



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 Harrison K.C. and Gordon E. Kaiser

This is the last issue of the *ERQ* for 2023. A number of the articles in this last edition update issues addressed in articles published earlier in the year. The first and possibly the most important is a recent decision of the Supreme Court of Canada.¹ Like an earlier decision of that court² this is another attempt to define the jurisdiction the federal government in energy and environmental regulation relative to the jurisdiction of the provinces.

THE CONSTITUTIONAL CHALLENGE

The first major constitutional challenge relating to the environment concerned federal government's jurisdiction to establish a carbon tax. In that decision the court held that the federal government had jurisdiction. The result was different on October 13 however in the *Impact Assessment Act (IAA) Reference*.

In June 2019 the federal government announced the *IAA* which replaced the *Canadian Environmental Assessment Act 2012*. The new legislation created significant controversy in Western Canada which led the Alberta government to lodge a constitutional reference before the Alberta Court of Appeal.

The *IAA* created a designated project scheme under which a federal minister could designate certain projects or activities under the Regulation which would be automatically prohibited pursuant to section 7 of the Act if they could cause certain effects within federal jurisdiction known as "project prohibitions." The project prohibition remains in place until the federal agency determines that a prohibited project does not require an impact assessment or the project proponent complies with the

conditions imposed following an impact assessment decision.

In the constitutional reference before the Alberta Court of Appeal the court held that the *IAA* and the Regulations could not be upheld under any federal power. The court concluded that the *IAA* fell squarely within several heads of provincial power including natural resource management, public lands, local works and undertakings and property and civil rights.

The appeal by the government Canada was heard by the Supreme Court of Canada (SCC) in March 2023. In total, 29 parties were granted leave to intervene including 7 provinces and 22 non-governmental intervenors. A majority of the SCC found that although the federal project scheme was constitutional, Parliament had plainly overstepped his constitutional authority in enacting the designated project scheme. The court found that the federal government was free to design environmental legislation as long as it respected the division of powers and invited the federal government to revise the legislation.

The true meaning of the *IAA* decision is carefully analysed in the first article in this issue by professors Olszynski, Banks and Wright — they are from the University of Calgary. A second article by Professors Bankes and Leach points out that some misleading statements have been made by the Premier of Alberta in interpreting the decision. Professor Leach is from the University of Alberta.

This constitutional battle is far from over. It is expected that the federal government will revise the legislation and it will be back before the courts shortly.

¹ *Reference re Impact Assessment Act*, 2023 SCC 23.

² *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

INTERNATIONAL CARBON REGULATION

A previous issue of the *ERQ* featured an article by Neil Campbell and his colleagues at McMillan about the EU's new carbon border adjustment mechanism and its impact on Canada.³ At the time European Union's new carbon border adjustment or CBAM had just and signed into law on May 10, 2023.

The same authors have offered an update in this issue of the *ERQ* which deals with the implementing new regulations the EU established in August 2023. The Regulation sets out the reporting obligations for EU importers of carbon intensive goods in the six sectors covered by the CBAM. The six sectors are iron and steel, aluminum, cement, fertilizer, electricity and hydrogen.

The new reporting obligations became effective on October 2023. That means that the EU importers will now be requiring Canadian exporters of carbon intensive goods to implement monitoring and reporting methodologies that ensure the importers have the information they need to meet their regulatory obligations. The Emission Reports will be due quarterly from October 2023 through December 2025 which is now called the transitional period.

The theory and purpose of the CBAM is to ensure that imported goods have incurred the same level of carbon costs as comparable EU goods. In the EU the cost is based on the price per unit of the emissions under the EU's emissions trading system which is currently about EUR €82 per tonne.

The CBAM recognizes that some countries have their own carbon pricing systems in place and importers must report specific information where exporting jurisdictions have domestic carbon pricing schemes. Almost 40 countries worldwide have these programs, including Canada.

The future of the Canadian carbon tax is not clear and what happens to the Canadian carbon pricing scheme will of course affect the impact of CBAM on Canada and Canadian exporters. This area of law will continue to be important. Readers, particularly exporters covered by the EU regulations, would be wise to follow the debate and regulatory framework that has been carefully set out in this series of articles.

THE TAX CREDIT DEBATE

The next article is also a follow-on article. In the last issue we featured a detailed article by Colena Der, Jake Sadikman and Edward Rowe from the Osler law firm regarding the draft Canadian legislation for tax credits for clean energy.⁴ In this issue we have a more detailed analysis by Charles DeLand, the Associate Director of the CD Howe Institute.

The DeLand article looks more carefully at tax credits for carbon capture, a technology that is now getting a great deal of attention in Alberta particularly from operators in the oil sands.

DeLand is very specific in his concerns about the inefficient aspects of the new legislation. In particular he says that the credits are too time-limited because they provide an unwarranted reduction in the credits. The credits are 60 per cent from 2022 to 2030 but after 2030 they drop by half and stop completely by 2041. That, DeLand says, is much too short given the length of time it takes to bring carbon capture projects to operational status. In addition, DeLand complains that regulations impose unwarranted high-cost labour charges. DeLand suggests that if Canadians can not offer tax credits that are equal or better than the ones the Biden Administration is offering in the US there will be few Canadian projects.

LOW INCOME RATES

The next article is another follow-up to an earlier article. In fact, it is a direct response. Ahmad Faruqui, a former partner at the Brattle group in San Francisco and his two associates

³ Neil Campbell, Talia Gordner, Lisa Page and Adelaide Egan, "The EU's Carbon Border Adjustment Mechanism in Action: Impacts on Canada and Beyond" (October 2023) 11:3 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/articles/the-eus-new-carbon-border-adjustment-mechanism-in-action-impacts-on-canada-and-beyond>.

⁴ Colena Der, Jake Sadikman and Edward Rowe, "Canada Issues Draft Legislation on Tax Credits for Clean Energy" (October 2023) 11:3 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/articles/canada-issues-draft-legislation-on-tax-credits-for-clean-energy>.

Jim Lazar and Richard McCann have responded to an earlier article in the *ERQ* by Meredith Fowlie, a Professor at the Haas Institute at the University of California at Berkeley.⁵

The question at issue is a new rate design proposal being considered by the California Commission for solar customers. The Commission is promoting an income graduated fixed charge for some 1 million households that have installed solar panels in the State. These low-income rates have created a very lively debate.

Faruqui and his associates concede that it is nice to help low-income consumers but higher income solar customers will unfairly see their bills increase. Some will see increases by as much as 150 per cent. They also argue that energy efficient customers will pay a penalty.

This article sets out a policy issue which is as relevant in Canada as it is in the United States. Readers will remember that the electric utility serving most of Nova Scotia recently faced a major conflict with both the government and the consumers of that province on this issue.

We should also note that it is becoming a widely held belief that an increase solar generation may be one of the lowest cost solutions to reducing Canada's carbon footprint. Prices have fallen dramatically, there is virtually no technology risk and there is less new transmission cost than many other solutions face.

The policy debate on solar energy generation is not going away. This article provides an important analysis of the problem facing California and a number of other jurisdictions. The same can be said about the earlier article in this publication by Meredith Fowlie, one of the leading energy economists in the United States.

FEDERAL ENERGY REGULATION

The last article in this issue of the *ERQ* is a frank challenge against the massive spending by

the federal government on different renewable energy projects as part of what is now called The Energy Transition. The article comes in the form of the criticism on the most recent Report⁶ by Canada's federal energy regulator known as the Canadian Energy Regulator or CER. The author, Ron Wallace, is a former member of the National Energy Board, the federal agency that the CER replaced in 2019.

Ron Wallace does not think the CER is doing its job and Canadians are going to pay a high price. The reason the CER is not doing its job, Wallace argues, is that federal government making all the decisions and the Commission no longer has a serious role.

The article starts with a criticism of the CER structure, which was unique at the time. The new agency, unlike the previous one, has a Board of Directors in addition to an adjudicative panel. The argue then, which is repeated now, is that regulatory agencies lose their independence when this dual structure is imposed.

Some will argue that in the provinces of BC, Saskatchewan, Manitoba, Quebec, and New Brunswick, where one government owned utility calls all the shots, there is little regulatory independence. The one exception is Nova Scotia, where the Chair has a life appointment identical to a judge. Wallace correctly argues, however, that this structure has larger consequences when applied to the sole federal regulator that has recently become responsible for massive national carbon reduction programs under the Energy Transition.

This structural argument is not new. This author made the point along with the former Chair of the Alberta Utility Commission and another former member of the NEB in an earlier article in this publication.⁷

The author points out that primary concern for any independent regulator is to avoid regulatory capture by those within its regulate community.

⁵ Meredith Fowlie, "New Electricity Rate Reform in California" (August 2023) 11:2 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/articles/new-electricity-rate-reform-in-california>.

⁶ "Canada's Energy Future 2023" (2023), online (pdf): *CER* <www.cer-rec.gc.ca/en/data-analysis/canada-energy-future/2023/canada-energy-futures-2023.pdf>.

⁷ Rowland Harrison, Neil McCrank, and Ron Wallace, "The Structure of the Canadian Energy Regulator: A Questionable New Model for Governance of Energy Regulation Tribunals?" (April 2020) 8:1 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/articles/the-structure-of-the-canadian-energy-regulator-a-questionable-new-model-for-governance-of-energy-regulation-tribunals>.

But what happens, he states, when regulatory capture comes from the government itself?

Investors, analysts and policy makers had come to rely upon the NEB for fact-based, independent analyses of the national interest untainted by either governmental policy direction or the direct economic interests of industry. The 2023 CER report on Canada's energy future stands all those principles on their head by uncritically assuming that Federal policies to achieve net zero greenhouse gas emissions by 2050 are not only desirable but technically and economically feasible.

In constructing a report "with the end-goal in mind", the CER appears to have by-passed an essential requirement as an expert agency first to assess the validity of the fundamental assumptions that underpin the modeling. One could question if many of the report's assumptions and findings were critically reviewed before those assumptions about net-zero scenarios were accepted: "...to help Canadians and policymakers see what a net-zero world could look like."

Arguably, assessments of the national interest should be based on more factors than the attainment of reduced emissions. It requires consideration of viable, economic and feasible methodologies for a "transitional" energy economy to maintain, or enhance, our standard of living. This is especially so when a significant proportion of the global energy economy appears headed in directions that make achievement of a global net-zero economy highly problematic.

In the concluding section of his article Wallace asks two pointed questions

1. Should a national regulator be laser-focussed "on the challenge of achieving net-zero greenhouse gas emissions by 2050" and issues associated with "integrating Canada's energy, economic and climate goals" and "end goals of achieving net-zero greenhouse gas (GHG) emissions in 2050" or should

it seek to provide Canadians with a clear vision of the true costs and consequences of these policies?

2. Is it appropriate for a national energy regulator to accept direction from government to consider an energy economy that is greatly reduced, or even perhaps devoid, of hydrocarbon production while appearing to ignore international and economic realities for energy security? This approach appears to ignore, or at least diminish, the reality that G-20 countries are increasingly confronted with concerns about the basic science and feasibility of attaining Net Zero. Arguably, any considerations of the Canadian national interest should embrace parallel considerations of feasible policy alternatives.

Ron Wallace concludes his article by saying

Determinations of the Canadian national interest in matters of energy will require sustained, intellectual efforts from experts freed from the constraints of policy aspirations of governments. The fundamental challenge facing not just the CER, but all Canadians, is to have access to expert, balanced and comprehensive advice about the costs and consequences of proposed net-zero policies – with parallel, balanced assessments of possible alternatives. These questions, concerning relevance, credibility and independence, are the real challenges facing our "modernized" CER.

This article is worth a careful read. Ron Wallace is right to state that the Energy Transition as is now called has become a huge central planning exercise with many questioning how much planning is actually taking place. In many countries including Canada the Energy Transition has become a huge Money Tree. In this kind of environment an independent energy regulator is an essential institution. ■

WHAT THE SUPREME COURT ACTUALLY SAID IN THE *IAA REFERENCE*¹

*Martin Olszynski, Nigel Bankes, and David Wright**

On October 13, the Supreme Court of Canada released its opinion in *IAA Reference*.² Writing for a 5:2 majority (Justices Mahmud Jamal and Andromache Karakatsanis dissenting), Chief Justice Richard Wagner held that what is known as the “designated project” (or “major project” in colloquial terms) review scheme of the *Impact Assessment Act* (“*IAA*”),³ is unconstitutional. This case comment sets out what is, and is not, constitutional about the *IAA* regime. We begin by first clarifying the Act’s current legal status. We then set out the principles — post-*IAA Reference* — of federal and provincial jurisdiction over the environment generally, and then with respect to impact assessment specifically. This is followed by a discussion of the *IAA*’s specific constitutional defects as found by the majority, the implications of those defects, and their potential remedies. We conclude with some observations regarding the *IAA Reference*’s relevance to future constitutional battles over federal clean electricity regulations and an oil and gas greenhouse gas emissions cap.

THE CURRENT LEGAL STATUS OF THE *IAA* AND REGULATIONS

This was a reference case brought by the Alberta government, which means that the Court did not strike down the *IAA* (that would require an actual challenge to the law, e.g., by a project

proponent subject to the *IAA*). References provide the Court’s opinion on specific legal issues rather than a definitive determination of legal validity. This means that the *IAA* regime as currently written *still applies* throughout Canada. That being said, proponents can expect that the Impact Assessment Agency of Canada (Agency) will address any necessary changes arising from the implementation of the Court’s decision in the near term, and that the federal government will introduce amendments to the law as soon as reasonably possible (as further set out below, the required changes appear relatively manageable). While it is possible that a proponent would seek to have the *IAA* struck down in the interim, we suspect that a court would agree to any federal request to pause any such litigation for a reasonable period of time while these changes are being pursued.

ENVIRONMENTAL JURISDICTION AFTER THE *IAA REFERENCE*

In what follows, we list a number of propositions that can now be considered settled law in terms of jurisdiction over the environment *generally* under Canada’s Constitution. Each principle or statement cites the relevant passage(s) from the *IAA Reference*. The figures are our own. Readers unfamiliar with the legislative division of powers between the federal and provincial governments are welcome to watch this brief

¹ An earlier version of this article appeared on the University of Calgary, Faculty of Law Blog on October 16, 2023 as Martin Olszynski, Nigel Bankes, and David Wright, “Wait, What? What the Supreme Court Actually Said in the *IAA Reference*” (16 October 2023), online: *ABlawg* <ablawg.ca/2023/10/16/wait-what-what-the-supreme-court-actually-said-in-the-iaa-reference>.

*Olszynski and Wright are professors at the Faculty of Law, University of Calgary, Bankes is an emeritus professor with the Faculty.

² *Reference re Impact Assessment*, 2023 SCC 23.

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

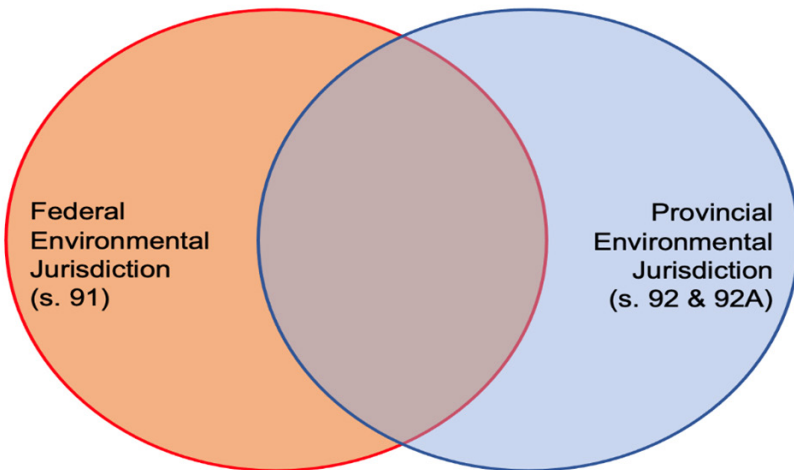
three-minute video⁴ first, and can also review an earlier ABlawg post⁵ by one of us.

