chilliwack BC Hydro Route Realignment*, PC 2019-1243, online: <orders-in-council.canada.ca/attachment.php?attach=38576&lang=en>. A subsequent application to the Federal Court of Appeal for judicial review of this decision was dismissed: *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34.

⁶² *Gitxaala*, *supra* note 39 at paras 327, 337.

all affected parties must have an opportunity to comment on any new recommendations that the coordinating Minister proposes to make to the Governor in Council.⁶³

Such an opportunity was not provided to affected parties in the NGTL case, including the proponent as the party on which the burden of complying with the revised conditions falls.

Cabinet could have invoked the reconsideration process under the *NEB Act* and referred the matter back to the CER Commission. Had it done so, presumably the CER Commission would have convened a process that would have provided NGTL (and other interested parties) with an opportunity to comment. At the least, the reconsideration process might have addressed concerns about procedural fairness. It could also have gone some way towards addressing concerns about transparency, thereby enhancing the integrity of the overall review process.

A two-step process in which cabinet makes its own decisions to approve or reject proposed infrastructure projects, after considering the recommendations of a prior regulatory process, inevitably introduces challenges for maintaining transparency. The cabinet approval step may be seen by aggrieved interests as an opportunity to reargue their positions — as a *de facto* appeal from the findings of the regulatory process. Cabinet should, therefore, generally be cautious about its approach to deviating from the regulator’s recommendations.

However, in the context of fulfilling the Crown’s duty to consult and, where appropriate, accommodate Indigenous concerns, further considerations arise. It is clear from the decisions of the Federal Court of Appeal in *Gitxaala* (Northern Gateway) and *Tsil-Waututh Nation* (TMX) that fulfillment of that duty requires the Crown to give serious consideration itself to whether “any of the Board’s findings were unreasonable or wrong [or] to amending or supplementing the Board’s

recommended conditions.”⁶⁴ As is clear from this case study, cabinet’s process for doing so may not be open and transparent.

In the absence of an open and transparent process, accountability is illusory. The respective Ministers responsible for the amendments to the *NEB Act* in 2012 and for the *CER Act* in 2018 each stressed accountability in proposing the respective Bills to Parliament.⁶⁴

In future, where cabinet concludes that amended or additional conditions to those recommended by the regulatory review process are warranted — in fulfillment of the Crown’s duty to consult — cabinet should, as a matter of course, refer the matter back for reconsideration by the CER Commission, as is provided for in the *CER Act*. Resort to the reconsideration process under the *CER Act* would both improve transparency of the overall review framework and address concerns about procedural fairness.⁶⁵ ■

⁶³ *Ibid* at para 337 (Emphasis added).

⁶⁴ See Ministerial statements *supra* at note 8.

⁶⁵ The CER is now taking a more direct role in fulfilling the Crown’s duty to consult, in parallel with the CER Commission’s hearing process and otherwise. See e.g. Canada Energy Regulator, “Canada Energy Regulator Approach to Crown Consultation” (30 November 2020), online: <www.cer-rec.gc.ca/en/consultation-engagement/crown-consultation/canada-energy-regulator-approach-crown-consultation.html>. However, the role of cabinet in considering recommendations from the CER Commission remains.

SUPREME COURT OF CANADA RE-WRITES THE NATIONAL CONCERN TEST AND UPHOLDS FEDERAL GREENHOUSE GAS LEGISLATION^a

*Nigel Bankes, Andrew Leach, and Martin Z. Olszynski**

I. INTRODUCTION

The essential factual backdrop to these appeals is uncontested. Climate change is real. It is caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity's future. The only way to address the threat of climate change is to reduce greenhouse gas emissions...¹

On March 25, 2021, the Supreme Court of Canada released its much-anticipated reference opinion regarding the constitutionality of the federal government's greenhouse gas (GHG)

pricing regime. In *Reference re Greenhouse Gas Pollution Pricing Act*,² a majority of the Supreme Court held that the *Greenhouse Gas Pollution Pricing Act*³ fell within Parliament's residual power to make laws for "peace, order, and good government" (POGG) as set out in s 91 of the *Constitution Act, 1867*.⁴ Writing for the majority, Chief Justice Richard Wagner concluded that setting minimum national standards of GHG price stringency to reduce GHG emissions was a "matter of national concern," a recognized branch of the POGG power.⁵ Justices Suzanne Côté, Russell Brown, and Malcolm Rowe dissented, albeit each for different reasons. Importantly, Justice Côté agreed with the Chief Justice with respect to

^aThis article is a revised version of a series of three posts published on ABlawg. The authors acknowledge with thanks the comments of our colleague David Wright and the comments, probing questions, and superb editorial work of Ms. Anna White (JD 2021).

* Nigel Bankes, Professor and Chair of Natural Resources Law, The University of Calgary, ndbankes@ucalgary.ca. Andrew Leach, Associate Professor, Alberta School of Business, University of Alberta.

Martin Z. Olszynski, Associate Professor, Faculty of Law, The University of Calgary. Professor Olszynski discloses that he was counsel to the intervener, Progress Alberta Communications Limited, in the proceedings before the Supreme Court of Canada.

¹ *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 2 [*GGPPA Reference*].

² *Ibid.*

³ *Greenhouse Gas Pollution Pricing Act*, SC 2018 c 12, s 186 [*GGPPA*].

⁴ *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted as RSC 1985, Appendix II, No 5 [*The Constitution Act, 1867*].

⁵ *GGPPA Reference*, *supra* note 1 at para 2.

“his formulation of the national concern branch analysis.”⁶

The *GGPPA Reference* was a jointly-heard appeal of three provincial appeals court reference decisions:⁷ the *GGPPA* was found to be constitutional under POGG’s national concern branch in a 3-2 decision in the *Saskatchewan GGPPA Reference*;⁸ Ontario’s Court of Appeal similarly advised that the federal legislation was constitutional under the national concern branch of POGG, in a 4-1 decision in the *Ontario GGPPA Reference*;⁹ and, finally, Alberta’s Court of Appeal, in a 4-1 decision, advised in the *Alberta GGPPA Reference* that the *GGPPA* was *ultra vires* Parliament.¹⁰

The basic issue at the core of the *GGPPA Reference* was not *whether* the federal government has jurisdiction to address climate change. Rather, all of the parties conceded that Parliament has several heads of power at its disposal, including its criminal law power.¹¹ The issue was the constitutionality of the *GGPPA* itself, which Counsel for Canada argued could be upheld under on the “national concern” branch of Parliament’s *residual* POGG power.¹² While scholars have argued that carbon pricing policies could be upheld under POGG, the constitutionality of the legislation was in

question because neither the environment nor climate change fall comfortably under any of the federal government’s enumerated heads of power as set out in section 91 of the *Constitution Act, 1867*.¹³ The *GGPPA Reference* also provided the Supreme Court with an opportunity to revisit the national concern doctrine itself, thirty years having passed since the *Crown Zellerbach* decision that last formalized a test for classification under POGG’s national concern branch.¹⁴

Our commentary is organized as follows. Section II provides an overview of the *GGPPA*. This is followed by a review of Chief Justice Wagner’s majority opinion (section III) as well as the three dissenting judgments (section IV). Our aim in summarizing the dissenting judgments is to highlight the key differences between the majority and the dissents. We close with comments on four aspects of the entire Reference: the breadth of the matter and the characterization of the *GGPPA*, the constitutional implications of minimum national standards as defined in this case, the role of provincial inability and extra-provincial effects, and finally the role of domestic courts in adjudicating a global problem like climate change.

⁶ *Ibid* at para 222. Note that while Justice Côté agrees with the formulation of the matter of national concern, she does not find that the federal government can rely on the national concern branch given the discretionary terms of the legislation.

⁷ For a summary of the issues in the provincial reference cases, see Nathalie J Chalifour, “Jurisdictional Wrangling over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament’s Greenhouse Gas Pollution Pricing Act” (2019) 50:2 Ottawa L Rev 197.

⁸ *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 [*Saskatchewan GGPPA Reference*].

⁹ *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 [*Ontario GGPPA Reference*]. Note that Hoy A.C.J.O wrote a separate, concurring opinion with a narrower definition of the matter of national concern, as discussed further below.

¹⁰ *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 [*Alberta GGPPA Reference*]. Note that Wakeling J.A. wrote separate, concurring reasons from the majority opinion of Fraser C.J.A. We previously wrote a comment on the ABCA decision in Martin Olszynski, Nigel Bankes & Andrew Leach, “Breaking Ranks (and Precedent): Reference re Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74” (2020) 33:1 J Envtl L & Prac 159.

¹¹ For example, regulations in relation to GHG emissions mitigation made under the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 [*CEPA*], have been upheld as a valid exercise of the federal government’s criminal law power in *Synchrude Canada Ltd v Canada (Attorney General)*, 2014 FC 776, aff’d 2016 FCA 160.

¹² While counsel for Canada argued that the legislation should be upheld under the national concern branch of POGG, intervenors argued in favour of classifying the *GGPPA* under multiple heads of federal power. The majority opinion, as we not below, considers only the classification of the Act under POGG, while the dissent of Justice Brown engages in more thorough consideration of classification of the Act under other federal heads of power.

¹³ *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 88 DLR (4th) 1 holds that the environment is shared jurisdiction between the provinces and the federal government.

¹⁴ *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, 49 DLR (4th) 161 [*Crown Zellerbach*].

II. THE IMPUGNED LEGISLATION

The *GGPPA* is the centrepiece of the federal government's climate change plan and provides for the imposition of regulatory charges on GHG emissions in Canada. The legislation contains four parts, of which only the first two parts were examined in the *GGPPA Reference*.

Part I of the *GGPPA* imposes a regulatory charge (or regulation with the “characteristics of a tax”¹⁵ through a fuel charge imposed at the point of purchase.¹⁶ The effective price on carbon emissions to be imposed via the fuel charge is specified in Schedule 4 of the Act and this price is converted to a charge to be applied to specific fuels on the basis of the emissions generated upon combustion of those fuels, stipulated in Schedule 2. The fuel charge applies only in provinces specified in Part 1 of Schedule 1 of the *GGPPA*.

The *GGPPA* restricts the use of funds collected by the fuel charge. Specifically, s. 165(1) stipulates that funds collected net of any rebates or exemptions must be distributed “in respect of the province.” It may be distributed directly to the province (s 165(2)(a)), or to prescribed persons or classes of persons in the province (s 165(2)(b)), or to a combination of the two.¹⁷ In practice, the federal government has chosen to distribute most of the funds through consumer rebates, which vary based on province, household size, and whether the household is in an urban or rural location.¹⁸ The balance of funds is returned by specific investments in emissions reductions in the province in question.

Part II establishes a separate carbon pricing system for large emitters, termed and

output-based pricing system (OBPS). Necessary conditions for facilities to be covered are defined in the *Output-Based Pricing System Regulations*, which stipulate that facilities must have annual emissions greater than 50,000 tonnes of carbon dioxide equivalent (CO₂e) in any year after or including 2014.¹⁹ To be covered under the OBPS, facilities must also be engaged in one of 38 activities listed in Schedule 1 of the regulations (only facilities in 2 of the 38 sectors, natural gas pipelines and power generation, qualify for the OBPS as applied in Saskatchewan).

The intent of the OBPS is to provide a lower average cost of emissions pricing to firms with exposure to international markets, while also maintaining a financial incentive to undertake investments to reduce the emissions-intensity of production. This is accomplished by providing emissions credits at a set rate per-unit output which the *GGPPA* terms an “output-based standard” which, when multiplied by annual output yields what is termed a facility’s “emissions limit.”²⁰ This is not a hard limit; a carbon price must be paid on emissions above the limit,²¹ while facilities with emissions below their emissions limit will be issued surplus credits.²² Since the carbon price applies at the margin, a facility increasing its emissions by one tonne (all else equal) will incur the same incremental costs as a consumer increasing their emissions by one tonne, and the same is true for the financial benefit of reduced emissions. The system is intended to protect industry competitiveness because the effective exemption from a carbon price on emissions up to the emissions limit reduces the total cost of the policy, thereby reducing incentives for firms to either relocate out of a jurisdiction or

¹⁵ The majority opinion of Chief Justice Wagner uses this language in the *GGPPA Reference*, *supra* note 1 at para 213.

¹⁶ *GGPPA*, *supra* note 3, s 17(1).

¹⁷ *GGPPA*, *supra* note 3, ss 165(2)(a)-(b) respectively.

¹⁸ The government reports annual distributions of funds to the provinces. See e.g., Government of Canada, “Climate Action Incentive Payment Amounts for 2021” (last modified 16 December 2020), online: *Government of Canada* <www.canada.ca/en/departement-finance/news/2020/12/climate-action-incentive-payment-amounts-for-2021.html> [perma.cc/R856-K6GM].

¹⁹ *Output-Based Pricing System Regulations*, SOR/2019-266, s 8 [*OBPS Regulations*].

²⁰ *GGPPA*, *supra* note 3, s 174, and see also *OBPS Regulations*, *supra* note 19, s 36.

²¹ *GGPPA*, *supra* note 3, s 174.

²² *Ibid*, s 175. Facilities can bank or transfer emissions credits to another facility.

to target new investments elsewhere because of increased costs.^{23,24}

Most importantly, despite the terminology of emissions limits and output-based standards, the legislation does not set performance standards or otherwise directly regulate or limit technology, production, or other facility activities; nor does it expressly forbid behaviour in any way other than in relation to compliance with the regulatory charges and reporting requirements.

As in Part I of the *GGPPA*, Part II also fetters the use of funds collected under the OBPS. As such, section 188 of the *GGPPA* is a parallel provision to section 165 referenced above.²⁵ There is substantial discretion afforded the Minister of National Revenue in determining the timing and manner of distribution of collected funds.

