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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

2016: THE CANADIAN ENERGY YEAR IN REVIEW

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

Previous versions of the *Canadian Energy Year in Review* discussed major decisions that had impacts on the industry, but 2016 beats them all.

Alberta and Québec both announced major changes to their regulatory processes. Although not formally announced yet, big changes are in the wings in Ontario.

The real changes in the past year were at the federal level and involved pipelines. The driver was the new Prime Minister in Canada and the new President in the United States. Major decisions were made with respect to pipeline development after years of delay. Keystone XL was reactivated within days of the new President entering the White House.

During the past year the industry has undergone major consolidation at three levels: gas distribution, electricity distribution, and pipelines. Those are detailed in the following report.

There is no question that the sector is undergoing rapid change. Some is driven by new technology giving customers greater options. In the search for lower cost electricity, many are moving to self-generation. The prospect of lower-cost renewable generation, backed up by gas-fired electricity and aided by lower-cost storage remains the hope of others, driven in part by the constant stream of higher renewable portfolio standards by States and Provinces.

More and more utilities are pursuing new market opportunities and new revenue streams in the face of customers leaving to self-generate.

At the close of the year Québec and Ontario

signed a historic electricity trade agreement between the two provinces. Under the agreement Ontario will purchase a total of 14 TW hours of electricity from Hydro-Québec over a seven-year period between 2017 and 2023.

Ontario will reduce its electricity costs by \$70 million by importing 2 TWh of power each year. The Ontario Minister of Energy noted that 2 TWh a year is enough to power the City of Kitchener and it would significantly reduce GHG emissions. The Quebec Minister of Energy noted that this is the largest agreement of its kind in Canadian history and Québec will continue to work with Ontario to explore opportunities to jointly promote clean renewable energy

The Pipeline Delays Are Over

After years of delay and setbacks, a number of major pipeline projects are moving forward.

The Enbridge Line 3 Replacement program was approved on November 29, 2016. The project will result in 370,000 barrels per day of additional capacity. The total project cost is estimated to be \$ 7.5 billion with a target in-service date of 2019.

The \$ 6.8 billion Trans Mountain Expansion project was also approved on November 29. This will yield 590,000 barrels per day as the project twins an existing pipeline carrying oil to a shipping terminal in Burnaby.

There was some negative news however. The Federal Government decided to drop Northern Gateway following NEB approval when the approval was suspended by a Federal Court decision on aboriginal claims. And the Energy

East project was forced to start over after the tribunal members decided to resign following claims of apprehension of bias.

A new panel assigned to Energy East has voided all of the decisions of the previous panel, with the result that the application is more or less being restarted, although the applicants do not need to reapply. Energy East is a 4500 km pipeline designed to carry 1.1 million barrels a day from Alberta to Saskatchewan to refineries in Eastern Canada and a Marine terminal in New Brunswick. Eastern Mainline, which is part of the proposal, will build approximate 278 km of new gas pipeline beginning in Markham, Ontario finishing in Brouseville, Ontario.

The big news in some circles is TransCanada Keystone XL. The project was rejected by President Barack Obama in 2015 but restarted by President Donald J Trump within days of his moving into the White House. The \$ 5.3 billion project will transport 830,000 bd from Alberta and North Dakota to the US Gulf over a 1,179 mile line. President Trump signed the Executive Order on January 24. TransCanada filed the new application two days later.

Shifting Markets

In 2015 virtually all of Canada's natural gas and crude oil exports were sold to one customer - the United States. That is changing. Technology to extract gas and oil from shale formulations continues to improve. Between 2010 and 2015 crude oil production from US shale regions increased 72%. Gas production increased by 28% in the same time frame.

As a result, Canadian exports of natural gas to the US fell by 23% between 2006 and 2015. To make matters worse on December 18, 2015 the United States lifted its 40 year ban on oil exports. The US is now exporting increased quantities of natural gas into central Canada. The bottom line is the Canada's largest customer just became Canada's largest competitor.

This highlights the importance of the recent approval of the Trans Mountain expansion. New markets like China and India have become critical. To serve those markets Western Canadian gas needs greater access to Tidewater and the Pacific Rim. Once the Trans Mountain expansion is complete the number of tankers leaving the Trans Mountain Burnaby terminal will increase by 300%.

A New Wave of Consolidation

In 2016 Canada saw a major consolidation in the energy sector.

On December 18 the OEB issued its decision approving the consolidation of the three largest electricity distribution companies in Ontario, Enersource Hydro Mississauga, Horizon Utilities Corporation and PowerStream. The three parties also agreed to purchase and amalgamate with Hydro One Brampton Networks owned by the Province of Ontario. The new company now called Alectra is the largest municipally owned LDC in Ontario and the second largest in North America second only to the Los Angeles Department of Water and Power in California. The new company will serve almost one million customers with a total rate base of \$ 2.5 billion.

The purchase of Hydro One Brampton at a price of \$607 million is the largest electricity distribution acquisition in Ontario to date. The Ontario government has long promoted consolidation and the number of electricity distributors in Ontario has gradually decreased from 300 two decades ago to just over 70 now. This is all done in the name of efficiency. Only time will tell if that is the case but early indications are that the labor cost per Mw of distribution will be significantly less going forward.

The consolidations were not limited to the electricity segment. On September 6 Enbridge and Spectra Energy Corp., the parents of Enbridge Gas Distribution and Union respectively, announced a merger of the two companies. The new Enbridge will have an enterprise value of \$127 billion. The merger was not subject to OEB approval as the merging parent companies are not within the Board's jurisdiction. The deal was presented as a merger of pipeline companies, each of whom happened to own a gas utility in Ontario. So while the implications for gas customers remain uncertain, the assumption has to be that efficiencies in delivery will be sought under a single owner. Combined, the two gas utilities will have total revenues in excess of \$31 billion.

It is reasonable to assume that pipeline mergers are driven by the same factors as electricity market - a search for greater economies.

And while the Enbridge – Spectra deal was the largest, it wasn't the only big pipeline deal. In July TransCanada completed its acquisition of the Columbia Pipeline Group for an aggregate purchase price of \$13 billion including the assumption of approximately \$ 2.8 billion in debt.

Both these deals had significant profile. But they weren't the only ones. Increasingly Canadian utility players are actively acquiring assets south of the border. The Fortis Group, the AltaGas group, and EMERA have all been on the acquisition trail, growing into major continental players. These players are all Canadian based, integrated (gas and electric) enterprises – and it has happened quietly.

All of these may reflect the new maxim that it is cheaper to buy than to build, with more opportunity to buy clearly appearing south of the border.

Renewables Continue to Grow

Renewables continue to grow in both Canada and the United States. Renewable energy provided 17% of US electricity in the first half 2016 up from 14% for all 2015. The Canadian figures were slightly less (excluding hydropower).

More importantly the Renewable Portfolio's Standards (RPS) continue to increase. In April the Québec government announced its *Energy Policy 2030*¹ which included a new RPS. The Québec government now wants renewable energy to meet 61% of Québec's needs by 2030. Currently that number stands at approximately 47%.

In November Alberta followed by introducing its *Renewable Electricity Act*² which set a goal of producing 30% of electricity in Alberta from renewable energy sources by 2030.

California has the most aggressive renewable portfolio standard. The state requires each firm that sells electricity to end users to obtain 33% of it from renewables by 2020 and 50% by 2030.

In August the New York Public Service

Commission adopted a new Clean Energy Standard mandating that 50% of New York's electricity must come from renewable sources by 2030. Oregon now has a RPS of 50% by 2040. Colorado is 30% by 2020, and Nevada is 25% by 2025. The New Mexico RPS is 20% by 2020.

While there remains strong enthusiasm on the part of decision makers in these and other jurisdictions for renewable programs, the public reaction to the costs these represent for energy services is showing signs of being less excited.

Capacity Markets

The most significant change in Canadian energy markets in 2016 was the decision of two provinces, Alberta and Ontario, to change the manner in which their energy markets function. Both provinces decided to move to what is termed a capacity market. There were however different reasons.

In Alberta's case the province had decided to abandon coal and move to renewable energy. It was not clear that Alberta could attract the necessary investment under the current energy only arrangements.

Alberta will transition its electricity market into two separate markets - a market in which generators compete to sell electricity and a market in which generators compete for payments to keep capacity available. Generators will accordingly have two revenue streams, one from the sale of capacity and another from the sale of electricity.

In Ontario's case the goal is market renewal and a new regime that relies more on competitive bidding than long-term power purchase agreements that the government have contracted for. Ontario believes the new regime will lead to greater cost control and innovation. Ontario will increasingly rely on competitive bidding as the contracts come to the end of their terms.

In November the Alberta government introduced the *Renewable Electricity Act* which established a goal of producing 30% of the total of electricity in Alberta from renewable energy

¹ Gouvernement du Québec, *The 2030 Energy Policy- Energy in Québec: A Source of Growth*, (Québec: Gouvernement du Québec, 2016).

² *Renewable Electricity Act*, SA 2016, c R-16.5.

resources by 2030. The Government intends to add 5000 MW of renewable electricity capacity by 2030 through the REP, a competitive process administered by the AESO, with the first 400 MW of renewable energy capacity procured through a competitive RFP in 2017 and subsequent tranches of capacity contracted to coincide with the retirement of coal power plants.

In November the Alberta government also announced that it had reached an agreement with Capital Power, TransAlta Corporation, and ATCO to compensate them for the early retirement of their plants. The total cost was \$ 1.36 billion in annual payments of \$ 97 million per year between 2017 and 2030. These payments represent the compensation for the early shutdown of 6 of the 18 coal-fired plants which were expected to operate past 2030. The other 12 coal-fired plants in Alberta are scheduled to close or convert to natural gas before 2030.

Capacity markets exist in the United States. These are not simple systems to administer. A great deal of effort will be required in both Alberta and Ontario to switch over to these new market designs. But there is general agreement among stakeholders that increased efficiencies will result.

Storage and Embedded Generation

The increased production of renewables has led to a rapid increase in cost-effective storage technology at both the customer and utility level. The largest utility storage facility in history is currently being installed in San Diego.

There are currently 2000 MW of solar embedded within LDCs in Ontario and that number grows every day. In 2016 Ontario utilities discovered how effective storage and local generation can be and more importantly how they can participate in this new market.

The leading example is PowerStream's POWERHOUSE project. There PowerStream developed 20 residential solar and storage systems that PowerStream controls from its facilities with intelligent software creating a single facility that can meet system needs. That system has now been licensed to Thunder Bay Hydro. Not far from PowerStream, Veridian has deployed a residential grid in partnership with homebuilders. That system will be managed

and operated through Veridian system controls.

At the end the day a distributor of electricity does not really care if the customer is generating electricity. A distributor only passes through the generation costs in any event. It does not matter if the generation is from a distant monopoly generator or a local generator. What matters to the distributor is that they maintain some share of the distribution revenue stream. Ontario distributors are increasingly finding ways to do that.

In the United States distributors have for some time been selling and renting solar panels. It turns out that aggregating those solar panels and maintaining and connecting them is good business even where they are located on a customer premise. The term Community Solar is now very popular.

All of this will require further regulatory work in both Canada and the United States. The FERC in Washington took the lead when it issued a Notice of Proposed Rulemaking to reduce barriers to energy storage and distributed energy resources. The FERC has directed the six US regional system operators to draft reports on their progress with storage rules and DER aggregators in their respective marketplaces. We may see Canadian regulators take similar steps.

A New Quebec Regulatory Regime

In April of 2016, the Quebec government issued its new *Energy Policy 2030, Energy in Quebec – a source of growth* (the Policy). With this Policy, the government seeks to favour a low emission economy, optimally develop energy resources, foster responsible consumption, capitalise on energy efficiency potential and promote the entire technical and social innovation chain. The Policy strives for a unifying vision to make Quebec, by the year 2030, a North American leader in the realms of renewable energy and energy efficiency and thus build a new, strong, low-carbon economy.

The Government sets ambitious and demanding targets: Enhance energy efficiency by 15%, reduce by 40 % the amount of petroleum products consumed, eliminate the use of thermal coal, increase by 25% the overall renewable energy output and increase by 50% bioenergy production.

To get there, the Policy provides four key strategic thrusts that will guide Québec's energy transition over the next 15 years:

- ensure integrated governance of the energy transition
- promote the transition to a low-carbon economy
- offer consumers a renewed, diversified energy supply
- define a new approach to fossil energies

Alberta Reforms its Electricity Market

The Government of Alberta has announced ambitious, wide-ranging reforms to the electricity market. While the government's vision for the electricity market is not available in a coherent package, a number of policy approaches have been announced since the Alberta New Democratic Party was elected with a majority government in May of 2015.

Early in its mandate, and prior to the Paris Climate Change conference in late 2015, the government announced an aggressive Climate Leadership Plan³ based on recommendations from the government appointed Climate Change Advisory Panel chaired by Dr. Andrew Leach of the University of Alberta.

Alberta's Climate Leadership Plan includes:

- An economy wide carbon levy
- Phasing out coal-fired electricity generation by 2030
- Subsidies for renewable energy projects
- Capping oil sands emissions by 100 mega tonnes per year
- Reducing methane emissions by 45% by 2025

The government has also announced the introduction of a capacity market. The capacity market policy has been justified on the basis of resource adequacy. That is, a policy intervention is required to ensure reliable capacity is available to meet future

demand given the changing nature of Alberta's market. The current energy only market was not viewed as capable of providing the necessary investment given the early retirement of coal fired generating plants and the introduction of significant renewable capacity to replace it. The intermittent nature of wind capacity will also require a significant investment in dispatchable resources when wind is low – likely gas-fired resources.

The Alberta ISO has stated Alberta's security of supply outlook remains broadly healthy until 2020. However, uncertainty about the timing of coal unit retirements and other issues give rise to uncertainty about whether supply tightness may occur earlier.

The government has also announced its intention to cap the regulated rate option for Alberta consumers. The RRO is the administratively established default electricity rate for consumers who have not entered into a competitive contract with a retailer. The RRO rate will be capped at 6.8 cents/kWh for a four-year period effective June of 2017. The policy rationale to support the RRO cap is to address historic price volatility. The Government will backstop the cap by requiring taxpayers or revenues from the carbon levy to cover RRO supplier costs above 6.8 cents.

Additional policy announcements and actions include a yet to be determined plan to compensate communities impacted by the forced shut down of coal generating plants, the establishment of a standalone office to promote energy efficiency with an initial endowment of \$700M, and establishing transition uplift arrangements for existing renewable investments to ensure fairness and stability in light of the subsidies being provided to new renewable investments in the clean power calls.

Lastly, the government launched a lawsuit to declare void a change in law clause in Power Purchase Arrangements. As reported above, settlements were reached late in 2016 with three of the PPA buyers however Enmax remains as a respondent with a court decision expected in 2017.

A final note

It was a busy year. And it concluded on

³ Government of Alberta, *Climate Leadership Plan*, (Edmonton: 22 November 2015), online: Government of Alberta <<http://www.alberta.ca/climate-leadership-plan.cfm>>.

a note of dramatic change for the North American market, with the election of Donald Trump. The continental climate alignment of the Obama-Trudeau governments is to be replaced by something new, at least on the America side. So too can we expect some dramatic tax and regulatory changes, if the Republican Congress and new administration are to be believed. All of this will affect Canada's domestic energy scene, as the actions of our biggest trading partner always do. The year ahead will not be a boring one for Canada's regulated energy sector. ■

2016 DEVELOPMENTS IN ADMINISTRATIVE LAW RELEVANT TO ENERGY LAW AND REGULATION

David J. Mullan*

Overview

2016 (and the first month of 2017) have provided many important instances in both the courts and before energy regulators of the application and refinement of the principles of administrative law in the context of energy regulation. Given space limitations, in this survey, as with last year's review, I will confine myself to a consideration of the more important aspects of that case law rather than evaluating the possible impact on energy law and regulation of judicial review decisions involving other statutory regimes.¹

More specifically, I will again assess some of the more important developments in energy settings of the role of regulatory agencies in the constitutional duty to consult and, where appropriate, accommodate Indigenous Peoples. This is an issue that will simply not go away and, while many of the cases decided in 2016 are very fact specific as to the detailed requirements of

the duty to consult,² there are still a number of significant issues of principle that remain to be settled prominent among which are the powers and responsibilities of regulatory agencies.

2016 also witnessed the first sustained consideration of the conduct of judicial review in the context of projects in which the regulator (the National Energy Board or a Joint Review Panel) reported on applications for a decision by the Governor in Council, the product of the 2012 legislation reconfiguring the decision-making process for *National Energy Board Act* pipeline applications and designated projects under the *Canadian Environmental Protection Act*.³ *Gitxaala Nation v Canada*⁴ attracted considerable public attention because the applicants succeeded in derailing a major pipeline initiative on the basis of the failure of the Governor in Council to consult adequately with affected Indigenous Peoples. However, the Federal Court of Appeal also made some important rulings on the process and the scope

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

¹ *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 is probably the 2016 non-energy judgment of the Supreme Court that has the most direct impact on energy regulatory law. Among the issues raised was whether the normal presumption of deferential reasonableness review when a tribunal is interpreting its home and closely related statutes applied in the context of appeals with leave on questions of law and jurisdiction from an Assessment Review Board. A majority of the Court held that application of the presumption remained appropriate and applied it to the question of law raised by the application for judicial review. This has obvious relevance for all situations in which there is a statutory right of appeal from an energy regulator requiring leave of the court and even when confined to questions of law and jurisdiction.

² See e.g. *Prophet River First Nation v British Columbia (Minister of Forests, Lands and Natural Resources Operations)*, 2016 BCSC 2007. In the Northern Gateway context, also of significance is *Coastal First Nations v British Columbia (Minister of the Environment)*, 2016 BCSC 34, in which Koenigsberg J held that British Columbia could not rely upon the federal Joint Review Panel process as satisfying its own consultation responsibilities with respect to the process under the provincial environmental protection legislation.

³ *The Jobs, Growth and Long-Term Prosperity Act*, SC 2012, c 19, s 52 repealing and replacing the 1992 *Canadian Environmental Assessment Act*, SC 1992, c 37 and amending the *National Energy Board Act*, RSC 1985, c N-7.

⁴ *Gitxaala Nation v Canada*, 2016 FCA 187 [*Gitxaala Nation*].

for review of regulatory evaluation of the merits of projects subject to approval under the regime created by the 2012 legislation.

I will also consider in the context of *Gitsxaala Nation* and the recusal of the panel assigned to conduct the National Energy Board's Energy East hearings, the application of the principles requiring impartiality or a lack of bias in the conduct of energy regulatory hearings. Next, I move to a consideration of an issue that has arisen in the context of appeals with leave on questions of law and jurisdiction in energy regulatory statutes in Alberta: the extent to which the decision to grant or deny leave hinges, if at all, on the applicable standard of review – reasonableness or correctness. Finally, taking a liberty with my mandate, I will provide analysis of the Supreme Court of Canada's first judgment in 2017, *Ernst v Alberta (Energy Regulator)*,⁵ in which the Court upheld the application of an immunity provision in the Regulator's statute to preclude an action for damages for violation of the plaintiff's freedom of expression as guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*.

The Duty to Consult Indigenous Peoples – The Role of Regulatory Agencies

a. Introduction

During 2016, the role of regulatory agencies⁶ in fulfilling the Crown's duty to consult Canada's Indigenous Peoples was once again a prominent aspect of litigation across a broad swath of the energy regulation process. Indeed, there is much more to come in 2017, including the various challenges to the Kinder Morgan Trans Mountain Pipeline approval.⁷

b. *Chippewas of the Thames First Nation and Hamlet of Clyde River*⁸

At present, the Supreme Court of Canada has under reserve two appeals from judgments of the Federal Court of Appeal argued on November 30, 2016: *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*⁹ and *Hamlet of Clyde River v Petroleum Geoservices Inc.*¹⁰ I discussed the Federal Court

⁵ *Ernst v Alberta Energy Regulator*, 2017 SCC 1.

⁶ In 2016, the Federal Court of Appeal also ruled on the issue whether the courts could, in the name of the duty to consult, assess the process of preparing, introducing, and passing primary legislation which might adversely affect an aboriginal claim or right. A First Nation had sought a declaration that the government had failed to fulfill the duty to consult aboriginal peoples in the context of the preparation, introduction and passage of the controversial 2012 omnibus Bills, legislation that it was claimed would, in its diminution of environmental protection have adverse impacts on various aspects of aboriginal hunting, fishing and trapping rights. In late 2014, in a decision discussed in my 2014 review ("2014 Developments in Administrative Law Relevant to Energy Law and Regulation" (2015) 3 *ERQ* 17, at 29), Hughes J of the Federal Court had held that the duty to consult was triggered at the point at which the legislation was introduced in Parliament: *Mikisew Cree First Nation v Governor in Council*, 2014 FC 1244. In early December 2016, the Federal Court of Appeal reversed that decision: *Mikisew Cree First Nation v Canada (Minister of Aboriginal Affairs and Northern Development)*, 2016 FCA 311. As well as holding that the legislative process did not implicate "a federal board, commission or other tribunal" in terms of the judicial review jurisdiction of the *Federal Courts Act*, with particular reference to the exclusions in section 2(2) of that Act, de Montigny JA (Webb JA concurring) went on to hold that judicial intervention of this kind in the legislative process would violate the unwritten constitution's recognition of the doctrine of separation of powers. Though concurring in the outcome, Pelletier JA would have recognized section 17 of the *Federal Courts Act* as a provision justifying the kind of declaration sought in this case; it existed independently of the judicial review provisions of the Act. He was also unwilling to countenance the doctrine of separation of powers as a justification for excluding judicial scrutiny of legislative process in the name of the duty to consult aboriginal peoples. On the other hand he would not endorse triggering of the duty to consult in the case of general legislation "which is not aimed at specific Aboriginal groups or to territories to which they have, or claim, an interest" (para 97). For an excellent commentary on this case, see Nigel Bankes, "The Duty to Consult and the Legislative Process: But What About Reconciliation?", *Ablawg.ca*, December 21, 2016.

⁷ See, in this regard, *Tsilil-Waututh Nation v Canada (National Energy Board)*, 2016 FCA 219. Here, the Federal Court of Appeal dismissed various appeals arising out of early stages of the Trans Mountain Pipeline application process. In essence, the appeals were dismissed because the First Nation had failed to first raise the matters in issue before the Board. This included what was a change in position for the First Nation, the contention that the National Energy Board itself had responsibility for fulfilling the constitutional duty to consult affected First Nations. However, the Court made it clear that this was without prejudice to the right of the First Nation to raise the consultation and other of its issues once the Governor in Council had issued its decision on the already released National Energy Board report on the application. The list of still pending Trans Mountain court challenges can be found on the National Energy Board's website in the file "Court Challenges to National Energy Board or Governor in Council Decisions", online: <<http://www.neb-one.gc.ca/pp/ctnflng/crt/index-eng.html>>.

⁸ For a more complete account, see Nigel Bankes, "The Supreme Court of Canada Grants Leave in Two Cases Involving the National Energy Board and the Rights of Indigenous Communities" (2016) 4 *ERQ*.

⁹ *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2015 FCA 222, application for leave to appeal granted on March 10, 2016: [2015] SCCA No 524 (QL) [*Chippewas of the Thames*].

¹⁰ *Hamlet of Clyde River v TGS-NOPEC Geophysical Company ASA (TGS)*, 2015 FCA 179, application for leave to appeal granted on March 10, 2016: [2015] SCCA No 430 (QL) [*Hamlet of Clyde River*].

of Appeal judgments in these two cases in last year's review.¹¹ Both concern the role of the National Energy Board in the consultation process but in different statutory contexts. In the former, the setting was the Line 9 reversal decision and, in the latter, it was the grant of an application for the conduct of an offshore seismic survey. In *Chippewas of the Thames*, the Federal Court of Appeal determined, in a matter where the Crown was not before it as a party, that the National Energy Board did not have authority to either assess whether the Crown had discharged its obligation to consult (a majority) or to itself fulfill the obligations of the Crown (unanimous).¹² In *Hamlet of Clyde River*, a unanimous and differently constituted panel of the Court determined that the Board had implicit authority to fulfill the Crown's obligation to consult and that, in any event, the Crown was entitled to rely upon the Board's proceedings as fulfilling at least in part its own obligations to consult. What these and other judgments point to is the continuing uncertainty (even after *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*¹³) as to the role of regulatory agencies in the consultation process. It is to be hoped that the judgments of the Supreme Court in these two cases will bring clarity to this highly contested area of regulatory authority both in terms of the underlying principles that should inform adjudication of these questions and, as part of this, what constitutes sufficient legislative signposting of the authority to engage in either or both of these roles.

c. Alberta Utilities Commission

In the meantime, in a ruling made during the *Fort McMurray West 500-kV Transmission Project Proceeding*,¹⁴ the Alberta Utilities Commission, in effect following¹⁵ the majority judgment in *Chippewas of the Thames*,¹⁶ ruled that it does not have authority to evaluate the adequacy of Crown consultation in a proceeding in which the Crown is not before it as either an applicant or participant. Despite its authority to determine constitutional questions provided for under the *Administrative Procedures and Jurisdiction Act*¹⁷ by way of Schedule 1 of the *Designation of Constitutional Decision Makers Regulation*,¹⁸ that authority was triggered only in situations where a constitutional question was properly before the Commission. At least in cases where the Crown was not a party to the application, it could not be said that the Court was seized of the constitutional question:

*[The Commission] has no powers to direct the Crown to carry out Crown consultation or to make a decision on the adequacy of Crown consultation where the Crown is not before the Commission.*¹⁹

In so holding, the Commission rejected the argument of the First Nations and Métis interveners that it was perfectly proper for the Commission to assess the adequacy of Crown consultation as part of determining whether the project that was before the Commission

¹¹ David J. Mullan, "2015 Developments in Administrative Law Relevant to Energy Law and Regulators" (2016) 4 *ERQ* 19, at 30-34.

¹² For valuable insights into this issue, see Chris W. Sanderson, Q.C. and Michelle S. Jones, "The Intersection of Aboriginal and Administrative Law: When does a Regulatory Decision Constitute "Crown Contemplated Conduct"?" which also appears in this issue of the *Energy Regulation Quarterly*. Sanderson and Jones argue that there has been too little attention paid to the second of the three requirements for the existence of a duty to consult set out by McLachlin CJ in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650: the requirement of "Crown-contemplated conduct." At the risk of distorting a complex argument, I take the authors' position to be that where the Crown is not before the regulatory agency as in the case of "private proponents seeking approval from statutory decision-makers to engage in conduct that is alleged to have adverse effects on Aboriginal rights and claims", absent express legislative conferral of consulting authority or responsibilities on the regulatory agency, it will be difficult to locate the requisite "Crown-contemplated conduct."

¹³ *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650.

¹⁴ Alberta Utilities Commission, Proceeding 20130, Applications 21030-A001 to 201030-A015, Ruling on jurisdiction to determine the questions stated in Notices of Questions of Constitutional Law, October 7, 2016. For other commentary on this ruling, see Martin Ignasiak, Jessica Kennedy and Justin Fontaine, "Alberta Utilities Commission Confirms it has no Jurisdiction to Assess Crown Consultation" (2016) 4 *ERQ*.

¹⁵ *Ibid*, at paras 109-13.

¹⁶ *Supra*, note 9.

¹⁷ *Administrative Procedures and Jurisdiction Act*, RSA, c A-3, s 16.

¹⁸ *Designation of Constitutional Decision Makers Regulation*, AR 69/2006, Schedule 1 designated the Commission as having authority to determine all constitutional questions.

¹⁹ *Supra*, note 14 at para 113.

for approval was in the public interest. The Commission held that even though this would not have involved any order against the Crown, it would have amounted to illegitimately doing indirectly what it could not do directly.²⁰

The Commission then asserted that it would in any event have been premature to rule on the Crown's efforts at consultation before the application was heard on the merits. It justified this conclusion on the basis that the hearings themselves might meet at least in part the Crown's obligation to consult. In so doing, it pointed to the Alberta Court of Appeal's endorsement of the proposition that the Crown can rely on the opportunities that exist for consultation "that are available within existing regulatory and environmental processes."²¹

To the extent that these are all matters that are relevant to the Supreme Court's determination of the two current appeals, it is likely that indirectly at least the judgment of the Court will also address the status of the Alberta Utilities Commission on the assessment of the Crown's consultation efforts.

d. The Role of Proponents in Consultation

Moreover, it is also to be hoped that the Court will clarify not just the place of regulators in the consultation and assessment of the adequacy of consultation processes but also the role of proponents and its limits in the fulfillment of the Crown's obligations and, in particular, at the direction of regulators.

In delivering the judgment of the Supreme Court of Canada in the 2004 foundational decision of *Haida Nation v British Columbia (Minister of Forests)*,²² McLachlin CJ stated that

*... the Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments.*²³

And, of course, the reality now is that directions for proponent "consultation" with affected Indigenous Peoples have become a routine and important aspect of many energy regulatory approval processes. However, there have always been lingering questions as to the extent to which the Crown can simply treat any such consultations as fulfilling its own obligations. After all, there is something quite perverse in assigning to proponents who are highly likely to be adverse in interest to affected Indigenous Peoples any significant role in the fulfilment of the Crown's constitutional duty. Making proponents pay for consultation is one thing but relying even on their evidence and argument gathering is quite another.

Indeed, it is significant that in two sentences in the same paragraph from which the quote above is taken, McLachlin CJ makes it clear that, irrespective of any delegation of a role to a proponent, the responsibility remains that of the Crown. Before the quoted sentence, she states that the "Crown alone remains legally responsible for the consequences of its actions"²⁴ and then immediately after:

*However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.*²⁵

Nonetheless, very early in 2017, there was an announcement of a seemingly new cause of action by affected First Nations against TransCanada: an action in damages for failing to consult "when conducting maintenance operations such as integrity digs on pre-existing lines", activities which allegedly violated the First Nations' Treaty Rights.²⁶ While moving from proponents as delegates of the Crown in conducting consultations to proponents as defendants in an action for damages for failing to engage in consultation seems a stretch to say the least, what the very commencement of this action points to is the critical need for greater clarity and legal definition of the role of not only regulatory bodies but also proponents in

²⁰ *Ibid.*

²¹ *Ibid.*, at para 116.

²² *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511.

²³ *Ibid.*, at para 53.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ See Michelle McQuigge, "First Nations sue TransCanada to refine consultation process", *The Globe and Mail*, January 10, 2017.

the consultation process.

e. The Northern Gateway Pipeline Application²⁷

The most publicly visible judgment on the duty to consult during 2016 was undoubtedly that of the Federal Court of Appeal in *Gitsxaala Nation v Canada*.²⁸ There, by a 2-1 majority, Dawson and Stratas JJA in a joint judgment held that the Governor in Council had failed to consult adequately affected First Nations when considering the report of the Northern Gateway Project Joint Review Panel. That duty to consult was triggered not only by the central role assigned to the Governor in Council in 2012 with respect to the decision whether or not to issue certificates for the construction of pipelines but also the Government's commitment to consultation throughout what were classified as the five phases of the approval process. Under Phase IV, the promise was of "Crown consultation carried out on the report of the JRP prior to consideration of the response by Governor in Council."²⁹

Keith Bergner has already provided an insightful and detailed comment on this case in the pages of this Journal³⁰ and I will not therefore engage fully with the many aspects of the duty to consult that arose in that litigation and, in particular, the majority's extensive exploration of what as a practical matter "deep consultation" required on the part of the Governor in Council.³¹ Rather, I will confine myself to emphasising one particular aspect of the judgment: the relationship between the role

played by the Joint Review Panel through the public hearing process and that of the Governor in Council in its consideration of the Panel's report.

One of the affected First Nations made the argument that the Crown had in fact over-delegated its consultation responsibilities to the Joint Review Panel. Part of this argument focussed on the nature of the Joint Review Panel's process. The Haida asserted that it was a "quasi-judicial process in which the Crown and Haida had no direct engagement."³² In rejecting the over-delegation argument, Dawson and Stratas JJA relied³³ on the Supreme Court in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*³⁴ where the Court affirmed that the Crown could rely on participation by affected First Nations in a forum such as this as fulfilling at least part of its constitutional duty to consult. In this context, the Joint Review Panel process was one in which aboriginal groups could both learn about the nature of the project and its potential impact as well as providing an appropriate forum in which "to voice their concerns".³⁵ Further, the Joint Review panel had both the mandate and the expertise required to "address mitigation, avoidance and environmental issues relating to the Project."³⁶ In short, the Crown was justified in relying on the Joint Review Panel processes as a component of "the totality of measures"³⁷ that were necessary to fulfill the duty to consult.

However, while there had not been over-delegation to the regulator, the Court also made it clear that the "totality of measures"

²⁷ Other commentary on this judgment includes Keith B. Bergner, "The Northern Gateway and the Federal Court of Appeal: The Regulatory Process and the Crown's Duty to Consult" (2016) 4 *ERQ* 53; Sharon Mascher, "Note to Canada on the Northern Gateway Project: This is NOT What Deep Consultation With Aboriginal People Looks Like", *Ablawg.ca*, August 12, 2016; and Martin Olszynski, "Northern Gateway: Federal Court of Appeal Applies Wrong CEEA Provisions and Unwittingly Affirms Regressiveness of 2012 Budget Bills", *Ablawg.ca*, July 5, 2016.

²⁸ *Supra*, note 4. (Ryer JA dissented on this aspect of the judgment on the basis that the Governor in Council had consulted sufficiently.)

²⁹ See Bergner, *supra*, note 27 at 54.

³⁰ *Supra*, note 27.

³¹ However, particularly noteworthy in the majority's discussion of the content of "deep consultation" is the emphasis (at paras 311-324) on the importance of reasons demonstrating that consultation did take place, that aboriginal concerns were taken into account, and the "impact" that those concerns had on the decision-making. For these purposes, the majority relied not only on the specific directive in section 54(2) of the *National Energy Board Act* that the Governor in Council "set out the reasons for making the order" that the National Energy Board issue a certificate but also the components of deep consultation set out by McLachlin CJ, delivering the judgment of the Court in *Haida Nation v British Columbia (Ministry of Forests)*, *supra*, note 22 at para 44.

³² *Supra*, note 4 at para 211.

³³ *Ibid*, at para 214.

³⁴ *Supra*, note 13 at para 56.

³⁵ *Supra*, note 4 at para 216.

³⁶ *Ibid*, at para 217.

³⁷ *Ibid*, at para 214.

under the 2012 legislative recalibration of the pipeline approval process were not exhausted by the extent of consultation provided by the Joint Review Panel. This was evidenced by both the existence of Phase IV of the terms of engagement for consultation on this particular project and the centrality of the Governor in Council in the whole decision-making process. In effect, the Governor in Council had accepted the terms of Phase IV and the responsibilities for consultation imposed on it when considering the report of the Joint Review Panel. However, perhaps even more importantly, the constitutional obligation of “deep consultation” (that the Crown conceded was necessary in this case), irrespective of the terms of Phase IV, carried with it extensive consultation requirements at this stage of the legislated process. This is underscored by the extent to which the Governor in Council’s mandate extended to the evaluation of various considerations that were not germane in the Joint Review Panel process.