1. The “environment” is not listed anywhere in the *Constitution Act, 1867*.⁶ Rather, each level of government can pass laws in relation to the environment through their other legislative authorities (also called heads of power) listed there. Responsibility for environmental protection is therefore *shared*, with considerable *overlap* (see Figure 1, below). This shared responsibility is neither unusual nor unworkable.⁷
2. Both the federal and provincial governments can, in certain circumstances, exercise legislative authority over *the same fact situation, activity, or project*. The “double aspect doctrine” allows that the same set of facts can be regulated from different perspectives or aspects, with the federal

government using heads of power falling within section 91, and provincial governments using heads of power within sections 92 or 92A (see Figure 2 below).⁸ In the event of a conflict or inconsistency between federal and provincial laws, the federal law will prevail on the basis of the doctrine of paramountcy (there was no direct discussion of paramountcy in the *IAA Reference* but this proposition follows from numerous authorities, including most recently *References re Greenhouse Gas Pollution Pricing Act*).⁹

3. A few heads of power (ss 92A(3) (export from provinces of resources), 92A(4) (taxation of non-renewable natural resources, forestry resources and electricity generation), and 95 (agriculture in the province, and immigration into the province)) are — exceptionally — assigned to both orders of government.¹⁰

Figure 1: Jurisdiction over the Environment – Shared and Overlapping



⁴ UCalgary Law, “The Environment, Natural Resources, and Canada’s Constitution” (10 October 2023), online (video): *YouTube* <www.youtube.com/watch?v=wEQw2yLqfSk>.

⁵ David Wright, “Supreme Court of Canada Will Soon Rule on the Constitutionality of the Federal Impact Assessment Act. Here’s What to Watch for...” (3 October 2023), online (pdf): *ABlawg* <ablawg.ca/wp-content/uploads/2023/10/Blog_DW_IAA_What_to_Watch_for.pdf>.

⁶ *Constitution Act, 1867*, 30 & 31 Vict, c 3.

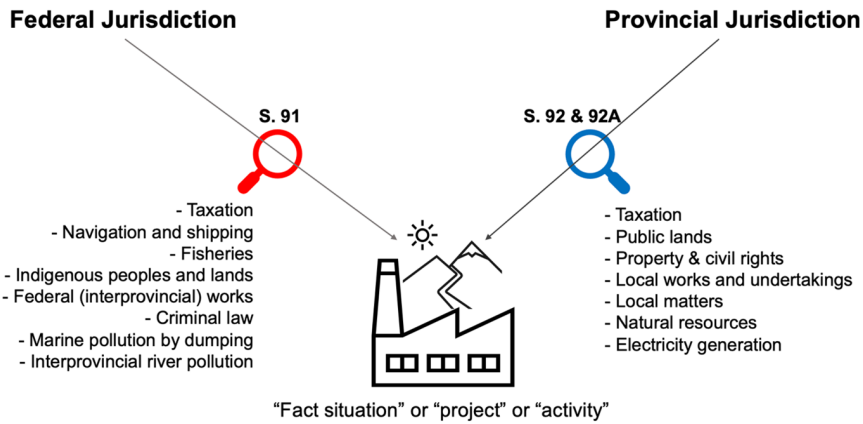
⁷ *Supra* note 2 at paras 114, 116.

⁸ *Ibid* at paras 117, 119.

⁹ *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 129–130, 197.

¹⁰ *Supra* note 2 at para 112.

Figure 2: The Double Aspect Doctrine – One Fact Situation, Two Aspects



4. Legislative authorities (heads of power) differ in their nature and scope. Consequently, the extent to which a power may be used to address environmental concerns varies from one power to another. Some heads of power relate to activities, others relate to resources, some cover both resources and activities depending on the situation. These distinctions may serve as convenient descriptors even if they do not fully explain the scope of the head of power.¹¹
5. Projects primarily subject to provincial jurisdiction (often referred to as “provincial projects”) are *not immune* or *otherwise shielded* from valid federal legislation. But where an activity is primarily regulated by one level of government, legislation aimed at the same activity by the other level should be tailored to those aspects falling within its jurisdiction.¹²

JURISDICTION WITH RESPECT TO IMPACT ASSESSMENT AFTER THE IAA REFERENCE

In this part, we set out the rules that apply to federal impact assessment post-*IAA Reference*.

1. Both federal and provincial governments have the constitutional authority to enact impact assessment regimes.¹³
2. Parliament *can* rely on a presumptive project list (i.e., a list of projects that brings them within the ambit of the legislation). This project list *can* include projects wholly within — and primarily regulated by — a province, such as an oil sands mine or a highway, if they are likely to cause effects with respect to which the federal government may properly legislate. These effects need not be certain at this listing stage. The logic of impact assessment as a planning tool, coupled with the precautionary principle, allows the designation of projects on the basis of their potential effects.¹⁴

¹¹ *Ibid* at paras 123–127.

¹² *Ibid* at para 128.

¹³ *Ibid* at paras 2, 7.

¹⁴ *Ibid* at paras 141–146.

3. When deciding whether an impact assessment should be required (known as a screening decision), the potential for adverse federal effects must be given *primacy* over other considerations.¹⁵
4. Once triggered, the subsequent impact assessment can be comprehensive. There is nothing unconstitutional about the current scope of assessment under the *IAA* regime, including the list of factors relevant to assessment under section 22 of the *IAA*. At the assessment stage, it does not matter whether the project being assessed falls primarily under federal or provincial jurisdiction.¹⁶
5. At the decision-making stage, the nature of the relevant federal heads of power does matter. Where federal activities are concerned (e.g., an interprovincial railway or a pipeline), the decision maker can make an integrated decision that considers both adverse federal effects and non-federal effects as contemplated in the *IAA* as it stands. Hence, the decision could be based “on a variety of environmental and socio-economic concerns, including a general concern for sustainability.”¹⁷ However, where jurisdiction over a resource is concerned, the decision must stay focused on the effects of the project or activity on that resource (e.g., fish and fish habitat).¹⁸ We have more to say about this aspect of the decision below.
6. Parliament does not currently possess broad jurisdiction over interprovincial pollution, nor has it established broad jurisdiction over greenhouse gas (GHG) emissions. Prior jurisprudence has recognized (i) marine pollution by ocean dumping, (ii) pollution of interprovincial rivers, and (iii) minimum

national standards for carbon (GHG) pricing as matters of national concern pursuant to Parliament’s residual power to enact laws for the “peace, order and good government” (POGG) of Canada under the *Constitution Act, 1867*. Parliament must comply with the revised test as set out in *References re Greenhouse Gas Pollution Pricing Act*,¹⁹ in order to establish a new matter of national concern.²⁰

7. Parliament may, for practical purposes, temporarily prohibit proponents from causing any impact or change to aspects of the environment falling within federal jurisdiction, such as fisheries, navigation and shipping, migratory birds, and Indigenous peoples and lands reserved for them (i.e. during the planning and assessment phases). However, these prohibitions are too broad to be permanent (i.e., where a negative public interest determination with respect to the project is made). Where jurisdiction over fisheries, Indigenous peoples, and migratory birds are concerned, any permanent prohibitions must be aimed at preventing harm (or adverse effects).²¹

THE IAA’S CONSTITUTIONAL DEFECTS, IMPLICATIONS, AND REMEDIES

The majority held that the *IAA* was unconstitutional for two overarching reasons.²² First, it was insufficiently focused on environmental effects within federal jurisdiction: both the screening and decision-making phases needed to be more tightly tethered to such effects.²³ Second, the definition of “effects within federal jurisdiction” was too broad, in that it included interprovincial effects not currently recognized as matters of national concern, and it resulted

¹⁵ *Ibid* at paras 150–152.

¹⁶ *Ibid* at paras 157, 160–161.

¹⁷ *Ibid* at para 173.

¹⁸ *Ibid* at paras 162–178.

¹⁹ *Supra* note 9.

²⁰ *Supra* note 2 at paras 182–189.

²¹ *Ibid* at paras 190–203.

²² *Ibid* at para 6.

²³ *Ibid* at paras 150, 177–178.

in impermissibly broad permanent prohibitions where a negative project decision was made.²⁴

In our view, with the exception of the decision-making phase, it seems fairly clear how the federal government can address the concerns identified by the Court. It should not be difficult for Parliament to amend the screening provisions to ensure that adverse federal effects are given primary consideration, which Canada argued was its practice anyway²⁵ (see e.g., subsection 8(2) of the *Canada National Parks Act*,²⁶ where “ecological integrity” is the primary consideration in parks management). Similarly, it should be relatively easy to amend the potentially permanent prohibition in section 7 of the *IAA* from prohibiting “any change or impact” to prohibiting harm or adverse effects.

With respect to GHG emissions or a general jurisdiction over a project’s transboundary impacts, Canada did not argue that it was relying on these as a basis for anchoring federal jurisdiction over major projects.²⁷ In our view, this was a missed opportunity to develop this area of the law, but the majority has not completely shut the door on the possibility that a more fully developed argument to the effect that transboundary impacts, appropriately circumscribed, might fall within a new category of national concern. The federal government will now have to consider whether it is prepared to make that case and defend it in subsequent litigation.

Amendments to the decision-making phase may prove the most difficult to the extent that, with respect, we have some difficulty following the majority’s reasoning. For example, the majority seems to suggest, in a first scenario, that where the federal government considers that a project (e.g., a mining project) with federal adverse effects (e.g., on fish and fish habitat) is still in the public interest, the federal government will clearly be able to impose terms and conditions “aimed at protecting the fisheries through mitigation measures, follow-up programs, and any other conditions that the Minister

considers appropriate.”²⁸ On the other hand, in a second scenario, should the federal minister conclude that adverse effects on fisheries were not in the public interest, the majority seems to suggest that a federal decision to reject such a project would somehow be impermissible on the basis that the government would be making a decision about the overall sustainability of the project. We may not have captured the majority’s reasoning in framing this particular point, so here is the relevant paragraph:

In the second scenario, the decision maker determines...that the overall effects of the designated project would hinder sustainability. “[I]n light of” this adverse impact, the decision maker would conclude...that the cumulative impact on the fisheries would not be in the public interest. The thrust of the decision and the force of federal regulation would no longer be driven by the fisheries aspect of the mine; rather, the fisheries aspect would have been subsumed into consideration of the project’s overall sustainability, an abstract concept that, much like the “environment”, is “constitutionally abstruse”. This is not to say that sustainability must never be considered in impact assessment. To the contrary, sustainability is a general guiding principle under this scheme that infuses the impact assessment process with a longer-term view for the benefit of both “present and future generations” (s. 2 “sustainability”). The concern in this second hypothetical scenario is that the presence of potential harm to the fisheries serves as the gateway to making a decision about the public interest in the project as a whole. Thus, rather than focusing on the fisheries, the Minister’s decision is predominantly focused on the regulation of the

²⁴ *Ibid* at paras 184–189.

²⁵ *Ibid* at para 152.

²⁶ *Canada National Parks Act*, SC 2000, c 32.

²⁷ *Supra* note 2 at para 187.

²⁸ *Ibid* at para 171.

project *qua* project on the basis of its overall sustainability.²⁹

With respect, this seems backward. The starting position must be that the federal government is entitled to conclude that the project's impacts to fisheries and aquatic species are not in the public interest. Such an outcome is surely constitutional; indeed, the current *Fisheries Act*,³⁰ generally prohibits the harmful alteration, disruption, or destruction of fish habitat³¹ as well as the deposit of deleterious substances in waters frequented by fish or any place where it may enter such waters.³² Such impacts can be authorized by the Minister or through regulations, but neither the Minister nor Cabinet are under any obligation to do so. Arguably, the next closest decision from the perspective of fisheries protection is to only accept such impacts when they will be mitigated to the extent possible and any residual effects (*i.e.* those that cannot be mitigated) are deemed to be worth it, which is to say for projects deemed to be of the greatest value. While some governments may privilege short-term economic gains over long term sustainability, we suspect that others might not, and we are inclined to agree with the dissent on this point.³³

Another critical missing piece from this part — and indeed most of the opinion — is a proper treatment of section 91(24) (“Indians and Lands reserved for the Indians”). This head of power is not in relation to either a resource or an activity. It is legislative authority in relation to (1) Indigenous peoples, a “primary constitutional responsibility for securing the welfare” of Indigenous peoples³⁴ and (2) lands

reserved for Indigenous peoples (which includes all lands held under an Indigenous title)³⁵.

The majority was quick to distinguish decision-making in relation to an activity from decision-making in relation to a resource, the former being comprehensive while the latter is not. Here the majority seems to be attracted, but perhaps not completely, to Kennett's theory of comprehensive and restricted environmental jurisdiction.³⁶ However, the majority said nothing about what a focus on federal effects means when *multiple* resources falling under federal jurisdiction (e.g., navigable waters, fisheries, interprovincial rivers, and migratory birds) are affected, as well as Indigenous peoples. As a matter of logic, the more numerous the adverse federal effects, the more constitutionally permissible it would seem to consider the desirability of a project *qua* project.

In summary then, and in broad terms, the *IAA Reference* suggests that the constitutional “sweet spot” for federal impact assessment is somewhere *between* the former *Canadian Environmental Assessment Act*³⁷ regime and the *IAA* regime as it exists now.

LOOKING AHEAD: CLEAN ELECTRICITY REGULATIONS AND AN OIL AND GAS GHG EMISSIONS CAP

From one perspective, the *IAA Reference* has little direct bearing on the constitutionality of the proposed Clean Electricity Regulations³⁸ and the planned oil and gas GHG emissions cap regulations. This is because the federal government appears to be relying on an entirely different federal head of power

²⁹ *Ibid* at para 172.

³⁰ *Fisheries Act*, RSC 1985, c F-14

³¹ *Ibid* at s 35.

³² *Ibid* at s 36.

³³ *Supra* note 2 at para 333.

³⁴ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302 (SCC), at para 176, as cited in *supra* note 2 at para 196.

³⁵ *Ibid* at paras 174–178

³⁶ Steven A. Kennett, “*Oldman* and Environmental Impact Assessment: An Invitation for Cooperative Federalism” (1992), 3 Const Forum 93, as cited at *supra* note 2 at para 116.

³⁷ *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c 19, s52.

³⁸ “Clean Electricity Regulations” (last updated 25 August 2023), online: *Government of Canada* <www.canada.ca/en/services/environment/weather/climatechange/climate-plan/clean-electricity-regulation.html>.

for these proposed regulations: section 91(27) — the criminal law power. Contrary to some political rhetoric³⁹ however, this does not mean that these regulations will form part of Canada’s *Criminal Code*.⁴⁰ Rather, the Supreme Court has long since recognized that section 91(27) refers to the criminal law in a broad sense. Consequently, this head of power has been used to uphold various laws and regulations, including prohibitions on tobacco advertising,⁴¹ the sharing of genetic information⁴², and the “toxic substances” regimes under the *Canadian Environmental Protection Act*,⁴³. The conservative government of former Prime Minister Stephen Harper designated GHG emissions as toxic substances under that regime, and both the Federal Court and Federal Court of Appeal have since upheld the constitutionality of subsequent Renewable Fuels Regulations,⁴⁴ which imposed a minimum content of renewable fuel in order to reduce GHG emissions, on the basis of the same federal statute.⁴⁵ It is also this head of power that supports many existing federal GHG emissions regulations, such as those focused on vehicle emissions and coal-fired power pollution.