The *GGPPA* functions as a backstop, applying only in provinces or territories that are listed in Schedule 1 of the *Act*. Provinces or territories are listed through regulatory action by the Governor in Council (a process that is central to the dissent of Justice Côté discussed below in Section IV.A.). With respect to Part I, the fuel charge, the *GGPPA* stipulates that, “for the purpose of ensuring that the pricing of GHG emissions is applied broadly in Canada at levels that the Governor in Council considers

appropriate, the Governor in Council may [list a province in Schedule 1, thus applying the fuel charge in that province].”²⁶ The discretion is not unfettered, since the Act requires that “the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for GHG emissions,” in making any listing decisions.²⁷ A parallel provision exists for the purposes of the OBPS.²⁸

Other parts of the legislation define reporting requirements, exemptions, penalties, appeal provisions, inspections, and records keeping. These provisions were not central to the decision. Parts III and IV were not contested in this case and are not discussed in detail here either. Part III establishes the discretion for the federal Governor in Council to stipulate that provincial laws may apply to federally-regulated activities.²⁹ Part IV requires that the government provide an annual report to Parliament on the administration of the *GGPPA*, beginning on the second anniversary of its coming into force.³⁰

III. CHIEF JUSTICE WAGNER’S MAJORITY OPINION

Facts matter in constitutional cases and they are particularly important in cases where a party is seeking to establish a new matter of national concern. It is therefore not surprising that, in addition to the opening passage cited at the outset of this post, the Chief Justice devoted

²³ This is referred to as emissions leakage, emphasizing that where these dynamics occur, a facility will relocate rather than reduce emissions leading to emissions leaking to other jurisdictions as a result of the policy.

²⁴ A quick example may be helpful here as the OBPS is a complex regulatory policy. Consider a large carbon-based electricity producer in Saskatchewan. The producer would be covered by the OBPS because Saskatchewan is listed in Part II, s.5 of Schedule 2 of the *GGPPA* and because, per s. 8(b)(ii) of the *OBPS Regulations*, electricity is a covered sector in Saskatchewan (Schedule 2, item 38 of the *OBPS Regulations*). The facility would be subject to a carbon price, in 2021, of \$40 per tCO₂e (Schedule 4, item 4 of the *GGPPA*) and its *output-based standard* would be set at 0.622 tCO₂e per MWh (Schedule 2, item 38 of the *OBPS Regulations*). The facility’s *emissions limit* is defined by multiplying the output-based standard by the facility’s annual output (*OBPS Regulations*, s. 36). Supposing that the facility had an operating emissions intensity, on average through the year, of 1tCO₂e per megawatt-hour (MWh) of electricity generated, its net charge would be the equivalent of \$15.12 per MWh, since it would be exempt from \$24.88 per MWh (0.622 tCO₂e x \$40 per tCO₂e) of carbon charges on emissions below its *emissions limit*. The *emissions limit* thus serves to offset more than half of what would otherwise be a \$40 per MWh (1tCO₂e x \$40 per tCO₂e) emissions charge. In the case of electricity, this assures that large cost increases aren’t passed through power bills, and in the case of industrial production, reduces any cost disparity introduced between Canadian firms and global competitors.

²⁵ *GGPPA*, *supra* note 3, s 188.

²⁶ *Ibid*, s 161(1).

²⁷ *Ibid*, s 166(2).

²⁸ *Ibid*, s 189.

²⁹ *Ibid*, s 263(1).

³⁰ The initial annual report is available, see Government of Canada, “Greenhouse Gas Pollution Act Annual Report for 2019” (last modified 10 December 2020), online: *Environment and Climate Change Canada* <www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/greenhouse-gas-annual-report-2019.html> [perma.cc/U48C-JE25].

substantial attention to background facts. This includes sections on the global climate crisis, Canada's efforts to address climate change, and a summary of provincial action with respect to climate change, all of which we summarize briefly below.

A) THE GLOBAL CLIMATE CRISIS

The Chief Justice emphasized that global climate change driven by human activities is real,³¹ and that the effects of climate change "have been and will be particularly severe and devastating in Canada."³² Particularly crucial for the national concern analysis were the following observations:

Climate change has three unique characteristics... First, it has no boundaries; the entire country and entire world are experiencing and will continue to experience its effects. Second, the effects of climate change do not have a direct connection to the source of GHG emissions. Provinces and territories with low GHG emissions can experience effects of climate change that are grossly disproportionate to their individual contributions to Canada's and the world's total GHG emissions... Yet the effects of climate change are and will continue to be experienced across Canada, with heightened impacts in the Canadian Arctic, coastal regions and Indigenous

territories. Third, no one province, territory or country can address the issue of climate change on its own. Addressing climate change requires collective national and international action. This is because the harmful effects of GHGs are, by their very nature, not confined by borders.³³

B) CANADA'S ACTIONS ON CLIMATE CHANGE

The subsection on Canada's efforts to address climate change recounts the history of the United Nations Framework Convention on Climate Change (1992) (UNFCCC),³⁴ the *Kyoto Protocol*,³⁵ and the *Copenhagen Accord*,³⁶ as well as Canada's failure to fulfill its commitments under these latter two instruments.³⁷ Canada ratified the most recent agreement, the *Paris Agreement*,³⁸ in 2016 following its adoption at the end of 2015. As the Chief Justice observed, Canada's current-at-the-time commitment under the Paris Agreement, its Nationally Determined Commitment (NDC), is to reduce its GHG emissions by 30 per cent below 2005 levels by 2030.³⁹ Note that Prime Minister Justin Trudeau indicated on April 22, 2021 that Canada's target would be revised to 40–45 per cent below 2005 levels by 2030.

Prior to ratifying the Paris Agreement, the federal government had convened a First Ministers' meeting that resulted in the adoption of the *Vancouver Declaration on Clean Growth and Climate Change* in which

³¹ *GGPPA Reference*, *supra* note 1 at para 7.

³² *Ibid* at para 10.

³³ *Ibid* at para 12.

³⁴ *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107, 31 ILM 849 (entered into force 21 March 1994) [*UNFCCC*].

³⁵ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 18 December 1997, 2303 UNTS 162 (entered into force 16 February 2005) [*Kyoto Protocol*].

³⁶ *Copenhagen Accord*, 18 December 2009, UNFCCC/CP/2009/L7 Draft decision -/CP.15 [*Copenhagen Accord*], online (pdf): [UNFCCC <unfccc.int/resource/docs/2009/cop15/eng/l07.pdf>](http://unfccc.int/resource/docs/2009/cop15/eng/l07.pdf) [perma.cc/CPF9-EW3M].

³⁷ *GGPPA Reference*, *supra* note 1 at para 13.

³⁸ *The Paris Agreement, United Nations Framework Convention on Climate Change*, 12 December 2015, Can TS 2016/9 (entered into force 4 November 2016) [*Paris Agreement*].

³⁹ Government of Canada, "Canada's 2017 Nationally Determined Contribution (NDC) submission under the Paris Agreement", (2017), online (pdf): [UNFCCC <www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Canada%20First/Canada%20First%20NDC-Revised%20submission%202017-05-11.pdf>](http://unfccc.int/sites/ndcstaging/PublishedDocuments/Canada%20First/Canada%20First%20NDC-Revised%20submission%202017-05-11.pdf) [perma.cc/BCZ9-LCQ6]. Note that in Government of Canada, "Canada's Enhanced Nationally Determined Contribution" (last modified 23 April 2021), online: [Environment and Climate Change Canada <www.canada.ca/en/environment-climate-change/news/2021/04/canadas-enhanced-nationally-determined-contribution.html>](http://www.canada.ca/en/environment-climate-change/news/2021/04/canadas-enhanced-nationally-determined-contribution.html) [perma.cc/6U4Z-3844], the government indicated that Canada's target would be revised to 40–45% below 2005 levels by 2030 in advance of the 2021 Council of the Parties to the UNFCCC meetings in Glasgow.

the parties recognized the commitment that Canada had made, as well the importance of adopting a collaborative approach to meet that commitment. The *Vancouver Declaration* led to the establishment of a federal-provincial-territorial Working Group on Carbon Pricing Mechanisms which in turn informed the adoption of the *Pan-Canadian Framework on Clean Growth and Climate Change* (December 2016).⁴⁰ The Framework provided the policy direction for the *GGPPA* and contemplated that each province or territory would have to have in place a carbon pricing system by 2018.⁴¹ The *Framework* was initially adopted by all provinces except Saskatchewan but, as the Chief Justice noted, that support soon dissipated:

On the day the federal government released the Pan-Canadian Framework, it was adopted by eight provinces, including Ontario and Alberta, and by all three territories. Manitoba adopted the framework in February 2018, but Saskatchewan has not done so yet. Later in 2018, Ontario, Alberta and Manitoba withdrew their support from the Pan-Canadian Framework.⁴²

The federal government followed up the release of the Framework with further guidance documents on the elements of the proposed federal carbon pricing system including a benchmarking document to inform the decision to apply federal carbon pricing in the provinces.⁴³

The Chief Justice also referenced the various measures taken by different provinces and territories, noting that only four of the provinces — British Columbia, Alberta,

Ontario and Quebec — had actually adopted a carbon pricing system at the time that the *Pan-Canadian Framework* was adopted, but all other provinces except Saskatchewan and Manitoba had indicated that they planned to do so.⁴⁴ The Chief Justice closed his review of the factual background with the following observation referencing the “collective action problem of climate change”:

Despite the actions that had been taken, Canada’s overall GHG emissions had decreased by only 3.8 percent between 2005 and 2016, which was well below its target of 30 percent by 2030. Over that period, GHG emissions had decreased in British Columbia, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Yukon, but had increased in Alberta, Saskatchewan, Manitoba, Newfoundland and Labrador, Northwest Territories and Nunavut. Illustrative of the collective action problem of climate change, between 2005 and 2016, the decreases in GHG emissions in Ontario, Canada’s second largest GHG emitting province, were mostly offset by increases in emissions in two of Canada’s five largest emitting provinces, Alberta and Saskatchewan. Canada’s remaining emissions reduction between 2005 and 2016 came from two of Canada’s remaining five largest emitting provinces, Quebec and British Columbia, as well as from decreases in GHG emissions of over 10 percent — well above Canada’s 3.8 percent overall GHG emissions reduction — in New Brunswick,

⁴⁰ *GGPPA Reference*, *supra* note 1 at para 14. The framework referred to is Government of Canada, “Pan-Canadian Framework on Clean Growth and Climate Change” (2016), online (pdf): *Environment and Climate Change Canada* <publications.gc.ca/collections/collection_2017/eccc/En4-294-2016-eng.pdf> [perma.cc/3SQK-9TJS].

⁴¹ *GGPPA Reference*, *supra* note 1 at para 18. Carbon pricing systems could take the form of a carbon tax or levy as was in place in BC, a cap-and-trade system like the one in place in Quebec, or a hybrid system such as the carbon pricing system for large emitters in place in Alberta since 2007.

⁴² *Ibid* at para 19.

⁴³ *Ibid* at para 20, with the application of the benchmark discussed at para 64. The federal benchmark referred to here is Government of Canada, “Guidance on the pan-Canadian carbon pollution pricing benchmark” (last modified 16 January 2018), online: *Environment and Climate Change Canada* <www.canada.ca/en/services/environment/weather/climatechange/pan-canadian-framework/guidance-carbon-pollution-pricing-benchmark.html> [perma.cc/GRU3-BNXC].

⁴⁴ *GGPPA Reference*, *supra* note 1 at para 23.

Nova Scotia, Prince Edward Island and Yukon.⁴⁵

Armed with this assessment of the facts as well as a review of the legislation (see our summary in Section II) the Chief Justice was ready to embark on the legal analysis. This began with some remarks on the principle of federalism before turning to the division of powers analysis, characterization of the *GGPPA*, and finally its classification. The Chief Justice dealt with the all-important issue of the scope and applicability of the national concern doctrine as part of the issue of categorization. The judgment concludes with the Chief Justice's reasons for characterizing the levies in Parts 1 and 2 of the *GGPPA* as regulatory charges rather than true taxes. In a final comment, the Chief Justice gave his reasons for thinking that it was inappropriate to comment on the validity of any implementing regulations for the *GGPPA* since they were not properly before the Court. We summarize each of these sections of the judgement in turn below.

C) PRINCIPLES OF FEDERALISM

The Chief Justice's discussion of the principle of federalism that informs the subsequent analysis is short.⁴⁶ He affirms that the objectives of Canadian federalism "are to reconcile diversity with unity, promote democratic participation by reserving meaningful powers to the local or regional level and foster cooperation between Parliament and the provincial legislatures for the common good."⁴⁷ The provinces are to have the autonomy to develop their societies while at the same time the federal government has "powers better exercised in relation to the country as a whole to provide for Canada's unity" but those powers "cannot be used in a manner that effectively eviscerates provincial power."⁴⁸ While the Court now adheres to a flexible view of federalism rather than "a rigid division of federal-provincial powers as watertight compartments," such a cooperative

federalism "cannot override or modify the constitutional division of powers."⁴⁹

D) CHARACTERIZATION

The characterization of the *GGPPA* in the three provincial Courts of Appeal generated a range of judicial responses as well as an evolution in counsel for Canada's articulation of the "pith and substance" of the legislation. The Chief Justice helpfully identified three different formulations of the *GGPPA*'s pith and substance:

- (1) a broad formulation to the effect that the *GGPPA*'s pith and substance is the regulation of GHG emissions;
- (2) a national standards-based formulation to the effect that the *GGPPA*'s pith and substance is to establish minimum national standards to reduce GHG emissions;
- and (3) a national standards pricing-based formulation to the effect that the *GGPPA*'s pith and substance is to establish minimum national standards of GHG price stringency to reduce GHG emissions.⁵⁰

In the end, the Chief Justice preferred the third formulation on the grounds that this was most consistent with the purpose and effects of the legislation, as defined with some precision, and having regard to the means chosen by Parliament to achieve its purpose.⁵¹ The intrinsic evidence in favour of this conclusion included the long title of the statute, the preamble including its references to the UNFCCC and the Paris Agreement, as well as the emphasis on GHG pricing in the *Pan-Canadian Framework*.⁵² The extrinsic evidence, in the form of background documents as well as parliamentary debates and testimony before the Standing Committee, all confirmed that the *GGPPA* was concerned with "imposing

⁴⁵ *Ibid* at para 24.

⁴⁶ *Ibid* at paras 48–50.

⁴⁷ *Ibid* at para 48, references omitted.

