ENERGY REGULATION QUARTERLY

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MISSION STATEMENT

The mission of Energy Regulation Quarterly (ERQ) is to provide a forum for debate and discussion on issues surrounding the regulated energy industries in Canada, including decisions of regulatory tribunals, related legislative and policy actions and initiatives and actions by regulated companies and stakeholders. The role of the ERQ is to provide analysis and context that go beyond day-to-day developments. It strives to be balanced in its treatment of issues.

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

EDITORIAL POLICY

The ERQ is published online by the Canadian Gas Association (CGA) to create a better understanding of energy regulatory issues and trends in Canada.

The managing editors will work with CGA in the identification of themes and topics for each issue. They will author editorial opinions, select contributors, and edit contributions to ensure consistency of style and quality. The managing editors have exclusive responsibility for selecting items for publication.

The ERQ will maintain a "roster" of contributors and supporters who have been invited by the managing editors to lend their names and their contributions to the publication. Individuals on the roster may be invited by the managing editors to author articles on particular topics or they may propose contributions at their own initiative. Other individuals may also be invited by the managing editors to author articles on particular topics.

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

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

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

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EDITORIAL

Managing Editors

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

The rapid pace of developments in Canadian energy regulation is reflected in this issue of Energy Regulation Quarterly, which includes analysis of two recent major federal announcements.

First, David Wright reviews "Canada's 2030 Federal Emissions Reduction Plan", released on March 30, 2022. While noting that this is not the first climate plan in Canada, he opines that "it may be the most significant." His apparent skepticism, however, is revealed in his subtitle: "A Smorgasbord of Ambition, Action, Shortcomings, and Plans to Plan."

It seemed appropriate to follow Wright's overall conclusion with a call to "look behind the labels" in the climate change debate. In "All that Glitters Isn't Green, or Renewable", Andrew Roman argues that "green" is being used in the debate as "a political obedience term". He points out that in the 2030 Emissions Reduction Plan "green" appears 216 times and "renewable" 150 times, yet neither word is defined. The debate, he argues, should stop using these labels and instead examine the merits of the various forms of energy, including their reliability and cost.

Just a week after the release of the 2030 Emissions Reduction Plan, the federal Minister of Environment and Climate Change announced his decision that the proposed Bay du Nord oil development project, located approximately 500 kilometres offshore from St. John's, Newfoundland and Labrador, "is not likely to cause significant adverse environmental effects", thereby clearing the path for the project to proceed through several remaining regulatory steps. This significant development is examined in by one of our Co-Managing Editors, Rowland Harrison, in "Bay du Nord Offshore Oil Production Project Clears Threshold Regulatory Hurdle."

The Minister's decision on the Bay du Nord project was taken under the transitional provisions of the federal *Impact Assessment Act*.[1] Less than a month later, the Alberta Court of Appeal released its decision that the Act was unconstitutional, on the ground that it "would permanently alter the division of powers and forever place provincial governments in an economic chokehold controlled by the federal government." The landmark decision is reviewed by Brett Carlson *et al.* in "Alberta Court of Appeal finds Federal *Impact Assessment Act* Unconstitutional."

In "ESG Claims: Managing risks and liabilities for Canadian businesses," Rick Williams *et al.* outline "key considerations for managing litigation and regulatory risk for Canadian companies making ESG [environmental, social and governance] claims and highlight some relevant cases."

In the final article in this issue of *ERQ*, Neil Campbell *et al.* offer "A Roadmap for Trade-Law-Compliant Border Carbon Adjustments".

Webinars are now a well-established seminar/conference format. In past issues of *ERQ*, we have provided links to specific webinars relevant to our audience on an *ad hoc* basis. With this issue of *ERQ*, we are formalizing the practice with the introduction of a Webinars section that will be included on an ongoing basis as appropriate. This issue includes links to the proceedings of the Sixteenth Annual Canadian Energy Law Forum and to a recent webinar hosted by the Canadian Gas Association on "New Technology and Canadian Energy Regulators."

The issue closes with a review by Rowland Harrison of Christy Smith and Michael McPhie's recently published book "Weaving Two Worlds: Economic Reconciliation Between Indigenous Peoples and the Resource Sector." ■

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[1] SC 2019, c 28, s 1. Know colloquially as Bill C-69.

CANADA'S 2030 FEDERAL EMISSIONS REDUCTION PLAN: A SMORGASBORD OF AMBITION, ACTION, SHORTCOMINGS, AND PLANS TO PLAN

*David V. Wright**

Outline

1. Introduction
2. Background and context
3. Key features and content
4. Concluding Commentary

1) INTRODUCTION

On March 30, 2022, the federal government released the new *2030 Emissions Reduction Plan: Canada's Next Steps for Clean Air and a Strong Economy* (ERP or the Plan)[1]. While this is not the first climate plan in this country, it may be the most significant. After decades of rising emissions, missing emission reduction targets, and insufficient or non-existent federal plans, this ERP and the associated contemporary context are different. It is, for example, the first ERP released pursuant to requirements of the new *Net-Zero Emissions Accountability Act* (*NZEAA*).[2] It also arrives in a context where the federal carbon pricing backstop is firmly part of the picture, recently confirmed as constitutionally valid by the Supreme Court of Canada. And, notwithstanding several shortcomings and many 'plans to make plans', on its face this ERP is perhaps the most ambitious ever released by the federal government.

This article provides a high-level review of the ERP. It begins with a short discussion of the contemporary context and the backdrop for the ERP. It then presents and reflects on key features and content of the ERP before then offering concluding commentary. Overall, the ERP can be seen as a significant development in federal climate (and energy) policy that — *if implemented* — will have far-reaching, long-term impacts. It is also, however, a plan that raises many questions and flags many steps that still need to be determined. As such, while the ERP is fit-for-purpose at the present time, future iterations — and implementation of those future plans — are likely to be more challenging and more important.

* Associate Professor and Member of the Natural Resources, Energy & Environmental Law Research Group, Faculty of Law, University of Calgary. Sincere thanks to colleagues for input on a previous draft. Any errors are the author's alone.

[1] Environment and Climate Change Canada, *2030 Emissions Reduction Plan: Canada's Next Steps for Clean Air and a Strong Economy*, Catalogue No En4-460/2022E-PDF (Gatineau: Environment and Climate Change Canada, 2022) [ERP], online (pdf): <www.canada.ca/content/dam/eccc/documents/pdf/climate-change/erp/Canada-2030-Emissions-Reduction-Plan-eng.pdf>.

[2] *Canadian Net-Zero Emissions Accountability Act*, SC 2021, c 22 [*NZEAA*].

2) ERP BACKGROUND AND THE *NZEAA* CONTEXT

With the release of the ERP, the federal government has provided its latest overarching, comprehensive road map for reducing greenhouse gas (GHG) emissions en route to meeting Canada's climate change commitments under the Paris Agreement (40–45% below 2005 levels by 2030) and beyond (net-zero by 2050). This is significant as it sets Canada's climate change law and policy direction for decades to come. It is also fair to view the ERP as *energy* policy, as many measures have direct or indirect implications for extraction, transportation, and use of energy across all sectors across the country. Much of the content of the ERP is not new or surprising. Many measures have been set out in previous announcements, such as those made at COP26,[3] or in previous reports submitted to the UNFCCC secretariat.[4] However, the ERP contains perhaps the most detailed and comprehensive bird's eye view ever released.

This ERP is also the first released under the new *Net-Zero Emissions Accountability Act* (*NZEAA*). The overarching purpose of the *NZEAA* is to provide a framework of accountability and transparency to deliver on Canada's commitment to achieve net-zero greenhouse gas emissions by 2050.[5] As part of that framework, the *NZEAA* requires the government to set national emission reduction targets and to put in place plans for achieving those targets. The *NZEAA* requires the government to release this first ERP no later than 29 March 2022,[6] and section 10(1) of that Act sets out explicit requirements that the ERP must contain:

> *(a) the greenhouse gas emissions target for the year to which the plan relates;*
>
> *(a.1) a summary of Canada's most recent official greenhouse gas emissions inventory and information relevant to the plan that Canada submitted under its international commitments with respect to climate change;*
>
> *(b) a description of the key emissions reduction measures the Government of Canada intends to take to achieve the greenhouse gas emissions target;*
>
> *(b.1) a description of how Canada's international commitments with respect to climate change are taken into account in the plan;*
>
> *(c) a description of any relevant sectoral strategies;*
>
> *(d) a description of emissions reduction strategies for federal government operations;*
>
> *(e) a projected timetable for implementation for each of the measures and strategies described in paragraphs (a) to (d);*
>
> *(f) projections of the annual greenhouse gas emission reductions resulting from those combined measures and strategies, including projections for each economic sector that is included in Canada's reports under the Convention; and*
>
> *(g) a summary of key cooperative measures or agreements with provinces and other governments in Canada.*

[3] See David V Wright, "Reflection on COP26 and the Glasgow Climate Pact", (2022) 125 Resources 1, online (pdf): <cirl.ca/sites/default/files/Resources/Resources125.pdf> (for discussion of COP26 developments and announcements relevant to Canada).

[4] See e.g. Environment and Climate Change Canada, *Canada's Fourth Biennial Report on Climate Change*, Catalogue No En4-73/2020E-PDF (Gatineau: Environment and Climate Change Canada, 2022), online (pdf): <unfccc.int/sites/default/files/resource/br4_final_en.pdf>.

[5] "Canadian Net-Zero Emissions Accountability Act" (last modified 29 March 2022), online: *Canada.ca* <www.canada.ca/en/services/environment/weather/climatechange/climate-plan/net-zero-emissions-2050/canadian-net-zero-emissions-accountability-act.html>.

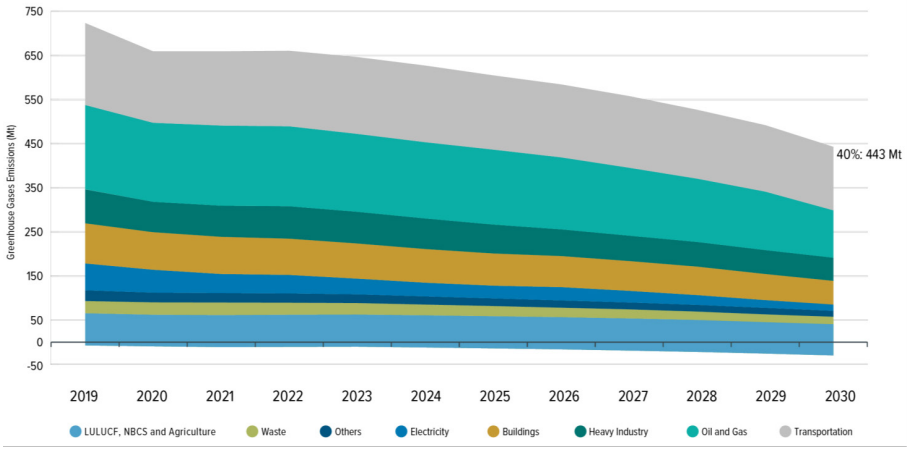
[6] *NZEAA*, *supra* note 2, s 9(2) (requiring that the minister release the plan within six months after the *NZEAA* came into force), s 9(3) (allowing for a 90-day extension, which was the case here). See also ERP, *supra* note 1 at 19.

While not structured in strict alignment with these requirements, the ERP contains all the requisite content.[7] Notably, the ERP also includes an interim objective for 2026 (20% below 2005 levels by 2026),[8] which is a requirement introduced late in the *NZEAA* legislative process.[9] Looking ahead, the federal minister is required to set subsequent emission reduction targets for every five years up until 2050,[10] and must in due course establish an ERP for each of those targets.[11] In light of that path ahead, this initial ERP is particularly important as it sets a precedent for what future plans could or ought to look like. As such, the ERP is a key early step as the new *NZEAA* regime takes hold. The balance of this article focuses on the contents of this first ERP.

3) KEY FEATURES AND CONTENT OF THE ERP

Viewed at a high level, the ERP represents an application of long-standing "wedge theory" of GHG emission reductions[12] — i.e. reductions are required from many different sectors using many different law and policy tools. Each of those wedges represent an opportunity for emissions reduction (or, in the long term in some cases, elimination). Figure 1[13] demonstrates how such wedges are depicted in the Canadian context by the ERP.

Figure 1: Pathway to 2030



[7] See Dave Sawyer et al, *Independent Assessment: 2030 Emissions Reduction Plan*, Canadian Climate Institute (April 2022) at 6, online (pdf): <climateinstitute.ca/wp-content/uploads/2022/04/ERP-Volume-2-FINAL.pdf> (indicating that the ERP does what the *NZEAA* requires it to do).

[8] ERP, *supra* note 1 at 88.

[9] The requirement for this target is included in *NZEAA*, *supra* note 2, s 9(2.1). See Rosa Galvez, "A Short Guide to the Canadian Net-Zero Emissions Accountability Act (CNZEAA)" (last visited 5 May 2022), online: *Senator Rosa Galvez* <rosagalvez.ca/en/initiatives/climate-accountability/short-guide-to-the-cnzeaa/>.

[10] *NZEAA*, *supra* note 2, s 7(4).

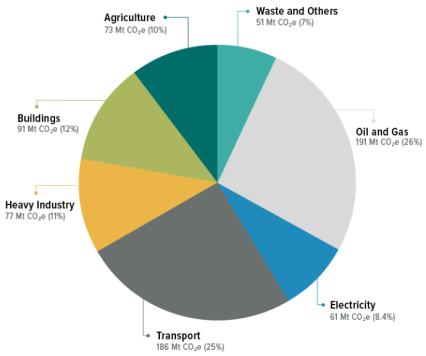
[11] *NZEAA*, *supra* note 2, s 9(1).

[12] See S Pacala & R Socolow, "Stabilization Wedges: Solving the Climate Problem for the Next 50 Years with Current Technologies" (2004) 305:5686 Science 968, online (pdf): <cmi.princeton.edu/wp-content/uploads/2020/01/Stabilization_Wedges_-Solving_the_Climate_Problem_for_the_Next_50_Years_with_Current_Technologies_Science.pdf>; Robert Socolow, "Wedges reaffirmed" (27 September 2011) Bulletin of the Atomic Scientists, online (pdf): <cmi.princeton.edu/wp-content/uploads/2020/01/Wedges_reaffirmed_-_Bulletin_of_the_Atomic_Scientists.pdf>.

[13] ERP, *supra* note 1 at 88.

These wedges can also be thought of as portions of the overall emissions pie chart, which is one way the ERP depicts Canada's GHG emissions (Figure 2)[14].

Figure 2: Breakdown of Canada's Greenhouse Gas Emissions by Economic Sector (2019)



The ERP contains detailed chapters focused on economy-wide measures, buildings, electricity, heavy industry, oil and gas, transportation, agriculture, waste, nature-based solutions, clean technology and climate innovation, sustainable finance, and sustainable jobs, skills and communities. Notably, particularly for the purposes of complying with *NZEAA* requirements, the ERP also includes information on emissions projections and associated modelling, as well as provincial and territorial collaboration. In the interest of succinctness, the following discussion focuses on particularly notable features from a climate and energy regulatory perspective, rather than walking through details of each chapter and associated measures.

Economy Wide Measures

Carbon Pricing

The federal carbon pricing regime put in place under the *Greenhouse Gas Pollution Pricing Act* (*GGPPA*)[15] figures prominently in the ERP, including mention of the Supreme Court of Canada's recent upholding of the constitutionality of the regime under the federal Peace, Order and Good Government power.[16] ERP content regarding carbon pricing is substantially similar to what was already in the public domain. In particular, the Plan includes confirmation that starting in 2023 the price will start rising by $15 per tonne, per year until it reaches $170 per tonne in 2030.[17] As noted in the Plan, this provides price certainty for the foreseeable future. Of course, given the benchmark approach of the *GGPPA*, this of course requires that provinces and territories update their respective pricing systems to keep pace. And it will remain the case that the federal system will apply in provinces and territories without their own pricing systems.[18]

One new carbon pricing development from the ERP is directed at augmenting the federal regime in service of the stated desire for certainty. The Plan states, "the Government of Canada will explore measures that help guarantee the future price of carbon pollution".[19] It goes on to indicate that this may include "investment approaches like carbon contracts for differences, which enshrine future price levels in contracts between the government and low-carbon project investors, thereby de-risking private sector low-carbon investments".[20] It remains to be seen what these measures will look like in practice, though a helpful reference point for that work is a 2021 article by economists Dale Beugin and Blake Shaffer where they explain the general concept whereby the Canada Infrastructure Bank "shares risk by signing up for the value of a project that comes from the rising carbon price. Should policy get more stringent over

[14] ERP, *supra* note 1 at 11.

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

[16] ERP, *supra* note 1 at 24. *See References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

[17] ERP, *supra* note 1 at 25, 27.

[18] See *Ibid* at 25 (map of current application).

[19] *Ibid* at 9, 27.

[20] *Ibid*.

time, those benefits accrue to the CIB; should government relax or remove carbon pricing, the CIB bears the loss".[21]

Beyond such measures, the ERP also indicates that the government will be "exploring legislative approaches to support a durable price on carbon pollution".[22] Additionally, the ERP indicates that the government is exploring carbon border adjustments as a potential complimentary policy tool — i.e. a mechanism "to account for differences between countries in carbon costs incurred in producing emissions-intensive goods that are traded internationally".[23]

In short, on the matter of carbon pricing, the ERP clearly indicates the government's intention to increase the price while entrenching it more deeply in the economy through targeted complementary tools. For those seeking certainty on this matter, the Supreme Court of Canada judgement and the contents of this ERP should provide strong assurances, notwithstanding political rhetoric that the topic continues to stimulate.

Methane

Building on announcements in fall 2021, the ERP confirms that the government is developing "more stringent regulations to achieve at least a 75 per cent reduction in methane emissions from the oil and gas sector by 2030".[24] These will increase the stringency of the existing *Regulations Respecting Reduction in the Release of Methane and Certain Volatile Organic Compounds (Upstream Oil and Gas Sector)*[25] under the *Canadian Environmental Protection Act, 1999* (*CEPA, 1999*).[26] The ERP also states: "regulations and other measures are being developed and consulted upon to address methane emissions from landfills and support the diversion of organics from landfills across the country".[27] This means more methane regulatory measures are coming. All of this and more, the ERP indicates, will be presented in a forthcoming federal methane emissions reduction plan,[28] which presumably will flow from the March 2022 federal discussion paper.[29]

Clean Fuel Regulations

While not new, the ERP confirms that the proposed federal *Clean Fuel Regulations*[30] are a first step, and that the government is still "consulting on the Clean Fuel Regulation to ensure it continues to play a meaningful role in the decarbonization of the transportation sector, driving investments in clean fuels and zero-emissions vehicle technology" and that it is also consulting on "increasing the stringency of the Clean Fuel Regulations".[31]

Together, the ERP content regarding methane regulations and clean fuel regulations clearly indicate that the federal government will continue to actively use direct regulation as a key tool for driving emissions reductions. A future example of such direct regulation is likely to be a cap on oil and gas emissions, which is discussed further below.

