ENERGY REGULATION QUARTERLY

VOLUME 2, SUMMER 2014

MISSION STATEMENT

The mission of the Energy Regulation Quarterly 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 Quarterly is intended to be balanced in its treatment of the issues. Authors are drawn principally from a roster of individuals with diverse backgrounds who are acknowledged leaders in the field of the regulated energy industries and whose contributions to the Quarterly will express their independent views on the issues.

EDITORIAL POLICY

The Quarterly is published by the Canadian Gas Association 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 Quarterly will maintain a "roster" of contributors 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. From time to time other individuals may also be invited to author articles. Some contributors may have been representing or otherwise associated with parties to a case on which they are providing comment. Where that is the case, notification to that effect will be provided by the editors in a footnote to the comment. The managing editors reserve to themselves responsibility for selecting items for publication.

The substantive content of individual articles is the sole responsibility of the contributors.

In the spirit of the intention to provide a forum for debate and discussion the Quarterly invites readers to offer commentary on published articles and invites contributors to offer rebuttals where appropriate. Commentaries and rebuttals will be posted on The Energy Regulation Quarterly website.

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EDITORIAL

Rowland J. Harrison, Q.C. and Gordon E. Kaiser, FCIArb
Managing Editors

Controversy and complexity continue to increase around the current political and legal environment for energy regulation. This is well reflected in the several Comments in Issue #4 of *Energy Regulation Quarterly*, particularly those relating to the prevalent themes of aboriginal rights and environmental assessment.

Nigel Bankes comments on the federal government's approval of Enbridge's Northern Gateway Project. He reports that the Joint Review Panel Report,[1] recommending approval of the project subject to 209 conditions, is the subject of five applications for judicial review. In addition, the Order in Council directing the National Energy Board (NEB) to grant certificates of public convenience and necessity for the project is the subject of nine further applications under section 55 of the *National Energy Board Act*.[2] The latter will test the responsibilities of the Governor in Council when deciding on recommendations by the NEB for approval of federal pipeline projects under the *NEB Act* as amended in 2012.

Bankes' report on challenges to the Northern Gateway decision is to be considered along with the comment by Terri-Lee Oleniuk, Jennifer Fairfax, and Patrick G. Welsh on the decision of the Federal Court of Canada to revoke the Licence issued to Ontario Power Generation to construct new nuclear generation units at the existing Darlington nuclear facility. The Court ordered that the environmental assessment (EA) under the *Canadian Environmental Assessment Act* be returned to the appropriate panel for further consideration, including addressing certain "gaps" in the analysis undertaken in the EA.

In addition to these Comments on specific projects, Richard King, Sylvain Lussier and Jeremy Barretto comment on the recent *Tsilhqot'in* decision of the Supreme Court of Canada on aboriginal title.[3] They note that the decision has been referred to variously as "historic", a "game-changer" and a "landmark" decision. Their conclusion: "Historic? Yes; A game-changer? Not necessarily."

Meanwhile, challenges to regulatory decisions on other substantive and procedural grounds continue. Gordon Kaiser comments on two appeals to the Supreme Court of Canada of decisions of the Ontario Energy Board and of the Alberta Energy and Utilities Board involving the prudence doctrine. Jim Smellie reviews the Utility Asset Disposition decision of the Alberta Utilities Commission. Nigel Bankes comments on what he reports is likely the first of many procedural challenges in "hotly contested" litigation between the Alberta Market Surveillance Administrator and TransAlta, arising from serious charges of market manipulation.

In light of the number and range of challenges reflected in these Comments, it might be asked whether any regulatory decision today will escape judicial review or procedural challenges. As noted, many challenges revolve around environmental assessment and aboriginal rights, to which must be added the related issue of participation in the regulatory process.

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1 The JRP Report was the subject of a Comment in Issue #3 of *ERQ*.
2 RSC 1985, c. N-7 (as amended) (*NEB Act*). The NEB has since issued the certificates.
3 *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.

These are complex issues and their dominance of much of the regulatory process is not likely to diminish any time soon.

As discussed in the editorial for Issue #3 of *ERQ*, yet other challenges for regulators continue to stem from evolving technological developments. Hugo Schotman's article on *Smart Grids: A European Regulatory Perspective* provides an overview of the approach to one such development by the Council of European Energy Regulators.

In this dynamic environment, it is tempting to suggest that we face a new world of energy regulation in which things really are different from the past. There is no denying that energy regulation has been thrust into the political and judicial arenas to an unprecedented degree. The demands on the system – and expectations of it – present increasingly complex challenges and, many would say, heighten regulatory uncertainty. In many respects, the world of energy regulation is different in today's environment, with some observers questioning the role of regulators.

Against this background, there is some reassurance to be found in reading the lead article by Gaétan Caron, the recently-retired Chair of the National Energy Board, reflecting on his 35-year career with the Board under the title *Preparing for the future of federal energy regulation in Canada: What is the past telling us?* M. Caron joined the Board as a junior engineer in 1979 and rose through various executive positions with the Board before being appointed Chair and CEO. M. Caron says that what has changed greatly over his 35 years with the Board is how Canadians interact with the NEB. His overall conclusion, however, is perhaps surprising (including to himself) and is worth repeating:

> I began writing this article expecting to demonstrate how different federal energy regulation is today compared to 35 years ago. Although some bells and whistles have changed, I have found the opposite: the very essence of regulation, its benefits to Canadian society, the values underpinning it, the principles providing its foundations, have not changed in 35 years, and will not likely change by much in the foreseeable future. This bodes well for the future of public interest determinations and the Canadian public interest.

Agree with the specific conclusion or not, the energy regulatory community should take some comfort from the view that there is an underlying, enduring benefit to society at large from sound, principled regulation. ■

PREPARING FOR THE FUTURE OF FEDERAL ENERGY REGULATION IN CANADA

WHAT IS THE PAST TELLING US?

*Gaétan Caron**

Participants in the regulatory world sometimes observe that if only one remembered what we have gone through in the past, perhaps it would be easier and faster to find solutions to difficult regulatory matters. As the saying goes, "memory is a faculty that forgets." It is in this spirit that this article is being offered, somewhat like the Rolling Stones' "Through the Past, Darkly," albeit in a very different field. Since 1979 I have had the pleasure, the opportunity and the privilege of being actively engaged in regulatory debates, proceedings, and day-to-day regulatory work, such as keeping oil and gas pipelines safe, setting just and reasonable tolls, and allowing exports that are surplus to the foreseeable needs of Canadians. This experience provided me with sufficient observations to offer a personal perspective on what has changed since then, and what will continue to change, but also, at least as importantly, what has not changed and remains true to itself.

Previous articles, publications and memoirs have been written[1,2,3] about the history of National Energy Board (Board) regulation. This article is presented in the same spirit, recognizing that it borrows from the author's personal experience and is therefore selective and greatly incomplete.

In the beginning…pipeline extensions

When I joined the National Energy Board on May 22, 1979, as a junior engineer (feeling lucky I had found a job when the labour market for graduates was mediocre, even in sciences and engineering), Canada already had major pipelines crossing a good part of the land from west to east. Oil and gas exploration and development was also mature, although the Beaufort Sea and the East Coast had yet to experience the boom of the 80's, owing in whole or in part to the Petroleum Incentives Program of the Trudeau Government. Yet, nation building through the construction of

* Gaétan Caron was Chair and CEO of the National Energy Board until June 06, 2014. He is now an Executive Fellow at the School of Public Policy of the University of Calgary. He also consults on energy, regulation and governance, and offers facilitation services.

[1] See the spirited article prepared by R. Priddle, "Reflections on National Energy Board regulation 1959-1998 - From persuasion to prescription and on to partnership", prepared for the Canadian Petroleum Law Foundation's Thirty-seventh Annual Research Seminar on Oil and Gas Law, Jasper, Alberta, June 05, 1998.

[2] See also the colourful description of how the Board was created and how it started operating: National Energy Board, *Twenty-five years in the Public Interest*, 1994, "Reminicences - Early Days by Douglas M. Fraser (Vice-Chairman from 1968 to 1975), at paras 53-58.

[3] The most comprehensive publication about the Board's history is the book prepared under the inspired leadership of then Chairman Kenneth W. Vollman: Earle Grey, *Forty years in the Public Interest - a History of the National Energy Board*, (Tontonto/ Vancouver : Douglas & McIntyre, 2000) and National Energy Board.

pipelines from west to east was still topical then as the gas pipeline network ended in Montreal. I was hired in large measure to help assess two competing applications. One was by TransCanada PipeLines Limited (TransCanada), under the name "Gas East Project", proposing to extend their pipeline to Quebec City and then through New Brunswick to Nova Scotia. The other application was by Q&M Pipe Lines Ltd. (Q & M), an affiliate of NOVA Gas Transmission Ltd., to do essentially the same thing.

In what was seen as a dramatic move, perhaps a precursor to the future merger between TransCanada and NOVA Gas Transmission Ltd. (NOVA), the two competing companies combined their application and presented to the NEB a single proposal, TransCanada sponsoring the pipeline to Quebec City, and Q&M from there to the Maritimes.

The project entailed a large-diameter mainline and several laterals to serve regions in Quebec and in the Maritimes. Much controversy was generated about these laterals. Regions wanted their own lateral, seeking the economic benefits that access to natural gas could bring. I recall in particular the Beauce and Lac St-Jean regions of Quebec who felt deprived of their own pipeline. The Board's approval did not include provision for these laterals due to their economics. Later on, each of these regions saw a lateral built under provincial jurisdiction and federal subsidies.

The Board approved the Quebec component on May 15, 1980, subject to approval by the federal Cabinet. As part of the same decision, the NEB turned down the Maritimes component, citing among the reasons that it was concerned about the lack of environmental information related to that segment. In its Reasons for Decision,[4] the Board indicated that:

> "…Q&M has not satisfied the Board that the pipeline could be constructed in an environmentally acceptable manner".

More specifically, in the environmental chapter of the Reasons,[5] the Board reasoned as follows:

> "The Board is not convinced that Q & M is sufficiently cognizant of the nature of the environmental concerns it would encounter, nor does it appear to the Board that the Company has sufficiently planned and thought out the appropriate measures necessary to protect the environment through which its pipeline would pass."

This denial of approximately 1800 km of mainline and lateral illustrates the Board's determination, since its inception, to integrate social, environmental and economic considerations in the decisions it must make under the *National Energy Board Act* (the NEB Act). It is sometimes observed that the Board is bent to approve pipeline projects rather than deny them. I disagree. The reason for there being more approvals than denials is not a "bent". The proportion of approved projects relative to denied projects is an indication of the degree of difficulty a company must face to prepare a complete application that is compliant with the Board's Filing Manual and the Board's expectations with respect to pre-filing consultations with the public and affected citizens and their communities. Many projects die on the drawing board or in the board room of corporations. Some survive this natural selection all the way to the filing stage and then die as a result of the Board's public interest determination, as the Q & M project shows.

The Board's recommendation to approve the Quebec component of the project was approved by the federal government.

The Maritimes component was refiled and re-heard. It was approved in 1981. Although unrelated in my view, the Maritimes extension had received the explicit and public support of the federal government as part of its October 1980 National Energy Program.[6] The certificate was issued to a new company combining the financial and human resources of TransCanada

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[4] National Energy Board, *Reasons for Decision in the Matter of applications under Part III of the National Energy Board Act of TransCanada PipeLines Limited and Q & M Pipe Lines Ltd.*, GH-4-79 , Ch 11, Decision, at 11-18.

[5] *Ibid* at 6-126

[6] Energy, Mines and Resources Canada, *The National Energy Program*, October 1980 at 58: "[…] the Government has recently accepted the recommendation of the National Energy Board that the application to extend the gas pipeline system

and NOVA, called Trans Québec & Maritimes Inc.

Inflation, cost overruns, regulatory burden and the policy and regulatory responses

The National Energy Program was updated in 1982[7] to reflect changed circumstances and to communicate the policy response to these changes. The status of the Maritimes extension was addressed in the update as follows:

> "…the construction timetable for the Trans Québec & Maritimes pipeline has slipped because of provincial regulatory delays and other factors beyond the control of the Government of Canada. Completion of the pipeline to Halifax is not now expected until late 1986."[8]

What this explanation did not convey was the reality at the time that the pipeline sector was experiencing devastating cost escalation and overruns. The Québec section of the pipeline, notably two construction contracts between Montréal and Trois-Rivières, was experiencing very significant overruns, intertwined with bad weather and labour unrest. The economics of pipeline construction was changing fundamentally. Policy makers felt they had to respond. And so they did. On December 16, 1982, Energy Minister Jean Chrétien announced the appointment of a "one man task force on pipeline construction costs."[9] Mr. Chrétien appointed Mr. Vernon L. Horte to "investigate increasing construction costs of federally-regulated pipelines in Canada, and recommend practical solutions." Mr. Horte had impressive credentials. He had been President of TransCanada from 1968 to 1972, and later President of Canadian Arctic Gas Study Ltd. At the time of his appointment, he was a consultant and member of the board of directors of several Canadian companies.

Mr. Horte produced his report on June 31, 1983,[10] known from then on as the "Horte Report." Mr. Horte spoke to a broad range of people in the industry and provided very creative recommendations. Not too many were implemented as proposed, but with respect to his recommendations aimed at the regulatory process, the spirit of his work was to be reflected in the practices of the Board in years to come, notably:

- make more clear to applicants what a complete, deficiency-free application looks like (the Board now has a very complete and helpful Filing Manual);
- make Board staff available to prospective applicants before they file applications so they are aware of the filing requirements (this is now a common practice and clear, explicit and public policy in that respect has been in place for many years); and,
- make a broader use of pre-hearing conferences.

Mr. Horte recognized what was accepted by the Board at the time, that is, the regulatory process imposes a cost on applicants and on society. Throughout its history, the Board has been mindful of this reality and has always strived to implement only those regulatory requirements that demonstrably added net value to Canadian society in the public interest. Chairman Roland Priddle was a leader, and my principal source of inspiration, in this area, and many others.

Some of Mr. Horte's recommendations were very audacious and would have required an amendment to the NEB Act. None of these recommendations were adopted. The most significant was a proposal to introduce an optional preliminary assessment:

> "Such a process would allow for a preliminary assessment of the project by the Board and Cabinet. The assessment would

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beyond Montreal to Quebec City be approved […] The Government wishes the pipeline to be extended into the Maritimes."

[7] Energy, Mines and Resources Canada, *National Energy Program - Update 1982*.

[8] *Ibid* at 58.

[9] Energy, Mines and Resources Communiqué, "Chrétien announces appointment of a one-man task force on pipeline construction costs", December 06, 1982.

[10] Task Force Report on Pipeline Construction Costs, V.L. Horte, June 1983

> be available to the applicant at the outset of the process, before substantial regulatory expenditures are made. By the use of this procedure, applicants for major projects which are likely to entail a lengthy hearing and substantial regulatory costs, will be afforded an opportunity to assess the risk of success or failure before committing to the heavy financial burden associated with the preparation and presentation of a detailed and complete regulatory case. In the view of the Task Force, the availability of such an option within the certification process will encourage the development of major projects in the years ahead. "[11]

By saying so, Mr. Horte was acknowledging what is not always appreciated by observers of the regulatory process. As I indicated earlier, project proposals are assessed throughout the life of project definition and justification, and many projects are abandoned along the way due to lack of economic justification, or due to environmental or social considerations. Therefore, only very strong projects ever get presented to the Board.

In parallel to the Horte Report, the Board and its staff were looking for ways to improve the regulatory process. The language of the time was about "regulatory burden", including the time and cost of responding to what was often seen by applicants as excessive numbers of information requests, "regulatory delays", and the need to "streamline" and reduce "overlap and duplication." Not much was talked about publicly in terms of the value of regulation in promoting safety, environmental and economic efficiency outcomes, although this must have been recognized implicitly in policy circles and many parts of the energy industry. But the public dialogue, the thinking in policy departments, the political discourse, and the Board's response, was focused on reduction or elimination of the cost of regulation.

The Board's response continued over time. In 1985, the Board concluded that smaller pipelines under its jurisdiction should be subject to a lighter degree of toll and tariff regulation.[12] The Board divided pipeline companies into two groups:

- Group 1 companies that operate extensive pipeline systems; and
- Group 2 companies that operate smaller pipelines.

A memorandum of guidance was issued to initiate this approach, which is still in effect today through the provisions of the Board's Filing Manual.[13] Also in effect today is the Streamlining Order, making clearer what needs to be the subject of a project-specific application, versus the work that can be carried out subject only to informing the Board. Since 1985, the number of projects requiring a specific decision by the Board has gone down very significantly. Resources of both regulated companies, affected parties and Board staff can be invested in the most productive regulatory pursuits.

In improving the regulatory process, the Board has always been determined to continually improve safety and environmental outcomes. Streamlining and improving has been about reducing the administrative aspects of processes and having regulated companies file only information that matters in achieving these outcomes. Safety and environmental protection have never been compromised in this journey. In fact, by focusing on high-value information provided by companies on a risk-informed basis, safety and environmental protection outcomes have continually improved. As per the Beatles' song, "Getting better", in this and many other areas at the Board, it's getting better all the time.

In another manifestation of its desire to continually improve its toolbox, on October 24, 1988 the Board issued a report on improving the regulatory process.[14] The report followed a public paper issued in 1987 and the subsequent exchange of correspondence with

[11] Ibid at 62.
[12] National Energy Board, *Regulation of Small Pipelines*, G132-27, 1985.
[13] National Energy Board, *Filing Manual*, Section P.6, Regulation of the Traffic, Tolls and Tariffs of Group 2 Companies
[14] National Energy Board, *Improving the Regulatory Process - Current Position on Submitters' Suggestions*, September 1988.

parties participating in the Board's processes. The topics addressed in the report ranged "… from procedural matters such as the feasibility of negotiated settlements and generic rule making, the clarification of the role of Board staff at hearings, the application of the rules of natural justice and the use of technical conferences."[15] Of note, the report was an early, timid effort at making possible the filing of negotiated settlements for tolls and tariff matters. The Board shied away from affirming toll determination principles as part of that exercise, a gap that the Board would soon fill in specific proceedings. It also refrained from imposing time limits for the processing of applications as suggested by some parties in industry. This would change gradually with the adoption by the Board of service standards a few decades later and with the passing of the *Jobs, Growth and Long-term Prosperity Act* by Parliament in 2012.

Principle-based regulation

As a quasi-judicial administrative tribunal, the Board is not bound by precedent. Yet many observers of the regulatory world see as a positive attribute the taking of decisions which shows a certain predictability and an overall sense of purpose and direction. The Board has for several decades attempted to be clear and explicit as to the core principles and values it espouses when taking decisions. As I have often put it, on a specific matter before the Board, one cannot say for sure where the Board is going, but one knows for sure where the Board is coming from. This has been made possible by the framing, by various Board panels, of the principles guiding them in their decisions.

A first manifestation of a series of Reasons containing first principles can be found in the Board's June 1987 Decision in respect of the tolls of Interprovincial Pipe Line Limited (IPL),[16] now known as Enbridge Inc. I credit the Panel Chair, Board member A. Digby Hunt, ably assisted by a then young Board counsel, Loyola Keough, for pushing the Board and its staff to endorse fundamental regulatory principles. I doubt the concept was new, but it is in that decision that the basic concept of "cost based tolls", or the "user pay" principle, was defined and explained clearly. In the words of the Board:

> "The complexity of the issues and the conflicting positions advocated by the various parties confirm that, when dealing with toll design, the Board must be aware of and attempt to apply consistently the principles which it views as resulting in just and reasonable tolls…[17] A principle is something from which one should not easily be diverted…[18] A principle which the Board has attempted to apply in the development of the appropriate toll design methodology for IPL is that the resultant tolls should be, to the greatest extent possible, cost based. In other words, generally speaking the concept of "user-pay" should be applied. The Board recognizes that due to such things as practical considerations and limitations on cost allocation procedures, no toll in practice will be absolutely cost-based, in the sense that it will precisely and completely reflect all expenditures related to a particular service over a precise distance. However, designing IPL's tolls to be as cost-based as practicable should yield the result that the users of the system bear the financial responsibilities for the costs caused by the transportation of their particular hydrocarbon through the line. As well, the Board is of the view that all reasonable efforts should be made to minimize cross-subsidization. If these objectives are attained the resultant tolls can reasonably be characterized as cost-based."[19]

At about the same time, the Board was dealing with successive expansions of the TransCanada system. In three consecutive decisions on

[15] *Ibid*, accompanying News Release dated October 24, 1988.
[16] National Energy Board, *Reasons for Decision in the matter of Interprovincial Pipe Line Limited, Application dated 5 September 1986 for new tolls effective 1 January 1987*, RH-4-86 (June 1987).
[17] *Ibid* at 47.
[18] *Ibid* at 48.
[19] *Ibid*.

these expansions in the late 80's/early 90's, the Board continued to build the foundation of a principle-based, value-driven, regulatory construct for pipeline facilities and their tolls and tariffs.

In the GH-2-87 Reasons for Decision,[20] following a 44-day hearing, the Board dedicated significant effort in explaining its choice of the rolled-in versus incremental toll treatment of a proposed expansion aimed in some measure at the US Northeast natural gas market. Depending on the economic consequences on them, parties were sharply divided on the matter. In the Toll Methodology Chapter[21] of these Reasons, the Board explained the practical and legal considerations relevant to its decision. This is the first occurrence of the Board providing a comprehensive commentary on the principles it had espoused in reaching its decisions. This included:

- fairness and equity
- the integrated nature of the system
- complexity/simplicity
- the just and reasonable standard, and the role of cost causation in achieving this standard
- no unjust discrimination
- no acquired rights.

Several of the statements made by the Board in these Reasons have been presented back to the Board in subsequent hearings, and re-affirmed by the Board in its decisions. No doubt these will appear again in the future. One of the best examples is the "no acquired rights" principle. In the Board's own words:

> "In the Board's view, the payment of tolls in the past conferred no benefit on tollpayers beyond the provision of services at that time. The Board does not equate those who paid for a service with those who paid for the facilities. Accordingly, the Board rejects the notion that shippers who have used the pipeline in the past are somehow entitled to continue using the existing facilities without being affected by new circumstances."[22]

In its subsequent facilities application, known as GH-4-88, TransCanada was seeking the Board's approval for a $568 million expansion aimed at strengthening the overall system capacity and increase domestic and export deliveries. It was a more modest hearing, lasting only 14 days.

The previous hearing, GH-2-87, had affirmed a number of principles considered by the Board under Part IV of the NEB Act, in respect of tolls and tariffs. In GH-4-88, the Board affirmed an important principle related to its examination of facilities carried out under Part III of the Act, namely, the question of economic feasibility of an expansion. Again, the words chosen by the Board in this case have often been presented back to the Board in future cases, and re-affirmed by the Board in its decisions. No doubt we will see these words again in the future. In the Board's words in GH-4-88:

> "The Board is of the view that TransCanada had the responsibility to submit evidence demonstrating, *inter alia*, the economic feasibility of an increase in pipeline capacity. TransCanada should not be perceived as a mere conduit of various information to be submitted and debated at a public hearing. Although it is ultimately for the Board to decide whether facilities that are applied for under Part III of the Act are and will be in the present and future public convenience and necessity, TransCanada has the onus to demonstrate through its evidence that an expansion is economically feasible. This evidence must demonstrate, among other things, that TransCanada has assured itself that there is or will be adequate natural gas supplies and viable natural gas markets in the long term to ensure the financial viability of the pipeline as a going concern."[23]

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[20] National Energy Board, *Reasons for Decision, TransCanada PipeLines Limited, Applications for Facilities and Approval of Toll Methodology and Related tariff Matters*, GH-2-87 (July 1988).
[21] *Ibid*, Ch 8, *Toll Methodology*, at 70 seq.
[22] *Ibid* at 70.
[23] Ibid at 64.