⁴⁸ *Ibid* at para 49.

⁴⁹ *Ibid* at para 50.

⁵⁰ *Ibid* at para 57.

⁵¹ *Ibid*.

⁵² *Ibid* at para 60.

a Canada-wide GHG pricing system” and not “regulating GHG emissions generally.”⁵³ The legal effects of both impugned Parts of the *GGPPA* are similarly concerned with price stringency rather than instructing individuals and industries “how they are to operate in order to reduce their GHG emissions.”⁵⁴ And while the Act affords considerable discretion to the Governor in Council in triggering the actual application of the Act to a particular province or territory, that discretion is not open-ended and subjective but must be exercised in a manner “consistent with the specific guideline of ensuring that emissions pricing is applied broadly in Canada and would have to take the stringency of existing provincial GHG pricing mechanisms into account as the primary factor.”⁵⁵ Much the same was true of both Parts 1 and 2 of the Act.⁵⁶

As for the practical effects of the legislation, it was difficult to conclude much since the legislation had only been in force for a short period of time. However, the experience to date did indicate that the legislation was being implemented in a manner that “is consistent with the principle of flexibility and support for provincially designed GHG pricing schemes.”⁵⁷ The backstop nature of the legislation was also crucial; in this case “a national GHG pricing scheme is not merely the means of achieving the end of reducing GHG emissions.”⁵⁸ Rather, the means was part of the rationale for the legislation. The Chief Justice also explains the reasons for characterizing the selective application of regulatory charges as imposing a “minimum national standard,” a subject to which we devote significant attention in the commentary below.⁵⁹

E) CLASSIFICATION

Having identified the pith and substance of the legislation and having dismissed arguments to the effect that the important regulation-making powers of the Act constituted unconstitutional sub-delegation, the Chief Justice turned to the classification of the Act, beginning with Canada’s contention that the legislation should be upheld on the basis of the national concern doctrine, with no consideration given to upholding the legislation under other federal heads of power.⁶⁰

F) THE NATIONAL CONCERN DOCTRINE

The Chief Justice began this part of his judgment by emphasizing both the residual and permanent nature of the “national concern” branch of the POGG power. As a result, “a finding that the federal government has authority on the basis of the national concern doctrine raises special concerns about maintaining the constitutional division of powers.”⁶¹ The Chief Justice then proceeded to carefully review the evolution of the national concern doctrine through the case law, emphasizing Justice Beetz’s dissenting reasons in the *Anti-Inflation Reference*,⁶² Justice Gerald LeDain’s judgment in *Crown Zellerbach*, as well as cases in which the Court had declined to recognize a national concern on the grounds that there was nothing in the proposed matter that transcended provincial boundaries or the power of local authorities to resolve.⁶³

Having conducted this chronological review, the Chief Justice then addressed what he referred to as two “preliminary” issues.⁶⁴ The first was

⁵³ *Ibid* at para 68. We return to this latter formulation in our commentary on the decision.

⁵⁴ *Ibid* at para 71.

⁵⁵ *Ibid* at para 73.

⁵⁶ *Ibid* at paras 73, 76, referring to the *GGPPA*, *supra* note 3, ss 165(2), 189(2).

⁵⁷ *GGPPA Reference*, *supra* note 1 at para 79.

⁵⁸ *Ibid* at para 80.

⁵⁹ *Ibid* at para 81.

⁶⁰ *Ibid* at para 86.

⁶¹ *Ibid* at para 90.

⁶² *Re: Anti-Inflation Act*, [1976] 2 SCR 373, 68 DLR (3d) 452.

⁶³ Cases cited include *Labatt Breweries of Canada Ltd v Attorney General of Canada*, [1980] 1 SCR 914, 110 DLR (3d) 594 (brewing and labelling of beer); *Schneider v The Queen*, [1982] 2 SCR 112, 139 DLR (3d) 417 (treatment of drug dependency); *R v Wetmore*, [1983] 2 SCR 284, 2 DLR (4th) 577 (regulation of the pharmaceutical industry).

⁶⁴ *GGPPA Reference*, *supra* note 1 at para 112.

whether a new matter of national concern could be framed in terms of the subject matter of the statute (its “pith and substance”), or whether it had to be framed “at a level of generality that is broader than the matter of the statute.”⁶⁵ The point was an important one insofar as the broader the articulation of the matter (e.g. the regulation of GHGs, as the Alberta Court of Appeal had framed the matter),⁶⁶ the greater the likelihood that the matter would not be *single, distinct and indivisible*, and the greater the threat to provincial autonomy if jurisdiction under the national concern branch of POGG was deemed to be both plenary and exclusive.

The Chief Justice gave four reasons for rejecting the need for a broader and more abstract formulation of the matter. First, the Chief Justice pointed to the actual text of sections 91 and 92 of the Constitution, which distinguish between “matters” and “classes of subjects” and observed that there is “[n]othing in the words of the Constitution that supports the construction of a class of subjects under the POGG power that is broader than the matter of the statute.”⁶⁷ Second, the Chief Justice observed that it was not unprecedented for the statement of the matter to be framed in the same terms as the pith and substance of the impugned legislation.⁶⁸ Such was the case, for example, in both *Anti-Inflation* and *Crown Zellerbach*. Third, consistent with the principle of judicial constraint, the Court should confine itself to the precise question before it. Simply put, “if Parliament has not indicated in a statute that its intention is to exercise jurisdiction over a broad matter, there is no reason for a court to artificially construct such a broad matter.”⁶⁹ Finally, the Chief Justice pushed back against

the contention that this approach conflates the characterization and categorization stages. An impugned statute must still be subject to categorization and if “the matter is not legally viable as a matter of national concern, then... the statute cannot be upheld on the basis of that doctrine.”⁷⁰

The second preliminary issue related to an even more significant point, namely, the presumed exclusiveness of the federal power to legislate with respect to any matter that qualifies as a national concern. The backstop nature of the federal legislation raises this issue directly, since backstop legislation is premised on the capacity of a provincial or territorial government to pass a law or laws that establishes carbon prices that meet or exceed a national stringency standard. If the federal parliament’s power to make laws dealing with the stringency of carbon pricing was literally exclusive, there would be a question as to whether and how provincial laws could survive.⁷¹ The Chief Justice answered this seeming conundrum by pointing out that the use of the word “plenary” to describe a matter that qualifies as a national concern is “unhelpful” because plenary speaks to the “scope of the power” and does not speak to the exclusiveness of such a power.⁷² The scope of the power is determined by the nature of the relevant matter. Thus, in *Ontario Hydro*, labour relations fell within the scope of the matter of nuclear energy because of the link between labour relations and the safe operation of nuclear facilities.⁷³ The ability of a province to regulate with respect to the same subject area should be determined through the application of the double aspect doctrine which permits

⁶⁵ *Ibid* at para 114.

⁶⁶ *Alberta GGPPA Reference*, *supra* note 10.

⁶⁷ *GGPPA Reference*, *supra* note 1 at para 115.

⁶⁸ *Ibid* at para 116.

⁶⁹ *Ibid* at para 117. See also *Munro v National Capital Commission*, [1966] SCR 663 at 672, 57 DLR (2d) 753 [*Munro*].

⁷⁰ *GGPPA Reference*, *supra* note 1 at para 118.

⁷¹ Andrew Leach & Eric M Adams, “Seeing Double: Peace, Order, and Good Government, and the Impact of Federal Greenhouse Gas Emissions Legislation on Provincial Jurisdiction” (2020) 29:1 Const Forum Const 1, frame this interpretation of the national concern branch as the transfer theory of POGG.

⁷² *GGPPA Reference*, *supra* note 1 at para 122.

⁷³ *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327, 107 DLR (4th) 457 [*Ontario Hydro*]. Other matters (see e.g., aerodrome siting in *Johannesson v Municipality of West St Paul*, [1952] 1 SCR 292, [1951] 4 DLR 609 [*Johannesson*]) might result in an even wider reach, but in each case the scope or plenary nature of the power must be determined by reference to the nature of that matter.

“the same fact situation to be regulated from different perspectives.”⁷⁴

Crucially, the double aspect doctrine is equally applicable to national concern powers as to other federal and provincial heads of power; but that does mean to say “that it *will* apply in a given case.”⁷⁵ The “fact situation” must lend itself to being viewed from different perspectives. But if it can, both laws may be valid, subject to federal paramountcy.⁷⁶ The importance of this conclusion was not lost on the Chief Justice:

The double aspect doctrine takes on particular significance where, as in the case at bar, Canada asserts jurisdiction over a matter that involves a minimum national standard imposed by legislation that operates as a backstop. The recognition of a matter of national concern such as this will inevitably result in a double aspect situation. This is in fact the very premise of a federal scheme that imposes minimum national standards: Canada and the provinces are both free to legislate in relation to the same fact situation — in this case by imposing GHG pricing — but the federal law is paramount.⁷⁷

Having addressed these “preliminary” concerns, the Chief Justice turned to two other methodological considerations associated with identifying matters of national concern. The first was to emphasize that the recognition of a matter as being of national concern must

be based on evidence.⁷⁸ This points to the importance of building an adequate record, particularly with respect to such matters as provincial inability but also, as we shall see, with respect to what the Chief Justice describes as the important threshold question, namely “whether the matter is of sufficient concern to Canada as a whole to warrant consideration under the doctrine.”⁷⁹ The second point relates to the issue of “newness” and the question as to whether the proposed matter should be something that must have been historically unknown at the time of Confederation. The Chief Justice rejected the requirement of “newness.” In his view, references to newness in the case law must be read such that “[t]he critical element of this analysis is the requirement that matters of national concern be inherently national in character, not that they be historically new.”⁸⁰ Thus, original appreciation of a matter (such as uranium mining) as something that was local in nature coming within “various enumerated provincial classes of subjects: ss. 92(5), 92(9), 92(10) and 92(13)” might evolve over time such that “the production of its raw materials [could be] ... found to be a matter which is, by nature, of national concern because of its safety and security risks, particularly the risk of catastrophic interprovincial harm...”⁸¹

G) CROWN ZELLERBACH, REFRESHED AND REFURBISHED

With these important clarifications in hand, the Chief Justice turned to the test for identifying matters of national concern. While Chief Justice Wagner’s refurbished test draws significantly on Justice Le Dain’s test as articulated in *Crown Zellerbach*, there are

⁷⁴ *GGPPA Reference*, *supra* note 1 at para 125, citing *Desgagnés Transport Inc. v Wärsilä Canada Inc.*, 2019 SCC 58 at para 84 which holds that, “[i]f a fact situation can be regulated from different federal and provincial perspectives and each level of government has a compelling interest in enacting legal rules in relation to that situation, the double aspect doctrine may apply.”

⁷⁵ *GGPPA Reference*, *supra* note 1 at para 128, emphasis in original. The argument that the double aspect doctrine should apply to matters of national concern was argued in Leach & Adams, *supra* note 71, Nathalie J Chalifour, Peter Oliver & Taylor Wormington, “Clarifying the Matter: Modernizing Peace, Order, and Good Government in the Greenhouse Gas Pollution Pricing Act Appeals” (2020) 40:2 NJCL 53, and in our comment on the Alberta GGPPA Reference, Olszynski, Bankes, & Leach, *supra* note 10.

⁷⁶ *GGPPA Reference*, *supra* note 1 at paras 129–130.

⁷⁷ *Ibid* at para 129.

⁷⁸ *Ibid* at para 133, citing Jean Leclair, “The Elusive Quest for the Quintessential ‘National Interest’” (2005) 38 UBC L Rev 355, and Katherine Swinton, “Federalism under Fire: The Role of the Supreme Court of Canada” (1992) 55:1 Law & Contemp Probs 121.

⁷⁹ *GGPPA Reference*, *supra* note 1 at para 142.

⁸⁰ *Ibid* at para 136.

⁸¹ *Ibid* at para 138.

some important modifications which draw extensively on the test for classification under the trade and commerce power developed in *General Motors*, as applied in *re Securities Act* and *re Pan-Canadian Securities*.⁸² Chief Justice Wagner’s test is effectively a three-step test. It begins with a threshold question (is the matter of sufficient concern to Canada as a whole to warrant consideration under the doctrine?) before proceeding to consider, as a second step, the question of “singleness, distinctiveness and indivisibility,” a strong indicator of which is provincial inability to effectively address the matter. The third and final step is to assess the impact of recognizing a matter of national concern on provincial autonomy. We discuss each of these in turn below.

1. The Threshold Question

The threshold question involves “a common-sense inquiry into the national importance of the proposed matter.”⁸³ The inquiry is designed to ensure “that the national concern doctrine cannot be invoked too lightly and provides essential context for the analysis that follows.”⁸⁴ This step will not be satisfied by merely asserting the *importance* of a matter: “Canada must adduce evidence to satisfy the court that the matter is of sufficient concern to Canada as a whole to warrant consideration in accordance with the national concern doctrine.”⁸⁵ If the federal government is able to discharge this burden, the inquiry turns to the ideas of “singleness, distinctiveness and indivisibility,” informed by provincial

inability but now viewed through the lens of two “principles.”

2. Singleness, Distinctiveness and Indivisibility

The *first principle* is that there must be “a specific and identifiable matter that is *qualitatively different* from matters of provincial concern.”⁸⁶

How then does one ascertain whether something is qualitatively different? The Chief Justice suggests that a key consideration is “whether it is predominantly extra-provincial and international in character, having regard both to its inherent nature and to its effects.”⁸⁷ In addition, “[i]nternational agreements may in some cases indicate that a matter is qualitatively different from matters of provincial concern.”⁸⁸ A further limiting consideration is that the matter “must not be an aggregate of provincial matters,” and “federal legislation will not be qualitatively distinct if it overshoots regulation of a national aspect of the field and instead duplicates provincial regulation or regulates issues that are primarily of local concern.”⁸⁹

The *second principle* is that “the evidence establishes provincial inability to deal with the matter.”⁹⁰ In developing this principle, the Chief Justice drew on the fourth and fifth *indicia* from *General Motors*. Thus:

- (1) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable

⁸² *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641, 58 DLR (4th) 255 [*General Motors*]; *Reference re Securities Act*, 2011 SCC 66; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48. For a detailed discussion of the test for classification under the trade and commerce power applied to the GGPPA and other carbon pricing policies, see Andrew Leach, “Environmental Policy is Economic Policy: Climate Change Policy and the General Trade and Commerce Power” (2021) 52:2 Ottawa L Rev 97.

