RECENT REGULATORY AND LEGISLATIVE DEVELOPMENTS OF INTEREST TO ENERGY LAWYERS

TERRI-LEE OLENIUK, JEREMY BARRETTO AND JOEL FORREST*

This article provides a high level overview of regulatory and legislative developments relevant to energy lawyers. The authors reviewed regulatory initiatives, decisions, related case law, and legislation from provincial, territorial, and federal authorities. Topics of note include pipeline regulation with a focus on recently proposed projects, Aboriginal law, liquefied natural gas, oil and gas development, renewable energy, and power and environmental protection. The period covered is May 2014 to April 2015, inclusive.

TABLE OF CONTENTS

* Terri-Lee Oleniuk is a partner and Jeremy Barretto is an associate with Osler, Hoskin & Harcourt LLP. Joel Forrest is Associate General Counsel in Regulatory and Pipelines Law with TransCanada Corporation. They would like to gratefully thank Jennifer Fairfax, who is a partner, Katherine Royer and Heather Weberg, who are associates, and Marissa Leclair, David Bach, and Kevin Lemke, who are students-at-law, with Osler, Hoskin & Harcourt LLP for their significant contributions to this article.

I. INTRODUCTION

This has been another significant year for the practice of energy and regulatory law in Canada. Several major oil export pipelines, including Northern Gateway, Trans Mountain and Energy East, advanced through the regulatory process. There were also significant legislative developments with respect to liquefied natural gas and transparency reporting. Notable legal developments occurred for several renewable energy and power projects across the country. Finally, the Supreme Court of Canada rendered major Aboriginal law decisions in *Tsilhqot'in Nation v. British Columbia* and *Grassy Narrows First Nation v. Ontario (Natural Resources)*.[1]

This article provides a high level overview of regulatory and legislative developments relevant to energy lawyers that occurred since the last review. The article is divided into seven sections, each of which discusses relevant legislative developments and regulatory and court decisions.

II. PIPELINE REGULATION AND PROJECT DEVELOPMENT

A. FEDERAL

1. NORTHERN GATEWAY

On 4 December 2009, the National Energy Board (NEB or the Board) and the Canadian Environmental Assessment Agency (CEA Agency) issued the Joint Review Panel (JRP or the Panel) Agreement for the Northern Gateway Pipeline Project (the Project).[2] On 9 September 2010, the JRP announced that Enbridge had submitted sufficient information to proceed to public hearings.[3] On 19 December 2013, following the conclusion of the public hearing, the JRP submitted its report recommending the approval of the Northern Gateway project subject to 209 conditions.[4] On 17 June 2014, the Governor-in-Council published its decision accepting the JRP's recommendation and ordering the issuance of Certificates of Public Convenience and Necessity (CPCNs) for the project, subject to 209 conditions.[5] The conditions address all aspects of the project, including potential risks associated with the

---

1 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in*], rev'g 2012 BCCA 285, [2012] 10 WWR 639, aff'g 2007 BCSC 1700, [2008] 1 CNLR 112; 2014 SCC 48, [2014] 2 SCR 447 [*Grassy Narrows*] aff'g *Keewatin v Ontario (Minister of Natural Resources)*, 2013 ONCA 158, 114 OR (3d) 401, rev'g 2011 ONSC 4801, [2012] 1 CNLR 13.

2 Canadian Environmental Assessment Agency & National Energy Board, News Release, "Northern Gateway Pipeline Project Joint Review Panel Agreement Issued" (4 December 2009), online: NEB <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/384192/384008/585692/A1Q9E1_-_Northern_Gateway_Pipeline_Project_-_Joint_Review_Panel_Agreement_Issued.pdf?nodeid=585693&vernum=-2>; Canadian Environmental Assessment Agency & National Energy Board, "Agreement Between the National Energy Board and the Minister of the Environment Concerning the Joint Review of the Northern Gateway Pipeline Project" (Ottawa: NEB, 4 December 2009), online: <https://docs.nebone.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/384192/384008/591959/A1R4D5_-_Joint_Review_Panel_Agreement.pdf?nodeid=591960&vernum=-2>.

3 "Northern Gateway: Timeline," *Global News* (17 June 2014), online: <globalnews.ca/news/1384346/northern-gateway-timeline/>.

4 National Energy Board & Canadian Environmental Assessment Agency, *Connections: Report of the Joint Review Panel for the Enbridge Northern Gateway Project*, (Ottawa: NEB, 19 December 2013), online: <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2396699&objAction=browse&viewType=1> [*Report of the Joint Review Panel*].

5 *Order — Certificates of Public Convenience and Necessity OC-060 and OC-061 to Northern Gateway Pipelines Inc for the Northern Gateway Pipelines Project*, PC 2014-809, (2014) C Gaz I, 1645.

proposed oil and condensate pipelines, the Kitimat Terminal, and associated activities and facilities.[6] Two CPCNs were subsequently issued for the Northern Gateway project. The first for the construction and operation of a terminal in Kitimat, British Columbia, and the second for two pipelines between Bruderheim, Alberta and Kitimat.[7]

In January 2014, several appeals were filed with the Federal Court of Canada and the Federal Court of Appeal challenging the recommendations given by the JRP in its report.[8] The appeals filed by Haisla Nation, Gitxaala Nation, Federation of British Columbia Naturalists, ForestEthics Advocacy and Gitga'at Nation allege that, *inter alia*, the JRP failed to consider: (1) the effects of the project on Aboriginal rights; (2) certain measures that would lessen the effects on threatened species; and (3) whether the Crown had satisfied the duty to consult.[9] By order dated 29 May 2014, the Federal Court of Appeal temporarily stayed five applications for judicial review of the JRP report pending the Court's determination on 13 leave applications for judicial review of the Federal Cabinet order and statutory appeals of the CPCNs issued for the Project.[10] On 26 September 2014, the Federal Court of Appeal granted leave and directed the parties to communicate with one another to discuss the appropriateness of consolidating all 18 proceedings within a common timetable.[11]

On 29 October 2014, Gitxaala, on behalf of the nine applicants and three respondents, brought a motion to consolidate 18 applications under one lead file. In the motion, Gitxaala took the position that consolidation of the applications would preserve judicial resources, reduce duplication, and avoid the risk of contrary findings.[12] A common timetable was agreed to by all parties, with the exception of Northern Gateway, to allow the parties to satisfy the requirements of the *Federal Courts Rules*[13] within an extended period of time. On 17 December 2014, the Federal Court of Appeal consolidated all proceedings filed in relation to the project under a lead file.[14] The consolidated applications include five applications for judicial review of the JRP report, nine applications for judicial review of the Federal Cabinet Order, and four notices of appeals filed in relation to the CPCNs. The applicants challenge the approval of the Northern Gateway project on three main grounds: (1) the JRP report recommending the approval of the Project was flawed; (2) the Governor-in-Council did not

---

6 *Report of the Joint Review Panel*, *supra* note 4 at 364.

7 National Energy Board, *Certificate OC-060* (Calgary: NEB, 18 June 2014); National Energy Board, *Certificate OC-061* (Calgary: NEB, 18 June 2014).

8 *Forestethics Advocacy v Canada (AG)* (17 January 2014), Vancouver, FCA A-56-14 (application for judicial review); *Federation of British Columbia Naturalists v Canada (AG)* (17 January 2014), Vancouver, FCA A-59-14 (application for judicial review); *Haisla Nation v Canada (Minister of Environment)* (17 January 2014), Vancouver, FCA A-63-14 (application for judicial review); *Gitxaala Nation v Canada (Minister of Environment)* (17 January 2014), Vancouver, FCA A-64-14 (application for judicial review); *Gitga'at First Nation v Canada (AG)* (20 January 2014), Vancouver, FCA A-67-14 (application for judicial review); *Federation of British Columbia Naturalists v Canada (AG)* (17 January 2014), Vancouver, FC T-270-14 (application for judicial review); *Haisla Nation v Canada (Minister of Environment)* (17 January 2014), Vancouver, FC T-273-14 (application for judicial review); *Gitxaala Nation v Minister of Environment* (17 January 2014), Vancouver, FC T-274-14 (application for judicial review); *Forestethics Advocacy v Canada (AG)* (17 January 2014), Vancouver, FC T-278-14 (application for judicial review).

9 National Energy Board, "Court Challenges to National Energy Board or Governor in Council Decisions," online: <www.neb-one.gc.ca/pplctnflng/crt/index-eng.html>.

10 *ForestEthics Advocacy v Canada (AG)* (29 May 2014), Ottawa, FCA A-56-14 (temporary stay).

11 *ForestEthics Advocacy v Canada (AG)* (26 September 2014), Ottawa, FCA 14-A-39 (granted leave to apply for judicial review).

12 *ForestEthics Advocacy v Canada (AG)* (29 October 2014), Vancouver, FCA A-56-14 (motion to consolidate).

13 SOR/98-106, s 105.

14 *Gitxaala Nation v Canada (AG)* (17 December 2014), Ottawa, FCA A-437-14 (order to consolidate).

have jurisdiction to issue the Order; and (3) the NEB did not have jurisdiction to issue the CPCNs for the Project. A similar application has been filed with the British Columbia Supreme Court by Coastal First Nations.[15] The application is a constitutional challenge against British Columbia which seeks to compel the province to use its decision-making power to refuse approval of the Northern Gateway project. It is the first challenge to the project that has been filed outside of the Federal Court and Federal Court of Appeal.

2. TRANS MOUNTAIN

On 16 December 2013, Trans Mountain Pipeline ULC (Trans Mountain) applied to the NEB pursuant to sections 52 and 58 of the *National Energy Board Act*[16] for a CPCN as well as related orders approving its proposed Trans Mountain Expansion Project (TMEP). The TMEP would expand an existing pipeline by adding 994 kilometres of new buried pipeline in British Columbia and Alberta and reactivating 193 kilometres of existing pipeline.[17] The project is undergoing a public hearing and environmental assessment before the NEB.

On 26 September 2014, the NEB received a Notice of Motion and Notice of Constitutional Question from Trans Mountain seeking an order pursuant to sections 12, 13 and 73(a) of the *NEB Act*. The Notice of Motion and Notice of Constitutional Question were the result of the City of Burnaby's denial of access to city-owned lands based on what it argued were contraventions of Burnaby's bylaws by Trans Mountain. On 23 October 2014, the NEB issued *Ruling No. 40* wherein the NEB granted Trans Mountain's request for an order pursuant to section 73(a) of the *NEB Act*. The NEB concluded that preventing access to lands as needed for the completion of surveys and studies relating to pipeline routing is contrary to the *NEB Act*.[18] The Federal Court of Appeal denied Burnaby leave to appeal the NEB's decision.[19] These decisions support the view that federally regulated pipeline companies have the ability to access public and private lands for the purposes of performing surveys and investigations under the *NEB Act*, in accordance with the process set out in the *Act*.

Additionally, the TMEP has been the subject of various applications for judicial review or leave to appeal. In October 2014, the Federal Court of Appeal dismissed two separate applications for leave to appeal that alleged the NEB erred in law or jurisdiction by refusing to consider the environmental and socio-economic effects of upstream and downstream activities associated with the TMEP.[20] On 23 January 2015, the Federal Court of Appeal

---

15 *Coastal First Nations–Great Bear Initiative Society v British Columbia (Minister of Environment)* (19 January 2015), Vancouver, BCSC S-150257 (petition).

16 RSC 1985, c N-7 [*NEB Act*].

17 Trans Mountain Pipeline ULC, *Trans Mountain Expansion Project: An Application Pursuant to Section 52 of the National Energy Board Act* (16 December 2013) at 1-41, online: NEB <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2385938/B1-1_-_V1_SUMM_-_A3S0Q7.pdf?nodeid=2385048&vernum=-2>.

18 *Application for the Trans Mountain Expansion Project* (23 October 2014), Ruling No 40, online: NEB <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2541380/A97-1_-_Ruling_No._40_-_Trans_Mountain_notice_of_motion_and_Notice_of_Constitutional_Question_dated_26_September_2014_-_A4D6H0.pdf?nodeid=2540944&vernum=-2> [*Ruling No 40*].

19 *Burnaby (City of) v National Energy Board* (12 December 2014), Ottawa, FCA 14-A-63 (leave to appeal dismissed).

20 *Vancouver (City of) v National Energy Board* (16 October 2014), Ottawa, FCA 14-A-55 (leave to appeal dismissed); *LD Danny Harvey v National Energy Board* (24 October 2014), Ottawa, FCA 14-A-59 (leave to appeal dismissed).

dismissed an application for leave to appeal in which the applicants argued that, *inter alia*, section 55.2 of the *NEB Act* (which limits representations before the NEB to persons directly affected by the application)[21] is unconstitutional on the ground it violates freedom of expression as guaranteed by section 2(b) of the *Charter*.[22] Finally, on 25 November 2014, the Federal Court of Appeal dismissed on the ground of prematurity an appeal that sought, *inter alia*, an order prohibiting the Minister of Indian Affairs and Northern Development from consenting to Kinder Morgan Canada Inc.'s (Kinder Morgan) requested assignment of two easements for oil pipelines located on the appellant's reserve.[23] Also ongoing are: (1) an appeal regarding, *inter alia*, the Crown's duty to consult and accommodate with respect to four interlocutory decisions issued by the NEB;[24] and (2) a judicial review regarding participant funding.[25] The decisions suggest that the Federal Court of Appeal has little, if any, appetite to review interlocutory decisions issued by the NEB.

3. KEYSTONE XL

The approval of the Keystone XL Pipeline (Keystone XL) remained an ongoing topic throughout 2014 and into the early part of 2015. The timing of a final decision on approval of the pipeline by United States President Barack Obama has been the subject of substantial speculation and anticipation. However, the timing of a final decision is uncertain.

In January 2014, the US State Department (State Department) issued its *Final Supplemental Environmental Impact Statement for the Keystone XL Project*, which concluded that the project would be unlikely to increase greenhouse gas emissions at a significant rate.[26] On 18 April 2014, the State Department announced that Keystone XL would be further delayed.[27] The purpose of this delay was to allow time to determine the impact of a Nebraska court ruling on the routing of the pipeline.[28]

---

21 *Supra* note 16, stating: "On an application for a certificate, the Board shall consider the representations of any person who, in the Board's opinion, is directly affected by the granting or refusing of the application, and it may consider the representations of any person who, in its opinion, has relevant information or expertise. A decision of the Board as to whether it will consider the representations of any person is conclusive."

22 *Quarmby v National Energy Board* (23 January 2015), Ottawa, FCA 14-A-62 (leave to appeal dismissed); *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

23 *Coldwater Indian Band v Canada (Minister of Indian Affairs and Northern Development)*, 2014 FCA 277, 466 NR 145 [*Coldwater* FCA], aff'g 2013 FC 1138, [2014] 1 CNLR 25 [*Coldwater* FC]; *Coldwater Indian Band v Canada (Minister of Indian Affairs and Northern Development)* (27 January 2015), Vancouver, FC T-133-15 (application for judicial review).

24 *Tsleil-Waututh Nation v National Energy Board* (5 September 2014), Toronto, FCA A-386-14 (notice of appeal).

25 *Smith v National Energy Board (Chief Operating Officer)* (23 March 2015), Vancouver, FC T-1447-14 (judicial review hearing).

26 US Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Final Supplemental Environmental Impact Statement for the Keystone XL Project: Executive Summary* (Washington, DC: US Department of State, January 2014), online: US Department of State <keystone pipeline-xl.state.gov/documents/organization/221135.pdf> [*Keystone Report*].

27 US Department of State, Media Note, "Keystone XL Pipeline Project Review Process: Provision of More Time for Submission of Agency Views" (18 April 2014), online: US Department of State <www.state.gov/r/pa/prs/ps/2014/04/224982.htm>.