In his case comment, Keith Bergner laments the extent to which the new legislative regime as interpreted by the majority “diminishes the role of the regulator and the importance of the regulatory hearing process”³⁸ presumably both generally and in the fulfilment of the duty to consult. If the Court’s judgment prevails on this point, it also seems likely that a return to a regime in which the regulator has more responsibility for the procedural components of the constitutional duty to consult cannot lawfully be accomplished simply by executive recalibration of the assigned responsibilities under the five Phase process adopted for the Northern Gateway application. For the Governor in Council to transfer its own responsibilities as recognized in this proceeding by the terms of Phase IV may very well require legislative amendment. To proceed otherwise would indeed provide a basis for an over-delegation argument. In the meantime, in the words of Keith Bergner, as long as the Joint Review Panel report on such applications is characterized, as it was by the Court, as a mere “guidance document”,³⁹ at the Governor in Council stage

... the consultation processes put in place will have to be robust enough to adequately underpin and inform the Governor in Council decision.⁴⁰

Moreover, despite the majority’s sense that this will not involve extensive delays and the need for significant extensions of the now legislated time limits to enable the fulfilment of the constitutional obligations and the demands of the Phase IV process, there is among Bergner and other commentators a sense that the enhancements will have to be significant and almost of necessity lengthy in the fulfilment.

Given that there will be no appeal⁴¹ and the new Government’s subsequent announcement that it would not be approving the Northern Gateway Project, the Court of Appeal’s judgment will, at least for now, provide the legal framework for the operation within the pipeline approval process of the constitutional duty to consult. Moreover, without the government having to respond to the remission of the matter for redetermination in accordance with the principles of consultation laid down by the Court, there will be no clear sense of what represents the detail of a satisfactory meeting of those principles.

What is also clear is that the majority’s delineation of what the duty to consult requires is situated within the operation of the new 2012 pipeline approval regime. For other regulatory decision-making under the *National Energy Board Act* and the *Canadian Environmental Assessment Act* the role of the regulators in the fulfilment of the Crown’s duty to consult may well be more extensive. It is also worthy of note that in early 2017, there has already been an example of a panel of the Federal Court of Appeal accepting a limited role for the Governor in Council in the exercise of another authority under the *Canadian Environmental Assessment Act*. *Prophet River First Nation v Canada (Attorney General)*⁴² involved the determination of a Joint Review Panel that the construction of a

³⁸ *Supra*, note 27 at 61.

³⁹ *Supra*, note 4 at para 317.

⁴⁰ *Supra*, note 27 at 62.

⁴¹ At least by the proponents or the government: see “Northern Gateway pipeline project won’t appeal federal court decision”, *The Globe and Mail*, September 20, 2016 and John Paul Tasker and Chris Hall, “Ottawa won’t appeal court decision blocking Northern Gateway pipeline”, *CBC News*, posted September 20, 2016, <<http://www.cbc.ca/news/politics/enbridge-northern-gateway-federal-court-1.3770543>>. However, the Raincoast Conservation Foundation applied on September 21, 2016, for leave to appeal the Court’s ruling that the JRP report was not subject to judicial review: see [2016] SCCA No 386 (QL). However, leave to appeal was denied on February 9, 2017.

⁴² *Prophet River First Nation v Canada (Attorney General)*, 2017 FCA 15.

hydroelectric dam (Site C) would be “likely to cause ... significant adverse environmental effects.”⁴³ Under the Act, on the making of such a determination, the Panel was obliged to refer the matter to the Governor in Council for a further determination of whether those effects were justified in the circumstances.⁴⁴ While it was accepted that, in so determining, the Governor in Council had a duty to consult potentially affected First Nations, the critical question on the application for judicial review was whether the Governor in Council was obliged to go further and respond to arguments that the construction of the dam would actually violate their treaty rights.

In sustaining the judgment of Manson J of the Federal Court,⁴⁵ Boivin JA, delivering the judgment of the Federal Court of Appeal, held that the Governor in Council had no such obligation. In so holding, it seems as though this panel of the Court of Appeal had a rather different sense of the institutional capacities of the Governor in Council than that envisaged by Dawson and Stratas JJA in *Gitxaala Nation*. The Governor in Council lacked the “necessary hallmarks associated with adjudicative bodies: public hearings, ability to summon witnesses and compel production of documents and the receipt of submissions by interested parties.”⁴⁶ It was engaged in a polycentric task balancing a range of interests from the perspective of not just facts but policy.⁴⁷ It lacked the expertise or equipment “to determine contested questions of law and complex factual issues.”⁴⁸ Accordingly, the determination of whether the project would violate First Nation treaty rights was not within the mandate of the Governor in Council.

Given that the agreement establishing this federal/provincial Joint Review Panel also explicitly stated that the Panel could not make any conclusions or recommendations on violation of treaty rights,⁴⁹ the determination of such questions was not part of the core regulatory process and had to await the commencement of an action by the affected First Nations. Obviously, in this domain, context is everything though it does not

help when the underpinnings of the analysis take such apparently divergent views on the capacities of the Governor in Council both legally and practically.

***Gitxaala Nation v Canada* – The Administrative Law Dimensions**

a. Introduction

As well as being a leading precedent on the constitutional duty to consult Indigenous Peoples, *Gitxaala Nation v Canada*⁵⁰ has significant administrative law dimensions. In particular, the majority judgment of Dawson and Stratas JJA (with Ryer JA concurring to this extent) provides a valuable road map for judicial review applications arising out of the pipelines and designated projects approval process as significantly revised by the *Jobs, Growth and Long-Term Prosperity Act, 2012*. In short, by virtue of that legislation, the Governor in Council or effectively Cabinet assumed decision-making responsibility for approval of such facilities, a process that is preceded by the presentation of a report (including recommendations) from the National Energy Board or a Joint Review Panel convened under the *National Energy Board Act* and the *Canadian Environmental Assessment Act*. Upon approval (as in this instance), the Governor in Council issues a directive to the Board to issue a certificate for the project. Thereafter, there is a further or final phase, not in issue in *Gitxaala Nation*, involving various implementation permits and authorizations.

b. How to Proceed

Gitxaala Nation was a consolidated proceeding consisting of applications for judicial review and statutory appeals with respect to various stages of the pipeline approval decision-making process – the report of the Joint Review Panel, the Order in Council requiring the National Energy Board to issue certificates of public convenience and necessity, and the certificates issued by the National Energy Board in response to that directive.

⁴³ *Supra*, note 3 at s 52(4)(a).

⁴⁴ *Ibid*, at s 52(4)(b).

⁴⁵ *Prophet River First Nation v Canada (Attorney General)*, 2015 FC 1030.

⁴⁶ *Supra*, note 42 at para 70.

⁴⁷ *Ibid*, at para 71.

⁴⁸ *Ibid*, at para 72.

⁴⁹ See clauses 2.5(a), (d) and (e) of the JRP Agreement and Terms of Reference: *Ibid*, at para 10.

⁵⁰ *Supra*, note 4.

However, notwithstanding the consolidation of the proceedings, Dawson and Stratas JJA commenced the analytical section of their judgment with a consideration of which among the three types of challenge was the appropriate forum for reviewing the substance of the pipeline approval process and the fulfilment of the Crown's responsibility to consult and, where appropriate, accommodate. Here, the Court was clear. By virtue of the 2012 amendments, amendments which Dawson and Stratas JJA described as a "unique"⁵¹ and "complete code",⁵² "the only meaningful decision-maker is the Governor in Council."⁵³ It was for the Governor in Council and the Governor in Council alone to make a decision following an assessment of the reports and whatever other forms of information were gathered following receipt of the required reports. As a consequence, Dawson and Stratas JJA held that the only proper target of an application for judicial review was the decision of the Governor in Council. It did not lie against the Joint Review Board as that report did not make any decisions "about legal and practical interests."⁵⁴ Moreover, whether the Joint Review Panel report was deficient in any way was solely for the Governor in Council, not the Court.⁵⁵

As for the subsequent role of the National Energy Board in issuing a certificate of public convenience and necessity, this was a purely formal step. The Board had to obey the directive of the Governor in Council.⁵⁶ Moreover, if the Court set aside the decision of the Governor in Council, this also undercut legally any certificate issued by the Board in obedience to the directive flowing from the now invalidated decision.⁵⁷

This specification of the Governor in Council decision as the only appropriate target of a judicial review application is certainly expressed

in definitive or unqualified terms. It also takes strength from the normal posture of the Canadian courts that, as a matter of *judicial discretion*, applications for judicial review should not be countenanced with respect to preliminary stages of a process at least where consideration of the subject matter of the challenge is within the mandate of a later or the ultimate stage of a multi-stage process.⁵⁸ Thus, in terms of this judgment, whether there was any "deficiency" in the report was within at least the initial authority of the Governor in Council and any such challenges should be raised there and not by way of statutory appeal from or judicial review of an earlier stage of the process and most particularly the report of the Joint Review Panel.

What does, however, remain unclear from this is whether this amounts to a complete ban on any prior challenges of the processes culminating in a report to the Governor in Council. Putting it another way, what is the reach of the term "deficiency" for the purposes of determining whether any challenge must first be taken to the Governor in Council before engaging the Federal Court? Does the code argument and the sense of the Governor in Council as the first line venue for challenges to what has gone before extend mandatorily (as opposed to on the basis of discretion) to all manner of interlocutory rulings made in the context of the Joint Review Board process such as responses to allegations of a reasonable apprehension of bias or applications for intervenor status?

Given the stringent timelines imposed on the process by the 2012 legislative amendments, it may well be that the judgment's declaration of the exclusivity of the Governor in Council as the initial point for challenging deficiencies in the process below should be read as comprehensively applying to all such

⁵¹ *Ibid.*, at para 92.

⁵² *Ibid.*, at para 119.

⁵³ *Ibid.*, at para 120.

⁵⁴ *Ibid.*, at para 125.

⁵⁵ *Ibid.* Note also in the context of section 22(1) of the *National Energy Board Act* providing for appeals from decisions or orders of the Board with leave on questions of law and jurisdiction, the insertion in 2012 of section 22(4) providing that reports (or any parts thereof) submitted by the Board to the Governor in Council under various provisions of the Act and the *Canadian Environmental Assessment Act, 2012* are not "a decision or order of the Board" for the purposes of section 22(1). This provision formed part of the backdrop to the Federal Court of Appeal's subsequent ruling in *Tsilil-Wautub Nation*, *supra*, note 7, that the First Nation could not raise certain issues in the context of an appeal under section 22 with respect to a proceeding covered by section 22(4).

⁵⁶ *Ibid.*, at para 126.

⁵⁷ *Ibid.*, at para 127.

⁵⁸ The leading authority remains *Harellkin v University of Regina*, [1979] 2 SCR 561. See also *Howe v Institute of Chartered Accountants of Ontario* (1994) 19 OR (3d) 483 (CA).

challenges. Nevertheless, it would probably be unwise to treat the exclusivity principle as not subject to any exceptions.

c. Standing to Seek Judicial Review

In 2014, in *Forest Ethics Advocacy Association v Canada (National Energy Board)*,⁵⁹ Stratas JA had ruled that the Association did not have either direct or public interest standing to bring an application for judicial review challenging various interlocutory rulings made by the National Energy Board in the context of Enbridge's Line 9 reversal application. These rulings involved the scope of that hearing, the justificatory requirements imposed on those who wished to participate, and the rejection of a particular individual's entitlement to participate as an intervenor as opposed to merely being allowed to provide comments on the application. In *Gitxaala Nation*, Northern Gateway relied on the Stratas holding for the argument that five groups did not have standing to seek judicial review of various elements of the overall decision-making process.⁶⁰

The groups in question (including the Forest Ethics Advocacy Association) were all special interest organizations which claimed expertise and engagement with issues that were relevant to the determination as to whether the project should be allowed to proceed, and, in the case of Unifor, represented workers whose interests would be affected by the approval of the project. All five groups had participated extensively as recognized interveners in the Joint Review Panel process.

In considering Northern Gateway's challenge to their participation, Dawson and Stratas JJA applied the following test for direct interest standing: Was the decision one that "affects [their] legal rights, imposes legal obligations upon [them], or prejudicially affects [them] in some way"?⁶¹ In response, they determined that all of these groups had sufficient "legal and

practical interests"⁶² to justify direct standing.

Long gone is the previously parsimonious approach that the courts took to public interest groups asserting standing as of right and on behalf of their members to challenge administrative action.⁶³ Indeed, to the extent that the Court emphasised their participation in the Joint Review Panel process, there may almost be a presumption of direct standing to seek judicial review once a regulatory agency provides participatory opportunities and those opportunities are taken up. The importance of participation with the blessing of the agency is also manifest in the contrast that the Court draws between the situation in this case and that which confronted Stratas JA sitting alone in *Forest Ethics*.⁶⁴ There, Forest Ethics had not even attempted to participate in the Line 9 reversal hearings let alone make any representations to the National Energy Board on the subject matters of the three specific interlocutory rulings. What this leaves open for future consideration, however, is whether a group *denied* standing or intervenor status by an agency might still subsequently be able to assert direct interest standing to seek judicial review at the end of the process.

d. Standard of Review

As discussed above, Dawson and Stratas JJA held that the decision of the Governor in Council was at least generally the relevant or exclusive target for any attack on the outcome of the multi-stage pipeline approval process called for under the 2012 amended legislation. Within that framework, Dawson and Stratas JJA went on to rule that "the amorphous nature and breadth of the discretion that the Governor in Council must exercise"⁶⁵ justified not only a deferential reasonableness standard of review but also one which afforded the Governor in Council the "widest margin of appreciation"⁶⁶ over the multifarious issues of "policy and public interest"⁶⁷ that came within the statutory

⁵⁹ *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 FCR 75. I discussed this ruling in "2014 Developments in Administrative Law Relevant to Energy Law and Regulation" (2015) 3 *ERQ* 17, at 19-20.

⁶⁰ *Supra*, note 4 at para 85.

⁶¹ *Ibid*, at para 86.

⁶² *Ibid*, at para 84.

⁶³ See e.g. *L'Association des Propriétaires des Jardins Taché Inc v Les Entreprises Dasken Inc*, [1974] SCR 2.

⁶⁴ *Supra*, note 4, at paras 86-87.

⁶⁵ *Ibid*, at para 141.

⁶⁶ *Ibid*, at para 155.

⁶⁷ *Ibid*, at para 145.

mandate. To be sure, they did not go so far as to hold that the exercise of discretion was non-justiciable. However, by classifying the scope of the potentially relevant considerations as “more properly within the realm of the executive”⁶⁸ and by emphasising the practical reality that a legislative vesting of power of this kind in the Governor in Council “implicated”⁶⁹ the Cabinet, Dawson and Stratas JJA made it clear that the courts should be extremely reluctant to interfere in such a process in the name of unreasonableness.

The judgment does, however, confirm that this virtual immunity from judicial review for unreasonableness is not a universal feature of any decision-making by the Governor in Council but a characteristic of the very particular statutory mandate under which the Governor in Council was operating in this case. In this regard, Dawson and Stratas JJA instanced situations where the Governor in Council was engaged in the determination of questions of law.⁷⁰ There, the application of the reasonableness standard of review could be more intrusive. Similarly, they started out this portion of their judgment by discussing and distinguishing⁷¹ *Council of the Innu of Ekuanitshit v Canada (Attorney General)*.⁷²

This too involved judicial review of the Governor in Council but under the 1992 version of the legislation. There, the role of the Governor in Council was the approval of a government response to a report from a Joint Review Panel. The essence of the Governor in Council’s evaluative process was whether a decision “made” by others (the Joint Review Panel and three government departments) on an environmental assessment should be approved. Within that narrower legislative mandate and its particular focus on environmental matters, the decision taken by the Governor in Council was subject to a rather different set of questions than applied under the 2012 amendments. As the Federal Court of

Appeal ruled in that case, it could ask whether the Governor in Council and the departments had adhered to the requirements of the legislation with intervention being appropriate only where the Governor in Council’s order was made without following the specified legislated process, “without regard for the purposes of the Act”, or had “no basis in fact.”⁷³

This standard of review analysis prompts two interrelated comments.

First, judgment in *Gitsxaala Nation* was delivered on June 23, 2016. On July 14, the Supreme Court delivered its judgment in *Wilson v Atomic Energy of Canada Ltd.*⁷⁴ In delivering a separate concurring judgment, Cromwell J categorically rejected the variable “margin of appreciation” approach developed principally by Stratas JA as the appropriate way in which to calibrate reasonableness review across a very broad spectrum of statutory and prerogative decision making.⁷⁵ Abella J appeared to be similarly critical of the Stratas “margin of appreciation” approach which he had deployed in the Court of Appeal judgment⁷⁶ from which *Wilson* was an appeal. After referring to that aspect of the Stratas judgment below,⁷⁷ she went on to state:

*But to attempt to calibrate reasonableness by applying a potentially indeterminate number of varying degrees of deference within it unduly complicates an area of law in need of greater simplicity.*⁷⁸

It is noteworthy, however, that the other members of the majority did not engage in discussion of the appropriateness of the “margin of appreciation” approach.⁷⁹ Moreover, even Abella J in her judgment traded in the concept of reasonableness as a context-sensitive or

⁶⁸ *Ibid.*, at para 140.

⁶⁹ *Ibid.*, at para 144.

⁷⁰ *Ibid.*, at para 153, citing among other authority *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40, [2014] 2 SCR 135.

⁷¹ *Ibid.*, at paras 129-39.

⁷² *Council of the Innu of Ekuanitshit v Canada (Attorney General)*, 2014 FCA 189.

⁷³ *Supra*, note 4 at para 135, citing *ibid.*, at paras 40-41 in turn citing the judgment at first instance: 2013 FC 418 at para 76.

⁷⁴ *Wilson v Atomic Energy of Canada Ltd.*, 2016 SCC 29.

⁷⁵ *Ibid.*, at para 73.

⁷⁶ *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17, [2015] 4 FCR 467.

⁷⁷ *Supra*, note 74 at para 18.

⁷⁸ *Ibid.*

⁷⁹ In a one paragraph judgment concurring in the outcome reached by Abella J, McLachlin CJ, Karakatsanis, Wagner and Gascon JJ (at para 70) declined to consider whether the standard of review template should be reconfigured.

-specific inquiry,⁸⁰ and broad and narrow ranges of acceptable answers or outcomes.⁸¹ For my part, I find it difficult to discern where for practical purposes the difference lies between this approach to reasonableness and one which describes the scope for intervention in terms of a variable “margin of appreciation”.

Secondly, I do remain puzzled as to why Dawson and Stratas JJA took the time to distinguish the regime before the Court in *Innu of Ekuanitshit* from that before the Court in *Gitxaala Nation*. Probably, the explanation lies in the applicant’s reliance on the earlier case as a justification for more intensive review in the name of reasonableness than the *Gitxaala Nation* Court was willing to countenance. However, it might also be that the Court was asserting that the specific examples of grounds of review to which the Court referred in *Innu of Ekuanitshit* had no application to the present statutory regime: failure to follow the prescribed legislative process, deciding without regard to the purposes of the Act, or no basis in fact for the decision.

Indeed, this possibility is given credence by the Court’s reference to the fact that many of the First Nations were arguing that the processes prescribed under the 2012 amendments to the *Canadian Environmental Assessment Act* were not followed,⁸² an argument that Dawson and Stratas JJA never did seem to address directly.⁸³ Why that argument could have no traction as matter of law within the reasonableness standard of review in *Gitxaala Nation*, I do not understand. Indeed, it is particularly troubling given the Court’s specification of the Governor in Council’s decision as at least the primary locus for any judicial review application in relation to this decision-making process. In the making of such an application for judicial review, I would have thought that it would be perfectly proper to assert that legislatively designated processes had not been followed with the final decision undermined if that was established to the satisfaction of the Court.⁸⁴ Indeed, the same argument can be applied to

assertions of failure to adhere to the purposes of the Act and lack of any support for the decision on the facts (though, given the breadth of the relevant considerations and facts under this legislative scheme, I can certainly see how this would be a very rare possibility).

e. Application of the Reasonableness Standard of Review to the Merits of the Governor in Council’s Decision

Given the extent of the margin of appreciation to which the Court held the Governor in Council was entitled, there was no surprise, leaving the issue of First Nation consultation aside, in the Court’s holding that there was no basis for intervention in the name of unreasonableness. Indeed, the merits of the unreasonableness argument are dealt with in one short paragraph:

The Governor in Council was entitled to assess the sufficiency of the information and recommendations that it had received, balance all the considerations – economic, cultural, environmental and otherwise – and come to the conclusion that it did. To rule otherwise would be to second-guess the Governor in Council’s appreciation of the facts, its choice of policy, its access to scientific expertise and its evaluation and weighing of competing public interest considerations, matters very much outside of the ken of the courts.⁸⁵

As suggested above, while this does not go as far as amounting to a holding of non-justiciability, it comes close to it. Nonetheless, the Court’s ultimate ruling that the processes engaged in by the Governor in Council and its advisors violated the constitutional rights of First Nations does underscore the point that review is not completely excluded. It

⁸⁰ *Ibid*, at para 22.

⁸¹ *Ibid*, at para 33.

⁸² *Supra*, note 4 at para 131.

⁸³ Was that because there was no substance to the argument, because the applicants had not raised the question at the Governor in Council stage of the process, or because it was an impermissible ground of review in this specific process?

⁸⁴ Though given the Court’s emphasis on the location of the Governor in Council as the initial repository of authority to make such assessments, presumably the context in which such questions would arise be that of the Governor in Council’s response to any such argument made to it by a party, participant or someone with standing.

⁸⁵ *Supra*, note 4 at para 157.

is also important to recall the “good faith” requirement as most recently articulated by Tremblay-Lamer J of the Federal Court in *Turp v Minister of Foreign Affairs*.⁸⁶ In dismissing the challenge to the Ministerial issuance of export permits for weaponry destined for Saudi Arabia, she emphasised the breadth of the statutory discretion reposed in the Minister of Foreign Affairs⁸⁷ and the illegitimacy of a reviewing court engaging in a reweighing of the various considerations animating the Minister’s decision-making process⁸⁸ but did reserve the possibility of a bad faith-based challenge and other administrative law grounds that might apply in that context.⁸⁹ Of course, establishing the bad faith of the Governor in Council as personified in Cabinet and the responsible Ministers is a massive evidential challenge in contexts such as this.⁹⁰

f. Bias

The Court of Appeal dealt with the issue of bias in the context of its consideration of whether the Crown failed in its duty to consult and, in particular, in the context of an allegation that the Crown had not consulted in good faith. It was said that the outcome of the process was pre-ordained with one of the indicators being statements made in 2011 by the then Minister of Natural Resources, a member of Cabinet, to the effect that the project was in the national interest and that steps needed be taken to ensure that the regulatory process was less duplicative and more expeditious.⁹¹

In rejecting this argument,⁹² Dawson and Stratas JJA referenced Supreme Court of Canada authority to the effect that the duty of impartiality was context sensitive⁹³ and that the demands imposed by that duty in the case of a policy-based decision by Cabinet were not as rigorous as was the case with judicial or quasi-judicial decision makers.⁹⁴ Rather,⁹⁵ the test to be applied to this form of decision maker was that developed by the Supreme Court in

*Old St. Boniface Residents Association Inc. v Winnipeg (City)*⁹⁶ in the context of municipal council by-law making. Were the statements relied upon an “expression of a final opinion on the question in issue” or, in the terminology of *Old St. Boniface*, did they demonstrate that the “decision-maker’s mind was closed such that representations to the contrary would be futile”? On the facts presented, the Court was not about to reach this conclusion on the basis of comments by a single Minister made years before the actual decision by the Governor in Council.

There is no reason to take issue with any of this. However, it does merit the observation that even though the argument failed, the Court’s countenancing of the possibility of a challenge to Cabinet decision-making based on bias or a lack of impartiality underscores the fact that the judgment of Estey J in 1980 in *Canada (Attorney General) v Inuit Tapirisat of Canada*⁹⁷ can no longer be taken as authority for the absolute immunity of the Governor in Council from procedural unfairness challenges in the context of its engagement with the decisions or reports of regulatory agencies whether by way of appeals to Cabinet or a regime for the approval of reports or recommendations.

Bias, the National Energy Board and the Energy East Hearings

As Dawson and Stratas JJA made clear in *Gitxaala Nation*, the test for what constitutes a reasonable apprehension of bias varies depending on the nature of the decision-maker and the task in which the decision-maker is engaged. Indeed, the notion of a context-sensitive approach to an evaluation of whether there was disqualifying bias emerged initially in a judgment of the Supreme Court of Canada involving a utilities regulator, the Newfoundland Board of Commissioners of Public Utilities.

⁸⁶ *Turp v Minister of Foreign Affairs*, 2017 FC 84.

⁸⁷ *Ibid.*, at para 36.

⁸⁸ *Ibid.*, at para 37.

⁸⁹ *Ibid.*, at paras 50 and 55.

⁹⁰ See e.g. *Thorne’s Hardware Ltd v Canada*, [1983] 1 SCR 106.

⁹¹ *Supra*, note 4 at para 192.

⁹² *Ibid.*, at paras 195-200.

⁹³ *Ibid.*, at para 196, citing *Imperial Oil Ltd v Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 SCR 624.

⁹⁴ *Ibid.*, at paras 197-98.

⁹⁵ *Ibid.*, at para 199.

⁹⁶ *Old St. Boniface Residents Association Inc v Winnipeg (City)*, [1990] 3 SCR 1170.

⁹⁷ *Canada (Attorney General) v Inuit Tapirisat of Canada*, [1980] 2 SCR 735.

*Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)*⁹⁸ involved allegations of bias based on statements made by a consumer representative on a panel of the Board engaged in a hearing into the costs and accounts including executive salaries at the Newfoundland Telephone Co. In delivering the judgment of the Supreme Court of Canada, Cory J, as with Dawson and Stratas JJA in *Gitxaala Nation*, justified a more relaxed standard for members of regulatory agencies performing a policy making function and, in particular, where appointed as representative of an interested constituency or the regulated community. There was nothing necessarily wrong with the appointment of such “representatives” whether authorized specifically by statute (as in this case) or not. Indeed, it was quite appropriate for members of a hearing panel to make public statements indicating strong opinions on matters that would be in issue at the hearing prior to the actual hearing provided that that expression of opinion was not indicative of

... pre-judgment of the matter to such an extent that any representations to the contrary would be futile.⁹⁹

However, once the hearing commenced (and this is where the member crossed the line), circumspection was required – the closed mind test ceased to apply and the standard test for tribunals was triggered, that of a “reasonable apprehension of bias”.¹⁰⁰ Nonetheless, even within that standard test, it was still necessary to calibrate the issue of what facts were sufficient to disqualify to the actual task of the regulator with those involved in policy matters receiving more leeway than those performing a truly adjudicative function.¹⁰¹

It is against this background that I want to analyse the decision of the three members of the National Energy Board’s panel hearing

the Energy East and Eastern Mainline applications¹⁰² (as well as that¹⁰³ of the Board’s Chair and Vice-Chair) to recuse themselves from further participation in those hearings in response to a public interest group’s assertion of disqualifying bias. In making that decision, did the members of the panel and the Chair and Vice-Chair respond too readily to the demand for their recusal?

In short, that demand for recusal arose out of the involvement of two members of the hearing panel (along with the Chair of the Board and various staff members) in a January 2015 meeting with the former Premier of Quebec, Jean Charest. This meeting was characterized as part of the Board’s preparation for its National Engagement Tour in which the Board would be crossing the country with a view to “improving relationships with municipalities and Indigenous peoples [and] improving pipeline safety and environmental concerns.”¹⁰⁴ At that point, the Board was also engaged in setting up the hearing on the two projects and beginning to deal with applications for participatory status.

When word of the meeting with Jean Charest started surfacing in news media reports and among those groups opposed to the applications, the Board’s response was that the purpose of this and other meetings held during two days in Montreal in January 2015 was the gathering of Quebec perspectives on matters germane to the National Engagement Tour and did not involve any discussion of the two applications. However, it eventually was admitted that the Energy East project was discussed at the meeting with Jean Charest, at which point the Board apparently changed tack and described this as just one of a number of meetings with stakeholders (including those opposed to the project) as part of preparation for the upcoming hearings.¹⁰⁵

While standing alone, the meeting with Jean

⁹⁸ *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623.

⁹⁹ *Ibid.*, at para 27.

¹⁰⁰ *Ibid.*, at para 35.

¹⁰¹ *Ibid.*, at para 39.

¹⁰² Hearing Order OH-002-2016, Energy East Pipeline Ltd and TransCanada Pipelines Limited, Energy East Project and Asset Transfer (Energy East), and Eastern Mainline Project (Eastern Mainline), Notices of motion from Stratégies Énergétiques and the Association québécoise de lutte contre la pollution atmosphérique, and Transition Initiative Kenora (TIK), Ruling No 28 (September 9, 2016).

¹⁰³ *Ibid.*, Chair and Vice-Chair Decision Statement (September 9, 2016).

¹⁰⁴ National Energy Board News Release, “Energy East Hearing Panel Steps Down”, September 9, 2016.

¹⁰⁵ See the summary contained in an August 30, 2016 *Globe and Mail* editorial, “Credibility gap” and also Campbell Clark, “NEB’s missteps make Energy East a political problem for Trudeau”, *The Globe and Mail*, August 30, 2016.

Charest may not have been problematic, the fact that the former Premier was a paid consultant for TransCanada Pipelines Ltd, one of the applicants on the two projects, added a critical dimension. Similarly, the Board's apparent lack of transparency and shifting ground on the facts of what had happened muddied the waters and, with the commencement of the hearings, increased the stridency of the calls for the panel to recuse itself. The most spectacular manifestation of this concern with both the process and the issues at stake in the two applications was the panel's abandonment because of disruption of the Montreal phase of the hearing.¹⁰⁶

At that point, the panel and the Chair of the Board acted on the matter of alleged bias and treated the communication from the public interest group as a formal motion requesting that the members of the panel recuse themselves, along with other associated actions.¹⁰⁷ However, even this course of action produced criticism and, in particular, that it was inappropriate for the panel itself to make this decision.¹⁰⁸ Nonetheless, the panel persisted (justifiably in my view¹⁰⁹) and considered written comments from those participating at the hearings.

The upshot of all of this was that on September 9, 2016, two rulings were issued: in the first, all three members of the panel recused themselves. Two did so on the basis of the perceptions created by their being part of the group that met with Jean Charest¹¹⁰ and the third on the basis of perceptions of taint resulting from his association in the hearings to that point with the other two members.¹¹¹ In addition, the Chair of the Board and the Vice-Chair, Mercier, who was also a member of the panel and both of whom had been at the meeting with Jean Charest,

announced that they would not participate in any of their limited administrative duties with respect to the hearing, including the assignment of a new panel.¹¹² As part of this second ruling, it was also stated that the Board would be reassigning to other files staff members who had attended the meeting with Jean Charest.¹¹³

Among the questions raised by this whole matter is that foreshadowed by the scene setting discussion of the more relaxed standards to which members of regulatory agencies with significant policy making components are held. Did the members of the panel and the Chair and Vice-Chair recuse themselves too readily? Were the meetings with Jean Charest as well as with some of the participants in the upcoming hearings not the kind of pre-hearing engagement with the issues that Cory J was willing to countenance in the *Newfoundland Telephone* case? Or, were the recusals more the product of a political or strategic response to the volume of the protests about the continued participation of the panel than any genuine assessment of whether the law required recusal?

My sense is that, as a matter of law, the panel was correct in its decision to recuse itself as were the Chair and the Vice-Chair in relation to their administrative duties with respect to the hearings. There are two reasons for this. First, the Board contributed to the apprehensions that the process was biased by its seemingly shifting ground on both the facts and the justification for what had happened. Complete transparency from the moment that the concerns surfaced could perhaps have changed the outcome. Secondly, however, unlike *Newfoundland Telephone*, this was not a case of allegedly disqualifying perceptions of attitudinal bias.¹¹⁴ Indeed, unilateral meetings

¹⁰⁶ See Shawn McCarthy, "Energy East hearings put on hold over complaints against NEB members", *The Globe and Mail*, August 31, 2016.

¹⁰⁷ See Chair and Vice-Chair Decision Statement, *supra*, note 102.

¹⁰⁸ See Ruling No 28, at 2, *supra*, note 101.

¹⁰⁹ The general position under Canadian law is that the first step in any pre-emptive bias challenge is for those with concerns to ask the member or members of multi-member panels to recuse themselves and for the impugned member or members to rule on that challenge: See e.g., *Communications, Energy and Paperworkers Union of Canada, Local 60N v Abitibi Consolidated Company of Canada*, 2008 NLCA 4. Thereafter, if the request for recusal is denied, that ruling becomes subject to judicial review. Indeed, this was the position taken by the panel in its recusal ruling.

¹¹⁰ Ruling No 28, *supra*, note 101 at Appendix 1, Recusal Statement of Member Gauthier and Appendix 2, Recusal Statement of Member Mercier.

¹¹¹ *Ibid.*, at Appendix 3, Recusal Statement of Member George.

¹¹² See September 9, 2016 Decision Statement of the NEB Chair and Vice-Chair addressed to All OH-002-2016 Parties.

¹¹³ *Supra*, note 103.

¹¹⁴ It should, however, be noted that while the panel was considering the recusal "motion", another public interest group challenged the participation of one of the panel members on other grounds: the perceptions arising out of the fact that shortly after his appointment to the Board, the company of which he had been chief executive officer had secured a contract to do work for TransCanada in connection with the Energy East project. See Shawn McCarthy, "NEB member's business ties to TransCanada queried", *The Globe and Mail*, September 3, 2016.

with parties and those with an interest in the subject matter of a hearing implicate not only the principles respecting bias but also another aspect of procedural fairness: the taking of evidence and submissions behind the backs of the other parties to or participants in the proceedings. Here too, under Canadian law, perceptions matter. As Dickson J (as he then was) said about *ex parte* meetings in *Kane v Board of Governors of University of British Columbia*:

*We are not here concerned with proof of actual prejudice but rather with the likelihood of prejudice in the eyes of reasonable persons.*¹¹⁵

In all of the circumstances of this case, the explanation that the Board and staff members who met with Jean Charest did not know that he was a paid consultant for TransCanada Pipelines was almost certainly not enough to assuage those reasonable persons.

What is to be learned from all of this? First, it should not be read as calling into question initiatives such as the National Energy Board's National Engagement Tour. However, it should also be recognized that, when such Tours involve private meetings with affected constituencies or their representatives, there are dangerous shoals. One of those shoals is encountered when those with whom the Board is meeting privately are parties to or have a material interest in an upcoming Board hearing. It is at that point that other parties and interests, if they come to know about the meetings, begin to have perceptions of impropriety in the form of the improper insinuation of evidence and representations on the subject matter of the hearing. And, of course, as this recent imbroglio illustrated graphically, the response to this concern is not to try to ensure that the meetings remain secret. Rather, the concerns counsel against private meetings and that all such engagements take place on the public record and with full transparency at least when the meetings involve those with an interest in matters pending hearing before the Board.