⁸³ *GGPPA Reference*, *supra* note 1 at para 142.

⁸⁴ *Ibid* at para 143.

⁸⁵ *Ibid* at para 144.

⁸⁶ *Ibid* at para 146, emphasis added.

⁸⁷ *Ibid* at para 148.

⁸⁸ *Ibid* at para 149. *Canada (Attorney General) v Ontario (Attorney General)*, [1937] 1 DLR 673 (PC), [1937] 1 WWR 299, holds that international agreements are not determinative of federal jurisdiction, but they have played a role in previous POGG cases including *Reference re the Regulation and Control of Aeronautics in Canada*, [1932] AC 54 (PC), [1931] 10 WLUK 26, *Reference re Regulation and Control of Radio Communication in Canada*, [1932] AC 304 (PC), [1932] 2 DLR 81, and notably in *Crown Zellerbach*, *supra* note 14 at 408. Chief Justice Wagner explains that “international agreements may help to show that a matter has an extra-provincial and international character, thereby supporting a finding that it is qualitatively different from matters of provincial concern,” while emphasizing that they do not in and of themselves confer new powers to Parliament.

⁸⁹ *GGPPA Reference*, *supra* note 1 at para 150.

⁹⁰ *Ibid* at para 152, emphasis added.

of enacting; and (2) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country. While Chief Justice Dickson frames the indicia in *General Motors* as not being individually necessary for classification under the trade and commerce power, for provincial inability to be established for the purposes of the national concern doctrine, both of these factors are required.⁹¹

In adopting this framing, the Chief Justice rejected the argument made during the proceedings that provincial inability should be interpreted literally to mean that the provinces are without jurisdiction to address the matter whatsoever.⁹²

To these two principles, the Chief Justice adds a third *indicium*, namely that “a province’s failure to deal with the matter must have *grave* extra-provincial consequences.”⁹³ While the Chief Justice suggested that this added element constitutes a “high bar,” it apparently encompasses a fairly broad range of scenarios.⁹⁴ In an attempt at further clarification, the Chief Justice went on to say that the requirement of grave national consequences “can be satisfied by actual harm or by a serious risk of harm being sustained in the future. It may include serious harm to human life and health or to the environment, though it is not necessarily limited to such consequences.”⁹⁵ At the same

time “[m]ere inefficiency or additional financial costs stemming from divided or overlapping jurisdiction is clearly insufficient.”⁹⁶

The two principles between them give effect to the requirement that a matter be indivisible as enunciated in *Crown Zellerbach*. As the Chief Justice explains:

The first of these principles requires a specific and identifiable matter which is not a boundless aggregate. The second principle requires provincial inability, as it is clearly defined in *Crown Zellerbach* and, indeed, throughout the Court’s national concern jurisprudence, which is a marker of indivisibility.⁹⁷

3. Scale of Impact on Provincial Jurisdiction

The final step in the analysis is the scale of impact test, which is a contextual test designed to “prevent federal overreach.” Thus,

...the intrusion upon provincial autonomy that would result from empowering Parliament to act is balanced against the extent of the impact on the interests that would be affected if Parliament were unable to constitutionally address the matter at a national level. Identifying a new matter of national concern will be justified only if the latter outweighs the former.⁹⁸

⁹¹ *Ibid.*, referring to *General Motors*, *supra* note 82.

⁹² For an argument that provincial ability to legislate in relation to GHG emissions should be determinative of a negative answer to the provincial inability indicium, see *GGPPA Reference* (Factum of the Attorney General of Saskatchewan), at para 86, or *GGPPA Reference* (Factum of the Attorney General of Quebec), at para 36.

⁹³ *GGPPA Reference*, *supra* note 1 at para 153.

⁹⁴ *Ibid.* at paras 153–54. For example, the Chief Justice references *Johannesson*, *supra* note 73 (the intolerable consequences of isolating northern communities were federal jurisdiction not to apply to aeronautics), *Munro*, *supra* note 69 (the absence of federal jurisdiction “would have resulted in the denial of a suitable national capital to all Canadians”), *Attorney General for Ontario v Attorney General for the Dominion*, [1896] AC 348 (PC), CR [11] AC 222 (referencing the discussion in that case of arms trafficking), and *Ontario Hydro*, *supra* note 73 (the risk of a nuclear disaster).

⁹⁵ *GGPPA Reference*, *supra* note 1 at para 155.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.* at para 158.

⁹⁸ *Ibid.* at para 161.

H) APPLYING THE NEW TEST TO THE GGPPA

1. Threshold question: significant concern for Canada as a whole

As with all of the provincial appellate courts, the majority accepts that climate change is an “existential challenge” and “a threat to the future of humanity.”⁹⁹ However, and much as in *Crown Zellerbach* where the matter was not marine pollution *simpliciter* but rather marine pollution by ocean dumping, “the specific question before the Court is whether establishing minimum national standards of GHG price stringency to reduce GHG emissions is a matter of national concern.”¹⁰⁰ The record fully supported “the importance of carbon pricing,”¹⁰¹ and indeed reflected “a consensus, both in Canada and internationally, that carbon pricing is integral to reducing GHG emissions.”¹⁰² As such, the proposed identification of a new matter of national concern “readily passes the threshold test” and warrants further consideration.¹⁰³

As further discussed in Part V (commentary), these findings by the Supreme Court are significant. While not the central issue, the majority’s holdings with respect to climate change go beyond mere *obiter* and are bound to influence other types of climate litigation in Canada, including current *Charter*-based litigation, future tort-based litigation (e.g. for climate change related costs), and disputes with respect to project-related impacts.¹⁰⁴

2. Singleness, Distinctiveness and Indivisibility

With respect to the first principle of the test outlined above, the Chief Justice holds that the matter of the legislation is qualitatively different from matters of provincial concern. Here again, the reasons lead with the nature of GHG emissions, which “are a specific and precisely identifiable type of pollutant” that “represent a pollution problem that is not merely interprovincial, but global, in scope.”¹⁰⁵ International agreements are brought to bear as “both the UNFCCC and the *Paris Agreement* help illustrate the predominantly extra-provincial and international nature of GHG emissions and support the conclusion that the matter at issue is qualitatively different from matters of provincial concern.”¹⁰⁶ The reasons next look at emissions pricing, holding that the *Vancouver Declaration* and other federal/provincial initiatives reflect the status of GHG pricing as a “distinct form of regulation.”¹⁰⁷ It does “not amount to the regulation of GHG emissions generally,” and “is also different in kind from regulatory mechanisms that do not involve pricing, such as sector-specific initiatives concerning electricity, buildings, transportation, industry, forestry, agriculture and waste.”¹⁰⁸ Finally, the implementation of minimum standards of carbon pricing through backstop architecture is deemed to be qualitatively different from matters of provincial concern. The federal approach complements provincial schemes and “does so on a distinctly national basis, one that neither represents an aggregate of provincial matters nor duplicates provincial GHG pricing systems.”¹⁰⁹ While there is a sense in which the federal scheme is always applicable, it is only

⁹⁹ *Ibid* at para 168.

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid* at para 169.

¹⁰² *Ibid* at para 170.

¹⁰³ *Ibid* at para 171.

¹⁰⁴ See e.g., the Government of Alberta’s reference to the Alberta Court of Appeal, *Re: 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*, SC 2019, c 28 and the *Physical Activities Regulations*, SOR/2019-285, ABCA, File Number 1901-0276-AC (decision pending) with respect to the validity of the *Impact Assessment Act* [C-69 Reference].

¹⁰⁵ *GGPPA Reference*, *supra* note 1 at para 173.

¹⁰⁶ *Ibid* at para 174.

¹⁰⁷ *Ibid*.

¹⁰⁸ *Ibid* at para 175.

¹⁰⁹ *Ibid* at para 177.

directly operable where a province or territory fails to implement a sufficiently stringent pricing mechanism and the federal government lists the province in a schedule by regulation.¹¹⁰ In sum:

...the *GGPPA*'s fundamental role is a distinctly federal one: evaluating provincial pricing mechanisms against an outcome-based legal standard in order to address national risks posed by insufficient carbon pricing stringency in any part of the country. The *GGPPA* does not prescribe any rules for provincial pricing mechanisms as long as they meet the federally designated standard.¹¹¹

We discuss below in our commentary the distinction between prescribing rules that a province must meet as opposed to the application of federal rules to supplement provincial rules that fail to establish the requisite degree of price stringency. We take the view that the *GGPPA* does the latter and not the former.

The Chief Justice then gave three reasons for concluding that the evidence established provincial inability to deal with the proposed matter. First, “the provinces, acting alone or together, are constitutionally incapable of establishing minimum national standards of GHG price stringency to reduce GHG emissions.”¹¹² While they might be able to achieve the same result through cooperation, there could be no guarantee that such cooperation would continue; “any province could choose to withdraw at any time.”¹¹³ Here the Chief Justice draws upon the decision in *re Pan-Canadian Securities* to support an interpretation of provincial inability which relies in part on the inability of provinces to pre-commit to future policies.

Second, the risk of a province opting out could undermine the efficacy of the entire scheme. Reduced emissions by provinces remaining in the scheme could be more than offset by increased emissions (whether as a result of emissions leakage or otherwise) in provinces failing to implement a sufficiently stringent GHG pricing mechanism.¹¹⁴ The record reinforced the reality of this risk, as set out in what are arguably two of the most important paragraphs in the decision. The Chief Justice noted that “[b]etween 2005 and 2016...emissions fell by 22 percent in Ontario, 11 percent in Quebec and 5.1 percent in British Columbia... But these decreases were largely offset by increases of 14 percent in Alberta and 10.7 percent in Saskatchewan.”¹¹⁵ He went on to observe that “when provinces that are collectively responsible for more than two thirds of Canada’s total GHG emissions opt out of a cooperative scheme, this illustrates the stark limitations of a non-binding cooperative approach.”¹¹⁶

Finally, the Chief Justice emphasized that a province’s failure to cooperate would “have grave consequences for extra-provincial interests.” The reasoning that justifies this conclusion is necessarily complex. It begins with a passage that revisits the risks associated with climate change:

It is uncontroversial that GHG emissions cause climate change. It is also an uncontested fact that the effects of climate change do not have a direct connection to the source of GHG emissions; every province’s GHG emissions contribute to climate change, the consequences of which will be borne extra-provincially, across Canada and around the world. And it is well established that climate change is causing significant environmental, economic and human harm

¹¹⁰ *Ibid* at para 178.

¹¹¹ *Ibid* at para 179.

¹¹² *Ibid* at para 182.

¹¹³ *Ibid*.

¹¹⁴ *Ibid* at para 183.

¹¹⁵ *Ibid* at para 184.

¹¹⁶ *Ibid* at para 185. The provinces referred to here are the three provinces which had launched reference proceedings: Saskatchewan, Ontario, and Alberta.

nationally and internationally, with especially high impacts in the Canadian Arctic, in coastal regions and on Indigenous peoples.¹¹⁷

The Chief Justice then moved from this statement of global effects to confront the argument that a province's failure to cooperate could hardly "have grave consequences for extra-provincial interests," since the impact of any single province's emissions could not result in measurable harm to other provinces.¹¹⁸ His response to this argument, which increasingly confronts domestic courts in different jurisdictions in a range of climate change litigation contexts (as further discussed in Part V), was concise: "[e]ach province's emissions are clearly measurable and contribute to climate change. The underlying logic of this argument [that emissions from any individual jurisdiction are immaterial to climate change] would apply equally to all individual sources of emissions everywhere, so it must fail."¹¹⁹ This conclusion was bolstered by further references to the dire implications of climate change together with the problem of defection in the context of collective action and the problems of emissions leakage. While the Chief Justice does not use this precise language at this point in the judgment, this appears to be the message underlying the following passage:

While each province's emissions do contribute to climate change, there is no denying that climate change is an "inherently global problem" that neither Canada nor any one province acting alone can wholly address. This weighs in favour of a finding of provincial inability. As a global problem, climate change can realistically be addressed only through international efforts. Any province's failure to act threatens Canada's ability to meet its

international obligations, which in turn hinders Canada's ability to push for international action to reduce GHG emissions. Therefore, a provincial failure to act directly threatens Canada as a whole. This is not to say that Parliament has jurisdiction to implement Canada's treaty obligations — it does not — but simply that the inherently global nature of GHG emissions and the problem of climate change supports a finding of provincial inability in this case.¹²⁰

Indeed, this is reinforced by the backstop nature of the *GGPPA* which only kicks in operationally when a province fails to legislate a sufficiently stringent carbon price.¹²¹

3. The final test: the scale of impact on provincial jurisdiction

The scale of impact on provincial jurisdiction was at the core of the objections of each of the provinces challenging the constitutionality of the *GGPPA*, in particular Alberta. We summarize the majority opinion on this issue below and provide our commentary in Section V. The Chief Justice acknowledged that the recognition "of a previously unidentified area of double aspect in which the federal law is paramount" would have "a clear impact on provincial autonomy."¹²² But this interference with autonomy is limited and could be justified or outweighed "by the impact on interests that would be affected if Parliament were unable to constitutionally address this matter at a national level."¹²³

The Chief Justice gave two reasons for this conclusion. First, he observed that the interference with the provinces' "freedom to legislate is minimal."¹²⁴ A province would still be able to legislate with respect to a broad

¹¹⁷ *Ibid* at para 187.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid* at para 188. Bracketed clarification added.

¹²⁰ *Ibid* at para 190. Recall that the Chief Justice had specifically recognized the problem of collective action earlier and as quoted above at para 24.

¹²¹ *Ibid* at para 195.

¹²² *Ibid* at para 197.

¹²³ *Ibid* at para 196.