Electricity

The most notable ERP content on electricity is the focus on developing a Clean Electricity

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[21] Memorandum from Dale Beugin & Blake Shaffer to Infrastructure Minister Catherine McKenna (4 June 2021) "Re: The Climate Policy Certainty Gap and How to Fill It", online (pdf): <www.cdhowe.org/sites/default/files/IM-Buegin%20and%20Shaffer_2021-0603_0.pdf>.

[22] ERP, *supra* note 1 at 27.

[23] *Ibid* at 27.

[24] *Ibid* at 32.

[25] *Regulations Respecting Reduction in the Release of Methane and Certain Volatile Organic Compounds (Upstream Oil and Gas Sector)*, SOR/2018-66.

[26] *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 [*CEPA, 1999*].

[27] ERP, *supra* note 1 at 32.

[28] *Ibid*.

[29] Environment and Climate Change Canada, *Reducing Methane Emissions from Canada's Oil and Gas sector*, (Discussion Paper) (Gatineau: Environment and Climate Change Canada, 2022), online (pdf): <www.canada.ca/content/dam/eccc/documents/pdf/cepa/20220325_OilGasMethaneDD-eng.pdf>.

[30] "What is the clean fuel standard?" (last modified 20 January 2022), online: *Canada.ca* <www.canada.ca/en/environment-climate-change/services/managing-pollution/energy-production/fuel-regulations/clean-fuel-standard/about.html>.

[31] ERP, *supra* note 1 at 30.

Standard (CES) "to support a net-zero electricity grid by 2035".[32] Details in the ERP are thin, but more can be found in the government's March 2022 discussion paper entitled, "A Clean Electricity Standard in support of a net-zero electricity sector".[33] The paper indicates that the Clean Electricity Standard will also be under *CEPA, 1999*. One particular dimension to watch is whether electricity may be moved out of its current inclusion under the output-based pricing system of the *GGPPA* and into this other regime. This is mentioned very briefly in the discussion paper[34] but not the ERP. Consultations on the CES were underway at the time of the ERP's release.[35]

Beyond the future CES work, the ERP primarily outlines planned federal support for "non-emitting energy" and "clean power".[36] This includes significant resources for renewables, grid modernization, and net-zero energy plans, as well as resourcing to create a new "Pan-Canadian Grid Council".[37] While ambiguous (like so many things are in the ERP), the Plan also indicates general support for "de-risking and accelerating the development of transformational, nation-building inter-provincial transmission lines".[38] It also repeats the government's commitment to implementing the Small Modular Reactor Action Plan, which was launched in December 2020.[39]

Surprisingly, the ERP's electricity chapter does not set out a comprehensive vision or plan for the role of electrification in the broader decarbonization agenda. Many measures and initiatives are set out, but they lack cohesion. While this is, to some extent, understandable given federal jurisdictional constraints, one would reasonably expect more clarity on the federal role and the bigger picture. This is a significant shortcoming, considering the importance of electrification going forward[40] (though the ERP does include some further discussion in the transportation chapter).

Oil and Gas

The ERP's chapter on oil and gas contains one of the most anticipated and attention-grabbing items: a commitment to capping and cutting emissions from the oil and gas sector "at the pace and scale needed to get to net zero by 2050".[41] This was not a surprise, as the federal government had previously announced it, including at COP26,[42] and the work is now well underway. For example, the House of Commons Standing Committee on Natural Resources commenced a study on the matter in February 2022.[43] Details remain to be seen; however, from a legal perspective, the most likely route is via direct regulation under *CEPA, 1999*,[44] which the federal government has used effectively (and

[32] *Ibid* at 42.

[33] Environment and Climate Change Canada, *A Clean Electricity Standard in support of a net-zero electricity sector*, (Discussion Paper) (Gatineau: Environment and Climate Change Canada, 2022), online (pdf): <www.canada.ca/content/dam/eccc/documents/pdf/cepa/CleanElectricityStandardDiscussionPaper-eng.pdf>.

[34] *Ibid* at 5.

[35] Environment and Climate Change Canada, News Release, "Canada launches consultations on a Clean Electricity Standard to achieve a net-zero emissions grid by 2035" (15 March 2022), online: *Canada.ca* <www.canada.ca/en/environment-climate-change/news/2022/03/canada-launches-consultations-on-a-clean-electricity-standard-to-achieve-a-net-zero-emissions-grid-by-2035.html>.

[36] ERP, *supra* note 1 at 42.

[37] *Ibid*.

[38] *Ibid*.

[39] *Ibid* at 41–42. See also "Canada's Small Modular Reactor Action Plan" (15 February 2022), online: *NRCAN.gc.ca* <www.nrcan.gc.ca/our-natural-resources/energy-sources-distribution/nuclear-energy-uranium/canadas-small-nuclear-reactor-action-plan/21183>.

[40] See Richard Florizone & Susan McGeachie, "Electrification is Canada's advantage in the race to net zero" (19 January 2022), online: *iPolitics* <ipolitics.ca/news/electrification-is-canadas-advantage-in-the-race-to-net-zero> (discussing importance of electrification).

[41] ERP, *supra* note 1 at 52.

[42] Wright, *supra* note 3.

[43] "Greenhouse Gas Emissions Cap for the Oil and Gas Sector" (last accessed 5 May 2022), online: *House of Commons* <www.ourcommons.ca/Committees/en/RNNR/StudyActivity?studyActivityId=11468847>.

[44] See Brief from Martin Olszynski to Standing Committee on Natural Resources "Re: Study of the proposal for a greenhouse gas emissions cap on the oil and gas sector" (17 February 2022), online (pdf): <www.ourcommons.ca/Content/Committee/441/RNNR/Brief/BR11637864/br-external/OlszynskiMartin-e.pdf>.

constitutionally) in relation to coal-fired power generation, vehicle emissions, and methane, as discussed above. The ERP does offer some contour at this stage, namely that "the intent of the cap is not to bring reductions in production that are not driven by declines in global demand," and that downstream emissions (i.e. combustion of exported oil and gas, also referred to as "scope 3 emissions") will not be regulated.[45]

In terms of expected emission reductions, the ERP indicates that the reductions expected of the oil and gas sector could be as much as 42% below current levels by 2030 (or 31% below 2005 levels by 2030),[46] and net zero emissions by 2050. The latter is consistent with the existing commitment of the Oil Sands Pathways to Net Zero initiative, which represents 95% of Canada's oil sands production.[47]

The ERP also indicates that the sector's transition will be assisted through a carbon capture, utilization, and storage (CCUS) tax credit,[48] which was then included in the latest federal budget.[49] The basic concept is for the credit to offset the costs of purchase and installation of eligible equipment. According to the government, the credit will be available starting in 2022,[50] though the rate of the credit is still to be determined. Preliminary indications of 50–60% have been met with criticism from industry,[51] while at the same time any credit of this type for the oil and gas sector has received significant criticism from some experts.[52] Presumably this tax credit will be in final form and appear as part of the broader CCUS Strategy that the government has committed to releasing in 2022.[53]

Controversy around the tax credit notwithstanding, the ERP sends a strong signal to Canada's oil and gas sector that the time for any complacency is now over. The Plan points to Canada's worse-than-global-average performance on carbon emissions (Figure 3) and underscores the magnitude of the challenge ahead. Law will now take the place of non-binding voluntary corporate commitments, essentially locking in a minimum for emission reduction performance, and compliance will be required. Canada's oil and gas sector faces a momentous transition in the years and decades ahead, though the government is clearly working hard to ease this transition through exclusion of downstream emissions, allowing access to offsets,[54] creation of the tax credit, and any other potential measures to come. This assistance with the transition is not surprising, though some of it could be characterized as fossil fuel subsidies arriving at a time when there are government commitments to move away from such.[55] If there is policy consistency and coherence here, it would be that the government trying to thread the needle by providing industry support that does not constitute they type of "inefficient fossil-fuel subsidies that encourage wasteful consumption" that is supposed to be phased out.[56]

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[45] ERP, *supra* note 1 at 195.

[46] ERP, *supra* note 1 at 8, 48.

[47] "We need to get to net-zero" (last visited 5 May 2022) online: *Oil Sands Pathways* <www.oilsandspathways.ca/#net-zero>.

[48] ERP, *supra* note 1 at 9, 51, 53.

[49] "Investment Tax Credit for Carbon Capture, Utilization, and Storage" (last modified 3 December 2021), online: *Canada.ca* <www.canada.ca/en/department-finance/programs/consultations/2021/investment-tax-credit-carbon-capture-utilization-storage.html>.

[50] *Ibid*.

[51] The Canadian Press, "Federal tax credit not enough to get carbon capture projects built, Cenovus CEO says", *CBC* (27 April 2022), online: <www.cbc.ca/news/canada/calgary/cenovus-energy-reports-1-6b-first-quarter-profit-triples-dividend-1.6432431>.

[52] Mia Rabson, "Hundreds of academics ask Freeland to scrap carbon capture tax credit", *CTV* (20 January 2022), online: <www.ctvnews.ca/climate-and-environment/hundreds-of-academics-ask-freeland-to-scrap-carbon-capture-tax-credit-1.5747401>.

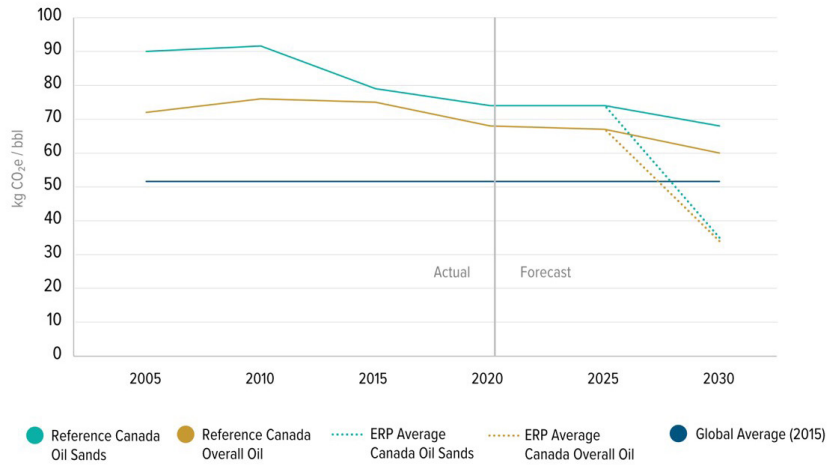
[53] ERP, *supra* note 1 at 78.

[54] *Ibid* at 53 (indicating that "[t]he sector may need time – limited flexibilities, for example using domestic or international offsets…"). The ERP also indicates that the federal government is currently in the process of developing policy on use of "internationally transferred mitigation outcomes" as part of the international emissions offset regime at 104.

[55] See Rachel Samson, Peter Phillips & Don Drummond, "Cutting to the Chase on Fossil Fuel Subsidies", *Canadian Institute for Climate Choices*, (February 2022), online (pdf): <climatechoices.ca/wp-content/uploads/2022/02/Fossil-Fuels-Main-Report-English-FINAL-1.pdf>.

[56] *Ibid* (discussing this commitment and what it may mean).

Figure 3: Canada Oil Intensity vs Global Average



(ERP Figure illustrating Canadian oil sands and overall Canadian oil emissions intensive in relation to global average)[57]

Transportation

The ERP describes a vision of ambitious electrification of Canada's transportation sector, particularly with respect to light duty vehicles (LDVs) and medium and heavy duty vehicles (MHDVs). The two most notable future initiatives include: developing a "light duty vehicles ZEV sales mandate, which will set annually increasing requirements towards achieving 100% LDV ZEV sales by 2035, including mandatory interim targets of at least 20% of all new LDVs offered for sale by 2026 and at least 60% by 2030"; and developing "a MHDV ZEV regulation to require 100% MHDV sales to be ZEVs by 2040 for a subset of vehicle types based on feasibility, with interim 2030 regulated sales requirements that would vary for different vehicle categories based on feasibility, and explore interim targets for the mid-2020s".[58] This shift to almost total electrification is significant because these two classes of vehicles account for more than two thirds of all of Canada's transportation emissions.[59]

The ERP also sets out commitments to significant resources in support of ZEVs and decarbonization of the transportation sector. These include resources for ZEV purchase incentives and charging infrastructure, as well as investments in public and active transportation, greening the federal fleet, and various support for reducing emissions from trucking (e.g. hydrogen).[60] These commitments are further detailed in Budget 2022.[61] While details are scant, the ERP also indicates more work to come in relation to rail, aviation, marine, off-road, and other aspects of the transportation sector.[62]

Modelling

A long-standing issue in climate law and policy is the transparency and accuracy of

[57] ERP, *supra* note 1 at 50.

[58] *Ibid* at 61.

[59] *Ibid* at 56.

[60] *Ibid* at 61.

[61] Transport Canada, News Release, "Minister of Transport announces the expansion of the Incentives for Zero-Emission Vehicles Program" (22 April 2022), online: *Canada.ca* <www.canada.ca/en/transport-canada/news/2022/04/minister-of-transport-announces-the-expansion-of-the-incentives-for-zero-emission-vehicles-program.html>.

[62] ERP, *supra* note 1 at 62.

the modelling behind the projected emissions reductions associated with any given measure or suite of measures. The saying, "all models are wrong, but some are useful"[63] is consistently apt. The ERP takes a significant step toward increased transparency on this front by including a chapter on projections. The chapter explains the methodology used in calculating expected emissions reductions and how those reductions contribute to meeting the 2030 commitment.[64] It also sets out expected emission reductions by sector, which is a useful bird's eye view. For example, this is where one finds the figure of 31% below 2005 levels by 2030 for the oil and gas sector.[65] It also indicates, for example, a reduction of 88% below 2005 levels from the electricity sector.[66]

The ERP also commits to enhancing transparency in modelling approaches. The government will, for example, "convene an expert-led process to provide independent advice in time for the 2023 Progress Report, enhancing the current robust and reliable modelling regime to inform the basis of future ERPs".[67] This commitment and associated actions is in response to advice from the federal Net-Zero Advisory Body.[68] It also takes a step toward addressing concerns voiced in the past by the federal Commissioner of the Environment and Sustainable Development who has previously recommended that the government "should provide greater access to model inputs, assumptions, and outputs, as well as details about the way policies are modelled".[69] The Commissioner very recently reiterated this type of concern in his Spring 2022 report in relation to the potential of hydrogen to reduce emissions, finding that government departments "used unrealistic assumptions".[70] While an assessment of the ERP projections by the Canadian Climate Institute concluded that the ERP "includes more transparency on the modelling and analysis used to develop the projections than we've seen before" and that the ERP policy package "puts Canada on a path to achieve the 2026 objective and very close to achieving the 2030 objective",[71] this will certainly be a critically important aspect going forward.

Cooperation and Jurisdiction

It is well known that federalism presents a fundamental challenge to climate change law and policy in Canada. While the federal government has ample jurisdiction to regulate GHG emissions,[72] it does not have plenary power over the matter. Constitutional constraints mean cooperation with provinces and territories is essential on the path to achieve emission reduction commitments. Overall, the measures and next steps outlined in the ERP represent the federal government taking an "all of the above" approach to deploying jurisdictionally tenable law and policy levers while being vigilant in observing constitutional constraints.

The ERP also fulfills its purpose (and the *NZEAA* requirement) of setting out cooperative measures and agreements with the provinces

[63] George Box & Norman Draper, "Empirical Model-Building and Response Surfaces" (New York: Wiley, 1987) at 424.

[64] ERP, *supra* note 1 at 87, Annex 5.

[65] *Ibid* at 88.

[66] *Ibid* at 89.

[67] *Ibid* at 91.

[68] *Ibid* at 91.

[69] Canada, Commissioner of the Environment and Sustainable Development, *2014 Fall Report of the Commissioner of the Environment and Sustainable Development*, Catalogue No FA1-2/2014-1-0E-PDF, (Performance Audit), Chapter 1 - Mitigating Climate Change (Ottawa: Office of the Auditor General of Canada, 2014) at 1.43 - 1.57 [Audit 2014], online: *OAG-BVG.gc.ca* <www.oag-bvg.gc.ca/internet/english/parl_cesd_201410_01_e_39848.html>.

[70] Canada, Commissioner of the Environment and Sustainable Development, *Report 3—Hydrogen's Potential to Reduce Greenhouse Gas Emissions*, Catalogue No FA1-26/2022-1-3E-PDF (Ottawa: Office of the Auditor General of Canada, 2022) at 3.16, online: *OAG-BVG.gc.ca* <www.oag-bvg.gc.ca/internet/English/parl_cesd_202204_03_e_44023.html>.

[71] Sawyer, *supra* note 7 at 11.

[72] See Nathalie J. Chalifour, "Canadian Climate Federalism: Parliament's Ample Constitutional Authority to Legislate GHG Emissions through Regulations, a National Cap and Trade Program, or a National Carbon Tax" (2016) 33 NJCL 331 at 361, online (pdf): <papers.ssrn.com/sol3/papers.cfm?abstract_id=2775370>; Alastair R Lucas & Jenette Yearsley, "The Constitutionality of Federal Climate Change Legislation" (2011) 4:15 SPP Research Papers, online (pdf): <journalhosting.ucalgary.ca/index.php/sppp/article/download/42369/30265/110948>.

and other governments in Canada. In particular, the chapter on "collaborating on climate change mitigation" and the annex of provincial and territorial submissions present this content comprehensively.[73] However, while this is useful information and appears to satisfy the *NZEAA*, it is not completely clear how emission reductions from provincial and territorial measures factor into the ERP's projections. This aspect is mentioned briefly,[74] but stands out as an aspect for improvement in future ERPs, likely as part of the abovementioned government commitment to improved transparency in modelling, jurisdictional complexities notwithstanding.

4) CONCLUDING COMMENTARY

In reports of 2012 and 2014, the federal Commissioner of the Environment and Sustainable Development found that the federal government had no overarching plan for how to achieve emission reduction commitments.[75] There was no place that set out "what the government is trying to achieve in quantitative terms and what specific steps it will take to get there".[76] Viewed against that baseline, the ERP represents a significant step forward. It is a comprehensive roadmap that charts a reasonably credible path to Canada's 2030 emission reduction target and beyond to net zero in 2050. Future specific measures and mechanisms notwithstanding, the ERP provides macro-level price and policy certainty that will likely be welcomed by many, even if reluctantly in some corners. It also provides an early signal that the *NZEAA* is having its intended effect, even if that task is relatively straightforward during the tenure of the same government that introduced the Act.