In a third of somewhat related applications, heard under Board Order GH-5-89,[24] TransCanada sought approval for a $2.6 billion expansion aimed again at a combination of Canadian and US markets. The Board approved the expansion using the framework for economic feasibility outlined in GH-4-88. It also endorsed a rolled-in methodology for the expansion, in keeping with the principles enunciated in GH-2-87. In summarizing the views of parties in its Reasons, the Board organized its summary of evidence according to these principles, notably, among others:

- the integrated nature of the system
- simplicity
- cost causation
- no unjust discrimination
- no acquired rights.

These four Reasons for Decision in a row, RH-4-86, GH-2-87, GH-4-88 and GH-5-89, formed together a body of principles that are still being used today and will likely be used for the foreseeable future. They contributed to the Board's reputation of a regulatory agency concerned about regulatory stability and consistency. They should be cited in any course on Canadian regulatory principles.

Many years later, in a case known as Gros Cacouna,[25] the Board re-affirmed these principles and applied them to the proposed receipt point for liquefied natural gas. The facilities have not been built due to changes in the market place, but the case allowed the Board to show that first principles do not easily change when it comes to grounding its decisions.

Relocation, Incentive Regulation, Negotiated Settlements, and Generic Cost of Capital

In parallel to these cases, a growing consensus was developing among many parties, and within the Board, that toll and tariff hearings often involved repetitive evidence, predictable debates, and fully expected expert witness evidence. Few believed that these long, drawn out, adversarial hearings were efficient and productive. I can only imagine that, for many witnesses preparing for cross-examination, this was not unlike AD/DC's "Highway to Hell."

The Board felt that it was important to communicate to the parties appearing before it that it was fully open-minded about the evolution of the regulatory framework it administered.

Meanwhile, the Board had moved from Ottawa to Calgary. The move was announced by the Minister of Finance, the Honourable Wilson, in the February 1991 Budget Speech of the Mulroney Government. Folk culture suggests that the wording of the announcement was handwritten on a yellow sticky, as the announcement was not part of the written budget material. By Labour Day 1991, the Board was operating from Calgary, its Ottawa office closed. Many employees, this author included, were shocked by the news, and the way it was announced. Budget confidentiality was invoked as to the choice of communication method. The Board lost two thirds of its staff in the process, several of its executives, but very few Board members. While we were concerned about the loss of institutional memory, the re-staffing in fact produced a fundamental transformation of the Board's culture and attitude, creating what is known in agricultural science as "hybrid strength", blending together in one organization the public service values one finds in all federal institutions, and the best of Calgary, that is, its entrepreneurial spirit and its "can do" attitude. I do not recall being deprived once of institutional memory during that time.

I had left Ottawa in July 1991 still employed as the Director of Engineering. I did not know at the time but Director General Ed Gordon and

[24] National Energy Board, *Reasons for Decision, TransCanada PipeLines Limited*, GH-5-89, Volume 1 (November 1990), Volume 2 (November 1990), Volume 3 (April 1991).

[25] National Energy Board, *Reasons for Decision in the Matter of TransCanada PipeLines Limited, Application for approval of new receipt point at Gros Cacouna, Quebec for the receipt of regasified natural gas and the toll methodology that will apply to service from that point*, RH-1-2007 (July 2007).

Executive Director Robin Glass had decided that, upon my landing in Calgary, I would become Director of Financial Regulation. Being a good soldier, I accepted, not knowing what lay ahead. Fundamental reforms of financial regulation was in stock.

Driven in large measure by the ideas of then Board member Ken Vollman, the Board published a white paper on incentive regulation,[26] held a workshop, and summarized the results.[27] In its covering letter attaching the workshop results, the Board stated:

> "…the Board remains interested in considering changes aimed at improving the efficacy of its regulatory process and at adjusting the regulatory regime to ongoing changes in market conditions."

By these simple steps, the Board had made it abundantly clear that it was open to new ideas, and new ideas came.

The first out of the gate was Imperial Oil Limited who published an innovative piece called "PRIDE."[28] The 39-page paper was used in discussions within the shippers group of then Inter Provincial Pipe Line. PRIDE stood for "Price Driven Efficiency." In its paper, Imperial proposed market-like regulation, focused primarily on tolls (prices) rather than costs, providing incentives for efficiencies of operation and the provision of services, and benefiting customers through these efficiencies by periodically rebasing rates and through an annual productivity offset. Imperial stated in its document that "this method isn't perfect, but it's better than traditional cost-of-service regulation."[29] In its introduction, Imperial made reference to the Board's Incentive Regulation Workshop as the basis for opening these discussion.

The Board was not actively engaged in the discussions around PRIDE. It is commonly understood that ¨PRIDE" was a key contributor to the first five-year negotiated settlement between Inter Provincial Pipe Line and its shippers. The settlement was guided by basic principles of incentive regulation. Canadian regulation had made a quantum leap. By accepting the settlement without modification, the Board provided concrete evidence that it was willing to accept negotiated settlements without "cherry picking", in keeping with its own negotiated settlement guidelines.

Prior to that, for several years, the Board had low credibility in dealing with negotiated settlements. One of the key contributing factors to this situation was the Board's "cherry picking" of a contested settlement filed by Trans Québec & Maritimes Pipeline Inc. for new tolls effective 1 February 1985. In its RH-4-85 Decision of September 1985,[30] the Board expressed the following lukewarm views about negotiated settlements:

> "The fact that an agreement on just and reasonable tolls was reached between the Applicant and some major interested parties has some relevance to the Board's determination of a just and reasonable toll. However, the existence of such an agreement cannot fetter the Board's discretion. The Board cannot abandon its mandate; the agreement cannot, per se, be the vehicle for determining the justness and reasonableness of the tolls applied for."[31]

The fact that this contested settlement was denied created a chilling effect that lasted almost 10 years. The first IPL settlement completely thawed the chill, and several settlements were filed and approved by the Board in years following. Today, negotiated settlements remain what people hope to achieve, going to adjudication before the Board when all else fails. Meanwhile, the Board remains clear that

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[26] National Energy Board, *Public Consultation on Incentive Regulation*, File No: 4500-A000- 9 (22 June 2002).
[27] National Energy Board, *Incentive Regulation Workshop: Summary of Discussion*, File No: 4500-A000-9 (11 March 1993).
[28] Imperial Oil Limited, *PRIDE - A New Vision of Pipeline Regulatio*n" (June 1994).
[29] *Ibid*, (Executive Summary) at 3.
[30] National Energy Board, *Reasons for Decision, Trans Québec & Maritimes Pipeline Inc., Application dated 22 February 1985, as revised, for new tolls effective 1 February 1985*, RH-4-85 (September 1985).
[31] *Ibid* at 1-2.

it sees two doors available to companies and their shippers to have tolls put in place: the settlement door, and the adjudication door. As I have said often, the Board does not have "feelings" about whether one door is better than the other. Submission of a contested application or a contested settlement is not viewed by the Board as failure, simply as a statement of facts to respond to.

As part of the flurry of activities in the first half of the 90's to improve the regulatory process, the Board took concrete action to reduce the burden, some will say the pain, of annual determinations of rate of returns or regulated settlements. Through its settlement, IPL made such a determination moot. Other companies, however, still had to go through the meat grinder, every year or almost every year. Financial regulation is seen by many as a very complicated science, by others as smoke and mirrors. Experts, often PhDs, can produce a broad range of fully justified rates of return. Assumptions are many. Exchanging information requests and cross-examining on the topic can be excruciating. And, in the end, informed judgment is absolutely required on the part of the Board members sitting on the case. As noted by the Board at the time:

> "…the Board has noted that evidence submitted by expert financial witnesses has tended to be much the same from one proceeding to the next. While the financial parameters change from year to year, the techniques and interpretations used in making rate of return on common equity recommendations typically do not. This led the Board to consider what potential economies could be realized from the implementation of a formulaic adjustment mechanism for rate of return on common equity."[32]

It is because of the apparent excessive investment in annual determinations that the Board decided, with mixed support from industry, to embark into a major generic multi-company cost of capital proceeding. On March 17, 1994, the Multi-Pipeline Rate of Return proceeding, RH-2-94, was born.

In what was a leadership move, the Board communicated its vision of the ultimate outcome, not in terms of the rate of return itself, but in terms of the way the rate of return would be set. In its hearing order:

> "The Board expressed the desire to avoid annual hearings on the cost of capital and was of the view that some automatic mechanism to adjust the return on common equity could be the most appropriate way to ensure that this return continued to be fair to all parties, while avoiding the expense of litigating annual or biennial changes in the rate of return. "

This is precisely what the Board did in the end. In its reasons for decision, the Board concluded that, for the 1995 test year, a rate of return on common equity of 12.25 per cent was appropriate for a benchmark pipeline. To account for company-specific risks, it established capital structures for each of the companies included in the scope of the hearing. It established an automatic adjustment mechanism for 1996 and beyond, based on the yield for long-term Canada Bonds. All of a sudden the ritual had ended. Other jurisdictions followed the lead. The nearly impossible goal been achieved. The same generic process was going to remain in place for 14 years, until October 2009, when it came to disuse.

This case is an example of one of the key attributes of the National Energy Board: it does not hesitate to take a leadership position and move forward even when the degree of support among affected parties is mixed, as was in this case at the start. The Board is guided in its actions by what it sees as being in the public interest. This does not always mean what is most popular - in fact it does very rarely.

Retooling internally, in a big way

While the Board continually looked for ways to improve its external processes, it was also

[32] National Energy Board, *Reasons for Decision in respect of Cost of Capital*, RH-2-94 (March 1995), at 1.

considering ways to improve the way it was running internally. In December 1984 I became Executive Director, a position later retitled Chief Operating Officer (COO). Soon did I hear from then Chairman Roland Priddle that I was free to consider significant changes, including a re-organization, this over-valued panacea, to bring about positive change.

It took two years, with invaluable help from Danny Woodard, an Ottawa-based consultant in organizational matters, for me to present at an all-staff meeting held at a downtown hotel on October 17, 1996 a major business transformation aimed at bringing the best out of people throughout the Board. This featured, yes, a re-organization, still essentially in place today, forming teams around business processes (e.g., applications, operations, analysis and monitoring of energy commodities). Until then, as it was when I joined the Board in 1979, people were grouped by profession, such as engineering, environment, and economics.

It is then that the Board created the concept of Professional Leaders, such as Chief Engineer, Chief Economist, and Chief Environmental Officer, to take care at the executive level of the more complex technical matters, and to oversee the professional development of people by professional group. Again, this feature is still in place today, enhanced by the creation of a few more Professional Leaders, such as Professional Leader, Legal and Professional Leader, Northern Engagement.

Any transition of this magnitude requires the occurrence of major costs, mostly human. I trust that, in this particular case, given how long the basic foundation of the 1996 transformation has been in place, the benefits exceeded the costs.

A pipeline extension through the Eastern Townships

Having completed a major internal initiative, then Chairman Roland Priddle had asked the Government to appoint me as a temporary Board member so there could be a bilingual Panel Chair available to preside over the Portland Natural Gas Transmission System (PNGTS) expansion application by Trans Québec & Maritimes Pipeline Inc. I do not recall then Chairman Roland Priddle ever asking me if I would agree to play that role. Again, being a good soldier, as he knew I was, when he informed me of both my appointment as temporary Board member and my role as Panel Chair, being asked to jump, I jumped. It was my first ever hearing as a Board member and, why not, my first hearing as Panel Chair by the same token.

This was not the first project considered by the Board with significant concerns about the project, its route, and its impact on residents and on the environment. It was of course my own first case of that kind or of any kind. While my legs were shaky the first day of the hearing when I climbed the stairs to the podium, it proved to be an extremely worthwhile task for me, in and of itself, and also in preparing me for future appointments as full time Board member, then Vice-Chair and finally Chair and CEO.

We held hearings in a part of Quebec which did not have any pipeline infrastructure at the time. Among key learnings for me was the skill of listening, carefully and intently, without judgment, to a broad range of views, including the views of citizens speaking with their hearts. As acknowledged in the Reasons for decision, the project "…could adversely impact the recreational and touristic vocation of a region."[33] The word "vocation" was borrowed from its common use in French. In the end, the Board approved the project and, as it has done since its inception in 1959, the Board exercised its discretion in balancing the interests of a diverse public. The theme of balancing, or integrating, the various economic, social and environmental considerations, into one decision, is in its very essence the concept of sustainability assessment. I will come back to this theme later in this article.

Sumas Energy 2, Inc. - not a plebiscite

It would not take long before the theme of

[33] National Energy Board, *Reasons for Decision in the Matter of Trans Québec & Maritimes Pipeline Inc., PNGTS Extension* GH-1-97 (April 1998).

balancing the various dimensions of the public interest would unfold again in a very big way in front of the Board, as part of the examination of the Sumas Energy 2, Inc. ("SE2") international power line project. The physical dimensions of the project were modest: a 8.5 km long power line from the Canada/US border to a BC Hydro substation in Abbotsford, BC. Its purpose would be to transport electricity generated in the US by a gas-fired plant. The level of interest in the case, however, would be unprecedented, in large measure because of the environmental effects of the electricity generated in the US on air quality in Canada.

SE2's application attracted the largest public response of any application ever filed with the Board at that time. More than 400 parties registered as intervenors and approximately 22 000 Letters of Comment were received by the Board. It would take the Gulf of Mexico blow out and the subsequent Northern Gateway oil pipeline application before the Board would see this level of interest again.

The Reasons for decision of the Board in this case contain a wealth of principle-based affirmations that students in regulation would be well advised to review. This article cannot even provide a summary of these affirmations. A few examples are provided here. The following is a particularly relevant quote in today's environment:

"…decisions by regulatory tribunals such as the National Energy Board are not made by conducting a plebiscite or merely on the basis of a demonstration of public opposition or support. Rather, such decisions are made within a legal framework enacted by the legislature and applied by the courts. This is, of course, the essence of the rule of law."[34]

An entire chapter[35] is dedicated to explaining the public interest determination made by the Board, including a detailed examination of the benefits of the project and its burdens, and how the Board weighed them. Once again, the Board was endorsing an approach consistent with the basic principles of sustainability framed by the Brundtland Commission, integrating all the relevant social, environmental and economic dimensions of the decision it had to take in the public interest. On the basis of this integration, the Board turned down the project.

The Canadian Arctic

The Board has been involved in oil and gas development in the Canadian Arctic since the 1970's, especially in the Northwest Territories. There were the years of the first Arctic pipeline hearings. Also, initially through the Canada Oil and Gas Administration, which was merged with the Board at the same time as the relocation to Calgary in 1991, the staff of the Board has been present in Northern communities, meeting people, listening to their concerns, providing assistance, and promoting safety and environmental outcomes while responding to Northern expectations. The Board's credibility in the North comes in large measure from the regular and respectful presence of its staff on the land of the people who have lived there from time immemorial, taking care of the land.

The Board's role, however, had to increase significantly with the expectation that an application for the Mackenzie Gas Project would be filed in the early 2000's.

Wanting to be ready for this giant filing, then Chairman Ken Vollman proposed first the idea that a cooperation plan be negotiated with all affected boards and agencies in the Northwest Territories. I had the privilege of accompanying him to most of the meetings discussing the plan. I learned through these meetings the fine art of listening to Northern concerns and the necessity to look for "made in the North" solutions. In the end, the achievement of a Cooperation Plan,[36] released on June 20, 2002, was about people and respect for the North and its land claim institutions.

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[34] *Reasons for Decision in the Matter of Sumas Energy 2, Inc., Application dated 7 July 1999, amended 23 October 2000, for the construction and operation of an International Power Line*, EH-1-2000 (March 2004) at 14.

[35] *Ibid* Ch 8 at 91-98.

[36] Northern Pipeline Environmental Impact Assessment and Regulatory Chairs' Committee, *Cooperation Plan* (20 June 2002).

The Plan provided for two parallel processes: a Joint Review Panel (JRP) dealing with the environmental and socio-economic dimensions, and a National Energy Board Panel dealing with the technical aspects other than those addressed by the JRP and the ultimate question of Public Convenience and Necessity. In December 2009, the JRP released its final report. Following a consultation process between the JRP and governments, as per the legislative requirements, the Board Panel completed its work by releasing its Reasons for Decision on December 15, 2010.

In its reasoning, the Board used a language that was inspired by the basic notion of sustainability as originally framed by the Brundtland Commission[37] in 1987, including the need to integrate the environmental, social and economic dimensions of a decision. This was a step beyond the reasoning of the PNGTS extension. In the words of the Board[38]:

> "We looked at how the project would contribute to sustainability in the way it would affect the people, the land where they live, and the economy, now and in the future.
>
> (…) We examined the benefits the project could bring. We found that they are large and varied. We also looked at the negative impacts. We found that they can be minimized and are acceptable. This allowed us to answer the key question before us, whether the North and Canada would be better off with the project than without the project. We find that the North and Canada would be better off with the project.
>
> Our thinking required us to bring together many factors into a single decision. In doing so, we considered:
>
> - the people, especially those who would be most directly affected;
> - the land, in the broad sense, including the environment and natural resources;
> - the economy; and
> - safety, including design, construction and engineering plans.
>
> Integrating our findings on these factors is how we reached our public interest decision."

Several years later, the Northern Gateway Panel would use a similar integrative approach.

Constitutional matters

For as long as I can remember, the Board and its staff have had internal discussions, sometimes debates, about the question of whether the Alberta system, regulated since its beginning by provincial regulatory bodies, was in fact a federal undertaking. The Board being a practical and very busy one, there was never enough of a reason for it to initiate, on its own volition, a proceeding to examine the jurisdictional aspects of the system. The Board also realized over the years that its record in terms of dealing with jurisdictional issues was not spotless - the federal Court would more than once disagree with its findings.

A decision to proceed on its own volition became moot when, on June 17, 2008, TransCanada PipeLines Limited applied to the Board to effect recognition that the TransCanada Alberta System (Alberta System) is by law properly within Canadian federal jurisdiction and subject to regulation by the Board as part of a single federal undertaking.

When the Board is facing a major case, it will sometimes decide to sit as a Panel of five Board

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[37] United Nations, *Report of the World Commission on Environment and Development, Our Common Future* (20 March 1987). See in particular Chapter 2, "Towards Sustainable Development, Part III, "Strategic Imperatives", Section 7, "Merging Environment and Economics in Decision Making", and section 72, "The common theme throughout this strategy for sustainable development is the need to integrate (emphasis added) economic and ecological considerations in decision making." Still today, the integration of social, economic and environment dimensions in decision taking, rooted in the Brundtland Commission Report, is seen as the essence of pursuing a sustainable future.

[38] National Energy Board, *Reasons for Decision, Mackenzie Gas Project, Respecting all voices: our journey to a decision* GH-1-2004 (28 October 2011), at 74.

members, instead of the usual panel of three. This happened in GH-5-89, when the Board was dealing with a major facilities expansion of TransCanada and the perennial question of "rolled-in vs. incremental" toll treatment was again before the Board. It would happen much later when the Board asked five Members to listen to Northerners and other interested parties in the Arctic Review.

In this case, we sat as a Panel of five for the jurisdictional questions. Three members, a subset of the Panel of five, then took care of the more technical question of the certificate of public convenience and necessity. It took three days of oral hearings to hear the jurisdictional matters. Seven additional days would suffice to deal with the rest of the case.

For a question that had been discussed and debated for so long, it is surprising that it took so little regulatory work to dispose of the matter. The Reasons for Decision[39] on the jurisdictional matter took only 10 pages to explain, including the one-page declaratory order. The decision came out on February 26, 2009, a little more than eight months after the filing of the application. I suppose it would be fitting to say in this case as Jim Morrison of The Doors sang, "when the music's over, turn out the lights." It was over. Before too long, however, a new event would turn the spotlight on the Board.

April 20, 2010 - a new Board is born

On April 20, 2010, an oil drilling platform, Deepwater Horizon, blew out in the Gulf of Mexico. The shock waves following the blow out reached every region of the globe. People were asking: "can it happen here?" In places like Inuvialuit communities on the shores of the Beaufort Sea, towns on the shores of the Gulf of St. Lawrence, Baffin island communities where exploration for oil and gas is being considered, the answer of course was: "yes, if we let it happen." For 87 days, the media were broadcasting a real life version of Groundhog Day: every morning, people were hoping the day would be different and the company would find a way to kill the well. For 86 days, the day was the same as the day preceding - not much had changed: the oil kept flowing in the Gulf of Mexico.

Within days of the blow out, the Board realized that it had acquired a major responsibility: explain to Canadians what it was doing to prevent such disasters under its jurisdiction. This was a quantum leap - in my view, the largest ever in the Board's history in terms of the Board's accountably and its public visibility. From a rather obscure administrative tribunal responsible for technical matters, the Board suddenly became front and centre in the eyes of the public and the media, and before Parliamentary Committees. A new Board was born.

The Board immediately launched its Review of Offshore Drilling in the Canadian Arctic, known as the Arctic Review. Media coverage was incessant. The Board appeared numerous times before Parliamentary Committees, both Senate and House of Commons. Access to information requests were filed at a frequency never seen before: what was the part-time job of a single employee became a well-resourced multi-disciplinary team. Monitoring of the work of Parliament and documentation of references to the NEB was a strategic task. Key message management became a way of life at the Board. Still today, the effects of the Gulf of Mexico blow out are felt pervasively throughout the organization. Not only has it profoundly changed the way the Board explains itself publicly with respect to drilling, but it also has sharpened its thinking in how it regulates pipeline safety - more on this in the Safety Culture section.

The Arctic Review was for me the most motivating and inspiring task in 35 years of work at the Board. Several times over the course of more than three years, I visited with a small team the six Inuvialuit communities in the Beaufort-Delta, several Central Arctic communities, and Baffin Island. I met there

[39] National Energy Board, *Reasons for Decision in the Matter of TransCanada Pipelines Limited, Application dated 17 June 2008 for a Declaratory Order and for a Certificate of Public Convenience and Necessity* GH-5-2008 (February 2009).

the people who, from time immemorial, have taken care of the land and have depended on it for their way of life. I have often heard from these people that, "if you take care of the land, the land will take care of you." I have deepened my ability to listen to people, attentively and respectfully, without time limits, not to judge what they feel or think, but seek to understand and simply acknowledge their fears, concerns, hopes and goals - the fine and difficult art of listening. I have met youth in several high schools, an experience I found frightening the first few times (how on earth does one interest teenagers in a topic like offshore drilling?) I have travelled in a small boat on the Beaufort Sea and got stuck on sand bars. I have tasted county food, including beluga, char, and snow geese and visited whaling camps. I have participated in the summer games at Shingle Point, on the western shore of the Canadian Beaufort and received the wisdom of elders who felt I was worthy of their knowledge. My work in the North was not work. It was a basic connection to the very essence of humanity and the true North. I am deeply grateful to all the Northerners I have met for all they have given me, which will stay with me the rest of my life.