¹²⁴ *Ibid* at para 199.

range of matters pertaining to GHG emissions. Indeed, a province is still “free to design and legislate any GHG pricing system as long as it meets minimum national standards of price stringency.”¹²⁵ Second, “the matter’s impact on areas of provincial life that would generally fall under provincial heads of power is also limited.”¹²⁶ Individual consumers could choose how they responded to the price signals that might result from federal minimum standards,¹²⁷ and while the new matter would entail some level of federal “supervisory” jurisdiction, this too would be limited by the purpose of the *GGPPA* and administrative law principles.¹²⁸ Provinces would retain the ability to legislate in most areas related to GHG emissions without any federal supervision.¹²⁹ In sum:

The result of the *GGPPA* is therefore not to limit the provinces’ freedom to legislate, but to partially limit their ability to refrain from legislating pricing mechanisms or to legislate mechanisms that are less stringent than would be needed in order to meet the national targets. Although this restriction may interfere with a province’s preferred balance between economic and environmental considerations, it is necessary to consider the interests that would be harmed — owing to irreversible consequences for the environment, for human health and safety and for the economy — if Parliament were unable to constitutionally address the matter at a national level.¹³⁰

In the commentary below, we address in more detail the suggestion that a province may not legislate a less stringent measure perhaps implying that such a provincial scheme may be invalid or inapplicable. In short, we do not believe that this implication is warranted. The

failure of a province to legislate a carbon price or to legislate a carbon price of sufficient stringency to satisfy the federal standard merely exposes the province to the backstop application of the federal scheme; it does not render the provincial scheme invalid or inapplicable (unless there is actual inconsistency sufficient to trigger paramountcy).

The Chief Justice concluded his discussion of the national concern test by anticipating at least some of the criticisms of the dissenting Justices, in particular Justice Brown. More specifically, he addressed the concern that the inclusion of national standard setting within the new matter posed the risk of opening the door to a broad suite of federal national standard setting legislation and federal supervision of provincial governments in a manner that would be inconsistent with Canada’s version of federalism. After all, national standard setting will always be beyond the reach of the provinces and territories. The Chief Justice responded by emphasizing the cumulative requirements that the federal government would have to satisfy to qualify a matter as a new matter of national concern. In particular, he chose to emphasize the need to establish that the failure to recognize the matter would endanger the interests of other provinces.¹³¹

IV. BRIEF SUMMARY OF THE REASONS FOR DISSENTS

As stated in the introduction, our goal in reviewing the dissents is to highlight areas of agreement and disagreement between the majority and the dissents.

A) DISSENT OF JUSTICE CÔTÉ

Justice Côté concurs with the majority with respect to the *formulation* of the national concern branch of POGG,¹³² but concludes that the *GGPPA* does not fit within that

¹²⁵ *Ibid* at para 200.

¹²⁶ *Ibid*.

¹²⁷ *Ibid* at para 201.

¹²⁸ *Ibid* at para 202.

¹²⁹ *Ibid* at para 206.

¹³⁰ *Ibid*.

¹³¹ *Ibid* at para 209.

¹³² *Ibid* at para 222.

formulation because of the breadth of discretion the legislation provides to the Governor in Council which results in the absence of any meaningful limits on the power of the executive. In addition, she considers that these broad discretionary powers independently “violate the *Constitution Act, 1867*, and the fundamental constitutional principles of parliamentary sovereignty, rule of law, and the separation of powers.”¹³³

For Justice Côté the crux of the matter is that the minimum national standards contemplated by the *GGPPA* are established by the executive branch and not explicitly in the *GGPPA* itself,¹³⁴ and that Part II of the *GGPPA* “empowers the executive to establish variable and inconsistent standards on an industry-by-industry basis.”¹³⁵ Justice Côté concludes that regulations under the Act could “impose such strict limits on the fossil fuel or potash industries, both heavy emitters of GHG emissions, that the industries would be decimated.”¹³⁶ As discussed above, Part II of the *GGPPA* does set output-based standards at the industrial level and so there may well be differing impacts across industries from the imposition of these policies. However, Part II ensures a standard of treatment that would no more disadvantageous than would be the case for a regulatory charge applied on all emissions. The output-based standards in Part II amount to the allocation of emissions credits on a per unit output basis, so Part II serves as a mechanism to reduce costs for large emitters relative to what would be the case if they were covered only under the fuel charge structure of Part I.

Justice Côté’s principal concern with the degree of discretion afforded to the federal cabinet focus lies with the “Henry VIII”

clauses in s. 168 of Part 1 and s. 192 of Part II of the *GGPPA*. A Henry VIII clause is a statutory clause that permits “the executive to amend by regulation the very statute which authorizes the regulation.”¹³⁷ Sections 168 and 192 of the *GGPPA* do, indeed, delegate broad authority to the Governor in Council to adjust a broad range of parameters which define the functioning of the fuel charge or the OBPS. Section 168 allows discretion to set rates, coverage, rebates, compliance assurance, and to set the benchmarking system to determine the listing of provinces for application of the backstop. Section 192, allows the executive to make regulations for the OBPS including definitions of a covered facility, constraints on record-keeping, compliance periods and payment deadlines, and emissions quantification and verification. These powers are all integral to the legislation. Only subsection 192(n) which allows for regulations “providing for user fees,” seems to lack a clear nexus with the legislative scheme. Justice Côté also highlights the broad discretion conferred by subsections 166(2-3) with respect to the fuel charge in Part I and especially subsection 166(4) which allows regulations to be made “in respect of the fuel charge system.” Since this applies “despite any provision of [Part I of the *GGPPA*]” such a regulation will prevail as Justice Côté notes over the text of the statute in the event of a conflict.¹³⁸ This is indeed a classic Henry VIII clause and, for Justice Côté, such clauses “that purport to confer on the executive branch the power to nullify or amend Acts of Parliament are unconstitutional.”¹³⁹

This conclusion runs counter to long-standing and high authority.¹⁴⁰ Broad delegations of legislative authority to the executive are common features of most — if not all — federal

¹³³ *Ibid.*

¹³⁴ *Ibid* at para 236.

¹³⁵ *Ibid* at para 238.

¹³⁶ *Ibid.*

¹³⁷ *Ibid* at para 231.

¹³⁸ *Ibid* at para 276.

¹³⁹ *Ibid* at para 294.

¹⁴⁰ See, as cited by the majority at paras 85–87, *In Re George Edwin Gray*, [1918] 57 SCR 150, 42 DLR 1, as well as more recent lower court authorities such as *Waddell v Governor in Council*, [1983] 8 Admin LR 266, 5 DLR (4th) 254.

and provincial environmental and natural resources statutes in Canada.¹⁴¹

In sum, while Justice Côté supports the majority's formulation of the national concern test she still finds the *GGPPA* unconstitutional partly because the *GGPPA* does not fit with the national concern matter as formulated and partly because of what she considers extraordinary discretionary powers conferred on the executive. One can infer that she would have found the *GGPPA* to be valid under the national concern test had parliament been more prescriptive as to standards within the legislation itself (however difficult this might be from a drafting perspective) rather than delegating this to the executive.

B) DISSENT OF JUSTICE BROWN

While Justice Côté focuses on the scope of the regulation-making powers in the *GGPPA*, and Justice Rowe (as discussed in the next section) focuses on the implications of the residual nature of the POGG power, Justice Brown takes issue with all of the main conclusions of the majority with the exception of the decision to characterize the levy embedded in Parts 1 and 2 of the *GGPPA* as a regulatory charge and not a tax.¹⁴² At its core, and as further discussed in the commentary below, Justice Brown's analysis systematically downplays the issue of extra-provincial harms, both generally and in the specific instances of GHGs.

Justice Brown offers the most detailed and nuanced discussion of the legislation, in particular with respect to the differences between Parts 1 and 2 of the *GGPPA*,

emphasizing that, in his view, the OBPS of Part 2 affords the federal cabinet significant discretion to reach far into the details of industrial regulation.¹⁴³ He argues that this potentially allows the federal cabinet to play favourites since it may lead to significant differences in the *average* carbon prices paid by different industrial sectors.¹⁴⁴ In expressing this view, Justice Brown very much concurs with Justice Rowe's comments on the potential for review of any implementing regulations on constitutional grounds,¹⁴⁵ which also leads him to sympathize with Justice Côté's concerns with respect to the scope of the regulation-making power.¹⁴⁶ Most significantly, however, the differences between Parts 1 and 2 of the *GGPPA* ultimately lead Justice Brown to insist that Parts 1 and 2 should be characterized separately.¹⁴⁷

For Justice Brown, the purpose of characterization is to facilitate classification of a law,¹⁴⁸ and as such he rejects not only the broad characterization of the *GGPPA* adopted in the *Alberta GGPPA Reference* as a law relating to the regulation of GHG emissions,¹⁴⁹ but also the narrower characterizations offered by Canada and British Columbia and ultimately endorsed by the majority, i.e. minimum national standards of GHG price stringency to reduce GHG emissions.¹⁵⁰ In particular, Justice Brown finds the inclusion of minimum national standards within the characterization of the legislation completely unhelpful, an "artifice" that "effectively decides the jurisdictional dispute" insofar as it short-circuits the analysis "by describing the means as something that only federal legislative authority can undertake."¹⁵¹ Justice Brown is surely correct that provinces are incapable of enforcing minimum national

¹⁴¹ See e.g. s 59 of Alberta's *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, which authorizes Cabinet to designate or exempt activities from environmental assessment, or s 81(a) of Saskatchewan's *Environmental Management and Protection Act*, 2002, SS 2002, c E-10.21, which authorizes Cabinet to make regulations "defining, enlarging or restricting the meaning of any word or expression used in this Act but not defined in this Act."

¹⁴² *GGPPA Reference*, *supra* note 1 at para 409.

¹⁴³ *Ibid* at paras 331, 339, 346.

¹⁴⁴ *Ibid* at para 338.

¹⁴⁵ *Ibid* at para 413.

¹⁴⁶ *Ibid* at para 414.

¹⁴⁷ *Ibid* at para 340.

¹⁴⁸ *Ibid* at para 317.

¹⁴⁹ *Alberta GGPPA Reference*, *supra* note 10 at para 256.

¹⁵⁰ *GGPPA Reference*, *supra* note 1 at paras 321–25.

¹⁵¹ *Ibid* at paras 327–31.

standards, and thus legislation characterized as imposing minimum national standards “effectively decides the jurisdictional dispute.”¹⁵² The imposition of national policies, however, is not the sole anchor for provincial inability in the majority opinion, and Justice Brown does not really engage with the fundamental role that extra-provincial harms play in the Chief Justice’s analysis.¹⁵³ Justice Brown also would have held that the backstop attributes of the legislation were not material to its purpose and legal effects, despite referring to them as a key feature of the Act.¹⁵⁴ Instead, Justice Brown ultimately settles on characterizing Part 1 of the Act as concerned with “the reduction of GHG emissions by raising the cost of fuel,” and Part 2 as concerned with “the reduction of GHG emissions by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure.”¹⁵⁵

While the majority moved immediately to consider Canada’s proposed classification of the *GGPPA* under the national concern head of POGG, both Justices Brown and Rowe insist that this is inappropriate given the residual nature of POGG, and that it was important to begin with the enumerated heads of power.¹⁵⁶ And having removed the language of minimum national standards from the characterization of the legislation, Justice Brown concludes that both Parts 1 and 2 of the *GGPPA* fell under one or more heads enumerated in s 92 or s 92A;¹⁵⁷ after all “the Act’s entire scheme is premised on the provinces having jurisdiction to do precisely what Parliament has presumed to do in the Act — that is, to impose carbon pricing through a comparable scheme.”¹⁵⁸

But while it is certainly the case that provincial governments could enact valid legislation to regulate GHGs under the heads of power described by Justice Brown, his discussion omits several considerations. First, the territorial limits of provincial jurisdiction preclude

provinces from pricing or otherwise regulating GHG sources in other provinces. Second, it omits any meaningful consideration of the double aspect doctrine which has been applied in other national concern cases. For example, while labour conditions normally fall under provincial jurisdiction, the close connection between such conditions and nuclear safety brings labour conditions associated with nuclear plants within federal jurisdiction (*Ontario Hydro*). Similarly, while zoning and property are clearly provincial jurisdiction, federal laws in relation to the National Capital Region can validly include zoning and restrictions on property rights (*Munro*). In short, the fact that legislation in relation to carbon pricing can be classified under a provincial head or heads of power does not establish that similar legislation, enacted with a view to a federal aspect of the subject matter, cannot be classified under POGG’s national concern branch.

Having classified the *GGPPA* under one or more heads of provincial power, it was not strictly necessary for Justice Brown to return to POGG and the national concern test, given his views as to the residual nature of POGG. However, Justice Brown did go on to further explain why, in his view, the *GGPPA* could not be sustained under POGG. Here again, Justice Brown was critical of the work done by the phrase “minimum national standards” insofar as it effectively prejudged the idea of national concern and deprived elements of the existing *Crown Zellerbach* framework of much of their value.¹⁵⁹ What he meant by this is that *national* standards must by definition be qualitatively different from provincial concerns and at the same time must also be beyond the authority of the provinces. For Justice Brown, characterizing the legislation in this way was a cheat code, allowing the majority to assume the result.

Justice Brown accepted that a narrow description of the matter that is alleged to be of

¹⁵² *Ibid* at para 329.

¹⁵³ We refer specifically here to the analysis in the majority reasons, *ibid* at para 190.

¹⁵⁴ *Ibid* at para 312.

¹⁵⁵ *Ibid* at para 340.

¹⁵⁶ *Ibid* at para 341 (Brown J.) and at para 480 (Rowe J.).

¹⁵⁷ *Ibid* at paras 343–51.

¹⁵⁸ *Ibid* at para 344.

