

RECENT LEGISLATIVE AND REGULATORY DEVELOPMENTS OF INTEREST TO ENERGY LAWYERS

LOU CUSANO, DAVID WOOD,
GINO BRUNI, AND TAYLOR CAMPBELL*

This article provides an overview of regulatory and legislative developments in Canada between June 2019 and April 2020. The authors reviewed decisions, regulations, policies, and federal and provincial legislation. Topics of note include a Canada (Minister of Citizenship and Immigration) v. Vavilov clarification on the standard of review, climate change-focused legislative change such as the passing of Bill C-69, market access challenges, Alberta Energy Regulator decisions and the review of the Alberta Energy Regulator, developments with respect to carbon tax legislation, changes to Aboriginal law, and updates to utilities and electricity regulation.

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* Lou Cusano, Q.C. is the managing partner of the Torys LLP Calgary office, David Wood is a senior counsel at Torys LLP, and Gino Bruni and Taylor Campbell are associates at Torys LLP. The authors would like to extend their special thanks to Julie Ward for her contributions to this article.

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I. INTRODUCTION

The past year saw a number of important energy-related regulatory and legislative changes in Canada. Tensions continued to increase among those with competing views of what Canada's energy resource-related laws and regulatory bodies should be accomplishing. Major market access pipelines, notably the Trans Mountain Expansion Project, pressed forward in their continued struggle to progress. Climate change concerns drove legislative change in the form of Bill C-69¹ and the federal carbon price. One common thread is that Canadians are becoming increasingly involved in the regulatory decisions that shape the future of Canada's resources and the direction of industry.

This article provides a high-level overview of key regulatory and legislative developments across Canada between the start of June 2019 and mid-April 2020. In preparing this article, the authors reviewed decisions, regulations, policies, and both federal and provincial legislation.

II. VAVILOV AND THE NEW STANDARD OF REVIEW

On 19 December 2019, the Supreme Court of Canada issued its highly anticipated decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, where the Supreme Court once again reconsidered the approach to the standard of review of administrative decisions.²

¹ *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, 2019 (assented to 21 June 2019), SC 2019, c 28 [Bill C-69].

² 2019 SCC 65 [Vavilov].

A. DETERMINING THE STANDARD OF REVIEW

The standard of review analysis now (formally) begins with a presumption that the standard is reasonableness, without the need for a contextual analysis. The legislature created a statutory decision-maker, and presumably intended that decision-maker to fulfil its mandate with minimal interference.³ The presumption can be rebutted in either of the following two circumstances, both of which occur in multiple ways:

1. Where the *statutory language* requires a different standard of review. For this circumstance to apply, one of the following two conditions must be met: the statute dictates the standard of review, or the statute creates a statutory appeal (including where leave or permission to appeal is required).
2. Where the *rule of law* requires a correctness standard of review, because the issue being reviewed relates to: a constitutional question, a question of importance to the legal system as a whole, or a question about the jurisdictional boundaries between two or more administrative bodies.

The Supreme Court of Canada did not identify any other situations where it would be appropriate to deviate from the reasonableness standard. The Supreme Court refused to “close” the list but did warn that rebutting the presumption of reasonableness would require exceptional circumstances.⁴

1. REBUTTED BY STATUTORY LANGUAGE

Statutory language will rebut the presumption that the standard of review is reasonableness in two circumstances. The first is where the statute clearly sets out the standard of review, in which case that standard should be applied, subject to limits imposed by the rule of law.⁵ The second is where the statute creates a statutory appeal (including where leave or permission to appeal is required), in which case the appellate standard of review, set out by the Supreme Court in *Housen v. Nikolaisen*,⁶ applies.

The appellate standard of review incorporates two different standards of review, one for questions of law and another for questions of fact:

1. questions of law, including interpretation of the decision-maker’s home statute, will be reviewed on a correctness standard;
2. questions of fact will be reviewed on a “palpable and overriding error” standard.⁷

³ *Ibid* at para 24.

⁴ *Ibid* at paras 69–70.

⁵ *Ibid* at paras 34–35.

⁶ 2002 SCC 33.

⁷ See *Vavilov*, *supra* note 2 at para 37.

In many cases, statutory appeals of administrative decisions are limited to questions of law or jurisdiction, in which case the standard of review will be correctness.⁸

In *Vavilov*, the Supreme Court concluded that there was no reason to give different meanings to the word “appeal” in the administrative law context than in the criminal or commercial context. The Supreme Court also concluded that using the appellate standard of review for statutory appeals helps explain why some statutes provide for both statutory appeals and judicial review, since that suggests the legislatures envisioned two different roles for reviewing courts.⁹ For example, the *CERA* provides for a statutory appeal from a decision or order of the Canadian Energy Regulator (CER) on questions of law or jurisdiction,¹⁰ and a judicial review from decisions by the Governor in Council following a report from the CER.¹¹

The introduction of the appellate standard of review represents a significant shift in the standard of review analysis. This shift may impact whether leave to appeal is granted from decisions issued by the Alberta Utilities Commission (AUC) or the Alberta Energy Regulator (AER). The Alberta Court of Appeal considers the standard of review as a factor in determining whether to grant permission to appeal. The Court of Appeal has historically been less likely to grant permission to appeal where a more deferential standard of review would apply.¹²

Ultimately, it will be up to the various legislatures to decide whether any legislative changes are required as a result of *Vavilov*. However, at present, the standard of review of a statutory appeal from an administrative tribunal on a question of law or jurisdiction is correctness. The Court of Appeal has confirmed that the correctness standard applies to statutory appeals from AER decisions on a point of law.¹³

2. REBUTTED BY THE RULE OF LAW

Where there is no statutory appeal, reasonableness will be the presumptive standard of review, even for questions of law. However, there will be three circumstances where the rule of law requires courts to apply a correctness standard, rebutting the presumption that the standard of review is reasonableness. The Supreme Court of Canada confirmed that constitutional questions¹⁴ and questions of central importance to the legal system as a whole (now regardless of whether they are within the administrative decision-maker’s expertise)¹⁵ should be reviewed on a correctness standard.

⁸ See e.g. *Canadian Energy Regulator Act*, SC 2019, c 28, s 10, s 72 [*CERA*]; *Alberta Utilities Commission Act*, SA 2007, c A-37.2, s 29(1) [*AUCA*]; *Responsible Energy Development Act*, SA 2012, c R-17.3, s 45(1) [*REDA*]; *Ontario Energy Board Act, 1998*, SO 1998, c 15, Sch B, s 33(2).

⁹ See *Vavilov*, *supra* note 2 at para 44.

¹⁰ See *CERA*, *supra* note 8, s 72.

¹¹ *Ibid*, s 188.

¹² See e.g. *Wood Buffalo (Regional Municipality) v Alberta (Energy and Utilities Board)*, 2007 ABCA 192 at para 5; *Equus Rea Ltd v Alberta (Utilities Commission)*, 2019 ABCA 277 at para 12; *Cymbaluk v TransAlta Corporation*, 2018 ABCA 429 at para 24.

¹³ See *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163 at para 29 [*Fort McKay*].

¹⁴ See *Vavilov*, *supra* note 2 at para 55.

¹⁵ *Ibid* at para 58.

Additionally, the Supreme Court finally did away with the category of “true questions of jurisdiction,”¹⁶ replacing it with questions about the jurisdictional boundaries between two or more administrative bodies that must be reviewed on a correctness standard to ensure predictability and certainty in administrative law.¹⁷

B. APPLICATION OF THE REASONABLENESS STANDARD

A reasonableness review considers both the outcome and the process. A reviewing court should refrain from deciding the issues itself, or from ascertaining the “range” of reasonable outcomes.¹⁸ As a court should not decide the issue itself, a reviewing court can arguably no longer avoid discussing the standard of review by concluding that the decision is correct and therefore should be upheld regardless of the standard of review. Similarly, a reviewing court should arguably refrain from concluding that an administrative decision was incorrect (in the sense that the reviewing court would have come to a different conclusion) but still reasonable.

The Supreme Court confirmed that reasonableness is a single standard; a reviewing court should not change the level of scrutiny depending on the context.¹⁹

Where reasons are provided, they will be the primary mechanism to demonstrate whether the decision is reasonable.²⁰

Generally, there will be two types of flaws that lead to an unreasonable decision: either the reasoning is not rational or the decision cannot be justified considering the factual or legal circumstances, or both.²¹

When reasons are not provided (and not required by procedural fairness), the court must look to the record before the decision-maker, which may reveal a rationale for the decision. The analysis may inevitably focus more on the outcome rather than the reasoning process when there are no reasons to review.²²

When a decision is unreasonable, the reviewing court will typically remit the matter to the administrative decision-maker to reconsider the issues in a manner consistent with the reviewing court’s reasons.²³ However, in certain circumstances a court may conclude that the outcome is inevitable, in which case it may not be useful to remit the matter to the statutory decision-maker.²⁴

¹⁶ *Ibid* at para 65.

¹⁷ *Ibid* at paras 63–64.

¹⁸ *Ibid* at para 83.

¹⁹ *Ibid* at para 89.

²⁰ *Ibid* at para 81.

²¹ *Ibid* at para 101.

²² *Ibid* at paras 137–38.

²³ *Ibid* at para 141.

²⁴ *Ibid* at para 142.

III. FEDERAL REGULATORY CHANGES

The past year has seen significant changes to the federal regulatory landscape because of the passing of Bill C-69 and Bill C-48²⁵ by the federal government. This section explores these changes and the notable Enbridge Mainline System (EMS) decision from the CER.

A. BILL C-69

Bill C-69²⁶ came into force on 28 August 2019, repealing the *National Energy Board Act*²⁷ and the *Canadian Environmental Assessment Act, 2012*²⁸ and replacing them with the *CERA* and the *Impact Assessment Act*,²⁹ respectively. This resulted in the replacement of the National Energy Board (NEB) with the CER.

The *CERA* introduces a new governance structure, separating the adjudication and administrative functions. Under the administrative function, the CER will be governed by a board of directors appointed by the federal Cabinet with at least one director being an Indigenous person. The Commission of the CER will assume the adjudicative and regulatory functions formerly performed by the NEB and is an independent tribunal housed within the CER.

The *CERA* maintains the same basic structure as the *NEBA*, subject to some notable amendments. Two of the most notable amendments are what the CER Commission must consider for recommending projects and the *IAA* review panel requirement for projects formerly under the NEB jurisdiction.

The list of factors that the CER Commission must consider has been significantly expanded from the factors the NEB was required to consider under the *NEBA*.³⁰ These factors relate to the inclusion of gender considerations, along with environmental concerns and Indigenous rights.

Additionally, the *CERA* now requires all “designated projects” under the *IAA* to be assessed by an *IAA* review panel, not the CER, with at least one member of the review panel being a CER Commissioner.³¹ This review panel requirement is entirely new³² for projects that are regulated by the CER.

The *Physical Activities Regulations*.³³ of the *IAA* provide the list of “designated projects,” which includes the construction of a new pipeline requiring 75 km or more of new right of

²⁵ *An Act respecting the regulation of vessels that transport crude oil or persistent oil to or from ports or marine installations located along British Columbia's north coast*, 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019), SC 2019, c 26 [Bill C-48].

²⁶ *Supra* note 1.

²⁷ RSC 1985, c N-7 [*NEBA*], as repealed by Bill C-69, *ibid*, s 44.

²⁸ SC 2012, c 19, s 52 [*CEAA*], as repealed by Bill C-69, *ibid*, s 9.

²⁹ *Impact Assessment Act*, SC 2019, c 28, s 1 [*IAA*].

³⁰ See *CERA*, *supra* note 8, ss 183(2)(a)-(e), (k). Sections 183(2)(f) –(i), (l) repeat the factors in section 52(2) of the *NEBA*, *supra* note 27.

³¹ See *CERA*, *ibid*, s 185.

³² Under the *CEAA*, the NEB was the “responsible authority” for designated projects that included activities regulated by the NEB: *CEAA*, *supra* note 28, s 15(b).

³³ SOR/2019-285 [*PAR*].

way.³⁴ For such projects, the list of factors that must be considered under the *IAA* (section 22(1)) is much longer than the list of factors under the *CERA* (section 183(2)).³⁵ Furthermore, as outlined below, the *IAA* requires the Minister of Environment, when considering whether a designated project is in the public interest, to consider broad factors, such as the extent to which the project hinders or contributes to Canada's ability to meet its environmental obligations in respect of climate change.³⁶

Other notable changes in the *CERA* include the codification of the “polluter pays” principle³⁷ and the establishment of a new “orphan pipeline” funding mechanism, which allows the CER to fund the abandonment and cleanup of pipelines where the certificate holder cannot be found or no longer exists.³⁸

The “directly affected” standing test for interveners in pipeline applications has also been removed from the *CERA*. The *Act* states that the CER can consider public comments in a manner specified by the Commission.³⁹

The *CERA* made notable changes in terms of its relationship with Indigenous peoples, including the codification of the CER's duty to consult and to consider impacts of decisions on the rights of Indigenous peoples,⁴⁰ providing for collaborative processes involving the CER and “Indigenous governing bodies,”⁴¹ and requiring permission to be obtained from the appropriate band council to conduct work on reserve lands.⁴² The *NEBA* made no specific reference to Indigenous peoples of Canada, although the NEB routinely dealt with projects that affected traditional territories and considered impacts on Indigenous peoples of Canada.

Finally, the *CERA* codified new review and approval timelines for *CERA* applications (that is, applications not subject to *IAA* panel review).⁴³

The CER has generally adopted the regulations of the NEB, updating references to the NEB to the CER. Substantive amendments have been made to the *Canadian Energy Regulator Onshore Pipeline Regulations*⁴⁴ and regulations related to international and interprovincial power lines. For the latter, the *Power Line Crossing Regulations*⁴⁵ have been replaced by two regulations: the *International and Interprovincial Power Line Damage Prevention Regulations – Authorizations*⁴⁶ and the *International and Interprovincial Power Line Damage Prevention Regulations – Obligations of Holders of Permits and Certificates*.⁴⁷

³⁴ *Ibid*, Schedule, s 41. These regulations came into force on 28 August 2019 concurrent with Bill C-69.

³⁵ See *IAA*, *supra* note 29, s 22(1); *CERA*, *supra* note 8, s 183(2).