The Board's Arctic Review finest moment was an amazing week at the recreation centre in Inuvik, in September 2011. For five full days, a few hundred people, including academia, environmental groups, youth, elders, community members, elected officials, representatives from land claim institutions, other regulators, industry and the Board itself met and shared what was important to them and what they knew about what makes drilling safe and protective of the environment. I will always remember the spirit of collaboration and respect that prevailed throughout these five days. I honestly cannot recall any major disagreement on anything discussed over these five days. A very strong final report[40] would come out on December 15, 2011 reflecting this consensus. Today, the Board has the best available knowledge reflected in its filing requirements for offshore drilling. I do not think there is a finer product of that kind anywhere else in the world.

Aboriginal engagement and collaboration

The Board's ongoing work in the North brought home to me the importance of Aboriginal peoples in our constitution, our history, and in our identity. Working towards a Cooperation Plan for the Mackenzie Gas Project was a very useful investment in my journey as a lifelong learner in that respect. More was to come. Soon after I became Chair and CEO, the Board signed a Memorandum of Understanding with the First Nations Tax Commission, another quasi-judicial body from whom we could learn and whom we could help. I also invested a great deal of my time and energy in the work of the NWT Board Forum, a fine group of Chairs, Executive Directors and staff representing all the land claim boards and environmental assessment bodies in the Territory. I have made many friends among these people, all highly dedicated to the well-being of all Northerners. In parallel to our work in the Arctic Review, and the subsequent visits to Arctic communities, the Board has signed several memoranda of agreement with institutions created by Northern Land Claims.[41]

Environment and sustainability

Early in my term as Chair and CEO I felt specific effort was required to effect a rapprochement with Environmental Non-Government Organizations (ENGOs). It was apparent that there was a major opportunity to understand each other, mostly through listening. This is what the Board did. With a small team, I visited Vancouver, Toronto and

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[40] National Energy Board, *The past is always present - Review of Offshore Drilling in the Canadian Arctic - Preparing for the Future* (December 2011); and *Filing Requirements for Offshore Drilling in the Canadian Arctic* (December 2011).

[41] Memoranda of Understanding have been signed with the Inuvialuit Environmental Impact Review Board, the Inuvialuit Environmental Impact Screening Committee, the Mackenzie Valley Environmental Impact Review Board, the Mackenzie Valley Land and Water Board, the Inuvialuit Water Board (formerly the Northwest Territories Water Board), the Nunavut Impact Review Board, and the Nunavut Water Board.
For a complete list of Memoranda of Understanding signed by the Board, see online : NEB <http://www.neb-one.gc.ca/clf-nsi/rpblctn/ctsndrgltn/mmrndmndrstndng/mmrndmndrstndng-eng.html>.

Montreal to meet with any ENGO wishing to talk with us and tell us how we could improve our processes to better meet their needs. We met several of them.

A concrete and very significant outcome of that round of meetings was a collaborative effort by many ENGOs to work with the Board towards a much improved version of the cumulative effects chapter in the Board's Filing Manual. In my view, there is no better description of what a solid, science-based cumulative assessment must include than that found in the Board's Filing Manual. This is to the credit of ENGOs who worked with the Board at the time, and the Board's environmental staff who shared the same goal of excellence in the approach to cumulative effects assessments.

When assessing applications for pipeline projects under s. 52 of its Act, the Board "… shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:

> (e) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.[42]

This language has been in place since 1959, when the Board was created. I believe the people on the Diefenbaker team were, perhaps inadvertently, visionaries, as they contemplated a Board looking at all the factors that are relevant to a case, and then integrating all of these considerations in the decision it must make in the public interest. It is this very integration that the Brundtland Commission recommended 28 years later as an essential part of the sustainability journey. And it is part and parcel of the overall approach proposed by Professor Robert Gibson from the University of Waterloo in his beautiful book, "Sustainability Assessment,"[43] a pillar of environmental assessment literature and a way of thinking that has been broadly referred to and used within the Board.

Environmental assessments have always been part of the Board's work since its inception. Environmental chapters appear in Board Reasons for decision since the 1970's. The Board has a large group of people specialized and devoted to environmental science, socio-economics, land matters, public engagement, participant funding and other related disciplines. There are more than 60 people working in these areas. Even when I joined the Board in 1979, environment was a large team.

When the *Canadian Environmental Assessment Act* (CEAA) was passed in 1994, what the Board acquired was new administrative processes. The substance of environmental assessment did not change. When the Board was first granted substitution status a few years ago, and more recently became again fully responsible on its own for environmental assessments, again nothing changed in the way the Board conducted environmental assessments. If anything, the removal of a number of administrative processes freed up some resources that were re-invested in the substance of environmental assessments, a net gain from an environmental outcome point of view.

The same could be said about the impact of recently transferring to the Board the responsibilities under the *Fisheries Act*. Board staff have always considered the effects of projects on fish and their environment. At the same time, officials at the Department of Fisheries and Oceans were doing similar work. The transfer of responsibilities was simply a reduction in process administration, a highly desirable outcome in government organizations.

Safety, safety, safety

This is the regulatory equivalent of what is known in real estate as "location, location, location."

The Board has in the last few years identified itself as Canada's safety watchdog in the energy

[42] *National Energy Board Act*, RSC 1985, c N-7 s 52.
[43] Robert B. Gibson et al, *Sustainability Assessment, Criteria and Processes* (London : Earthscan Publishers, 2005).

sector. This is how media now refer to it when reporting on pipeline incidents and compliance issues with regulated companies. This is good.

Thanks in part to the learnings from major accidents on drilling platforms, from Piper Alpha in the North Sea in the 80's to Deep Horizon in the Gulf of Mexico in 2011, and the clever teachings of Professor Mark Fleming of Dalhousie University, the Board has moved gradually towards a regulatory regime based on outcomes, risk-informed choices, management systems, and the promotion of a pervasive safety culture in regulated companies. Much of its safety work is now based on strongly worded regulations, compliance audits, enforcement actions and, more recently, administrative monetary penalties, affectionately known as AMPs.

One of the Board's great achievements was to assemble several hundred people in Calgary for a day and a half, on June 05 and 06, 2013, to talk about what makes pipelines safe. Industry people, safety advocates, academia, students, environmentalists, landowner representatives, and other regulators attended the Board's Safety Forum 2013. Not unlike the magic of the Arctic Review roundtable in Inuvik in September 2011, all quickly realized there was a broad consensus on what needed to be done: good management systems strongly and explicitly supported by the company leadership, and a pervasive safety culture, for safety to be achieved. Once again, the Board had taken a leadership role in advancing a regulatory outcome and people wanted to follow the trend set by the Board. Today, the final report on the Board's safety workshop[44] is still an important reference for those involved in pipeline safety.

Two potential visions of a country again - Northern Gateway

I have referred to the Board's Reasons for Decision in the Mackenzie Gas Project, referring to the three pillars of the sustainability stool: social, economic and environmental dimensions, integrated to form the basis of a decision.

In its final report, the Northern Gateway Panel[45] adopted a similar approach. It offered to Canadians two visions of a country, one with the project, one without, followed by an independent affirmation of which of these two visions, in the Panel's view, was in the public interest, integrating all of the relevant dimensions. In the Panel's words:

> "We find that Canadians will be better off with this project than without it…we found that the project would bring significant local, regional, and national benefits. These benefits, on balance, outweighed the potential burdens of the project. These benefits would be both social and economic…The environmental, social, and economic aspects of this project and our recommendations are all connected…it was our job to weigh all aspects…"

Volume 1 of the Panel's Report was fittingly titled "Connections". This heading and the content of the report were in keeping with the 1959 vision of the Board as enunciated by Parliament, with the 1987 Brundtland Commission report, and with basic principles of sustainability assessment proposed in 2005 by Gibson. Again, the Board showed that it could be relied upon when it comes to the consistency of the basic principles guiding its many actions.

Restructuring gas transmission, in a big way

Having dedicated a good part of my career to tolls and tariff matters as a Board staff member, it was with particular delight that I embarked in 2011 on a remarkable journey: hearing the TransCanada tolls case for 2012 and 2013, known as the TransCanada Restructuring Case. It was like going back to my deep roots. The size of the task was gargantuan. It was contested. It was complicated. Discussions had been going on for a long time between TransCanada and its shippers without apparent progress. Nobody could say "It's so easy," as

[44] National Energy Board, *2013 Safety Forum Report*, (30 September 2013).
[45] National Energy Board and Canadian Environmental Assessment Agency, *Connections, Report of the Joint Review Panel for the Enbridge Northern Gateway Project* (December 2013), Volume 1at 72-74.

Buddy Holly and the Crickets had sung more than 50 years earlier, in the early days of both the mainline and rock & roll.

Toll and tariff hearings can be rather laborious and complicated. And not always riveting, when cross-examination of a witness on a spreadsheet, line-by-line, over several hours, is the order of the day. As the matter under consideration is about money, and pretty much a zero-sum game, it is normal for the atmosphere in the hearing room to be sometimes austere and adversarial.

I knew from the start this was likely to be my last public hearing, and it was. We managed to make this 72-day hearing a very interesting affair. We also insisted that part of the debate be one of a vision of the future of transportation services on the TransCanada Mainline. And it was.

The Reasons for Decision,[46] issued March 27, 2013, must speak for itself, and it would not be appropriate to comment on them. Financial analysts have commented on the effects of the decision on TransCanada and how it has been viewed in financial circles. I will simply say that I savoured every moment of the time we invested in this proceeding, before the hearing, during the hearing, and during deliberation. A proud and grand finale it has been for me.

Independence

The Board has a degree of independence.

It is absolutely independent in the way it takes decisions under its enabling legislation, including the way it makes recommendations to Governor-in-council when the legislation provides for the duty to recommend.

At the same time, the Board itself does not decide who sits on the Board as Board members. Parliament has determined that the government of the day, namely, the Governor-in-council, appoints Board members. The Board also does not independently decide on its budgets and its cash flow: this is a decision made by Parliament through the *Appropriations Act*, as part of the budget cycle, informed by the submissions of Treasury Board ministers. The Board also does not independently decide how it will approach official languages and staffing. There are countless other examples that illustrate my point: the Board has a degree of independence from Government.

In 2012, with the passage of Bill C-38, which became the *Jobs, Growth and Long-term Prosperity Act*, the NEB Act was amended to provide for a change in the way the Board disposes of certificates of public convenience and necessity. Since 1959, the Board would recommend approval when it found the project to be in the public interest. It would take the final decision to deny, if it found it was not. Bill C-38 made the Board's responsibilities related to approving or denying a project symmetrical: it would now recommend approval or denial to the Governor-in-council.

There was concern expressed by some at the time Bill C-38 was debated, and when it passed, that the Board had lost some independence. I do not share that view. The Board is created by statute. The statute requires that it be independent in the action it takes on specific cases. Post Bill C-38, the Board conserves its entire independence in the way it assesses the merits of projects. What has changed with Bill C-38 is what happens after the Board has completed its work. This change was adopted democratically by the people Canadians elected to represent their interests in Parliament. This change is not about how the Board looks at the public interest. For the Board and is staff, nothing has changed, saved for the wording of the Board's disposition, and the covering page of the decision, in keeping with the wishes of Parliament.

And in the end…

I began writing this article expecting to demonstrate how different federal energy regulation is today compared to 35 years ago.

[46] National Energy Board, *Reasons for Decision in the matter of TransCanada Pipelines Limited, NOVA Gas Transmission Ltd., and Foothills PipeLines Ltd., Business and Services Restructuring Proposal and Mainline Final Tolls for 2012 and 2013* RH-003-2011 (March 2013).

Although some bells and whistles have changed, I have found the opposite: the very essence of regulation, its benefits to Canadian society, the values underpinning it, the principles providing its foundations, have not changed in 35 years, and will not likely change by much in the foreseeable future. This bodes well for the future of public interest determinations and the Canadian public interest.

What has changed greatly is how Canadians interact with their federal energy regulator, the National Energy Board. Since the Gulf of Mexico blowout, many Canadians from all walks of life know about the Board. They read about it in newspapers almost every day, some times on the front page. They hear about it in national newscasts regularly. They associate it with difficult and controversial topics, such as accidents, ruptures and leaks, the oil sands, and even climate change. The facts show that federally-regulated pipelines are fundamentally safe, that accidents are few and far between, that the environmental consequences of all the leaks, mostly very minor, since the Board's creation in 1959, have all been fully reversed, in the short term with that. These facts however, do not inform much the public debate playing out before the Board. As a result, the Board is exposed to a broad range of comments and criticisms as to the state of our society, whether or not it is under the Board's jurisdiction, and to a broad range of policy choices that only policy makers and elected officials can make, not the Board itself. For the Board, this is neither good nor bad. This is a fact of life to be considered when organizing public hearings and making procedural choices as to how it will get relevant information, choices which it is enabled to make, just like any judicial or quasi-judicial entity.

The Board has shown that it has adapted to this change in the public debate unfolding in front of it. It has also shown that it will continue to be clear as to where it is coming from: rigorous adhesion to the basic principles of natural justice, fair mindedness, commitment to continual improvement in all it does, internally and externally, ability to listen with sincerity to all the points of view on any matter before it begins forming an opinion, after having hear from everybody from all sides. The law requires that it be so.

In his article on the first 25 years of the Board, former Vice-Chairman Douglas M. Fraser wrote, in respect of the first hearing held by the Board in 1960[47]:

> "Looking back now at that quarter-century, one can think of many things that one might have done better, or differently, but from that first transcript and those first Reasons for Decision, one can clearly see the willingness to listen, and the determination to get it right, that we all felt on that first day. May it so continue."

From the beginning, the National Energy Board has been the Rock of Gibraltar of energy regulation in Canada. It is my turn to say: may it so continue. I believe it will. ■

[47] *Ibid* at 58.

SMART GRIDS: A EUROPEAN REGULATORY PERSPECTIVE

*Dr. Hugo Schotman**

Introduction

In Europe, the regulatory approach to innovation and smart grid development is an enduring topic, that also seems to be relevant to Canada[1]. Recently, the Council of European Energy Regulators (CEER)[2] has published its second status review on regulatory approaches to enabling smart grids solutions (hereafter: CEER Status Review)[3], which is a follow up on an 2011 status review[4] and a 2009 position (and conclusions) paper on smart grids[5,6].

In this article we will summarize this European view on regulatory approaches to enabling smart grid solutions, based on the CEER Status Review[7]. We will focus on the distribution networks, which are operated by Distribution System Operators (DSOs)[8]. The goal is to highlight those aspects that are related to the specifics of the European energy market and the role of the National Regulatory Authority (NRA) in that market. In our conclusions we will try to draw some lessons learned from the European efforts described in this paper.

We will start with the drivers for smart grids in Europe and the user-centric definition of smart

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1 See e.g. Concentric Energy Advisors, *Stimulating Innovation on behalf of Canada's Electricity and Natural Gas Consumers: A Discussion Paper Prepared For Canadian Gas Association and Canadian Electricity Association,* (21 November 2013); Ontario Energy Board, *Report of the Board, Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach* (18 October 2012); Regulator/Industry Dialogue, *Long Term Utility Service Planning in a Short Term World,* (27-28 September 2012); and, ICES Literacy Series No 3, *Economic Regulation and the Development of Integrated Energy Systems* (September 2012).

2 The Council of European Energy Regulators (CEER) is the voice of Europe's national regulatory authorities (NRAs) of electricity and gas, online: <http://www.ceer.eu>. CEER works closely with the Agency for the Cooperation of Energy Regulators (ACER), which is an EU Agency that assists NRAs "in exercising, at Community level, the regulatory tasks that they perform in the Member States and, where necessary, to coordinate their action." online: <http://ec.europa.eu/energy/gas_electricity/acer/acer_en.htm>. A good introduction to the work and vision of ACER can be found in the green paper: Agency for the Cooperation of Energy Regulators, *European Energy Regulation: A Bridge to 2025 - Public Consultation Paper* PC_2014_O_01 (29 April 2014).

3 Council of European Energy Regulators, *Status Review of Regulatory Approaches to Enabling Smart Grids Solutions ("Smart Regulation")* C13-EQS-57-04 (18 February 2014).

4 Council of European Energy Regulators, *CEER status review of regulatory approaches to smart electricity grids* C11-EQS-45-04 (6 July 2011).

5 European Regulators' Group for Electricity & Gas, *Position Paper on Smart Grids- an ERGEG Public Consultation Paper* E09-EQS-30-04 (10 December 2009).

6 European Regulators' Group for Electricity & Gas, *Position Paper on Smart Grids - An ERGEG Conclusions Paper* E10-EQS-38-05 (10 June 2010).

7 The CEER Status Review is based on a questionnaire among CEER members, to which 27 have responded.

8 The Distribution System Operator (or DSO) is the European equivalent of the Canadian Local Distribution Company (LDC).

grids proposed by CEER. We then look at the relation between unbundling and smart grids development, after which we briefly discuss the general regulatory framework in Europe and the role of NRAs in demonstration projects. We will look at specific incentives for innovation within performance-based price regulation and consider some performance indicators aimed at the "smartness" of the network. We end with some thoughts about the extension of the ideas for smart grids to smart energy networks, which include natural gas.

A User-Centric Definition of Smart Grids

"Utilities must be prepared to receive distributed power and to manage fluctuations in supply and demand that would result from innovations on the customer's premises"[9]

To reduce the emission of greenhouse gasses and to enhance security of supply in Europe[10], the European Union has set specific targets for 2020:

- Cutting greenhouse gases by at least 20 per cent of 1990 levels;
- Increasing the use of renewables to 20 per cent of total energy, and;
- Improving energy efficiency by 20 per cent.[11]

These targets have been important drivers for innovation in the European energy sector, largely through national implementation plans[12] that changed the needs of energy users. In the Netherlands for example, incentives for sustainable energy production[13] have lead to a large growth of distributed generation (particularly of Combined Heat and Power plants) in certain regions. This prompted a DSO to develop a system of congestion management and to balance electricity on the distribution level[14].

This focus on the needs of energy users has lead CEER to adopt a user-centric and technology-neutral definition of a smart grid:

> *"A smart grid is an electricity network that can cost-efficiently integrate the behaviour and actions of all users connected to it – generators, consumers and those that do both – in order to ensure economically efficient, sustainable power systems with low losses and high levels of quality and security of supply and safety."*[15]

This definition is a slightly modified version of the definition of the European SmartGrids Technology Platform[16] and is adopted by the European Commission Taskforce for Smart Grids[17].

Note that in general, smart meters are considered

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[9] Richard K. Lester & David M. Hart, *Unlocking energy innovation: How America can build a low-cost, low-carbon energy system* (Massachusetts: The MIT Press, 2012) at 122. We will use quotes from this book to counterpoint the article with a North American view.

[10] Sustainability and security of supply are two of the three core objectives in implementing a European energy policy. The third objective is competitiveness: to support the development of a truly competitive internal energy market, see Communication from the Commission to the European Council and the European Parliament - An energy policy for Europe, COM(2007) 1 final, (10 January 2007).

[11] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - 20 20 by 2020 - Europe's climate change opportunity, COM(2008) 30 final, (23 January 2008).

[12] CEER members differ in their opinion on the desirability of harmonization of these national implementation plans, see Implications of Non-harmonised Renewable Support Schemes - A CEER Conclusions Paper (12-SDE-25-04b), 18 June 2012. ACER states that "National RES subsidies targeted at specific technologies, although consistent with political EU objectives, are a major market distortion.", see reference *supra* note 2.

[13] See e.g., Netherlands Enterprise Agency, *Stimulation of Sustainable Energy Production (SDE+)*, online: <http://english.rvo.nl/subsidies-programmes/stimulation-sustainable-energy-production-sde>.

[14] Electricity: Renewables and Smart Grids, OECD Best Practice Roundtables on Competition Policy series, 4 May 2011, references are to the Netherlands contribution herein (at 135 - 141).

[15] *Supra* notes 5, 6.

[16] European SmartGrids Technology Platform, *Strategic Deployment Document for Europe's Electricity Networks of the Future* (20 April 2010).

[17] European Commission Task Force for Smart Grids, *Expert Group 1: Functionalities of smart grids and smart meters* (December 2010).

part of smart grids. However, CEER has stated that "it is technically possible to develop smart grid and smart meter infrastructures independently of each other."[18] The CEER Status Review finds that in 70 per cent of the countries smart grids will use smart meter data and that in most countries, consumers (71 per cent) and DSOs (67 per cent) will have access to smart meter data. We will not discuss regulatory aspects of smart meters here, as this would go outside the scope of this paper, but refer to the extensive work CEER has done on this subject.[19]

Unbundling: Enabler or Barrier to Smart Grid Development?

"The most important institutional innovation that will enable [...] the smart grid to fulfill [its] potential is [...] the vertical disintegration of the electricity industry"[20]

In Europe, the formerly vertically integrated utilities are unbundled, at least legally and functionally[21]. This means that DSOs cannot be active in the generation and retail markets, which are competitive. The goal of unbundling is to have a fully open market for generation and supply, thus "secur[ing] competition and the supply of electricity at the most competitive price."[22] Some argue that legal unbundling is not sufficient, but that DSOs should also be ownership unbundled[23], as is required for transmission system operators[24]. The CEER Status Review does not state that unbundling is a prerequisite for innovation, but merely mentions that NRAs are in general of the opinion that "existing rules for unbundling are not expected to hinder smart grid development [...]", though some NRAs make additional comments.

The British regulator for example is afraid that "[...] storage [..] sponsored by the DSO for network reinforcement [...] would separate consumer involvement in the smart grid and make it harder for customers to be involved." This remark touches on the role of DSOs and which activities the DSO should employ. CEER finds that in most countries (38 per cent), the boundary between regulated and non-regulated activities will be affected by the development of smart grids. As a result new commercial and regulatory arrangements will be necessary in order to facilitate the development of smart grids, which is confirmed by 73 per cent of the countries. Examples of these arrangements are "coordination between suppliers and DSOs on the flexibility requested of customers" and "[d]efining the relationships and roles of stakeholders in the value chain".

Output Regulation and Demonstration Projects

"In the demonstration stage, this knowledge ought not to be proprietary - rather it should be diffused widely to other members of the industry as well as to regulators and the public."[25]

The general rate-setting mechanism in Europe is performance-based price regulation[26]. This form of (output) regulation is generally thought to have better incentives for innovation than

[18] *Supra* note 6.
[19] Council of European Energy Regulators, *Status Review of Regulatory Aspects of Smart Metering* C13-RMF-54-05 (12 September 2013); European Regulators Group for Electricity & Gas, *Final Guidelines of Good Practice on Regulatory Aspects of Smart Metering for Electricity and Gas* E10-RMF-29-05 (8 February 2011); and references herein.
[20] *Supra* note 9 at 126.
[21] Based on Directives 2003/54/EC (electricity) and 2003/55/EC (gas). Member States may decide not to apply the rules for unbundling to integrated electricity undertakings serving less than 100.000 connected customers. ACER is currently investigating whether to recommend to revise this limit, as customers connected to these DSOs have not the same benefits as customers connected to the unbundled DSOs, see reference *supra* note 2.
[22] Directives 2009/72/EC (electricity) and 2009/73/EC (gas) of the Third Energy Package.
[23] Legally unbundled DSOs are part of a larger, vertically integrated, undertaking. ACER argues that a DSO can only really act as a neutral market facilitator if it is also ownership unbundled, see reference in *supra* note 2.
[24] Ownership unbundling of transmission system operators is based on the directives in *supra* note 22.
[25] *Supra* note 9 at 139.
[26] For an example of performance-based price regulation in Europe, see Hugo Schotman, "Fostering competition amongst regulated LDCs: the Dutch Experience", *Energy Regulation Quarterly*, Vol 2, (5 May 2014) 65.

cost regulation, though also price regulation seems to have its shortcomings[27]. Examples of these might be the existence of externalities[28] and a focus on short term efficiency gains and postponement of investments[29]. We will not go into the details of possible solutions to these shortcomings (e.g. separate remuneration of R&D costs[30] or of innovative investments[31]), but will instead focus on the views of the NRAs as expressed in the CEER Status Review.