28 *Ibid.*

The Nebraska Supreme Court issued its ruling on 9 January 2015, finding that Nebraska law LB 1161[29] is not unconstitutional.[30] The law allowed proponents such as TransCanada Keystone Pipeline LP to follow a less onerous review process through the Department of Environmental Quality and Nebraska's Governor for final approval or rejection, rather than the state's Public Service Commission, which has a stricter permitting process that involves at least one public hearing to determine if the project is in the public interest. The effect of this ruling is to approve the route of the project through Nebraska.[31] The State Department has not indicated whether or how this decision impacts its analysis of the project.

On 2 February 2015, the US Environmental Protection Agency filed a response to the *Keystone Report*.[32] The focus of the Environmental Protection Agency's submission relates to the State Department's findings on climate change and spill impacts, particularly in light of the recent change in oil prices.[33]

In February 2015, the US Senate and Congress passed a bill to approve Keystone XL.[34] President Obama vetoed this bill on 24 February 2015, choosing to continue with the State Department review process for approval.[35]

In Canada, the Keystone XL Pipeline Project received NEB *Certificate OC-56* on 27 April 2010.[36] Pursuant to this certificate, certain components of the Keystone XL System have been constructed in Canada, including three oil storage tanks located at the Hardisty B Terminal. In November 2014, TransCanada Keystone Pipeline GP Ltd. applied to the NEB for approval of a short term storage service to make use of the storage tanks while the non-NEB approvals for Keystone XL are still pending. On 9 December 2014, the NEB approved the short term storage service in which the storage tank capacity is leased for a 36-month term and is subject to termination upon commencing line-fill activities on the Keystone XL System.[37]

---

29 US, LB 1161, *An Act Relating to Oil Pipelines*, 102nd Legislature, Reg Sess, Neb, 2012.

30 *Thompson v Heineman*, 289 Neb 798 at 802 (Sup Ct 2015). See also Reagan Melton & Delaney LLP, "Merits of the case not reached in Keystone Pipeline decision from the Nebraska Supreme Court" (15 January 2015), *Reagan Melton & Delaney LLP* (blog), online: <www.rmdlaw.net/blog/2015/01/merits-of-the-case-not-reached-in-keystone-pipeline-decision-from-the-nebraska-supreme-court/>.

31 Aruna Viswanatha, "Nebraska court clears pipeline route as showdown looms in Washington," *Reuters* (9 January 2015), online: <www.reuters.com/article/2015/01/09/us-usa-keystone-court-idUSKBN0KI1FV20150109>.

32 US Environmental Protection Agency, "EPA Comment on the Final Supplemental Environmental Impact Statement" (Washington, DC: EPA, 2 February 2015), online: <www.eenews.net/assets/2015/02/03/document_gw_04.pdf>.

33 *Ibid*.

34 US, Bill S 1, *Keystone XL Pipeline Approval Act*, 114th Cong, 2015 (vetoed).

35 US, *Message from the President of the United States Returning Without My Approval S. 1, the Keystone XL Pipeline Approval Act* (S Doc No 114-2) (Washington, DC: US Government Publishing Office, 2015), online: <www.gpo.gov/fdsys/pkg/CDOC-114sdoc2/pdf/CDOC-114sdoc2.pdf>.

36 National Energy Board, *Certificate OC-56* (27 April 2010), online: <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/418396/550305/609772/614188/A1S6R8_-_Certificate_OC-56_-_Keystone_XL_ Pipeline_Project.pdf?nodeid=614192&vernum=-2>.

37 National Energy Board, *Hardisty B Tanks – Short-Term Storage Service (Application)* (9 December 2014), online: <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/418396/550305/609772/2583863/Letter_and_Order_OPSO-T241-041-2014_-_A4F8Q9.pdf?nodeid=2578809&vernum=-2>.

4. ENERGY EAST

TransCanada Pipelines Limited (TransCanada) is proposing to build the Energy East Pipeline, which will carry 1.1 million barrels of crude oil per day from Alberta and Saskatchewan to refineries in Eastern Canada.[38] TransCanada filed its application with the NEB in October 2014, anticipating an in-service date in 2018, subject to obtaining the necessary regulatory approvals and permits.[39] To meet its public engagement obligations under the *NEB Act*, the Board opened the Application to Participate process from 3 February to 3 March 2015.[40] It allowed for additional time from 10–17 March 2015.[41] The application to participate process is now closed. On 22 April 2014, the NEB announced that participant funding will be available.[42]

On 2 April 2015, TransCanada filed a letter with the NEB indicating that it would not proceed with the proposed Cacouna Energy East Marine Terminal. In the notification letter, TransCanada indicated that it was evaluating other potential options for marine terminals and expected that a related NEB application amendment would likely be made in the last quarter of 2015.[43]

The premiers of Quebec and Ontario indicated that they will require the project to meet seven conditions prior to approving construction in those provinces.[44] The conditions include an environmental assessment, economic benefit analysis, and consultation requirements with local communities and Aboriginal groups.[45] Ontario Premier Kathleen Wynne stated that the province would not consider the project's impact on upstream greenhouse gas emissions.[46]

---

38 TransCanada Corporation, News Release, "$12-Billion Energy East Pipeline Project Takes Important Step Forward With NEB Application Filing" (30 October 2014), online: <www.energyeastpipeline.com/wp-content/uploads/2014/10/TransCanada-Energy-East-News-Release-2014-10-30.pdf>.

39 *Ibid*.

40 National Energy Board, News Release, "From 3 February to 3 March 2015 the NEB will Accept Applications to Participate in the Energy East Hearing," online: <https://www.neb-one.gc.ca/bts/nws/whtnw/2015/2015-02-03ee-eng.html>.

41 National Energy Board, News Release, "The NEB will provide more time for people to apply to participate in the Energy East hearing" (9 March 2015), online: <www.neb-one.gc.ca/bts/nws/nr/2015/nr14-eng.html>.

42 National Energy Board, News Release, "Funding available to participate in the NEB's regulatory process regarding the Energy East Pipeline Project" (22 April 2014), online: <https://www.neb-one.gc.ca/bts/nws/nr/2014/nr15-eng.html> ["Funding Available for Energy East Participants"].

43 Letter from Energy East Pipeline Ltd and TransCanada PipeLines Limited to the National Energy Board (2 April 2015), online: NEB <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/2432218/2540913/2543426/2748716/NEB_Energy_East_Project_Cacouna_Notification_Letter_-_A4K2E0.pdf? nodeid=2758510&vernum=-2>.

44 Scott Haggett, Julie Gordon & David Ljunggren, "Quebec imposes conditions on TransCanada's Energy East pipeline," *Reuters* (20 November 2014), online: <ca.reuters.com/article/businessNews/idCAKCN0J41VU20141120>; Geoffrey Vendeville, "Ontario echoes Quebec's Conditions on Energy East Pipeline Project," *Montreal Gazette* (21 November 2014), online: <montrealgazette.com/news/quebec/ontario-echoes-quebecs-conditions-on-energy-east-pipeline-project>.

45 *Ibid*.

46 Adrian Morrow, "Wynne drops main climate change requirement in considering Energy East pipeline," *Globe and Mail* (3 December 2014), online: <www.theglobeandmail.com/news/politics/ontario-plays-down-climate-change-concerns-of-energy-east-pipeline/article21907743/>.

5. NORTH MONTNEY

On 8 November 2013, NOVA Gas Transmission Ltd. (NGTL) applied to the NEB to build the North Montney Project (the Project) in northeast British Columbia.[47] The project involves the construction of approximately 306 kilometres of pipeline, and will tie into the existing Groundbirch Mainline (Saturn Section) (the Mainline).[48] Hearings for the North Montney Project were held in November 2014.[49] On 15 April 2015, the NEB recommended that the Governor-in-Council issue a Certificate to construct and operate the Project.[50]

A significant aspect of the Project proposal was the tolling methodology, which would be rolled in to the NGTL system tolls. The NEB recommendation included the use of this proposed tolling methodology during a transition period, which would begin when gas first begins to flow on the Project and end when North Montney gas production is first delivered at the Mackie Creek Interconnection.[51] The Board attached conditions to the use of the rolled in tolling methodology, which include establishing a separate cost pool and maintaining separate accounting records for the Project.[52] After the transition period ends, NGTL may apply to the NEB for a revised tolling methodology or may implement stand-alone tolling.[53]

6. TRANSCANADA MAINLINE TOLLS AND TARIFFS (*RH-001-2014*)

On 28 November 2014, the NEB approved the revised tolls and tariffs for TransCanada's Mainline System.[54] TransCanada's application was filed pursuant to Parts I and IV of the *NEB Act*,[55] the 2002 *Guidelines for Negotiated Settlements of Traffic, Tolls and Tariffs*,[56] and the directives in the *RH-003-2011* decision.[57] TransCanada reached a settlement with its three largest Mainline System customers and the largest Canadian local distribution companies: Enbridge Gas Distribution Inc., Union Gas Limited, and Gaz Métro Limited Partnership. In its application, TransCanada asked the NEB to approve the negotiated settlement and to set

---

47 National Energy Board, *Hearing Order GH-001-2014 NOVA Gas Transmission Ltd (NGTL) North Montney Project Application of 8 November 2013 Procedural Update No 5 and Directives* (Calgary: NEB, 10 November 2014), online: <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90550/554112/915551/1060220/2452264/2545450/A50-1__Procedural_Update_No._5_and_Directives_-_A4E7V7.pdf?nodeid=2545563&vernum=-2> [*Hearing Order GH-001-2014*].

48 National Energy Board, News Release, "NEB Announces Public Hearing for NGTL's North Montney Project" (5 February 2014), online: <https://www.neb-one.gc.ca/bts/nws/nr/2014/nr06-eng.html>.

49 *Hearing Order GH-001-2014*, *supra* note 47.

50 National Energy Board, News Release, "NEB Recommends NGTL's North Montney Mainline Project" (15 April 2015), online: <www.neb-one.gc.ca/bts/nws/nr/2015/nr18-eng.html> ["North Montney Recommendation"].

51 National Energy Board, *National Energy Board Report NOVA Gas Transmission Ltd GH-001-2014*, (Calgary: NEB, April 2015) at 2, online: <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90550/554112/915551/1060220/2452264/2760037/Report_GH-001-2014_-_North_Montney_Mainline_-_A4K5R6.pdf?nodeid=2759936&vernum=-2>.

52 "North Montney Recommendation," *supra* note 50.

53 *Ibid*.

54 *Re TransCanada PipeLines Ltd* (December 2014), RH-001-2014, online: NEB <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90465/92833/92843/955803/2397890/2585806/2585804/Reasons_for_Decision_RH-001-2014_-_A4G2G5.pdf?nodeid=2585408&vernum=-2> [*RH-001-2014*].

55 *Supra* note 16.

56 National Energy Board, *Guidelines for Negotiated Settlements of Traffic, Tolls and Tariffs* (Calgary: NEB, 12 June 2002).

57 *Re TransCanada Pipelines Ltd, NOVA Gas Transmission Ltd, and Foothills Pipelines Ltd* (March 2013), RH-003-2011, online: NEB <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90465/92833/92843/665035/711778/941262/939799/A3G4A3_-__RH-003-2011_Reasons_for_Decision_-_TransCanada_PipeLines_Limited%2C_NOVA_Gas_Transmission_Ltd._and_Foothills_Pipe_Lines_Ltd.pdf?nodeid=939800&vernum=-2> [*RH-003-2011*].

tolls and tariffs in accordance with the settlement.[58] The NEB found the resulting tolls to be just and reasonable and not unjustly discriminatory.[59] It approved the applied for toll design for Mainline tolls for 2015–2020 and parameters for a toll setting methodology up to 2030. In addition, the NEB approved tariff changes that introduced new services, including: the 15-year minimum contract term requirement for expansion facilities, the introduction of an option and process for shippers to convert their long-haul firm transportation contracts to short-haul firm service contracts, and new summer storage service. The Board approved the concept of multi-year fixed tolls and pricing discretion as established in *RH-003-2011* to provide long-term toll stability for the Mainline.[60]

7. *PIPELINE SAFETY ACT*

On 8 December 2014, the Honourable Greg Rickford, Canada's Minister of Natural Resources, introduced the *Pipeline Safety Act*.[61] Through proposed amendments to the *NEB Act*[62] and the *Canada Oil and Gas Operations Act*,[63] the *Pipeline Safety Act* includes a number of measures designed to strengthen the safety and security of pipelines regulated by those *Acts*. The *Pipeline Safety Act* will enshrine for the first time in NEB legislation the "polluter pays" principle, making pipeline companies fully responsible for the costs and damages they cause through the release of oil, gas or any other commodity from a pipeline.[64] It also clarifies and expands the audit and inspection powers of the NEB and expands the NEB's powers to ensure companies operating pipelines remain responsible for their abandoned pipelines.[65]

The *Pipeline Safety Act* will build on a pipeline company's unlimited liability under common law or civil law for damage caused by their fault or negligence. It will provide governments with the ability to pursue pipeline operators for the costs of environmental damages. The NEB will have the authority to order reimbursement of spill cleanup costs incurred by any government, Aboriginal governing body, or person.[66] It will expand the NEB's authority to recover costs incurred for incident response from industry in exceptional circumstances.

Companies that operate pipelines will be required under the *Pipeline Safety Act* to hold a minimum level of financial resources, set at $1 billion for companies operating pipelines with a capacity to transport at least 250,000 barrels of oil per day. These financial resources must be readily accessible to ensure a rapid response to any incident. It will also give the NEB the power to order greater amounts be held, and in the manner it specifies (for example, letters of credit, guarantees, bonds or suretyships, or insurance).[67] The *Pipeline Safety Act* also provides for enhanced NEB authority over spill response and reimbursement, and the

---

58 *RH-001-2014*, *supra* note 54 at ix.
59 *Ibid* at x.
60 *Ibid* at ix–xiv.
61 Bill C-46, *An Act to amend the National Energy Board Act and the Canada Oil and Gas Operations Act*, 2nd Sess, 41st Parl, 2015 (assented to 18 June 2015), SC 2015, c 21 [*Pipeline Safety Act*].
62 *Supra* note 16.
63 RSC 1985, c O-7.
64 *Supra* note 61, cl 16, adding ss 48.11–48.17 to the *NEB Act*, *supra* note 16.
65 *Pipeline Safety Act*, *ibid*, cls 13–15, 17(4).
66 *Ibid*, cl 16, adding s 48.15 to the *NEB Act*, *supra* note 16.
67 *Pipeline Safety Act*, *ibid*, cl 16, adding s 48.13 to the *NEB Act*, *ibid*.

establishment of a new ad hoc Pipeline Claims Tribunal to consider claims for compensation in relation to a release from a pipeline under the *NEB Act*.[68] The *Pipeline Safety Act* received Royal Assent on 18 June 2015.[69]

8. TRANSCANADA'S KING'S NORTH CONNECTION PIPELINE PROJECT (*GHW-001-2014*)

On 15 August 2014, TransCanada applied to the NEB under section 58 of the *NEB Act*, for an order approving the construction and operation of the King's North Connection Pipeline Project (the King's North Project).[70] The NEB is currently conducting a public hearing to consider the application. The King's North Project consists of 11 kilometres of pipeline and associated facilities crossing the three municipalities of Vaughan, Toronto, and Brampton, as well as the Regional Municipalities of York and Peel.[71] The King's North Project follows approval of the settlement agreement between TransCanada, Union Gas Limited, Gaz Métro Limited Partnership, and Enbridge Gas Distribution to ensure access to natural gas supplies at Dawn Hub and Niagara[72] and to reduce the number and potential for duplication of new natural gas pipelines required in the Greater Toronto Area.[73]

B. BRITISH COLUMBIA

1. FORTISBC AMALGAMATION OF GAS UTILITIES

On 23 May 2014, FortisBC Energy Utilities (FortisBC) received the consent of British Columbia's Lieutenant Governor-in-Council to amalgamate its natural gas utilities and adopt common rates for the amalgamated entity.[74] FortisBC plans to amalgamate its regulated natural gas utilities: FortisBC Energy Inc., FortisBC Energy (Vancouver Island) Inc., FortisBC Energy (Whistler) Inc., and Terasen Gas Holdings Inc., into one legal entity under the name FortisBC Energy Inc. The rationale for this amalgamation is lower cost of service for the amalgamated entity. This follows regulatory approval for the proposed amalgamation under section 53 of the *Utilities Commission Act*[75] by the British Columbia Utilities Commission (BCUC) on 26 February 2014,[76] after FortisBC's previous application for amalgamation was denied in 2013.[77] The BCUC found it to be appropriate that "all customers

---

68 *Pipeline Safety Act*, *ibid*, cl 16, adding ss 48.18–48.46 to the *NEB Act*, *ibid*.