Finally, one of the other lessons for the Board in all of this is that it should be proactive in any extra-hearing engagements of this kind to ask those with whom they are meeting either privately or publicly whether they have any interests in any applications currently before the Board.

Indeed, as a footnote illustrating the costs that can be paid by crossing the line of what is acceptable is that the new Energy East panel has responded to further challenges and agreed to start the hearing process all over again with all decisions of the previous panel removed from the record.¹¹⁶ This means that, among other matters, the new hearing panel will be re-evaluating all applications for participatory status as well as the list of issues to be considered as part of the environmental assessments aspects of the hearing.

The Standard of Review and Applications for Leave to Appeal

In 2014, in *FortisAlberta Inc. v Alberta (Utilities Commission)*,¹¹⁷ in the context of an application for leave to appeal on questions of law aspects of two decisions of the Commission, McDonald JA was confronted with an argument that the standard of review to be applied to the determinations in question was a relevant consideration. This argument was based on precedents in which earlier leave judges had teased out the standard Alberta Court of Appeal test as to whether the appeal raised a "serious, arguable point".¹¹⁸ Among those factors was "whether the appeal is *prima facie* meritorious."¹¹⁹ While acknowledging that there was authority¹²⁰ supporting the relevance of the applicable standard of review to that question, McDonald JA tantalizingly ruled in this case without any detailed reasons that

*... the decision as to what is the appropriate standard of review is to be determined by the panel hearing the appeal and I will give it no consideration in coming to my ruling herein.*¹²¹

¹¹⁵ *Kane v Board of Governors of University of British Columbia*, [1980] 1 SCR 1105, at 1116.

¹¹⁶ See National Energy Board News Release, January 27, 2017, "Energy East Hearing to restart from the beginning" and Ruling No 1 of the new panel.

¹¹⁷ *FortisAlberta Inc v Alberta (Utilities Commission)*, 2014 ABCA 264.

¹¹⁸ *Chevron Standard Ltd v Energy Resources Conservation Board*, 1983 ABCA 187, at para 13.

¹¹⁹ *Atco Electric Limited v Alberta (Energy and Utilities Board)*, 2003 ABCA 44, at para 17.

¹²⁰ *Atco Electric Limited v Energy and Utilities Board (Alberta)*, 2002 ABCA 45, at para 14 and *Nycan Energy Corp v Energy and Utilities Board (Alberta)*, 2001 ABC 31, at para 4.

¹²¹ *Supra*, note 117, at para 26.

Subsequently, however, McDonald JA, in at least three 2015-16 rulings on leave applications,¹²² toed the earlier line and deployed the application of the reasonableness standard to the questions of law raised by appellants as justification for rejection of applications for leave to appeal in particular on the basis that it is not *prima facie* meritorious. More particularly, he ruled in these cases by reference to the presumption that tribunals interpreting their home statute are entitled to the deferential reasonableness standard of review and the *Dunsmuir* test for reasonableness that the decision under attack falls

... within a range of possible acceptable outcomes that are defensible in respect of the facts and the law.¹²³

Four comments are in order:

1. In some of these cases, the issues raised by the appellants as questions of law seemed heavily suffused with facts and, as such, not, in any event, subject to an appeal on questions of law and jurisdiction, save to the extent that there was an extricable pure question of law.
2. The test applied (“demonstrat[ion] that there is a meritorious argument on the law”) appears to require that the appellant establish to the motion judge’s satisfaction that the argument will almost certainly succeed on appeal. On its face, this is more demanding or onerous than establishing a “serious, arguable case”.
3. Nonetheless, to the extent that the leave provision is aimed at weeding out appeals for a variety of reasons, there is no reason to exclude from consideration

of the likelihood of success the test or standard that the appellant must meet to succeed on the appeal – that the outcome does not come within the range of possible, acceptable meanings.

4. To the extent to which McDonald JA’s 2014 holding in *FortisAlberta* is an outlier, he may well have changed his mind, or perhaps, more satisfactorily, it was not clear in that instance that the issues raised were reviewable on a reasonableness rather than a correctness basis. By reference to the latter explanation, where it is the correctness of the ruling that may be in issue rather than its reasonableness, there is no reason to weigh the applicable standard of review as counting against the appellant. It is a neutral factor.

Regulatory Liability for Violation of Charter Rights and Freedoms – *Ernst v Alberta Energy Regulator*¹²⁴

Canadian law limits dramatically the extent to which regulators are exposed to civil or extracontractuelle liability in the performance of their multifarious responsibilities. There are many juristic reasons for this, particularly with respect to negligence as opposed to bad faith in public office claims. To the extent that regulators engage in policy making as opposed to the operational side of their mandate, there will generally be immunity.¹²⁵ Similarly, in the exercise of judicial or *quasi*-judicial functions, there is also for the most part immunity.¹²⁶ Modern Canadian law is reluctant to detect the existence of a duty of care on the part of regulators towards members of the public affected by their operations.¹²⁷ Moreover, even if a duty of care *prima facie* exists, it may be

¹²² *ATCO Power Ltd v Alberta (Utilities Commission)*, 2015 ABCA 405, at paras 17-19; *Remington Development Corp v ENMAX Power Corp.*, 2016 ABCA 6, at paras 28-30; and *Direct Energy Regulated Services v Alberta (Utilities Commission)*, 2016 ABCA 156, at paras 11 (where there is reference to divergence of opinion on the Court of Appeal) and 29-32. (See also the judgment of Berger JA in *Kikino Metis Settlement v Husky Oil Operations Ltd*, 2016 ABCA 228, at para 12 where, in granting leave, he professed to be “[m]indful of the standard of review in respect of an extricable question of law in the interpretation of the tribunal’s home statute.”)

¹²³ *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47.

¹²⁴ For other commentary, see Lorne Sossin, “Damaging the Charter: *Ernst v Alberta Energy Regulator*”, theCourt.ca, January 20, 2017, and Jennifer Koshan, “Die Another Day: The Supreme Court’s Decision in *Ernst v Alberta Energy Regulator* and the Future of Statutory Immunity Clauses for *Charter* Damages”, Ablawg.ca, January 16, 2017. See also the reaction to the Alberta Energy Regulator’s press release praising the judgment in Shaun Fluker and Sharon Mascher, “The Alberta Energy Regulator in the Post-Information World: Best in Class?”, Ablawg.ca, January 18, 2016.

¹²⁵ See e.g. *Just v British Columbia*, [1989] 2 SCR 1228 and *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45.

¹²⁶ See e.g. *Welbridge Holdings Ltd v Winnipeg (Greater)*, [1971] SCR 957.

¹²⁷ See e.g. *Cooper v Hobart*, 2001 SCC 79, [2001] 3 SCR 537.

negated by considerations of public policy not normally encountered in the domain of private negligence or extracontractuelle law such as the exposure of the regulator to unlimited liability on the part of a potentially broad segment of the public.¹²⁸ Moreover, in many instances, there will be relevant statutory immunity provisions which on their face seem to resolve the matter.¹²⁹

Most of these considerations found expression in the judgment of the Alberta Court of Appeal in *Ernst v Alberta (Energy Resources Conservation Board)*¹³⁰ in affirming the striking out of the plaintiff's negligence claim. Ernst asserted that the Board (the predecessor of the Alberta Energy Regulator) had negligently administered its regulatory regime by failing to take sufficient steps to protect her water supply from harm by EnCana which was engaged in various energy related and Board regulated activities in the region of her property.

Among the significant considerations that led the Alberta Court of Appeal to sustain the decision of the case management judge was a provision in the then *Energy Resources Conservation Act*¹³¹ respecting regulatory liability. Section 43 provided:

No action or proceeding may be brought against the Board or a member of the Board ... in respect of any act or thing done purportedly in pursuance of this Act, or any Act that the Board administers, the regulations under any of those Acts or a decision, order or direction of the Board.

(That provision has now been replaced by section 27 of the *Responsible Energy Development Act*¹³² covering the Alberta Energy Regulator:

No action or proceeding may be brought against the Regulator, a director, a hearing commissioner, an officer or employee of the

Regulator, or a person engaged by the Regulator, in respect of any act or thing done or omitted to be done in good faith under this Act or any other enactment.)

In a judgment delivered by the Court (consisting of Côté, Watson and Slatter JJA), it was held that this provision had the effect of barring all common law torts claims against the Board. In so doing, the Court rejected an argument to the effect that, as opposed to its successor, this provision did not cover omissions, only "acts or things done." It would have been "absurd" to apply the provision to only half of the Board's conduct in the exercise of its mandate.¹³³

Ms. Ernst did, however, advance other claims. One of these related to action that the Board took in response to her public criticisms of the Board in relation to this matter. The Board's Compliance Branch for just under two years allegedly refused to receive communications from her through the usual public channels unless she agreed to raise her concerns only with the Board and not publicly or with other citizens. She claimed that this action violated her freedom of expression as guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms* ("the Charter") and entitled her to make a claim for damages. Here too, the Court held that section 43 was fatal to the cause of action.¹³⁴ There was no general principle that provisions that excluded tortious or extracontractuelle liability for Charter violations were unconstitutional and impermissibly restrictive of the jurisdiction of section 96 courts under section 24(1) of the Charter to award "such remedy as the court considers appropriate and just in the circumstances." Among the justifications for this conclusion was that the "long standing remedy for improper administrative action has been judicial review."¹³⁵ The Court also referenced the existence of a statutory appeal from orders of the Board to the Court of Appeal, albeit with leave.¹³⁶

¹²⁸ *Ibid* and *Alberta v Elders Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261.

¹²⁹ See e.g. *Proceedings Against the Crown Act*, RSO 1990, c P.27, s 5(6), immunizing the Crown from liability for persons functioning in a judicial capacity including the execution of judicial processes.

¹³⁰ *Ernst v Alberta (Energy Resources Conservation Board)*, 2014 ABCA 285, 580 AR 341.

¹³¹ *Energy Resources Conservation Act*, RSA 2000, c E-10.

¹³² *Responsible Energy Development Act*, SA 2012, c R-17.3.

¹³³ *Supra*, note 130 at para 22.

¹³⁴ *Ibid*, at paras 23-30.

¹³⁵ *Ibid*, at para 30.

¹³⁶ *Ibid*.

Subsequently, Ernst sought and obtained leave to appeal the judgment of the Alberta Court of Appeal not on the negligence issue but on whether section 47 precluded her *Charter* damages claim. In the pages of this journal in December 2015, Ross, Marion and Massicotte looked forward to “guidance from the Supreme Court as to the proper framework for addressing the interplay between statutory immunity provisions and *Charter* damages claims against state actors.”¹³⁷ Unfortunately, the Supreme Court, in a judgment delivered on January 13, 2017,¹³⁸ a year and a day after the case had been argued before it, dashed those hopes.

Certainly, Ms. Ernst lost her appeal to the Supreme Court of Canada, and four of the judges (in a judgment delivered by Cromwell J) basically affirmed the reasoning of the Alberta Court of Appeal on this point though with more developed analysis. In particular, Cromwell J, as well as asserting the primacy of applications for judicial review as the remedial response to unlawful state action,¹³⁹ drew support from the reasons why courts have recognized common law restrictions on the exposure of public authorities to liability in damages¹⁴⁰ and the legislative expression of those reasons in common immunity provisions as exemplified by section 43.¹⁴¹ These expressions of common law and legislative policy could be deployed in justification of the constitutionality of section 43 in so far as it also on its face created immunity from *Charter*-based damages claims.

However, the other member of the majority, Abella J, in a separate judgment, held that the appeal should be dismissed because Ernst had at no point given the requisite formal notice of a constitutional challenge. Ernst could not justify this omission on the basis that she was not challenging the constitutional validity of section 43, but its application or operability to her cause of action. This in no way altered the fact that her application and operability based

claims depended on establishing that section 43 was unconstitutional, a reality that Ernst in effect acknowledged in the Supreme Court. One could not avoid the notice of constitutional question requirements by pleading one’s case in this manner. This was an “improper collateral attack”¹⁴² on the provision.

As for the minority, in a judgment penned by McLachlin CJ, Moldaver and Brown JJ and concurred in by Côté J, they held, first, that it was not plain and obvious that *Charter* damages could not be an appropriate and just remedy on the facts pleaded,¹⁴³ and, secondly, that it was also not plain and obvious that, as a matter of interpretation (as opposed to constitutional law), the immunity provision reached the conduct that was alleged to give rise to the claim in this case.¹⁴⁴

In his judgment, Cromwell J was particularly critical of the minority.¹⁴⁵ The parties had accepted that it was plain and obvious that on its face section 43 precluded any claim for *Charter* damages, a conclusion with which the four judges agreed. Therefore, it was unfair to determine the case on a basis on which the parties had had no opportunity to make submissions. He also expressed the view that it called into question the scope of many (“scores of”) similar immunity clauses on which there had previously been no doubt that they were sufficiently expressed to cover all manner of *Charter* damages claims.¹⁴⁶

In commenting in this context on the judgment of the Supreme Court, I do not want to dwell on the issue of the failure to give notice of a constitutional question¹⁴⁷ and the merits of Abella J’s analysis of why it was fatal here to a consideration of the merits of Ernst’s constitutional arguments. However, it does provoke a couple of observations, observations that lead into matters of more direct concern to the merits of the constitutional argument. It is

¹³⁷ Alan L. Ross, Michael Marion and Michael Massicotte, “Supreme Court of Canada Will Hear “Charter Damages” Case Against Alberta’s Energy Regulator” (2015) 3 *ERQ* 45.

¹³⁸ *Supra*, note 5.

¹³⁹ *Ibid.*, at paras 32-41.

¹⁴⁰ *Ibid.*, at paras 42-49.

¹⁴¹ *Ibid.*, at paras 50-55.

¹⁴² *Ibid.*, at para 114.

¹⁴³ *Ibid.*, at paras 153-78.

¹⁴⁴ *Ibid.*, at paras 179-86.

¹⁴⁵ *Ibid.*, at paras 15-17.

¹⁴⁶ *Ibid.*, at para 17.

¹⁴⁷ Or, for that matter, on the application in this case of the test for striking out a claim on the basis that it did not reveal a cause of action.

puzzling that, of the nine judges, only Abella J paid any attention to this issue of notice. After all, it was as recently as 2015 in *Guindon v Canada*¹⁴⁸ that the Supreme Court set out authoritatively the exceptional circumstances in which it should allow a constitutional argument to be made when there had been no requisite notice in the courts below. Abella J both acknowledged *Guindon* and engaged with it in determining this was not an exceptional case according to the criteria laid down in that leading precedent.¹⁴⁹

Of course, viewing the matter from the perspective of Cromwell J and the three judges who agreed with him, it might be that they did not address this issue on the basis that they were about to come to a conclusion that supported what more than likely would have been that argued for by the Minister of Justice and Solicitor General of Alberta, and the Attorney General of Canada had notice been given and they had appeared. Indeed, this was the position of the Alberta Court of Appeal which noted but did not respond to the objections before the panel based on a lack of notice made by the Alberta Minister of Justice and Solicitor General.¹⁵⁰ However, particularly in the case of the Attorney General of Canada, this assumption may have involved rather too much speculation.

However, it also worthy of note that Abella J did take a position on at least three points deployed by Cromwell J in his judgment. Do these in any way salvage the case in the sense of providing a majority on at least some aspects of the merits of the challenge to section 43 or its application to the pleadings in *Ernst*?

First, Abella J was of the view that the immunity clause was “absolute and unqualified”¹⁵¹ and could only give way on the basis of a successful constitutional challenge.¹⁵² In so holding, she rejected any notion that it might be interpreted so as not to apply to “punitive” conduct as

alleged by the plaintiff¹⁵³ or that it did not reach beyond the Board operating in an adjudicative capacity.¹⁵⁴ As a consequence, it may well be that the “minority” judgment must be taken as incorrect to the extent that it leaves open the possibility of the provision (and ones like or identical to it) not applying as a matter of interpretation in some situations.

I would, however, venture the following observation: It is noteworthy that, well before the advent of the *Charter*, in the landmark case of *Roncarelli v Duplessis*,¹⁵⁵ a majority of the Court held that a notice provision for an action for damages against a public official for acts “done by him in the exercise of his functions”¹⁵⁶ was not triggered in the case of the bad faith of exercise of power or an exercise of power which did not come within the scope of that official’s authority. Has the Court moved so far from the principles of that judgment to now accept the position that actions that might have violated the *Charter* should be included within the immunity established by provisions such as section 43? Did the addition by the legislature of the word “purportedly” achieve that end and put paid to the *Roncarelli* restrictive interpretation argument? If so, it is at least of some moment that the replacement to section 43 applicable to the Energy Regulator is excluded in the case of actions by the Regulator that are not taken in “good faith”. However, should the new provision, nonetheless, still be read as preventing actions based on alleged violation of rights and freedoms guaranteed by the *Charter*? In other words, can there be damages claims based on the bad faith exercise of public power but not *Charter* violations? That would be ironic!

Secondly, in the course of her judgment,¹⁵⁷ Abella J mounts a spirited justification of immunity provisions such as section 43 especially in the case of adjudicative tribunals or agencies. Much of this parallels Cromwell J’s bases for upholding the constitutional validity

¹⁴⁸ *Guindon v Canada*, 2015 SCC 41, [2015] 3 SCR 3.

¹⁴⁹ *Supra*, note 5 at paras 102-12.

¹⁵⁰ *Supra*, note 130 at para 7. At para 9, the Court stated that it was not necessary to deal with that issue to resolve the appeal.

¹⁵¹ *Supra*, note 5 at para 70.

¹⁵² *Ibid*, at para 73.

¹⁵³ *Ibid*, at paras 71-72.

¹⁵⁴ *Ibid*, at para 71.

¹⁵⁵ *Roncarelli v Duplessis*, [1959] SCR 121.

¹⁵⁶ Article 88 of the *Code of Civil Procedure*.

¹⁵⁷ *Supra*, note 5 at paras 114-20.

of such provisions. However, what is clear is that Abella J is speaking from a different perspective with that being the inappropriateness of dealing with constitutional challenges to such provisions without representations from the relevant Minister or Ministers to whom notice must be given, and in the absence of a full record including what might be said by way of a section 1 justification of such provisions. While, in some sense, the strength of her statements might indicate a very strong disposition to sustaining the constitutional validity of such provisions, as a matter of precedent, it does not go so far as to give the Cromwell judgment majority status on the issue of constitutionality.

In particular, at least implicitly, there is a clear divide between the two judgments on the methodology for dealing with the constitutionality of provisions such as section 43. The Cromwell judgment is confident in its assertion of the justifications for the constitutionality of such provisions based on the discerned policies of the common law, the perpetuation of such immunities by the legislature, and the limitations on recourse to *Charter* damages identified in the leading precedent of *Vancouver (City) v Ward*.¹⁵⁸ In contrast, despite all the similar justificatory discussion including protection of the independence of judicial and *quasi*-judicial decision makers, Abella J at the end of the day still wants to make these assessments against the backdrop of an evidentiary record and on the assumption that there is seemingly a section 1-like evidentiary burden on the government. There should be no nibbling away at the reach of such immunity provisions “without a full and tested evidentiary record.”¹⁵⁹ She then continued:

*It may or may not be the case that governments will be able to justify immunity from Charter damages, but until the s 1 justificatory evidence is explored, this Court should not displace the necessary evidence with its own inferences.*¹⁶⁰

Given this, it is particularly regrettable that there is no explicit engagement in the Cromwell judgment with this critical question of how to approach challenges to statutory limitations on remedial responses to alleged *Charter* violations.¹⁶¹

Thirdly, the other principal point on which there might seem to be apparent accord between the Cromwell and Abella judgments is with respect to judicial review being the primary way of vindicating *Charter* challenges to administrative action which allegedly has violated a *Charter* right or freedom (or *Charter* values, if they do indeed represent a separate category of review for unlawful administrative action). However, here too, the role of judicial review as the normal manner of recourse in such cases is seemingly being deployed for different purposes. For Cromwell J, it provides an argument in favour of the constitutionality of section 43; excluding a claim for damages does not unconstitutionally limit access to remedies for *Charter* challenges to administrative action, because as a matter of constitutional law, judicial review is available. Given, however, that Abella J is otherwise careful not to accept that the provision is necessarily constitutional, her assertion that judicial review is available cannot really be interpreted as anything more than a statement that, on the facts of this case, that is what Ernst should have done rather than pursuing an after the event action for damages. In other words, as a matter of discretion,¹⁶² this was not in any event a case for allowing the action for damages to proceed given the opportunity that Ernst had to apply for judicial review and, in that setting, making the substantive *Charter* violation argument. However, there is a big difference between deploying the availability of an application for judicial review as a basis for sustaining the constitutional validity of an immunity provision (Cromwell J) and asserting that an application for judicial review is either normally or on the facts of the particular case the appropriate way in which to proceed (Abella J).

As for the merits of the argument that an application for judicial review provides one of the justifications for the constitutionality

¹⁵⁸ *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28.

¹⁵⁹ *Supra*, note 5 at para 120.

¹⁶⁰ *Ibid.*

¹⁶¹ At para 23, Cromwell J does state that the onus did lie on Ms. Ernst to create a record adequate to permit a decision on the provision's unconstitutionality. However, from that point on, he deals with the constitutionality of section 43 on the basis of juristic principles and policies and not the record; on the basis of argument, not evidence.

¹⁶² As recognized, for example, by Binnie J, delivering the judgment of the Court in *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62, [2010] 3 SCR 585.

of the relevant provision, three observations are in order: 1. The existence of and failure to seek judicial review is at common law not an automatic basis for striking out an action for damages; it is a matter of judicial discretion.¹⁶³ 2. While the illegitimate collateral attack argument was to my knowledge never made in *Roncarelli v Duplessis*,¹⁶⁴ a strict application of the collateral attack rules would have meant that the merits of that highly significant common law constitution based challenge would never have been determined. 3. Even Cromwell J is not dogmatic about the issue conceding that, in some instances, an application for judicial review is not the most appropriate way of proceeding to call into question administrative action on the basis of alleged *Charter* violations. In this regard, he cites claims for damages for *Charter* violations arising out of the conduct of criminal prosecutions.¹⁶⁵

To me, this raises the question why, on any occasion, when judicial review fails to provide an adequate remedy for the vindication of *Charter* rights, freedoms and perhaps values, the possibility does not exist that immunities such as section 43, as a matter of constitutional law, either do not apply or should be read down to allow for an alternative damages claim. As I read the Cromwell judgment, this would increase the exposure of the state and regulatory bodies to the costs and inconvenience of litigation on all such occasions when such a plea was made and provide an incentive to plaintiffs to always plead that excuse for not seeking judicial review.¹⁶⁶ However, I question whether intuitively this is obviously the case particularly given the discretion that exists at common law for refusing to allow such forms of collateral attack. Moreover, if remedial discretion rather than a dogmatic rule is the way of the common law in dealing with such issues, why should this not also act as a source of guidance in assessing the constitutional reach of provisions such as section 43 at least absent government evidential justification of a complete ban or immunity of the kind seemingly demanded by Abella J?

In sum, *Ernst* is a frustrating decision. In particular, in the division that exists among the three judgments, there is a failure to resolve the key question on which the appeal was taken

and leave was given: the constitutionality of an immunity provision which the Alberta Court of Appeal held precluded the pursuit of civil claims for damages against a regulatory agency even for violation of *Charter* rights and freedoms. Certainly there are indicators that Abella J, who created the majority for dismissing the appeal, would struggle to find such a provision unconstitutional even if read to preclude all manner of *Charter* claims. Nonetheless, a definitive ruling must now await a further appeal to the Supreme Court in which the critical issues of substance and methodology are raised much more cleanly than in *Ernst*.

In the meantime, most regulatory agencies can take comfort from the fact that, at common law and even without the benefit of a statutory immunity provision, they are not exposed to negligence or extracontractuelle liability. And, while the bad faith exercise of authority can give rise to liability at common law, properly drafted statutory immunities may also eliminate this as a risk. Also, particularly for regulators exercising judicial or quasi-judicial powers, there will be many occasions on which at common law, courts will hold that the appropriate course of action is an application for judicial review rather than a form of collateral attack on a decision by way of an action for damages. Moreover, at the very least, the Supreme Court judgment in *Ernst* has to be read as extending this presumptive primacy of judicial review to the exclusion of a cause of action for damages to decisions that allegedly violate a *Charter* right or freedom whether by reliance on common law remedial discretion or, if the Cromwell judgment prevails ultimately on the constitutional issue, by the mandatory operation of an appropriately worded immunity provision. Indeed, given Cromwell J's reliance in *Ernst* on both the common law justifications for limited civil liability exposure on the part of regulators and the principles identified in *Ward* under which courts should consider whether damages are an appropriate and just remedy under section 24(1) of the *Charter*, it may well be that he and the judges who concurred in his judgment would not have countenanced an action such as that brought by Ms. Ernst even in the absence of section 43, the immunity provision. ■

¹⁶³ *Ibid.*

¹⁶⁴ *Supra*, note 155.

¹⁶⁵ *Supra*, note 5 at para 38.

¹⁶⁶ *Ibid.*, at paras 56-57.

THE INTERSECTION OF ABORIGINAL AND ADMINISTRATIVE LAW: WHEN DOES A REGULATORY DECISION CONSTITUTE “CONTEMPLATED CROWN CONDUCT”?

*Chris W. Sanderson, Q.C. and Michelle S. Jones**

In an article published in May 2012¹, we ventured the optimistic opinion that the then recent Supreme Court of Canada decisions in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*² (“*RTA*”) and *Beckman v Little Salmon Carmacks First Nation*³ (“*Beckman*”) could lead to a broadly accepted understanding of the source, trigger, purpose and limits of the Crown’s duty to consult Aboriginal peoples. Perhaps not surprisingly, the path to understanding has not turned out to be as smooth as we might have hoped.

RTA was significant in two primary respects. First, it broke down the test for determining whether the duty to consult that was first identified in *Haida Nation v British Columbia (Ministry of Forests)*⁴ (“*Haida Nation*”) exists into 3 constituent elements. Second, it

described how the courts should ascertain the role(s) a statutory decision maker is required to play when the three elements giving rise to a duty to consult are all present.

In our view, these two aspects of *RTA* must be kept distinct. That is, the existence of a duty to consult tells us nothing about whether a particular regulator has any role to play in fulfilling it. The role of the regulator is to be determined by its legislative mandate and the regulator and the courts are to discern that role through conventional means of statutory interpretation.

Conversely, the powers provided to a tribunal tell us nothing about whether a duty to consult arises in any particular situation. The fact that a tribunal has the express duty to assess

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¹ Chris W. Sanderson et al, “The Crown’s Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Payers and Limits of the Duty” (2012) 490: 4 *Alberta Law Review* 821.

² *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 [*RTA*].

³ *Beckman v Little Salmon Carmacks First Nation*, 2010 SCC 53 [*Beckman*].

⁴ *Haida Nation v British Columbia (Ministry of Forests)*, 2004 SCC 73 [*Haida Nation*].

the adequacy of consultation or to consult itself, tells us nothing about whether the three elements necessary for the *Haida Nation* test are present. That determination must be based on evidence that demonstrates the presence of all three elements in any particular case.

We think post *RTA* cases have tended to conflate these two distinct aspects of *RTA*.⁵ The result has been inconsistent treatment of the responsibilities of statutory decision makers in circumstances where the conduct which is alleged to have a potential adverse impacts on Aboriginal claims or rights is being contemplated by private actors. In this article, we propose to focus on those situations and outline the manner in which regulators and the courts reviewing their decisions ought to analyse whether consultation is required before a decision affecting a private sector activity can properly be made.

We begin by observing that private activities affecting land use are distinct from the situations in *Haida Nation* and *RTA*. In both those cases, the contemplated Crown's conduct was active and direct. In *Haida Nation*, the province of British Columbia contemplated issuing a licence to cut Crown timber in return for the payment of stumpage to the Crown. In *RTA*, the Crown, through its agent, BC Hydro contemplated the purchase of power. These cases involved the Crown or its agents contemplating conduct that was alleged to have a potential physical impact on resources or land subject to Aboriginal claims or rights. These facts are distinct from cases in which a private actor contemplates activities that are subject to some form of regulation but involve no other active or direct Crown participation and do not involve a disposition of Crown resources. In those cases, the question that arises is whether government regulation of these private activities is "contemplated Crown conduct" that can attract the consultation obligation of the Crown.

This is a complex question that in our view

raises distinct issues that require further analysis of the duty established in *Haida Nation* and elaborated in *RTA*. *RTA* tells us that the obligation to consult arises when the following three elements are present:

- a) The Crown's knowledge, actual or constructive of a potential claim or right;
- b) Contemplated Crown conduct; and
- c) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.⁶

In this article, we will use the term "Trigger" to denote the presence of all three of these elements because when they are present in a given situation, the obligation to consult the potentially affected Aboriginal peoples is triggered.

In *RTA* the parties accepted the Crown had the requisite knowledge and contemplated conduct. The issue was whether that conduct met the third element of the Trigger. That is, was there a potential "adverse effect" on an Aboriginal claim or right tied directly to the Crown conduct. When a private proponent is involved and a statutory decision-maker has only a regulatory role to play, it becomes less obvious whether the requirement for "contemplated Crown conduct" in the second element of the Trigger is present. An opportunity to illuminate this question recently arose in two cases heard by the Supreme Court of Canada.⁷ In those cases, the second element of the Trigger is directly at issue.

We submit below that consideration of the second element of the Trigger requires the rigorous use of the same tools employed by the Court in *RTA* when analysing the third element. In order for the second element of the Trigger to be present, we believe (1) there must be contemplated conduct, and (2) the actor contemplating the conduct must be the Crown or its delegatee. Accordingly, where

⁵ See for instance, the contextual circumstances that arose in *Ross River Dena Council v Government of Yukon*, 2012 YKCA 14, 358 DLR (4th) 100 leave to appeal denied in 2013 [*Ross River*], *Neskonlith Indian Band v Salmon Arm (City)*, and 2012 BCCA 379 [*Neskonlith*].

⁶ *RTA*, *supra* note 2 at para 31.

⁷ *Hamlet of Clyde River, et al v Petroleum Geo-Services Inc (PGS), et al*, Supreme Court Case Number #36692 [*Clyde River*] and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc, et al*, Supreme Court Case #36776 [*Chippewas*] was heard by the Supreme Court of Canada on November 30, 2016. A third case, *Ktunaxa Nation Council v Minister of Forests, Lands and Natural Resource Operations, et al*, Supreme Court Case #36664 [*Ktunaxa*] which also involved adequacy of the Crown's duty to consult was heard the following day.

a private actor is proposing conduct that requires some sort of regulatory approval but no other Crown conduct, the second element of the Trigger will only be present if the act of approval itself can properly be considered conduct of the Crown or its delegatee. It is that question that will be the primary focus of what follows.

We have analysed this question because in our respectful view, some court decisions⁸ addressing private sector developments have failed to critically consider the content of the second element of the Trigger. Instead, the tendency has been to avoid it entirely or to address the issue of “contemplated Crown conduct” superficially, to find the Trigger to be met and to move immediately to the *RTA* analysis regarding what roles, if any, the regulator has been statutorily delegated to play in consultation. With few exceptions, even those cases that address the issue⁹ tend to limit their focus on whether the decision-maker is the “Crown” instead of asking whether there is “contemplated Crown conduct” involved. In our view, this limited treatment is not adequate to the task because it wrongly focuses on the characteristics of the decision-maker as opposed to the particular decision that it contemplates making.

One partial exception may be the decision of the Yukon Court of Appeal in *Ross River*. There, the Court expressly considered the second element of the Trigger and concluded the decision of the Mining Recorder to register a claim under the *Quartz Mining Act*¹⁰ was “contemplated Crown conduct”. The Court determined that even if the enabling legislation conferred no jurisdiction on the Mining Recorder to reject the claim, the

Yukon Government could not grant mineral rights without first engaging in consultation.

In our respectful view, it is not possible to reconcile the reasoning in *Ross River* with the decision in *RTA*. In dicta¹¹, the Court of Appeal in *Ross River* rejected the argument that the Crown had conferred no discretion on the Mining Recorder absolved him from the need to consult with the blanket statement that:

“Statutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist.”¹²

On that basis, the Court concluded that, notwithstanding the statute, the Mining Recorder could not register claims without prior consultation because the enabling legislation was deficient. As we discuss further below, in so doing the Court either read into the *Quartz Mining Act* obligations on the Mining Recorder that were manifestly not intended by the legislature or crossed the bridge that the Supreme Court declined to cross in *RTA*¹³ and presumed to place limitations on the statutory regime the legislature may enact.

We think the former step is inconsistent with the express guidance provided in *RTA*. *RTA* firmly established that:

- it is up to the Crown, not the Court, to determine how to meet the obligation;
- The obligation must be met and where the statutory scheme does not succeed in doing so, the courts will provide a remedy, ranging from injunction

⁸ For instance in *Neskonlith*, the Court of Appeal did not engage in a meaningful way in whether or not the City of Salmon Arm's issuance of a development permit constituted “contemplated Crown conduct”. Instead, the Court focused on whether the City was empowered by statute to engage in and/or adjudicate consultation. Having found that the City was not delegated the authority to engage in or adjudicate consultation, it dismissed the appeal. However, in doing so, it did not seriously consider the preliminary question of whether or not a duty to consult was in fact triggered by the decision being contemplated.

⁹ For instance in *Standing Buffalo Dakota First Nation v Enbridge Pipelines Inc*, 2009 FCA 308, the Federal Court of Appeal considered whether or not the National Energy Board's regulation of private activities required it to adjudicate the adequacy of consultation prior to issuing the requested permits. In considering the issue the Court noted that the scenario in *Carrier Sekani Tribal Council v British Columbia (Utilities Commission)*, 2009 BCCA 67 was distinguishable on the basis that the applicant in that case was the Crown. The Court further stated “Finally, I would add that the NEB itself is not under a Haida duty and, indeed, the appellants made no argument that it was. The NEB is a quasi-judicial body [...] and, in my view, when it functions as such, the NEB is not the Crown or its agent” (para 34).

¹⁰ *Quartz Mining Act*, SY 2003, c 14.

¹¹ The Court did not accept that the Mining Recorder lacked discretion to refuse to register a claim under the relevant legislation. Thus, its discussion of the deficiency in the legislation was premised on an assumption that it did not find to be substantiated in the case before it. See *Ross River*, *supra* note 5 at paras 36, 52-53.

¹² *Ibid* at para 32.

¹³ *RTA*, *supra* note 2 at para 44.

to damages to mandamus requiring consultation¹⁴; and

- The focus of any remedy needs to be on the contemplated conduct, not on future conduct which is not itself the cause of the potential infringement of the Aboriginal claim or rights in issue.

We think that in requiring the Mining Recorder to take steps the legislature had not, the Court fashioned a remedy that imposed inappropriate preconditions on the future conduct of the Mining Recorder instead of designing a remedy to compensate for the Crown's past decision to allow free miners to stake claims as of right without consultation.