³⁶ See *IAA*, *ibid*, s 22(1)(i).

³⁷ *CERA*, *supra* note 8, ss 137–42.

³⁸ *Ibid*, ss 243–46.

³⁹ *Ibid*, s 183(3).

⁴⁰ *Ibid*, s 56.

⁴¹ *Ibid*, ss 76–77.

⁴² *Ibid*, s 317.

⁴³ *Ibid*, ss 183(4), 214(4), 262(5), 298(5), 346 (1).

⁴⁴ SOR/99-294.

⁴⁵ SOR/95-500.

⁴⁶ SOR/2019-347.

⁴⁷ SOR/2020-49.

1. IAAC AND THE IAA

Bill C-69 also repealed and replaced the *CEAA* with the *IAA*, thereby replacing the Canadian Environmental Assessment Agency with the Impact Assessment Agency of Canada (IAAC).

The IAAC is now the single agency responsible for conducting all federal “impact assessments” for all designated projects under the *PAR*⁴⁸ and projects that are designated by the Minister of Environment on his or her request or own initiative.⁴⁹ One of the first major projects being reviewed by the IAAC is a 780 km natural gas pipeline between northeastern Ontario and Saguenay, Quebec (the Gazoduq Project). This pipeline would bring liquefied natural gas (LNG) to the Énergie Saguenay LNG terminal for export.⁵⁰

Contrary to the *CEAA*, and similar to the *CERA*, the *IAA* requires consideration of impacts of a designated project beyond environmental to health, social and economic, and Indigenous impacts. The *IAA* imports considerations, such as the impact of the project on the federal government’s ability to meet its commitments on climate change and “the intersection of sex and gender with other identity factors.”⁵¹

Under the *IAA*, the political decision-making structure set out in the *CEAA* is largely retained, with final approval coming from the Minister or the Governor in Council. However, consistent with the use of “impact assessment” in the *IAA*, the focus of the Minister’s decision under the *IAA* is whether the proposed project is “in the public interest,”⁵² rather than whether the project causes “significant adverse environmental effects.”⁵³ This requires consideration of sustainability, Indigenous groups, and the extent to which the project hinders or contributes to Canada’s ability to meet its environmental obligations in respect of climate change.⁵⁴

Like the *CERA*, there is no test for standing in the *IAA*.⁵⁵ This creates uncertainty for proponents’ designated projects. However, the *IAA* does include improved timelines for assessments that are favourable to proponents, including reducing the maximum timeline and ministerial decision timeline for a standard assessment and review panel assessment, although these legislated timelines can be increased or suspended by the Governor in Council.⁵⁶ It therefore remains to be seen whether these new deadlines will have any real impact on the timeline for regulatory approvals from the IAAC.

The *IAA* includes provisions that allow the assessment processes of another jurisdiction (for example, provinces and Indigenous jurisdictions⁵⁷) to be substituted for the federal

⁴⁸ See *IAA*, *supra* note 29, s 155.

⁴⁹ *Ibid*, s 9.

⁵⁰ See “Project Summary,” online: <energiesaguenay.com/en/project/project-summary/>.

⁵¹ See *IAA*, *supra* note 29, ss 22(1)(i), (s).

⁵² *Ibid*, s 60(1).

⁵³ *CEAA*, *supra* note 28, s 52.

⁵⁴ See *IAA*, *supra* note 29, s 63.

⁵⁵ *Ibid*, ss 11, 27, 99.

⁵⁶ *Ibid*, ss 28(7), 37.

⁵⁷ *Ibid*, s 2 (defining “jurisdiction”).

process.⁵⁸ However, any substituted process will have to consider the impacts of proposed projects beyond environmental impacts and must address the opinions of relevant federal authorities and Indigenous peoples in addition to considering regional impacts.

B. CER – ENBRIDGE MAINLINE DECISION AND OTHER NOTABLE DECISIONS

One of the most notable decisions of the CER in the past year was its decision to quash the open season of Enbridge Pipelines Inc. (Enbridge) related to contract carriage on the Enbridge Mainline System (EMS).⁵⁹

The EMS is the only major Canadian oil pipeline to operate entirely as a common carrier.⁶⁰ This contrasts with other major pipelines in the country that utilize a “contract carriage” model where two categories of service are offered: committed (or firm) and uncommitted (spot or interruptible).

For contract carriage pipelines, the NEB found that the common carrier requirement in the *NEBA*⁶¹ was satisfied when an oil pipeline company conducted a reasonable open season⁶² for firm contract service with some capacity available to shippers for uncommitted service.⁶³

On 2 August 2019, Enbridge announced that it was holding an open season to allow shippers to enter into long-term contracts for firm service on the EMS.⁶⁴

In response, Suncor Energy Inc. (Suncor) filed a complaint and application with the NEB requesting a declaration that Enbridge may not offer contract carriage service on the EMS until such contract carriage, and associated terms and conditions, including tolls, are approved by the NEB in Enbridge’s EMS tariff.⁶⁵ The CER also received submissions from Shell Canada Limited, the Explorers and Producers Association of Canada, and Canadian Natural Resources Limited, all requesting similar relief.⁶⁶

⁵⁸ *Ibid.*, ss 31–33.

⁵⁹ Letter from L George, Secretary of the Commission, Canada Energy Regulator Re Enbridge Pipelines Inc Mainline Open Season (27 September 2019), online: <docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90465/92835/155829/3773831/3815517/3828616/C01893-1 CER %E2%80%93 Letter %E2%80%93_Suncor%2C Shell%2C EPAC_and_CNRL %E2%80%93 Enbridge_Mainline_Open_Season_-_A6YIF0.pdf?nodeid=3829179&vernum=-2> [*Re Enbridge Open Season*].

⁶⁰ See National Energy Board, *Western Canadian Crude Oil Supply, Markets, and Pipeline Capacity* at 17, online: <www.cer-rec.gc.ca/en/data-analysis/energy-commodities/crude-oil-petroleum-products/report/2018-western-canadian-crude/2018wstrncndncrd-eng.pdf> [NEB, *Western Canadian Crude*].

⁶¹ See *NEBA*, *supra* note 27, s 71(1) (now section 239 of the *CERA*, *supra* note 8).

⁶² A process where a pipeline company openly offers pipeline capacity (existing or new) to the market and receives bids for that capacity.

⁶³ See NEB, *Western Canadian Crude*, *supra* note 60 at 16.

⁶⁴ See Enbridge Inc, News Release, “Enbridge to Hold Open Season for Transportation Services on Canadian Mainline Pipeline System” (2 August 2019), online: <www.enbridge.com/media-center/news/details?id=123583&lang=en>.

⁶⁵ Suncor Energy Inc Complaint and Application re: Enbridge Pipelines Inc Canada Mainline Open Season at para 1(b), online: <docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90465/92835/55829/3773831/81517/813349/C01156-2_Suncor_Complaint_and_Application_-_A6X0S8.pdf?nodeid=3813350&vernum=-2>.

⁶⁶ Complaints from Suncor, Shell, the Explorers and Producers Association of Canada, and Canadian Natural Resources Limited concerning Enbridge’s open season can be found online: see Letter from Suncor Energy Inc re: Enbridge Pipelines Inc (Enbridge) Canadian Mainline Open Season, online: <docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90465/92835/155829/3773831/3815517/3813349/C01156-1_Letter_re_Suncor_Complaint_and_Application_-_A6X0S7.pdf?nodeid=3812749&vernum=->

On 27 September 2019, in one of its first formal decisions, the CER Commission granted the relief requested by Suncor, effectively quashing the open season.⁶⁷ The CER Commission emphasized that it was “guided by the established regulatory framework, including past decisions of ... the NEB ... regarding toll and tariff regulation,” the “importance of fairness and transparency in open season processes,” and the prevention of abuse of market power, both in substance and appearance.⁶⁸ As one legal scholar highlighted in his review of this decision, this display of regulatory continuity from the CER should come as a relief to the industry and investors.⁶⁹

The CER Commission agreed with Suncor and the other objecting parties that Enbridge’s open season was unfair to shippers. It noted that many shippers had no choice but to participate, with some having to do so in order to maintain existing business operations, and that the open season had given a broad cross-section of the market an apprehension that Enbridge may have exercised its market power.⁷⁰ The CER Commission concluded that “potential shippers would benefit from a regulatory review of the terms and conditions of firm service” on the EMS prior to making contract decisions.⁷¹ The CER emphasized that Enbridge’s specific and unique circumstances put Enbridge “in a dominant position in the market”⁷² that necessitated the CER Commission’s intervention in the open process, but such intervention should be rare, agreeing with its predecessor (the NEB) that it was not in the “industry’s best interest for [it] to dictate the terms and processes for open seasons, *unless it is necessary in the circumstances.*”⁷³

This decision is welcome news for shippers on major pipelines in Canada. The lack of capacity that has plagued the shipment of oil from Western Canada to other markets has given companies that operate such pipelines a very favourable market position and the potential to exercise market power. This decision acknowledges that the CER will be alert to the concerns of shippers regarding the exercise of such market power or the apprehension of such an exercise.

2>; Letter from Shell Canada Limited re: Enbridge Mainline Open Season Proposed Changes to Firm Service, online: <docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90465/92835/155829/3773831/381517/3812895/C01179-1_Shell_-_Enbridge_Mainline_Letter_to_NEB_-_August_21_2019_-_A6X1Q9.pdf?nodeid=3812896&vernum=-2>; Letter from the Explorers and Producers Association of Canada re: Enbridge Pipeline Inc (Enbridge) Open Season to Introduce Mainline Firm Service, online: <docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90465/92835/155829/3773831/381517/3817266/C01181-1_Enbridge_Mainline_NEB_EPAC_Response_August_26_2019-pdf_-_A6X1R3.pdf?nodeid=3817046&vernum=-2>; Letter from Canadian Natural Resources Limited re: Request for Relief - Enbridge Inc’s (“Enbridge”) Open Season on the Mainline, online: <docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90465/92835/155829/3773831/381517/3817600/C01212-1_CNQ_Ltr_to_NEB_Aug_26_2019_-_A6X2D9.pdf?nodeid=3817721&vernum=-2>.

⁶⁷ See *Re Enbridge Open Season*, *supra* note 59.

⁶⁸ *Ibid* at 1–2.

⁶⁹ Nigel Bankes, “The Canadian Energy Regulator Shuts Down the Open Season for Enbridge’s Mainline,” online (blog): <ablawg.ca/2019/10/04/the-canadian-energy-regulator-shuts-down-the-open-season-for-enbridges-mainline/>.

⁷⁰ See *Re Enbridge Open Season*, *supra* note 59 at 2.

⁷¹ *Ibid* at 3.

⁷² *Ibid* at 2. Such specific and unique circumstances included the fact that Enbridge controlled “over 70% of oil transportation capacity out of the Western Canadian Sedimentary Basin,” the “lack of alternative transportation options for potential shippers,” that the proposed model would reduce uncommitted oil pipeline capacity from 80 percent to 15 percent of the total available capacity for transport out of Western Canada, and the considerable opposition to the proposed model by market participants (*ibid*).

⁷³ *Ibid* at 3 [emphasis in original].

In the past year, the CER Commission has also approved the expansion of the NOVA Gas Transmission Ltd. (NGTL) transmission system (the NGTL system)⁷⁴ and the tolling methodology, including the tolling methodology for the new North Montney Mainline.⁷⁵ In both cases the CER Commission applied existing principles set by the NEB. This is a promising signal to industry that there will be continuity of well-established principles. However, both applications were initiated under the *NEBA*, and the CER Commission decided those applications under the *NEBA* and not the *CERA*,⁷⁶ so it remains to be seen whether that will hold true for decisions decided under the *CERA*.

C. PROVINCIAL RECEPTION OF BILL C-69

Alberta and several other provincial and territorial jurisdictions have expressed strong concerns about the new impact assessment regime implemented by Bill C-69.⁷⁷

In September 2019, the Government of Alberta filed a reference with the Alberta Court of Appeal to challenge the constitutionality of Bill C-69.⁷⁸ Alberta raised two issues with respect to Bill C-69: whether the *IAA* is unconstitutional as it is beyond the legislative authority of the federal government, and whether the *PAR* is unconstitutional because its environment assessment requirement relates to a matter entirely within the authority of the provinces. The Governments of Saskatchewan and Ontario both indicated their intention to intervene in this matter in support of Alberta, and were given intervenor status by the Alberta Court of Appeal on 4 March 2020.⁷⁹

D. BILL C-48

On 21 June 2019, Bill C-48⁸⁰ received royal assent concurrently with Bill C-69. Bill C-48, now the *Oil Tanker Moratorium Act*, prohibits oil tankers from stopping or unloading at ports along the northern coast of British Columbia if they contain more than 12,500 metric tons of crude oil;⁸¹ it also prohibits vessels from transporting crude oil between tankers, floating

⁷⁴ *Canada Energy Regulator Report In the Matter of NOVA Gas Transmission Ltd* (February 2020), GH-003-2018, online: <docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90550/554112/3422050/3575553/3575989/3905746/C04761-1_Canada_Energy_Regulator_Report_-_NOVA_Gas_Transmission_Ltd_GH-003-2018_-_A7D5G0.pdf?nodeid=3905626&vernum=-2>. Nova Gas Transmission Ltd is a wholly owned subsidiary of TC Energy Corporation (TC Energy) which was formerly TransCanada Corporation.

⁷⁵ *Canada Energy Regulator Reasons for Decisions in the Matter of NOVA Gas Transmission Ltd* (March 2020), RH-001-2019, online: <docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90465/92833/554137/3752363/3752364/3760156/3913151/C05448-1_CER_%E2%80%93_Reasons_for_Decision_RH-001-2019_%E2%80%93_NOVA_Gas_%E2%80%93_NGTL_System_Rate_Design_and_Services_-_A7E4S8.pdf?nodeid=3912507&vernum=-2>.

⁷⁶ Pursuant to the transitional provision in clause 36 of Bill C-69, *supra* note 1.

⁷⁷ In June 2019, the Premiers of Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, and the Northwest Territories wrote a joint letter to Prime Minister Justin Trudeau, in which they stated Bill C-69 “would make it virtually impossible to develop critical infrastructure, depriving Canada of much needed investment”: *House of Commons Debates*, 42-1, No 432 (12 June 2019) at 29013 (Shannon Stubbs).