Before we discuss some specific incentives, it is important to note that NRAs in general have not a large role in demonstration projects. Generally the government, or a government agency, grants funding for demonstration projects, with the NRA sometimes having an advisory role. Demonstration projects that align with the DSO's legal tasks (and that are thus in the regulated domain) are ultimately funded from network tariffs[32]. Because of the regulation on outputs, a DSO can do these projects without prior consent from the regulator, though in some countries, a DSO can turn to the regulator for separate remuneration[33]. Also in the monitoring of demonstration projects and the general dissemination of lessons learned from the projects, an important recommendation from CEER[34], the NRAs have only a marginal role.

Incentivizing Innovation

"Regulators should allow distribution [...] utilities to recover the cost of appropriately justified investments in the utility-side smart grid."[35]

Of the participating NRAs, 63 per cent state that general (i.e. not smart-grid specific) incentives are used for smart grid development, which correlates with the generally shared view that there is no differentiation between smart grids and conventional grids for "incentives to encourage network operators to choose investment solutions that offer the most cost-effective solutions" and for "[n]ew tariffs to incentivise more efficient network use". This view is largely influenced by regulatory frameworks that look at outputs rather than inputs, and that leave technological and investment choices as much as possible to the DSOs[36]. The focus on performance is supported by the European Commission, stating that "regulatory incentives should encourage a network operator to earn revenue in ways that are not linked to additional sales, but are rather based on efficiency gains and lower peak investment needs"[37].

It is no surprise then that 79 per cent of the countries that participated in the CEER Status Review use tools for price regulation to facilitate smart grid development and 63 per cent use performance indicators. Though a large number of NRAs believes that the existing regime already enables the development of smart grids, the majority of countries (76 per cent) still think that regulatory instruments, especially investment incentives and performance indicators, will need to be adapted for smart grid development. In the next section we discuss possible performance indicators that specifically aim at smart grid development.

Performance Indicators for Smartness

"Regulators [...] will need to become smarter in tandem with the utilities they are regulating."[38]

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[27] For a discussion see Dierk Bauknecht, *Incentive Regulation and Network Innovations* RSCAS 2011/02 (2011).
[28] See e.g. *supra* note 14.
[29] See e.g. *supra* note 26.
[30] See e.g. *supra* note 27.
[31] See e.g. *supra* note 26.
[32] The vertically integrated undertaking of which most DSOs are part also operate in the competitive areas of production and retail. Demonstration projects in those areas are outside the scope of the NRAs.
[33] See e.g. *supra* note 26.
[34] *Supra* note 5.
[35] *Supra* note 9 at 136.
[36] *Supra* note 5, 14.
[37] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Smart Grids: from innovation to deployment", COM (2011) 202 final, Brussels, (12 April 2011).
[38] *Supra* note 9 at 73.

European regulators have extensive experience with the use of performance indicators for the quality of supply[39]. These performance indicators are also important in encouraging smart grid solutions, as it is expected that smart solutions in the networks are needed to provide (at least) the level of quality while integrating for example distributed generation and demand side management. In the CEER Status Review, some of the considered performance indicators[40] for quantifying the "smartness" of networks are closely related to the quality of supply indicators. The indicator "Measured satisfaction of grid users for the grid services they receive" for example, is closely related to *commercial quality* indicators. As CEER phrases it, this should be the ultimate indicator, as "the grid is there for the users", however it is difficult to quantify customer satisfaction in an objective way. This indicator is used in Great Britain as a revenue driver and in four countries it is used or under consideration for monitoring purposes.

An indicator that is closely related to the *continuity of supply* indicator "Energy Not Supplied" is "Energy not withdrawn from renewable sources due to congestion and/or security risks". It is used in Great Britain as a revenue driver and in seven countries used or under consideration for monitoring. This indicator has not a strong incentive to invest before renewable electricity production is in place, contrary to the indicator "Hosting capacity for distributed energy resources in distribution grids", that might however lead to overinvestment in capacity. This indicator reflects the amount of production that can be connected to the distribution network without endangering the continuity of supply and voltage quality and is used in some countries as a revenue driver or for monitoring.

An indicator that is directly related to energy efficiency and sustainability is the "Level of losses in transmission and distribution networks". This indicator is used extensively both as a revenue driver and for monitoring, which has lead CEER to publish a position paper on this subject in the past[41]. Though part of the losses are not controllable, the use of this indicator as a revenue driver gives the operator a strong incentive to use smart solutions to minimize energy losses.

From Smart Grids to Smart Energy Networks

"The electric power system is the *central front in the energy transition"*[42]

The focus in this article has been on innovation in the electricity networks, on smart grids, which is not a coincidence: There has been much less discussion on innovation in gas networks, on smart gas networks. We will argue here that it is important to also consider smart gas networks, because one of the great advantages of natural gas over electricity is that it can easily be stored.[43] This is of special importance due to the increase of renewable, but intermittent, electricity generation. Advanced power to gas systems would diminish the need for (expensive) local storage of electricity and add to the efficiency of the energy system as a whole.

Another example of interaction between the electricity and gas networks is the choice between using biogas for (sometimes low-efficiency) electricity production or to upgrade the biogas to renewable natural gas (or biomethane), which can be transported in the natural gas pipelines. These examples show that it is not useful to (only) talk about smart gas networks[44], but immediately make the step to the integration of smart grids and

[39] Quality of supply includes "Continuity of Supply", "Voltage Quality" and "Commercial Quality", see *5th CEER Benchmarking Report on the Quality of Electricity Supply 2011* C11-EQS-47-03, (2 December 2011).

[40] We will here consider indicators that relate to the distribution networks, indicators for the transmission networks are related to the maximum injection of power without congestion, the amount and use of interconnection capacity and (transmission) network losses.

[41] European Regulators Group for Electricity & Gas, *Treatment of Losses by Network Operators - an ERGEG Position Paper for public consultation* E08-ENM-04-03 (15 July 2008); and, *Treatment of Losses by Network Operators - an ERGEG Conclusions Paper* E08-ENM-04-03c (19 February 2009).

[42] *Supra* note 9 at 58.

[43] ACER recognizes that gas networks can add flexibility to the electricity networks and that for that reason it might be useful "to integrate gas and electricity market regimes as far as is appropriate, thereby avoiding unnecessary obstacles and ensuring efficient system balancing.", see reference *supra* note 2.

[44] European Commission Task Force for Smart Grids, *Expert Group 4: Smart Grid aspects related to Gas* EG4/SEC0060/

smart gas networks. From a system point of view, it would even be better to look at the optimization of all available energy carriers (e.g. also heat in thermal networks) within so called smart energy networks.

One important barrier to the development of smart energy networks is the division of the regulatory world, in Europe, but also in Canada, in electricity and gas. This division has contributed to a focus on issues in each energy subsystem and not on the energy system as a whole. One of the recommendations of the EC Task Force for Smart Grids is therefore to "[a]lign the 3rd energy package directives[45] in order to allow for more interaction between energy carriers."[46] Other recommendations from this Task Force relate specifically to the change in gas composition and quality due to injection of hydrogen produced from surplus renewable electricity and renewable natural gas produced from biogas. For these it is important to define the responsibilities for gas quality and composition at a European level and to promote gas appliances which accept a wider range of gas compositions.

Another recommendation of the EC Task Force for Smart Grids is to develop a regulatory framework that has incentives for smart gas networks development. The use of performance indicators for smart gas networks is however a bit more challenging, as in no way should safety be jeopardized[47]. Continuity of supply indicators are less suited, because of the generally high availability of gas networks, but commercial quality indicators and some "smartness" indicators, as the use of renewable gas, the available capacity for renewable gas and the level of network losses (i.e. methane emissions), could well be used for gas networks.

Conclusion

"[...] some entity [...] has to look out for the system as a whole [...] and ensure that innovation on the system's edges is compatible with its reliable functioning [...]. That entity should be - must be - the "smart integrator" [...] utility [...]."[48]

The European regulatory view on smart grid development is based on a (legally) unbundled utility for the operations of the electricity networks that is a facilitator of change, driven by users needs and remunerated under performance-based price regulation. European regulators in general perform only a marginal role in demonstration projects and focus for enabling smart grid solutions on a combination of investment incentives and performance indicators.

Due to this regulatory approach, the involvement of regulators in technological choices is minimized and the freedom for the utility to act as a "neutral market facilitator"[49] is optimized, though some argue that ownership unbundling has to be added to the mix. Performance indicators to incentivize smart grid solutions are often closely related to more widely used quality of supply indicators. As with those, it is challenging to get it right with regard to timing and scale of investments. Therefore the output-based framework is often supplemented with some form of input regulation, in which investments are explicitly approved by the regulator.

The changing role of the utility requires clear boundaries of the regulated domain and definition of relationships and roles of stakeholders. An example of the former is the responsibility for operating storage facilities in the distribution networks and of the latter the roles in handling smart meter data. These issues pose challenges to the regulatory framework and might lead to inefficiencies if not properly addressed by regulators.

The focus in Europe is largely on electricity grids, though there are strong arguments to also consider incentives for smart gas networks.

DOC (6 June 2011).

[45] *Supra* note 22.

[46] *Supra* note 44.

[47] *Supra* note 26.

[48] *Supra* note 9 at 68.

[49] The term "neutral market facilitator" is from the reference in *supra* note 2.

In the nearby future, smart gas networks can provide important flexibility and storage functionalities to smart grids. Considerations are then the responsibility for gas quality and composition, and the possible consolidation of the regulatory frameworks for electricity and gas (and if in place, thermal) into one regulatory framework for smart energy networks, which optimize the integration of all available energy carriers. ■

TRIBUNAL INDEPENDENCE: IN QUEST OF A NEW MODEL

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

Intorudction

The broad **concept** of "independence" in the context of regulatory tribunals may be widely understood at an intuitive level. However, understanding the **meaning** of independence – identifying the **content** of the concept and applying it in specific circumstances – is a continual challenge. All the more so when we realize that, outside the realm of judicial independence of the superior courts, absolute independence does not and cannot exist in a parliamentary democracy. On reflection, we are forced to accept that, in fact, independence is a relative concept, the meaning of which is context-specific. Nevertheless, we probably all share a general understanding of what we mean when we speak of independence in reference to regulatory tribunals.

Several recent legislative changes, both federally and provincially, have undermined this general understanding of independence with respect to energy regulation tribunals in particular. These developments indicate a trend by governments to play a more direct role in the regulatory process, by arrogating unto themselves final decision-making authority over some matters previously thought to best be decided by independent tribunals, at arm's length from government, or by introducing mechanisms aimed at ensuring better alignment of the outcomes of the regulatory process with overall government economic and development policies. It might be asked: **Is independence of energy regulation tribunals dead**?

The question arises not only because of recent government initiatives that are outlined in this article, but also because of **perceptions** in some quarters of the independence (or more accurately the lack of independence) of such tribunals. A recent Op-Ed column in the *New York Times* on development of the Canadian oil sands referred to the National Energy Board as "an ostensibly independent regulatory agency" and to the Alberta Energy Regulator as "quasi-independent."[1]

Many would argue that the trend, which appears to be driven by the increasing politicization of all things energy-related, should be resisted and that energy regulation should be left to independent regulators. The political arena, it is said, is no place for analyzing and resolving the highly controversial – and frequently emotional – issues that arise with respect to energy development and use. It is interesting to note in this regard at least one recent call in the U.S. for the review of divisive projects such as Keystone XL to be assigned to an "independent" agency.[2] But that is overly simplistic.

"Energy regulation" is not, of course, a single function; rather, it comprises a wide variety of matters, ranging from authorizing exploration and development activities to the construction and operation of production and distribution facilities, financial regulation, market oversight, and energy use and conservation. The

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1 March 31, 2014.

2 By Lee Terry, a U.S. congressman from Nebraska, as reported in *Maclean's Magazine*, February 3, 2014, at 36.

appropriate role of the regulator is likely to vary depending on the specific function.

It is the legitimate authority of government to decide what that role should be, function by function. Obviously there will be debate. Would it be appropriate, for example, to leave final decisions on controversial projects, such as Northern Gateway,[3] in the hands of an independent tribunal, without any further recourse other than judicial review? At the end of the day, there is no right or wrong answer to the question of whether these projects are in the public interest – there is a legitimate question whether a final determination should be left to a tribunal that is not directly accountable to the public. On the other hand, final decisions on financial matters such as tolls and tariffs might appropriately be left to an arm's length process.

There will, of course, be debate about exactly what is the appropriate role for regulation, and independent tribunals, with respect to the many aspects of energy development and use. Part of that debate should be whether any particular mechanism for injecting government into the overall regulatory process respects the concept of independence and its underlying elements to the greatest extent possible.

An important distinction must be kept in mind in furthering the debate. Criticism of an alleged lack of independence is often, on closer examination, not about independence in the legal sense; rather, some criticism that is expressed in terms of independence is really about the scope or breadth of a tribunal's mandate. The more detailed the assignment of responsibilities, the less independent a tribunal might be thought to be. Indeed, detailed statutory prescriptions may mean a tribunal is left with such a narrow mandate that it is in reality little more than an **administrative** agency and has only limited scope to act independently of government. At the same time, statutory tribunals are, by definition, tribunals of limited jurisdiction, with boundaries around the matters assigned to them. No one would seriously advocate the establishment of a tribunal with a mandate to simply "regulate energy matters in the public interest."

Jurisdictional boundaries do not themselves undermine independence in the sense in which we generally speak about tribunal independence. Rather, the concern in the present context is with independence **within** the exercise of a tribunal's mandate – the extent to which a tribunal is free from external influence when performing its responsibilities, regardless of whether its mandate is defined narrowly or broadly.

Another preliminary observation may be helpful. The Supreme Court in *Committee for Justice and Liberty v. National Energy Board* (the *Crowe* case)[4] affirmed that the **reasonable apprehension** of bias (an element of independence) is a ground for challenging a tribunal's application of the principles of natural justice and fairness. The Court was, of course, concerned with the **external** apprehension of bias by third parties. It is submitted that the question should also be considered from within: do the tribunal members themselves perceive that their independence is not compromised, directly or indirectly, by the overall framework within which they must function? Do they believe that they are independent?

First Principles

The Supreme Court of Canada was clear in *Ocean Port Hotel Ltd.* v. *British Columbia* (*Ocean Port*):

> Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction. ***Courts*** engaged in judicial review of administrative decisions ***must defer to the legislator's intention in assessing the degree of independence required***

3 [The recent decision of the federal cabinet accepting the recommendation of the Joint Review Panel for the Northern Gateway Project that the project be approved is discussed in this issue of *Energy Regulation Quarterly* in the Case Comment by Nigel Bankes.]

4 *Committee for Justice and Liberty v National Energy Board,* [1978] 1 SCR 369, [*Crowe*].

> ***of the tribunal in question***.
>
> * * *
>
> [G]iven their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. Thus, ***the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature*** and, absent constitutional constraints, this choice must be respected.[5]

In addition to the fundamental points that there is no general right to independence, and that the legislator's intention must be respected, note the phrase "the **degree** of independence…"

Ocean Port was applied last year by the Saskatchewan Court of Appeal to uphold the dismissal of members of the Saskatchewan Labour Relations Board under the authority of section 20 of province's *Interpretation Act 1995*,[6] which empowers the Lieutenant Governor in Council, on a change of government, to end the term of office of any member of any board, commission, agency, or other appointed body of the Government of Saskatchewan.[7] Leave to appeal has been granted by the Supreme Court of Canada.

Macauley and Sprague in their leading *Practice and Procedure Before Administrative Tribunals* go so far as to question the very idea of independence with respect to tribunals:

> [A]dministrative agencies are not independent. They never were independent and never will be independent. If they ever became independent, they would not then be administrative agencies. The association of the word 'independent' with 'administrative agencies' in Canada is…a misnomer.[8]

Professor Ron Ellis, one of Canada's most experienced and distinguished regulators and author of the recently-published *Unjust By Design: Canada's Administrative Justice System*,[9] told a Canadian Bar Association conference in Ottawa last December:

> [T]he evidence is perfectly clear…that [with the exception of certain Quebec tribunals] none of Canada's tribunals whether they be regulatory agencies or adjudicative tribunals, nor any of their members, are independent – not in law, not in fact.[10]

A startling conclusion indeed!

Against this background, four examples are offered of legislated mechanisms intended to circumscribe the roles of specific energy regulatory tribunals, with implications for the independence of those tribunals.

National Energy Board

The role of the National Energy Board in reviewing proposals for new pipeline facilities under the *National Energy Board Act*[11] was fundamentally changed in 2012. Previously, the Board itself decided whether to issue a certificate of public convenience and necessity authorizing the construction and operation of pipeline facilities.[12] A decision by the Board to issue a certificate was subject to the approval of the Governor in Council. However, the GIC could only approve or reject, but not amend, the Board's decision. Where the Board decided

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5 *Ocean Port Hotel Ltd. v British Columbia,* [2001] 2 S.C.R. 781, at 794-95, [*Ocean Port*]. Emphasis added.
6 *Interpretation Act 1995,* SS 1995, c I-11.2.
7 *Saskatchewan Federation of Labour et al v Government of Saskatchewan et al,* 2013 SKCA 61, 2013-06-11.
8 Robert W Macauley & James LH Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Carswell, 2004) Volume 1 at 2-12.28.
9 *Unjust By Design: Canada's Administrative Justice System,* Vancouver: UBC Press, 2013.
10 Presentation at the CBA Annual National Administrative Law, Labour and Employment Law Conference, Ottawa, November 29-30, 2013.
11 *National Energy Board Act,* RSC 1985, c n-7 (as amended), [*NEB Act*].
12 *NEB Act*, *ibid,* s 52.

to deny an application for a certificate, its decision was final; no further approval was required and the GIC had no role.

The amendments to the *NEB Act* in 2012 redefined the role of the Board, which is now mandated, not to decide on applications for certificates, but to instead make a recommendation to the GIC.[13] Decision-making authority is vested directly in the GIC (that is to say, cabinet), which is free to accept or reject the recommendation of the Board. Where the Board recommends that a certificate not be issued, it must nevertheless include in its report to the GIC the terms and conditions it considers necessary or desirable in the public interest in the event that the GIC should direct the Board to issue a certificate, notwithstanding the Board's recommendation to the contrary.[14]

This is a substantive change in the role of the Board, made explicitly for the purpose of removing the Board's decision-making authority. The then Minister of Natural Resources told Parliament:

> We are also ensuring that there is clear accountability in the system. The federal cabinet will make the go, no-go decisions on all major pipeline projects, informed by the recommendations of the National Energy Board…
>
> We believe that for major projects that could have a significant economic and environmental impact, the ultimate decision-making should rest with elected members who are accountable to the people rather than with unelected officials. Canadians will know who made the decision, why the decision was made and whom to hold accountable.[15]

Views may legitimately differ on the wisdom of this redefinition of the Board's role, which, in and of itself, need not have compromised the Board's independence within its newly-defined role. There is, however, much more to the scheme, the details of which raise serious concerns about independence.

Before making its decision, the Governor in Council is empowered to refer the Board's recommendation or any of the terms or conditions included in its report back to the Board for reconsideration.[16] The GIC may direct the Board to conduct the reconsideration taking into account any factor specified in its direction and may specify a time limit within which the Board must complete its reconsideration and submit a further report.[17] The GIC may direct the Board to conduct a further reconsideration, again specifying any factors to be taken into account by the Board.[18]

This scheme raises fundamental concerns that the independence of the NEB could be seriously jeopardized. The reconsideration process at the direction of the GIC, requiring the Board to take into account any factors specified by the GIC, could be used in an attempt to co-opt the Board's support for an ultimate decision that is contrary to the Board's original recommendation. This possibility could also subtly influence the Board to move towards a recommendation that it believed would be more likely to be reflected in the GIC's final decision. The previous arm's length relationship between the Board and the GIC has been replaced, potentially, by an interactive process in which the Board may be directed by the GIC to reconsider its recommendation on the basis of factors specified by the GIC.

These concerns about the independence of the Board are exacerbated by two significant procedural changes that were also imposed on the Board by the 2012 amendments to the *NEB Act*. First, the Board is now subject to mandatory time limits for completing its review of applications for pipeline certificates and submitting its report with its recommendation

13 *NEB Act*, *ibid,* s 52, as amended by the *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19.
14 *NEB Act*, *ibid* at para 52(1)(b).
15 Hansard, May 2, 2012 at 7471.
16 *NEB Act*, *supra* note 11, s 53(1).
17 *NEB Act*, *ibid,* s 53(2).
18 *NEB Act*, *ibid,* s 53(9).

to the GIC.[19] In the writer's view, mandatory time limits are themselves a direct intrusion into the independence of a tribunal on several counts. They may constrain the hearing process itself and impede the compilation of a complete record, to the detriment of parties and the tribunal itself. They may also constrain a tribunal's ability to prepare comprehensive reasons for its decision or recommendation. Mandatory time limits are antithetical to the principle that a measure of a tribunal's independence is the extent to which it is master of its own procedure.

In the case of the NEB, however, still further objections arise from fact that the time limits scheme directly insinuates the Minister into the Board's procedures. Time limits for individual proceedings – not to exceed 15 months from a determination that an application is complete to the submission of a report to the GIC – are initially set by the Chairperson of the Board. This provision interferes directly with the independence of Board panels assigned to specific proceedings and is objectionable on that ground alone. The grounds for objecting to it are exacerbated by the authority of the Chairperson to take measures to ensure that time limits are met, including the ability to replace the members of a hearing panel even after a hearing has begun.[20] The amended *NEB Act* forestalls any potential challenge on this ground to procedural fairness by providing explicitly that a substitute panel member is deemed to have heard any evidence that had previously been heard by the replaced member.[21] This is, of course, a direct rejection of the principle that he who hears must decide.

But perhaps the most serious objection to the time limits scheme in the amended *NEB Act* arises from the powers of the Minister to direct the Chairperson to issue directives specifying time limits in individual cases and to take measures to ensure those time limits are met.[22] The scheme explicitly authorizes ministerial – that is to say political – interference in essential procedural matters and thus rejects the principle of procedural independence.

Alberta Energy Regulator

In Alberta, the *Responsible Energy Development Act* (*REDA*),[23] enacted in 2012, established the Alberta Energy Regulator (AER), combining functions previously performed by the Energy Resources Conservation Board (ERCB) and Alberta Environment and Sustainable Resource Development. The mandate of the AER is defined in broad terms to include providing for "the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta…"[24] However, the Minister may give directions to the Regulator for the purposes of providing priorities and directions and "ensuring the work of the Regulator is consistent with the programs, policies and work of the Government…"[25] It is worth noting that such directions originate with the Minister alone and are not subject to the additional accountability that would follow if they were required to be made instead by the Lieutenant Governor in Council.

In addition to ministerial directives, the *REDA* authorizes the Lieutenant Governor in Council to make regulations, among other things, prescribing "factors that the Regulator must consider in considering an application or conducting a regulatory appeal, reconsideration or inquiry…"[26] The use of this authority to prescribe generic factors that the Regulator must consider would not likely compromise independence. However, any attempt to use the authority to prescribe factors that must be considered by the Regulator in processing a specific application would raise serious concerns.