To the extent the Court took the latter step by purporting to declare legislation invalid because a particular regulator had not been provided with the responsibility to consult, it went further than *RTA* contemplated and indeed is inconsistent with that decision. We know of no authority to support the conclusion that the legislation "cannot be allowed to subsist"¹⁵ because it failed to provide for the role that the Court wished to see assigned to the Mining Recorder. If, as the Court concludes, "the failure of the Crown to provide for discretion in the recording of mineral claims under the *Quartz Mining Act* regime can be said to be the source of the problem"¹⁶, then the remedy is not to read things into or out of the Mining Recorders powers but rather to fashion a remedy against the Crown while being mindful of the potential limitations constraining Crown legislative sovereignty. The Court's reluctance to take on the question of whether the Crown can be obliged to consult with particular First Nations before presuming to enact specific legislation that may affect them is understandable in a case that did not directly raise the issue¹⁷ given the enormously broad implications of declaring invalid historical legislation that does not provide for consultation. There is much legislation in Canada that has alienated Crown control of its land and resources to the private sector with no consultation and if all of it is to be held deficient, the consequences for Canadian tenure and ownership systems could be enormous. However, that difficulty is not a

justification for reading into legislation things it clearly was not intended by its drafters to include.

We hope to show that where the Crown's only role in connection with a proposed activity is regulatory oversight, the second element of the Trigger requires determining whether a specific decision required in connection with that activity comprises "contemplated Crown conduct". The rest of the analysis undertaken in *RTA* regarding the role of the regulator in consultation and its adjudication is only required once it has been determined that all elements of the Trigger including "contemplated Crown conduct" are met. Thus, before the inquiries mandated under *RTA* in respect of the roles of tribunals in consultation are necessary, the Court must inquire as to whether there is sufficient "contemplated Crown conduct" to permit the duty to be triggered in the first place. That said, the Court's affirmation of administrative law and statutory interpretation principles and their role in determining the allocation of roles in relation to the Crown's duties under section 35 of the *Constitution Act*¹⁸ provided in *RTA* does give valuable guidance that can be employed when assessing whether the second element of the Trigger is met.

We think the struggle the courts have had in assessing consultation obligations associated with private sector development is the product of the challenges inherent in coming to grips with the intersection between principals of statutory interpretation evolved during the development of administrative law in Canada and constitutional principles developed particularly in the context of section 35 of the *Constitution Act*. The notion that a government created process could allow a private proponent to take actions that could potentially affect an Aboriginal claim or right in the absence of Crown consultation regarding those actions is uncomfortable. This discomfort was central to the Court's concerns in *Ross River*. However, in our view *RTA* tells us that the solution is not to assume the result and assign duties accordingly, but rather, to return to the principles of administrative law and statutory interpretation and to determine the true nature of the regulator's role in a particular case to assess

¹⁴ *Ibid* at para 37.

¹⁵ *Ibid*.

¹⁶ *Ibid* at para 38.

¹⁷ *Supra* note 11.

¹⁸ *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

whether its actions constitute “contemplated Crown conduct”. In cases where the legislature has in the absence of adequate consultation, designed the scheme in such a way that permits potential impacts on Aboriginal claims and rights without further consultation, then *RTA* tells us that Aboriginal people are not without remedies and could pursue damages against the Crown.¹⁹

In this regard, we rely in particular on the language of the Chief Justice in Canada in *RTA* where she said:

“The decisions below and the arguments before us at times appear to merge the different duties of consultation and its review. In particular, it is suggested that every tribunal with jurisdiction to consider questions of law has a constitutional duty to consider whether adequate consultation has taken place and, if not to itself fulfil the requirement regardless whether its constituent statute so provides.”²⁰

She went on to say:

“This argument cannot be accepted, in my view. A tribunal has only those powers that are expressly or implicitly conferred on it by statute. In order for a tribunal to have the power to enter into interim resource consultations with the First Nations, pending the final settlement of claims, the tribunal must be expressly or impliedly authorized to do so. The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred for the mere power to consider questions of law.”²¹

We believe the intent of these passages in *RTA* was to contain arguments that the duty to consult flowing from the honour of the Crown and enshrined through s 35 confers powers or imposes duties on statutory decision-makers where a statute does not. We believe that the same limitations apply to determining whether a statutory decision-maker’s actions constitute “contemplated Crown conduct”. *RTA* reminds us that whether or not the powers being exercised by a decision-maker in a given case amount to “contemplated Crown conduct” turns on the statutory scheme conferring jurisdiction with

respect to that specific decision. In our view, the Chief Justice’s admonition that legislative intent, as traditionally understood as a matter of administrative law, remains paramount and should not be compromised.²² Put another way, the temptation to confer jurisdiction and obligations on decision-makers in circumstances where there is little evidence of legislative intent to do so, should be resisted notwithstanding the constitutional significance of the consultation issue.

In this article, we suggest approaching the issue of what constitutes “contemplated Crown conduct” by focusing on the nature of the decision as indicated by the language of the statute. As the Court directed in *RTA*, we suggest looking at each component of a decision-maker’s characteristics in the context of the specific decision that is contemplated to determine if, having regard to its mandate, structure and function, the Crown has delegated to that decision-maker the obligation to determine whether it is honourable to permit the incursions on Aboriginal claims or rights that might result from the proposed private activity. We conclude that if the enabling legislation charges the decision-maker with this onerous responsibility, it must have the benefit of adequate consultation on the *Haida Nation* spectrum before making its decision. If the legislation does not charge the decision-maker with that responsibility in making that decision, then its decision is not “contemplated Crown conduct” within the meaning of the second element of the Trigger and unless there is some other Crown conduct, the duty to consult does not arise.

1. The Administrative Law Backbone to *RTA*

In *RTA*, the Court first elaborated the principles governing the three elements of the Trigger and then moved on to consider the potential roles of a regulator in the context of the duty to consult. The first step required the Court to elaborate Aboriginal law principles still in the process of development. The second step simply required it to apply well established principles of administrative law.

¹⁹ *RTA*, *supra* note 2 at para 37.

²⁰ *Ibid* at para 59.

²¹ *Ibid* at para 60.

²² *Ibid* at para 49.

The Court determined that the principles of administrative law were key to determining the role the Commission was required to play in ensuring adequate consultation had occurred before Crown conduct was undertaken. To determine the Commission's role, the Chief Justice's analysis at paragraph 58 of *RTA* relied on the Court's decision in *Conway*²³, a Charter case that did not involve Aboriginal law issues. In *Conway*, the Court held that "relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function".²⁴

Applying the logic of *Conway*, *RTA* confirmed that when Crown activity is subject to regulatory oversight, the role of any particular regulator can be whatever its enabling statute provides. The regulator may be required to engage in the consultation required by the contemplated activity, it may be required to determine whether the crown actor has itself complied with the duty, or it may be required to do both or neither of those things.²⁵ Its role will be defined by its statute. Discerning a regulator's role through application of the rules of statutory interpretation applies no differently in an administrative context involving Aboriginal law issues than it does in other administrative contexts.

We believe the analytical approach based on administrative law principles used by the Court in *RTA* points the way to an appropriate analysis for the quite distinct issue we are considering in this paper. That is: When is the decision of a statutory regulator capable of being "contemplated Crown conduct" for the purposes of the second element of the Trigger?

The Administrative Law Tools to Determine Whether a Decision is "Contemplated Crown Conduct"

Where a private as opposed to Crown actor seeks regulatory approval to undertake and activity potentially harmful to Aboriginal claims or rights, it is clear that the private activity itself is not "contemplated Crown conduct". Assuming no other Crown involvement then,

the only candidate conduct is the regulator's decision to permit the activity. We think that *RTA* tells us that to determine whether that decision can be Crown conduct within the meaning of the second element of the Trigger, the regulator's enabling legislation must be examined. The focus of that analysis must be to determine whether the legislature intended the regulator to balance the constitutionally protected Aboriginal rights or claims that may be adversely affected against whatever other considerations are relevant to its statutory mandate when making the particular decision in issue.

In this regard, the focus of the analysis should be on the regulator's responsibilities with respect to the issue before it, as opposed to whether the regulator itself is the Crown or a Crown delegate. As we elaborate below, a particular decision-maker may have a variety of duties only some of which may permit it to potentially affect constitutionally protected Aboriginal rights. An analysis that focuses solely on the Crown or non-Crown status of the decision-maker would fail to appreciate what role the decision-maker is playing in a given context. Where that role anticipates the use of delegated decision-making powers to authorize activities that may adversely affect constitutionally protected Aboriginal rights, the exercise of those powers should necessarily attract the same constitutional duties as if that power was exercised by the Crown. Conversely, where constitutionally protected Aboriginal interests have already been compromised by Crown conduct that expressly or implicitly authorized private activities subject only to demonstrating that other public interests were being served, those same duties may not be present because the decision to abrogate Aboriginal rights has already been made.

Thus, we submit that the determination that must be made in the context of any regulatory decision is whether the decision to countenance private activity that has potentially adverse impacts on Aboriginal claims or rights has already been made, will subsequently be made or was left to the regulator²⁶. For instance, if the decision to allow some sort of private use

²³ *R v Conway*, 2010 SCC 22 [*Conway*].

²⁴ *Ibid* at para 82 referencing *Dunedin*.

²⁵ *RTA*, *supra* note 2 at para 58.

²⁶ For a very complete discussion of when the duty to consult may not arise in the context of an early Crown decision, see *Buffalo River Dene Nation v Saskatchewan (Energy and Resources)*, 2015 SKCA 31.

of public resources (land, minerals, etc.) has already been made, then the Crown conduct giving rise to potential impact on Aboriginal claims or rights may have been too. By contrast, if the regulator has been asked to determine if undertaking a private activity can be reconciled with respect for potentially affected Aboriginal rights, then the Crown has in essence delegated its decision and the regulator's decision can constitute "contemplated Crown conduct".

It may sometimes be intuitively straightforward to determine whether a regulator is charged with considering the impacts of its decision on constitutionally protected Aboriginal claims or rights. For instance, a statutory body empowered to allow the removal of land from an agricultural land reserve would likely not be charged with this duty if the Crown activity adversely affecting Aboriginal claims or rights was the decision to convert the use of the land to non-Aboriginal agricultural purposes in the first place. Given the horse was already out of the barn, it would be surprising to find a statute requiring the decision maker consult before preferring one non-Aboriginal use over another. Thus, given its mandate, and absent express language to the contrary, its decisions would likely not be seen as "contemplated Crown conduct" within the meaning of the second element in the Trigger therefore requiring consultation.

Often the role of the regulator will not be so clear from the circumstances and thus, the language of its enabling statute must be scrutinized to determine if it has the responsibility to consider whether a proposed private activity has the potential to adversely affect constitutionally protected Aboriginal claims or rights. The principles of statutory interpretation developed in administrative law and discussed in *Conway* and *RTA* to facilitate that examination require consideration of the mandate, structure and function of the decision-maker in the particular case to guide the interpretive exercise we have described.²⁷ Below we discuss how a consideration of each of these attributes assists in determining the precise nature of the role of the regulator in a given case.

Mandate

The statutory mandate of any decision-maker

as expressed in its enabling legislation is clearly the first place to look to see if it confers any responsibility on the decision-maker to determine whether the proposed activity could give rise to adverse impacts on Aboriginal claims or rights. At its simplest, the decision of a regulator pursuant to a statute that said it was to issue a permit for specified activities only if there was no unacceptable adverse impact on Aboriginal claims or rights, would likely be "contemplated Crown conduct" because the Crown would expressly not have previously authorized unacceptable interference with the potentially affected Aboriginal claims or rights. The mandate of the decision-maker to consider precisely that issue would be compelling evidence that the legislature intended to defer consideration of that issue, and therefore the obligation to consult, to that process. If the tools to consult adequately were not given to the decision-maker or some other manifestation of the Crown, then the Crown would have failed in its obligation to establish a process that facilitated consultation, for the obligation to consult cannot be shirked – it must be met.²⁸

Structure

Where the mandate of the regulator is less clear, regard can be had to its structure to obtain further evidence of legislative intent. Has the decision-maker been provided the tools to determine the nature of Aboriginal interests through consultation it conducts itself or through its command of other Crown actors? Are the statutory requirements for the qualifications required of members of the regulator likely to result in individuals knowledgeable about Aboriginal claims and rights? Similarly are they likely to be in a good position to appreciate and assess impacts on Aboriginal interests? Can the normal conduct of the regulator's business be expected to bring it into contact with conflicts between Aboriginal and non-Aboriginal rights so that it will develop a particular familiarity with the issues required to be resolved? Do the powers of the decision-maker reflect a focus on the type of assessment required to determine whether it is honourable for the Crown to permit specific non-Aboriginal uses of land or resources or are they more compatible with other types of assessment? The answer to any one of these

²⁷ *Conway*, *supra* note 23 at para 82.

²⁸ *RTA*, *supra* note 2 at para 63.

questions is unlikely to be definitive but the way in which the decision-maker is structured when considered as a whole may provide a valuable clue as to legislative intent.

Function

The function of a decision-maker may give the clearest indication of whether it was intended to make the final decision to permit private activities adversely affecting Aboriginal claims or rights. Typically, government or Crown functions are broadly divided into three categories: legislative, executive and judicial. Existing case law makes clear that where the Crown is acting in an executive capacity, it will be required to consult before taking decisions that adversely affect Aboriginal claims or rights.²⁹ Existing case law is also clear that it remains to be determined whether the Crown can be required to consult before passing legislation.³⁰ Finally, we know of no case suggesting the judicial arm of the Crown can attract an obligation to consult to maintain the honour of the Crown. Courts are expected to carry out their decision making functions in an impartial and independent manner and treat all participants equally. That approach is difficult to reconcile with assuming responsibility for direct consultation with some participants but not others. The same logic can be applied to quasi-judicial decisions of regulators and accordingly, we do not think such decisions will normally attract a consultation obligation. Thus, characterizing the function of a decision-maker might shed considerable light on whether the decision it makes can attract a duty to consult or not.

We believe that the mandate of most decision-makers could, but usually is not, expressed in a sufficiently clear manner to make consideration of its mandate determinative of the duty of the decision-maker and thus of whether its decision can be a trigger for the consultation

requirement. We also believe that while the structure of the decision-maker may give clues as to legislative intent, it will rarely be determinative. Accordingly, we think function will often be the best indicator of legislative intent in this regard and it is an elaboration of that indicator to which we now turn.

While neither *Haida* nor *RTA* required the Court to explore the relationship between the regulator and the Crown, the need to characterize the function of a regulator has often and long been the subject of judicial inquiry. At its core, determining the role of a regulator based on the powers conferred upon it and its relationship to the Crown is a question of statutory interpretation, not a question of Aboriginal law. Thus, the tools the courts have used to resolve questions of the nature we have identified can be found in the tenets of constitutional and administrative law developed over the last several hundred years as first formalized in the work of A.V. Dicey over 100 years ago. Determining the extent of the decision-maker's authority lies at the heart of administrative law and indeed, the rule of law.³¹ Relating the role of regulators to the intent of the legislation that created them remains critical to the rule of law. As stated by Halsbury's Laws of Canada³², judicial interference on judicial review is generally justified in relation to one of the three principles underlying the rule of law:

"...that political action should be exercised according to law and no one should suffer but for a breach of a clear law; that the same laws should apply in the same way to everyone, including the state; and that the law should not be applied whimsically or arbitrarily."³³

The threshold issue in determining the intended powers of a statutory decision-maker is whether it has "exercise[d] power in a manner contrary to its delegated mandate, thereby offending the principle that administrative action must

²⁹ *Ibid* at para 44.

³⁰ *Ibid*.

³¹ See Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 8th edition (London: Macmillan, 1915) at e.g. Introduction, para 43; Part II, Chapter IV and particularly Chapter 11 where Dicey concludes as follows:

"it is now well-established law that the Crown can act only through Ministers and according to certain prescribed forms which absolutely require the co-operation of some Minister, such as a Secretary of State or the Lord Chancellor, who thereby becomes not only morally but legally responsible for the legality of the act in which he takes part. Hence, indirectly but surely, the action of every servant of the Crown, and therefore in effect of the Crown itself, is brought under the supremacy of the law of the land. Behind Parliamentary responsibility lies legal liability, and the acts of Ministers no less than the acts of subordinate officials are made subject to the rule of law".

³² Halsbury's Laws of Canada, *Administrative Law* (2013 Reissue), "Standards of Review: General: Judicial Intervention" (V.I.(3)) at HAD 105. [*Halsbury*]

³³ *Ibid*.

be authorized by elected representatives of the people.”³⁴ In such cases, the result is often a finding that the administrator has lost or exceeded its jurisdiction.

It is true that many recent decisions have explored which institutions should ensure that these principles are honoured. This finds expression in the ongoing debate about the extent to which tribunals should be able to assess the extent of their jurisdiction themselves, provided they act reasonably, or whether the courts have a role to play in ensuring they do so correctly. However, that debate should not be permitted to obscure the issue the regulator or reviewing court is charged with resolving, which is whether the regulator is charged with determining whether a potential intrusion on Aboriginal claims or rights should be permitted or not .

The characterization and distinction between these functions and their relationship to the rule of law was traditionally a central preoccupation of administrative law. The availability of judicial review often turned on arcane rules designed to distinguish between legislative, executive (or administrative), and quasi-judicial functions. While this effort at characterization is not as central to administrative law as it once was, it remains useful in specific contexts.³⁵ In particular, we believe it remains useful in discerning legislative intent with respect to the responsibilities of a statutory decision-maker in connection with Aboriginal claims or rights. Below we consider the three distinct function of government discussed in administrative law.

Legislative Powers

Legislative powers almost always must be directly conferred. That is, the power to make legally enforceable rules must be expressly granted as opposed to implicitly conferred.³⁶ As well, legislative powers are usually only part of the picture – most statutory bodies have functions other than simply passing regulations or making other subordinate legislation generally applicable to persons engaged in the

activities being addressed. If the purpose of the analysis is to ascertain the nature of the particular powers being exercised in a given regulatory context, the mere fact that a statutory decision-maker has legislative powers is not dispositive of the issue. The question is whether or not the regulatory role that it is playing in a given case is grounded in those powers.

If the function being exercised in a given case is in fact grounded in a regulator’s legislative powers, then there is legal uncertainty as to whether the regulator’s decision constitutes “contemplated Crown conduct”. The Court in *RTA* left the question of whether government conduct attracting the duty to consult includes legislative action for another day.³⁷ We will do the same. If the answer is ultimately in the affirmative, then it likely follows that sub-delegated legislation could also amount to conduct under the second element of the Trigger where the legislative power is being used to potentially interfere with Aboriginal claims or rights that would otherwise not occur.

Quasi-Judicial vs. Executive Powers

We have considered quasi-judicial and executive powers together because the debate in the cases often seeks to categorize between those two functions as opposed to discussing the characteristics of either on its own. There are several aspects of a statutory decision-maker’s mandate that are telling when determining whether its role is intended to be executive or quasi-judicial. Perhaps most prominent amongst these aspects is whether the decision-maker is empowered to decide questions of law in connection with the decision it is contemplating. If it is, then its mandate and structure would tend heavily towards quasi-judicial on the premise that the executive ought not to be presumed to have the power to determine its own authority by deciding questions of law. Conversely, in the absence of that authority, it may be easier to classify the power being exercised by tribunal as executive in nature.

The leading case that considers this issue is

³⁴ *Ibid.*

³⁵ See David Phillip Jones and Anne De Villars, *Principle of Administrative Law*, 6th ed (Toronto: Carswell, 2014) at p 97 for a discussion of the current status of the need to characterize functions as legislative, judicial or executive.

³⁶ Robert W. Macaulay & James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomson Reuters, 2016), at c 6.8, para 7.

³⁷ *RTA*, *supra* note 2 at para 44.

Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch) (“*Ocean Port*”).³⁸ In *Ocean Port*, the Court set aside a decision of the British Columbia Court of Appeal that determined the Liquor Licensing Board lacked the necessary guarantee of independence required of administrative decision-makers where their decisions had a significant impact on personal rights. The Supreme Court held that determining the degree of independence required by statutory decision-makers was a matter of statutory interpretation and the legislature was free to provide for as much or as little independence as it wished. The Court held that there is a fundamental distinction between administrative tribunals and courts in that the latter are constitutionally required to be independent whereas the former have whatever degree of independence their enabling statute provides them. Those that would view a tribunal as part of the executive branch of government find support in *Ocean Port’s* observation that tribunals are often created precisely for the purpose of implementing government policy.³⁹ However, they place less emphasis on the judgment’s recognition that “that policy may require tribunals to make quasi-judicial decisions”.⁴⁰

Thus, as Smith points out⁴¹ a specific tribunal may be empowered to perform both executive and quasi-judicial tasks and even specific tasks may include both executive and judicial components. Indeed, the courts have considered the distinction between executive (and to this we would add administrative) functions and judicial ones as a spectrum.⁴² The goal of the analysis is not to put a particular function squarely into one category or the other, but rather to ascertain where along the spectrum the function fits. Functions that are more executive in nature are more likely to be “contemplated Crown conduct” than those which are more judicial in character.

Another important indicator of the role that the legislature intended a regulator to play is the

extent to which legislation provides procedural protections normally associated with judicial functions. While it has been clear for some time that a general duty of fairness attach to executive and quasi-judicial decisions,⁴³ the latter attract significantly more process obligations. Thus, where a statute confers a right to be heard, requires impartiality and perhaps independence, or otherwise enshrines procedural protections for participants, the activities of the decision-maker acquire a more judicial appearance and can be characterized as quasi-judicial. Indeed, where a decision-maker is affecting individual rights (as opposed to imposing general policies), the courts would be quick to infer a quasi-judicial aspect and thus quasi-judicial burdens on the decision-maker. This was illustrated in *Ocean Point* where individual rights were in issue and the Court held that:

“Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal’s process to comport with principles of natural justice...”⁴⁴

Where a statutory decision-maker is called upon to determine individual rights to undertake particular behaviour or to impose sanctions on individuals, absent express language to the contrary, the courts will infer that the decision-maker is exercising a power towards the judicial end of the spectrum and will afford the parties the procedural safeguards and rights that are compatible with that function. In turn this inference would tend to suggest the decision being made is not “contemplated Crown conduct” for the purposes being discussed here.

In the context of the consultation obligation, we believe this tendency was evident in the Supreme Court of Canada’s rejection of arguments that the National Energy Board owed distinctive duties to First Nation interests in its *Hydro Quebec* decision.⁴⁵ The Court

³⁸ *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 [*Ocean Port*].

³⁹ *Ibid* at para 24.

⁴⁰ *Ibid*.

⁴¹ Honourable Madam Justice Lynn Smith, “Administrative Tribunals as Constitutional Decision-Makers” (2004), 17:2 Can J of Administrative Law and Practice 113, at 16.

⁴² See *Idziak v Canada (Minister of Justice)*, [1992] 3 SCR 631, 97 DLR (4th) 577.

⁴³ *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311, 88 DLR (3d) 671 at 324.

⁴⁴ *Ocean Port*, *supra* note 38 at para 21.

⁴⁵ *Quebec (Attorney General) v Canada (National Energy Board)*, [1994] 1 SCR 159, 112 DLR (4th) 129 [*Hydro Quebec*].

could not infer a legislative intent to require the National Energy Board to treat all parties fairly on the one hand while also requiring it to confer unique procedural and substantive rights on a few parties.⁴⁶ This is not to say that Aboriginal parties before the Board did not have unique procedural and substantive rights – only that the National Board had not been chosen by Parliament as the vehicle to determine the extent to which those rights should be protected. We do not believe anything in *Haida* or *RTA* casts doubt on the correctness of the reasoning in *Hydro Quebec*.⁴⁷

In summary on this point, we think that the more a statute requires a decision maker to play the role of a hands off adjudicator based on evidence brought to it as opposed to developed by it, the less likely that its decision would be a trigger for the duty to consult. As always, the legislature can provide otherwise, but where it does not, a legislative mandate that requires a decision maker to adjudicate disputes brought before it by third parties is much less likely to attract the duty to consult than is a mandate that allows the decision maker to self-initiate policy or otherwise assume a proactive as opposed to reactive role in connection with an activity proposed by a private actor.

Application of Administrative Law Tools to Decisions Affecting Private Activity

The observations above allow the formulation of some general conclusions on the question of whether the regulation of private activities by a statutory decision-maker constitutes “contemplated Crown conduct” that could trigger a duty to consult. Firstly, the existence of the Trigger will turn on the role of the decision-maker which can only be determined by ascertaining the legislature’s intent. That intent will be manifest in the mandate, structure and function of the decision-maker.

A mandate clearly set out in legislation can be determinative of the significance of a decision made under the statute. The legislature is free to expressly set out the extent to which the decision-maker is charged with determining whether private activity should be permitted to adversely affect Aboriginal claims or rights

and what limitations should be placed on that activity if it does.⁴⁸ The greater the express discretion conferred on the decision-maker to consider these issues, the more likely that its pending decision represents the Crown’s determination that non-Aboriginal activity that has the potential to adversely affect Aboriginal claims or rights can be permitted honourably. If that is the case, a strong argument will exist that the decision can only be taken after consultation by some manifestation of the Crown.

It is important to note that there is no constitutionally mandated role for the decision-maker. It is true that the Crown has a constitutionally protected obligation to consult before undertaking an activity that has the potential to adversely affect Aboriginal claims or rights. However, it can meet that obligation by comprehensively consulting before permitting any potential adverse impact on Aboriginal claims or rights (in which case later decisions adjudicating disputes between competing non-Aboriginal issues would not trigger a duty to consult) or leave consultation to be conducted on a case by case basis as individual decisions are made (in which case each decision might represent contemplated Crown conduct capable of triggering the duty). Again, as stated in *Haida Nation* and upheld in *RTA*, the method of consultation is to be determined by the Crown but the obligation must be met.⁴⁹

Because most legislation does not confer an explicit mandate on decision-makers in the context of consultation much less explain the significance of decisions they make, it will usually be necessary to consider the structure and function of the decision-maker to assess the significance of its decisions. As set out above, the structure of a decision-maker may give valuable clues concerning the role of its decisions but will rarely be determinative. Accordingly, we believe a functional analysis of the decision-maker often will be the most important tool for assessing whether its decisions relating to private activity trigger the obligation to consult. We think that the authorities are consistent in seeking to maintain the basic principles that underpin the rule of

⁴⁶ *Ibid* at 182-185.

⁴⁷ For further discussion see Sanderson et al, *supra* note 1 at 850-851.

⁴⁸ See for instance *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3.

⁴⁹ *RTA*, *supra* note 2 at para 63.

law by recognizing the unique role of each of the legislature, the executive and the judiciary, while ensuring that in sum, the obligations of the Crown to Aboriginal people are met. The result is that where a tribunal is developing, determining or implementing government policy, it is exercising an executive function that may attract the duty to consult. Where it is interpreting existing policy that has already been developed and implemented through the establishment of a tribunal with specific and limited jurisdiction, it is performing a judicial like function that will not normally attract the duty to consult. As stated by the Supreme Court of Canada in *Dunsmuir*, courts play a critical role in supervising administrative decision-makers to ensure they do not exceed the bounds of their legal authority:

“Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.”⁵⁰

We also note that legislation conferring broad discretion on a regulator does not necessarily imply the regulator’s decision will itself be “contemplated Crown conduct”. A regulator may be required to consider a broad range of issues before authorizing particular behaviour. Those issues may even include consideration of impacts on First Nation communities or on environmental values important to those communities. They may also be conferred with general language requiring consideration of “the public interest” of “the public convenience and necessity”. However, in our view the question of whether the resulting decision is “contemplated Crown conduct” will still require the interpretative exercise we have described because the conferral of a broad discretion by itself does not resolve whether the tribunal is charged with the onerous duty of resolving whether permitting a proposed activity by a private actor is consistent with the honour of the Crown.⁵¹

We acknowledge that a specific decision-maker

may have multifaceted functions and some of its activities may be seen as executive acts of government while others may be viewed as more closely akin to traditional judicial functions.⁵² Nevertheless, sorting out which is which and what the consequences or different categorizations may be in connection with each action of the decision-maker is what administrative law is all about. We believe that administrative law is central to determining the extent to which any particular tribunal is making a decision that could attract the duty to consult.

We are hopeful that at least some of the issues discussed in this article may soon be resolved. In our view, the Supreme Court of Canada has been provided the opportunity to do so by focusing on the second requirement in *Haida Nation* in the three cases it has just heard. *Clyde River* and *Chippewas* both involve decisions of the National Energy Board but under different statutory regimes. Although there is an obvious Crown in *Kunaxa* (i.e. the Minister), the case nonetheless provides an opportunity for the Court to clarify whether the focus of the “contemplated Crown conduct” requirement in the second criteria of the *RTA* test is the identity of the decision-maker (i.e. Crown vs. non-Crown) or whether it is the function it is performing (i.e. “Crown conduct”). By analyzing the enabling legislation for each decision with the aid of the tools we have discussed above, we believe the Court could introduce the same level of clarity to the “contemplated Crown conduct” component of the Trigger as *RTA* introduced to the third while maintaining the administrative law principles that are so central to the rule of law. We hope it takes advantage of that opportunity. ■

⁵⁰ *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 28.

⁵¹ We acknowledge the comments of Donald, J.A. cited by the Chief Justice at para 70 of *RTA*, *supra* note 2 regarding consideration of the public interest in connection with Crown activities but believe those remarks were directed at the Commission’s assessment of the conduct being undertaken by BC Hydro, not the decision being made by the Commission itself.

⁵² Smith, *supra* note 41 at 16.

ONTARIO ENERGY BOARD DECISION INTRODUCES COMPETITIVE BIDDING FOR NATURAL GAS FRANCHISES

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On November 17, 2016, the Ontario Energy Board (the “OEB”) released its Decision with Reasons (the “Decision”) following a generic hearing commencing on January 20, 2016 to establish a common framework for the expansion of natural gas service to Ontario communities not currently serviced by natural gas (the “Generic Proceeding”).¹

In its Decision, the OEB determined that the existing framework under which utilities are required to charge customers that are in the same rate class the same rate (sometimes referred to as “postage stamp” rates) was one of the primary barriers to natural gas expansion. Following the Decision, the OEB will allow utilities to charge “stand alone” rates to new expansion communities. At the same time, the OEB rejected requests from various parties to subsidize the development of natural gas infrastructure into expansion communities by requiring existing ratepayers to shoulder a portion of the costs.

Background

The expansion of natural gas distribution systems has been a key issue for rural and remote Ontario communities without access to natural gas for many years.

For example, most residents in the municipalities of Kincardine, Arran-Elderslie and Huron-Kinloss (collectively, “South Bruce”) do not currently have access to natural gas, even though bringing natural gas to these municipalities was estimated to save consumers \$27 million annually in lower energy costs.²

Despite these cost savings, Union Gas Limited (“Union Gas”) submitted a proposal that would have required the South Bruce municipalities to pay an upfront contribution in aid of construction of \$86 million (based on forecast 2012 costs). As might be expected, the South Bruce municipalities did not have this capital readily available and progress stalled.

To overcome these obstacles, South Bruce decided to conduct a competitive Request for Information (RFI) process to canvass the market for potential suppliers of natural gas distribution services in March of 2015.

After receiving proposals from a number of respondents, South Bruce selected EPCOR as the preferred proponent and entered into franchise agreements with EPCOR on February 22, 2016. EPCOR filed applications with the OEB on March 24, 2016 seeking approval of these franchise agreements, which was placed on hold pending the outcome of the Generic Proceeding.

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¹ *Ontario Energy Board Generic Proceeding on Community Expansion* (17 November 2016), EB-2016-0004.

² The author acted for the South Bruce municipalities during the Generic Proceeding.

An innovative aspect of the EPCOR proposal was the use “stand alone” rates rather than imposing an onerous capital contribution requirement on the municipalities. This innovation would later be adopted by the OEB to form the basis of the Decision in the Generic Proceeding.

The old framework didn't work

Prior to the Decision, the framework governing the assessment of the economics of natural gas distribution expansion projects, known as E.B.O. 188, had been in place since January 30, 1998.³

Under this framework, utilities could only expand to communities where the incremental revenues generated from the expansion would, over time, cover the costs of the expansion. Where revenues were insufficient to recover the long-term costs, an up-front payment in the form of a capital contribution was required from new customers. The capital contribution was put in place based on a principle that existing customers should be protected from having to pay higher rates to subsidize the extension of natural gas service to new communities.

As the example of the South Bruce municipalities illustrates, the \$86 million capital contribution required under the E.B.O. 188 framework proved prohibitive for many rural and remote communities. And the expansion of natural gas distribution into these communities stalled.

A new approach was needed

In 2013 the Government of Ontario committed in its 2013 Long-Term Energy Plan (the “LTEP”)⁴ to work with gas distributors and municipalities to pursue options to expand natural gas infrastructure to service a greater number of rural and northern Ontario communities.

In April of 2015, the Government of Ontario announced the creation of a \$200 million

Natural Gas Access Loan and a \$30 million Natural Gas Economic Development Grant.

And in February of 2015 the Government wrote to encourage the OEB to move forward on its plans to examine opportunities to facilitate access to natural gas services to more communities, and the OEB invited parties with the appropriate technical and financial expertise to apply for approvals for expansion projects, and to propose, within those applications, the regulatory flexibility or exemptions from current requirements that would facilitate these expansions.

In response to this invitation, Union Gas filed an application for approval to provide natural gas service to numerous unserved communities on July 23, 2015.⁵ In its application, Union Gas proposed alternative approaches to recover the revenues required to fund the capital investment for these expansions, submitting that they are uneconomic under existing criteria.

During a pre-hearing conference, the OEB determined that the issues raised in the proceeding had broader implications and were common to all gas distributors and new entrants seeking to provide gas distribution services, and it was at this point that the OEB established the Generic Proceeding and adjourned Union Gas' application.

The Generic Decision

The Generic Proceeding (EB 2016-0004) was heard orally from May 5th to May 13th, 2016.⁶ Tasked with the challenge of reviewing a vast record of evidence from the over 40 parties that participated in the hearing, the OEB released its Decision on November 17, 2016.

Most involved would agree that the Decision is clear, cogent, concise and well written.

In its Decision, the OEB considered a variety of measures proposed by EPCOR, Enbridge Gas Distribution Inc. and Union

³ Ontario, *Report of the Board in the matter of a hearing to inquire into, hear and determine certain matters relating to natural gas system expansion for The Consumers' Gas Company Ltd, Union Gas Limited and Centra Gas Ontario Inc*, EBO 188 (Toronto: Ontario Energy Board, 1998).

⁴ Ontario, *Achieving Balance: Ontario's Long-Term Energy Plan* (Toronto: Ministry of Energy, 2013) at 77, online: <<http://www.energy.gov.on.ca/en/ltep/achieving-balance-ontarios-long-term-energy-plan/>>.