⁷⁸ See OC 160/2019 (9 September 2019).

⁷⁹ *Reference re Impact Assessment Act*, 2020 ABCA 94. See also Canada, Department of Intergovernmental Affairs, “Briefing Book for the Minister of Intergovernmental Affairs,” online: <www.canada.ca/en/intergovernmental-affairs/corporate/transparency/briefing-documents.html>.

⁸⁰ *Supra* note 25.

⁸¹ SC 2019, c 26, s 4.

ports, or marine installations.⁸² Contravention of the *Act* could result in penalties of up to five million dollars.⁸³

The governments of Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, and the Northwest Territories have expressed strong concerns that Bill C-48 will discourage investment and negatively impact their economies.⁸⁴ Alberta has been particularly critical of the Bill, and while Premier Jason Kenney stated he intended to challenge the constitutional validity of Bill C-48, Alberta has yet to do so.⁸⁵

IV. MARKET ACCESS: NOT JUST A PIPE DREAM

Construction of energy infrastructure to improve market access continues to be a challenge for Canadian energy companies. However, in the past year some of these companies have made small gains towards achieving market access for their major pipeline projects.

A. CURTAILMENT IN ALBERTA

In 2018, Alberta produced more oil than it could export by rail or pipeline, which led to increased storage levels. Faced with low oil prices and large price differentials between West Texas Intermediate and Western Canadian Select, the Government of Alberta introduced the *Curtailment Rules*⁸⁶ in late 2018 to limit production from both conventional oil fields and oil sands.⁸⁷ The *Curtailment Rules* allow the Minister of Energy to issue orders limiting the amount of oil that a company can produce.

The *Curtailment Rules* were originally set to expire at the end of 2019. However, the *Curtailment Rules* have been extended to 31 December 2020.⁸⁸ Since the *Curtailment Rules* were brought in to address a lack of pipeline capacity, the extension may have been prompted by permitting delays to Enbridge's Line 3 Replacement Project which caused the company to delay the projected in-service date from late 2019 to the second half of 2020.⁸⁹

In October 2019, the *Curtailment Rules* were amended to allow the Minister of Energy to grant special production allowances to operators who demonstrate that additional production will be shipped by new rail capacity.

⁸² *Ibid.*

⁸³ *Ibid.*, s 25.

⁸⁴ See David Akin, "In 'Urgent Letter,' 6 Premiers Tell Trudeau National Unity Would be Threatened if Bills C-48, C-69 Become Law," *Global News* (10 June 2019), online: <globalnews.ca/news/5374642/ford-kenney-moe-pallister-higgs-letter-to-trudeau/>.

⁸⁵ See Shaughn Butts, "Watch: Premier Kenney Will Fight Bill C-48 and Bill C-69 in Court," *Edmonton Journal* (22 June 2019), online: <edmontonjournal.com/news/local-news/watch-premier-kenney-will-fight-bill-c-48-and-bill-c-69-in-court/>.

⁸⁶ Alta Reg 214/2018.

⁸⁷ See Government of Alberta, "Oil Production Limit," online: <www.alberta.ca/oil-production-limit.aspx>.

⁸⁸ See *Curtailment Rules Amendment Regulation*, Alta Reg 100/2019.

⁸⁹ See Enbridge Inc, News Release, "State of Minnesota Provides Permitting Timeline for Line 3 Replacement Project" (1 March 2019), online: <www.enbridge.com/media-center/news/details?id=123564&lang=en>.

In December 2019, the Government of Alberta exempted new conventional oil wells from curtailment to encourage the drilling of new wells, which would create jobs. This contrasts with the initial policy behind curtailment, which was to limit production to reduce storage levels, at least until additional capacity to transport the product to market was established. This recent change suggests that the Government of Alberta's primary policy goal may be shifting away from limiting capacity and towards increasing production and creating jobs.

The Government of Alberta has not currently announced any further action as Western Canadian Select prices drop amid COVID-19 concerns.

B. TRANS MOUNTAIN PIPELINE PROJECT

As expected, in the past year, the controversial Trans Mountain Expansion Project (TMX) has faced further legal challenges. At the municipal level, the City of Vancouver challenged the validity of the project's environmental assessment certificate to the British Columbia Supreme Court, which dismissed its arguments on 24 May 2018.⁹⁰ Vancouver appealed the dismissal to the British Columbia Court of Appeal, which remitted the certificate back to the Minister for reconsideration in light of the new NEB report on 17 September 2019.⁹¹ As of 18 April 2020, the Province is still reviewing the conditions.

TMX has also faced legal challenges to the second federal approval for the project. The federal Cabinet first approved TMX on 29 November 2016,⁹² but this approval was quashed by the Federal Court of Appeal on 30 August 2018 in *Tsleil-Waututh Nation v. Canada (Attorney General)*.⁹³ The Federal Court of Appeal remitted the matter back to the Governor in Council citing two concerns: the NEB's decision not to review increased tanker traffic as a result of the project's construction, which led to deficiencies in its report and recommendation for the expansion; and the Governor in Council's failure to adequately discharge its duty to consult.⁹⁴

The federal Cabinet approved the TMX for a second time on 18 June 2019,⁹⁵ after considering a new NEB report and further — more extensive — Crown consultations.⁹⁶

⁹⁰ See *Vancouver (City) v British Columbia (Environment)*, 2018 BCSC 843, rev'd 2019 BCCA 843 [Vancouver CA].

⁹¹ See *Vancouver CA*, *ibid.*

⁹² PC 2016-1069. See also Canada, National Energy Board, *Certificate OC-064* (Calgary: National Energy Board, 2016) at 2.

⁹³ 2018 FCA 153 [Tsleil-Waututh].

⁹⁴ *Ibid* at paras 5–6. In its decision, the Federal Court of Appeal determined that in Phase III of the Crown consultation the Crown played the role of a note taker in that it simply collected Indigenous concerns and conveyed those back to the decision-makers without meaningful two-way dialogue. Accordingly, the Federal Court of Appeal stated that “Canada must re-do its Phase III consultation”: *ibid* at paras 768–71.

⁹⁵ *Certificate of Public Convenience and Necessity OC-65 to Trans Mountain Pipeline ULC in respect of the Trans Mountain Expansion Project*, PC 2019-0820, (2019) C Gaz I, Vol 153, No 25 (Supplement).

⁹⁶ Following the Federal Court of Appeal decision to quash Cabinet approval, the federal government re-initiated Phase III consultations using its new “comprehensive approach,” which supplemented its original approach with a series of guiding principles for “meaningful consultation.” These include: mutual respect and trust, transparency, responsiveness, flexibility and openness, mutuality (such as recognition of reciprocal obligations), and a “Whole-of-Government Approach” that would involve multiple other federal programs and initiatives, relating to reconciliation, in the consultation process. See Government of Canada, *Trans Mountain Expansion Project: Crown Consultation and Accommodation Report* at 11, online: <www.canada.ca/content/dam/nrcan-mcan/site/tmx/TMX-CCAR_June2019-e-accessible.pdf>.

1. FEDERAL COURT OF APPEAL CHALLENGES TO
SECOND FEDERAL CABINET APPROVAL OF PROJECT

On 4 September 2019, in *Raincoast Conservation Foundation v. Canada (Attorney General)*,⁹⁷ the Federal Court of Appeal granted leave to six of the 12 applicants who applied to judicially review the second federal approval on the issue of whether the federal government's further consultation with Indigenous peoples was adequate to address the shortcomings identified in *Tsleil-Waututh*.⁹⁸ In exercising its discretion to give reasons,⁹⁹ the Federal Court of Appeal held that those six parties¹⁰⁰ had a "fairly arguable" case that the further consultation was hurried and of poor quality.¹⁰¹

On 4 February 2020, the Federal Court of Appeal upheld the second federal approval for TMX in *Coldwater Indian Band v. Canada (Attorney General)*.¹⁰² The Court applied a reasonableness standard of review (applying *Vavilov*), finding that it was reasonable for the federal Cabinet to conclude that the Government of Canada had remedied the flaws in consultation earlier identified by the Federal Court of Appeal in *Tsleil-Waututh* and had engaged in adequate and meaningful consultation with Indigenous peoples.¹⁰³ Further, the Federal Court of Appeal found that the re-approval of the project was not a ratification of the earlier approval, but a second approval with amended conditions that flowed directly from renewed consultation.¹⁰⁴

The Federal Court of Appeal extensively reviewed the nature of the duty to consult and clarified that:¹⁰⁵

- reasonable and meaningful consultation does not give Indigenous groups a *de facto* veto right;
- accommodation can be satisfied by imposing conditions, and it does not guarantee outcomes; and
- if Indigenous groups continue to oppose a project despite adequate consultation, their concerns may be balanced against "competing societal interests."¹⁰⁶

⁹⁷ 2019 FCA 224.

⁹⁸ *Ibid* at para 4.

⁹⁹ *Ibid* at para 7.

¹⁰⁰ The Court listed the successful parties, *ibid* at para 71:

Aitchelitz, Skowkale, Shxwhá:y Village, Soowahlie, Squiala First Nation, Tzeachten, Yakweakwoose; Chief Ron Ignace and Chief Rosanne Casimir, on their own behalf and on behalf of all other members of the Stk'emlupsemc Te Secwepemc of the Secwepemc Nation; the Coldwater Indian Band; the Squamish Nation, the Tsleil-Waututh Nation; and the Upper Nicola Band.

¹⁰¹ *Ibid* at paras 52, 55, 64.

¹⁰² 2020 FCA 34 [*Coldwater*].

¹⁰³ *Ibid* at paras 75, 158.

¹⁰⁴ *Ibid* at para 77.

¹⁰⁵ *Ibid* at paras 40, 46, 53, 57–58, 78.

¹⁰⁶ *Ibid* at para 57.

On 7 April 2020, the Coldwater Indian Band and three other First Nations announced they were seeking leave to appeal *Coldwater* to the Supreme Court of Canada.¹⁰⁷ The Supreme Court of Canada dismissed the application for leave to appeal on 2 July 2020.¹⁰⁸

2. LEGISLATIVE DEVELOPMENTS ARISING FROM TMX IN ALBERTA AND BRITISH COLUMBIA

The TMX has also faced continued political opposition from the Government of British Columbia.

In April 2019, the British Columbia government initiated a reference question to the British Columbia Court of Appeal that sought clarity on the scope of the province's constitutional jurisdiction to make new regulations for the *Environmental Management Act* that would restrict the flow of heavy oil into the province (resulting in significant impacts for TMX).¹⁰⁹

On 24 May 2019, the British Columbia Court of Appeal in *Reference re Environmental Management Act (British Columbia)* held that the regulation of an interprovincial pipeline is in pith and substance a federal undertaking.¹¹⁰ While environmental regulation is governed federally and provincially, the proposed regulations would have interfered substantially with the federal government's jurisdiction over interprovincial undertakings.¹¹¹

The Government of British Columbia appealed the decision to the Supreme Court of Canada. On 16 January 2020, the appeal was unanimously dismissed by the Supreme Court, on the same day, without reasons, which was seen by many as a clear rebuke of the British Columbia government by the Supreme Court.¹¹²

3. BILL 12: *PRESERVING CANADA'S ECONOMIC PROSPERITY ACT*

Preserving Canada's Economic Prosperity Act, which gives the Alberta Minister of Energy sweeping powers to control the export of natural gas, crude oil, and refined fuels from Alberta using export licences, was proclaimed into force on 30 April 2019, the same day the current United Conservative Party (UCP) formed the government.¹¹³ The UCP government proclaimed the *Prosperity Act* in retaliation to the British Columbia government's opposition to the TMX and its proposed amendments to the *EMA's* regulations.

The British Columbia government wasted no time in challenging the *Prosperity Act* with an application to the Alberta Court of Queen's Bench on 1 May 2019. But on 19 June 2019,

¹⁰⁷ See Tsleil-Waututh Nation Sacred Trust, New Release, "Press Release and Legal Background: First Nations Launch Fight of TMX Project Approval to Supreme Court of Canada" (7 April 2020), online: <twnsacredtrust.ca/press-release-and-legal-background-first-nations-launch-fight-of-tmx-project-approval-to-supreme-court-of-canada/>.

¹⁰⁸ *Coldwater*, *supra* note 102, leave to appeal to SCC refused, 39111 (2 July 2020).

¹⁰⁹ SBC 2003, c 53 [EMA].

¹¹⁰ 2019 BCCA 181, aff'd 2020 SCC 1 [EMA Reference SCC].

¹¹¹ *Ibid* at para 101.

¹¹² See *EMA Reference SCC*, *supra* note 110.

¹¹³ SA 2018, c P-21.5 [*Prosperity Act*].

the Alberta Court of Queen's Bench stayed the action citing lack of jurisdiction to determine whether the Attorney General of British Columbia had standing in the Alberta Court of Queen's Bench regarding the constitutionality of Alberta legislation.¹¹⁴ The Court of Queen's Bench concluded that question would be more properly addressed by the Federal Court, where the Attorney General of British Columbia would have standing as of right.¹¹⁵

The Attorney General of British Columbia also brought its action before the Federal Court of Canada seeking a declaration that the *Prosperity Act* was unconstitutional.¹¹⁶ To date, the Federal Court has not held a hearing on the constitutionality of the *Prosperity Act* but has released a decision on two motions. The first motion, brought by Alberta to strike British Columbia's action on the basis that it was not within the jurisdiction of the Federal Court and was premature, was struck down by the Federal Court. The Federal Court found that it had jurisdiction under section 19 of the *Federal Courts Act*,¹¹⁷ which grants it optional jurisdiction over interprovincial disputes.¹¹⁸

The second motion, brought by British Columbia for an interlocutory injunction preventing Alberta's Minister of Energy from exercising her discretion under section 2(2) of the *Prosperity Act* was granted. This discretion would otherwise have allowed the Minister to require certain persons to obtain a licence to export natural gas and crude or refined fuels from Alberta. The Federal Court found the validity of the *Prosperity Act* to be a serious issue and agreed that an embargo, if it occurred, would cause irreparable harm to British Columbia's residents.¹¹⁹ The Federal Court rejected Alberta's argument that the harm was speculative and held the balance of convenience was in British Columbia's favour, given the strength of its case and the absence of "any clear and identifiable negative consequences for Alberta" that could result from the granting of the injunction.¹²⁰

C. ENBRIDGE ENERGY: LINE 3, LINE 5, AND THE EMS

1. PROGRESS ON LINE 3

The existing Enbridge Line 3 pipeline extends from Edmonton, Alberta to Superior, Wisconsin. Enbridge has proposed to replace the existing Line 3 pipeline with a new wider pipeline (the Line 3 Replacement Project).¹²¹ The United States portion goes through North Dakota, Minnesota, and Wisconsin.