The Alberta *Act* also provides that the Regulator

19 *NEB Act*, *ibid,* s 52(4).
20 *NEB Act*, *ibid,* ss 6(2.1)-(2.2).
21 *NEB Act*, *ibid,* s 6(2.4).
22 *NEB Act*, *ibid,* s 52(8).
23 *Responsible Energy Development Act,* SA 2012, c R-17.3 [*REDA*].
24 *REDA, ibid,* s 2(1).
25 *REDA, ibid,* s 67(1).
26 *REDA, ibid* at para 78(f).

shall act in accordance with any applicable regional plan issued under the *Alberta Land Stewardship Act*.[27]

Collectively, these elements of the *Responsible Energy Development Act* are aimed at conferring on the Regulator what the Alberta government refers to as a "policy assurance function."[28] Commentators have speculated that the provisions raise questions about the independence of the new AER, particularly compared to the predecessor ERCB.[29] However, provided they are not abused, they are reasonable mechanisms for ensuring that the AER performs its responsibilities in a manner that conforms to broader government policies, without compromising independence.

As with the 2012 amendments to the *NEB* Act, the *REDA* also includes provisions with respect to time limits and participation rights. The *Act* does not impose time limits on the Alberta Energy Regulator, but instead authorizes the Regulator itself to make rules for that purpose.[30] Section 41 of the *Alberta Energy Regulator Rules of Practice*[31] provides that the Regulator may set time limits for doing anything provided for in the Rules and, on its own initiative or on motion, can abridge or extend a time limit, which it may do after the expiration of any specified time limit.

Given that time limits are not imposed externally, but are determined by the Regulator itself, there is less concern about any denial of the procedural independence of the Regulator than is the case for the National Energy Board under the amended *NEB Act.* Furthermore, the *REDA* itself does not include compliance measures that directly deny natural justice and fairness, as does the time limit scheme under the federal *Act.*[32] However, the same general concerns arise about the effect of time limits on the ability of parties to fully present their cases and of the AER to prepare comprehensive reasons for its decisions.

Ontario Energy Board

Turning to Ontario, the *Ontario Energy Board Act*[33] first sets out broad objectives to guide the Ontario Energy Board in carrying out its responsibilities. These explicitly include the protection of the interests of consumers with respect to prices and reliability of service, the promotion of economic efficiency and cost effectiveness, the promotion of conservation, demand management and energy efficiency and, specifically with respect to gas, "the maintenance of a financially viable gas industry…"[34] Statements of objectives such as these help define the mandate of the Board and are, no doubt, more helpful to the Board itself than merely generic references to the public interest. Such statutory statements do not jeopardize the independence of the Board; rather, they are an integral and commendable part of the definition of the Board's mandate – if left at that, they would establish a clear policy framework within which the Board could proceed to perform its specific responsibilities independently.

The *OEB Act*, however, goes on to provide for the issuance of ministerial directives. Under subsection 27(1), the Minister may issue, and the Board shall implement, "policy directives that have been approved by the Lieutenant Governor in Council concerning general policy and objectives." Starting from this broad authority, the Act proceeds to provide in some detail for the issuance of directives in several specific areas, such as promoting "energy conservation, energy efficiency, load

27 *Alberta Land Stewardship Act,* SA 2009, c A-26.8; *REDA*, *supra* note 23, s 20(1).

28 See "Enhancing Assurance, Enhanced Policy Development and Policy Assurance: Report and Recommendations of the Regulatory Enhancement Task Force to the Minister of Energy," (31 December 2010), online: Alberta Energy <http://www.energy.alberta.ca/Initiatives/2788.asp>.

29 See Harrison, Olthafer and Slipp, "Federal and Alberta Energy Project Regulation – At What Cost Efficiency?" (2013), 51 Alta L Rev 249.

30 *REDA, supra* note 23 s 61.

31 *Alberta Energy Regulator Rules of Practice* , AltaReg 99/2013.

32 As discussed above at notes 18-20.

33 *Ontario Energy Board Act,* SO 1998, c 15 [*OEB Act*].

34 *OEB ACT, ibid,* ss 1-2.

management or the use of cleaner energy sources, including alternative and renewable energy sources"[35] and even to amend conditions in licences already issued by the Board.[36] A directive may require the Board to hold, or to not hold, a hearing with respect to certain matters.[37]

The *OEB Act* institutes a scheme that begins with statements of broad objectives, or policies, to guide the Board, but then authorizes, with increasing specificity, the issuance of binding directives to the Board to take or refrain from taking a particular course of action and, in the case of licence conditions, even to change decisions already taken by the Board.

General directives might be seen as a useful mechanism for ensuring the ongoing conformance of Board decisions with general government policies. Such directives themselves need not compromise independence. However, as directives become more specific and detailed, and particularly where they can be used retroactively to change decisions already taken, they beg the question of whether they undermine independence. A tribunal subjected to such directives may still be independent in the sense of being free of any interference in the performance of its responsibilities, although it might well be asked what is the value of the tribunal's role. At a minimum, in the case of the OEB, the inclusion of such provisions indicates an unwillingness on the part of government to leave the Board to determine independently the means by which the stated policy objectives are to be pursued by the Board. Overall, the scheme reflects a nod by government to independence as a principle, but not where independence might lead to results it does not like.

British Columbia

Another example of recent government initiatives to reduce the role of the regulator in energy matters is found in the British Columbia *Clean Energy Act,*[38] which assigned to the Minister certain responsibilities with respect to B.C. Hydro that were formerly within the mandate of the B.C. Utilities Commission. These provisions are also notable examples of an occasional tendency of government to resort to direct, prescriptive measures with respect to matters that it would arguably be more appropriate to delegate to a regulatory agency.

For example, while the B.C. *Clean Energy Act* includes a laudable statement of the province's energy objectives, generally expressed in broad terms,[39] the *Act* proceeds to require the British Columbia Hydro and Power Authority (B.C. Hydro) to submit to the Minister, for approval, an integrated resource plan, with detailed requirements spelled out in the *Act* with respect to the contents of that plan.[40] The plan must, for example, include forecasts of energy and capacity requirements, a description of consultations, a description of export demand and the potential for B.C. to meet that demand, and specifics of any planned expenditures relating to export, together with a rationale therefore. B.C. Hydro is not a regulatory agency and questions of independence perhaps do not arise. However, the approach is the very antithesis of a public administration model in which government sets broad policy and other agents, whether administrative or regulatory, are charged with implementing that policy. It is a further example of the fundamental discomfort of governments with assigning, without recourse, decision-making with respect to increasingly controversial energy matters to arm's length tribunals or agencies.

Principles

There appears to be a clear trend towards more direct involvement by governments in decision-making with respect to energy matters. There is, however, no consistent approach to how best to balance an increased desire on their part to exercise authority over – and presumably to be accountable for – ultimate outcomes. One

35 *OEB Act, ibid,* s 27.1(1).
36 *OEB Act, ibid,* ss 28.1(1)-28.3(2).
37 *OEB Act, ibid,* s 28(2).
38 *Clean Energy Act,* SBC 2010, c 32, [*CEA*].
39 *CEA*, *ibid* s 2.
40 *CEA, ibid* s 3.

reason may well be the tendency of governments to resort to immediate *ad hoc* responses to specific issues, frequently considered at the time to be crises that must be responded to immediately.

Even where there is a measured approach to redefining the role of the regulatory process, the challenge of developing an appropriate model is compounded by the fact that "energy regulation" covers a wide range of functions, from approving facilities, to regulating their safe and environmentally acceptable operation, to financial matters, to energy use, to the protection of consumers. Yet many of these diverse functions are frequently vested in a single agency. Further, the degree of independence – or the absence of mechanisms for governments to play a role in the regulatory process – is likely to vary with the function. Governments may, for example, be less inclined to become directly involved in financial regulation such as tariff and toll matters, compared to facilities matters.

Nevertheless, some general principles can provide a framework for balancing, on the one hand, the legitimate role of government in ensuring the overall effectiveness of regulatory outcomes with, on the other hand, upholding the fundamental value of the independence of the regulatory process. In general terms, the approach should be to ensure that a tribunal is truly independent **within the scope of its mandate**.

The starting point must, of course, be a clear statement of a tribunal's mandate and its role in the overall regulatory process, in particular whether the tribunal is to make a final decision, or to make a decision subject to approval (as was the case with the NEB prior to the 2012 amendments to the *NEB Act*) or, rather, to make a mere recommendation to some other decision-maker, presumably cabinet. Whatever the tribunal's role, the approach should then refrain from introducing mechanisms for **any** external influence on or interference in the substantive exercise of that mandate, as well as refrain from imposing procedural constraints on how the tribunal goes about fulfilling its mandate.

What, then, about the use of directives, which are found in various forms? Where general directions are included directly in the constituting statute of a tribunal,[41] they are really just a particular means of defining the mandate of that tribunal and, as such, do not raise concerns about independence; they simply go to setting the boundaries of the tribunal's mandate, establishing its jurisdiction, if you will.

However, authorizing the **subsequent** issuance of directions requires caution. Such authorization should be limited to issuing directives for the purpose of ensuring consistency between broad government policies and specific regulatory outcomes, a purpose that is perhaps best pursued by requiring that directives be issued by order in council, rather than as mere ministerial directives. In no circumstances should directives be authorized for the purpose of intervening in specific proceedings once underway (as is now possible under the *NEB Act* with respect to the enforcement of time limits). Directives with respect to individual proceedings may not directly undermine the independence of a tribunal in the sense of interfering with how the tribunal might have come to a conclusion on a matter. They are, however, objectionable on the broader ground that they devalue the **integrity** of the process and may, therefore, indirectly bring into question the independence of the relevant tribunal in that process. What is the value of a supposedly independent process if elements of the outcome can simply be changed by government?

A distinction should be drawn here between, on the one hand, models where government is authorized to issue directives to a tribunal to **change** an outcome *ex post facto*[42] and, on the other hand, schemes where the tribunal's role is limited to either making a decision

41 For example, the direction in subsection 20(1) of the Alberta *Responsible Energy Development Act*, *supra* note 23, that the ERA shall apply the *Alberta Land Stewardship Act*.

42 For example, the provision in the *OEB Act*, empowering the issuance of directives to change licence conditions, as discussed *supra* note 36.

subject to further approval[43] or to making a recommendation to a final decision-maker. The latter two models do not themselves involve interference in the exercise of the relevant tribunal's circumscribed role.[44]

Apart from general directives, a scheme that provides for any type of ongoing interaction between government and a tribunal with respect to the exercise of the tribunal's mandate necessarily erodes the principle of independence. In the case of a scheme where the tribunal's role is to make a recommendation, rather than a decision, it might be asked whether the quality of the ultimate decision by another party (usually cabinet) could be improved by providing for further input from the tribunal. Before addressing this question, a distinction should be made between, on the one hand, a process that allows the ultimate decision-maker to seek clarification of a tribunal recommendation and, on the other hand, a process that requires a tribunal to reconsider its recommendation on the basis of factors specified by the ultimate decision-maker. The latter approach, particularly as found in the amended *NEB Act*, strikes directly at the independence of the tribunal.

Next, it is submitted that mandatory procedures imposed on tribunals, in principle, are antithetical to the concept of independence. In order to be truly independent, a tribunal must be free to determine for itself the process by which it will perform its functions. Mandatory time limits in particular may directly impede a tribunal's ability to compile a complete record, including an opportunity to hear and properly test evidence. They may also constrain a tribunal in preparing adequate reasons. Similarly, statutory limits on rights of participation in tribunal proceedings strike directly at a tribunal's independence by constraining the tribunal's authority to decide for itself what material it should have before it in order to fulfill its mandate.

Apart from their direct and indirect effects on tribunal independence, procedural constraints such as time limits and restrictions on participation rights may also have the negative effect of undermining perceptions of the integrity of the process. Both those who are excluded entirely and those whose participation is constrained by time limits are less likely to respect the process. It is submitted that both mandatory time limits and restrictions on participation rights may be counter-productive. Where mandatory time limits also contemplate the involvement of the political level of government and draconian enforcement measures, as is the case under the amended *NEB Act*, they are objectionable as abnegating any concept of independence. Tribunals in the field of energy regulation are well capable of dealing with both matters themselves. It is worth noting in this regard that, before the amendment of the *NEB Act* in 2012, the NEB had its own performance standards for processing applications within published timeframes.

Lastly, a framework that upholds the principle of independence must reflect the need for "institutional independence." Among other things, the tenure of tribunal members must be secure, without fear of consequences. The measures for enforcing the mandatory time limits under the amended *NEB Act* include the potential removal of panel members, either by the Chairperson of the Board or even at the direction of the Minister, and thus repudiate the very concept of security of tenure.

While governments frequently pay lip service to the principle of independence, they are at the same time often unwilling to live with the consequences. Such unwillingness may be grounded in validly held views about the appropriateness of ceding decision-making authority to an independent tribunal without recourse to the political level of government. In some other circumstances, governments are only too willing to leave potentially controversial matters to an independent process from which they can insulate themselves and thereby avoid direct accountability. Even then, political controversy may lead a government to seek to intervene, either indirectly or directly

43 As was the case under section 52 of the *NEB Act*, *supra* note 11, prior to its amendment in 2012.

44 At least in the absence of any mechanism for intervening consultation between the tribunal and the decision-maker (such as is now the case under the amended section 52 of the *NEB Act*, *supra* note 11).

by resorting to legislation to fundamentally restructure the role of the regulator, as was the case with the NEB in 2012.

Redefining the role of a regulator need not, however, come at the expense of rejecting the principle of independence, particularly given that complete independence, in the sense that the superior courts are independent, is not possible in this context. The meaning of independence as applied to energy regulatory tribunals is relative, which of course is not to say that we should not be guided by the principle. The question is how to respect the principle while at the same time acknowledging the right of government to decide on the role that any particular energy tribunal is to play in the overall regulatory process.

Legislative change does not come easily and, as noted, is frequently triggered in reaction to a perceived crisis, with the result that it is most likely to be directed narrowly at addressing that crisis, with a notable tendency by governments to overreach in their responses. It is perhaps unrealistic to think that legislative change will be forthcoming to address any of the concerns identified in this article with respect to specific legislative provisions.

There are, however, two important reasons to continue to discuss the subject and to identify the issues. The first is to be ready with constructive approaches when legislative opportunities do arise.

The second and more immediate reason is that participants in the regulatory process should look to what might be done **within** the framework of existing legislation, both by governments and by tribunals themselves, to guard against potential infringements of the principle of independence. The mere existence of some of the discretions identified above is of course cause for concern about **potential** impacts on the independence of tribunals. Their ***de facto*** independence, however, may be largely determined by whether these discretionary powers are actually exercised in ways that interfere with that independence. Governments should, therefore, be appropriately circumspect, and respectful, in exercising their discretions.

However, maintaining the principle of independence is a two-way street. Faced with the potential exercise of discretion by others in a manner that could be perceived to undermine their independence, tribunals themselves must be all the more vigilant to avoid any conduct on their own part that could raise questions about their independence. Respect for regulatory tribunals, and for the integrity of the overall regulatory process, may depend in large part on formal structures. Equally as important, it is suggested, is the way in which all participants in the process in fact conduct themselves. A tribunal that is formally structured in a way that upholds the principle of independence may nevertheless conduct itself in such a way as to make a mockery of the principle. The formal structure may provide the framework, but respect for independence – recognition for independence **in fact** – must also be earned within that framework. Watch what the players actually do and not just what they are empowered to do. Tribunals faced with potential interference with their independence by the exercise of discretions over which they have no control should conduct themselves with added regard for maintaining their independence. ■

ENBRIDGE'S NORTHERN GATEWAY PROJECT: CABINET APPROVAL BUT COMPLEX COURT PROCEEDINGS

*Nigel Bankes**

The Joint Review Panel (JRP) for Enbridge's Northern Gateway Project (NGP) issued its Final Report on the project on December 19, 2013.[1] The JRP had the responsibility to assess under the *Canadian Environmental Assessment Act, 2012*[2] (*CEAA, 2012*) what significant effects the project could have on people and the environment and how these effects might be mitigated, and whether the project met the public convenience and necessity test of the *National Energy Board Act* (*NEB Act*).[3] The JRP decided to recommend approval of the project subject to 209 conditions. In reaching that assessment the JRP concluded that the project would (in combination with the effects of other projects) have a significant effect on certain populations of woodland caribou and populations of grizzly bear (listed species under the *Species at Risk Act*[4]) even after all of Northern Gateway's mitigation efforts. Nevertheless the JRP recommended that these significant effects could be justified in the circumstances.[5] The particular circumstances that led to this conclusion included the ability of the Project to diversify Canada's oil markets and condensate supply, and the other economic and social benefits of the project.[6]

Under the terms of both *CEAA, 2012* and *NEB Act* the JRP's report serves simply as a recommendation to the federal Cabinet. Thus, and focusing here on *NEB Act*, under the amendments to that Act enacted in 2012,[7] the Governor in Council must respond to the NEB's report directing the Board to issue a certificate of public convenience and necessity subject to the terms and conditions of the report, or dismiss the application.[8] Section 54(2) of *NEB Act* stipulates that "The order must set out the reasons for making the order." By Order in Council on June 17, 2014[9] cabinet accepted the JRP's recommendations and

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1 *Connections, Report of the Joint Review Panel for the Enbridge Northern Gateway Project*, 2013, [*Connections*].
2 *Canadian Environmental Assessment Act, 2012,* SC 2012, c 19, [*CEAA, 2012*].
3 *National Energy Board Act,* RSC 1985, c N-7, s.52 [*NEB Act*].
4 *Species at Risk Act* SC 2000, c 29.
5 *Connections*, volume 1, *supra* note 1 at 57.
6 *Ibid* at 74.
7 *CEAA, 2012, supra* note 2.
8 *NEB Act* , *supra* note 3 s 54. The Order must be made within three months unless extended. Cabinet may also (s 53) refer the report and any terms and conditions back to the Board for its reconsideration.
9 *Certificates of Public Convenience and Necessity OC-060 and OC-061 to Northern Gateway Inc. for the Northern Gateway Pipelines Project,* PC 2014-809, (2014) C Gaz I, 1646, National Energy Board Act.

directed the NEB to issue the two certificates of public convenience and necessity for which Enbridge had applied, including the terms and conditions recommended by the NEB. The Board has since complied with that direction.

Both the JRP Report and the Order in Council attracted numerous applications for appeal or judicial review. There were five applications for judicial review of the Report. These applications were consolidated by Justice Sharlow[10] following which Justice Noël ordered a stay of these applications pending the resolution of any application for judicial review of the subsequent cabinet decision (which at the time Justice Noël's order was still outstanding).[11]

Issuance of the Order in Council spurred nine further applications under s.55 of *NEB Act*:[12] 14-A-39 *(Forestethics Advocacy Association, Living Oceans Society and Raincoast Conservation Foundation v. Attorney General of Canada and Northern Gateway Pipelines Limited Partnership),* 14-A-41 *(Gitxaala Nation v. Attorney General of Canada, Northern Gateway Pipelines Inc. and Northern Gateway Pipelines Limited Partnership),* 14-A-42 *(Kitasoo Xai'Xais Band Council on behalf of all members of the Kitasoo Xai'Xais Nation and Heiltsuk Tribal Council on behalf of all members of the Heiltsuk Nation v. Her Majesty the Queen and Northern Gateway Pipelines Limited Partnership),* 14-A-43 *(Federation of British Columbia Naturalists carrying on business as B.C. Nature v. Attorney General of Canada and Northern Gateway Pipelines Limited Partnership),* 14-A-44 *(Unifor v. Attorney General of Canada and Northern Gateway Pipelines Limited Partnership),* 14-A-45 *(Haisla Nation v. Attorney General of Canada, Northern Gateway Pipelines Limited Partnership and Northern Gateway Pipelines Inc.)* 14-A-46 *(Gitga'at First Nation v. Attorney General of Canada and Northern Gateway Pipelines Limited Partnership)* 14-A-47 *(The Council of the Haida Nation and Peter Lantin, suing on his own behalf and on behalf of all citizens of the Haida Nation v. Attorney General of Canada, Northern Gateway Pipelines Limited Partnership and Northern Gateway Pipelines Inc.)* 14-A-48 *(Martin Louie, on his own behalf and on behalf of all Nadleh Whut'en, and Fred Sam, on his own behalf, on behalf of all Nak'Azdli Whut'en, and on behalf of the Nak'Azdli Band v. Attorney General of Canada and Northern Gateway Pipelines Inc. on behalf of Northern Gateway Pipelines Limited Partnership). A* further application has been brought under *NEB Act* s.22(1), 14-A-38 (*Forestethics Advocacy Association, Living Oceans Society and Raincoast Conservation Foundation v. Attorney General of Canada, National Energy Board and Northern Gateway Pipelines Inc.*).

The 2012 amendments to *NEB Act* expressly dealt with the judicial supervision[13] of the new procedure envisaged by the Act pursuant to which the NEB makes a recommendation (with terms and conditions) to cabinet and any certificate of public convenience and necessity is issued by the NEB on the instruction of an Order in Council. By contrast with the procedure contemplated by s.22 of *NEBA* which provides for an *appeal*, with leave, to the Federal Court of Appeal,[14] of a *Board* decision, the new s.55 of *NEB Act* contemplates an application for *judicial review* of the Order in Council, with leave, to the Federal Court of Appeal. The application for leave must be commenced within 15 days of notice in the Gazette and is to be disposed of "without delay and in a summary way … and without personal appearance."[15] An appeal under s.22 of *NEB Act* must be on a question of law or jurisdiction whereas an application for judicial review is governed by the terms of s.18.1 of the

10 Order of February 17, 2014.

11 Order of May 29, 2014 on the application of the Gitxaala Nation. These developments are outlined in BC Nature's Notice of Motion on the cabinet decision filed July 14, 2014 at paras 16 – 19. The Orders are included in BC Nature's filings.

12 All as listed in *Forestethics Advocacy Association, Living Oceans Society and Raincoast Conservation Foundation v Attorney General of Canada and Northern Gateway Pipelines Limited Partnership,* 2014 FCA 182.

13 I use the term "judicial supervision" to refer compendiously to either or both judicial review or statutory appeal to the courts.

14 *NEB Act*, *supra* note 3, s 22(1). Furthermore, s 22(4) provides that a report submitted to cabinet under s 52 or 53 is not a decision or order of the Board that is subject to appeal under s 22(1).

15 *Ibid*, s 55(2).

Federal Court Act which provides, *inter alia*, for review on the basis of an erroneous finding of fact.[16] There is no privative clause protecting the Order in Council from judicial review.