From another perspective, both the tone and substance of the *IAA Reference* are at least indirectly relevant. In terms of tone, and like Justice Claire L’Heureux-Dubé before him,⁴⁶ Chief Justice Wagner’s majority reasons have reaffirmed the importance of federalism and the constitutional division of powers. Substantively, however, the majority’s overarching framework for environmental jurisdiction and its re-affirmation of the double aspect doctrine, whereby the same fact situation or activity can be subject to both federal and provincial legislation, does permit a federal role focused on — or tailored to — reducing

GHG emissions in sectors otherwise primarily regulated by the provinces.

The majority concluded by inviting “Parliament and the provincial legislatures to exercise their respective powers over the environment harmoniously”.⁴⁷ In light of the chasm between Alberta and the federal government with respect to the imperative of reducing GHG emissions, as well as the hyperbole and misinformation that followed the release of this reference decision, we suspect that more court battles loom ahead. In the meantime, we look forward to seeing the amendments that the federal government will introduce to bring the *IAA* regime into line with the majority opinion, and what those amendments reveal about the government’s understanding of the majority’s opinion with respect to the decision-making stage of the legislative scheme. ■

³⁹ Joel Dryden, “Premier Smith says Alberta preparing Sovereignty Act motion over federal emissions plans” *CBC* (28 September 2023), online: <www.cbc.ca/news/canada/calgary/alberta-electricity-grid-aeso-blake-shaffer-danielle-smith-1.6981123>.

⁴⁰ *Criminal Code*, RSC, 1985, c C-46.

⁴¹ *RJR-MacDonald Inc v Canada (Attorney General)*, 1995 CanLII 64 (SCC), 100 CCC (3d) 449.

⁴² *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 (CanLII).

⁴³ *Canadian Environmental Protection Act*, 1999, SC 1999, c 33; *R v Hydro-Québec*, 1997 CanLII 318 (SCC), 118 CCC (3d) 97, as acknowledged by the majority in *supra* note 3 at para 126.

⁴⁴ Renewable Fuels Regulations, SOR/2010-189.

⁴⁵ *Syncrude Canada Ltd v Canada (Attorney General)*, 2016 FCA 160 (CanLII).

⁴⁶ *114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, 2001 SCC 40 (CanLII).

⁴⁷ *Supra* note 2 at para 216.

THE WORD “EXCLUSIVE” DOES NOT CONFER A CONSTITUTIONAL MONOPOLY, NOR A RIGHT TO DEVELOP PROVINCIAL RESOURCE PROJECTS¹

*Nigel Bankes and Andrew Leach**

The majority opinion in the *IAA Reference* concludes that the federal government has arrogated to itself decision-making powers that properly belong to provincial governments; powers, that is, with respect to resource projects and other works and undertakings located entirely within a province (for short, “provincial resource projects”).

Alberta Premier Danielle Smith, as well as former premier Jason Kenney, who initiated the *Reference*, have celebrated the decision. But in doing so they have both significantly overstated the majority’s conclusions by suggesting that the majority endorsed a strong theory of exclusive provincial jurisdiction over provincial resource projects. Premier Smith, echoing language in the Alberta Court of Appeal majority opinion in the *IAA Reference* would extend this interpretation further to a right of development and to a form of

interjurisdictional immunity for projects falling outside the exceptions in section 92(10) of the *Constitution Act, 1867*.² We provide concrete examples of Premier Smith’s use of the word “exclusive” (or its synonyms) and references to a “right to develop” from the Premier’s press conference³ on the *IAA Reference* decision and an interview prior to the decision in Appendix A to this post, and a link to the views of the Hon. Jason Kenney in Appendix B.

This rhetoric is unfortunate because it necessarily leads to unjustified expectations that the federal government will need to vacate important areas of law-making responsibility in deference to these claims of exclusivity, and/or that Parliament must necessarily be deferential to a provincial right to develop resources. Amendments to the *Impact Assessment Act (IAA)*⁴ regime need to be informed by a common understanding of fundamental constitutional

¹ An earlier version of this article appeared in the University of Calgary, Faculty of Law Blog as “The Word “Exclusive” Does Not Confer a Constitutional Monopoly, Nor a Right to Develop Provincial Resource Projects” (2 November 2023), online (pdf): [ABlawg <ablawg.ca/wp-content/uploads/2023/11/Blog_NB_AL_Reference_IAA_Constitution.pdf>](https://ablawg.ca/wp-content/uploads/2023/11/Blog_NB_AL_Reference_IAA_Constitution.pdf).

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² *Constitution Act, 1867*, 30 & 31 Vict, c 3.

³ “Alberta premier reacts to ruling on federal environmental assessment law – October 13, 2023” (13 October 2023), online (video): [Youtube <www.youtube.com/watch?v=8LW22sJPdtg&t=1108s>](https://www.youtube.com/watch?v=8LW22sJPdtg&t=1108s).

⁴ *Impact Assessment Act*, SC 2019, c 28, s 1 [IAA].

principles as well as the guidance offered by the majority opinion of the Supreme Court. This means that the federal government will need to ensure that its *IAA* decision-making powers are securely tethered to real (and not speculative or yet-to-be established) heads of federal power. But, by the same token, there is no basis for provincial demands (framed in terms of exclusivity, rights, or “sole jurisdiction”) that the federal government simply abandon the field of regulating the federal aspects of provincial projects.

The respectful dialogue that the majority opinion calls for requires both federal and provincial governments to moderate their positions. The majority opinion, by its nature, is principally directed at the federal government, but provincial governments cannot ignore what the majority has said about the reality that provincial projects will frequently present a double aspect. In other words, there will commonly (if not invariably) be elements of those provincial resource projects that fall squarely within a head or heads of federal power. The power to make a law in relation to a matter may be exclusive, but in most, if not all, cases there is no such thing as an exclusive power over a project or an activity. Projects typically affect the environment, and the environment is broadly recognized to be an area of shared jurisdiction — largely because the *Constitution Act, 1867* had nothing to say about the environment.

The 1867 *Act*, as amended by the *Constitution Act, 1982*,⁵ generally allocates the power to make laws to the federal and provincial governments on an exclusive basis. This is most clearly demonstrated by the opening words of section 92 of the 1867 *Act*, which provide that “[i]n each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated...” Section 91 is similar insofar as it states that matters not assigned exclusively to the provinces are assigned exclusively to Parliament, and, for greater

certainty, to the classes of subject enumerated in that section. Section 92A(1), the first subsection of the 1867 *Act* “resources amendment,” follows the same pattern and affords the legislatures of the provinces the exclusive power to make laws in relation to the exploration and production of non-renewable and forestry resources and the generation of electricity.

While the exclusive assignment of law-making authority is the norm, the Constitution occasionally provides for concurrent law-making authority. As it happens, section 92A contains one such example: the power to make laws dealing with interprovincial exports of resources and electricity,⁶ for which concurrent and paramount federal law-making power of such exports is established in section 92A(3).⁷

But how do we apply the notion of exclusive law-making authority to a resource activity such as a proposed new coal or oil sands mine, or a proposed new hydroelectric dam? The majority opinion in the *IAA Reference* offers important guidance on this crucial question. The majority begins by confirming that the general rule is as stated above, and that “[o]nly the level of government to which a head of power has been assigned can validly legislate in respect of matters falling within that head of power.”⁸ But the classification of environmental laws is challenging because the environment is not a head of power under sections 91, 92, or 92A and rather is an aggregate of matters.⁹ “Accordingly, *neither level of government has exclusive jurisdiction over the whole of the ‘environment’ or over all ‘environmental assessment.’*”¹⁰ Instead, each level of government can legislate in relation to certain aspects of the environment and resource projects that affect the environment. The same fact pattern (for example, a new dam or a new mine), can be regulated from both provincial and federal perspectives (or aspects) so long as the law of each level of government can be classified as falling with one of its heads of power. This is known as the double aspect doctrine:

⁵ *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11 ss 50 and 51.

⁶ *Supra* note 2 at s 92A(2).

⁷ *Ibid* at s 92A(3).

⁸ *Reference re Impact Assessment Act*, 2023 SCC 23 [*IAA Reference*] at para 112.

⁹ *Ibid* at para 114.

¹⁰ *Ibid* at para 116 [emphasis added].

The double aspect doctrine explains how laws enacted by both the federal and provincial levels of government may validly regulate the same fact scenario from different perspectives, pursuant to their respective heads of power.¹¹

Each order of government has “the *exclusive* power to legislate within their respective jurisdiction”¹² and it follows from this that each can potentially regulate the same fact pattern. The fact pattern itself (the construction and/or operation of the project or activity, the mine, or the dam) is unlikely to be exclusive. The province may be able to authorize the construction of a dam under various heads of power in section 92 and 92A of the *Constitution Act, 1867*, but that dam would also require federal fisheries authorization under legislation that has been repeatedly upheld under section 91(12) and, if the river on which the dam is built is navigable, then it will also need an authorization under the federal government’s navigation and shipping power, a power upheld in the *Oldman River* decision under section 91(10).¹³ Parliament’s power to regulate the dam, however, is constrained: “it can validly legislate only from the perspective of the federal aspects of the activity, such as the *impacts* of the activity on federal heads of power,”¹⁴ although it may consider a wide array of reasons for allowing (or disallowing) such an authorization. Some of these reasons, e.g. the value of *base-load* electricity generation, may fall within provincial jurisdiction but may be considered by the federal government in assessing the issuance of an authorization.¹⁵

A provincial legislature is not entitled to waive whatever requirements Parliament may choose to impose on that dam to protect navigation or fishery interests, or other “federal aspects” such as Indigenous peoples or lands reserved

for Indigenous peoples. As the majority warns, “[t]he fact that a project involves activities primarily regulated by the provincial legislatures does not create an enclave of exclusivity. The most ‘provincial’ of projects may cause effects in respect of which the federal government can properly legislate.”¹⁶

This is not new law derived from the decision in the *IAA Reference*, nor do our hypothetical mines or dams fall far from reality. As Justice Ian Binnie for the majority of the Supreme Court stated in *Quebec (Attorney General) v Moses*:

There is no doubt that a vanadium mining project, considered in isolation, falls within provincial jurisdiction under s. 92A of the *Constitution Act, 1867* over natural resources. There is also no doubt that ordinarily a mining project anywhere in Canada that puts at risk fish habitat could not proceed without a permit from the federal Fisheries Minister... The mining of nonrenewable mineral resources aspect falls within provincial jurisdiction, but the fisheries aspect is federal.¹⁷

In sum, just as lands reserved for Indigenous communities are not enclaves within a province (with the result that provincial laws of general application may apply to lands reserved, including Indian reserves¹⁸), neither are provincial projects “enclaves” that are immune from the application of valid federal laws.¹⁹ Those federal laws must be connected to a federal head of power (and this is the principal clarification offered by the *IAA Reference*). But once the connection is established, federal regulation may be far reaching. For example, the federal government may validly instruct

¹¹ *Ibid* at para 119.

¹² *Ibid* at para 121 [emphasis in original].

¹³ *Friends of the Oldman River Society v Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 SCR 3, *supra* note 2 at s 91(10).

¹⁴ *Supra* note 8 at para 131 [emphasis in original].

¹⁵ *Ibid* at paras 157–161.

¹⁶ *Ibid* at para 142.

¹⁷ *Quebec (Attorney General) v Moses*, 2010 SCC 17 (CanLII), at para 36.

¹⁸ *Cardinal v Attorney General of Alberta*, 1973 CanLII 1980 (SCC), [1974] SCR 695.

¹⁹ *Supra* note 8 at para 142.

a proponent to construct fish ladders around a dam and prescribe certain flows of water to protect fish or to build locks to ensure navigation around that dam as a condition of federal approval.

The federal government may exercise its jurisdiction even if doing so would render the project uneconomic, such that the proponent is no longer prepared to proceed, and such measures may certainly affect resource production from provincial projects. A court may test the *vires* of such a requirement (i.e., the connection of the condition to a federal head of power),²⁰ but it may not question the wisdom of such a requirement once the connection is established.

In conclusion, in most cases, the power to make laws is assigned exclusively to one or other level of government. But that does not itself assign exclusive project approval authority nor a right of development to a province for provincial projects or other works and undertakings lying wholly within the province. This is because most resource projects will also engage legitimate federal interests for which the federal government is entitled to legislate and regulate. In fact, one of the projects cited by Premier Smith – the Teck Frontier Mine – was itself subject to exactly such conditions before the *IAA* regime was enacted.²¹ The *IAA Reference* has told the federal government that it can only use these federal interests to regulate the federal aspects of such projects and not interests and values that are not connected to a federal head of power. But the majority has also told the provinces that these provincial resource projects are not provincial approval enclaves immune from the application of federal laws. It is not helpful for the Premier to claim otherwise. Neither is it helpful for the Premier to continue to rely on the inflammatory rhetoric of the majority decision of Alberta's Court of Appeal in the *IAA Reference*. The Supreme Court of Canada may have concluded that significant

parts of the *IAA* were unconstitutional, but it gave very different reasons for that conclusion than those offered by Alberta's Court of Appeal. ■

APPENDIX A:

Examples of Premier Smith's claims to provincial exclusivity in relation to provincial resource projects

All quotes taken from Premier Smith's press conference, October 13, 2023; references are to the approximate time of the remarks.²²

Premier Smith's prepared comments

The Court ruled that the act and regulations are unconstitutional and reaffirms that the primary jurisdiction of non-renewable natural resource development *is the sole jurisdiction of the provinces*.²³

Response to a question from Emma Graney (Globe and Mail)

The Supreme Court of Canada was very clear that the Constitution matters, sections of the Act, section 92, *they should reread them again so that they can see that we have the exclusive jurisdiction over natural resource development and the exclusive jurisdiction over electricity development, and they should make sure that they honour that*.²⁴

Responses to a question from Shaun Polczer (Western Standard)

*We have the exclusive right as the Supreme Court determined today to exercise under section 92 and that includes electricity and that's what we'll do...*²⁵

They recognized that we have two orders of governments with sovereign powers and exclusive jurisdiction *and acknowledged that*

²⁰ See *Fowler v The Queen*, 1980 CanLII 201 (SCC), [1980] 2 SCR 213.

²¹ See Impact Assessment Agency of Canada, Report of the Joint Review Panel Established by the Federal Minister of Environment and Climate Change and the Alberta Energy Regulator Decision 2019 ABAER 008: Teck Resources Limited, Frontier Oil Sands Mine Project, Fort McMurray Area" (25 July 2019), online (pdf): <www.iaac-aeic.gc.ca/050/documents/p65505/131106E.pdf>[perma.cc/8KTV-L8D4] at 3 and at para 1448.

²² *Supra* note 3. The emphasis in each of the following quotations has been added by the authors.

²³ *Ibid* at 1m:32s.

²⁴ *Ibid* at 6m:56s.

²⁵ *Ibid* at 11m:19s.

