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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 Co-Editors

Karen J. Taylor and Moin A. Yahya

Since the publication of our last issue of *ERQ*, there has been no shortage of matters relating to energy regulation, economics and the interplay between law and policy that are at the focus of this publication. We are monitoring various significant developments that continue to advance, including the August 7 decision of the Supreme Court of British Columbia (*Cowichan Tribes v Canada (Attorney General)*[1], the September Alberta Court of Appeal decision in *Mikisew Cree First Nation v Alberta*[2], the June 2023 application by Trans Mountain Pipeline ULC to the Canadian Energy Regulator for Interim Final Tolls, and the regulatory and legal issues relating to Enbridge Inc.'s Line 5 crude oil pipeline.

After the passage of Bill C-5 "*An Act to enact the Free Trade and Labour Mobility in Canada Act and the Building Canada Act*"[3] in June, Prime Minister Mark Carney announced the creation of a Major Projects Office ("MPO") at the end of August.[4] The MPO, headquartered in Calgary, is meant to be "a single point of contact to get nation-building projects built faster"[5], which it will do "by streamlining and accelerating regulatory approval processes" as well as "co-ordinat[ing] financing of these projects as needed."[6] Calgary's own Dawn Farrell, a veteran energy executive, was appointed to be the first CEO of the MPO. The Prime Minister also appointed an Indigenous Advisory Council ("IAC") for the MPO, consisting of "eleven representatives from First Nations, Inuit, Métis, and Modern Treaty and Self-Governing communities"[7], the purpose of which is to provide "expert advice on policy, operational practices, and process improvements related to the inclusion of Indigenous perspectives on and interests in major projects"[8].

In early September, a list of 32 potential infrastructure projects under consideration by the federal government for inclusion as Projects of National Interest was leaked to the press[9] and on September 11, in Edmonton, Alberta, Prime Minister Carney announced a list of

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[1] *Cowichan Tribes v Canada (Attorney General)* 2025 CanLII 1490 (BCSC).

[2] *Mikisew Cree First Nation v Alberta*, 2025 CanLII 304 (ABCA).

[3] Bill C-5, An Act to enact the Free Trade and Labour Mobility in Canada Act and the Building Canada Act, *One Canadian Economy Act*, 1st Sess, 44th Parl, 2025.

[4] Prime Minister of Canada, Statement, "Prime Minister Carney launches new Major Projects Office to fast-track nation-building projects" (29 August 2025), online: <pm.gc.ca/en/news/news-releases/2025/08/29/prime-minister-carney-launches-new-major-projects-office-fast-track-nation-building-projects>.

[5] *Ibid*.

[6] *Ibid*.

[7] Prime Minister of Canada, Statement, "Prime Minister Carney announces Indigenous Advisory Council membership for the new Major Projects Office" (10 September 2025), online: <pm.gc.ca/en/news/news-releases/2025/09/10/prime-minister-carney-announces-indigenous-advisory>.

[8] Government of Canada, PC, "Partnering with Indigenous Peoples: Indigenous Advisory Council" (last modified 11 September 2025), online: <canada.ca/en/privy-council/major-projects-office/partnering-indigenous-peoples/council.html>.

[9] Bill Curry, "Internal government list of 32 potential infrastructure projects includes new oil pipeline" *The Globe and Mail* (4 September 2025), online: <theglobeandmail.com/politics/article-32-potential-infrastructure-projects-government-list-oil-pipeline>.

five projects for consideration by the MPO.[10] These are:

1. **Phase 2 of LNG Canada in Kitimat, British Columbia:** This project would double LNG Canada's production of liquefied natural gas and create one of the largest LNG facilities in the world.

2. **Darlington New Nuclear Project in Bowmanville, Ontario:** This project would see the development of a small modular reactor ("SMR"), which would make Canada the first G7 country to have an operational SMR.

3. **Contrecœur Terminal Container Project in Contrecœur, Québec:** This project would expand the Port of Montréal's capacity by approximately 60 per cent.

4. **McIlvenna Bay Foran Copper Mine Project in East-Central Saskatchewan:** This project would see the development of a copper and zinc mine in collaboration with the Peter Ballantyne Cree Nation.

5. **Red Chris Mine expansion in Northwest British Columbia:** This project will see the mine's lifespan expanded and its production increased.[11]

Absent from the initial announcement was any decision a new pipeline from Alberta to the west coast.[12] Alberta Premier Danielle Smith, nonetheless, seemed optimistic that such a project would make it to the MPO at some point in the future.[13] Despite the apparent omission, the Prime Minister's announcement contained several projects that could be referred to the MPO in the future, among them, the Pathways carbon capture project in Alberta.[14] If this project is ultimately referred to the MPO, a new pipeline to tide water on the west coast could also be on track for the streamlined regulatory process. Other projects that the Prime Minister is considering include:

1. **Critical Minerals Strategy:** Ontario's Ring of Fire region could finally get the green light for development.

2. **Wind West Atlantic Energy:** Over 60 GW of wind power in Nova Scotia and Atlantic Canada could be developed under this initiative.

3. **Arctic Economic and Security Corridor:** Development of northern mineral exploration linked to Canada's armed forces would be the theme of this project.

4. **Port of Churchill Plus:** Manitoba's Port of Churchill would be upgraded and access to it improved to allow for more trade with Europe and the world.

5. **Alto High-Speed Rail:** A high-speed railway connecting Toronto to Québec City could be on the fast track for approval.[15]

Although there has been intense focus on the streamlined process set out in the *Building Canada Act*, both the Federal and British Columbia provincial government announced mid-September that the Ksi Lisims LNG project had received joint approval under the *Impact Assessment Act* ("*IAA*"), which means that the project can move to the next stage of seeking permits and authorizations.[16]

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[10] Prime Minister of Canada, Statement "Prime Minister Carney announces first projects to be reviewed by the new Major Projects Office" (last visited 11 September 2025), online: <pm.gc.ca/en/news/news-releases/2025/09/11/prime-minister-carney-announces-first-projects-be-reviewed-new>.

[11] *Ibid*.

[12] Matthew Black, "Carney's first five fast-track megaprojects exclude Alberta, but carbon capture could prompt new pipeline" *Edmonton Journal* (12 September 2025), online: <edmontonjournal.com/news/politics/no-pipeline-mark-carney-megaprojects-carbon-capture>.

[13] *Ibid*.

[14] *Supra* note 10.

[15] *Ibid*.

[16] Government of Canada, "Federal Government Green Lights Ksi Lisims LNG Project Following Substituted Impact Assessment by British Columbia" (last modified 15 September 2025), online: <canada.ca/en/impact-assessment-agency/news/2025/09/federal-government-green-lights-ksi-lisims-lng-project-following-substituted-impact-assessment-by-british-columbia.html>.

The flurry of positive announcements aside, geopolitical issues remain — with potentially serious consequences for multi-jurisdictional energy infrastructure, Canada's economic growth, and the nation's imperative for new trading and security partners. South of the border, challenges continue on the imposition of tariffs and the independence of the U.S. Federal Reserve. The question of whether the tariffs are even legal remains unresolved, as one United States federal appeals court has struck down the tariffs. The United States Supreme Court will now hear this question in November, and a decision could be issued next year.[17] Uncertainty continues to be one of the enduring features of the second Trump presidency.

Perhaps the best illustration of the change in approach required to meet Canada's pressing challenges is the September resolution by Ontario's NDP to "modernize its electricity policy in support of a low-carbon, good-jobs future for Ontarians"[18]. The resolution reverses a decades long position opposing nuclear energy and recognizes the well discussed made-in-Canada value chain for nuclear energy and its associated benefits.

This edition of *ERQ* begins with an article by Roy Hrab and Avi Lipsitz that considers recent decisions of the Ontario Energy Board ("OEB") with respect to certain applications by Enbridge Gas Inc., the response to those decisions by the government of Ontario and the OEB itself, and the resulting legislative attempts to clearly set out the future role of natural gas in Ontario's energy system. Hrab and Lipsitz effectively illustrate the consequences of regulatory determinations that do not give the appropriate weight to the policies of the government from whom the agency has received delegated authorities and powers to decide; the need for clear policy statements to guide delegated decision making, including a provincial statutory emissions reduction target; and general confusion about what constitutes "independence" for a regulator that has the dual responsibilities of implementing government policy and making adjudicative decisions within the context of that policy.

In the article "CEO of the Alberta Energy Regulator ("AER") Denies Public Hearing Rights on a Coal Application", authors Nigel Bankes, Professor Emeritus, and Shaun Fluker, Professor, both of the Faculty of Law, University of Calgary, delve into the unusual decision by the CEO of the Alberta Energy Regulator to overrule a decision by a Panel seized to hear an application by Summit Coal Inc. Bankes and Fluker analyze the decision made by the AER panel on standing to require a public hearing for Summit's application and the CEO's decision to reverse the decision of the Panel. The discussion focuses on the subject of standing to trigger an AER public hearing, in the context of a regulatory framework in which hearings to consider an application are relatively rare. The authors also discuss the possible implications of the decision to override the Panel on future applications and potential hearings.

Nancy Rubin, KC and Brianne Rudderham, both of Stewart McKelvey in Nova Scotia, explore a series of recent decisions by the Nova Scotia Utility and Review Board and the Nova Scotia Energy Board that attempt to balance customer and utility interests with respect to higher-than-expected cost of utility service. In this series of cases, significantly higher costs of power due to delays in the delivery of renewable energy to Nova Scotia from Muskrat Falls. Rubin and Rudderham write that the decisions illustrate a number of key regulatory principles, including intergenerational equity and the beneficiary-pays doctrine. They also assert that cooperative federalism and government financial aid when combined with thoughtful regulation can mitigate the cost pressures arising from the modernization and decarbonization of the electricity grid.

Professor Adebayo Majekolagbe comments on the International Court of Justice's ("ICJ") recent advisory opinion outlining states' legal responsibilities on climate change under treaties and customary international law. The opinion, which is not legally binding, carries significant persuasive authority, especially for Canada. The opinion reinforces Canada's obligations to reduce emissions, regulate corporate

[17] Andrew Chung, "US Supreme Court to hear Trump's tariffs case on November 5" *Reuters* (18 September 2025), online: <reuters.com/world/us-supreme-court-hear-trumps-tariffs-case-november-5-2025-09-18>.

[18] Society of United Professionals, "Society welcomes Ontario NDP passage of pro-nuclear resolution" (21 September 2025), online: <newswire.ca/news-releases/society-welcomes-ontario-ndp-passage-of-pro-nuclear-resolution-860826133.html>.

environmental impact, and support vulnerable nations. Majekolagbe argues that failure to meet these duties could result in international legal liability and financial reparations for climate-related harm.

Issue 4 concludes with an article by Ruppa Louissaint, the Director of Markets at Alberta's Electric System Operator ("AESO"), providing an overview of Alberta's new Restructured Energy Market ("REM"). Louissaint explains that the main goals of the AESO are to ensure reliability, affordability, and investment attractiveness while facing challenges from changing generation sources, rising demand, and transmission needs while reflecting Alberta's unique grid characteristics. Addressing the transition to renewable and dispatchable generation while trying to strengthen investor confidence as well as modernize congestion management and pricing means that the AESO had to reexamine many of its market policies. The REM was officially launched in August 2025, and this article provides a succinct statement of the new plan. ■

PIPE DREAMS? DECIDING THE ENERGY TRANSITION IN ONTARIO

*Roy Hrab and Avi Lipsitz**

INTRODUCTION

The energy transition is a complex public policy and regulatory challenge, including decisions on the mix of energy for end-uses (e.g., heating and transportation) and industrial processes, how to transition from greenhouse gas ("GHG")-emitting sources of energy to non-emitting (or low emission) sources, and how to deal with the cost implications of these transitions for expanding certain energy infrastructure (e.g., electricity) and potentially decommissioning (pruning or stranding) other infrastructure (e.g., natural gas).

There are no easy answers to these challenges, and many jurisdictions are wrestling with solutions. Many are struggling. In some cases, there is friction between the regulator and government, regulated utilities and stakeholders, and sometimes even within the regulator itself. This article considers recent events in Ontario, which has now spent almost three years attempting to sort out issues related to the future role of natural gas in the province's evolving energy system.

THE INTEGRATED RESOURCE PLANNING PILOT PROJECT DECISION

On March 27, 2025 the Ontario Energy Board ("OEB") issued a 17-page decision[1] on an application[2] made on July 19, 2023 by Enbridge Gas Inc. ("Enbridge"), Ontario's predominant natural gas distributor. The initial application sought approval of two integrated resource planning ("IRP") pilot projects. The pilot projects were intended to evaluate the ability of alternatives to defer, reduce, or avoid the need for traditional pipeline infrastructure to meet natural gas system needs.

The application was made in response to the OEB's July 2021 Integrated Resource Planning Framework for Enbridge Gas, in which the OEB stated that Enbridge was "expected to develop and implement two IRP pilot projects. The pilots are expected to be an effective approach to understand and evaluate how IRP can be implemented to avoid, delay or reduce facility projects."[3]

Generally, IRP refers to "a planning process that evaluates and compares both supply-side

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The views expressed in this article are those of the authors alone, and do not necessarily reflect those of Power Advisory.

[1] Decision on Enbridge's Integrated Resource Planning Pilot Project Application (27 March 2025), EB-2022-0335, online (pdf): Ontario Energy Board <oeb.ca/sites/default/files/backgrounder-enbridge-IRP-Pilot-EB-2022-0335-20250327.pdf>.

[2] Application and Evidence on Enbridge Gas Integrated Resource Planning Pilot Projects 19 July 2023) EB-2025-0124, Ontario Energy Board.

[3] Ontario Energy Board, Integrated Resource Planning Framework for Enbridge Gas, EB-2020-0091, (22 July 2021), at 24.

and demand-side options to meeting an energy system need."[4] The goal of the OEB's IRP Framework is to provide "direction to Enbridge Gas on topics to be covered in an IRP Plan and the OEB's requirements as Enbridge Gas considers and develops IRP Plans to meet its system needs,"[5] as well as noting that "demand-side programming, including geotargeted energy efficiency, and demand response programs, should be part of the IRP Framework."[6]

During the course of the proceeding, Enbridge withdrew one of the proposed projects in an updated application filed on June 28, 2024.[7]

The result was that OEB approval was sought for the Southern Lake Huron Pilot Project ("SLH Pilot Project"). The SLH Pilot Project had a proposed budget of $14.2 million and four categories of activities: (1) energy efficiency measures; (2) demand response; (3) electrification (i.e., cold climate air source and ground source heat pumps); and, (4) advanced technology (i.e., hybrid heating, natural gas heat pumps, thermal energy storage).

In its decision, the panel of OEB Commissioners did not approve funding for hybrid heating or natural gas heat pumps (but allowed thermal energy storage, "on the condition that it utilizes electricity"[8]), arguing that:

> *The inclusion of incentives for gas equipment is entirely inconsistent with the purpose of:*
>
> - *IRP, which has as its objective the avoidance of gas infrastructure where there are economic alternatives, and*
> - *DSM [Demand-Side Management], which has as its objective the reduction of the utilization of gas through various efficiency and conservation measures.*
>
> *Incentives for gas equipment continue the need for gas infrastructure and utilization of gas, rather than reducing it.*[9]

The decision also noted that

> The IRP Framework decision determined that electrification solutions would not be part of the IRP approach initially, with the focus being on system optimization and demand-side management. However, the IRP Framework indicated this could evolve as energy planning evolves and it is now clear that electric solutions are squarely on the table, as part of the IRP Framework.[10]

MOTION TO REVIEW

Also on March 27, 2025, so close to the issuance of the IRP pilot decision as to be practically concurrent with it, the OEB issued a notice stating that, on its own motion, it was initiating a review of the IRP pilot decision. Interestingly, the OEB's motion did not identify who within the organization made the decision to initiate the review (e.g., the Chief Commissioner, CEO, or Board of Directors). The notice stated that the review was considering the following questions:

> *1. By requiring the use of electricity IRPAs and/or excluding funding for gas-fired technologies, did the Decision change the IRP Framework and do so improperly without notice to the parties and without providing parties with a full opportunity to address this issue through the hearing process?*

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[4] *Ibid* at 3.

[5] Enbridge Gas Inc., Integrated Resource Planning Proposal (22 July 2021), EB-2020-0091, Ontario Energy Board, at 21.

[6] *Ibid* at 34.

[7] Enbridge Gas Inc., Integrated Resource Planning Pilot Projects, Updated Application and Evidence (28 June 2024), EB-2025-0124.

[8] *Supra* note 1 at 5.

[9] *Ibid* at 5 [emphasis added].

[10] *Ibid* at 4.