However, as noted in the foregoing discussion, an immense amount of work is left to do. A significant amount of the ERP content is essentially planning to do more planning. While that is understandable given that it is an overarching document, this underscores that follow-through and policy consistency is critical from here forward. Climate change law and policy is a story of a long-standing and ever-increasing gap between glossy plans on paper and actual emission reductions in the real world. The ERP charts a bridge across that gap for Canada with an unprecedented degree of detail, ambition, and comprehensiveness. However, there will be an ever-present risk of derailment by devilish details, jurisdictional battles, claims of unfairness, technical complexities, and shifting political winds. Unfortunately, if abandoned or even unimplemented to any substantial degree (without equivalent policies introduced), the ERP will only serve as the latest and starkest example of a highly developed country failing to follow-through in a context where time and fairness are of the essence. The ERP was released into a high stakes context, and those stakes will remain high for decades to come. In coming months and years, the world will see whether Canada can finally move beyond the easy step of making commitments and onto the difficult and unprecedented step of acting to dramatically reduce GHG emissions. ■

[73] ERP, *supra* note 1 at 95–104.

[74] *Ibid* at 87.

[75] Audit 2014, *supra* note 69 at 1.36.

[76] *Ibid* at 1.37.

ALL THAT GLITTERS ISN'T GREEN, OR RENEWABLE

*Andrew Roman**

Green energy, green cars, green jobs, green policies, cleaner and greener — notice how making everything green is good? Today, "green" is not just a colour, it has become a synonym for "good". And so has "renewable". But all that glitters isn't green. Or renewable.

The central problem with our obsession with green and renewables is that these words are never defined. These loose, borderless categories include and exclude a lot of different things. The loose language permits governments, when it is politically expedient, to treat technologies as renewable that are clearly not renewable. For example, The EU's executive during the week of Feb 4, 2022, expanded its "taxonomy" to include nuclear and natural gas-fired power in its green finance criteria,[1] despite objections from NGOs, investors, member states, and its own expert group. That is why if we really care about the global environment we need to look through the green and renewable slogans to see what lies underneath.

All energy sources have some adverse effects on the environment, including wind and solar:

- extensive use of scarce minerals supply, largely controlled by China;
- massive concrete bases and steel towers of wind generators require extensive use of coal in manufacturing;
- low energy density requires huge amounts of land (some 25 per cent of the US land area if all electricity was to be generated by solar panels);
- wind turbines kill birds and bats;
- both solar panels and wind turbines create huge amounts of un-recyclable waste
- China dominates solar panel and wind turbine manufacturing by burning a lot of coal.

GREEN

Green as an Obedience Button

Today, "green" is being used as a political obedience button. For example, Canada's 2030 Emissions Reduction Plan uses the word "renewable" 150 times, and the word "green" 216 times.[2] When government ministers say that their proposed policy is green, they are pushing your green button to turn on your

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You can read more of Andrew Roman's writing on a variety of energy related topics on his blog, here: andrewromanviews.blog.

[1] Cristina Brooks, "EU Taxonomy adds gas, nuclear despite veto from EC's own experts" *S&P Global* (4 February 2022), online: <cleanenergynews.ihsmarkit.com/research-analysis/eu-taxonomy-adds-gas-nuclear-despite-thumbsdown-from-ecs-own-e.html>.

[2] Environment and Climate Change Canada, *2030 Emissions Reduction Plan: Canada's Next Steps for Clean Air and a Strong Economy*, Catalogue No En4-460/2022E-PDF (Gatineau: Environment and Climate Change Canada, 2022), online (pdf): <www.canada.ca/content/dam/eccc/documents/pdf/climate-change/erp/Canada-2030-Emissions-Reduction-Plan-eng.pdf>.

obedience algorithm. We are expected to agree, without closely examining the proposed law or policy. After all, how could it be bad if it's green? We are not expected to ask "green in comparison to what?" Or "green at what cost, to whom?" If you were to ask these questions, it is unlikely that government officials would provide any useful answers.

Presenting oneself as a green leader in the "fight" to save the planet from the "climate crisis" is a source of political power, money and social acclaim. The political benefit of this panic-generating strategy is to convert scientific and economic issues into moral and tribal issues. The virtuous are on "our" side, clean green, so join us and be good too.

American and Canadian politicians exaggerate the dangers of climate change and then, egotistically, pretend that they are the leaders in fighting the planetary crisis. Sorry, America, at a mere 13 per cent of global CO_2 emissions you aren't the planet and you can't do much to fix it. Sorry Canada, you are roughly 1/10 as able to affect planetary climate change as are the Americans.

At a long string of global climate conferences (number 26 was recently held in Glasgow), we see displays of green ego competition among politicians, to out-promise each other on being more green, without any discernible reduction in emissions over the years. Greta Thunberg was right to call this just "blah, blah, blah."

Green Jobs

In the rapid transition to net-zero pledged by Western countries, we are usually promised a "just transition" from fossil fuel jobs to "clean green jobs". What is a green job? There is no clear definition, which is why government promises of such jobs will be virtually impossible to verify.

In the US, when the Obama administration was enthusiastically praising its record in creating green jobs, the definitions used for green jobs, when exposed, became hilarious.[3]

The government agency doing the classification admitted that it would have described an employee of a used bookstore or of an antique store as having a clean green job because their work involved recycling; likewise, a cleaner in a school mopping the floor had a clean green job. Of course, these or similar employees may well have been doing this same work for decades. But they were only classified as green employees when it became politically desirable to give the impression that the incumbent administration had "created" millions of new green jobs. These were supposed to replace the two to three times greater number of jobs lost through cancelling pipelines and off-shoring to China and India manufacturing jobs that weren't "green" enough.

Green as a Sign of Corporate Virtue

Pressing our green button is profitable, and not just for politicians. When a corporation announces that it already has, or soon will have net-zero emissions of CO_2, it is expected that it has achieved this through restructuring its operations. But usually it is either through off-shoring production and the resulting emissions, or purchasing "carbon credits" or other financial investments, while its operations, wherever located, continue to emit CO_2 at almost the same level.

As just one example, in late 2021, Delta Airlines announced:

> "Last year, we became the first carbon neutral airline on a global basis."[4]

Really, in just one year? So since 2020 have planes stopped burning jet fuel? Are they battery powered? Well, no, their announcement goes on to say it's still just a commitment:

> "We're committed to carbon neutrality from March 2020 onward, balancing our emissions with investments to remove carbon across our global operations."

How do you balance two dissimilar things, emissions and investments? How much

[3] See "Darrell Issa explore Obama administration definition of Green Jobs – June 7, 2012", online (video): *Youtube* <www.youtube.com/watch?v=q0IQ_vI9WZ0>.

[4] Amelia DeLuca, "An Update on Our Path to Net Zero" (28 September 2021), online: *Delta* <news.delta.com/update-our-path-net-zero>.

"carbon" can Delta "remove" across its global operations, from March 2020 onward, while still flying jet aircraft? The answers to these questions exceed my understanding.

Why are bankers and other business leaders competing to present themselves as leaders in fighting climate change? Perhaps because in the competition for climate change virtue signalling a business can't afford to appear less virtuous than its competitors.

Delta tells us:

> "Our commitment to carbon neutrality is rooted in the idea that our customers shouldn't have to choose between seeing the world and saving the world."

So if you fly with Delta — the first carbon neutral airline — instead of using another airline flying the same aircraft to the same destination, you are not only seeing the world, you are saving it. But if you fly with another airline, you aren't saving the world. The world may perish unless you save it by flying with Delta. Too bad United, Air Canada and all the other airlines.

"Green" as a Useless Distinction

In a recent Fraser Institute video interview host Danielle Smith asked her guest, Lynne Kiesling of the University of Colorado-Denver, whether hydroelectric generation is "green".[5] The answer was "yes" and "no". It is green in the sense that water flowing over a dam emits no CO_2. But it also has some harmful environmental impacts.

Kiesling's answer demonstrates that whether hydroelectric generation is labelled "green" doesn't matter, because it doesn't tell us what the project does or doesn't do to the local environment. A better question would be: "If a new hydroelectric generating station was to be built at location X, what would be its positive and negative environmental impacts?" There is no need to use the word "green" in asking or answering this question.

Because we associate the colour green with grass, leaves and plants, it fosters warm emotions. But our love of "green" tells us nothing about whether any particular energy technology has acceptable environmental costs compared to their benefits, when compared with alternative technologies. Let's lose the greenspeak and start talking about what is actually happening.

RENEWABLES

What Are Renewables?

What are renewables? Whatever you want them to be, it seems. But they are always assumed to be good, green sources of energy.

Hydroelectric generation is sometimes classed as renewable even though nothing is actually renewed. It is just water flowing downhill and through electricity generator turbines. The same can be said of wind or solar generation: when the wind blows the turbine blades rotate, but the wind is not renewed by humans, any more than humans renew the sun when it shines. It would be more accurate to describe the common characteristic of all three types of generation as non-CO_2 emitting. There is no need to use the word "renewable" in discussing the positive and negative impacts of these technologies.

Renewables Have a Very Limited Role

Fossil fuels still dominate the global energy supply. In 2019 (prior to the impact of the pandemic), 84 per cent of global primary energy came from oil, gas and coal.[6] Renewables provided 5.0 per cent, hydro 0.3 per cent and nuclear 4.3 per cent. In Canada, 87 per cent of primary energy came from oil, gas and coal.[7]

Of all the energy sources Canadians consume, electricity represents only about 22 per cent (the other 78 per cent is used for heating,

[5] The Fraser Institute, "Alternating Currents: re-examining electricity markets in Canada" (21 January 2022), online (video): *YouTube* <www.youtube.com/watch?v=kJsqSn013qI>.

[6] British Petroleum, "Statistical Review of World Energy, 69th Edition" (2020), online (pdf): <www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/statistical-review/bp-stats-review-2020-full-report.pdf>.

[7] Statistics Canada, "Energy supply and demand, 2019" (21 January 2021), online: <www150.statcan.gc.ca/n1/daily-quotidien/210121/dq210121d-eng.htm>.

transportation, manufacturing and agriculture).[8] Electrical generation by fuel type in 2018 showed that wind, solar and biomass — the traditional renewables — represented only 7 per cent of Canada's electricity generation (the rest came from hydro, nuclear and fossil fuels).[9] Seven per cent of 22 per cent is 1.54 per cent — the total contribution of wind, solar and biomass to Canadian energy consumption. Renewables won't get Canada to net-zero any time soon.

Burning Trees is Renewable?

Another renewable is "biomass", a name few people understand. Although biomass includes a variety of technologies such as energy from waste or geothermal, the vast majority of biomass is wood pellets burned to generate steam, which runs through turbines to generate electricity.

For example, the Drax facility in the UK burns wood pellets imported from the US, Canada, and Brazil (as well as from domestic sources). First, a large, diesel powered machine chops down trees, then diesel powered trucks transport the logs to a facility using fossil fuels to manufacture the wood pellets. The pellets are carried by diesel powered rail or truck to a port, where a diesel powered ship transports them to the UK. According to the Yale Environment 360 newsletter, burning wood pellets releases as much or even more CO_2 per unit of energy as burning coal.[10] So why are these cumulatively large emissions encouraged? Simply because through a definitional loophole, burning trees has been treated as renewable, and anything renewable is treated as good.

In theory, when trees are cut down others can be replanted, but the theory has problems. First, the replacement trees are not the same natural mix of species as found in a forest; they are usually rapidly growing trees of a single species, requiring lots of insecticides (which can get into the soil and water) to avoid crop losses. Second, the seedlings take decades to reach sufficient height, when they are again harvested for combustion. With biomass, the generic label "renewable" actually causes more emissions and greater damage to mature forests, the very opposite of the purpose of environmental policy.

The European Union "Taxonomy" Trick

There is an escalating energy crisis in Europe, exacerbated recently by the Russian invasion of Ukraine. This has been largely caused by shutting down many nuclear and gas plants, while creating excessive reliance on wind generation. Then the wind stopped blowing for an extended time. This required replacing the lost wind generation with a gas generation. But this spike in gas demand caused a huge spike in gas prices. It also increased European dependence on gas from Russia. With Russia strategically limiting its gas exports to Europe, several countries have had to burn more coal to keep the lights on.[11] Coal emits approximately twice as much CO_2 as gas.

After much debate, the European Union, desperate to increase its electricity supply without burning even more coal, changed its green "taxonomy" to treat both nuclear and gas generation as "green" for investment purposes.[12]

But nuclear technology uses uranium, a limited resource that is not renewable. Likewise, natural gas, another limited resource, is no more renewable than coal. These governments try to conceal the obvious political game: last year nuclear and gas were dangerous and dirty, this year they are green. What has changed? Taxonomy.

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[8] *Ibid.*

[9] Canada Energy Regulator, "Provincial and Territorial Energy Profiles – Canada" (last modified 25 April 2022), Figure 2, online: <www.cer-rec.gc.ca/en/data-analysis/energy-markets/provincial-territorial-energy-profiles/provincial-territorial-energy-profiles-canada.html>.

[10] Roger Drouin, "Wood Pellets: Green Energy or New Source of CO_2 Emissions?" (22 January 2015), online: <e360.yale.edu/features/wood_pellets_green_energy_or_new_source_of_co2_emissions>.

[11] Todd Gillespie, "Europe Forced to Rely on Expensive, Dirty Coal to Keep Lights On", *Bloomberg* (25 January 2022), online: <www.bloomberg.com/news/articles/2022-01-25/europe-forced-to-rely-on-expensive-dirty-coal-to-keep-lights-on?mc_cid=33664feadb&mc_eid=ac7042661f>.

[12] "EU to keep 'green' gas and nuclear labels", *euobserver* (27 January 2022), online: <euobserver.com/tickers/154213?mc_cid=02dab7466b&mc_eid=ac7042661f>.

Increasing Reliance While Decreasing Reliability

Energy is life. Secure, reliable 24/7/365 electricity is essential to our lives, as Europe is painfully learning through the Russian invasion of Ukraine. The European energy crisis well illustrates what happens when countries increase their reliance on an intermittent generation technology while decreasing the overall reliability of their electricity systems. If more than a certain per cent of electricity generation (around 33–50 per cent, depending on the system) uses unreliable, weather dependent wind and solar technologies, then fossil fuel or nuclear backup will be essential when the wind doesn't blow or the sun doesn't shine. Without that backup, furnaces and air conditioners stop working, as do refrigerators, computers and lights, gas pumps and electric vehicles. By shutting down their own exploration and extraction of gas, Europe has increased its dependency on Russian gas for backup to wind and solar generation.

The Impacts of Widespread Use of Electric Vehicles

As but one example of "clean green" policy, consider the electric vehicle. EVs will become the only vehicles sold after 2035, when Canada will prohibit the sale of internal combustion engine vehicles. The energy that comes down the wire to charge an EV is zero emitting, unlike what comes out the tailpipe from an internal combustion engine. But that's only one impact of many. There are some questions about:

1. The vehicle itself

(i) How is the electricity to charge the battery generated? If, as in some places, it is mostly generated with coal or gas, you have a fossil-powered car that happens to use batteries to store the fossil-generated electricity. (ii) How are the 1,000 lbs of batteries in the car manufactured? Probably by using fossil-fuelled earthmoving equipment in China or Africa to move tons of earth to extract the small amounts of useful minerals and chemicals that go into the battery. (iii) What will happen to the price of some of these scarce battery materials (the supply of which China largely controls) as more EVs are being manufactured and as older EV batteries have to be replaced? (iv) How will these billions of large, heavy batteries be recycled or disposed of?

2. Its impact on your neighbourhood

EVs require high voltage chargers for quick charging. The wires that bring electricity to your home and those of your neighbours were designed for the much lower electricity demand prior to EVs. As more EVs are charged in your area the capacity of the wires system may be overloaded. Engineers at EPCOR, the large Edmonton-based electric and water utility, conducted a study of the impact of EVs, and concluded, at slide 14, that:

- Charging demand is what matters
    - Just a single EV can overload a standard service transformer
    - A small number of EVs could lead to circuit overloads[13]

To charge more than a small number of EVs would, long before 2035, require rebuilding the entire local distribution system of every municipal and provincial electricity distribution system, taking years and costing billions. These costs would be borne either by electricity users through higher rates or by taxpayers in higher taxes, or both, even though the vast majority of Canadians would not yet have purchased an EV. In effect, most Canadians will be subsidizing the small minority owning EVs. And, as the cost of electricity rapidly rises, so will the cost of charging an EV.

LOOK BEHIND THE LABELS

Real environmental leaders don't promote empty slogans like "clean green jobs" or "Build Back Better". If, as a country, we are serious about environmental protection, we must stop using the "green" and "renewable" labels and examine the pros and cons of the various forms of energy on their merits, including their reliability and cost.

If all fossil fuels are to be phased out to net-zero by 2050, all heating, lighting, transportation

[13] Darren McCrank, "DER Integration – EPCOR'S Experience in Edmonton" (2019), online (pdf): *OEB* <www.oeb.ca/sites/default/files/stakeholder-presentations-EPCOR%20Utilities_Day%202.pdf>.

and manufacturing will have to become 100 per cent electric. Western countries all promise to do this, without ever explaining how. Perhaps the most honest government when it comes to admitting that the pursuit of net-zero has to be balanced with economic and social realities is China.[14]

As the European experience has recently demonstrated, energy security is critical, and won't be undermined by political climate targets. The US and Canada are perhaps a decade behind the Europeans, and haven't yet learned the reliability lesson the hard way. That's why I expect that when "The Great Reset" to net-zero inevitably runs into a brick wall, we will see "The Great U-Turn". Of course it won't be called that — it will merely be a change in taxonomy. ■

[14] "China's Xi Says Climate Targets Can't Compromise Energy Security", *Bloomberg News* (25 January 2022), online: <www.bloomberg.com/news/articles/2022-01-26/xi-jinping-says-climate-targets-can-t-compromise-energy-security?mc_cid=d94787db9d&mc_eid=ac7042661f>.

BAY DU NORD OFFSHORE OIL PRODUCTION PROJECT CLEARS THRESHOLD REGULATORY HURDLE

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

INTRODUCTION

On April 6, 2022, the federal Minister of Environment and Climate Change announced his decision that the proposed Bay du Nord oil development project (BdN Project), located offshore in the Flemish Pass Basin approximately 500 kilometres east of St. John's, Newfoundland and Labrador, "is not likely to cause significant adverse environmental effects when mitigation measures are taken into account."[1] The Minister's decision, with 137 conditions, clears the path for the project to proceed through several remaining regulatory steps.

The announcement had been delayed twice, adding to anxiety among interested parties that the project might be rejected. It had been reported that there was opposition within the federal cabinet to approving the project.[2]

Not surprisingly, the decision was heavily criticized by advocates for stronger measures to restrict carbon dioxide (CO_2) emissions,[3] particularly coming as it did only a week after the release of the federal government's *2030 Emissions Reduction Plan: Canada's Next Steps for Clean Air and a Strong Economy*.[4] At the same time, the government of Newfoundland and Labrador welcomed the announcement, with the Premier reportedly describing it as a "giant step forward" for the project and a key part of an economic recovery for the provincial government.[5] Industry reportedly described the approval as a "triumph".[6] The Canadian Association of Petroleum Producers (CAPP) issued a statement

* Energy Regulation Consultant, Co-Managing Editor *Energy Regulation Quarterly*.

