ENERGY REGULATION QUARTERLY

VOLUME 6, ISSUE 2 2018

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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.

ENERGY REGULATION QUARTERLY

TABLE OF CONTENTS

EDITORIAL

Editorial 9
Rowland J. Harrison, Q.C. and Gordon E. Kaiser

ARTICLES

A(Nother) New Federal Regime for Assessing Interprovincial Pipeline Projects: The Proposed *Impact Assessment Act* 11
Martin Z. Olszynski

The Tortuous Path to NEB 'Modernization' 23
Ron Wallace

The *Impact Assessment Act, Canadian Energy Regulator Act* and Offshore Energy: A View from Atlantic Canada.......... 41
Daniel Watt

Environmental Clearance and Authorization: A New Framework for Quebec 51
Ludovic Fraser

Effective Utility Regulation: A Unifying Cause for A Divided America.......... 63
Scott Hempling

OEB Issues Its Final Report on Wireline Pole Attachment Charges 65
David Stevens

BOOK REVIEW

A Guide to Energy Market Manipulation 69
Dr. A. Neil Campbell

EDITORIAL

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

As this issue of *Energy Regulation Quarterly* goes to press, the federal Parliament is proceeding with legislation that would radically restructure the regulatory framework for major energy projects under federal jurisdiction, including in particular interprovincial and international pipelines. The changes proposed by Bill C-69[1], innocuously titled *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, are fundamental; they are the most significant federal initiative in energy regulation since at least the 1980 National Energy Program.

After nearly 60 years, the National Energy Board (NEB) would be abolished. Its replacement – the Canadian Energy Regulator (CER) – would have a fundamentally different role, particularly in the assessment of whether proposed new projects were in the public interest. That threshold determination would be made initially by joint review panels under the proposed *Impact Assessment Act*. Further, the CER would function under the direction of a board of directors that would resemble a corporate board. Hearings would be conducted by members of a "commission", rather than by board members.

This issue of *ERQ* presents a comprehensive review and analysis of these sweeping changes, which begins with Martin Olszynski's informative overview of the proposed changes, in his lead article on "A(nother) New Federal Regime for Assessing Interprovincial Pipeline Projects: The Proposed *Impact Assessment Act.*" The article focuses on how the new regime would apply to proposed interprovincial and international pipeline projects.

Radical shifts in government policy rarely occur in a vacuum and are only fully understood in the context of their evolution and preceding, formative events. In his article on "The Tortuous Path to NEB 'Modernization'", Ron Wallace, a widely-experienced regulator and former member of the NEB, provides an informative review of developments that no doubt contributed to the proposed demise of the NEB, while reflecting concern about the implications of the scheme proposed by Bill C-69, not just for pipeline projects, but for the overall integrity of the regulatory system.

Public discourse on Bill C-69 has, not surprisingly, focused on the implications for federally-regulated pipeline projects. However, the proposed new framework reaches far beyond pipeline projects to include offshore oil and gas exploration and production projects and potential offshore renewable energy projects. Daniel Watt reviews the implications in his article on "The *Impact Assessment Act*, *Canadian Energy Regulator Act* and Offshore Energy: A View from Atlantic Canada."

Significant changes in environmental regulation, with implications for the energy industries, also continue at the provincial level. Ludovic Fraser reviews developments in Québec in "Québec's New Environmental Authorization Framework."

Political and regulatory developments in the U.S. have obvious implications for the Canadian energy industry. Scott Hempling offers a thoughtful commentary on the broader political lessons that might be learned from the world of utility regulation in his article "Effective Utility Regulation: A Unifying Cause for a Divided America."

Meanwhile, the daily business of energy regulators carries on. David Stevens reviews the Final Report of the Ontario Energy Board on

1 Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018.

wireline attachment charges.

The final offering in this issue of *ERQ* is Dr. A. Neil Campbell's review of *The Guide to Energy Market Manipulation*, edited by one of our Co-Managing Editors, Gordon Kaiser. ■

A(NOTHER) NEW FEDERAL REGIME FOR ASSESSING INTERPROVINCIAL PIPELINE PROJECTS:

THE PROPOSED *IMPACT ASSESSMENT ACT*

*Martin Z. Olszynski**

I. INTRODUCTION

On February 8, 2018, after nearly two years of expert panel and parliamentary committee review,[1] the federal Liberal government tabled Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts.*[2] As further set out below, the proposed *Impact Assessment Act* (*IAA*) can be described as a bulked-up version of the current *Canadian Environmental Assessment Act, 2012*[3] (*CEAA, 2012*). Like *CEAA, 2012*, the *IAA* is built around a designated project list rather than being triggered by federal decision-making generally (as the original *Canadian Environmental Assessment Act* was).[4] The main differences include a new "planning phase" where before there was only a screening decision,[5] the elimination of any standing test for public participation,[6] and an expansion of the scope of assessments, including not just environmental effects but also social, economic, and health effects that fall within Parliament's legislative jurisdiction.[7] The federal government will also have to consider, among other things, a project's contribution to sustainability[8] and whether it contributes to or hinders Canada's ability to meet its climate

*Martin Z. Olszynski is an Associate Professor at the University of Calgary, Faculty of Law. He is grateful to Professors Nigel Bankes and David Wright for their comments and suggestions on an earlier draft of this article.

1 See Canada, Minister of Environment and Climate Change, *Building Common Ground: A New Vision for Impact Assessment in Canada*, by the Expert Panel for the Review of Environmental Assessment Processes, (Ottawa: Canada Environmental Assessment Agency, 2017), online: <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html> [*Building Common Ground*]; Natural Resources Canada, *Forward, Together: Enabling Canada's Clean, Safe and Secure Energy Future*, by the Expert Panel on the Modernization of the National Energy Board, (Ottawa: NRCan, 2017), online: <https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/NEB-Modernization-Report-EN-WebReady.pdf>; House of Commons, Standing Committee on Fisheries and Oceans, *Review of Changes Made in 2012 to the Fisheries Act: Enhancing the Protection of Fish and Fish Habitat and the Management of Canadian Fisheries* (February 2017) (Chair: Scott Simms); House of Commons, Standing Committee on Transport, Infrastructure and Communities, *A Study of the Navigation Protection Act* (March 2017) (Chair: Hon. Judy A. Sgro).

2 Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018 (current version) [referred to herein as *IAA* or *CERA,* as the case may be].

3 *Canadian Environmental Assessment Act, 2012,* SC 2012, c 19, s 52 [*CEAA, 2012*].

4 *Canadian Environmental Assessment Act,* SC 1992 c 37 [*CEAA*].

5 For the new planning phase, see *IAA, supra* note 2, ss 10 – 20, further discussed in Part IV of this article. For the screening provisions of *CEAA, 2012*, see ss 8 – 10.

6 See *CEAA, 2012, supra* note 3, subs 2(2) for the definition of "interested party," which is further discussed in Part II.

7 *IAA, supra* note 2, s 2 (definition of effects).

8 *Ibid,* ss 22, 63. Sustainability is defined in s 2 as "the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations."

change commitments.[9]

There has already been considerable commentary about Bill C-69, most of which is focused on the *IAA* and the *Canadian Energy Regulator Act* (*CERA*).[10] The Standing Committee on Environment and Sustainable Development (ENVI) began its own review of the legislation at the end of March 2018 and was scheduled to complete its clause-by-clause review by May 24, 2018.[11] The purpose of this article is to explore those changes that are relevant to the assessment of interprovincial pipelines. Bearing in mind that Bill C-69 is ultimately a response to the previous Conservative government's 2012 omnibus budget bills,[12] it should not come as a surprise that the *IAA* will undo many of the changes brought about by that legislation, including the exclusive role that it gave the National Energy Board (NEB) (soon to be the Canadian Energy Regulator, or CER) with respect to the assessment of interprovincial pipeline projects.

The paper is organized as follows. The next part sets out the relevant provisions of the current *CEAA, 2012* regime as well as the jurisprudence with respect to those provisions. This is followed by an overview of the proposed regime under the *IAA*. The paper concludes with some commentary with respect to both regimes.

II. THE ASSESSMENT OF INTER-PROVINCIAL PIPELINE PROJECTS PURSUANT TO *CEAA, 2012*

As noted above, pursuant to section 15 of *CEAA, 2012*, the NEB is one of four "responsible authorities," alongside the Canadian Environmental Assessment Agency (the Agency) and the Canadian Nuclear Safety Commission (CNSC), responsible for conducting environmental assessments. Sections 17 – 27 set out various rules of general application including the factors that must be considered in an environmental assessment,[13] who determines the scope of those factors,[14] a duty of assistance on federal authorities with expert or specialist knowledge,[15] and the power to require the collection of additional information.[16] Sections 28 – 32, however, set out specific rules for assessments by the NEB.

Section 28 requires the NEB to ensure that any "interested party" is provided with an opportunity to participate in the environmental assessment. *CEAA, 2012* defines interested parties as those that, in a responsible authority's opinion, are "directly affected by the carrying out of the designated project or if, in its opinion, the person has relevant information or expertise."[17] The term "directly affected" is common in much of Alberta's environmental legislation and is generally understood as describing some kind of personal interest, such as an effect on private land, with a certain degree of proximity to a project.[18] Confronted with essentially the same wording,[19] the Federal Court of Appeal in *Forest Ethics Advocacy Assn. v. National Energy Board*[20] held that the NEB "is entitled to a significant margin of appreciation in the circumstances…"[21] and upheld the NEB's denial of participation to Ms. Donna Sinclair. Ms. Sinclair's concerns with respect to Enbridge's Line 9 project were primarily in relation to climate change, which the NEB had determined to be "irrelevant" to its review.[22]

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9 *Ibid.*
10 See *e.g.* Martin Olszynski "In Search of #BetterRules: An Overview of Federal Environmental Bills C-68 and C-69" (15 February 2018), *ABlawg* (blog), online: <http://ablawg.ca/wp-content/uploads/2018/02/Blog_MO_Bill68_Bill69.pdf>; Nigel Bankes, "Some Things have Changed but Much Remains the Same: the New Canadian Energy Regulator" (15 February 2018), *ABlawg* (blog), online: <http://ablawg.ca/wp-content/uploads/2018/02/Blog_NB_Much_Remains_The_Same.pdf> ; Martin Ignasiak, Sander Duncanson & Jessica Kennedy, "Changes to federal impact assessments, energy regulator and waterway regulation (Bills C-68 and C-69)" (12 February 2018), *Osler* (blog), online: <https://www.osler.com/en/resources/regulations/2018/changes-to-federal-impact-assessments-energy-regulator-and-waterway-regulation-bills-c-68-and-c-1>.
11 Readers should therefore note that the *IAA* may still be amended from its current form.
12 *Jobs, Growth and Long-TermProsperity Act*, SC 2012, c 19.
13 *CEAA, 2012*, *supra* note 4, subs 19(1).
14 *Ibid*, subs 19(2).
15 *Ibid*, s 20.
16 *Ibid*, subs 23(2).
17 *Ibid,* s 28, subs 2(2).
18 See Jody Saunders and Jessica Lim, "The National Energy Board's Participation Framework: Implementing Changes Resulting from the *Jobs, Growth and Long-Term Prosperity Act*" (2014) 52:2 Alta L Rev 366.
19 See s 55.2 of the *National Energy Board Act,* RSC 1985, c N-7 [*NEBA*].
20 *Forest Ethics Advocacy Assn v Canada (National Energy Board),* 2014 FCA 245 [*Forest Ethics*].
21 *Ibid*, at para 72.
22 *Ibid.*, at para 64.

Section 29 requires the NEB to prepare a "report concerning the environmental assessment" of the project, setting out its recommendation with respect to the likelihood, or not, of the project resulting in significant adverse environmental effects and any follow-up programs to be implemented. It also directs that this report be submitted to the Minister of Natural Resources at the same time as the NEB submits its report pursuant to *National Energy Board Act* subsection 52(1) (recommending, or not, the issuance of a Certificate of Public Convenience and Necessity).[23] Finally, and as further discussed below, subsection 29(3) sets out a privative clause, stating that with the exception of the processes set out in section 30 and 31, the NEB's environmental assessment report is "final and conclusive."[24]

Section 30 sets out a process for the Governor in Council (*i.e.* Cabinet) to refer back to the NEB any of its recommendations for reconsideration, and gives Cabinet the power to direct the NEB to take into account any specified factors, as well as to impose a time limit within which the NEB must complete its reconsideration. As in section 29, subsection 30(5) states that the NEB's reconsideration report is "final and conclusive."[25]

These provisions were interpreted in *Gitxaala Nation v. Canada*[26] – the litigation surrounding Enbridge's Northern Gateway pipeline.[27] As noted by the Federal Court of Appeal, Cabinet had three options upon receipt of both the *CEAA, 2012* and *NEBA* reports with respect to that project: (1) it could "direct the Board to issue a certificate in respect of the pipeline or any part of it and to make the certificate subject to the terms and conditions set out in the report"; (2) it could "direct the Board to dismiss the application for a certificate"; or (3) it could ask the Board to reconsider its recommendations in its report or any terms and conditions, or both.[28]

The-then federal Cabinet proceeded with the first option.[29] The NEB's Joint Review Panel report, Cabinet's decision based on that report, and Northern Gateway's section 52 certificates were all subsequently challenged by First Nations and environmental groups.[30] As is now widely know, the Federal Court of Appeal ultimately allowed the First Nations' applications for judicial review, finding that the federal government had failed to meet its constitutional duty during the post-report consultation stage.[31] The environmental groups' applications, however, were all dismissed. According to Stratas J.A. for the majority, the statutory scheme is such that the federal Cabinet alone determines whether the NEB's environmental assessment report meets the requirements of *CEAA, 2012:*

> [120] The legislative scheme shows that for the purposes of review the only meaningful decision-maker is the Governor in Council…
>
> [122] In particular, the environmental assessment under the *Canadian Environmental Assessment Act, 2012* plays no role other than assisting in the development of recommendations submitted to the Governor in Council so it can consider the content of any decision statement and whether, overall, it should direct that a certificate approving the project be issued.
>
> [123] This is a different role—a much attenuated role—from the role played by environmental assessments under other federal decision-making regimes. It

23 *CEAA, 2012*, *supra* note 4, s 29.
24 *Ibid,* subs 29(3).
25 *Ibid,* s 30.
26 *Gitxaala Nation v Canada*, 2016 FCA 187 [*Gitxaala*]. The Federal Court of Appeals' approach was recently affirmed in *Bigstone Cree Nation v. Nova Gas Transmission Ltd.*, 2018 FCA 89 at para 23: "The legislative scheme for pipeline approvals set out by Parliament in the *NEB Act* has been aptly summarized in *Gitxaala* […]."
27 For commentary on this decision, see Keith B. Bergner, "The Northern Gateway Project and the Federal Court of Appeal: The Regulatory Process and the Crown's Duty to Consult" (2016) 4:1 Energy Regulation Q, online: < http://www.energyregulationquarterly.ca/case-comments/the-northern-gateway-project-and-the-federal-court-of-appeal-the-regulatory-process-and-the-crowns-duty-to-consult#sthash.5MrRFERk.dpbs>.
28 *Ibid,* at para 113.
29 *Gitxaala*, *supra* note 26 at paras 60 – 65.
30 *Ibid* at paras 68 – 70.
31 *Ibid* at para 327.

> is not for us to opine on the appropriateness of the policy expressed and implemented in this legislative scheme. Rather, we are to read legislation as it is written.
>
> [124] Under this legislative scheme, the Governor in Council alone is to determine whether the process of assembling, analyzing, assessing and studying is so deficient that the report submitted does not qualify as a "report" within the meaning of the legislation:
>
> - In the case of the report or portion of the report setting out the environmental assessment, subsection 29(3) of the *Canadian Environmental Assessment Act, 2012* provides that it is "final and conclusive" …
>
> [125] In the matter before us, several parties brought applications for judicial review against the Report of the Joint Review Panel. Within this legislative scheme, those applications for judicial review did not lie. No decisions about legal or practical interests had been made. Under this legislative scheme, as set out above, any deficiency in the Report of the Joint Review Panel was to be considered only by the Governor in Council, not this Court. It follows that these applications for judicial review should be dismissed.[32]

As further discussed in Part IV, this approach represents a significant departure from the established jurisprudence that, as prerequisites to subsequent government approvals, environmental assessment reports are directly reviewable for the purposes of determining their lawfulness.[33] A very restricted *scope of review* (*e.g.* to certain questions of law) could perhaps be defended on the grounds of a strong privative clause,[34] but then the privative clause contained in *CEAA, 2012* is not particularly strong. More importantly, Stratas J.A. appeared less influenced by privative clauses than by the fact that the Cabinet was the sole decision-maker. This, however, is generally the case in the environmental assessments: they are primarily recommendatory but their lawful completion is also required to confer jurisdiction on subsequent decision-makers.[35]

In any event, the only decision to review, according to Stratas J.A., was Cabinet's *NEBA* section 54 Order-in-Council directing the NEB to grant Enbridge its certificates. With respect to this decision, several of the parties sought to apply the Federal Court of Appeal's decision in *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*[36] as setting out the applicable legal framework for challenging Cabinet decision-making following a *CEAA* panel report. Stratas J.A., however, distinguished *Ekuanitshit* and chose not to follow it.[37] In addition to what he thought were two very different legislative regimes, Stratas J.A. was of the view that Cabinet approval of a hydroelectric dam project found likely to result in significant adverse environmental effects (as in *Ekuanitshit*) was somehow different than the approval of an interprovincial pipeline that was also found likely to result in significant adverse environmental effects:

> [138] The standard of review of the decision of the Governor in Council in *Ekuanitshit* may make sense where this Court is reviewing a decision by the

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32 *Ibid* at paras 120 – 125.

33 See *infra* note 75. It is also doubtful that ss 29 – 31 had any application in this case, as the Northern Gateway project was commenced as a Joint Review Panel and continued as such pursuant to transitional provisions contained within the *Jobs, Growth and Long-Term Prosperity Act, supra* note 12. See Martin Olszynski, "Northern Gateway: Federal Court of Appeal applies Wrong Provisions" (5 July 2016), *ABlawg* (blog), online: <https://ablawg.ca/2016/07/05/northern-gateway-federal-court-of-appeal-wrong-ceaa-provisions/>.

34 *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 31: "The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government."

35 See *CEAA, 2012, supra* note 4, s 7, *IAA supra* note 2, s 8, which prohibit federal authorities from exercising any power or performing any duty with respect to a project before an assessment has been completed.

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

37 *Gitxaala*, *supra* note 26 at paras 132 – 140.

> Governor in Council to approve a decision made by others based on an environmental assessment. The Governor in Council's decision is based largely on the environmental assessment. A broader range of policy and other diffuse considerations do not bear significantly in the decision…
>
> [139] In the case at bar, however, the Governor in Council's decision—the Order in Council—is the product of its consideration of recommendations made to it in the report. The decision is not simply a consideration of an environmental assessment. And the recommendations made to the Governor in Council cover much more than matters disclosed by the environmental assessment—instead, a number of matters of a polycentric and diffuse kind.
>
> [140] In conducting its assessment, the Governor in Council has to balance a broad variety of matters, most of which are more properly within the realm of the executive, such as economic, social, cultural, environmental and political matters. It will be recalled that under subsection 52(2), matters such as these must be included in the report that is reviewed by the Governor in Council.[38]

Consequently, the majority concluded that it "must give the Governor in Council the widest margin of appreciation over these questions," and was "not persuaded that the Governor in Council's decision was unreasonable on the basis of administrative law principles."[39]

III. THE ASSESSMENT OF INTER-PROVINCIAL PIPELINE PROJECTS PURSUANT TO THE PROPOSED IMPACT ASSESSMENT ACT

As noted at the outset, probably the most significant difference between *CEAA, 2012* and the *IAA* is that the NEB will no longer be a responsible authority with exclusive jurisdiction over the assessment of interprovincial pipelines. This part of the paper begins with this difference and then considers the main elements of each of the proposed impact assessment phases: planning, assessment, and decision-making.

A. Joint Review Panels with the Canadian Energy Regulator

Under the *IAA*, designated projects regulated by the Canadian Energy Regulator will be assessed by review panels.[40] Pursuant to subsection 39(2), such panels would be federal only, without the option of joint review panels with other interested jurisdictions.[41] Sections 47 – 50 set out several additional rules, including the creation of a roster of commissioners under the *Canadian Energy Regulator Act* who would be eligible to sit on such panels.[42] Like *CEAA, 2012,* subsection 51(3) of the *IAA* makes clear that such panels will carry out their duties in conjunction with their duties under the proposed *Canadian Energy Regulator Act.*[43]

While obviously a departure from *CEAA, 2012*, it should be noted that this scheme is essentially a return to the pre-2012 *status quo*. Northern Gateway, it bears recalling, was assessed by a joint review panel. With respect to impact assessment, panels' duties will be as follows:

a. conduct an impact assessment of the designated project;

b. ensure that the information that it uses when conducting the impact assessment is made available to the public;

c. hold hearings in a manner that offers the public an opportunity to participate in the impact assessment;

d. prepare a report with respect to the

38 *Ibid* at paras 138 – 140.
39 *Ibid* at paras 155 – 156.
40 *IAA, supra* note 2, s 43: "The Minister must refer the impact assessment of a designated project to a review panel if the project includes physical activities that are regulated under … (b) the *Canadian Energy Regulator Act.*"
41 *Ibid,* subs 39(2).
42 *Ibid*, ss 47-50.
43 *Ibid,* subs 51(3).

impact assessment that

i. sets out the effects that, in the opinion of the review panel, are likely to be caused by the carrying out of the designated project,

ii. indicates which of the effects referred to in subparagraph (i) are adverse effects within federal jurisdiction and which are adverse direct or incidental effects, and specifies the extent to which those effects are adverse,

iii. sets out a summary of any comments received from the public, and

iv. sets out the review panel's rationale, conclusions and recommendations, including conclusions and recommendations with respect to any mitigation measures and follow-up program;

e. submit the report with respect to the impact assessment to the Minister; and

f. on the Minister's request, clarify any of the conclusions and recommendations set out in its report with respect to the impact assessment.[44]

Amongst other things, the return to review panels should mean that Stratas J.A.'s unique approach to reviewing assessments by the NEB, *i.e.* that they are not directly reviewable, will no longer apply. There is some ambiguity on this front, however, because of related provisions in the proposed *CERA*, and sections 183 to 185 in particular.

Section 183 sets out the general rules for applications for certificates of public convenience and necessity, including additional direction to the CER in terms of the factors to be considered,[45] opportunities for "representations by the public,"[46] time limits,[47] and – of particular relevance to the discussion here – a privative clause at 183(11) to the effect that, subject to a reconsideration process at section 184,[48] CER reports are "final and conclusive."[49] Section 185 then modifies those rules for projects that are designated under the *IAA*, as follows:

> 185 If the application for a certificate relates to a *designated project*, as defined in section 2 of the *Impact Assessment Act*, that is subject to an impact assessment under that Act,
>
> a. the Commission's powers, duties and functions under section 182, subsections 183(1) and (2) and section 184 are to be exercised and performed by a review panel established under subsection 47(1) of that Act;
>
> b. in subsections 183(1) and 184(5), a reference to the Minister is to be read as a reference to the Minister and the Minister of the Environment;
>
> c. the report referred to in subsection 183(1) is to be submitted within the time limit established under section 37 of that Act;
>
> d. subsections 183(3) to (10) do not apply; and
>
> e. subsection 189(1) applies with respect to the review panel.[50]

Thus, the review panel tasked with the assessment under the *IAA* will also carry out the CER's duties with respect to reviewing applications for certificates of public convenience and necessity, with some modifications. While subsections 183(3) – (10) will cease to apply (including the *CERA*-specific rules for public participation and timelines), the rules with respect to reconsideration at section 184 and the privative clause at subsection 183(11) will continue to apply, presumably to a single report that is intended to fulfill the requirements of both the *IAA* and the *CERA*. Whether this regime is sufficiently different from the *CEAA, 2012*

44 *Ibid*, subs 51(1).
45 *CERA*, *supra* note 2, s 183(2)
46 *Ibid*, s 183(3).
47 *Ibid*, s 183(4).
48 *Ibid*, s 184.
49 *Ibid*, s 183(11).
50 *Ibid*, s 185.

regime to displace *Gitxaala*'s posture of extreme deference is unclear and will probably only be resolved by litigation, if and when the time comes.