69 Natural Resources Canada, News Release, "Natural Resources Minister Rickford Announces that the Pipeline Safety Act has Received Royal Assent" (18 June 2015), online: NRC <news.gc.ca/ web/article-en.do?nid=989109&tp=1>.

70 TransCanada Pipelines Ltd, *Section 58 Application for King's North Connection Pipeline Project* (15 August 2014), online: NEB <docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2498489&objAction=browse &viewType=1>.

71 *Ibid* at 7-1.

72 *RH-001-2014*, *supra* note 54.

73 TransCanada Pipelines Ltd, "King's North Connection Project" (2014), online: <www.transcanada.com/kingsnorthconnection.html>.

74 OIC 300, (23 May 2014), Resume of Orders in Council Vol 41, No 21, online: British Columbia Queen's Printer <www.qp.gov.bc.ca/statreg/oic/2014/resume21.htm>.

75 RSBC 1996, c 473, s 53.

76 *Re FortisBC Energy Utilities* (26 February 2014), G-21-14, online: BCUC <www.bcuc.com/Documents/Proceedings/2014/DOC_40754_WEB-FEU-Reconsideration%20of%20G-26-13.pdf> [*G-26-2013 Reconsideration*].

77 *Re FortisBC Energy Utilities* (25 Feburary 2013), G-26-13, online: BCUC <www.bcuc.com/Documents/Proceedings/2013/DOC_33726_02-25-2013_FEU-Amalgamtion-WEB.pdf>.

be phased in to postage stamp rates over a three-year period."[78] Postage stamp rates are a method of toll design where the tolls paid to move gas anywhere in the interconnected system are the same.

2. COASTAL GASLINK PIPELINE PROJECT

TransCanada is proposing to build the Coastal GasLink pipeline, which will be an approximately 675 kilometre pipeline that will transport natural gas from a point near Dawson Creek in northeastern British Columbia to Kitimat.[79] The project will have a capacity of two to three billion cubic feet per day. On 24 October 2014, the Environment Minister and Natural Gas Development Minister issued an Environmental Assessment Certificate for the project (the Certificate). In issuing the Certificate, the Ministers concluded that "the project will be constructed, operated and decommissioned in a way that ensures that no significant adverse effects are likely to occur, with the exception of adverse effects on caribou and from greenhouse gas emissions."[80]

The Certificate included 32 conditions, and the Certified Project Description contained design restrictions, which are legally-binding requirements on the project. The key conditions include developing a greenhouse gas management plan, mitigating effects on caribou and grizzly bears, and offsetting the effects of the project on existing, protected old growth forest by identifying new areas of old growth forest to be protected. The Certificate also adopts route changes that were proposed by the project during the review process to minimize environmental effects. The Environmental Management Office will coordinate with the federal and provincial governments, as well as local governments, to ensure that the Certificate conditions are satisfied.[81]

The Coastal GasLink project requires permits from the British Columbia Oil and Gas Commission (OGC) under section 25 of the *Oil and Gas Activities Act*[82] for the construction and operation of the pipeline. The OGC has permitting authority over technical, environmental, and land access aspects of the Project. For permitting purposes, the project was divided into eight pipeline sections and two facilities (one compressor station and one meter station). As of 19 May 2015, the OGC has issued two pipeline permits and one facilities permit for the project.

On 29 June 2015, TransCanada announced that it had signed agreements with six northern British Columbia First Nations regarding benefits related to the project. The benefits include commitments of financial benefits, skills training, employment opportunities, and use of Aboriginal businesses in constructing the project.[83]

---

78 *G-26-2013 Reconsideration*, *supra* note 76 at 27.

79 British Columbia Environmental Assessment Office, Information Bulletin, "Coastal GasLink Pipeline Project granted environmental assessment approval" (24 October 2014), online: Government of British Columbia Newsroom <www.newsroom.gov.bc.ca/2014/10/coastal-gaslink-pipeline-project-granted-environmental-assessment-approval.html>.

80 *Ibid*.

81 *Ibid*.

82 SBC 2008, c 36, s 25.

83 TransCanada Pipelines Ltd, Press Release, "Coastal GasLink Pipeline Project Signs Project Agreements with Six British Columbia First Nations" (29 June 2015), online: <transcanada.mwnewsroom.com/Files/07/07aa49af-0e85-41bf-b2f0-3b59123e8737.pdf>.

3. PRINCE RUPERT GAS TRANSMISSION PLAN

TransCanada is proposing to build the Prince Rupert Gas Transmission Pipeline, a 900 kilometre natural gas pipeline which will run from the District of Hudson's Hope in northeastern British Columbia to the Pacific NorthWest LNG export facility.[84] On 25 November 2014, the Environment Minister and Natural Gas Development Minister issued a Certificate for the project.

The Certificate included 45 conditions, and the Certified Project Description contained design restrictions, which are legally-binding requirements on the project. The key conditions that were developed following the consultation process include developing mitigation and monitoring plans regarding marine access and traffic management, and developing a greenhouse gas management plan.[85]

The project requires permits from the OGC under section 25 of the *Oil and Gas Activities Act*[86] for the construction and operation of the pipeline. For permitting purposes, the Project was divided into seven pipeline sections and four facilities (one meter station and three compressor stations). As of 19 May 2015, the OGC has issued two pipeline permits for the project.[87]

4. WESTCOAST CONNECTOR GAS TRANSMISSION PROJECT

Westcoast Connector Gas Transmission Ltd. is proposing to build the Westcoast Connector Gas Transmission project, which would involve the construction and operation of "up to two 42 to 48-inch (1067 to 1219 mm) diameter sweet natural gas transmission pipelines of up to 860 km in length." The Westcoast Connector Gas Transmission Project would run "from the Cypress Area in northeast British Columbia (100 km northwest of Fort St. John) to the Prince Rupert LNG terminal being proposed by the BG Group at Ridley Island near Prince Rupert." On 25 November 2014, the Environment Minister and Natural Gas Development Minister issued a Certificate for the project.[88]

The Certificate included 43 conditions, and the Certified Project Description contained design restrictions, which are legally-binding requirements on the project. The key conditions that were developed include developing a greenhouse gas management plan, mitigating effects on caribou and grizzly bears, offsetting the effects of the project on existing, protected old growth forest by identifying new areas of old growth forest to be protected, and the development of a social and economic effects management plan. In addition there are

---

84 British Columbia Environmental Assessment Office, Information Bulletin, "Three LNG projects granted environmental assessment approval" (25 November 2014), online: <www.eao.gov.bc.ca/pdf/LNG%20Ministers%20Decision/Info_bulletin_3_projects.pdf> ["Three LNG Approvals"].

85 British Columbia Environmental Assessment Office, Fact Sheet, "Prince Rupert Gas Transmission Project Granted Environmental Assessment Approval" (25 November 2014), online: <www.eao.bc.ca/pdf/LNG%20Ministers%20Decision/FS_PRGT_Decision_25Nov14.pdf>.

86 *Supra* note 82.

87 BC Oil & Gas Commission, "Prince Rupert Gas Transmission," online: <https://www.bcogc.ca/public-zone/major-projects-centre/prince-rupert-gas-transmission>.

88 British Columbia Environmental Assessment Office, Fact Sheet, "Westcoast Connector Gas Transmission Project Granted Environmental Assessment Approval" (25 November 2014), online: <www.eao.gov.bc.ca/pdf/LNG%20Ministers%20Decision/FS_WCGT_Decision_25Nov14.pdf>.

conditions related to the marine environment that include managing and monitoring marine and contaminated sediment during construction activities, and monitoring crab movements. The Certificate also adopts route changes that were proposed by the project during the review process to minimize environmental effects.[89]

C. ALBERTA

1. GRAND RAPIDS PIPELINE PROJECT

On 9 October 2014, the Alberta Energy Regulator (AER) approved an application to construct and operate the Grand Rapids Pipeline Project, with certain exceptions.[90] The pipeline was proposed by Grand Rapids Pipeline GP Ltd., which is jointly owned by TransCanada and Brion Energy Corporation (formerly Phoenix Energy Holdings Limited). The project consists of a 460 kilometre oil and diluent pipeline system from northwest of Fort McMurray, Alberta to terminals in the Edmonton region. The pipeline, operated by TransCanada, will have an ultimate capacity of up to 900,000 barrels per day of crude oil and 330,000 barrels per day of diluent. The AER exempted certain terminal, pump station, river crossing, and pipeline segments from the approval due to application changes, demonstrated facility needs, and additional information requirements.[91]

III. LIQUEFIED NATURAL GAS

A. FEDERAL

1. NEB EXPORT LICENCE APPROVALS

Under section 118 of the *NEB Act*,[92] the NEB may issue licences authorizing the exportation of liquefied natural gas (LNG), provided the quantity of gas to be exported is surplus to foreseeable requirements for use in Canada. Such licences are subject to the final approval of the Governor-in-Council, pursuant to section 4 of the *National Energy Board Act Part VI (Oil and Gas) Regulations.*[93]

To date, the NEB and Governor-in-Council have approved and issued ten LNG export licences.[94] An additional three LNG export licences have been approved by the NEB, but

---

89 *Ibid*.

90 *Grand Rapids Pipeline GP Ltd, Applications for the Grand Rapids Pipeline Project* (9 October 2014), 2014 ABAER 012, online: AER <www.aer.ca/documents/decisions/2014/2014-ABAER-012.pdf>.

91 *Ibid* at 1–2.

92 *Supra* note 16, s 118.

93 SOR/96-244, s 4.

94 LNG export licences issued to date, include: (1) KM LNG Operating General Partnership; (2) BC LNG Export Co-operative LLC (subsequently revoked); (3) LNG Canada Development Inc; (4) Pacific NorthWest LNG Ltd; (5) WCC LNG Ltd; (6) Prince Rupert LNG Exports Ltd; (7) Woodfibre LNG Export Pte Ltd; (8) Triton LNG Limited Partnership; (9) Aurora Liquefied Natural Gas Ltd; (10) Woodside Energy Holdings Pty Ltd; (11) Jordan Cove LNG LP; and (12) Oregon LNG Marketing Co LLC: National Energy Board, "LNG Export and Import Licence Application Schedule," online: NEB <https://www.neb-one.gc.ca/pplctnflng/mjrpp/lngxprtlcnc/index-eng.html>. The BC LNG Export Co-operative license was subsequently revoked on 5 March 2015: *Re BC LNG Export Cooperative* (5 March 2015), RO-GL-299, online: NEB <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90466/94153/552726/674445/674203/2692158/2697544/Letter_and_Revocation_Order_RO-GL-299_to_Grant_Thornton_for_BC_LNG_-_A4J2U6.pdf?nodeid=2697870&vernum=-2>.

remain subject to the review of the Governor-in-Council.[95] An increasing number of LNG export licence applications have been presented to the NEB in the past year and are presently under review.[96]

LNG export licence application volumes (approved and under review) far exceed the remaining established natural gas production potential in the Western Canada Sedimentary Basin (WCSB). The below matrix highlights such disparities between the total production and remaining established natural gas reserves in billion cubic meters (bcm) in the WCSB, and the current total LNG export licence volume in bcm.

LNG EXPORT LICENCE VOLUMES[97]

Project	Export Point	Status	Licence Volume
KM LNG Operating General Partnership	Kitimat, British Columbia	Approved	272 bcm over 20 years
LNG Canada Developments Inc.	Kitimat, British Columbia	Approved	911 bcm over 25 years
Pacific North West LNG Ltd.	Port Edward, British Columbia	Approved	754 bcm over 25 years
WCC LNG Ltd.	West Coast, British Columbia (TBD)	Approved	1,102 bcm over 25 years
Prince Rupert LNG Exports Limited	Ridley Island, British Columbia	Approved	825 bcm over 25 years
Woodfibre LNG Export Pte. Ltd.	Squamish, British Columbia	Approved	81 bcm over 25 years
Triton LNG Limited Partnership	West Coast, British Columbia (TBD)	Approved	78 bcm over 25 years
Aurora Liquefied Natural Gas Ltd.	Prince Rupert, British Columbia	Approved	816 bcm over 25 years
Woodside Energy Holdings Pty Ltd.	Grassy Point, British Columbia	Approved	807 bcm over 25 years

95 LNG export licences approved by the NEB and awaiting Governor-in-Council approval, include: (1) WesPac Mistream Vancouver LLC; (2) Quicksilver Resources Canada Inc; (3) Orca LNG Ltd; (4) Bear Head LNG Corporation; (5) GNL Quebec Inc; (6) Saint John LNG Development Canada Ltd; (7) Steelhead LNG (A) Inc; (8) Steelhead LNG (B) Inc; (9) Steelhead LNG (C) Inc; (10) Steelhead LNG (D) Inc; (11) Steelhead LNG (E) Inc; (12) New Times Energy Ltd; and (13) Stolt LN Gaz Inc: *ibid*.

96 The LNG export licence application for Kitsault Energy Ltd is under review. Incomplete LNG export license applications include: (1) Pieridae Energy (Canada) Ltd; (2) Canada Stewart Energy Group Ltd; (3) Cedar 1 LNG Export Ltd; (4) Cedar 2 LNG Export Ltd, and; (5) Cedar 3 LNG Export Ltd: *ibid*.

97 National Energy Board, "Canadian Energy Overview 2013 — Energy Briefing Note" (Calgary: NEB, June 2014), online: <www.neb-one.gc.ca/nrg/ntgrtd/mrkt/vrvw/2013/index-eng.html>; *ibid*.

Project	Export Point	Status	Licence Volume
Jordan Cove LNG L.P.	Kingsgate, British Columbia/Eastport, Idaho and Huntingdon, British Columbia/Sumas, Washington to the International Port of Coos Bay, Oregon	Approved	442 bcm over 25 years
Oregon LNG Marketing Company LLC	Kingsgate, British Columbia/Eastport, Idaho and Huntingdon, British Columbia/Sumas, Washington	Approved	375 bcm over 25 years
WesPac Midstream Vancouver LLC	Delta, British Columbia	NEB Approval (Awaiting GIC Approval)	103 bcm over 25 years
Quicksilver Resources Canada Inc.	Campbell River, British Columbia	NEB Approval (Awaiting GIC Approval)	639 bcm over 25 years
Orca LNG Ltd.	Prince Rupert, British Columbia	NEB Approval (Awaiting GIC Approval)	901 bcm over 25 years
GNL Quebec Inc.	La Baie, Quebec	NEB Approval (Awaiting GIC Approval)	420 bcm over 25 years
Bear Head LNG Corporation	Point Tupper, Nova Scotia	NEB Approval (Awaiting GIC Approval)	437 bcm over 25 years
Stolt LNGaz Inc.	Becancour, Quebec	NEB Approval (Awaiting GIC Approval)	17 bcm over 25 years
Saint John LNG Development Canada Ltd.	Saint John, New Brunswick	NEB Approval (Awaiting GIC Approval)	192 bcm over 25 years
Steelhead LNG (D) Inc.	West Coast, British Columbia (TBD)	NEB Approval (Awaiting GIC Approval)	235 bcm over 25 years

Project	Export Point	Status	Licence Volume
Steelhead LNG (E) Inc.	West Coast, British Columbia (TBD)	NEB Approval (Awaiting GIC Approval)	235 bcm over 25 years
New Times Energy Ltd.	Prince Rupert, British Columbia	Under Review	408 bcm over 25 years
Cedar 1 LNG Export Ltd.	Kitimat, British Columbia	Incomplete Application	108 bcm over 25 years
Canada Stewart Energy Group Ltd.	Stewart, British Columbia	Incomplete Application	1,020 bcm over 25 years
Pieridae Energy (Canada) Ltd.	Goldboro, Nova Scotia	Incomplete Application	272 bcm over 20 years
Cedar 2 LNG Export Ltd.	Kitimat, British Columbia	Incomplete Application	217 over 25 years
Cedar 3 LNG Export Ltd.	Kitimat, British Columbia	Incomplete Application	217 bcm over 25 years
Total LNG Export Licence Volume (approved and under review):			**10,050 bcm (natural gas)**
Total Natural Gas Production in the Western Canada Sedimentary Basin (31 December 2013):			**5,335 bcm (natural gas)**
Remaining Established Natural Gas Reserves in the Western Canada Sedimentary Basin (31 December 2013):			**1,894 bcm (natural gas)**

The total LNG Export Licence Volume (approved and under review) equates to 10,050 bcm, which significantly exceeds the total natural gas production in the WCSB of 5,335 bcm, and remaining established natural gas reserves in the WCSB of only 1,894 bcm (as of 31 December 2013).