> *2. Was there sufficient evidence to support the findings that categorically exclude funding for gas-fired technologies in the IRP Pilot?*
>
> *3. In assessing the cost effectiveness of electric heat pumps versus gas-fired heat pumps, which formed part of the basis for denying the use of gas-fired heat pumps, was there sufficient evidence of, and did the Decision adequately consider, the potential cost of any required electricity system upgrades?*[11]

With the notice was an announcement by the OEB that it would also be initiating a review of the IRP Framework in the Fall of 2025.[12]

The speed at which the OEB issued its motion to review was extraordinary. In particular, the issuance of the review motion occurred prior to Enbridge having an opportunity to assess the decision and file its own motion to review. Enbridge agreed with the OEB's motion, however, and in its initial submission observed that "[t]he issuance of a Review Motion on the OEB's own motion, immediately revisiting and questioning an OEB decision ***even before the parties have had the opportunity to react is a very rare circumstance. This signals doubt as to the fairness and appropriateness of the approach taken by the participating Commissioners***."[13]

Enbridge also expressed its own concerns with the IRP decision and why it should be reviewed, including arguing that there was an

> inconsistency between Ontario Government policy and the findings in the Decision about the need to avoid any incentives for natural gas equipment, even where the goal is to reduce natural gas consumption. OEB decisions must take account of and implement Ontario Government policy, rather than conflicting with such policy," and that "[t]he Decision includes what appears to be gratuitous comments and criticisms that fall outside of the scope of the case.[14]

Enbridge stated further that it wished for additional concerns be included in the scope of the Review Motion, requesting

> that the OEB confirm that the matters described above are in scope for the Review Motion. Alternately, Enbridge Gas requests that the OEB expand the scope of the Review Motion questions stated in the Notice of Review to include all such matters. ***Enbridge Gas submits that this approach is more efficient than the Company bringing its own similar, but not identical, review motion***.[15]

NATURAL GAS POLICY STATEMENT

On June 12, 2025, as set out subsection 25.29 (1) of the *Electricity Act, 1998*,[16] the provincial government released its integrated energy plan ("IEP")[17], which included a "Natural Gas Policy Statement."[18] The statement affirmed a long-term commitment to the continuing use of natural gas for electricity generation, heating, and industrial processes:

> *…A premature phase-out of natural gas-fired electricity generation is not*

[11] Notice of Review on the OEB's Own Motion (27 March 2025), EB-2025-0124, Ontario Energy Board [emphasis added].

[12] Review and Evaluation of the Integrated Resource Planning Framework for Enbridge Gas (27 March 2025), EB-2025-0125.

[13] Enbridge Gas Inc., Enbridge Gas Request Re: Scope of Review Motion (15 April 2025), EB-2025-0124, Ontario Energy Board [emphasis added].

[14] *Ibid*.

[15] *Ibid*.

[16] *Electricity Act*, SO 1998, c 15, Schedule A.

[17] Government of Ontario, "Energy for Generations Ontario's Integrated Plan to Power the Strongest Economy in the G7" (2025), online (pdf): <ontario.ca/files/2025-07/mem-energy-for-generations-en-2025-07-18.pdf>.

[18] The concept of a "Natural Gas Policy Statement" originated in the aftermath of the OEB's December 21, 2023 decision in the Enbridge rate application and is not a term with defined legal meaning.

> *feasible and would hurt electricity consumers and the economy.*
>
> *The majority of Ontario's homes use natural gas for heat, while homeowners in rural and northern areas who do not have access to natural gas, want the option to have it through expansion of the natural gas network.*
>
> …
>
> *The OEB will continue to play its role as the natural gas system's economic regulator, protecting consumers, allowing gas utilities an opportunity to earn a fair return on investment, and enabling the continued rational expansion of the natural gas system.*
>
> *As part of a gradual transition to a more diverse energy system, Ontario will continue to support the important role of natural gas in Ontario's energy system and economy while pursuing options to lower costs and reduce emissions through energy efficiency, electrification, clean fuels (e.g., renewable natural gas, low-carbon hydrogen) and carbon capture and storage…*[19]

Accompanying the release of the IEP was a directive to the OEB (issued under subsection 25.30 (2) of the *Electricity Act, 1998*), instructing the OEB to

> Consider the government's Natural Gas Policy Statement to ensure the OEB appropriately considers the future role of natural gas in Ontario's economy. There is a need for an economically viable natural gas network — as the province builds a more diverse energy system — to attract industrial investment, to drive economic growth, to maintain customer choice and ensure overall energy system resiliency, reliability and affordability.[20]

THE SOUND OF SILENCE

At the time of submission of this article (October 1, 2025), the OEB has neither issued any further communication on the review nor taken or articulated any steps to advance the hearing since the initial March 2025 announcement of its the intention to review the IRP pilot decision. The months-long silence follows the release of the Natural Gas Policy Statement as well as a submission from Enbridge on June 20, 2025, stating that "[w]e write now to inquire as to the status of a Procedural Order setting out the process and scheduling of next steps for the OEB's Review Motion."[21]

ONCE BITTEN, TWICE SHY?

In many respects, the OEB's Motion to Review its own decision is a variant of what transpired following a previous OEB decision involving Enbridge[22] — specifically, the OEB's December 21, 2023 decision in an Enbridge rate application, which reduced the revenue horizon for small volume customer connections from 40 years to zero. In this case, less than 24 hours after the decision was issued, Ontario's Minister of Energy issued a statement that he would "…use all of [his] authorities as Minister to pause the Ontario Energy Board's decision. At the earliest opportunity, our government will introduce legislation that, if passed, would reverse it, so that we protect future homebuyers and keep shovels in the ground."[23]

Following through on this commitment, on February 22, 2024, the Minister introduced Bill 165, *Keeping Energy Costs Down Act,*

[19] *Supra* note 17.

[20] Government of Ontario, Minister of Energy and Mines, Directive to the Ontario Energy Board, (12 June 2025).

[21] Enbridge Gas Inc., Enbridge Gas Request Re: Scope of OEB's Review Motion (30 June 2025), EB-2025-0124, Ontario Energy Board.

[22] See Ian Mondrow, "Why Bother with an Independent Energy Regulator?" (2014) 12:1 Energy Regulation Quarterly, online: <energyregulationquarterly.ca/articles/why-bother-with-an-independent-energy-regulator>; and Gordon Kaiser, "The Energy Transition, Stranded Assets, and Agile Regulation" (2024) 12:1 Energy Regulation Quarterly, online: <energyregulationquarterly.ca/articles/the-energy-transition-stranded-assets-and-agile-regulation> [*Kaiser*].

[23] Government of Ontario, "Ontario Government Standing Up for Families and Businesses," (23 December 2023), online: <news.ontario.ca/en/statement/1004010/ontario-government-standing-up-for-families-and-businesses>.

2024.[24] The legislation (which received Royal Assent on May 16, 2024) gave "the province authority to reverse the OEB decision to require residential customers and small businesses to pay 100 per cent of the cost of new natural gas connections upfront."[25] The province then proceeded to make a regulation setting the revenue horizon back to 40 years.[26]

Insofar as the OEB decision to reject two of Enbridge's proposed IRP pilot projects could have been viewed as questioning the role of natural gas in Ontario — much as the December 2023 Enbridge rate application decision did — the OEB's quick announcement of a review could be interpreted as an attempt to pre-empt government intervention of the kind that followed the December 2023 decision. At the same time, as noted above, while the OEB's motion does not state who within the organization made the decision to initiate the review (the OEB's response to a formal query on this matter was only that "The OEB, in its corporate capacity, initiated the review"[27], the action revealed clear disagreement between the OEB Commissioners adjudicating the IRP pilot project application and other decision-makers within the OEB.

In any event, in both of these cases, an alternative to the immediate moves to challenge the decisions of OEB Commissioners would have been for the government and OEB respectively to allow Enbridge to file its own Motion to Review and/or file an appeal to the Ontario Divisional Court (both of which it did following the revenue horizon decision).

THE ENERGY TRANSITION − WHO CALLS THE SHOTS?

The energy transition is a matter of critical public policy and political importance, requiring clear government direction. Ontario, like many jurisdictions, has decided that decisions related to whether and how certain kinds (and amounts) of energy ought to be used is a matter of government policy that will not be delegated to an agency, such as the utility regulator. However, in the absence of binding direction, regulatory decisions and/or policies may conflict with, or even contradict, government expectations, as well as potentially resulting in confusion within the regulator itself. Both of these conflicts appear to be playing out in Ontario.

Uncertainty as to who decides the future of natural gas in Ontario was remarked with some concern by Enbridge as far back as February 2023, when its CEO sent a letter to the Minister of Energy while the proceeding for the aforementioned Enbridge rate application was underway. In its letter[28], Enbridge noted "a lack of clear understanding of roles and responsibilities across the Ontario energy agencies" and presciently raised concerns about the potential for "an OEB decision that signals the retirement of all gas infrastructure and economy wide electrification". Enbridge urged the minister to provide "a clear signal […] on the respective roles and responsibilities across the agencies."

The Government of Ontario is clearly in favour of the continued, and even expanded, use of natural gas. To wit:

- In its first legislative session after winning office in 2018, the government amended the OEB Act[29] to enable the creation a $45 million[30] cross-subsidy initiative known as the Natural Gas Expansion Program, which uses ratepayer funds to expand the natural gas distribution network to areas of the

[24] Bill 165, *Keeping Energy Costs Down Act*, 2024, Parl, Ontario (assented to 16 May 2024), online (pdf): <ola.org/sites/default/files/node-files/bill/document/pdf/2024/2024-05/b165ra_e.pdf>; Government of Ontario, "Ontario Keeping Energy and Housing Costs Down" (22 February 2024), online: <news.ontario.ca/en/release/1004217/ontario-keeping-energy-and-housing-costs-down>.

[25] *Ibid*.

[26] O. Reg. 274/24.

[27] Correspondence with OEB's Industry Relations group , on file with the authors.

[28] Ontario Energy Board, Enbridge Gas Inc. – 2024-2028 Natural Gas Distribution Rates – Phase One, Exhibit J8.1 (Attachment 2), (26 July 2023).

[29] Bill 32, *Access to Natural Gas Act*, 2018, Parl. Ontario (assented 6 December 2018), online (pdf): <ola.org/sites/default/files/node-files/bill/document/pdf/2018/2018-12/b032ra_e.pdf>.

[30] O. Reg. 24/19.

province where such expansion would otherwise be uneconomic;

- In 2021 the government launched a second phase of the Natural Gas Expansion Program, providing for an additional $234 million of ratepayer funds to further expand the gas network;

- In its July 2023 *Powering Ontario's Growth* report, the government observed that "Natural gas will continue to play a critical role in providing Ontarians with a reliable and cost-effective fuel supply for space heating, industrial growth, and economic prosperity"[31];

- In August 2023, the government held a first consultation on a potential third phase of the Natural Gas Expansion Program[32];

- In his November 2023 letter of direction to the OEB, the Minister of Energy instructed the OEB to "[ensure] that Ontario's electricity and gas transmission and distribution systems are built to support [housing, transportation, and job creation] goals in a timely manner" and that the OEB should ensure that " that access to electricity and natural gas in an affordable manner remains central to decision-making"'[33];

- In December 2023, the minister announced his intent to overturn the OEB's decision in Enbridge's rate application, as discussed above;

- Accordingly, in February 2024, the government introduced the *Keeping Energy Costs Down Act*, giving itself the authority to prescribe the natural gas connection horizon;

- In his December 2024 letter of direction to the OEB, the Minister of Energy reiterated his belief that "Ontario needs an economically viable natural gas network" and his expectation that "upon release of the government's integrated energy plan and the government's natural gas policy statement […] the OEB will carefully consider these documents to ensure the OEB's policies and processes appropriately consider the role of natural gas in Ontario's energy system"[34];

- As discussed further below, in June 2025 the government introduced Bill 40, the *Protect Ontario by Securing Affordable Energy for Generations Act* which would allow the OEB's CEO to issue policies to commissioners respecting, among other things, "requirements respecting information or documents to be considered in conducting a hearing or making a determination";

- Also in June 2025, the government issued its "Natural Gas Policy Statement" (first promised in February 2024), as part of its *Energy for Generations* plan. The statement includes that "as part of a gradual transition to a more diverse energy system, Ontario will continue to support the important role of natural gas in Ontario's energy system and economy while pursuing options to lower costs and reduce emissions through energy efficiency, electrification, clean fuels (e.g., renewable natural gas, low-carbon hydrogen) and carbon capture and storage."[35];

- In August 2025 the government launched a second consultation on a potential third phase of the Natural Gas Expansion Program[36].

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[31] Government of Ontario, *Powering Ontario's Growth: Ontario's Plan for a Clean Energy Future*, (2023), online (pdf): <ontario.ca/files/2023-07/energy-powering-ontarios-growth-report-en-2023-07-07.pdf>.

[32] Government of Ontario, Environmental Registry of Ontario, *Consultation on the future of natural gas expansion and home heating affordability*, (2023), online: <ero.ontario.ca/notice/019-7506>.

[33] Ontario, Minister of Energy, Directive to the Ontario Energy Board, November 29, 2023: <oeb.ca/sites/default/files/letter-of-direction-from-the-Minister-of-Energy-20231129.pdf>.

[34] Government of Ontario, Minister of Energy and Electrification, Directive to the Ontario Energy Board, (19 December 2024) online (pdf): <oeb.ca/sites/default/files/Letter%20from%20the%20Minister%20of%20Energy%20and%20Electrification%20-%202024-1074.pdf>.

[35] *Supra* note 17.

[36] Government of Ontario, Environmental Registry of Ontario, *Consultation on the Future of Community Natural Gas Expansion*, (8 August 2025), online: <ero.ontario.ca/notice/025-0923>.

And yet for all that, the government has not articulated how, if it all, it envisions the eventual decline (i.e., "gradual transition") of gas consumption in Ontario, let alone defection from the gas network. It has overridden an OEB decision whose intent was to protect (albeit in a highly conservative manner) customers from the risk of stranded assets, but has provided no substitute policy to address that same risk — if it even acknowledges the risk at all. Ontario has no statutory emissions reduction targets or decarbonization strategy that could provide the regulator (or the public) with detailed insight into the government's expectations for reducing gas usage over the long term, even as the federal government has for years now had a comprehensive plan that consists not merely of white papers, but of law (e.g., the *Canadian Net-Zero Emissions Accountability Act*[37] and the *Greenhouse Gas Pollution Pricing Act*[38]). Ontario's lack of legislated emission targets can also be contrasted to, for example, British Columbia's *Climate Change Accountability Act*, which established provincial emissions reduction targets, including the requirement that the government "establish greenhouse gas emissions targets for individual sectors" of the economy (e.g., buildings, transportation, industry).[39] Quebec, too, has a legislated framework for emissions reduction targets (established by Quebec's *Environment Quality Act*)[40] and recently passed legislation affirming that Quebec's integrated energy resource management plan must consider the province's climate change policies and emissions targets.[41] Other jurisdictions have similarly undertaken comprehensive processes to determine how natural gas and other forms of energy can be managed in a way that meets energy needs while also aligning with environmental objectives.[42]

Meanwhile, the Ontario government is still attempting to walk a fine line between ensuring the OEB comes to decisions about the natural gas system (and other matters) that take the government's policy preferences into account, and respecting the adjudicative and decision-making independence of Commissioners (and the OEB overall) as set out in legislation and in line with general principles of administrative law. In this context it is not entirely surprising when government and regulator find themselves out of step with each other.

This dilemma was well expressed when, on June 2, 2025, the provincial government proposed new legislation, Bill 40, the *Protect Ontario by Securing Affordable Energy for Generations Act, 2025* which, among other things, would amend the OEB Act.[43] These amendments will, on the one hand, "authorize " the OEB's CEO "to issue internal policies respecting various procedural matters in relation to hearings and determinations," including "[r]equirements respecting information or documents to be considered in conducting a hearing or making a determination."[44] On the other hand, the government subsequently issued a notice regarding the proposed legislation making it clear that "this authority would not bind Commissioners to make determinations in alignment with government direction/policy" — notwithstanding that the same notice then goes to make an oblique reference to the Natural Gas Policy Statement.[45] It therefore remains to be seen if the issuance

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

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

[39] British Columbia, Climate action legislation, online: <www2.gov.bc.ca/gov/content/environment/climate-change/planning-and-action/legislation>; *Climate Change Accountability Act*, SBC 2007, C 42.

[40] *Environment Quality Act*, CQLR c Q-2.

[41] Bill 69, *An Act to ensure the responsible governance of energy resources and to amend various legislative provisions,* 1st Sess, 43th Leg, Quebec, 2024.

[42] See, for example, discussion by Roy Hrab and Travis Lusney, "Towards Developing a Natural Gas (and Energy Transition) Policy for Ontario" (1 April 2024), online: <poweradvisoryllc.com/reports/towards-developing-a-natural-gas-and-energy-transition-policy-for-ontario>.

[43] Bill 40, *Protect Ontario by Securing Affordable Energy for Generations Act*, 2025 Parl. Ontario (1st Sess, 44th Leg, Ontario, 2025).

[44] *Ibid*.

[45] Government of Ontario, Environmental Registry of Ontario, *Proposed Amendments to the Electricity Act, 1998, Ontario Energy Board Act, 1998 and the Municipal Franchises Act, to secure energy for generations*, (4 September 2025), online: <ero.ontario.ca/notice/025-0993>.

of the province's Natural Gas Policy Statement will succeed in mitigating future misalignment between government, the OEB, and/or OEB Commissioners.