¹¹⁴ See *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 ABQB 550 at paras 9, 55.

¹¹⁵ *Ibid* at para 54.

¹¹⁶ See *Attorney General of British Columbia v Attorney General of Alberta*, 2019 FC 1195 [*BC v AB FC*].

¹¹⁷ RSC 1985, c F-7.

¹¹⁸ See *BC v AB FC*, *supra* note 116 at para 6.

¹¹⁹ *Ibid* at para 7.

¹²⁰ *Ibid*.

¹²¹ See "Line 3 Replacement Project," online: <www.enbridge.com/projects-and-infra-structure/public-awareness/minnesota-projects/line-3-replacement-project> ["Line 3"].

On 1 December 2016, the Canadian portion of the Line 3 Replacement Project received regulatory approval from the NEB, and construction of the Canadian portion of the project was completed in December 2019.¹²²

The North Dakota segment received approval from the North Dakota Industrial Commission on 1 February 2019, while the Minnesota Public Utilities Commission (PUC) confirmed its Order to issue Enbridge a Certificate of Need and a Route Permit for Line 3 on 20 July 2020.¹²³ Construction of the line will begin once Enbridge receives and finalizes all necessary permits.¹²⁴

In a recent statement, Enbridge announced that it will continue to work with permitting agencies, in Minnesota and federally, to finalize its permits before starting construction on the US portion of the Line 3 Replacement Project.¹²⁵ To date, construction has not begun.

2. LINE 5 PROGRESS

Enbridge is currently replacing Line 5, a crude oil and LNG pipeline running from Enbridge's Superior Terminal in Superior, Wisconsin, to Sarnia, Ontario.¹²⁶ The State of Michigan and the Bad River Band of the Lake Superior Tribe of Chippewa Indians (the Bad River Band) have opposed the line and its replacement.

Michigan opposed the underwater segment of the line, which runs under the Straits of Mackinac in the Great Lakes, due to the environmental damage that would occur in the event of a leak.¹²⁷ The State originally supported the line under former Governor Rick Snyder and provided for its approval through an enactment known as 2018 PA 359 (December 2018).¹²⁸ His successor, Governor Gretchen Whitmer, challenged the constitutional validity of 2018

¹²² As of January 2020, most of the line was complete except less than 100 km through Saskatchewan and Manitoba. See e.g. "Line 3 Replacement Program (Canada)" online: <www.enbridge.com/projects-and-infrastructure/projects/line-3-replacement-program-canada>.

¹²³ Enbridge initially applied to the Minnesota PUC on 23 March 2015. Despite challenges to the adequacy of environmental considerations, the Minnesota PUC issued an approval for the modifications to Line 3 on 23 January 2019. However, on 3 June 2019, the Minnesota Court of Appeals overturned this approval, finding the environmental impact statement insufficient, and remanded the matter back to the Minnesota PUC. The Minnesota PUC issued an Order on 1 May 2020 finding the environmental impact assessment sufficient, granting the certificate of need, and granting the route permit. The Minnesota PUC further denied several applications to reconsider on 20 July 2020: *In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border* (20 July 2020), online: Minnesota Public Utilities Commission <www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPop&documentId={101E6E73-0000-CF38-9542-21052AD8F09E}&documentTitle=20207-165093-02>.

¹²⁴ See also "Line 3," *supra* note 121.

¹²⁵ Enbridge Inc, News Release, "Minnesota Public Utilities Commission Approves/Accepts Line 3RP Revised FEIS and Reaffirms Certificate of Need and Routing Permits" (3 February 2020), online: <www.enbridge.com/media-center/news/details?id=123608&lang=en&year=2020>.

¹²⁶ See "Line 5 Segment Replacement Project: St. Clair River Crossing," online: <www.enbridge.com/~media/Enb/Documents/Factsheets/FS_Line5_St_Clar_HDD-Factsheet_Feb_2018.pdf>.

¹²⁷ See Devon Mahieu, "Michigan Judge Rules in Favor of Enbridge," *UpNorthLive* (31 October 2019), online: <upnorthlive.com/news/local/michigan-judge-rules-in-favor-of-enbridge>; Nia Williams & Rod Nickel, "Michigan Sues Enbridge in US, Seeks to Shut Oil Pipeline Through Great Lakes," *Reuters* (27 June 2019), online: <www.reuters.com/article/us-michigan-enbridge-pipeline/michigan-sues-enbridge-in-u-s-seeks-to-shut-oil-pipeline-through-great-lakes-idUSKCN1TS2G2>.

¹²⁸ Act of 11 December 2018, 2018 PA 359 (Mich) (codified as amended in scattered sections of MCL 254 [Act 359]. See also *Enbridge Energy v State of Michigan*, 19-000090-MZ (Mich Ct Cl) (State Defendants' Motion for Summary Disposition).

PA 359 and on 28 March 2019, the Attorney General of Michigan issued an opinion that the *Act* was unconstitutional.¹²⁹ Enbridge reacted by filing a suit with the Michigan District Court to establish Act 359's constitutionality.¹³⁰

In October 2019, the Michigan District Court ruled the legislation constitutional.¹³¹ This decision was echoed by the Michigan Court of Appeal in January 2020, following appeal of the District Court decision by Governor Whitmer.

Enbridge was also embroiled in litigation instituted by the Bad River Band, which sued Enbridge seeking removal of the line in June 2019 because of fears of environmental pollution and degradation.¹³² Ongoing attempts to settle the litigation have been unsuccessful¹³³ and Enbridge has begun preparations for rerouting the line.¹³⁴

D. THE COASTAL GASLINK PROJECT

The Coastal GasLink pipeline is owned and will be operated by Coastal GasLink Pipeline Ltd. (Coastal GasLink), a subsidiary of TC Energy. The proposed project will deliver natural gas to a proposed LNG facility operated by LNG Canada Development Inc. (LNG Canada)¹³⁵ near Kitimat, British Columbia. Between May 2015 and April 2016 Coastal GasLink obtained the necessary permits for construction as a provincial undertaking in British Columbia.¹³⁶

However, the regulatory status of the pipeline was complicated by a constitutional challenge that argued the pipeline should be federally regulated.¹³⁷

¹²⁹ See Michigan, Office of the Governor, *Attorney General's Opinion #7309 on the Constitutionality of 2018 PA 359*, online: <www.michigan.gov/documents/ag/7300_-_SIGNED_650_660_7.pdf>.

¹³⁰ See Enbridge Inc, New Release, "Enbridge Seeks Court Ruling on Enforceability of Line 5 Tunnel Agreements" (6 June 2019), online: <www.enbridge.com/media-center/media-statements/line-5-legal-action>.

¹³¹ See Natasha Blakely, "Line 5 Agreement Upheld: Michigan Court says Enbridge Tunnel Project is Constitutional" *Great Lakes Now* (1 November 2019), online: <www.greatlakesnow.org/2019/11/enbridge-line-5-michigan-court-ruling-constitutional/>.

¹³² See *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v Enbridge Inc*, 3:19-cv-602 (D Wis) (Complaint at para 2), online: <www.wpr.org/sites/default/files/7-23-19_lawsuit.pdf>.

¹³³ See "Settlement Offer to the Bad River Band of the Lake Superior Chippewa," online: <www.enbridge.com/projects-and-infrastructure/public-awareness/line-5-in-northern-wisconsin/settlement-offer-to-bad-river-band>.

¹³⁴ See "Line 5 in Northern Wisconsin," online: <www.enbridge.com/projects-and-infrastructure/public-awareness/line-5-in-northern-wisconsin>.

¹³⁵ LNG Canada is a joint venture company comprised of the following five global energy companies: Shell Canada Energy, PETRONAS, PetroChina Company Limited, Mitsubishi Corporation, and Korea Gas Corporation (KOGAS): "Joint Venture Participants," online: <www.lngcanada.ca/about-lng-canada/joint-venture-participants/>.

¹³⁶ See *Jurisdiction over the Coastal GasLink Pipeline Project* (26 July 2019), MH-053-2018 at 1, online: NEB <docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90550/90715/3615343/3715570/3809973/C00715%2D1_NEB_%E2%80%93_Letter_Decision_%E2%80%93_Coastal_GasLink_%E2%80%93_MH%2D053%2D2018_%2D_A6W4A5.pdf?nodeid=3809655&vernum=-2> [*Coastal GasLink Decision*].

¹³⁷ See Letter from William J Andrews to: Sheri Young re: Application of Michael Sawyer regarding jurisdiction over TransCanada Pipeline Limited's proposed coastal GasLink Project, online: <docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90550/90715/3615343/3715572/3715573/3594963/A93296-1_2018-07-30_WJA_for_MS_to_NEB_re_CGL_-_A6G4L2.pdf?nodeid=3593533&vernum=-2>.

On 26 July 2019, the NEB released its decision on the jurisdictional question, finding that the Coastal GasLink pipeline is a local work and undertaking under provincial jurisdiction.¹³⁸

The NEB applied the well-known two part test from the decision in *Westcoast Energy Inc. v. Canada (National Energy Board)*¹³⁹ which asks whether the pipeline: (a) forms part of a “single federal work or undertaking” (the first branch); or (b) is essential, vital, and integral to a federal work or undertaking (the second branch).¹⁴⁰

The NEB concluded that the Coastal GasLink Pipeline did not meet the first branch of the test as it was not sufficiently integrated with,¹⁴¹ or subject to common management, control, and direction as, the federally regulated NGTL System. It reached this conclusion for the following reasons.

The main purpose of the pipeline was “to transport natural gas within BC as feedstock supply to the provincially regulated LNG Terminal.”¹⁴² The NEB rejected the argument extending the purpose of the pipeline to marine shipping and export of LNG from Canada.¹⁴³

The mere physical connection (or probable future physical connection) of the provincial undertaking with a federal undertaking was not sufficient to find federal jurisdiction. Nor was a close commercial relationship or some level of coordinated operations sufficient.¹⁴⁴

The NEB found the Coastal GasLink Pipeline is exclusively dedicated to the downstream LNG terminal, not the upstream NGTL System,¹⁴⁵ and there is no dependence or interdependence between the two systems.¹⁴⁶ The NEB also concluded that the different business models for the two systems (single shipper closed access system for the Coastal GasLink Pipeline and common carrier open access system for the NGTL System) meant that they were not operating as a single enterprise.¹⁴⁷

The NEB found that there is some level of common management, control, and direction between the two systems, but this did not meet the threshold to conclude that the Coastal GasLink Pipeline formed part of the NGTL System. Rather, the NEB found there is “substantial control and direction [by] LNG Canada ... over the design, construction, day-to-day operation, access to the capacity, and potential expansion of the [Coastal GasLink] Pipeline,” which differed from the NGTL system.¹⁴⁸ While TransCanada Pipelines Limited, through its affiliate Coastal GasLink, does play a role in providing this service to the LNG Canada, it did not have unilateral control nor did this alter the exclusive nature of the service provided.¹⁴⁹

¹³⁸ See *Coastal GasLink Decision*, *supra* note 136 at 46–47.

¹³⁹ [1998] 1 SCR 322 [*Westcoast*].

¹⁴⁰ *Ibid* at para 45.

¹⁴¹ See *Coastal GasLink Decision*, *supra* note 136 at 33–34.

¹⁴² *Ibid* at 27.

¹⁴³ *Ibid* at 28.

¹⁴⁴ *Ibid* at 30.

¹⁴⁵ *Ibid* at 31.

¹⁴⁶ *Ibid* at 32.

¹⁴⁷ *Ibid* at 32–33.

¹⁴⁸ *Ibid* at 38.

¹⁴⁹ *Ibid* at 37.

For the second branch of the test from *Westcoast*, the NEB found that there was no basis in evidence or law to conclude that the Coastal Gaslink Pipeline was “essential, vital, or integral” to the federal work or undertaking (the NGTL System).¹⁵⁰ The NEB also concluded that there was no basis for LNG Canada’s LNG facility to be brought under federal jurisdiction simply because the NEB regulates the international export of LNG from the provincially regulated LNG terminal.¹⁵¹

This decision from the NEB emphasizes that the threshold remains high for finding that a local provincial project, physically connected to or likely to be physically connected to a federal undertaking, will form part of a federal undertaking.

E. PERMITTING FOR THE KEYSTONE XL PIPELINE PROJECT

The proposed Keystone pipeline would transport crude oil from western Canada and shale oil from North Dakota and Montana to Nebraska for delivery to Gulf Coast refineries. However, despite the significant benefits of Keystone, its development has been widely opposed, with challenges to the Presidential Permit required for the pipeline to cross the Canada-US border and challenges to other permits and approvals required for construction of the pipeline.

The project has a long regulatory history, starting in 2008, largely dealing with the US Presidential Permit and associated environmental review.

On 29 March 2019, President Donald Trump issued a new Presidential Permit¹⁵² to replace the initial Presidential Permit that was issued by the Trump administration in 2017.¹⁵³ A new Final Supplemental Environmental Impact Statement (2019 FSEIS) was issued on 20 December 2019,¹⁵⁴ along with a new biological assessment and order, superseding the earlier Final Supplemental Environmental Impact Statement (the 2014 FSEIS).

Keystone has faced several court challenges, including ongoing challenges in the Montana District Court. On 8 November 2018, the Montana District Court found that the 2014 FSEIS was out of date and required supplementation to account for new information and developments, particularly with respect to new greenhouse gas emissions modelling and updates to policies relating to accidental release of hazardous materials.¹⁵⁵ The 2019 FSEIS resolved this issue but did not end litigation in Montana.¹⁵⁶ There are currently five ongoing

¹⁵⁰ *Ibid* at 40.

¹⁵¹ *Ibid* at 41.

¹⁵² See United States, *Presidential Permit of March 29, 2019: Authorizing TransCanada Keystone Pipeline, LP, To Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada*, 84 FR 13101.