B. BRITISH COLUMBIA

1. LNG ENVIRONMENTAL ASSESSMENTS

On 25 November 2014, after consideration of a review led by British Columbia's Environmental Assessment Office (EAO), the British Columbia Ministry of Environment issued environmental assessment certificates for three LNG or LNG-related pipeline projects in northern British Columbia, including: (1) the Westcoast Connector Gas Transmission

pipeline; (2) the Pacific NorthWest LNG export facility; and (3) the Prince Rupert Gas Transmission pipeline.[98]

On 5 May 2015 and 10 May 2015 Pacific NorthWest LNG Ltd. submitted additional information on the Environmental Impact Statement pursuant to a request from the CEA Agency. The CEA Agency sought comments from federal experts on the additional information at the end of May 2015. On 2 June 2015, the CEA Agency indicated to Pacific NorthWest LNG that information is still required from them in order to respond to the CEA Agency's information request.[99]

The Pacific NorthWest LNG export facility is also subject to a federal environmental assessment by the CEA Agency, which halted its review 11 weeks in, in an effort to gain more information on the effects of an LNG export facility on Flora Bank, though has since restarted its review.[100] The British Columbia EAO and the CEA Agency agreed to work together to conduct a coordinated environmental assessment for the Pacific NorthWest LNG export facility, and the project application was prepared to meet the requirements of both regulators. The CEA Agency is the lead agency for the environmental assessment, as the LNG facility will be primarily located on federal land and waters, and in the traditional territory of the Lax Kw'alaams.[101] In May 2015, Lax Kw'alaams members rejected an unprecedented $1 billion cash offer over 40 years from Petronas (leader of the Pacific NorthWest LNG venture) to consent to the construction of the facility, in fear that the project will harm juvenile salmon habitats in Flora Bank.[102]

On 17 June 2015, the EAO issued an environmental assessment certificate to the LNG Canada Export Terminal Project.[103] The Woodfibre LNG Project received an Environmental Assessment Certificate on 26 October 2015.[104] A number of proposed LNG projects are in the "Pre-Application" phase of assessment and have not proceeded to EAO review.[105]

---

98 "Three LNG Approvals," *supra* note 84.

99 Canadian Environmental Assessment Agency, "Pacific NorthWest LNG Project, Latest Update," online: CEAA <www.ceaa-acee.gc.ca/050/details-eng.cfm?evaluation=80032>; Brent Jang, "Controversial LNG energy project faces environmental review," *Globe and Mail* (19 May 2015), online: <www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/environmental-agency-restarts-review-of-pacific-northwest-terminal-plans/article24478747/>.

100 *Ibid*.

101 *Reasons for Ministers' Decision–Pacific NorthWest LNG Project* (25 November 2014), online: Government of British Columbia <a100.gov.bc.ca/appsdata/epic/documents/p396/1416939043083_l0pwJ01QhLtT3GnJwRzm12YHRq5BWhTshGjgHWg3xz3KJ7Qs770T!-231679769!1416934832825.pdf>.

102 Brent Jang, "For the Lax Kw'alaams, cultural identity is priceless compared to LNG," *Globe and Mail* (15 May 2015), online: <www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/for-the-lax-kwalaams-cultural-identity-is-priceless-compared-to-lng/article24462392/>.

103 British Columbia Environmental Assessment Office, Information Bulletin, "LNG Canada Export Terminal Granted Environmental Assessment Approval" (17 June 2015), online: <www2.news.gov.bc.ca/news_releases_2013-2017/2015ENV0031-000890.htm>.

104 British Columbia Environmental Assessment Office, Project Information Centre, "Woodfibre LNG Project," online: <a100.gov.bc.ca/appsdata/epic/html/deploy/epic_document_408_38736.html>.

105 Projects in Pre-Application include: (1) Aurora LNG Digby Island; (2) Grassy Point LNG; (3) WCC LNG Project, and; (4) Prince Rupert LNG Project: British Columbia Environmental Assessment Office, Project Information Centre, "Project Index Report," online: BC EAO <a100.gov.bc.ca/appsdata/epic/html/deploy/epic_project_index_report.html>.

2. *LIQUEFIED NATURAL GAS INCOME TAX ACT*

The British Columbia *Liquefied Natural Gas Income Tax Act*[106] received Royal Assent on 27 November 2014. The *LNG Act* implements competitive tax rates and policies to support liquefied natural gas development in British Columbia. While the *LNG Act* is estimated to raise between $200 and $600 million per year,[107] it has been criticized for its potential to contribute to the cost of financing and ability for proponents to access markets in a timely fashion.[108]

The *LNG Act* imposes a tax on income derived from liquefaction activities at LNG facilities (as distinguished from LNG plants) in British Columbia, distinct from federal and provincial income taxes.[109] The main liquefaction activities subject to the LNG income tax include:

> (a) acquiring, owning, or disposing of liquefied natural gas, natural gas liquids or natural gas that is at an LNG facility, or the right to acquire, own, or dispose of such commodities in an LNG facility,
>
> (b) acquiring, owning or disposing of all or part of an LNG facility, or a right to use all or part of an LNG facility, and
>
> (c) operating all or part of an LNG facility.[110]

The *LNG Act* establishes taxation on liquefaction activities at the following rates:

- **Tier 1 Rate**: 1.5 percent on net operating income until such time as net operating losses and capital costs have been recovered.[111]
- **Tier 2 Rate**: On or after 1 January 2017, 3.5 percent on net income derived from liquefaction of natural gas at LNG facilities in British Columbia.[112]
- **Tier 2 Rate**: On or after 1 January 2037, 5 percent on net income derived from liquefaction of natural gas at LNG facilities in British Columbia.[113]

---

106 SBC 2014, c 34 [*LNG Act*].

107 Marc Lee, "Path to Prosperity? A Closer Look at British Columbia's Natural Gas Royalties and Proposed LNG Income Tax" Canadian Centre for Policy Alternatives, BC Office (April 2014) at 2, online: <https://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2014/04/CCPA-BC-Path-To-Prosperity.pdf>.

108 MC Moore et al, "Risky Business: The Issue of Timing, Entry and Performance in the Asia-Pacific LNG Market" (July 2014) *SPP Research Papers*, vol 7, No 18 at 77, online: University of Calgary School of Public Policy <policyschool.ucalgary.ca/sites/default/files/research/risky-business-moore-hackett-noda-winter.pdf>.

109 *Supra* note 106, ss 7–8.

110 *Ibid*, s 1.

111 *Ibid*, ss 19(2), 21.

112 *Ibid*, s 18(a).

113 *Ibid*, s 18(b).

On Royal Assent, Bill 26, the *Liquefied Natural Gas Income Tax Amendment Act*,[114] will introduce administrative and enforcement provisions, and clarify a number of key components of the *LNG Act*.[115]

3. *GREENHOUSE GAS INDUSTRIAL REPORTING AND CONTROL ACT*

On 27 November 2014, the British Columbia *Greenhouse Gas Industrial Reporting and Control Act*[116] received Royal Assent. The *Act* delivers on British Columbia's political commitments to develop the LNG industry under safe development standards and satisfactory environmental protection protocols.

The *Greenhouse Gas Act* sets mandatory reporting of greenhouse gas (GHG) emissions[117] and prescribes emission limits for all coal-based electricity generation facilities and LNG liquefaction facilities, including a limit of 0.16 carbon dioxide equivalent tonnes per tonne of LNG produced at LNG facilities, and a zero emissions limit for coal-fired electricity generation.[118]

Entities whose operations exceed their emissions limit can still comply with the proposed legislation by earning the necessary number of compliance units. Such units can be any combination of the following:

- offset units, earned through the removal or reduction of GHG emissions by way of an approved emission offset project and verified by third-party verification procedures;
- funded units, earned by payment of $25 per tonne of GHG emissions to the Minister into a technology fund;
- earned credits, earned through GHG emissions below the emission limit in a previous compliance period and carried over into the period in which the earned credit is used; and
- recognized units, being units of another jurisdiction which are deemed to be equivalent to offset units under the *Greenhouse Gas Act*.[119]

The *Greenhouse Gas Act* repeals and replaces the *Greenhouse Gas Reduction (Cap and Trade) Act*.[120]

---

114 4th Sess, 40th Leg, British Columbia, 2015 (third reading 30 April 2015).

115 *Supra* note 106; Government of British Columbia, "British Columbia's LNG Income Tax – An Overview" Version 2.0 (Victoria: Government of BC, 25 March 2015) at 2, online: <www2.gov.bc.ca/gov/DownloadAsset?assetId=37B76560978 C491F961C610E2F483745&filename=lng-income-tax-overview.pdf>.

116 SBC 2014, c 29 [*Greenhouse Gas Act*].

117 *Ibid*, s 2.

118 *Ibid*, ss 4–7, 65.

119 *Ibid*, ss 1, 8, 11, 12, 20.

120 *Ibid*, s 55; SBC 2008, c 32.

4. PROHIBITING THE CONVERSION OF NATURAL GAS PIPELINES TO TRANSMIT OIL OR DILUTED BITUMEN

On 6 January 2015, the Province of British Columbia established a regulation under the *Oil and Gas Activities Act* to ensure pipelines built to support LNG facilities will not be permitted to transport oil or diluted bitumen.[121] The regulation prohibits the British Columbia OGC from permitting any conversion of a natural gas pipeline supplying an LNG facility. Six proposed pipelines are currently subject to the regulation:

- Coastal GasLink Pipeline Project (for LNG Canada);
- Westcoast Connector Gas Transmission Project (for Prince Rupert LNG);
- Prince Rupert Gas Transmission Project (for Pacific Northwest LNG);
- Pacific Trail Pipelines Project (for Kitimat LNG);
- Pacific Northern Gas Looping Project (for Douglas Channel LNG); and
- Eagle Mountain-Woodfibre Gas Project (for Woodfibre LNG).

Private members' Bill M 213-2014 was separately introduced to amend section 28 of the *Oil and Gas Activities Act* to prohibit the conversion of natural gas pipelines to transmit oil or diluted bitumen.[122]

IV. ABORIGINAL LAW

A. SUPREME COURT OF CANADA

1. *TSILHQOT'IN NATION V. BRITISH COLUMBIA*[123]

The Supreme Court of Canada decision in *Tsilhqot'in Nation v. British Columbia* represents a reiteration of established law regarding Aboriginal title that has developed over decades. The decision is historic because it is the first time that any court has formally granted a declaration of Aboriginal title, albeit under an existing legal framework. The decision also provides greater certainty and clarity for the application of provincial laws and regulatory regimes to Aboriginal title lands. On its face, the decision does not affect lands over which there are "assertions" of Aboriginal title, to which the Crown's duty to consult still applies.

a. Brief Facts

The Tsilhqot'in Nation, a semi-nomadic grouping of six bands, has lived in part of central British Columbia for centuries.[124] In 1983, British Columbia granted a commercial logging licence on land considered by the Tsilhqot'in people to be part of their traditional territory. The band objected and sought a declaration prohibiting commercial logging on the land. Talks with the province were unsuccessful, and the original land claim was amended to

---

121 *Direction No. 1 to the Oil and Gas Commission*, BC Reg 1/2015.
122 *British Columbia Oil and Gas Activities Amendment Act, 2014*, 3rd Sess, 40th Parl, British Columbia, 2014 (first reading 26 November 2014).
123 *Tsilhqot'in*, *supra* note 1.
124 *Ibid* at para 3.

include a claim for Aboriginal title over 4,380 square kilometres. The federal and provincial governments opposed the title claim. In 1998, Chief Roger William of the Xeni Gwet'in Indian Band brought an action on behalf of the Tsilhqot'in against British Columbia and Canada.[125]

The trial commenced in 2002 before the British Columbia Supreme Court and continued for 339 days over a span of five years. The Court held that "occupation" was established for the purpose of proving Aboriginal title by evidence showing regular and exclusive use of sites or territory. The trial judge found that the Tsilhqot'in people were entitled to a declaration of Aboriginal title for a portion of the claim area as well as a small area outside of the claim area.[126]

On appeal, the British Columbia Court of Appeal held that the Tsilhqot'in claim to Aboriginal title had not been established. The Court of Appeal said that, in the future, the Tsilhqot'in might be able to prove sufficient occupation for Aboriginal title for specific sites within the claim area where the Tsilhqot'in's ancestors intensively used a definite tract of land with reasonably defined boundaries at the time of European sovereignty. For the rest of the claimed territory, the Court of Appeal held that the Tsilhqot'in rights were limited to Aboriginal rights to hunt, trap, and harvest.[127]

b. Decision

The Supreme Court of Canada overturned the Court of Appeal's decision and held that a declaration of Aboriginal title should be granted for the claim area determined by the trial judge. In its analysis, the Supreme Court applied the test in *Delgamuukw v. British Columbia* for Aboriginal title to land.[128] The test requires that an Aboriginal group asserting title satisfy three criteria: (1) the land must have been occupied prior to sovereignty; (2) if present occupation is relied on as proof of occupation pre-sovereignty, occupation must have been continuous since pre-sovereignty; and (3) at sovereignty, that occupation must have been exclusive.[129] The trial judge found that the Tsilhqot'in occupation was both sufficient and exclusive at the time of sovereignty (as supported by evidence of more recent continuous occupation) and the Supreme Court agreed with this conclusion.

In cases where Aboriginal title is unproven, the Supreme Court affirmed the well-established requirement that the Crown owes a procedural duty to consult, imposed by the honour of the Crown, and, if appropriate, to accommodate the unproven Aboriginal interest. By contrast, where Aboriginal title has been established, the Crown must not only comply with its procedural duties, but also ensure that the proposed government action is substantively consistent with the requirements of section 35 of the *Constitution Act, 1982*.[130] At the time the commercial logging licences were granted, the Tsilhqot'in title claim had not yet been proven, and the Supreme Court found that the honour of the Crown required the

---

125 *Ibid* at para 5.
126 *Ibid* at para 8.
127 *Ibid* at para 9.
128 [1997] 3 SCR 1010 [*Delgamuukw*].
129 *Ibid* at para 143.
130 *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

province to consult with the Tsilhqot'in people on the uses of the lands and to accommodate their interests. By failing to do both, the province breached the duty owed to the band. The Supreme Court also said that once title is established, it may be necessary for the Crown to reassess its prior conduct and potentially cancel decisions that result in an unjustifiable infringement of Aboriginal title.