*exclusive jurisdiction on resource development and on electricity belongs to us.*²⁶

*That's our exclusive right to be able to make decisions on being able to permit and approve those types of projects. I would say that if I want to build a highway between Grand Prairie and Fort McMurray, which is 70 for more than 75 kilometers of new roads that's within our exclusive jurisdiction in order to be able to develop and I would say that if a Teck Frontier mine wants to put in another application that's also within our exclusive jurisdiction to prove. Those are just three examples that I would give if they're completely within our borders. And we have the ability through our regulatory process to go through our own environmental reviews, then those are the ones that should stay with us.*²⁷

Response to a question from Don Braid (Calgary Herald)

...obviously we have to work together on certain issues, navigable waters being one, *but we also know from this court decision, we've got the exclusive right to develop our resources, and that includes electricity* and we're going to be exercising that.²⁸

Response to a question from Lisa Johnson (Edmonton Journal)

But I'm asking for...the federal government to *accept that there is exclusive provincial jurisdiction* under the Constitution, accept that that's what the language of the Constitution says, and to work with us on those areas of shared priority.²⁹

See also Premier Smith's comments on The ARC Energy Ideas Podcast, (4 October 2023), before the SCC decision in the IAA Reference.³⁰

In response to a question on the *Alberta Sovereignty within a United Canada Act*,³¹ Smith stated that "I'm prepared to go to court and say, we are defending the Constitution. *We are defending our right to develop our resources. We're defending our constitutional right to develop our own electricity system.*"³²

And Premier Smith's Throne Speech, (October 30, 2023)

Referring to "individuals [who] believe that developing Alberta's natural resources is inconsistent with reducing global emissions,... they seek to impose these policies on our province *knowing full well the Canadian Constitution grants our province exclusive jurisdiction over the development of our natural resources and operation of our provincial electrical grid.*"³³

APPENDIX B:

Views of the Hon. Jason Kenney

For Jason Kenney's post-*IAA Reference* views on the exclusive nature of provincial jurisdiction over provincial resource projects (and referencing the "black letter" of the *Constitution*), see his CBC interview on October 16, Calgary Eyeopener.³⁴

²⁶ *Ibid* at 12m:41s.

²⁷ *Ibid* at 13m:30s.

²⁸ *Ibid* at 16m:48s.

²⁹ *Ibid* at 17m:23s.

³⁰ "A conversation with the Honourable Danielle Smith" (4 October 2023) (podcast), online: *ARC Research Institute* <www.arcenergyinstitute.com/a-conversation-with-the-honourable-danielle-smith>.

³¹ *Alberta Sovereignty within a United Canada Act*, SA 2022, c A-33.8.

³² *Supra* note 30 at 10m:07s.

³³ "Throne Speech 2023" (30 October 2023), online: *Government of Alberta* <www.alberta.ca/release.cfm?xID=8918911D500C7-C63C-FE27-E65B9E51F57B01BF>.

³⁴ "Jason Kenney on the Impact Assessment Act" (16 October 2023) (podcast) at 0:57s – 0:60s, 1m:56s, 3m:40s, 5m:23s, online: *CBC* <www.cbc.ca/listen/live-radio/1-5-calgary-eyeopener/clip/16016030-jason-kenney-imp-act-assessment-act>.

CAN CANADIAN EXPORTERS AND EUROPEAN IMPORTERS COOPERATE? IT WILL BE ESSENTIAL UNDER THE NEW EUROPEAN UNION CARBON BORDER ADJUSTMENT REGULATION¹

*Neil Campbell, Talia Gordner, Lisa Page, and Brigid Martin**

EDITOR'S INTRODUCTION

In the last issue of the *ERQ*² we published an article by Neil Campbell and his colleagues at the McMillan law firm dealing with the new carbon regulations that the European Union implemented in August 2023. Those reporting obligations become effective in October 2023. Emission Reports are due quarterly between October 2023 and December 2025 and starting in 2026 importers will have to begin paying for CBAM certificates based on the reported quantity and value of carbon emissions embedded in the goods they bring into the EU.

To guide the Canadian companies affected by this important new legislation we are publishing

here a follow-up article by Neil Campbell and his colleagues that addresses the latest developments in this important new legislation.

BACKGROUND

The European Union (“EU”)’s pathbreaking Carbon Border Adjustment Mechanism (“CBAM”)³ will require Canadian exporters to closely monitor and calculate the amount and cost of carbon embedded in goods exported to importing counterparties in the EU. In August 2023, the EU adopted the *Implementing Regulation* (the “**Regulation**”) that sets out the reporting obligations for EU importers of carbon-intensive goods in the six sectors currently covered by the CBAM (iron and

¹ An earlier version of this article was published by McMillan LLP (4 October 2023), online: <mcmillan.ca/insights/communication-is-key-cooperation-between-canadian-exporters-and-european-union-importers-will-be-essential-to-operate-under-the-carbon-border-adjustment-mechanism-regulation>.

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² Neil Campbell, Talia Gordner, Lisa Page and Adelaide Egan, “The EU’s New Carbon Border Adjustment Mechanism in Action: Impacts on Canada and Beyond” (October, 2023) 11:3 *Energy Regulation Q*, online: *ERQ* <energyregulationquarterly.ca/articles/the-eus-new-carbon-border-adjustment-mechanism-in-action-impacts-on-canada-and-beyond>.

³ For an assessment of the EU’s original CBAM proposal, see Neil Campbell, Talia Gordner, Lisa Page and Adelaide Egan, “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-wit-h-proposed-carbon-border-adjustment-mechanism>.

steel, aluminum, cement, fertilizer, electricity and hydrogen).⁴ The reporting obligations are in effect as of October 2023.

Practically speaking, this means that EU importers will be requiring Canadian exporters of carbon-intensive goods to implement monitoring and reporting methodologies to ensure the importers have the information they need to satisfy their regulatory obligations. Emissions reports will be due quarterly from October 2023 through December 2025 (the “**Transitional Period**”). The purpose of this Transitional Period is to collect emissions data and information on calculation methodologies in order to facilitate a smooth roll out of the CBAM. In 2026, the CBAM will enter its Definitive Phase, in which importers will have to begin paying for CBAM certificates based on the reported quantity and value of carbon emissions embedded in the goods they bring into the EU.

NEW REPORTING AND DATA COLLECTION RESPONSIBILITIES FOR IMPORTERS AND EXPORTERS

Throughout the Transitional Period, and in the subsequent Definitive Phase, EU importers are responsible for reporting the information about carbon-intensive goods that is needed to determine the magnitude of the border carbon adjustment. Such adjustments will place the imported goods on a level playing field with goods produced in the EU that are subject to the EU’s carbon emissions regulatory and pricing regime.

The required information for reporting on imported goods includes details on the country of origin, the exporting company’s name and address, the production routes, and the direct and indirect embedded emissions, along with other factors.⁵ Importantly, exporters are not directly subject to the CBAM or the

Regulation. However, they will have to provide the embedded emissions in their exported goods and communicate that data, along with information about their production facilities, to enable their EU importing counterparties to comply with obligations under the Regulation.

The first reporting period will cover emissions related to imported CBAM goods from October 1, 2023 to December 31, 2023 and the first report on such emissions will be due at the end of January 2024. The European Commission has developed an “emissions data communication” template⁶ to assist exporters in compiling the necessary embedded carbon emissions data. The template covers all necessary embedded emissions information that exporters must share for their importers’ CBAM reports, as well as recommended information that will provide greater transparency of the shared data.

An electronic database called the CBAM Transitional Registry (the “**Registry**”) will be accessible only to EU importers, the European Commission, and competent authorities (including national authorities, central CBAM authorities and customs authorities). The CBAM Trader Portal (the “**Portal**”) will function as the entry point to the Registry.⁷ The Registry is intended to ease the administrative burden on both importers and exporters as it will allow importers to store information about exporting partners and their embedded emissions, enabling re-use of the information during later reporting periods.

CARBON PRICING POLICIES IN EXPORT JURISDICTIONS HAVE A KEY ROLE TO PLAY

The CBAM seeks to ensure that imported goods have incurred the same level of carbon costs as comparable EU goods. In the EU, the cost is based on the price per unit of emissions under

⁴For an assessment of the CBAM’s application and implications, see Neil Campbell, Talia Gordner, Lisa Page and Adelaide Egan, “The EU’s New Carbon Border Adjustment Mechanism in Action: Impacts on Canada and Beyond” (5 June 2023), online: *McMillan* <mcmillan.ca/insights/publications/the-eus-new-carbon-border-adjustment-mechanism-in-action-impacts-on-canada-and-beyond>.

⁵Official Journal of the European Union, “Commission Implementing Regulation (EU) 2023/1773 of 17 August 2023 laying down the rules for the application of Regulation (EU) 2023/956 of the European Parliament and of the Council as regards reporting obligations for the purposes of the carbon border adjustment mechanism during the transitional period” (15 September 2023) OJ L228/94, art 3(2), online (pdf): <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023R1773>.

⁶“Guidance Document on CBAM Implementation for Imports of Goods into the EU” (17 August 2023) at 76, online: *European Commission* <taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en#guidance>.

⁷*Supra* note 5, art 22.

the EU's emission trading system — currently about EUR €82 per tonne.⁸

Presently, the EU's carbon emissions regime provides free allocations designed to mitigate the risk of “carbon leakage” prior to the CBAM's implementation. Carbon leakage happens when companies move production abroad, often to countries with less stringent or no environmental policies. However, as the CBAM is introduced, the European Commission will be phasing out the free allocations in line with the EU's increasing climate ambition and carbon prices. The phase out also aligns with efforts to level the playing field between EU producers and third-country producers. These allocations will cease entirely in 2026 after the Transitional Period concludes.⁹

The CBAM recognizes that some countries have their own carbon pricing systems in place.¹⁰ Importers must report specific information where exporting jurisdictions have domestic carbon pricing schemes,¹¹ including the type of product and carbon price, the country and law providing for the carbon price, and whether there are rebates available, among other factors. Exporters must monitor and communicate to importers the actual price per tonne of CO₂ emissions that has already been paid. If the price paid in the exporter's jurisdiction equals or exceeds the EU price, no border carbon adjustment would be payable.¹²

In implementing this principle, the CBAM and the Regulation require adjustments for rebates, free allocations or other forms of compensation that would ultimately reduce the carbon price paid in the exporter's jurisdiction. Any rebates or other reductions of the exporter's carbon costs must be reported by the EU importer in order to properly calculate the difference between EU carbon pricing and the exporting jurisdiction costs.¹³

Canadian producers and exporters are subject to a domestic carbon pricing regime through the output-based pricing system (“OBPS”).¹⁴ The current posted price under the OBPS is CAD \$65 per tonne. In an effort to accelerate a shift towards a low carbon economy, it is scheduled to increase annually by CAD \$15 per tonne from 2023 to 2030.¹⁵ The OBPS requires specific industries and large emitters to pay this carbon price after they exceed their applicable emissions limit (analogous to the free allocations in the EU).¹⁶ Companies that emit less than their regulated limit will in most circumstances earn credits that they can trade with other companies to meet their compliance obligation under the OBPS for the following year or bank for future use.¹⁷ These reductions in domestic carbon costs are required to be reported under the Regulation in order to ensure that the importer will purchase CBAM certificates that fully reflect the difference between the actual amounts paid under the

⁸ “The price of emissions allowances in the EU and UK”, online: *Ember* <ember-climate.org/data/data-tools/carbon-price-viewer/>. Note that EUR €82 would equal approximately CAD \$117 using the October 1, 2023, exchange rate of 1.4304 from the Bank of Canada.

⁹ *Supra* note 6, at 18.

¹⁰ Neil Campbell and Talia Gordner, “Communication is Key: Cooperation Between Canadian Exporters and European Union Importers Will Be Essential to Operate Under the Carbon Border Adjustment Mechanism Regulation” (4 October 2023), online: *McMillan* <mcmillan.ca/insights/communication-is-key-cooperation-between-canadian-exporters-and-european-union-importers-will-be-essential-to-operate-under-the-carbon-border-adjustment-mechanism-regulation/>.

¹¹ *Supra* note 5, art 7.

¹² Neil Campbell, William Pellerin and Tayler Farrell, “A Roadmap for Trade-Law-Compliant Border Carbon Adjustments” (July 2022) 10:2 *Energy Regulation Q*, online: *ERQ* <energyregulationquarterly.ca/articles/a-road-map-for-trade-law-compliant-border-carbon-adjustments1/>.

¹³ *Supra* note 5, art 7.

¹⁴ *Supra* note 10.

¹⁵ “The federal carbon pollution pricing benchmark” (11 December 2022), online: *Government of Canada* <www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/carbon-pollution-pricing-federal-benchmark-information.html>.

¹⁶ “Carbon pollution pricing systems across Canada” (5 July 2023), online: *Government of Canada* <www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/carbon-pollution-pricing-federal-benchmark-information.html>.

¹⁷ Talia Gordner, “Transition to Emissions Performance Standards (EPS) Program Underway for Greenhouse Gas Emitters in Ontario” (12 April 2022), online: *McMillan* <mcmillan.ca/insights/transition-to-emissions-performance-standards-eps-program-underway-for-greenhouse-gas-emitters-in-ontario/>; See also Neil Campbell, Talia Gordner, Lisa Page and Adelaide Egan, “Carbon Tariffs – the Next Challenge in Canadian Climate Law and Policy?” (October 2021) 9:3 *Energy Regulation Q*, online: *ERQ* <energyregulationquarterly.ca/articles/carbon-tariffs-the-next-challenge-in-canadian-climate-law-and-policy/>

OBPS (or more stringent Canadian provincial) regime relative to the EU's carbon price level.

CARBON EMISSIONS DATA CALCULATION METHODOLOGIES FOR EU IMPORTERS

Since CBAM reporting obligations have commenced quickly, the Regulation provides for temporary alternative monitoring and reporting methods, so long as full and accurate emissions data are maintained.¹⁸ The Regulation contemplates the following two available methods to determine embedded emissions:

- *Calculations-based method:* This method determines emissions from source streams based on activity data gathered from measurements and calculation factors, either from laboratory analyses or standard values.¹⁹ Source streams are a specific fuel type, raw material, or product that either contain carbon or generate carbon emissions during production.²⁰ Activity data refers to data from the materials consumed or produced by a carbon-emitting process.²¹
- *Measurements-based method:* This method involves continuously measuring the concentration of carbon emitted in the site-specific composed mixed gases at exported production facilities.²²

Where an eligible monitoring, reporting, and verification system is already established for the purpose of a carbon pricing scheme or compulsory emission monitoring scheme (“EMS”) in the exporting jurisdiction, there are three alternative methodologies contemplated under the Regulation.²³ Importers can use data collected within any of the following systems by their exporting counterparties to fulfill their reporting requirements until December 31, 2024:

- *Carbon pricing scheme:* This methodology generally refers to any pricing mechanism that is directly charged to the source emitting carbon.²⁴
- *Compulsory EMS:* This methodology monitors, analyzes, and quantifies the amount of carbon emitted over a specified period.
- *EMS with verification:* This methodology operates using an independent third party who has been verified in accordance with CBAM Regulations²⁵ to issue a report confirming the data obtained by the EMS.

After December 31, 2024, EU importers will have to calculate emissions using either the calculations-based method or the measurements-based method, highlighted above.²⁶

¹⁸ *Supra* note 5, arts 4(2), 4(3).

¹⁹ *Ibid*, art 4(1)(a).

²⁰ Official Journal of the European Union, “Commission Implementing Regulation (EU) 2018/2066 of 19 December 2018 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council and amending Commission Regulation (EU) No 601/2012” (28 August 2022) OJ, L 334/1 at arts 3(4), 21, online: <eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R2066>.

²¹ *Ibid*, art 3(1).

²² *Ibid*, art 3(40). Note: “continuously” refers to using periodic measurements to determine the value of a quantity.