B. The Planning Phase

In what appears to be one of the few substantive recommendations of the Expert Panel on Environmental Assessment adopted by the federal government,[51] impact assessment in Canada will soon have three phases as opposed to the conventional two: a new planning phase, an assessment phase, and a decision-making phase. According to the Expert Panel on Environmental Assessment Processes,

> [a] Planning Phase should lead to a more effective and efficient process. In the development of projects today, some proponents may already undertake a conceptual Planning Phase, prior to the initiation of the current assessment process. Bringing this conceptual Planning Phase into the formal IA process would aid both proponents and communities by helping facilitate relationship building and trust. It would also provide clarity to the proponent early in the process with regard to the main issues of concern. For communities and Indigenous Groups, the Planning Phase would allow them to identify important information that can be inputted into the IA.[52]

As captured in the *IAA*, this new planning phase appears to be primarily a bulked-up version of the initial "screening decision" made under the current regime with respect to designated projects other than pipelines.[53] Pursuant to sections 8 – 10 of *CEAA, 2012*, the proponent of a designated project has an obligation to submit a project description to the Agency, following which the Agency makes a determination as to whether an environmental assessment is required. Under the *IAA*, this determination will apply to all projects, will involve a greater degree of public participation[54] and will require an offer to consult with other relevant jurisdictions and Indigenous groups.[55] Following such consultation, the Agency will provide the proponent with a list of issues that it considers relevant. The list will be posted on the Registry and the proponent will be required to respond with a detailed description of its project, including any information set out in the relevant regulations.[56]

At this juncture (and as is currently the case under *CEAA, 2012*), the Agency will make a decision, following consideration of specified factors,[57] as to whether an impact assessment is required. If one is required, the entire planning phase is to take 180 days from the time that the proponent posted its initial project description.[58] This stands in contrast to the current screening decision under *CEAA, 2012*, which must be made 45 days after a project description is deemed complete. It is hard to glean much else from the legislation, but further details are currently being sorted out (*e.g.* the Agency is currently consulting on proposed *Information and Time Management Regulations*).[59]

In some respects, this new planning phase appears similar not only to *CEAA, 2012* but also to the process that applied to "comprehensive studies" under the original *CEAA* following amendments in 2003. This included public consultation on the scope of the project to be assessed, the scope of factors to be considered, and the "ability of the comprehensive study to address issues relating to the project."[60]

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51 *Building Common Ground*, *supra* note 1.
52 *Ibid.*
53 *CEAA, 2012, supra* note 3, ss 8 – 12. The screening provisions do not apply to projects regulated by the NEB, which automatically required assessment.
54 *IAA*, *supra* note 2, s 11.
55 *Ibid*, s 12.
56 *Ibid*, subs 14(2).
57 *Ibid*, subs 16(2). These are essentially the same factors as under the current *CEAA, 2012* regime, with the explicit addition of Indigenous rights.
58 *Ibid*, s 18.
59 See Government of Canada, Public Notice, "Public Comments Invited to support the Development of Regulations under the proposed Impact Assessment Legislation" (8 February 2018), online: <https://www.canada.ca/en/environmental-assessment-agency/news/media-room/public-comments-invited-development-regulations-impact-assessment-legislation.html>.
60 *CEAA, supra* note 4 s 21, as it existed between Jun 11, 2006 and Jul 11, 2010. This wording proved pivotal in the Supreme Court of Canada's decision in *MiningWatch Canada v. Canada (Fisheries and Oceans),* 2010 SCC 2, and the Court's conclusion that responsible authorities did not have the power to "scope" projects in such a manner so as to avoid having to carry out a comprehensive study rather than a screening-type assessment.

C. The Assessment Phase

As foreshadowed by its title, the proposed regime is no longer focused primarily on adverse environmental effects and their significance. Pursuant to section 2, "effects within federal jurisdiction" include not only environmental effects but also "any change to a health, social or economic matter that is within the legislative authority of Parliament that is set out in Schedule 3."[61] Schedule 3 has yet to be populated.

The mandatory list of factors to be considered in the course of an impact assessment has also been expanded.[62] Table 1 compares the list of factors to be considered pursuant to both *CEAA, 2012* and the I*AA*:

See table 1 on page 19.

Some of these factors, such as impacts on Indigenous rights (paragraph 22(1)(c)), are essentially a codification of current law,[63] while others do expand that which is currently considered when reviewing a project, including alternatives to the project (paragraph 22(1)(f)) (rather than merely alternative means, as under *CEAA, 2012*), traditional knowledge of Canada's Indigenous peoples (paragraph 22(1)(g)) (discretionary under *CEAA, 2012*), a project's contribution to sustainability (paragraph 22(1)(h)) and whether it hinders or contributes to Canada's attainment of its climate change commitments (paragraph 22(1)(i)). As noted above, climate change was explicitly excluded from the NEB's review of Enbridge's Line 9 project.

Determining the scope of these factors, however, will remain at the discretion of the Agency or the Minister.[64] And notwithstanding the additional factors to be considered, the *IAA* imposes a 600 day time limit on review panels.[65]

D. The Decision-Making Phase

Finally, with respect to the decision-making stage, the *IAA* more or less retains *CEAA, 2012*'s political decision-making structure. Review panels will submit their reports to the Minister of Environment and Climate Change (and, in the case of pipelines, the Minister of Natural Resources), who must then refer the matter of determining whether the project is "in the public interest" to Cabinet.[66] However, the *IAA* has abandoned both *CEAA*s' concept of "significance" as the dividing line here. Rather, Cabinet will have to consider the following factors:

> (a) the extent to which the designated project contributes to sustainability;
>
> (b) the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are adverse;
>
> (c) the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate;
>
> (d) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*; and
>
> (e) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.[67]

These factors are essentially a subset of the factors that need to be assessed pursuant to section 22 (see Table 1, on page 19), and their consideration will need to be demonstrated through reasons required as part of any subsequent decision-statement.[68] As is currently the case under *CEAA, 2012*, the conditions set out in such decision-statements will form part

61 *IAA, supra* note 2, s 2.
62 *Ibid*, subs 22(1).
63 See *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, and most recently *Clyde River (Hamlet) v. Petroleum GeoServices Inc.*, 2017 SCC 40.
64 *IAA*, *supra* note 2, subs 22(2).
65 *Ibid,* subs 37(1).
66 *Ibid,* s 61.
67 *Ibid,* s 63.
68 *Ibid*, subs 65(2).

Table 1: Factors to be Considered under *CEAA, 2012* and the *IAA*

CEAA, 2012	*IAA*
a. the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out; b. the significance of the effects referred to in paragraph (a); c. comments from the public — or, with respect to a designated project that requires that a certificate be issued in accordance with an order made under section 54 of the National Energy Board Act, any interested party — that are received in accordance with this Act; d. mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project; e. the requirements of the follow-up program in respect of the designated project; f. the purpose of the designated project; g. alternative means of carrying out the designated project that are technically and economically feasible and the environmental effects of any such alternative means; h. any change to the designated project that may be caused by the environment; i. the results of any relevant study conducted by a committee established under section 73 or 74; and j. any other matter relevant to the environmental assessment that the responsible authority, or — if the environmental assessment is referred to a review panel — the Minister, requires to be taken into account.	a. the effects of the designated project, including i. the effects of malfunctions or accidents that may occur in connection with the designated project, ii. (ii) any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out, and iii. (iii) the result of any interaction between those effects; b. mitigation measures that are technically and economically feasible and that would mitigate any adverse effects of the designated project; c. the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982; d. the purpose of and need for the designated project; e. alternative means of carrying out the designated project that are technically and economically feasible, including through the use of best available technologies, and the effects of those means; f. any alternatives to the designated project; g. traditional knowledge of the Indigenous peoples of Canada provided with respect to the designated project; h. the extent to which the designated project contributes to sustainability; i. the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change; j. any change to the designated project that may be caused by the environment; k. the requirements of the follow-up program in respect of the designated project; l. considerations related to Indigenous cultures raised with respect to the designated project; m. community knowledge provided with respect to the designated project; n. comments received from the public; o. comments from a jurisdiction that are received in the course of consultations conducted under section 21; p. any relevant assessment referred to in section 92, 93 or 95; q. any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project; r. any study or plan that is conducted or prepared by a jurisdiction, that is in respect of a region related to the designated project and that has been provided with respect to the project; s. the intersection of sex and gender with other identity factors; and t. any other matter relevant to the impact assessment that the Agency or — if the impact assessment is referred to a review panel — the Minister requires to be taken into account.

of the CER's certificate of public convenience and necessity.[69]

IV. COMMENTARY

The major differences between *CEAA, 2012* and the proposed *IAA*, insofar as the assessment of interjurisdictional pipelines is concerned, may be summarized as follows:

- Whereas under *CEAA, 2012*, the NEB had exclusive responsibility for such assessments, under the *IAA* that responsibility will be carried out jointly under the terms of a review panel;
- *CEAA, 2012* included a standing test to restrict the extent of public participation, whereas the *IAA* does not;
- According to the Federal Court of Appeal in *Gitxaala* (at least), the effect of sections 29 – 31 of *CEAA, 2012* was to immunize the NEB's environmental assessment reports from judicial scrutiny, whereas the return to review panels under the *IAA* could re-instate the long and well-established line of jurisprudence that such reports are directly reviewable;[7]
- A new planning phase intended to assist in the early identification of key issues and build relationships will be superimposed onto the current *CEAA, 2012* screening decision;
- The scope of assessment under the *IAA* will be broader, to include not just economic, health and social effects, but also a project's contributions to sustainability, and whether it will help or hinder Canada's commitments with respect to climate change;
- Government decision-making under the *IAA* will be more robust and transparent than the current "justified in the circumstances" test under *CEAA, 2012*.

It is, of course, too soon to tell what most of these changes will mean in practice. One exception may be the elimination of the standing test. Professor Shaun Fluker and University of Calgary LLM graduate Nitin Kumar Srivastava examined the application of the *CEAA, 2012* standing test across four projects (the New Prosperity Mine, Shell's Jackpine Mine Expansion, Site C, and Kinder Morgan's Trans-Mountain Expansion) and found "inconsistent rulings on public participation."[71] The New Prosperity Panel, for example, applied the relatively generous "public interest" standing test from the Supreme Court of Canada's decision in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society.*[72] Even the Kinder Morgan panel granted some degree of public participation opportunities to the vast majority of the over 2,000 individuals who sought it.[73] In other words, this may be a case of nothing gained, nothing lost -- or not much in any event.

Another change that may already be ripe for comment is the discarding of *CEAA, 2012*'s specialized regime for assessments by the NEB (sections 28-31, as discussed above), together with Stratas J.A.'s interpretation of it. As noted by Keith B. Bergner at the time, "[r]eframing the NEB/JRP report as a mere recommendation greatly diminishes the role of the regulator and importance of the regulatory hearing process. This seems regrettable. The regulatory processes for such major projects typically occupy a lengthy period of time and require enormous effort from a large number of participants."[74] In addition to seeming regrettable, it also seems wrong: review panels under both the original *CEAA* and *CEAA, 2012* have always played a recommendatory role (*i.e.* were not actual decision-makers), and yet their reports have always been reviewable.[75]

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69 *Ibid*, subs 67(2).

70 *Gitxaala*, *supra* note 26.

71 Shaun Fluker and Nitin Kumar Srivastava, "Public Participation in Federal Environmental Assessment under the Canadian Environmental Assessment Act 2012: Assessing the Impact of 'directly affected'" (2016) 29 J Env L & Prac 65.

72 *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45.

73 *Fluker and Srivastava*, *supra* note 71.

74 *Bergner, supra* note 27.

75 See *e.g. Ontario Power Generation Inc v Greenpeace Canada*, 2015 FCA 186, *Pembina Institute for Appropriate Development v Canada (Attorney General)*, 2008 FC 302, and especially *Alberta Wilderness Assn. v Canada (Fisheries and Oceans Canada)*, [1999] 1 FCR 483.

Finally, it may be what will remain the same that is as – or perhaps even more – important than what will change. Like all of its predecessors, the *IAA* refuses to draw an environmental, or any other, bottom line. Consistent with the original theory of environmental assessment, it merely requires government agencies to *consider* a project's effects in a transparent manner – on the increasingly shaky assumption that such consideration usually leads to better decision-making.[76] ■

76 See Dan Tarlock, "Is There a There There in Environmental Law" (2004) 19 J Land Use & Envtl L 213.

THE TORTUOUS PATH TO NEB 'MODERNIZATION'

*Ron Wallace**

OVERVIEW

The epic, and apparently accelerating, struggle between the twin forces of globalism and nationalism play out against a backdrop of rising environmentalism, increasingly threaten the global economic order. No less affected is Canada, as legislators attempt to reconcile national energy policies with international conventions for climate change. Competing views on policies for the economy and the environment underpin the current debates. Meanwhile, advocates of opposed economic and social ideologies have increasingly looked to the courts for resolution. Is there a common ground that can be found between these forces and, of interest here, what are the consequences for energy regulators and policy makers who now find themselves at the center of this social, economic and political storm?

The recent turbulence in Canadian energy policies affecting legislators, regulators and the public results from attempts to reconcile national economies with international treaties that conflict with national, and provincial, interests. Regrettably, simplistic concepts of a Canadian "energy transition" exhibit a limited understanding of energy economics - an enormously complex, global enterprise. There are significant political, financial and social barriers to achieving wholesale transformations in energy production and electricity generation and few solutions are amenable to legislative fiat devoid of material economic consequences. Heightened public expectations for change have increasingly focussed on energy regulators whose decisions are increasingly challenged while the public expresses a rising dismay over the material economic consequences of ill-considered energy policies. Regrettably, Canadian legislators have increasingly interjected themselves into the regulatory decision-making and, in so doing, have steadily eroded the independent decision-making powers of energy regulators and expert tribunals. Canada has demonstrated that these political interventions in the pursuit of ideological or political ideals have tended to create more, not fewer, conflicts associated with significant economic excesses. Such political and regulatory uncertainties have imperiled the Canadian energy industry and have discouraged vital capital investment.

Since 2000, reflecting the ideological views of a divided electorate, Canadian legislators have swung widely across the spectrum of economic and environmental interests. As a result, major energy projects have been cancelled, while material investment capital has sought more certain, or at least more predictable, markets outside Canada. No less a victim are energy regulators, such as the National Energy Board (NEB). After almost 60 years of service that brought Canada one of the globes' most efficient and safe pipeline systems, the NEB has found itself at the center of controversies that have exposed it to concerns over apprehension of bias and to parallel political initiatives of "modernization". In particular, the NEB's National Engagement Initiative led to reports of NEB Energy East Panel members having met privately in early 2015 with former Quebec Premier Jean Charest who was alleged to have been working as a consultant to Trans Canada. Prime Minister Trudeau was urged to scrap the

*Dr. Ron Wallace, an Emerald-Award winning scientist with extensive international service, lives in Calgary. He has served on energy and environmental regulators and advisory boards for federal, provincial and territorial agencies. He was appointed as a Permanent Member to the National Energy Board in 2013 and in 2014 briefly served as the Board's first elected Interim Chairman. Dr. Wallace retired as a permanent NEB member in 2016.

entire NEB Energy East review.[1]

The direct annual cost to Canada of insufficient pipeline capacity needed to reach potential international export markets has recently been estimated by Scotiabank as in excess of CAD $15 billion. Such amounts, when combined with an estimated $60 billion in lost investment due to cancelled energy infrastructure projects since 2015, are material.[2] Canada has the 11th largest GDP in the world (ranked behind India, Italy and Brazil)[3] and is nonetheless vulnerable to massive financial outflows that can affect the national economy. These ominous financial trends may yet prefigure a financial and economic 'transformation' in Canada with unintended consequences for political, regulatory and economic institutions.

By revisiting a "modernized" version of the Great Pipeline Debate of the 1950s, one that has entailed a heightened involvement of the judicial, regulatory and legal communities, Canada has embarked upon a national experiment of consequence, one that may significantly shape our economy and national identity for generations. Meanwhile, Canadian energy policies have been remarkably out of phase with our primary export customer - the U.S.A. Except for the time when the Trudeau government briefly overlapped with the Obama administration (until its overturn to the newly-elected Trump administration on January 20, 2017)[4] the previous Harper government frequently found itself at odds with Obama. Now, at a time of increasing internal discord over pipeline projects, the Trudeau government finds itself significantly at odds with the U.S. Trump administration on implementation of the *Paris Climate Agreement*[5] and also on other major energy and taxation policies.

INTRODUCTION

Since its election in 2015, the Trudeau government has introduced a remarkable series of legislative initiatives for environmental assessment and regulation many of which significantly affect the Canadian energy sector. This paper deals with some recent examples of interest to the Canadian energy regulatory community with an emphasis on those initiatives affecting administrative law and the practice of Canadian energy regulation. What began as a series of intense controversies that centered on the National Energy Board (NEB) has spiraled into legislative and political challenges for a new federal government that potentially places at risk economic and environmental policies. The outcomes may yet threaten federal and provincial governments.

The Canadian energy regulatory community has witnessed the evolution of an intense, political debate that has enveloped long-established regulators, such as the NEB. These debates have evolved into material legislative proposals being read to Parliament at the time of writing.[6] In regard to the NEB, Canada is now in advanced preparations to consider options for legislative amendments to *CEAA 2012*[7] and the *NEB Act*[8] through *Bills C-68*[9] and *C-69*. The highly qualitative language used by the current government to describe the objectives for the new legislation, to "rebuild public trust and advance Indigenous reconciliation" while advancing "good projects" to ensure energy resources "get to markets responsibly" in many

1 Although the NEB denied prior knowledge of Charest's alleged connections to TransCanada, the public and media storm that erupted led to successful calls for the resignations of all three Energy East panel members due to allegations of apprehension of bias.
2 Scotiabank, "Pipeline Approval Delays: the Cost of Inaction", Commodity Note (2018) Global Economics, online: <http://www.gbm.scotiabank.com/scpt/gbm/scotiaeconomics63/pipeline_approval_delays_2018-02-20.pdf>.
3 Trading Economics, "Canada GDP", online: <https://tradingeconomics.com/canada/gdp>: "1960-2018 Data: The Gross Domestic Product (GDP) in Canada was worth 1529.76 billion U.S. dollars in 2016. The GDP value of Canada represents 2.47 percent of the world economy. GDP in Canada averaged 616.46 USD Billion from 1960 until 2016, reaching an all-time high of 1842.63 USD Billion in 2013 and a record low of 40.77 USD Billion in 1961."
4 Martin Fletcher, "The Final Year: The breathless story of Obama's last days as president", *RadioTimes* (19 January 2018), online: <http://www.radiotimes.com/news/film/2018-01-19/the-final-year-the-breathless-story-of-obamas-last-days-as-president/>; David Edelstein, "Documentary Offers A Devastating Look At The Obama Administration's 'Final Year'", *Nashville Public Radio* (22 January 2018), online: <http://nashvillepublicradio.org/post/documentary-offers-devastating-look-obama-administrations-final-year#stream/0>.
5 *Paris Agreement*, Off Doc UNFCCC, 21st sess, Annex, UN Doc FCCC/CP/2015/Add.1 (2016) 23 [Paris Agreement].
6 Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018.
7 *Canadian Environmental Assessment Act 2012*, SC 2012, c 19, s 52.
8 *National Energy Board Act*, RSC 1985, c N-7 [NEB Act].
9 Bill C-68, *An Act to amend the Fisheries Act and other Acts in consequence*, 1st Sess, 42nd Parl, 2018.

respects appear to be somewhat inconsistent with the actual legislation.[10] Critically, the new legislation, and the uncertainties entailed in it, arrives at a time when capital flight out of Canada from cancelled energy projects such as Energy East, Northern Gateway and the Pacific NorthWest LNG Projects exceeds an estimated CAD $60 billion. It also comes at a time of rising provincial and international competitive pressures affecting Canada's energy infrastructure.

Recent papers and opinion pieces have described Canada as being at an "energy crossroads" with the Canadian energy industry being enveloped by a "perfect storm",[11] one that has resulted from sophisticated attacks from national and international activist groups, changeable regulatory agendas and political interventions in Canada and the U.S.A. that have tended to aggravate regulatory uncertainties and, not least, accompanied by a significant drop in international energy commodity prices.[12] These events have also swept over energy regulators across Canada, the most significant being the NEB.[13]

In experiencing this 'storm', Canada is far from unique. In a parallel dance, U.S. lawmakers have swung wildly in their attempts to address global emissions strategies. Notwithstanding these abrupt changes in policy, Canada has shown a determination to proceed with an aggressive 'leadership role' associated with the Paris Climate Agreement, one in which the Federal government appears highly disposed to achieve high ideals for "decarbonisation" through the enactment of certain political and regulatory initiatives. These legislative actions, combined with continuing uncertainties on Canada's position on aboriginal consultation under FPIC[14] and UNDRIP[15], have perplexed Canadian energy investment communities. In sum, these events appear to constitute very material challenges for the energy sector and its regulators, further exacerbated by the emergence of an increasingly fractious political and regulatory environment between federal, provincial and municipal governments.

The Canadian energy sector has witnessed substantial reductions of Canadian investments by industry heavyweights Apache Corp., ConocoPhillips, Chevron, Petronas, Marathon Oil and Shell Canada. The rejection of the Gateway Pipeline by the federal cabinet followed by the recent collapse of TransCanada's Energy East Project has been paralleled by ongoing delays to TransCanada's Keystone XL pipeline proposal. Although the latter project received a Presidential Permit in March 2017, it remains mired in regulatory wrangling in the U.S. Canadian political attentions have now turned to Kinder Morgan's $7.4 billion Trans Mountain pipeline expansion for which current political leaders in British Columbia have vowed to use "every tool available to stop" the project, starkly in the face of project approvals by the NEB and the Federal Cabinet.[16] Many actions remain pending with the Federal Court of Appeal. This maelstrom extends well beyond legal, political and regulatory issues into material questions of constitutional rights, national economic development and the rule of law.

A BRIEF HISTORY OF CANADIAN ENERGY AND ENVIRONMENTAL REGULATION

Harrison (2013)[17] and Hummel (2016)[18] detail what could be considered to be the two most

10 Jim Carr, Address (delivered at the Canada's Minister of Natural Resources GLOBE Forum 2018, 15 March 2018), online: <https://www.canada.ca/en/natural-resources-canada/news/2018/03/the-honourable-jim-carr-canadas-minister-of-natural-resources-globe-forum-2018-vancouver-british-columbia.html>.

11 Ron Wallace & Bonnie Gray Wallace, "Expert Perspectives on the NEB Modernization", *Daily Oil Bulletin* (21 September 2018), online: <http://www.dailyoilbulletin.com/article/2017/9/21/expert-perspectives-neb-modernization/>.

12 Ron Wallace, "Is the Canadian energy industry approaching a tipping point?", *JW Energy* (2 October 2017), online: <http://www.jwnenergy.com/article/2017/10/canadian-energy-industry-approaching-tipping-point/>.

13 Ron Wallace, "Babies, Bathwaters and Regulators: The 'Precautionary Principle' should also apply to how government deals with regulators" *Daily Oil Bulletin* (2017) 77.

14 Food and Agriculture Organization of the United Nations, *Free Prior and Informed Consent – An Indigenous Peoples' right and a good practice for local communities* (Guide) (Italy: FAO, 2016), online: <http://www.fao.org/3/a-i6190e.pdf>.

15 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNAGOR, 2007, UN Doc A/61/L.67 and Add.1.

16 Laura Stone, "Jason Kenney vows repercussions against B.C. over Trans Mountain pipeline", *The Globe and Mail* (4 August 2017), online: <https://www.theglobeandmail.com/news/alberta/jason-kenney-vows-repercussions-against-bc-over-trans-mountain-pipeline/article35887445/>.

17 Rowland J. Harrison, "Social Licence to Operate: The Good, The bad, The Ominous" (Public Lecture delivered at the Faculty of Law, University of Alberta, 15 March 2015) [unpublished].