¹⁵⁹ *Ibid* at paras 376, 378.

national concern might make it easier to meet the *Crown Zellerbach* framework,¹⁶⁰ but he was clearly skeptical of the idea that a matter of national concern could be framed as narrowly as the pith and substance of the impugned law (he stepped back from saying it could never be).¹⁶¹ But in this case, even if the matter of national concern could be confined to the scope of the legislation, however, the matter must still be described in terms broad enough to embrace both Parts 1 and 2 of the *GGPPA*.¹⁶² For Justice Brown, this meant that the alleged matter of national concern would have to be framed as broadly as “*the reduction of GHG emissions*.”¹⁶³

Having stripped away any reference to both minimum national standards and carbon pricing from the statement of the matter of national concern, it became much easier for Justice Brown to conclude that the legislation did not measure up to the *Crown Zellerbach* framework. Justice Brown gave three reasons for this conclusion. First, such a matter could not meet the test of *distinctiveness* in the sense of it being a matter that is distinct from matters falling within provincial jurisdiction under s 92.¹⁶⁴ For Justice Brown, as noted above, this point was confirmed by the backstop nature of the legislation.¹⁶⁵ The double aspect doctrine could not *confer* jurisdiction on the federal parliament where there was none, and neither could such jurisdiction be conferred simply by invoking minimum national standards.¹⁶⁶ Second, the matter could not meet the test of *indivisibility* since, by their nature, GHG emissions are divisible by source and therefore by geography and jurisdictional boundaries.¹⁶⁷ The fact that emissions might have extra-provincial effects was far from

conclusive and does not make the issue indivisible.¹⁶⁸ Under the *Crown Zellerbach* test, Justice Brown reminds us, provincial inability is an indicium of singleness and indivisibility and not itself proof of either.¹⁶⁹ Finally, Justice Brown was of the view that “Even *were* the reduction of GHG emissions a single and indivisible area of jurisdiction, its impact on provincial jurisdiction would be of a scale that is completely irreconcilable with the division of powers.”¹⁷⁰ Justice Brown reached this conclusion on the basis that the *GGPPA* was about much more than just paying money and would have profound effects on behaviour. The fact that backstop legislation based on a national concern would be far less invasive than a federal law based on either the taxation power or the criminal law power was irrelevant:

...within their sphere of jurisdiction, the provincial legislatures are sovereign, which sovereignty connotes provincial power to act — or not act — as they see fit, not as long as they do so in a manner that finds approval at the federal Cabinet table... The very idea of recognizing federal jurisdiction to legislate “minimum national standards” of matters falling within provincial jurisdiction is corrosive of Canadian federalism.¹⁷¹

C) DISSENT OF JUSTICE ROWE

Justice Rowe adopts Justice Brown’s reasons for concluding that *GGPPA* is *ultra vires* in whole,¹⁷² but adds reasons of his own for that conclusion.¹⁷³ He also adds some observations

¹⁶⁰ *Ibid* at para 354.

¹⁶¹ *Ibid* at paras 369–70.

¹⁶² *Ibid* at para 370.

¹⁶³ *Ibid*, emphasis in original.

¹⁶⁴ *Ibid* at para 371.

¹⁶⁵ *Ibid* at para 372.

¹⁶⁶ *Ibid* at paras 374–77.

¹⁶⁷ *Ibid* at para 381.

¹⁶⁸ *Ibid* at para 382.

¹⁶⁹ *Ibid* at para 383.

¹⁷⁰ *Ibid* at para 387, emphasis in original.

¹⁷¹ *Ibid* at para 394, references omitted.

¹⁷² *Ibid* at para 616.

¹⁷³ *Ibid* at paras 457–795.

as to how the Court might, in a future case, examine the constitutional validity of any regulations enacted pursuant to the provisions of the *GGPPA*.¹⁷⁴ With the exception of this discussion of the regulation-making powers under the Act, Justice Rowe's dissent focuses entirely on the national concern power, which he contextualizes within his vision of Canadian federalism. Thus, he has nothing to say about the characterization of the legislation beyond generally adopting Justice Brown's views.¹⁷⁵

Justice Rowe's vision of federalism is one that privileges a certain type of provincial autonomy and celebrates difference and the opportunity to act differently.¹⁷⁶ Much like Justice Brown, this leads him to a strong (but arguably lop-sided) view of provincial sovereignty,¹⁷⁷ that allows provinces to "adversely affect extra-provincial interests if they are acting within their sphere of jurisdiction,"¹⁷⁸ without recognizing that such adverse effects must also diminish the sovereignty of the affected province(s). This vision of federalism informs Justice Rowe's emphasis on the residual nature of POGG and specifically the national concern head of POGG.¹⁷⁹ This, at least according to Justice Rowe, seems to be the principal difference between him and the majority. Whereas for him the wording of the POGG power in s. 91 ('not coming within') is such that at the categorization stage one must look first to provincial powers, and at specific federal heads of power before moving to the general.¹⁸⁰ He contrasts this with the approach taken by the Chief Justice which sees POGG as a primary source of authority that can be triggered or generated by the invocation of "minimum

national standards". This, according to Justice Rowe, "is not residual authority. It is the antithesis of residual authority, as it would operate to encroach on jurisdiction conferred on the provinces."¹⁸¹ Indeed, like Justice Brown, Justice Rowe sees the entire idea of a national concern power based on minimum national standards as contrary to the Canadian version of federalism. This is because, in his view, it denies provinces autonomy and amounts to a supervisory view of federalism: "where provinces become subordinate units, the nation is no longer federal in its nature. In other words, supervisory federalism isn't federalism at all."¹⁸² Thus, while the double aspect doctrine may still allow a province to make laws with respect to aspects of carbon management, the federal paramountcy power effectively undermines provincial autonomy if the court adopts a broad view of national concern.¹⁸³

Ultimately, Justice Rowe's analysis of national concern remains firmly grounded within Justice LeDain's articulation of the relevant test in *Crown Zellerbach* and he was at pains to emphasize that the threshold for each of LeDain's indicia was high. The *importance* of the matter is irrelevant,¹⁸⁴ and a matter could not attain the status of national concern just because it was the subject of an international agreement or agreements for that would be inconsistent with the *Labour Conventions* case.¹⁸⁵ The *distinctiveness* of the matter, for Justice Rowe, turns not just on the distinctive nature of the gases in question,¹⁸⁶ but also required the federal government to show how the impugned matter was "distinct from matters falling under the enumerated heads of

¹⁷⁴ *Ibid* at paras 595–615.

¹⁷⁵ *Ibid* at para 616.

¹⁷⁶ *Ibid* at paras 464–69. Justice Brown cites Jean Leclair, "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity" (2002) 28 *Queen's LJ* 411, on this point.

¹⁷⁷ *GGPPA Reference*, *supra* note 1 at para 557.

¹⁷⁸ *Ibid* at para 556.

¹⁷⁹ *Ibid* at paras 480, 532. Note, at para 478, that Justice Rowe's conception of the national concern branch also embraces the 'gap' head of POGG.

¹⁸⁰ *Ibid* at para 532.

¹⁸¹ *Ibid* at para 574.

¹⁸² *Ibid* at para 570.

¹⁸³ *Ibid* at paras 566–70.

¹⁸⁴ *Ibid* at paras 540, 577.

¹⁸⁵ *Ibid* at para 578.

¹⁸⁶ *Ibid* at para 580.

s. 92.”¹⁸⁷ But this was “inherently incompatible with the backstop nature of the Act.”¹⁸⁸ As for singleness and indivisibility, Justice Rowe seems to have been of the view that carbon pricing, much like “the environment,” represented an aggregate that could be shared between federal and provincial government and did not have a “singleness” that required exclusive federal competence.¹⁸⁹ Finally, on the matter of provincial inability and extra-provincial effects, as already noted Justice Rowe’s strong views of provincial sovereignty led him to think that extra-provincial effects, while relevant, would not be determinative of provincial inability and neither would the mere risk of non-co-operation.¹⁹⁰ All this said, it is difficult to get a reading from his judgment as to what Justice Rowe would consider to be sufficient to meet the test of provincial inability.

With respect to the broad regulation-making powers in Parts 1 and 2 of the Act, the main difference between Justice Rowe and the Chief Justice related to the question of whether it was appropriate to offer much in the way of comment on *GGPPA*-implementing regulations, given that they were not before the court. For the majority it was enough to observe that any such regulations would potentially be amenable to review on constitutional grounds. Justice Rowe went well beyond that.¹⁹¹ In particular, he expressed concerns that the breadth of the regulation-making powers under the Act create opportunities for favoritism and for regulating on grounds that have nothing to do with the effectiveness of GHG pricing.¹⁹² Justice Rowe also expressed some concerns as to the lack of transparency typically associated

with regulation making.¹⁹³ In our view, these comments represent a significant break with the traditional (and appropriate) reluctance of courts to comment on matters that are not before them. Furthermore, instead of offering the executive the benefit of the presumption that the executive will exercise its powers in conformity with the statute, Justice Rowe draws attention to the *possibility* that it may not and that the executive may exercise those powers for extraneous and preferential purposes. Furthermore, while Justice Rowe notes that some regulation making powers may not attract much transparency, he must also know that *GGPPA* regulations will require the preparation of a regulatory impact assessment statement (RIAS) that will be published in the *Canada Gazette*.¹⁹⁴

V. COMMENT AND ANALYSIS

A) PITH AND SUBSTANCE, AND THE SUBJECT MATTER OF NATIONAL CONCERN: NARROW OR BROAD?

As our review demonstrates, there are significant differences in how the majority and dissents view the breadth of both the subject matter of the legislation and the subject matter of national concern. While these are, as a matter of law, distinct questions, the majority and dissents follow the same alignment with respect to both questions. That is, while the majority consistently favours a *narrow* view of the pith and substance of the *GGPPA* and of the alleged matter of national concern, the dissents take a broader or more expansive view of both pith and substance and the national concern.

¹⁸⁷ *Ibid* at para 541.

¹⁸⁸ *Ibid* at para 580.

¹⁸⁹ *Ibid* at paras 545, 579–87.

¹⁹⁰ *Ibid* at paras 556–57.

¹⁹¹ *Ibid* at para 600 et seq.

¹⁹² *Ibid* at para 614 for Part 2 and 609 for Part 1.

¹⁹³ *Ibid* at para 606.

¹⁹⁴ See e.g., *Output-Based Pricing System Regulations* SOR/2019-266, (2019) C Gaz II, 5232, online (pdf): *Canada Gazette* <www.gazette.gc.ca/rp-pr/p2/2019/2019-07-10/pdf/g2-15314.pdf> [perma.cc/7GDL-MXYT]. Rowe J. references this requirement in *GGPPA Reference*, *supra* note 1 at para 607.

The following table summarizes the main positions:

	Pith and substance	The matter of national concern
Majority	Both parts 1 and 2: establish minimum national standards of GHG price stringency to reduce GHG emissions. ¹⁹⁵	Establish minimum national standards of GHG price stringency to reduce GHG emissions. ¹⁹⁶
Justice Côté	Dissents from the majority on the grounds that the Act itself does not establish minimum standards and so cannot fall within the matter of national concern; ¹⁹⁷ does not offer an alternative characterization.	Concurs with the majority. ¹⁹⁸
Justice Brown	Part 1: the reduction of GHG emissions by raising the cost of fuel. ¹⁹⁹ Part 2: the reduction of GHG emissions by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure. ²⁰⁰	The reduction of GHG emissions. ²⁰¹
Justice Rowe	Follows Justice Brown. ²⁰²	No clear articulation; appears to base his critique on the national concern as articulated by Canada: “establishing minimum national standards integral to reducing nationwide [greenhouse gas] emissions.” ²⁰³

The same is also true of the judicial commentary on the scope or reach of the legislation itself. Whereas the majority considers that the federal government is entitled to the usual presumption that it will only enact regulations within the four contents of the statute (and to some extent downplays the discretionary powers associated with the OBPS scheme), both Justices Brown and Rowe consider that the breadth of the regulation making powers

in the *GGPPA* creates the risk of abuse. In our view, this risk is overstated and while we acknowledge that Justice Brown offers, in many respects, the clearest exposition of the *GGPPA*, he also exaggerates the scope of the discretion afforded to the federal executive. Thus, while the OBPS scheme affords discretionary powers that will affect the *average* price that different sectors of industry will pay on its carbon emissions, all are subject to the same marginal

¹⁹⁵ *GGPPA Reference*, *supra* note 1 at para 80.

¹⁹⁶ *Ibid* at para 119.

¹⁹⁷ *Ibid* at paras 236–40.

¹⁹⁸ *Ibid* at para 236.

¹⁹⁹ *Ibid* at para 340.

²⁰⁰ *Ibid*.

²⁰¹ *Ibid* at para 370.

²⁰² *Ibid* at para 616.

²⁰³ *Ibid* at para 577.

price and thus have a similar incentive to reduce emissions.²⁰⁴ Furthermore, insofar as Part II engages in industrial policy, it does so by reducing the total costs to some industries and facilities more than others. The regulatory discretion is bounded implicitly by the fact that the worst-case treatment for any facility covered under Part II of the *GGPPA* would be to receive the treatment of facilities covered under Part I, i.e. having the regulatory charge apply on all emissions.

The dissents, and in particular Justice Brown, take a broader view of both the pith and substance of the legislation and the national concern matter. This in turn makes it easier to find the statute unconstitutional because the expanded federal jurisdiction allows a greater, and in Justice Brown's view impermissible, level of interference with provincial autonomy.

B) THE ROLE OF MINIMUM NATIONAL STANDARDS

As our summary of the majority and dissent demonstrates, the role of the concept of minimum national standards is one of the key dividing lines between the majority and the dissent of Justice Brown (with Justice Rowe concurring on these issues). The use of the term minimum national standards as part of the characterization of the *GGPPA* first made its appearance in the opinion of Richards C.J.S in the *Saskatchewan GGPPA Reference*.²⁰⁵ The majority and concurring the *Ontario GGPPA Reference* adopted this characterization with slight modifications and Chief Justice Wagner adopts this framing in specifying both the matter of national concern and the pith and substance of the *GGPPA*.²⁰⁶ In our view, the language of “standards” is both inaccurate

and unfortunate. It is inaccurate because the legislation is concerned with ensuring the pricing of emissions rather than setting standards. And it is unfortunate because it suggests more intrusive federal supervisory authority than is actually the case.