²³ *Supra* note 5 at art 4(2). For a description of the CBAM, see Neil Campbell, Talia Gordner, Lisa Page, and Adelaide Egan, “The EU’s New Carbon Border Adjustment Mechanism in Action: Impacts on Canada and Beyond” (5 June 2023), online: *McMillian* <mcmillan.ca/insights/publications/the-eus-new-carbon-border-adjustment-mechanism-in-action-impacts-on-canada-and-beyond>.

²⁴ *Supra* note 5, art 4(2)(b).

²⁵ Official Journal of the European Union, “Regulation (EU) 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93” (16 July 2021) OJ L 218/30, online: <eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008R0765>; Official Journal of the European Union, “Commission Implementing Regulation (EU) 2018/2067 of 19 December 2018 on the verification of data and on the accreditation of verifiers pursuant to Directive 2003/87/EC of the European Parliament and of the Council” (1 January 2021) OJ L 334/94, online: <eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.334.01.0094.01.ENG>

²⁶ *Supra* note 5, art 4(2).

PENALTIES FOR NON-COMPLIANCE DURING THE TRANSITIONAL PERIOD

Even though importers are not required to make CBAM payments during the Transitional Period, they are required to comply with the data reporting obligations. The Regulation prescribes penalties for importers that do not take the necessary steps to comply, including where a quarterly report is incorrect or incomplete, and for failure to remedy such reporting inaccuracies.²⁷ The penalties range between EUR €10 and EUR €50 per tonne of improperly reported or unreported emissions.²⁸

While exporters are not directly subject to the penalty regime in the Regulation, they will want to accurately communicate their embedded emissions to avoid their importing counterparties being penalized. It is likely that importers will seek representations and warranties, cooperation covenants and indemnification provisions in supply agreements that effectively transfer their responsibilities and risks under the Regulation in large part to the exporters that have supplied products to them.

KEY TAKEAWAYS

While Canadian exporters do not have a formal reporting onus, they should be aware of their EU counterparties' reporting obligations to provide complete and accurate emissions reports. The Regulation effectively creates a parallel expectation that exporters will closely monitor and communicate the production cycle, embedded emissions, and carbon costs of their carbon-intensive goods to their EU importers.²⁹ Canadian exporters should also use the Transitional Period to ensure they understand how their OBPS or provincial carbon emissions regime obligations in Canada will interact with the EU regime once payments start to be required under the CBAM and the Regulation.

Notwithstanding the increased compliance burdens, the CBAM could also provide opportunities for Canadian companies in certain circumstances. In particular, Canadian companies that are competing in Europe with goods exported from the US or numerous other countries that have no or lower carbon regulatory costs than are imposed under Canada's OBPS (or a more stringent Canadian provincial regime) may have a valuable cost advantage once the Definitive Phase of the CBAM kicks in. ■

²⁷ *Ibid*, art 3(2).

²⁸ *Ibid*, art 16(2)

²⁹ "Carbon Border Adjustment Mechanism", online: *European Commission* <taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en>. The European Commission has published three guidance documents for EU importers and non-EU installation operators on the practical implementation of the Regulation. These guidance documents contain provisional methodology for calculating embedded emissions.

THE NEW CARBON CAPTURE TAX CREDIT: IT CAN AND SHOULD BE IMPROVED

*Charles DeLand**

Canada's federal government has proposed a range of policies over the past few years designed to reduce greenhouse gas (GHG) emissions. Among them are the refundable investment tax credits (ITCs) in Budget 2022, designed to increase carbon capture and storage (CCUS) investment in industrial facilities.

The recent tax credit legislation¹ needs serious changes if it is to give investors the clarity and incentives they need to make the large-scale investments CCUS requires.

Large carbon capture projects face many obstacles, not least the lack of which is meaningful examples anywhere in the world. Financing is only one of the barriers and tax credits are only one policy lever. But under the current proposal, these credits are set to be cut in half and end too soon. They also require unusual burdensome reporting and present confusing provisions to investors. Taken together, these restrictions seriously limit their real-world usefulness.

Investment tax credits return to a company a portion of what that organization spends on eligible projects. This should lower the ultimate cost of the project and in theory, increase the likelihood investors will commit to the investment.

The government proposes time-limited credits for capturing carbon. Projects that capture carbon directly from ambient air receive 60 per cent from 2022 to 2030, and other projects (like those planned in oil sands operations) receive 50 per cent. Other transport and storage expenses receive 37.5 per cent. After 2030 these rates drop by half and end completely by 2041.

Major projects take a long time to plan, build, and complete under the best of circumstances. Carbon capture projects are likely to take significantly longer. First, proponents face a limited supply chain and an experienced labour force. Second, emission-reduction policies in the US and EU are also driving up demand for materials and workers. Those proposing direct air capture projects face yet longer project development time, for which the technology has yet to be commercialized.

Moreover, investors in many provinces, like Ontario, are not yet eligible for the credit because their provinces are still working to develop the needed regulatory frameworks

To give the credit a chance to work, the federal government ought to extend the credit's maximum value by at least five years. A too-limited window is not the only hurdle

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¹ "Additional Design Features of the Investment Tax Credit for Carbon Capture, Utilization and Storage: Recovery Mechanism, Climate Risk Disclosure, and Knowledge Sharing" (9 August 2022,) online: *Government of Canada* <www.canada.ca/en/departement-finance/news/2022/08/additional-design-features-of-the-investment-tax-credit-for-carbon-capture-utilization-and-storage-recovery-mechanism-climate-risk-disclosure-and-k.html>.

to the proposed ITC. Failing to meet certain labour requirements (a concept from the US *Inflation Reduction Act*) takes another 10 percentage points off the rate.

To receive the maximum tax credit rates under these investment tax credits, businesses are required to pay at least a “prevailing wage” based on certain prior collective bargaining agreements and ensure that at least 10 per cent of tradesperson hours worked are performed by registered apprentices. It comes with added compliance and reporting requirements. Additional burdens like this erode effectiveness by introducing extraneous reporting and uncertainty over how much the tax credit will actually offer.

Investors also worry about a complex and confusing set of provisions which may deter investment such as those that “claw back” value under certain circumstances. In response to consultations, some stakeholders have said;

Claw back provisions, differing phase out schedules, narrow and confusing eligibility criteria, knowledge sharing requirements and a high-level auditing risk are just some of the provisions that could discourage companies and investors from using the ITCs. Meanwhile questions remain about the stackability of certain ITCs amongst themselves and with federal programs such as the Strategic Innovation Fund and projects supported by the Canada Infrastructure Bank, Canada Growth Fund, or provincial governments.²

Investors, provincial governments and their taxpayers contemplating their own support programs, need to know the risks beforehand. There are enough risks in carbon capture already without adding a layer from the Canada Revenue Agency. The legislation should be as simple as possible.

Reducing Canada’s GHG emissions is neither cheap nor easy. Progress has been slower than many would like, especially in sectors like industrial manufacturing or oil sands where energy demands for heat or other processes

are high, and few alternatives exist. If the federal government is serious about private sector investment to reduce emissions, Canada needs a more flexible, less burdensome approach, predisposed to removing barriers not erecting them.

GOING FORWARD

To give the carbon capture investment tax credit a fair chance to work, the legislation should extend the time period of maximum credit, drop the unnecessary labour requirements feature, and simplify or eliminate confusing mechanisms. ■

² “Members to grow Canada’s clean economy” (8 September 2023), online: *Business Council of Canada* <thebusinesscouncil.ca/publication/measures-to-grow-canadas-clean-economy>.

NEW ELECTRICITY RATE REFORM IN CALIFORNIA: A REJOINDER TO MEREDITH FOWLIE

*Ahmad Faruqui, Jim Lazar and Richard McCann**

This article is written in response to an article by Professor Meredith Fowlie in the *Energy Regulation Quarterly*.¹ She is one of the original proponents of a new rate design proposal that embodies an income-graduated fixed charge (IGFC).

Fowlie's article focuses on the one million households that have installed solar panels in the state. They made their investment to both expand the use of green energy, at the behest of state and federal incentives, and to combat rising bills, based on expectations about stability in the rate structure. The return on their investment in solar panels, estimated to run in the tens of thousands of dollars, would be significantly lowered by the IGFC. If they had known that the IGFC would be levied, most of them may not have made that investment.

In a section entitled "Solar losers, don't be sore losers," she tells the reader that she has solar panels on her roof and will also face higher bills once the IGFC is in place. Then she goes on to say, "Fellow solar losers, we hope we can take a step back and recognize this as a big win for California and the climate." Unfortunately, her claim is likely to come across as gratuitous advice to other solar customers.

There is no question that the bills of customers with rooftop solar, as well as those who made significant investments in other energy saving measures, are going to rise, often substantially, if the IGFC is imposed by the California Public Utilities Commission (CPUC). If a middle income solar customer in the PG&E service area with an income in the fourth income bracket put forward by the three investor-owned utilities has a current bill of \$50 a month, it will rise to \$124 a month, an increase of nearly 150 per cent.² A customer with a current bill of \$100 a month will face a new bill of \$156, an increase of 56 per cent. The value of their investment will be severely degraded.

Similarly, any household that has invested thousands of dollars to enhance the energy efficiency of their home by replacing their HVAC equipment, installing double or triple pane windows, and adding ceiling and wall insulation will also see the value of their investment being degraded.

But solar and energy efficient customers won't be the only losers. Any household that uses energy frugally and is a middle income customer would see its bills go up. So will single-person households and couples living in

* The authors are energy economists with several decades of experience in designing electric rates. They have each testified multiple times before regulatory commissions on rate design issues in the US and abroad, presented often at conferences and published numerous articles on the subject in academic and trade journals.

¹ Meredith Fowlie, "New Electricity Rate Reform in California" (August 2023) 11:2 *Energy Regulation Q*, online: [ERQ <energyregulationquarterly.ca/articles/new-electricity-rate-reform-in-california>](https://energyregulationquarterly.ca/articles/new-electricity-rate-reform-in-california).

² The energy charge will drop by 36%, or \$18. The new energy charge will be \$32. When added to the \$92 fixed charge, the new bill will be \$124.

small apartments. The lower their current bill, the more it will go up in percentage terms.

These two groups — energy efficient customers and frugal customers — comprise millions of customers in California. Neither is mentioned by Fowlie. She chooses to ignore the significant collateral damage to these millions of Californians in her single-minded focus on customers with solar panels. Should the IGFC come to pass, it will erode the credibility of future government incentives that are designed to encourage customers to make environmentally-enhancing investments, those whose economics is predicated on the stability of the regulatory compact .

A detailed analysis of how the IGFC will hit consumer pocket books across the four income brackets in the utilities' proposal shows that, in a reversal of fortunes, large users in all income brackets will benefit from the IGFC. It also shows that all customers in the lower two income brackets will benefit from it.³ It's worth noting that California Alternate Rates for Energy (CARE) customers already get a 35 per cent discount on their electric bills. It will probably rise to 50 per cent under the IGFC.

WHERE FOWLIE ERRS

The article suffers from several limitations and makes several unsubstantiated assertions. First, it asserts without offering any empirical, or even analytic, evidence that the IGFC will accelerate electrification. A more likely outcome is an increase in overall electricity use (if Fowlie's hypothesis is correct), with only a small portion focused on converting uses from fossil fuel to electricity. That increase is more likely to exacerbate reliability concerns in the state, which have been surfacing all too often since 2020, with little environmental benefit.

That unproven hypothesis underlies the provision in AB 205⁴ regarding IGFC. It was never debated or discussed before it became the law. The provision was slipped into a backdoor “budget trailer” bill. That is a sad comment on the state of democracy in California. To make matters worse, in what appears to be a sleight of hand, the CPUC has decided not to allow a public hearing session focused on getting customer comments, and it has also decided not to hold evidentiary hearings on the matter. The irony is that the CPUC is discussing the IGFC in a proceeding devoted to enhancing load flexibility, ignoring the fact that high fixed charges are likely to discourage load flexibility.

Second, the article neglects to mention that income provides no cost-related basis for setting fixed charges and raises important data reliability and privacy issues. The first question is, where else is that being done, and if so, how have they ironed out these key details? How will income data be obtained, to begin with? What coercive steps might be adopted to compel releasing such data to private corporations? Even if the income data becomes available, are utility IT and billing systems capable of processing it month after month and billing customers on time.

There are multiple reasons⁵ why that cannot be done as easily as presupposed by the academic proponents of the IGFC. We speak from experience, derived from assisting utilities, regulators, and consumer advocates in the regulatory process over several decades. We have never encountered such a proposal.

Third, the article skips over the fact the \$92 fixed charge for customers in the fourth tier that's being proposed by PG&E is nine times higher than the national average of \$11, nor does it acknowledge that the current fixed charge is zero. Even the \$51 fixed charge that's being proposed for the third tier is nearly five times higher than the national average.

³ Ahmad Faruqui, “What Will Happen if the CPUC Approves the Utility Proposals to Implement Income Graduated Fixed Charges?” *Energy Central* (1 August 2023), online: <energycentral.com/c/um/what-will-happen-if-cpuc-approves-utility-proposals-implement-income-graduated>.

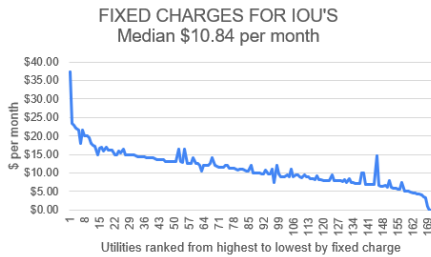
⁴ AB 205, Committee on Budget. Energy.

⁵ Jim Lazar, “The California “Income-Graduated Fixed Charge” Proposal Is Probably Impossible to Implement. There are Better Options Available” *Energy Central* (25 April 2023), online: <energycentral.com/c/pip/california-“income-graduated-fixed-charge”-proposal-probably-impossible-implement>.

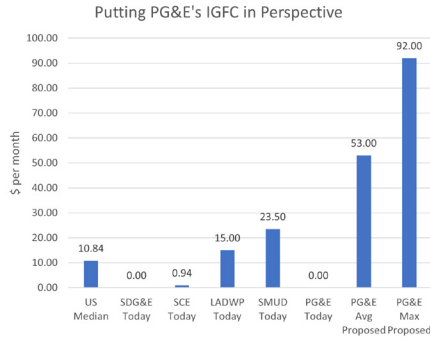
In our view, the guiding principles of Smart Rate Design⁶ should be as follows:

- a. Customers should be able to connect to the grid for no more than the cost to connect to the grid;
- b. Customers should pay for power supply and for grid services in proportion to how much they consume, and when they consume it; and
- c. Customers supplying power and other services to the grid should receive full and fair compensation; no more and no less.

This first principle has been approved by nearly every utility regulator in the US, approving fixed charges that recover the cost of the final service connection to the shared grid, plus the costs of metering and billing. In most cases, this results in a fixed charge that ranges between \$5 – \$15/month.



The current utility fixed charges in California are far below the national average, with two of the utilities having no fixed charge at all and the third having a fixed charge of just under \$1 per month. We agree that these should be converted to cost-based fixed charge to recover billing and collection costs — the very costs that form the basis for fixed charges for nearly every other regulated utility. That number may come in at \$15 a month and be discounted for lower income consumers, and waived entirely for the lowest income consumers. That would meet the requirement of the law, and allow a reduction in the per-kWh rate by about \$0.025/kWh. This would not create severe financial dislocation among customers.



While California has been noteworthy in going beyond the conventional approach in several regulatory areas such as on promoting energy efficiency, renewable generation, and, yes, even rooftop solar, it has also stumbled badly at times. Failure to consider the unintended consequences of its market restructuring initiative nearly a quarter century ago led to an epic market implosion and a series of botched solutions. Fifteen years ago, the state urged the utilities to invest heavily in renewable energy resources when they were more expensive than conventional forms of energy, largely foregoing the technology enhancements that now make solar, wind, and battery storage competitive with conventional generation. The proponents of the IGFC are asking yet again for approval a dramatic diversion from conventional wisdom on the same “trust us” basis that led to those earlier disasters.