18 Monte Hummel, "Environmental and Conservation Movements" (21 February 2010), *The Canadian Encyclopedia*, online: <http://www.thecanadianencyclopedia.ca/en/article/environmental-and-conservation-movements/>.

significant factors that have driven Canadian environmental movements: The rise of the concept of "social licence" and the parallel rise of environmental activism associated with "climate change", respectively.

Harrison described the concept of "social license to operate" in which he raised the concern over using "social licence" as a justification for certain individuals and groups as a justification for rejecting the outcomes of formal regulatory processes that, in effect, worked ominously to diminish the rule of law to failures by governments to insist on the use of proper regulatory arenas for determinations of the public interest. His insightful critique effectively anticipated and prefigured the Federal election campaign of 2015 in which candidate Trudeau, at a time when the National Energy Board (NEB) was being subjected to unremitting pressures from local and international activists, joined a chorus that asserted that the NEB was "broken" and in need of "modernization".[19] Notwithstanding these assertions, many polls indicated that the majority of Canadians considered that the NEB made decisions that properly reflected the national interest.

Hummel (2016) described a movement of environmental activists and conservationists that emerged in the 2000's as a "Fourth Wave" during which climate change emerged as a global and growing national concern. In the late 1980s, not just environmentalists but many Canadians assumed that Canada was positioning itself to lead the international community on actions to combat climate change. Canada made commitments to adopt the *Kyoto Protocol*[20] in 1997, which it joined in 2002 under the leadership of Jean Chrétien's Liberals.

The 2006 federal election resulted in the minority Conservative government of Steven Harper, Canada's 22nd Prime Minister, who led Canada's smallest but longest-serving minority government since Confederation. In the subsequent 2008 federal election, the Conservative Party won a stronger minority. However, it (the 40th Canadian Parliament) was dissolved on March 2011 after a non-confidence vote held Cabinet in contempt of parliament. In the subsequent federal election, the Conservatives won a majority government, the first majority since 2000.

Throughout this electoral process there were a series of measures introduced to change Canadian scientific institutions, including the 2008 elimination of the Office of the National Science Adviser and rules to restrict government scientists from "unauthorized access" to the media. Many scientists and environmentalists considered that these actions were contrary to the institutional basis for federal research by preventing scientists, particularly those in the environmental sciences, from advancing and discussing their research. This view was further heightened when the government directed federal audits at certain environmental charities and when certain Cabinet officials characterized some environmental organizations as being "radicals".[21]

The declaration by Canada, Japan and Russia in 2010 not to accept new Kyoto commitments was followed in December by negotiations held in Durban, South Africa (that included delegates from nearly 200 countries) to establish a new binding international treaty to limit carbon emissions with targets to take effect in 2020. However, immediately following the conference, Canada announced its intention to withdraw from the Kyoto Protocol. The government argued that it was impractical since it did not include the United States and China, the world's largest emitters collectively responsible for over 40 per cent of global emissions. Canada further argued that it could not meet the targets set for it and thus became the only country to repudiate the Kyoto Accord - a decision that immediately drew widespread national and international criticisms.[22]

The 2012 *Jobs, Growth and Long-Term Prosperity*

19 Harrison, *Supra* note 17.
20 *Kyoto Protocol To The United Nations Framework Convention On Climate Change*, 11 December 1997, 2303 RTNU 162 (entered into force 16 February 2005).
21 Former NRCan Minister Joe Oliver authored a spirited review and defence of his statements by advocating that the prime minister should tell "foreign agitators to butt out of Canada." Joe Oliver, "Yet more proof radicals (yes, radicals) are sabotaging Canada's economy", (13 March 2018) *Financial Post*, online: <http://business.financialpost.com/opinion/joe-oliver-yet-more-proof-foreign-radicals-yes-radicals-are-sabotaging-canadas-economy>.
22 "Canada to withdraw from Kyoto Protocol", BBC News (13 December 2011), online: <http://www.bbc.com/news/world-us-canada-16151310>.

Act[23], became a significant flashpoint for the national environmental community. Passed as omnibus legislation, it became controversial not as a result of the way the legislation was "bundled" but because many considered it to be a material weakening of environmental policies and regulations. *Bill C-38*[24] was crafted to replace the *Canadian Environmental Assessment Act*[25] (CEAA 1992, 1999) with the *Canadian Environmental Assessment Act*[26] (2012) and made major changes to the *Canadian Environmental Protection Act*[27], the *National Energy Board Act*[28], the *Canada Oil and Gas Operations Act*[29], the *Nuclear Safety and Control Act*[30], the *Species at Risk Act*[31] and the *Fisheries Act*[32] while emphasizing "jobs, growth and prosperity". It significantly refocussed existing federal environmental regulatory and assessment regimes across Canada.

Harrison (2013)[33] extensively reviewed the 2012 amendments to the *National Energy Board Act* (NEB Act) highlighting concerns such as the removal of the Board's previous authority as a decision-maker with respect to the issuance of certificates of public convenience and necessity for pipelines and concurrent changes to impose time limits on the Board's processing of applications for certificates. The legislation transferred authority to make a final decision to issue or deny a certificate to the Governor in Council (ie. the federal cabinet) with the NEB's role thereafter relegated to making a recommendation.[34] Harrison (2012) noted that these intrusive limits imposed on the NEB appeared to be "wholly disproportionate to any problem of timeliness in the NEB's processes for reviewing pioneering pipeline certificate applications. It would appear that the remedy for a timeliness problem that was perceived to have arisen in another *ad hoc* regulatory process outside the NEB's process has nevertheless been imposed upon the NEB."[35]

In addition to the changes affecting the *NEB Act*, funding reviews of Federal departments, including Fisheries and Oceans Canada (DFO), resulted in the proposed closing of the Experimental Lakes Area (ELA) in Ontario, an internationally-recognized aquatic research facility. The item received significant attentions from activists and the public, who viewed the decision as part of a continuing campaign by the Harper government to "muzzle" federal scientists in a shift away from "science-based decision-making". Canadian scientists and activists protested the decision and continued their protests into the time of the ensuing election.

What followed was a remarkable mobilization of national and international environmental activists who directed public criticisms at these policy and legislative changes and, more specifically, at the government of Canada and its leadership. The stage was set for a major confrontation between the Harper government and the national and international activist communities, one which opposition parties and their advisors immediately recognized. As a result, energy producers, pipeline companies and the NEB, already besieged by opponents in hearings literally from coast to coast, unexpectedly found themselves at the center of the electoral and political stage.

THE 2015 CANADIAN FEDERAL ELECTION: CONSEQUENCES FOR ENERGY REGULATION

Unquestionably, legislative initiatives of the Harper government set off volatile reactions

23 *Jobs, Growth and Long-Term Prosperity Act*, SC 2012, c 19.
24 Canada, Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012* and other measures, 1st Sess, 41st Parl, 2013.
25 *Canadian Environmental Assessment Act*, SC 1992 c 37.
26 *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19.
27 *Canadian Environmental Protection Act*, SC 1999, c 33.
28 NEB Act, *Supra* note 8.
29 *Canada Oil and Gas Operations Act*, RSC 1985, c O-7.
30 *Nuclear Safety and Control Act*, SC 1997, c 9.
31 *Species at Risk Act*, SC 2002, c 29.
32 *Fisheries Act*, RSC 1985, c F-14.
33 Rowland J. Harrison, "The Assault of Regulatory "Efficiency" on Procedural Fairness and Procedural Effectiveness: Mandated time limits under recent amendments to the National Energy Board Act" (Public lecture delivered at the Faculty of Law, University of Alberta, 7 March 2013). The lecture was a presentation version of a more comprehensive paper under the same title.
34 NEB Act, *Supra* note 8. Under section 52 of the Act, recommendations from the NEB are made to the Minister, but it is the GIC that has the authority under section 54 to direct the Board to issue a certificate or to dismiss an application.
35 Harrison, *Supra* note 33.

in the Canadian media and spurred activists and communities to participate in an election that focussed to a remarkable degree on energy regulation, in particular to the actions and decisions of the NEB. Some advocated positions to "restore lost protections" such as were alleged to have occurred for diminished provisions to the *Fisheries Act and Navigable Waters Act*, while others argued for a complete revamp of the Canadian environmental assessment and regulatory system. Such heightened political interests in energy generation and regulation focussed attentions on legislative changes.

In 2008, the province of British Columbia had become the first jurisdiction in North America to institute a carbon tax, and in 2014 the province of Ontario shuttered its last coal-fired power station. However, these provincial policy initiatives were dwarfed by the consequential issues raised in the 2015 Canadian Federal election. The political uproar generated by the 2012 *Jobs, Growth and Long-Term Prosperity Act* led to an unprecedented wave of initiatives to organize, fund and interject environmental activism into the Canadian political landscape.

Vivian Kraus[36] has documented extensively the degree and nature of the international funding that has been directed toward Canada's energy sector. In describing the anti-pipeline movement as a "directed, network campaign", she noted that the Tides Foundation of San Francisco "is the funding and co-ordination juggernaut behind anti-pipeline activism. Totaling $USD 35 million, Tides made more than 400 payments (2009 – 2015) to nearly 100 anti-pipeline groups. Without all that money, pipeline projects would not be facing well-organized opposition."[37] Journalist Claudia Cattaneo has also documented actions of certain "Green Coalitions" to disrupt pipeline projects, such as a "KM Action Hive Proposal" to support mass popular resistance to construction of the Kinder Morgan pipeline.[38] Cattaneo also documented investigations by U.S. lawmakers that linked activities from a "troll factory" in St. Petersburg, Russia using Facebook and other social media platforms to possible "manipulation of U.S. energy markets – including activism against pipelines such as TransCanada Corp's Keystone XL pipeline-is a wake-up call to Canadian governments that foreign interests have a big hand in campaigns to block Canadian oil and gas exports."[39] Cattaneo further cautioned that:

> By designing energy and environmental policy to appease that inflated activism — for example, regulatory reforms that are expected to further discourage energy investment in Canada - Canadian governments are accommodating competitors prepared to do whatever it takes to protect and grow their global oil and gas market share, not Canada's best interest.[40]

The revelations as to the degree and magnitude of foreign-funded anti-pipeline campaigns in Canada may perhaps have included Russian involvement. Others have concluded that U.S. foundations and groups are "sabotaging" the Canadian energy economy in ways that may constitute "blatant U.S.-based interference in Canadian energy policy."[41]

These events in Canada may reflect an international groundswell that considers climate change and large-scale conflicts to be real global concerns, issues that are reflected in the World Economic Forum Annual Survey (2017).[42]

Climate change and concerns for the global

36 Viviane Kraus, "The Cash Pipeline Opposing Canadian Oil Pipelines", *Financial Post* (3 October 2016), online: <http://business.financialpost.com/opinion/vivian-krause-the-cash-pipeline-opposing-canadian-oil-pipelines>.

37 *Ibid*.

38 Claudia Cattaneo, "Leaked HIVE document shows how far Trans Mountain opponents will go to orchestrate outrage", *Financial Post* (2 March 2018), online : <http://business.financialpost.com/commodities/energy/mixing-with-activists-proves-to-be-a-cautionary-tale-for-government>.

39 Claudia Cattaneo, "Russian Meddling in Pipelines Uses Old Soviet 'Useful Idiots' Ploy", *Financial Post* (3 March 2018), online: <http://business.financialpost.com/commodities/energy/russian-meddling-another-worry-for-canadian-energy-exports>.

40 *Ibid*.

41 Suzanne Anton, "Canadians are realizing foreign groups sabotaged our energy economy – for no good reason", *Financial Post* (21 March 2018), online: <http://business.financialpost.com/opinion/canadians-are-realizing-foreign-groups-sabotaged-our-energy-economy-for-no-good-reason>.

42 Global Shapers Community, "Global Shapers Annual Survey 2017" (2017) World Economic Forum, online: <www.shaperssurvey2017.org>.

environment formed a major part of the 2015 Federal election debate as pipeline issues, particularly past decisions by the NEB, were viewed by various political candidates and commentators through the lens of the global environment. Indeed, one could say that the traditional environmental mantra of "act locally – think globally" had been reversed. Following the Great Pipeline Debate of the 1950's, and the fall of a Liberal government, elected leaders wisely distanced themselves from controversial pipeline issues through the creation of a quasi-judicial Board (the NEB) designed to independently arbitrate decisions and regulate pipelines in the national interest. In an ironic reversal in 2015, federal politicians of all stripes entered directly into pipeline debates during the election and aggressively questioned not just the fairness and decisions of the NEB but its very mandate and structure. This focus appeared to take many, including the industry and its associations, by storm as the debate swirled around what was portrayed as the Harper government's overly-aggressive approach to resource development. The election debate featured Canadian political parties with starkly different visions of the country's oil and gas sector.[43] The Liberals promised to launch an immediate review of Canada's regulatory process for oil and gas projects, while the NDP proposed to work with provinces to put a price on carbon. The Green Party's promised a Carbon Fee and Dividend Plan to provide Canadians over age 18 an annual "carbon dividend". The incumbent Conservatives opposed all these plans.

After having actively championed economic developments, including pipeline infrastructure projects, during the October 2015 federal election debate, the Conservatives argued that their government under *Bill C-46*: The *Pipeline Safety Act*[44] had introduced strengthened safety and security measures for regulated pipelines by increasing annual inspections and comprehensive audits. The government had also introduced new financial penalties for pipeline companies aimed at preventing major incidents.

In an election platform that accused the Harper government of significantly diluting environmental regulatory processes under the omnibus 2012 "*Jobs, Growth and Long-Term Prosperity Act*", the Liberals argued that "Canadians must be able to trust that government will engage in appropriate regulatory oversight, including credible environmental assessments, and that it will respect the rights of those most affected, such as Indigenous communities." They promised to:

> […] launch an immediate, public review of Canada's current assessment process. Based on this review, a Liberal government will replace Mr. Harper's changes to the environmental assessment process with a new, comprehensive, timely and fair process that: restores robust oversight and thorough environmental assessments – which have been gutted by this Conservative government – of areas under federal jurisdiction; ensures decisions are based on science, facts, and evidence, and serve the public's interest; provide ways for interested Canadians to express their views and for experts to meaningfully participate in assessment processes. We will also, in full partnership and consultation with First Nations, Inuit, and Métis Peoples, undertake a full review of regulatory law, policies, and operational practices. This will ensure that the Crown is fully executing its consultation, accommodation, and consent obligations on project reviews and assessments, in accordance with its constitutional and international human rights obligations. These include Aboriginal and Treaty rights and the United Nations Declaration on the Rights of Indigenous Peoples.[45]

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43 Yadullah Hussain, "Pipelines & politics: Where the parties stand on oil and gas issues", *Financial Post* (14 October 2015), online: <http://business.financialpost.com/commodities/energy/pipelines-politics-where-the-parties-stand-on-oil-gas-issues>.

44 Bill C-46, *An Act to amend the National Energy Board Act and the Canada Oil and Gas Operations Act*, 2nd Sess, 41st Parl, 2015.

45 Liberal Party of Canada, "Election Platform" (2015), online: <https://www.liberal.ca/wp-content/uploads/2015/10/New-plan-for-a-strong-middle-class.pdf>.

POLITICAL AND LEGISLATIVE ACTIONS FOLLOWING THE 2015 FEDERAL ELECTION

On October 9, 2015 the Conservative Party under Steven Harper was defeated at the polls by the Liberal Party of Canada led by Justin Trudeau sworn-in on November 4, 2015.

The Trudeau government immediately made its views on gender equality, rights for indigenous communities and climate change of paramount parliamentary importance. The latter issue became a major policy focus and, in April 2016, in the presence of a somewhat disproportionate but enthusiastic, delegation that accompanied the Prime Minister, Canada endorsed the Paris Agreement that was ratified later in New York.[46] The Agreement with almost 200 other countries set out terms of cooperation to restrict emissions of greenhouse gasses (GHGs).

In what was also viewed by many in the environmental community as an important semantic shift, Trudeau also changed the name of Environment Canada to Environment and Climate Change Canada and appointed several individuals formerly from prominent NGOs to senior positions in the new government, individuals that undoubtedly had made a major impression on the young Prime Minister to prefigure the election platforms and the subsequent policy initiatives of the Trudeau government.

These appointments represented a significant breakthrough into the highest levels of decision in the Trudeau government for former prominent environmental advocates who undoubtedly reflected, or shaped, views on gender equality and climate change.

In an exceptional decision that effectively "second-guessed" the quasi-judicial process of the NEB, that had previously conditionally approved the Kinder Morgan Trans Mountain pipeline, Resources Minister Jim Carr appointed a three-person "ministerial panel" to review the project. The panel reported in November 2016 immediately prior to the governments' approval of the project.[47]

The Ministerial Panel noted in its report:

> [...] Canadians have been locked in debate about the processes, policies and staffing of the current NEB. And many, particularly in British Columbia, have asserted that, in its research and deliberations, the NEB left gaps — in knowledge and public confidence — that were so significant that the Board's recommendation could not, of itself, support a government approval of the Trans Mountain Pipeline project. In light of those two factors — the changing circumstances and public concern about the nature and comprehensiveness of the NEB process — the Government of Canada announced that it would direct three new initiatives before making a decision on the pipeline proposal. First, it commissioned an Environment Canada analysis of upstream greenhouse gas emissions associated with the project, to better understand its climate impacts. Second, the Government of Canada recommitted to ongoing consultation with First Nations whose interests would be affected by the pipeline's construction and operation. And third, on May 17, 2016, the Honourable Jim Carr, Canada's Minister of Natural Resources, announced the appointment of a three-member panel to complement the NEB review and identify gaps and/ or issues of concern of which the Government should be aware

46 Paris Agreement, *Supra* note 5. *(4 November 2016, in accordance with article 21(1) the Agreement enters into force on the thirtieth day after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 per cent of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession. The Paris Agreement was adopted on 12 December 2015 at the twenty-first session of the Conference of the Parties to the United Nations Framework Convention on Climate Change held in Paris from 30 November to 13 December 2015. In accordance with its article 20, the Agreement shall be open for signature at the United Nations Headquarters in New York from 22 April 2016 until 21 April 2017 by States and regional economic integration organizations that are Parties to the United Nations Framework Convention on Climate Change).*

47 National Resources Canada, *Report from the Ministerial Panel for the Trans Mountain Expansion Project*, by the Ministerial Panel for the Trans Mountain Expansion Project (Ottawa: NRCan, 1 November 2016).

> before deciding the fate of the pipeline proposal."[48]

On November 29, 2016 the Trudeau cabinet approved two pipeline projects, the previously NEB-approved Kinder Morgan Trans Mountain Pipeline and the Enbridge Line 3 project, but rejected Enbridge's Northern Gateway project notwithstanding an NEB approval.

Confronted with such major pipeline decisions, Trudeau and his Cabinet had been conspicuously courting its voter base with plans to impose a national price on carbon, restrictions on methane emissions, paralleled by a phase-out of coal powered plants by 2030 and an overhaul ("modernization") of the National Energy Board. Following the earlier announcement of a $1.5-billion ocean protection plan to improve responses to tanker and fuel spills in the Pacific, Arctic and Atlantic oceans, Trudeau announced a ban on crude oil tankers along the North Coast of British Columbia, promising a future moratorium on oil tanker traffic. These decisions and actions cascaded into a series of political actions and events some of which threatened to escalate into federal-provincial, if not constitutional, conflicts.

PARALLEL EVENTS IN THE UNITED STATES

In the past decade international upheavals in oil prices combined with changing regulatory policies for energy in the U.S. have presented material economic challenges for Canada. In 2015 the Obama administration denied the application by TransCanada for the Keystone XL Pipeline Project proposed to transport Canadian crude oil to the U.S. Gulf Coast, a history thoroughly reviewed by McConaghy (2017).[49] Additionally, the Obama Administration also initiated significant national and international actions to regulate carbon. The U.S. Clean Power Plan (CPP) was an ambitious policy of the Obama administration to combat anthropogenic climate change (global warming). First proposed by the Environmental Protection Agency (EPA) in June 2014 the CPP advanced a major EPA rule aiming to cut carbon dioxide emissions from existing U.S. power plants 32 per cent below 2005 levels by 2030. The final version of the plan was unveiled by President Obama on August 3, 2015 through a rule (RIN 2060–AR33) entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units"[50] published in the Federal Register on October 23, 2015 that, as an Executive Order, effectively bypassed Congressional oversight and approval.

In February 2016 the U.S. Supreme Court, in a landmark ruling, granted a stay to halt implementation of the EPA's Clean Power Plan pending the resolution of legal challenges to the program in court.[51] This decision represented a major blow to President Obama's centerpiece strategy to combat climate change and placed a hold on federal regulations to curb carbon dioxide emissions mainly from coal-fired power plants. The court voted 5-4 to grant the request by 27 states, companies and business groups to block the CPP.[52] The decision suggested that a majority of the court, and also some U.S. legal scholars, were concerned about the basic premise of the EPA's authority to impose the CPP under the Clean Air Act.

During the 2016 U.S. election campaign, candidate Trump had gone so far as to propose the elimination of the EPA and, following his election, he proposed a 31 per cent cut to the 2018 EPA budget. Trump made aggressive appointments to key agencies in ways that reflected his commitment to deregulation, particularly for the fossil fuel industry.

Subsequently, President Trump issued an Executive Order that instructed executive departments and agencies to: "immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law."[53] Significantly, the Executive

48 *Ibid.*
49 Dennis McConaghy, *Dysfunction: Canada after Keystone XL* (Toronto: Dundurn, 2017).
50 *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed Reg 64661 (2015) (to be codified at 40 CFR).
51 *Chamber of Commerce, et al. v EPA* (9 February 2016), US 15A787 (order 577 in pending case).
52 *Ibid.*
53 *Promoting Energy Independence and Economic Growth*, 82 Fed Reg 16093 (2017) (to be codified at 82 FR § 1(c)).

Order directed the USEPA Administrator to "immediately take all steps necessary" to review the Rule for consistency with these and other policies set forth in the Order and further instructed the agency to "if appropriate [and] as soon as practicable . . . publish for notice and comment proposed rules suspending, revising, or rescinding" the Rule.[54]

By October 10, 2017 the USEPA Administrator had signed a Federal Register notice proposing to repeal the Clean Power Plan on the grounds that it exceeded EPA's statutory authority.[55] The matter has continued a convoluted progress through the U.S. court system. On March 1, 2018 the U.S. Court of Appeals ordered that the consolidated cases should remain in abeyance for 60 days while directing the USEPA to continue to file status reports at 30-day intervals.[56]

Arguably, the CPP was the Obama administration's signature environmental initiative one that advanced the EPA's most ambitious effort to control greenhouse gas emissions under the Clean Air Act[57]. While some other states, environmental groups and some energy companies opposed the stay, five separate applications were filed by more than two dozen states and numerous industry groups. As the signature piece of Obama's "climate legacy" the CPP was designed as a shift toward renewable energy from coal-fired electricity and represented a potential diplomatic approach to broker the 2014 agreement between President Obama and China's president, Xi Jinping.[58] That agreement effectively signaled the will of the leaders of the world's two largest polluting countries jointly to enact policies for reductions of emissions. That U.S.-China agreement also paved the way for the signing of the landmark 2015 Paris Climate Change Accord.

Notwithstanding the prior initiatives of the Obama administration, the remarkable events that followed the U.S. election of November 2016 have witnessed a wholesale reversal of those policies. Within days of taking office President Trump signed executive orders to overturn previous decisions by the Obama administration to approve two controversial oil pipelines, one of which was the long-delayed and subsequently rejected, Keystone XL pipeline. The executive orders also required a federal review of the Clean Water Rule and the Clean Power Plan along with initiatives aimed at significantly expanding offshore oil and gas leasing.[59] This "America First Energy Plan"[60] focused not on decreasing, but increasing, the combustion of fossil fuels and contained little, or no, mention of renewable energy. In sum, the Trump administration repealed many Obama policies, including the Climate Action Plan and Clean Power Plan, while further limiting the EPA's mandate for the protection of air and water quality. These actions represented a wholesale shift away from the policy priorities of the Obama administration to decrease fossil fuel use.