¹⁵³ See United States, Department of State, “Keystone XL Pipeline Application,” online: <www.state.gov/keystone-pipeline-xl/>.

¹⁵⁴ See United States, Department of State, *Final Supplemental Environmental Impact Statement for the Keystone XL Project*, Vol 1, online: <www.state.gov/wp-content/uploads/2019/12/Vol-1-Keystone-Final-SEIS-Cover-through-Chapter-11_508-December-2019.pdf>.

¹⁵⁵ *Indigenous Environmental Network v United States Department of State*, 347 F Supp (3d) 561 at 590 (D Mont 2018) [*Indigenous Environmental Network*].

¹⁵⁶ See EXP Energy Services Inc, “Keystone XL Pipeline Project: Plan of Development” at 15, online: <eplanning.blm.gov/epl-front-office/projects/nepa/1503435/20011515/250015757/BLM_FINAL_POD_20200117_508c.pdf>.

and unresolved court actions against TC Energy and Keystone XL in the US.¹⁵⁷ Keystone suffered a significant setback on 15 April 2020 when the Montana District Court cancelled the key Nationwide Permit 12 (NWP 12) because the US Army Corps of Engineers inadequately considered endangered species when issuing the permit.¹⁵⁸ An NWP 12 is required for Keystone XL to construct and operate where it crosses the Yellowstone and Cheyenne Rivers in Montana.¹⁵⁹ This ruling is not expected to shut down construction work that began in early April for the project at the US-Canada border crossing in Montana.

Despite the recent legal obstacles for Keystone, the most promising recent event for Keystone occurred on 31 March 2020 when the Alberta government announced a significant investment of up to \$7.5 billion in the pipeline.¹⁶⁰ Whether this was a sound investment remains to be seen.

V. CARBON TAX LEGISLATION

A. THE FEDERAL *GREENHOUSE GAS POLLUTION PRICING ACT*

Three provinces, Saskatchewan, Ontario, and Alberta, asked their Courts of Appeal to rule on the constitutionality of the federal carbon tax legislation, the *Greenhouse Gas Pollution Pricing Act*.¹⁶¹ All three provincial appellate courts issued split decisions. Saskatchewan and Ontario both upheld the legislation but the Alberta Court of Appeal found the *GGPPA* unconstitutional.¹⁶² The Saskatchewan and Ontario governments have both appealed the decisions to the Supreme Court of Canada, although the hearings have been deferred due to COVID-19.¹⁶³ More information on these decisions can be found in the article by Brendan Downey, Robert Martz, Paul G. Chiswell, and Ramona Salamucha also published in this issue.¹⁶⁴

¹⁵⁷ *Indigenous Environmental Network*, *supra* note 155; *Rosebud Sioux Tribe v Trump* (20 December 2019) CV-18-118-GF-BMM (D Mont); *Indigenous Environmental Network v Trump* (3 February 2020), CV-19-28-GF-BMM (D Mont).

¹⁵⁸ *Northern Plains Resource Council v US Army Corps of Engineers* (15 April 2020), CV-19-44-GF-BMM (D Mont) (interlocutory judgment) at 19.

¹⁵⁹ *Ibid* at 1.

¹⁶⁰ See Government of Alberta, "Investing in Keystone XL Pipeline," online: <www.alberta.ca/investing-in-keystone-xl-pipeline.aspx>.

¹⁶¹ SC 2018, c 12, s 186 [*GGPPA*].

¹⁶² *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544; *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74.

¹⁶³ See Supreme Court of Canada, News Release (16 March 2020), online: <decisions.scc-csc.ca/scc-csc/news/en/item/6823/index.do>.

¹⁶⁴ See Brendan Downey et al, "Federalism in the Patch: Canada's Energy Industry and the Constitutional Division of Powers" (2020) 58:2 *Alta L Rev* 273.

**B. ALBERTA'S TECHNOLOGY INNOVATION
AND EMISSIONS REDUCTION REGULATION¹⁶⁵**

On 1 January 2020, Alberta replaced its carbon emission regulation relating to large industrial emitters in the province, namely, the *Carbon Competitiveness Incentive Regulation*,¹⁶⁶ with the *TIER*.¹⁶⁷

The *TIER* applies to facilities that emitted 100,000 tonnes of carbon dioxide equivalent (CO₂e) in 2016 or any subsequent year.¹⁶⁸ Under the *CCIR*, the regulation applied for facilities that had met this threshold of emissions in 2003 or any subsequent year.¹⁶⁹

Other notable changes in the *TIER* include the following:

- The *TIER* provides an exemption period of up to three years from compliance for new facilities.¹⁷⁰ This treatment is being phased out for electric facilities in 2023.¹⁷¹
- The *TIER* has a lower threshold for facilities that may opt in to the regulation, allowing the opt in for facilities that have greater than 10,000 tonnes of annual emissions in an emissions-intensive-trade-exposed sector.¹⁷² The threshold was 50,000 tonnes under *CCIR*.¹⁷³
- The *TIER* applies a different benchmark methodology for emissions intensity than the *CCIR*. The *TIER* has a facility-specific benchmark based on historical emissions and a high performance benchmark similar to the product-based benchmark under the *CCIR*.¹⁷⁴ For the facility-specific benchmark, the emissions intensity reduction target in 2020 will be 90 percent of the facility's production-weighted average emissions intensity for non-Industrial Process emissions, tightened by 1 percent per year after 2020.¹⁷⁵ The high performance benchmark will not be subject to a tightening rate but will act as the floor for the tightening rate for facility-specific benchmarks.
- The *TIER* allows conventional oil and gas facilities to be a designated aggregate facility under the regulation, defined as a group of two or more individual oil and gas facilities, so long as the facilities individually emit fewer than 100,000 tonnes of CO₂e and share the same responsible person.¹⁷⁶ In situ and mining oil sands

¹⁶⁵ Alta Reg 133/2019 [*TIER*].

¹⁶⁶ Alta Reg 255/2017 [*CCIR*], as repealed by *TIER*, *ibid*, s 38.

¹⁶⁷ *TIER*, *ibid*.

¹⁶⁸ *Ibid*, s 1(1)(cc).

¹⁶⁹ See *CCIR*, *supra* note 166, s 3(1).

¹⁷⁰ See *TIER*, *supra* note 165, s 12(1).

¹⁷¹ *Ibid*, s 36(7).

¹⁷² *Ibid*, s 4(4).

¹⁷³ See *CCIR*, *supra* note 166, s 4(4).

¹⁷⁴ See Government of Alberta, "TIER Regulation Fact Sheet" at 1, online: <www.alberta.ca/assets/documents/ep-fact-sheet-tier-regulation.pdf>.

¹⁷⁵ *Ibid* at 2.

¹⁷⁶ *TIER*, *supra* note 165, s 5.

facilities are excluded from being an aggregate facility.¹⁷⁷ There is no minimum emission threshold for aggregate facilities under the *TIER* and “[a]n aggregate facility will be required to reduce its emission intensity of stationary fuel combustion emissions by 10 per cent relative to the aggregate facility’s historical baseline.”¹⁷⁸ There is no tightening rate for such facilities.¹⁷⁹

Some things will stay the same. There remains no overall cap on emissions for large emitters. Electric facilities will remain subject to a “good-as-best” gas benchmark of 0.37 CO₂e/MWh. Compliance options remain the same (on-site emission reductions, use of emission performance credits or emission offsets, or payment into a *TIER* compliance fund at a current rate of \$30/tonne of CO₂e).

The federal government has confirmed that the *TIER* is compliant with its requirements. On 5 March 2020, the Alberta government announced that it would increase the compliance amount under the *TIER* in 2021 to \$40/tonne CO₂e and in 2022 to \$50/tonne CO₂e to keep in line with federal requirements.¹⁸⁰ It therefore appears that the two levels of government have made peace for now, at least on carbon pricing.

VI. TO THE AER AND BEYOND!

The past year has been an eventful one for the AER. The regulator has been subject to reviews and investigations, has issued impactful decisions, and is coming to terms with new royalty legislation.

Most recently, the Government of Alberta installed a new board of directors effective 15 April 2020 with David Goldie as the new Chair, and Beverley Yee, Georgette Habib, Corrina Bryson, Jude Daniels, Gary Leach, and Tracey McCrimmon as members of the board.¹⁸¹

A. AER UNDER INVESTIGATION

The Government of Alberta launched a review of the AER in September 2019 to identify potential enhancements to the AER’s “mandate, governance and system operations to ensure Alberta remains a predictable place to invest.”¹⁸² The government accepted feedback until 14 October 2019, which is currently under review. The Government of Alberta has not provided a timeline for completion of the review.¹⁸³

¹⁷⁷ Government of Alberta, “Conventional Oil and Gas TIER Fact Sheet” at 2, online: <open.alberta.ca/dataset/9af5b5d5-a7d4-41ba-b3f4-14dd708ed124/resource/cc5803e8-d403-47f5-973c-2c28254a2b8d/download/aep-conventional-oil-and-gas-sector-tier-fact-sheet.pdf>.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ See James Keller & Gary Mason, “Alberta to Increase its Industrial Carbon Tax in Step with Ottawa,” *The Globe and Mail* (5 March 2020), online: <www.theglobeandmail.com/canada/alberta/article-alberta-to-increase-its-industrial-carbon-tax-in-step-with-ottawa/>.

¹⁸¹ See OC 109/2020 (1 April 2020).

¹⁸² Government of Alberta, “Alberta Energy Regulator Review,” online: <www.alberta.ca/alberta-energy-regulator-review.aspx>.

¹⁸³ *Ibid.*

In October 2019, reports from the Ethics Commissioner,¹⁸⁴ the Public Interest Commissioner,¹⁸⁵ and the Auditor General¹⁸⁶ became publicly available. All three reports dealt with allegations that the AER and key officials, including the then CEO, Jim Ellis, improperly used public resources (both time and money) to build the International Centre for Regulatory Excellence (ICORE).

ICORE was created in 2014 to provide training to the AER to turn the AER into a world class regulator. However, over time ICORE's purpose shifted toward generating revenue by training other governments and regulators *outside* Alberta. Thus, ICORE's new function fell outside the AER's mandate "to provide efficient, safe, orderly and environmentally responsible development of energy resources in Alberta."¹⁸⁷

The three reports from the Ethics Commissioner, Public Interest Commissioner, and Auditor General all concluded that key AER personnel, including Ellis, acted inappropriately in their involvement with, and use of public resources in relation to, ICORE.

In her report, the Ethics Commissioner concluded that Ellis made decisions on behalf of the AER, or influenced decisions made by the AER, to further his own, and other key personnels', personal interests.¹⁸⁸ She also found that Ellis concealed the extent of his involvement with ICORE from the AER Board of Directors, the Minister of Energy, the Deputy Minister of Energy, and the Deputy Minister of Executive Council.¹⁸⁹ The Ethics Commissioner recommended further board oversight, including director training, and an internal review into the AER's internal conflict of interest procedures.¹⁹⁰

In her report, the Public Interest Commissioner concluded that Ellis grossly mismanaged public funds, assets, and the delivery of public services.¹⁹¹ She found that ICORE's functions fell outside of the AER's mandate, meaning Ellis breached *REDA*¹⁹² when he authorized activity relating to ICORE.¹⁹³ Finally, the Public Interest Commissioner recommended a review of the internal whistleblowing policies and procedures and ensuring that AER staff are made distinctly aware of them.¹⁹⁴

¹⁸⁴ Office of the Ethics Commissioner, Province of Alberta, *Report of the Investigation under the Conflicts of Interest Act by Hon Marguerite Trussler, QC, Ethics Commissioner, into allegations involving Jim Ellis* (14 June 2019), online: <open.alberta.ca/dataset/2eff9891-6b7f-4f1f-ba60-f0231e680a2a/resource/f4fc8ab2-5baf-4522-8b40-cacdb20e2d9f/download/report-ethics-commissioner-2019-06.pdf> [*Ethics Commissioner Report*].

¹⁸⁵ Alberta, Public Interest Commissioner, *A report of the Public Interest Commissioner in relation to wrongdoings within the Alberta Energy Regulator*, PIC-18-02777 (3 October 2019), online: <yourvoiceprotected.ca/wp-content/uploads/2019/10/2019Oct3-Public-Interest-Commissioners-Report-AER-ICORE.pdf> [*PIC Report*].

¹⁸⁶ Auditor General of Alberta, *An Examination of the International Centre of Regulatory Excellence (ICORE)* (October 2019), online: <www.oag.ab.ca/documents/855/OAG_AER_ICORE_Oct_2019_Report-web.pdf> [*Auditor General Report*].

¹⁸⁷ *REDA*, *supra* note 8, s 2.

¹⁸⁸ *Ethics Commissioner Report*, *supra* note 184 at 28.

¹⁸⁹ *Ibid* at 29.

¹⁹⁰ *Ibid* at 31–32.

¹⁹¹ See *PIC Report*, *supra* note 185 at 17–18.

¹⁹² *Supra* note 8.

¹⁹³ See *PIC Report*, *supra* note 185 at 16.

¹⁹⁴ *Ibid* at 20.

The Auditor General concluded that the AER engaged in activities outside its mandate,¹⁹⁵ inappropriately spent public funds, and had ineffective board oversight and internal AER management and controls.¹⁹⁶ She also found that ministerial oversight had been ineffective.¹⁹⁷ The Auditor General recommended increased board oversight and training of AER staff on whistleblowing policies.¹⁹⁸ She also recommended the evaluation of whether further public resources belonging to the AER were expended on ICORE, with a view to recovering such resources.¹⁹⁹

B. AER BEARSPAW'S COMMON CARRIER AND RATEABLE TAKE APPLICATIONS

In January 2017, Bears paw Petroleum Ltd. (Bears paw) filed applications with the AER seeking a declaration that Harvest Operations Ltd. (Harvest) “is a common carrier of gas produced from the Crossfield Basal Quartz C Pool” (the Crossfield pool) and for a rateable take order against Harvest to distribute gas production among wells in the Crossfield pool, including Bears paw’s gas well.²⁰⁰ A common carrier declaration requires a proprietor to share capacity on a pipeline system in order to provide owners of oil and gas in the province the opportunity to obtain their share of production and subjects the pipeline to rate regulation by the AUC.²⁰¹ A rateable take order restricts the amount of gas that may be produced from a given pool in Alberta and is granted when an applicant can show that they are being deprived of the opportunity to obtain their share of production from the pool.²⁰²

However, on 14 November 2019, before these applications were heard, Harvest filed a motion asking that the AER dismiss, or at least suspend or adjourn the applications, because it was no longer operating the facilities in question and therefore Bears paw could not meet the requirements for either application. The AER granted Harvest’s motion on 24 January 2020.²⁰³

This decision is notable for two reasons. First, it confirms that the AER has jurisdiction to grant summary judgment.²⁰⁴ While the AER acknowledged that the *Alberta Energy Regulator Rules of Practice*²⁰⁵ do not directly provide for nor prohibit summary determinations, it held it had discretion to make such a determination where it is necessary in the interest of resolving an issue fairly and efficiently.²⁰⁶

¹⁹⁵ See *Auditor General Report*, *supra* note 186 at 21.