CALIFORNIA NEEDS BETTER RATE DESIGNS THAN THE IGFC

Professor Fowlie shows graphically that there is a mismatch between household solar generation and system marginal costs. While the accuracy of her graph is open to question, if the issue is indeed present, it can be fixed more productively and directly by following the steps outlined below.

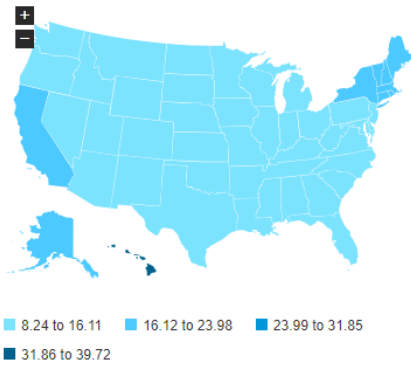
First, address the core problem that is making rates unaffordable in California — rapidly escalating utility costs. Why are rates going up? The article mentions mitigating wildfire risk and repairing damages as a reason, implying it is the primary factor. Yes, it’s a reason but it is a relatively minor factor to date. Even for future

⁶Wilson Gonzalez, “Smart Rate Design for a Smart Future” (15 July 2015), online: *Regulatory Assistance Project* <www.raponline.org/knowledge-center/smart-rate-design-for-a-smart-future>.

rate increases, it is not the key driver, PG&E has asked for a 46 per cent increase in revenue requirements from 2022 to 2026 — of that, only 7 per cent is for wildfire risk management. Electric rates in the Golden State have been higher than the US average long before wildfires arrived. Data from the US Energy Information Administration show that they have been higher than the US average since 1979, and took a strong upturn in 2016 prior to the 2017 wildfire conflagration. California also has higher allowed profit rates, higher executive compensation rates, and, yes, higher energy taxes than the national average.

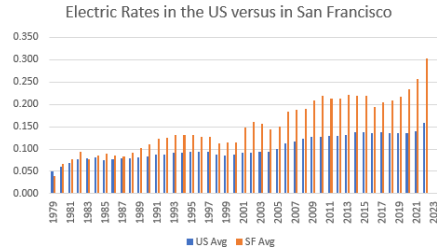
Taken together, California rates are 2-3 times higher than those in nearby states like Arizona, New Mexico, Nevada, Utah, Idaho, Washington, and Oregon. This graph from the US Energy Information Administration shows that California’s rates are the highest in the continental US:⁷

U.S. average retail price per kilowatthour is 12.36 cents



The article seems to suggest that California has higher rates because of factors such as wildfires and solar cost-subsidies. The fact is that California’s average residential rates began rising faster than the national average long

before these two factors came into play, as seen in the graph below.



The real culprit has been an almost willful ignorance of changing industry conditions. The utilities added generation and grid enhancements based on a belief that demand would just keep on rising. Instead, loads and peak demands have stagnated since 2006. Even the record peak caused by beyond historic temperatures in 2022 was only 4 per cent higher than the 2006 high. The utilities failed to anticipate how building and appliance codes combined with rooftop solar installations in response to rising rates would suppress demand. And they have been told about these changes for over a decade.

Any risk associated with those misjudgments unfortunately has been shifted away from shareholders to ratepayers and taxpayers. Correcting that fundamental misalignment of incentives must be the starting point. Doing otherwise is just rearranging the deck chairs on the Titanic.

Second, change the rate structure to better track costs. The utilities and the CPUC bear responsibility for keeping an inappropriate rate structure in place and for continuing to raise rates. One of us is on PG&E’s EV2-A rate, which resembles the rate shown in the article. The off-peak rate, which applies from midnight to 3 pm and accounts for two-thirds of the hours of the day, has been going up at 15 per cent a year since 2019.

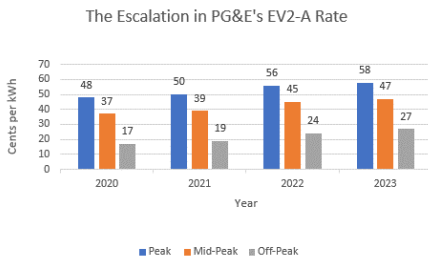
In California, all residential customers of investor-owned utilities have been moved to a default TOU rate with much smaller differentials between peak and off-peak rates. Providing customers with such an anemic TOU

⁷ “US Electricity Profile 2022” (2 November 2023), online: *U.S. Energy Information Administration* <www.eia.gov/electricity/state>.

rate erodes their incentive to use power off-peak when it is cheaper to serve and benefits accrue to all ratepayers in lower costs. It is nothing but a check list type of exercise which will yield no savings to customers or to society as a whole.

Sacramento Municipal Utility District (SMUD) has implemented a much better TOU rate design as the default tariff in its service territory which includes the state capital and adjacent regions. Other states have adopted much more effective default TOU rates as well as opt-in TOU rates that are easy for consumers to understand.⁸ California should be a follower, not a leader, on this.

In addition to offering TOU rates, a dynamic element can be added to enhance load flexibility on critical system days. This can be done through peak-time rebates (PTR) or critical-peak pricing. The state of Maryland offers PTR as the default to all residential customers and it has yielded significant benefits to customers and to the power system as a whole.



Third, there are better ways to promote electrification.⁹ For example, if we want to encourage electrification directly, and not just increased air conditioning loads, we should target those marginal-cost-based rates at new electricity uses that displace natural gas and gasoline. Customers who replace a furnace with a heat pump, or a gas car with an EV could

be given an allowance equal to the projected use for a heat pump or EV priced at a much lower rate. Many utilities do this, in one form or another, today. California even has a system in place today to grant each customer a climate-zone and housing-type customized “baseline” allocation of low-cost power which could be augmented for this purpose. The billing system changes for this solution would be far less complicated than trying to tie income to specific households.

Fourth, encourage current NEM 1 and 2 solar customers to install a battery. Those batteries will defer costly grid upgrades by shifting use away from peak periods and will improve system reliability. They will also provide resilience against increasingly frequent and annoying power outages, mostly stemming from a poorly maintained grid.

THE CPUC SHOULD REJECT THE IGFC AS “NOT READY FOR PRIME TIME”

The IGFC violates all principles of rate design as the director of rates at a very progressive utility that’s focused on electrification told one of the authors. The Howard Jarvis Tax Foundation that originated Proposition 13 has already indicated that it will challenge this as a “tax” that requires voter approval. There are numerous loopholes in the utility proposal. The three of us, along with a dozen others, including academics, consultants, executives, regulators and researchers, filed ex parte comments¹⁰ with the CPUC asking the commission to reject it.

We agree that California rates need to be changed to enable an economic transition away from fossil fuels. As noted earlier in this article, there are far better ways to achieve this goal than the proposed IGFC. ■

⁸ Examples include Colorado, Hawaii, Michigan, Missouri, Oregon and Washington. Ahmad Faruqui and Ziyi Tang, “Time Varying Rates (TVRs) are moving from the periphery to the mainstream of electricity pricing for residential customers in the United States” (21 August 2023), online (pdf): [Brattle <www.brattle.com/wp-content/uploads/2023/07/Time-Varying-Rates-TVRS-Are-Moving-from-the-Periphery-to-the-Mainstream-of-Electricity-Pricing-for-Residential-Customers-in-the-United-States.pdf>](https://www.brattle.com/wp-content/uploads/2023/07/Time-Varying-Rates-TVRS-Are-Moving-from-the-Periphery-to-the-Mainstream-of-Electricity-Pricing-for-Residential-Customers-in-the-United-States.pdf).

⁹ Ahmad Faruqui, “Promoting electrification without penalizing efficiency: An alternative to the income graduated fixed charge” *Energy Central* (10 August 2023), online: energycentral.com/c/um/promoting-electrification-without-penalizing-efficiency-alternative-income.

¹⁰ “Notice of written ex parte communications: The CPUC should not adopt Income Graduated Fixed Charges for Electricity” (30 May 2023), online (pdf): docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M510/K287/510287693.PDF.

A ‘MODERNIZED’ NEB? THE CER REPORT ON CANADA’S ENERGY FUTURE 2023

Ron Wallace*

INTRODUCTION

This paper provides a commentary on the Canada’s Energy Future (EF2023)¹ report issued by the Canada Energy Regulator (CER).

Using economic and energy models, the report, one of a series, “explores how possible energy futures might unfold for Canadians over the long-term” and specifically focusses “on the challenge of achieving net-zero greenhouse gas emissions by 2050.”²

“In this analysis, we begin with the end goal in mind: net-zero greenhouse gas (GHG) emissions in 2050, and use our models to identify pathways to that point. This is a different approach compared to past versions of the report where we ran our models without restrictions, giving us insights into what a given premise meant for the future.

In this report we explore a key question about Canada’s energy future: what could reaching net-zero emissions by 2050 look like? This report is not a prediction or a recommendation. It presents net-zero scenarios that can help Canadians and policy makers see what a net-zero world could look

*like, visualize the goal, and make informed decisions.”*³

FIRST, SOME HISTORY

Before attempting to discuss the report, it is useful to review not only its genesis and context but that of the CER itself.

The predecessor to the CER, the National Energy Board (NEB), established in 1959 under the *National Energy Board Act*, was authorized to regulate the export of oil, natural gas and electricity, the import of gas and, significantly, to oversee, the construction and operation of interprovincial and international pipelines including the setting of tolls and tariffs for those projects. The Board, composed of independent members appointed by Governor-in-Council, had all the powers vested in a superior court (a “court of record”) and reported to Parliament through the Minister of Natural Resources.

The events that surrounded the formation of the NEB were not unremarkable. The “Great Pipeline Debate” held in Parliament in May and June 1956 became one of the most significant confrontations in Canadian parliamentary history. The Liberal government of the day proposed to have constructed, in the national interest, a pipeline to carry natural gas from Alberta into central Canada. Requiring significant capital expenditures, in

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¹ “Canada’s Energy Future 2023” (2023), online (pdf): CER <www.cer-rec.gc.ca/en/data-analysis/canada-energy-future/2023/canada-energy-futures-2023.pdf>.

² *Ibid* at 4.

³ *Ibid* at 1.

1954 then-Minister C.D. Howe called for the formation of a private syndicate to create TransCanada Pipelines, having introduced a Bill to authorize it with provisions, introduced in May 1956 that provided a loan to support construction. A political storm ensued which led the government to introduce a time limit on debate through closure — a legislative procedure used to address the urgent need to begin pipeline construction that year. With the Liberal majority in the House, the Bill passed. However, the debate so coloured views within the electorate that it was considered, in whole or in part, to have led to the defeat of the Liberal government in the 1957 Canadian general election, one that ended more than two decades of Liberal governments.

Fast-forward to the 2015 Canadian general election, one that arrived at a time of unprecedented protests over proposed pipeline construction applications, when Liberal candidate Justin Trudeau vowed to “reform” and “modernize” the National Energy Board and, significantly, promised not to allow pending pipeline applications to proceed. During the election, Trudeau made these attacks on the regulatory process and the NEB a core element of his campaign:

“It’s obvious the Harper government’s politicization of the National Energy Board, the process around approval for projects like this, is not working, and if there’s any hope for projects like this and others to go forward, there needs to be a restoration of public trust. That’s why we’ve announced we’re going to engage in a new, open process for all pipelines.”⁴

The campaign also made explicit promises to restructure the NEB and to “re-do” the Kinder Morgan Trans Mountain pipeline expansion from Alberta to B.C. to ensure:

“...environmental assessments include an analysis of upstream impacts and greenhouse-gas emissions resulting from projects under review.”⁵

Unlike the Parliamentary debates of 1956 that preceded an election, it was the 2015 election itself that focussed direct attention on pipelines and the NEB. In effect, it was being alleged that the independence of the NEB had been politically compromised to such a degree that public trust in national interest decisions had been eroded and therefore required material legislative and administrative changes.

The subsequent Liberal government’s 2015 mandate letter to Natural Resources Minister Jim Carr carried direction to:

“Modernize the National Energy Board to ensure that its composition reflects regional views and has sufficient expertise in fields such as environmental science, community development and indigenous traditional knowledge.”⁶

It did not help the NEB that, shortly after the 2015 election, a scandal erupted over meetings held by certain NEB Members and political leaders in Quebec with alleged ties to the Energy East Consortium. This gave new impetus to modernize the NEB, as reflected in a 2016 statement from NRCan Minister Carr when the Energy East Hearing was suspended:

“Canadians expect and deserve to have confidence in their public institutions. Independence and neutrality are fundamental principles for all of Canada’s regulatory institutions, including those reviewing major projects such as the National Energy Board (NEB). Canadians expect all regulatory institutions to address claims that the principles of independence and neutrality are not being respected.

We are modernizing the NEB to restore the trust that Canadians want, and we will be reviewing the NEB’s mandate, structure and role, including public participation in the regulatory reviews.

We hope the situation involving the Energy East hearings will be resolved

⁴ David J. Martin, “Comment: What happened to Liberal promises on NEB?” *Times Colonist* (12 January 2016), online: <www.timescolonist.com/opinion/comment-what-happened-to-liberal-promises-on-neb-4630840>.

⁵ *Ibid.*

⁶ Hon. Justin Trudeau, “Minister of Natural Resources Mandate letter” (12 November 2015), online: <www.pm.gc.ca/en/mandate-letters/2015/11/12/archived-minister-natural-resources-mandate-letter>.

*immediately to allow the process to continue so Canadians can voice their point of view on this important national topic.”*⁷

The eventual cancellation by the proponent in October 2017 of the proposed \$15.7 billion Energy East Pipeline Project⁸ was unquestionably a result of a complex series of events,⁹ some of which embraced not just Canadian regulatory uncertainty, but changed economics, opposition from Quebec and organised, vocal opposition from environmental organizations and numerous First Nations.

These events set off a cascade of activities by the new Federal government as it proceeded to form an Expert Panel on the Modernization of the National Energy Board leading to a NEB Expert Panel Report¹⁰ released on May 2017. As extensively reviewed by Professor Banks¹¹, the Expert Panel Report was one of four that examined aspects of how the federal government reviews and regulates major projects. Three other reports dealt with a review of environmental assessment procedures, habitat protection under the *Fisheries Act* and the role of the *Navigation Protection Act*. In June 2017, the Federal Government released a discussion paper “Environmental and Regulatory Reviews”¹² that outlined certain, broad proposed changes for federal assessment and regulatory processes, these in response to the earlier-cited reports.

For almost 60 years the National Energy Board (NEB) had assumed legislative responsibilities

for the regulation of approximately 73,000 kilometres of international and interprovincial pipelines 1,400 kilometres of international power lines and for the import and export of energy in Canada. All of that was about to change — significantly.

As noted in a Federal announcement about the unfolding processes:

*“As Canadians made clear during 14 months of extensive public consultations, our federal energy regulations must continue to evolve and adapt to changing times. Canadians had diverse recommendations on reforms, but all agreed these efforts are central to integrating Canada’s energy, economic and climate goals, as well as renewing Canada’s relationship with Indigenous peoples. A modern regulator is also critical to ensuring Canadians continue to have access to a safe, affordable and reliable supply of energy.”*¹³

Those “extensive public consultations” were marked by widespread protests, especially in western Canada, during which time Bill C-69 became known as the “no more pipelines Act.” Nonetheless, on June 20, 2019 Bill C-69 was passed into law¹⁴ following sometimes acrimonious hearings held by the Standing Senate Committee on Energy, the Environment and Natural Resources, chaired by Senator Rosa

⁷ Hon. Jim Carr, “Statement from the Honourable Jim Carr on the Suspension of the Energy East Hearings” (1 September 2016), online: *Government of Canada* <www.canada.ca/en/natural-resources-canada/news/2016/09/statement-honourable-carr-suspension-energy-east-hearings.html>.