On June 1, 2017, in a move diametrically opposed to the enthusiastic endorsements of Obama's agenda made by the new Canadian Trudeau government in 2016, Trump announced plans to have the United States withdraw from the Paris Climate Agreement. In a telecast speech delivered in the White House Rose Garden Trump stated:

> As President, I can put no other consideration before the wellbeing of American citizens. The Paris Climate Accord is simply the latest example of Washington entering into an agreement that disadvantages the United States to the exclusive benefit of other countries, leaving American workers — who I love — and taxpayers to

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54 *Ibid*, section 1(g).

55 Jonathan H. Adler, "Supreme Court puts the brakes on the EPA's Clean Power Plan", *The Washington Post* (9 February 2016), online: <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/?utm_term=.50b5826f057f>.

56 Environmental Defense Fund, "Clean Power Plan case resources", online: <https://www.edf.org/climate/clean-power-plan-case-resources>.

57 US, Bill HR 6518, *An Act to improve, strengthen, and accelerate programs for the prevention and abatement of air pollution*, 88th Cong, 1963 [*Clean Air Act*].

58 Office of the Press Secretary, Press Release, "U.S.-China Joint Announcement on Climate Change" (11 November 2014), online: <https://obamawhitehouse.archives.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change>.

59 US, Executive Office of the President, *Implementing an America-First Offhsore Energy Strategy* (S Exec Doc No 13795) (Washington DC: US Government Printing Office, 2017).

60 US, "Energy & Environment", online: <https://www.whitehouse.gov/issues/energy-environment/>.

> absorb the cost in terms of lost jobs, lower wages, shuttered factories, and vastly diminished economic production. Thus, as of today, the United States will cease all implementation of the non-binding Paris Accord and the draconian financial and economic burdens the agreement imposes on our country. This includes ending the implementation of the nationally determined contribution and, very importantly, the Green Climate Fund which is costing the United States a vast fortune. Compliance with the terms of the Paris Accord and the onerous energy restrictions it has placed on the United States could cost America as much as 2.7 million lost jobs by 2025 according to the National Economic Research Associates.[61]

CANADIAN AND AMERICAN POLICIES REMAIN "OUT OF PHASE"

(Harper-Obama, Obama-Trudeau, Trudeau-Trump)

The Harper and Obama administrations were consistently "out of phase" during their respective terms of office – a view that is highlighted by Prime Minister Harper's comments that approval of the XL Pipeline was a "no brainer", an opinion that was subsequently marked by President Obama's rejection of the project.[62]

Remarkably, in the closing days of the Obama administration, there was an acceleration of Executive Orders in a last-minute attempt to secure the "Obama legacy". Samantha Power, an Obama top aide and U.S. ambassador to the United Nations during Obama's second term remarked: "We should have a clock up, with the days counting down, because what we've set in motion…all of that is at stake."[63] The comment reflected concerns that, in face of the imminent arrival of the Trump Presidency, before leaving the White House lame-duck President Obama and his top advisors had to initiate actions around the world aimed at securing Obama's foreign policy objectives. These actions included negotiating an arms deal in Iran, completing the Paris Climate Accord and managing a response to the refugee crisis in Syria.

Extending from the date of the U.S. election until the early morning of January 20, 2017, the action plan of the dying administration included numerous, and widespread actions ranging from the addition of the Rusty Patched Bumble Bee to the U.S. list of endangered species through to an award of the Presidential Medal of Freedom to Vice President Biden. In face of election promises by President-elect Trump and Vice President-elect Mike Pence to reverse some of Obama's key policies immediately upon assuming office, many U.S. departments also accelerated hiring in anticipation of planned freezes of federal employees. Princeton University history and public affairs professor Julian Zelizer remarked that: "It is clear that a President who was once reluctant to use the power of his own office has changed his heart, especially now that he sees a radically conservative Congress and Republican president-elect are getting ready to dismantle much of what he has done."[64]

Congressional Republicans and members of the Trump transition team questioned the White House for pressing ahead given the imminent change of control in the executive and legislative branch prompting Republican senators to write to Obama asking that his administration "cease issuing new, nonemergency rules and regulations given the recent election results of November 8" noting that: "It is our job now to

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61 Donald Trump, "Statement issued by President Trump on the Paris Climate Accord" (Address delivered at the White House Rose Garden, 1 June 2017) [unpublished].

62 Shawn McCarthy, "Keystone pipeline approval 'complete no-brainer,' Harper says", *The Globe and Mail* (21 September 2011), online: <https://www.theglobeandmail.com/news/politics/keystone-pipeline-approval-complete-no-brainer-harper-says/article4203332/>.

63 Martin Fletcher, "The Final Year: The breathless story of Obama's last days as president", *Radio Times* (19 January 2018), online: <http://www.radiotimes.com/news/film/2018-01-19/the-final-year-the-breathless-story-of-obamas-last-days-as-president/>.

64 Juliet Eilperin and Brady Dennis, "With days left in office, President Obama ushers in dozens of policies. But will they stay seated?", *The Washington Post* (14 January 2017), online: <https://www.washingtonpost.com/national/health-science/with-days-left-in-office-obama-ushers-in-dozens-of-policies-but-will-they-stay-seated/2017/01/14/30f56b4a-d8f9-11e6-9a36-1d296534b31e_story.html?utm_term=.14506c38d3ef>.

determine the right balance between regulation and free market principles and make sure that our federal government no longer stands between Americans and financial success."[65]

The administrative race to the electoral finish line was typical of many dying U.S. administrations, but this one was particularly significant for Canada and the new Trudeau government, who appeared to be closely tracking the actions of the White House especially in relation to environmental regulations and international agreements.

Remarkably, subsequent actions by the Trudeau government appeared to ignore the reality of the 2016 U.S. election, and during the interim post-U.S. election a brief re-alignment of energy regulatory policies occurred. The Trudeau government embraced the outgoing lame-duck Obama administration with an almost farcical joint announcement on December 20, 2016 in which the two governments agreed to jointly "launch actions ensuring a strong, sustainable and viable Arctic economy and ecosystem, with low-impact shipping, science-based management of marine resources, and free from the future risks of offshore oil and gas activity."[66]

Unsurprisingly, organizations like the World Wildlife Federation (WWF) and Environmental Defence lauded the announcement. Less laudatory was Northwest Territories Premier Bob McLeod who, aghast at the lack of governmental consultation that preceded the announcement, voiced concerns about the announcement and asserted his belief in northern involvement in decisions that affect them and their economic future. He noted that, in this instance, they weren't. Asserting that the North is an expensive place to live where there aren't a lot of options for people who need good jobs to provide for themselves and their families. McLeod also noted that the drilling ban negated important benefits of the NWT's Devolution Agreement that allocated it province-like powers in 2014 negotiated under the Harper government that allowed co-management of the offshore and resource revenue sharing. McLeod added that his government was committed to environmentally sound growth but noted that limiting fossil fuel development could be harmful to the sustainability of the northern way of life.[67]

While the announcement achieved a short-lived alignment between Canada and the U.S., it ignored decades of oil and gas exploratory activities in the Canadian Arctic (ironically previously enthusiastically supported by the elder Trudeau), one that had been an economic mainstay of the north through many long-term industrial benefit agreements. Perhaps there is no better illustration of the relentless focus of Trudeau's government to diminish the economic decision-making of devolved northern governments in the face of the ideological forces of the climate change agenda – an action that trampled any hope for meaningful prior governmental consultation with northerners. The dying Obama administration provided a brief opportunity for the Trudeau government to "secure" that legacy jointly with the U.S. It was a short-lived triumph for international climate diplomacy. On April 2017, Trump's America First Offshore Energy Executive Order[68] explicitly reversed the Obama administration's ban on Arctic leases. This reversal of the "Obama legacy" once again placed Canada's policies directly at odds with the Trump administration. By January 2018, U.S. Interior Secretary Ryan Zinke unveiled a draft proposal (extending from 2019 to 2024) to allow the largest offshore lease sale on the U.S. outer continental shelf (not including the North Aleutian Basin in Alaska).[69] The Trump Interior Department subsequently announced plans to offer offshore leases for Arctic oil and gas exploration with access to previously inaccessible acreages and overturned the indefinite drilling bans in much of the Arctic Ocean announced during the final days of the Obama administration.

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65 *Ibid.*
66 CBC, "Trudeau announces review of Arctic strategy, joint drilling ban with US", *CBC* (21 December 2016), online: <http://www.cbc.ca/news/politics/trudeau-obama-arctic-1.3905933>.
67 Claudia Cattaneo, "'The last frontier': Arctic drilling ban big blow to Northern Indigenous communities, premier says", *Financial Post* (29 January 2018).
68 *Implementing an America-First Offshore Energy Strategy*, 82 Fed Reg 20815 (2017).
69 Julia Boccagno and Justin Covington, "Huge swaths of land may be open to offshore drilling in the near future", *CIRCA* (4 January 2018), online: <https://www.circa.com/story/2018/01/04/politics/secretary-zinke-unveils-new-draft-proposal-to-open-the-arctic-pacific-and-atlantic-to-offshore-drilling>.

THE NEB NATIONAL ENGAGEMENT INITIATIVE[70]

In November 2014 the National Energy Board announced a unique outreach program, the National Engagement Initiative (extending from 25 November 2014 to 3 June 2015), in which the NEB "asked Canadians to help us to better understand how we can adjust our pipeline safety program, public engagement activities and communications".[71] The NEB Chairman, along with selected board members and staff, undertook a broad-based national public consultation on issues related to pipeline safety and environmental protection[72] while initiating a parallel Pipeline Safety Forum directed at further examining issues of pipeline safety, the environment and landowner concerns. Additionally, the NEB established new "regional offices" in Vancouver and Montreal to better focus on engagement and outreach activities with Canadians across the country.

In meetings that extended from December 2014 to May 2015, the NEB was careful to qualify the National Engagement Initiative as being distinct from its regulatory processes stating that the sessions were:"…..in addition to the existing engagement efforts of Board. They are also outside of our regulatory process; they are not discussing any specific project".[73] The clear intent of the NEB was to focus on public, stakeholder views on matters regarding pipeline safety and environmental protection. The laudable engagement initiative, unique in the history of the NEB, was nonetheless destined to have material, largely unintended, consequences that impacted not just the NEB and the Energy East application, but eventually extended to federal policies affecting the regulation of the energy industry.

Momentous Events Envelop the NEB[74]

The National Engagement Initiative led to reports that two NEB members from the Energy East Panel, including the Vice Chairman, had met privately in January 2015 with former Quebec Premier Jean Charest. As Charest was alleged to have been working as a consultant to Trans Canada at the time of the meeting, Prime Minister Trudeau was urged to scrap the entire NEB Energy East review. Although the NEB denied prior knowledge of Charest's alleged connections to TransCanada, the public and media storm that erupted led to calls for the resignations of all three panel members due to apprehension of bias.

The initial NEB hearings for Energy east were suspended on 29 August 2016 after violent protests in Montreal reached into, and disrupted, the hearing room. While some protestors displayed a banner at the front of the hearing room, another reached the table where the board members were seated and almost knocked it over causing the evacuation of the NEB panel. Police entered to remove the protesters and made three arrests: two men were charged with assaulting a police officer and with obstruction of justice and a woman was charged with obstruction of justice. Montreal Mayor Coderre, an outspoken critic of the proposed $15.7-billion project, cancelled his appearance that he described as a "circus."[75]

On August 29, 2016 the National Energy Board announced that it had suspended hearings into the Energy East pipeline project until such time as the board could rule on formal motions demanding the resignations of two panel members. Written comments on the Motions were invited until September 7, 2016.

Then, on September 9, 2016 the NEB announced that all three NEB Panel members had chosen to recuse themselves, a decision that ultimately led to a limiting of the duties by the NEB Chairman and the Vice Chair associated with the Energy East application. The NEB subsequently chose to appoint a new

70 National Energy Board, "National Engagement Initiative" (11 August 2017), online: <https://www.neb-one.gc.ca/glbl/ccct/index-eng.html>.
71 National Energy Board, *National Engagement Initiative Report - Engaging Canadians on Pipeline Safety* (Calgary: NEB, 2015), online: <http://www.neb-one.gc.ca/glbl/ccct/ntnlnggmnt/2016rprt-eng.pdf>.
72 *Ibid*.
73 *Ibid*.
74 *Ruling No. 1 Consequences of the Energy East Hearing panel's recusal and how to recommence the Energy East hearing*, (27 January 2017), OF-Fac-Oil-E266-2014-01 0, online: NEB <https://apps.neb-one.gc.ca/REGDOCS/File/Download/3178888>.
75 Benjamin Shingler and Stephen Smith, "NEB cancels 2 days of Energy East hearings in Montreal after 'violent disruption'", *CBC News* (29 August 2016), online: <http://www.cbc.ca/news/canada/montreal/neb-hearings-energy-east-protest-quebec-2016-1.3739215>.

panel formed by new temporary members. After delays of three months, in mid-December 2016 NRCan Minister Carr announced the appointment of three new temporary members who were to be directed not by recused Chairman Watson but by temporary member Hamilton who was appointed as "alternate Chairman" for Energy East. Significantly, the appointments overlooked existing appointees to the NEB, both temporary and permanent, and appointed wholly-new individuals for the regulatory proceedings – untested members to hear the single largest pipeline application in the history of the NEB.

Previously, NRCan Minister Carr had named a five-person "Modernization Panel" tasked with carrying out national consultations to recommend reforms to the NEB. The uproar that forced the recusals therefore came at a time when activists, and some parliamentarians, were advocating that the "NEB was broken" and needed to be reformed.[76] It also led to complicated, precedent-setting, internal administrative arrangements within the NEB to accommodate the recused Chair and Vice Chair, a new "alternate chairman" and the new Energy East panel members.

On June 5, 2017 the NEB also launched an initiative to be led by four new temporary members who were to be independent of the three-person Energy East Panel. They were appointed to gather input from Indigenous peoples as part of a new Engagement Initiative to shape the hearing process and identify procedures for the collection and use of oral traditional evidence. However, in spite of the clean slate of appointed members, some landowners expressed scepticism because they felt that the emphasis on aboriginal consultations by the panel ignored their concerns as directly affected parties.

These developments were unique in the history of the NEB and came at a time when government was undertaking a major review of the role and structure of the NEB. There were recusals of the panel appointed to hear the Energy East application, recusals of the Chair and Vice Chair, the unique appointment of the NEB COO in the role as panel CEO in place of the recused Chairman and the appointment of a new "alternate NEB Chair" tasked with appointing and presiding over the Energy East panel. Impossibly, the reorganization required that the new panel not associate with previous panel members or the NEB Chair and Vice Chair. These steps constituted the most significant deviation from established regulatory practices in the history of the NEB

Prior to these events, there had been other administrative delays for the applicants. On February 2016 the first NEB Panel deemed the Energy East application to be difficult to read and understand. This required TransCanada to re-submit a reconsolidation of the massive 50 volume 30,000-page project application.

Following that, on January 2017, after a review process that had taken more than two years, the new panel decided to void previous decisions of the recused panel and re-start the Energy East and Mainline application. Perhaps most significantly, the ruling voided previous decisions for a completeness determination, the list of participants and the Hearing Order (OH-002-2016) issued in June 2016. This forced a reformulation of issues for the project and a new completeness determination. The Ruling noted that: "According to case law, once a reasonable apprehension of bias has been established, the outcome of the proceeding, or the proceeding to date, is void."[77]

In its Ruling, the new panel noted: "… the Transition Initiative Kenora (TIK) requested, in letters dated 7 and 22 September 2016 and in a 10 January Notice of Motion, that the Board void all previous decisions of the Energy East hearing, given that a reasonable apprehension of bias had been established. Other participants filed related submissions."[78] The panel rejected TIK's request to have the applicants resubmit their applications noting: "The Panel decides that the Eastern Mainline application filed on 30 October 2014 remains valid. The Energy East application refiled as a consolidated version on 17 May 2016 also remains valid and will stay on the hearing record."[79] As a result, the proponent was not

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76 Ron Wallace and Jack M. Mintz, "Trudeau wrongly said Canadian energy regulation was 'broken.' Then he wrecked it", *Financial Post* (23 February 2018), online: <http://business.financialpost.com/opinion/trudeau-wrongly-said-canadian-energy-regulation-was-broken-then-he-wrecked-it>.
77 *Supra* note 74.
78 *Ibid.*
79 *Ibid.*

required to resubmit an application that had already been subjected to 18 months of public consultations.

PARALLEL POLITICAL DEVELOPMENTS

On January 27, 2016 the new federal government introduced five interim principles to guide decision-making on major resource projects. One principle was that direct and upstream greenhouse gas emissions (GHG's) linked to projects would be reviewed by the newly renamed Environment and Climate Change Canada (ECCC), while the NEB was to consider GHG emissions "directly related to construction and operation of the project" but would not consider "upstream or downstream GHG's in its project review"[80] with a formal Memorandum of Understanding to establish the "engagement process" to address upstream GHG emissions associated with the Energy East project. This process was designed to be independent from the rekindled NEB hearings process.

As part of its reconsideration of a Completeness Decision, on May 10, 2017 the NEB sought public input on its reconsiderations of the draft list of issues for the Energy East application. The applicants responded on June 21, 2017 with a detailed legal analysis. The applicant filing noted that: "…the Board advises that it is "particularly interested" in obtaining comments on whether and if so why, certain additional issues (Draft Additional Issues) should be included in the final lists of issues for the Projects."[81] Among four issues was possible consideration of potential impacts of the Project on Canada's greenhouse gas (GHG) emissions. The applicants' analysis concluded that upstream and downstream GHG and GHG emissions policies are both important issues that merit discussion, in an appropriate forum: "However, the Applicants submit that the Board is not the appropriate forum for those discussions, which should and will take place elsewhere. As noted in the submission of Natural Resources Canada, the Government of Canada has committed to assessing the upstream and direct GHG emissions associated with the Projects."[82]

The legal submission went on to argue that: "The Board should not and cannot consider Upstream and Downstream GHG Emissions in the context of either of the Projects, for a variety of reasons…" that included consideration of the *Constitution Act, 1867*[83], the mandate of the NEB and policy guidance set out in the Interim Measures and principles for Pipeline Reviews set by Canada in January 2016.[84] The Applicants further argued that the NEB had "… no authority to mandate or direct the implementation of OSELA[85], or to order its implementation. Any attempt by the Board to do so would be a recipe for disaster."[86] In relation to requests that the NEB delay its considerations of the Projects until such time as the CEAA Review and NEB Modernization Panels reports were concluded, the Applicants argued that: "… the Board can only apply existing law, not pending or potential legislation. In short, the Board does not have that legislative authority and cannot delay the pending application. The alternative would not only be a violation of the rule of law, but an abdication of its authority in favour of 'sheer speculation.' "[87]

Clearly the stage was set for an epic regulatory confrontation.

On August 23, 2017, the newly-appointed NEB Energy East Panel issued its Decision, one which appeared to overlook the MOU signed between the NEB and ECCC and that directly contradicted the legal analysis of the Applicant. The panel ruled that it would for the first time consider the public interest and impacts of upstream and downstream GHG emissions from potential increased production and consumption of oil resulting from the

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80 National Energy Board, *Memorandum of Understanding between ECCC and the NEB for the Establishment of a Public Engagement Process for the Assessment of Upstream Greenhouse Gas Emissions related to the Energy East Project (MOU),* online: <https://www.neb-one.gc.ca/bts/ctrg/mmrndm/2016nvrnmntclmtchngcnd-eng.html?=undefined&wbdisable=true>.
81 C Kemm Yates, *Applicants comments on draft lists of issues and draft factors and scope of the factors for the Environmental Assessments pursuant to the Canadian Environmental Assessment Act 2012* (21 June 2017).
82 *Ibid.*
83 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.
84 *Ibid.*
85 *Oil Sands Emissions Limit Act,* SA 2016, c O-7.5, enacted by the Alberta Legislature about one year after finalization of the Paris Accord as part of the Notley Government's Alberta's Climate Change Strategy.
86 *Supra* note 81.
87 *Ibid.*

project. It also ruled that, for the first time, it would allow discussion at hearings of the effect of meeting government GHG emission targets on the financial viability and need for the 4,500-kilometre pipeline (previously, the NEB had considered only those GHG emissions that were directly associated with construction and operation of a pipeline).[88]

Shortly after that ruling on September 7, 2017 the proponent TransCanada Corp announced that it was suspending its application for 30 days while it conducted a careful review of the NEB's assessment process: "The applicants hereby request thirty days to review the Decision, the resulting implications to the Projects, and the respective Project applications. The Board is respectfully requested to not undertake any further review process on the Projects during the thirty-day period."[89]

Predictably, the announcement set off a cascade of political catcalls between provinces and the federal government, while Alberta Energy Minister McCuaig-Boyd, citing Alberta's Climate Leadership Plan as sufficient to satisfy concerns on emissions, termed the NEB's decision as an "historic overreach" by the regulator, noting that: "Deciding the merits of a pipeline on downstream emissions is like judging transmission lines based on how its electricity will be used – this is not an appropriate issue to include in this review" further noting that that the Prime Minister had cited the Alberta Climate Plan in his approvals for the Enbridge Line 3 and the Kinder Morgan Trans Mountain pipeline projects. Alberta MP Remple accused the federal Liberals of sending the regulatory system into "quicksand" that would have the effect of damping investment in the Canadian energy sector: "It's not just disappointing. This is infuriatingly frustrating – and people across the country whose jobs depend on this will look at this as an example of extreme incompetence by an ideological Liberal government that is opposed to development of the energy sector, writ large."[90]

TransCanada argued in its request for suspension that an internal corporate project review was warranted due to the significant challenges resulting from the NEB decision.[91] It also noted that should the corporation choose not to proceed with the project, the carrying value of the investment including potential recoveries of incurred development costs for the $15.7 billion project would be "negatively affected", costs that were subsequently estimated at $1 billion. On September 8, 2017 the NEB granted TransCanada's requested suspension of the Energy East review process agreeing not to issue further decisions or take further process steps relating to the review of the projects until 8 October 2017.

Finally, on October 5, 2017, in a corporate decision that created a Canadian political furor not witnessed since the days of the Great Pipeline Debate of the 1950s, TransCanada announced that it had abandoned the Energy East Project, Asset Transfer and Eastern Mainline Project (EMP).

CONCLUDING COMMENTS

Many considered that a decision by a novice NEB Energy East panel to require a review of upstream greenhouse gas emissions has contributed to a fundamental re-examination of constitutional powers between provincial and federal governments. That decision, and the subsequent events surrounding the Kinder Morgan pipeline, may have brought Canada to a point that some consider is a "crisis".

In a house so divided and coming at a time when the mandate of the NEB was being significantly revised with regulatory proposals in *Bill C-69*, many would consider it unlikely there could be an enhancement of regulatory certainty in national interest determinations. These regulatory uncertainties, when compounded by implications of the Northern Gateway decision and the continuing uncertainties surrounding the Kinder Morgan pipeline application,

88 National Energy Board, News Release, "Expanded focus for Energy East assessment" (23 August 2017), online: <https://www.canada.ca/en/national-energy-board/news/2017/08/expanded_focus_forenergyeastassessment.html>

89 TransCanada, List of issues and factors and scope of factors for the EA pursuant to CEAA 2012, NEB File OF-Fac-Oil-E266-2014-01 02 (7 September 2017).

90 John Gibson, "Politicians spar over Energy East as NEB suspends pipeline review", *CBC News* (8 September 2017), online: <http://www.cbc.ca/news/canada/calgary/national-energy-board-energy-east-review-trans-canada-alberta-halt-suspend-review-1.4281060>.

91 TransCanada, News Release, "TransCanada Seeks 30-day suspension of Energy East Pipeline and Eastern Mainline Project Applications" (7 September 2017), online: <https://www.transcanada.com/en/announcements/2017-09-07-transcanada-seeks-30-day-suspension-of-energy-east-pipeline-and-eastern-mainline-project-applications/>.

have eroded international investment interest in major projects just when Canada's energy industry is struggling to maintain its competitiveness in an era of reduced prices and challenged exports. Is it possible for Canada and its energy sector to become greener and more innovative while enduring lower profitability, restrictions to market access, significant capital flight and major project cancellations? The regulatory authority of the NEB, previously affirmed by the Supreme Court, has been undermined to the extent that a host of jurisdictions and aboriginal organizations now presume, if not demand, a final say in Canadian energy development and transportation. The consequential erosion of the pre-eminence of the regulatory powers of the NEB is creating fundamental uncertainty and makes problematic any science-based determinations that reflect the national interest.