Because Aboriginal title carries with it the right to control the land, governments and others seeking to use the land must obtain the consent of the Aboriginal title holder. If the Aboriginal title holder does not consent to the proposed use of the land, the government must establish that the proposed incursion on the land is justified under section 35 of the *Constitution Act, 1982*. The Supreme Court stated that, in order to justify infringements of Aboriginal title on the basis of the broader public good, the government must satisfy the infringement and justification framework originally set out in *R. v. Sparrow*.[131] To justify an infringement of Aboriginal title, the government must show: (1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial legislative objective; and (3) that the governmental action is consistent with any Crown fiduciary obligation to the group.

Provincial laws of general application apply to lands held under Aboriginal title, subject to the constitutional limits and the infringement and justification framework from *Sparrow*. The Supreme Court of Canada held that, in the present case, granting rights to third parties to harvest timber on Tsilhqot'in land is a serious infringement that will not lightly be justified. In order to grant such harvesting rights in the future, the government will be required to establish a compelling and substantial objective.

In concluding that provisions of the *Forest Act*[132] were inapplicable to land held under Aboriginal title, the trial judge placed considerable reliance on *R. v. Morris*.[133] In that decision, the Supreme Court of Canada held that only Parliament has the power to derogate from rights conferred by a treaty because treaty rights are within the core of federal power over "Indians." However, in the *Tsilhqot'in* decision, the Supreme Court expressly overturned *Morris* and stated that "[t]o the extent that *R. v. Morris* stands for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights, [including Aboriginal title], it should no longer be followed."[134]

2. *GRASSY NARROWS FIRST NATION V. ONTARIO (NATURAL RESOURCES)*[135]

In *Grassy Narrows*, also known as the *Keewatin* decision, the Supreme Court of Canada confirmed that provinces have the power to take up treaty lands for resource development projects and other purposes consistent with provincial jurisdiction. Where a province intends to take up treaty lands, it must consult with affected Aboriginal groups regarding the potential impact the project may have on the exercise of treaty rights, such as the right to

131 [1990] 1 SCR 1075 [*Sparrow*].
132 RSBC 1996, c 157.
133 2006 SCC 59, [2006] 2 SCR 915 [*Morris*].
134 *Tsilhqot'in*, *supra* note 1 at para 150.
135 *Grassy Narrows*, *supra* note 1.

hunt, fish, and trap. The decision also confirms that provincial laws of general application apply to treaty lands, and that provincial governments can infringe treaty rights, where justified.

The central question in *Grassy Narrows* was whether the Province of Ontario had the power to "take up" lands in the Keewatin area under Treaty 3 so as to limit the harvesting rights under the Treaty, or whether it needed federal authorization to do so. The Supreme Court of Canada unanimously dismissed the appeal and concluded that only Ontario has the power to take up lands under Treaty 3. This conclusion relied on the Supreme Court's analysis of Canada's constitutional framework, the interpretation of Treaty 3 and its history, and the legislation dealing with Treaty 3 lands.

a. Brief Facts

Treaty 3 was signed in 1873 by treaty commissioners acting on behalf of the Dominion of Canada and Chiefs of the Ojibway people. In exchange for their territory, the Ojibway received the right to harvest certain lands until such time as they were taken up for settlement, mining, lumbering, or other purposes by the Government of the Dominion of Canada. Treaty 3 territory covers approximately 55,000 square miles and includes the Keewatin area. In 1912, the *Ontario Boundaries Extension Act*[136] extended Ontario's boundaries to include the Keewatin territory. Since that time, Ontario has issued licences for the development of these lands.

In 1997, Ontario issued a licence to a large pulp and paper manufacturer to carry out clear-cut forestry operations on Crown lands situated in the Keewatin area. The Grassy Narrows First Nation, descendants of the Ojibway signatories of Treaty 3, commenced an action in 2005 challenging the forestry licence on the basis that it violated their Treaty 3 harvesting rights. The legal issue was whether Ontario can take up lands in the Keewatin area under Treaty 3, and limit harvesting rights, without federal authorization.[137]

The trial judge held that the taking up of lands in the Keewatin area could only be done by a two-step procedure involving approval by both the federal and provincial governments. The Ontario Court of Appeal disagreed and allowed appeals of the trial judge's decision. The Court of Appeal found that Ontario's beneficial ownership of Crown lands within Ontario, combined with provincial jurisdiction over the management and sale of provincial public lands and the exclusive provincial power to make laws in relation to natural resources, provides Ontario with exclusive legislative authority to manage and sell lands within the Keewatin area.[138] The Supreme Court of Canada upheld the Ontario Court of Appeal's decision and dismissed the appeal.

---

136 SC 1912, c 40.
137 *Grassy Narrows*, *supra* note 1 at para 18.
138 *Ibid* at paras 21–22.

b. Decision

Although Treaty 3 was negotiated by the federal government, it is an agreement between the Ojibway and the Crown. The Supreme Court of Canada concluded that both the federal and provincial government are responsible for fulfilling the Treaty promises within their respective constitutional powers.[139] Under section 109 of the *Constitution Act, 1867*,[140] Ontario is given the beneficial interest in the Keewatin lands and the resources on or under the lands. In addition, sections 92(5) and 92A give Ontario the power to take up lands in the Keewatin area under Treaty 3 for provincially regulated purposes, such as forestry.[141] When the lands covered by Treaty 3 were determined to belong to Ontario, it became responsible for their governance with respect to matters falling under its jurisdiction, subject to the terms of the Treaty. Therefore, Ontario was not required to obtain federal approval prior to taking up the lands at issue under Treaty 3.

The Supreme Court examined the words of the taking up clause and found that nothing in the text, or the well-documented history of the negotiation, contemplated a two-step process involving both levels of government. The right to take up land rests with the level of government that has jurisdiction under the Constitution. The Court noted that Ontario has exercised its power to take up lands for a period of over 100 years without any objection by the Ojibway, which, while not determinative of the matters at issue, indicates that federal approval was never considered part of the Treaty.[142]

The jurisdictional interpretation of the take up clause is consistent with the way subsequent governments dealt with the right to take up land under Treaty 3. The 1894 agreement between Canada and Ontario expressly provided Ontario with the right to take up the lands by virtue of its control and beneficial ownership of the territory.[143] Further, the 1912 transfer of lands confirmed that Ontario would stand in Canada's shoes with respect to the rights of the Indians in those lands.[144] According to the Supreme Court, the legislation did not constitute a transfer of Crown rights and obligations by Canada to Ontario, but a transfer of beneficial interest in the land. Having acquired the land, Ontario's constitutional power over lands within its boundaries entitled it to take up land, subject to the Crown's duties to Aboriginal peoples who had interests in the land.

The Supreme Court indicated that Ontario's power to take up the Treaty 3 land is "not unconditional."[145] Any taking up of the land for forestry or other purposes must meet the conditions set out by the Supreme Court of Canada in its 2005 decision in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*,[146] including meeting the requirements of the Crown's duty to consult and, if appropriate, accommodate Aboriginal interests. If the taking up leaves the Ojibway with no meaningful right to hunt, fish, or trap

---

139 *Ibid* at para 35.
140 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 109, reprinted in RSC 1985, Appendix 11, No 5.
141 *Ibid*, ss 92(5), 92A.
142 *Grassy Narrows*, *supra* note 1 at para 40.
143 *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands*, SO 1891, c 3, Schedule.
144 *Grassy Narrows*, *supra* note 1 at para 46.
145 *Ibid* at para 50.
146 2005 SCC 69, [2005] 3 SCR 388.

in the territories in which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise. The Supreme Court said "[w]hen a *government* — be it the federal or a provincial government — exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question."[147]

Finally, the Supreme Court confirmed that provinces can infringe treaty rights if the infringement can be justified under section 35 of the *Constitution Act, 1982*.[148]

B. FEDERAL

1. *COLDWATER INDIAN BAND V. THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT*[149]

In the *Coldwater* decision, the Federal Court of Appeal rendered a unanimous decision upholding the principle that, absent exceptional circumstances, courts must not interfere with ongoing administrative processes.

a. Brief Facts

In June 2012, Kinder Morgan initiated an administrative process before the Minister of Indian Affairs and Northern Development Canada, seeking his consent to assign two easements that allowed Kinder Morgan to construct, operate, and maintain the Trans Mountain Pipeline through Coldwater Indian Reserve No. 1. The assignment, which was from one Kinder Morgan affiliate to another, arose as a result of a corporate restructuring in 2007 related to the sale of Kinder Morgan's natural gas and propane distribution assets to a third party. Before the Minister could make the decision, the Coldwater Indian Band (Coldwater Band) commenced a judicial review application seeking to prohibit the Minister from making the decision, or to direct the Minister to refuse consent to the assignments.[150]

The Federal Court of Canada denied the primary relief sought, but granted Coldwater Band declaratory relief expressly, although not conclusively, considering whether the Minister's consent should be granted, and how the Minister ought to exercise his discretion. The lower court judge concluded that Coldwater Band's motivation for bringing its application was that Coldwater Band does not want the Minister to give his consent, "sensing that there is a much better deal to be made if Kinder Morgan was required to bargain under some duress."[151]

Coldwater Band appealed, arguing that the judge erred in, among other things, concluding that the Minister was not required to follow the informed consent of Coldwater in respect of the easements. Kinder Morgan cross-appealed, arguing that the Judge erred and exceeded his jurisdiction by prematurely commenting on a pending Ministerial decision.

---

147 *Grassy Narrows*, *supra* note 1 at para 50.
148 *Supra* note 130, s 35.
149 *Coldwater* FCA, *supra* note 23.
150 *Coldwater* FC, *supra* note 23 at paras 14–24.
151 *Ibid* at para 1.

b. Decision

Relying on its decision in *C.B. Powell Limited v. Canada (Border Services Agency)*,[152] the Federal Court of Appeal held that, absent exceptional circumstances, courts must not interfere with ongoing administrative processes. Calling the application a "pre-emptive strike,"[153] the Court found that the Appellants' application has resulted in the very harm that the Court warned against in *CB Powell*: (1) the administrative process was fragmented pending a resolution of the proceeding; (2) there was a real risk of further litigation arising from the Minister's decision; (3) all parties incurred unnecessary costs; and (4) the Minister's decision was unjustifiably delayed. Coldwater's appeal was dismissed, with costs, and Kinder Morgan's cross-appeal was granted, with costs.[154]

2. *ATHABASCA CHIPEWYAN FIRST NATION V. CANADA (MINISTER OF THE ENVIRONMENT)*[155]

In *Athabasca Chipewyan*, the Federal Court evaluated the adequacy of Canada's consultation with, and accommodation of, the Athabasca Chipewyan First Nation (ACFN) prior to issuing federal approvals under the *Canadian Environmental Assessment Act, 2012*[156] for the expansion of Shell Canada Limited's (Shell) Jackpine oil sands mine (Jackpine Project). The Court concluded that Canada had fulfilled its duty to consult ACFN, and that the accommodation offered to ACFN was reasonable and adequate.

The decision — the first of its kind under the *CEAA 2012* — affirmed the constitutionality of Canada's Aboriginal consultation process in the context of a major natural resource development project requiring both federal and provincial authorization. It also affirmed that accommodation offered by one level of government must respect the constitutional division of powers.

a. Brief Facts

In January 2007, Shell proposed to expand its existing Jackpine Mine, engaging both federal and provincial environmental assessments (EAs) under the *Canadian Environmental Assessment Act 1992*[157] (since repealed by *CEAA 2012*) and Alberta's *Environmental Protection and Enhancement Act*.[158] Canada and the Government of Alberta struck a JRP to conduct a single EA. ACFN participated extensively in the EA. During this time, Shell also engaged in comprehensive direct consultations with ACFN.

The end result of the six-year EA was a JRP report that, among other things, issued 88 non-binding recommendations to Canada and Alberta in respect of the Jackpine Project and

---

152 2010 FCA 61, [2011] 2 FCR 332.
153 *Coldwater* FCA, *supra* note 23 at para 12.
154 *Ibid* at paras 13–14.
155 2014 FC 1185, [2015] 2 CNLR 28 [*Athabasca Chipewyan*].
156 SC 2012, c 19 [*CEAA 2012*].
157 SC 1992, c 37 [*CEAA 1992*].
158 RSA 2000, c E-12 [*EPEA*].

regional land use management.[159] Following the release of the JRP report, Canada engaged in a five-month consultation process with ACFN (among other Aboriginal groups) that included correspondence, written submissions, direct meetings, and an opportunity for ACFN to comment on draft approval conditions.

Following this process, on 5 December 2013, the Governor-in-Council decided that the significant adverse environmental effects of the Jackpine Project were "justified in the circumstances" under section 52 of *CEAA 2012*. The next day, the Minister of the Environment issued a Decision Statement under section 54 of *CEAA 2012* that addressed some of ACFN's concerns through the imposition of binding conditions on Shell.[160] Alberta also engaged in a consultation process with ACFN, which had not concluded as of the time of Canada's decisions under *CEAA 2012*. The ACFN sought judicial review of Canada's decisions claiming that both the Crown consultation (following the JRP report) and the resulting accommodations were inadequate.

b. Decision

Applying well-established principles of Aboriginal law, the Court assessed the adequacy of Canada's consultation and accommodation in light of ACFN's specific grievances. The Court rejected ACFN's allegations that the consultation process was rushed and lacked transparency. To the contrary, it found that the time period was sufficient and that the Crown's conduct was demonstrative of a fair and responsive process. Ultimately, the Court concluded that it could not see "what more could be done to ensure meaningful consultation."[161]

The Court concluded that the accommodation offered to ACFN was reasonable. The accommodations included imposing binding conditions on Shell, and committing to certain actions, including direct cooperation with Alberta. The Court held, among other things, that: (1) Canada's accommodation cannot encroach on matters of provincial jurisdiction; and (2) the Crown is not required to accommodate vague requests (specificity is required). After reviewing the extensive facts on the record, the Court concluded that "Canada's accommodations, adequate in themselves, bear witness to the attentive, responsive consultation that Canada has afforded the ACFN throughout the process."[162]

3. *COURTOREILLE V. CANADA (MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT)*[163]

In *Courtoreille*, Chief Steve Courtoreille, on behalf of himself and the members of the Mikisew Cree First Nation (Mikisew), sought a declaration that the federal government has a duty to consult regarding the development and introduction of legislation that has the

---

159 *Report of the Joint Review Panel: Shell Canada Energy Jackpine Mine Expansion Project* (9 July 2013), 2013 ABAER 011, online: CEAA <www.ceaa.gc.ca/050/documents/p59540/90873E.pdf>.

160 *Decision Statement Issued under Section 54 of the* Canadian Environmental Assessment Act, 2012 (6 December 2013), online: CEAA <www.ceaa.gc.ca/050/documents/p59540/96773E.pdf>.

161 *Athabasca Chipewyan*, *supra* note 155 at para 86.

162 *Ibid* at para 105.