⁸ The Canadian Press, “Timeline: TransCanada’s controversial Energy East pipeline” *CTV News* (5 October 2017), online: <www.ctvnews.ca/business/timeline-transcanada-s-controversial-energy-east-pipeline-1.3621145>.

⁹ Markham Hislop, “Why did TransCanada cancel \$12 billion Energy East pipeline project?” *The American Energy News* (6 October 2017), online: <theamericanenergynews.com/markham-on-energy/energy-east-transcanada-06oct17>.

¹⁰ “Forward, Together – Enabling Canada’s Clean, Safe and Secure Energy Future” (15 May 2017) NEB Modernization Expert Panel Report, online (pdf): *NRCAN* <natural-resources.canada.ca/sites/nrcan/files/pdf/NEB-Modernization-Report-EN-WebReady.pdf>.

¹¹ Nigel Bankes, “The NEB Modernization Report” (14 June 2017), online: *ABlawg* <ablawg.ca/2017/06/14/the-neb-modernization-report>.

¹² “Environmental and Regulatory Reviews: Discussion Paper” (June 2017), online: *Government of Canada* <www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/share-your-views/proposed-approach/discussion-paper.html>.

¹³ “A new Canadian Energy Regulator” (28 August 2019), online: *Government of Canada* <www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/national-energy-board-modernization.html>.

¹⁴ McLennan Ross, “The Notorious Bill C-69 Becomes Law in Canada” *Mondaq* (12 July 2019), online: <www.mondaq.com/canada/climate-change/825356/the-notorious-bill-c-69-becomes-law-in-canada>.

Galvez¹⁵. Many sessions were accompanied by strong opposition and vocal protests.¹⁶

Bill C-69 enacting the *Impact Assessment Act*, the *Canadian Energy Regulator Act*, and amending the *Navigation Protection Act* (renamed as the *Canadian Navigable Waters Act*) was passed by a final vote of 57–37 and received Royal Assent shortly thereafter. Although the Senate recommended 188 amendments to the Bill, the House of Commons chose to accept only 62 amendments with another 37 agreed after alterations. Notwithstanding these amendments, the final version of the Bill passed by the Senate largely resembled the version originally tabled by the Federal Government in the House of Commons on February 8, 2018.

Following a process that perhaps surpassed the public and political rancor witnessed in the 1956 Great Pipeline Debate, Liberal electoral promises were fulfilled when the CER was formed on August 28, 2019 under the *Canadian Energy Regulator Act (CER Act)*.

Significantly, in its stated attempt to “modernize” the NEB, the *CER Act* emphasised Indigenous participation, sustainability, climate change and new criteria for regulatory decisions. However, as asserted not just by industry, the *Act* increased the level of investment uncertainty already associated with a protracted Canadian Federal assessment process. This raised the valid question as to whether or not Bill C-69 would achieve its primary objective to provide more efficient and timely regulatory decision-making. Indeed, many considered

that the requirements of the *Act* would place the new CER in a difficult position in future considerations of the public interest, especially those associated with large interprovincial pipelines, or carbon-emitting, resource projects. However, in light of subsequent decisions made by Cabinet on November 29, 2016 to officially reject plans for the Enbridge Northern Gateway Pipeline¹⁷ project, it was clear that the long-standing governing principle of the NEB that “those who hear the evidence decide” had effectively been abandoned.

At the end of the day, the *Canadian Energy Regulator Act* had created the new Canada Energy Regulator and successfully repealed the *National Energy Board Act*. It was the end of an era.

WHAT DID “MODERNIZATION” ACCOMPLISH?

Although the CER arrived in 2019 through a process vastly different from that which had led to the creation of the NEB in 1959, its birth was nonetheless equally as traumatic.¹⁸ Different from 1959 was the emergence of well-funded environmental activist organizations that appeared to extensively employ social media to form a vocal, highly effective voice that targeted not just the NEB, its Permanent Members and their regulatory decisions, but the entire Canadian oil, gas and pipeline sector.¹⁹ These alleged activities led to the creation of an Alberta public enquiry into anti-Alberta energy campaigns that attempted to reveal funding from foreign special interest groups.²⁰

¹⁵ “Senate committee recommends amendments to Bill C-69” (21 May 2019) Standing Senate Committee on Energy, the Environment and Natural Resources, online: *Senate of Canada* <sencanada.ca/en/newsroom/enev-senate-committee-recommends-amendments-to-bill-c-69>.

¹⁶ The Canadian Press, “Bill C-69 gets a rough ride at Senate committee hearing in Calgary” *CBC* (10 April 2019), online: <www.cbc.ca/news/canada/calgary/calgary-senate-hearing-bill-c69-oilsands-energy-projects-pipeline-lines-1.5091846>.

¹⁷ Bruce Cheadle, “Justin Trudeau halts Northern Gateway, approves Kinder Morgan expansion, Line 3” *Global News* (last updated 30 November 2016), online: <www.globalnews.ca/news/3094856/northern-gateway-pipeline-line-3-pipeline-announcement>.

¹⁸ Ron Wallace, “The Tortuous Path to NEB ‘Modernization’” (July 2018) 6:2 *Energy Regulation Q*, online: *ERQ* <energyregulationquarterly.ca/articles/the-tortuous-path-to-neb-modernization>.

¹⁹ “Vivian Kraus: New U.S. funding for the war on Canadian oil” *Financial Post* (29 November 2013), online: <financialpost.com/opinion/vivian-krause-new-u-s-funding-for-the-war-on-canadian-oil>.

²⁰ “Public inquiry into anti-Alberta energy campaigns” (last updated 20 November 2020) Final report, online: *Government of Alberta* <www.alberta.ca/public-inquiry-into-anti-alberta-energy-campaigns.aspx>.

After what has been described as a “great run”²¹ that extended over almost six decades, the NEB had been “modernized.” That structural alteration had material legislative and administrative consequences which elicited concern from some quarters.²² Notably, the CER’s adjudicative function was separated from its administrative operations through the creation of a Board of Directors set to provide oversight, strategic direction and advice on operations. With a Chief Executive Officer, separate from the Chair of the Board, responsibilities for day-to-day operations now rest with the CEO. The CER’s adjudicative branch has up to seven full-time commissioners who replaced the NEB’s nine Permanent Board Members. At least one of the CER’s directors and at least one of the Commissioners was specified to be of Indigenous ancestry.

While the mandate for the CER included traditional NEB regulatory concerns such as decisions for pipelines (including abandoned pipelines), power lines, offshore renewable energy and also the oversight of pipeline construction, operation and abandonment, it did not include impact assessment or consultations on major projects. These tasks were assigned to the Impact Assessment Agency of Canada (IAAC), a central agency for impact assessment and consultations not just for the CER but also for other lifecycle regulators.

THE CER AND ITS ENERGY FUTURE 2023 REPORT

The 2023 CER report (EF2023) provided some insight into its new directions:

“In this analysis, we begin with the end goal in mind: net-zero greenhouse gas (GHG) emissions in 2050 and use our models to identify

pathways to that point. This is a different approach compared to past versions of the report where we ran our models without restrictions, giving us insights into what a given premise meant for the future.

*In this report we explore a key question about Canada’s energy future: what could reaching net-zero emissions by 2050 look like? This report is not a prediction or a recommendation. It presents net-zero scenarios that can help Canadians and policy makers see what a net-zero world could look like, visualize the goal, and make informed decisions.” [emphasis added]*²³

A primary concern for any independent regulator is to avoid the potential of “regulatory capture”²⁴ from agents within its regulated community. But what happens when regulatory capture appears to emanate from government itself? Alignment by line departments with governmental policy priorities has always been a standard operating principle. Indeed, the Liberal government has been restructuring Natural Resources Canada (NRCan) to, among other things, attain “meaningful Indigenous participation in natural resources projects and net-zero transition.”²⁵ However, there are material consequences that arise when such directives are applied to what was formerly an independent, expert energy and pipeline tribunal notably when, under Ministerial direction, the CER was directed to consider the “end goals” of governmental policy.

Investors, analysts, and policy makers had come to rely upon the NEB for fact-based, independent analyses of the national interest untainted by either governmental policy

²¹ “It’s been a great run NEB: After almost 60 years, the National Energy Board to be replaced with the Canadian Energy Regulator” (9 February 2018), online: *McCarthy Tétrault LLP* <www.mccarthy.ca/en/insights/blogs/canadian-energy-perspectives/its-been-great-run-neb-after-almost-60-years-national-energy-board-be-replaced-canadian-energy-regulator>.

²² Rowland Harrison, Neil McCrank, and Ron Wallace, “The Structure of the Canadian Energy Regulator: A Questionable New Model for Governance of Energy Regulation Tribunals?” (April 2020) 8:1 *Energy Regulation Q*, online: *ERQ* <energyregulationquarterly.ca/articles/the-structure-of-the-canadian-energy-regulator-a-questionable-new-model-for-governance-of-energy-regulation-tribunals>.

²³ *Supra* note 1 at 4.

²⁴ Will Kenton, “Regulatory Capture Definition With Examples” *Investopedia* (last updated 1 March 2021), online: <www.investopedia.com/terms/r/regulatory-capture.asp>.

²⁵ “Energy and Natural Resources organizational structure” (last updated 10 August 2023), online: *NRCan* <natural-resources.canada.ca/home/about-us/natural-resources-canada-organizational-structure/23054>.

direction or the direct economic interests of industry. The 2023 CER report on Canada's energy future stands all those principles on their head by uncritically assuming that Federal policies to achieve net-zero greenhouse gas emissions by 2050 are not only desirable but technically and economically feasible.

The three scenarios considered by the CER are a significant departure from prior analyses done by the NEB because they incorporate, as a first assumption, a “net-zero baseline” into the long-term outlook for the Canadian energy industry. Unsurprisingly, the report assumes that targets for net-zero greenhouse gas emissions reductions set out in the Paris Agreement²⁶ will be successful and result in Canadian oil production materially declining by 2050. This assumption flies in the face of the growing evidence of substantial disagreements within the G20 group of nations (who account for three-quarters of international GDP and global emissions) who have consistently failed to reach consensus to phase down fossil fuels.²⁷ In addition to objections from some producer nations within the G20 group, there are clear indications that substantive producer²⁸ and consumer²⁹ nations like Russia, India, Indonesia and China are moving in directions that would negate any Canadian, and perhaps all G20 group, emissions reductions. Hence, many consider that the attainment of “net-zero” should be considered more as an aspiration than as a feasible policy based on realistic engineering or economics.

In constructing a report “with the end-goal in mind,” the CER appears to have by-passed an essential requirement as an expert agency first to assess the validity of the fundamental assumptions that underpin the modelling. One could question if many of the report's assumptions and findings were critically reviewed before those assumptions about net-zero scenarios were accepted: “...to help Canadians and policymakers see what a net-zero world could look like.”³⁰

In contrast, previous reports from the CER helpfully assessed projects that have the potential to increase Alberta's CCS carbon capture and sequestration (CCS) capacity to 56 million tonnes CO₂/year by 2030 — equivalent to 22 per cent of the 256.5 million tonnes CO₂ emitted in the province in 2020.³¹ By contrast, CER's EF2023 report models scenarios for net-zero that do not critically assess the global efforts needed to achieve international net-zero targets. It also omits careful consideration of the importance of establishing fiscal certainty for industry before significant investments could be made in CCS technologies.³²

It may be useful to recall that the genesis for the CER report was in response to certain criticisms³³ voiced by the Minister and climate advocates in regard to the CER's 2021 Annual Report³⁴ that projected Canadian oil and gas production could increase until 2032–2040. One commentator noted the inconsistency between the CER and the IEA's approach to

²⁶ “The Paris Agreement” (12 December 2015), online: *Government of Canada* <www.canada.ca/en/environment-climate-change/services/climate-change/paris-agreement.html>.

²⁷ Sudarshan Varadhan and Nidhi Verma, “G20 bloc fails to reach agreement on cutting fossil fuels” *Reuters* (23 July 2023), online: <www.reuters.com/business/energy/g20-draft-tweaked-reflect-dissent-cutting-unabated-fossil-fuels-2023-07-22>.

²⁸ “Iraq, TotalEnergies sign massive oil, gas, renewables deal” *Reuters* (10 July 2023), online: <www.reuters.com/business/energy/iraq-totalenergies-sign-27-bln-deal-energy-projects-2023-07-10>.

²⁹ AFP, “Global coal demand to stay near record in 2023: IEA” *Insider Paper* (27 July 2023), online: <insiderpaper.com/global-coal-demand-to-stay-near-record-in-2023-iea>.

³⁰ *Supra* note 1 at 4

³¹ “Market Snapshot: New projects in Alberta could add significant carbon storage capacity by 2030” (21 December 2022) Upcoming CCS projects in Alberta, online: *CER* <www.cer-rec.gc.ca/en/data-analysis/energy-markets/market-snapshots/2022/market-snapshot-new-projects-alberta-could-add-significant-carbon-storage-capacity-2030.html>.

³² Layla Nelson, “In a net-zero future, Canadian oil production could peak as early as 2026, according to the Energy Regulator” *Canada Today* (20 June 2023), online: <canadatoday.news/ca/in-a-net-zero-future-canadian-oil-production-could-peak-as-early-as-2026-according-to-the-energy-regulator-382373>.

³³ Inayat Singh, “Canada energy regulator criticized for not modelling net-zero future” *CBC* (14 December 2021), online: <www.cbc.ca/news/science/cer-report-missing-net-zero-1.6285394>.

³⁴ “Canada's Energy Future 2021” (2021), online (pdf): *CER* <www.cer-rec.gc.ca/en/data-analysis/canada-energy-future/2021/canada-energy-futures-2021.pdf>.

forecasting: “We need to make sure that this is the last year that our energy regulator can get away with energy forecasting that sets us up for failure.”³⁵

Subjected to these criticisms, in December 2021 NRCan Minister Wilkinson:

“...requested that the CER produce a report that would undertake a scenario analysis consistent with the objectives of the Paris Agreement and with Canada achieving net-zero emissions by 2050. This report was to include modelled scenarios relating to the supply and demand of all energy commodities. EF2023 is the result of that request.” [emphasis added]³⁶

In response to the Minister’s letter of request dated December 16, 2021³⁷ the CER confirmed that its next report iteration would be “*expanded to include modelling consistent with Canada’s commitment to achieve net-zero emissions by 2050.*”³⁸ It could be argued that there is an additional role for the CER — that being to provide a critical assessment of consequences of this “commitment.” In light of developing real-world concerns, such as energy security and the economic and financial challenges associated with the attainment of net-zero policies, would it not have been reasonable to expect any national regulator also to consider the potential material effect of these policies for the Canadian national interest?

CONCLUDING COMMENTARY

In light of the NEB’s acclaimed prior independence for regulatory decisions and analysis, these events marked a significant departure from past practices and shifted

the Regulator toward activities traditionally addressed by line departments. Many would consider that any regulator directed by Ministers to respond to public pressures from advocacy groups would have suffered a serious diminishment of its image for independent thought and analysis.