⁵ Union Gas Limited, *Application for approval to expand natural gas service to certain rural and remote communities in Ontario; for certain exemptions to meet revenue recovery requirements that apply to pipeline projects and approval to construct facilities to serve the communities of Milverton, Prince Township and the Chippewas of Kettle and Stony Point and Lambton Shores*, EB-2015-0179.

Gas (collectively the “Gas Utilities”) and representatives of various other interests (including municipalities, ratepayers, first nation communities, environmental advocacy groups, and suppliers utilizing competing energy sources) to implement expanded gas service. The measures considered included imposing surcharges for new customers, requesting financial contributions from municipalities, collecting subsidies provided by existing customers, and accounting for funding from other levels of government.

Overlaying all of this, the OEB was concerned with facilitating competitive market outcomes where possible, whether by permitting new entrants into the gas distribution business, like EPCOR, considering new delivery methods like liquefied or compressed natural gas, or by helping customers make economic decisions when choosing between different energy supply options such as natural gas, propane, fuel oil, electricity or geothermal.

The OEB ultimately denied requests to subsidize the expansion of new natural gas infrastructure by requiring existing ratepayers to shoulder a portion of the cost. The Decision held that:

The other chief measure proposed to enable more expansions was a subsidy from existing customers. The OEB has determined that this is not appropriate. As noted above, the economic benefits of expansion to many communities are much greater than the costs. This approach would also distort the market to the detriment of existing energy services that compete with gas, such as propane, and new gas distributors who do not have an existing customer base. Under these circumstances, it would not be appropriate to require existing customers to pay for a portion of any expansion. The communities that receive the benefit will be the ones paying the costs.⁷

In turn, the OEB acknowledged that the

existing framework which requires customers in the same rate class to pay identical rates created barriers to natural gas expansion by preventing utilities from being able to charge customers in potential expansion communities a higher rate than existing customers in the same rate classification.

With EPCOR and the South Bruce municipalities as a case study of a solution that could work in practice, the OEB allowed utilities to create “stand alone” rates for services provided to expansion communities based on the higher costs associated with connecting natural gas service. The OEB stated that:

The evidence shows that for many communities a higher gas distribution rate would be more than offset by the savings these customers would realize over time by converting to natural gas. This is true even when one considers the costs of conversion, such as a new or modified furnace.⁸

Next Steps: Natural Gas Expansion Plans

With the conclusion of the Generic Proceeding, we anticipate increased activity regarding new natural gas expansion projects to continue throughout 2017 and 2018. There is already some evidence of this.

For example, on November 17, 2016, the OEB issued a procedural order for Union Gas’ application concurrently with its Decision,⁹ requesting that Union advise the OEB of how it proposes to proceed with its application in light of the OEB’s Decision in the Generic Proceeding. In a letter dated December 22, 2016, Union advised the OEB that it will update its application and evidence to reflect the OEB’s findings in EB 2016-0004 and expects to file its updated application and evidence with the OEB by the end of March 2017. One might expect that Enbridge will file a similarly re-framed application, based on the projects the initially identified during the Generic Proceeding.

In addition, while the Decision opens the door

⁶ EB 2016-0004, *supra* note 1.

⁷ *Ibid* at p 4.

⁸ *Ibid*.

⁹ *Supra* note 5.

for new expansion opportunities that were previously uneconomic, whether the Decision will actually result in a level playing field for potential new entrants and existing gas utilities in Ontario remains to be seen. On January 5, 2017, the OEB issued the first procedural order in the EPCOR application for approval of its franchise agreements with the South Bruce communities. In it the OEB canvassed whether any other parties to the Generic Proceeding were interested in serving the areas covered by the EPCOR Applications. Union Gas responded, filing a letter on January 19, 2017 notifying the Board of its interest in serving the areas covered by the EPCOR applications. ■

QUEBEC'S NEW PETROLEUM RESOURCES ACT

*Erik Richer La Flèche**

In the early hours of Saturday December 10, 2016 a bleary-eyed Quebec National Assembly voted 62 to 38 to adopt Bill 106, *An Act to implement the 2030 Energy Policy and to amend various legislative provisions*.¹ Pierre Arcand, Quebec's Minister of Natural Resources and Wildlife, had introduced the bill on June 7, 2016 and Government wanted it adopted before the year's end.

Energy policy has been a subject of much debate in Quebec for the better part of a decade and after numerous policy papers, expert panels, public consultations and other tergiversations, Government wanted to remove a potential irritant from the political scene. The next Quebec provincial election is scheduled for October 2018 and Premier Couillard's Liberals want the last two years of their current mandate to have a happier tone than the first three, when the focus was the cleanup of Quebec's public finances replete with painful service and budget cuts. With Quebec having largely righted its financial affairs – at the time of writing unemployment is at a 34-year low and tax revenues have materially increased -- it was time to clear the tables.

The legislative process has been arduous. Bill 106 is an unusual statute. It is akin to an omnibus bill. It deals with four energy-related but nonetheless discrete subjects. The first three are relatively uncontroversial and supported by a wide-ranging consensus. The same cannot be said of the fourth chapter.

The first three chapters of Bill 106 pertain to (i) the adoption of *An Act respecting Transition Énergétique Québec*, a new state-owned entity created to assist transition from fossil fuels to renewable energy, (ii) amendments to *An Act respecting the Régie de l'énergie*² designed to ensure market access for renewable gas (e.g., biomethane) and increased gas pipeline capacity in Quebec, and (iii) amendments to the *Hydro-Quebec Act*³, the province's vertically integrated electricity provider and one of the world's major hydroelectricity producers. The amendment to the *Hydro-Quebec Act* allows Hydro-Quebec to become another source of financing for electric public transportation systems such as the \$5 billion Réseau électrique métropolitain light rail system proposed by CDPQ Infra, a subsidiary of the Caisse de dépôt et de placement du Québec. This is the "Green" part of Bill 106 and is meant to anchor the renewable energy credentials of Government.

The fourth chapter deals with the adoption of the *Petroleum Resources Act (the "PRA")*. The opposition parties, some municipalities, most environmental groups, many First Nations and other members of civil society wanted Bill 106 split into two with the *PRA* removed to allow for a more focused examination, debate, amendment or, as some groups advocate, defeat of the *PRA*. There is a vocal minority that does not want Quebec to allow any exploration and production of hydrocarbons on its territory. In their view, Quebec, at a time of plentiful oil

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¹ Bill 106, *An Act to implement the 2030 Energy Policy and to amend various legislative provisions*, 1st Sess, 41th Leg, Quebec, 2016.

² *An Act respecting the Régie de l'énergie*, CQLR, c R-6.01.

³ *Hydro-Quebec Act*, CQLR, c H-5.

⁴ *Environment Quality Act*, CQLR, c Q-2.

and gas, need not start an industry that even the Premier of Quebec, when piqued by the press, blurted would not be representative of the economic future of Quebec.

Purpose of *Petroleum Resources Act*

The purpose of the *PRA* is set out at section 1: the Act regulates oil and gas exploration and production whilst ensuring (i) the security of individuals and property, (ii) the protection of the environment and (iii) optimal production. Section 1 laconically adds that all of the above must be accomplished in conformity with the Government's greenhouse gas reduction commitments. It is not clear what impact subservience to greenhouse gas reductions will have in concrete terms but it is certain that Government wants to take a holistic view of oil and gas exploration and production as well as leave a door open quickly to reshape policies to the political needs of the day.

Main Features of the *Petroleum Resources Act*

The *PRA* does the following:

1. It lays down the framework for a comprehensive oil and gas regulatory regime,
2. It enables the authorities closely to monitor all phases of an exploration and production project,
3. It effectively requires projects to be socially acceptable,
4. It provides for a strict liability regime,
5. It favors participation by well-funded and technically advanced entities,
6. It is agnostic as to technology and geography, and
7. It depoliticizes many project regulatory decisions whilst allowing Government opportunity to respond to the political climate of the day by tweaking licensing and approval conditions and in, rare cases, suspending licenses or approvals until resolution of court challenges.

Comprehensive Regime. When announcing the adoption of Bill 106 a proud Premier Couillard stated that the *PRA* lays down the framework for one of the world's most comprehensive and stringent oil and gas regulatory regimes. The Act has 269 sections and borrows from best practices adopted in other Quebec statutes, most noticeably the *Environment Quality Act*⁵ and the *Mining Act*⁵.

Despite being fulsome the Act does not at this time provide a complete picture. Nearly 50 sections of the *PRA* expressly provide for supplementary regulations. Many of these regulations concern matters critical to an investment decision, including:

- i. the auction rules governing exploration licenses (section 15)
- ii. the oil and gas royalty rates and calculation methodology (section 59),
- iii. the annual license fees (sections 17, 60 and 63),
- iv. the information and documents required to apply for licenses and authorizations,
- v. the form and amount of the site closure and remediation guarantees (section 95), and
- vi. the upward limit of a license holder's strict liability (section 119).

The *PRA* comes into force on the date of coming into force of the first regulation that replaces the *Regulation respecting petroleum, natural gas and underground reservoirs* (chapter M-13.1), which regulation effectively serves as the cornerstone of the current oil and gas regulatory regime in Quebec.⁶

Close Monitoring. From start to finish the major stages of an oil and gas project will require licenses and authorizations as well as much reporting. The Quebec regime is diametrically opposed to a self-regulatory one and will require that the regulators devote adequate staffing and financial resources to avoid bottlenecks and ensure that science-based decisions are taken on a timely basis. The *PRA* imposes few time constraints on the regulatory

⁵ *Mining Act*, CQLR, c M-13.1.

⁶ *Regulation respecting petroleum, natural gas and underground reservoirs*, RSQ, c M-13.1, r 1.

authorities and unless the forthcoming regulations provide otherwise there is a risk of authorities proceeding at a very deliberate pace.

In connection with oil and gas the *PRA* provides for three types of licenses. These licenses are supplemented by seven additional ministerial authorizations. The licenses are as follows:

Exploration license (*PRA*, sections 14 to 37)

The Minister may grant exploration licenses. Such grant is made pursuant to a call for tenders (section 14). When deciding which territories to put up for auction, the Minister will take into account exploration requests made by interested parties (section 16). This having been said there is no obligation for the Minister to auction exploration licenses. An exploration license gives the right to its holder to explore for hydrocarbons on the licensed territory (section 22). However, certain types of exploration activities will require, as we shall see later, additional ministerial authorizations (sections 69 to 91). The license is valid for five years and may be renewed (section 24). An exploration license holder must create a monitoring committee so as to involve local communities and First Nations in the exploration project (section 25). A monitoring committee is composed of at least one member from the municipal sector, one from the economic sector, a member of the public and, if government has consulted a First Nation regarding the issuance of such license, a member of the First Nation so consulted (section 25). The licensee has the right to access the territory that is subject to its license (section 27). This right is conditional in the case of private lands or public lands leased from the state upon the licensee securing from the landowner or lessee the right to enter such lands (section 27). An exploration licensee does not have the right unilaterally to enter upon private lands or lands leased from the state nor does the licensee have any expropriation or other right to force a right of access on private lands or lands obtained from the state. In the case of municipal lands licensee needs only to provide not less than 30

days prior notice to the municipality (section 27). The licensee must perform a minimum amount of work (section 28), pay an annual fee (section 33) and file an annual report (section 34). The licensee must inform the Minister of any important hydrocarbon find (section 35) and must within four years seek a production license, failing which the Minister may terminate in whole or in part the licensee's exploration license (section 36).

Production license (*PRA*, sections 38 to 61)

The holder of a hydrocarbon exploration license who wishes to obtain a production license must first submit its production project to the Régie de l'énergie ("Régie"), Quebec's independent energy regulator (section 38) and apply for an environmental authorization pursuant to section 31.5 of the *Environment Quality Act* (Quebec). Bill 106 subjects the following to a section 31.5 environmental authorization: (i) all work related to oil or gas production and storage to which the *PRA* applies, and (ii) any oil or gas drilling in marine areas (section 249). In other words, from an environmental standpoint the production and underground storage of oil and gas will now be treated like any other extractive activity. The Régie will deliver its decision to the Minister for further transmittal to Government and consideration in connection with the section 31.5 environmental authorization (section 42).

The Minister will issue a production license to an exploration licensee who has obtained (i) a favorable decision from the Régie in connection with its production project, and (ii) an authorization from Government pursuant to section 31.5 of the *Environment Quality Act* (Quebec) (section 45). Should a territory not be subject to an exploration or production license, the Minister may issue a production license by way of an auction (section 46).

A production license gives its holder the right to produce oil or gas (section 48). A production license is valid for 20 years

and may be renewed (section 51). The monitoring committee created pursuant to section 25 in connection with the exploration license continues its activities in order to allow local involvement with the production project (section 52). Government may, when granting or renewing a production license, require the maximization of economic benefits within Quebec (section 53).

As with exploration licenses the licensee has the right to access private lands and public lands leased from the state (section 55). However the licensee may, through expropriation, access private lands or public lands leased from the state if the owner or lease is unable or unwilling to grant such access (section 55). In the case of municipal lands the licensee need only provide 30 days prior notice to the municipality (section 55). The licensee also has the right to evict from public lands any person in possession of such lands illegally (section 57).

The licensee must provide monthly reports to the Minister as to the amount of oil or gas produced and pay the related royalties (section 59). The licensee must also pay an annual fee (section 60) and prepare an annual report (section 61).

Underground Storage license (*PRA*, sections 38 to 58 and sections 62 to 64)

The regime governing underground storage licenses is substantially the same as the one applicable to production licenses.

Ministerial Authorizations (*PRA* sections 69 to 91 and sections 113 to 118)

As we stated above a license holder will, in addition to the license, need additional ministerial authorizations to carry out certain activities. There are seven such authorizations, namely:

- Geophysical or geochemical surveys (sections 69 and 70)
- Stratigraphic surveys (sections 71 and 72)

- Drilling (sections 73 to 79)
- Completion (sections 80 and 81)
- Workover and reconditioning (sections 82 and 83)
- Temporary or permanent well closure (sections 84 to 91)
- Junction pipelines (sections 113 to 118)

The rules regarding well drilling, well closure and junction pipeline authorizations are the most detailed.

Drilling authorizations are granted on a per well basis (section 73). They can be issued only after (i) issuance of the relevant environmental permit, if any, under the *Environment Quality Act* (Quebec), (ii) ministerial approval of the relevant well closure and site restoration plan required pursuant to *PRA*, sections 93 to 107, and (iii) ministerial approval of the guarantee required to be delivered in connection with such plan (section 75). Drilling work must commence within the time period specified by the Minister and the latter must be notified when work commences (section 76). The location of the well must be published in the relevant oil and gas and land registries (section 77).

A well must be closed before the expiry of a license (section 89). A well cannot be temporarily or permanently closed without the prior authorization of the Minister (section 84). A permanent closure must be carried out in accordance with the relevant well closure and site restoration plan (section 87). The location of the closed well must be published in the relevant oil and gas and land registries (section 90). The holder of an authorization must file a report with the Minister once the activity covered by the authorization has been completed (section 92).

The linkage of wells and other facilities by pipeline requires a junction pipeline authorization from the Minister (section 108). A favorable decision from the Régie and the relevant authorization

certificate under the *Environment Quality Act* (Québec) are conditions precedent to the issuance of a pipeline junction authorization (section 113). The holder of a junction pipeline authorization need not be a holder of a production or underground storage license thus allowing pipeline operators and others to provide such services.

Social Acceptability. Projects that do not have social acceptability are unlikely to be approved. Having rights without broad local support will be insufficient. There is no legal definition of the phrase “social acceptability” but section 6 of the *Sustainable Development Act* (Quebec) lists 16 principles that must be adhered to by Quebec ministries and many government agencies.⁷ This list can serve as a reference. It includes health and quality of life, environmental protection, economic efficiency, prevention of damage, and cultural heritage protection. Social acceptability does not mean unanimity. Rather, it should be interpreted as requiring majority acceptance. The wind power and mining industries offer many recent examples of how projects in Quebec achieved social acceptability and serve as useful precedents.

The *PRA* brings together a relatively large number of participants to analyze, review, approve and monitor oil and gas projects. This scrutiny should assist the promoter of an oil and gas project in the early identification of local and other concerns that may impede social acceptability. The participants include:

1. The Minister of Natural Resources and Wildlife charged with the application of the *PRA*;
2. The monitoring committees created pursuant to *PRA*, sections 25 and 52, designed to provide representation of local municipal, business and civic interests;
3. Each First Nation consulted by Government will have at least one monitoring committee member (*PRA*, section 25);
4. The Minister of Sustainable Development, Environment and

the Fight against Climate Change in connection with environmental authorizations required under section 35.1 of the *Environment Quality Act* (Quebec);

5. The public at large when the Bureau des audiences publiques sur l’environnement (BAPE) holds consultations and public hearings on proposed projects;
6. The BAPE when it reports on consultations and public hearings;
7. The Régie in connection with production and underground storage projects as well as junction pipelines (*PRA*, sections 38 and 113).
8. The independent experts that must certify permanent well closures (*PRA*, section 105), and
9. The Quebec Cabinet in connection with environmental authorizations required for production and underground reservoir licenses (*PRA*, section 42) and undertakings regarding Quebec economic benefits (*PRA*, section 53).

One argument raised by critics against the *PRA* concerned the expropriation right granted to production and storage licensees. The fear of many is that the expropriation right is unfettered and will lead to many forcible dispossessions. The right of expropriation is similar to the one provided in the *Mining Act* (Quebec). Mining industry experience shows that this right is seldom used. This is likely also to be the case under the *PRA*. The numerous steps required to obtain production and storage licenses as well as the transparency of the process is likely greatly to limit, if not alleviate, the need for expropriation. Authorities are reluctant to issue environmental and other authorizations if expropriation is involved. Thus, it is likely that projects will be sculpted to avoid expropriation in order to garner social acceptability.

Strict liability. The *PRA* at section 119 enshrines the polluter pay principle and establishes a limited strict liability regime for the holders of production and underground storage licenses as well as the holders of pipeline

⁷ *Sustainable Development Act*, CQLR, c D-8.1.1.

junction authorizations. The strict liability will include damage caused by force majeure. Above the strict liability limit to be determined by regulation, the normal rules apply and fault will have to be proven (section 119).

Established Companies. The *PRA* betrays a strong preference for well-funded and technically advanced companies. Simply stated, major oil and gas players have greater credibility. Compliance with the *PRA* regulatory framework requires considerable administrative, technical and financial resources. The *PRA* places great emphasis on best practices and optimal recovery and the Régie will have to be convinced as to the technical and commercial merits of any oil or gas production or underground storage project. The strict liability regime requires the licensee to demonstrate its ability to meet its polluter pays obligations as well as its site restoration and mine closure obligations. All this means that social acceptability is easier to obtain if the promoter can demonstrate deep technical sophistication coupled with actual experience.

Agnostic. To the relief of many parties interested in Quebec oil and gas, the *PRA* is agnostic as to the technologies used to extract oil and gas or as to the location of such activities, provided that such techniques allow for the optimal extraction of a resource whilst complying with the objectives set out at section 1 of the *PRA* (section 123). To its critics the *PRA* fails by not expressly prohibiting fracking and offshore exploration and drilling. The latter is even expressly envisaged at sections 59 and 249. Note that drilling in the St. Lawrence River remains off limits as provided in An Act to limit oil and gas activities (Quebec).⁸ Although the *PRA* does not ban fracking it is unlikely that Government would welcome a fracking project, at least not in the early days of the Quebec oil and gas industry. Premier Couillard is on record as being skeptical about the current state of the art and suspects that public opinion will remain opposed for some time.

Flexibility. The *PRA*'s heavy reliance on regulations allows Government quickly to adjust the oil and gas regime to reflect public opinion across Quebec or in any given region. Moreover, the Minister may withdraw land from oil and gas activities if it considers it in the public interest (*PRA*, section 131) or suspend

the validity of an exploration, production or underground storage license should it be challenged before the courts (*PRA*, section 134). Such flexibility can act as a vital safety valve should a project become problematical.

Conclusion

Quebec has no intention at this time to promote oil and gas or its new law. Quebec hopes that industry will accept the *PRA* as evidence that it is serious about allowing some oil and gas activities. Quebec is well aware that natural gas can serve as a transition fuel in trucking, shipping, heavy industry and remote communities and has incorporated natural gas in many of its economic and development policies. Quebec also acknowledges that oil will continue to be an essential part of Quebec's energy mix for some time and recognizes that oil also has important non-energy uses. Oil is used as feed stock in industrial processes and Quebec's light oil appears ideally suited to higher value added uses. All this to say that some oil and gas development dovetail's with Government's energy and regional development policies. ■

⁸ *An Act to limit oil and gas activities*, SQ 2011, c 13.

BRITISH COLUMBIA REGULATOR HAS NO JURISDICTION TO SET LOW INCOME RATES

David Stevens*

On January 20, 2017, the British Columbia Utilities Commission (BCUC) released its decision in a BC Hydro Rate Design Application (the Decision).¹ The Decision addresses a number of issues related to how BC Hydro sets its rates, and will be applicable to the updated BC Hydro revenue requirement being determined in a separate proceeding.²

Among other things, the Decision approves the continuation of BC Hydro's two-tier residential rate structure, the simplification of BC Hydro's commercial rate structure and the termination of a legacy rate program for customers with space and water heating from BC Hydro. A summary of the Decision is set out in the BCUC's News Release explaining the Decision.³

One main topic addressed in the Decision is around whether the BCUC has the jurisdiction to approve separate distribution rates (or waiver from certain charges) for low-income customers.⁴ This topic arises because, in addition to the rate design approvals sought by BC Hydro, other parties in the proceeding made their own proposals. Notable among these was a series of requests/proposals from the British Columbia Old Age Pensioners' Organization (referred to as BCOAPO) and

other aligned groups for approvals that would assist low-income ratepayers having difficulty with rising electricity bills. A fundamental part of the BCOAPO proposals was for the BCUC to approve an "essential services usage block" (ESUB) rate applicable to a base level of electricity consumption. The ESUB rate would only be available for qualified low-income ratepayers.

The BCUC's evaluation of the BCOAPO proposals begins with a general review of whether the BCUC has jurisdiction to approve low-income rates. The BCUC then looks specifically at the BCOAPO proposals.

On the general question of jurisdiction, the BCUC agrees with BC Hydro that the appropriate test is as set out in the Supreme Court of Canada's 2006 decision in *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*.⁵ As set out in that decision, a utility regulator is only entitled to do those things that are expressly authorized by its governing statute, or that are necessarily implied by the governing statute. In the Decision, the BCUC reviews the relevant provisions of its own governing statute (the *Utilities Commission Act*)⁶, and concludes that there is no express jurisdiction to approve separate rates for low-income

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¹ *British Columbia Hydro and Power Authority 2015 Rate Design Application* (20 January 2017), G-5-17, online: <<http://www.ordersdecisions.bcuc.com/bcuc/decisions/en/218025/1/document.do>>.

² *BC Hydro F2017-F2019 Revenue Requirements*, Project No 3698869, online: <<http://www.bcuc.com/Application-View.aspx?ApplicationId=533>>.

³ British Columbia Utilities Commission, News Release, "BCUC Releases Decision on BC Hydro Rate Design Application" (20 January 2017), online: <http://www.bcuc.com/Documents/NewsRelease/2017/01-20-2017_NewsRelease-BCHydro-RDA.pdf?platform=hootsuite>.

⁴ The discussion of the low-income rates issues is found in the Decision, *supra* note 1 at 49-107.

⁵ *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 [ATCO].

⁶ *Utilities Commission Act*, RSBC 1996, c 473.

ratepayers and also determines that this is not a necessary implication of the BCUC's powers.⁷ On the latter point, the BCUC points out that there are no relevant statutory objectives for the BCUC that would support the approval of rates that are unrelated to cost of service. The BCUC notes that its obligation is to ensure that rates are not unjust, unreasonable or unduly discriminatory, and concluded that different rates for identical service provided to low-income ratepayers would be "unduly discriminatory" unless it can be shown that there is an economic or cost of service justification for such rates.

Before leaving the issue of jurisdiction, the BCUC's Decision considers how similar requests have been treated in other provinces.⁸ The BCUC concludes that nothing decided in other provinces changes the "no jurisdiction" conclusion under the *Utilities Commission Act*. Much of the focus here is on the Ontario Divisional Court's determination in *Advocacy Centre for Tenants-Ontario v Ontario Energy Board* that the OEB has jurisdiction to establish a rate affordability assistance program for low-income natural gas ratepayers.⁹ The BCUC distinguishes that case on several bases, including the fact that the OEB has statutory objectives to protect consumers as to price as well as the fact that there is no express requirement in the *OEB Act*¹⁰ that gas distribution rates be "fair, reasonable and not unduly discriminatory".

After looking at the jurisdiction issues, the BCUC's Decision considers whether there is any economic or cost of service justification for the BCOAPO proposals.¹¹ For the most part, the BCUC's Decision concludes that there is no such justification. Accordingly, the BCUC declines to approve the proposal for an ESUB rate, as well as the proposal to waive certain charges for BC Hydro's low-income ratepayers. However, on the question of whether BC Hydro should implement a "crisis intervention fund" for ratepayers who are in arrears and cannot pay their electricity bills, the BCUC agrees that this is not unduly discriminatory because it would be available to all ratepayers and would impose minimal

costs. The BCUC requires BC Hydro to take steps to establish a pilot "crisis intervention fund" project. ■

⁷ The determination of the jurisdictional issues is found in the Decision, *supra* note 1 at 50-67.

⁸ The review of treatment of low-income rates in other jurisdictions is found in the Decision, *supra* note 1 at 67-79.

⁹ *Advocacy Centre for Tenants-Ontario v Ontario Energy Board*, 293 DLR (4th) 684.

¹⁰ *Ontario Energy Board Act*, 1998, SO 1998, c 15, Schedule B.

¹¹ The review of treatment of BCOAPO proposals is found in the Decision, *supra* note 1 at 80-107.

OEB APPROVED MERGER CREATES THE SECOND LARGEST MUNICIPALLY OWNED ELECTRIC LDC IN NORTH AMERICA

*Mark J. Rodger**

In April, 2016, Enersource Hydro Mississauga Inc. (“Enersource”), Horizon Utilities Corporation (“Horizon”), and PowerStream Inc. (“PowerStream”), three of the largest municipally owned local electricity distribution companies (“LDCs”) in Ontario, applied to the Ontario Energy Board requesting approval to amalgamate to form a new utility, now named Alectra.

Approval was also sought to purchase and amalgamate with Hydro One Brampton Networks Inc. (“Hydro One Brampton”), owned by the Province of Ontario¹, under section 86 of the *Ontario Energy Board Act, 1998* (the “*OEB Act*”).²

On December 8, 2016, after written interrogatories, a technical conference, a five-day hearing and written argument, the OEB issued its Decision approving the consolidation.

The consolidation will create the largest municipally-owned LDC in Ontario and second-largest in North America, by customer numbers, second only to the Los Angeles

Department of Water and Power in California. The new company will serve almost one million customers with a total rate base of \$2.5 billion.

The purchase of Hydro One Brampton, for a price of \$607 million is the largest electricity distributor acquisition in Ontario to date. The application was the first involving multiple distributors and the first merger application since the release of the OEB’s *Handbook to Electricity Distributor and Transmitter Consolidation* in January 2016.³

Jurisdiction over Electricity Distributor Share Purchases and Amalgamations

In the late 1990s, the Ontario Government undertook a fundamental restructuring of the Province’s electricity sector. This included the breakup of Ontario Hydro into (among others) a wires company (Hydro One) and a generation company (Ontario Power Generation), and a requirement that the 300+ local hydro commissions be incorporated under the *Ontario Business Corporations Act* (“*OBCA*”).⁴ The municipalities in which those

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¹ *Enersource Hydro Mississauga Inc, Horizon Utilities Corporation & Powerstream Inc: Application for approval to amalgamate to form LDC Co and for LDC Co to purchase and amalgamate with Hydro One Brampton Networks Inc*, (8 December 2016), EB-2016-0025, online: OEB <http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/554096/view/licence_dec_order_ed_LDC%20Co_20161208.PDF> [*LDC Co Decision*].

² *Ontario Energy Board Act*, SO 1998, c 15, Schedule B.

³ Ontario Energy Board, *Handbook to Electricity Distributor and Transmitter Consolidation* (Toronto: 19 January 2016).

⁴ See section 142 of the *Electricity Act, 1998*, SO 1998, c 15, which provides, in part, that “...every municipal corporation that generates, transmits, distributes or retails electricity, directly or indirectly, shall cause a corporation to be incorporated under subsection (1) for the purpose of carrying on those activities”; *Business Corporations Act*, RSO 1990, c B.16.

commissions operated would become their initial shareholders.

Section 86 of the *Ontario Energy Board Act, 1998* provides (in part) that OEB approval is required prior to the sale, lease or disposition of a distribution system as an entirety or substantially as an entirety; the amalgamation of a distributor with any other corporation; the acquisition of shares of a distributor such that the purchaser and its affiliates/associates will hold more than 10% distributor's voting shares; and/or the acquisition of control of any corporation that holds, directly or indirectly, more than 10 per cent of the distributor's voting securities if such voting securities constitute a significant asset of that corporation.

Key Aspects of the Decision — the “No Harm Test”

a) OEB Principles in Consolidation Applications from 2005 to the Present

The OEB's policies on merger, acquisition, amalgamation and divestiture (MAADs) applications, and more particularly its use of the “no harm test” in considering those applications, were established in the OEB's 2005 decision in a Combined Proceeding in which the OEB considered the principles to be applied to MAADs applications.⁵ In its decision in the Combined Proceeding, the Board established several principles that would be considered in determining applications of this kind. Among them:

- The Board determined that the “no harm” test is the appropriate test. “The Board is of the view that its mandate in these matters is to consider whether the transaction that has been placed before it will have an adverse effect relative to the status quo in terms of the Board's statutory objectives. It is not to determine whether another transaction, whether real or potential, can have a more positive effect than the one that has been negotiated to completion by

the parties. In that sense, in section 86 applications of this nature the Board equates ‘protecting the interests of consumers’ with ensuring that there is ‘no harm to consumers’”.

- The selling price of a utility is relevant only if the price paid is so high as to create a financial burden on the acquiring company which adversely affects economic viability as any premium paid in excess of the book value of assets is not normally recoverable through rates. The fact that the seller could have received a higher price for the utility, even if true, would not lead to an adverse impact in the context of the objectives set out in section 1 of the *OEB Act*.
- As a general matter, the conduct of the seller generally, including the extent of its due diligence or the degree of public consultation in relation to the transaction, would not be issues for the Board on share acquisition or amalgamation applications under section 86 of the *OEB Act*. Based on the “no harm” test, the question for the Board is neither the why nor the how of the proposed transaction. Rather, the Board's concern is limited to the effect of the transaction when considered in light of the Board's objectives as identified in section 1 of the *OEB Act*.
- With respect to the claim that ratepayers have a right to “an open and transparent process” for the sale of the shares or the assets of an electricity distributor, the Board observed that the *OBCA* contains provisions governing procedures and rights associated with, among other things, amalgamations and other significant corporate activities. “The Board does not believe it is appropriate to add an additional layer of corporate review by vesting process rights (again, in the sense of rights associated with the process leading up to the conclusion of a transaction) within customers of distribution companies. The content of

⁵ OEB File Nos RP-2005-0018/EB-2005-0234/0254/0257, online: OEB <http://ontarioenergyboard.ca/documents/cases/RP-2005-0018/decision_310805.pdf>. The OEB's section 1 objectives in electricity-related matters, and which the OEB focuses on in MAADs proceedings, include the protection of the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service, and the promotion of economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and the facilitation of the maintenance of a financially viable electricity industry. Other section 1 objectives are addressed through other OEB policies and reporting requirements.

such rights and the process by which they may be exercised is beyond the Board's objectives or role within the energy sector.⁶

Since its decision in the Combined Proceeding, the OEB has set out and refined its policies on rate-making associated with consolidation in 2007 and 2015 reports (the Reports) entitled *Rate-making Associated with Distributor Consolidation*.⁷ The OEB's January 19, 2016 Handbook provides guidance on the process for the review of an application, the information the OEB expects to receive in support of an application, and the approach it will take in assessing whether the transaction is in the public interest. The Handbook also includes Filing Requirements for the consolidation applications. With the *LDC Co Decision*, the OEB reinforced these long-standing principles.

b) MAADs Principles Applied to the Application

In its Decision, the OEB reaffirmed its application of a no harm test in consolidation proceedings. If the proposed transaction has a positive or neutral effect on the attainment of the objectives set out in section 1 of the *OEB Act*, the OEB will approve the application. In applying the no harm test, the OEB's review primarily focuses on the impacts of the proposed transaction on price and quality of service to customers, and the cost effectiveness, economic efficiency and financial viability of the consolidating utilities. In this case, the OEB found that it "has considered the specific facts in this application and is of the view that the features of this transaction are anticipated within the framework of the OEB's policy and the outcomes are aligned with the articulated policy objective of improving the efficiency of electricity distribution. The OEB finds that the scale enhancements of service delivery embedded in this transaction can be expected to result in long term benefits to customers." Having determined that the proposed consolidation meets the no harm test, the OEB approved the transaction, the LDC Co Licence application and the transfer of the rate orders for each of the applicants and Hydro One Brampton to LDC Co.

Price, Cost Effectiveness, Economic Efficiency and the Rebasing Period

The 2015 Report established a policy under which a consolidating distributor may choose to defer its next rebasing application (in which the distributor's rate base and costs of providing distribution services are updated) for up to 10 years (previously, the limit had been five years). The deferral period allows for recovery of costs related to the consolidation and creates an incentive for consolidation. Savings during the deferral period will flow to the consolidated utility's shareholders, but earnings in years 6-10 that are greater than 300 basis points above the applicable OEB-approved rate of return are to be shared on a 50/50 basis with customers.

The intervenors in the proceeding generally did not oppose the consolidation. Instead, their submissions included arguments that:

- The projected net synergies over the first 10 years were based on high level estimates and there was no credible evidence that savings realized in the deferral period would be sustainable in perpetuity;
- The projected savings (the applicants estimated \$429 million in savings over the 10-year deferral period) were understated, and there were many potential synergies/savings that had not been counted or quantified (this was used in support of the argument that the 10 year deferral period should be reduced because the significant anticipated savings that would flow to the utility's shareholders during the deferral period were excessive and should be transferred to customers sooner); and
- The applicants suggested that rates would be lower under the consolidated scenario than under the *status quo* because in the absence of the consolidation and rebasing deferral, each of the individual utilities would have been rebasing at least once during the 10-year period. Intervenors argued that the gap between the *status quo* and consolidated scenarios was overstated, as (in their submission)

⁶ *Ibid* at pp 7-9.

⁷ Ontario Energy Board, *Report of the Board: Rate-making Associated with Distributor Consolidation* (26 March 2015), EB-2014-0138.

the applicants had overstated the annual rate increases that would be approved by the OEB during the deferral period.