The jurisprudence on the national concern branch of POGG reflects a long-standing concern that the federal parliament should not be able to occupy areas of provincial jurisdiction simply by establishing national standards in federal legislation. For example, in the *Board of Commerce* case, Viscount Haldane held that “however important it may seem to the Parliament of Canada that some such policy...should be made general throughout Canada,” a desire for national uniformity was not sufficient to establish federal jurisdiction.²⁰⁷ Nor was a general concern across the country an adequate basis for invoking federal authority. Chief Justice Duff amplified the implications of the *Board of Commerce* decision when he held in *Re: Natural Products Marketing* that “nobody denied the existence of the evil [addressed by the legislation in *Board of Commerce*]. Nobody denied that it was general throughout Canada. Nobody denied the importance of suppressing it.”²⁰⁸ It was therefore important for the majority in this case to establish that there were appropriate anchors for federal jurisdiction *beyond the simple desire for coordinated national policy on the part of Parliament*.

The majority does so by emphasizing the qualitative difference between carbon pricing rules in general and rules establishing minimum levels or carbon pricing stringency,²⁰⁹ and by emphasizing the substantial extra-provincial effects of GHG emissions.²¹⁰ But in doing so majority also recognizes that there are substantial

²⁰⁴ The marginal price refers to the impact on operating costs of increasing emissions by one tonne while holding output and all else constant. For more detail, see Canada's EcoFiscal Commission, “Comparing Stringency of Carbon Pricing Policies” (July 2016) at 7, online (pdf): *EcoFiscal* <ecofiscal.ca/wp-content/uploads/2016/07/Ecofiscal-Com-mission-Comparing-Stringency-Carbon-Pricing-Report-July-2016.pdf>.

²⁰⁵ *Saskatchewan GGPPA Reference*, *supra* note 8 at para 125, as discussed by the majority opinion in *GGPPA Reference*, *supra* note 1 at para 39.

²⁰⁶ *Ontario GGPPA Reference*, *supra* note 9 at para 77 (majority), 187 (concurring opinion). As discussed in the majority reasons in the *GGPPA Reference*, *supra* note 1 at paras 41–42.

²⁰⁷ *Attorney-General For The Province Of Ontario v Attorney-General For The Dominion Of Canada*, [1922] 1 AC 191 (PC) at 200–01, 60 DLR 513.

²⁰⁸ *Reference re legislative jurisdiction of Parliament of Canada to enact the Natural Products Marketing Act*, [1936] SCR 398 at 422–23, [1936] 3 DLR 622.

²⁰⁹ *GGPPA Reference*, *supra* note 1 at paras 142–57, 167–71.

²¹⁰ *Ibid* at para 173.

anchors for valid provincial legislation in relation to GHG emissions.²¹¹ It is thus clear that the majority relies heavily on the application of the *double aspect* doctrine within the context of POGG to minimize the degree of federal intrusion on provincial authority.²¹² The double aspect doctrine also provides the necessary underpinning for the backstop nature of the *GGPPA* which provides another key means of minimizing federal intrusion. As the majority notes, the fact that the regulatory charge applies only where provincial policies are not sufficiently stringent ensures that “the *GGPPA* does not create a blunt unified national system.”²¹³

While a broad application of the double aspect doctrine should serve to protect provincial autonomy, it is important to address two additional questions. First, and as already suggested above, there are a couple of examples in the majority judgment where the Chief Justice seems to suggest that the prescription of national standards may render some forms of provincial legislation invalid or inoperative:

1. “the only thing *not permitted* by the *GGPPA* is for a province or a territory not to implement a GHG pricing mechanism, or to implement one that is not sufficiently stringent.”²¹⁴
2. (In the context of scale of impact on provincial jurisdiction): “[u]nder the *GGPPA*, provinces and territories are free to design and legislate any GHG pricing system *as long as it meets minimum national standards of price stringency*.”²¹⁵
3. “Emitting provinces retain the ability to legislate, without any federal supervision, in relation to all methods of regulating GHG emissions that do not involve pricing,” and the “[provinces] are free to design any GHG pricing system they choose *as long as they meet the federal government’s outcome-based targets*.”²¹⁶

In our view each of these statements goes too far and serves to bolster claims that the recognition of a new matter of national concern will significantly impair provincial autonomy. We say these statements go too far because they simply do not follow from the application of the double aspect doctrine or the terms of the *GGPPA*. We can take them one at a time.

1. It is clear that there is nothing in the *GGPPA* that requires a province or territory to adopt carbon pricing. All that the legislation provides for is that the failure to do so establishes a condition precedent for the backstop application of the legislation. Similarly, the adoption of less stringent carbon pricing scheme than that established as a national standard does not somehow render that scheme invalid or even inoperative — it merely establishes the condition precedent necessary to trigger the backstop to eliminate the difference between the provincial price and the federal benchmark.
2. As with the discussion in the previous paragraph, it is clear that provinces and territories are in fact free to establish whatever scheme they like even if it doesn’t meet the minimum national standard. If it doesn’t meet the national standard, that merely gives the federal cabinet the license to trigger the application of the federal carbon price in that jurisdiction.
3. Similarly, a province or territory has no obligation to adopt an OBPS scheme of the same stringency as that provided for in the *GGPPA*. Its failure to do so though may trigger the backstop provisions and the application of the federal regulatory charge.

These passages all provide fodder for the dissents of Justices Brown and Rowe who, as noted above, emphasize both the conclusory effect of the national standards label as well as what the dissents characterize as the

²¹¹ *Ibid* at para 197.

²¹² *Ibid* at paras 120–31.

²¹³ *Ibid* at para 81.

²¹⁴ *Ibid* at para 79, emphasis added.

²¹⁵ *Ibid* at para 200, emphasis added.

²¹⁶ *Ibid* at para 206, emphasis added.

far-reaching supervisory implications of such standards. Justice Brown, for example writes that “the provinces can exercise their jurisdiction however they like, *as long as they do so in a manner that the federal Cabinet also likes*,”²¹⁷ and that “provinces may legislate [in relation to emissions pricing] *only where such legislation meets the criteria unilaterally set by the federal government*.”²¹⁸ Similarly, Justice Rowe holds that the federal act serves “to supervise provinces in the exercise of their authority.”²¹⁹ However, just as with our itemized discussion of the three passages in the majority judgment, each of these statements can be shown to significantly overstate the supervisory or even coercive effect of the *GGPPA*.

In sum, it is inconsistent with our federal system to imply that federal legislation can restrict the provincial legislative ambit. The degree of federal supervision imposed by the *GGPPA* is actually very limited since, as the dissents concede, the provinces will still be able to legislate with respect to GHG emissions including GHG pricing. There is only one thing that the provinces cannot do as a consequence of this ruling: they cannot prevent the federal government from applying regulatory charges to GHG emissions within their province to the extent that the province has not itself imposed a sufficiently stringent charge on those emissions. The *GGPPA* does not place minimum standards on provincial emissions pricing policies; it provides for the contingent application of a federal regulatory charge on GHG emissions where a province or territory fails to make provision for an economy-wide carbon price with a stringency that meets the federal benchmark provided for in regulations made under the *GGPPA*.

The second point that we must address as part of double aspect is the role of federal paramountcy. Federal paramountcy is triggered in two situations: operational conflict and frustration of purpose,²²⁰ but neither is likely to be triggered in the context of *GGPPA* because of its backstop nature. There is nothing in the

GGPPA that prevents a province or territory from establishing more ambitious carbon pricing provisions. And while a provincial regime that is deemed insufficiently stringent may trigger a federal regulatory charge there will be no direct conflict or frustration of purpose. Emissions pricing is such that it will always be possible to comply with both federal and provincial regimes by, as Wagner C.J. puts it, “just paying money.”²²¹ While it is true that, in principle, the doctrine of federal paramountcy might have some further supervisory effect, it is hard to think of a practical example of operational conflict short of a province both failing to establish its own carbon pricing scheme and purporting to prohibit payment of any federal levy in relation to carbon pricing or attempting to otherwise negate the federal regulatory charges.

An analogy to income taxes may be illustrative. A provincial government has the authority to exempt entities from provincial income taxes, but it cannot prevent the collection of valid, federal income taxes in its jurisdiction since that would necessarily entail an operational conflict that would trigger federal paramountcy. Federal and provincial income taxes can also apply concurrently with no barriers to joint compliance. It is, however, unlikely that a court would choose to frame federal income taxes as imposing minimum national standards of income taxation.

C) PROVINCIAL INABILITY AND EXTRAPROVINCIAL EFFECTS

A third area of significant disagreement between the Chief Justice and Justices Brown and Rowe relates to the meaning and role of the provincial inability test and whether it is met in this case. Not surprisingly, each side claims fidelity to *Crown Zellerbach* and accuses the other of some departure. Perhaps also not surprisingly, the truth lies somewhere in between, though in our view and as further set out below it lies closer to the Chief Justice’s approach.

²¹⁷ *Ibid* at para 358, emphasis added.

²¹⁸ *Ibid* at para 348, emphasis added.

²¹⁹ *Ibid* at para 574, emphasis added.

²²⁰ See *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5.

²²¹ *GGPPA Reference*, *supra* note 1 at para 71. See also the dissent of Justice Brown at para 391.

Returning to first principles, *Crown Zellerbach* described provincial inability as follows:

In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extraprovincial interests of a provincial failure to deal effectively with the control or regulation of the intraprovincial aspects of the matter.²²²

At the risk of stating the obvious, this test is very clearly concerned with extra-provincial harms arising from provincial inaction. In tying it to the “singleness, distinctiveness, and indivisibility” inquiry, however, Justice LeDain rejected a deterministic role for provincial inability; rather, provincial inability was to be but one factor, or indicium, albeit out of an unspecified number of factors.

As summarized in Part III, the Chief Justice approaches provincial inability as one of two principles (the other being qualitative difference) informing the “singleness, distinctiveness and indivisibility” inquiry, which he fairly observes “does not amount to a readily applicable legal test.”²²³ Drawing on *Crown Zellerbach* and recent developments under the trade and commerce power, provincial inability now has three elements: (1) the provinces must be jointly or severally incapable, in the constitutional sense, of enacting the legislation; (2) refusal by one or more provinces would jeopardize the legislative scheme’s operation in other parts of the country; and (3) refusal to deal with the matter of the legislation must have grave extra-provincial consequences. While clearly an elaboration, these three elements can all be fairly traced back to the *Crown Zellerbach* test, which recognized that each province may have jurisdiction over some aspect of the matter (the “intra-provincial aspects”)

but not over the whole (the “extra-provincial interests”) (1st element) and that these may be inextricably linked (2nd element) such that a province’s refusal to deal with the former has consequences for the latter (3rd element).

Justice Brown rejects the Chief Justice’s approach to provincial inability, which he describes as a dilution of the *Crown Zellerbach* test.²²⁴ Both he and Justice Rowe object to its seemingly strengthened position in the overall national concern analysis, reminding us several times that provincial inability was but one indicator of singleness, indivisibility, and distinctiveness in *Crown Zellerbach*.²²⁵ On this score, Justices Brown and Rowe are clearly correct, although the Chief Justice’s approach also technically meets this requirement (as one of two principles animating that inquiry).

As to the formulation of the test, Justice Brown complains that the “majority does not appear to appreciate that the extraprovincial effects must be such that all or part of the matter is beyond the scope of the provinces’ legislative authority under s. 92 to address, *whether independently or in tandem*.”²²⁶ For Justice Brown, the sum of provincial parts is equal to the federal whole, which perspective is made clearer in an earlier passage in his dissent: “Hence the constitutional impossibility of the *Act*’s backstop model: if the provinces *have* jurisdiction to do what the *Act* does — and, that is, again, the very premise of the *Act*’s scheme — then the *Act* cannot be constitutional under the national concern branch of POGG.”²²⁷ But this is plainly incorrect: the provinces do not have the jurisdiction to do all that the *GGPPA* does because no province has the jurisdiction to regulate the GHG emissions of another. As explained by the Attorney General of British Columbia, “the inability is not of the emitting jurisdiction, but of the jurisdictions experiencing the consequences of the emissions.”²²⁸ This, as noted by the Chief Justice, lies at the core of the *GGPPA*: “this matter would empower the federal government

²²² *Crown Zellerbach*, *supra* note 14 at 432.

²²³ *GGPPA Reference*, *supra* note 1 at para 146.

²²⁴ See e.g. *GGPPA Reference*, *supra* note 1 at paras 376, 420, 441, 448.

²²⁵ See e.g. *Ibid* at paras 383, 448, 558.

²²⁶ *Ibid* at para 446, emphasis added.

²²⁷ *Ibid* at para 350; see also the dissenting reasons of Rowe J. at para 555.

²²⁸ *GGPPA Reference* (Factum of the Attorney General of British Columbia) at para 46.

to do only what the provinces cannot do to protect themselves from this grave harm, and nothing more.”²²⁹

Justice Brown also objects to the addition of the third criterion, “grave extra-provincial harm,” as “peremptory, almost uselessly subjective and susceptible to change.”²³⁰ We agree that qualifiers like “grave” or “significant” do inject some subjectivity to the exercise, but it seems clear enough that the intention here is to discourage indiscriminate invocation of the national concern branch and that such a qualifier does at least provide an intelligible basis for debate.²³¹ Justice Brown’s concern for subjectivity is also hard to reconcile with his disdain for the provincial inability test, which in the wake of the Supreme Court’s decision in *Hydro-Quebec* was championed for establishing “an objective and normatively attractive standard for coordinating federal and provincial initiatives.”²³² At the very least, it is doubtful that Justice Brown’s approach, which amounts to provincial inability and “something more” is any less subjective.²³³

The majority and dissenters also disagree on the significance, or gravity, of the harm that one province’s failure to mitigate its own GHG emissions may have on other provinces. Drawing on the record before him, the Chief Justice sees a straight and increasingly dire line from such failure to Canada’s inability to meet its international commitments and its knock-on effects on global efforts to address climate change.²³⁴ Justice Brown, on the other hand, endorses the Alberta Court of Appeal majority’s reasoning that no “measurable harm” could be linked to any one province’s failure to limit its emissions.²³⁵ The same can be inferred for Justice Rowe, who begins with the somewhat jarring proposition that some

extra-provincial effects must be compatible with provincial jurisdiction:

Clearly, some extra-provincial effects are compatible with provincial jurisdiction, considering that, under the federal structure, provinces can adversely affect extra-provincial interests if they are acting within their sphere of jurisdiction... If the pith and substance of provincial legislation comes within the classes of subjects assigned to the provinces, incidental or ancillary extra-provincial effects are irrelevant to its validity... Given the potential displacement of provincial authority, courts should have a “strong empirical base” for concluding that the extra-provincial effects are such that the matter is beyond the powers of the provinces to deal with on their own or in tandem...²³⁶

Of course, the *vires* of provincial legislation was not at issue in the *GGPPA* references, and even if it was, it only tells part of the story. While it is true that pursuant to current doctrine (see *BC v Imperial Tobacco*), provincial legislation cannot be struck down on the basis of *incidental or ancillary* extra-provincial provincial effects (setting aside for the moment whether such effects are indeed merely incidental), this does not mean that such effects are lawful.²³⁷ The Supreme Court’s decision in *Interprovincial Co-operatives* is perhaps most widely known for holding that one province cannot modify the legal rights of a company in another province, but a majority of the Supreme Court also held that provinces cannot authorize harms beyond their own borders.²³⁸ Alberta conceded as much in its supplemental factum when it

²²⁹ *GGPPA Reference*, *supra* note 1 at para 195.