Some consider that the Supreme Court has been thrust into the energy regulatory mix as a direct result of federal governments that have consistently refused to issue clear rules for aboriginal consultation and accommodation. Fortunately, the Supreme Court has ruled that it does not equate the constitutional duty to consult with a veto over development—a useful legal clarification, but perhaps one in a long series of decisions that may be viewed by investors and industrial proponents as being too little and far too late.[92]

The federal government's initial intentions to "modernize" and "restore public confidence" in the NEB have increasingly been eclipsed by far more pressing concerns for the economy, the national interest and, perhaps, the ability of the Canadian energy sector to survive such disparate, concerted regulatory assaults from so many sectors.[93]

The real casualties of this regulatory morass are Canadian corporations, investors and shareholders. Proponents have expended hundreds of millions of dollars in a complex Canadian political, legal and regulatory environment subject to final decisions made behind closed doors using previously undisclosed rules and standards. Such decisions made so late in the regulatory process fundamentally affect how investors view Canada and directly influences future corporate investment decisions.

When a federation dissolves into narrow definitions of federal, provincial and local government interests, the number of hands in the pot increases the complexity of issues for everyone. Such jurisdictional complexities also expand the amount of time needed by proponents to navigate all the interconnected issues through competing jurisdictions that increasingly include First Nations and local governments. The result is a complex, often contradictory and competing web of legislative and regulatory tools whose resolution cannot reasonably be achieved by continuous references to federal courts. The urgent responsibility for resolving these challenges rests with all Canadians, especially its leaders, who are increasingly being confronted with undesirable economic and social consequences of their actions and decisions. ■

92 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at 48.
93 *Supra* note 6.

THE *IMPACT ASSESSMENT ACT*, *CANADIAN ENERGY REGULATOR ACT* AND OFFSHORE ENERGY: A VIEW FROM ATLANTIC CANADA

*Daniel Watt**

Introduction

If enacted, Bill C-69[1] will entail significant changes to the regulation of offshore energy projects in Atlantic Canada. The shift from environmental assessments (**EAs**) under the *Canadian Environmental Assessment Act, 2012*[2] (**CEAA 2012**) to "impact assessments" (**IAs**) under the *Impact Assessment Act*[3] (**IA Act**) will be acutely felt in the offshore oil and gas industry. The new but incomplete offshore renewable energy regime in the *Canadian Energy Regulator Act*[4] (**CERA**) will have less immediate effect, but brings the potential for major change in the longer term. In both the oil and gas and renewable energy industries, there remains much uncertainty about how these changes will play out. The devil will be in the detail: revisions during the legislative process, supporting legislation, regulations, and implementation.

This article comments on a small selection of issues in Bill C-69 of importance to Atlantic Canada's offshore oil and gas industry, and to its embryonic offshore renewable energy industry. It examines two broad issues that are among those bedeviling Atlantic Canada's well-established offshore industry: who is responsible for conducting IAs for offshore projects; and what projects will be subject to the new IAs. A brief overview of CERA's nascent offshore renewable energy regime is provided, with some comments on opportunities for Atlantic Canada, both missed and realized.

1. *Impact Assessment Act* and Offshore Oil & Gas in Atlantic Canada

The IA Act will bring in a host of changes with consequences for the assessment of Atlantic Canada offshore oil and gas projects, including the requirement to assess a list of factors[5] much expanded from those required under CEAA 2012.[6] Among those changes are two issues that are, at the time of writing, of particular concern for Atlantic Canada's offshore industry. The first is the shift to a mandatory and inflexible requirement for panel reviews for designated offshore activities. The second, in part exacerbated by the first issue, is what activities will be included on the project list regulations.

a) Responsibility for Atlantic Canada Offshore IAs: Some Context

The Canada-Newfoundland & Labrador Offshore Petroleum Board **(CNLOPB)** and

*Daniel is a partner in the Halifax office of McInnes Cooper. His practice focuses primarily on litigation and regulatory advice, with a focus on offshore energy and all aspects of marine law. He is the lead Partner on McInnes Cooper's Ocean Economy Team.

1 Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018.
2 *Canadian Environmental Assessment Act,* SC 2012, c 19, s 52 ("*CEAA 2012*").
3 *Impact Assessment Act*, being Part I of Bill C-69, *supra* note 1 ("*IA Act*").
4 *Canadian Energy Regulator Act, being Part II of Bill C-69, supra* note 1 (*"CERA").*
5 *IA Act*, *supra* note 3, s 22.
6 *CEAA 2012*, *supra* note 2, s 19.

Canada-Nova Scotia Offshore Petroleum Board (**CNSOPB**) used to be responsible for all EAs for offshore projects, including those under the *Canadian Environmental Assessment Act.*[7] This changed with the coming into force of CEAA 2012 and the Regulations Designating Physical Activities[8] (the **Project List**). The Canadian Environmental Assessment Agency (the **CEA Agency**) became responsible for EAs for designated Atlantic Canada offshore oil and gas activities.[9] The offshore boards continue to conduct EAs – sometimes called Accord Act EAs – for activities that do not trigger CEAA 2012[10] in accordance with their enabling legislation (the **Accord Acts**).[11] While they supply specialist or technical knowledge and information to the CEA Agency, they do not directly participate in CEAA 2012 EAs.[12]

In 2015, the Conservative government sought to restore the offshore boards' authority over CEAA 2012 EAs, giving them powers to hold the public hearings[13] necessary for "responsible authority" status[14] and publishing draft regulations designating the CNSOPB as a responsible authority.[15] The effort failed, but continues to inform the debate over the offshore boards' role in EAs.

The debate resurfaced during the federal review of EA processes. Views are sharply divided. Some assert that boards have no expertise in environmental matters, and with a purported mandate to "promote" the offshore industry, the boards are in a conflict of interest, "captured" by industry.[16] As such, the boards should play no role in assessing the projects they regulate. By contrast, the NL government and industry associations, concerned about the time, cost and effort involved in CEAA 2012 EAs, have advocated returning some degree of assessment responsibility to the boards.[17]

For its part, the Expert Panel appointed to review federal EA processes (the **Panel**) did not specifically address the offshore boards' role in EAs. The Panel's report uses the term "offshore" only once and does not mention the offshore boards. The Panel's view is restricted by considering only the two lifecycle regulators that, with the CEA Agency, comprise the responsible authorities: the National Energy Board (**NEB**) and the Canadian Nuclear Safety Commission (**CNSC**). The Panel largely focused on remedying perceived biases of the NEB and CNSC to restore public trust in EAs and support social licence.[18] The Panel recommended removing these regulators from the EA process and incorporating the function into a single authority.[19]

In its June 2017 discussion paper (the **Discussion Paper**), the federal government advised that it was considering an approach where "the agency and life-cycle regulators would jointly conduct impact assessments as part of a single, integrated review process."[20] The Panel's views on the lifecycle regulators

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7 *Canadian Environmental Assessment Act*, SC 1992, c 37 (*"CEAA"*).
8 SOR/2012-147 (the Project List).
9 *Ibid,* ss 2, 4(1) and Schedule, ss 10-13.
10 See the CNSOPB's *Guidelines on Plans and Authorizations Required for Development Projects*, August 1995, at 2.3, online: <https://www.cnsopb.ns.ca/sites/default/files/pdfs/plansauthoriazations.pdf>.
11 Respectively, the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act,* SC 1987, c 3 and "mirror" provincial counterpart, the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*, RSNL 1990, c C-2 (collectively, the *NL Accord Act*); *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act,* SC 1988, c 28 and *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act,* SNS 1987, c 3 (together, the *NS Accord Act*). All citations in this article are to the federal versions.
12 *CEAA 2012, supra* note 2, s 11.
13 *Energy Safety and Security Act*, SC 2015, c 4, ss 41, 51, adding *NL Accord Act, supra* note 11, ss 44.1, 138.01; and ss 77, 87, adding *NS Accord Act, supra* note 11, ss 44.1, 142.02.
14 *CEAA 2012, supra* note 2, s 15(c).
15 See the "Federal Authority as a Responsible Authority for Designated Projects Regulations: Regulatory Impact Analysis Statement", (2015) 149:26 Can Gaz, online: <gazette.gc.ca/rp-pr/p1/2015/2015-06-27/html/reg5eng.php>. At the time of publication in the Gazette, the CNLOPB was apparently unwilling take on the "responsible authority" role.
16 CBC News, "Environmental groups perplexed over possible offshore assessment changes" (24 January 2018), online: <http://www.cbc.ca/news/canada/nova-scotia/offshore-alliance-protest-nova-scotia-environmental-impact-assessments-1.4501948>.
17 CBC News, "Proposal to retool environmental assessments rattling nerves in Newfoundland's offshore" (19 June 2017), online: <http://www.cbc.ca/news/canada/newfoundland-labrador/enironmental-assessment-changes-1.4164484>.
18 Expert Panel for the Review of Environmental Assessment Processes, "Building Common Ground: A New Vision for the Review of Impact Assessment in Canada" (April 2017) at 51, online: <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html>.
19 *Ibid.*
20 Government of Canada, *Environmental and Regulatory Reviews: Discussion Paper* (June 2017) at 17, online: <https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/share-your-views/proposed-approach/discussion-paper-june-2017-eng.pdf> "(Discussion Paper)".

were thus not accepted. Industry may have taken comfort in a collaborative joint agency-offshore board process; environmental groups surely decried the involvement by the offshore boards. What appears in the IA Act, however, probably leaves both groups dissatisfied.

b) Responsibility for Atlantic Canada Offshore IAs: The IA Act

The new Impact Assessment Agency (the **IA Agency**) makes the threshold determination of whether designated component activities of an offshore project require an IA.[21] This determination follows a new "planning phase." As with CEAA 2012, the designated project proponent must submit an initial project description to the IA Agency.[22] On the IA Agency's request, the offshore boards, as "federal authorities,"[23] must provide the IA Agency with specialist or expert information or knowledge on request.[24] The IA Agency decides whether an IA is required.[25] Although the planning phase is new, the threshold decision-maker has not changed: the federal agency makes the decision without offshore board input.

The major change is who assesses designated Atlantic Canada offshore projects if an IA is required. As drafted, the IA Act obligates the Minister to refer the IA of such project to a review panel, without exception.[26] This same rule applies to activities regulated under CERA and the *Nuclear Safety and Control Act* (**NSCA**).[27] The IA Agency cannot conduct the IA. The Minister cannot approve the substitution of another jurisdiction's EA process for an IA process for designated offshore projects.[28] Nor can the Minister enter into an agreement with another jurisdiction to jointly establish a review panel.[29] Designated offshore activities requiring an IA will therefore invariably undergo the most formal and rigorous form of IAs. Rather than the joint IA Agency-offshore board process suggested in the Discussion Paper, none of those entities will be responsible for IAs of designated offshore oil and gas projects. That responsibility will fall to variously composed review panels.

IA Act panel reviews will resemble those under CEAA 2012. As with CEAA 2012,[30] the Minister has the discretion to refer IAs to a review panel if he or she is of the opinion that it is in the public interest, considering a number of mandatory factors.[31] It remains to be seen how the review panel timelines in the IA Act will play out, but the process is likely to be lengthy.[32] The IA Agency will gather information and "scope" the project, determining the information and studies that the IA Agency considers necessary for the IA.[33] Time will be required to set the panel's terms of reference and appoint its members.[34] The panel may then require the proponent to obtain any additional information or studies the panel deems necessary, before or after the IA is conducted.[35] IAs will be quasi-judicial proceedings with public hearings.[36] The IA Act review panel processes will undoubtedly be more time-consuming, expensive and onerous than assessments by the IA Agency or the offshore boards as responsible authorities.[37]

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21 *IA Act*, *supra* note 3, s 16.
22 *Ibid*, s 10.
23 *Ibid*, s 2, *federal authority* (d), s 109(a), Schedule 1. The IA Agency also has some authority to direct the offshore boards how to carry out their own regulatory mandate under the Accord Acts: see s 13(2), which allows the Agency to direct federal authorities to "engage the proponent [...] in order that the federal authority may specify to the proponent the information, if any, that it may require in order to exercise those powers or perform those duties or functions."
24 *IA Act*, *supra* note 3, s 13(1).
25 *Ibid*, s 16.
26 *Ibid*, s 43(a.1) and (c), as added by the Amendments to the Impact Assessment Act (the Amendments), s 5.
27 *Ibid*, ss 43(a) and (b).
28 *Ibid,* s 32(b).
29 *Ibid*, s 39(2).
30 *CEAA 2012*, *supra* note 2, s 38
31 *IA Act*, *supra* note 3, s 36.
32 The panel must submit its IA report to the Minister no later than 600 days after the Minister has appointed the minimum number of panel members: see IA Act, *supra* note 3, at s 37. This is subject to Ministerial orders to lengthen or shorten the timeline (s 37(2)), among other things, as well as the 45 days available to the Minister after the notice of commencement of the IA is posted to refer the IA to a review panel (s 36(a)), and, subject to extensions, 180 days from the planning phase to the IA Agency's posting of the notice of the commencement of the IA (s 18(1)).
33 *IA Act, supra* note 3, ss 18-20.
34 *Ibid*, ss 46.1 and 48.1, added by the Amendments, ss 6-7.
35 *Ibid*, ss 38, 52(2).
36 *Ibid*, ss 51 – 53.
37 *Compare IA Act, supra* note 3, ss 25-29 on IA Agency IAs, and ss 36-59 on panel reviews.

This all points to a lengthy and complex process for IAs for designated offshore projects, with no flexibility to scale the assessment mechanism to the assessed activities.

The process is thus not a "joint" IA Agency-offshore board collaborative process, as proposed in the Discussion Paper. However, there is a degree of mandatory "integration" of offshore board and review panel membership. In this regard, the IA Act is consistent with the Discussion Paper. Review panels for designated projects that include activities regulated under the Accord Acts must include at least two persons appointed from rosters of CNLOPB or CNSOPB members, on the recommendation of the Chairperson of the respective offshore board in consultation with the Minister of Natural Resources.[38] There are similar panel appointment requirements for activities regulated established under CERA and NSCA, requiring appointees from the Commission to established under CERA (the **Commission**) and the CNSC, respectively.[39] If this feature becomes law, offshore board technical expertise will be integrated into the panel. This is another significant change from CEAA 2012 review panels, which do not require any offshore board involvement or input.

Panels will require a minimum of five appointees, but there is no cap on offshore board member numbers.[40] The chairperson could be an offshore board member. Theoretically, a review panel could also consist entirely of offshore board members. It seems unlikely that such a panel would ever be appointed, at least by the present government. The government's intent was not to give responsibility for offshore oil and gas IAs to the offshore boards, but to include some measure of offshore board expertise in IAs. In any case, a five-member panel would require appointing the entire CNSOPB, or most of the CNLOPB.[41]

There is a notable difference in the IA Act's treatment of the Commission and CNSC and offshore board review panels' respective abilities to regulate under their enabling statutes during the IA process. Commission and CNSC review panels are essentially required to simultaneously conduct the IA and permitting processes required under their home statutes and in doing so can exercise their powers under those statutes.[42] This is consistent with the government's intention to "focus on single window for federal coordination (e.g. ensuring alignment of assessment and follow-on permitting)."[43]

By contrast, the IA Act does not permit panels assessing offshore projects to exercise Accord Act powers during the IA process, and does not require such panels to address the requirements for authorizations under the Accord Acts as part of the assessment process. While some have raised concerns about the intermingling of assessment and regulatory approval processes,[44] the IA Act does not clearly integrate IA and regulatory permitting processes for Atlantic Canada offshore projects in the same way it does for Commission and CNSC processes. Whether this is intentional or an oversight is unclear. The government's treatment of the offshore boards and Accord Acts in relation to the IA Act seems an afterthought: all of the provisions relating to this issue are contained in amendments to Part I of Bill C-69.

c) Some Observations on the IA Act Process for Offshore Projects

Offshore board membership on review panels is likely to remain controversial if the IA Act becomes law. Offshore board member appointments may be challenged for conflict of interest or bias. The IA Act requires that the persons appointed to review panels must "be unbiased and free from any conflict of interest relative to the designated project."[45] Thus, challengers must show that an appointee is biased or in conflict of interest relative to the actual project, rather than having a generalized

38 *IA Act*, *supra* note 3, ss 46.1, 48.1, 50(b.1), (d), added by the Amendments, ss 6-8.
39 *Ibid*, ss 44 and 47.
40 *Ibid,* ss 46.1, 48.1, 50(b.1), (d), added by the Amendments, ss 6-8.
41 *NS Accord Act*, *supra* note 11 at s 10(1), creating a five-member board; *NL Accord Act*, *supra* note 11, ss 10(1), creating a seven-member board.
42 IA Act, *supra* note 3, ss 46, 48, 51(2)-(3).
43 Discussion Paper, *supra* note 20 at 18.
44 Meinhard Doelle & John Sinclair, "Panel Reviews under the Proposed Federal Impact Assessment Act (IAA)", Environmental Law News, Climate Change, EA, Regulation, Governance (4 March 2018), online: <https://blogs.dal.ca/melaw/2018/03/04/panel-reviews-under-the-proposed-canadian-impact-assessment-act-ciaa/>.
45 *IA Act*, *supra* note 3, ss 46.1(2), 48.1(2), added by the Amendments, ss 6-7.

"industry" bias. A petroleum industry résumé alone should not be sufficient to disqualify a potential appointee. Aside from the dubious foundation for any allegation of inherent, general conflict or bias,[46] it is doubtful that, absent conduct or comments suggesting bias, offshore board members would be excluded under the Supreme Court of Canada's flexible approach to bias in relation to administrative boards.[47] The controversy, however, will no doubt remain. The possibility of challenges to panel composition within or outside the IA Act process adds to the potential for delay.

From an Atlantic Canadian practitioner's perspective, perhaps the most glaring issue with the IA Act process for designated offshore oil and gas activities is that it is completely inflexible in terms of process. The IA Act assumes all offshore oil and gas activities must undergo the most rigorous and also lengthy and onerous of IA processes without regard for the activities designated. Nor is there any room for joint assessments or substitutions that might help streamline assessments and permitting processes. The IA Agency will have a threshold role in determining whether designated offshore activities require an IA, but it seems unlikely that designated offshore activities would ever spared an IA. This rigid feature of the IA Act seems incongruous with the government's guiding principle that "the scale of assessment [will be] aligned with the scale and potential impacts of the project."[48] Requiring a panel review panel may be appropriate for a major development project, but in many cases, it seems inappropriate for the drilling of exploratory wells in an offshore area where the risks are already well documented.

d) What A.tlantic Canada Offshore Projects will be subject to IAs?

The federal government has indicated that it will maintain a project list approach to IAs "to retain clarity on when a federal assessment is required."[49] This includes maintaining authority to designate non-listed projects, and to exclude "designated projects from assessment under certain conditions based on clear criteria and a transparent process."[50] At the time of writing, the government is seeking input on its proposed approach to revising the CEAA 2012 Project List.[51] Its stated intent is to list only those projects that have the most potential for adverse environmental effects in areas of federal jurisdiction. Projects with potential for smaller likely effects would be subject to other federal regulatory processes, such as the Accord Act EAs.[52]

The IA Act maintains a project list approach and allows the Minister to designate non-listed projects for IA.[53] However, with respect to excluding designated projects, the options are limited. Cabinet can make regulations varying or excluding requirements under the IA Act or regulations in certain circumstances, mostly relating to activities taking place within reserves, lands covered by land claim agreements, areas subject to agreements with bodies established

46 A typical argument is that the Accord Acts require the offshore boards to promote or expand offshore oil and gas activity. This is, in the author's opinion, a mischaracterization of the legislation. The Accord Acts do not require the offshore boards to promote or expand oil and gas activity. Under the Accord Acts, the offshore boards must conduct themselves with the political accords – the Canada-Newfoundland Atlantic Accord and the Canada-Nova Scotia Offshore Petroleum Resources Accord (the Accords) – in mind: see *Mobil Oil Canada Ltd v Canada Newfoundland Offshore Petroleum Board,* [1994] 1 SCR 202 at 219. It is true that the Accords' objectives include, among many other objectives, achieving the early development of offshore resources for the benefit of Canada as a whole and the respective provinces in particular. However, the Accord Acts' provisions take precedence over any duties or powers in the Accords that are inconsistent with the Accord Acts: *NS Accord Act*, s 18(1) and *NL Accord Act,* s 17(1). In any case, neither the Accords nor the Accord Acts can be reasonably interpreted as requiring the boards to prioritize project approvals over environmental responsibility. Absent evidence to the contrary, offshore board members, like any panel appointees, ought to be entitled to a presumption they will carry out their statutory duties without bias. They are no more or less biased than panel members that oppose hydrocarbons as an energy source or who view offshore development as inherently problematic.

47 The basic test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator, and the courts must take a flexible approach to the problem so that the standard which is applied varies with the role and function of the board being considered: see *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 (*Newfoundland Telephone*) at 636.

48 Discussion Paper, *supra* note 20 at 7.

49 *Ibid* at 19.

50 *Ibid* at 18-19.

51 Government of Canada, *Consultation Paper on Approach to Revising the Project List: A Proposed Impact Assessment System* (8 February 2018), online: <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/consultation-paper-approach.html>.

52 *Ibid* at 2-3.

53 *IA Act*, *supra* note 3, ss 2 *designated project*, 7, 9, 17, 109(b).

under land claims agreements or Indigenous governing bodies, or under international agreements or arrangements entered into by the Government of Canada.[54] Cabinet may order that designated projects be excluded from the application of the IA Act if there are matters of national security in relation to the project, while the Minister can exclude projects in cases of national emergency.[55] There are no other procedures for excluding designated projects from the IA Act's application.

The upshot is that once a project category is on the Project List, there are no mechanisms for exclusion relating to the nature of the activity within the IA Act. If the mandatory review panel requirement becomes law, the types of activities included on the Project List therefore take on added importance. Since the IA Act does not allow for a less onerous form of assessment for Atlantic Canada offshore oil and gas projects, the projects to be listed should be carefully considered to avoid including activities for which an IA might be appropriate, but a full panel review would constitute overkill. The inflexibility of mandatory panel reviews is mitigated to some extent if the types of projects designated are limited to those that truly warrant a panel review.

It is likely appropriate to require major offshore development, production or decommissioning activities to undergo the most formal and rigorous form of IA. However, subjecting all exploratory well activity without exception, and certain development plan amendments, to panel review is more problematic, and is proving to be a major issue for the Atlantic Canada industry and NL government.

The current Project List assigns the following category of Atlantic Canada offshore exploratory well activities to the CEA Agency:[56]

> **10** The drilling, testing and abandonment of offshore exploratory wells in the **first drilling program in an area** set out in one or more exploration licences issued in accordance with the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act* or the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*. [Emphasis added]

The CEA Agency has interpreted the "area" at issue to be the exploration licence(s) (**EL**) held by the proponent, rather than a particular area, basin or geological feature of the offshore that is under Accord Act jurisdiction. This interpretation is far more restrictive than the governing legislation and has a real effect on the quantity of activity designated. Under the CEA Agency's interpretation, the first exploratory drilling program on an EL is a designated activity, regardless of whether the EL and the proposed exploratory wells are in "an area" of the offshore that has already been subject to exploratory drilling, development or production. For instance, the first exploratory drilling program on an EL issued within the Jeanne D'Arc basin area would require an EA, despite that the area is in production and the environmental and other risks have been well documented through previous EAs. Similarly, the first well on an EL in the Flemish Pass basin area, where over 20 exploratory wells have been safely drilled, would be captured. Under the CEA Agency's approach, exploratory wells drilled in these existing high-activity areas are treated the same as wells in truly frontier areas, such as the Gulf of St. Lawrence or Canadian Arctic. It seems unlikely that section 10 was intended to capture such activity.