[1] The Honourable Steven Guilbeault, "Decision Statement Issued under Section 54 of the *Canadian Environmental Assessment Act, 2012*" (6 April 2022), online (pdf): <iaac-aeic.gc.ca/050/documents/p80154/143500E.pdf>.

[2] "As political divisions emerge over Bay du Nord, N.L. PCs lash out at federal Liberals", *CBC News* (10 February 2022), online: <www.cbc.ca/news/canada/newfoundland-labrador/bay-du-nord-divisions-politics-1.6346794>.

[3] See e.g. The Sierra Club Canada Foundation, "Media Statement on Reported Bay du Nord Approval" (6 April 2022), online: <www.sierraclub.ca/en/media/2022-04-06/media-statement-reported-bay-du-nord-approval>.

[4] Environment and Climate Change Canada, *2030 Emissions Reduction Plan: Canada's Next Steps for Clean Air and a Strong Economy*, Catalogue No En4-460/2022E-PDF (Gatineau: Environment and Climate Change Canada, 2022); See also David V. Wright, "Canada's 2030 Federal Emissions Reduction Plan: A Smorgasbord of Ambition, Action, Shortcomings, and Plans to Plan" (2022) 10:2 Energy Regulation Q 7.

[5] Darrell Roberts, "Federal government approves controversial Bay du Nord oil project", *CBC News* (6 April 2022), online: <www.cbc.ca/news/canada/newfoundland-labrador/bay-du-nord-approval-1.6410509>; The Premier also issued a formal statement see Executive Council Industry, Energy and Technology, News Release, "Premier Furey and Minister Parsons Comment on Bay du Nord Development Project" (6 April 2022), online: <www.gov.nl.ca/releases/2022/exec/0406n06/>.

[6] Darrell Roberts, "Oil industry calls Bay du Nord approval triumph, climate advocates condemn it", *CBC News* (7 April 2022), online: <www.cbc.ca/news/canada/newfoundland-labrador/bay-du-nord-reaction-1.6411013>.

it was "pleased that the Government of Canada relied on the science".[7]

Reservations about the future prospects for new oil and gas development projects are widespread, both in Canada and internationally. Only a year ago, the International Energy Agency (IEA) issued a report stating that no new oil and gas fields should be approved for development if the world is to meet its climate goals and limit global warming.[8] The Minister's decision is a significant milestone indicating that, notwithstanding the IEA's report, a path forward remains for such developments in Canada, challenging as that path might be.[9]

In this regard, the conditions attached to the decision are particularly significant; for the first time, they include a legally binding requirement that a project proponent achieve net-zero greenhouse gas (GHG) emissions by 2050.

From a broad regulatory perspective, the decision is of fundamental, systemic significance. In particular, it confirmed that, at least since the enactment of the *Canadian Environmental Assessment Act, 2012*,[10] the threshold determination of whether a resource development project that invokes federal jurisdiction will be allowed to proceed is unequivocally to be made by the responsible Minister (or in some circumstances by the Governor in Council), which is to say at the political level.

It might also be asked whether that reality — that a federal minister unilaterally makes the "go/no go" decision on the BdN Project and presumably any future projects offshore from Newfoundland and Labrador — erodes the principle of joint federal-provincial management underlying the *Atlantic Accord*.[11]

The decision also places the BdN Project a step closer to being the first offshore oil and gas project in the world to trigger Article 82 of the *United Nations Convention on the Law of the Sea* (*UNCLOS*).[12] As is discussed briefly below, Article 82 would oblige Canada to make payments to the international community based on production from the BdN Project.

The Minister's decision is an important milestone in advancing the BdN Project. It must be noted, however, that no decision has yet been made to proceed with development.

THE BAY DU NORD PROJECT

The BdN Project is a proposal by Equinor Canada Ltd. (Equinor)[13] to develop two significant oil discoveries, Bay du Nord and Baccalieu (discovered in 2013 and 2016 respectively), with a view to commencing production in the late 2020s using a floating production, storage and offloading vessel (FPSO).[14] Rights to the two discoveries are currently held under significant discovery licences issued by the Canada-Newfoundland & Labrador Offshore Petroleum Board (C-NLOPB) to Equinor and Cenovus Energy Inc. (as successor to Husky Oil Operations Limited). Rights to adjacent discoveries drilled in 2020 that could potentially be tied into the project are held by Equinor and BP Canada Energy Group ULC. Further exploratory drilling in the area is planned for 2022. Any resulting discoveries would be considered for potential tie-ins to the BdN Project.

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[7] Paul Barnes, "CAPP Statement: Approval of the Environment Assessment of the Bat du Nord Offshore Development Project" (6 April 2022), online: <www.capp.ca/news-releases/capp-statement-approval-of-the-environmental-assessment-of-the-bay-du-nord-offshore-development-project/>.

[8] International Energy Agency, "Net Zero by 2050: A Roadmap for the Global Energy Sector" (May 2021), online (pdf): <iea.blob.core.windows.net/assets/0716bb9a-6138-4918-8023-cb24caa47794/NetZeroby2050-ARoadmapfortheGlobalEnergySector.pdf>.

[9] See the further discussion below at note 35 of suggestions that the Minister had hinted that the BdN Project could be the last such project.

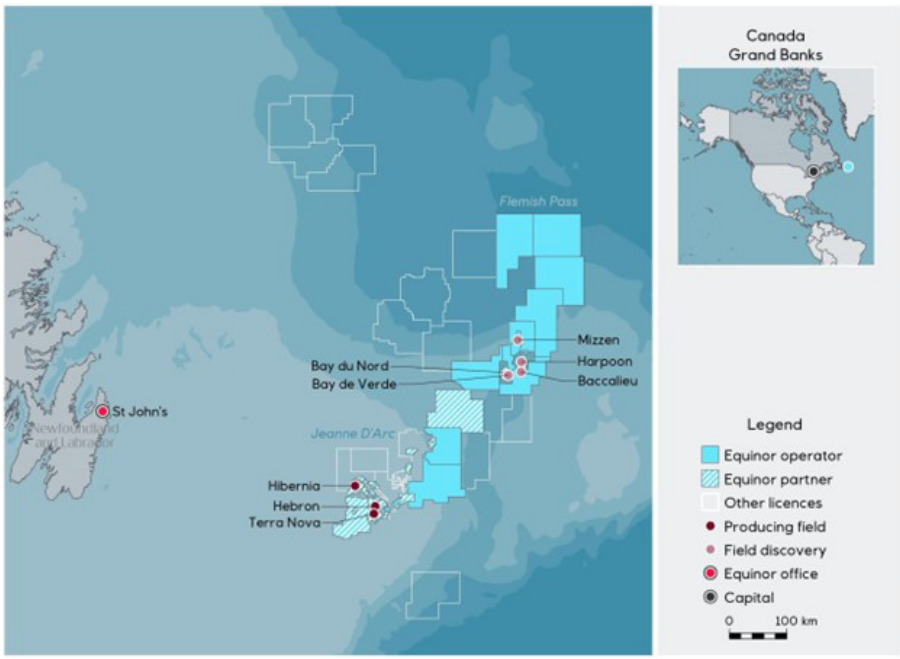
[10] SC 2012, c 19, s 52 [*CEA Act, 2012*].

[11] Government of Canada & Government of Newfoundland and Labrador, "The Atlantic Accord" (11 February 1985), online (pdf): <www.gov.nl.ca/dgsnl/files/printer-publications-aa-mou.pdf>.

[12] *Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 397 (entered into force 1 November 1994), online (pdf): <www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf>.

[13] Formerly Statoil, the Norwegian state oil company.

[14] The BdN Project is described on Equinor's website see Equinor, "The Bay du Nord project" (last accessed 20 April 2022), online: <www.equinor.com/where-we-are/canada-bay-du-nord>.



Source: Equinor website: https://www.equinor.com/en/where-we-are/canada-bay-du-nord.html. Reproduced with permission.

Equinor estimates the recoverable reserves of the BdN Project to be approximately 300 million barrels. Production is expected to approach 200,000 barrels per day. Project cost is estimated to be $CAN12 billion. Equinor estimates revenues to government will be $3.5 billion over the project's anticipated lifespan of 30 years.

THE ASSESSMENT PROCESS

The primary regulatory agency with direct authority over oil and gas activities offshore from Newfoundland and Labrador is the joint federal-provincial C-NLOPB, established by legislation enacted by each of Parliament[15] and the provincial legislature[16] to implement the *Atlantic Accord*.[17] However, the BdN Project also comes under the *CEA Act, 2012* as a designated activity.[18] A Memorandum of Understanding between the Impact Assessment Agency of Canada (Agency) and the C-NLOPB, dated February 20, 2019, provided that an integrated environmental assessment and regulatory review of the BdN Project would be undertaken.[19]

On August 9, 2018, the Agency determined that an environmental assessment was required under the *CEA Act, 2012*. While the *CEA Act, 2012* was repealed on August 28, 2019, by the *Impact Assessment Act*,[20] the effect of the transitional provisions of the later Act was that the environmental assessment of the BdN Project continued under the *CEA Act, 2012* as though that Act had not been repealed. The

[15] *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*, SC 1987, c 3.

[16] *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*, RSNL 1992, C-2. These Acts are referred to together as the "*Accord Acts*".

[17] *Supra* note 11.

[18] Impact Assessment Agency of Canada, *Bay du Nord Development Project: Environmental Assessment Report*, Catalogue No En106-243/2021E-PDF (Ottawa: Impact Assessment Agency of Canada, 2021), online (pdf): <iaac-aeic.gc.ca/050/documents/p80154/143494E.pdf>.

[19] *Ibid* at 1.

[20] SC 2019, c 28, s. 1, known colloquially as Bill C-69.

Agency therefore proceeded to conduct an environmental assessment of the BdN Project in accordance with section 5 of the *CEA Act, 2012*.

The Agency's Environmental Assessment Report (EA Report)[21], dated December 2021 but not released until April 2022, was prepared in consultation with the C-NLOPB, Fisheries and Oceans Canada, Environment and Climate Change Canada, Health Canada, Natural Resources Canada, Transport Canada, Parks Canada Agency and the Department of National Defence. The views of Indigenous peoples and the general public were also considered.[22]

The EA Report concluded that the BdN Project "is not likely to cause significant adverse environmental effects, taking into account the implementation of the mitigation measures described in this EA Report."[23] It identified "key mitigation measures and follow-up program requirements for consideration by the Minister of Environment and Climate Change (Minister) in establishing conditions as part of the decision statement in the event that the Project is permitted to proceed."[24]

Having received the EA Report, the Minister was obligated to then decide if "taking into account the implementation of any mitigation measures [the Minister] considers appropriate [the BdN Project] is likely to cause significant adverse environmental effects", within the meaning of specific sections of the *CEA Act, 2012*.[25] The Minister must then establish "the conditions in relation to the environmental effects…with which the proponent of the…project must comply."[26] Further, the Minister must issue "a decision statement" (Decision Statement) informing the proponent of the decisions made and including the conditions.[27]

WHO DECIDES?

Before proceeding to discuss the Minister's Decision Statement, the central structural feature of this regulatory scheme should be noted. Firstly, when making the mandated decisions with respect to the likelihood of significant adverse environmental effects, the Minister (or in certain circumstances the Governor in Council) is only obligated to "take into account" the report of the Agency. The scheme is silent on whether the Minister may take into account other considerations. Similarly, it is the Minister who "must establish the conditions" with which a project proponent must comply.

As noted, the *CEA Act, 2012* under which the BdN Project was assessed has been repealed. It is beyond the scope of this article to discuss the assessment process established under the successor *Impact Assessment Act*[28], which came into force on August 28, 2019. However, for present purposes it is noted that the architecture of the assessment processes is broadly similar under both Acts and that the Minister is similarly obligated under the later Act to make a determination only after "taking into account"[29] an assessment report and to "establish any condition that he or she considers appropriate…with which the proponent…must comply."[30] The *Impact Assessment Act* expressly states that the Minister's determination "must be based on the report…and a consideration of" certain specified factors, including the extent to which the project contributes to sustainability and the extent to which the effects of the project "hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change."[31]

It is clear under both the *CEA Act, 2012* and the *Impact Assessment Act*, that the "go/no go"

[21] Impact Assessment Agency of Canada, *supra* note 18.
[22] *Ibid* at ii.
[23] *Ibid* at 145.
[24] *Ibid*.
[25] *CEA Act, 2012*, *supra* note 10, s 52(1).
[26] *Ibid*, s 53.
[27] *Ibid*, s 54.
[28] *Supra* note 20.
[29] *Ibid*, s 60(1).
[30] *Ibid*, s 64.
[31] *Ibid*, s 63(1).

decision (including conditions) on projects that are subject to either Act is consolidated at the political level, to be made unilaterally by the responsible Minister (or in certain circumstances by the Governor in Council[32]). It is noted, however, that there is a lack of transparency with respect to the process followed by the Minister, in making the mandated decision (including the attachment of conditions) after having received the Agency's Assessment Report.

The BdN Project review process can thus be seen as another illustration of what appears to be a broader trend to remove decision-making authority with respect to the review of energy development projects from the mandates of independent regulatory agencies and consolidate that authority in the hands of elected officials.

IMPLICATIONS FOR THE *ATLANTIC ACCORD*

The *Atlantic Accord* is a 1985 agreement between the Government of Canada and the Government of Newfoundland and Labrador providing for the "**joint management** of the offshore oil and gas resources off Newfoundland and Labrador…"[33] The enumerated purposes include:

> …to recognize the **equality** of both governments **in the management of the resource**, and ensure that the pace and manner of development optimize the social and economic benefits to Canada as a whole and to Newfoundland and Labrador in particular…[34]

A unilateral threshold decision by the federal government on whether a project will or will not be allowed to proceed appears to be inconsistent with the concepts of "joint management" or "equality of both governments in the management of the resource".

There have not been any reports of the issue having been raised during the review process for the BdN Project. Given the provincial government's enthusiastic support of the project, however, it can be speculated that the issue might well have led to a full-blown federal-provincial dispute had the Minister's decision been otherwise.

The approval of the BdN Project may, however, have only brought a temporary reprieve. In the wake of the release of the Decision Statement, it was reported that the Minister had hinted the BdN Project could be the last such project.[35] The provincial government, on the other hand, expects the offshore oil and gas industry to continue to grow.[36] Future tensions between Ottawa and St. John's, may, therefore, be expected.

MINISTER'S DECISION STATEMENT

The central determination recorded in the Minister's Decision Statement[37], released on April 6, 2022, is the conclusion that, "after considering the report of the Agency on the Designated Project and the implementation of mitigation measures that I consider appropriate [the BdN Project] "is not likely to cause significant adverse environmental effects…"[38] The Decision Statement also records 137 "legally-binding conditions."[39]

As noted, the Assessment Report was prepared by the Agency in consultation with other

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[32] See e.g. *ibid*, s 60(1)(b).

[33] *Supra* note 11, Clause 1, emphasis added.

[34] *Ibid*, Clause 2(d), emphasis added.

[35] "Oil projects after Bay du Nord will be even harder to approve, says environment minister", *CBC News* (20 April 2022), online: <www.cbc.ca/news/canada/newfoundland-labrador/steven-guilbeault-bay-du-nord-1.6423671>.

[36] See e.g. Government of Newfoundland and Labrador, "Advance 2030: A Plan for Growth in the Newfoundland and Labrador Oil and Gas Industry, 2018-19 Implementation Report" (19 February 2018), online (pdf): <www.gov.nl.ca/iet/files/advance30-pdf-advance-2030-2019-report.pdf>.

[37] Guilbeault, *supra* note 1.

[38] *CEA Act, 2012*, *supra* note 10, ss 5(1), 5(2).

[39] Impact Assessment Agency of Canada, News Release, "Government Accepts Agency's Recommendation on Bay du Nord Development Project, Subject to the Strongest Environmental GHG Condition Ever" (6 April 2022), online: <iaac-aeic.gc.ca/050/evaluations/document/143501?culture=en-CA>.

agencies, Indigenous peoples and the public. Of particular relevance, these included agencies with direct responsibilities engaged by the BdN Project, namely the C-NLOPB (under the *Accord Acts*[40]) and the Minister of Fisheries (under the *Fisheries Act*[41] and the *Species at Risk Act*[42]). As was to be expected therefore, the conditions set out in the Minister's Decision Statement cover a wide and varied range. Many would not be unusual as applied to an offshore oil development project such as BdN.

One particular group of these conditions, however, is noteworthy for focusing directly on requirements to reduce GHGs from the BdN Project and, for the first time ever,[43] requiring a proponent to achieve net-zero GHG emissions by 2050.

GHG EMISSIONS

Condition 6.2 requires the proponent to identify and incorporate GHG emission reduction measures into the design of the BdN Project and implement these measures for its duration. In doing so, the proponent is required to take into account "the most recent guidance issued by Environment and Climate Change Canada related to greenhouse gas mitigation measures and the quantification of net greenhouse gas emissions."

> Condition 6.4 provides:
>
> Commencing on January 1, 2050, the Proponent shall ensure that the Designated Project does not emit greater than 0 kilotonnes of carbon dioxide equivalents per year (kt CO_2 eq/year), as calculated in equation 1 (section 3.1) of Environment and Climate Change Canada's *Strategic Assessment of Climate Change* and any associated guidance documents published by the Government of Canada.

The News Release accompanying the Minister's Decision Statement cited the BdN Project as "an example of how Canada can chart a path forward on producing energy at the lowest possible emissions intensity while looking to a net-zero future."[44] While the Release noted that emissions from the project would be "five times less emissions intensive than the average Canadian oil and gas project, and ten times less than the average project in the oil sands", it was silent on the actual volume of GHGs (acknowledged to be less intensive) that would be emitted by the BdN Project.

ARTICLE 82 OF *UNCLOS*

As noted, no decision to proceed with the BdN Project has been made. The Minister's Decision Statement is, however, an important milestone towards that end and advances the possibility that the project could become the first in the world to trigger a coastal state's obligation under Article 82 of *UNCLOS*[45] to make payments to the international community based on production. As discussed in a previous issue of *Energy Regulation Quarterly*[46], Article 82 of *UNCLOS* requires the coastal state to make payments or contributions in kind in respect of the production of non-living resources beyond 200 nautical miles. Such payments must be made annually, commencing at 1 per cent in the 6th year of production and increasing by 1 per cent per year until the 12th year. Thereafter, the payments or contributions remain at 7 per cent. Payments or contributions are to be made through[47] the International Seabed Authority to states parties

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[40] *Accord Acts*, *supra* notes 15, 16.

[41] RSC 1985, c F-14.

[42] SC 2002, c 29.

[43] Impact Assessment Agency of Canada, *supra* note 39.

[44] *Ibid*.

[45] *Supra* note 12.

[46] Rowland J. Harrison, Q.C., "Offshore Oil Development in Uncharted Legal Waters: Will the Proposed Bay du Nord Project Precipitate Another Federal-Provincial Conflict?" (2018) 6:4 Energy Regulation Q 37.