163 2014 FC 1244, [2015] 1 CNLR 243 [*Courtoreille*], leave to appeal to FCA requested (5 February 2015), Ottawa, FCA A-29-15 (notice of appeal).

potential to affect Mikisew's treaty rights. In its decision, the Federal Court confirmed that the Crown's duty to consult during the legislative process is limited to providing notice to the Mikisew of the proposed legislation's potential impacts to the Mikisew's treaty rights. For future bills which could potentially impact the Mikisew's treaty rights, notice should be provided upon introduction to Parliament and the Mikisew should be given a reasonable opportunity to make submissions. The decision affirms the long-established separation of powers principle between the executive, legislative, and judicial branches in the law-making context.

a. Brief Facts

The Mikisew have historically occupied and harvested lands located within the Peace-Athabasca Delta and Lower Athabasca River regions, which today form part of northeastern Alberta and neighbouring areas. The region contains a number of rivers and lakes that have provided the Mikisew with abundant fishing, trapping, and navigation. In 1899, the Mikisew and other First Nations entered into Treaty 8 and ceded certain lands in exchange for certain guarantees from the Crown. The Treaty 8 guarantees included the Mikisew's right to pursue "their usual vocations of hunting, trapping and fishing throughout the tract surrendered."[164]

In 2012, the federal government made significant changes to Canada's environmental legislation through the introduction of Omnibus Bills C-38[165] and C-45[166] (the Environmental Bills). The Mikisew argued that the proposals contained in the Environmental Bills would reduce the federal monitoring of many of their waterways within their tract of Treaty 8 lands, and that this reduction could reduce the government's ability to monitor those waterways. The Mikisew were not consulted prior to the introduction of the Environmental Bills in Parliament, nor during the process in Parliament that resulted in the Environmental Bills receiving royal assent. Chief Courtoreille sought a declaration that the federal government had a duty to consult with the Mikisew during the legislative process that led to the passing of the Environmental Bills into law.[167]

b. Decision

The Court first considered the point at which it may order intervention in the law-making process. It concluded that existing Supreme Court jurisprudence supports the proposition that courts "will not intervene to dictate a particular regulatory scheme for Parliament to impose upon the Crown."[168] Based on this jurisprudence, the Court held that Parliament is best placed to make the policy choice for creating the procedure administered by the Crown in discharging the duty to consult.[169]

---

164 *Courtoreille*, *ibid* at para 13.

165 *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 1st Sess, 41st Parl, 2012 (assented to 29 June 2012).

166 *A second Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 1st Sess, 41st Parl, 2012 (assented to 14 December 2012).

167 *Courtoreille*, *supra* note 163 at para 13.

168 *Ibid* at para 54.

169 *Ibid*.

In the present case, the Ministers made a set of policy choices that led to the creation of a legislative proposal to be submitted to Cabinet, which resulted in the formulation and introduction of the Environmental Bills into Parliament. In doing so, they acted in their legislative capacity to make decisions that were legislative in nature. The practical effect of the Court's intervention after finding a duty to consult exists in the law-making process would place procedural constraints upon Parliament, thus compromising the sovereignty of Parliament. This would have the effect of constraining a process for which the government requires flexibility to carry out its duties. The Court concluded that, if the Crown had a duty to consult the Mikisew, judicial intervention could not be triggered before the Environmental Bills were introduced into Parliament.[170]

The Court went on to consider whether there was a duty to consult, and whether, based on the facts, the duty to consult was triggered. The Crown conceded that it had knowledge of the Mikisew's rights under Treaty 8. Since the Treaty was signed in 1899, development has affected the usual vocations of the Mikisew. Monitoring the waterways has been beneficial in processes intended to protect the environment and preserve the usual vocations pursued by the Mikisew. Citing the Supreme Court of Canada decision in *Haida Nation v. British Columbia (Minister of Forests)*,[171] the Court found the evidence demonstrated a sufficient potential risk to the fishing and trapping rights so as to trigger the duty to consult.[172] Regarding the extent of the duty to consult, the Court acknowledged that certain aspects of the Environmental Bills clearly address waterways that are within the Mikisew Treaty 8 territory. For provisions that had the potential to impact upon the Mikisew's usual vocations, notice should have been given to the Mikisew upon the introduction of each of the Environmental Bills into Parliament, together with a reasonable opportunity for the Mikisew to make submissions.[173]

Based on the fact that the Environmental Bills have now passed into law, the Court concluded that "a declaration that the parties must now consult would be pointless."[174] The Court denied what amounted to a request for injunctive relief regarding environmental assessment on the basis that it would be impossible to define the scope of such an order, which would also unduly fetter the workings of government.[175] However, the Court noted that a declaration to the effect that the Crown ought to have given the Mikisew notice at the time the Environmental Bills were introduced, along with a reasonable opportunity to make submissions, may have an effect on the future continuing obligations to the Mikisew under Treaty 8.[176]

---

170 *Ibid* at para 72.
171 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*].
172 *Courtoreille*, *supra* note 163 at para 93.
173 *Ibid* at para 101.
174 *Ibid* at para 109.
175 *Ibid* at para 106.
176 *Ibid* at para 110.

C. ALBERTA

1. CREATION OF THE NEW ABORIGINAL CONSULTATION OFFICE

In August 2013, the Alberta Government released a new policy on Aboriginal consultation in the province entitled "The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013."[177] This policy announced the creation of a new Aboriginal Consultation Office (ACO), which was tasked with managing all aspects of Crown consultation. New consultation guidelines, entitled "The Government of Alberta's First Nations Consultation Guidelines on Land and Natural Resource Management,"[178] were released in July 2014 to clarify the ACO's consultation processes and the respective responsibilities of project proponents, First Nations, and the ACO. Among other things, the Consultation Guidelines require the ACO to determine whether consultation with potentially affected First Nations has been adequate before the AER may issue any approval under a "specified enactment"[179] as defined in the *Responsible Energy Development Act*,[180] namely any approval under the *Public Lands Act*,[181] *Mines and Minerals Act* (Part 8),[182] *Water Act*,[183] or *EPEA*.[184]

On 10 June 2015, the AER announced the release of the revised "Joint Operating Procedures for First Nations Consultation on Energy Resource Activities," which were originally released in February 2015 but subsequently suspended.[185] The Joint Operating Procedures provide further details regarding coordination between the AER's application review process and the Aboriginal consultation process administered by the ACO.

D. BRITISH COLUMBIA

1. *EHATTESAHT FIRST NATION V. BRITISH COLUMBIA (MINISTER OF FORESTS, LANDS AND NATURAL RESOURCE OPERATIONS)*[186]

The British Columbia Supreme Court decision in *Ehattesaht* concerned an application for judicial review of a Ministerial decision (the Timber Decision) to allocate timber undercut within a Tree Farm Licence (TFL) held by Western Forest Products Inc. (Western) on the west coast of Vancouver Island. The Timber Decision reduced the unharvested volume potentially available to the Ehattesaht First Nation (EFN). The Crown did not consult the

---

177 Government of Alberta, "The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013" (Edmonton: Aboriginal Consultation Office, 3 June 2013), online: <www.aboriginal.alberta.ca/documents/GoAPolicy-FNConsultation-2013.pdf>.

178 Government of Alberta, "The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management" (Edmonton: Aboriginal Consultation Office, 28 July 2014), online: <www.aboriginal.alberta.ca/documents/First_Nations_Consultation_Guidelines_LNRD.pdf> [Consultation Guidelines].

179 *Ibid* at 7.

180 SA 2012, c R-17.3 [*REDA*].

181 RSA 2000, c P-40.

182 RSA 2000, c M-17.

183 RSA 2000, c W-3.

184 *Supra* note 158.

185 Alberta Energy Regulator, "Joint Operating Procedures for First Nations Consultation on Energy Resource Activities" (Edmonton: AER, 10 June 2015), online: <www.aer.ca/documents/ actregs/JointOperatingProcedures.pdf>.

186 2014 BCSC 849, [2014] 10 WWR 405 [*Ehattesaht*].

EFN regarding the Timber Decision. The Court recognized that a duty to consult extends to this situation where the government decision may have a potential adverse effect on a First Nation's economic interests, as opposed to an Aboriginal right.

a. Brief Facts

The EFN asserts Aboriginal rights and title to an area within a TFL held by Western. The Minister's Timber Decision retained 25 percent of timber undercut in the TFL and returned the remaining 75 percent to the TFL inventory, thereby capping the portion of undercut that could be allocated to the EFN at 25 percent. Ehattesaht was not notified that the matter was under consideration. The issue before the Court was whether the province had a duty to consult the EFN in respect of the Timber Decision.[187] The province and Western argued that there was no duty to consult because the affected Aboriginal interest was an economic interest as opposed to an Aboriginal right.

Since 2005, the EFN has had the opportunity to harvest timber within the TFL through Forestry Accommodation Agreements with the province. The licences issued pursuant to these agreements began to expire in December 2012. During negotiations for a new tenure agreement, the EFN advocated that the province should provide interim accommodation of its Aboriginal rights and title through the reallocation of TFL undercut to the EFN.[188]

The *Forest Act*[189] governs the harvesting of Crown timber in British Columbia. While the holder of a TFL has the exclusive right to harvest timber in the TFL area, the holder must obtain further authorizations to undertake harvesting activities. At the end of a cut control period, any undercut is returned to the Crown and cannot be harvested by the licensee. The undercut may be disposed of by way of certain types of tenure agreements specified under the *Forest Act*.

b. Decision

In assessing whether there was a duty to consult in respect of the Timber Decision, the Court applied the three conditions established by the Supreme Court of Canada in *Haida Nation*: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.[190]

With respect to the first condition, it was not disputed that the Crown had knowledge of the the EFN's claims of Aboriginal right and title to the lands within the TFL. This was demonstrated by the EFN's interest in the allocation of the TFL undercut. As to the second condition, the events preceding the Timber Decision "clearly constituted 'contemplated Crown conduct.'"[191] The Ministry had engaged in extensive consultation with Western prior to making the Timber Decision. However, there was no consultation whatsoever with the

187 *Ibid* at para 44.
188 *Ibid* at paras 7–15.
189 *Supra* note 132.
190 *Supra* note 171 at para 35.
191 *Ehattesaht*, *supra* note 186 at para 54.

EFN. Regarding the third requirement, the Court held that the Timber Decision had the potential to adversely affect the EFN's interest because it capped the portion of the TFL undercut that could be allocated to Ehattesaht at 25 percent. As a result, it would be impossible for the EFN to be allocated any of the undercut that was returned to the inventory of the TFL.[192] Based on these findings, the Court concluded that the Crown had a duty to consult the EFN prior to making the Timber Decision. In the result, the Timber Decision was quashed.

E. ONTARIO

1. *WABAUSKANG FIRST NATION V. ONTARIO (MINISTER OF NORTHERN DEVELOPMENT AND MINES)*[193]

Wabauskang involved a decision of the Director of Mine Rehabilitation (the Mine Director) to acknowledge a Production Closure Plan (PCP) submitted by Rubicon Minerals Corporation (Rubicon). The Wabauskang First Nation (WFN), through an application for judicial review, sought to have the Mine Director's decision suspended on the basis that Ontario failed to fulfill the duty to consult when it improperly delegated the duty to consult to Rubicon. The Ontario Superior Court of Justice dismissed WFN's application.

In *Wabauskang*, the Ontario Superior Court made a significant observation confirming earlier guidance from numerous courts across Canada — it found that, if there had been an improper delegation or a failure to fulfill the duty to consult, the remedy would have been against Ontario and not against Rubicon.

a. Brief Facts

Ancestors of WFN entered into Treaty 3 with Canada in 1873. Today, about 350 WFN members reside on a reserve located in northwestern Ontario. Rubicon's proposed Phoenix Gold Project is situated on privately held land within the traditional territory of both WFN and the Lac Seul First Nation, as well as within Region 1 of the Métis Nation of Ontario. Rubicon began consultations with WFN in respect of the project in 2008, and these consultations continued in 2009 and 2010 while Rubicon pursued its exploration activities. On 17 February 2011, to continue development of the project, Rubicon filed its initial PCP with the Ministry of Northern Development and Mines. Rubicon articulated its commitment to ongoing consultation with WFN, and the PCP indicated that Rubicon was acting under the guidance of the Mine Director. WFN took the position that their interests, rights, and title had not been considered under the PCP and formally objected to the PCP. In response to the Mine Director's concerns with the adequacy of consultation, Rubicon withdrew its PCP. On 17 October 2011, Rubicon re-filed a revised PCP, addressing each of the concerns raised by WFN. The Mine Director acknowledged receipt of the revised PCP on 2 December 2011. Over a year later, on 20 December 2012, WFN made its application to have the Mine Director's decision suspended.[194]

---

192 *Ibid* at para 55.
193 2014 ONSC 4424, 324 OAC 341 [*Wabauskang*].
194 *Ibid* at paras 2–13.

b. Decision

The Court relied on the Supreme Court of Canada decision in *Haida Nation*[195] for the proposition that Ontario alone had a duty to consult and, where appropriate, accommodate WFN, and that Ontario is permitted to delegate only procedural aspects of consultation to Rubicon. In support of this proposition, the Court cited the following excerpt from *Haida Nation*:

> The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environment assessments.… However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.[196]

During the relevant time frame, Ontario repeatedly offered to consult directly with WFN, but WFN insisted that it negotiate on its own with Rubicon. Despite WFN's lack of cooperation, the evidence indicated that ministry staff were regularly keeping in touch with representatives of both WFN and Rubicon and were routinely keeping the Mine Director informed. Further, decision-makers were consistently at the negotiating table. The Court noted that considerable historical development and mining had already occurred at the site, and the duty to consult had to be considered in that context.[197]

The Court found that Ontario's process for assessing the actual or potential claim asserted by WFN, and the assessment made by Ontario regarding the project, was reasonable.[198] While WFN relied on prima facie Aboriginal rights under Treaty 3 in support of its application, WFN did not make any submissions on how Ontario had failed to fulfill its duty to consult regarding these treaty rights.

Ontario did delegate consultation activities to Rubicon, but only on procedural issues related to asserted and acknowledged treaty rights, including by encouraging Rubicon to participate in the development of the work plan and budget, by promoting meaningful communications, and by ensuring that WFN received sufficient finances to obtain advice from professional consultants.[199] Ontario acknowledged that it had the ultimate responsibility for ensuring appropriate consultation, and demonstrated that responsibility in various ways. The evidence indicated that the process established by Ontario to assess potential Aboriginal claims was reasonable, and that Ontario did not improperly delegate its duty to consult and accommodate to Rubicon. The Court then went on to make a significant observation: "if there had been an improper delegation or indeed a failure to fulfill the duty to consult and accommodate, then the remedy would have been against Ontario, not against Rubicon."[200]

---

195 *Supra* note 171.

196 *Ibid* at para 53. See also *Wabauskang*, *supra* note 193 at para 208.

197 *Wabauskang*, *ibid* at para 226.

198 *Ibid* at para 234.

199 At the time the consultation activities were delegated, Rubicon was required to certify that it had carried out reasonable and good faith consultations with appropriate representatives of all Aboriginal peoples affected by the project under section 12(2)(e) of the *Mining Act and Regulation*. On 1 November 2012, section 12(2)(e) was changed to read "the proponent has complied with any written direction regarding Aboriginal consultation provided by the Director pursuant to subsection 8.1(2)": O Reg 240/00.

200 *Wabauskang*, *supra* note 193 at para 243.

V. ENVIRONMENTAL PROTECTION

A. FEDERAL

1. ENVIRONMENTAL ASSESSMENT

a. *Greenpeace Canada v. Canada (Attorney General)*[201]

In *Greenpeace Canada*, several non-governmental environmental organizations challenged a proposal by Ontario Power Generation (OPG) to construct up to four new nuclear reactors as part of the federal Darlington New Nuclear Power Plant Project (the Darlington Project). The decision considered two judicial review applications involving challenges of (1) the adequacy of the federal environmental assessment of the Darlington Project under the *CEAA 1992*;[202] and (2) the Darlington Project's Site Preparation Licence (the Darlington Licence) based on the failure to comply with the requirements of the *CEAA 1992* and the *Nuclear Safety and Control Act*.[203]

The Federal Court revoked the Darlington Licence given to OPG to construct new nuclear generation units at the existing Darlington nuclear facility, and ordered that the environmental assessment under the *CEAA 1992* be returned to the appropriate panel for further consideration including addressing certain "gaps" in the analysis.[204]

i. Brief Facts

In June 2006, OPG sought approval for the construction of a new nuclear power generation facility at the existing Darlington nuclear site in Clarington, Ontario. The Darlington Project, which included the construction, operation, decommissioning and abandonment of nuclear reactors, and the management of the associated conventional and radioactive waste, triggered an environmental assessment under the *CEAA 1992* and the *Law List Regulations*.[205] The Darlington Project was the first proposed nuclear new build in Canada in over a generation, the first since the *CEAA 1992* was enacted, and the first to potentially use enriched uranium fuel.