In a critical review Stewart Muir noted:

“There’s nothing wrong with ambitious blue-sky thinking on what the world should look like in a quarter century. But providing the boring statistics of energy system performance as it exists in the moment is also still important. A national energy regulator insulated by design from the whims of political actors should be able to walk and chew gum — but it feels like somebody has instructed it not to try.

*In its particulars, the new report misses crucial details. For instance, it overlooks Article 6 of the Paris Agreement, which allows countries to transfer carbon credits earned from the reduction of GHG emissions to help others meet climate targets. This could significantly enhance the prospects for low-emission LNG exports from Canada. Similarly, the report overlooks two LNG projects, both owned by First Nations, that are moving through the regulatory process. Considering all the other assumptions the report entertains, it could have assumed Cedar LNG and Ksi Lsims LNG might well come to fruition. When built, these projects could significantly improve Canada’s decarbonization story, but they are nowhere in the plan.”*³⁹

³⁵ Julia Levin, *supra* note 33.

³⁶ Natural Resources Canada, “Minister Wilkinson’s Statement Regarding the Canada Energy Regulator’s First Long-Term Outlook Modelling Net-Zero by 2050 in Canada” (20 June 2023), online: *Government of Canada* <www.canada.ca/en/natural-resources-canada/news/2023/06/minister-wilkinsons-statement-regarding-the-canada-energy-regulators-first-long-term-outlook-modelling-net-zero-by-2050-in-canada.html>.

³⁷ Letter from the Honourable Jonathan Wilkinson to Cassie Doyle (16 December 2021), online (pdf): <www.cer-rec.gc.ca/en/about/news-room/whats-new/2021/canadas-energy-future-report-minister-letter-to-cer-16-december-2021.pdf>.

³⁸ Letter from Cassie Doyle to the Honourable Jonathan (20 December 2021), online: *CER* <www.cer-rec.gc.ca/en/about/news-room/whats-new/2022/letter-from-the-chairperson-canadas-energy-future-report-letter-to-minister-20-december-2021.html>.

³⁹ Stewart Muir, “Energy regulator should deal in reality” *Financial Post* (28 June 2023), online: <epaper.calgaryherald.com/article/281831468170899>.

Significantly Muir also acknowledged an important contribution of the report:

“The report isn’t without merit. The inclusion of discussions around carbon capture, nuclear power, and hydrogen is commendable. Many climate warriors are dead set against these technologies, insisting instead on total reliance on renewables. Kudos to the CER for standing its ground on them. Its doing so gives hope discussions about transition may be guided by a realistic understanding of our energy-intensive civilization, not just wishful thinking.”⁴⁰

Arguably, assessments of the national interest should be based on more factors than the attainment of reduced emissions. It requires consideration of viable, economic and feasible methodologies for a “transitional” energy economy to maintain, or enhance, our standard of living. This is especially so when a significant proportion of the global energy economy appears to be headed in directions that make achievement of a global net-zero economy highly problematic.⁴¹

Notwithstanding Canada’s⁴² and the parallel international consensus for industrialized democracies to “transition” away from fossil fuels, as was demonstrated by the recent Group of 7 meetings in Hiroshima, Japan there continue to be material difficulties experienced in attaining such targets.⁴³ The final G7 communiqué⁴⁴ acknowledged the need for continued financing by Japan for some coal-fired power plants, while others, such as Germany, continue to support investment in

natural gas infrastructure required to replace Russian gas imports.

Significantly, a recent report by the US Institute for Energy Research concluded:

“Achieving any of the net-zero pathways in Net-Zero America requires heroic assumptions about land use, coal use, sales of electric vehicles (EVs), and construction of new generation and infrastructure. Achieving any one of these assumed target values would require massive, unprecedented, and rapid change. Hitting net-zero would require all these unprecedented targets to be achieved.”

...

“Attempting to achieve net-zero will require wrenching change. The already substantial, world-leading CO₂ emissions reductions made by the U.S. are only a fraction of what would be required. Rapid and unprecedented reordering of American energy production and use would have to happen along with huge increases in mineral production. The economy would be severely damaged. And even with all that, achieving net-zero still requires dubious assumptions and projections about future technology and behavior that likely make net-zero an impossible near-term target. Understanding these challenges and costs at the outset must inform policymakers before they pursue any version of a net-zero target.”⁴⁵

⁴⁰ *Ibid.*

⁴¹ *Supra* note 27.

⁴² “Powering Canada Forward: Building a Clean, Affordable, and Reliable Electricity System for Every Region of Canada” (last updated 31 August 2023), online: *NRCan* <natural-resources.canada.ca/our-natural-resources/energy-sources-distribution/electricity-infrastructure/powering-canada-forward-building-clean-affordable-and-reliable-electricity-system-for/25259>.

⁴³ “G7 Hiroshima Leaders’ Communiqué” (20 May 2023), online: *The White House* <www.whitehouse.gov/briefing-room/statements-releases/2023/05/20/g7-hiroshima-leaders-communication>.

⁴⁴ Motoko Rich, Lisa Friedman and Jim Tankersley, “Behind the Scenes, G7 Nations Wrangle Over Ambitious Climate Commitments” *The New York Times* (20 May 2023), online: <www.nytimes.com/2023/05/20/world/asia/climate-fossil-fuels-g7.html>.

⁴⁵ IER, “The Challenges and Costs of Net-Zero and the Future of Energy” (9 August 2023), online: *IER* <www.instituteforenergyresearch.org/the-grid/the-challenges-and-costs-of-net-zero-and-the-future-of-energy>.

This developing international “energy security”⁴⁶ reality demonstrates the political, technical and economic challenges for the Group of 7 as they endeavour to accelerate a global energy transition⁴⁷ one that will require trillions in governmental incentives. Largely unspoken of at these meetings are the measures⁴⁸ taken to maintain “temporary” supplies of fossil fuels in face of the EU’s electricity crisis, efforts to mitigate rising energy prices in the UK⁴⁹ and efforts by the US to maintain low gasoline prices.

Other authors have advanced more forcible arguments about this issue:

“Even more ironic (or insane), China dominates the world’s wind, solar and battery technologies, their raw material supply chains and their manufacturing. U.S. politicians may be ramping up talk about reducing dependence on China for critical items related to American economic and national security they are demanding and pursuing policies that make the USA and West ever more dependent on so-called “clean renewable” energy from wind, solar, battery and fossil powerhouse China.

We are witnessing a geopolitical shift of historic proportions. Fossil fuel-friendly China and other autocratic producers will be the biggest winners; fossil fuel-repressing democratic America and the West the biggest losers.”⁵⁰

These are a sampling of the strategic issues that could have been referenced in, or considered by, the EF2023 report. Usefully, the CER had earlier reported fact that Canada was already a world leader in electricity generation from renewable and non-emitting sources (in 2018 more than two-thirds of Canadian electricity generation was derived from renewable sources).⁵¹ Hence, the ongoing focus on emissions tends to diminish the fact that Canada already has one of the cleanest electricity systems in the world (led by hydropower), reportedly with over 83 per cent sourced from non-emitters⁵² even as Canadian political leaders pursue ever-more stringent policies with proposed Clean Electrical Regulations.

Significantly, there are material costs estimated for the achievement of such a clean electrical transition. The Public Policy Forum noted:

“The Conference Board of Canada has put the cost of the clean electricity transformation before us at \$1.7 trillion, nearly the size of the entire Canadian economy in 2023. Université de Montreal’s Canada Energy Outlook report estimates the price tag at \$1.1 trillion, although that did not include such infrastructure expenses as charging stations. Incredibly for the national Project of the Century, there is very little economic modelling publicly available.”⁵³

Canada has chosen to respond to the U.S. *Inflation Reduction Act (IRA)* with hundreds

⁴⁶ Jack Mintz and Ron Wallace, “The global energy transition confronts East vs West realpolitik” (April 2022), online (pdf): *Macdonald Laurier Institute* <macdonaldlaurier.ca/wp-content/uploads/2022/04/Apr2022_The_global_energy_transition_confronts_EastvsWest_realpolitik_Mintz_Wallace_PAPER_FWeb.pdf>.

⁴⁷ Paul Krugman, “Biden and America’s Big Green Push” *The New York Times* (17 August 2023), online: <www.nytimes.com/2023/08/17/opinion/biden-green-ira-industrial-trade.html>.

⁴⁸ Tsvetana Paraskova, “Germany Signs Long-Term U.S. LNG Deal To Replace Russian Gas” (23 June 2023), online: *OilPrice.com* <oilprice.com/Energy/Energy-General/Germany-Signs-Long-Term-US-LNG-Deal-To-Replace-Russian-Gas.html>.

⁴⁹ Sachin Ravikumar and Susanna Twidale, “Britain commits to hundreds of North Sea oil and gas licenses” *Reuters* (31 July 2023), online: <www.reuters.com/business/energy/uk-grant-hundreds-new-north-sea-oil-gas-licenses-2023-07-31>./

⁵⁰ Don Ritter, “Abandon Fossil Fuels, Empower China” *Townhall* (30 July 2023), online: <townhall.com/columnists/don-ritter/2023/07/30/abandon-fossil-fuels-empower-china-n2626379>.

⁵¹ “Canada’s Renewable Power – Canada” (last updated 30 June 2022), online: *CER* <www.cer-rec.gc.ca/en/data-analysis/energy-commodities/electricity/report/canadas-renewable-power/provinces/renewable-power-canada-canada.html>.

⁵² “Canada 2022 Energy Policy Review” (January 2022) Executive Summary, online: *IEA* www.iea.org/reports/canada-2022/executive-summary>.

⁵³ Janet Annesley, David Campbell, Arash Golshan and Edward Greenspon, “Project of the Century: A Blueprint for Growing Canada’s Clean Electricity Supply – and Fast” (19 July 2023) Energy Future Forum, online: *Public Policy Forum* <ppforum.ca/publications/net-zero-electricity-canada-capacity>.

of billions of dollars of new spending and tax breaks for new energy sources. In so doing, the Federal government is wagering an enormous financial bet on alternative, non-emitting energy, one that approaches \$30 billion in subsidies for battery production plants alone with another \$60 billion allocated for clean energy tax credits and \$20 billion in sustainable infrastructure investments. All this is in response to what some critics believe is a material U.S. legislative over-reaction with the *IRA* with costs now estimated at US \$1.2 trillion⁵⁴. Some commentators, such as William McNally of Wilfred Laurier University, have brought attention to the adverse economic distortions arising from these subsidized “transitional” energy strategies:

*“What’s the distortion that this causes for the rest of the economy? Taxes have to go up. There’s less money to be spent on other priorities like health care. So we’re definitely going to pay for this.”*⁵⁵

Other commentators suggest that in order to reverse diminishing future economic prospects from these policies Canada must make “a dramatic U-turn based on common sense and real-world evidence” noting that:

“...the federal government and several provinces continue to march forward on a massive centrally-planned restructuring of the Canadian economy and our energy markets despite disastrous results in the parts of Europe and the United States that have pursued similar policies. Which raises a common sense question: if this approach didn’t work in Europe and

*the U.S., why implement the same policies in Canada and expect different results?”*⁵⁶

Given these concerns,⁵⁷ and others from the Parliamentary Budget Officer,⁵⁸ should a national regulator be laser-focussed “on the challenge of achieving net-zero greenhouse gas emissions by 2050” and issues associated with “integrating Canada’s energy, economic and climate goals” and “end goals of achieving net-zero greenhouse gas (GHG) emissions in 2050” or should it seek to provide Canadians with a clear vision of the true costs and consequences of these policies?

Similarly, is it appropriate for a national energy regulator to accept direction from government to consider an energy economy that is greatly reduced, or even perhaps devoid, of hydrocarbon production while appearing to ignore international and economic realities for energy security? This approach appears to ignore, or at least diminish, the reality that G20 countries are increasingly confronted with concerns about the basic science and feasibility of attaining net-zero. Arguably, any considerations of the Canadian national interest should embrace parallel considerations of feasible policy alternatives.⁵⁹

Importantly, other methodologies are being proposed.

“But while adaptation has an excellent record of success, mitigation has proven a costly failure. Despite 30 years of aggressive international mitigation effort, global carbon dioxide emissions have continued to rise

⁵⁴ The Editorial Board, “The Real Cost of the Inflation Reduction Act Subsidies: \$1.2 Trillion” *The Wall Street Journal* (24 March 2023), online: <www.wsj.com/articles/inflation-reduction-act-subsidies-cost-goldman-sachs-report-5623cd29>.

⁵⁵ Rahul Vaidyanath, “Ottawa’s Competition With the US Inflation Reduction Act, ESG Investing Distort the Economy: Analysts” *The Epoch Times* (27 July 2023), online: <www.theepochtimes.com/article/ottawas-competition-with-us-inflation-reduction-act-esg-investing-distort-the-economy-analysts-5427108>.

⁵⁶ Jason Clemens and Niels Veldhuis, “Wanted: Common sense in Ottawa” *Financial Post* (8 August 2023), online: <epaper.calgaryherald.com/article/281827173286581>.

⁵⁷ Terence Corcoran, “Net zero plans, slower growth and trade wars coming soon to an economy near you” *Financial Post* (21 June 2023), online: <financialpost.com/opinion/net-zero-plans-slower-growth-trade-wars-economy>.

⁵⁸ Nasreddine Ammar, Marianne Laurin and Diarra Sourang, “A Distributional Analysis of the Federal Fuel Charge under the 2030 Emissions Reduction Plan” (30 March 2023), online: *Parliamentary Budget Officer* <www.pbo-dpb.ca/en/publications/RP-2223-028-S--distributional-analysis-federal-fuel-charge-under-2030-emissions-reduction-plan-analyse-distributive-redevance-federale-combustibles-dans-cadre-plan-reduction-emissions-2030>.

⁵⁹ Kevin Stocklin, “Princeton, MIT Scientists Say EPA Climate Regulations Based on a ‘Hoax’” *The Epoch Times* (12 August 2023), online: <www.theepochtimes.com/mkt_app/article/two-princeton-mit-scientists-say-epa-climate-regulations-based-on-a-hoax-5460699>.

whereas adaptation efforts have shown considerable success at reducing risks to health and agricultural yields from weather variability. It is, moreover, a long-established view in mainstream climate economics that the primary response to climate change will (and should be) adaptation rather than heroic but prohibitively costly attempts to prevent warming. As the costs of mitigation efforts mount it is necessary for policy-makers to confront the risk that continued attempts at aggressive mitigation policy may in fact impede adaptation and increase the harm from future warming.⁶⁰

The Government of Canada Adaptation Action Plan,⁶¹ released alongside the National Adaptation Strategy in November 2022, appears to recognise the importance of this parallel approach.

Determinations of the Canadian national interest in matters of energy will require sustained, intellectual efforts from experts freed from the constraints of policy aspirations of governments. The fundamental challenge facing not just the CER, but all Canadians, is to have access to expert, balanced and comprehensive advice about the costs and consequences of proposed net-zero policies — with parallel, balanced assessments of possible alternatives.

These questions, concerning relevance, credibility and independence, are the real challenges facing our “modernized” CER. ■

⁶⁰ Ross McKittrick, “Adaptation needs greater focus in climate policy” (June 2023), online (pdf): *Macdonald Laurier Institute* <macdonaldlaurier.ca/wp-content/uploads/2023/07/20230614_Adaptation-needs-greater-focus-McKitrick_PAPER-v2.pdf>.

⁶¹ Environment and Climate Change Canada, News Release, Plan, prepare, act: Government of Canada launches first National Adaptation Strategy” (27 June 2023), online: *Government of Canada* <www.canada.ca/en/environment-climate-change/news/2023/06/plan-prepare-act-government-of-canada-launches-first-national-adaptation-strategy.html>.