In order to coordinate these applications Justice Sharlow, the Acting Chief Justice for the Federal Court of Appeal, issued directions for these applications.[17] These directions have been modified in some respects by Justice Stratas' Order of July 24, 2014 in *Forestethics Advocacy Association, Living Oceans Society and Raincoast Conservation Foundation v. Attorney General of Canada, National Energy Board and Northern Gateway Pipelines Inc*[18] on the application of Northern Gateway. In his Order Justice Stratas ordered the consolidation of all ten applications on the grounds that "They all arise from the same matter and they have similar facts and law."[19] Justice Stratas also noted that while the applications "have different perspectives and circumstances, many of the issues that they raise are similar if not identical."[20] If any of the applications are granted Justice Sharlow's Direction contemplates that the actual application must be filed within five days of leave being granted.[21]

My review of the various leave applications suggests that the applicants will seek to challenge the Order in Council both on grounds internal to the order itself as well as on grounds that will seek to question the validity or sufficiency of the JRP report on which the Order in Council is based.[22] As to the first, many of applications contest the validity of the Order in Council on the grounds that the Governor in Council failed to provide reasons in support of the Order as required by s.54(2) and specifically with respect to the conclusion that the significant environmental effects of the project on woodland caribou and grizzly bear are justified in the circumstances.[23] Others allege that the Crown generally breached its duty to consult and accommodate First Nation interests[24] (or failed to obtain consent or established constitutional justification for not doing so).[25] As to the second, the different applicants focus on various aspects of the JRP's report in suggesting that it fails to meet the requirements of either or both of *NEB Act* or *CEAA, 2012*. For example, BC Nature's application refers to the JRP's reasoning for the conclusion that the significant impacts on grizzly and caribou could be justified but also, for example, to the JRP's treatment of cumulative effects for marine birds.[26] Other parties chose to emphasise that the JRP had failed to take account of the upstream environmental effects of oil sands exploration and production activities as well as the fate of spilled bitumen in marine areas,[27] while others have suggested

16 *Federal Court Act,* RSC 1985, c F-7.

17 The Directions are available on the NEB's website, online: NEB <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2485286&objAction=browse&viewType=1>.

18 *Forestethics Advocacy Association, Living Oceans Society and Raincoast Conservation Foundation v. Attorney General of Canada, National Energy Board and Northern Gateway Pipelines Inc* , 2014 FCA 182.

19 *Ibid* at para 13.

20 *Ibid* at para 26, and thus, for this and other reasons, Justice Stratas declined to grant Northern Gateway's request that it be allowed to file a more extensive memorandum of fact and law than contemplated by the Rules of Court.

21 Direction of July 3, 2014 at para 14.

22 Richard Neufeld QC counsel for Enbridge and Chris Tollefson counsel for BC Nature kindly provided me with copies of the pleadings.

23 It should be noted that these are two separate grounds. See BC Nature's notice of motion for application for leave to seek judicial review of the Order in Council, at paras 29 – 40; paras 41 – 61.

24 *Haida Nation*, *Notice of Motion*, at para 15; Martin Louie on behalf of Nadleh Whut'en, *Notice of Motion,* at paras 37–54.

25 Gitga'at Notice of Motion at paras 25 – 28 and evidently drawing on the Supreme Court of Canada's judgement in *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44.

26 BC Nature's application for leave to seek judicial review of the Order in Council, at para. 67 and BC Nature's application for leave to appeal the JRP at paras 32 et seq.

27 Application of Forestethics Advocacy Association, Living Oceans Society and Raincoast Conservation Foundation for leave to appeal the JRP report at paras 33 – 35 and 38 – 40. For further exploration of the upstream activities point see Martin Olszynski, "The Not Quite Twelve Days of Northern Gateway" Ablawg, January 15, 2014 available here http://ablawg.ca/2014/01/15/the-not-quite-twelve-days-of-northern-gateway/

that the JRP failed to take a precautionary approach in its assessment of the evidence.[28] Finally, some of the First Nation applicants critique the JRP for failing to properly assess the impact of the project on cultural heritage or more generally that it failed to take into account the effect of the project on aboriginal rights and interests in its assessment of public interest[29] as well as for its failure to address the inadequacy of Crown consultation,[30] or more generally for its failure to uphold the honour of the Crown.[31] Thus the applicants will seek to question both the conduct and decision of the JRP as well as that of the Crown generally or more specifically the Governor in Council.

Comments

It is of course too early to assess what the outcome will be of all of these proceedings. I am, of necessity, finalizing this comment just before the leave to seek judicial review applications will be heard in the summer of 2014. Several comments however are in order. First, the 2012 amendments to the *NEB Act* were designed to ensure ultimate political accountability for pipeline decisions under *NEB Act* and thus designed to remove the provision under the old legislation which allowed the NEB to make a final decision to *reject* a pipeline application (a decision to *approve* an application always required the concurrence of the Governor in Council). While the government has achieved this result it has in the course of doing so created significant complexity as to the role of the other branch of government, the Court, in supervising all of this. In particular, the amendments have created two opportunities for judicial supervision of the proceedings, first with respect to the NEB\JRP recommendations to cabinet, and second with respect to the review of the Order in Council (and perhaps a third locus is the NEB's certificate of public convenience and necessity issued in response to the Order in Council). The complexity is enhanced by the adoption of different terminology (judicial review as opposed to appeal) for the judicial supervision of the Order in Council – possibly engaging different standards and grounds of review. Second, at least to this point, the Federal Court has handled the complexity with some dexterity by ordering consolidation and by putting the requests to review the JRP report on hold until the applications to review the Order in Council have been dealt with. This makes sense since, as noted above, some if not all of the applications under s.55 of *NEB Act* also question aspects of the JRP Report. Third, while it may be difficult to characterize some of the attacks on the JRP Report and\or the Order in Council as giving rise to questions of law or jurisdiction, the argument about the absence of reasons accompanying the Order in Council would seem to raise a pure point of law. One of the issues that will need to be dealt with here is whether the same rules on "reasons" apply to the Governor in Council in drafting an Order in Council as apply to more conventional administrative tribunals which have a statutory duty to provide reasons. But regardless of how that is resolved on the merits it is a question on which we should expect leave to be granted. The same must be true of at least some of the claims made by First Nations especially in light of the Supreme Court's recent decision in *Tsilhqot'in Nation v British Columbia.*[32] There is no case law on the test for leave under s.55 of *NEB Act* but the applicants are surely on strong ground in asserting that the threshold is low and requires them only to show an arguable case related to at least one head of s.18.1 of the *Federal Court Act*. ■

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28 Application of Haisla Nation for leave to appeal the JRP Report, at para 21 [*Haisla Nation*]; Application of Gitxaala Nation for leave to appeal the JRP Report at paras 77 – 79 [*Gitxaala Nation*].

29 *Haisla Nation, ibid* at paras 18,23; Application of Gitxaala Nation for leave to appeal the JRP Report, at para 74.

30 *Gitxaala Nation, ibid* at para 71.

31 Application of Gitga'at Nation for leave to appeal the JRP Report, at para 37.

32 *Supra*, note 25. It seems well understood in the jurisprudence that the existence of the duty to consult and accommodate and the intensity of the consultation required gives rise to questions of law and the standard of correctness the assessment of the actual consultation and accommodation engaged in by the Crown gives rise to mixed questions of law and fact and the standard of reasonableness: *Haida Nation v British Columbia (Ministry of Forests)*, [2004] 3 SCR 511 and *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43.

ALBERTA UTILITIES ASSET DISPOSITION DECISION

*James H. Smellie**

I Introduction

In November 2013, the Alberta Utilities Commission (AUC) issued its Utility Asset Disposition (UAD) decision following a generic proceeding convened in order to establish the principles that should apply to the disposition of utility assets in Alberta, including the question of stranded asset risk, in light of the Supreme Court of Canada's 2006 decision in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board),* the *Stores Block* case.[1]

Prior to the *Stores Block* decision, the Alberta regulator had approached the issue of allocating any gain on the sale of a utility asset outside the normal course of business – which dispositions require its approval, as a matter of law – on two basic premises:

i. If the proposed disposition would harm utility customers, the gain could be used in whole or in part as a credit to rates or otherwise distributed to customers to mitigate that harm;

ii. If no harm would be occasioned to customers, any excess sale proceeds over the original cost of the asset would be shared on a formulaic basis between the utility's customers and its shareholders.

The *Stores Block* decision changed this. In its 4-3 decision dismissing an appeal from the Alberta Court of Appeal, the Court addressed the ratemaking jurisdiction of the Alberta Energy and Utilities Board (EUB).[2] The Court determined that where the sale of an Alberta utility asset by ATCO Gas outside the normal course of business does not cause harm to customers, the regulator has no explicit or incidental jurisdiction to allocate any portion of the sale proceeds to customers. The essence of the decision lay in the principal conclusion that customers of a regulated utility have no property interest in the asset to be disposed of, and which was used to provide them with utility service.

Since the *Stores Block* decision, the Alberta regulator and Court of Appeal have grappled with numerous questions arising in relation to it, which have been the subject of frequent and diverse comment.[3] These have included the continued inclusion of assets in utility rate base; what amounts to a disposition requiring regulatory approval; whether dispositions in the normal course are any different; and the treatment of the costs of an asset once it is withdrawn from service.

Along the way, the Alberta Court of Appeal has determined, at least in the context of gas utilities, that here is no such thing as a 'dedicated' rate base, having regard to the requirement that

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

2 The successor to the EUB, and current Alberta regulator, is the Alberta Utilities Commission.

3 See, for example, Prof. Alice Woolley's analysis of *Stores Block* and its implications at Alberta Law Review, 2006 Volume 44, No 2.

assets must be used or required to be used in utility service (*Carbon*[4]); that an asset no longer required for utility service must be removed from rate base (*Harvest Hills*[5]); that regulatory approval of a disposition requires that there be a sale or transfer of interest by the utility (*Harvest Hills)*; and that it is for the regulator to determine which assets are used or required for use in utility service and as such, to be included in rate base (*Salt Caverns #1*[6]).

During this same period, in the course of exercising its authority over utility rates, the Alberta Utilities Commission (AUC or Commission) has concluded that it would be unreasonable for a utility to pass on any costs of an asset that is not used or required to be used to provide gas utility service.[7]

It is in this context that the Commission approached the issue of utility asset dispositions.

II The UAD Decision[8]

Principles

The AUC first initiated the UAD proceeding in April 2008 – prior to many of the above-referenced cases - on the premise that *Stores Block* "may require reconsideration of certain aspects of traditional regulatory approaches to the acquisition and disposition of utility assets and to the setting of just and reasonable rates."

In the Commission's view, this warranted having all parties involved in a single proceeding to discuss their interpretations of *Stores Block* and their view of its implications for regulation in Alberta, and to assist the AUC in developing a consistent and principled approach to its application.

The proceeding was suspended in November 2008, given that certain issues related to *Stores Block* had by then found their way to the Alberta Court of Appeal. Once these issues were decided in *Harvest Hills* and *Salt Caverns #1*, the generic UAD proceeding continued.

Prior to the resumption of the process, the AUC rendered its decision on the approved generic return on equity for utilities for 2011.[9] The Commission rejected a suggestion that utility ratepayers should be at risk for stranded transmission facility assets. Relying on *Stores Block*, the Commission found that any stranded assets not required to provide service must not remain in rate base, and that the utility is at risk for any outstanding costs of those assets.

In the UAD decision, the AUC first canvassed *Stores Block* and numerous Alberta and other decisions in order to derive a number of principles that it believed to have been established by such decisions. It bears noting that *Stores Block* and the other Alberta decisions supporting the AUC's principles concerned the regulatory scheme under Alberta's *Gas Utilities Act* (GUA).

In summary, the relevant principles identified by the AUC were as follows:

1. The Commission's authority is derived from its enabling statutes and is limited by its rate setting function or mandate.
2. Disposition of a gas utility asset outside the normal course of business is governed by the no harm test.
3. Utility assets are the property of the utility; its shareholders bear the risk of, and are entitled to, the net proceeds of their disposition.

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4 *ATCO Gas and Pipelines Ltd. v Alberta (Energy and Utilities Board),* 2008 ABCA 200 (leave to appeal to SCC refused).
5 *ATCO Gas and Pipelines Ltd. v Alberta (Energy and Utilities Board),* 2009 ABCA 171 (leave to appeal to SCC refused).
6 *ATCO Gas and Pipelines Ltd. v Alberta (Energy and Utilities Board),* 2009 ABCA 246 (leave to appeal to SCC refused).
7 Albert Utilities Commission, *ATCO Gas 2011-2012 General Rate Application Phase I*, Decision 2011-450, (5 December 2011), at paras 319-320, online: AUC <http://www.auc.ab.ca/applications/decisions/Decisions/2011/2011-450.pdf >.
8 Alberta Utilities Commission, *Utility Asset Disposition* Decision 2013-417, (26 November 2013), online: AUC <http://www.auc.ab.ca/applications/decisions/Decisions/2013/2013-417.pdf>.
9 Alberta Utilities Commission, 2011*Generic Cost of Capital,* Decision 2011-474 (8 December2011), online: AUC <http://www.auc.ab.ca/applications/decisions/Decisions/2011/2011-474.pdf>.

4. Conditions may be imposed on a disposition if there is a close and immediate connection between the sale and a need to replace the asset.
5. The term "used or required to be used" in the GUA means operational use and refers to assets currently and reasonably used and likely to be used in the future to provide utility services. Past use does not guarantee continued inclusion in rate base.
6. The AUC has no authority to include assets in rate base that are not used or required to be used, and revenue generation is not a sufficient basis to do so.
7. The AUC has the responsibility to determine utility rate base and which assets are or are still relevant investment on which a return may be earned.
8. Gas utilities may remove an asset from their rate base that is not used or required to be used, subject to the AUC disallowing recovery of the financial impacts of such removal if it was imprudent.
9. Gas utility assets not having an operational purpose and not used or required to be used to provide utility service, no matter their historical use, should be removed from rate base and not reflected in customer rates, on the earlier of the date of the utility's advice to the AUC or its determination that such asset is not required.

Findings

With these principles in mind, the Commission then addressed the various issues that had been identified for discussion in the UAD proceeding.

(i) Application of *Stores Block*

The Alberta Utilities[10] argued that *Stores Block* did not address or deal with disposition of assets in the ordinary course, or retirements, and the Commission's uniform accounting systems for all utilities dealt with such dispositions: on the sale or retirement of an asset in the normal course, ratepayers are entitled to the gain or loss on the depreciable portion of the invested capital, and shareholders to the non-depreciable portion.

The AUC found that the property and utility asset ownership principles established by *Stores Block* apply to all utility assets, whether they are disposed of outside or inside of the normal course. This is not surprising; as the AUC noted, customers cannot reasonably have no interest in certain assets depending on the character of their disposition. As the Commission said, any other conclusion would mean or at least imply that customers would have acquired some sort of interest in the utility asset, contrary to *Stores Block.*

The Commission also found that such principles are equally applicable to dispositions of assets by Alberta's electric utilities.

(ii) Inclusion of Assets in Rate Base

The AUC affirmed the various decisions that establish that utility assets should only be included in rate base if they continue to be used or required to be used for utility service. The Alberta Utilities argued, however, that electric utilities are not subject to this regime, as the *Electric Utilities Act* (EUA) requires a utility to be given the opportunity to recover prudently incurred costs and a reasonable return on investment, irrespective of whether an asset meets the used or required to be used criterion. The Commission rejected this argument, concluding that it conflicted with the property ownership principles laid down in *Stores Block.*

That being the case, the Commission had no difficulty that the referenced decisions and rationale would apply equally to electric utilities, and that they too must not include in rates any costs of assets no longer used or required to be used for utility service.

[10] AltaGas Utilities Inc., AltaLink Management Ltd., ATCO Utilities, ENMAX Power Corporation, EPCOR Distribution & Transmission Inc., FortisAlberta Inc.

The next question to be addressed was whether the Commission could deal with gains or losses on assets in a different way, depending upon the circumstance in which they cease to provide utility service.

(iii) Depreciation

The AUC reiterated that the purpose of depreciation is to return to the utility the costs of assets used to provide utility service over the period of time of that use, and that the current Alberta methodology includes provision for the recovery of the costs of assets retired or removed from utility service and assets disposed of in the normal course. This conclusion stemmed from the premise that the AUC's rate setting function extends to establishing methods of depreciation regarding prudent utility investment.

The only questions of concern were then whether that method complies with *Stores Block* and subsequent cases, and whether the AUC's rate making authority goes so far as including a provision that prospectively charges or refunds depreciation adjustments resulting from prior year's over or under recovery of depreciation.

As to the first question, the Commission concluded in the affirmative, but also found that the depreciation methodology in use by the majority of Alberta's utilities was informed by the *Store Block* principles. As such, the AUC noted that the effect of this method is to "remove from rate base and customer rates depreciable assets that are no longer used or required to be used to provide utility service."

As to the second question, the AUC found that having customers pay depreciation reserve differences is not inconsistent with the principles of shareholder risk and removal of assets from service, because it results in customers paying "no more and no less, and the utilities recovering "no more and no less" than the costs of the assets used to provide utility service over the period of that service.

(iv) Stranded Asset Costs

The Commission then turned to the important question of the recovery of costs associated with and capital invested in stranded assets no longer used or required to be used to provide gas and electric utility service.

In the case of an ordinary retirement of an asset at the end of it service life, i.e. one that is reasonably contemplated by depreciation and amortization provisions, it is removed from rates, given that its cost will have been recovered from customers during that time, or as may be adjusted after the fact.

In the case of the extraordinary retirement and removal from rates of an asset before it is fully depreciated, for causes not reasonably anticipated or contemplated in applicable depreciation and amortization provisions used to set rates (such as obsolete, abandoned, overdeveloped or surplus property), under or over recovery of capital investment on an extraordinary retirement is for the account of the utility and its shareholders. In other words, extraordinary retirements are to be dealt with similarly to assets disposed of by a utility outside the normal course of business.

(v) Operational Purpose

The Commission solicited submissions from parties as to how it might obtain periodic assurance that assets are used or required to be used in the operational sense – that is, present use, reasonable use or likely use in the future to provide utility service.

Given the Alberta Court of Appeal's finding in *Carbon* that used or required to be used implies use in an operational sense, and its clear direction in *Salt Caverns #1* that relevant utility investment is for the Commission to determine, the AUC directed each utility to review their rate base and confirm in their next rate filing that:

> (a) All assets in their rate base continue to meet the operational use requirement – that is, are used or required to be used to provide utility service, and
>
> (b) Do not include any depreciable assets which should be treated as extraordinary retirements and removed, because they are

property that: is obsolete; to be abandoned; is overdeveloped and surplus to future needs; is used for non-utility purposes; or should be removed due to unusual casualty, sudden and complete obsolescence, or unexpected and complete shutdown of an entire asset, with the costs thereof being for the account of the utility and its shareholders.

III Post-UAD Decision Developments

Applications for Leave to Appeal

The Alberta Utilities moved quickly to challenge the UAD decision by seeking leave from the Alberta Court of Appeal on several questions of law and/or jurisdiction.[11] AltaGas and ATCO Gas, along with the electric utilities – AltaLink, ATCO Electric, ENMAX, EPCOR and FortisAlberta - challenged various aspects of the UAD Decision.[12] The applications were heard on April 17, 2014 and as at the time of writing, are still under reserve.

Amongst the comprehensive grounds for appeal tabled by the Alberta Utilities, they have argued that the Commission erred in its UAD decision because:

1. The common law and legislative right of a utility to recover its prudently incurred costs, including at least a return of capital, as a result of its mandatory obligation to serve, is not affected by *Stores Block*.
2. The EUA specifically revoked the rate base paradigm and used or required to be used standard for electric utilities in favor of the principle of recovering prudently incurred costs, regardless of whether the assets continue to be used or required to be used. Applying that standard to electric utilities is in breach of the EUA.
3. *Stores Block* was only concerned with the allocation of sale proceeds arising from the disposition of gas utility assets outside the normal course of business (not in the normal course of business), did not consider the EUA regime at all, and is irrelevant to the recovery of prudently incurred costs by a utility.
4. Alberta's electric transmission facility owners are required by the EUA to build facilities on the direction of the Alberta ISO (once regulatory approval is given), regardless of their scope. Alberta's electric distribution facility owners are required by the EUA to connect and serve customers. TFO and DFO rates that do not include the recovery of costs prudently incurred are therefore neither just nor reasonable. Just and reasonable rates for gas utilities must include the recovery of their prudently incurred costs.
5. The AUC's recognition in the 2011 GCOC decision that the requirement to remove assets from rate base could pose additional risk for utilities was reached without providing utilities with any opportunity to provide evidence as to their fair return in light of this determination. As such, the UAD decision and fairness require the record of that proceeding to be re-opened to allow the utilities a fair opportunity to ensure that their fair return for those years reflects such additional risk.
6. Alberta's utilities cannot be governed by legislation that assures a reasonable opportunity to recover prudently incurred costs while at the same time being exposed to having that opportunity unreasonably curtailed by their regulator.

Salt Caverns #2

Shortly following the release of the UAD Decision and before the UAD leave applications were heard, the Alberta Court of Appeal, in a decision that again dealt with the Salt Cavern assets of ATCO Gas, essentially confirmed a

11 Pursuant to subsection 29(1) of the *Alberta Utilities Commission Act,* SA 2007, c A-37.2

12 The City of Calgary and the Utilities Consumer Advocate opposed the applications for leave.

number of important aspects touched on by the AUC in the UAD decision.

The Court again affirmed that assets not used or required for use in an operational utility sense should not be included in rate base, and that the final say in this respect is precisely the mandate of the AUC. Moreover, the Court found that if utility customers cannot share in the benefits of asset sales, there is a need to protect them by ensuring that only proper assets are included in rate base. Quoting from the majority decision of the Court:

"Since the authorities have established that ratepayers cannot share in any of the sales of assets, it follows that holding property within the rate base, once its use has expired, works to the detriment of the ratepayer. The recent principles set down in Stores Block and Carbon make it clear that ratepayers have no opportunity to share in the better times when land values rise, so it is important to protect the ratepayer by ensuring only proper assets remain in the rate base. In judging reasonableness, it is important to remember that since ratepayers cannot share in sale proceeds of utility assets, their protection for fair treatment lies in excluding assets not required for utility operations from the rate base."

In light of the fact that Court of Appeal seems to have settled on a number of the key principles related to asset disposition by utilities in Alberta, and the consequences of same based initially but not entirely on the *Stores Block* decision, it may be the case that some of the arguments raised in the UAD leave applications will not find favour with the Court.

That said, at least the following issues and questions appear to be outstanding:

- How strong is the principle of prudent cost recovery by utilities and does it trump the legislative regime for utilities in Alberta, at least as interpreted by the AUC?
- On their face, the Alberta legislative regimes concerning gas and electric utilities differ in some material respects. Is it the case that there is a sufficient difference to warrant a different form of regulatory compact for each? Should there be and what would they look like?

IV Conclusion

The UAD decision is a recent, but unlikely the last chapter in the evolution of regulatory oversight as it relates to the treatment of utility assets in Alberta, including their disposition in various circumstances. That evolution, beginning with *Stores Block*, has extended well beyond the narrow jurisdictional point decided in that case as to the authority of Alberta's regulator to allocate sale proceeds on the disposition of a gas utility outside the ordinary course of business.

The UAD decision, unsurprisingly, affirmed and adopted many of the intervening judicial principles and findings of the Alberta Court of Appeal. Going beyond those decisions, however, the Commission's determination that utilities and their shareholders are at risk for the cost consequences of extraordinary retirements, that are not reflected or otherwise anticipated in the depreciation provisions upon which customer rates are established, is a matter of no small moment.

In the event that leave is not granted to the Alberta Utilities in their respective challenges of the UAD decision, then a significant change in the regulation of Alberta utilities – which some commentators have specifically advocated - will have occurred. [13] No longer will the AUC consider the treatment of utility assets only at the time of their disposition, but instead, as directed in the UAD decision, this will be an ongoing review associated with utility rate regulation, in the normal course.

But should leave be granted, then we will again have to look to the Alberta Court of Appeal, and perhaps the Supreme Court of Canada, for the next step in this continuing evolution.