[47] The word 'to' was used in early drafts of Article 82 and was intentionally changed to 'through'. See International Seabed Authority, "Issues Associated with the Implementation of Article 82 of the United Nations Convention on the Law of the Sea, Technical Study No: 4" (2009) at 20, online (pdf): <isa.org.jm/files/files/documents/tstudy4.pdf>; see also the discussion in International Seabed Authority, "Implementation of Article 82 of the United Nations Convention on the Law of the Sea, Technical Study No. 12" (2013) at 27, online (pdf): <isa.org.jm/files/documents/EN/Pubs/TS12-web.pdf>.

to *UNCLOS* "on the basis of equitable sharing criteria…"[48] To date, Canada has not adopted any mechanism to actualize its obligation under Article 82 and it is an open question who within Canada would ultimately bear the cost of these payments.[49]

CONCLUSIONS

The Minister's Decision Statement has cleared the BdN Project to proceed through the remaining steps to obtain further required approvals. While a decision to proceed with the project is still to be taken, the Minister's decision clearly puts the project over the threshold "go/no go" regulatory hurdle.

The decision also has broader significance in that it signals future oil and gas development projects that trigger federal reviews could be cleared, subject to stringent conditions dealing specifically with GHG emissions, including a requirement that a particular project achieve net zero emissions by a specified date.

From a broader regulatory perspective, the BdN Project review process illustrates that final decision-making authority with respect to projects invoking federal authority rests exclusively with the Minister (or the Governor in Council in certain circumstances).

This reality, in turn, raises a question of the extent to which the fundamental principles embedded in the *Atlantic Accord* — "joint management" and "equality of both governments in the management of the resource" — continue to apply.

Finally, the development advances the possibility that the BdN Project could become the first offshore production project in the world to trigger Article 82 of *UNCLOS*. In that event, further controversy is almost certain to arise around the question of who would ultimately bear the cost of meeting Canada's obligation to make payments to the international community, based on production from the development. ■

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

[49] The potential payers are the federal government (upon which the legal obligation under *UNCLOS* rests), the provincial government (as the primary recipient under the *Atlantic Accord* of revenues from offshore developments) or industry (as the holder of the relevant production rights). See Patrick Butler, "Ottawa, N.L. disagree on who will foot hefty Bay du Nord royalty bill", *CBC News* (21 April 2022), online: <www.cbc.ca/news/canada/newfoundland-labrador/bay-du-nord-international-royalties-bill-disagreement-1.6424884>.

ALBERTA COURT OF APPEAL FINDS FEDERAL *IMPACT ASSESSMENT ACT* UNCONSTITUTIONAL[1]

*Brett Carlson, Chidinma Thompson, Matti Lemmens, Rick Williams and Aidan Paul**

INTRODUCTION

On May 10, 2022, the Alberta Court of Appeal issued its highly anticipated decision[2] (the Decision) on the constitutionality of the federal *Impact Assessment Act* (the *IAA*) and *Physical Activities Regulations* (the *Regulations*). Alberta's highest court considered complex legislative and constitutional issues and ruled that the *IAA* "would permanently alter the division of powers and forever place provincial governments in an economic chokehold controlled by the federal government."[3]

The federal government has already announced its intention to appeal the Decision to the Supreme Court of Canada, which, if upheld, will have significant impacts on the regulation of designated projects and Canada's constitutional division of powers with respect to environmental assessments.[4]

BACKGROUND

In June 2019, the federal government introduced the *IAA*, which replaced the *Canadian Environmental Assessment Act 2012*. In response, the Alberta government launched a constitutional reference before the Alberta Court of Appeal, where it requested the Court's opinion on the constitutionality of the *IAA* and *Regulations*.

The *IAA* is a complex piece of federal environmental legislation that sets out when and on what terms a resource project or activity will be subject to a federal environmental impact assessment.

Put simply, the *IAA* provides for a mechanism through which the Minister may designate certain projects or activities under the *Regulations*, which are then automatically prohibited by virtue of s 7 of the *IAA* if they "may cause effects within federal jurisdiction". The section 7 prohibition applies unless and until the Agency decides under s 16(1) that the project does *not* require an impact assessment or the proponent *complies with the conditions in the decision statement* issued for the project following an impact assessment. Crucially, the prohibition and other mechanisms under the *IAA* are governed largely by the "effects within federal jurisdiction" threshold, which is broadly

[1] An earlier version of this article was published on BLG's Insights, see: www.blg.com/en/insights/2022/05/court-of-appeal-finds-federal-impact-assessment-act-unconstitutional.

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[2] Reference re *Impact Assessment Act*, 2022 ABCA 165 [*IAA*].

[3] *Ibid* at para 27.

[4] Brett Carlson acted as counsel to the Canadian Energy Pipeline Association in this Decision. Please reach out to him directly if you have any questions about the Decision.

defined and include potential environmental, socioeconomic, and health related effects.[5] Therefore, a key issue in the Decision was the extent to which "effects within federal jurisdiction" actually tethered the *IAA* to matters within federal jurisdiction.

MAJORITY DECISION

As a starting point, the majority emphasized that the "environment" is not a head of power that has been assigned to Parliament or the Provinces under the *Constitution Act, 1867*, and accordingly, an environmental matter may have "some provincial aspects and some federal aspects".[6] However, projects will only be subject to federal environmental oversight if they are connected in some way to a federal head of power.

Drawing on these principles, the Court proceeded to "characterize" the *IAA's* "pith and substance" in light of its purpose and its legal and practical effects. The Court concluded the "main thrust" of the *IAA* was "the establishment of a federal impact assessment and regulatory regime that subjects all activities designated by the federal executive to an assessment of all their effects and federal oversight and approval".[7] Characterized this way, the Court found that the *IAA*, "intrudes fatally into provincial jurisdiction and the provinces' proprietary rights as owners of their public lands and natural resources." In particular, and among twelve other reasons provided to support this finding,[8] the Court rejected the "self-defined effects within federal jurisdiction" trigger, and held that many of these effects were not linked, or not sufficiently linked, to a federal head of power.[9]

The Court then considered the second step of the constitutional analysis, which involved determining whether the *IAA* could be "classified" under any federal heads of power. However, the Court concluded the *IAA* did not fall under any federal heads of power, including the federal POGG power. Instead, the Court found the *IAA* fell "squarely within several heads of provincial power", including, among others: (1) natural resources (s 92A); (2) the management of public lands (s 92(5)); (3) local works and undertakings (s 92(1)); and (4) property and civil rights (s 92(13)).[10]

Ultimately, the Court concluded that the *IAA* "constitutes a profound invasion into provincial legislative jurisdiction and provincial proprietary rights"[11] which, if upheld, would result in the "centralization of the governance of Canada to the point this country would no longer be recognized as a real federation."[12]

CONCURRING AND DISSENTING DECISIONS

Justice Strekaf concurred with the majority's analysis and conclusions, with the exception of the majority's conclusion that the *IAA* and *Regulations* amounted to a *de facto* federal expropriation of the provinces' natural resources, on which she declined to express an opinion.

In dissent, Justice Greckol would have upheld the *IAA* and *Regulations* as a "valid exercise of Parliament's authority to legislate on the matter of the environment."[13] Justice Greckol was of the view that although the *IAA* and *Regulations* applied to intra-provincial projects, which *prima facie* fell under provincial heads of power,

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[5] For example, "effects within federal jurisdiction" includes any change: related to any change: (1) occurring outside of a province for which an activity is located, (2) to the health social, or economic conditions of indigenous peoples of Canada; (3) to fish and fish habitat; (4) to migratory birds; and (5) to federal lands.

[6] *IAA*, *supra* note 2 at para 47, citing *Quebec (Attorney General) v Moses*, 2010 SCC 17.

[7] *Ibid* at para 372.

[8] See summary of reasons for overreach, *ibid* at para 373.

[9] For example, "effects within federal jurisdiction", which includes extra-provincial effects stemming from a project, would effectively allow Canada to assert federal oversight over provinces on the sole basis that a project otherwise within its jurisdiction emits GHG emissions. Citing the Supreme Court's recent decision in *Reference re Greenhouse Gas Pollution Pricing Act*, the Court held that Parliament does not have jurisdiction over the general regulation of GHG emissions.

[10] *IAA*, *supra* note 2 at paras 409–20.

[11] *Ibid* at para 421.

[12] *Ibid* at para 423.

[13] *Ibid* at para 740.

they were nevertheless constitutional because they targeted adverse environmental effects in federal jurisdiction.[14]

IMPLICATIONS

The Decision is significant for the Government of Alberta and various allied industry and Indigenous interveners. Since its inception, the *IAA* has faced fierce criticism from various provinces and resource market participants, who argued that the *IAA* introduced a high degree of regulatory uncertainty and complexity with respect to project approval and oversight. The Court echoed similar concerns and noted several practical business impacts flowing from the *IAA*, including delays and the stifling of investment.

The Decision has several important implications for the division of powers with respect to energy issues. First, it represents a major update to constitutional law regarding federal authority over environmental assessments, which had not been thoroughly considered since *Oldman River* in 1993, where the Supreme Court upheld an earlier but significantly different version of federal environmental assessment legislation.[15] Second, the Decision contributes to a growing body of recent case law that is etching out provincial and federal jurisdictional boundaries with respect to modern environmental legislation. These developments have been spurred in recent years as various levels of government have become increasingly motivated to regulate with respect to environmental issues, which has invariably led to disputes, uncertainty and judicial intervention.

Notwithstanding the majority's strong rebuke of Canada's position on the *IAA*, the Supreme Court of Canada will have the final say, given that the federal government has already announced its intention to appeal the Decision. Until then, and since the Decision was a "reference" or "advisory opinion", it is expected that the *IAA* will remain in force and effect unless and until the Decision is upheld by the Supreme Court. BLG will continue to monitor these events and report updates. ■

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[14] *Ibid*.

[15] See e.g. *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5; *Reference re Environmental Management Act*, 2020 SCC 1; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

ESG CLAIMS: MANAGING RISKS AND LIABILITIES FOR CANADIAN BUSINESSES[1]

*Rick Williams, Laura M. Wagner, Benedict S. Wray and Roark Lewis**

The concept of environmental, social and governance (ESG) has become almost ubiquitous. ESG generally refers to the environmental, social, and governance factors that can affect company value and investor decisions. In this article, we briefly outline some key considerations for managing litigation and regulatory risk for Canadian companies making ESG claims and highlight some relevant cases.

WHAT YOU NEED TO KNOW

- Strong ESG performance is valued by many shareholders and consumers, and can be a way to differentiate your brand.
- Failure to take sufficient action on ESG matters can risk proxy contests and harm to a company's business. Businesses should be aware of and understand the legal obligations to disclose information relating to ESG, as failure to abide by them can result in enforcement and other sanctions.
- Companies should routinely audit and revise their ESG frameworks to ensure that they are up to date with their operations and ever-evolving industry best practices. Companies should ensure that they choose an appropriate ESG framework for their intended audience.
- To reduce the risk of misstatements or inconsistent statements, boards and management should have a proactive process for reviewing and approving ESG disclosure prior to its public release. A robust legal review is also advisable.
- Canadian businesses should be careful to scrutinize their ESG disclosure to ensure it aligns with their operations.
- ESG disclosures should be relevant to the specific entity, measurable, and grounded in verifiable data.

ESG OVERVIEW

Although similar to the concept of corporate social responsibility, ESG relates to factors that are financially material to a company's business and includes such wide-ranging considerations as climate change, modern slavery, diversity, equity, and inclusion. Recent years have seen growing market and shareholder demand for businesses to implement and report on their ESG commitments and performance.

In response to this demand, companies are increasingly identifying, measuring, and disclosing ESG factors that are material to their operations. While in the past this disclosure was largely voluntary, recent years have seen many levels of government adopt ESG factors as part

[1] An earlier version of this article was published on BLG's Insights, see: www.blg.com/en/insights/2022/03/esg-claims-managing-risks-and-liabilities-for-canadian-businesses.

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To learn more about how to structure and define your businesses ESG claims, or for additional questions about how ESG impacts value and investor decisions, please reach out to any of the authors.

of their mandatory reporting requirements, which has inevitably led to an expanded risk of litigation and other attempts to hold companies accountable for their claims.

ESG LITIGATION

ESG litigation and regulatory risks generally fall into two broad categories. The first category includes allegations of false ESG claims or misrepresentations in a company's ESG disclosure. Companies risk both regulatory action and consumer- or investor-led class actions related to alleged misrepresentations.[2] The second category of litigation risk includes claims directly challenging a company's ESG-related conduct or perceived lapses in ESG action. Recent trends in Canada, and globally, include attempts to hold companies accountable for conduct by suppliers or subsidiaries in foreign jurisdictions[3] and subject companies to litigation for the contribution of their greenhouse gas emissions to climate change.[4]

Even if a company can successfully defend a claim on the merits, being forced to defend an ESG record can be costly and lead to reputational harm. Historically, many ESG programs and reports have had little legal oversight or input. To manage the risk of litigation and regulatory or administrative sanctions, businesses should proactively involve experienced legal assistance to review how they are addressing ESG issues while guarding against overstating their commitments and actions.

KEY CONSIDERATIONS

1. Consider the risks of proxy disputes from inaction on ESG

Failure to take sufficient action on ESG matters can risk proxy contests and harm to a company's business.

The recent proxy contest between ExxonMobil and Engine No. 1 demonstrates the growing power of ESG to alter even the largest of public companies.[5] In May 2021, Engine No. 1, an activist hedge fund with only 0.02 per cent ownership in ExxonMobil, argued that there were shortcomings in oil and gas experience on ExxonMobil's board, slow strategic transitioning to a low carbon economy, and historic underperformance and overleverage relative to peers. Engine No. 1 proposed four board director candidates, three of whom were elected to the 12-member board, ousting three sitting board members. Engine No. 1's campaign gained the support of three large investors in ExxonMobil — Vanguard, BlackRock, and State Street.

Engine No. 1's success within ExxonMobil may be a harbinger of things to come for Canadian public companies, particularly those in natural resources sectors. Large institutional investors in Canada are increasingly expecting businesses to take action on ESG matters. On November 25, 2020, CEOs of eight Canadian pension plan investment managers, representing approximately $1.6 trillion of assets under management, issued a joint statement calling on companies to measure and disclose their performance on material and industry-relevant ESG factors.

Two leading proxy advisory firms, Glass Lewis and Institutional Shareholders Services (ISS), have publicly stated they may recommend

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[2] See discussion of the Competition Bureau of Canada's (**Competition Bureau**) recent settlement with Keurig Canada Inc. (**Keurig**), discussed below; Competition Bureau Canada, News Release, "Keurig Canada to pay $3 million penalty to settle Competition Bureau's concerns over coffee pod recycling claims" (6 January 2022), online: <www.canada.ca/en/competition-bureau/news/2022/01/keurig-canada-to-pay-3-million-penalty-to-settle-competition-bureaus-concerns-over-coffee-pod-recycling-claims.html>.

[3] See *Garcia v Tahoe Resources Inc.*, 2017 BCCA 39 [*Garcia*] and *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 [*Nevsun*]. Both *Garcia* and *Nevsun* were settled before any decisions on their merits.

[4] The Hague District Court, Hague, 26 May 2021, *Milieudefensie et al. v Royal Dutch Shell PLC*, (2021), ECLI:NL:RBDHA:2021:5339 (Netherlands) [*Milieudefensie*].

[5] Rusty O'Kelley & Andrew Droste, "Why ExxonMobil's Proxy Contest Loss is a Wakeup Call for all Boards", *Harvard Law School Forum on Corporate Governance* (5 July 2021), online: <corpgov.law.harvard.edu/2021/07/05/why-exxonmobils-proxy-contest-loss-is-a-wakeup-call-for-all-boards/>.

voting against certain board members if a company does not adequately address or disclose ESG matters. As outlined in their 2022 Policy guidelines, Glass Lewis will "generally recommend" voting against the governance chair of a company in the S&P/TSX 60 index that does not to their satisfaction provide clear disclosure concerning board-level oversight afforded to environmental and/or social issues. Likewise, ISS has stated that under "extraordinary circumstances" it will recommend voting against or withholding a vote for directors, committee members, or an entire board where there has been demonstrably poor risk oversight of environmental and social issues, including expressly climate change. Considering the guarded language used in these policy guidelines (*i.e.*, "generally recommend" and "extraordinary circumstances"), there is a considerable grey area as to if, and when, they will be invoked. Nevertheless, the guidelines signify a shift and increased consideration of ESG by institutional advisors.

2. Understand applicable mandatory reporting requirements

Mandatory legal obligations to disclose information relating to ESG already apply to many Canadian businesses, and new disclosure obligations are forthcoming. It is imperative that businesses be aware of and understand these requirements, as failure to abide by them can result in enforcement and other sanctions.

For example, under Canadian securities legislation and instruments, reporting issuers must disclose material information in their continuous disclosure documents and in other contexts.[6] Environmental, social, and governance factors may already be material to an issuer, and may also be subject to specific existing or forthcoming disclosure obligations. In response to the public company accounting crisis of 2002 and 2003, modern corporate governance rules and practices were developed and implemented. In the United States, the *Sarbanes-Oxley Act* was introduced, and in Canada, provincial securities regulators adopted a series of national instruments and policies including National Policy 58-201 — Corporate Governance Guidelines and National Instrument 58-101 — Disclosure of Corporate Governance Practices.

In the environmental sphere, the Canadian Securities Administrators (CSA) have released guidance on how issuers can determine what environmental and climate change information is material.[7] The CSA have also published a proposed National Instrument 51-107 *Disclosure of Climate-related Matters* (Proposed Instrument) and a companion policy for a 90-day comment period. The Proposed Instrument would require some reporting issuers to disclose climate-related information in compliance with the Task Force on Climate-related Financial Disclosures (TCFD) recommendations, with some modifications. The Proposed Instrument is generally in line with initiatives of market regulators in other jurisdictions such as the United States, the European Union, Hong Kong, the United Kingdom, and New Zealand.[8]

Of relevance to the social and governance factors, public companies existing under the *Canada Business Corporations Act*, RSC 1985, c C-44 (*CBCA*) must provide to shareholders information respecting diversity among the directors and members of senior management.[9] This goes well beyond the current diversity disclosure requirements regarding women on boards under National Instrument 58-101 and Form 58-101F1. Forthcoming amendments to the *CBCA* will require disclosure relating to senior management compensation and

[6] See e.g. National Instrument 51-102 – Continuous Disclosure Obligations; *Securities Act*, RSBC 1996, c 418, s 85; *Securities Act*, RSA 2000, c S-4, s 146; and *Securities Act*, RSO 1990, c S.5, s 75.

[7] Canadian Securities Administrators, "CSA Staff Notice 51-333: Environmental Reporting Guidance" (27 October 2010), online (pdf): <www.osc.ca/sites/default/files/pdfs/irps/csa_20101027_51-333_environmental-reporting.pdf>; Canadian Securities Administrators, "CSA Staff Notice 51-358: Reporting of Climate Change-related Risks" (1 August 2019), online (pdf): <www.bcsc.bc.ca/-/media/PWS/Resources/Securities_Law/Policies/Policy5/51358-CSA-Staff-Notice-August-1-2019.pdf>.