The environmental assessment of the Darlington Project was referred to a three-member JRP, with a mandate that included performing an environmental assessment of the Darlington Project based on an Environmental Impact Statement prepared by OPG and reviewing OPG's application for the Darlington Licence. The environmental assessment process engaged the public, the Canadian Nuclear Safety Commission (CNSC), and other government agencies and departments, including public hearings and written submissions. Since OPG had not yet committed to a particular reactor design for the Darlington Project, the Environmental Impact Statement examined — and the JRP considered — multiple possible reactor designs using the "plant parameter envelope" (PPE) approach which involves examining reactor design and

---

201 2014 FC 463, 77 Admin LR (5th) 1 [*Greenpeace Canada*].
202 *Supra* note 157.
203 SC 1997, c 9 [*NSCA*].
204 *Greenpeace Canada*, *supra* note 201.
205 SOR/94-636.

site parameters in a way that strives to consider the greatest potential adverse impact to the environment.

On 25 August 2011, the JRP issued its report, concluding that the Darlington Project is not likely to cause significant adverse environmental effects, provided that the Panel's recommendations and OPG's commitments are fulfilled.[206] The *Darlington Report* stated that, if the Darlington Project is to go forward, the selected reactor technology "must be demonstrated to conform to the [PPE approach] and regulatory requirements, and must be consistent with the assumptions, conclusions and recommendations of the environmental assessment."[207] If the reactor technology selected is fundamentally different than those assessed by the JRP, the *Darlington Report* stated that the environmental assessment "does not apply and a new environmental assessment must be conducted."[208] Moving the Darlington Project forward, on 17 August 2012, the CNSC issued the ten-year Darlington Licence to OPG.[209]

ii. Decision

The applicants challenged the environmental assessment on a number of grounds. Their overall position was that, in conducting the environmental assessment, the JRP failed to comply with the mandatory requirements of the *CEAA 1992* and the JRP's own Terms of Reference. Specifically, the applicants argued that the *CEAA 1992* required the JRP to take a precautionary and restrictive approach to environmental assessments, characterizing the *CEAA 1992* as the federal "look before you leap" law and characterizing the environmental assessment conducted by the JRP as the opposite, as a "leap before you look" approach.[210]

The applicants took issue with the JRP's adoption of the PPE approach, arguing that the approach does not allow for a meaningful analysis and, as a result, invalidates the environmental assessment. The applicants contended that, by using the PPE approach, the Panel did not review a "project" within the meaning of the *CEAA 1992*, because the specific nature of the physical work to be undertaken was not identified. The applicants argued that it was not possible to conduct an environmental assessment that met the requirements of the *CEAA 1992* — and that meaningfully assessed the environmental effects — when the reactor technology had not been chosen and other key Darlington Project components, such as the site design layout, the cooling system option, the used nuclear fuel storage option, and the radioactive waste management option, all remained unspecified.[211]

Among other things, the applicants argued that there were a number of "information gaps" in the *Darlington Report*, so significant as to have the effect that the JRP did not consider the environmental effects of the Darlington Project as required by the *CEAA 1992*. For instance, the applicants argued that the JRP did not properly consider the potential hazardous

---

206 Canadian Environmental Assessment Agency, Joint Review Panel, *Environmental Assessment Report: Darlington New Nuclear Power Plant Project* (Ottawa: CEAA, 25 August 2011), online: <www.ceaa.acee.gc.ca/oso/documents/55381/55381E.pdf> [*Darlington Report*].

207 *Ibid* at 11.

208 *Ibid* at 143.

209 *Greenpeace Canada*, *supra* note 201 at para 1.

210 *Ibid* at paras 36–37.

211 *Ibid* at para 38.

substance emissions. Also, the applicants argued that the JRP's conclusion — that "radioactive and used fuel waste is not likely to result in significant adverse environmental effects" — had "no factual basis."[212] According to the applicants, the JRP simply recommended "future study and analysis" of the radioactive waste issue, accepting OPG's evidence that "effective and practical mitigation options would be available when required in the future."[213]

After undertaking a thorough and lengthy review of various technical aspects of the environmental assessment, the Court ultimately disagreed with the applicants' over-arching argument about the inadequacy of the environmental assessment and of the PPE approach. The Court decided that the *CEAA 1992* contains no prescriptive method for conducting an assessment, and that a specific reactor technology does not need to be chosen and identified to make the environmental assessment meaningful, especially in light of the fact that an environmental assessment is to take place as early as practicable in the planning stages of the project.[214]

Nevertheless, the Court went on to rule that the JRP's environmental assessment failed to comply with the *CEAA 1992* in three areas:

(1) Inadequacies in the PPE analysis regarding hazardous substance emissions and non-radioactive wastes, such that the JRP took "a short-cut by skipping over the assessment of effects, and proceeding directly to consider mitigation," making it "questionable whether the [JRP] has considered the [Darlington] Project's effects at all in this regard."[215] Nothing in the *Darlington Report* suggested a "qualitative assessment of the effects of hazardous substance releases."[216]

(2) Long-term management and disposal of radioactive waste (that is, spent or used nuclear fuel to be generated by the Darlington Project), such that the JRP had provided no analysis of the feasibility of storing and managing used nuclear fuel at Darlington in perpetuity. The issue had "not received adequate consideration" by the Panel.[217]

(3) Deferral of the analysis of a severe "common cause" accident involving both the new and existing reactors at the Darlington site.[218]

Importantly, the remedy crafted by the Court did not include quashing the *Darlington Report*. Rather, it returned the matter to the JRP to reconsider and resolve the shortcomings identified by the Court. Until such time as the shortcomings are resolved, the Darlington Project is not permitted to proceed, in whole or in part.[219]

---

212 *Ibid* at para 48.
213 *Ibid*.
214 *Ibid* at para 185.
215 *Ibid* at para 275.
216 *Ibid* at para 282.
217 *Ibid* at paras 228, 297.
218 *Ibid* at paras 319, 333.
219 *Ibid* at para 431.

The Court reasoned that, since a valid environmental assessment is a prerequisite to the Darlington Licence, and since the environmental assessment was determined not to comply with the *CEAA 1992*, the Darlington Licence is, therefore, invalid. In terms of remedies, this means that (1) the Darlington Licence is quashed; and (2) CNSC (and the Department of Fisheries and Oceans and Transport Canada) may not issue another Darlington Licence or other authorization until the Panel has resolved the shortcomings of the *Darlington Report*.[220] This remedy is in line with prior Federal Court jurisprudence. The Court rejected the applicants' argument that the Darlington Licence failed to comply with the *NSCA*.[221] The Federal Court of Appeal heard an appeal of the Federal Court ruling on 2 June 2015 and reserved its decision.[222]

b. Cooperation with Other Jurisdictions in Conducting Environmental Assessments

In December 2014, the NEB panel considering the Trans Mountain Expansion Project (TMEP) accepted the Matsqui First Nation as a "jurisdiction" within the meaning of the *CEAA 2012*, thereby placing obligations on the Panel to cooperate with the Matsqui First Nation in conducting an environmental assessment.[223]

Under the *CEAA 2012*, an entity conducting an assessment pursuant to the *CEAA 2012* is required to offer to consult and cooperate with all other jurisdictions that have powers, duties, or functions in relation to an assessment of the environmental effects of the designated project. [224]

This gave rise to questions regarding the meaning of "jurisdiction" under section 18 of the *CEAA 2012*. On 20 December 2013, the CEA Agency posted a notification with regard to the TMEP, inviting those who were of the opinion that they were a "jurisdiction"[225] with powers, duties, or functions in relation to an assessment of the environmental effects from the TMEP, and wished to be consulted, to contact the NEB.

In response, the Matsqui First Nation wrote the NEB, arguing they were a "jurisdiction" in respect of the environmental assessment. The Matsqui First Nation provided information about the environmental assessment laws they had in place for developments located on their reserve lands, which would be crossed by the project. On 16 December 2014, the NEB wrote to the Matsqui First Nation, accepting them as a "jurisdiction" under the *CEAA 2012* and setting out how the NEB proposed that the Matsqui First Nation's review process would be coordinated with the Board's process.[226]

---

220 *Ibid*.
221 *Ibid* at para 410.
222 *Ontario Power Generation Inc v Greenpeace Canada*, 2015 FCA 186, 388 DLR (4th) 685.
223 Letter from National Energy Board to Chief Alice McKay, Matsqui First Nation (16 December 2014), online: NEB <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2583717/A119-1_-_Letter_from_Matsqui_First_Nation_dated_4_November_2014_%E2%80%93_Matsqui_jurisdiction_and_Matsqui_Environmental_Assessment_Law_-_A4G0J9.pdf?nodeid= 2584832&vernum=-2>.
224 *CEAA 2012*, *supra* note 156, s 18.
225 Within the meaning of the *CEAA 2012*, *ibid*, s 2(1).
226 *Supra* note 223.

In its letter, the NEB stated that since the NEB's review process was already well underway, the primary opportunities for cooperation would be through the exchange of information utilizing the Board's hearing process, including the NEB notifying the Matsqui First Nation of each significant step in the Board's assessment, and the Matsqui First Nation providing the Board with the results of its assessment. The NEB panel allowed for a separate filing deadline after the deadline for intervenor evidence for the Matsqui First Nation to provide information about the results of its assessment. The Panel also stated that it remained open to considering further specific requests or recommendations from the Matsqui First Nation, related to further cooperation under section 18 of the *CEAA 2012*.

On the same day, the NEB also sent a letter to the Tsleil-Waututh First Nation.[227] In it, the NEB recognized that the Tsleil-Waututh Nation was proceeding with its own environmental assessment. The NEB noted that the Tsleil-Waututh Nation had not yet developed an environmental assessment process or laws in accordance with section 21 of the *First Nations Land Management Act*[228] and section 25 of the *Framework Agreement on First Nation Land Management*.[229] Despite this, the NEB indicated that due to the broad objectives of section 18 of the *CEAA 2012*, it was willing to consider any specific requests for cooperation that the Tsleil-Waututh Nation wished to explore with the NEB.[230] They also stated that the Tsleil-Waututh had the information in the public record available to it for its assessment and that the NEB would consider any report produced by the Tsleil-Waututh so long as it was submitted within the normal deadline for filing written evidence.[231]

c. New Cumulative Effects Guidance

In December 2014, the CEA Agency replaced the agency's 2007 operational policy statement entitled "Addressing Cumulative Environmental Effects under the *Canadian Environmental Assessment Act*," with a new operational policy statement entitled "Addressing Cumulative Environmental Effects under the *Canadian Environmental Assessment Act, 2012*."[232]

The purpose of the New OPS is to set out the general requirements and approach for considering cumulative effects under the *CEAA 2012*, where the CEA Agency is the responsible authority. The New OPS should provide direction to the agency in developing directives such as the Environmental Impact Statement Guidelines, and serve as core guidance to project proponents.

---

227 Letter from National Energy Board to Ernie George, Tsleil-Waututh Nation (16 December 2014), online: NEB <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2583822/A120-1_-_Letter_from_Tsleil-Waututh_Nation_dated_14_November_2014_%E2%80%93_update_on_TWN%E2%80%99s_assessment_of_the_Project_-_A4G0K1.pdf?nodeid=2584124& vernum=-2> [Tsleil-Waututh Letter].

228 SC 1999, c 24, s 21.

229 *Framework Agreement on First Nation Land Management* (1996), s 25, online: First Nation Land Management Resource Centre <www.labrc.com/wp-content/uploads/2014/03/Framework-Agreement-Amendment-5.pdf>.

230 Tsleil-Waututh Letter, *supra* note 227 at 2.

231 *Ibid*.

232 Canadian Environmental Assessment Agency, "Assessing Cumulative Environmental Effects under the *Canadian Environmental Assessment Act, 2012*" (Ottawa: CEAA, March 2015), online: <https://www.ceaa-acee.gc.ca/Content/1/D/A/1DA9E048-4B72-49FA-B585-B340E81DD6AE/Cumulative%20Effects%20OPS%20-%20EN%20-%20March%202015.pdf> [New OPS].

As per the New OPS, all cumulative environmental effects assessments should include five steps: scoping, analysis, mitigation, significance, and follow-up.[233]

The CEA Agency has also released a draft document entitled "Technical Guidance for Assessing Cumulative Environmental Effects under the Canadian *Environmental Assessment Act, 2012*."[234] The agency has invited environmental assessment practitioners, the public, and Aboriginal groups, to provide comments on the draft document by 30 June 2015. The technical guidance will provide environmental assessment practitioners with detailed methodological options and the CEA Agency's expectations for cumulative effects assessments. The technical guidance will replace the CEA Agency's Cumulative Effects Assessment Practitioners Guide for environmental assessments conducted by the CEA Agency. The Cumulative Effects Technical Guidance will not apply directly to environmental assessments conducted by the NEB, CNSC, or review panels.

d. Explanation of "Standing" Threshold for *CEAA 2012* Hearings

Contained in the *CEAA 2012* is a "standing" threshold for hearings conducted by the NEB and review panels. The NEB, or review panel, is required to hold public hearings that afford any "interested party" an opportunity to participate in the review process.[235] "Interested party" is defined as anyone whom the NEB or review panel determines is directly affected by the carrying out of the designated project, or has relevant information or expertise.[236]

The NEB has issued guidance (entitled "Section 55.2 Guidance — Participation in a Facilities Hearing"[237]) outlining the factors that it will consider when determining if it will allow a person to participate in an NEB hearing. The NEB explained these factors in a letter dated 22 December 2014 in relation to TransCanada's King's North Project:

> When the Board assesses the directly affected status of an applicant, the Board looks at how the applicant uses the area where the project will be located, how the project will affect the environment, and how the effect on the environment will affect the applicant's use of the area. The Board also considers direct effects that are commercial or financial as well as uses of land and resources for traditional Aboriginal purposes. The closer these elements are connected (their proximity), the more likely the applicant is directly affected. An effect that is too remote, speculative, or is not likely to impact the applicant's interests will not lead to finding that an applicant is directly affected.[238]

---

233 *Ibid* at 3.

234 Canadian Environmental Assessment Agency, "Technical Guidance for Assessing Cumulative Environmental Effects under the *Canadian Environmental Assessment Act, 2012*" (Ottawa, CEAA, December 2014), online: <https://www.ceaa-acee.gc.ca/default.asp?lang=en&n=B82352FF-1&offset=&toc =hide>.

235 *CEAA 2012*, *supra* note 156, s 43(1)(c).

236 *Ibid*, s 2(1).

237 National Energy Board, "Section 55.2 Guidance — Participation in a Facilities Hearing" (Ottawa: NEB), online: <https://www.neb-one.gc.ca/prtcptn/hrng/prtcptnthrhrnggdncs52_2-eng.pdf>.

238 Letter from National Energy Board to TransCanada Pipelines Ltd (22 December 2014), online: NEB <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90550/90715/2453169/2498195/2547610/2585721/A4-01_Letter_with_List_of_Parties_GHW-001-2014_-_A4G2X2.pdf?nodeid=2585534&vernum=-2> at 3.

e. Definition of Environmental Effects

The *CEAA 2012* defines "environmental effect" narrowly.[239] Based on this narrow definition, an environmental assessment under the *CEAA 2012* should be focused exclusively on areas of federal jurisdiction and effects that are the direct result of an exercise of federal power.

In light of this, the NEB has taken a narrow approach to environmental effects with regard to oil and gas pipelines. The NEB has consistently held that effects associated with upstream oil production and downstream consumption of oil are irrelevant to the Board's consideration of a pipeline project under both the *NEB Act* and the *CEAA 2012*.