CONCLUSION

Previous commentators have noted that "[a] better approach would be to give relevant government agencies adequate notice of any aspect of a proposed hearing that raised the possibility of conflict with government policy. There is no reason why government agencies cannot intervene in regulatory hearings."[46] Adopting such an approach, with the Ontario government more actively participating in proceedings, might have avoided or at least mitigated the current uncertainty enveloping OEB decision- and regulatory policy making. In lieu of issuing "statements" (of both the press and policy varieties) that have lesser legal and procedural weight, such participation would have given the government a formal opportunity to state its energy transition positions and expectations on the record and make them transparently clear to OEB Commissioners, OEB management and staff, and stakeholders, prior to determinations being made. This would allow OEB adjudicative and non-adjudicative decision-makers to incorporate the government's position as part of their deliberations.

As an alternative or complement to the above, there is also no reason that the regulator cannot transparently seek greater policy guidance and clarity from government on issues that are known to be priorities and/or contentious matters of public policy. The energy transition is clearly one such area that is deeply political with broad social impacts, going well beyond traditional economic regulation functions such as rate making, prudence, and cost allocation.

In any event, the conflicts that are playing out in Ontario were likely avoidable if all relevant parties engaged more proactively and transparently in resolving any actual or perceived government policy and regulatory gaps. And perhaps this is the lesson Ontario and other jurisdictions should take away from this example: the energy transition is an enormous undertaking, involving an economy-wide transformation of energy consumption, transportation, and production. That transition requires not only unambiguous government policy direction, but also a thoughtful and rigorous reimagining, if not reinvention, of public utility regulation.

Postscript

On October 6, 2025, following the submission of this article, the OEB issued Procedural Order No. 1 on its motion to review the IRP pilot decision.[47] The procedural order notes that

> There has been a significant passage of time [about six months] since the Review notice was filed in March. The OEB notes that the three questions identified in the Review notice appear to be predicated on issues that can be or will be raised in other ongoing OEB proceedings initiated mostly after the Review was filed,[48]

such as the consultation on the OEB's IRP framework (for which an OEB staff discussion paper[49] was also released on October 6, 2025). Interestingly, the procedural order also states: "The OEB invites submissions from parties on the following preliminary question: *Is there still merit in proceeding with the Review and addressing the three questions posed in the Review notice?*"[50] ■

[46] *Kaiser, supra* note 22.

[47] Ontario Energy Board, Motion to Review: Decision On IRP Framework, Procedural Order No. 1, EB-2025-0124, (6 October 6 2025), online (pdf): <rds.oeb.ca/CMWebDrawer/Record/915827/File/document>.

[48] *Ibid*.

[49] Ontario Energy Board, Staff Discussion Paper: Integrated Resource Planning Framework Review, EB-2025-0125, (6 October 2025), online (pdf): <rds.oeb.ca/CMWebDrawer/Record/915816/File/document>.

[50] *Supra* note 47 [emphasis added].

DECARBONIZATION DEFERRED: A CASE STUDY OF FEDERAL LOAN GUARANTEE 2, THE MARITIME LINK DEBT FRAMEWORK AND THE REGULATORY RESPONSE

*Nancy G. Rubin, KC and Brianne E. Rudderham**

As Canada's electricity sector continues to decarbonize and transition toward more sustainable energy sources, the need for government financial support has grown significantly. With legislated net-zero emissions targets and ambitious green energy initiatives, federal and provincial governments are increasingly being called upon to mitigate the economic pressures placed on ratepayers to modernize and decarbonize the electricity grid. This evolving landscape has brought concepts such as cooperative federalism and the beneficiary-pays principle to the forefront of utility regulation in Canada.

In Nova Scotia, a series of recent decisions by the Nova Scotia Utility and Review Board, now the Nova Scotia Energy Board (each referred to as the "Board") illustrate the roles of both governments and the utility regulator in balancing customer and utility interests. The backdrop to these decisions is the delay associated with delivery of renewable energy to Nova Scotia from Muskrat Falls hydroelectric generating station in Labrador via overland transmission and two subsea cables, the Labrador Island Link and the Maritime Link (the "Maritime Link" and collectively, the "Maritime Link Project").

BACKGROUND

The Maritime Link Project was originally expected to be operational and deliver reliable renewable hydro-electric energy by 2018. The in-service dates of the Maritime Link itself and the overall interconnected Maritime Link Project became disconnected, in large part because of delays on the Newfoundland and Labrador side. Accordingly, the Maritime Link Project failed to meet its energy delivery targets.

During this period, Nova Scotia Power Incorporated ("NS Power") accrued substantial debt under its Fuel Adjustment Mechanism ("FAM") — a deferral account which tracks the difference between NS Power's forecasted and actual cost of fuel and purchased power. The deferred balance is then applied as a credit or debit against rates though a FAM rate rider,

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as approved by the Board[1]. The growth in the FAM balance was largely due to a sharp increase in global fuel and natural gas prices. These rising commodity costs, coupled with the delayed availability of forecasted clean energy from the Maritime Link, which necessitated the purchase of additional alternative costly fuel sources, all placed significant unanticipated financial burdens on electricity ratepayers.

PROVINCIAL SUPPORT

In response, NS Power sought financial assistance from both the provincial and federal governments. In 2024, an agreement was reached between NS Power and the Province of Nova Scotia. Invest Nova Scotia, a Crown corporation whose mandate is economic development and innovation, agreed to purchase $117 million of NS Power's FAM-related debt. As part of NS Power's application to set the FAM rate rider, approval was sought and granted by the Board in April 2024 to sell this debt as a "regulatory asset".[2] Under the arrangement, repayment to Invest Nova Scotia will occur over a ten-year period at a more favourable interest rate than the carrying cost of NS Power's FAM account.

Despite this support, NS Power's ratepayers remained burdened with approximately $280 million in FAM-related debt, which continued to grow.

FEDERAL SUPPORT

NS Power and the Project-focused entity, Nova Scotia Power Maritime Link ("NSPML"), continued to engage in negotiations with both levels of government to secure further relief. These efforts culminated in a commercial agreement with the Government of Canada, under which NSPML would issue $500 million in debt, backed-stopped by a second federal loan guarantee ("FLG2"). This arrangement mirrored the structure of the original loan guarantee ("FLG1"), which funded the initial Maritime Link construction. Approval of this arrangement was required from the Board and was pursued throughout 2024 and 2025.

The regulatory process to approve the FLG2 arrangement, and the required repayment obligations by ratepayers, has resulted in a series of decisions issued by the Board which collectively underscore the importance of governmental support in the transition to clean energy. The decisions also reflect a regulatory approach that recognizes the complexities of cooperative federalism as a practical tool for addressing climate change related debt and striking a balance between the interests of utilities, governments, and ratepayers.

***NSP MARITIME LINK INCORPORATED (RE)*, 2024 NSUARB 199**

NSPML recovers its revenue requirement by way of a cost assessment to NS Power, which, in turn, is recovered in rates. The test-year cost assessment is the amount required to finance the Maritime Link, and pay for depreciation, sustaining capital costs, operating and maintenance expenses. On July 4, 2024, NSPML applied in the usual course for its 2025 assessment. Partway through that process, NS Power and the Federal Government negotiated a deal related to the FLG2 arrangement. As a result, on September 25, 2024, NSPML filed a supplemental request related to the FLG2 arrangement to recover an increased cost assessment associated with issuing the federally guaranteed debt.

The NSPML assessment application was combined with NS Power's application to set the FAM rate rider for 2025 but was decided separately due to the timing of FLG2 negotiations.

By the end of 2024, NS Power's FAM-related debt was projected to reach $412 million. This was too significant to be resolved through a single-year true-up in the following year's FAM rate rider. Given that the accumulation of this debt was partly attributable to delays in Maritime Link energy delivery, and corresponding need to acquire more expensive alternative fuel sources, the proposed solution was to pay down the FAM balance through debt issued to NSPML. This would allow the costs to

[1] The Board-approved FAM allows NS Power to recover fluctuating fuel and purchased power costs from customers through fuel rate adjustments. Differences between prudently incurred fuel costs and amounts recovered from customers through electricity rates in a given year are deferred to a FAM regulatory asset or liability and recovered from or returned to customers in subsequent periods, as approved by the Board.

[2] *Re Nova Scotia Power Incorporated*, 2024 CanLII 71 (NSUARB).

be amortized over the remaining 28-year term of the original Maritime Link FLG1, shifting and spreading out payment obligations to the future period.

Under the approved arrangement, NSPML would issue $500 million in new debt and the monies would be refunded to NS Power (net of fees). NS Power was required to refund ratepayers for prior payments related to principal and interest associated with the existing FLG and apply that refund against its outstanding FAM balance. The allocation of the refund was left to be allocated to customer classes in line with a regulatory framework to be determined within the separate but related FAM riders proceeding.

The debt issuance was guaranteed by the federal government, with an annual 0.5% guarantee fee payable estimated to total approximately $33 million over the amortization period. Despite the added cost, the arrangement was widely supported by intervenors, including the Consumer Advocate, Small Business Advocate, and the Industrial Group, who viewed the financing as the only viable resolution to a significant financial problem. NS Power emphasized — and the Board agreed - that approval would benefit both customers, by mitigating significant near-term rate pressures, and the utility, by improving its credit metrics and particularly its cash flow to debt metrics.

One intervenor, Port Hawkesbury Paper ("PHP"), expressed concern for the FLG2, without directly opposing the arrangement. Instead, during submissions, it sought a declaration that it would not be responsible for repaying any portion of the new debt. The Board directed PHP's request to be determined in a separate proceeding, 2025 NSEB 2, outlined below.

The Board ultimately approved the creation of a $500 million regulatory asset, and collection of a supplemental 2025 NSPML cost assessment against NS Power related to interest and principal bond repayments and the guarantee fee. The $500 million debt was also excluded for purposes of calculating NSPML's regulated capital structure.

The Board was satisfied that the commercial arrangement and the proposal benefited customers and the utility. On the issue of intergenerational equity, NS Power's position was that "because principal and interest expenses for repayment of the project costs will be deferred to the future, the costs will be matched to the customers who will ultimately benefit from Maritime Link energy."[3] This rationale later influenced how the $500 million refund was allocated.

***RE NOVA SCOTIA POWER INCORPORATED*, 2025 NSUARB 33**

After approving the commercial arrangements related to the FLG2 and NSPML's supplemental assessment to repay the FLG2, NS Power needed Board approval to allocate the NSPML refund and the supplemental assessment to customer classes. The vehicle to do this was NS Power's FAM rate rider.

The allocation of the refund was not without controversy. Some intervenors argued that the refund should be allocated based on each class's share of the FAM balance rather than the proposed method being based on each class's share of historic Maritime Link assessment costs. While various rationales were advanced, the proposed allocation resulted in some classes being left with a FAM balance and some placed in a surplus position.

In its decision of February 18, 2025, the Board affirmed that the purpose of FLG2 was to refund Maritime Link-related costs previously assessed, not to eliminate the outstanding FAM balance uniformly. The approved allocation method aligned the $500 million refund with the historical Maritime Link assessments, effectively integrating the repayment into the ongoing Maritime Link cost structure over the future 28-year period. Echoing the arguments of NS Power in the NSPML cost assessment matter, the Board found that this realigned the benefits of the Maritime Link, which are anticipated into the future, with the associated costs.

The Board confirmed that this structure served the public interest by preventing unaffordable rate increases and reinforcing the beneficiary-pays principle. By treating

[3] *Re NSP Maritime Link Inc.*, 2024 CanLII 199 (NSUARB) at para 77.

the FLG2 debt as part of the Maritime Link's long-term cost of service, the Decision ensured that future customers benefiting from the Project would bear their fair share of its costs.

RE PORT HAWKESBURY PAPER LP, 2025 NSEB 2

PHP is an extra-large industrial customer served "below-the-line" under a unique single customer tariff which does not include a FAM rider. PHP is required to pay the incremental costs for fuel and purchased power that NS Power incurs to provide service to it, along with some contribution to fixed costs. PHP is not subject to any adjustments under the FAM rider. Following the above two FLG2 decisions, PHP sought a determination from the Board that it would never be responsible for any part of the repayment of the $500 million regulatory asset as part of any tolls, rates or charges that PHP may pay in future. PHP argued that, as a non-FAM customer over the relevant time between 2018-2024, it had neither contributed to the FAM balance nor received any portion of the benefit of the $500 million refund.

The issue was particularly pertinent as PHP's tariff is scheduled to expire at the end of 2025 and negotiations with NS Power remain ongoing for a new embedded cost above-the-line tariff which has not yet been filed for approval.

In considering the application, the Board examined the federal commercial arrangement and concluded it was distinguishable from the Invest Nova Scotia $117 million regulatory asset purchase because it was structured as a refund and repayment. This, it reasoned, drives how costs are characterized and allocated. Because of the refund, the previously incurred FAM costs were eliminated.

It found that "[t]here is no obligation on NS Power's FAM customers to repay the refund provided by NSPML from the proceeds of the new federally guaranteed debt. Rather, the new federally guaranteed debt is being paid as part of the cost of service for the Maritime Link over the next 28 years."[4] In other words, going forward, recovery of payments relating to NSPML's approved $500 million regulatory asset from NS Power's customers over the next 28 years, are more appropriately associated with *future service* from the Maritime Link rather than past costs. It is better characterized as costs incurred to provide service and benefits at that future time, rather than as recovery of historically incurred costs.

In making this determination, the Board affirmed the regulatory compact and reset the clock to allow NSPML to earn its return of and on its investment, including the new debt issuance related to the Maritime Link:

> *The arrangement with the Federal Government rolled back NSPML's recovery of principal and interest payments for the Maritime Link. However, under longstanding regulatory principles enshrined in the Public Utilities Act, NSPML is entitled to the opportunity to recover its prudently incurred costs, including a return of, and on, invested capital. As such, the NSUARB approved a regulatory asset to allow the rolled-back recovery of principal and interest payments for the Maritime Link to be recovered by NSPML over the remaining 28 years of the existing financing arrangement for the Maritime Link (the recovery period was another requirement under the arrangements with the Federal Government). Hence, payments related to the approved regulatory asset are for the recovery of and return on its investment in a capital asset used to serve customers, they are not for the repayment of a debt.*[5]

Addressing the principle that rates should not be unduly discriminatory, it went on to find that PHP would be in the same position as any new customer who joined the system in the future who would be responsible for the costs of using the Maritime Link at that time. As stated:

> *The Board finds the refund eliminated the existing debt. The recovery of the refunded principal and interest payments for the Maritime Link have been shifted in time to better match*

[4] *Re Port Hawkesbury Paper LP*, 2025 CanLII 2 (NSEB) at para 50.

[5] *Ibid* at para 51.

> *costs and benefits over the next 28 years. Therefore, any future payments by PHP associated with NSPML's recently approved regulatory asset for the new federally guaranteed debt are not payments for costs incurred by other customers, but are payments for the cost of using the Maritime Link at that point in time. In this regard, PHP would be in the same situation as new customers who join the system in the future.*
>
> *This outcome is not a violation of regulatory norms but is consistent with cost-of-service principles. The Board fully accepts that the arrangement with the Federal Government, and the shifting of Maritime Link costs to a future period to better match costs and benefits, would not have occurred if there was no outstanding FAM balance. However, that motivation cannot turn the remedy that was implemented from a refund to the buyout of a receivable, as was done with Invest Nova Scotia.*[6]

In its decision issued on April 20, 2025, the Board refused to confirm that PHP would not be responsible for the repayment of any of the costs associated with the $500 million regulatory asset as part of a future tariff. It ruled that PHP will be responsible for those payments *if it takes service under a tariff that covers those costs.*

Postscript – Whether PHP will be responsible for Maritime Link payments under some still-to-be filed tariff is yet to be conclusively determined. In addition, PHP has since appealed this decision to the Nova Scotia Court of Appeal and concurrently filed for judicial review at the Nova Scotia Supreme Court. PHP alleges, among other grounds, that the Board misunderstood and misapplied the legal test for contract interpretation to determine the effect of the loan arrangement and erred in concluding that because it was used to refund NS Power, this had the legal effect of eliminating the underlying debt. It also alleges the Board exceeded its jurisdiction by altering PHP's approved rate structure to "potentially" include repayments and altering NS Power's approved cost allocation.

PHP has asked to have the matter remitted back to the Board for reconsideration or the Court of Appeal to issue a decision in its favour. The Appeal is set to be heard on March 10, 2026. The judicial review has been placed in abeyance pending the outcome of the appeal.

CONCLUSION

The FLG2 arrangement reflects a carefully negotiated, multi-governmental response to the economic impacts of the delays associated with decarbonizing electricity systems. In Nova Scotia, this was the Maritime Link.