[8] International Orgaization of Securities Commissions, "Report on Sustainability-related Issuer Disclosures – Final Report" (28 June 2021), online (pdf): <www.iosco.org/library/pubdocs/pdf/IOSCOPD678.pdf>.

[9] *CBCA*, s 172.1; *Canada Business Corporations Regulations, 2001*, SOR/2001-512, s 72.2.

the well-being of employees, retirees, and pensioners.[10]

ESG-related disclosure guidance has advanced rapidly in the investment fund industry over the past year. In November 2021, the CFA Institute released its Global ESG Disclosure Standards for Investment Products — the first voluntary global standards governing disclosure about how investment managers consider ESG issues in the objectives, investment process, and stewardship activities of their products. BLG provided a more detailed analysis of the standards, which are to help stakeholders better understand, compare and evaluate ESG investment products in a previous article. Soon after, on January 19, 2022, the CSA issued Staff Notice 81-334: ESG-Related Investment Fund Disclosure, which sets out the CSA's suggested best practices to enhance ESG-related fund disclosure and sales communications.

In Quebec, the Autorité des marchés financiers published a notice highlighting how existing disclosure obligations on reporting issuers may be applied to disclose issues of modern slavery.[11] On a national basis, Bill S-216, An *Act to enact the Modern Slavery Act and to amend the Customs Tariff* passed second reading in the Senate on March 30, 2021. If enacted, the Bill will mandate certain entities to report on the measures taken to prevent and reduce the risk that forced labour or child labour is used in any step in the production of goods in Canada or goods imported into Canada. The Bill mirrors similar mandatory reporting regimes in place in Australia[12] and the UK.[13]

Businesses involved in import and export must be aware of the mandatory restrictions regarding forced labour and importation. Under article 23.1 of the Canada-United States-Mexico Agreement, the importation of goods produced in whole or in part by forced labour is prohibited. In Canada, this is implemented by CBSA Memorandum D9-1-6, as well as targeted measures published by Global Affairs Canada for goods originating in China's Xinjiang province. Under these provisions, importers must carry out due diligence on imported goods, in line with the UN Guiding Principles on Business and Human Rights (UNGPs) or the OECD Guidelines for Multinational Enterprises. For Xinjiang-origin goods, importers who wish to receive services and support from the Trade Commissioner Service of Global Affairs Canada must sign an integrity declaration. The new customs controls could well lead to disputes with the CBSA and litigation at the Canadian International Trade Tribunal.

Although the Canadian measures are still new, similar measures in the United States have been in force since 2015. As of now, there are 53 active Withhold Release Orders in force in the United States relating to forced labour.[14] Some of these Withhold Release Orders are far-reaching. For example, one applies to "All…products produced in whole or in part with Turkmenistan cotton". As the Canadian practices develop, they may track developments south of the border.

Businesses should seek experienced legal assistance to make sure they stay on top of new and developing mandatory disclosure obligations.

3. Choose appropriate frameworks to measure and voluntarily report ESG

Strong ESG performance is valued by many shareholders and consumers, and can be a way to differentiate your brand.[15]

There are good reasons to consider voluntary ESG disclosures beyond what may be required by regulation. Companies should routinely audit and revise their ESG frameworks to ensure

[10] *Budget Implementation Act, 2019, No. 1*, SC 2019, c 29, s 143(3).

[11] Autorité des marchés financiers, "Notice relating to modern slavery disclosure requirements" (4 September 2018), online (pdf): <lautorite.qc.ca/fileadmin/lautorite/reglementation/valeurs-mobilieres/0-avis-amf/2018/2018sept04-avis_esclavage_moderne-en.pdf>.

[12] *Modern Slavery Act 2018* (Cth), 2018/153.

[13] *Modern Slavery Act 2015* (UK).

[14] United States Customs and Border Protection, "Withhold Release Orders and Findings List" (last modified 14 February 2022), online: <www.cbp.gov/trade/forced-labor/withhold-release-orders-and-findings?language_content_entity=en>.

[15] See discussion in ESG best practices and lessons learned from the 2021 legal summit.

that they are up to date with their operations and ever-evolving industry best practices.

To help mitigate the risk of voluntary ESG disclosures, a company should carefully consider the framework it uses to measure and report ESG factors. Following industry best practices in ESG disclosure may support a company's claims that it acted with due diligence or met the appropriate standard of care in making ESG statements.

Businesses should be familiar with and consider adopting respected ESG disclosure standards and frameworks. The TCFD recommendations, Carbon Disclosure Project, and the Climate Disclosure Standards Board provide various frameworks for companies to report environmental and climate change-related information.[16] The Global Reporting Initiative provides standards to measure social and governance issues, in addition to environmental factors. The UNGPs, and the OECD Guidelines for Multinational Enterprises, provide internationally-recognized due diligence frameworks for human rights and social issues. The IFRS International Sustainability Standards Board, Value Reporting Foundation, and UN Sustainable Development Goals are other sources of respected ESG framework standards.[17]

With growing interest in ESG reporting, we can expect best practices to evolve, with possible convergence towards more unified global standards. In September 2020, five established framework and standard-setting institutions committed to working towards a comprehensive corporate reporting system that could complement financial generally accepted accounting principles. In June 2021, the Internal Integrated Reporting Council and the Sustainability Accounting Standards Board merged to form the Value Reporting Foundation, which now oversees the development of integrated reporting frameworks and industry-specific ESG standards and metrics. By June 2022, the Climate Disclosure Standards Board and the Value Reporting Foundation will be consolidating into the IFRS International Sustainability Standards Board.

A business should first consider its audience and then determine the appropriate disclosure framework for that audience. For example, if investors are the intended audience for ESG disclosure, a business may wish to choose a framework that is oriented towards financial materiality and risk, such as the SASB Standards published by the Value Reporting Foundation. On the other hand, if ESG disclosure is intended for stakeholders beyond investors, broader standards such as the Global Reporting Initiative or the UN Sustainable Development Goals may be apt. In selecting an appropriate disclosure framework, businesses should identify the ESG factors that present the most significant risks and opportunities to the issuer over the short, medium, and long term. This will involve consideration of the company's operations, supply chain, and broader industry trends.

4. Ensure the accuracy of ESG statements

Globally there has been increased regulatory action and litigation related to false or misleading ESG claims. In recent years, regulators in the United States and Canada have been actively pursuing companies for alleged misstatements and deceptive claims.

For example, the Attorney General of New York brought a lawsuit against ExxonMobil, alleging that Exxon Mobil was publishing a misleading proxy cost of carbon. The lawsuit was dismissed, but a similar case brought by the Massachusetts Attorney General and shareholders continues to proceed.[18] In California, then-Attorney General Kamala Harris brought "greenwashing" lawsuits against companies for alleged misrepresentations about products being recyclable. Private parties in the United States and internationally are now filing greenwashing lawsuits of their own against

[16] To be combined with the Value Reporting Foundation into the IRFS' International Sustainability Standards Board by June 2022.

[17] To be combined with the Climate Disclosure Standards Board into the IRFS' International Sustainability Standards Board by June 2022.

[18] See also Attorney General's Office Lawsuit Against ExxonMobil.

companies.[19] Canadian businesses would be well advised to review their ESG disclosures with these legal trends in mind.

Under Canadian securities legislation, issuers that make misrepresentations may be subject to legislative provisions regarding forward-looking information and civil liability for secondary market disclosure. The CSA, including the Ontario Securities Commission and British Columbia Securities Commission, recently conducted desk reviews or "sweeps" of ESG practices and claims of select investment fund managers, portfolio managers, and exempt market dealers identified as participants in ESG investing. This follows a similar review by the United States Securities and Exchange Commission.

Under the Canadian *Competition Act*, RSC 1985, c C-34, and provincial consumer protection laws, businesses can face regulatory action and civil liability for false, misleading, or deceptive ESG claims. The Competition Bureau has been active in investigating and imposing fines for false or misleading environmental claims. The Competition Bureau recently settled with Keurig respecting false or misleading claims about the recyclability of single-use Keurig K-Cup pods. As part of the settlement, Keurig agreed to pay a $3 million penalty, donate $800,000 to a charitable organization focused on environmental causes, pay $85,000 for the Bureau's costs of investigation, change its claims and packaging, publish corrective notices, and enhance its corporate compliance program.

As another example, in November 2021, Greenpeace Canada filed a complaint with the Competition Bureau concerning Shell Canada's Drive Carbon Neutral program, arguing that the claims made by Shell under the "program" constituted "greenwashing". The Competition Bureau has yet to make a determination on Greenpeace Canada's complaint.

In addition to regulatory action, companies that make ESG claims may find themselves subject to private litigation, including proposed class proceedings. For example, carmakers have been subject to class proceedings in Canada and other jurisdictions arising from environmental statements about emissions from diesel vehicle engines. These class proceedings against carmakers have generally included allegations of breaches of the *Competition Act*, consumer protection legislation, negligence, and unjust enrichment. Public companies in the United States have also faced litigation from investors alleging misrepresentations in ESG-related statements. It is highly likely that Canada will soon see its own class actions based on alleged prospectus misrepresentation or secondary market representation claims.

In making public statements and prospectus disclosures about ESG factors companies must ensure that these statements do not contain misrepresentations or contradict other disclosures. Where possible, ESG disclosures should be relevant to the specific entity, measurable, and grounded in verifiable data, while adding any necessary caveats. To reduce the risk of misstatements or inconsistent statements, boards and management should have a robust process for reviewing and approving ESG disclosure prior to its public release. A robust legal review is also advisable.

5. Be ready to defend your ESG-related performance, at home and abroad

In addition to litigation and regulatory action based on allegedly false or misleading ESG statements, there is an increasing international trend towards litigation targeting companies' ESG-related performance, or perceived lack thereof.

Canadian companies have faced lawsuits alleging negligence or misconduct by subsidiaries and suppliers in foreign jurisdictions. For the most part, these lawsuits have been unsuccessful to date. For example, in *Das v George Weston Limited*, 2018 ONCA 1053, the Ontario Court of Appeal upheld the rejection of a proposed class action brought in Ontario related to the collapse of a building in Bangladesh. One of the businesses operating in the building was a sub-supplier that was producing garments for a Canadian clothing retailer at the time. In rejecting the proposed class action, Justice Perell of the Ontario Superior Court of Justice stated, "…[T]he imposition of liability is unfair given that the Defendants are not responsible for the

[19] One example includes *Smith v Keurig Green Mountain, Inc.* Case No. 4:18-cv-06690 (ND Cal 2019). The parties in this case recently reached an agreement in principle to resolve all claims raised by the plaintiff and class.

vulnerability of the plaintiffs, did not create the dangerous workplace, had no control over the circumstances that were dangerous, and had no control over the employers or employees or other occupants of Rana Plaza".[20]

Claims relating to alleged human rights abuses abroad have seen some limited success, at least at a preliminary stage. For example, in *Garcia*, the British Columbia Court of Appeal overturned the stay of a claim against Tahoe Resources in British Columbia based on the alleged actions of private security personnel employed by a mine in Guatemala owned by one of its subsidiaries. Similarly, in the earlier case of *Choc v Hudbay Minerals Inc.*, 2013 ONSC 1414, the Ontario Superior Court of Justice refused to dismiss a claim based on similar facts. In *Nevsun*, three Eritrean workers brought a claim against Nevsun Resources in British Columbia alleging they were conscripted into forced labour at a mine owned and operated by an Eritrean corporation of which Nevsun was 60 per cent owner. Although, as in *Garcia*, the case settled prior to any decision on its merits, the Supreme Court of Canada in *Nevsun* confirmed that parent companies can be held liable for breaches of customary international law for actions of their subsidiaries abroad.

In other jurisdictions, companies have been subject to litigation endeavouring to hold them liable for the climate-change impacts of their greenhouse gas emissions. In the United States, these efforts have been unsuccessful to date, although that has not stopped plaintiffs from trying to bring new and creative claims.[21] Very recently, in *Milieudefensie*, the Hague District Court ordered Royal Dutch Shell PLC (Shell) to reduce CO_2 emissions of the Shell group by 45 per cent in 2030, compared to 2019 levels.[22] This case is also noteworthy for its application of the UNGPs, which it referred to as "an authoritative and internationally endorsed 'soft law' instrument", and found that they were "suitable as a guideline in the interpretation of the unwritten standard of care".[23] Given the status of the UNGPs as a benchmark for human rights and ESG due diligence, it is possible that similar reasoning could be adopted by a common law court in formulating the standard of care in negligence.

Businesses in the garment, mining, and oil and gas sectors should also be aware of the possibility of a complaint being made to the Canadian Ombudsperson for Responsible Enterprise (CORE). The CORE has a mandate to review human rights complaints about Canadian companies operating abroad, make findings about their conduct, and make recommendations to the Minister for International Trade and the company concerned. This can result in the loss of trade support services, as well as reputational losses where reports are published.

Finally, directors and officers in corporations incorporated under the *CBCA* may face increased pressure from investors and other stakeholders to consider ESG factors in exercising their powers and discharging their duties on behalf of the corporation. In 2019, Parliament enacted s. 122(1.1) of the *CBCA* to permit directors and officers to consider the interests of various stakeholders, the environment, and the long-term interests of the corporation when acting with a view to the best interests of the corporation. These amendments codify some of the principles relating to directors' duties set out in *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69. While the factors in s. 122(1.1) may not be mandatory, directors and officers may need to consider taking these factors into account

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[20] 2017 ONSC 4129, at para 457. Borden Ladner Gervais LLP was counsel to George Weston Limited, Loblaws Companies Limited, Loblaws Inc., and Joe Fresh Apparel Canada Inc. before the Ontario Superior Court of Justice, the Ontario Court of Appeal, and in responding to an application for leave to appeal to the Supreme Court of Canada, which was denied. While Justice Perell held that the claim could not succeed under the law of either Bangladesh or Ontario, the Ontario Court of Appeal held that the law of Bangladesh applied and that the claim could not succeed under that law. The Court did not have to decide whether the claim would have been viable under the law of Ontario.

[21] *Native Village of Kivalina v ExxonMobil Corp*, 696 F.3d 849 (9th Cir 2012); See also in New Zealand, *Smith v Fonterra Co-Operative Group Limited*, [2020] NZHC 419.

[22] In a public statement on July 20, 2021, Shell stated that it plans to appeal the Hague District Court's decision; Royal Dutch Shell plc, "Shell confirms decision to appeal court ruling in Netherlands climate case" (20 July 2021), online: <www.shell.com/media/news-and-media-releases/2021/shell-confirms-decision-to-appeal-court-ruling-in-netherlands-climate-case.html>.

[23] *Milieudefensie*, *supra* note 4 at para. 4.4.11.

when exercising their fiduciary duties or risk allegations they have breached those duties.

Subsection 122(1.1) of the *CBCA* may represent a stepping stone towards a future statutory duty to consider ESG-related factors, as has occurred for directors in the United Kingdom.[24] In Canada, some companies may already voluntarily choose to mandate consideration of ESG factors in their operations. Companies that choose to achieve "B Corporation" certification are required to amend their articles to include a requirement that directors consider factors that mirror the ones listed in s. 122(1.1) of the *CBCA*. Similarly, benefit companies under the British Columbia *Business Corporations Act*, SBC 2002, c 57, must include in their articles a commitment to conduct their business in a "responsible and sustainable manner", which is a defined term under the Act. Although "B Corporation" and "benefit company" status are voluntary, they may raise investor expectations for other companies.

This trend towards increasing attempts to hold companies liable for their ESG-related performance is likely to continue. Canadian businesses should be prepared to defend their environmental, social, and governance actions, at home and abroad.

6. Don't let your ESG Disclosure be used against you

Even where ESG-related statements are accurate, they may be used as evidence in litigation about whether a company has fulfilled its legal obligations.

For example, in *Milieudefensie*, discussed above, the Hague District Court referred to Shell's environmental commitments and public statements as evidence that Shell had not taken sufficient steps to meet its unwritten standard of care under the Dutch Civil Code. In *Das v George Weston Limited*, also discussed above, the plaintiffs relied on the company's voluntarily-adopted Corporate Social Responsibility Standards, incorporated into its Supplier Code of Conduct, to argue that the company should be held responsible for its suppliers' actions in Bangladesh. Although unsuccessful, it serves as a warning that a company's ESG promises and commitments may be scrutinized by courts when determining whether the company should be held legally responsible for alleged misconduct.

Recent case law in Canada and the United Kingdom suggests that public ESG statements may provide a basis for plaintiffs to bypass the "corporate veil" and sue a parent company directly for the actions of its subsidiaries. If a parent company is sued for the actions of subsidiaries abroad, it should be familiar with the substantive laws of the foreign jurisdiction, which may apply in tort claims brought in Canada.

In *Choc v Hudbay Minerals Inc.*, the plaintiffs alleged that security personnel working for a Canadian parent company's subsidiaries committed human rights abuses in Guatemala. The parent company had made public statements about its adoption of the *Voluntary Principles on Security and Human Rights* and implementation of these principles for its personnel and contractors in Guatemala. The Ontario Superior Court of Justice considered these public statements, among other factors, to indicate a relationship of proximity between the defendants and the plaintiffs. The case has not been decided on the merits, but the Court allowed the plaintiffs' claims in negligence to proceed.

Two recent decisions by the United Kingdom Supreme Court confirm the trend towards ESG statements as providing some basis for liability of parent companies. In *Vedanta Resources PLC & Anor v Lungowe & Ors*, [2019] UKSC 20 (*Vedanta*), and *Okpabi & Ors v Royal Dutch Shell Plc & Anor* [2021] UKSC 3 (*Okpabi*), the plaintiffs sued parent companies based in the United Kingdom for the actions of subsidiaries in Zambia and Nigeria, respectively. To connect the defendants to alleged harms abroad, the plaintiffs in each case pointed to published statements and policies of the parent companies.

In both *Vedanta* and *Okpabi*, the United Kingdom Supreme Court allowed the plaintiffs' claims to proceed to trial. The Court held that the liability of parent companies to third parties affected by subsidiaries in foreign jurisdictions is to be determined by the ordinary, general principles of tort. A parent company may owe a duty of care to third parties where, in published

[24] See *Companies Act 2006* (UK), s 172.

materials, it holds itself out as exercising a particular degree of supervision and control of its subsidiaries, even if it does not in fact do so. Neither case has been decided on its merits, but the Ontario Court of Appeal has already cited *Vedanta* and *Okpabi* in considering potential liability in tort for parent companies.[25]

In light of plaintiffs using companies' ESG statements and commitments in court in an attempt to base liability for corporate actions or inaction, **Canadian businesses should be particularly careful to scrutinize their ESG disclosure to ensure it aligns with their operations**. Similar to the auditing of due diligence programs, an early legal review of ESG disclosure may be beneficial.