If Atlantic Canada offshore activities will automatically be subjected to lengthy panel reviews, the Project List should specify with greater clarity what exploratory drilling activities are designated for IA Act review. A panel review may take years, while an offshore exploratory well can typically be completed in 30 to 90 days. Consideration should be given to clearly excluding from the Project List exploratory activities that take place within areas where the environmental and other risks

54 *Ibid* at s 109(d). Query whether offshore oil and gas activities constitute physical activities "carried out … under international agreements … entered into by the Government of Canada" within the meaning of s 109(d) of the *IA Act*. The exploitation of offshore oil and gas is an exercise of Canada's sovereign rights to explore and exploit the natural resources of the continental shelf, as recognized in the *Geneva Convention on the Continental Shelf,* 29 April 1958, 450 UNTS 11, art 2 (in force 10 June 1964) and the *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3, art 76 (in force 16 November 1994).
55 *IA Act*, *supra* note 3, ss 115.
56 Project List, *supra* note 8 at Schedule, s 10.

have been previously assessed. The relevant areas could be defined in geographical or geological terms or other descriptors, provided the description of the area was clear. Activities in these areas would remain subject to EAs under the Accord Acts.

Regional assessments, which are available under the IA Act, could also play a role in relation to IAs for exploratory drilling.[57] However, the regional assessment processes in the IA Act are skeletal. They are creatures of Ministerial discretion and their parameters will be set out in terms of reference. There are no provisions respecting timelines for completion or even guaranteeing the completion of the assessment.

There is no doubt that Canada's federal environmental processes have suffered from a lack of public trust, and the restoration of trust to these processes is a laudable and important goal. It is also clear, however, that the processes are in many cases time-consuming, lengthy and expensive, to the extent that projects that are in the public interest do not proceed. This concern should not be minimized.

2. *The Canadian Energy Regulator Act* and Offshore Renewable Energy in Atlantic Canada

As this author has written elsewhere,[58] offshore renewable energy represents a key opportunity for sustainable economic growth in Atlantic Canada. One of the hurdles to the development of an offshore renewable energy industry is the absence of a federal regulatory regime applicable to waters outside provincial territory. Part II of Bill C-69 will enact CERA, repeal the *National Energy Board Act* and replace the National Energy Board with the new Canadian Energy Regulator, establishing a Commission. An important component of CERA is that it creates the first – albeit incomplete – federal regulatory regime for offshore renewable energy (**ORE**) projects and offshore power lines (**OPL**) outside provincial territory.[59] Despite the importance of this first step, the ORE regulation has received far less public attention than other aspects of Bill C-69. Although the consequences of CERA's ORE provisions for Atlantic Canada will be less immediate than the IA Act changes, their long-term potential is significant.

The ORE provisions are set out at Part 5 of CERA, and they essentially provide the regulatory framework for the permitting and ongoing regulation of ORE and operations in the "offshore area." CERA defines "offshore area" essentially as Canada's internal waters or territorial sea that are not situated in a province and the waters above the Continental Shelf of Canada.[60] The law will apply to ORE projects, including: research or assessment conducted in relation to the exploitation or potential exploitation of a renewable resource to produce energy; storage of energy produced from a renewable resource; and transmission of energy produced from a renewable resource that is not transmitted to a province or a place outside of Canada.[61] It also applies to OPL, defined as facilities constructed or operated for the purpose of transmitting electricity from an ORE project to a province or a place outside Canada.

A key limitation of the new ORE provisions is that they will not apply to waters that are within a province, such as the Bay of Fundy. This risks regulatory inconsistency between provincial regimes – such as Nova Scotia's *Marine Renewable-energy Act*[62] - and the federal ORE under CERA. This author has argued elsewhere that a joint federal-provincial provincial regime for ORE akin to the Accord Acts would be preferable to the federal government acting alone, partly because joint legislation could provide regulatory consistency across all Atlantic Canadian waters.[63] The joint federal-provincial Accord Acts, for instance, incorporate the *Canada Oil & Gas Operations Act*[64] (**COGOA**) operations framework and *Canadian Petroleum Resources Act*[65] (**CPRA**)

57 *IA Act, supra* note 3, ss 92-94.
58 Sarah Mahaney & Daniel Watt, "Canada's New Ocean Economy: Charting a Course for Good Governance of Emerging Ocean Resources", Canadian Institute of Resources Law, Occasional Paper #61 (September 2017), online: <https://www.cirl.ca/files/cirl/charting-a-course-for-good-governance-of-canadas-emerging-ocean-economy.pdf>.
59 *CERA*, *supra* note 4, Part 5.
60 *Ibid*, s 2, *offshore area.*
61 *Ibid*, *offshore renewable energy project.*
62 *Marine Renewable-energy Act,* SNS 2015, c 37.
63 Mahaney & Watt, *supra* note 58 at 35-36.
64 *Canada Oil & Gas Operations Act,* RSC 1985, c O-7.
65 *Canadian Petroleum Resources Act,* RSC 1985, c 36 (2nd Supp).

land tenure model. As such, offshore oil and gas regulations are generally consistent across all of Canada's offshore areas. Absent any concerted effort by the Atlantic Canadian provinces to engage the federal government, it seems likely that disparate and overlapping federal and provincial regimes in significant areas like the Bay of Fundy will be the unfortunate reality.

As it stands, the Commission will be responsible for authorizing and regulating ORE operators under CERA.[66] The framework will be familiar to offshore oil and gas industry participants, as it closely resembles the COGOA/Accord Acts model. Some of the common features include the following:[67]

- Work or activity in the offshore area related to an ORE project or OPL, or any work or activity to construct, operate or abandon any part of an OPL that is in a province, is prohibited except in accordance with an authorization.
- The Commission issues authorizations for ORE and OPL work and has broad discretion to attach conditions to authorizations.
- The Commission may suspend or revoke authorizations for contravention of a condition of the authorization.
- There is unlimited at-fault liability for actual loss or damage caused by debris from ORE and OPL projects, with absolute liability (*i.e.* without proof of fault or negligence) being imposed on the authorization holder for actual loss and damage up to the limit of liability, currently set at $1 billion in most areas.
- Applicants must provide proof of financial resources and financial responsibility in the amount set by the Commission and in specified forms.

Authorizations for projects on the Project List will be subject to the joint assessment/permitting process applicable to CERA-regulated activities set out in the IA Act.[68] Where the ORE or OPL project requires an IA under the IA Act, the Commission must approve or deny the proponent's application for an authorization solely based on the report issued by the review panel under the IA Act.[69] Thus, the assessment and permitting processes are integrated. As noted above, this integrated IA Act process applies to review panels for CERA and CNSC-regulated activities, but does not apply to panel reviews of offshore activities regulated under the Accord Acts.

While the current Project List is undergoing review and may be revised, it currently includes in-stream tidal projects of 50 MW or more, or other tidal projects of 5 MW or more.[70] As offshore wind turbine farms become increasingly viable in Canada, it is possible that some of the associated activities will be included on the Project List, particularly for large scale arrays.

If an IA is not triggered for the ORE or OPL project, the Commission must take into account specific enumerated factors when considering the application for an authorization.[71]

As noted, CERA's new ORE regime is incomplete. It does not address land/spatial rights issuance and tenure. Presumably, this component of the regulatory regime will follow in the form of separate legislation, rather than additions to CERA as Bill C-69 winds through the legislative process, or amendments after CERA has been enacted. In this regard, Natural Resources Canada (**NRCan**) is currently "developing a supportive policy framework for administering marine renewable energy measures in the federal offshore through the Marine Renewable Energy Enabling Measures program,"[72] which was put in place in November 2011.[73] As the federal department responsible for the marine renewables program,

66 *CERA*, *supra* note 4, s 298.
67 *Ibid*, ss 297-298, 301-304.
68 *IA Act*, *supra* note 3, ss 47(1), 51(3).
69 *CERA*, *supra* note 4, s 299.
70 Project List, *supra* note 8, at Schedule, ss 2(b), (3)(b).
71 *CERA*, *supra* note 4, s 298(3).
72 Natural Resources Canada, "Report on Plans and Priorities, 2016-2017" (2016) at 47, online: <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/plansperformancereports/rpp/2016-2017/pdf/NRCan_RPP_2016-17-eng.pdf>.
73 Michael Paunescu, Natural Resources Canada, "Marine Renewable Energy: Global and Canadian Overview", Presentation to IEA-RETD Workshop (27 September 2012) at 11-12, online: <http://iea-retd.org/wp-content/uploads/2012/10/11-Paunescu-Canada1.pdf>.

it is possible that NRCan will ultimately be tagged to run the land rights issuance process. Further, if the incorporation of the COGOA operations model into CERA's ORE regime is any indication, it may be that the CPRA land tenure model forms the basis for the federal ORE land tenure regime. As noted above, both COGOA and CPRA form the basis for the Accord Acts. However, this aspect of the federal ORE regime remains unknown at the time of writing.

CERA's new ORE provisions facilitate the potential for sustainable economic development in Atlantic Canada. Ultimately, the development of an offshore renewable energy industry in Atlantic Canada will depend on much more than simply putting in place a regulatory regime. Market conditions and policy incentives will undoubtedly play a big role in how quickly the industry might develop and how successful it is. Yet the partial creation of a regulatory regime goes a long way to creating the legal and procedural certainty that project proponents require. However, as with the IA Act, much of the detail of the regime remains unknown, in the form regulations yet to be developed, and the development of legislation for land rights issuance. Since the Commission will have a great degree of discretion to regulate by attaching conditions to authorizations, the Commission's practices and policies will also be important. The degree to which Atlantic Canada will benefit from and participate in the regulation of renewable energy projects off the Atlantic provinces' coasts remains an open question.

Conclusion

Bill C-69 is a behemoth of legislative change, and many of its changes will have consequences for offshore energy projects in Atlantic Canada. This article has commented on only a few of those changes as they relate to offshore energy projects, largely from the point of view that the time, effort and cost of assessment processes in Canada has become problematic. This is not to say that other goals of reform are unimportant or are less important. In particular, EA processes have been challenging for Canada's Indigenous peoples and reconciliation is and should be a central important goal of reform. However, IA processes should also be scaled to the type of activity being assessed. Currently, the IA Act process seems unnecessarily rigid in this regard. There is also no clear explanation for the incongruities between the Commission and CNSC panel review approach, which provides for integrated assessment and permitting processes, and the offshore board approach, which does not. Whatever the reason, restricting the assessment of offshore activities to a single IA mechanism without exception does not seem to fit with the Liberal government's guiding principle of "one project – one assessment, with the scale of assessment aligned with the scale and potential impacts of the project."[74]

By contrast, the new but incomplete ORE regime in CERA represents a quiet step forward for Canada's emergent offshore renewable energy industry. While a joint federal-provincial regime would be preferable to disparate and potentially inconsistent regulations, some regulatory certainty in waters outside provincial territory is better than none. One hopes the Atlantic Canada provincial governments will become more engaged and form a cohesive front as the federal government moves towards completing the regime. ■

74 Discussion Paper, *supra* note 20 at 7.

ENVIRONMENTAL CLEARANCE AND AUTHORIZATION: A NEW FRAMEWORK FOR QUEBEC

*Ludovic Fraser**

The *Environment Quality Act*[1] (hereinafter *EQA*), the key legislation governing Quebec's environmental regime, had not been thoroughly reviewed or revised since it was passed in 1972. In June 2015, the Ministère du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques (MDDELCC) tabled a Green Paper to modernize the regime. Its aim was to "give Quebec a more clear, predictable, and effective regime while maintaining the strictest environmental requirements and standards."[2] Its real innovation was the creation of four environmental clearance mechanisms based on four risk levels (very low, low, moderate, and high). The government also wanted to "improve access to information, civic engagement, and transparency."[3]

We already knew the project's main points in June 2015. In the National Assembly on June 7, 2016, MDDELCC tabled Bill 102, *An Act to amend the Environment Quality Act to modernize the environmental authorization scheme and to amend other legislative provisions, in particular to reform the governance of the Green Fund* (hereinafter called the *AEEQA*).[4] The bill was passed on March 23, 2017, and its amendments will be phased in between March 23, 2018 and late 2018. The *AEEQA* affirmed the Green Paper's commitments. However, in view of the details yet to be addressed by regulation, it left many issues unresolved.

On February 14, 2018, MDDELCC issued 24 draft regulations to this end. While most sought only to make regulations consistent, others have substantially changed the way some activities are regulated and helped to implement environmental clearance mechanisms. The two main ones are the *Regulation respecting ministerial authorizations and declarations of compliance in environmental matters* (hereinafter called the RMADCEM)[5] and the *Regulation respecting environmental impact assessment and review for certain projects* (hereinafter called the REIAR).[6]

We will review the environmental impact of authorization and clearance mechanisms under the new regulations and address the new provisions on public access to industrial and environmental data. For conciseness, and given the scope of the new regulations, we will focus only on aspects affecting the energy sector. Since the *Act to implement the 2030 Energy Policy*[7] was passed in 2016, Quebec law has treated the mining (solid substances) and petroleum sectors (gaseous and liquid substances) separately.

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*Ludovic Fraser is a Quebec lawyer specializing in regulatory law for the energy sector, with a focus on electricity trading. He holds an MBA and a master's degree in energy law.

1 *Environment Quality Act,* LRQ, c Q-2 (EQA).

2 Quebec, Ministère du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques, "Green Paper - Modernizing the Environmental Authorization Scheme Under the Environmental Quality Act", (Gatineau: June 2015), online: <http://www.mddelcc.gouv.qc.ca/autorisations/modernisation/livreVert.pdf>.

3 *Ibid* at 13.

4 Bill 102, *An Act to amend the Environment Quality Act to modernize the environmental authorization scheme and to amend other legislative provisions, in particular to reform the governance of the Green Fund*, 1st Sess, 41st Leg, 2017.

5 *Regulation respecting ministerial authorizations and declarations of compliance in environmental matters*, (2018) GOQ II, 480 [*RMADCEM*].

6 *Regulation respecting environmental impact assessment and review for certain projects*, CQLR, c Q-2, r 23 [*REIAR*].

7 *An Act to implement the 2030 Energy Policy and to amend various legislative provisions,* LQ 2016, c 35, s 207.

However, given their close relation to the energy sector, our study will include mining issues. Lastly, we should note that at the time of writing, the regulations are still in the consultation stage and subject to change.

1. Authorization Mechanism Based on Risk Level

Section 20 of the new EQA (hereinafter called the *NEQA*) sets out the Act's key tenet, namely, that: "No one may emit, deposit, issue or discharge or allow the emission, deposit, issuance or discharge into the environment of a contaminant in a greater quantity or concentration than that provided for by regulation of the Government."[8] Compliance with the Act is now classified by risk level, and the new regulations set out applicable procedures and required information.

See table 1 below.

1.1. Very Low Risk

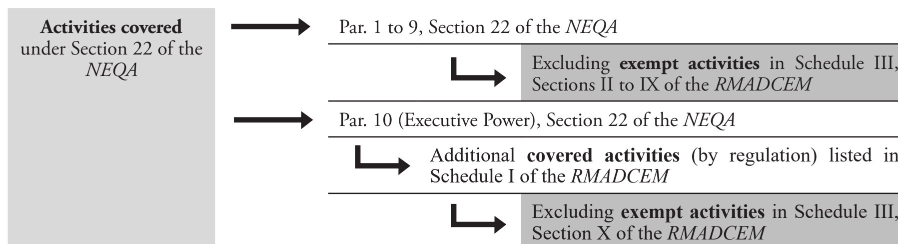
Some activities are exempt from ministerial authorization,[10] in particular the Environmental Impact Assessment and Review Process or EIARP. Exemptions fall into two categories based on the source of the exemption. Paragraphs 1 to 9 in the *NEQA* list activities that require ministerial authorization, while Paragraph 10 of the same section authorizes the government to include "any other activity determined by government regulation." Schedule I of the *Regulation respecting ministerial authorizations and declarations of compliance in environmental matters* (RMADCEM) identifies these activities, and the first category of exemption is listed in sections II to IX of Schedule III. The second category, in Section X of the Schedule, excludes by regulation some of the activities added by Schedule I of the same regulations.

See table 2 below.

Table 1 - New Authorization Process by Risk Level

Risk	Authorization	Accountability	Legal and Regulatory Sources
Very low	Exemption	N/A	- *NEQA*, Subsection 3, S. 31.0.11 and s. - *RMADCEM*, Schedule III
Low	Declaration of compliance	Proponent	- *NEQA*, Subsection 2, S. 31.0.6 and s. - *RMADCEM*, Part 3 and Schedule II
Moderate	Ministerial authorization	MDDELCC	- *NLQE*, Subsection 2, S. 22 and s. - *RMADCEM*, Part 2 and Schedule I
High	EIARP[9]	Government	- *NEQA*, Subsection 4, S. 31.1 and s. - *REIAR*

Table 2 - Sources of Exempt Activities



8 *Environment Quality Act*, CQLR, c Q-2, s 20 (*NEQA*).
9 Environmental Impact Assessment and Review Process.
10 *NEQA*, *supra* note 8, s 31.0.11.

While there are few energy sector exemptions in the first category, they include:

- Halocarbon recovery and reclamation projects[11]

- Storage of new petroleum products[12]

- Maintenance, upgrade, repair, or demolition projects for aspects of an air transport or power distribution network (under certain conditions)[13]

Exemptions in the second category include:

- Certain mining activities (staking, geophysical surveys, drilling, etc.) when they are part of a mineral exploration project[14]

- The following oil and gas activities:

  1° Installation of gas pipelines with a standard rated diameter of less than 300 mm, designed for pressures below 4,000 kPa

  2° Geophysical, geological, or geochemical surveys

  3° Temporary or permanent closure subject to the standards set out in the *Petroleum Resources Act* and its regulations[15]

Despite the exemption for a prior ministerial or government authorization, some exempt activities must be reported to the Minister. This information must include identifying information as well as a description of the activity and its location.[16] Failure to notify the Minister can incur an administrative monetary penalty of $500 for an individual or $2,500 in other cases.[17]

1.2. Low Risk

Low-risk activities are those "that have a minor environmental impact but may require mitigative action."[18] The proponent must "provide a declaration of compliance within 30 days before activity begins . . . and state that it will comply with all project conditions, restrictions, and prohibitions"[19] and "is not likely to destroy or otherwise damage a threatened or vulnerable animal species,[20] a threatened or vulnerable plant species,[21] or a plant or animal species likely to be designated threatened."[22]

The declaration must contain the same information as for very low-risk activities,[23] and in some cases be signed by a professional or other qualified person in the field.[24]

Schedule II of the *RMADCEM* lists low-risk activities and their specific conditions. None of these activities relates directly to the energy sector. In the mining sector, a declaration of compliance can be given for mineral exploration drilling (even in wetlands and water environments)[25] if the information for Section 23, Schedule II is included and specified conditions are met.

1.3. Moderate Risk

Projects with moderate-risk activities must obtain ministerial authorization through the following process:

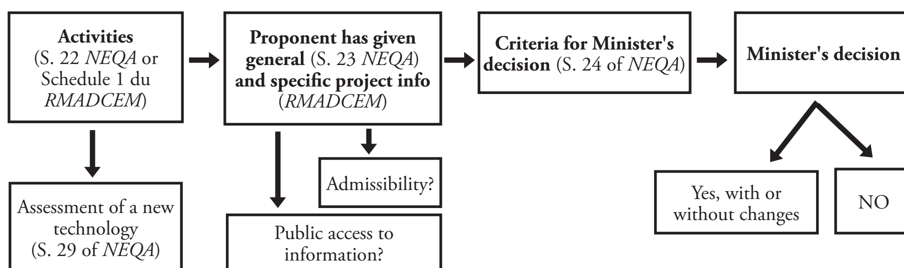
See table 3 on page 54.

Required Information

First, the proponent must provide the

11 *RMADCEM*, *supra* note 5, s 5, Schedule III.
12 *Ibid*, s 8, Schedule III.
13 *Ibid*, s 11, Schedule III.
14 *Ibid*, s 37, Schedule III.
15 *Ibid*, s 38, Schedule III.
16 *Ibid*, s 86.
17 *Ibid*, s 90.
18 *Supra* note 2 at 37.
19 *NEQA*, *supra* note 8, s 31.0.6.
20 Covered by the *Regulation respecting threatened or vulnerable wildlife species and their habitats*, CQLR, c E-12.01, r 2.
21 *Ibid*, r 3.
22 Covered by the *List of plant and animal species likely to be designated threatened or vulnerable*, CQLR, c E-12.01, r 5.
23 *RMADCEM*, *supra* note 5, s 82.
24 *NEQA*, *supra* note 8, s 31.0.7.
25 *RMADCEM*, *supra* note 5, Schedule II, s VII.

Table 3



information required under the *NEQA* (i.e. description of activities as well as and the nature, quantity, concentration, and location of all contaminants that may be released into the environment).[26]

Then, the *RMADCEM*[27] provides other lists of information to include in an application. These lists fall into two categories. The first (see Section 7) is a "common core" list for all covered activities. The most problematic required information includes:

- 5° A full list of project activities that require the Minister's authorization, that need a declaration of compliance, or that are exempt
- 6° A detailed site description (environmental characteristics, location of all buildings, infrastructure and facilities, presence of protected or threatened plant or animal species, etc.)
- 7° An interior plan for each building (including production or generating equipment, wastewater and air emission treatment plants, loading and unloading areas, storage sites, discharge or emission points, etc.)
- 8° a) Nature and methods of the activity (including technical and operational details) for all project phases
- 12 ° Activity's expected impact on the environment and the health of humans and other species, and proposed mitigation measures
- 14° Information and records for related greenhouse gas emissions where applicable (we'll come back to the Climate Test)
- 17° When the applicant has used the services of professionals or other qualified people to prepare the project or the authorization request, their names and contact information, a brief description of their mandates, and a statement confirming that their information and records are complete and accurate

These aspects are problematic in terms either of application or lack of clarity. For instance, can the Minister ask the proponent for information on the professionals without breaching confidentiality? Another example: It is hard to gauge the presence of wildlife species within 300 metres of the site because animals, unlike plants, tend to travel and migrate. Also, what facilities need to be listed in the site plan and how much detail is required? Do we include facilities with no environmental impact? Similarly, what is the expected impact on human health (physical or mental)? At the activity site or within a certain radius? We don't yet know how such information would be used.

The second category, in sections II to XXIII, lists information needed for certain activities.

Note: If the party requesting ministerial authorization has already given the information

26 *NEQA*, *supra* note 8, subs 23(1).
27 *RMADCEM*, *supra* note 5, Part I, c II.

required under the Environmental Impact Assessment and Review Process, it does not need to be given again for the application to be admissible.[28]

The Minister will reject applications that do not have all required information.[29] The proponent must also send a copy to the municipality in question[30] and the documents will be published in the Minister's new register (we'll come back to this).

Criteria and Decision

The *NEQA* provides a non-exhaustive, non-weighted list of authorization criteria[31] that includes:

- Nature of the project and methods used
- Characteristics of the affected surroundings
- Nature, quantity, concentration, and location of all contaminants that may be released into the environment
- Strategic environmental assessment findings, where applicable
- Project-related greenhouse gas emissions and any required reduction measures (if prescribed by regulation, see the Climate Test section below)
- The risks and expected impact of climate change on the project and its surroundings, accommodation measures where applicable, and Quebec's greenhouse gas reduction commitments

In issuing an authorization, the Minister may set further environmental protection conditions, restrictions, or prohibitions if it is felt existing ones are inadequate for the host environment or cannot protect human health or the health of other species.[32] While these conditions or restrictions may relate to things listed in Section 25 of the *NEQA*, they typically concern measures to reduce the activity's environmental impact.