¹⁹⁶ *Ibid* at 31.

¹⁹⁷ *Ibid* at 38.

¹⁹⁸ *Ibid* at 54.

¹⁹⁹ *Ibid* at 51.

²⁰⁰ See *Bears paw Petroleum Ltd Common Carrier and Rateable Take Order Applications, Applications 1877294 and 1878333*, 2020 ABAER 002 at para 2, online: <www.aer.ca/documents/decisions/2020/2020ABAER002.pdf>.

²⁰¹ See Alberta Energy Regulator, *Directive 065: Resources Applications for Oil and Gas Reservoirs* (14 July 2020) at 1–15, online: <www.aer.ca/documents/directives/Directive065.pdf>. See also *Harvest Operations Ltd Motion to Dismiss Bears paw Petroleum Ltd Applications 1877294 and 1878333*, (24 January 2020) at 10, online: <www.aer.ca/documents/decisions/Participatory_Procedural/1877294percent20_20200124.pdf> [*Bears paw Decision to Dismiss*].

²⁰² *Bears paw Decision to Dismiss*, *ibid* at 13–14.

²⁰³ *Ibid* at 17.

²⁰⁴ *Ibid* at 13.

²⁰⁵ Alta Reg 99/2013.

²⁰⁶ *Bears paw Decision to Dismiss*, *supra* note 201 at 16.

The decision is also notable because the AER held that it did not have the jurisdiction to compel Harvest to continue to operate the facilities that would be the subject of these orders against its will. Bears paw could not satisfy the common carrier application requirements because Harvest was in the process of abandoning a pipeline and compressor that were the subject of the application.²⁰⁷ Bears paw could not satisfy the rateable take order application because it could not show that drainage was occurring from the Crossfield pool, which was the subject of the application.²⁰⁸

C. PROSPER RIGEL PROJECT STATUS

Prosper Petroleum Ltd. (Prosper) has applied for its Rigel project to operate a recovery scheme including a central processing facility and cogeneration power plant within the area covered by the Moose Lake Access Management Plan (the MLAMP). Fort McKay First Nation opposed the application and said that the project would effectively defeat the purpose of the MLAMP.²⁰⁹

The MLAMP is a plan to manage access and activities near Namur Lake, also known as Buffalo Lake, and Gardiner Lake, also known as Moose Lake, in northern Alberta to protect Fort McKay First Nation's ability to practice its treaty and Aboriginal rights while still allowing for responsible resource development. The MLAMP has not yet been finalized.

In June 2018, the AER approved the Rigel project, subject to Cabinet approval.²¹⁰ In its decision, the AER acknowledged that the Government of Alberta had said that it intended to finalize the MLAMP. However, since it was not finalized, the AER found that it could not guide its decision.²¹¹

In February 2020, Prosper applied for a mandatory injunction or an order of mandamus directing Cabinet to issue a decision on the Rigel project.²¹² The application was heard more than 19 months after the AER issued its decision. The Alberta Court of Queen's Bench concluded that since the Rigel project could only proceed with authorization by the Lieutenant Governor in Council (an authorization the Alberta government has since decided to eliminate in a recently introduced omnibus bill as part of its red tape reduction initiatives),²¹³ there was an implicit legal duty on Cabinet to exercise its power.²¹⁴ The Alberta Court of Queen's Bench agreed that Cabinet had discretion in making its decision; however, this did not include the discretion to refuse to make the decision.²¹⁵

The Government of Alberta did not give specific reasons for the delay in making a decision on Prosper's project, citing cabinet confidentiality. It did note that there was an

²⁰⁷ *Ibid* at 12.

²⁰⁸ *Ibid* at 14.

²⁰⁹ See *Prosper Petroleum Ltd Rigel Project* (12 June 2018), 2018 ABAER 005 at para 91, online: <www.aer.ca/documents/decisions/2018/2018-ABAER-005.pdf>.

²¹⁰ *Ibid* at para 1.

²¹¹ *Ibid* at para 38.

²¹² *Prosper Petroleum Ltd v Her Majesty the Queen in Right of Alberta*, 2020 ABQB 127 [*Prosper*].

²¹³ See Bill 22, *Red Tape Reduction Implementation Act*, 2020, 2nd Sess, 30th Leg, Alberta, 2020 (assented to 23 July 2020), SA 2020, c 25.

²¹⁴ See *Prosper*, *supra* note 212 at para 14.

²¹⁵ *Ibid* at para 28.

election resulting in a new government and new Cabinet and urged the Court to infer that this was a complex project given the time it took to get through the regulatory process. However, Justice Romaine noted that the new Cabinet had been in place for ten months and had approved three other oil sands projects in that time. She also noted that there were other factors beyond the complexity of the project that contributed to the regulatory delays, and that the Minister of Environment informed Prosper that Cabinet was well briefed on the topic.²¹⁶ Justice Romaine concluded that there was a strong prima facie case that Cabinet had breached its legal duty under the *Oil Sands Conservation Act*.²¹⁷

Prosper submitted that this project is its principal asset and without certainty the future of both the project and Prosper would be jeopardized by delay. Justice Romaine accepted that this constituted irreparable harm.²¹⁸ Justice Romaine also found there is a strong public interest in ensuring timely Cabinet decisions.²¹⁹ Ultimately, Justice Romaine granted Prosper's application and directed Cabinet to make a decision within ten days.²²⁰

On 28 February 2020, the Alberta Court of Appeal stayed Justice Romaine's decision pending the outcome of an appeal that was scheduled to be heard on 27 April 2020.²²¹ The Government of Alberta's failure to approve Prosper's project comes off as somewhat ironic given their criticisms of the AER²²² and the federal government²²³ for delaying projects.

However, Cabinet was saved from deciding on Prosper's Rigel project on 24 April 2020 when the Alberta Court of Appeal overturned the AER's approval of the project.²²⁴ The AER had concluded that it could not consider the MLAMP for three reasons:

1. Section 21 of *REDA* prohibits the AER from assessing adequacy of Crown consultation;
2. Section 7(3) of LARP [the Lower Athabasca Regional Plan] prohibits the AER from adjourning, deferring, denying, refusing, or rejecting any application by reason only of incompleteness of a LARP regional plan; and
3. AER approval ... is subject to authorization by Cabinet, which is the most appropriate place for a decision on the need to finalize MLAMP.²²⁵

The issue on appeal was whether the honour of the Crown was implicated by the MLAMP process. The Court of Appeal concluded that this was different than considering the

²¹⁶ *Ibid* at paras 46–47.

²¹⁷ *Ibid* at para 51; *Oil Sands Conservation Act*, RSA 2000, c O-7.

²¹⁸ *Prosper*, *ibid* at paras 61–62.

²¹⁹ *Ibid* at para 69.

²²⁰ *Ibid* at para 81.

²²¹ *Prosper Petroleum Ltd v Her Majesty the Queen in Right of Alberta*, 2020 ABCA 85 at para 45.

²²² See Government of Alberta, News Release, "Promise Made, Promise Kept on the Alberta Energy Regulator" (6 September 2019), online: <www.alberta.ca/release.cfm?xID=644204AFFDD87-B96A-D0CF-F64984DCC01E91AD>.

²²³ See Government of Alberta, News Release, "Correction*: Teck Frontier Project Update: Premier Kenney" (23 February 2020), online: <www.alberta.ca/release.cfm?xID=68670907E7CA8-F7F5-DC5E-C06FC8F8AF4D9E25>. See also Government of Alberta, News Release, "TMX Construction Restart: Premier Kenney" (21 August 2019), online: <www.alberta.ca/release.cfm?xID=643380E8C23DF-E96D-6FD2-E198C8AFDC2A75BF>.

²²⁴ See *Fort McKay*, *supra* note 13.

²²⁵ *Ibid* at para 44.

adequacy of Crown consultation.²²⁶ The honour of the Crown is broader than the duty to consult and includes treaty-making and implementation.²²⁷ The Court of Appeal concluded the issues relating to the MLAMP negotiations were broader than the adequacy of Crown consultation and the AER was not prevented from considering these issues by section 21 of the *REDA*.²²⁸

The Alberta Court of Appeal also concluded that the LARP also did not prohibit the AER from considering the MLAMP negotiations. The MLAMP is a planning initiative that will be assessed for inclusion in LARP implementation and is not within the scope of section 7(3) of the LARP.²²⁹

Finally, the Court of Appeal concluded that the AER was required to consider whether the proposed project was in the public interest. The AER could not decline to address matters that fell within the scope of the public interest because it considered that Cabinet was better able to consider those issues.²³⁰ The “public interest” includes adherence to constitutional principles like the honour of the Crown, so the AER is required to consider the MLAMP negotiations to the extent that they implicate the honour of the Crown.²³¹

The Alberta Court of Appeal concluded that the AER took “an unreasonably narrow view of what comprises the public interest” when it excluded the negotiations relating to the MLAMP from its consideration,²³² and the Court remitted the matter back to the AER for further consideration.²³³

D. THE ROYALTY TREATMENT

In its platform, the UCP committed to guaranteeing that the royalty regime that is currently in place when a well is permitted will remain in place for the life of that well (or at least ten years). To accomplish this, the Government of Alberta passed Bill 12, the *Royalty Guarantee Act*²³⁴ on 18 July 2019 which amended the *Mines and Minerals Act*²³⁵ to commit to two things:

1. the royalty regime will not be fundamentally restructured for ten years after the relevant section comes into force; and
2. subject to the regulations, the royalty regime in place when a well commences production will not change for that well for ten years.

Of course, Canada inherited a parliamentary supremacy system from the United Kingdom and a fundamental tenet of Canadian democracy is that one government cannot bind future

²²⁶ *Ibid* at para 52.

²²⁷ *Ibid* at para 53.

²²⁸ *Ibid* at para 57.

²²⁹ *Ibid* at para 60.

²³⁰ *Ibid* at para 64.

²³¹ *Ibid* at para 65.

²³² *Ibid* at para 68.

²³³ *Ibid* at para 69.

²³⁴ 1st Sess, 30th Leg, Alberta, 2019 (assented to 18 July 2019), SA 2019, c 9.

²³⁵ RSA 2000, c M-17.

governments. Therefore, a guarantee to maintain a royalty structure for ten years is only good for as long as the government of the day chooses to honour it.

VII. RECENT CHANGES TO ABORIGINAL LAW

A. *THE ALBERTA INDIGENOUS OPPORTUNITIES CORPORATION ACT*²³⁶

In November 2019, the Government of Alberta passed the *Alberta Indigenous Opportunities Corporation Act*, which created the Alberta Indigenous Opportunities Corporation (the Corporation). The Corporation's mandate is to facilitate investment by Indigenous groups in natural resource projects and related infrastructure. This may include Indigenous groups from outside of Alberta where Alberta Indigenous groups hold at least 25 percent of Indigenous ownership of the project.²³⁷

Eligible natural resource projects include projects from energy (including oil and gas, renewable energy, electricity, and coal), mining, and forestry industries.²³⁸ According to the Corporation's website, this can include projects outside of Alberta, if they benefit Alberta's natural resource sector.²³⁹

With the approval of the Lieutenant Governor in Council, the Corporation can make loans, issue loan guarantees, purchase equity, and enter into joint ventures and partnerships. The Corporation can also issue grants and contributions in accordance with a grant program approved by the Minister of Indigenous Relations. The grants and contributions cannot be used to purchase or invest in a natural resource project or related infrastructure. The Corporation can issue up to \$1 billion in loan guarantees.²⁴⁰

Indigenous groups must invest a total of at least \$20 million in a specific project before the Corporation can make loans, issue loan guarantees, purchase equity, or enter into a joint venture or partnership.²⁴¹

B. *ATHABASCA CHIPEWYAN FIRST NATION V. ALBERTA*²⁴²

The Athabasca Chipewyan First Nation sought judicial review of a 17 July 2014 decision from the Aboriginal Consultation Office (the ACO), which found there was no duty to consult the Athabasca Chipewyan First Nation in relation to a pipeline project.²⁴³ The project was ultimately approved by the AER and the Athabasca Chipewyan First Nation did not challenge the project approval.²⁴⁴

²³⁶ SA 2019, c A-26.3.

²³⁷ See "Eligibility," online: *Alberta Indigenous Opportunities Corporation* <www.theaioc.com/program/eligibility> [AIOC].

²³⁸ See *Authorized Natural Resource Sectors Regulation*, Alta Reg 27/2020, s 1.

²³⁹ See AIOC, *supra* note 237.

²⁴⁰ "Overview," online: *Alberta Indigenous Opportunities Corporation* <www.theaioc.com/program/overview/>.

²⁴¹ See *Alberta Indigenous Opportunities Corporation Regulation*, Alta Reg 162/2019, s 1.

²⁴² 2018 ABQB 262, aff'd 2019 ABCA 401 [*Athabasca Chipewyan CA*].

²⁴³ *Ibid* at para 1.

²⁴⁴ *Ibid* at para 3.