CONCLUSION

Businesses need to think critically about the accuracy and structure of their ESG claims to protect against possible legal challenges and regulatory action. Businesses should clearly define the scope of their commitments to ESG, while ensuring they meet legal obligations and market expectations for disclosure. Companies should also review their insurance policies to determine whether ESG-related claims are covered.

Heightened awareness of the importance of ESG brings many benefits, but businesses will need to navigate new dimensions of legal liability and litigation risk. Experienced legal counsel can help businesses to do this with confidence. ■

[25] *Avedian v Enbridge Gas Distribution Inc. (Enbridge Gas Distribution)*, 2021 ONCA 361 at para 19. In *Das*, issued before the United Kingdom Supreme Court's decisions, the Ontario Court of Appeal cited the lower court decisions in *Vendanta* and *Okpabi*.

A ROADMAP FOR TRADE-LAW-COMPLIANT BORDER CARBON ADJUSTMENTS[1]

*Neil Campbell, William Pellerin and Tayler Farrell**

Interest in Border Carbon Adjustments (BCAs) is accelerating. The European Union proposed a Carbon Border Adjustment Mechanism (CBAM) last July,[2] Canada concluded consultations on BCAs last February,[3] the recent US-EU sustainable steel announcement indicates carbon content may be incorporated into trade measures,[4] and BCAs are expected to be discussed at the World Trade Organization's Ministerial Conference that begins Sunday.[5] Positive comments in the Ministerial Statement would be an important step forward for global climate protection.

BCAs are taxes or charges imposed on goods from nations that have less rigorous emission requirements.

They are complex, and must comply with the General Agreement on Tariffs and Trade or risk being challenged at the WTO. A trade-law-compliant BCA must provide national treatment (imports treated no less favourably than domestic goods), and most favoured nation (MFN) treatment (equal treatment of imports from all WTO countries), or meet the criteria for an exception from these GATT requirements.

Here are some pathways to a compliant BCA.

1. Domestic Carbon Regulation is the Point of Departure

Countries that regulate carbon emissions risk placing their producers at a disadvantage. A tax or charge can ensure that imported products include a cost of carbon that is comparable to domestic producers' costs, creating a level playing field. Any nation implementing a BCA needs a

[1] An earlier version of this article was published on CD Howe Institute's Intelligence Memos, see: https://www.cdhowe.org/intelligence-memos/campbell-pellerin-farrell-roadmap-trade-law-compliant-border-carbon-adjustments. To send a comment or leave feedback, email us at blog@cdhowe.org.

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The views expressed here are those of the authors. The C.D. Howe Institute does not take corporate positions on policy matters.

[2] Neil Campbell, Talia Gordner & Lisa Page, "Leveling the Playing Field: EU First Out of the Gate with Proposed Carbon Border Adjustment Mechanism" (11 August 2021), online: *McMillan* <mcmillan.ca/insights/leveling-the-playing-field-eu-first-out-of-the-gate-with-proposed-carbon-border-adjustment-mechanism/>.

[3] Neil Campbell, Talia Gordner & Lisa Page, "Greening Canadian Borders – Canada Considers Border Carbon Adjustments for Carbon-Intensive Imports" (6 July 2021), online: *McMillan* <mcmillan.ca/insights/greening-canadian-borders-canada-considers-border-carbon-adjustments-for-carbon-intensive-imports/>.

[4] Office of the United States Trade Representative, "Joint US-EU Statement on Trade in Steel and Aluminum" (31 October 2021), online: *USTR* <ustr.gov/about-us/policy-offices/press-office/press-releases/2021/october/joint-us-eu-statement-trade-steel-and-aluminum>.

[5] World Trade Organization, Committee on Trade and Environment, "Report of the Meeting Held on 23 June 2021", (3 August 2021), online (pdf): *WTO* <docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/CTE/M72.pdf&Open=True>.

domestic regulatory framework against which to adjust the price of carbon-intensive products as they cross the border. BCAs will be most feasible where there is a clear domestic cost for carbon (e.g., a price per tonne of CO_2 emissions).

For example, the EU's emissions trading system has a market-determined CO_2 emission price.[6] Its CBAM imposes a charge on imports linked to their embedded carbon emissions and trading system prices.

2. Regulatory Framework

A BCA must meet national treatment and other GATT requirements for taxes or regulatory charges.[7] Two key challenges are the treatment of exporters' home country carbon costs and any free allocations provided to domestic producers.

BCAs will likely need to account for foreign climate regimes by reducing charges on imports based on carbon payments made in the country of export, as the CBAM does.[8] Otherwise, exporters would be charged for carbon emissions to produce their products, and charged again for such emissions through any BCA.

Many climate regimes provide free emission allowances to reduce "carbon leakage" (migration of production to low-emission jurisdictions).[9] Where this occurs, charging imported products at the full carbon price would raise national treatment issues, an issue the EU is addressing by phasing out free allocations.[10]

3. Most-Favoured Nation Treatment

The GATT requires a country imposing taxes or regulatory charges on imports to treat the products of all exporting countries as favourably as it treats the goods from its most favoured nation.[11]

This obligation poses an issue for products originating from countries with different climate policies.

If a BCA is set without regard to exporters' home country carbon charges, there would be no formal discrimination in the charge itself; however, there would be substantive discrimination against countries that already impose carbon regulatory costs on their exporters. Conversely, if a BCA accounts for exporters' home-country carbon costs, this would avoid discrimination on total CO_2 emission charges between WTO members, but would result in exporters from low carbon cost countries paying higher BCA amounts than those with high carbon costs.

While BCA charges that vary based on the embedded carbon content of imports from different countries may be challenged based on some historical jurisprudence, we believe they should be defensible under a purposive application of the MFN obligation because the combination of the charges imposed in the home jurisdiction plus the BCA would be the same for all exporting countries.

4. The Article XX Exceptions

BCAs that do not meet national treatment or MFN Treatment requirements might be defended using general exceptions in GATT Article XX:[12] measures "necessary for the

[6] European Parliament, "Review of the EU ETS 'Fit for 55' package" (2022), online (pdf): <www.europarl.europa.eu/RegData/etudes/BRIE/2022/698890/EPRS_BRI(2022)698890_EN.pdf>.

[7] World Trade Organization, "Part II – Article III – National Treatment on Internal Taxation and Regulation", online (pdf): *WTO* <www.wto.org/english/res_e/booksp_e/gatt_ai_e/art3_e.pdf>.

[8] Jean-Marie Paugam, "DDG Paugam: WTO rules no barrier to ambitious environmental policies" (16 September 2021), online: *WTO* <www.wto.org/english/news_e/news21_e/ddgjp_16sep21_e.htm>.

[9] European Court of Auditors, "The EU's Emissions Trading System: free allocation of allowances needed better targeting" (2020), online (pdf): *Publication Office of the European Union* <www.eca.europa.eu/Lists/ECADocuments/SR20_18/SR_EU-ETS_EN.pdf>.

[10] European Commission, "Revision for phase 4 (2021-2030)" (last accessed 23 June 2022), online: <ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets/revision-phase-4-2021-2030_en>.

[11] World Trade Organization, *supra* note 7.

[12] World Trade Organization, "Article XX – General Exceptions", online (pdf): *WTO* <www.wto.org/english/res_e/booksp_e/gatt_ai_e/art20_e.pdf>.

protection of human, animal or plant life or health," or "relating to the conservation of exhaustible natural resources."

The implementation of the measure must not operate in a way that unfairly restricts international trade. Any discrimination must also be rationally related to the policy objective.[13] For example, if adjustments for home-country carbon pricing were found to contravene the MFN obligation, they would be good candidates for an exception because consideration of home-country carbon costs would be consistent with the objective of reducing carbon emissions globally.

5. Concluding Observations

Export-oriented countries with weak commitment to greenhouse gas reduction may well challenge BCAs at the WTO. Despite Appellate Body gridlock, panels can hear such disputes and the Multi-Party Interim Appeal Arrangement is available among participating countries.[14]

In our view, WTO-compliant BCAs are achievable without, or if need be with, recourse to the Article XX exceptions. As more countries enact BCAs, the incentives for remaining jurisdictions to address emissions will increase as the number of markets in which they benefit from an unlevel playing field decline. ■

[13] World Trade Organization, "European Communities – Measures Prohibiting the Importation and Marketing of Seal Products" (22 May 2014), online (pdf): *WTO* <docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/400ABR.pdf&Open=True>.

[14] "Multi-Party Interim Appeal Arbitration Arrangement (MPIA)" (last accessed 23 June 2022), online: *WTO Pluritaletrals* <wtoplurilaterals.info/plural_initiative/the-mpia/>.

NEW TECHNOLOGY AND CANADIAN ENERGY REGULATORS

Canadian Gas Association

OVERVIEW

Canada has made new commitments to reduce GHG emissions by 2030 and 2050. Significant public sector funding has been offered to assist in achieving Canada's goals. New forms of regulatory intervention will be required to integrate new technologies into regulated utility systems — both for natural gas and electricity. In 2020, energy regulators in Nova Scotia, Ontario, and British Columbia for the first time grappled with this problem. On June 25, 2021, the Canadian Gas Association hosted a webinar centered on the role of regulators and legislators who in the pursuit of a lower emission future examined the opportunities and challenges these new cases create and the changes in practice and procedure that may be necessary in the future.

MODERATOR

Gordon Kaiser
First Canadian Chambers, Toronto

Gordon Kaiser is Counsel in energy and competition law practising in Toronto and Calgary.

He is a former vice chair of the Ontario Energy Board and a former Market Surveillance Administrator in Alberta. Prior to that he was a partner in a national law firm where he appeared in the courts of five provinces , the Federal Court of Appeal and the Supreme Court of Canada.

Gordon has advised the Alberta Utility Commission and the Ontario Independent Electricity System Operator (IESO) on settlements under the Electricity Act and the Attorney General of Canada on settlements under the Competition Act. He has acted in disputes dealing with transmission and pipeline facilities, power purchase agreements, gas supply contracts, and wind and solar contracts. He is the editor of Energy Law and Policy and The Guide to Energy Arbitration. For one year Gordon was Visiting Professor in Law and Economics at the University of Toronto Faculty of law. He is currently Co-Chair of the Canadian Energy Law Forum, Editor of the Energy Regulation Quarterly and President of the Canadian Chapter of The Energy Bar Association.

THE PANEL

Peter Gurnham
Former Chair
Nova Scotia Utilities and Review Board

Peter was appointed as a Member of the Nova Scotia Utility and Review Board on June 5, 2003 and then as Chair on October 23, 2004, retiring on March 1, 2022.

Peter holds bachelor's degrees in Economics and Law from Dalhousie University in Halifax and was appointed as a Queen's Counsel in 1998. Prior to his appointment to the Board, he practiced

law for 27 years with a regional Atlantic Canada law firm (Cox & Palmer), where he specialized in administrative and regulatory law, and was managing partner for nine years. He also had an active municipal and planning law practice. He is a Past Chair of CAMPUT: Canada's Energy and Utility Regulators. He is a frequent speaker at conferences and seminars and is former Co-Chair of the annual Energy Regulation Course sponsored by CAMPUT at Queens University.

Peter has been active in many community and charitable groups and is a recipient of several awards in recognition of service to community.

Joseph T. Kelliher
Former Chair
Federal Energy Regulatory Commission

Joe Kelliher is the former executive vice president for federal regulatory affairs for NextEra Energy Inc. As executive vice president, Kelliher was responsible for managing regulatory issues for NextEra's two principal subsidiaries, NextEra Energy Resources and Florida Power & Light Co. before federal agencies.

From 2005 to 2009, he served as chairman of the Federal Energy Regulatory Commission (FERC), where he managed 1,400 employees and a $260 million annual budget. Among the highlights of his chairmanship was the efficient implementation of the Energy Policy Act of 2005, the largest expansion in FERC regulatory authority since the 1930s.

Kelliher has worked on energy policy matters in different capacities for the federal government and private sector. He holds a B.S. from Georgetown University's School of Foreign Service and a J.D. from The American University Washington College of Law.

David Morton
Chair and CEO
British Columbia Utilities Commission

David was appointed Chair and CEO of the BCUC in December 2015. David's responsibility is to deliver on the Vision of the BCUC — to be a trusted and respected regulator that contributes to the well-being and long-term interests of British Columbians. In addition, to being the Chair and CEO, he is also a Commissioner — a role he has had since 2010. He considers this to be a key part of his leadership role. As a result, he continues to participate, usually as the Panel Chair, in a number of key proceedings. A significant proceeding that he recently led is the Site C Inquiry — the largest proceeding ever undertaken by the BCUC.

David also has over 25 years of experience as a consultant in the information technology sector. He is a Professional Engineer in British Columbia, has a Licentiate in Accounting from the Society of Management Accountants Canada, is certified with the ICD.D designation in 2013 by the Institute of Corporate Directors and holds a Bachelor of Applied Science from the University of Toronto. David also serves as director for the Arts Club Theatre Company, and as President of the West Vancouver Community Arts Council.

A recording of the webinar can be accessed here: https://lawlectures.com/3-erq-the-video/ ■

SIXTEENTH ANNUAL CANADIAN ENERGY LAW FORUM 2022 PROGRAM

Gordon E. Kaiser

OVERVIEW

This program marks the 16th annual Canadian Energy Law Forum. Every year around 50 lawyers meet in a Canadian city to review the developments in energy regulation across Canada. The members of the Forum are legal counsel in different Canadian provinces that act for utilities, intervenors and regulators in proceedings before both energy regulators and the courts that review the regulatory decisions.

Today's program starts, as it always does, with the lecture by David Mullan Canada's leading authority on constitutional and administrative law. The Mullan annual lecture at the Forum is also published every year in this journal.

Following David is a panel on greenwashing that includes Adonis Yatchew at the University of Toronto, Joseph Kelleher, a former Chair of FERC in Washington, Carolyn Calwell, General Counsel at the Ontario Energy Board and Amanda Klein, General Counsel at Toronto Hydro. Misleading claims regarding carbon reduction is attracting a growing interest by regulators in both Canada and the United States The Securities Commissions in both countries are taking the lead but energy regulators will soon get involved whether they like it or not.

The second panel, which is chaired by Jonathan Liteplo at the BLG law firm in Calgary, deals with a very unique topic. That is the impact of the Covid virus on regulation within the energy sector. Like the courts regulators have had to live in the new Zoom life. More importantly they have had to make adjustments to filing requirements and hearing procedures. These have created some real challenges and debate.

Last but not least Katie Slipp, a partner with the Blakes law firm in Calgary, chairs a panel dealing with investments to promote green energy. Meeting Canadian climate change goals will require huge investments in new technology. That will create significant regulatory challenges for both the regulatory agencies and the lawyers that practice before them.

The last matter on the program marks a longstanding tradition at the Forum. For each of the last 15 years we have recognized the Energy Lawyer of the Year. One from the West and one from Eastern Canada. The award consists of unique Inuit sculpture of a grizzly bear. This recognition started in the very first Energy Law Forum held in Kelowna British Columbia. In those days there is only one bear. The award that year went to Neil McCrank QC, then Chair of the Alberta Utilities Commission.

This year we are pleased to announce that two senior members of the energy bar are being recognized. The first is Bruce Outhouse QC, a partner at Blois Nickerson firm in Halifax . Bruce for the last 35 years has acted as counsel to the Nova Scotia regulator. The Western Bear goes to Chris Sanderson QC, a partner at the Lawson Lundell law firm in Vancouver who practiced for 40 years before the British Columbia Utilities Commission.

This is the first time in the history of the Energy Law Forum that one of the Bears has gone to a lawyer on the Pacific coast while the second Bear went to a lawyer on the Atlantic coast. So much for the monopoly long enjoyed by Ontario and Alberta lawyers. In closing we must thank the sponsors of the grand Bear Dinner — the national law firms — Borden Ladner and Blakes.

Thursday, May 5, 2022

	Welcome Remarks
	Gordon Kaiser, Counsel & Arbitrator, Energy Law Chambers (Toronto, ON/Calgary, AB)
10:15 A.M. – 11:15 A.M. MT	**Recent Developments in Administrative Law**
	David Mullan, Professor Emeritus, Constitutional and Administrative Law, Queen's University (Kingston, ON)
11:15 A.M – 12:15 P.M. MT	**Greenwashing and Climate Disclosure Regulation Where are the Regulators?**
	Moderator: Gordon Kaiser, Counsel & Arbitrator, Energy Law Chambers (Toronto, ON/Calgary, AB)
	Adonis Yatchew, Professor of Economics, University of Toronto (Calgary, AB)
	Hon. Joseph Kelliher, Former FERC Chair (Washington, DC)
	Carolyn Calwell, General Counsel, Ontario Energy Board (Toronto, ON)
	Amanda Klein, General Counsel, Toronto Hydro (Toronto, ON)
12:15 P.M. – 1:00 P.M. MT	**Health Break**
1:00 P.M. – 2:00 P.M. MT	**Impacts of COVID Emergency Conditions on the Electricity Sector: "Actions Taken & Lessons Learned"**
	Moderator: Jonathan Liteplo, Partner, Borden Ladner Gervais LLP (Calgary, AB)
	Jennifer Addison, Senior VP, Sustainability, General Counsel & Corporate Secretary, EPCOR (Edmonton, AB)
	Paul Kwasnik, President & CEO, Brantford Power Inc. (Brantford, ON)
	Michael Millar, Legal Counsel, Ontario Energy Board (Toronto, ON)
2:00 P.M. – 3:00 P.M. MT	**Institutional Investment and the Drive to Energy Transition and Regulatory Change**
	Moderator: Katie Slipp, Partner, Blake, Cassels & Graydon LLP (Calgary, AB)
	Jackie Forrest, Executive Director, ARC Energy Research Institute (Calgary, AB)
	Gillian Barnett, Director, Legal and Regulatory Affairs (Markets and Operations), Alberta Electric System Operator (Calgary, AB)
	Tina Ackermans, Vice President Strategy & Corporate Development, Suncor Energy Inc. (Calgary, AB)
3:00 P.M. – 3:15 P.M. MT	**2022 Eastern Energy Bear Award**
	Bruce Outhouse, Q.C., Partner, Blois, Nickerson & Bryson LLP (Halifax, NS) | presented by Peter Gurnham (Retired)
3:15 P.M. – 3:30 P.M. MT	**2022 Western Energy Bear Award**
	Chris Sanderson, Q.C. (Retired) | presented by Lewis Manning, Senior Counsel, Lawson Lundell LLP (Calgary, AB)
3:30 P.M. MT	**Adjourn**

Program Committee

Co-Chairs: Gordon Kaiser, Jonathan Liteplo
J.Mark Rodger, Katie Slipp, Neil McCrank

THE PANEL

Tina Ackermans
Vice President Strategy & Corporate Development,
Suncor Energy Inc. (Calgary, AB)

Tina Ackermans is currently the Vice President of Strategy & Corporate Development at Suncor Energy. In this role, she works closely with the executive leadership team and is accountable for corporate and downstream strategies, manages corporate development and commercial work including merger, acquisition, and divestment activities, and oversees enterprise capital portfolio and economics. Tina also leads Suncor's Renewable Energy (wind and solar) business, accountable for asset operations and portfolio development of this business.