Lastly, the *RMADCEM* has procedures to amend[33] and renew[34] an authorization. An authorization may need to be amended if a change occurs that could increase the activity's environmental impact.[35] The procedure consists mainly of explaining the nature of the change and its environmental impact. However, proponents must also provide accurate and updated information and data.[36] Proponents applying for ministerial authorization often lack precise data on, for example, GHG emission levels, whether they are based on assumptions and estimates, etc. When updating an application, the proponent may no longer provide only these estimates. In the event of a large disparity between real data and estimates submitted for ministerial authorization, is there accountability? At the very least, we suspect no authorization is granted.[37] The Minister could also impose new conditions and restrictions.[38]

Covered Activities

As noted earlier, Section 22 of the *NEQA* has a preliminary list of moderate-risk activities that need ministerial authorization. These include:

1° Operation of an industrial plant

2° Any removal of water, including work and projects where this is required

3° The building, modification, or expansion of a water management or treatment facility, and the setup and operation of any other water treatment equipment or device to prevent, reduce, or stop the release of contaminants into the environment or a sewer system

28 *RMADCEM*, *supra* note 5, subs 7(2).
29 *NEQA*, *supra* note 8, subs 23(4).
30 *Ibid*, subs 23(5).
31 *Ibid*, s 24.
32 *NEQA*, *supra* note 8, s 26.
33 *RMADCEM*, *supra* note 5, ss 68, 69.
34 *Ibid*, c IV.
35 *NEQA*, *supra* note 8, s 30.
36 *RMADCEM*, *supra* note 5, subs 68(1), para 6-7.
37 *NEQA*, *supra* note 8, s 31.0.3.
38 *Ibid*, subs 30(2).

4° Any project, construction, or other activity in wetland or water environments

5° Management of hazardous materials

6° Setup and operation of equipment or devices to prevent, reduce, or stop the release of contaminants into the atmosphere

7° Building and operation of a waste disposal facility

8° Building and operation of a waste diversion facility, including storage and treatment of waste materials for this purpose

9° Any construction on the site of a now-decommissioned waste disposal facility, or any project to change the use of such a site

10° Any other activity determined by government regulation

If a project has other activities that may release contaminants into or change the quality of the environment, the following must also be authorized:

1° Construction of an industrial plant

2° Operation of an industrial plant other than those covered in Paragraph 1°, Subsection 1

3° Use of an industrial process or procedure

4° Increased production of a product or service

Paragraph 10, Section 22 of the *NEQA* authorizes the Minister to add activities, and there are more than 31 additional activities in Schedule I of the *RMADCEM*. Things indirectly affecting the energy sector include: bulk water removal;[39] quarries and sandpits;[40] road infrastructure construction or modification;[41] ditch, drainage, or sewer projects;[42] contaminated soil (including disposal, storage, and treatment sites);[43] and combustion equipment.[44]

Activities directly affecting the energy sector include the following:

Mining

Under the *RMADCEM*, all mining activities need ministerial authorization.[45] The proponent must also provide the additional information listed in Section XI.[46]

Oil and Gas

1° Stratigraphic sounding

2° Well drilling and re-entry

3° Well completion

4° Fracturing or fracking

5° Tests for hydrocarbon extraction and underground tank use

6° Well workover

7° Pipeline construction or use

8° Any other oil and gas-related activity[47]

This includes specific information from Section 40 of the *RMADCEM*, including technical programs for each project phase, initial site and soil characteristics, soil production and detection programs, and, most importantly, notice of public consultation.

Oil and Coal Processing

1° Oil refinery

2° Petrochemical manufacturing and processing plant

39 *RMADCEM*, *supra* note 5, Schedule I, s I.
40 *Ibid*, s III.
41 *Ibid*, s XVIII.
42 *Ibid*, s XXI.
43 *Ibid*, s XXVII.
44 *Ibid*, s XXXI.
45 *Ibid*, s II.
46 *Ibid*, s XI.
47 *Ibid*, s 6.

3° Industrial gas manufacturing and processing plant

4° Oil processing plant

5° Coal/charcoal production and processing plant[48]

Power Transmission, Transformation, and Storage

Any project involving:

1° The construction, relocation, and operation of a control or transformer station and a system to store electricity at a voltage of 120 kV or higher

2° The construction and relocation of power transmission and distribution lines with a voltage of 120 kV or more and of other high-voltage lines that are longer than 2 km.[49]

Power Generation

Any project to build, operate, or upgrade:

1° A wind farm or a wind turbine with a capacity of at least 100 kW

2° A solar power plant with a rated capacity of at least 10 kW

3° A fossil fuel power plant

4° A hydro-electric power plant

This does not include the replacement or modification of technical equipment for such plants if it does not lead to management changes.[50]

Climate Test

The *RMADCEM* requires ministerial authorization for any person planning to, among other things:

4° Develop a mine with a daily ore extraction capacity of at least 2,000 metric tonnes

5° Build an ore processing plant with a daily capacity of at least 2,000 metric tonnes

6° Use equipment, a process, or a facility for oil and gas exploration

10° Use equipment or a process to make hydrogen from natural gas or other fossil fuels

11° Use equipment to process natural gas

14° Make and process biogas when the equipment's daily capacity is at least 30,000 cubic metres of methane[51]

Section 64 of the *RMADCEM* requires the proponent of a project undergoing the Climate Test to provide certain information (e.g., GHG quantification report, GHG reduction measures, and "evidence that greenhouse gas reduction has been considered and optimized in the choice of variant.").[52]

Of course, "a project's greenhouse gas emissions and measures to reduce them are considered when reviewing an application [for ministerial authorization]."[53]

Comments and Feedback

First, the term "quantification report" suggests the Minister requires exact data rather than just a model. Second, consideration of these factors does not necessarily mean a project will be cancelled based solely on GHG emissions. Third, while there must be a report for each phase, i.e. "all stages of a project, including planning, construction, operation, closure, and post-closure,"[54] this does not consider GHG emissions from third-party activities (e.g., gas use made possible by construction of a pipeline). Fourth, those who emit 25,000 metric tonnes of GHG per year already have similar requirements under the *Regulation respecting mandatory reporting of certain emissions of contaminants into the atmosphere*.[55] Lastly, we wonder if it makes sense to subject renewable (clean) energy producers to the

48 *Ibid*, s 10.
49 *Ibid*, s 21.
50 *Ibid*, s 22.
51 *Ibid*, Schedule IV.
52 *Ibid*, s 64, 7, para 14.
53 *Ibid*, subs 63(3). Also see subs 24(5).
54 *Ibid*, s 3.
55 *Regulation respecting mandatory reporting of certain emissions of contaminants into the atmosphere*, RLRQ Q-2, r. 15.

Climate Test. Why aren't they exempt?

1.4. High Risk

The environmental impact assessment and review process is for projects with "complex or large-scale activities that raise serious environmental or social concerns and require mitigation measures"[56] and whose acceptability depends in part on a public process. No proponent may conduct activities set out in the *REIAR* without following the environmental impact assessment and review process and obtaining government approval.[57] The new procedure improves environmental protection by covering more activities and ensures a more transparent process through access to information, greater public participation, etc.

Unlike with lower-risk activities, the authorization process is determined largely by the *NEQA* rather than a regulation. While *REIAR* provides some assessment process details, its greatest contribution is the list of covered activities.

Activities relating directly to energy include:

2. Dams and breakwaters

7. Natural gas or biomethane re-gasification or liquefaction facilities

    - The coverage threshold for a natural gas liquefaction facility is a daily capacity of 100 cubic metres[58]

8. Oil and gas pipelines

    - Pipelines that are at least 2 km long are covered unless they are in an existing right-of-way that serves the same purpose, are less than 300 mm in diameter, and have a pressure below 4000 kPa[59]

9. Power transmission lines and transformer stations

    - Does not include transmission lines located in or next to a road or railway right-of-way[60]

10. Power generation

    - Does not apply to solar panels installed on the roof of existing infrastructure[61]

12. Oil and gas exploration and development[62]

13. Oil, gas, and coal processing[63]

37. Certain greenhouse gas emissions[64]

    - Facility emitting 100,000 metric tonnes or more per year of greenhouse gas (CO_2 equivalent)[65]

The government may occasionally subject non-listed activities to the EIARP when:

1° It feels that the project may raise significant environmental issues and public concerns warrant it

2° The project will involve a new technology or type of activity with a major projected environmental impact

3° It feels the project will pose serious climate change issues[66]

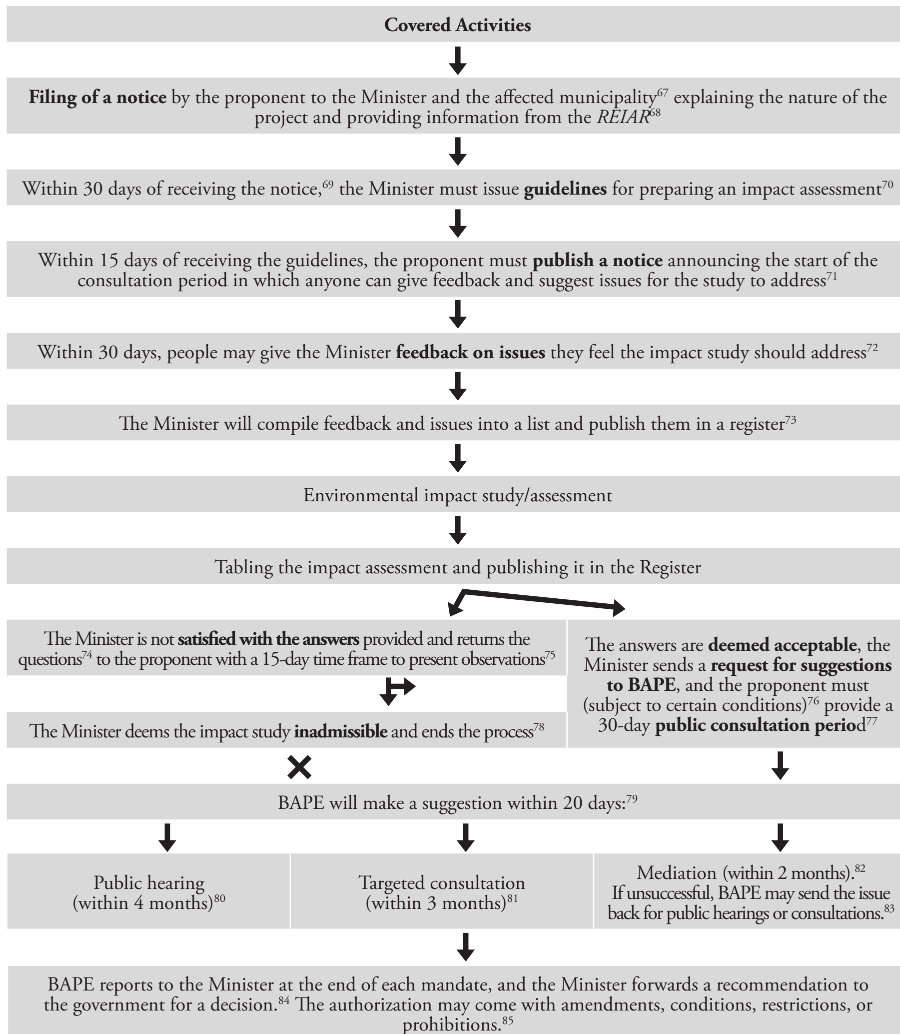
See table 4.

Comments and Feedback

An interesting aspect of the authorization

56 *Supra* note 2 at 29.
57 *NEQA*, *supra* note 8, s 31.1.
58 REIAR, *supra* note 6, Schedule 1, s 7(1).
59 *Ibid*, s 8.
60 *Ibid*, s 9.
61 *Ibid*, s 10.
62 *Ibid*, s 12.
63 *Ibid*, s 13.
64 *Ibid*, s 2.
65 *Ibid*, s 37.
66 *NEQA*, *supra* note 8, s 31.1.1.

Table 4 - Environmental Impact Assessment and Review Process



67 *Ibid*, s 31.2.
68 REIAR, *supra* note 6, s 3.
69 *Ibid*, s 4. The time frame may be 45 days in some cases.
70 *NEQA*, *supra* note 8, s 31.3.
71 *Ibid*, s 31.3.1.
72 REIAR, *supra* note 6, s 8.
73 *NEQA*, *supra* note 8, subs 31.3.1(2); REIAR, *supra* note 6, s 8.
74 *Ibid*, s 31.3.3.
75 *Ibid*, subs 31.3.4(3).
76 If it seems clear that there will be a public hearing, the consultation phase will be bypassed. *Ibid*, subs 31.3.5(6).
77 *Ibid*, s 31.3.5; REIAR, *supra* note 6, s 10-14.
78 *Ibid*, s 31.3.4.
79 *NEQA*, *supra* note 8, subs 31.3.5(5); REIAR, *supra* note 6, s 15.
80 REIAR, *supra* note 6, subs 17(1), para 1.
81 *Ibid*, subs 17(1), para 2.
82 *Ibid*, subs 17(1), para 3.
83 *NEQA*, *supra* note 8, s 31.3.6.
84 *Ibid*, s 31.0.3, 31.3.7.
85 *Ibid*, s 31.5.

process is that when decisions concern oil and gas, the government must consider the Régie de l'énergie.[86] However, the article does not note the degree to which its decision must be in line with that of the Régie.

The government may also, in the "public interest," exclude a project from the impact study[87] without defining what the public interest is.

The Minister may exclude information or data on industrial processes, national security, or the location of threatened or vulnerable species from public consultations.[88] The term "industrial processes" is not defined and we have no criteria for excluding such information.

Lastly, as the environment is an area of shared responsibility,[89] other authorities may have jurisdiction over projects covered by the EQA. The Minister may consult with these authorities to coordinate environmental assessment procedures.[90]

2. Right of Access to Industrial and Environmental Information

The Minister keeps a register of declarations of compliance, ministerial authorizations,[91] and projects requiring an EIARP,[92] which includes each application (issuance, modification, renewal, etc.) and all supporting documents.[93] The Minister's diligence[94] will help to make all these records accessible to the public.[95] Information on administrative penalties[96] and convictions[97] is also recorded and available to the public,[98] as was the case under the old system. The aim of creating and publishing the register is to give the public all information needed to determine a project's issues and form an opinion, especially during public consultations and impact studies.[99]

However, information is not published if it is likely to, among other things,[100] impede an investigation[101] or undermine national security,[102] or if it concerns a weapon or method that may be used to commit a crime or offence.[103] When applying for ministerial authorization, project proponents can identify information they consider an industrial or commercial secret but must explain why.[104] The Minister will have complete discretion to approve or reject the application. The onus is on the proponent to identify and, most importantly, defend and justify each exemption, though the new EQA and regulations provide no definitions or criteria. *An Act respecting access to documents held by public bodies and the protection of personal information*[105] provides such criteria[106] but the government has not wished to refer to them.

Conclusion

The new regulations have not made the regulatory framework more "clear and effective" as the government had promised. While the old system had just two mechanisms and made an assessment for each project, environmental compliance is now determined for each activity within a project. This makes regulations and procedures more cumbersome

86 *Ibid*, s 31.5.
87 *Ibid*, s 31.7.4.
88 *Ibid*, s 31.8.
89 Gérald A Beaudoin, *La constitution du Canada : Institutions, Partage des pouvoirs, Charte canadienne des droits et libertés*, 3rd ed (Montreal : Wilson & Lafleur, 2004) at 359.
90 *NEQA*, *supra* note 8, s 31.8.1.
91 See *NEQA*, *supra* note 8, ss 23, 23.1; *RMADCEM*, *supra* note 5, s 6.
92 *REIAR*, *supra* note 6, s VI.
93 *NEQA*, *supra* note 8, ss 118.5-118.6.
94 *Ibid*, s 118.5.3.
95 *Ibid*, s 118.5-118.5.3; *RMADCEM*, *supra* note 5, s 8.
96 *Ibid*, s 118.5.1.
97 *Ibid*, s 118.5.2.
98 *Ibid*, s 118.5.3.
99 See ss 31.3.1 and 31.3.2 of the *NEQA*, *supra* note 8, on impact assessments.
100 *NEQA*, *supra* note 8, s 118.5.3.
101 *An Act respecting access to documents held by public bodies and the protection of personal information*, CQLR, c A-2.1, s 27.
102 *Ibid*, s 28.1.
103 *Ibid*, s 29.
104 *NEQA*, *supra* note 8, s 23.1; *RMADCEM*, *supra* note 5, s 6. Section 31.9 of the *NEQA* is similar for public consultations.
105 *Supra* note 101.
106 *Ibid*, ss 23-24.

for the proponent, who must now:

1. Break the project down into its separate activities, from planning to post-closure

2. List all activities that may release any "contaminant whose presence in the environment is prohibited by regulation or likely to harm human life, health, safety, well-being or comfort, cause damage, or otherwise hurt the environment, ecosystems, living species, or property"[107]

3. Classify these activities by risk level[108]

4. Follow the applicable authorization process

This "activity-based" approach requires more regulations. These clearance and authorization mechanisms address many key energy industry activities, including the protection of water sources and wetlands, which are well covered by the new framework (through legislative changes,[109] the *RMADCEM,*[110] and the *REIAR*[111]). Proponents must also consider the new regulatory framework for "industrial facilities."[112] Lastly, any transformation of the environmental impact assessment process will involve legislative[113] and regulatory[114] changes to BAPE's jurisdiction and hearing rules, which must of course be closely reviewed by the project proponent. ■

107 *NEQA*, *supra* note 8, s 20.
108 *RMADCEM*, *supra* note 5, s 7, para 5.
109 Via the *NEQA* (s 46 in particular) and other laws.
110 Water bulk removal, management, or treatment, *RMADCEM*, *supra* note 5, ss III, IV; *NEQA*, *supra* note 8, s 22.
111 Including wetland/water environment projects and river or lake diversions, REIAR, *supra* note 6, Part II, ss 1-2.
112 *NEQA*, *supra* note 8, subs 22(1), (2), par. 2 & s III; *RMADCEM*, *supra* note 5, s II.
113 See *NEQA*, *supra* note 8, c II.1.
114 Quebec, *Rules of procedure for public hearings of the Bureau d'audiences publiques sur l'environnement.*

EFFECTIVE UTILITY REGULATION: A UNIFYING CAUSE FOR A DIVIDED AMERICA

*Scott Hempling**

The U.S has 50 sovereign states, five inhabited territories and 3.8 million square miles, with 320 million people and plenty of political differences. Yet across this diverse and divisive land, from Maine to New Mexico to Washington to Florida, the principles and practices of utility regulation are held in common. Why? Here are nine possible answers—each one a lesson for the nation's leaders.

1. We don't build walls. One of the 20th century's greatest engineering achievements was the electrification of America. Electrical interconnection made America great. Interconnection brought integration—of diverse power sources from diverse markets. Supporting that electrical integration today is institutional integration—regional transmission organizations, formed by the broad-minded: government-owned and investor-owned utilities; independent producers, transmitters and marketers; conventional and renewable sources; centralized and dispersed sources; industrial, commercial and residential customers. Big-tent thinking.

Breaking down walls, regulators build unity from diversity. That diversity promotes short-term economic efficiency (by substituting low-cost power for high-cost power), long-term cost savings (by making winter peaking capacity available for summer peak loads), clean air (by displacing high-polluting sources with low-polluting sources) and mutual support (as teams from fair-weather regions help restore service in storm-ravaged regions). Diversity supports a common goal: a reliable, low-polluting infrastructure for a national economy. None of this could happen without regulation—the principles and practices that align self-interest with the public interest. In regulation, we don't build walls. We build connections, because success comes not from artificial isolation but from joint performance.

2. We don't discriminate. Ever since the Interstate Commerce Act of 1887[1], every regulatory statute has prohibited discrimination. Immigrant or native; Jewish, Christian, Muslim, Hindu, atheist or agnostic; red, purple or blue: Regardless of race, ethnicity, age or sexual orientation, every like customer receives like service on like terms. Microeconomics 101 tells us why: For the economically powerful, discrimination is tempting because discrimination is profitable. So we ban discrimination, because the discriminator's profit is made not from merit but from extraction. Regulation does honor differences—rate structures vary with load size, load shape and geographic location, because different customer-types cause different costs and bring different benefits. So regulation is like the U.S. Constitution: It prohibits discrimination for economic profit, just as the Constitution prohibits discrimination for political profit.

3. We make tax returns public. Cost-based

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* Scott Hempling is an attorney and expert witness. He has advised regulatory and legislative bodies throughout North America, and is a frequent speaker at international conferences. Hempling is an adjunct professor at Georgetown University Law Center, where he teaches courses on public utility law and regulatory litigation. His book, Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction, from which portions of this article are drawn, was published by the American Bar Association in 2013. He has also authored a book of essays on the art of regulation, Preside or Lead? The Attributes and Actions of Effective Regulators. Hempling received a B.A. cum laude from Yale University in (1) Economics and Political Science and (2) Music, and a J.D. magna cum laude from Georgetown University Law Center. More detail is at www.scotthemplinglaw.com.

1 *Interstate Commerce Act of 1887,* Pub L No 49-104, 24 Stat 379.

ratemaking means basing rates on cost. Taxes are a cost. If utilities want their rates to recover their costs, they must disclose their taxes. Disclosure exposes excess profits, conflicting business ventures and undue financial risks. Disclosure reveals the facts that help the public hold their utilities accountable.

4. We don't fake facts. With billions of dollars at stake and profits to make, players on the regulatory field have incentive and opportunity to exaggerate, over-promise, distract and deceive. It happens in regulation as it does in politics. But effective regulation makes the truth-hiders and fact-deniers accountable. Witnesses have to work under oath, cross-examiners are trained to expose the distortions, and regulatory decisions emerge as signed orders with transparent explanations subject to appellate review. If everyone does his or her job, "alternative facts" have short lives and those who repeat them or tweet them have short careers. (That "if" is important: Witnesses must be expert witnesses, not billboard advertisers; cross-examiners must aim for the jugular, not clip toenails; commission opinion-writers must cite hard facts rather than copy applicants' soft claims; and reviewing courts must call out soggy reasoning rather than hide behind "judicial deference.")

5. We honor science. Investigation, facts, reinvestigation, more facts. Everything we know about electricity production, water pumping, data transmission, gas molecules, pipelines, transmission lines—we learned it all from science. Utility service seems like magic, but it's not. Turn on the toaster and 500 miles away a generating plant puffs out smoke. Utility service is not magic, it is science; and climate change is not a hoax, it is science. When 320 million lives depend on utility services, regulators lack the luxury of dismissing science.

6. We pay for the present and invest in the future. Responsible regulators don't ask "How low can I set rates to ensure my re-appointment?"; they ask "What dollars do we need to make the system strong?" To responsible regulators, legislators who cut taxes while leaving children under-educated and bridges unrepaired are a remote genus in the policymaking animal kingdom. Enlightened regulators talk of "revenue requirement," not "rate burden," just as enlightened legislators talk of "tax responsibility" rather than "tax burden." (See George Lakoff, *Don't Think of an Elephant: Know Your Values and Frame the Debate* (2004).)

7. We don't use government positions to pad family profits. Thanks to longstanding, universally accepted rules, regulators do not invest in businesses affected by their official decisions. Nor do their children. No exemptions.

8. We don't personalize. I have known, worked with and testified before hundreds of regulators. Plenty of egos, ambitions and sensitivities. Like normal human beings. But I have never seen a regulator conflate his position with his person. No regulator tells a legislature "Don't change my statute," or tells a court "Don't reverse my ruling," or tells a reporter "Don't underestimate my support." No regulator tells a witness "Don't tell me what I don't want to hear." There is no regulatory version of "*L'État, c'est moi*." That separation of position from person, that placement of institution above ambition, is repaid with trust and respect. Hundreds of decision-makers affect billions of dollars, yet the regulatory community is remarkably free of gossip, backbiting, leaks and recriminations. We prize our professionalism, so we act like professionals.

9. We know our decisions aren't "the greatest." Regulation has its faults and makes its mistakes. Ask the South Carolinians about the Summer nuclear plant, the Georgians about the Vogtle nuclear plant, the Long Islanders about the Shoreham nuclear plant. Ask the Mississippians about the Kemper coal gasification plant, and the Californians about the San Bruno gas pipeline explosions. Ask the internet users who now face discrimination from the FCC's undoing of net neutrality; the schoolchildren whose download speed is less than South Korea's. Ask the National Association for the Advancement of Colored People, whose groundbreaking work on asthmatic children is forcing a rethinking of where we place our power plants.[2]

Effective regulators don't say they're "the greatest"; they avoid adjective and adverbs in favor of facts and logic. They own their decisions and admit their errors. If they want to unify the nation, if they want to keep America great, they have no choice. ■

2 National Association for the Advancement of Colored People, Press Release, "Fumes Across the Fence-Line, A New Study by NAACP, Clean Air Task Force, and National Medical Association" (14 November 2017), online: <http://www.naacp.org/>.