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13 See Prof. Alice Woolley's case comment on *Harvest Hills, A Rock and a Hard Place* (19 May 2009), online: ABlawg.ca <http://ablawg.ca/2009/05/19/a-rock-and-a-hard-place/>.

V Update

It would appear that the evolution will continue. On August 20, Justice Bruce McDonald of the Alberta Court of Appeal granted leave to appeal the UAD decision brought by the Alberta Utilities.

Justice McDonald first acknowledged that the applications had been brought by two "categories" of applicants: gas utilities and electric utilities. In that regard, he was "less swayed" by, and confessed to having some "misgivings" about the arguments and applications of the gas utilities.

Nevertheless, on the well-established test for leave to appeal – does the question of law or jurisdiction raise a serious, arguable point – Justice McDonald granted leave to both the electric and the gas utilities, on the following questions:

Electric Utilities:

"Did the AUC err in law or jurisdiction in its interpretation of the EUA to hold that the shareholders of electrical utilities bear the risks that the electrical utilities will not be able to recover the prudently incurred costs of assets no longer used or required to be used by the electrical utility?"

Here, the apparent differences between the pertinent provisions of the governing GUA and EUA were persuasive in deciding to grant leave.

Gas Utilities:

"Did the AUC err in law or jurisdiction by concluding that it must deny gas utilities the opportunity to recover their prudently incurred costs in the provision of mandated utility services when those assets are removed from utility service in the circumstances as described in paragraph 327 of the UAD Decision?"[14]

Having noted the concession by the gas utilities that the GUA does differ from the EUA, it was at least seriously arguable to Justice McDonald that the issue of prudent cost recovery warranted consideration by the full court.

Electric and Gas Utilities

"Did the AUC err in law or jurisdiction in the GCOC Proceeding and/or in the UAD Proceeding by denying the Alberta Utilities or any of them the opportunity to provide evidence and submissions on the impact of the AUC's imposition of a new prudent cost recovery risk on their fair return for the years 2011 and 2012, in light of the enhanced risks?"

Given the complex history of this issue, it is interesting that the Court, at least at the leave stage, seems to have accepted the fact that in the UAD decision, the AUC created a "new prudent cost recovery risk." As to the particulars, it is perhaps notable that leave was granted on this question notwithstanding the arguments of the UCA that there was no procedural unfairness on the part of the AUC, and neither did the GCOC decision impose a new risk on them.

Whether prudent cost recovery risk emanated from the GCOC decision or the UAD decision, it seems for the moment at least to have a life, and to be an issue that may well be an explicit fact of life in the rate regulation of Alberta utilities. ■

[14] In paragraph 327 of the UAD decision, the AUC laid out the circumstances in which assets should be removed from utility service as extraordinary retirements.

THE PRUDENCE DOCTRINE GOES TO THE SUPREME COURT OF CANADA

ALBERTA AND ONTARIO APPEALS TO BE HEARD AT THE SAME TIME

*Gordon E. Kaiser, FCIArb**

It's not every day that a decision of a Canadian energy regulator goes to the Supreme Court of Canada. It is even rarer when two go together from different provinces on essentially the same issue.

The issue in these cases is the prudence doctrine. This is a time-honored concept first established in the United States Supreme Court in 1923 by Justice Brandeis in Southwestern Bell.[1] Canadian courts and regulators have affirmed the Rule over the decades.

The established principle is this - if a utility makes investment that is prudent, it is entitled to recover the costs in rates.[2] There is a presumption that investments are prudent unless there's countervailing evidence.[3] And the determination of whether a decision is prudent must be based on the facts known to utility the time the investment was made. In other words hindsight cannot be used.[4]

For utilities this is an article of faith. Courts have long recognized the need to balance the interests of consumers and investors. And the prudence doctrine is one of the fundamental protections for investors. Two recent cases, the *Power Workers* case in Ontario[5] and the *ATCO Gas* (ATCO) case in Alberta[6] question the principle.

Before looking at these decisions, it is useful to remember that two things changed over the decades. These two factors may have a bearing on the outcome in these two cases.

The first is that courts in Canada and the United States now give greater deference to regulators[7]- particularly to sophisticated regulators like Energy Boards that manage billions of dollars of investment in a critical industry. This deference

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1 *Southwestern Bell Telephone Company v Public Service Commission*, 262 US 276 (1923).

2 *Enbridge Gas Distribution Inc. v Ontario Energy Board* (2006) 10 OAC 4 (Ont CA) [*Enbridge*]; *ATCO Electric v Alberta Energy and Utilities Board*, 2004 ABCA 215 [*ATCO Electric*]; *TransCanada PipelinesLimited v National Energy Board* (2004) FCA 149 [*TransCanada*].

3 *ATCO Gas v Alberta Energy Utilities Board*, 2005 ABCA 122.

4 *Enbridge*, *supra* note 2.

5 *Power Workers Union v Ontario Energy Board*, 2013 ONCA 359, 116 OR (3rd) 793 [*Power Workers*].

6 *ATCO Gas Ltd and ATCO Electric Ltd v Alberta Utilities Commission*, 2013 ABCA 310.

7 *Newfoundland and Labrador Nurses Union v Newfoundland and Labrador Treasury Board*, 2011 SCC 62, [2011] 3

now covers not just the facts but also the legal interpretation of the Boards home statutes.[8]

The second factor that has changed is that rate setting throughout North America is now done on a forward test year basis. In the old days regulators looked at past costs. The question arises - does the same rule apply where regulators have only disallowed a certain portion costs going forward? Some argue that regulators are not violating the prudence rule because the utility can manage those costs going forward.

That discussion is present in both of these appeals.

There is another issue. How important is it if the decision regarding the cost was previously made by a third-party that was empowered to do so? That wildcard is also present in both of these cases.

In *Power Workers* the Ontario Energy Board (the Board) denied Ontario Power Generation (OPG) recovery of $145 million of the utilities $2.8 billion compensation costs over a two-year forward test year. Those costs were driven by collective agreement the utility had entered into with the *Power Workers* union, and that process involved an independent arbitrator.

Both the labor union and the utility argued that the Board was required to presume that the compensation costs were prudent. The Board disagreed and found it could rely on benchmarking studies comparing the performance of the utility with similar companies. These studies, which had been mandated by the Board in a previous case, showed high staffing levels, excessive compensation and poor performance at OPG facilities. As a result the Board disallowed $145 million of costs.

The Board recognized the constraints imposed by OPG's union but nonetheless held that ratepayers were only required to bear reasonable costs. The Board's decision was appealed to the Ontario Divisional Court which upheld the $145 million reduction although one member of the court dissented.[9] The Court held that the Board must have the freedom necessary to consider current compensation comparators in order to perform its role in protecting ratepayers.

The Board's decision was overturned by the Ontario Court of Appeal which held that the costs were committed costs fixed by collective agreements. The Appeal Court held the Board had acted unreasonably by using hindsight market comparison information. In short the Board had not applied the prudent test properly.

The *ATCO Gas* case in Alberta is similar to the *Ontario Power Workers* case. There, the utility had applied to the Alberta Utilities Commission (the Commission) to levy a special charge on ratepayers to cover unfunded pension liabilities of $157 million. Those costs included a cost-of-living allowance that was set in advance each year by an independent plan administrator. In the past that allowance had been set at 100 per cent of the Consumer Price Index (CPI). The Commission had never faced the issue before because the liability had been funded and a special charge to ratepayers had not been required.

Now that there was an unfunded liability, the Commission had to consider if the cost of living index was too rich. The utility argued it was a committed cost set by an independent authority. The Board disagreed and reduced the recoverable cost of living allowance to 50 per cent of CPI. The Commission relied on evidence that 100 per cent of CPI was high by industry standards. The Commission also held that any legal constraints on the Plan Administrator did not justify passing excessive costs on to ratepayers.

ATCO appealed to the Alberta Court of Appeal which upheld the Commission decision.
The utility argued that their decision to use

SCR 708; *Alberta v Alberta Teachers Association*, 2011 SCC 61, [2011] 3 SCR 654.

8 *Nor-Man Regional Health Authority Inc. v Manitoba Association of Healthcare Professionals*, 2011 SCC 59, [2011] 3 SCR 616.

9 *Power Workers, supra* note 5.

100 per cent index was not only prudent but required. ATCO further argued that the comparator data was hindsight information that violated the accepted prudence rule.

The Court disagreed with ATCO Gas stating that the statute did not mandate the use of the prudent investment test with respect to the price index. The Court further stated that the decisions of the Commission were entitled to deference. The Court rejected the ATCO argument that the 100 per cent index must be presumed to be prudent because it was fixed earlier by independent third-party. Moreover, the Court ruled that the Commission was not limited to examining the prudence of the cost based only on the facts known at the time.

Given the similarity on both the facts and the legal issues in these two cases, it's not surprising that the Supreme Court of Canada granted leave to appeal. The two appeals will be heard together in a hearing scheduled for December 2014. This will be the first Supreme Court of Canada's decision on an important principle of public utility law since Stores Block[10] decision eight years ago. The result could have a major impact on energy regulation across North America. ■

10 *ATCO Gas and Pipeline Ltd v Alberta Energy and Utilities Board*, 2006 SCC 4, [2006] 1 SCR 140.

ALBERTA DECISION IN *MARKET SURVEILLANCE ADMINISTRATOR V. TRANSALTA*

*Nigel Bankes**

Decision commented on: AUC Decision 2014-135[1], TransAlta Corporation, TransAlta Energy Marketing Corp., TransAlta Generation Partnership, Mr. Nathan Kaiser and Mr. Scott Connelly; Complaints about the conduct of the Market Surveillance Administrator, May 15, 2014

The Alberta Utilities Commission has now ruled in what is likely the first of many procedural challenges in the hotly contested litigation between the Alberta Market Surveillance Administrator and TransAlta. The litigation turns on very serious charges of market manipulation.

Is it possible to ensure a competitive electricity market in Alberta? This is I think the broad issue that underlies the current proceedings before the Alberta Utilities Commission (AUC) involving the Market Surveillance Administrator (MSA) and TransAlta (TAU). Several months ago the MSA filed with the AUC notice of a request to initiate a proceeding against TAU and two of its current or former employees, Kaiser and Connelly (K & C). In brief the MSA is charging these parties with unlawfully manipulating the price of electricity as set by Alberta's power pool to the advantage of TAU in breach of the Electric Utilities Act, SA 2003, c E-5.1 and the Fair, Efficient and Open Competition Regulation, Alta Reg 159/2009. The MSA seeks to prosecute those charges before the AUC as contemplated by the Alberta Utilities Commission Act, SA 2007, c A-37.2 (AUCA). Days before the MSA took this action TAU, K and C seized the moment and filed their own complaints with the AUC under s.58 of the AUCA alleging that the MSA was abusing its position. To be clear, TAU and K and C knew what was in store for them. The MSA had informed TAU three years ago (March 2011) that it was commencing an investigation and it has spent the time in between diligently collecting information from TAU and building its case. The MSA provided TAU with the draft case against it in November 2013. It is fairly evident therefore that the preemptive filing by TAU, K and C was a strategic effort to seize the initiative, put the MSA on the defensive, and perhaps seek to have the complaints against the MSA heard before the MSA's own case.

And that was the specific issue that was at stake in this set of preliminary proceedings: could TAU, K & C hijack the MSA's application? The AUC, in my view correctly, has concluded that it cannot.

The legal issue

The legal issue at stake in this preliminary proceeding turns on the proper interpretation of s.58 of the AUCA. That section provides as follows:

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1 Alberta Utilities Commission, *TransAlta Corporation, TransAlta Energy Marketing Corp., TransAlta Generation Partnership, Mr Nathan Kaiser and Mr Scott Connelly: Complaints about the conduct of the Market Surveillance Administrator* (15 March 2014), online: AUC < http://www.auc.ab.ca/applications/decisions/Decisions/2014/2014-135.pdf >.

> 58(1) Any person may make a written complaint to the Commission about the conduct of the Market Surveillance Administrator.
>
> (2) The Commission
>
> (a) shall dismiss the complaint if the Commission is satisfied that it relates to a matter the substance of which is before or has been dealt with by the Commission or any other body, or
>
> (b) may dismiss the complaint if the Commission is satisfied that the complaint is frivolous, vexatious or trivial or otherwise does not warrant an investigation or a hearing.
>
> (3) The Commission may, in considering a complaint, do one or more of the following:
>
> (a) dismiss all or part of the complaint;
>
> (b) direct the Market Surveillance Administrator to change its conduct in relation to a matter that is the subject of the complaint;
>
> (c) direct the Market Surveillance Administrator to refrain from the conduct that is the subject of the complaint.
>
> (4) A decision of the Commission under subsection (2) or (3) is final and may not be appealed under section 29.

The focus here was on the mandatorily framed s 58(2)(a). That provision and the facts of these proceedings gave rise to two principal points of statutory interpretation: (1) Is the relevant time for applying this paragraph the time that the written complaints were filed (at which time there was no MSA proceeding) or when the matter came to be determined by the AUC? (2) Were the complaints and the MSA's own application "related"?

In answering these two questions the AUC was careful to examine the ordinary and grammatical meaning of the relevant provisions and to consider them within their entire statutory context and legislative intent noting as well that it should avoid adopting an interpretation which led to an absurdity of inconsistency. The AUC's concluding observations on statutory context and legislative intent are worth quoting at length:

> [66] When read as a whole, the Commission finds that the statutory scheme makes clear the fundamental importance of establishing and maintaining an electricity market that is fair, efficient and openly competitive. The scheme establishes the MSA as the market watchdog with one of its primary goals being the protection of the fair, efficient and openly competitive operation of the electricity market. The MSA is given broad powers to carry out this role. The Commission considers that those broad powers reflect the fundamental importance of preserving or maintaining a fair, efficient and openly competitive market.
>
> [67] The Commission notes that the MSA's exercise of its authority over market participants is not unlimited and is subject to a number of checks. First, it has a statutory duty to act fairly, responsibly and in the public interest. Second, it is required to consult with market participants with respect to its investigation procedures and any guidelines it makes under Section 39(4) of the Alberta Utilities Commission Act. It cannot change existing procedures or guidelines without consultation. Third, the MSA concerns about the conduct of market participants are subject to the Commission's oversight. Fourth, a person who has a concern about the conduct of the MSA may make a complaint about that conduct.
>
> [68] The statutory scheme places the Commission in a supervisory role over the activities and conduct of the MSA.

> The Commission not only rules on matters brought before it by the MSA but also rules on complaints relating to the conduct of the MSA. Importantly, neither the MSA nor a complainant is entitled to appeal a decision of the Commission on a complaint.[2]

As to the purpose of s 58(2)(a), the AUC emphasized that the paragraph is not concerned with the merits of the complaints (that is the office of the discretionary paragraph (b)), instead, the purpose of paragraph (a)

> [86]… is to address the conflicts that could arise in circumstances where a complaint and a matter brought forward by the MSA are premised on common issues. Specifically, the Commission finds that subsection 58(2)(a) embodies a number of common law doctrines designed to ensure the integrity, fairness and finality of the decision making process. Those doctrines include: abuse of process, collateral attack, issue estoppel, res judicata and lis pendens.[3]

This did not mean however that the statutory provision imported all of the technical rules associated with these common law doctrines. The AUC expressed the relevant test as follows: "the Commission finds that subsection 58(2)(a) requires it to dismiss a complaint about the conduct of the MSA if it is satisfied that there is a logical or reasonable connection between the complaint and a matter the essence or essential quality of which is, or has been before the Commission."[4] As to the question of whether or not the provision was operable even in the situation where the complainants filed first the Commission ruled as follows:

> [94] Because the purpose of subsection 58(2)(a) is to safeguard the electricity market while promoting a timely, fair, efficient, and final decision-making process, the Commission finds that an overly technical or literal reading of that subsection that precludes its operation when a complaint is made before the MSA initiates proceedings against the complainant would be contrary to Section 10 of the Interpretation Act and produce an absurd result. This is especially so given the MSA's practice of providing its facts and findings to a market participant prior to filing its notice commencing a proceeding against that market participant.
>
> [95] Accordingly, the Commission finds that to achieve the purposes described above it may dismiss a complaint under subsection 58(2)(a), even if the complaint is filed before the MSA files a notice under Section 51 of the Alberta Utilities Commission Act.[5]

This did not deprive the complainants of their day in court but it did mean that "the complainant's 'day in court' occurs within the context of the MSA initiated proceeding."[6] Furthermore "in the event that a matter raised in a complaint dismissed under subsection 58(2)(e) is ultimately not considered in the context of the associated MSA proceeding, a complainant may not be precluded from re-filing the complaint as it relates to the unaddressed matter."[7]

Applying the "logical or reasonable connection" test to the substance of the MSA charges and the three complaints the Commission had little difficulty in concluding that they covered common ground.[8]

The decision is not appealable (see s 58(4)) and it is therefore time now to get on with the merits of the MSA's charges - supported as they are

[2] *Ibid* at paras 66-68.
[3] *Ibid* at para 86.
[4] *Ibid* at para 96.
[5] *Ibid* at paras 94-95.
[6] *Ibid* at para 91.
[7] *Ibid* at para 93.
[8] *Ibid* at paras 107-116.

by what appear to be a number of "smoking gun" and self - congratulatory internal email exchanges within TAU (for details see the MSA's Application to the AUC filed on March 21, 2014 available on the AUC's website under File 0630). Any further delays will only serve to question the efficacy the MSA's supervision of Alberta's electricity market. ■

THE TSILHQOT'IN DECISION: THE SUPREME COURT CONFIRMS ABORIGINAL TITLE

*Richard King, Sylvain Lussier and Jeremy Barretto**

The importance of the recent Supreme Court of Canada ("SCC") decision in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (the "Decision") has not gone unnoticed, being variously referred to as "historic", a "game-changer" and a "landmark" decision.[1] Historic? Yes. A game-changer? Not necessarily. The Decision is historic because it is the first time that any Canadian court has formally declared that Aboriginal title exists. The SCC's reasoning and ultimate determination represents a reiteration of established law regarding Aboriginal title that has been developed over decades. Less headline-grabbing is the SCC's greater clarity on the important issue of the application of provincial laws and regulatory regimes on Aboriginal title lands. In addition, on its face, the Decision does not affect lands over which there are "assertions" of Aboriginal title, to which the Crown's duty to consult continues to apply.

The original claim was brought by Roger William, Chief of the Xeni Gwet'in First Nation, one of six First Nations making up the Tsilhqot'in people. The claim sought recognition of Aboriginal title to two tracts of mostly undeveloped land in the Tsilhqot'in traditional territory, located in a remote valley in central British Columbia.

The SCC released its Decision on June 26, 2014, allowing the Tsilqhot'in's appeal from the British Columbia Court of Appeal. As mentioned, it marked the first declaration of Aboriginal title by a Canadian court.

The Facts

The Tsilhqot'in people, a semi-nomadic grouping of six bands, have lived in part of central British Columbia for centuries. In 1983, British Columbia granted a commercial logging licence on land considered by the Tsilhqot'in people to be part of their traditional territory. The Tsilhqot'in objected and sought a court declaration prohibiting commercial logging on the land. Negotiations with the British Columbia government failed to resolve the dispute, and the Tsilhqot'in claim was amended to include a claim for Aboriginal title over 4,380 square kilometres – an area slightly smaller than Prince Edward Island, which comprises a small fraction of the Tsilhqot'in traditional territory. The federal and provincial

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1 See, for example: Amber Hildebrandt, "Supreme Court's Tsilhqot'in First Nation ruling a game-changer for all" (27 June 2014), online: CBC <http://www.cbc.ca/m/touch/news/story/1.2689140>; Canadian Press, "Historic land title ruling creates development 'uncertainty', report argues" (10 July 2014), online: CBC <http://www.cbc.ca/news/politics/historic-land-title-ruling-creates-development-uncertainty-report-argues-1.2702083>; and Tonda MacCharles,"Supreme Court grants land title to B.C. First Nation in landmark case" *The Toronto Star* (26 June 2014), online: The Star <http://www.thestar.com/news/canada/2014/06/26/supreme_court_grants_land_title_to_bc_first_nation_in_lanlandm_case.html>.

governments opposed the title claim, and in 1998, Chief William brought an action on behalf of the Tsilhqot'in against British Columbia and Canada.

The trial commenced in 2002 before the British Columbia Supreme Court and continued for 339 days over a span of five years. The trial judge heard extensive evidence from elders, historians and experts and spent time in the claim area. The Court held that "occupation" was established for the purpose of proving Aboriginal title by evidence showing regular and exclusive use of sites or territory. On this basis, the trial judge found that the Tsilhqot'in people were entitled to a declaration of Aboriginal title to a portion of the claim area as well as a small area outside the claim area.

On appeal, the British Columbia Court of Appeal held that the Tsilhqot'in claim to Aboriginal title had not been established. The Court of Appeal said that in the future, the Tsilhqot'in might be able to prove sufficient occupation for Aboriginal title for specific sites within the claim area where the Tsilhqot'in's ancestors intensively used a definite tract of land with reasonably defined boundaries at the time of European sovereignty. For the rest of the claimed territory, the Court of Appeal held that the Tsilhqot'in rights were limited to Aboriginal rights to hunt, trap and harvest.

SCC Decision

The SCC overturned the British Columbia Court of Appeal's narrow construction of Aboriginal title and occupation in favour of the trial judge's finding that the Tsilhqot'in had established Aboriginal title to the claim area at issue. The SCC held that a declaration of Aboriginal title should be granted for the claim area determined by the trial judge. Although the Decision is historic because it is the first time that any court has formally declared that Aboriginal title exists to a particular tract of land, the law relating to Aboriginal title has arguably been developing since the SCC affirmed Aboriginal rights to land in the 1973 decision of *Calder v. Attorney General of British Columbia*.[2] The *Calder* case gave rise to the modern era of treaty negotiations between the federal and provincial governments and those First Nations without treaties.

In its analysis, the SCC applied the test in *Delgamuukw v. British Columbia*[3] for Aboriginal title to land. The test requires that an Aboriginal group asserting title satisfy the following criteria: (i) the land must have been occupied prior to sovereignty; (ii) if present occupation is relied on as proof of occupation pre-sovereignty, occupation must have been continuous since pre-sovereignty; and (iii) at sovereignty, that occupation must have been exclusive. The trial judge in the *Tsilhqot'in* case found that the Tsilhqot'in occupation was both sufficient and exclusive at the time of sovereignty (as supported by evidence of more recent continuous occupation) and the SCC agreed with this conclusion.

Where Aboriginal title is not yet proven, the SCC affirmed the well-established requirement that the Crown has a constitutional duty to consult and, if appropriate, to accommodate the unproven Aboriginal interest. By contrast, where Aboriginal title has been established, the Crown must not only comply with its constitutional consultation obligation but also ensure that the proposed government action is substantively consistent with the requirements of section 35 of the *Constitution Act, 1982*.[4] At the time the commercial logging licences were granted, the Tsilhqot'in title claim had not yet been proven, and the SCC found that the honour of the Crown required the Province to consult with the Tsilhqot'in people on the uses of the lands, and accommodate their interests. By failing to do both, the Province breached the duty owed to the Tsilhqot'in.