Over her 25-year career at Suncor, Tina has progressively taken on leadership roles in many different business units, including Retail, Direct Sales, Wholesale Operations, Lubricants, Supply Trading & Optimization, Renewable Energy, and Strategy, Integration and Development before assuming her current role. In addition to Tina's wealth of knowledge across the business, her strong leadership has enabled Tina to make a positive difference in each of her roles. She is a former member of Suncor's Inclusion and Diversity Council and sponsor of the Downstream Employee Workplace Inclusion Network and continues to be a champion for an inclusive workplace.

Tina holds a Bachelor of Commerce degree from Concordia University in Montreal and is also a graduate of the Ivey Management Program at Western University.

She is a former member of Canada's National Synchronized Swim Team. She retired from the sport after finishing just shy of qualifying for the 1996 Canadian Olympic team. She credits much of her philosophies about teamwork and coaching from her time in the sport.

Jennifer Addison
Senior VP, Sustainability, General Counsel & Corporate Secretary,
EPCOR (Edmonton, AB)

Jennifer Addison is SVP Sustainability, General Counsel and Corporate Secretary at EPCOR Utilities Inc., based in Edmonton, Alberta. Jennifer oversees the delivery of legal services for EPCOR, as well as compliance, ethics and privacy; public and government affairs; EPCOR's sustainability strategy; and supply chain management. As Corporate Secretary, Jennifer works closely with EPCOR's Board of Directors. She is Vice Chair of the board of Edmonton's Citadel Theatre, and serves on the board of Women General Counsel Canada and the Queen's Law Alberta Advisory Council. Prior to joining EPCOR, Jennifer held progressively more senior roles in a global engineering and design firm helping to grow the business by acquisition.

Gillian Barnett
Director, Legal and Regulatory Affairs (Markets and Operations),
Alberta Electric System Operator (Calgary, AB)

Gillian Barnett is the Director of Legal and Regulatory Affairs (Markets & Operations) with the Alberta Electric System Operator ("AESO"). She began her legal career as a litigator with a major national firm, and her current legal practice is focused in the area of energy regulatory law. Gillian leads a team that is accountable for the development of the ISO rules, Alberta reliability standards and the ISO tariff, along with the related stakeholder engagement and regulatory proceeding processes. Through this work, the Legal and Regulatory Affairs team enables the transformation of the province's electricity sector while ensuring reliable, affordable power is always available to Albertans.

Carolyn Calwell
General Counsel,
Ontario Energy Board (Toronto, ON)

Carolyn Calwell was appointed as Chief Corporate Services Officer & General Counsel in April 2021. Ms. Calwell brings to the organization deep energy sector expertise and a proven track record in public administration. She has served in senior leadership roles in legal services and energy policy, most recently as Assistant Deputy Minister, Strategic, Network and Agency Policy Division at the Ministry of Energy, Northern Development and Mines since 2017. Prior to that Ms. Calwell was Legal Director at the ministries of Energy, Economic Development and Growth, Research, Innovation and Science, and Infrastructure. Ms. Calwell has an Honours B.A. in Geography & Politics from Queen's University and she earned her LL.B at Osgoode Hall before joining a large law firm in Toronto.

Jackie Forrest
Executive Director,
ARC Energy Research Institute (Calgary, AB)

Jackie actively monitors emerging strategic trends related to energy. She is an author and sought after public speaker with 25 years of experience in the energy industry. She is the co-host of the ARC Energy Ideas podcast, a weekly show that explains the latest trends and news in Canadian energy and beyond.

Jackie is a member of the Board of Directors for the Canadian Renewable Energy Association (CanREA). She is a former board member of Longshore Resources Ltd. and the Explorers and Producers Association of Canada (EPAC).

Prior to joining ARC, she was the leader of North American crude oil research for IHS CERA. Jackie has published 20 public papers on energy issues. She has co-hosted over 100 podcasts and written numerous columns, spanning all energy systems from oil and gas to clean energy, including electric vehicles, renewable power, carbon capture and biofuels.

Jackie was the recipient of the 2018 Schulich School of Engineering Environment and Sustainability Alumni Award, recognizing her contribution to a significant body of knowledge that has helped to increase the understanding of the connection between energy and environment. She is currently a member of the Schulich Industry Advisory Council (SIAC), the group provides input to the engineering school to help to ensure that programs and initiatives align with industry needs.

Jackie attended the University of Calgary where she received an undergraduate degree in Chemical Engineering. She also has an MBA from Queens University.

Peter Gurnham
Retired

Peter was appointed as a Member of the Nova Scotia Utility and Review Board on June 5, 2003 and then as Chair on October 23, 2004, retiring on March 1, 2022.

Peter holds bachelor's degrees in Economics and Law from Dalhousie University in Halifax and was appointed as a Queen's Counsel in 1998. Prior to his appointment to the Board, he practiced law for 27 years with a regional Atlantic Canada law firm (Cox & Palmer), where he specialized in administrative and regulatory law, and was managing partner for nine years. He also had an active municipal and planning law practice. He is a Past Chair of CAMPUT: Canada's Energy and Utility Regulators. He is a frequent speaker at conferences and seminars and is former Co-Chair of the annual Energy Regulation Course sponsored by CAMPUT at Queens University.

Peter has been active in many community and charitable groups and is a recipient of several awards in recognition of service to community.

Gordon Kaiser
Counsel & Arbitrator,
Energy Law Chambers (Toronto, ON/Calgary, AB)

Gordon Kaiser is a counsel and arbitrator practising in Toronto, Calgary and Washington at Energy Law Chambers. He is a former vice chair of the Ontario Energy Board and a former Alberta Market Surveillance Administrator. Prior to that he was a partner in a major law firm where he appeared in the courts of five provinces, the Federal Court of Appeal, the Supreme Court of Canada and ten different regulatory agencies across the country.

He has advised the Alberta Utility Commission and the Ontario's Independent Electricity System Operator on settlements under the Electricity Act and the Attorney General Canada and the Commissioner of Competition on settlements under the Competition Act. He has arbitrated disputes dealing with transmission and pipeline facilities, power purchase agreements, gas supply contracts, and wind and solar contracts.

Gordon is the editor of four books: Corporate Crime and Civil Liability, Energy Law and Policy, Regulating Energy Market Manipulation, and The Guide to Energy Arbitration. He is Co-Chair of the Canadian Energy Law Forum, Co- Editor of the Energy Regulation Quarterly and past President of the Canadian Chapter of the Energy Bar Association. He was the first Visiting Professor in Law and Economics at the University of Toronto Faculty of Law.

Hon. Joseph Kelliher
Former FERC Chair (Washington, DC)

Joe Kelliher is the former executive vice president for federal regulatory affairs for NextEra Energy Inc. As executive vice president, Kelliher was responsible for managing regulatory issues for NextEra's two principal subsidiaries, NextEra Energy Resources and Florida Power & Light Co. before federal agencies.

From 2005 to 2009, he served as chairman of the Federal Energy Regulatory Commission (FERC), where he managed 1,400 employees and a $260 million annual budget. Among the highlights of his chairmanship was the efficient implementation of the Energy Policy Act of 2005, the largest expansion in FERC regulatory authority since the 1930s.

Kelliher has worked on energy policy matters in different capacities for the federal government and private sector. He holds a B.S. from Georgetown University's School of Foreign Service and a J.D. from The American University Washington College of Law.

Amanda Klein
General Counsel,
Toronto Hydro (Toronto, ON)

Amanda Klein is Executive Vice-President, Public and Regulatory Affairs and Chief Legal Officer at Toronto Hydro. Her work takes her to the heart of the corporation's strategy and operations, and she brings over a decade of experience to her leadership of Toronto Hydro's advocacy, communications, stakeholder relations, enterprise risk and governance, law, business development, energy and regulatory policy, as well as streetlighting activities.

Amanda is a regular speaker and contributor in a wide variety of forums and initiatives in the sector and community. Prior to her time at Toronto Hydro, Amanda practiced commercial litigation and government relations in Toronto. She holds a law degree from the University of British Columbia.

Paul Kwasnik
President & CEO,
Brantford Power Inc. (Brantford, ON)

Paul is an accomplished leader and has over 25 years of experience in the energy industry. Most recently, Paul served as CEO & President of the Brantford Energy Corporation (BEC). He held this role from 2013–2022 and was responsible for the BEC family of companies, which included Brantford Power Inc., the local distributor of electricity to more than 41,000 residential, commercial and industrial customers in the City of Brantford; and Brantford Hydro Inc., the retail division that provides high-speed fibre optic telecommunication connections through its NetOptiks division. During his tenure as CEO & President, Paul's strategic focus was on building, transforming and modernizing the business while making continual improvements and investments across all aspects of the business, including employee and community safety; organizational development; regulatory strategy; operational efficiency and reliability; asset management; innovation; and responsive customer service. His role culminated with the successful merger of Brantford Power and Energy+ that resulted in the formation of GrandBridge Corporation, including affiliates GrandBridge Energy and GrandBridge Group.

Paul brings considerable governance experience having served as an elected Trustee on the Brant Haldimand Norfolk Catholic District School Board; serving as a member on the Board of Directors for Brantford Power, and the Board of Governors for Wilfrid Laurier University. Paul is currently a Director on the St. Joseph's Health System Board of Directors.

Paul Kwasnik graduated from Wilfrid Laurier University with a BA in Political Science and he holds an MBA from Queen's University.

Jonathan Liteplo
Partner,
Borden Ladner Gervais LLP (Calgary, AB)

Jonathan Liteplo is a partner in Borden Ladner Gervais LLP. He works extensively in energy and utilities regulation representing participants in the electricity, oil and gas, water and wastewater, and mining industries in a broad range of matters before regulatory authorities and the courts. He has wide-ranging experience representing owners in obtaining tariff-related approvals, including performance based rate regulation and utility cost of capital, change of control approvals, and regulatory permitting for complex and controversial infrastructure projects. Jonathan has been involved in charitable work throughout his career, most recently as Chair of the Board of an international development organization.

Lewis Manning
Senior Counsel,
Lawson Lundell LLP (Calgary, AB)

Lewis' practice focuses on Regulatory/Administrative Law energy matters involving both the electricity and oil and gas sectors including all aspects of rate applications, toll design, facilities applications, cost of capital and related matters before the Alberta Utilities Commission (previously the Alberta Energy and Utilities Board), the Alberta Energy Regulator (previously the ERCB) and the Canada Energy Regulator (formerly National Energy Board). He has appeared at all levels of the Alberta courts in relation to various energy related matters both at trial and appeals, the BCUC, OEB, Manitoba PUB, the Offshore Helicopter Safety Inquiry, the Federal Court, Federal Court of Appeal, and the Supreme Court of Canada. He has also represented clients in arbitrations as well as sitting as an arbitrator in relation to oil and gas and electric industry related contract disputes.

Lewis represents independent power producers, industrial & commercial customers, oil & gas producers, utilities, forest industries, industry associations, regulators, consumers and transmission companies in relation to a variety of regulatory matters. He has participated actively in all matters relating to the restructuring of the gas transmission and distribution sectors in Canada and the

electric industry in Alberta. He was also a member of the legislative drafting committee responsible for the Alberta Electric Utilities Act and related matters.

Lewis has a strong civil litigation background and has appeared as counsel in the Federal Court and Federal Court of Appeal in relation to a number of first nation challenges to pipeline projects. He has also acted as counsel before many other administrative tribunals, including the Development Appeal Board, the Workers Compensation Board, Calgary Real Estate Board, and the Municipal Government Board (Commercial Property Tax Assessment Appeals in relation to gas plants).

Michael Millar
Legal Counsel,
Ontario Energy Board (Toronto, ON)

Michael Millar is senior legal counsel at the Ontario Energy Board. In his role as counsel Michael regularly provides advice to Board members and assumes carriage of major rates hearings (transmission, distribution and generation), leave to construct proceedings, and various other regulatory hearings. Michael also regularly represents the OEB at appeals before the Ontario Divisional Court and the Ontario Court of Appeal.

Prior to joining the OEB Michael practiced litigation, administrative law, and municipal law with the with the firm Osler Hoskin and Harcourt LLP.

David Mullan
Professor Emeritus, Constitutional and Administrative Law,
Queen's University (Kingston, ON)

David Mullan retired from the Faculty of Law at Queen's University, Kingston, Ontario, Canada in 2003 as the holder of the Osler, Hoskin & Harcourt Professorship in Constitutional and Administrative Law. From 2004 until 2008, he was the first Integrity Commissioner for the City of Toronto. From 1998 to 2006 he was a part-time member of the Human Rights Tribunal of Ontario, and, until 2015, a part-time Vice-Chair of the Ontario Workplace Safety and Insurance Appeals Tribunal. From 1993 until 2018, he was also a member of the NAFTA Chapter 19 Canadian Panel. He continues to provide strategic advice on administrative law issues (including applications for judicial review) to governments, agencies and tribunals. He has been a frequent speaker at continuing legal education seminars and workshops for members of courts, tribunals, and agencies as well as the profession. David is widely published in the field of administrative law and has prepared reports for various governments and agencies. Most recently, he was a member of the three person Alberta Utilities Commission Procedures and Processes Review Committee.

Bruce Outhouse, Q.C.
Partner,
Blois, Nickerson & Bryson LLP (Halifax, NS)

Bruce Outhouse is a partner with the law firm of Blois, Nickerson & Bryson LLP in Halifax. He received his law degree from Dalhousie University in 1971 and has been in private practice since that time.

He specializes in public utility regulation, arbitration, mediation, civil litigation and administrative law. He has been very active as an arbitrator and mediator, having decided more than 1,200 labour and commercial arbitrations and having been involved in the successful settlement of major labour disputes both provincially and nationally. He has extensive experience in administrative law and public utility regulation, serving as counsel to the Nova Scotia Utility and Review Board (formerly the Board of Commissioners of Public Utilities) since 1976.

He is a Fellow of the American College of Trial Lawyers and a Member of the National Academy of Arbitrators.

Chris Sanderson, Q.C.
Retired

At the end of 2019, Chris retired from 41 year practicing as an energy lawyer with Lawson Lundell, LLP. His practice focused on government relations, regulation and dispute resolution in the energy and resource sectors. He advised utilities, independent power producers, marketers, mines and energy project developers, crown corporations, tribunals and governments.

Chris appeared frequently before regulatory boards in energy and environmental matters in British Columbia, Alberta and the Northwest Territories and was called to the bar in all 3 jurisdictions. He represented clients in judicial proceedings at all levels of court in British Columbia and Alberta and in the federal court system including the Supreme Court of Canada.

Chris has served on the board of BC Hydro and Power Authority since January 2018 and also sits on the board of the Islands Art Centre Society (ArtSpring).

Katie Slipp
Partner,
Blake, Cassels & Graydon LLP (Calgary, AB)

Katie is a partner in the Regulatory and Environmental Group in the Calgary office of Blake, Cassels & Graydon LLP. She advises and represents oil and gas developers, pipeline companies, electric generation and transmission companies and renewable energy companies in respect of regulatory and environmental approvals and compliance issues, stakeholder consultation, Indigenous issues and surface land rights and compensation matters. Katie has assisted clients before the National Energy Board/Canada Energy Regulator, regulators in Alberta, British Columbia, Manitoba and the Northwest Territories, as well as at all levels of court in Alberta and at the Federal Court of Appeal.

Adonis Yatchew
Professor of Economics,
University of Toronto (Calgary, AB)

Adonis Yatchew's research focuses on energy, regulation and econometrics. Since completing his Ph.D. at Harvard University, he has taught at the University of Toronto. He has also held visiting appointments at Trinity College, Cambridge University and the University of Chicago, among others. He has written a graduate level text on semiparametric regression techniques published by Cambridge University Press. He has served in various editorial capacities at The Energy Journal since 1995 and is currently the Editor-in-Chief. He has advised regulators, public and private sector companies on energy, regulatory and other matters for over 35 years and has provided testimony in numerous regulatory and litigation procedures. He currently teaches PhD. level courses in econometrics, and M.A. and undergraduate level courses on energy in the University of Toronto Department of Economics and the School of Environment. The energy courses are interdisciplinary, spanning economics, the environment and sustainability, politics, geopolitics and security. He has also taught short courses covering these areas at international conferences.

A recording of the webinar can be access here: https://lawlectures.com/4-the-video/ ■

REVIEW OF CHRISTY SMITH & MICHAEL MCPHIE'S *WEAVING TWO WORLDS: ECONOMIC RECONCILIATION BETWEEN INDIGENOUS PEOPLES AND THE RESOURCE SECTOR*

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

Reconciliation with Indigenous peoples — shaped in large measure in the context of resource development projects by the duty to consult — is frequently the predominant dynamic in advancing such projects (particularly energy projects) in Canada. *Weaving Two Worlds* (subtitled "Economic Reconciliation Between Indigenous Peoples and the Resource Sector")[1] is a timely, practical guide to navigating the challenges — and identifying the opportunities.

Weaving Two Worlds is neither an academic treatise nor a crusading polemic. Rather, it offers insights and advice based on the authors' years of hands-on experience, one in the mining industry and the other as a member of a First Nation. McPhie has more than 25 years' experience in the Canadian and international resource industry. He is a former president and CEO of the Mining Association of British Columbia. Smith is a member of K'omoks First Nation living in her traditional territory on Vancouver Island who has worked in the resource sector for more than 25 years. Currently, McPhie and Smith are both executives with Falkirk Environmental Consultants Ltd. in Vancouver.

On initial reading, some of the advice offered by the authors may seem somewhat clichéd: "…in considering building resilient relationships with others, the first step is to 'know thyself'".[2] The value of Weaving Two Worlds, however, lies in its application of this, and other adages, to the specific context of Indigenous relations:

> …recognize what biases you might carry with you into a new relationship…ask yourself whether you are aware of the history of colonialism and subjugation of Indigenous Peoples in Canada and globally.[3]

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[1] Christy Smith & Michael McPhie, *Weaving Two Worlds: Economic Reconciliation Between Indigenous Peoples and the Resource Sector* (Vancouver: Page Two, 2022).

[2] *Ibid* at 23.

[3] *Ibid*.

The authors proceed to offer a valuable step-by-step guide to "How to Engage".[4]

The work also includes discussion of several case studies of Indigenous and non-Indigenous businesses and communities working together on resource projects.[5]

Weaving Two Worlds has been received to widely positive reviews, perhaps the most pertinent of which for readers of ERQ is that by Susannah Pierce, Shell Canada Limited President and Country Chair:

> This is a timely, provocative, and necessary book. Much of corporate Canada continues to struggle to deeply understand, let alone design and walk the path, to true economic reconciliation with Indigenous Peoples. This book will help build awareness and understanding and challenge long-held myths and biases.

This is a valuable book for anyone looking for tools, understanding and insights into how to engage and build meaningful, respectful relationships with Indigenous people and communities. ■

[4] *Ibid*, Chapter 5.

[5] *Ibid*, Chapter 7.