By treating the $500 million debt issuance back-stopped by the government as a "refund" to FAM customers and integrating future repayment into the long-term cost of service, the regulatory framework not only alleviates near-term rate pressures but also aligns with the principles of intergenerational equity and the beneficiary-pays doctrine. Importantly, the decisions demonstrate how cooperative federalism and government financial aid, when combined with thoughtful regulatory oversight, can facilitate a more equitable and sustainable transition to clean energy in Canada. ■

[6] *Ibid* at paras 57–58.

OBLIGATIONS OF CANADA IN RESPECT OF CLIMATE CHANGE: A COMMENT ON THE INTERNATIONAL COURT OF JUSTICE'S ADVISORY OPINION

*Adebayo Majekolagbe**

1. INTRODUCTION

Vanuatu embodies the nature, reality, complexity, and urgency of climate change. A chain of more than eighty islands in the Southwestern Pacific Ocean, populated by about 300,000 people who are predominantly Indigenous Ni-Vanuatu. Vanuatu's economy is primarily agricultural, a sector that represents its main source of emissions. Vanuatu's total greenhouse gas ("GHG") emissions for 2022 were approximately 600,000 metric tonnes of carbon dioxide equivalent (Mt CO_2e).[1] For context, in the same year, Suncor Energy reported emitting approximately 32,000,000 Mt CO_2e.[2] The EU's Emissions Database for Global Atmospheric Research puts Vanuatu's contribution to global emissions in 2022 at 0.00 per cent.[3] For the same year, Suncor's emission share would have been about 0.06 per cent of global emissions. However, just as Suncor was generating more than $18 billion in adjusted funds and distributing nearly $8 billion to its investors in 2022,[4] Vanuatu was declaring a climate emergency and ramping up diplomatic push for the United Nations General Assembly ("UNGA") to request the advisory opinion of the International Court of Justice ("ICJ") on the climate obligations of States.[5]

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[1] European Commission, *GHG Emissions of All World Countries*, (Emissions Database for Global Atmospheric Research, 2023), online: <edgar.jrc.ec.europa.eu/report_2023> [*European Commission*].

[2] Open Sustainability Index, "Suncor Energy" (2022), online: <opensustainabilityindex.org/company/suncor-energy>.

[3] *European Commission, supra* note 1.

[4] Suncor, *Annual Report* (Suncor, 2022) 2, online (pdf): <suncor.com/-/media/project/suncor/files/investor-centre/annual-report-2023/2023-annual-report-en.pdf?modified=20240613203824&created=20240321155537>.

[5] Government of Vanuatu, Department of Climate Change, "Declaration of Climate Emergency Approved Unanimously by the Parliament of Vanuatu" (2022), online: <docc.gov.vu/index.php/resources/news-events/news/120-declaration-of-climate-emergency-approved-unanimously-by-the-parliament-of-vanuatu>.

The climate emergency in Vanuatu has been and remains a serious and ongoing danger. In 2015, the island was struck by Category 5 Tropical Cyclone Pam, destroying or damaging 90 per cent of buildings, impacting 80 per cent of the livelihoods of Indigenous communities, and costing the country about 65 per cent of its Gross Domestic Product ("GDP").[6] Within 48 hours in 2023, Vanuatu was hit by two cyclones (tropical cyclones Judy and Kevin) and an earthquake. These affected 80 per cent of the population, with more than one-third of buildings in the country damaged or destroyed.[7] While climate change did not directly or singularly cause Pam, Judy, or Kevin, it made these cyclones and others like them more frequent, intense, and devastating.[8] Human emissions have made the earth warmer more quickly than it would have been, with catastrophic effects. Worse still, countries that contributed the least, like Vanuatu, are bearing the brunt of a warming world.

The 2025 advisory opinion of the ICJ is set against the foregoing backdrop.[9] Vanuatu and other nation-states sought the ICJ's interpretation of international law on what the obligations of states are to protect the climate system and other parts of the environment from GHG emissions, and the legal consequences for States that have caused significant environmental harm.[10] The ICJ was established after the Second World War as the primary judicial branch of the United Nations ("UN"). Nation-states granted the court the authority to resolve legal conflicts and provide advisory opinions on international law issues. International law, as interpreted by the ICJ, primarily consists of treaties and binding norms and practices that are widely accepted and recognized as law (customary international law).[11] While all parties who have ratified a treaty must abide by it, customary international law applies to all nations. For instance, torture is internationally acknowledged as wrongful regardless of whether a country has signed the treaty against torture, just as the international rule against pollution that causes harm in other countries.[12]

The ICJ's advisory opinion, in this case, addressed obligations under treaties and customary international law. While advisory opinions are not legally binding in themselves, they serve as authoritative interpretations of treaties and customary law.[13] Advisory opinions should guide how governments and domestic courts interpret and implement international law. The extant opinion, therefore, provides authoritative guidance on Canada's climate mitigation and adaptation commitments, its duty to regulate corporate activities, and its obligation to cooperate with other nations to support vulnerable countries under international climate agreements and customary law. This article reviews the obligations as interpreted by the ICJ and their specific

[6] "Cyclone Pam destroyed 90% of buildings in Vanuatu, says president - video", The Guardian (16 March 2015), online: <theguardian.com/world/video/2015/mar/16/cyclone-pam-vanuatu-president-video>; Julie Webb et al, "Does Gender Responsive Disaster Risk Reduction Make a Difference?: A Comparative Study of Category Five Tropical Cyclone Pam in Vanuatu" (2017) Care, online (pdf): <sistalibrary.com.vu/wp-content/uploads/2020/09/CARE_Vanuatu_DRR_Impact_Study.pdf>.

[7] Government of Australia, "A Triple Disaster Event Series in Vanuatu: Cascading and Compounding Impacts of Climate Change" (2023) <unfccc.int/sites/default/files/resource/casestudy_australia_vanuatu_cascadingcoumpounding.pdf>.

[8] Roz Pidcock, "Cyclone Pam: Untangling the Complex Science on Tropical Storms and Climate Change" (16 March 2015), online: <carbonbrief.org/cyclone-pam-untangling-the-complex-science-on-tropical-storms-and-climate-change>; Sanjay Srivastava & Sudip Ranjan Basu, "Vanuatu Twin Cyclones Underscore Pacific's Vulnerability to Climate Risks" (16 March 2023) online: <sdg.iisd.org/commentary/guest-articles/vanuatu-twin-cyclones-underscore-pacifics-vulnerability-to-climate-risks>.

[9] *Obligations of States in Respect of Climate Change*, Advisory Opinion, [2025] ICJ Rep 187.

[10] *Vanuatu ICJ Initiative*, UNGA, 22 Sess, UN Doc A/70 (2023) GA Res 77/276.

[11] *Statute of the International Court of Justice*, 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945), art 38.

[12] *Prosecutor v Anto Furundzija*, IT-95-17/1-t101, Judgement on Trial Chamber (10 December 1998) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online (pdf): <icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

[13] "Contrary to judgments and except in rare cases where it is expressly provided that they shall have binding force, …the court's advisory opinions are not binding. The requesting organ, agency or organization remains free to decide, as it sees fit, what effect to give to these opinions. Despite having no binding force, the Court's advisory opinions nevertheless carry great weight and moral authority…[they] contribute to the clarification and development of International law and thereby to the strengthening of peaceful relations between States" (International Court of Justice, "Advisory Jurisdiction" (last visited 6 October 2025), online: <icj-cij.org/advisory-jurisdiction>).

implications for Canada. Failure to meet these obligations could make Canada responsible for internationally wrongful acts. Additionally, Canada's failure to fulfill its climate obligations may be extremely costly, as the country could be legally liable for paying reparations to nations adversely affected by climate change.

2. CLIMATE OBLIGATIONS IN THE ADVISORY OPINION

The climate obligations of States flow from multiple sources, including climate change-specific treaties, non-climate treaties, and customary international law. The 1992 United Nations Framework Convention on Climate Change ("UNFCCC"), 1997 Kyoto Protocol, and the 2015 Paris Agreement are the foremost international agreements on climate change. An earlier opinion of the International Tribunal for the Law of the Sea addressed States' climate obligations under the 1982 United Nations Convention on the Law of the Sea.[14] The decisions made by Parties at various climate conferences could also create legal obligations in some cases.[15] The Kyoto Protocol, which mandates that developed countries meet specified emission targets, is currently not in effect, as countries have failed to pledge to a further commitment period. Nevertheless, the ICJ held that the Protocol remains relevant as an interpretive aid and for determining whether countries met targets under previous commitment periods.[16] The 1992 UNFCCC, however, remains extant and State parties to the Convention. The continued substantive relevance of the Convention is vital as it recenters the annex-based obligations, which the Paris Agreement supposedly moved away from.[17] It is also important, as it continues to serve as an independent legal source of climate obligation for countries, such as the United States, which have withdrawn from the Paris Agreement.

The ICJ also clarified the previously vaguely defined obligations that governments have used to justify inaction on climate change. Canada's climate obligations extend beyond the Paris Agreement, encompassing customary international law and various international treaties it has ratified, notably the 1992 United Nations Framework Convention on Climate Change and the 1982 United Nations Convention on the Law of the Sea ("UNCLOS").

The Paris Agreement, nevertheless, remains the premier international climate treaty. Notably, the court rejected the argument that the Paris Agreement has replaced the UNFCCC and Kyoto Protocol.[18] The UNFCCC provides the overarching objectives and framework for addressing climate change, which are further specified in subsequent instruments.[19] These instruments are not incompatible, and they impose similar obligations to varying degrees of detail. The obligations are categorized (mitigation, adaptation, regulation, and cooperation) and briefly discussed below.

The Obligation to Mitigate

In 2015, countries from around the world, including Canada, gathered in Paris, France, and committed to collectively keeping the global temperature below 2°C and striving to limit it to 1.5°C above pre-industrial levels.[20] In the years following the Paris agreement, it has become clearer that while a 1.5°C rise

[14] *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (2024), Advisory Opinion, No 31, *International Tribunal for the Law of the Sea.*

[15] "The Court observes that in certain circumstances the decisions of these bodies have certain legal effects. First, when the treaty so provides, the decision of COP may create legally binding obligations for the parties… Second, decisions of these bodies…[can] be taken into account as means of interpreting the climate change treaties" (*ibid* at para 184).

[16] *Ibid* at para 221.

[17] Under the UNFCCC, annexe I countries are developed countries with obligations to adopt national policies and take corresponding measures on climate change mitigation (See UNFCCC, art 4(2)(a)), while annex II countries must go further to provide support to developing countries (see UNFCCC, art 4(3)). Canada is both an annex I and II country (see UNFCCC, Annexes I and II). See also *ibid* at para 199.

[18] *Supra* note 14 at para 189.

[19] *Ibid* at para 195.

[20] *Paris Agreement*, being an Annex to the *Report of the Conference of the parties on its twenty-first session, held in parties from 30 November to 13 December 2015 – Addendum Part two: Action taken by the Conference of the parties at its twenty-first session*, 12 December 2015, UN Doc FCCC/CP/2015/10/Add.1, 55 ILM 740 (entered into force 5 October 2016, accession by Canada 4 November 2016) , art 2(1)(a) [*Paris Agreement*].

leads to increased flooding, drought, heatwaves, and some countries and communities going underwater, a 2°C rise would be significantly worse.[21] A consensus has therefore emerged among countries committed to the Paris Agreement for a 1.5°C target. In its advisory opinion, the ICJ provided legal backing to the 1.5°C target as the collective goal for nations.[22] According to the court, this target must guide the commitments and ambitions of states in reducing their greenhouse gas emissions.[23]

The ICJ's findings on the mitigation obligations of States were heavily influenced by the definitions and scopes of key concepts, including obligations of conduct and result, the legal implications of verbs such as 'shall', 'will', 'would', and the standard of due diligence. Obligations of result compel States to bring about results required under the obligation, while the obligation of conduct only requires using all means at the State's disposal to bring about an objective under the obligation.[24] The distinction between the two obligations, however, is not strict, as both often coexist and seek to achieve similar goals through different means.[25] The distinction is further blurred as the obligation of conduct entails an obligation to act with due diligence, that is, the duty to utilize all means at a State's disposal to fulfill its international obligations.[26] The standard of due diligence, although stringent considering the seriousness of climate change, differs across countries. The principle of common but differentiated responsibilities ("CBDR"), which requires that climate obligations, rights, and privileges be based on considerations of historical responsibility, capability, and national circumstances, is essential in determining the level of due diligence expected from a country.[27]

State-parties' obligation to mitigate includes the legal duty to submit a 1.5°C-compliant nationally determined contribution ("NDC") containing their climate mitigation (emission reduction) goals every five years (an obligation of result), as well as an obligation to make every effort to achieve those climate goals (an obligation of conduct).[28] Every country, developed or developing, is obliged to submit an NDC under the Paris Agreement. The ICJ noted that countries do not have untrammelled liberty to decide and communicate emission reduction (climate mitigation) targets that are progressive and represent their "highest possible ambition".[29] Countries' discretion in determining their NDCs is limited and attenuated by basic requirements that NDCs must meet. NDCs must become more ambitious over time, making an adequate contribution to staying within the 1.5°C target, and be presented in a manner that promotes environmental integrity, transparency, accuracy, completeness, comparability, consistency, and the avoidance of dubious accounting.[30]

While every country must make efforts to submit ambitious NDCs, the NDCs of developed countries like Canada, considering their historical emissions and current financial and technological capabilities, will be subject to a rigorous application of the requirements set out by the ICJ.[31] Canada's current pledge to cut its emissions by 45-50 per cent by 2035, compared to its 2005 levels, is unlikely to meet the ICJ's standards.[32] This is especially true, as comparable jurisdictions like the United

[21] Masson-Delmotte, V. et al, *Global Warming of 1.5°C. An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (Cambridge: Cambridge University Press, 2018).

[22] *Supra* note 14 at at para 224.

[23] *Ibid* at para 242.

[24] *Ibid* at para 208.

[25] *Ibid* at para 175.

[26] *Ibid* at para 176.

[27] *Ibid* at para 247.

[28] *Paris Agreement*, *supra* note 20 art 4(2).

[29] *Supra* note 14, at paras 245–46.

[30] *Ibid* at paras 241–44.

[31] *Ibid* at para 247.

[32] Government of Canada, "Canada's 2035 Nationally Determined Contribution" (June 2025), online (pdf): <unfccc.int/sites/default/files/2025-02/Canada%27s%202035%20Nationally%20Determined%20Contribution_ENc.pdf>.

Kingdom (81 per cent by 2035, compared to 1990) and Norway (70-75 per cent by 2035, compared to 1990) have committed to more ambitious emission reduction targets.[33] However, even if Canada's 45-50 per cent emission reduction commitment were accepted, a significant gap remains between the country's pledge and its policy plans to achieve it. The recent NDC submitted in 2025 is Canada's third NDC. The country, however, failed to meet the targets committed to under NDCs submitted in 2015 and 2020.[34] Ambitious NDCs alone do not fulfill the legal climate mitigation obligations of states. Each country must adopt and implement domestic measures adequate to meet its commitments. While countries only have an obligation of conduct — not result — with respect to the targets they have committed to, they must exercise due diligence in fulfilling this obligation.[35] In other words, while there is no obligation to achieve these targets, they must deploy all appropriate measures and best practices to reach their targets.[36]

Climate mitigation measures will differ across countries. The Paris Agreement allows NDCs and related instruments to reflect each nation's circumstances. However, every country should have legislative, administrative, and enforcement mechanisms that effectively enable it to meet its NDCs. Canada's main climate legislative tools, the *Net-Zero Emissions Accountability Act* ("*NZEAA*") and the *Greenhouse Gas Pollution Pricing Act* ("*GGPPA*"), arguably do not meet these high standards.[37] The *NZEAA* is not action-forcing, and the *GGPPA* has weakened over time. Canada must now review its climate laws and measures to ensure they align with the requirements set out by the ICJ. Just as Canada's NDCs must be ambitious and progressive, implementation measures should also be forward-looking and bold.

The One Canadian Economy Act also risks breaching Canada's climate mitigation commitments if it promotes the development of infrastructure for increased exploration, production, subsidization, and use of fossil fuels.[38] As clarified by the court, emitting GHGs is not inherently an internationally wrongful act. However, neglecting to take climate-protective measures in relation to fossil fuel activities might be indicative of Canada's failure to fulfill its climate obligations. Emissions from fossil fuels are the main driver of climate change. Canada cannot meet its climate commitments without addressing this reality in a meaningful way. At a minimum, Canada must have and implement a plan that ensures that developments in the fossil fuel sectors are consistent with its emission reduction targets, which must be ambitious and progressive.

The Obligation to Adapt

Climate change is no longer a distant threat; it is a current reality. A sudden halt to global emissions today would bring significant benefits for future generations. Still, it would not protect the current generation from the already locked-in negative impacts of climate change. For example, one-third of Tuvalu has applied to relocate to Australia as the island gradually disappears into the Pacific.[39] Countries in Sub-Saharan Africa are currently experiencing some of the most severe effects

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[33] Government of United Kingdom, "United Kingdom of Great Britain and Norther Ireland's 2035 Nationally Determined Contribution" (January 2025), online (pdf): <assets.publishing.service.gov.uk/media/679b5ee8413ef177de146c1e/uk-2035-nationally-determined-contribution.pdf>; Government of Norway, "Norway's Nationally Determined Contribution 2035" (June 2025), online (pdf): <unfccc.int/sites/default/files/2025-06/Norways%20NDC%20for%202035..pdf>.