In rejecting the intervenor submissions, the OEB observed:

“The Handbook states that to demonstrate no harm, applicants must show that there is a reasonable expectation based on underlying cost structures that the costs to serve customers following a consolidation will be no higher than they would otherwise have been. The Handbook also states that the impact the proposed transaction will have on economic efficiency and cost effectiveness will be assessed based on an applicant’s identification of the various aspects of utility operations where it expects sustained operational efficiencies, both quantitative and qualitative.

In this case, the applicants submit that the effect of the consolidation on underlying cost structures will be positive, that costs to serve customers will not be higher as a result of the consolidation and that the consolidation will have a positive effect on economic efficiency and cost effectiveness.”⁸

In its Decision, the OEB advised that its “incentive framework is intended to provide sufficient financial gains over and above the status quo to incent utilities to seek out merger or acquisition efficiency gains opportunities. The incentive framework is also intended to have customers share in large savings through earnings sharing beyond the 5 year deferred rebasing period.”

The applicants selected a 10 year deferral period, and submitted that customers were expected to benefit from the consolidation with regard to the price for distribution service, in that revenues would be lower during the 10

year deferral period relative to the status quo, in which the individual utilities would be rebasing sooner.

The OEB agreed, and found that “customers will be not be harmed by the proposed transaction in the short term, and will, in fact, be better off and will likely benefit from the enduring benefits of scale in the long term.” Hydro One Brampton was identified as being the lowest cost entity involved in this transaction, but in response to intervenor concerns about potential impacts of the transaction on that utility’s customers, the OEB noted that “Hydro One Brampton will have additional scale available to it in the long term and its existing cost structures are embedded in its rates for the next 10 years.”

The OEB will consider the matter of its rates and the impact of rate harmonization in the context of a rate application. In the OEB’s view, there will be no net negative impact on Hydro One Brampton’s customers in the long term in comparison to the status quo.”⁹

Reliability and Quality of Electricity Service

The OEB stated that:

“The Handbook sets out that under the OEB’s regulatory framework, consolidating utilities are expected to deliver continuous improvement for both reliability and quality of service performance to benefit customers. The applicants submit that they are committed to maintaining the quality, reliability, and adequacy of electricity service for customers, stating that they currently have a total of six service centres across their service areas which will continue to be used for decentralized functions such as construction and maintenance, trouble response, logistics, fleet services, and metering, such that the adequacy, reliability, and quality of electricity service will be maintained. The applicants

⁸ LDC Co Decision, *supra* note 1 at p 8.

⁹ LDC Co Decision, *supra* note 1 at p 12.

further expect LDC Co to maintain and improve upon the five-year average reliability indices and the OEB customer service standard metrics for its customers.”¹⁰

The OEB concluded that no issues of concern were raised by the intervenors regarding the transaction resulting in a potential deterioration of overall reliability. The OEB noted that it “has the ability to monitor the reliability performance of licensed entities on an ongoing basis and also has the authority to intervene and impose corrective action where a licensed entity does not meet established performance expectations.”¹¹

Financial Viability

The Handbook sets out two primary considerations in this regard — the effect of the purchase price, including any premium paid above the historic (book) value of the assets involved; and the financing of incremental costs (transaction and integration costs) to implement the consolidation transaction. In this case, as is common in MAADs transactions, a premium is being paid for the shares of Hydro One Brampton, and the OEB’s policy is that any premium is not recoverable through rates.

A combination of debt financing and shareholder contributions is being used to fund the purchase. The OEB was satisfied that “the evidence relating to the proposed financing of the Hydro One Brampton acquisition and the premium to be paid will not impact the applicants’ financial viability and finds that the proposed transaction therefore meets the no harm test with respect to financial viability.”¹²

The Distributor Licence and the transfer of Rate Orders

The OEB approved the issuance of the new Distributor Licence to the new company and the transfer of the existing rate orders. The Licence will be effective when the company is incorporated, and the transfer of the rate orders will take place after notice of the completion of the consolidation has been given to the OEB.

Conclusion

This case represents a landmark decision by the OEB in the largest amalgamation the regulator has reviewed to date. The Board’s decision clearly set out the Board’s approach to the no harm test and again recognized that LDC consolidations will likely benefit rate payers and shareholders alike. ■

¹⁰ *Ibid* at p 13.

¹¹ *Ibid* at p 14.

¹² *Ibid* at p 16.

WINDSTREAM ENERGY: NAFTA ARBITRATORS ORDER CANADA TO PAY \$ 25 MILLION

Gordon E. Kaiser*

An earlier issue of this Journal¹ reported on a claim brought by *Trillium Wind*² in the Ontario Courts relating to decision by an Ontario Power Authority to cancel a wind energy contract. That matter is still before the courts. In recent months there have been two decisions by arbitration panels under the *North American Free Trade Agreement* (NAFTA) relating to similar the claims.

The first case, *Mesa Power*³, was a claim relating to onshore wind contracts. The second case, *Windstream Energy*⁴ involved offshore wind contracts.

Mesa, a claim for \$775 million, resulted in an arbitration panel decision on March 24 2016 denying the claim in its entirety. *Windstream*, a claim for \$ 568 million, resulted in a decision on September 27, 2016 granting the Complainant \$26 million plus costs, the largest NAFTA judgment in Canadian history.

In both cases the canceled contracts were contracts the Ontario government issued under the *Green Energy Act* known as feed in tariffs or FIT contracts. The Order in *Windstream* was against the Government of Canada rather than Ontario because under the NAFTA treaty Ottawa is responsible for the actions of the provinces

Background

Disputes involving renewable energy are not new. Over the last 10 years a number of countries have developed incentive programs to attract investment in renewable energy. These programs are usually driven by a policy commitment to reduce the dependence on fossil fuel electricity generation.

In most jurisdictions a common problem has developed. Governments for different reasons change the incentive programs either by reducing the incentives or eliminating them entirely. There may be good reasons for this but investors are not amused. When that happens, investors often seek damages through arbitration under investment treaties.

There are two reasons why investors often choose arbitration. First as the Court found in *Trillium Wind* there is often no remedy under domestic law. There, the plaintiff sought \$ 2 billion in damages against the Ontario government based on claims of breach of contract, unjust enrichment, negligent misrepresentation, misfeasance in public office and intentional infliction of economic harm. The motion judge threw out the case, entirely on the basis that the government's decision to stop financing windfarms was a policy decision and therefore immune from suit. The Court of

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¹ Gordon Kaiser, "Trillium Wind: Can Developers Sue When Government Wind Projects are Cancelled?" (2014) 2 Winter 2014, Energy Regulation Quarterly 75.

² *Trillium Power Wind Corp v Ontario*, 2013 ONCA 683.

³ *Mesa Power Group LLC v Government of Canada*, PCA Case No 2012-17, 24 March 2016.

⁴ *Windstream Energy LLC v Government of Canada*, PCA Case No 2013-22, 27 September 2016.

Appeal reversed to a degree finding that there was one claim that could proceed, namely the claim for misfeasance in public office – not the easiest claim to prove.

The remedies available in arbitration, whether under NAFTA or the *Energy Charter Treaty (ECT)*⁵ under which many of the European cases are brought, include direct and indirect expropriation of the investment, discrimination against a specific investor, denial of fair and equal treatment and denial of legitimate expectations

The second reason investors prefer arbitration is that many of the investors are foreigners and they prefer an arbitration panel to the domestic courts particularly where the claim is against the government of that country. To date 27 arbitration claims involving renewable energy have been filed against Spain, 7 against the Czech Republic, and 5 against Italy.

The only decision to date in the European cases is the decision in *Charanne*⁶ where the majority dismissed entirely the claims of a Dutch company and a Luxembourg company that had jointly invested in solar generation based on an incentive program established by the Spanish government. As in Ontario the Spanish program consisted of feed-in tariffs for 25 year period. Aside from the attractive rate for the power the program allowed the claimants to distribute all of the energy produced to the grid. Subsequently the Spanish government amended the program to limit the amount of electricity that could be supplied and added a new charge for grid access.

The Claimants argued that the amendments reduced their return on investment and expropriated part of the value of their investment in breach of Article 13 of the *ECT*. They also argued that the amendments violated the standard of fair and equitable treatment and denied their legitimate expectations as investors contrary to *ECT* Article 10 (1) and 10 (12).

A majority of the arbitration panel dismissed all of the claims. The claim for indirect expropriation was dismissed on the ground that the claimants had to show that the investor had been deprived of all or part of its investment.

This claim failed because the program remained in place as did the contracts although the rate of return was reduced.

The majority also held that the government actions did not breach the investor's legitimate expectations because the claimants had not received any specific promises or commitments from Spain. The program did not create commitments to *specific* individuals and investors. The Tribunal found that a commitment to a *group* of investors did not amount to a commitment to an individual investor, noting that to find otherwise would amount to an excessive limitation on the power of the state to regulate the economy in accordance with the public interest. This of course is the fine line that arbitration panels in these cases often face.

In support of this conclusion the Tribunal also noted that the materials provided to the investors in 2007 did not say that the feed-in tariff would stay in place for the regulatory lives of the solar plants. To decide otherwise, the Tribunal stated, would mean that any modification of the tariff would be a violation of international law, a principle the Tribunal was not prepared to accept.

There is another rationale to the decision which might find its way into Canadian decisions at some point. The majority concluded that in order to exercise the right of legitimate expectations the Claimants must show that they had first made a diligent analysis of the legal framework for the investment. The Tribunal found that if the Claimant had done that, they would have discovered that amendments to the feed in tariff program were permitted under established Spanish domestic law.

But is domestic law the right test? The dissenting arbitrator disagreed with the majority concluding that legitimate expectations can arise where states grant incentives to a specific category of persons in exchange for their investment. The dissenting arbitrator found that regardless of the state's regulatory power under domestic law, a breach of an investors legitimate expectations should result in compensation. To some this dissent may bear a striking resemblance to the dissent of Judge Bower in *Mesa Power*.

⁵ *The International Energy Charter Consolidated Energy Charter Treaty*, 17 December 2014.

⁶ *Charanne v Kingdom of Spain*, Case No 062/2012, ECT, 21 January 2016.

The Ontario FIT Program

On September 24, 2009 the Ontario Minister of Energy directed the Ontario Power Authority to create the FIT program including the fit rules which established the eligibility criteria as well as a criteria for evaluating applications, the deadlines for commercial operation and the domestic content requirements. Those were originally set at 25% but increase later to 50%. The domestic content requirements were subsequently challenged under another regulatory regime.⁷

The FIT program offered 20 or 40 year power purchase agreements with the Ontario Power Authority. Under those contracts the generator was guaranteed a fixed price per kilowatt hour for electricity delivered to the Ontario grid. Contracts were available for projects located in Ontario that generated electricity exclusively from renewable energy. Applicants also had to establish that the project could be connected to the electricity grid through a distribution system or transmission system. That proved to be a particular problem for Mesa Power.

Windstream Energy

In October 2012 Windstream filed a claim against the government of Canada in the amount of \$ 475 million. Following a 10 day hearing in February 2016 a panel of three arbitrators issued an award of \$ 26 million resulting from Ontario's decision in February 2011 to suspend all offshore wind development. The panel accepted Windstream's argument that the government's decision frustrated Windstream's ability to obtain the benefits of the 2010 contract Windstream had signed with the Ontario Power Authority.

In November 2009 Windstream had submitted 11 FIT applications for wind power projects including an application for a 300 MW 130 turbine offshore wind project near Wolfe Island in Lake Ontario a short distance from Kingston. The Ontario Power Authority offered Windstream a FIT contract in May 2010 which Windstream signed in August of that year. Under the contract the OPA would pay Windstream a fixed price for power for 20 years. In total the contract was worth \$ 5.2 billion.

During this period the Ontario Government was conducting a policy review to develop the regulatory framework for offshore wind projects including the proposed 5 km shoreline exclusion zone. The policy review ceased on February 11, 2011 when the Government of Ontario decided to suspend all offshore wind development until further research was completed

The main ground for the Windstream claim was that the Ontario decision was arbitrary and was based on political concerns that wind contracts would increase electricity rates. Windstream argued that the government really had no intention of pursuing scientific research.

Canada in response said that Ontario was entitled to proceed with caution on offshore wind development and that NAFTA does not prohibit reasonable regulatory delays.

The Claims

Windstream made a number of claims under the NAFTA The Most important (and the only one that succeeded) was a breach of Article 1105 (1), the Minimum Standard of Treatment provision, which reads:

“Each Party shall accord to investments of nother Party treatment. In accordance with international law, including fair and equitable treatment and full protection and security”

The Tribunal noted that any judgement as to what is fair and equitable will turn on the facts of each case, stating at para 360 to 362:

“360. Similarly, the Mondev tribunal observed:

“When a tribunal is faced with the claim by a foreign investor that the investment has been unfairly or inequitably treated or not accorded full protection and security, it is bound to pass upon that claim on the facts and by application of any governing treaty provisions. A judgment of what is fair and equitable cannot

⁷ That requirement was successfully challenged by Japan and Europe in WTO cases reporting amendments to the programme. WTO, Canada – Measures relating to the Feed-In Tariff Program (WT/DS 426/AB/R).

be reached in the abstract; it must depend on the facts of the particular case. It is part of the essential business of courts and tribunals to make judgments such as these. In doing so, the general principles referred to in Article 1105(1) and similar provisions must inevitably be interpreted and applied to the particular facts.

[T]he FTC interpretation makes it clear that that in Article 1105(1) the terms ‘fair and equitable treatment’ and ‘full protection and security’ are, in the view of the NAFTA Parties, references to *existing* elements of the customary international law standard and are not intended to add novel elements to that standard. The word ‘including’ paragraph (1) supports that conclusion. To say that these elements are included in the standard of treatment under international law suggests that Article 1105 does not intend to supplement or add to that standard. But it does not follow that the phrase ‘including fair and equitable treatment and full protection and security’ adds nothing to the meaning of Article 1105(1), nor did the FTC seek to read those words out of the article, a process which *would* have involved amendment rather than interpretation.”

361. The Tribunal underwrites all of these observations, including in particular the *Mondev* tribunal’s observation that “[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.”⁸ The *Mondev* tribunal rightly stressed that “[i]t is part of the essential business of courts and tribunals to make judgments such as these;” and that “[i]n doing so,

the general principles referred to in Article 1105(1) and similar provisions must inevitably be interpreted and applied to the particular facts.”⁹

362. In other words, just as the proof of the pudding is in the eating (and not in its description), the ultimate test of correctness of an interpretation is not in its description in other words, but in its application on the facts.”

In finding that there was a breach the Tribunal questioned whether the real rationale for the moratorium was the need for more scientific research. Just as important was the tribunal finding that Ontario made little if any efforts to accommodate Windstream and seemed to deliberately keep Windstream in the dark. This is best set out in the decision at para 366 and 367:

“366. The Tribunal notes that following the signing of the FIT Contract on 20 August 2010, the position of the Government of Ontario grew gradually more ambiguous towards the development of offshore wind. Thus, while the Government appears to have envisaged still in August 2010 that

The relevant regulatory framework, including the setback requirements, would be in place possibly its position started changing in the fall of 2010. This change appears to have coincided with the receipt and analysis of the information generated through the EBR posting of 25 June 2010, which indicated an increasing resistance to the development of offshore wind.

367. It does not appear from the evidence that the various options that were being considered and the related concerns were

⁸ *Mondev International Ltd v United States of America* (ICSID Case No ARB(AF)/99/2), Award of 11 October 2002 (CL-66), para 118.

⁹ *Ibid* at para 11.

communicated to Windstream, either at the meetings between the government officials and Windstream representatives or otherwise. On 10 December 2010, Windstream delivered a force majeure notice to the OPA, effective from 22 November 2010, stating that MNR's failure to proceed with the permitting process, in particular the site release process, and MOE's failure to take steps to implement its policy proposal to create an exclusion zone, had prevented Windstream from progressing the Project in accordance with the FIT Contract.

The Tribunal concluded at para 377, 378 and 380:

"377. At the same time, however, the evidence before the Tribunal suggests that the decision to impose the moratorium was not only driven by the lack of science. The impact of offshore wind on electricity costs in Ontario, as well as the upcoming provincial elections in November 2011, also appear to have influenced the decision, and the latter in particular in light of the public opposition to offshore wind that had emerged during the relevant period in many parts of rural Ontario (although not in Kingston, where the Project was located). Again, however, the Tribunal is unable to find, on the basis of the evidence before it, that these concerns were the predominant reason for the moratorium, or that the decision to impose the moratorium amounted to a breach of Article 1105(1) of NAFTA just because the Government failed to communicate these other concerns when imposing the moratorium.

378. As to the period following the moratorium, the Tribunal notes that, while the MOE developed research plans relating

to offshore wind, and while it appears that the Government did conduct some studies, the Government on the whole did relatively little to address the scientific uncertainty surrounding offshore wind that it had relied upon as the main publicly cited reason for the moratorium. Indeed, many of the research plans did not go forward at all, including some for lack of funding, and at the hearing counsel for the Respondent confirmed that Ontario did not plan to conduct any further studies. Nor have the studies that have been conducted led to any amendments to the regulatory framework.

380. The Tribunal concludes that the failure of the Government of Ontario to take the necessary measures, including when necessary by way of directing the OPA, within a reasonable period of time after the imposition of the moratorium to bring clarity to the regulatory uncertainty surrounding the status and the development of the Project created by the moratorium, constitutes a breach of Article 1105(1) of NAFTA. It was indeed the Government of Ontario that imposed the moratorium, not the OPA, so it cannot be said that the resulting regulatory and contractual limbo was a result of the Claimant's own failure to negotiate a reasonable settlement with the OPA. The regulatory and contractual limbo in which the Claimant found itself in the years following the imposition of the moratorium was a result of acts and omissions of the Government of Ontario, and as such is attributable to the Respondent. The Tribunal therefore need not consider whether the conduct of the OPA during the relevant period must also be considered attributable to the Respondent."

There was a further claim by Windstream that Ontario had violated Article 1102 of NAFTA by granting Windstream less favorable treatment than was accorded to other entities in similar circumstances. It was argued that the treatment of Windstream was less favorable than the treatment Ontario granted to TransCanada. Both companies were parties to power purchase agreements with the OPA that guaranteed a fixed price for electricity. Both contracts had force majeure provisions. Both contracts were terminated. However, when Ontario terminated the TransCanada contract, Ontario awarded TransCanada a new project and compensated TransCanada for the costs of the cancellation. In contrast Ontario failed to do the same thing for Windstream following the moratorium.

The Tribunal rejected Windstream's argument noting that Article 1102 deals with national treatment and most favored nation treatment. However, the Tribunal concluded that TransCanada was not in like circumstances. Unlike TransCanada, Windstream had a FIT contract for offshore wind. TransCanada did not.

There is no question that the TransCanada project was different from the Windstream project. TransCanada had a contract with the OPA to build a gas generation plant in

Mississauga near Toronto. The local residents were not too happy and the Liberal government canceled the project in the heat of the provincial election. To keep TransCanada happy the OPA negotiated an agreement that reimbursed them for their costs and gave them a new contract in another area. The circumstances were different as was the government's response. In TransCanada there was extensive negotiation. In Windstream there was none. The Tribunal concluded that the two projects were totally different and therefore did not result in like circumstances. TransCanada was not even renewable energy which is the basis of all FIT contracts

Accordingly, the Tribunal ruled that the moratorium and related measures did not apply to TransCanada in the first place. TransCanada was not affected by the moratorium on offshore wind. Moreover the moratorium was not applied in a non-discriminatory manner because it resulted in the cancellation of all offshore wind projects. The problem was that

Windstream had the only contract for offshore wind. The tribunal therefore concluded that it could not agree that Windstream had been treated less favorably than other developers of offshore wind.

Mesa Power

The decision of the NAFTA panel in *Mesa Power* is much different than *Windstream Energy*. Both involved claims under Article 1105 of the NAFTA. Both were heard in Toronto in 2016.

In 2011 Mesa Power Group, a US corporation owned by Texas oil tycoon T. Boone Pickens, filed a \$700 million claim against Canada relating to the Province of Ontario's policy of awarding power purchase agreements under the Ontario feed in tariff program for the supply renewable energy.

Mesa claimed that Canada adopted discriminatory measures, imposed minimum domestic content requirements and failed to provide Mesa with the minimum standard treatment in violation of NAFTA's investment provisions. In the end the Tribunal dismissed all the Mesa's claims and ordered Mesa to bear the cost of the arbitration as well as a portion of Canada's legal costs of nearly \$3 million.

Mesa argued that the reason it did not receive any FIT contracts was that the program was mismanaged and Mesa was discriminated against when Ontario granted unwarranted preferences to two other applicants. *Windstream* really turned on the legitimacy of the moratorium issued by Ontario to defer all offshore wind generation and the conduct of the Ontario government following the announcement of that moratorium.

The OPA launched the FIT program in October 2009. During the first round of contacts the OPA reviewed 337 applications and granted 184 contracts for a total of 2500 MW of capacity. The second round of contracts took place in February 2011. Forty FIT contracts for a total of 872 MW were issued. The third round of contracting took place in July 2011 resulting in 14 contracts totaling 749 MW.

Mesa Power filed six applications under the FIT program but was unsuccessful in all three rounds of contracting. The problem was that all the MESA projects were located in Bruce County. In order to obtain a contract

all applicants had to demonstrate that they had the right to connect to the transmission system. Mesa was unable to obtain transmission connection due to the transmission constraints in Bruce County.

Mesa argued that the failure to acquire transmission access was due to flaws in the contracting process and preferences granted to two other parties, namely Next ERA Energy (an affiliate of Florida Light and Power) and the Korean Consortium led by Samsung.

Fair and Equitable Treatment

Mesa argued that this conduct amounted to a breach of Article 1105(1) of the NAFTA which reads:

“Each Party shall accord to investments of investors of another Party treatment in accordance with International law, including fair and equitable treatment and full protection and security”

Before the Tribunal could determine if Canada had failed to grant Mesa Power fair and equitable treatment, the Tribunal had to define that term. The panel’s definition is set out in paragraphs 501, 502, 504, and 505 of the decision:

“501. Having considered the Parties’ positions and the authorities cited by them, the Tribunal is of the opinion that the decision in *Waste Management II* correctly identifies the content of the customary international law minimum standard of treatment found in Article 110. This decision was cited with approval in the Claimant’s submissions.¹⁰ It was also quoted in the recent *Bilcon* decision,¹¹ with which the Claimant agrees,¹² in the following terms:

“The formulation of the ‘general standard for Article 1105’ by the *Waste Management* Tribunal is particularly influential, and a number of other tribunals have applied its formulation of the international minimum standard based on its reading of NAFTA authorities:

[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.

Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case.”

While no single arbitral formulation can definitively and exhaustively capture the meaning of Article 1105, the Tribunal finds this quote from *Waste Management* to be a particularly apt one. Acts or omissions constituting a breach must be of a serious nature. The *Waste Management* formulation

¹⁰ *Mesa*, *supra* note 3 referring to the Memorial of the Investor (20 November 2013) at §361.

¹¹ *Mesa*, *supra* note 3 at n 228: “The decision was also quoted in the cases relied on by the Respondent. See *Mobil Investments Inc & Murphy Oil Corporation v Government of Canada* (ICSID Case No ARB(AF)/07/14), Decision on Liability and on Principles of Quantum, 22 May 2012 (“Mobil”), §141; *Cargill Incorporated v United Mexican States* (ICSID Case No ARB(AF)/05/2), Award, 18 September 2009 (“Cargill”), §283.”

¹² *Mesa*, *supra* note 3 at n 229: “See Claimant’s Submissions on *Bilcon v Canada* §§46-50 (setting out the Bilcon tribunal’s decision on Article 1105 and stating that “[i]n this arbitration, the Investor made similar submissions [...] advocating for the standard ultimately adopted in Bilcon.”).

applies intensifying adjectives to certain items—but by no means have all of them—in its list of categories of potentially nonconforming conduct. The formulation includes ‘grossly’ unfair, ‘manifest’ failure of natural justice and ‘complete’ lack of transparency.

The list conveys that there is a high threshold for the conduct of a host state to rise to the level of a NAFTA Article 1105 breach, but that there is no requirement in all cases that the challenged conduct reaches the level of shocking or outrageous behaviour. The formulation also recognises the requirement for tribunals to be sensitive to the facts of each case, the potential relevance of reasonably relied-on representations by a host state, and a recognition that injustice in either procedures or outcomes can constitute a breach.”

502. On this basis, the Tribunal considers that the following components can be said to form part of Article 1105: arbitrariness; “gross” unfairness; discrimination; “complete” lack of transparency and candor in an administrative process; lack of due process “leading to an outcome which offends judicial propriety”; and “manifest failure” of natural justice in judicial proceedings.¹³ Further, the Tribunal shares the view held by a majority of

NAFTA tribunals¹⁴ that the failure to respect an investor’s legitimate expectations in and of itself does not constitute a breach of Article 1105, but is an element to take into account when assessing whether other components of the standard are breached.

504. The threshold for a breach of Article 1105 is also relevant to the Tribunal’s analysis. The Claimant does not appear to dispute – and rightly so – that the threshold for Article 1105 is high. Indeed, the three NAFTA Parties concur on this issue¹⁵ and other Chapter 11 tribunals have come to the same conclusion.¹⁶

505. Finally, when defining the content of Article 1105 one should further take into consideration that international law requires tribunals to give a good level of deference to the manner in which a state regulates its internal affairs. Or, in the words of the *Bilcon* tribunal:

“Even when state officials are acting in good faith there will sometimes be not only controversial judgments, but clear-cut mistakes in following procedures, gathering and stating facts and identifying the applicable substantive rules. State authorities are faced with competing demands on their administrative resources and there can be delays or limited

¹³ *Mesa*, *supra* note 3 at n 231: “In a recent case, while interpreting Article 10.5 of the U.S.-Oman Treaty, which is similar to Article 1105 of the NAFTA, the tribunal described the scope and content of the customary international law standard of treatment as “a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law. Such a standard requires more than that the Claimant point to some inconsistency or inadequacy in Oman’s regulation of its internal affairs: a breach of the minimum standard requires a failure, wilful or otherwise egregious, to protect a foreign investor’s basic rights and expectations. It will certainly not be the case that every minor misapplication of a State’s laws or regulations will meet that high standard.” See *Adel A Hamadi Al Tamimi v Sultanate of Oman* (ICSID Case No ARB/11/33), Award, 3 November 2015, §390”.

¹⁴ *Mesa*, *supra* note 3 at n 232. See for instance *Waste Management, Inc v United Mexican States* (ICSID No ARB(AF)00/3), Award, 30 April 2004 at §96; *Cargill*, *supra* note 11 at §296.

¹⁵ *Mesa*, *supra* note 3 at n 234: “US Second Article 1128 Submission §20 (“Accordingly, there is a high threshold for Article 1105 to apply”); Mexico’s Second Article 1128 Submission §8 (“[T]he threshold for establishing a breach of the minimum standard of treatment at customary international law is high.”); Canada’s Observations on the *Bilcon* §15; C-Mem. §394-402; Rej. §146.”

¹⁶ *Mesa*, *supra* note 3 at n 235: “*Bilcon* §441; Exh. CL-194, *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL), Arbitral Award, 26 January 2006 (“*International Thunderbird*”), §§194, 197.”

time, attention and expertise brought to bear in dealing with issues. The imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard.”

The Tribunal rejected all three claims that Mesa made that Canada had breached the fair and equitable treatment provisions of Article 1105 of NAFTA.

The Tribunal rejected the allegation that the OPA had mismanaged the program and did not treat all applicants fairly noting that the OPA had retained an independent monitor to administer the FIT program.

The Tribunal also discounted the charge that NextEra had met with government officials noting that this was common practice in the industry and there was no evidence of any preference. NextEra was given access to transmission facilities in Bruce County at one point but apparently Mesa was also offered the opportunity.

The most contentious part of the Mesa allegations related to the Korean Consortium agreement. Mesa had argued that the agreement between Ontario and the Korean Consortium unfairly diminished the prospects for other investors including Mesa that were already participating in the renewable energy program by setting aside transmission capacity for the Korean Consortium that was intended for FIT applicants.

Mesa also argued that Ontario was less than transparent in negotiating the Agreement and issued inaccurate and incomplete information. Canada responded that there was nothing manifestly arbitrary or unfair when a government enters into an investment agreement which grants advantages to a investor in exchange for investment commitments.

Deference to Government Regulators

Deference is an important concept. In Canada and the United States courts routinely grant deference to both arbitrators¹⁷ and regulators¹⁸. In investor state arbitrations arbitrators grant deference to governments particularly where those governments are carrying out a regulatory function where the public interest is the dominant test.

The Mesa Tribunal pointed to the deference which NAFTA Chapter 11 Tribunals usually grant to governments when it comes to assessing how governments regulate and manage their affairs. The Tribunal stated at para 553 of the decision:

“553. In reviewing this alleged breach, the Tribunal must bear in mind the deference which NAFTA Chapter 11 tribunals owe a state when it comes to assessing how to regulate and manage its affairs. This deference notably applies to the decision to enter into investment agreements.¹⁹ As noted by the *S.D. Myers* tribunal, “[w]hen interpreting and applying the ‘minimum standard’, a Chapter Eleven tribunal does not have an open-ended mandate to second-guess government decision-making.”²⁰ The tribunal in *Bilcon*, a case which the Claimant has cited with approval, also held that “[t]he imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard.”²¹

Jurisdictions and Exceptions

A number of preliminary matters arose in *Mesa* regarding questions of jurisdiction and the

¹⁷ *Moses H Cane Memorial Hospital v Mercury Construction*, 460 US 1 (1983) at 24; *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34, [2007] 2 SCR 801; *Ontario Hydro v Dominion Mines Ltd.*, (1992 OJ 2848).

¹⁸ *McLean v British Columbia Securities Commission*, 2013 SCC 67, [2013] 3 SCR 895; *Chevron v Natural Resource Def Council*, 467 US 837; *Walton v Alberta Securities Commission*, 2014 ABCA 273 at para 17.

¹⁹ *Mesa*, *supra* note 3 at n 296: “The Claimant agrees with this position. See C-PHB §201 (“a tribunal’s role is not to weigh the wisdom of the decision to enter an agreement, but to determine whether a government provided preferential treatment when it did so.”).

²⁰ *Mesa*, *supra* note 3 at n 297: “SD Myers, §261”.

²¹ *Mesa*, *supra* note 3 at n 298: “Bilcon §§437, 440. See also SD Myers §263; International Thunderbird §127 (a State “has a wide discretion with respect to how it carries out such policies by regulation and administrative conduct.”

procurement exception under NAFTA.

The Mesa Tribunal agreed with Canada's claim that an investor cannot challenge pre-existing measures. Mesa had relied upon the domestic content requirements under the program as part of its claim. The tribunal found that these requirements were part of the fit program before the Mesa projects were initiated. As a result the arbitrators did not have jurisdiction over that claim.

Another issue related to the status of the Ontario Power Authority. Canada agreed that the acts of the government of Ontario were attributable to Canada but did not agree that the OPA was a state agency. Accordingly Canada argued that the OPA was not subject to the Tribunal's jurisdiction. However the Tribunal ultimately found that the OPA was state enterprise and its acts were attributable to Canada.

The procurement exception NAFTA raised another issue. NAFTA provides that if the conduct at issue constitutes procurement by a state enterprise a number of the NAFTA obligations do not apply. Those include national treatment and most favored nation treatment. The exception was designed to ensure that NAFTA signatories retained the ability to include nationality-based preferences in their procurement programs. Despite Mesa's objection the majority of the tribunal ruled that the fit program was in fact procurement implemented by the OPA, a state enterprise. Accordingly the OPA's actions could not be challenged under the non-discrimination provisions of NAFTA.

In the end the Mesa case turned on the existence of fair and equitable treatment. The majority was not convinced that Next Era Energy had received the special deal that Mesa argued was the case. There was no question that Next Era received a number of FIT contracts totaling \$3.8 billion in value. But the majority refused to agree that this resulted from collusion and discounted the contribution of \$18,600 that Next Era made to the Liberal Party of Ontario.

The more contentious issue related to the Green Energy Investment Agreement or GEIA which Ontario and the Korea Electric Power Consortium entered in January 2010. There was no question that that agreement gave priority access to 2500 MW of generation capacity in Ontario and that the OPA was

directed in September 2010 to reserve 500 MW of transmission capacity in Bruce region for the consortium.

Mesa saw preference as a red flag given that its lack of access to transmission capacity in Bruce County was the source of its problems. However the Tribunal refused to find that this amounted to discrimination. Arguably, this was a finer distinction but the majority ruled that the GEIA was not part of the FIT program. It was a totally separate deal - a one off agreement where the Korean Consortium received transmission capacity in exchange for an agreement to make a substantial investment in Ontario manufacturing.

Going Forward

It turns out that neither *Windstream* nor *Mesa* is over. There is no appeal under NAFTA but Mesa Power has filed an application for the vacatur before the District Court for the District of Columbia. Mesa claimed that the award constitutes a manifest disregard of the law. The argument seems to be that the majority relied too much on the deference that should be granted to the Government of Ontario instead of carefully examining the government's conduct, as the dissenting arbitrator did in finding that the Ontario's conduct violated NAFTA.

More recently *Windstream* filed a motion before the Ontario Supreme Court seeking to enforce the award against Canada. Canada responded that it intended to meet its obligations under NAFTA but Canada and Ontario had not been able to agree who should pay and when.

The arbitrations in the renewable energy cases around the world may raise serious questions as to whether arbitration is the best mechanism to resolve these disputes. The renewable energy cases present a unique opportunity for this type of analysis.

There are currently over 40 cases in five countries with essentially the same facts. A government has created incentives to attract investment in renewable energy. Investors have responded to those incentives. Governments then decided to eliminate the incentives either whole or in part because an oversupply of renewable energy resulted or voters and rate payers objected to the high cost of that energy.

These are difficult cases because arbitrators have considerable latitude in determining what conduct meets the standard of fair and equitable treatment and the legitimate expectations of the investors. The real issue is whether the standard in international law is different than the powers a government can lawfully exercise under domestic law. Generally domestic law allows government's greater latitude.

The long established principle in NAFTA cases that Tribunals must grant government's wide discretion when they are exercising lawful regulatory jurisdiction adds to the difficulty. There is no longer a clear line between what is allowable under domestic law and what is allowable under international law and investor state treaties. The *Charanne*, *Windstream* and *Mesa* Tribunals all struggled with this distinction. ■

THE WASHINGTON REPORT

Robert S. Fleishman*

Energy regulatory developments in the United States impact numerous sectors of the energy industry and address a wide swath of issues. We reported on key federal and state energy regulatory developments in the United States during 2015 in Volume 4, Issue 2 of the ERQ in June 2016. This report highlights significant developments in 2016 which should be of interest to readers of the ERQ.

I. LIQUIFIED NATURAL GAS EXPORTS

In 2016, the United States Court of Appeals for the District of Columbia Circuit denied four petitions for review by environmental intervenors that challenged on various grounds Federal Energy Regulatory Commission (FERC) orders authorizing the siting, construction and operation of liquefied natural gas (LNG) export facilities. In addition, FERC rejected an application for authorization to site, construct and operate an LNG export terminal due to insufficient evidence of need.