OEB ISSUES ITS FINAL REPORT ON WIRELINE POLE ATTACHMENT CHARGES

*David Stevens**

On March 22, 2018, the Ontario Energy Board ("OEB") issued its Final Report on Wireline Pole Attachment Charges[1] (the "Final Report") setting the amount that telecom carriers will pay to attach wirelines to electricity poles. In the Final Report, the OEB has set a province-wide charge of $43.63 per pole/per attacher/ per year. The updated charge will apply to all electricity distributors that do not currently have an OEB-approved utility-specific wireline pole attachment charge.[2] This is said to impact around 10 per cent of the province's electricity distribution poles, because there are current utility-specific wireline pole attachment charges approved by the OEB for Hydro One ($41.28), Toronto Hydro ($42.00), Hydro Ottawa ($53.00) and InnPower ($38.82), which together own about 90 per cent of the electricity poles in Ontario.[3] The OEB's determinations only apply to wireline pole attachments. Wireless attachments to electricity poles continue to be subject to market-based pricing, as described below.

Background

Pole attachment charges ensure that Canadian "Carriers" (as defined by the *Telecommunications Act*[4]) attaching to electricity poles pay an appropriate share of the cost of buying, installing and maintaining the poles. The revenues received by electricity distributors (for both wireless and wireline pole attachments) are credited in whole or in part to utility ratepayers who have paid for the installation and upkeep of electricity poles through their delivery rates.

The pole attachment fees to be charged to Carriers for pole attachments were previously approved by the OEB in a generic proceeding in 2005 (the "CCTA" case).[5] In that case, the OEB decided that all licensed electricity distributors shall provide access to their power poles to all Carriers (including cable companies). The OEB also decided that the same "pole attachment rate" should apply for all distributors, and to all Carriers. There was significant debate about the method to be used to calculate the appropriate "pole attachment rate". The OEB decided that the rate should take account of the "incremental or direct" costs of attachment, as well as a portion of the fixed or common costs of each power pole. Taking all of this into account, the OEB ordered that the "pole attachment rate" would be $22.35 per pole per year.[6] This was to be included as a condition to each electricity distributor's licence.

There have been a number of OEB rate proceedings in recent years where wireline pole

*David Stevens is a partner at Aird & Berlis LLP, and is an editor and contributor for EnergyInsider.ca.

1 Ontario Energy Board, *Wireline Pole Attachment Charges*, EB-2015-0304, (Toronto: OEB, 22 March 2018) ("Final Report").

2 Ontario Energy Board, Backgrounder, "OEB updates province-wide wireline pole attachment charge", 22 March 2018.

3 Final Report, *supra* note 1 at 4.

4 *Telecommunications Act,* SC 1993, c 38.

5 *Application pursuant to section 74 of the Ontario Energy Board Act, 1998 by the Canadian Cable Television Association (CCTA) for an Order or Orders to amend the licenses of electricity distributors*, RP-2003-0249.

6 *Decision and Order* (2005), RP-2003-0249 (OEB).

attachment fees have been an issue (including Toronto Hydro[7], Hydro One[8] and Hydro Ottawa[9] rate applications).

In the Toronto Hydro and Hydro One cases, Carriers argued that the OEB does not have jurisdiction to set the charges for pole attachments pursuant to the rate setting provisions of the *OEB Act* (section 78).[10] The Carriers argued that this is not an electricity rates issue. The OEB decided in the Toronto Hydro case that it does have jurisdiction under section 78 because pole attachment rates are incidental to the distribution of electricity as the poles are an essential facility properly considered while setting rates.[11]

These recent rate applications have set relevant wireline pole attachment fee amounts for the applicant utilities, based on the evidence presented in each case. The determinations (or settlements) were made by use of the methodology for calculating wireline attachment fees that was adopted in the 2005 CCTA case. These proceedings did not determine the question of whether the generally applicable methodology for determining wireline pole attachment fees should be updated.

The OEB's "comprehensive policy review"

In November 2015, the OEB commenced a generic process to determine the approach to set future wireline pole attachment fees.[12] According to the OEB, its review of pole attachment fees planned to consider the methodology to be used to determine charges, including the appropriate treatment of revenues that the Carriers may receive from third parties for allowing additional cables to be attached to existing cables (referred to as "overlashing"). An earlier case comment published in Energy Regulation Quarterly[13] discussed the process that the OEB launched to undertake to review these fees, with assistance from a stakeholder working group (the "Pole Attachment Working Group" or "PAWG") and an expert consultant.

Over the course of the OEB's review process, the PAWG met four times, and an expert (Nordicity Group Ltd.) was retained to provide a report summarizing the current pole attachment landscape within Ontario and recommend an appropriate framework methodology for setting wireline pole attachment charges. Nordicity's report, entitled the "OEB Wireline Pole Attachment Rates and Policy Framework"[14] (the "Nordicity Report"), was released on December 18, 2017 in conjunction with a draft OEB Report on policies for wireline pole attachment rates charged by electricity distributors.

The Nordicity Report addressed relevant regulatory decisions, pole attachment data and findings from meetings of the working group. It recommended an appropriate framework methodology for setting wireline pole attachment charges using 2005 to 2015 data to derive a new recommended province-wide wireline pole attachment rate. Nordicity recommended a province-wide rate (subject to circumstances in which a rate will be determined on a utility cost-specific basis) because it was not possible to determine accurately the cost per pole according to different geographic locations and because the examination of the data did not reveal major systemic cost differences.[15] Using an equal sharing methodology for the allocation of indirect pole-related costs, Nordicity calculated the province-wide pole attachment rate to be $42.19 per attacher.[16]

The OEB's Draft Report on a Framework for Wireline Pole Attachment Charges[17] (the "Draft

7 *Toronto Hydro-Electric System Limited Application for electricity distribution rates for the period from May 1, 2015 to December 31, 2019* (2015), EB-2014-0116 (OEB) [EB-2014-0116].
8 *Hydro One Networks Inc. Application for electricity distribution rates for 2015 to 2019* (2015), EB-2013-0416/EB-2014-0247 (OEB).
9 *Hydro Ottawa Limited Application for electricity distribution rates for the period from January 1, 2016 to December 31, 2020* (2015), EB-2015-0004 (OEB).
10 *Ontario Energy Board Act 1998*, SO 1998, c 15, Schedule B, s 78.
11 EB-2014-0116, *supra* note 7.
12 *Review of Miscellaneous Rates and Charges* (2015), EB-2015-0304 (OEB).
13 David Stevens, "Pole Attachment Charges – Ontario Energy Board Initiates a Comprehensive Review" (2016) 4:1 Energy Regulation Q.
14 Nordicity, *OEB Wireline Pole Attachment Rates and Policy Framework* (14 December 2017) (the "Nordicity Report").
15 *Ibid* at 73.
16 *Ibid* at 70.
17 *Draft Report of the Board Framework for Determining Wireline Pole Attachment Charges* (2017), EB-2015-0304 (OEB).

Report") agreed with much of the Nordicity Report, but it made certain adjustments to arrive at a provincial wireline pole attachment rate. Among other things, the OEB used six years of historical data (considered to be more reflective of current costs than Nordicity's 2005 to 2015 data) and it added an inflationary adjustment to escalate costs from 2015 dollars to 2018 dollars. In the result, the OEB came to an annual rate of $52.00 per attacher per year per pole (rounded down from $52.37), including inflation to 2018.[18] The OEB, in its Draft Report, said that this set of data and information represents more than 90 per cent of the "pole population" in the province and is considered to be one of the most comprehensive pole attachment data sets ever collected.[19]

After a comment period, the OEB issued the Final Report on March 22, 2018. The Final Report summarizes the process undertaken and, in large part, adopts the findings and recommendations in the earlier OEB Draft Report and Nordicity Report.

The OEB has determined that it is in the public interest to set a province-wide wireline pole attachment charge of $43.63.[20] The charge is calculated based on an allocation of "common costs" of electricity poles between electricity distributors and wireline attachers. The OEB's new wireline pole attachment charge ($43.63) is lower than the $52.00 recommended in the OEB's draft Report – the reduction arises from the OEB's decision to remove "vegetation management costs" from the pole attachment charge.[21]

Implementation of the OEB's Final Report

The new wireline pole attachment charge will apply to all licensed distributors that have not received OEB approval for a distributor-specific pole attachment charge (which is all distributors except the four named above).[22] The new charge will be implemented in two steps. From September to December 2018, the charge will increase to $28.09 (to represent an inflation increase from 2005). Then, on January 1, 2019, the new charge of $43.63 will apply. The wireline pole attachment charge will be adjusted annually based on the OEB's inflation factor commencing on January 1, 2020.

At their next cost of service rate application, distributors will have the option to adopt the then-current standard wireline pole attachment charge or to apply for a utility-specific rate, based on their own costs.

The OEB's Final Report directs distributors who are implementing the new wireline attachment charge to record incremental revenues in a new variance account related to pole attachment charges. The balance in the new account will be refunded to ratepayers in the distributor's next cost based rate application. The OEB will issue accounting directions related to the establishment of the variance account.[23]

As a later step, the OEB's Final Report promises "a follow-up policy consultation at a time to be determined". As part of this next review, the OEB indicates that it "will consider moving from a cost-based approach for establishing the pole attachment charge to a value-based approach, which is more reflective of a competitive market and the OEB's approach to wireless attachments."[24]

Wireless Pole Attachment Charges

The OEB's Final Report applies only to wireline attachments to electricity poles. It does not deal with attachments of wireless communication devices to electricity poles.

Until recently, the OEB set the charges for both wireline and wireless attachments. In the 2011 "CANDAS" proceeding,[25] the OEB was asked by the Canadian Distributed Antenna Systems Coalition ("CANDAS") to confirm that the CCTA decision applied equally to "wireless" attachments, as it did to "wireline" attachments. At that time, some

18 *Ibid* at 32.
19 *Ibid* at 10.
20 Final Report, *supra* note 1 at 4.
21 *Ibid* at 42-43.
22 *Ibid* at 51.
23 *Ibid* at 52.
24 *Ibid* at 5.
25 *Application by Canadian Distributed Antenna Systems Coalition for certain orders under the Ontario Energy Board Act, 1998* (2012), EB-2011-0120 (OEB).

distributors had taken the position that pole access did not need to be granted for "wireless" attachments. In its Decision on a Preliminary Motion in the CANDAS proceeding, the OEB confirmed that the findings in the CCTA decision, including the pole attachment rate and the associated requirement on distributors to provide access apply to both wireline and wireless attachments.[26]

Subsequently, Toronto Hydro brought an application to the OEB requesting that the OEB forbear from regulating the terms, conditions and rates for wireless attachments.[27] This would allow Toronto Hydro to charge competitive rates. A settlement agreement was reached and approved by the OEB, under which Toronto Hydro was permitted to provide access for wireless attachments to its poles on commercial terms normally found in a competitive market.[28] Toronto Hydro agreed that it would credit net revenue from wireless attachments against its revenue requirement.

Following the Toronto Hydro decision, the OEB initiated a consultation to consider whether all rate-regulated distributors should be permitted to charge market rates for attachment of wireless telecommunications devices to utility poles. [29] The responses received in that process generally supported allowing market rates. On July 30, 2015, the OEB issued a letter indicating that it has decided to allow distributors to charge market rates for wireless pole attachments.[30] Subsequently, the OEB amended the electricity distribution licences for each distributor to allow them to charge market rates to Carriers and cable companies for wireless pole attachments.[31] This means that those rates will not be regulated by the OEB.

While the rates to be charged for wireless pole attachments will not be regulated, that does not mean that the distributors can retain the associated revenues for their shareholders. Instead, the revenues will be credited as an offset to the distributor's revenue requirement. It is not clear whether the Board will adopt the suggestion made in the consultation that a distributor be allowed to retain a portion of the wireless pole attachment revenues, as an incentive to maximize the amounts received for the benefit of ratepayers.

Implications

In the immediate term, there will not be substantial impacts from the OEB's Final Report. Some distributors will transition to the new (higher) fee for wireline attachments over the next two years. However, as noted, the current fees charged for wireline attachments for most (90 per cent) electricity poles in Ontario have been approved in distributor-specific rate proceedings. In the coming years, those specific fees will have to be re-set as the relevant distributors rebase/reset their rates. At that time, the affected distributor may choose to adopt the then-applicable province-wide fees, or they may choose to have specific fees approved based on the allocation of their own costs using the methodology described in the Final Report. Therefore, over time, it can be expected that all distributors will be charging wireline pole attachment fees at least as high as the level indicated in the Final Report. This will benefit electricity ratepayers.

Whether regulators in other Canadian provinces adopt the OEB's approach remains to be seen. When Nordicity looked at pole attachment regulation several years ago, there was little consistency as to the level of oversight and approved fees for wireline attachments in other provinces.[32] It was clear, though, that any regulator-approved fees in other provinces were much lower than the amount approved by the OEB in the Final Report ($43.63 per pole/per attacher/per year). Should regulators in other provinces take a similar approach to that set out in the Final Report, then Carriers will find themselves paying substantially more. ■

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26 *Decision on Preliminary Issue and Order* (2012), EB-2011-0120 (OEB).
27 *Application by Toronto Hydro-Electric System Limited for an order pursuant to section 29 of the Ontario Energy Board Act,1998* (2014), EB-2013-0234 (OEB).
28 *Settlement Proposal* (2014), EB-2013-0234 (OEB).
29 *Re Wireless Attachment Consultation* (2014), EB-2014-0365 (OEB).
30 *Ibid.*
31 *Amending Rate-Regulated Electricity Distributor Licences to Authorize Market Rates for Wireless Pole Attachments* (2016), EB-2016-0115 (OEB).
32 Nordicity, *Pole Attachment Regulation, Canada,U.S.,U.K. and Other Jurisdictions* (March 2014) at 8-13.

A GUIDE TO ENERGY MARKET MANIPULATION

Edited by Gordon E. Kaiser

*Reviewed by A. Neil Campbell**

Despite its title, *The Guide to Energy Market Manipulation*[1] is not a how-to book for entrepreneurial energy traders! Rather, as Joseph Kelliher notes in the foreword, it is a first-of-its-kind survey of the developing law of market manipulation across nations and energy sectors that combines contributions from recognized experts in each area.[2] The editor and driving force behind the book is Gordon Kaiser, a former vice-chair of the Ontario Energy Board and long-time cochair of the Canadian Energy Law Forum. It has been published with high production values by Law Business Research.

Legislation and Jurisprudence

The core of the book consists of eight chapters which explain the regulatory frameworks and jurisprudence applicable to energy markets in the US, Canada, the EU and Australia.

In the US, the overlapping jurisdictional reach of the Federal Energy Regulatory Commission (FERC) and the Commodity Futures Trading Commission (CFTC) are set out thoroughly in chapters by Robert Fleishman and Paul Varnado and by Anthony Mansfield, respectively.[3] Fleischman and Varnado usefully go beyond the legal framework and identify several areas where there are unresolved issues regarding the substantive legal standards as well as controversial aspects of the FERC's practices. Mansfield's contribution is less specific to energy markets, reflecting the wide range of commodity markets that are subject to CFTC oversight. However, it provides energy market participants and their advisors, as well as energy regulators, with valuable comparative perspectives from other commodity markets.

The European energy markets and related regulatory regimes will be less familiar to North American audiences. The chapter by Peter Willis contains an in-depth discussion of the EU's Regulation on Wholesale Energy Market Integrity and Transparency (REMIT)[4] as well as the enforcement activities of various national regulatory authorities and the coordinating role of the Agency for the Cooperation of Energy Regulators (ACER).[5] It includes helpful summaries of key cases arising under European competition law as well as REMIT. An accompanying report by James Jameson and Nenad Njegovan of the UK's Competition and Market Authority (CMA), which describes the results of the CMA's Energy Market Investigation in 2014, is perhaps out of place in part one of the book since it is not really about the regulatory framework. However, it

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* Dr. A. Neil Campbell is a partner in competition, trade and energy law groups at McMillan LLP in Toronto. He was the Chair of the Ontario Energy Board's Market Surveillance Panel between 2007-2012.

1 Gordon E. Kaiser (ed.), *The Guide to Energy Market Manipulation* (London: Global Competition Review, La Business Research, 2018) [*Energy Market Manipulation*].

2 Joseph T Kelliher, "Foreword", in *Energy Market Manipulation*, at 12.

3 Robert S Fleishman & Paul C Varnado, "Perspectives on FERC's Enforcement Programme as it relates to Energy Market Manipulation", c 2; Anthony M Mansfield, "Commodity Futures Trading Commission Enforcement", c 3, in *Energy Market Manipulation*.

4 European Commission, Regulation 1227/2011, December 28, 2011.

5 Peter Willis, "REMIT Energy Market Manipulation", c 6, in *Energy Market Manipulation*.

is a particularly interesting contribution which addresses "for both wholesale market power and CfD contract for differences manipulation, how manipulation might occur, how we set about assessing it and our findings."[6]

The Ontario and Alberta markets have generated relatively few cases to date, but the very distinctive applicable legal frameworks in both provinces are well described in this volume. The Alberta overview takes full advantage of the co-authors' recent experience as counsel for the Market Surveillance Administrator (MSA) in the TransAlta case[7] to discuss several specific issues arising in the proceedings before the Alberta Utilities Commission (AUC).[8] While the procedural issues are canvassed effectively, less attention is paid to the substantive market power and market regulation issues arising under Alberta's "fair, efficient and open competition" (FEOC) regime.[9] Glenn Zacher's discussion of the Ontario regulatory regime traces the historical development of the shared enforcement responsibilities of the Independent Electricity System Operator (IESO)'s compliance division and the Ontario Energy Board's Market Surveillance Panel (MSP), including the recently developed and not yet tested "general conduct rule" which reflects notable differences from FERC and FEOC models.[10] A parallel chapter by George Vegh overlaps somewhat, but focuses heavily on institutional design and investigative process issues that he considers to be of concern.[11] Interestingly, Canadian administrative law scholar Professor David Mullan puts forward a supportive view of the Ontario as well as the Alberta regulatory regimes in his chapter dealing with administrative law principles.[12]

The Australian contribution by Peter Adams and his colleagues at the Australian Energy Regulator is particularly valuable because it includes a discussion of the monitoring function in energy markets.[13] It also considers some of the challenges involved in the interface "between the oversight of energy derivate products in the financial markets and physical products in the energy markets."[14] This is certainly one of the central issues in energy market manipulation cases. Traders make decisions related to the overall economic incentives in both physical and financial markets, and enforcement authorities need to have effective jurisdictional reach and investigative powers to address such conduct on an integrated basis.

Enforcement Practices

The second part of the book contains quite varied contributions on topics that are loosely categorized as relating to enforcement practices. The chapters on practice and procedure before the FERC and under REMIT in the EU[15] are somewhat repetitive of the FERC and REMIT overview chapters. However, they do take a deeper dive into procedural issues and provide some useful practice points for counsel working on such cases.

The sanctions and private actions chapters are two areas in which the book offers systematic multi-jurisdictional comparisons. JP Mousseau of the AUC puts forward a compact and readily digestible survey of the applicable sanctioning and settlement frameworks in the US (FERC but not CFTC), Alberta, Ontario and Australia.[16] However, an analysis of the actual sanctions and settlement outcomes in these jurisdictions would have been a useful addition. The private actions chapter embraces this approach with brief summaries of cases

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6 James Jameson & Nenad Njegovan, "Testing Energy Market Manipulation in Great Britain", c 7, in *Energy Market Manipulation*, at 80.

7 *Re Market Surveillance Administrator Allegations Against TransAlta Corporation et al,* Alberta Utilities Commission Decision 3110D012015, Phase 1 (27 July 2015).

8 Randall W Block, John D Blair & Laura M. Poppel, "Energy Market Manipulation in Alberta", c 5, in *Energy Market Manipulation*.

9 *The Electric Utilities Act,* SA 2003, c E-5.1, s 6, imposes an obligation on all market participants to support the fair, efficient and openly competitive operation of the Alberta electricity market. This obligation is fleshed out in the Fair Efficient and Open Competition Regulation, Alta Reg 159/2009 (*FEOC Regulation).*

10 Glenn Zacker, "Compliance and Enforcement in the Ontario Electricity Sector", c 3, in *Energy Market Manipulation.*

11 George Vegh, "Investigating Energy Market Activity in Ontario", c 4, in *Energy Market Manipulation.*

12 David J. Mullan, "Administrative Law Principles", c 13, in *Energy Market Manipulation.*

13 Peter Adams, Kate Murphy & Jeremy Llewellyn, "Australia", c 8, in *Energy Market Manipulation.*

14 *Ibid* at 95.

15 David A Applebaum, Todd L Brecher & J Porter Wiseman, "FERC Practice and Procedure", c 9; Mark J Mills, "Energy Market Manipulation in the EU: Practice and Procedure", c 10, in *Energy Market Manipulation.*

16 JP Mousseau, "Fines, Sanctions and Settlements", c 11, in *Energy Market Manipulation.*

that have emerged thus far in the US, EU and Canada.[17]

Expert Evidence

The concluding part of the book includes two very interesting chapters on expert evidence. Philip Tunley contrasts the AUC's receptive approach to expert economic and technical evidence in the TransAlta case with the trend in Canadian courts to apply more rigorous screening with respect to the admissibility of expert evidence[18] (albeit one which may seem tame for counsel that are familiar with "Daubert" challenges in the US).[19] A chapter on economic analysis by Brian Rivard, Chris Russo and colleagues at CRA is less jurisdiction-bound and provides useful (albeit brief) overviews of the types of manipulation theories that have been addressed in the US, the EU and Canada as well as the outcomes in such cases.[20]

Concluding Observations

A key strength of the book is the participation of many authors who are current or former energy regulators. This adds significant credibility and balance to the volume. Unlike some multi-jurisdictional reference books, the editor has not prescribed a template for each author to follow. This approach allows chapter authors to focus on the areas that they consider to be most important, but does result in some coverage gaps (e.g. the administrative law and expert evidence contributions are limited to Canadian law) and makes comparative analysis more cumbersome.

Mousseau touches briefly on the importance of compliance programs as a mechanism for mitigating potential sanctions, particularly under the FERC's penalty guidelines where a reduction of up to 60 per cent may be available.[21] Compliance programs are also a key preventive strategy for companies, and if a second edition of this book is prepared in the future, a chapter on energy trading compliance program design and implementation from an in-house legal or compliance officer would be a worthwhile addition.[22]

Kaiser modestly notes in his introductory essay that "this book is a first attempt to survey a new and complex form of regulation that applies to one of the most important industry sectors in the world".[23] The book more than achieves this objective and will be an indispensable resource for regulators and counsel practising in the area — not because it has the definitive answers to all of the questions in this complex field, but because it provides extensive points of reference that will facilitate efficient domestic and comparative analysis when issues arise. ■

17 Randall Hofley, Jutine Johnston & Joseph J Bial, "Private Actions in the United States, Canada and Europe", c 12, in *Energy Market Manipulation*.
18 M Philip Tunley, "The Use of Expert Evidence", c 14, in *Energy Market Manipulation.*
19 *Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579.
20 Robin Cohen, David Hunger, Brian Rivard & Christopher Russo, "Economic Evidence of Market Power and Market Manipulation in Energy Markets", c 15, in *Energy Market Manipulation.*
21 Mousseau, *supra* note 16 at 130; *Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216 (17 September 2010).
22 A useful starting point is the FERC guidance on the topic: FERC, "Staff White Paper on Effective Energy Trading Compliance Practices" (November 2016), online: <https://www.ferc.gov/legal/staff-reports/2016/tradecompliance-whitepaper.pdf>.
23 Gordon E. Kaiser, "Energy Market Manipulation: A New Regulatory Regime", in *Energy Market Manipulation*, at 10.