[34] Office of the Auditor General of Canada, "Canadian Net-Zero Emissions Accountability Act – 2030 Emissions Reduction Plan" (2023) Report 6 – Reports of the Commissioner of the Environment and Sustainable Development, online (pdf): <oag-bvg.gc.ca/internet/docs/parl_cesd_202311_06_e.pdf>.

[35] *Supra* note 14 at para 251.

[36] *Ibid* at paras 252–53.

[37] *Net-Zero Emissions Accountability Act*, SC 2021 c 22; *Greenhouse Gas Pollution Pricing Act*, SC 2018 c 12.

[38] *One Canadian Economy Act,* SC 2025 c 5; *Supra* note 14 at para 427.

[39] Angus Watson, "More than a third of this country's population has applied to relocate" (27 June 2025) CNN World, online: <edition.cnn.com/2025/06/27/australia/tuvalu-relocation-visa-australia-climate-intl-hnk>.

of climate change.[40] Here at home, permafrost in Canada's North continues to melt quickly, putting Indigenous communities and residents in danger.[41]

The reality of adverse impacts from climate change makes climate adaptation a crucial part of international climate law. Climate adaptation measures help individuals and communities prepare for and adjust to the current and expected effects of climate change. Although it receives less attention than climate mitigation in international climate agreements, the ICJ reaffirmed important climate adaptation obligations that Canada and other nations must fulfill.[42] There is no obligation to commit to specific or quantitative adaptation goals under international law. States must, however, take appropriate measures to strengthen the resilience of their people, communities and infrastructure, reduce their vulnerability to climate change, and improve their ability to adapt.[43] The ICJ emphasized that the country should make its best efforts towards these goals in line with current scientific knowledge.[44] While there is no mandatory list of actions, it is arguable that the indicative list in the Paris Agreement — such as having national adaptation plans and assessing climate change impacts and vulnerabilities before approving projects — is a minimum requirement.

Canada's adaptation strategy has been criticized as inadequate.[45] There is little meaningful integration of climate adaptation into its regulatory impact assessment framework. The country also falls short on other measures highlighted by the ICJ, including early warning systems, ecosystem restoration, and climate-resilient infrastructure. The level of public knowledge and awareness about place-specific climate impacts. There is also no concerted system to proactively and actively educate and inform Canadians about the vulnerabilities of communities and places to climate change.

Canada lacks a country-wide climate vulnerability map and database comparable to the US National Oceanic and Atmospheric Administration Climate Mapping for Resilience and Adaptation ("CMRA").[46] The closest equivalent is a Government of Canada website hosting a Quebec climate database with a disclaimer stating that the "resources are not under the control of the Government of Canada."[47] The Climate Atlas by the Prairie Climate Center at the University of Manitoba is a very useful tool.[48] However, public awareness of this platform remains limited. Its comprehensiveness, accessibility, and user-friendliness are also questionable. Provinces, particularly in the Atlantic region, as well as several Indigenous bodies, have developed adaptation plans and strategies.[49] Nonetheless, there is no meaningful coordination among provincial and federal adaptation plans and strategies. The legal framework for climate adaptation at both federal and provincial levels is currently highly fragmented and mostly only implicitly relevant to climate adaptation and resilience.

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[40] World Meteorological Organization, "Africa faces disproportionate burden from climate change and adaptation costs" (2 September 2024) online: <wmo.int/news/media-centre/africa-faces-disproportionate-burden-from-climate-change-and-adaptation-costs>.

[41] Firelight Research Inc. & Canadian Climate Institute, *The Impacts of Permafrost Thaw on Northern Indigenous Communities* (Vancouver, Canadian Climate Institute, 2022).

[42] *Supra* note 14 at para 255.

[43] *Ibid* at para 256.

[44] *Ibid* at para 258.

[45] Office of the Auditor General of Canada, Canada's strategy for adapting to climate change lacks key elements and progress, (Ottawa, Commissioner of the Environment and Sustainable Development to the Parliament of Canada, 2025).

[46] U.S. Climate Resilience Toolkit, "Climate Mapping for Resilience and Adaptation", online: <resilience.climate.gov>.

[47] Government of Canada, "Vulnerability to Climate Change" (31 July 2017), online: <open.canada.ca/data/en/dataset/3603f75a-1963-4130-9fc5-ab3e7272211a>.

[48] Climate Atlas of Canada, (last visited 15 October 2025), online: <climateatlas.ca>.

[49] David L. VanderZwaag et al, "Canada and Ocean Climate Adaptation: Tracking Law and Policy Responses, Charting future Directions" (2023) 10:1 Frontiers in Marine Science 1.

The Obligations to Regulate and Cooperate

Failing to properly regulate the actions of companies that contribute to climate change could make Canada liable for an international wrongful act. Traditionally, international law has focused on the obligations and actions of states. As a result, companies are generally considered to have no obligations under international law. However, the trend in Canada and other countries has shifted. The Supreme Court of Canada, for instance, has decided that a company could be held liable for human rights abuses under customary international law.[50] In other countries, courts have used international climate agreements to establish the climate responsibilities of corporations.[51]

Although the ICJ stopped short of ruling that corporate entities have direct climate obligations under international law, it stated that failing to regulate their activities could indicate a state's failure to fulfill its climate commitments.[52] It may also suggest that a State is not complying with its duty under customary international law to prevent significant environmental harm.[53] Consequently, States must establish regulatory mechanisms that bind both public and private entities under their control to achieve deep, rapid, and sustained reductions in emissions and to minimize climate-related risks. Additionally, systems for monitoring and enforcement are essential. Although Canada has laws and policies at the federal, provincial, and municipal levels regulating corporate emissions, it lacks the comprehensive climate change due diligence regulatory framework present in other countries.[54] Impact assessment is also important in this context. According to the ICJ, States should provide and carry out impact assessments regarding how projects within their jurisdiction or control contribute to GHG emissions, using the best available science.[55] Impact assessment is an indicator that a country is making its best efforts to meet its climate obligations under international customary law.

Climate change cannot be dealt with by the efforts of any single country, no matter how ambitious. Global emissions collectively contribute to climate change, and their impacts do not respect borders. The ICJ describes the climate system as a shared resource belonging to all states.[56] It is a matter of common concern for humankind that requires international cooperation. Climate agreements, including the Paris Agreement, acknowledge the vital importance of countries working together to fight climate change.

The need for cooperation becomes even more essential, especially since the emissions-intensive industrialization of countries like Canada has significantly contributed to climate change, with its worst impacts felt disproportionately by countries with the least emissions.[57] That is why supporting emission reduction and adaptation efforts in developing nations is a vital part of every international climate agreement. However, the obligation to cooperate extends beyond international agreements, as it is also a customary international law norm. Even if a country is not a signatory to an international climate treaty, it still bears a duty to make good faith efforts to collaborate with other nations to combat climate change.[58]

Good faith and understanding are vital to the duty to cooperate. They recognize the interdependence of States and the importance of each nation genuinely contributing its fair share. Fair burden sharing and responsibility are essential. According to the ICJ, the duty to cooperate and prevent significant environmental harm is a legal standard used

[50] *Nevsun Resources Ltd v Araya*, 2020 SCC 5 [*Nevsun*].

[51] *Civiel recht, Rechtbank Den Haag [District Court of The Hague, Civil Division], 26 May 2021, Milieudefensie et al v Royal Dutch Shell plc, No C/09/571932 / HA ZA 19-379 (Netherlands).*

[52] *Supra* note 14 at para 428.

[53] *Ibid* at 282.

[54] See for example, French Corporate Duty of Vigilance Law (2017).

[55] *Supra* note 14 at para 298.

[56] *Ibid* at para 302.

[57] Ruma Bhargawa and Megha Bhargava, "The climate crisis disproportionately hits the poor. How can we protect them?" (13 January 2023), online: <weforum.org/stories/2023/01/climate-crisis-poor-davos2023>.

[58] *Supra* note 14 at para 304.

to evaluate whether international agreements and their implementation meet their objectives and whether additional collective actions are needed.[59] Canada has an obligation, considering its historical emissions, current capabilities, and circumstances, to commit to emission targets that fairly reflect its burden. It has been estimated that Canada's fair contribution to the global temperature goal should be a 140 per cent reduction by 2030, including at least a 60 per cent domestic emission reduction and the rest through support for developing countries.[60]

Although countries can choose their mode of cooperation, refusing to cooperate is not an option. The court also acknowledged that financial assistance, technology transfer, and capacity building are primary forms of collaboration.[61] As a developed nation, Canada has a duty to provide and support financial aid, technology transfer, and capacity development to developing countries in line with the 1.5°C target. Canada is behind in delivering international support to developing countries, with its climate finance contributions currently considered highly insufficient.[62]

3. IMPLICATIONS OF ADVISORY OPINION FOR CLIMATE LITIGATION IN CANADA

The advisory opinion of the ICJ does not bind Canadian courts. Such opinion could, however, be "compelling" to Canadian courts,[63] particularly in their determination of the scope of the obligations of the federal government, provinces, municipalities, and private actors under international law. The existing ICJ opinion may not necessarily alter the trajectory of judicial decisions radically. Its most significant impact might be in the implications of its component parts for discrete issues. In a sense, the parts might be of greater consequence than the whole.

One of the understated yet most consequential findings of the ICJ is its full-throated grounding of the obligations of States in respect of climate change in customary international law. This is important not only because it is the first time the argument received judicial approval, but also more significantly because such grounding extends climate obligations beyond States that are parties to climate treaties. Countries that withdraw from international climate agreements remain obligated under customary international law. The argument can, however, be taken even further, drawing on the universality of customary international law. The ICJ did not address the climate obligations of sub-State units and private actors.

While the general rule under international law is that the State is liable for the wrongful acts of its sub-State units and private actors, the decision of the SCC in *Nevsun Resources Ltd v Araya* makes it possible to hold non-State entities liable under customary international law directly. After reviewing a long line of cases, the court concluded that "Canada has followed the conventional path of automatically incorporating customary international law into domestic law via the doctrine of adoption, making it part of the common law of Canada in the absence of conflicting legislation".[64] This reasoning allowed the court to conclude that a private actor can be held accountable under customary international law. Similarly, private actors and sub-State units in Canada have an obligation under customary international law to prevent significant harm to the environment, including the climate system. So far, direct climate litigation against private actors in Canada has been rare, and most cases against federal and provincial governments have been based on the Charter. There is now a real

[59] *Ibid* at para 307.

[60] Climate Action Network, "Canada's Climate Fair Share" (2019), online (pdf): <climateactionnetwork.ca/wp-content/uploads/2019/12/Canada-Fair-Share-Infographic.pdf>.

[61] *Supra* note 14 at para 306.

[62] Climate Action Tracker, "Canada: Country summary" (last visited 15 October 2025), online: <climateactiontracker.org/countries/canada/#:~:text=Canada's%20international%20public%20climate%20finance,Land%20use%20&%20forestry%20Source%20&%20Sink>.

[63] *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 at para 67. ["Similarly, other sources of international law may be relevant in a court's determination of whether an act falls within Article 1F(c). For example, determinations by the International Court of Justice may be compelling"].

[64] *Nevsun*, *supra* note 49 at para 90.

possibility that a viable claim under customary international law can now be made against private actors and sub-national units.

The advisory opinion is also relevant for more recent reference case initiated by Alberta against the Impact Assessment Act.[65] In the first *Impact Assessment Act Reference*, a majority of the Supreme Court of Canada held that the federal *IAA* was beyond Parliament's legislative authority because the Act insufficiently focused on areas of federal jurisdiction.[66] In part, the Supreme Court of Canada ("SCC") found that by using broad considerations like effects of projects on Canada's climate commitments to substantiate a negative public interest decision, the law lost its focus on regulating federal impacts.[67] Canada subsequently amended the Act, but Alberta was unsatisfied with those changes and referred the amended Act to another reference before the Alberta Court of Appeal.

With respect to transboundary environmental harm specifically, the SCC in the first *IAA Reference* constrained prior precedents to establishing federal jurisdiction over marine pollution, transboundary river pollution, and national standards of carbon pricing, not transboundary air pollution *per se*.[68] The ICJ has, however, highlighted impact assessment as a due diligence requirement for fulfilling Canada's duty to prevent significant harm to the climate system.[69] While an opinion of the ICJ does not alter the constitutionally established distribution of power in Canada, it certainly seems clearer now that Canada has an international obligation to assess projects' GHG emissions that the federal and provincial governments will have to meet.

Canadian courts may find the ICJ's opinion that climate change can impact rights such as life, health, and privacy under international human rights treaties, to which Canada is a signatory, compelling in their determination of climate rights under the Canadian Charter of Rights and Freedoms.[70] Courts around the world, including in the United States, have to varying degrees reached positive findings on the existence and violation of climate rights either under their constitution or under the law of tort.[71] So far, no Canadian court has. The most promising climate right case in Canada, as of the time of writing, *Mathur v Ontario* has returned to the Ontario Superior Court of Justice after the Court of Appeal overturned the decision of trial court rejecting the claims of litigants under sections 7 (right to life, liberty and security) and 15 (equality rights) of the *Charter*.[72] The trial court found it difficult to accommodate climate rights within the traditional scopes of sections 7 and 15.[73]

The ICJ's determination that core human rights treaties like the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), and rights under international customary law, form part of the most directly relevant applicable law in the climate context,[74] should compel Canadian courts to rescope the bounds of Charter rights accordingly. This argument is consistent with the firmly established interpretive principle that "the Charter is presumed to provide protection at least as great as that afforded by similar provisions in international human rights that Canada has ratified".[75] It is worth noting that Canada has ratified the ICCPR, ICESCR, and other relevant human rights treaties like the Convention on the Rights of the Child;

[65] *Reference re Impact Assessment Act (Canada)*, 2022 CanLII 165 (ABCA).

[66] *Reference re Impact Assessment Act*, 2023 SCC 23.

[67] *Ibid* at para 178.

[68] *Supra* note 14 at paras 182–89.

[69] *Ibid* at paras 295–98.

[70] *Ibid* at paras 376–93.

[71] *Supra* note 51; *Held v State of Montana*, 312 MT MT 312 (Mont S Ct 2024) DA 23-0575; *Bundesverfassungsgericht [Federal Constitutional Court], 24 March 2021, Neubauer et al v Germany, No 2656/18 (Germany).*

[72] *Mathur v Ontario*, 2024 CanLII 762 (ONCA).

[73] *Mathur v His Majesty the King in Right of Ontario*, 2023 CanLII 2316 (ONSC).

[74] *Supra* note 14 at para 145.

[75] *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at para 59; *Quebec (AG) v 9147-0732 Québec Inc.*, 2020 SCC 32 at para 31.

treaties that the ICJ held to include protection for climate rights.

Further, the common argument that governments or private actors cannot be legally responsible for climate change because climate harm cannot be directly linked to their actions has been weakened by the ICJ. The court clarified that attribution — the responsibility for failing to meet climate obligations — differs from causation, which pertains to liability for the harm caused by climate change.[76] Attribution alone suffices to establish responsibility for an international wrongful act under treaties and international customary law. Legal consequences, including the duties of performance, cessation, and guarantees of non-repetition, can arise if attribution is proven without more. Causation is only relevant if reparation (including compensation, restitution, and satisfaction) is claimed. Notably, the court rejected the idea that States cannot be held liable for climate-related harm requiring reparations, even though proving causation remains challenging.[77] This finding will potentially open a new frontier of reparation claims against Canada, provinces, and potentially, private actors by people and communities suffering the worst impacts of climate change, including Canadian Indigenous communities, as confirmed by the SCC in the *Greenhouse Gas Pollution Pricing Act Reference* and vulnerable countries like Vanuatu.[78]

4. CONCLUSION

To the realist, international law is the law of the powerful by the powerful for the powerful. Powerful countries ignore it freely, while weaker nations can be compelled into obedience. In an ideal world, every country should consider the opinion of the ICJ to review, set higher ambitions, and implement its climate laws and policies in good faith. Every nation, whether or not it is a party to an international climate agreement, should pass laws, adopt policies, and take actions to protect a deteriorating climate. This is because the duty to safeguard the climate is rooted not only in treaties but also in the core practices and norms that are believed to bind every country. These norms include a responsibility to ensure that activities in one country do not harm another, to cooperate in protecting global spaces over which no single State holds exclusive jurisdiction, and to ensure that the integrity of the climate system is protected.

The world is far from ideal, and as the ICJ acknowledged, there are limits to international law.[79] As the impacts of climate change grow more severe in Canada and countries like Vanuatu through wildfires, cyclones, heatwaves, and flooding, causing loss of life, livelihoods, and ecosystems, levels of government in Canada have engaged in unnecessary jurisdictional disputes and consistently weaken already insufficient climate policies and laws. The ICJ's opinion is not a cure-all, but it is an important step forward. Its effectiveness depends on human will and wisdom, as the court pointed out, to make tough choices for protecting our planet and future generations. Hopefully, Canada and its people will see this decision, made by 15 individuals from around the world, as a call to unite our collective resolve and wisdom in halting our rapid slide into disaster. ■

[76] *Supra* note 14 at para 422.