On June 28, 2016, the court denied appeals of FERC authorizations with respect to (1) construction and operation of the Freeport liquefaction export facilities in Texas and (2) expansion of the capacity of the Sabine Pass liquefaction export facility.¹ Appellants in both cases argued that FERC's *National Environmental Policy Act (NEPA)*² analysis was deficient particularly with respect to indirect and cumulative environmental effects

of granting the projects' applications. The court said that the issue before it was whether FERC "discharged its *NEPA* duty to adequately consider the indirect and cumulative environmental effects of authorizing the 'siting, construction, expansion, [and] operation' of the Freeport Projects."³ The environmental intervenors' principal issue was that FERC was required in performing its *NEPA* analysis to consider possible indirect effects of the anticipated exports of natural gas from the projects, such as increased production of natural gas and emissions.

The court held that the United States Department of Energy (DOE) has sole legal authority to authorize the export of natural gas through the liquefaction facilities. Because FERC's statutory authority with respect to the exported LNG is limited, the court reasoned, FERC cannot prevent such indirect effects of LNG exports. Therefore, the court determined, FERC's authorization "cannot be considered a legally relevant 'cause' of the effect for *NEPA* purposes."⁴ DOE's "independent decision" whether to authorize exports from the Freeport project "breaks the *NEPA* causal chain" and absolves FERC of responsibility in performing its *NEPA* analysis to consider issues that it cannot act on.⁵ The court in *Sierra Club v FERC (Freeport)* noted that the appellants had petitioned the court to review DOE's decisions to authorize exports from the Freeport facility and issues with respect to environmental effects associated with exports of natural gas from the

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¹ *Sierra Club v FERC (Freeport)*, 827 F.3d 36 (DC Cir 2016).

² *National Environmental Policy Act*, 42 USC § 4321.

³ *Supra* note 1 at 46.

⁴ *Supra* note 1 at 47.

⁵ *Ibid.*

facility should be raised in that appeal. The court also affirmed FERC's analysis of the cumulative impacts of the project; under *NEPA*, FERC was required to consider only the effect of the current project along with any past, present or likely future actions in the same geographic area as the current project under review.

On July 15, 2016, the court denied environmental intervenors' petition for review of FERC's order authorizing the liquefaction facilities at the Dominion Cove Point plant in Maryland to be converted from import to export.⁶ Appellants contended that FERC's failure to consider certain possible environmental impacts that the project may have resulted in FERC failing to satisfy its obligations under *NEPA*. The court held, "[f] or the reasons set forth in *Sierra Club v FERC (Freeport)*..." that FERC "was not required under *NEPA* to consider indirect effects of increased natural gas exports through the Cove Point facility, including climate impacts."⁷ The court stated that the effect of emissions arising from the transportation and consumption of natural gas in the facilities could not occur unless DOE independently authorized the project to increase the natural gas exports from the facility. In addition the court rejected appellants' argument that FERC erred by not using the "social cost of carbon" analysis in analyzing the environmental impacts of greenhouse gas emissions from the project.⁸ The court noted FERC had specified the reasons it decided not to rely on the analysis, and the appellants had not identified to FERC an alternative methodology. Thus, appellants' presented no reason to doubt the reasonableness of FERC's conclusion not to adopt the methodology.

Finally, on November 4, 2016, the court denied a petition for review of FERC's orders authorizing construction and operation of the Corpus Christi Liquefaction LNG export terminal in Texas, and issuing a certificate of public convenience and necessity under Section 7 of the *Natural Gas Act (NGA)* to construct and operate an interconnected interstate

pipeline. Citing its opinion in *Sierra Club v FERC (Freeport)*, the court ruled that FERC did not have to address the indirect effects of the anticipated export of natural gas under *NEPA*. The court also rejected appellant's arguments regarding greenhouse gas emissions citing its ruling on "identical arguments" in *EarthReports*.⁹

FERC issued an order denying applications on March 11, 2016, filed by Jordan Cove Energy Project under Section 3 of the *NGA* for authorization to site, construct and operate an LNG export terminal at Coos Bay, Oregon and by Pacific Connector Gas Pipeline for a certificate of public convenience and necessity under Section 7 of the *NGA* to construct and operate an interconnected interstate natural gas pipeline. Pacific Connector had presented "little or no evidence of need" and failed to satisfy the standards for issuance of a certificate under Section 7 of the *NGA*. Accordingly, FERC dismissed the Jordan Cove project's application as it would not be able to access natural gas supplies and thus "can provide no benefit to the public to counterbalance any of the impacts which would be associated with its construction."¹⁰

The applicants filed requests for rehearing at FERC, stating that long-term precedent agreements had been signed for 77 per cent of the pipeline's capacity and that FERC should proceed with review of the applications with "evidence of need" having been demonstrated. FERC denied rehearing. In order to reopen the record on these applications, FERC held that there had to be "extraordinary circumstances" to overcome the need for finality in contested proceedings. Before filing for rehearing, the pipeline was afforded "ample time – over 3.5 years – to demonstrate evidence of market demand"¹¹ and failed to do so. FERC reiterated that dismissal of the applications was without prejudice to either applicant to submit a new application. FERC cautioned that evidence of market need in a new application should be submitted as part of the initial application, or in a timely manner in response to FERC staff

⁶ *EarthReports, Inc v FERC*, 828 F.3d 949 (DC Cir 2016).

⁷ *Ibid* at para 1.

⁸ *Ibid* at II.A.

⁹ *Sierra Club v FERC*, No 15-1133 (DC Cir 4 November 2016).

¹⁰ Order Denying Applications for Certificate and Section 3 Authorization, *Jordan Cove Energy Project LP and Pacific Connector Gas Pipeline LP*, 154 FERC 61190 (11 March 2016) at para 44.

¹¹ Order Denying Rehearing, *Jordan Cove Energy Project LP and Pacific Connector Gas Pipeline LP*, 157 FERC 61194 (9 December 2016) at paras 17, 19.

data requests, should the companies show a market need in the future for the projects.

II. ENERGY STORAGE

A. FEDERAL DEVELOPMENTS

As background, FERC issued an important order regarding energy storage - Order 784 - in 2013.¹² That order directed wholesale market operators to find ways to monetize “fast response” resources—storage devices such as batteries and flywheels. On April 11, 2016, FERC issued a series of data requests and requests for comments in a new informational docket, “Electric Storage Participation in Regions with Organized Wholesale Electric Markets,” Docket No. AD16-20-000.¹³ This docket concerns the “participation of electric storage resources in the organized wholesale electric markets, that is, the regional transmission organizations or RTOs and the independent system operators or ISOs.”¹⁴ FERC will be seeking input in May 2017 on whether additional action is necessary to address potential barriers to electric storage participation in the RTO and ISO markets.

FERC opened another informational docket concerning storage in late 2016: “Utilization In the Organized Markets of Electric Storage Resources as Transmission Assets Compensated Through Transmission Rates, for Grid Support Services Compensated in Other Ways, and for Multiple Services,” Docket No. AD16-25-000.¹⁵ FERC staff convened a technical conference on November 9, 2016. Eight days later, FERC issued a Notice of Proposed Rulemaking to “remove barriers to the participation of electric storage resources and distributed energy resource aggregations in the organized wholesale electric markets.”¹⁶ The proposed rulemaking would also allow storage to provide services not necessarily procured through markets, such as black start, primary

frequency response and reactive power.

In addition to activity at FERC, the Department of Energy’s Energy Storage Systems Program conducted an energy storage reliability workshop in June 2016, a series of webinars on various technical issues associated with integrating storage into energy grids, and a peer review conference.

B. State Storage Proposals

1. California

We start again with background. As detailed in prior years’ Washington Reports, California has taken the lead to include energy storage in its electric utilities and energy suppliers’ resource planning. Assembly Bill 2514 required the California Public Utilities Commission (CPUC) to determine appropriate targets, if any, for each load-serving entity to procure viable and cost-effective energy storage systems. The CPUC opened Rulemaking R.10-12-007 to implement AB 2514.¹⁷ R.10-12-007 culminated in Decision D.13-10-040 in 2013 which requires California’s three large investor-owned electric utilities to procure 1,325 MW of energy storage capacity by 2020.¹⁸ The CPUC divided the 1,325 MW into biennial procurement targets by “grid domain” in 2014, 2016, 2018 and 2020.

D.13-10-040 directed a comprehensive evaluation of the Energy Storage Framework and Design Program no later than 2016 and once every three years thereafter. In compliance with D.13-10-040, the CPUC opened a new rulemaking to consider policy and implementation refinements to the Energy Storage Procurement Framework and Design Program (D.13-10-040, D.14-10-045) and related Action Plan of the California Energy Storage Roadmap.” As the proceeding’s name

¹² Third-Party Provision of Ancillary Services; Accounting and Financial Reporting for New Electric Storage Technologies, Order 784, Docket Nos AD10-13-000 and RM11-24-000, 144 FERC 61056 (18 July 2013).

¹³ *Electric Storage Participation in Regions with Organized Wholesale Electric Markets*, FERC Docket No AD16-20-000 (11 April 2016).

¹⁴ Transcript of Commission Meeting, (FERC issued 21 April 2016), online: <<https://www.ferc.gov/CalendarFiles/20160509131051-transcript.pdf>>.

¹⁵ *Utilization in the Organized Markets of Electric Storage Resources as Transmission Assets Compensated Through Transmission Rates, for Grid Support Services Compensated in Other Ways, and for Multiple Services*, FERC Docket No AD16-25-000 (30 September 2016).

¹⁶ *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Nos AD16-20-000 and RM16-23-000, 157 FERC 61121 (17 November 2016).

¹⁷ US, AB 2514, *An act to amend Section 9620 of, and to add Chapter 7.7 (commencing with Section 2835) to Part 2 of Division 1 of, the Public Utilities Code, relating to energy*, 2009-2010, Cal, 29 September 2010.

¹⁸ *Decision Adopting Energy Storage Procurement Framework and Design Program*, CPUC D.13-10-040, (17 October 2013).

implies, it is a broad review of all CPUC policies (and associated IOU practices) relating to energy storage.¹⁹ The CPUC has conducted a workshop in the proceeding, and further workshops are anticipated. In a separate rulemaking, R.14-10-003, the CPUC issued a decision in December 2016 (D.16-12-036) establishing a framework for utility solicitations for Distributed Energy Resources (DER).²⁰ Small-scale storage is eligible to participate in the resulting utility solicitations.

2. Oregon

The Oregon legislature passed an energy storage bill in 2016, Oregon House Bill 2193 (HB 2193),²¹ requiring Oregon's major investor owned utilities to obtain up to one per cent of 2014 load of energy storage in service by January 1, 2020 and directing the Oregon Public Utility Commission to adopt guidelines for proposals of projects providing at least 5 MWh of storage. On December 28, 2016, the Commission adopted the required guidelines, establishing a technology-neutral framework for development and evaluation of storage proposals but leaving many details to utilities, bidders, and Commission staff.²²

3. Massachusetts

Massachusetts adopted an energy storage law in August of 2016, deferring to the Massachusetts Department of Energy Resources (MADERS) on whether to set appropriate targets for electric companies to procure viable and cost-effective energy storage systems to be achieved by January 1, 2020.²³ In response to this legislation, MADERS determined that storage mandates were appropriate and a stakeholder process is now underway to establish a mandate amount by July 1, 2017.

III. DISTRIBUTED GENERATION AND NET METERING

State public utility commissions across the United States continue to grapple with how to incorporate distributed generation and net metering into rate design. Traditional utilities contend that giving consumers credit for energy produced from distributed generation (such as residential solar panels that connect with the grid) unfairly reduces utility revenues. Utilities recover a large portion of costs through per-KWh charges. Such utilities also contend that distributed generation users, and particularly net metering customers, do not pay a fair share of the fixed costs needed to provide the electricity they use. Advocates of distributed generation counter that high fixed prices (coupled with lower variable prices) encourage energy use and would allow the utilities to avoid competition from distributed generation. Different states are addressing these issues in divergent ways.

A. California's Distributed Resources Proceedings

1. California's Distribution Energy Resources and Distribution Resources Plan Proposals

For more than a decade, it has been California's policy to require each of its investor-owned utilities (IOUs) to consider nonutility-owned distribution energy resources (DERs) as a possible alternative to investments in its distribution system to ensure reliable electric service at the lowest possible cost.²⁴ In 2013, the California legislature enacted PU Code Section 769 requiring IOUs to submit distribution resource plan proposals (DRPs) to the CPUC.²⁵ Section 769 requires IOUs to submit DRPs that recognize the need for investment, to integrate cost-effective DERs and for activity identifying barriers to the deployment of DERs. The CPUC is authorized to modify and approve an IOU's DRP "as appropriate to minimize overall system costs and maximize ratepayer benefit from investments in distributed resources."²⁶

¹⁹ *Order Instituting Rulemaking to consider policy and implementation refinements to the Energy Storage Procurement Framework and Design Program (D.13-10-040, D.14-10-045) and related Action Plan of the California Energy Storage Roadmap*, CPUC R.15-03-011 (2 April 2015).

²⁰ *Decision Addressing Competitive Solicitation Framework and Utility Regulatory Incentive Pilot*, CPUC D.16-12-036 (22 December 2016).

²¹ US, HB 2193, *An act relating to energy storage; and declaring an emergency*, 78th Leg Assem, Reg Sess, Or, 2015.

²² *Order Implementing Energy Storage Program Guidelines pursuant to House Bill 2193*, Order 16-504, Docket No UM 1751 (Or 2016).

²³ US, H 4568, *An act to promote energy diversity*, 2015-2016, Mass, 2016.

²⁴ Cal Pub Util Code § 353.5.

²⁵ Cal Pub Util Code § 769.

²⁶ Cal Pub Util Code § 769(c).

In August 2014, the CPUC opened Rulemaking 14-08-013 to establish policies, procedures, and rules to guide IOUs in developing their DRPs and to review, approve, or modify and approve the plans. The CPUC-assigned Administrative Law Judge issued a proposed decision for consideration at the Commission's February 9, 2017 meeting. The proposed decision, if adopted, would approve utility plans to pilot DER programs that demonstrate locational benefits, that allow for high levels of DER penetration, and/or that constitute a microgrid.

In another recent development, the CPUC issued a decision in December 2016 in R.14-10-003, the "Order Instituting Rulemaking to Create a Consistent Regulatory Framework for the Guidance, Planning and Evaluation of Integrated Distributed Energy Resources" approving a pilot program for DER solicitations by CPUC-jurisdictional utilities.

2. California Net Energy Metering

Under AB 327²⁷, enacted in 2013, CPUC had until December 31, 2015, to develop a standard contract or tariff that applies to customer-generators who own rooftop solar installations or other distributed generation. On January 28, 2016, the CPUC approved Decision 16-01-044, adopting a net energy metering (NEM) successor tariff that continues the existing NEM structure while making adjustments to align the costs of NEM successor customers more closely with those of non-NEM customers. The CPUC has stated it will not revisit NEM policy for three years.

Assembly Bill 793²⁸ directed California IOUs to provide incentives to residential and small and medium business (SMB) customers for "energy management technology" (EMT), which may include a product, service, or software that allows a customer to better understand and manage electricity or gas use in their home or place

of business. AB 793 also required the IOUs to educate residential and SMB customers about incented EMT offerings available to them. The IOUs filed proposals with the CPUC on August 1, 2016, and supplemental programs including marketing plans followed later that month and in September. CPUC is expected to approve the IOU programs, with modifications to increase customer and utility use of "smart-meter" data.

B. Nevada's Evolving Regulatory Regime for Rooftop Solar

In 2015, the Nevada legislature enacted SB 374²⁹ directing utilities to prepare a cost-of-service study for rooftop solar installations and to prepare a new tariff to go into effect once solar rooftop installations in Nevada exceeded a cumulative 235 MW of installed capacity. Nevada's two major utilities, NV Energy and Sierra Pacific, filed cost-of-service studies, and, on December 23, 2015, the Public Utilities Commission of Nevada (PUCN) issued a controversial order approving tariff filings by the two utilities³⁰ that significantly reduced the economic benefits customers would see when they installed rooftop solar panels.³¹ Further, the PUCN declined to "grandfather" the approximately 17,000 existing solar customers who had already installed and interconnected rooftop solar systems into the pre-existing rate regime.³² Thus Nevada is the first state in the country to significantly change the economics of net metering without grandfathering existing customers.

In the wake of public criticism and court challenges, Nevada courts and the PUCN in 2016 restored some net metering benefits to some rooftop solar customers, including by restoring the status quo ante for grandfathered customers. Subsequently, the PUCN reopened net metering for new customers in the Northern portion of the state (Sierra Pacific's service territory).³³

²⁷ US, AB 327, *An act to amend Sections 382, 399.15, 739.1, 2827, and 2827.10 of, to amend and renumber Section 2827.1 of, to add Sections 769 and 2827.1 to, and to repeal and add Sections 739.9 and 745 of, the Public Utilities Code, relating to energy*, 2013-2014, Cal, 2013.

²⁸ US, AB 793, *An act to amend Section 2790 of, and to add Section 717 to, the Public Utilities Code, relating to public utilities*, 2015-2016, Cal, 2015.

²⁹ US, SB 374, 78th session, 2015, online: <<https://www.leg.state.nv.us/App/NELIS/REL/78th2015/Bill/1973/Overview>>.

³⁰ Order re: NV Energy and Sierra Pacific Power Applications, PUCN Docket Nos 15-0741 and 15-0742 (23 December 2015).

³¹ *Ibid*; Advice Letter No 453-R, PUCN Docket No 15-07041 (30 December 2015) at 2, 6 ROD 006938.

³² *Supra* note 30 at 108 (23 December 2015), 7 ROD 007515.

³³ Order Granting in Part and Denying in Part General Rate Application by Sierra Pacific Power, PUCN Docket No 16-06006 (20 December 2016).

C. New York Public Service Commission's (NYPSC's) Reforming Energy Vision and Customer Choice

The NYPSC continues its comprehensive *Reforming the Energy Vision (REV)* proceeding intended to improve customer knowledge, market animation, system-wide efficiency, fuel and resource diversity, and system reliability and resiliency and reduce carbon emissions.³⁴ A companion proceeding will address the future of New York clean energy programs currently funded by a surcharge on the delivery portion of customers' utility bills.³⁵

The NYPSC adopted a two-phase schedule for Case 14-M-0101. Track 1 considers issues related to the concept and feasibility of a distributed system platform provider (DSPP). Track 2 focuses on regulatory changes and ratemaking issues. Task forces and working groups have been formed and are working on both tracks, along with a large-scale renewable track.

The NYPSC issued a series of orders over the last two years on various REV issues.³⁶ The orders serve principally to establish analytical frameworks for issues such as how to conduct cost-benefit analyses and expand the scope of the proceeding.

A recent development is the NYPSC's proposal to reconsider its retail electricity competition framework. On December 2, 2016, in the NYPSC issued a Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits establishing a process for evaluating this proposal.³⁷

D. Other States' Rate Changes Regarding Distributed Generation

In Hawaii, a state with the highest penetration

rate for rooftop solar in the country, customers reached the state's limit on rooftop solar eligible to export power to the grid. Rooftop solar customers in Hawaii must now use the customer self-supply (CSS) option, which is for solar PV installations that are designed to not export any electricity to the grid. Customers are not compensated for any export of energy. CSS customers must pay a minimum \$25/month to their utility.

Another state with considerable insolation, Arizona, allowed utilities to impose fixed charges on distributed generation owners of \$0.70 per KW/month.³⁸ Arizona has now ended its retail net metering program for new customers.³⁹ Customers who already have solar rooftops will be grandfathered under the prior rate structure. Arizona has not decided how (or how much) to pay rooftop solar owners for energy placed on the grid. That issue will be decided in pending rate cases.

IV. ENERGY EFFICIENCY

The federal government has long promoted energy efficiency in various ways, ranging from setting efficiency standards for consumer products such as lightbulbs⁴⁰, sponsoring research at National Laboratories into how to build more energy efficient buildings,⁴¹ and implementing the "Energy Star" labeling program overseen by the Environmental Protection Agency.

Many states have laws requiring regulated entities to undertake energy efficiency activities. State-mandated energy efficiency activities commonly include rebates for efficient equipment and efficiency-focused changes to building codes. For illustrative purposes, we will focus on California.⁴²

Public Utilities Code Sections 454.55 and

³⁴ Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision, NYPSC Docket No 14-M-0101.

³⁵ Proceeding on Motion of the Commission to Consider a Clean Energy Fund, NYPSC Docket No 14-M-0094.

³⁶ The NYPSC has collected its REV orders, online: <<http://www3.dps.ny.gov/W/PSCWeb.nsf/All/C12C0A18F55877E785257E6F005D533E?OpenDocument>>.

³⁷ *In the Matter of Eligibility Criteria for Energy Service Companies*, NYPSC Docket No 15-M-0127; *Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State*, NYPSC Docket No 12-M-0476; *Uniform Business Practices*, NYPSC Docket No 98-M-1343.

³⁸ Arizona Public Service Company's Application for Approval of Net Metering Cost Shift Solution, Decision No 74202 at 19-20, Ariz Corp Comm'n Docket No E-01345A-13-0248 (3 December 2013).

³⁹ Arizona Corporation Commission, Docket No E-00000J-14-0023 (20 December 2016).

⁴⁰ See, e.g., the *Energy Independence and Security Act of 2007*, Pub L No 110-140, 42 USC 17001.

⁴¹ Lawrence Berkeley National Laboratory, *What's Energy Efficiency*, online: <<https://eetd.lbl.gov/ee/ee-2.html>>.

⁴² The American Council for an Energy Efficient Economy (ACEEE) ranks states annually on the extent to which states

454.564⁴³ require the CPUC, in consultation with the California Energy Commission (CEC), to identify potentially achievable cost-effective electricity and natural gas efficiency savings and establish efficiency targets for electrical or gas corporations to achieve. Public Utilities Code Section 381 mandates that the CPUC “allocate funds spent to programs that enhance system reliability and provide in-state benefits including: (1) cost-effective EE and conservation activities . . .”⁴⁴

The CPUC devotes approximately \$1 billion per year in customer funds to energy efficiency programs, spread across all CPUC-jurisdictional energy utilities. The CPUC devotes another approximately \$300 million per year to low-income energy efficiency programs. The CEC, for its part, develops building codes and appliance standards, and also funds energy efficiency research.

The CPUC is now evaluating a PG&E proposal to spend an additional \$200 million per year to procure energy efficiency to partially offset the loss of capacity from PG&E’s proposed closure of the Diablo Canyon Nuclear Power Plant (Diablo Canyon).⁴⁵ Using energy efficiency to make up for generation capacity lost in the closing of a nuclear power plant is an idea pioneered by Southern California Edison Company (SCE) in connection with the closure of the San Onofre Nuclear Generating Station (SONGS) in 2013. PG&E’s proposal differs from its SCE predecessor in two ways: energy efficiency will be procured before any other resource. In contrast, SCE procured energy efficiency as one among many “preferred resources.” PG&E is proposing to spend \$1.2 billion just on energy efficiency procurement, which is orders of magnitude more than SCE spent on energy efficiency in connection with SONGS replacement. A decision on PG&E’s proposal is expected in late 2017 as part of a broader decision on whether/how to close Diablo Canyon.

V. FREQUENCY RESPONSE SERVICE

On November 20, 2015, FERC issued Order

No. 819, a final rule that permits wholesale sellers with market based rate authority to sell Primary Frequency Response Service at market based rates.⁴⁶ “[P]rimary frequency response service” is “a resource standing by to provide autonomous, pre-programmed changes in output to rapidly arrest large changes in frequency until dispatched resources can take over.” Under North American Electric Reliability Corporation (NERC) Reliability Standards, balancing authorities are required to maintain a minimum frequency response obligation. FERC noted that balancing authorities may be interested in purchasing primary frequency response service from third parties (in addition to or in place of their own resources) if doing so would be economically beneficial.

On November 17, 2016, FERC issued a proposed rule that would require all newly interconnecting large and small generating facilities, both synchronous and non-synchronous, to install and enable primary frequency response capability as a condition of interconnection. FERC explained that as conventional generating facilities retire or are displaced by variable energy resources such as wind or solar, the net amount of frequency responsive generation online could be reduced, challenging system operators in maintaining reliability, and balancing authorities in meeting their obligations under NERC Reliability Standards to have primary frequency response capabilities.

FERC proposed its new rules, under Section 206 of the *FPA*, “...to address the increasing impact of the evolving generation resource mix and to ensure that the relevant provisions of the *pro forma* LGIA and *pro forma* SGIA are just, reasonable, and not unduly discriminatory or preferential.” The existing *pro forma* Large Generator Interconnection Agreement (LGIA) contains limited primary frequency response requirements that apply only to synchronous generating facilities “and do not account for recent technological advancements that have enabled new non-synchronous generating facilities to now have primary frequency

promote energy efficiency. In 2016, the top two states on the “ACEEE Scorecard” were California and Massachusetts, online: ACEEE <<http://aceee.org/state-policy/scorecard>>.

⁴³ Cal Pub Util Code §§ 454.55, 454.564.

⁴⁴ Cal Pub Util Code § 381.

⁴⁵ California Public Utilities Commission, Docket No A-16-08-006.

⁴⁶ Third-Party Provision of Primary Frequency Response Service, Order No 819, Docket No RM15-2-000, 153 FERC 61220 (20 November 2015).

response capabilities.” The *pro forma* Small Generator Interconnection Agreement (SGIA) does not contain any provisions related to primary frequency response. The proposed rules would require both new large and small generating facilities to comply with comparable primary frequency response requirements.

In addition, FERC is not proposing to require that the interconnection customer receive any compensation for meeting the new frequency response requirements. FERC cited cases where it has accepted changes to individual transmission provider tariffs that required interconnection customers to install primary frequency response capability or that established specified governor settings, without requiring any accompanying compensation. A party that wanted to receive, or pay, compensation could file a proposed rate under *FPA* Section 205.

VI. DODD-FRANK AND CFTC DEVELOPMENTS

The Commodity Futures Trading Commission (CFTC) continued to implement the *Dodd-Frank Wall Street and Consumer Protection Act* reforms during 2016. Chairman Timothy Massad completed his tenure as Chairman of the CFTC on January 20, 2017, when the new Trump Administration took office. We describe some significant developments for energy companies below.

On March 16, 2016, the CFTC approved a final rule that eliminated the reporting and recordkeeping requirements in CFTC regulations for trade option counterparties that are neither swap dealers nor major swap participants (Non-SD/MSPs), including commercial end user energy companies that transact trade options in connection with their businesses. Trade options generally are physically-settled option transactions in nonfinancial commodities involving commercial counterparties. Significantly, the final rule eliminated the requirement that such counterparties annually file a Form TO in connection with their trade options, and does not require them, as had been proposed, to notify the CFTC’s Division of Market Oversight if they enter into trade options that have, or are expected to have, an aggregate notional value in excess of \$1 billion in any calendar year. Trade option counterparties were also relieved from swaps recordkeeping requirements, although a legal entity identifier must be obtained and

furnished to a counterparty that is a swap dealer or major swap participant.

This relief, along with an interpretation issued by the CFTC that generally relaxes the requirements for forward contracts with volumetric optionality issued in 2015 (i.e., optionality as to the amount of the commodity delivered), should alleviate CFTC-related compliance obligations for energy companies with respect to many of the commercial contracts.

In addition, on October 18, 2016, after much pushback from energy market participants, the CFTC issued final orders reiterating that it will exempt from regulation under the *Commodity Exchange Act (CEA)* (other than anti-fraud and anti-manipulation provisions) electric energy-related agreements, contracts, and transactions in organized wholesale electric markets that are under the jurisdiction of FERC. The CFTC decided that activity in organized electric markets is also exempt from private actions brought pursuant to *CEA* Section 22, and thus addressed energy industry concerns about an earlier proposal to allow private rights of action.

Specifically, one of the final orders amends the CFTC’s March 28, 2013, order exempting from most *CEA* and CFTC regulation certain transactions within markets administered by six regional transmission organizations (RTOs) and independent system operators (ISOs) (the RTO-ISO Order). The scope of the RTO-ISO Order included transactions for: electric energy, financial transmission rights (FTRs), forward capacity of electric generation, and ancillary services known as reserve or regulation (collectively, the covered transactions). The CFTC clarified in the final order that transactions exempt by the RTO-ISO Order are also exempt from private rights of action under *CEA* Section 22, including actions for alleged fraud or manipulation. In its May 15, 2016 proposed order, the CFTC had stated its intent to preserve private rights of action to deter manipulators and protect market participants. However, it received comments from a wide variety of energy market participants and consumer advocates who argued that RTO-ISO markets are already comprehensively regulated by FERC and the Public Utility Commission of Texas (PUCT). Commenters also expressed concerns about regulatory uncertainty, decreased liquidity, and

potentially massive costs due to exposure to private rights of action in the courts.

The CFTC in issuing the final order decided against preserving private actions, reasoning that FERC and PUCT regulation of RTO-ISOs is “pervasive” and includes rate monitoring, tariff approval, authorization of market rules and pricing mechanisms, and real-time oversight and surveillance of markets. Accompanying the final order, CFTC Chairman Massad issued a statement to explain that he had been persuaded private rights of action would “inadvertently introduce regulatory uncertainty and increase costs for consumers.”

The CFTC issued another final order in response to an exemption application from Southwest Power Pool, Inc. (SPP)—an RTO which in 2014 became the newest wholesale market administrator—exempting from *CEA* regulation most transactions in SPP’s markets. Exempt transactions include those for: energy in SPP’s day-ahead and real-time balancing markets, operating reserves, and transmission congestion rights (also known as FTRs). The CFTC found that these covered transactions are inextricably tied to SPP’s physical delivery of electric energy and are thoroughly supervised by SPP, SPP’s Market Monitor, and FERC. The SPP Final Order tracks the March 2013 RTO-ISO Order for the six other RTO-ISOs, with the addition of the exemption from private rights of action. As with the other regional wholesale markets, transactions in SPP markets remain subject to the CFTC enforcement’s anti-fraud and anti-manipulation authority.

Finally, on December 5, 2016, the CFTC unanimously re-proposed position limits on 25 core physical commodity futures contracts and their “economically equivalent” futures, options, and swaps (referenced contracts), and deferred action on three cash-settled commodities contained in the original position limits proposal of November 2013. The re-proposal would impose limits on 4 energy reference contracts: NYMEX Henry Hub

Natural Gas, Light Sweet Crude Oil, NY Harbor ULSD (Heating Oil) and RBOB Gasoline, and generally increases these limits compared to the November 2013 proposal. At the same time, the CFTC finalized its aggregation rules for position limits that will apply to the limits under the re-proposal, if adopted. It is unclear how the re-proposal will fare under a new Chairman appointed by President Trump.

VII. FRACKING

A. State Developments

In October 2016, Pennsylvania overhauled its fracking regulations. The new rules, supported by environmental groups, allow Pennsylvania’s Department of Environmental Protection (DEP) to require additional protective measures if fracking operations are located near public resources and require the restoration of water supplies degraded or damaged by fracking.⁴⁷ The rules also imposed tighter requirements for the storage of fracking wastewater and include electronic filing provisions that will allow DEP to more easily track well development.⁴⁸ A Pennsylvania court granted a limited injunction blocking portions of these regulations in November 2016, finding that DEP exceeded its statutory authority under the state’s Clean Streams Law by attempting to extensively regulate pre-drilling evaluation and post-drilling remediation and monitoring of drill sites and water resources.⁴⁹

In November 2016, California voters approved a ballot measure which limits oil operations in Monterey County, CA and bans all fracking operations.⁵⁰ The ballot measure also prohibits drilling new wells and phases out the practice of wastewater impoundment and injections over the next five to fifteen years.⁵¹ Unlike the other five counties in California that have already banned fracking, Monterey County has a significant oil and gas industry – it is the fourth largest oil-producing county in the state.⁵² The ballot measure, Measure Z, was

⁴⁷ David DeKok, “Pennsylvania Adopts New Fracking Regulations”, *Insurance Journal* (10 October 2016), online: <<http://www.insurancejournal.com/news/east/2016/10/10/428843.htm>>.

⁴⁸ Dan Packel, “New Pa. Fracking Regs Finally Take Effect”, *Law360* (7 October 2016), online: <<https://www.law360.com/articles/849422/new-pa-fracking-regs-to-finally-take-effect>>.

⁴⁹ *Marcellus Shale Coalition v Department of Environmental Protection*, case number 573 MD 2016 (Pa 8 November 2016).

⁵⁰ Claudia Melendez Salinas, “Big Oil Sues Monterey County to Stop Measure Z”, *Mercury News* (16 December 2016), online: <<http://www.mercurynews.com/2016/12/16/big-oil-sues-monterey-county-to-stop-measure-z/>>.

⁵¹ *Ibid.*

⁵² *Ibid.*

heavily opposed by the oil and gas industry and its opponents spent \$5 million to fight the ballot proposition. Oil producers have already filed two lawsuits seeking to overturn Measure Z. In December 2016, a Monterey County judge delayed Measure Z's implementation pending resolution of the litigation, although the stay will not apply to the fracking ban.⁵³ If Measure Z is able to survive its legal challenges, the ballot proposition may provide further momentum for county-wide fracking bans across the U.S.

As concern spreads regarding the potential for fracking-induced earthquakes in several Midwestern U.S. states, the Sierra Club filed a class action lawsuit in Oklahoma against several of the state's largest energy companies in February 2016.⁵⁴ The lawsuit, brought under the *Resource Conservation and Recovery Act*⁵⁵, alleges that several energy companies have contributed to increased seismic activity in Oklahoma and southern Kansas.⁵⁶ Among other remedies, Sierra Club sought the establishment of an independent earthquake monitoring center which would determine the amount of fracking waste that would be permissible to be injected before seismic activity would occur. The case remains pending in the Western District of Oklahoma.⁵⁷

B. Federal Developments

In May 2016, several environmental organizations brought suit against the U.S. Environmental Protection Agency (EPA) alleging that EPA had failed to regulate fracking as a hazardous waste for the past 30 years.⁵⁸ The litigation seeks to force EPA to impose stricter regulations on the disposal of fracking wastewater and notes that regulations for handling oil and gas drilling waste have not

been updated since the 1980s.⁵⁹ In particular, plaintiffs want EPA to address the safety specifications for ponds and landfills in which fracking waste is deposited and ban the practice of dumping fracking wastewater on fields and roads.⁶⁰ Under a December 28, 2016, consent decree, EPA has agreed to review and potentially update its oil and gas waste disposal rules and either propose new rules by March 2019 or determine that no updates are necessary.⁶¹

In June 2016, a federal district court in Wyoming stayed a final rule the Bureau of Land Management (BLM) of the Department of Interior issued in March 2015, which would regulate fracking on federal and Native American lands including by ensuring that usable water zones have been isolated and protected from contamination, more stringent requirements for demonstrating well integrity, and ensure that hydraulic fluids are recovered and contained.⁶² The court found that BLM exceeded its statutory authority under public land use and mineral development statutes.