While the project proponent did consult the Athabasca Chipewyan First Nation, the ACO concluded that there was no constitutional duty to consult with Athabasca Chipewyan First Nation for this project based on the location of the project, and its assessment of the impacts on the Athabasca Chipewyan First Nation.²⁴⁵

The Athabasca Chipewyan First Nation applied to have the ACO decision judicially reviewed by the Alberta Court of Queen's Bench. It argued that the ACO did not have the authority to decide whether the duty to consult is triggered, and that the duty to consult is automatically triggered any time land is taken up within its treaty lands.²⁴⁶

The Court issued three declarations:

1. The [ACO] has the authority to decide whether the duty to consult is triggered.
2. The mere act of taking up of land by the Crown in a treaty area is not adverse conduct sufficient to trigger the duty to consult.
3. Procedural fairness is engaged in the determination of whether a duty to consult is triggered.²⁴⁷

The Athabasca Chipewyan First Nation then appealed the first two declarations from the Alberta Court of Queen's Bench to the Alberta Court of Appeal.²⁴⁸ The Court of Appeal held that the ACO did have the authority to assess whether the duty to consult was triggered. The Government of Alberta is not required to create a statute specifically authorizing the ACO to assess whether the duty to consult was required.²⁴⁹

The Court of Appeal also disagreed that taking up land anywhere within Treaty 8 automatically triggered the duty to consult with Athabasca Chipewyan First Nation. The taking up would have required a potential to adversely impact Athabasca Chipewyan First Nation's Treaty rights for them to be consulted.²⁵⁰

C. THE DUTY TO CONSULT WITH ABORIGINAL GROUPS IN AUC PROCEEDINGS

In September 2019, the AUC granted intervener standing to the Alexis Nakota Sioux First Nation in the Cascade Power Plant Project facility application.²⁵¹ In doing so, the AUC ruled that it had jurisdiction to consider whether the duty to consult had been met.

The AUC had previously concluded that it did not have an explicit or implicit duty to assess the adequacy of Crown consultation where the Crown is not a participant and there

²⁴⁵ *Ibid* at para 29.

²⁴⁶ *Ibid* at para 71.

²⁴⁷ *Ibid* at para 122.

²⁴⁸ See *Athabasca Chipewyan CA*, *supra* note 242.

²⁴⁹ *Ibid* at para 39.

²⁵⁰ *Ibid* at paras 57, 61.

²⁵¹ *Ruling on Standing Re Cascade Power Plant Project* (6 September 2019), Proceeding 24081, Application 24081-A001, online: AUC <www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2019/24081-F0035.pdf> [*Cascade Standing*].

is no Crown decision before the AUC.²⁵² However, the prior AUC decision was issued before the Supreme Court of Canada's decisions in *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*²⁵³ and *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*²⁵⁴ In those decisions, the Supreme Court of Canada confirmed that a regulatory decision can trigger the duty to consult, and that the Crown can rely on the regulatory process to meet the duty to consult.²⁵⁵

The AUC also noted that the Government of Alberta confirmed that decisions from regulators like the AUC and the Natural Resources Conservation Board can trigger the duty to consult and that the government relies on the regulator's process to address potentially adverse impacts. Accordingly, the AUC concluded that it had jurisdiction to assess the adequacy of Crown consultation.²⁵⁶ The AUC's decision was not appealed.

Ultimately, the Alexis Nakota Sioux First Nation was granted standing in the proceeding to consider the Cascade Power Plant Project's power plant approval but subsequently withdrew from the proceeding noting that its concerns had been adequately addressed.²⁵⁷

VIII. UPDATES TO UTILITIES AND ELECTRICITY REGULATION IN ALBERTA

A. CAPACITY MARKET

Alberta currently has an "energy-only" market where, with limited exceptions, generators are only paid for the electricity they actually produce. In 2016, the New Democratic Party (NDP) government announced that it would transition to a capacity market, with the goal of the market being operational by 2021. The plan was to add a capacity market to the energy-only market where generators would be paid for their ability to produce electricity overall and in real time. The idea was based on a concern of revenue uncertainty and revenue instability in the market caused by the transition to renewable sources of electricity.²⁵⁸

In the end, the UCP cancelled the plan for a capacity market on 24 July 2019, citing investors' concerns over uncertainty and the energy-only market's proven track record of providing an affordable and reliable supply of electricity in Alberta.²⁵⁹ The announcement was made on the eve of a decision from the AUC on the first set of Independent System Operator (ISO) rules essential for the implementation and operation of the capacity market, which were required for a planned first capacity auction in the fall of 2019.

²⁵² *Ibid* at para 23.

²⁵³ 2017 SCC 41.

²⁵⁴ 2017 SCC 40.

²⁵⁵ See *Cascade Standing*, *supra* note 251 at para 25.

²⁵⁶ *Ibid* at para 26.

²⁵⁷ See *Cascade Power GP Ltd, Cascade Power Plant Project* (8 October 2019), 24081-001-2019 at para 3, online: AUC <[www2.auc.ab.ca/Proceeding24081/ProceedingDocuments/24081_X\[\]_Decision24081-D01-2019-CascadePowerGPLtd_0100.pdf](http://www2.auc.ab.ca/Proceeding24081/ProceedingDocuments/24081_X[]_Decision24081-D01-2019-CascadePowerGPLtd_0100.pdf)>.

²⁵⁸ Government of Alberta, News Release, "Consumers to Benefit from Stable, Reliable Electricity Market" (23 November 2016), online: <www.alberta.ca/release.cfm?xID=44880BD97DCDC-D465-4922-25225F9F43B302C9>.

²⁵⁹ Government of Alberta, News Release, "Restoring Certainty in the Electricity System" (24 July 2019), online: <www.alberta.ca/release.cfm?xID=642387D0ECA3E-ED8E-6B02-885D35312EBBB3EE>.

On 29 October 2019, the UCP government passed Bill 18, the *Electricity Statutes (Capacity Market Termination) Amendment Act, 2019*²⁶⁰ to remove references to the capacity market in the *AUCA*,²⁶¹ *Electric Utilities Act*²⁶² and the *Hydro and Electric Energy Act*.²⁶³ The Act came into force on 30 October 2019.

B. RENEWABLE ELECTRICITY PROGRAM

The Renewable Electricity Program (REP) was implemented by the previous NDP government with the goal to add 5,000 MW of renewable electricity capacity by 2030 using a competitive process administered by the Alberta Electric System Operator (AESO).

The AESO has contracted for 1360 MW of renewable energy under the program.

Successful proponents of these projects entered into a Renewable Electricity Support Agreement (RESA) with the AESO,²⁶⁴ which provides a 20 year indexed renewable energy credit covering any difference between the bid price for energy generated from the project and the pool price received by the proponent when the energy enters the Alberta Interconnected Electricity System (AIES).

On 10 June 2019, the Minister of Energy for Alberta, Sonya Savage, informed the AESO, by letter, that her government did not intend to proceed with additional rounds of the REP and that the AESO's efforts should focus on oversight of the projects awarded under the previous rounds of the REP.²⁶⁵ Minister Savage also encouraged the AESO to continue to work closely with her department to ensure that "market-driven renewable power, without the need for costly direct subsidy, is a part of Alberta's future electricity mix."²⁶⁶

However, it is not all bad news for the wind and solar industry in Alberta. On 15 April 2020 the federal government issued a request for information (RFI) regarding Canada's proposal to enter into one or more power purchase contracts to support Canada's electricity requirements and create new renewable generation in Alberta.²⁶⁷ New installations must be capable of generating net new renewable electricity for the equivalent of 200,000 to 280,000 MWh annually (the amount federal buildings currently consume in Alberta) plus an additional 240,000 to 360,000 MWh to displace emissions of electricity consumed by federal facilities outside of Alberta. The RFIs are due on 1 May 2020.

²⁶⁰ 1st Sess, 30th Leg, Alberta, 2019 (assented to 30 October 2019), SA 2019, c 11.

²⁶¹ *Supra* note 8.

²⁶² SA 2003, c E-5.1 [EUA].

²⁶³ RSA 2000, c H-16 [HEEA].

²⁶⁴ A copy of the RESA for each round of the REP is available at "REP Results," online: <www.aeso.ca/market/renewable-electricity-program/rep-results/>.

²⁶⁵ Letter from Minister Sonya Savage, Minister of Energy, to Michael Law, President and Chief Executive Officer of the AESO, online: <www.aeso.ca/assets/Uploads/GoA-REP-32469signed-letter.pdf>.

²⁶⁶ *Ibid.*

²⁶⁷ Public Works and Government Services Canada, "Request For Information (RFI) on Renewable Electricity Generation in Alberta (EW038-210082/A)," online: <buyandsell.gc.ca/procurement-data/tender-notice/PW-PWZ-219-11016>.

C. COGENERATORS CONTINUE TO SEEK CLARITY ON SELF-SUPPLY AND EXPORT

On 20 February 2019, the AUC issued Decision 23418-D01-2019²⁶⁸ that altered the landscape for cogeneration and self-supply units in Alberta.

In *EL Smith*, EPCOR Water Services Inc. (EPCOR Water) applied for approval of a 12 MW solar plant where 70 percent of the energy output would remain on-site and 30 percent would be exported to the grid. The AUC held that this proposal was inconsistent with the must offer, must exchange rule.²⁶⁹

EPCOR Water attempted to rely on an exemption in section 2(1)(b) of the *EUA* which states the *Act* does not apply to “electric energy produced on property of which a person is the owner or a tenant, and consumed solely by that person and solely on that property,”²⁷⁰ arguing that the exemption applies only to the portion of the electric energy produced and consumed by it on its property (such as the 70 percent).²⁷¹

The AUC disagreed, finding that the plain and ordinary meaning of section 2(1)(b) establishes three preconditions for the exemption to apply, and EPCOR Water’s proposal ran afoul of the final two:

- The electric energy must be produced on EPCOR Water’s property.
- The electric energy must be consumed solely by EPCOR Water.
- The electric energy must be consumed solely on EPCOR Water’s property.²⁷²

The AUC also considered two self-supply mechanisms under the *EUA* that allow a person to self-supply and export excess electric energy: micro-generation²⁷³ and the industrial system designation (ISD).²⁷⁴ The AUC held that these are examples of express authorization from the legislature that these types of units can self-supply *and* export excess electricity through the AIES, and no such express approval was provided for EPCOR Water’s proposal in section 2(1)(b) of the *EUA*.²⁷⁵

²⁶⁸ *EPCOR Water Services Inc, EL Smith Solar Power Plant* (20 February 2019), 23418-D01-2019, online: AUC <www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2019/23418-D01-2019.pdf> [*EL Smith*].

²⁶⁹ The rule that generators in Alberta must offer their generation output to and exchange their energy through the power pool pursuant to sections 18(2) and 101 of the *EUA*, *supra* note 262 and section 2(f) of the *Fair, Efficient and Open Competition Regulation*, Alta Reg 159/2009.

²⁷⁰ *Supra* note 262, s 2(1)(b).

²⁷¹ See *EL Smith*, *supra* note 268 at para 83.

²⁷² *Ibid* at paras 86–87.

²⁷³ See *Micro-Generation Regulation*, Alta Reg 27/2008, s 6.

²⁷⁴ See e.g. Nigel Bankes, “Opening a Can of Worms: What are the Applicable Market Rules for Generation Where the Generator Fails to Use the Entire Output?” at 4, online (blog): <ablawg.ca/wp-content/uploads/2019/03/Blog_NB_Applicable_AUC_Rules_Failure_to_Use_Entire_Output_Mar2019.pdf>.

²⁷⁵ See *EL Smith*, *supra* note 268 at para 101.

EL Smith was followed by three similar decisions in 2019.²⁷⁶ Notably, in one of these decisions, the AUC rejected the argument that units on one site could be separated into on-site and export power units to get around the must offer, must exchange rule.²⁷⁷

On 13 September 2019, in response to *EL Smith* and the decisions that followed, the AUC issued Bulletin 2019-16, inviting consultation on three options for the revision of the statutory scheme that prohibits self-supply and export from a generating unit. They are: (1) status quo; (2) allow limited self-supply and export; or (3) allow unlimited self-supply and export.²⁷⁸

In Bulletin 2019-16, the AUC recognized that *EL Smith* was a departure from its earlier decisions²⁷⁹ but it was satisfied that the statutory scheme prohibits self-supply and export unless the owner of a generating unit falls within certain limited circumstances, such as when it is a small micro-generation unit or where it has an ISD.

On 9 January 2020, the AUC issued Bulletin 2020-01, outlining the results of stakeholder feedback on the three presented options.²⁸⁰ Most stakeholders preferred the option of unlimited self-supply and export. There was also widespread support for statutory amendments to clarify the availability of self-supply and export to all generators and the AUC has asked stakeholders to comment on the market and tariff implications.²⁸¹ No feedback has been published to date.

In Bulletin 2020-01, the AUC also stated that while consultation was ongoing it would not investigate any market participants operating legacy facilities under approvals that allowed them to self-supply and export.²⁸²

D. ISO 2018 TARIFF DECISION AND CONSTRUCTION CONTRIBUTIONS

In Decision 22942-D02-2019,²⁸³ the AUC approved the 2018 ISO tariff for AESO including approval of a new policy for construction contributions (the new policy) proposed

²⁷⁶ See *Advantage Oil and Gas Ltd, Glacier Power Plant Alteration* (26 April 2019), 23756-D01-2019, online: AUC <www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2019/23756-D01-2019.pdf> [*Advantage Oil*]; *International Paper Canada Pulp Holdings ULC, Request for Permanent Connection for 48-Megawatt Power Plant* (6 June 2019), 24393-D01-2019, online: AUC <www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2019/24393-D01-2019.pdf> [*International Paper*]; *Keyera Energy Ltd, Corrigenda to Decision 24126-D02-2019 Cynthia Gas Plant Power Plant* (26 July 2019), 24126-D01-2019, online: <[www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2019/24126-D01-2019%20\(Corrigenda\).pdf](http://www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2019/24126-D01-2019%20(Corrigenda).pdf)>.

²⁷⁷ *Advantage Oil, ibid* at para 21.

²⁷⁸ See “Bulletin 2019-16: Consultation on the issue of power plant self-supply and export,” online: <www.auc.ab.ca/News/2019/Bulletin%202019-16.pdf>.

²⁷⁹ See e.g. *International Paper, supra* note 276, where the power plant of International Paper Canada Pulp Holdings ULC was initially approved in 1995 and is an example of how self-supply and export arrangements were approved by the AUC’s predecessor, the Alberta Energy and Utilities Board.

²⁸⁰ “Bulletin 2020-01: Exploring market concerns and tariff issues related to self-supply and export reform,” online: <www.auc.ab.ca/News/2020/Bulletin%202020-01.pdf>.