[77] *Ibid* at paras 433–38.

[78] *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 11–12.

[79] *Supra* note 14 at para 456.

ALBERTA'S GRID IN TRANSITION: AN OVERVIEW OF THE RESTRUCTURED ENERGY MARKET

*Ruppa Louissaint**

INTRODUCTION

Over the next few years, the Alberta Electric System Operator ("AESO") is undertaking the most significant restructuring of its electricity market in decades and implementing major changes to Alberta's transmission policies. These initiatives are designed to ensure the province's power grid remains reliable and affordable while adapting to a rapidly changing energy landscape. This article provides a comprehensive summary of the Restructured Energy Market ("REM") design and other policy changes being introduced into Alberta, outlining core components, objectives and implementation plan.

WHAT THE REM IS SOLVING FOR

Alberta's electricity framework faces mounting challenges that require a comprehensive redesign to ensure the system remains reliable, affordable and attractive to investors. The REM was initiated to address these critical issues, which stem from a combination of changing sources of electricity supply, shifting policy pressures and infrastructure demands.

1. TRANSITIONING TO A NEW GENERATION MIX

Alberta has moved away from traditional coal-fired power plants to a mix of renewable resources like wind and solar, alongside dispatchable gas-fired generation. While this has been driven by decarbonization policy and economics of supply, it introduces operational challenges due to the intermittent nature of renewable energy.[1] The REM builds on the existing energy-only design to send stronger investment signals for the reliability attributes needed in Alberta, especially dispatchable generation sources that improve system reliability. This way the REM supports the integration of variable renewables while maintaining grid stability through flexible, dispatchable generation.

2. NAVIGATING POLICY AND INVESTMENT UNCERTAINTY

Investor confidence in the long-term operation of the market relies on clear frameworks and well-defined design parameters essential for creating a stable and attractive investment environment. REM is designed to provide

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[1] For an assessment of how the Alberta grid is impacted by intermittent and inverter-based resources, such as wind and solar generation, see Alberta Electric System Operator, "2025 Reliability Requirements Roadmap" (August 2025), online (pdf): <aeso.ca/assets/Uploads/future-of-electricity/AESO-2025-Reliability-Requirements-Roadmap.pdf>.

stronger price signals, ensuring Alberta attracts the necessary investment to support the integration of a diversified supply mix and strengthen system stability.

3. ADDRESSING RISING ELECTRICITY DEMAND

Growth in industrial loads, such as energy processing and data centres, is driving up demand for new generation and transmission infrastructure.[2] REM seeks to align market incentives with this rapid demand growth, ensuring adequate development of the infrastructure needed to meet Alberta's evolving energy needs.

4. EXPANDING AND FUNDING TRANSMISSION SYSTEMS

The increasing penetration of wind and solar generation, particularly in southern Alberta is accelerating the need for transmission expansion.[3] Historically, the cost recovery framework placed the entire burden on consumers, but this is changing. Alberta is moving away from an unconstrained transmission policy toward an optimal transmission planning ("OTP") framework, where some costs will now be allocated to suppliers based on cost-causation principles.[4] These changes, introduced through OTP and other transmission policy changes, aim to create a more balanced and sustainable approach for transmission development.

5. ADAPTING TO ALBERTA'S UNIQUE ENERGY LANDSCAPE

Unlike other regions, Alberta lacks significant hydroelectric or nuclear resources and has limited interconnections with neighbouring grids. This forces the province to rely heavily on internal generation, much of it natural gas-powered, with energy-intensive sectors like oil sands and manufacturing driving demand.[5] REM is designed to reflect Alberta's unique energy profile, ensuring the market structure supports a system that can reliably meet the province's specific needs.

6. LEARNING FROM OTHER JURISDICTIONS

Alberta's challenges are not isolated. Texas has faced reliability issues during extreme weather, and California struggles with balancing renewable integration and grid stability. REM draws on lessons from these markets, aiming to implement solutions that improve resilience and better manage the complexities of a decarbonizing grid.

Through the REM, Alberta is creating a market design that balances reliability, affordability and investment attractiveness, ensuring the province's electricity system is prepared for the future.

HOW THE REM COMPONENTS ADDRESS ALBERTA'S GRID CHALLENGES

The REM introduces fundamental changes to the technical design of Alberta's electricity market. The final design, released in August 2025, contains several critical components that will reshape how electricity is dispatched, priced and settled.[6]

The transition to the REM will have wide-ranging effects on all market participants, from generators and industrial consumers to retail demand. The new design is intended to create a more efficient, responsive and resilient electricity market capable of navigating the energy transition.

1. CONGESTION MANAGEMENT, MARKET CLEARING AND PRICING MECHANISMS

Problem being solved: Alberta's electricity grid is facing more congestion, making generation

[2] Alberta Electric System Operator, *2024 Long-Term Outlook Report* (Calgary: Alberta Electric System Operator, 2024), online (pdf): <aeso.ca/assets/Uploads/grid/lto/2024/2024-LTO-Report-Final.pdf>.

[3] Alberta Electric System Operator, "2025 Long-term Transmission Plan" (January 2025), online (pdf): <aesoengage.aeso.ca/34607/widgets/151628/documents/146968>.

[4] Alberta Government, Minister of Affordability and Utilities, "Direction Letter to the AESO on REM technical design, transmission planning and ISO tariff design" (July 2024), online (pdf): <aeso.ca/assets/direction-letters/Direction-Ltr-from-Minister_REM_Tariff_Tx-Policy_03July2024.pdf>.

[5] For an overview of Alberta's historical generation mix, see AESO, "2024 Annual Market Statistics Report" (March 2025), online (pdf): <aeso.ca/assets/Uploads/market-and-system-reporting/Annual-Market-Stats-2024.pdf>.

[6] Alberta Electric System Operator, "Restructured Energy Market Final Design" (August 2025), online (pdf): <aeso.ca/assets/REM/Restructured-Energy-Market-Final-Design.pdf>.

dispatch increasingly difficult and inefficient. This challenge, coupled with a changing supply mix, highlights the need to incentivize flexible, dispatchable resources and attract imports during periods of scarcity across neighbouring jurisdictions. To address these issues, Alberta is modernizing grid congestion management tools, revisiting dispatch processes and updating the pricing framework to create a market structure that better supports grid reliability.

Solution: The REM introduces locational marginal pricing ("LMP") to manage congestion in the grid by ensuring electricity prices vary by location based on real-time grid conditions, including system line losses. LMP will apply to supply resources, while most consumers will continue to pay a single Alberta-wide price. Eligible large customers will have a one-time option to choose to pay their local price instead.

Dispatching the new market will be based on a security-constrained economic dispatch ("SCED") mechanism, used in many North American markets, to clear the market every five minutes. This system co-optimizes energy bids and a new 30-minute ramping reserve ("R30") while accounting for the transmission system's physical limits as well as each generator's operational constraints.

The REM also revises market price parameters to encourage investment. The energy market offer cap will increase from $999.99/MWh to $1,500/MWh initially, rising to $2,000/MWh by 2032. When the grid supply conditions are in scarce conditions, prices could set at the price cap which will increase from $1,000/MWh to $3,000/MWh. A scarcity pricing curve will set prices between the offer cap and price cap, providing stronger investment signals for dispatchable resources while setting prices at the cap during scarcity. The price floor will also be adjusted to incent flexible generation and demand response by dropping it from $0/MWh to -$100/MWh in 2032.

Forward-looking impact: With locational marginal pricing ("LMP"), electricity prices will vary by location, providing clear economic signals for where new generation and transmission upgrades are needed. SCED, R30 and the new pricing framework will incent flexible generation and demand response, which in turn will enhance grid efficiency, optimize resource allocation and incentivize investment in critical infrastructure.

2. NEW ANCILLARY SERVICES AND RELIABILITY TOOLS

Problem being solved: The increasing integration of intermittent renewable generation creates challenges for grid stability, requiring new mechanisms to ensure sufficient supply and manage fluctuations.

Solution: To address this, the REM introduces two key reliability mechanisms: the R30 and the reliability unit commitment ("RUC"). The R30 ensures the system has flexible capacity to respond to sudden changes in demand or renewable output, while the RUC allows the AESO's system operators to commit additional generation resources if a supply shortfall is forecast. Both R30 and RUC providers will be compensated for their role in maintaining system reliability.

Forward-looking impact: Rewarding these reliability services incentivizes investment in dispatchable technologies and infrastructure that improve their predictability or flexibility. This will enhance overall system flexibility and resilience, supporting a smooth transition to a sustainable energy grid by ensuring consistent power delivery even with increased renewable energy sources.

3. MARKET POWER MITIGATION

Problem being solved: The market is maintaining the concept of strategic bidding as a mechanism to incent investment. This needs to be balanced with appropriate guardrails that protect consumers against the excessive exercise of market power, especially during periods when there is limited competition. REM balances market power mitigation rules protect consumer affordability while allowing cost recovery to attract investments that enhance grid reliability.

Solution: The REM establishes a market power mitigation framework that includes broad market power mitigation ("MPM") for large market participants and local MPM rules to address situations where transmission constraints create market power in specific geographic areas. A key component of the broad MPM framework is the introduction of a secondary offer cap, designed to limit the potential for the use of market power to maintain prices above fair levels over a prolonged period.

Forward-looking impact: This framework protects consumers from excessive costs by limiting the ability of suppliers with large portfolios and generating units in constrained areas to exert undue influence on prices. While the higher offer caps create the potential for higher prices during scarcity events, the overall design aims to drive long-term investment in a reliable and diverse supply mix. Ultimately, this will promote competition and deliver lowest cost of delivered electricity over the long run.

4. SETTLEMENT AND COST ALLOCATION

Problem being solved: The current 60-minute settlement interval is not aligned with real-time grid dynamics, leading to less accurate price signals and less efficient operational responses. Additionally, existing cost allocation methods may not accurately reflect who benefits from or drives certain grid costs.

Solution: A key element of the REM is the transition to a five-minute settlement interval, aligning financial settlements with dispatch and pricing. New principles for cost allocation will also be introduced.

Forward-looking impact: Five-minute settlements will provide more accurate price signals and reward resources that can respond quickly to system needs and promoting operational efficiency. The revised cost allocation will create economic incentives for intermittent resources to enhance grid reliability (e.g., by pairing wind/solar with batteries), ensuring a more equitable distribution of costs based on actual causation.

OPTIMAL TRANSMISSION PLANNING FRAMEWORK

The optimal transmission planning ("OTP") framework changes how Alberta plans and approves investments in its electricity grid.[7] Developed by the AESO, based on direction from the Minister of Affordability and Utilities in July 2024, OTP replaces the previous "zero-congestion" model.[8]

OTP is guided by several principles: transparency, predictability, balance and practical implementation. The framework uses a 20-year planning horizon within the AESO's regular long-term planning cycle.

OTP evaluates new transmission projects based on three criteria: system reliability, a legislative requirement, or a clear net benefit based on cost-benefit analysis. For the latter projects focused on economics, a structured cost-benefit method is used. Development alternatives that fit under the reliability and legislated project streams are assessed using least-cost principles.

OTP is part of broader electricity market changes in Alberta and has been developed alongside the REM. These measures are intended to improve investment decisions and ensure that grid development aligns with system needs and government priorities.

The OTP design will be finalized by the end of 2025, with implementation set for the AESO's next Long-Term Transmission Plan.

IMPLEMENTATION TIMELINE AND REGULATORY FRAMEWORK

In fall 2025, the AESO will be consulting with stakeholders on the detailed independent system operator ("ISO") rules that govern the new market.[9] The AESO intends to submit the REM-related ISO rules for approval by the Alberta Minister of Affordability and Utilities before the end of 2025.[10]

Implementation of the Restructured Energy Market will begin in mid–2027. For updates and technical backgrounders, please check out: www.aeso.ca/rem ■

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[7] Alberta Electric System Operator, "Optimal Transmission Planning Framework: Methodology and Process Recommendation" (September 2025), online (pdf): <aesoengage.aeso.ca/45964/widgets/194012/documents/158689>.

[8] Alberta Government, Minister of Affordability and Utilities, "Direction Letter to the AESO on market and transmission policy" (December 2024), online (pdf): <aeso.ca/assets/direction-letters/Direction-Ltr-from-Minister-REM_Tx-Policy_10Dec2024.pdf>.

[9] As Alberta's independent system operator, the AESO has the authority to make ISO rules. See *Electric Utilities Act*, SA 2003, c E-5.1, s 20.

[10] The Alberta government may, by regulation, establish REM ISO rules for the operation of a restructured energy market and to support its implementation, as it was initially outlined in Alberta Government, Minister of Affordability and Utilities, "Direction Letter to the AESO on REM technical design, transmissions planning and ISO tariff design" (July 2024); see also Alberta Government, "Transforming the Utilities System" (April 2025), online: <alberta.ca/transforming-the-utilities-system>.

CEO OF THE ALBERTA ENERGY REGULATOR DENIES PUBLIC HEARING RIGHTS ON A COAL APPLICATION[1]

*Nigel Bankes and Shaun Fluker**

This post comments on a recent interlocutory proceeding at the Alberta Energy Regulator ("AER" or "Regulator") concerning a motion by Summit Coal Inc. ("Summit") to cancel a scheduled public hearing on its coal mine project application. The basis for the motion was that all the directly and adversely affected persons who initially opposed the application, had subsequently withdrawn their opposition. Accordingly, Summit submitted there was no longer a need for a public hearing to consider the application. The AER panel assigned to the hearing dismissed Summit's motion on July 23, ruling that the hearing should proceed because two environmental non-government organizations ("ENGOs"), the Alberta Wilderness Association ("AWA") and the Canadian Parks and Wilderness Society (Northern Alberta) ("CPAWS-NAB") with full participation status in the hearing remain opposed to the application. On August 21 the AER's Chief Executive Officer ("CEO") Rob Morgan issued a reconsideration decision that reversed the panel's ruling and cancelled the public hearing. Two novel questions of law under the *Responsible Energy Development Act*[2] ("*REDA*"), arise from these decisions: (1) as a matter of law does the CEO have the authority to vary or reverse a decision of a panel of a hearing commissioners seized with an application to the AER and (2) what is the legal significance of being "directly and adversely affected" for the purposes of a hearing on an application before the AER.

The focus of our analysis is on the decision made the AER panel on standing to require a public hearing for Summit's coal application and CEO Morgan's decision to reverse the panel's decision. The subject of both decisions is standing to trigger an AER public hearing. This is important context, particularly given that post-*REDA* the AER essentially no longer holds public hearings for project applications. For readers who are not already familiar with the law on this topic, we have included a primer and overview as an Appendix at the end of this post.

AER PANEL DECISION: MOTION TO CANCEL HEARING DENIED

The AER panel received submissions from Summit, the MD of Greenview, CPAWS-NAB

[1] **Decisions Commented On**: Alberta Energy Regulator, Summit Coal Inc., Mine 14 Underground Coal Mine (Summit) (21 August 2025), Proceeding 449, online (pdf): Alberta Energy Regulator <static.aer.ca/prd/documents/decisions/Participatory_Procedural/449-20250723.pdf>.

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

and the AWA, on the motion seeking a cancellation of the hearing. We note with some interest that the panel's summary of these submissions indicates that Summit argued CPAWS- NAB and the AWA were not "directly and adversely affected" because they did not establish an adversely affected right and had an insufficient connection to the project area (AER Panel Decision at 2–3). Both of these arguments appear to be based on bad law regarding standing determinations because they fail to reflect on the changes to the law made by the Alberta Court of Appeal in *Normtek Radiation Services Ltd v Alberta Environmental Appeal Board*[3], (see the Appendix for further discussion of how *Normtek* changed the law on standing).

The panel sidesteps the "directly affected" argument by relying on sections 9 and 9.1 of the *Alberta Energy Regulator Rules of Practice*[4], which grant the panel discretion to give any person full participation rights in a hearing if that participation will materially assist the panel in making its decision, even if that person is not "directly and adversely affected" by the application which is the subject of the hearing. The panel interprets these sections to mean that there is no distinction in law on the participatory status of a "directly and adversely affected" participant and other full participants, once a hearing has been established. The panel then observes that it had already assigned full participant status to both CPAWS-NAB and the AWA on the basis that their participation in the hearing would materially assist the panel (AER Panel Decision at 3–4). Accordingly, the Summit motion was denied.

The AER panel does not reference or otherwise appear to rely on judicial decisions to support its decision to deny Summit's motion. However, we would submit the panel's reasons are consistent with the direction provided by the Court of Appeal in its decisions over the past 15 years that eschew a strict and narrow reading of the AER standing test (see the Appendix for a discussion of those Court of Appeal decisions).