Once established, Aboriginal title gives the right to exclusive use and occupation of the land for a variety of purposes. Importantly, the

[2] *Calder v Attorney General of British Columbia*, [1973] SCR 313, 34 DLR (3d) 145 [*Calder*].
[3] *Delgamuukw v British Columbia,* [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*].
[4] *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

usage and occupation rights are not confined to traditional or distinctive uses. Aboriginal title holders have the right to decide how land is used and the right to benefit from those uses, subject to the requirement that the uses must be consistent with the collective nature of the interest; this condition means that the Aboriginal title land cannot be dealt with in a way that would prevent future generations of the group from using and enjoying it. The SCC also said that once title is established, it may be necessary for the Crown to reassess its prior conduct and potentially cancel decisions that result in an unjustifiable infringement of Aboriginal title. The potentially retrospective nature of these comments from the SCC will likely be the subject of future litigation and interpretation.

Because Aboriginal title carries with it the right to control the land, governments and others seeking to use the land must obtain the consent of the Aboriginal title holder. If the Aboriginal title holder does not consent to the proposed use of the land, the government must establish that the proposed incursion on the land is justified under section 35 of the *Constitution Act, 1982*.

The SCC stated that in order to justify infringements of Aboriginal title on the basis of the broader public good, government must satisfy the infringement and justification framework originally set out in *R v. Sparrow*.[5] To justify an infringement of Aboriginal title, the government must show: (i) that it discharged its procedural duty to consult and accommodate; (ii) that its actions were backed by a compelling and substantial legislative objective; and (iii) that the governmental action is consistent with any Crown fiduciary obligation to the group. In discussing the interests potentially capable of justifying an incursion on Aboriginal title, the SCC referenced its previous 1997 decision in *Delgamuukw*:

> In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). **In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.** Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.[6]Provincial laws of general application apply to lands held under Aboriginal title, subject to the constitutional limits and the infringement and justification framework from *Sparrow*. The SCC held that, in the present case, granting rights to third parties to harvest timber on Tsilhqot'in land constituted a serious infringement that would not lightly be justified. In order to grant such harvesting rights in the future, the government will be required to establish a compelling and substantial objective.

In concluding that provisions of the *Forest Act*[7] (British Columbia) were inapplicable to land held under Aboriginal title, the trial judge placed considerable reliance on *R. v. Morris*.[8]

[5] *R v Sparrow,* [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].
[6] *Delgamuukw*, *supra* note 3 at para 165 [Emphasis added, emphasis in original deleted].
[7] *Forest Act,* RSBC 1995 c 157.
[8] *R v Morris,* 2006 SCC 59, [2006] 2 SCR 915 [*Morris*].

In that case, the SCC held that only Parliament had the power to derogate treaty rights, because such rights fell within the core of federal power over "Indians." However, in the Decision, the SCC expressly overturned *Morris* and stated that to the extent that *Morris* stands for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights, including Aboriginal title, it should no longer be followed.

Implications for Resource Development

With the exception of the SCC's rejection of *Morris*, the Decision does not represent a departure from the aboriginal jurisprudence to date. To support an Aboriginal title claim over a specific area, significant evidence must be advanced in support of such claims – but the evidentiary test has not changed. The SCC does provide valuable guidance regarding how semi-nomadic peoples can assert and prove Aboriginal title. In this regard, the concepts of sufficiency, continuity and exclusivity are useful lenses through which to view the question of Aboriginal title.

Although much of the media coverage and legal discussion has focused on implications of the Decision for resource development, the implications are not solely restricted to British Columbia. Title claims have been asserted over large tracts of land outside British Columbia. For instance, title claims have been made in southwestern Ontario, along the north shore of Lake Superior and over a 36,000-square kilometre section of eastern Ontario by the Algonquins. One can expect additional title claims in light of the SCC's Decision. The SCC confirmed that the Crown's duty to consult continues to apply to activities or decisions by the Crown that may affect asserted, but unproven, Aboriginal title.

The Decision also confirms that governments can infringe proven Aboriginal title, provided that they meet the established test for "justification" (i.e., a compelling and substantial governmental objective and the government action is consistent with any fiduciary duty to the group). The Decision notes that governments may want to consider the test for "justification" when engaging in legislative activities. This particular guidance to governments should initiate an extensive review by all governments of their legislation affecting lands to ensure that the objectives of such legislation are clear and unambiguous because they will likely form a core component to any future justification.

The Decision also provides regulatory certainty by making clear that provincial laws of general application apply to Aboriginal title lands, subject to constitutional limits. In considering whether provincial legislation applies to an area of federal jurisdiction, the SCC asked two questions: First, does the provincial legislation touch on a protected core of federal power? Second, would application of the provincial law significantly impair the federal power?

The SCC concluded that provincial laws of general application should apply unless they are unreasonable, impose a hardship upon the title holders or deny them their preferred means of exercising their rights, and such restrictions cannot be justified.

Finally, the SCC affirmed that governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group. ■

BALANCING CAUTION AND PRAGMATISM, FEDERAL COURT FINDS "GAPS" IN DARLINGTON ENVIRONMENTAL ASSESSMENT, REVOKES LICENCE AND ORDERS RECONSIDERATION

*Terri-Lee Oleniuk, Jennifer Fairfax, and Patrick G. Welsh**

In a rare (and over 200-page) decision, the Federal Court of Canada revoked the Licence given to Ontario Power Generation (OPG) to construct new nuclear generation units at the existing Darlington nuclear facility, and ordered that the environmental assessment (EA) under the *Canadian Environmental Assessment Act* be returned to the appropriate panel for further consideration including addressing certain "gaps" in the analysis undertaken in the EA.

Introduction

On May 14, 2014, the Federal Court released its decision in *Greenpeace Canada v. Attorney General of Canada,* 2014 FC 463. The case, brought by environmental non-governmental organizations, challenged OPG's proposal to construct up to four new nuclear reactors as part of the federal Darlington New Nuclear Power Plant Project (the Project). The decision considered two judicial review applications:

- A challenge to the adequacy of the federal EA of the Project under the *Canadian Environmental Assessment Act*, SC 1992, c 37 (CEAA 1992);[1] and
- A challenge to the Project's Site Preparation Licence (Licence) based on the failure to comply with the requirements of CEAA 1992 and the *Nuclear Safety and Control Act* (NSCA).

Brief Facts

In June 2006, OPG sought approval for the construction of a new nuclear power generation facility at the existing Darlington nuclear site in Clarington, Ontario. The Project, which included the construction, operation, decommissioning and abandonment of nuclear reactors and the management of the associated conventional and radioactive waste, triggered an EA under the CEAA 1992 and *Law List Regulations*. The Project was the first proposed nuclear new build in Canada in over a generation, the first since CEAA 1992 was enacted, and the first to potentially use enriched uranium fuel.

The EA of the Project was referred to a three-member joint review panel (the Panel), with a mandate that included: (a) performing an EA of the Project based on an Environmental

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1 CEAA 1992 was replaced by the *Canadian Environmental Assessment Act, 2012* (SC 2012, c 19, s 52) July 6, 2012.

Impact Statement (EIS) prepared by OPG; and (b) reviewing OPG's application for the Licence. The EA process engaged the public, Aboriginal groups, the CNSC, and other federal and provincial government agencies and departments, including public hearings and written submissions.

Since OPG had not yet committed to a particular reactor design for the Project, the EIS examined – and the Panel considered – multiple possible reactor designs using the "plant parameter envelope" (PPE) approach,[2] which involves examining reactor design and site parameters in a way that strives to consider the greatest potential adverse impact to the environment.

On August 25, 2011, the Panel issued its report (the Report), concluding that the Project is not likely to cause significant adverse environmental effects, provided that the Panel's recommendations and OPG's commitments are fulfilled. The Report stated that, if the Project is to go forward, the selected reactor technology "must be demonstrated to conform to the [PPE approach] and regulatory requirements, and must be consistent with the assumptions, conclusions and recommendations" of the EA. If the reactor technology selected "is fundamentally different than those assessed" by the Panel, the Report stated that the EA "does not apply and a new environmental assessment must be conducted." Moving the Project forward, on May 2, 2012, the Minister of Natural Resources accepted the Report on behalf of the federal government and on August 17, 2012, the CNSC issued the ten-year Licence to OPG.

Decision

Environmental Assessment

The applicants challenged the EA on a number of grounds. Their overall position was that, in conducting the EA, the Panel failed to comply with the mandatory requirements of CEAA 1992 and the Panel's own Terms of Reference.

Specifically, the applicants argued that CEAA 1992 required the Panel to take a precautionary and restrictive approach to environmental assessments, characterizing CEAA 1992 as the federal "look before you leap" law and characterizing the EA conducted by the Panel as the opposite, as a "leap before you look" approach.

In particular, the applicants took issue with the Panel's adoption of the PPE approach, arguing that the approach does not allow for a meaningful analysis and, as a result, invalidates the EA. The applicants contended that, by using the PPE approach, the Panel did not review a "project" within the meaning of the CEAA 1992, because the specific nature of the physical work to be undertaken was not identified. The applicants argued that it was not possible to conduct an EA that met the requirements of CEAA 1992 – and that meaningfully assesses the environmental effects – when the reactor technology had not been chosen and other key Project components, such as the site design layout, the cooling system option, the used nuclear fuel storage option, and the radioactive waste management option, all remained unspecified.

In addition, among other things, the applicants argued that there were a number of "information gaps" in the Report, so significant as to have the effect that the Panel did not consider the environmental effects of the Project as required by CEAA 1992. For instance, the applicants argued that the Panel did not properly consider the potential hazardous substance emissions. Also, the applicants argued that the Panel's conclusion – "radioactive and used fuel waste is not likely to result in significant adverse environmental effects" – had "no factual basis." According to the applicants, the Panel simply recommended "future study and analysis" of the radioactive waste issue, accepting OPG's evidence that "effective and practical mitigation options would be available when required in the future."

However, after undertaking a thorough and lengthy review of various technical aspects of the EA, the Court ultimately disagreed with the applicants' over-arching argument about the inadequacy of the EA and of the PPE approach, deciding that the CEAA 1992 contains no prescriptive method for conducting an assessment such that a specific reactor technology does not need to be chosen and identified to make the EA meaningful, especially in light of the fact that an EA is to take place as early as practicable in the planning

[2] Also known as a "bounding approach" or a "bounding scenario."

stages of the Project.

Nevertheless, the Court went on to rule that the Panel's EA failed to comply with the CEAA 1992 in three areas:

- inadequacies in the PPE analysis regarding hazardous substance emissions and non-radioactive wastes, such that the Panel took "a short-cut by skipping over the assessment of effects, and proceeding directly to consider mitigation," making it "questionable whether the Panel has considered the Project's effects at all in this regard." Nothing in the Report suggested a "qualitative assessment of the effects of hazardous substance releases";

- long-term management and disposal of radioactive waste (i.e., spent or used nuclear fuel to be generated by the Project), such that the Panel had provided no analysis of the feasibility of storing and managing used nuclear fuel at Darlington in perpetuity. The issue had "not received adequate consideration" by the Panel; and

- deferral of the analysis of a severe "common cause" accident involving both the new and existing reactors at the Darlington site.

Importantly, the remedy crafted by the Court did not include quashing the Report. Rather, it returned the matter to the Panel to reconsider and resolve the shortcomings identified by the Court. Until such time as the shortcomings are resolved, the Project is not permitted to proceed, in whole or in part.

Quashing of the Licence

The Court reasoned that since a valid EA is a prerequisite to the Licence, and since the EA was determined not to comply with the CEAA 1992, the Licence is, therefore, invalid. In terms of remedies, this means that: (a) the Licence is quashed; and (b) CNSC (and the Department of Fisheries and Oceans and Transport Canada) may not issue another Licence or other authorization until the Panel has resolved the shortcomings of the Report. This remedy is in line with prior Federal Court jurisprudence.[3] The Court rejected the applicants' argument that the Licence failed to comply with the NSCA.

Discussion

Deference owed to the Panel

Generally speaking, it is uncommon for a judicial review of a panel assessment under CEAA 1992 (given the expertise of such panels, the deference usually accorded, the volume of evidence considered, and the complexity of the EA) to weigh in on how specific issues under consideration were addressed by the Panel. To this end, the Court noted that there is a presumption that the Panel's interpretation and application of the NSCA and the CEAA will be reviewed on a (more deferential) reasonableness standard.

The Court was clear on the law: a reviewing court should not act as an "academy of science" or comment on EA principles or approaches; instead, it should focus on whether the Panel had complied with the legislative scheme and the relevant jurisprudence.

However, the Court in this case took a hands-on approach, finding specific aspects of the EA deficient, and therefore non-compliant with the governing statute.

Precautionary Principle

At first glance, this decision may appear to be a ringing endorsement of the Precautionary Principle:[4] the Court identified three aspects of the EA that did not sufficiently address future uncertainties such that a reconsideration was necessary. However, the Court's overall tone was deferential to the Panel, recognizing

[3] *Imperial Oil Resources Ventures Limited v Canada (Fisheries and Oceans)*, 2008 FC 598 6.

[4] "In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation." See the Supreme Court of Canada's definition of the "precautionary principle" in *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)* 2001 SCC 40 at para 31 referencing the *Bergen Ministerial Declaration on Sustainable Development* (1990)'s definition of the principle. See also Jamie Benidickson, *Environmental Law*, 4th ed (Toronto: Irwin Law Inc,, 2013) at paras 24-26.

that EAs involve a balancing of caution and pragmatism, and that this particular EA was difficult in light of the project's magnitude and anticipated longevity.

An appropriate remedy is reconsideration

The Federal Court's decision reaffirms the concept that the Court should not simply quash or "throw out" the entire EA report, or the analysis done by a panel or the decision-makers in an EA. Rather, where a Court perceives gaps or errors in an EA, it should send those issues back to the panel for (re)consideration.

Practical Consequences: A speed bump, not a road block

While the Court's decision has no immediate impact — Ontario has already indefinitely postponed the Project — the federal Cabinet "has no jurisdiction to issue any authorizations or to take any other action, which would enable the Project to proceed, in whole or in part," until such time as the Panel has completed its work of reconsideration and determination. This does not mean that the Project cannot proceed; rather, it necessitates additional steps in order to fulfil the existing legislative requirements for the EA. In other words, it is not a road block, but rather a "speed bump" in the regulatory process, which will require additional time, analysis and consideration.■

DEALING WITH LOSERS, THE POLITICAL ECONOMY OF POLICY TRANSITIONS

by Michael Trebilcock
OUP USA

*Dr. Leonard Waverman**

Michael Trebilcock, Professor of Law at the University of Toronto, has now published his 29th book (I may be one or two out) "Dealing with Losers". Michael, a most distinguished academic lawyer/political economist has since his first book in 1997, influenced significantly the way that we think about public policy and law and their interaction with economics. He is a scholar and to those who know him, a complete gentleman. I have had the honor of teaching with him.

The "losers" in this book are those made worse off by some change in public/government policy. The cases he considers run the gamut:

- public pensions (think of raising the minimum age required in order to address deficits);
- mortgage deductibility in the USA ;
- trade liberalization;
- agricultural supply management (think of the impact on dairy farmers of removing the quota system);
- immigration policy (think of the impact of ending family preferences or "temporary workers" in Canada) ;
- climate change;

These 6 chapters are bookended by two introductory chapters on framing the issues and two concluding chapters on general conclusions and his preferred general policy: incrementalism, compromise and explicit transition policies usually involving compensation.

As I was reading the book, the Globe and Mail on Saturday August 2 in the column The Lunch, had a discussion with Richard Doyle, executive director of the Dairy Farmers of Canada. This sector is in Trebilcock's Chapter 6 on Agriculture Supply Management. Michael states on page 83 that 'the average value of quota for the milk production of one cow was $28,000 up from only $16,000 only 10 years before. Significantly, these agriculture schemes which limit production and imports prevent or retard Canada from negotiating free trade pacts

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with other nations or groups of nations. How do a relatively few dairy farmers (12,000 dairy farms in Canada) which cost Canadians $276 a year or $26 billion over the last decade (CD Howe Institute) deter liberalization? Why can't we, the many, end this subsidy to the few dairy farmers? Mr. Doyle in his interview gives some answers: the 12,000 dairy farmers fund their Association with $75 million a year, a lot of money to lobby. When in 2012, the Canadian Council of Chief Executives urged the Prime Minister to abandon the dairy industry in order to succeed in trade pact talks; Mr. Doyle wrote to the CEOs of Canadian banks and said that "the billions of dollars tied up in loans to dairy farmers" were at risk. The Banks defended the dairy industry.

Liberalizing dairy, eggs, chicken farming would create losers – farmers and those who hold their debt. Now if all dairy farmers were the original farmer families who acquired the quotas, given for free by the government decades ago, liberalization would be simple- remove the quotas as those farmers have earned excess economic profits, capitalized at $28,000 a cow in 2009. But the public policy conundrum is what to do about that farmer who paid $28,000 per dairy cow in 2009 to enter the milk industry? Ending quotas is unfair to him and the bank holding the loan on that cow will also have losses.

So, losers are all those originally made better off by public policy/regulation : people who bought million dollar houses in the USA because of mortgage interest tax deductibility, chicken farmers, firms dependent on temporary foreign workers, cab drivers facing Uber. So what do we do?

Professor Trebilcock begins by describing the academic literature which is quite large. The issue of how to change revolves on one's concept of social justice, one's views of the nature of political decision making and one's articulation of institutional design. These chapters are not easy reading for those never having tested these waters before. In addition the six chapters differ in their readability, several (trade liberalization, climate change) being more academically dense than others. Still, the journey is worth it.

Michael's initial chapters bring in new behavioral economics and his two concluding chapters lay waste to some academic woods: the extremes. At one extreme lie academics who think we can do little as all government actions create winners and losers. At the other extreme are those who say we should do nothing as dairy farmers for example face all kinds of risks- weather, etc. and the end of the quota system is but one such risk. But doing nothing as Professor Trebilcock points out, leaves the status quo and no change will occur.

His review of theory and the six detailed examples proves to him (and most readers) that there is no easy way out. One cannot as the Canadian Council of Chief Executives urged, end dairy quotas in one fell swoop. First, the public with a sense of equity won't go along. While each family overpays for milk, its annual burden is small and its sense of social justice (even if they knew and believed the facts) are barriers to change. In addition with an average Canadian dairy farm being worth $2 million and likely mortgaged, the losers will really lose. So, a pragmatic approach is best. Professor Trebilcock's policy on dairy quotas is as follows: sign new trade agreements and simultaneously announce a 10 year phase out of dairy quotas, with an immediate phase out to anyone who has had a quota since the 1970s (half of farmers). Compensate other farmers for their losses at the end of the period for an audited decrease in book value or at any time over the ten year period on a sale. This explicit subsidy is paid for with a 10 per cent dairy product tax and a modest 10 per cent export tax on expanded sales from the trade liberalization.

In other chapters, Michael tempers the academic arguments with such pragmatic policies, such as described for the dairy sector, adding other policies including grandfathering

current rights but liberalizing all new entry.

This book is a very useful primer for anyone wanting to understand how we appear to get trapped by policies which benefit the few at the expense of the majority. It is also clear on the remedy – we need in most cases to indemnify the losers. There is one other big lesson – governments need to think deeply before offering some tax incentive, some restriction on entry, some favor (lower spectrum prices for new entrants). Public policies create winners and losers; it is the winners who can hold up rationalization down the road, requiring direct monetary payments to offset the losses incurred on the benefits they initially received! Governments beware! ■

THE BOOM: HOW FRACKING IGNITED THE AMERICAN ENERGY REVOLUTION AND CHANGED THE WORLD

by Russel Gold
Simon & Schuster Canada

*Rick Smead**

The development of natural gas and oil using horizontal drilling and hydraulic fracturing, ("Fraccing," or "Fracking," depending on one's position on it) has been one of the most revolutionary and one of most divisive events in the last hundred years of energy history in North America. The use of these techniques to extract massive quantities of energy from almost impermeable shale rock thousands of feet underground has spawned unprecedented growth in high-quality energy resources at modest cost and offers probable energy independence to the United States, at the same time that very vocal opposition in many communities raises questions about the environmental impact of development. Russell Gold has leapt into the middle of this fray, writing a remarkably entertaining, in-depth, and predominately accurate story of the beginning and growth of the techniques of shale development, the fascinating cast of characters involved, and of course, the value and the risks. In the style of Yergin's "The Prize" or "The Quest," Gold has brought to life risk-taking, creativity, deep and searching doubts followed by the raw elation of the gas equivalent of a gusher, spanning six decades.

I found many surprising historical revelations in the book. In the interests of your being able to be surprised, I do not want my review to be a spoiler. However, I still would point out a number of things I learned, that jumped out at me:

- How bad were George Mitchell's dire financial straits when the Barnett field finally came in?
- Who really invented slickwater hydraulic fracturing, and why did it work?
- Who really paired it with horizontal drilling?
- When government-sponsored experiments tried the nuclear fracs, how did the devices compare with the Hiroshima bomb?
- And what surprising war-surplus fluid was used for the early fracs (and how do you think it would go over today?)

I do have to answer the last one, since it sort of startled me. As Gold explains, the well completions right after World War II were

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fractured using *napalm*. Remember Robert Duvall in "Apocalypse Now," going all mushy over the smell of napalm in the morning? Somehow it's hard to picture that working out well with today's environmental protestors.

The big names in shale development are fairly well known: George Mitchell, Aubrey McClendon, Larry Nichols, or opponents such as Michael Brune of the Sierra Club. But Gold tells the story of the other key players, less well known but every bit as important: Nick Steinsberger, Brad Foster, Claude Cooke, among others.

Gold's tone is often somewhat biased, sort of casting something a cloud of portending doom over the subject of development as he discusses helping his parents decide whether to lease their property for drilling. He also waxes a bit patronizing in discussing the lives and careers of some individuals who took substantial risks and caused a huge energy breakthrough. Being a longtime reporter for the *Wall Street Journal,* a lot of this may just be the pervasive tone of skepticism that goes with being an investigator. But then throughout, he acknowledges what the natural gas boom has meant to the nation, that it had a lot to do with the 2008 recession not becoming a depression, that it (along with the companion oil development) stands to let U.S. achieve energy independence and stop living in fear of the Middle East, and that when burned, it is a very low-carbon and clean source of fuel.

Regardless of tone, Gold's exploration of the issues around development appears to be largely thorough and honest, legitimately framing the ongoing tension between energy abundance and development impact. He illuminates a key aspect of that tension that honestly eluded the natural gas industry for too long, that to an engineer "Fraccing" means the deep subsurface, contained, hydraulic fracturing of rock, while to the general public, "Fracking" means everything from the first truck to the last truck.

There is an extensive discussion of the energy market crisis that occurred in California in 2000-2001, primarily as part of a good bit of sniping at Ralph Eads, the financier who worked with Aubrey McClendon in building Chesapeake Energy into an industry giant. I admit to a bit of prejudice on my part, since I was there and collaterally involved in that crisis, and Gold's explanation is tremendously oversimplified to leap to culpability on the part of Eads and his company. It didn't quite happen that way, but being ancient history should not undermine the power and engagement offered by Gold's overall story.

This is in many ways a story of regular folks who became larger than life, and for better or for worse gave us an energy and economic bonanza that—if the U.S. and Canada can maintain a stable and accepted trajectory of development cleanly and safely—can go on for many decades. Gold correctly explains in great depth how the challenges to hydraulic fracturing have less to do with that process than they do with basic well integrity. His description of the physical process of well development, where problems can happen and how they are avoided, is accurate and meaningful.

Overall, I would say that anyone genuinely interested in a thorough and entertaining understanding of shale development, how it's done, what it means, and what questions are raised, should read this book. It's well done. ■