²³⁰ *Ibid* at para 447.

²³¹ We can draw from the international case law on this issue. See, for example *Certain Activities carried out by Nicaragua in the Border Area*, (*Costa Rica v Nicaragua and Construction of a Road in Costa Rica Along the San Juan River* (*Nicaragua v Costa Rica*), [2015] ICJ Rep 665.

²³² David M Beatty, “Canadian Constitutional Law in a Nutshell” (1998) 36:3 *Alta L Rev* 605 at 610.

²³³ *GGPPA Reference*, *supra* note 1 at para 382.

²³⁴ *Ibid* at para 190.

²³⁵ *Ibid* at para 384.

²³⁶ *Ibid* at para 556, citations omitted.

²³⁷ *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49.

²³⁸ *Interprovincial Co-operatives Ltd et al v R*, [1975] 1 SCR 477 at 498 (per Laskin J.), 511 (per Pigeon J.), 53 DLR (3d) 321.

attempted to distinguish GHG emissions from “provincial actions with an immediate and tangible impact on other provinces — such as toxic waste flowing directly from one province to the other.”²³⁹

This is essentially the state of affairs as between nation states, where national governments have recourse to litigation and principles of international environmental law, including the prohibition against significant transboundary environmental harm.²⁴⁰ Framed this way, the question is whether respect for provincial autonomy — as envisioned by Justices Brown and Rowe — requires British Columbia (or perhaps one of its municipalities) to sue Alberta or members of its oil and gas sector for climate change-related harms,²⁴¹ or whether Canadian federalism can accommodate a “legislative solution,” in which case “Parliament is the only forum competent to weigh the *competing provincial interests* and reach a policy decision based on a perception of what will best serve the national welfare.”²⁴²

In our view, the majority and dissenting judges’ disagreements regarding provincial inability can ultimately be traced back to competing visions of federalism — indeed, both Justice Brown and Rowe essentially admit as much. For Justice Brown, a strengthened role for provincial inability means embracing a “centralized vision” of Canadian federalism.²⁴³ Justice Brown rather boldly claims that “[n]o province, and not even Parliament itself, ever agreed to — or even contemplated” such an approach,²⁴⁴ while Justice Rowe concludes that it “permanently alter[s] the Confederation bargain.”²⁴⁵ The Chief Justice, for his part, does not really engage in this discussion, except

perhaps in a subtle reminder “that courts, as *impartial arbiters*, are charged with resolving jurisdictional disputes over the boundaries of federal and provincial powers on the basis of the principle of federalism.”²⁴⁶

We cannot help but remark that both Justices Brown and Rowe appear to view provincial autonomy as something that can only be impaired by the federal government rather than something that may also be impaired by the effects of one province’s action or inaction on another province. This same omission can be found in the Alberta Court of Appeal majority opinion, as noted by the Attorney General for British Columbia.²⁴⁷

The potential for unilateral action or inaction is another gap in Justices Brown and Rowe’s reasoning. They appear to be of the view that provinces should have a unilateral right to balance environmental concerns with economic sustainability even where it is abundantly clear, both conceptually and from the very record before the Court, that these competing interests are not situated wholly within any one province. This, in turn, can have profound and readily foreseeable incentivizing or disincentivizing effects. As noted by Ruth Sullivan almost thirty years ago, in such situations “the best solution for each [province] will likely be to sacrifice the interests in the other.”²⁴⁸ GHG emissions and their effect, in the form of climate change, are diffuse, transcending not only provincial boundaries but international ones as well.²⁴⁹ The preponderance of the benefits of resource development (*i.e.* jobs, royalties, and other taxes), on the other hand, remain within each province (acknowledging that the federal government also benefits from the revenues

²³⁹ *GGPPA Reference*, *supra* note 1, (Factum of the Attorney General for Alberta) at para 28.

²⁴⁰ *The Trail Smelter Arbitration, the United States v Canada (1938 and 1941)*, 3 UNRIAA 1905-1982.

²⁴¹ See e.g. Martin Olszynski, Sharon Mascher & Meinhard Doelle, “From smokes to smokestacks: Lessons from tobacco for the future of climate change liability” (2017) 30:1 *Geo Intl Envtl L Rev* 1.

²⁴² Ruth Sullivan, “Interpreting the Territorial Limitations on the Provinces” (1985) 7 *SCLR* 511 at 551.

²⁴³ *GGPPA Reference*, *supra* note 1 at para 365.

²⁴⁴ *Ibid* at para 456.

²⁴⁵ *Ibid* at para 592.

²⁴⁶ *Ibid* at para 50, emphasis added.

²⁴⁷ See *GGPPA Reference*, *supra* note 1, (Supplemental Factum of the Attorney General of British Columbia) at para 47, which notes that “the (ABCA) majority does not consider — and indeed discounts — the possibility that provinces may find themselves on the ‘outside looking in’ at the unilateral action or inaction of other provinces that affects their vital interests. But this was above all why those colonies opted for a federal union.”

²⁴⁸ Sullivan, *supra* note 242 at 544.

²⁴⁹ *GGPPA Reference*, *supra* note 1 at para 173.

and taxes generated by such development). Fundamentally, when Alberta or Saskatchewan are considering the pace and scale of oil and gas development, they are weighing the majority of the benefits against only a part of the environmental costs. The remainder are essentially externalities, which predictably distort the balancing exercise — as is clear from the record before the Court in this Reference.²⁵⁰

D) THE ROLE OF DOMESTIC COURTS IN ADDRESSING GLOBAL CLIMATE CHANGE

Around the world, domestic courts are increasingly being called upon to adjudicate disputes in relation to climate change. The response from some courts, especially in the United States, has recently been described as a form of “judicial nihilism,” where the complexity and global scale of the challenge serve to excuse domestic inaction.²⁵¹ This approach is implicit in the Alberta Court of Appeal majority’s approach to the issue of extra-provincial harm.²⁵²

The problem, as noted by the Chief Justice, is that the “underlying logic of this argument would apply equally to all individual sources of emissions everywhere, so it must fail.”²⁵³ In rejecting this approach, the Chief Justice very explicitly tethers his judgment to other recent and internationally renowned climate change judgments.²⁵⁴

In our view, the Chief Justice’s approach is vastly preferable to the judicial shrugging offered by the dissenting justices and the Alberta Court of Appeal majority. It is also bound to affect the course of current and future Canadian climate litigation, beyond divisions of powers cases and even public law itself. Consider that, for example, in *Mathur v Ontario* Justice Carole Brown began her judgment by quoting from the majority opinion in the *Ontario GGPPA Reference* to emphasize that “global climate change is taking place and that human activities are the primary cause.”²⁵⁵ The Supreme Court’s opinion in this reference was similarly cited shortly after its release. In *Flying Squad*, the applicant company was granted an injunction prohibiting road blockades intended to obstruct its logging activities on Vancouver Island.²⁵⁶ Justice Verhoeven went out of his way, however, to acknowledge and validate the Flying Squad’s concerns:

The protestors have serious and passionate concerns about the environment. There is no doubt that climate change is real, and poses a grave threat to humanity’s future. The Supreme Court of Canada has said so just a few days ago. But as I have said, the effect of old growth forest logging on climate change and biodiversity is not before me and is not for me to say.²⁵⁷

²⁵⁰ *Ibid* at para 184.

²⁵¹ Scott Novak, “The Role of Courts in Remediating Climate Chaos: Transcending Judicial Nihilism and Taking Survival Seriously” (2020) 32(4) *Geo Env L Rev* 743 at 755.

²⁵² *Alberta GGPPA Reference*, *supra* note 10 at para 324, as endorsed by Justice Brown in *GGPPA Reference*, *supra* note 1 at para 384.

²⁵³ *GGPPA Reference*, *supra* note 1 at para 188.

²⁵⁴ The Chief Justice referenced the following cases: (1) *Massachusetts v Environmental Protection Agency*, 549 US 497 (2007) in which the majority rejected the federal government’s argument that projected increases in other countries’ emissions meant that there was no realistic prospect that domestic reductions in GHG emissions in the U.S. would mitigate global climate change. (2) *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda*, three levels of court culminating in ECLI:NL:RBDHA:2015:7196, at para. 4.79 confirming the finding at first instance that at “any anthropogenic (GHG) emission, no matter how minor, contributes to...hazardous climate change”. (3) To the same effect, *Gloucester Resources Limited v Minister for Planning*, [2019] NSWLEC 7 dealing with a coal project.

²⁵⁵ *Mathur v Ontario*, 2020 ONSC 6918 at para 97 [*Mathur*], citing the *Ontario GGPPA Reference*, *supra* note 9 at para 7. *Mathur* was a representative action seeking certain declaratory and mandatory orders against the province on the basis that the province’s climate change standards and targets were insufficiently stringent and as such violated the plaintiff’s Charter rights. Justice Brown relied on several findings from the *Ontario GGPPA Reference* majority reasons to conclude that the *Mathur* applicants could marshal scientific evidence to establish the requisite harm from climate change. For these citations, see *Mathur*, *supra* note at para 97, citing the *Ontario GGPPA Reference*, *supra* note 9 at paras 9–11, 16.

²⁵⁶ *Teal Cedar Products Ltd v Rainforest Flying Squad*, 2021 BCSC 605.

²⁵⁷ *Ibid* at para 74, reference to *GGPPA Reference*, *supra* note 1 at para 2 omitted.

Of course, the Supreme Court's findings were not directly relevant to the matter before the Court in *Flying Squad*, and so their actual influence was limited. But it is not difficult to imagine a wide range of litigation contexts, both public and private, where the Supreme Court's findings and its approach to the global nature of climate change will be relevant. With respect to the former, the contributions of major projects to climate change are now formally part of Canada's environmental assessment regime under the *Impact Assessment Act*.²⁵⁸ Setting aside for the moment the constitutionality of such consideration,²⁵⁹ project proponents should expect the *GGPPA Reference* to figure prominently in legal challenges to any assessment that would purport to minimize a project's GHG emissions as insignificant relative to global emissions.²⁶⁰ The Chief Justice's approach could also reasonably be invoked in the civil litigation context (e.g. if a municipality were ever to sue oil and gas companies for climate change-related harms, as is increasingly happening in the United States), where a traditional approach to *de minimis* causation might exclude all but the largest emitters. To be clear, we are not suggesting that the *GGPPA Reference* will be determinative in such disputes, but there is little doubt in our minds that their trajectory would be different in its absence.

VI. CONCLUSION

As one would expect of any decision in which the Supreme Court recognizes a new matter of national concern, the *GGPPA Reference* is significant. But this decision is particularly significant insofar as it recognizes a new matter of national concern in the context of developing appropriate legislative responses within the Canadian federation to an existential threat — global climate change. It confirms that the federal parliament is not confined to the blunt instruments of the criminal law power and the taxation power and that it may also craft less intrusive backstop legislation, in this case in the form of selectively applied regulatory charges.

The Reference has also clarified some aspects of the national concern doctrine. Perhaps the most important clarification is that the national concern (or any other branch of POGG) is not so exclusive as to eliminate the application of the double aspect doctrine whenever national concern is triggered. POGG does not confer plenary jurisdiction, and "Plenary" as it has been used in previous POGG cases does not mean no double aspect. This is crucial since it allows the national concern power to be wielded in a carefully crafted manner to fill in gaps and to take account of provincial inability rather than as something that necessarily limits provincial legislative authority. Indeed, there is nothing in this decision that limits provincial legislative authority, and the very narrowness of the matter of national concern that has been recognized means that the federal paramountcy doctrine has little if any role to play.

The decision has also modified the tests for recognizing new matters of national concern from those adumbrated by Justice LeDain in *Crown Zellerbach*. While the majority judgment still uses the language of "singleness, distinctiveness and indivisibility" it has layered on top of this some additional considerations. While layering-on does result in a proliferation of tests, principles and factors that as Justice Brown suggests can be somewhat confusing,²⁶¹ there appear to be three main changes. First, the analysis begins with a new threshold question "a common-sense inquiry into the national importance of the proposed matter."²⁶² Second, and as part of applying the concept of distinctiveness the majority introduces the concept of "qualitative difference" which effectively serves to sanction the linked concepts of national standard-setting and backstopping. Third, and as part of analysing the idea of provincial inability which informs the *Crown Zellerbach* tests, the majority places increased emphasis on extraprovincial effects in the context of collective action problems as amply demonstrated in the section V.C above. ■

²⁵⁸ *Impact Assessment Act*, SC 2019, c 28, s 1.

²⁵⁹ Recall that this matter is currently before the Alberta Court of Appeal in the *C-69 Reference*, *supra* note 104.

²⁶⁰ See e.g. Mark Friedman, "Assessing Greenhouse Gas Emissions in the Oil Sands: Legislative or Administrative (in)Action?" (2016) 6:3 UWO J Leg Studies 5, online: <ir.lib.uwo.ca/uwojls/vol6/iss3/5>.

²⁶¹ *GGPPA Reference*, *supra* note 1 at para 300.

²⁶² *Ibid* at para 142.