POLITICAL PRESSURE

Following the Panel's decision to deny Summit's request to cancel the hearings, Summit, and the owner of Summit, Valory Resources, went behind the Panel's back to put political pressure on anybody who might be in a position to overturn this decision.

This campaign began with a letter from Brian MacDonald[5], President of Valory Resources, to Minister Jean and members of Executive Council (i.e. cabinet, thus including Premier Smith) on July 28, 2025. MacDonald copied his letter to Duncan Au, Board Chair of the AER and Rob Morgan, Chief Executive Officer of the AER. The letter suggested that the project has the support of the local community and that neither AWA nor CPAWS-NAB have any connection to the community and that the delay hurts the community. At the same time, the letter argued that AWA and CPAWS-NAB had no expertise in metallurgical coal and no useful evidence to present: "The AER issues approvals every day without the benefit of 'information' from AWA or CPAWS."[6] Valory went so far as to say that "This is something we expected from the previous federal government, and we are dismayed to see such a position taken by an Alberta regulator."[7] We note these appear to be the same arguments that had already been rejected by the AER panel.

Summit followed up on this zinger the following day (July 29) with a motion to adjourn[8] the proceedings and then on August 6, 2025 filed a motion with the CEO of the AER[9] pursuant

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[3] *Normtek Radiation Services Ltd v Alberta Environmental Appeal Board*, 2020 CanLII 456 (ABCA).

[4] Alta Reg 99/2013.

[5] See the letter from the President of Valory Resources, Brian MacDonald, to the Minister of Energy and Minerals, Biran Jean (28 July 2025), online (pdf): <albertawilderness.ca/wp-content/uploads/2025/08/20250729_lt_valory_resources_summit_minister_energy_minerals_complaints_about_mine_14_public_hearing.pdf>.

[6] *Ibid* at 2.

[7] *Ibid*.

[8] Alberta Energy Regulator, "Proceeding ID 449" (29 July 2025), online (pdf): <view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Falbertawilderness.ca%2Fwp-content%2Fuploads%2F2025%2F07%2F20250729_lt_Summit_Coal_Inc_Motion_for_Adjournment_of_Hearing_AER_Proceeding_449.docx&wdOrigin=BROWSELINK>.

[9] Alberta Energy Regulator, "Proceeding ID 449" (6 August 2025), online (pdf): <albertawilderness.ca/wp-content/uploads/2025/08/20250806_lt_summit_motion_to_CEO.pdf>.

to section 42 of *REDA* asking the CEO to reconsider the Panel's decision to deny Summit's motion to cancel the hearing. Meanwhile, the hearing Panel, in a decision rendered August 8[10] addressed itself to Summit's July 29 request for adjournment and also put on record the Panel's views as to the way in which Summit was conducting itself. These comments merit quoting in full:

> As the panel of Alberta Energy Regulator (AER) hearing commissioners presiding over this proceeding (the panel), we write to you to provide our decision on Summit's July 29, 2025, adjournment motion (Motion for Adjournment)… We are aware that Summit has filed a separate motion for reconsideration (Motion for Reconsideration) that is currently under review in a separate process and will not be put on the record of this proceeding at this time.
>
> In our review of the materials submitted by the parties in response to the Motion for Adjournment, we note that the Chief Executive Officer (CEO) and Board Chair of the AER were copied on one submission, and a letter to Alberta's Minister of Energy was attached to another submission. It appears necessary to clarify for the parties our role in this proceeding.
>
> We, the hearing commissioners constituting this hearing panel, are independent decision makers authorized under section 12 of the Responsible Energy Development Act (REDA) to carry out hearings of applications and make decisions in the name of and on behalf of the AER[11].
>
> The Alberta Legislature delegated to the AER the power, duty, and function to consider and decide applications under energy resource enactments in respect of mines for the recovery and processing of mineral resources, among other powers.
>
> Where the AER is to conduct a hearing in respect of applications such as the Mine 14 Applications, the hearing must be conducted on behalf of and in the name of the Regulator by a panel of one or more hearing commissioners, and a decision of a panel of hearing commissioners on a hearing is a decision of the AER. Neither the CEO nor a director of the AER may be appointed as a hearing commissioner, and the board of directors of the AER may not authorize a person to carry out a power, duty or function of the Regulator that is prescribed by the regulations — in particular in this case, the conduct of hearings by hearing commissioners.
>
> Accordingly, we, the panel of hearing commissioners, have been delegated the power, duty, and function to conduct this hearing of the Applications. The participants to this hearing are Summit, as applicant, the full participants CPAWS NAB, AWA, and the MD of Greenview, and the Limited Participants identified in the schedule to this decision. The panel reminds all participants that correspondence and submissions in this proceeding should be addressed to the panel and to the parties, and not to external persons.[12]

The Panel went on to grant Summit's application in part but rejected the suggestion that the proceedings should be adjourned indefinitely (*sine die*). That appears to have been the last communication from the Panel to the parties.

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[10] Alberta Energy Regulator, Summit Coal Inc., Mine 14 Underground Coal Mine (Summit) (8 August 2025), Proceeding 449, online (pdf): Alberta Energy Regulator <albertawilderness.ca/wp-content/uploads/2025/08/20250808_lt_AER_to_parties_re_motion_decision_proceeding_449.pdf>.

[11] The Panel here referenced *O'Brien and Young v AER Compliance and Liability Management*, 2021 CanLII 3 (ABAER) at para 27.

[12] *Supra* note 10 at 1–2.

The next communication was from the AER's Regulatory Appeals Coordinator, Aimée Hockenhull seeking comments from parties (CPAWS – NAB, AWA and the MD of Greenview) as to Summit's request for reconsideration. Ms Hockenhull's August 11 letter[13] quoted section 42 of *REDA* with the following commentary:

> As indicated by section 42, the AER has sole discretion to reconsider a decision made by it. That section does not provide an appeal mechanism that is designed to be applied-for and utilized by industry or members of the public: other provisions provide this opportunity. The AER will only exercise its discretion to reconsider a decision outside under extraordinary circumstances, where it is satisfied that there are exceptional and compelling grounds to do so.[14]

Counsel for AWA and CPAWS-NAB did reply[15] arguing, amongst other things, that the relevant rules "do not authorize an applicant to choose its decision-maker"[16] by addressing the request for reconsideration to the CEO.[17]

AER RECONSIDERATION DECISION: MOTION TO CANCEL HEARING GRANTED

On August 21, 2025[18], Rob Morgan, the CEO of the AER decided to reconsider the Panel's July 23 decision not to cancel the scheduled hearing and to return Summit's applications to the AER Regulatory Applications branch for consideration and decision. In order to reach that conclusion, Mr. Morgan had to decide whether he had the statutory authority to deal with Summit's request for reconsideration and, if so, whether Summit had made out its application. Our focus here is on the first question, the question of whether, as a matter of law, Mr. Morgan, as CEO, had the power to make the reconsideration decision, or whether this power could only be exercised by the hearing commissioners on the panel charged with the responsibility to consider Summit's applications at the scheduled hearing. Our position is that the CEO had no statutory authority to act in relation to this matter.

THE CEO'S AUTHORITY TO ENTERTAIN THE REQUEST

Mr. Morgan concluded that he had the authority to entertain the requestion. He did so on the basis that:

> As CEO, I am responsible for the day-to-day operation of the business and affairs of the AER, per section 7(1)(a) REDA. This includes the proceedings of the hearing commissioners, as these are expressly part of the AER's day-to-day operations: section 13(1) of the REDA. Under the AER's General Bylaw, I also have authority and general supervision over the operation of the business and affairs of the AER. Through formal delegation of authority under section 6(2) of the REDA, the Board has authorized the CEO to carry out any power, duty or function of the AER under the REDA and other enactments. This includes the power to reconsider a decision of the AER, and to vary, confirm, revoke or suspend such decision. I am satisfied that I have proper authority to decide Summit's request for

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[13] Letter from Aimée Hockenhull to Adam Bordignon and Tyler Olsen (11 August 2025), online (pdf): <albertawilderness.ca/wp-content/uploads/2025/08/20250729_lt_valory_resources_summit_minister_energy_minerals_complaints_about_mine_14_public_hearing.pdf>.

[14] *Ibid* at 1.

[15] Alberta Energy Regulator, "Proceeding ID 449" (15 August 2025), online (pdf): <albertawilderness.ca/wp-content/uploads/2025/08/20250815_lt_awa_cpaws_reconsideration_reply_hearing_449.pdf>.

[16] *Ibid* at 6.

[17] *Ibid* at 15.

[18] Alberta Energy Regulator, "Reconsideration No.: 1958898" (21 August 2025), online (pdf): <static.aer.ca/prd/documents/decisions/Participatory_Procedural/1958898-20250821.pdf>.

> reconsideration, and this falls within my purview and discretion.[19]

Mr. Morgan did not expressly consider any of the relevant submissions made by counsel for AWA and CPAWS-NAB on this threshold question.

The question of whether or not the CEO has the authority to intercede (to use a somewhat neutral word) in a proceeding that is currently before an AER hearing panel, and to intercede in such a way as to effectively dismiss the panel, is a question of statutory interpretation with important implications for the conduct of all future applications before the AER. Mr. Morgan was evidently aware of the potentially far-reaching consequences of his decision, and did his best to temper the possibility that his office will, in the future, be routinely called on to intercede whenever a proponent objects to an interim or final decision by a hearing panel.

> I recognize it is without precedent for a non-hearing commissioner decision maker to consider a reconsideration request of a procedural decision made by hearing commissioners. Except for the very unique circumstances in this situation, I am not inclined to exercise my discretion to reconsider decisions of hearing panels, out of respect for the hearing process and the autonomy and independence of hearing panels. Certainty, and finality in decision making is of fundamental importance to Alberta's energy regulatory system, to the participants involved, and Albertans generally. My decision should not be construed as a means by which parties can circumvent hearing or other AER decisions they disagree with.[20]

The rules of statutory interpretation are well known. An interpreter must ascertain the meaning of a statutory provision using what the Supreme Court of Canada calls the "modern principle of statutory interpretation"[21] The modern principle commands courts to consider text, context, and purpose. We draw this summary from Justice Feasby's recent judgment in *Chief Electoral Officer of Alberta v Sylvestre*[22].

Justice Feasby went on to offer the following guidance with respect to the three different elements of text, context, and purpose:

> Text is the starting point for statutory interpretation because it "specifies…the means chosen by the legislature to achieve its purposes"… Attention to context is important because words take meaning from their surroundings. Context should be understood primarily to mean the scheme and structure of the statute itself… The purpose of a statute and the purpose of a specific provision may be different. For example, a legislature may enact a statute to seek to achieve a broad purpose but contain within the statute certain limitations to protect countervailing interests. Use of the primary purpose of a statute in interpretation cannot be allowed to brush aside secondary purposes that may shape or limit how the primary purpose is to be achieved[23]

The starting point for Mr. Morgan's analysis is the claim that since he has responsibility for "the day-to-day operation of the business and affairs of the AER, per section 7(1)(a) *REDA*"[24] and since the proceedings of the hearing commissioners are part of the AER's day-to-day

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[19] *Ibid* at 2.

[20] *Ibid*.

[21] Re *Rizzo & Rizzo Shoes Ltd.*, 1998 RCS 1 at para 21; *Piekut v Canada (National Revenue)*, 2025 SCC 13 at paras 42-50.

[22] *Chief Electoral Officer of Alberta v Sylvestre*, 2025 CanLII 476 (ABKB) at para 50.

[23] *Ibid* at 52.

[24] *Supra* note 18 at 2.

operations as per section 13, then he must have the "power to reconsider a decision of the AER, and to vary, confirm, revoke or suspend such decision."[25] This is a purely textual argument and so it is useful to locate sections 7 and 13 within the structure of *REDA* (i.e., context) and consider the purpose of the different provisions.

Both sections 7 and 13 are found in Part 1 of *REDA*, under the heading 'Alberta Energy Regulator'. Part 1 has five divisions. Section 7 is in division 1 under the heading 'Establishment and Governance of the Regulator'. Section 13 is found in division 2 under the heading 'Hearing Commissioners'. The existence of two separate divisions in Part 1, one division dealing with the board and the CEO, and one division dealing with hearing commissioners suggests that the legislature contemplated a distinctive role for hearing commissioners. Indeed, we note that this separate structure was a distinct addition to the new energy regulator when *REDA* was enacted in 2013[26].

Sections 5 and 6 of *REDA* deal with the establishment of the board of the AER and indicate that the board is "responsible for the general management of the business and affairs of the Regulator"[27]. By contrast, it is the chief executive officer under section 7 that is "responsible for the day-to-day operation of the business and affairs of the Regulator"[28].

Part 1, Division 2, 'Hearing Commissioners' comprises three sections. Section 11 indicates that the Lieutenant Governor in Council must establish a roster of hearing commissioners while section 11(3) stipulates that "Neither a director nor the Chief Executive Officer may be appointed to the roster."[29] This confirms that the legislature intended to maintain a separation of function and power between the board and the CEO on the one hand and the hearing commissioners on the other. Section 12(1) indicates that where the Regulator conducts a hearing in respect of an application, including an application for reconsideration, such a hearing "must be conducted on behalf of and in the name of the Regulator by a panel of one or more hearing commissioners selected by the chief hearing commissioner from the roster."[30] We return to the significance of this later. Section 12(3) establishes that "A decision of a panel of hearing commissioners on a hearing…is a decision of the Regulator."[31] In sum, the hearing commissioners empanelled by the chief hearing officer constitute the Regulator for the purposes of applications that have been referred to a hearing.

Part 2 of the *Alberta Energy Regulator Rules of Practice*[32], confirms this interpretation.

Section 13 of *REDA* along with its heading provides in its entirely as follows:

> **Nature of hearing commissioners proceedings**
>
> 13(1) The proceedings of the hearing commissioners are part of the day-to-day operations of the Regulator.
>
> (2) Without limiting the generality of subsection (1), the hearing commissioners
>
> > (a) may participate in the development of the Regulator's practices, procedures and rules, and
> >
> > (b) are entitled to receive professional, technical, administrative and operational support from the Regulator to assist the hearing commissioners in

[25] *Ibid*.

[26] See Nickie Nikolaou, "An Overview of Bill 2: Responsible Energy Development Act – What are the changes and What are the issues?" (15 November 2012), online (pdf): <ablawg.ca/2012/11/15/an-overview-of-bill-2-responsible-energy-development-act-what-are-the-changes-and-what-are-the-issues>.

[27] *Supra* note 2 s 6(1).

[28] *Ibid* s 7(1)(a).

[29] *Ibid* s 11(3).

[30] *Ibid* s 12(1)(c).

[31] *Ibid* s 12(3).

[32] Alta Reg 99/2013.

> the conduct of hearings and inquiries.[33]

Section 13(1) is informed by the language of subsection (2) and, read in its entirety, the section suggests that "the day-to-day operations"[34] language of the section is not adopted to make hearing commissioners subordinate to the CEO in respect of applications that have been referred to them, but rather to ensure that they are part of the AER for the purposes of access to resources and the development of AER rules and practices. This interpretation is reinforced by the language of section 11(3) referenced above. If the legislature has stipulated that the CEO cannot be a hearing commissioner, that must counsel against any interpretation that allows general language, such as "day-to-day operations"[35], to be used to allow the CEO to effectively step into the shoes of hearing commissioners seized with particular applications and conduct his own hearing (albeit in this case a written hearing).

Furthermore, when we read section 13 in the context of the entirety of Division 2 it is apparent that there are two types of applications: applications that are dealt with routinely by AER staff without the need for a hearing, and those few applications that are dealt with by way of a hearing. Those applications that are dealt with by a hearing must be handled by hearing commissioners and those hearing commissioners constitute the Regulator for the purposes of those applications. The other sections of *REDA* that are essential to Mr. Morgan's decision are the three sections of Part 2, Division 4 of *REDA* ,'Reconsideration by Regulator'. These sections provide as follows:

> **Reconsideration of decisions**
>
> 42 The Regulator may, in its sole discretion, reconsider a decision made by it and may confirm, vary, suspend or revoke the decision.[36]
>
> **Hearing on reconsideration**
>
> 43 Subject to the regulations, the Regulator may conduct a reconsideration with or without conducting a hearing.[37]
>
> **Decision of Regulator on reconsideration**
>
> 44(1) The Regulator shall, after the completion of a reconsideration, make a written decision, with reasons, on the reconsideration within the time prescribed.
>
> (2) The Regulator shall publish or otherwise make the Regulator's decision, with reasons, publicly available in accordance with the rules.[38]

We have already emphasised that a hearing in respect of an application for reconsideration, like other hearings, must also be conducted by hearing commissioners[39].

We have established above that decisions in relation to applications that are referred to a hearing are to be made by hearing commissioners. We have also established that decisions of hearing commissioners are decisions of the Regulator. The question of statutory interpretation that arises therefore is this: who is the Regulator for the purposes of sections 42–44 of *REDA* when the decision to be reconsidered (either on application or of the Regulator's own motion), is a decision of hearing commissioners seized with the application as Regulator? Is it the hearing commissioners seized with the application? Or is it, as Mr. Morgan would have it, the CEO?