²⁸¹ *Ibid* at 1.

²⁸² *Ibid* at 4.

²⁸³ *Alberta Electric System Operator, 2018 Independent System Operator Tariff* (22 September 2019), 22942-D02-2019, online: AUC <www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2019/22942-D02-2019.pdf> [*2018 ISO Tariff*].

by AltaLink Management Ltd. (AltaLink).²⁸⁴ Construction contributions are payments made by market participants for the construction and associated costs of transmission facilities required to provide system access service to customers.

The new policy removes approximately \$400 million in construction contribution capital costs from the rate base of FortisAlberta Inc. (FortisAlberta) as a distribution facility owner (DFO) and places these costs into AltaLink's rate base as the transmission facility owner (TFO) in FortisAlberta's service area.²⁸⁵

On 25 September 2019, FortisAlberta requested an immediate review and variance of Decision 22942 on the AUC's own motion, citing several implications of the new policy, including the unwinding of rates, recapitalization of FortisAlberta's balance sheet, and significant tax and credit implications of the new policy.²⁸⁶ On 2 October 2019, the AUC granted FortisAlberta's motion to consider whether Decision 22942 should be confirmed, rescinded, or varied.²⁸⁷

The AUC held that a review was warranted given the extent of financial readjustments as result of the new policy that "may not have been completely developed by FortisAlberta or others in the proceeding" but may be material to the company and its customers.²⁸⁸ This is noteworthy, given the AUC's criticism of FortisAlberta in Decision 22942 that it only provided a general discussion of the implications of the new policy without identifying any tax consequences²⁸⁹ and the AUC's conclusion that the effort to implement the new policy outweighed the significant financial savings to ratepayers (of approximately \$40 million for 2018–2022) achieved through the new policy.²⁹⁰ It appears that the AUC's concerns on the possible financial effects of the new policy on FortisAlberta and its customers may now outweigh its previous concerns.²⁹¹

On 4 November 2020, the AUC reversed Decision 22942.²⁹² The AUC found that the costs associated with the transfer of \$400 million in assets from FortisAlberta to AltaLink outweighed the financial benefits. The AUC is commencing a new proceeding to assess the legal basis for the existing AESO customer contribution policy and whether there is a need for a new policy, in which all DFOs and TFOs are expected to participate.²⁹³

²⁸⁴ *Ibid* at paras 879–92.

²⁸⁵ *Ibid* at paras 1015, 1078.

²⁸⁶ See Letter from Janine Sullivan to Alberta Utilities Commission re: Request for Immediate Review and Variance of Decision 2242-D02-2019; Proceeding 24932, Exhibit 24932-X0001 (25 September 2019).

²⁸⁷ See *FortisAlberta Inc Review and Variance Decision 22942-D02-2019 Proceeding 24932 Application 24982-2001*, Exhibit 24932-X0004 (2 October 2019) [AUC Process Letter].

²⁸⁸ *Ibid* at para 4.

²⁸⁹ See *2018 ISO Tariff*, *supra* note 283 at para 1074.

²⁹⁰ *Ibid* at paras 1061–62.

²⁹¹ See AUC Process Letter, *supra* note 287 at para 3.

²⁹² *Commission-Initiated Review and Variance of Decision 22942-D02-2019* (4 November 2020), 24932-D01-2020, online: AUC <www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2020/24932-D01-2020.pdf>).

²⁹³ *Ibid* at para 30.

E. THE *HYDRO AND ELECTRIC ENERGY ACT*

As part of its red tape reduction initiatives, on 5 December 2019 the Government of Alberta passed the *Red Tape Reduction Implementation Act, 2019*,²⁹⁴ which amended several acts, including the *HEEA*²⁹⁵ to streamline the approval process for hydroelectric power plants. Prior to the amendments, a hydroelectric power plant needed three types of approvals before coming into operation:

1. an AUC hearing recommending approval of the hydroelectric power plant;²⁹⁶
2. a standalone act allowing the AUC to approve hydroelectric power plant construction;²⁹⁷ and
3. Lieutenant Governor in Council approval to operate the hydroelectric power plant.²⁹⁸

The requirements for a standalone act and Lieutenant Governor in Council approval have been removed, and the AUC can now approve hydroelectrical power plants directly instead of making a recommendation bringing the regulatory approval process for hydro power plants in line with those for other power plant applications.²⁹⁹

IX. NOTABLE DEVELOPMENTS IN OTHER CANADIAN JURISDICTIONS

A. BRITISH COLUMBIA SEEKING TO BE SAFER AND GREENER

In 2019, the British Columbia Oil and Gas Commission (the BCOGC) took steps towards ensuring safer and more environmentally conscious oil and gas operations by amending the British Columbia *Pipeline Regulation*,³⁰⁰ and introducing new methane regulations and fugitive emissions guidelines.

Amendments to the *Pipeline Regulation* came into effect on 9 March 2020.³⁰¹ They now require permit holders to implement both a damage prevention program and an integrity management program³⁰² that apply to the pipeline's entire life cycle.³⁰³

²⁹⁴ SA 2019, c 22 [*Red Tape Act 2019*].

²⁹⁵ *Supra* note 263.

²⁹⁶ *Ibid.*, s 9, as repealed by the *Red Tape Act 2019*, *supra* note 294, s 8(2).

²⁹⁷ *Ibid.*

²⁹⁸ *HEEA*, *ibid.*, s 10, as repealed by the *Red Tape Act 2019*, *supra* note 294, s 8(3).

²⁹⁹ *HEEA*, *ibid.*, s 9, as repealed by the *Red Tape Act 2019*, *ibid.*, s 8(2).

³⁰⁰ BC Reg 281/2010.

³⁰¹ See BCOGC, News Release, "Pipeline Regulation Amendments (2020-07)" (18 March 2020), online: <bcogc.ca/news/pipeline-regulation-amendments/>.

³⁰² See "Compliance Assurance Protocol Integrity Management Program for Pipelines: version 2.0: April 2020," online: <www.bcogc.ca/files/operations-documentation/Integrity-Management-Program-Compliance-Assurance-Pipeline-IMPs-Documentation/pipelines-imp-compliance-assurance-protocol-april-release-v20-2020.pdf>.

³⁰³ See BCOGC, "Integrity Management Program (IMP)," online: <www.bcogc.ca/energy-professionals/operations-documentation/integrity-management-program-imp>.

The new methane regulations came into force in January 2020,³⁰⁴ with the aim of reducing methane emissions to meet British Columbia's emissions reduction target.

The BCOGC also released the Fugitive Emissions Management Guideline³⁰⁵ to clarify new leak detection and repair requirements of the *Drilling and Production Regulation*.³⁰⁶

B. NOVA SCOTIA

On 4 October 2019, the Government of Nova Scotia announced that it would be making changes to the *Marine Renewable-energy Act*³⁰⁷ to promote tidal energy projects in the Bay of Fundy and Bras D'Or Lake.³⁰⁸ The *MRA*, which came into force on 23 January 2018, previously allowed connected generators in these areas to apply for a demonstration permit (DP), under which they could connect to the electrical grid of Nova Scotia Power for 15 years at a fixed price.³⁰⁹

Amendments to the *MRA*, which became effective on 30 October 2019,³¹⁰ allow all licenced developers to sell electricity to the public utility for 15 years at a fixed price without a DP.³¹¹

C. PRINCE EDWARD ISLAND

In late July 2019, PEI Energy Corporation made a preliminary application for the proposed expansion and development of a 30 MW wind farm development in the rural municipality of Eastern Kings.³¹² This proposed project would be instrumental in lowering Prince Edward Island's dependence on the importation of electricity.

On 23 October 2019 an environmental impact assessment was submitted to the provincial Department of Environment, Water and Climate Change, and a supplemental report considering bird and bat populations was submitted on 16 December 2019.³¹³ Additionally, a special permit is required for wind turbine projects under the Eastern Kings *Development Bylaw*.³¹⁴ On 1 November 2019, a special permit application was submitted. The project currently awaits approval from the municipal, provincial, and federal governments.³¹⁵

³⁰⁴ *Regulation of the Board of the Oil and Gas Commission*, BC Reg 286/2018.

³⁰⁵ "Fugitive Emissions Management Guideline: Version 1.0: July 2019," online: <bcogc.ca/files/documents/femp-guidance-july-release-v10-2019.pdf>.

³⁰⁶ BC Reg 282/2010.

³⁰⁷ SNS 2015, c 32 [*MRA*].

³⁰⁸ See Government of Nova Scotia, News Release, "Amendments Support Tidal Energy Industry" (4 October 2019), online: <novascotia.ca/news/release/?id=20191004001> [*News Release*].

³⁰⁹ See *MRA*, *supra* note 307, s 49A.

³¹⁰ *An Act to Amend Chapter 32 of the Acts of 2015, the Marine Renewable-energy Act*, SNS 2019, c 34.

³¹¹ See *MRA*, *supra* note 307, s 49B.

³¹² See e.g. "2020 Proposed Wind Farm," online: *PEI Energy Corporation* <www.peiec.ca/2020-wind-farm.html> [PEIEC].

³¹³ *Ibid.*

³¹⁴ Rural Municipality of Eastern Kings, 2013 Subdivision and Development Control Bylaw, ss 5.33, 13.2.4, online: <www.easternkings.ca/uploads/1/2/4/3/124361359/122614-eastern-kings-final-by-law-20131202_jh.pdf>.

³¹⁵ See PEIEC, *supra* note 312.

D. NEWFOUNDLAND AND LABRADOR

In June 2019, the Quebec Court of Appeal sided in part with Hydro-Québec in the decision *Churchill Falls (Labrador) Corporation Ltd. c. Hydro-Québec*,³¹⁶ which considered an appeal by Churchill Falls Labrador Corporation (CFLCo) of a Quebec Superior Court decision declaring Hydro-Québec is entitled to all the power produced by CFLCo at Churchill Falls.³¹⁷ The decisions of the Quebec Superior Court and Quebec Court of Appeal related to terms of the 2016 renewal of a 1969 power contract between the parties for the supply of power to Hydro-Québec for up to 65 years (the power contract).

In the initial power contract, Hydro-Québec undertook to purchase most of the electricity produced by the Churchill Falls power plant (whether needed or not), which allowed CFLCo to use debt financing to construct the plant, which was estimated to be worth \$20 billion in 2018. Similarly, the contract benefitted Hydro-Québec by allowing it to obtain a right to purchase electricity at a fixed price for the entire term of the contract regardless of the impact of inflation and market forces.³¹⁸

As Newfoundland and Labrador's energy requirements changed along with market forces, the power contract became increasingly unprofitable for CFLCo. Following several unsuccessful attempts by CFLCo to renegotiate the terms of the power contract with Hydro-Québec, litigation ensued culminating in a 2018 Supreme Court of Canada ruling that no court could change the contents of the contract nor require parties to renegotiate it.³¹⁹

Churchill Falls relates to the 2016 renewal of the power contract. This renewal imported some important changes that the parties could not agree on, including changes relating to the amount of power Hydro-Québec could purchase. CFLCo contended that the renewal contained monthly and yearly caps on the amount of electricity Hydro-Québec could purchase, and an entitlement that would allow CFLCo to sell power to third parties on an interruptible basis before and after 1 September 2016.³²⁰

At the Quebec Superior Court, Hydro-Québec sought a declaration supporting its rights to "operational flexibility" under the renewal, which would mean no monthly caps. The Superior Court judge disagreed with CFLCo's interpretation of the renewal entirely and held that Hydro-Québec was entitled to *all* the energy produced by the plant.³²¹

On appeal, the Quebec Court of Appeal reversed the Superior Court's decision in part, disagreeing that Hydro-Québec was entitled to *all* the energy produced by the Churchill Falls power plant but was rather constrained by a yearly cap, but agreed that Hydro-Québec would not be bound by monthly caps.³²²

³¹⁶ 2019 QCCA 1072 [*Churchill Falls CA*], rev'g in part 2016 QCCS 3746 [*Churchill Falls Sup Ct*].

³¹⁷ *Churchill Falls Sup Ct*, *ibid.*

³¹⁸ *Churchill Falls (Labrador) Corp v Hydro-Québec*, 2018 SCC 46 at para 2.

³¹⁹ *Ibid* at paras 6, 133.

³²⁰ *Churchill Falls CA*, *supra* note 316 at para 4 (citing the wording of the 2016–2041 contract).

³²¹ See *Churchill Falls Sup Ct*, *supra* note 316 at paras 974–81.

³²² See *Churchill Falls CA*, *supra* note 316 at para 4.

X. CONCLUSION

With newly created federal regulators, the AER review ongoing, and unsettled constitutional challenges to the federal carbon tax and impact assessment legislation, there is no shortage of “files to watch” in 2020 and 2021.

The Government of Alberta appears committed to its “red tape reduction” initiative, passing into royal assent the *Red Tape Reduction Implementation Act, 2019* on 5 December 2019, with changes to 11 pieces of legislation. It also recently introduced on 11 June 2020 a new omnibus bill, Bill 22, the *Red Tape Reduction Implementation Act, 2020*, which proposes 14 legislative changes across six different ministries, including removing the requirement for cabinet approval (by order in council) for oil sands projects under the *Oil Sands Conservation Act* and giving the Energy Minister (rather than Cabinet) sole approval over changes to royalty rates.³²³ We expect the Government of Alberta to continue to identify areas where it can streamline regulatory processes. Where they reduce oversight, these measures are likely to attract criticism.

Pipelines are likely to continue to be divisive both in Canada and in the US and to face continued uncertainty. Project proponents will likely be watching the CER and IAAC closely to see how the new regimes, including new participation provisions, are applied.

Indigenous peoples of Canada are also likely to continue to be actively engaged with energy projects, both as opponents and potential partners, in the courts and in the streets. With decisions like *Fort McKay* we may see more challenges based on the honour of the Crown, and arguments that go beyond the duty to consult.

We can expect to see many of the trends seen in 2019 continue into 2020. Furthermore, courts and regulators have changed the way they operate during the COVID-19 pandemic, including the use of remote attendance and virtual proceedings. It will be interesting to see whether these will continue to be used after the immediate threat of the pandemic has passed.

³²³ *Supra* note 213; *supra* note 217.

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