VIII. CRUDE BY RAIL

Concerns regarding crude by rail (CBR) transportation safety have led to the implementation of several new administrative rules and policies over the past few years, including a US Department of Transportation (DOT) final rulemaking for safe transportation of flammable liquids by rail in May 2015 and the enactment of the *Fixing America's Surface Transportation Act* in December 2015.

In 2016, certain industry groups, such as freight railroad interests, called for standards beyond those established by the Pipeline and Hazardous Materials Safety Administration (PHMSA), a DOT sub-agency, while other

⁵³ *Ibid.*

⁵⁴ Paul O'Donnell, "Days after Oklahoma Earthquake, Sierra Club Lawsuit Targets Chesapeake, Devon, Others", *Dallas Morning News* (17 February 2016), online: <<http://www.dallasnews.com/business/energy/2016/02/17/days-after-oklahoma-earthquake-sierra-club-lawsuit-targets-chesapeake-devon-others>>.

⁵⁵ *Resource Conservation and Recovery Act*, 42 USC § 6901 et seq (1976).

⁵⁶ Blake Watson, "Hydraulic Fracturing Tort Litigation Summary" (1 January 2017).

⁵⁷ *Ibid.*

⁵⁸ Brady Dennis, "Environmental Groups Sue EPA, Seek Stricter Rules over Fracking Waste Linked to Earthquakes", *Washington Post* (4 May 2016), online: <https://www.washingtonpost.com/news/energy-environment/wp/2016/05/04/environmental-groups-sue-epa-seek-stricter-rules-over-fracking-waste-linked-to-earthquakes/?utm_term=.2e6625b2cdae>.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Keith Goldberg, "EPA Will Review Drilling Waste Regs to Settle Enviro's Suit", *Law360* (4 January 2017), online: <<https://www.law360.com/articles/877132/epa-will-review-drilling-waste-regs-to-settle-enviros-suit>>.

⁶² Order on Petitions for Review of Final Agency Action, *Wyoming v Jewell et al*, No 2:15-cv-043 (D Wyo 21 June 2016); 80 FR 16128 (26 March 2015).

industrial manufacturers petitioned PHMSA with the goal of establishing the sub-agency's ultimate authority for imposing new hazardous tank car standards. The opponents of separate standards fear that allowing additional third parties to devise standards may damage the economic viability of CBR, pushing crude to be transported by road in a less safe fashion.

In 2016, U.S. regulators may become more focused on increasing accountability and more stringent enforcement of violations. Currently, individuals who willfully or recklessly violate federal hazardous materials regulations face both civil and criminal penalties. Further, companies may be criminally liable for violations committed by their employees. The Federal Railroad Administration (FRA), another DOT sub-agency, is tasked with enforcement authority over CBR and the U.S. Department of Justice (DOJ) is responsible for prosecuting both criminal and civil actions for those violations that are not resolved by the FRA.

In practice, criminal liability for violations has rarely been enforced. While the FRA celebrated its "highest-ever" civil penalty collection rate in 2015, a 2016 report by the DOT's Office of Inspector General criticized the FRA for weak civil enforcement efforts and non-existent pursuit of criminal liability for violations.⁶³ The DOT report recommended that the FRA increase its civil penalties and require all of its staff to directly report to the Office of Inspector General all suspected criminal violations. FRA has indicated that it will comply with the requirements of the report by March 15, 2017.

IX. CLIMATE ACTION PLAN

While outgoing President Obama touted the progress his administration has made on climate change and renewable energy deployment, President Trump's administration threatens to undermine whatever momentum the prior Administration's Climate Action Plan (CAP) generated over the past three years. From the Clean Power Plan to the finalization of EPA rules aimed at methane emission reductions, President Trump has vowed to dismantle much of Obama's climate legacy.

A. Clean Power Plan

In June 2013, Obama set forth a three-pronged plan to cut carbon pollution, referred to as the CAP. The Clean Power Plan (CPP) is widely regarded as a lynchpin to the CAP. Adopted pursuant to Section 111(d) of the *Clean Air Act (CAA)*, the CPP establishes the first ever national standards to limit greenhouse gas (GHG) emissions from existing power plants. If fully implemented, the CPP will have significant implications for how energy is generated, transmitted, and consumed in the United States. However, the 2016 presidential election results increased the uncertainty as to whether the CPP will be implemented.

Several US states challenged the CPP in federal court, asserting that the EPA lacks authority under the *CAA* to mandate GHG emission cuts from existing power plants. After the DC Circuit Court of Appeals declined to stay the rule's implementation, the US Supreme Court (quite surprisingly, to many legal observers) granted a stay of the CPP's implementation while legal challenges played out. With oral arguments heard on September 27, 2016, further implementation of the CPP continues to be stayed as a 10-judge en banc panel in the DC Circuit reviews the legal challenges to the rule.

On the campaign trail, Trump vowed to rescind the CPP if elected. Indeed, President's Trump's nominee for EPA Administrator – Oklahoma Attorney General Scott Pruitt – has led the legal charge against the CPP. But the path President Trump may take to undermine the rule remains uncertain.

In December 2016, a 24-state coalition led by West Virginia and Texas submitted a letter to then President-elect Trump requesting that he issue an order to undercut enforcement of the CPP on the first day of his presidency. The letter also recommends that he take action to formally withdraw the rule via a formal administrative action consistent with the *Administrative Procedure Act*⁶⁴ and the *CAA*. Finally, the letter also recommends that Congress and the President-elect take action to ensure that similar rules are never attempted

⁶³ Department of Transportation, Report No ST-2016-020, "FRA's Oversight of Hazardous Materials Shipments Lacks Comprehensive Risk Evaluation and Focus on Deterrence" (24 February 2016), online: https://www.oig.dot.gov/sites/default/files/FRA%20Oversight%20of%20Hazmat%20by%20Rail_Final%20Report%5E2-24-16.pdf.

⁶⁴ *Administrative Procedure Act*, Pub L No 79-404, 60 Stat 237 (1946).

by the EPA in the future. In response, a counter-coalition of states and cities submitted a letter to Trump, urging him to preserve the rule and continue defending it in court. New York Attorney General Eric Schneiderman, former California Attorney General (now U.S. Senator) Kamala Harris, and others contend in the letter that any attempt to remand the rule or undermine its enforcement would only lead to more litigation.

In short, while some form of nationwide carbon emissions regulation remains probable in the long term, the implementation of the CPP is unlikely over the next four years.

B. Methane Emissions

As part of the Obama Administration's CAP, the EPA finalized rules in May 2016 aiming to curb the methane emissions of new and modified oil and gas infrastructure. Methane emissions are widely considered to be a leading contributor to GHG emissions, second only to carbon dioxide. These rules represent the first effort to curb methane emissions in any industry. North Dakota led the legal charge against the rule in July 2016 by asking the DC Circuit to strike down the rule as beyond the scope of the EPA's authority under the *CAA*. Texas and West Virginia launched similar attacks against the new regulations.

As with the CPP, President-elect Trump has pledged to rescind the Obama Administration's recently published methane regulations, which may circumvent the basis for the state-led legal challenges to the regulations. One mechanism the Trump Administration may attempt to use is the *Congressional Review Act*.⁶⁵

C. Mercury and Air Toxics Standards

The EPA developed the mercury and air toxics standards (MATS) to regulate hazardous air pollutant emissions from power plants under

the *CAA*. Finalized in 2012, environmental and industry groups litigated MATS all the way to the US Supreme Court, which ultimately remanded the litigation back to the DC Circuit after finding that the EPA had not sufficiently considered the cost of the rule prior to promulgation.

In December 2016, industry and environmental groups challenged MATS yet again – albeit for different reasons. Environmental groups argued that the EPA improperly ignored necessary particulate matter limitations. Industry groups contended that the underlying study used by the agency to support MATS rested on inaccurate emissions data. Final briefs for the case are due April 3, 2017, with a decision likely in the months following.

X. DEMAND RESPONSE

Demand response–compensation for the curtailment of electric use during periods of peak demand and high system marginal cost–is an increasingly integral feature of wholesale power markets by reducing peak system demands and forestalling the need for costly new generation capacity. The US Supreme Court in January 2016 held that FERC has the authority under the *Federal Power Act (FPA)*⁶⁶ to regulate demand response bids in wholesale markets and compensate demand response providers be paid the same amount for conserving electricity as generators are paid for producing it.⁶⁷ The Court upheld FERC's Order No. 745, which directed RTOs and ISOs to pay suppliers of cost-effective demand response resources in their day-ahead and real-time wholesale power markets the full locational marginal price (LMP) used to compensate generation suppliers to these markets.⁶⁸

The *EPSA* decision ended several years of uncertainty over the future viability of demand response, and has prompted significant investment in the industry likely to

⁶⁵ Emmarie Huetteman, "How Republicans Will Try to Roll Back Obama Regulations", *The New York Times* (30 January 2017), online: <https://www.nytimes.com/2017/01/30/us/politics/congressional-review-act-obama-regulations.html?_r=0>.

⁶⁶ *Federal Power Act*, 16 USC § 791a.

⁶⁷ *FERC v Electric Power Supply Ass'n*, 577 US __, No 14-840, slip op (25 January 2016); For a case comment on this decision previously included in this quarterly, see Scott Hempling, "The Supreme Court Saves Demand Response: Now What?" (2016) 4:1 Energy Regulation Quarterly 35.

⁶⁸ Demand Response Compensation in Organized Wholesale Energy Markets, Order No 745, Docket No RM10-17-000, 134 FERC 61,187 (15 March 2011), *order on reh'g*, *Order No 745-A*, 137 FERC 61,215 (15 December 2011). The Order required that demand resources actually be capable of supplying the claimed reduction in demand, that the resources pass a 'net benefits test' and that the applicable state regulatory commission permit the bidding of the demand in an organized wholesale market.

continue into 2017. RTO/ISOs have recently endeavored to adapt their market rules to accommodate this growth in demand response. For example, PJM Interconnection (PJM) recently sought and obtained FERC approval to revise its settlement process to improve the accuracy of demand response baseline and reduction calculations, provide flexible options for participation, and better align market incentives with efficient market outcomes.⁶⁹ NYISO is seeking to exempt demand response resources from its buyer-side capacity market power mitigation measures, reasoning that demand response has no ability to meaningfully suppress capacity prices in New York State.⁷⁰ A variety of stakeholders are likely to increasingly take advantage of demand response incentives, including emerging technologies such as distributed generation and energy storage which are able to provide demand response.

XI. STATE SUBSIDY OF ELECTRIC GENERATION

On August 1, 2016, the NYPSC issued a controversial order as part of New York's goal to drastically reduce carbon emissions, requiring ratepayers of investor-owned utilities to subsidize the continued operation of several nuclear generators which would likely otherwise be decommissioned. The subsidies would take the form of so-called zero emissions credits (ZEC), entitling each plant to receive both the locational marginal price for energy and an additional revenue stream calculated using the federal government's "social cost of carbon" methodology.⁷¹

New York's program has been challenged in federal district court by non-nuclear generator owners who allege it will artificially suppress energy and installed capacity prices in the

state's markets.⁷² The impending legal battle over ZEC marks the first significant test of the scope of the U.S. Supreme Court's April 2016 ruling in *Hughes v Talen Energy Marketing LLC (Hughes)*, which invalidated the state of Maryland's subsidy for new gas-fired generators as preempted by FERC's jurisdiction over the field of wholesale electricity markets and rates under the *Federal Power Act*.⁷³ Opponents argue that New York's subsidy similarly distorts wholesale market prices. The NYPSC and supporters argue that New York's program merely compensates the nuclear generators for their environmental attributes in furtherance of the state's public policy, not "tethered" to wholesale market clearing prices and therefore in compliance with the narrowly tailored *Hughes* decision.

On December 7, 2016, the State of Illinois also passed the *Future Energy Jobs Act* which included a ZEC program to subsidize baseload nuclear generation for ten years, prompting competing generators to file legal challenges at FERC and in federal court.⁷⁴

XII. FERC AND CFTC ENFORCEMENT AND COMPLIANCE

FERC's Office of Enforcement (Enforcement) continued to focus its efforts during 2016 in four principal areas: (1) fraud and market manipulation; (2) serious violations of mandatory reliability standards; (3) anticompetitive conduct; and (4) conduct threatening the transparency of regulated markets.⁷⁵ In FY 2016, Enforcement continued to prosecute matters under FERC's authority to impose civil penalties of up to \$1 million per day for market manipulation and fraud.⁷⁶ FERC opened 17 new investigations and obtained monetary penalties and disgorgement

⁶⁹ Order Accepting Proposed Tariff Revisions, Docket No ER16-2460-000, 157 FERC 61,067 (31 October 2016).

⁷⁰ Complaint, *New York State Public Service Commission et al v New York Independent System Operator, Inc*, FERC Docket No EL16-92 (24 June 2016).

⁷¹ Petition of Constellation Energy Nuclear Group LLC; R.E Ginna Nuclear Power Plant, LLC; and Nine Mile Point Nuclear Station, LLC to Initiate a Proceeding to Establish the Facility Costs for the R.E Ginna and Nine Mile Point Nuclear Power Plants, *Implementation of a Large-Scale Renewable Program and a Clean Energy Standard*, NYPSC Docket No 16-E-0270 (1 August 2016).

⁷² Complaint, *Coalition for Competitive Energy v Zibelman*, Case No 1:16-cv-08164 (SDNY 19 October 2016).

⁷³ 578 US ___, 136 S. Ct. 1288 (2016). For a discussion of the decision previously included in this quarterly, see Robert Fleishman, "The Washington Report" (2016) 4:2 Energy Regulation Quarterly 54.

⁷⁴ *Electric Power Supply Association et al v Star et al*, No. 1:17-cv-01164 (ND Ill 2017); *Calpine Corp et al v PJM Interconnection LLC*, FERC Docket No EL16-49-000 (14 February 2017).

⁷⁵ Federal Energy Regulatory Commission, *2016 Report on Enforcement*, FERC Docket No AD07-13-010 (17 November 2016), online: FERC <<https://www.ferc.gov/legal/staff-reports/2016/11-17-16-enforcement.pdf>>. The Report provides additional transparency and guidance for regulated entities and the public.

⁷⁶ See *Prohibition of energy market manipulation*, 16 USC § 824v(a) (2012); *Prohibition on market manipulation* 15 USC § 717c-1 (2012).

of unjust profits totaling approximately \$18 million. With the pending litigation in U.S. federal district courts and before the Commission, Enforcement is seeking to recover more than \$567 million in civil penalties and disgorge more than \$45 million in allegedly unjust profits.

FERC Enforcement also issued two white papers: one summarizing recent FERC and federal court case law regarding development of the Commission's anti-manipulation doctrine and identifying factors staff investigates for indicia of fraudulent conduct; and another explaining internal best practices for jurisdictional entities to prevent and detect market manipulation and other violations.⁷⁷

The Commodities Futures Trading Commission (CFTC) also continued to aggressively exercise its enforcement authority in FY 2016, bringing 68 enforcement actions, resulting in more than \$1.2 billion in monetary sanctions. A significant portion of the CFTC's enforcement actions continue to involve the energy sector, and the CFTC has prohibited disruptive trading practices on the commodities exchanges under its jurisdiction. Notable FERC matters are briefly described below.

A. Maxim Power Corporation, et al

On September 26, 2016, the Commission approved a settlement with Maxim Power Corporation (Maxim), several of its affiliates, and one individual employee, resolving claims pending in litigation before the United States District Court for the District of Massachusetts.⁷⁸ Maxim stipulated to the alleged facts but neither admitted nor denied the violations. It agreed to pay \$4 million in disgorgement to ISO New England (ISO-NE) and \$4 million in civil penalties.

The settlement resolved allegations FERC issued an Order Assessing Civil Penalties against the Maxim entities on May 1, 2015, that they had violated the Commission's Anti-Manipulation Rule,⁷⁹ through a scheme to collect approximately \$3 million in inflated payments from ISO-NE for reliability runs by charging the ISO for costly oil when it actually burned much less expensive natural gas.⁸⁰ FERC also found that Maxim had violated FERC's false statements regulation by misleading and omitting material omissions in its communications with the ISO-NE Market Monitor.⁸¹ FERC assessed civil penalties of \$5 million against Maxim and \$50,000 against an individual employee, with one Commissioner dissenting from the Commission's Order. The September 2016 settlement also resolved a separate non-public investigation into whether Maxim potentially gamed ISO-NE mitigation procedures to maximize its uplift payments when it was dispatched for reliability purposes.

B. Lincoln Paper and Tissue LLC, et al

On June 1, 2016, the Commission issued an order approving a settlement in which Lincoln Paper and Tissue LLC (Lincoln) stipulated to the facts but neither admitted nor denied allegations that it manipulated ISO New England's demand response markets.⁸² The settlement was also approved by the United States Bankruptcy Court for the District of Maine as part of an ongoing Chapter 11 bankruptcy reorganization by Lincoln. As part of the bankruptcy proceeding, FERC agreed that the disgorgement will be paid as an unsecured claim and the civil penalty will be treated as a subordinated claim.

FERC had issued orders⁸³ on August 29, 2013, assessing civil penalties of \$5 million, \$7.5 million, and \$1.25 million against Lincoln,

⁷⁷ Federal Energy Regulatory Commission, *Anti-Market Manipulation Enforcement Efforts Ten Years After EPAct 2005* (November 2016), online: <<https://www.ferc.gov/legal/staff-reports/2016/marketmanipulationwhitepaper.pdf>>; Federal Energy Regulatory Commission, *Effective Energy Trading Compliance Practices* (November 2016), online: <<https://www.ferc.gov/legal/staff-reports/2016/tradecompliancewhitepaper.pdf>>.

⁷⁸ Order Approving Stipulation and Consent Agreement, *Maxim Power Corporation*, 156 FERC 61223 (26 September 2016).
⁷⁹ 18 CFR § 1c.1 (2015).

⁸⁰ Order Assessing Civil Penalties *Maxim Power Corporation*, 151 FERC 61094 (1 May 2016).

⁸¹ 18 CFR § 35.41(b) (2015).

⁸² Order Approving Stipulation and Consent Agreement, *Lincoln Paper and Tissue, LLC*, 155 FERC 61228 (1 June 2016). "Demand response" refers to a reduction in customers' consumption of electricity from their anticipated consumption in response to an increase in the price of electricity or to incentive payments designed to induce lower electricity consumption.

⁸³ Order Assessing Civil Penalty, *Lincoln Paper & Tissue, LLC*, 144 FERC 61162 (29 August 2013); Order Assessing Civil Penalty, *Competitive Energy Servs LLC*, 144 FERC 61163 (29 August 2013); Order Assessing Civil Penalty, *Richard Silkman*, 144 FERC 61164 (29 August 2013).

Competitive Energy Services, LLC (CES), and Richard Silkman (Silkman), CES' managing partner, respectively. The orders also sought disgorgement of unjust profits of approximately \$380,000 from Lincoln and \$170,000 from CES. FERC's petition seeking orders affirming the imposition of penalties against CES and Silkman⁸⁴ continues to be litigated in the United States District Court for the District of Maine and has survived Motions to Dismiss.⁸⁵

C. BP America Inc, *et al*

On July 11, 2016, FERC affirmed an Initial Decision issued on August 13, 2015, by an Administrative Law Judge at FERC after an evidentiary hearing lasting approximately two weeks. The Initial Decision found that BP America Inc., BP Corporation North America Inc., BP America Production Company, and BP Energy Company (collectively, BP) illegally manipulated a certain natural gas market in Houston from September to November 2008. Enforcement Staff alleged manipulation by citing, among other things, markedly changed market activity by BP at points in Texas following Hurricane Ike, and a recorded telephone demonstrating that a junior trader realized BP's trading was manipulative and expressed concern to his supervisor. The Initial Decision assessed penalties totaling \$28 million and disgorgement of \$800,000 in unjust profits, which is equal to the amount sought in the Commission's Order to Show Cause issued on August 5, 2013.⁸⁶

On August 10, 2016, BP sought rehearing and a stay of the Commission's July 11, 2016 order and the Commission responded by staying civil penalty payment and granting rehearing for further consideration of the merits.⁸⁷ On September 7, 2016, BP appealed the Commission's original order setting the matter for hearing before an administrative law

judge to the US Court of Appeals for the Fifth Circuit.

D. Total Gas & Power North America, Inc, *et al*

On April 28, 2016, FERC issued an Order to Show Cause alleging that Total Gas & Power North America, Inc (Total), along with its affiliates and two traders, violated the Anti-Manipulation Rule by trading during bidweeks to influence the published index prices of natural gas at four locations in the southwest United States between June 2009 and June 2012.⁸⁸ FERC alleged that Total traded a dominant market share of monthly physical fixed price natural gas during bidweek to inflate or suppress the volume-weighted average price and then reported these trades for inclusion in the calculation of the published monthly index prices to which it was exposed, thereby benefiting its derivative positions whose value was tied to those indices. FERC seeks civil penalties totaling more than \$216 million and disgorgement of more than \$9 million.

Total also filed a lawsuit in United States District Court for the Western District of Texas seeking to prevent FERC from adjudicating the alleged violations, seeking a declaratory judgment that the Commission: (1) has no legal authority to adjudicate *NGA* violations; (2) any such adjudication would violate Article III and the Fifth and Seventh Amendments of the United States Constitution; (3) the process by which FERC appoints administrative law judges is unconstitutional, because those judges are not appointed by the Commission as a whole; and (4) communications among FERC staff during the investigative stage (i.e. before issuance of the Order to Show Cause) of the Total matter violated the prohibition on *ex parte* communications and the separation of function requirements established by

⁸⁴ Petition for an Order Affirming the Federal Energy Regulatory Commission's August 29, 2013 Order Assessing Civil Penalty Against Lincoln Paper and Tissue, LLC, *FERC v Lincoln Paper & Tissue LLC*, No 1:13-cv-13056-DPW (D Mass) (2 December 2013).

⁸⁵ Memorandum and Order Regarding Motions to Dismiss, *FERC v Lincoln Paper & Tissue, LLC*, No 1:13-cv-13056-DPW (D Mass) (11 April 2016). The order contained rulings favorable to FERC Enforcement on the issues of statute of limitations, waiver of all defenses and arguments not raised during the Commission penalty assessment process, applicability of the Anti-Manipulation Rule to individual persons, and fair notice of which fraudulent conduct is proscribed. The Court in 2016 did not provide clarity sought on the scope of *de novo* review under the *FPA*.

⁸⁶ Initial Decision, *BP America Inc*, 152 FERC 63016 (13 August 2015); Order to Show Cause and Notice of Proposed Penalty, *BP America Inc*, 144 FERC 61100 (5 August 2013).

⁸⁷ Order Staying the Payment Directives of the Order Assessing Penalties, *BP America Inc*, 156 FERC 61174 (12 September 2016); Order Granting Rehearing, *BP America Inc*, Docket No IN13-15-002 (8 September 2016).

⁸⁸ Order to Show Cause and Notice of Proposed Penalty, *Total Gas & Power North America, Inc*, 155 FERC 61105 (28 April 2016).

the *Administrative Procedure Act*. The court subsequently transferred the matter to the United States District Court for the Southern District of Texas, and that court dismissed the plaintiffs' complaint on July 15, 2016, finding the claims were non-justiciable, hypothetical and not ripe, and rejecting Total's jurisdictional challenge.⁸⁹ Total appealed that dismissal to the US Court of Appeals for the Fifth Circuit on September 26, 2016.⁹⁰

In December 2015, the CFTC filed and settled market manipulation charges against Total for a subset of the same bidweek trading FERC is pursuing. CFTC collected a \$3.6 million civil penalty and banned Total from trading physical basis or physical fixed-price natural gas at hub locations when it also holds certain related financial natural gas positions.⁹¹

E. ETRACOM LLC, et al

On August 17, 2016, FERC filed a petition in the United States District Court for the Eastern District of California to enforce the Commission's June 2016 order assessing civil penalties against ETRACOM LLC and its majority owner and its principal owner.⁹² FERC alleged that during May 2011 ETRACOM violated the Commission's Anti-Manipulation Rule by submitting virtual electric supply transactions at an intertie on the border of the California Independent System Operator (CAISO) market, in order to benefit ETRACOM's congestion revenue rights (CRR) positions. Respondents allege that pricing at the intertie was affected by, among other things, market design and software flaws and modeling errors in CAISO's operation of its energy and CRR markets.

The Commission has asked the court to summarily affirm assessed civil penalties totaling \$2.5 million and disgorgement

of approximately \$315,000. The court is evaluating the scope of de novo review of a penalty assessment under the *FPA*, including whether the Federal Rules of Civil Procedure apply and to give ETRACOM the rights to seek discovery from FERC and third parties.

F. National Energy and Trade, LP, et al

On September 1, 2016, the Commission approved settlement agreements resolving the investigations of National Energy & Trade, LP (NET) and one of its natural gas traders.⁹³ Enforcement staff alleged that NET violated the Anti-Manipulation Rule by engaging in directional trading in the January 2012 and April 2014 bidweeks at natural gas trading hubs in New York and Texas to benefit its related financial positions. NET paid a civil penalty and disgorgement of approximately \$1.5 million, neither admitting nor denying the allegations, and the trader paid a civil penalty of \$40,000 and agreed to a one-year trading ban.

G. Up-To Congestion Investigations, Settlements, and Proceedings

FERC continues to litigate two cases stemming from allegations of "gaming" of market rules in the PJM market under the Anti-Manipulation Rule with respect to so-called Up-to Congestion (UTC) transactions. FERC defines a UTC transaction as a "product that enables a trader to profit if the congestion price spread between two nodes changes favorably between the Day Ahead Market (DAM) and the Real Time Market (RTM)."⁹⁴

1. Powhatan Energy Fund, et al

FERC has petitioned the United States District Court for the Eastern District of Virginia⁹⁵ to enforce the Commission's May 2015 order assessing civil penalties against Powhatan

⁸⁹ Memorandum and Order, *Total Gas & Power North America, Inc v FERC*, No 4:16-cv-01250 (SD Tex 15 July 2016).

⁹⁰ Notice of Appeal, *Total Gas & Power North America, Inc v FERC*, No 16-20642 (5th Cir 26 September 2016).

⁹¹ US Commodity Futures Trading Commission, Press Release, pr7289-15, "CFTC Files and Settles Charges against Total Gas & Power North America, Inc. and Therese Tran for Attempted Manipulation of Natural Gas Monthly Index Settlement Prices" (7 December 2015), online: <<http://www.cftc.gov/PressRoom/PressReleases/pr7289-15>>.

⁹² Petition for an Order Affirming the Order Assessing the Civil Penalties, *FERC v ETRACOM LLC*, No 2:16-cv-01945 (ED Cal 17 August 2016).

⁹³ Order Approving Stipulation and Consent Agreement, *National Energy & Trade, L.P.*, 156 FERC 61154 (1 September 2016); Order Approving Stipulation and Consent Agreement, *In re David Silva*, 156 FERC 61155 (1 September 2016).

⁹⁴ Order Approving Stipulation and Consent Agreement, *In re PJM Up-To-Congestion Transactions*, 142 FERC 61088 (1 February 2013) at para 3.

⁹⁵ Petition for an Order Affirming FERC's Order Assessing Civil Penalties, *FERC v Powhatan Energy Fund LLC*, No 3:15-cv-00452 (ED Va 31 July 2015).

Energy Fund, LLC (\$16.8 million), HEEP Fund Inc. (\$1.92 million), CU Fund Inc. (\$10.08 million), and the companies' principal trader Houlian "Alan" Chen (\$1 million) (collectively, "Powhatan Respondents") and ordered the corporate entities to disgorge allegedly unjust profits. FERC alleges that the Powhatan Respondents engaged in manipulative UTC trading by "plac[ing] UTC trades in opposite directions on the same paths, in the same volumes, during the same hours for the purpose of creating the illusion of bona fide UTC trading and thereby to capture large amounts of marginal loss surplus allocation (MLSA) that PJM distributed at that time to UTC transactions with paid transmission," and proposing civil penalties of the same amounts.⁹⁶ The court has not yet determined the scope of the *de novo* review required by the *FPA*.

2. City Power Marketing, LLC, *et al*

FERC has petitioned the United States District Court for the District of Columbia⁹⁷ to enforce the Commission's July 2015 order assessing civil penalties totaling \$15 million and disgorgement of more than \$1.2 million against City Power Marketing, LLC (City Power) and its owner, K. Stephen Tsingas.⁹⁸ The Commission found that City Power and Tsingas had violated the Commission's Anti-Manipulation Rule by engaging in fraudulent Up-To Congestion trades in the PJM market during the summer of 2010. As part of that finding, the Commission determined that City Power and Tsingas had engaged in three types of trades to improperly collect MLSA payments intended for bona fide Up-To Congestion trades: (1) "roundtrip" trades that constituted wash trades, (2) trading between export and import points that had the same prices and (3) trading between two other points which had minimal price differences, not to profit from spread changes but instead for the purpose of collecting MLSA payments. The Commission reasoned, in part, that City Power's trades were

inherently fraudulent because they were pre-arranged to cancel each other out and involved little to no economic risk.

The Commission also found that City Power had violated section 35.41(b) of the Commission's regulations by making false and misleading statements and material omissions in its communications with Enforcement staff to conceal the existence of relevant instant messages. On August 10, 2016, the court issued an opinion dismissing City Power's Motion to Dismiss but holding—consistent with other district courts evaluating the question—that FERC's petition for review must be treated as an ordinary civil action governed by the Federal Rules of Civil Procedure, rejecting FERC's argument that the proceeding was merely a summary review of agency action.⁹⁹

3. Coaltrain Energy, LP, *et al*

FERC has petitioned the United States District Court for the Southern District of Ohio¹⁰⁰ to enforce the Commission's May 2016 order assessing civil penalties totaling \$38 million and disgorgement of more than \$4.1 million against Coaltrain Energy LP, its co-owners, and three traders.¹⁰¹ Enforcement staff alleged that Coaltrain used financially-settled UTC transactions in the summer of 2010 to manipulate and defraud PJM by over-collecting MLSA payments, and that Coaltrain misled investigators by initially failing to produce screenshots from its internal computer monitoring software.

XIII. OIL AND NATURAL GAS PIPELINES

Increased public scrutiny and controversy regarding the direct and upstream environmental impacts of crude oil and natural gas pipelines contributed to the delay or rejection of several proposed projects in late 2016. Most notably, sustained protests

⁹⁶ Order to Show Cause and Notice of Proposed Penalty, *Powhatan Energy Fund LLC*, 149 FERC 61261 (17 December 2014).

⁹⁷ Petition for an Order Affirming the FERC's July 2, 2015 Order Assessing Civil Penalties Against City Power Marketing, LLC and K. Stephan Tsingas, *FERC v City Power Marketing LLC*, No 15-cv-01428 (DDC 1 September 2015).

⁹⁸ Order Assessing Civil Penalties, *City Power Marketing LLC and K. Stephen Tsingas*, 152 FERC 61012 (2 July 2015).

⁹⁹ Memorandum Opinion and Order Denying City Power and Tsingas' Motion to Dismiss, *FERC v City Power Marketing LLC*, No 15-cv-01428, (DDC 10 August 2016).

¹⁰⁰ Petition for an Order Affirming Order Assessing Civil Penalty, *FERC v Coaltrain Energy et al*, No 16-cv-00732 (SD Ohio 27 July 2016).

¹⁰¹ Order Assessing Civil Penalties, *Coaltrain Energy LP*, 155 FERC 61204 (27 May 2016).

by environmental activists at the proposed site of the Dakota Access oil pipeline in North Dakota culminated on December 4, 2016, when the Obama Administration directed the Army Corps of Engineers to refuse Energy Transfer Partner an easement required for the project. However, the Trump Administration reversed this decision as part of Trump's pledge to streamline permitting and environmental review processes for energy infrastructure, particularly with respect to approving TransCanada Corporation's extension of the Keystone XL pipeline which would import tar sands crude oil from Alberta.

In May 2016, Constitution Pipeline appealed to the US Court of Appeals for the Second Circuit an April 2016 decision by the New York State Department of Environmental Conservation not to issue a construction permit under Section 401 of the *Clean Water Act*,¹⁰² despite FERC having approved the gas pipeline project in 2014.¹⁰³ Industry trade associations including producers, transporters, and users of natural gas are participating in the litigation and arguing that New York impermissibly interfered with FERC's authority under the *NGA* over siting and approval of new pipelines.

Other projects—primarily those designed to alleviate gas transportation constraints in New England and elsewhere in the Northeastern United States—have pushed back their estimated completion dates due to complications with FERC and/or state environmental reviews. Inadequate demand and uncertain market conditions also led to the cancellation of the Northeast Energy Direct pipeline proposed by Kinder Morgan Inc and prompted FERC to reject the certificate application of the Pacific Connector Pipeline proposed in connection with the Jordan Cove LNG export terminal in Oregon.¹⁰⁴

XIV. ELECTRIC RELIABILITY

FERC continues to actively oversee and enforce Reliability Standards compliance, in

coordination with the NERC, an industry self-regulatory organization, and NERC's regional reliability entities. Reliability enforcement is of particular interest because the Reliability Standards are also mandatory and enforceable in the provinces of Ontario, New Brunswick, Alberta, British Columbia, Manitoba, and Nova Scotia and are in the process of being adopted in Quebec.¹⁰⁵

FERC continues to focus on strengthening the security of the North American bulk power system by overseeing development of new Critical Infrastructure Protection (CIP) Reliability Standards. On July 21, 2016, FERC directed NERC to develop a new supply chain risk management CIP standard in order to address security vulnerabilities faced by the specialized vendors providing industrial control system hardware, software, and computing and networking services to power system operators.¹⁰⁶ On July 21, 2016, FERC also issued a notice of inquiry into modifying CIP standards to better protect from cyberattack the control centers that are used to monitor and control the bulk electric system by requiring those control centers to be separated to some extent from the Internet and to have the ability to prevent unauthorized applications.¹⁰⁷ In 2016, FERC did not announce any major enforcement actions related to widespread electric outages or serious violations of Reliability Standards. ■

¹⁰² *Clean Water Act*, 33 USC §1251 et seq (1972).

¹⁰³ *Constitution Pipeline v New York State Department of Environmental Conservation*, No 16-1568 (2d Cir 23 May 2016).

¹⁰⁴ Order Denying Applications for Certificate and Section 3 Authorization, *Jordan Cove Energy Project, LP*, 154 FERC 61190 (11 March 2016) at para 48: *order denying reb'g*, 157 FERC 61194 (9 December 2016).

¹⁰⁵ NERC, *Key Players: Canada*, online: <<http://www.nerc.com/AboutNERC/keyplayers/Pages/Canada.aspx>>.

¹⁰⁶ Revised Critical Infrastructure Protection Reliability Standards, Order No 829, Docket No RM15-14-002, 156 FERC 61050 (21 July 2016).

¹⁰⁷ Cyber Systems in Control Centers, Docket No RM16-18-000, 156 FERC 61051 (21 July 2016).