[33] *Supra* note 2 s 12.

[34] *Ibid*.

[35] *Ibid*.

[36] *Ibid* s 42.

[37] *Ibid* s 43.

[38] *Ibid* s 44.

[39] See *Ibid* s 12(1).

Mr. Morgan does not directly address this issue. Instead, he seems to assume that he is the Regulator in these circumstances: see above where he indicates that his "day-to-day" powers include "the power to reconsider a decision of the AER, and to vary, confirm, revoke, or suspend such decision. I am satisfied that I have proper authority to decide Summit's request for reconsideration, and this falls within my purview and discretion."[40] He fails to address the possibility that he might not be the Regulator for applications that have been referred to hearing commissioners.

Mr. Morgan reaffirms this assumption when he asks whether he ("I") should reconsider the decision. In the relevant part of his decision, he begins by quoting section 42 and then reasons as follows:

> The AER has very broad discretion to choose to reconsider any decision made by it. The AER does not need a 'request' to exercise its authority under section 42. It can do so on its own initiative, if it becomes aware, by any means, of facts or circumstances that cause it to decide to reconsider a decision.
>
> While I am of the view that Summit has met the test traditionally imposed on requesters to justify the AER exercising its reconsideration powers, I am also deciding to reconsider the decision based on my absolute discretion to do so, as I feel it is of sufficient importance to the AER, given the unique and unprecedented issues raised.[41]

Again, Mr. Morgan fails to address the possibility that the undoubtedly broad discretionary powers of section 42 may be vested in the hearing commissioners for applications that have been remitted to those commissioners.

Mr. Morgan also fails to address the actual decisions that led to Summit's applications being referred to a panel. We discuss those decisions in the next few paragraphs.

By letter of October 3, 2024[42], under the signature of Sean Sexton, EVP Law & General Counsel, On behalf of the Executive Leadership Team, of the AER, Mr. Sexton informed Alex Bolton, the then Chief Hearing Commissioner, that the AER had "determined [that Summit's applications] should be decided by a panel of hearing commissioners"[43]. Mr. Bolton communicated that decision to counsel for Summit on October 7, 2024[44] noting that:

> A hearing will be held unless the issues are resolved in some other manner, such as by alternative dispute resolution (ADR). Hearings are led by hearing commissioners who are independent from the day-to-day operations of the AER. I assign one or more hearing commissioners to sit on hearing panels to decide matters sent to them by the AER. Their decisions may only be reviewed by the Court of Appeal of Alberta[45]

We also note that Mr. Morgan also claims that he can and has decided the matter, either of his own motion or on the application of Summit, and that he can and should do so "without a hearing". It is obvious why he makes this latter claim for if he decided that this matter should be resolved by way of a hearing, then, as noted above, section 12(1) instructs that this should be done by hearing commissioners. One significant difficulty with Mr. Morgan's claim however is that he has in fact held a hearing. After all, a hearing may be conducted "in writing, electronically or orally"[46]. Insofar as

[40] *Supra* note 18 at 2.

[41] *Ibid*.

[42] See the letter from the Executive Vice president Law & General Counsel, Sean Sexton, to the AER Chief Hearing Commissioner, Alex Bolton (3 October 2024), online (pdf): <static.aer.ca/prd/2024-10/1945552-20241003.pdf>.

[43] *Ibid*.

[44] Alberta Energy Regulator, "AER Proceeding 449" (7 October 2024), online (pdf): <static.aer.ca/prd/documents/decisions/Participatory_Procedural/1945552-20241007.pdf>.

[45] *Ibid* at 1 [emphasis added].

[46] *Supra* note 32 s 18.

Mr. Morgan had in front of him an application and invited and received comments on that application, we would submit that he has already conducted a "hearing" — albeit in writing. In sum, not only did Mr. Morgan embark upon a reconsideration that he was not entitled to conduct, he has also unlawfully conducted a hearing on the reconsideration since s 12(1) of *REDA* expressly remits such a hearing to hearing commissioners.

Finally, we observe that Mr. Morgan does not address, or even reference, the panel's reasons for denying the Summit motion. While Mr. Morgan faults CPAWS-NAB and the AWA for not providing any authorities to support the position that there should be no distinction between the participatory status of a "directly and adversely affected"[47] participant and other full participants, he fails to engage at all with the actual reasons and interpretation given by the AER panel on this point of law.

WHAT ARE THE IMPLICATIONS OF MR. MORGAN'S DECISION?

To this point we have argued that Mr. Morgan has misinterpreted *REDA* and that the general language of sections 7 and 13 of *REDA* do not allow Mr. Morgan to arrogate to himself the section 42 power of reconsideration of a decision made by hearing commissioners. But suppose that we are wrong. What are the implications if Mr. Morgan is correct on this threshold jurisdictional question?

The principal implication must be this. Every time a proponent whose application has been referred to hearing commissioners and who is unhappy with any decision made by those commissioners, whether a final decision or an interlocutory decision, may, in addition to seeking permission to appeal that decision to the Court of Appeal[48], also pursue an alternative remedy. That remedy has two prongs. The first prong is to bring political pressure to bear on the AER and specifically the CEO to have the matter reconsidered. The second prong is to do an end run around the hearing commissioners and make an application for reconsideration directly to the CEO, perhaps hoping that the political prong has helped make the CEO receptive to the application.

This does not of course mean that any such application will be successful. Mr. Morgan has offered the assurance that he will exercise this power sparingly and only in exceptional circumstances, but the point is that he claims to have this power as a matter of law and one can therefore expect others to follow in Summit's footsteps. Consider this, if Mr. Morgan is correct, Benga could have applied directly to the then CEO of the AER to have it reconsider and redetermine the AER portions of the joint review panel's decision on Grassy Mountain.[49] Continued use of this process would of course make a mockery of proceedings conducted by hearing commissioners and make it even easier for critics of the AER to make and sustain the claim that the AER is a captured regulator.

Surely part of Mr. Morgan knows this full well, for he writes in his decision that he is generally "not inclined to exercise my discretion to reconsider decisions of hearing panels, out of respect for the hearing process and the autonomy and independence of hearing panels. Certainty, and finality in decision making is of fundamental importance to Alberta's energy regulatory system, to the participants involved, and Albertans generally."[50] But the point is this: Mr. Morgan has now opened the door and others will undoubtedly try to enter unless we can demonstrate that Mr. Morgan's decision is wrong as a matter of law. We have endeavoured to make that case.

Postscript

After the original ABlawg post was released CPAWS ("NAB") and AWA applied to the Court of Appeal[51] for permission to appeal the CEO's decision. The applicants have stated three grounds:

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[47] *Supra* note 1 at 3.

[48] *Alberta Wilderness Association v Alberta Energy Regulator*, 2025 CanLII 389 (ABCA).

[49] Benga Mining Limited, "Report of the Joint Review Panel" (17 June 2021) Panel established by the Federal Minister of Environment and Climate Change and the Alberta Energy Regulator, online (pdf): Alberta Energy Regulator <static.aer.ca/prd/documents/decisions/2021/2021ABAER010.pdf>.

[50] *Supra* note 18 at 2.

[51] *Supra* note 48.

a. Whether the AER's CEO erred in law in interpreting *REDA* as authorizing him to intercede in an ongoing proceeding before a panel of the AER's hearing commissioners and reconsider a procedural decision of the panel in a manner that ended the proceeding and dismissed the panel.

b. Whether the AER's CEO breached his statutory authority, including sections 11(3) and 12(1)(c) of *REDA*, by conducting a written hearing in respect of a reconsideration request under section 42.

c. Whether the AER's CEO erred in law or acted unreasonably by misinterpreting and misapplying the AER's reconsideration test and departing from the AER's established interpretation and application of section 42 of *REDA* without justification.

The application is scheduled to be heard on November 6, 2025.

APPENDIX – STANDING TO TRIGGER AN AER PUBLIC HEARING

ABlawg has followed the law on standing — the test to be met by a person seeking to trigger a public hearing on an energy project application — and the AER (and its predecessor Energy Resources Conservation Board) extensively over the years. These posts can generally be organized into three phases of commentary: (1) the law as it was prior to the enactment of *REDA* in 2013; (2) the changes made by *REDA* in 2013; and (3) the application of *REDA* by the AER since 2013.

The first phase of ABlawg commentary was in relation to the test for standing prior to 2013 and set out in section 26(2) of the now-repealed *Energy Resources Conservation Act*[52]. A person who could establish that a decision on an application would directly and adversely affect their rights, was entitled to a public hearing. This so-called 'directly and adversely affected' test was the subject of many ABlawg posts, such as The problem of Locus Standi at the Energy Resources Conservation Board: A Diceyan solution[53] and Still More Questions about Standing before the ERCB[54]. One of us also wrote on the history and development of this test in a 2015 Alberta Law Review article – The Right to Public Participation in Resources and Environmental Decision-Making in Alberta.[55] The upshot of most critical commentary was that the 'directly and adversely affected' standing test was applied very narrowly by the Board, such that it almost completed eliminated the ability of anyone to trigger a public hearing at the Board, other than another industry operator or someone who could establish that the decision on an application would directly and adversely affect their legal right (typically in relation to the use of affected land).

Phase two of ABlawg commentary was on changes to the standing test implemented by the enactment of *REDA* in 2013. In the Fall of 2012, the Alberta government proposed new legislation (which became *REDA*) to significantly overhaul the regulation of non-renewable energy resource development and create a new regulatory agency to oversee and administer that regulation — the Alberta Energy Regulator. ABlawg published a series of posts on these changes[56] including commentary on the (then) new standing rules at the AER in Amended Rules of Practice for the Alberta Energy Regulator: More Bad News for

[52] *Energy Resources Conservation Act*, RSA 2000, c E-10 [*ERCA*].

[53] Shaun Fluker, "The problem of Locus Standi at the Energy Resources Conservation Board: A Diceyan solution" (17 November 2009), online (pdf): <ablawg.ca/2009/11/17/the-problem-of-locus-standi-at-the-energy-resources-conservation-board-a-diceyan-solution>.

[54] Nickie Nikolau, "Still More Questions about Standing before the ERCB" (16 July 2010), online (blog): <ablawg.ca/2010/07/16/still-more-questions-about-standing-before-the-ercb>.

[55] Shaun Fluker "The Right to Public Participation in Resources and Environmental Decision-Making in Alberta", (2015) 52:3 Alberta L R.

[56] See Nickie Nikolau, "An Overview of Bill 2: Responsible Energy Development Act – What are the changes and What are the issues?" (15 November 2012), online (blog): <ablawg.ca/2012/11/15/an-overview-of-bill-2-responsible-energy-development-act-what-are-the-changes-and-what-are-the-issues>.

Landowners and Environmental Groups.[57] The primary changes to AER standing implemented by *REDA* in 2013 was that (1) a person seeking a public hearing would need to file a statement of concern with the Regulator that was accepted by the Regulator; and (2) the decision to conduct a public hearing is almost entirely within the discretion of the Regulator. To put the change another way: Under the prior *ERCA* regime, a person who established their legal rights were directly and adversely affected was legally entitled to a public hearing on the application, but under *REDA* there is no such legal entitlement to a hearing: a directly and adversely affected person does not have standing to trigger an AER hearing on an application. IF a hearing is conducted, the directly and adversely affected person has a statutory entitlement to participate in that hearing.

These legislative changes in 2013 came on the heels of a notable Alberta Court of Appeal decision in *Kelly v Alberta (Energy Resources Conservation Board)*[58], on AER cost awards that also emphasized the important contribution that a credible regulatory hearing process makes towards earning the social license[59] to operate:

> In the process of development, the Board is, in part, involved in balancing the interests of the province as a whole, the resource companies, and the neighbours who are adversely affected: *Re Suncor Energy Inc.*, Energy Cost Order 2007-001 at pp. 10-11. *Granting standing and holding hearings is an important part of the process that leads to development of Alberta's resources. The openness, inclusiveness, accessibility, and effectiveness of the hearing process is an end unto itself.* Realistically speaking, the cost of intervening in regulatory hearings is a strain on the resources of most ordinary Albertans, and an award of costs may well be a practical necessity if the Board is to discharge its mandate of providing a forum in which people can be heard. In other words, the Board may well be "thwarted" in discharging its mandate if the policy on costs is applied too restrictively. It is not unreasonable that the costs of intervention be borne by the resource companies who will reap the rewards of resource development.[60]

At the time of *REDA*'s enactment in 2013, it seemed that the Legislature was responding to the *Kelly* decision by going the opposite direction and making it more difficult for the public to be granted a hearing on an energy project application. Accordingly, the third phase of ABlawg commentary was to assess the actual impact of the standing rule changes. In Directly and Adversely Affected: The Actual Practice of the Alberta Energy Regulator[61] one of us examined a number of AER letter decisions made on two applications, demonstrating that in fact the AER was applying the *REDA* standing rules narrowly to deny hearings. The Regulator had established a very high threshold on "directly and adversely affected" to be met: essentially actual use of land in the proposed project area.

In 2020, the law on how to interpret 'directly affected' in Alberta's energy and environmental legislation was fundamentally changed by the Alberta Court of Appeal in *Normtek Radiation Services Ltd v Alberta Environmental Appeal Board*[62]. In *Normtek*, the Court of Appeal rejected a formalistic and rigid interpretation of 'directly affected' and ruled that while the phrase connotes some form of adverse effect in a "direct manner" the phrase must also be interpreted and applied in manner that reflects the wide range of concerns that may arise in relation

[57] Shaun Fluker, "Amended Rules of Practice for the Alberta Energy Regulator: More Bad News for Landowners and Environmental Groups" (11 December 2013), online (blog): <ablawg.ca/2013/12/11/amended-rules-of-practice-for-the-alberta-energy-regulator-more-bad-news-for-landowners-and-environmental-groups>.

[58] *Kelly v Alberta (Energy Resources Conservation Board)*, 2012 CanLII 19 (ABCA).

[59] Nigel Bankes, "The Social Licence to Operate: Mind the Gap" (24 June 2015), online (blog): <ablawg.ca/2015/06/24/the-social-licence-to-operate-mind-the-gap>.

[60] *Supra* note 57 at para 34.

[61] Nigel Bankes, "Directly and Adversely Affected: The Actual Practice of the Alberta Energy Regulator" (3 June 2014), online (blog): <ablawg.ca/2014/06/03/4447>.

[62] *Normtek Radiation Services Ltd v Alberta Environmental Appeal Board*, 2020 CanLII 456 (ABCA) [*Normtek*].

to an energy, resources, or environmental decision, including environmental, social, economic, cultural, property, human health, safety, and regulatory (the Faculty's Public Interest Law Clinic[63] was legal counsel for the appellant in *Normtek*). The *Normtek* decision reversed almost two decades of jurisprudence in Alberta on how to interpret 'directly affected' and has the potential to significantly broaden the entitlement for public participation in environmental and resource development decision-making — including in the context of AER standing determinations.[64]

A related subject of commentary in the early days of *REDA* was that the Regulator was not transparent in publishing its letter decisions issued to statement of concern filers, the large majority of which reject the statement of concern and thus deny a hearing. This changed in 2015 as noted in The Alberta Energy Regulator Announces that It will Publish a Broader Range of Decisions[65], such that now you can see for yourself how frequently the AER denies hearings on project applications (see Participatory and Procedural Decisions on the AER website)[66].

Predictably, the number of public hearings conducted by the AER has drastically fallen in comparison to the pre-*REDA* days when a directly and adversely affected person had a statutory right to a hearing. A review of the AER website for hearing decisions[67] on the merits of a project application shows just three decisions in 2021, one decision in 2022, one decision in 2023, three decisions in 2024, and two decisions thus far in 2025. The AER receives approximately 40,000 applications per year,[68] and essentially the Regulator no longer conducts public hearings on any of them. ■

[63] University of Calgary, Public Interest Law Clinic, "Surface Disposal of Radioactive Waste", (last visited 18 November 2025), online: <aw.ucalgary.ca/clinics/public-interest-law/our-projects/radioactive-waste>.

[64] See *Fort McMurray Métis Local Council 1935 v Alberta Energy Regulator*, 2022 CanLII 179 (ABCA).

[65] Nigel Bankes, "The Alberta Energy Regulator Announces that It will Publish a Broader Range of Decisions" (29 September 2015), online (blog): <ablawg.ca/2015/09/29/the-alberta-energy-regulator-announces-that-it-will-publish-a-broader-range-of-decisions>.

[66] Alberta Energy Regulator, "Participatory and Procedural Decisions" (last visited 25 November 2025), online: <aer.ca/applications-and-notices/application-status-and-notices/decisions/participatory-and-procedural-decisions>.

[67] Alberta Energy Regulator, "Hearing Decisions" (last visited 18 November 2025), online: <aer.ca/applications-and-notices/application-status-and-notices/decisions/hearing-decisions?page=0>.

[68] Alberta Energy Regulator, "Application Processes" (last visited 18 November 2025), online: <aer.ca/applications-and-notices/application-processes>.