In 2014, this approach was considered and upheld by the Federal Court of Appeal in *Forest Ethics Advocacy Association v. National Energy Board*.[240] The Court concluded that this approach was reasonable in that it reaches an outcome within a range of acceptability and defensibility on the facts and the law. In support of this conclusion, the Court noted that, *inter alia*, the Board's primary responsibilities under the *NEB Act* are to regulate inter-provincial pipelines, the Board has a wide discretion to determine what is relevant to its consideration of new pipeline projects, and the Board does not regulate upstream or downstream developments — and these activities require approval from other regulators.[241]

B. ALBERTA

1. NORELLCO CONTRACTORS INC.

On 6 November 2014, Norellco Contractors Inc. (Norellco) was ordered by the Alberta Provincial Court[242] to pay a $185,000 fine after Norellco pleaded guilty to one count of an offence under the *Fisheries Act*.[243]

The one offence stemmed from two separate incidents where Norellco punctured the same water main line, releasing 18,000 litres and 16,000 litres of chlorinated water into the St. Albert sewer drain system through to the Sturgeon River. Environment Canada enforcement officers determined that Norellco failed to follow guidelines set out in the Alberta Occupational Health and Safety code by using a backhoe within one metre of a pipeline.[244]

Of the fine, $180,000 was directed to the Environmental Damages Fund.

---

239 *Supra* note 156, s 5(1).
240 2014 FCA 245, 465 NR 152.
241 *Ibid* at para 69.
242 Environment Canada, Enforcement Notification, "Norellco ordered to pay $185,000 for releasing chlorinated water into the Sturgeon River" (19 November 2014), online: <www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=04C547D3-1> [Norellco Enforcement Notification].
243 RSC 1985, c F-14.
244 Norellco Enforcement Notification, *supra* note 242.

2. AER ASSUMES RESPONSIBILITY FOR ENVIRONMENTAL IMPACT ASSESSMENTS

Effective 1 October 2014, the AER assumed responsibility for environmental assessments related to energy resource activity.[245] It assumed this responsibility from the Environment and Sustainable Resource Development (ESRD), the same entity from which the AER had formerly assumed responsibility for issuing approvals for energy projects pursuant to the Alberta *EPEA*.[246] This brings regulation in Alberta closer to a single regulatory review process for energy projects.

Energy resource activity is defined in the *REDA*[247] to include activities that can only be carried out with approval under a number of acts, including the *Gas Resources Preservation Act*,[248] the *Oil and Gas Conservation Act*,[249] the *Oil Sands Conservation Act*,[250] and the *Pipeline Act*.[251] Included in these are upstream oil, oil sands, natural gas, and coal developments.[252] The ESRD retained responsibility for assessments relating to agriculture and forestry.[253] The AER has stated that it will use the policies, guidelines, and regulations already developed by the ESRD and will work with the ESRD to develop effective, efficient, and consistent regulations.[254]

C. ONTARIO

1. CONVICTIONS FOR NOT REPORTING NATURAL GAS DISCHARGES

On 6 August 2014, three Ontario companies were fined $17,500 for failing to report the discharge of natural gas into the environment.[255] This was contrary to the *Environmental Protection Act*.[256] The three companies were the general contractor, D. Koets Plumbing and Heating Limited, the sub-contractor, Scaletta Sand and Gravel Limited, and Union Gas Limited — the owner of the natural gas infrastructure and the natural gas.

During excavation, a rock struck the natural gas pipeline and caused the leak. Union Gas Limited shut the gas off and police and fire crews attended to the scene.

The Ministry of the Environment and Climate Change later learned of the leak through local media and confirmed that it had not been reported by any of the three companies. Union

---

245 *REDA*, *supra* note 180, s 2(2).
246 *Supra* note 158.
247 *Supra* note 180, s 1(1)(i).
248 RSA 2000, c G-4.
249 RSA 2000, c O-6.
250 RSA 2000, c O-7.
251 RSA 2000, c P-15.
252 Alberta Environment, *Environmental Assessment / EIAs*, online: <esrd.alberta.ca/lands-forests/land-industrial/programs-and-services/environmental-assessment/default.aspx>.
253 Alberta Energy Regulator, "Fact Sheet" (January 2015) *Environmental Protection and Enhancement Act*, online: <www.aer.ca/documents/enerfaqs/EPEA_FS.pdf>.
254 *Ibid*.
255 Ontario Ministry of the Environment and Climate Change, Court Bulletin, "Ontario Companies Fined $17,500 for Failing to Report Natural Gas Release" (6 August 2014), online: <news.ontario.ca/ene/en/2014/08/ontario-companies-fined-17500-for-failing-to-report-natural-gas-release.html>.
256 RSO 1990, c E.19.

Gas was fined $7,500 plus a victim fine surcharge of $1,875. The other companies together were fined $5,000 as well as victim fine surcharges totalling $2,500.

D. QUEBEC

1. BLOOM LAKE GENERAL PARTNER LIMITED

On 22 December 2014, the Criminal and Penal Division of the Court of Quebec ordered the Bloom Lake General Partner Limited (Bloom Lake) to pay a record $7.5 million fine.[257] Bloom Lake had pleaded guilty to 45 charges under the *Fisheries Act*.[258]

The charges arose from infractions at the Bloom Lake mine site, including the release of 14,500 litres of ferric sulfate into fish bearing water, a separate release of over 200,000 cubic meters of other deleterious materials — resulting from the breach of a tailings pond dam — into fish bearing water, failing to notify the Department of the Environment of such releases, omitting to take samples and conduct analyses as required under regulations, and the failure to comply with an inspector's direction.[259]

Of the total fine, $6.83 million will be directed to the Environmental Damages Fund. The Environmental Damages Fund is a specific purpose account administered by Environment Canada to fund projects that benefit the natural environment.[260]

VI. OIL AND GAS DEVELOPMENT

A. FEDERAL

1. OIL BY RAIL

a. *Safe and Accountable Rail Act*

In the wake of the 2013 Lac-Mégantic rail disaster, and increased shipments of dangerous goods by rail, the federal government introduced Bill C-52, the *Safe Rail Act* in the House of Commons.[261] On 18 June 2015, the *Act* received Royal Assent. The *Safe Rail Act* aims to strengthen the liability and compensation regime for federally-regulated railway companies through the imposition of minimum insurance requirements and transportation levies to cover damages resulting from railway accidents involving the transportation of designated goods.

The *Safe Rail Act* establishes that a railway company is liable, without proof of fault or negligence (subject to certain defences) for losses, damages, costs, and expenses resulting

---

257 Environment Canada, Enforcement Notification, "Bloom Lake General Partner Limited ordered to pay $7.5 million for environmental infractions" (22 December 2014), online: <www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=87E31737-1> [Bloom Lake Enforcement Notification].

258 *Supra* note 243.

259 Bloom Lake Enforcement Notification, *supra* note 257.

260 Environment Canada, "Environmental Damages Fund," online: <www.ec.gc.ca/edf-fde/>.

261 Bill C-52, *An Act to Amend the Canada Transportation Act and the Railway Safety Act*, 2nd Sess, 41st Parl, 2015 (assented to 18 June 2015), SC 2015, c 31 [*Safe Rail Act*].

from a railway accident involving designated goods, including crude oil.[262] This liability regime parallels the "polluter pays" principle proposed in the *Pipeline Safety Act*.[263]

To ensure that losses and damages resulting from a railway accident involving crude oil are adequately covered, as proposed in the *Pipeline Safety Act*, the *Safe Rail Act* prescribes minimum liability insurance levels for railway operations based on the type and volume of goods transported, including:

- $25 million minimum liability insurance coverage for carriers of minimally dangerous goods;
- $50 million minimum liability insurance coverage for carriage of less than 100,000 tonnes of crude oil per calendar year, increasing to $100 million two years after Royal Assent;
- $125 million minimum liability insurance coverage for carriage of at least 100,000 tonnes, but less than 1.5 million tonnes, of crude oil per calendar year, increasing to $250 million two years after Royal Assent; and
- $1 billion for carriage of crude oil exceeding 1.5 million tonnes per calendar year.[264]

Under the *Safe Rail Act*, federally-regulated railway companies are also subject to a transportation levy of $1.65 for every tonne of crude shipped by rail up to 31 March 2016, and adjusted annually thereafter.[265] Proceeds from the levy support the establishment of a "Fund for Railway Accidents Involving Designated Goods" which provides compensation to persons involved in railway accidents involving designated goods.[266]

b. TC-117 Tank Car Regulations

On 1 May 2015, in response to three train derailments in northern Ontario in 2015, Transport Canada adopted the TC-117 Tank Car Regulations, which provides new standards for tank-cars used to transport flammable liquids. Such standards are more stringent than the previously proposed TC-140 standards, and require such tank-cars to be jacketed, thermally protected, and fitted with thicker steel, full head shields, top protection, and new bottom outlet valves and braking requirements for certain trains, by 2025.[267]

---

262 *Ibid*, cl 7, amending the *Canada Transportation Act*, SC 1996, c 10, ss 152.7–152.8.
263 *Supra* note 61, cl 16, amending the *NEB Act*, *supra* note 16, s 48.11.
264 *Supra* note 261, Schedule IV.
265 *Ibid*, cl 10, amending the *Canada Transportation Act*, *supra* note 262, s 155.3.
266 *Safe Rail Act*, *ibid*, cl 10, amending the *Canada Transportation Act*, *ibid*, s 153.4.
267 Regulations Amending the Transportation of Dangerous Goods Regulations (TC 117 Tank Cars), SOR/2015-100 (2015) C Gaz II, 1344; Transport Canada, "Explanatory Note," online: <https://www.tc.gc.ca/eng/tdg/clear-modifications-menu-1193.html>; Eric Atkins & Kim Mackrael, "Transport Canada proposes new tank-car standards after fiery derailments," *Globe and Mail* (11 March 2015), online: <www.theglobeandmail.com/news/national/transport-canada-proposes-new-tank-car-standards-after-fiery-derailments/article23414472/>.

2. *Extractive Sector Transparency Measures Act*

The *Extractive Sector Transparency Measures Act*,[268] representing Canada's fulfillment of its international commitments to fight against corruption through transparency measures, received Royal Assent on 16 December 2014. The *Transparency Act* sets out reporting requirements for payments made by entities engaged in the commercial development of oil, gas, or minerals to domestic or foreign governments, bodies established by two or more governments, or companies exercising government functions including trusts, boards, commissions, and corporations.[269]

Entities subject to such disclosure requirements include: (1) entities listed on a stock exchange in Canada; (2) entities having a business in Canada, doing business in Canada, or having assets in Canada and which have at least two of a) $20 million in assets, b) $40 million in revenue, or c) employ an average of at least 250 employees; and (3) any other prescribed entities.[270]

Payments requiring disclosure include both monetary and in-kind payments amounting to $100,000 or more, or as otherwise prescribed by regulation, and falling within one of the following categories:

- taxes (other than consumption taxes and personal income taxes);
- royalties;
- fees (including rental fees, entry fees, and regulatory charges as well as fees or other considerations for licences, permits, or concessions);
- production entitlements;
- bonuses including signature, discovery, and production bonuses;
- dividends other than dividends paid as ordinary shareholders;
- infrastructure improvement payments; and
- any other prescribed category of payment.[271]

Payments made to Aboriginal governments in Canada and bodies established by two or more Aboriginal governments, are not subject to disclosure for a two-year transitional period.[272] The *Transparency Act* came into force on 1 June 2015.

---

268 SC 2014, c 39, s 376 [*Transparency Act*].
269 *Ibid*, s 2.
270 *Ibid*, s 8.
271 *Ibid*, ss 2, 9(2).
272 *Ibid*, s 29.

3. *ENERGY SAFETY AND SECURITY ACT*

Bill C-22, the *Energy Safety and Security Act*,[273] received Royal Assent on 26 February 2015. The two-part legislation aims to enhance safety and security in Canada's offshore petroleum and nuclear industries.

Part 1 of the legislation codifies the "polluter pays" principle, making oil and gas companies operating in the Arctic and Atlantic fully responsible for the costs and damages they cause through the release of oil or gas offshore, by implementing an absolute liability limit of $1 billion (increased from $30 million in the Atlantic and $40 million in the Arctic). Liability of at-fault operators in the event of a spill or damages caused by debris remains unlimited.[274]

Part 1 amends the *Canada Oil and Gas Operations Act*,[275] the *Canada Petroleum Resources Act*,[276] the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*[277] and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*[278] to update, strengthen, and increase the level of transparency of the liability regime. Further, the legislation harmonizes the environmental assessment process for projects for which the NEB, the Canada-Newfoundland Offshore Petroleum Board, or the Canada-Nova Scotia Offshore Petroleum Board is the responsible authority.

Part 2 of the *Act* repeals the *Nuclear Liability Act*[279] and enacts the *Nuclear Liability and Compensation Act*[280] to strengthen the liability regime applicable after a nuclear incident.[281] It also provides for the establishment of an administrative tribunal to hear and decide claims in certain circumstances.[282]

4. TRADE AGREEMENTS

The *Canada and European Union Comprehensive Economic and Trade Agreement*[283] (draft released 26 September 2014), and the *Canada-China Foreign Investment Promotion and Protection Agreement* (in force 1 October 2014),[284] set more favourable conditions for energy proponents to engage in foreign investment and trade. Specifically, the *CETA* improves industry access to European Union (EU) markets through national treatment of

---

273 Bill C-22, *An Act respecting Canada's offshore oil and gas operations, enacting the Nuclear Liability and Compensation Act, repealing the Nuclear Liability Act and making consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2015 (assented to 26 February 2015), SC 2015, c 4 [*Energy Safety and Security Act*].

274 *Ibid*, cl 19, amending the *Canada Oil and Gas Operations Act*, *supra* note 63, s 26.

275 *Supra* note 63.

276 RSC 1985, c 36 (2nd Supp).

277 SC 1987, c 3 [*Newfoundland Atlantic Act*].

278 SC 1988, c 28 [*Nova Scotia Offshore Act*].

279 RSC 1985, c N-28.

280 SC 2015, c 4, s 120.

281 *Ibid*, ss 8–13.

282 *Ibid*, s 36.

283 *Canada and European Union Comprehensive Economic and Trade Agreement* (26 September 2014), online: European Commission <trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> [*CETA*].

284 *Agreement between Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments*, 9 September 2012, Can TS 2014/26 (entered into force 1 October 2014) [*FIPA*].

Canadian goods within the EU,[285] elimination of tariffs on originating goods, promotion of simplified licensing and qualification requirements and procedures,[286] labour mobility through temporary movement of key personnel, contractual services suppliers, independent professionals and short-term business visitors between the EU and Canada,[287] mutual recognition of certain professional qualifications,[288] non-discriminatory treatment of foreign investors,[289] and protection and security of foreign investments.[290]

Further, the *FIPA* promotes foreign investment from enterprises located in Canada or China. It codifies international investment law principles on a reciprocal basis, including protection from discriminatory treatment,[291] failure to provide fair and equitable treatment,[292] repatriation of capital and income, and safeguards against expropriations and regulatory takings.[293] Pre-existing, non-conforming measures of governmental authorities, however, are not subject to the disciplines of the *FIPA*.[294]

B. ALBERTA

1. ENHANCED OIL RECOVERY

a. *Enhanced Oil Recovery Royalty Regulation*

On 24 July 2014, the Government of Alberta issued the *Enhanced Oil Recovery Royalty Regulation*[295] under the *Mines and Minerals Act*.[296] The *EOR Royalty Regulation* establishes that, on application, the Minister may grant an approval providing for a maximum royalty rate applicable to the calculation of crude oil obtained from well events that are part of an enhanced oil recovery scheme or proposed royalty scheme.[297]

b. *Enhanced Oil Recovery Program Guidelines*

Alberta Energy issued the *Enhanced Oil Recovery Program Guidelines*[298] in August 2014 to explain the administration of the Enhanced Oil Recovery Program under the *EOR Royalty Regulation*.[299] The guidelines assist operators in completing applications under the *EOR Royalty Regulation*, and offer guidance on the administration and approvals of such applications, dispute resolution, and reporting procedures.

---

285 *CETA*, *supra* note 283 at 19–43.
286 *Ibid* at 246–50.
287 *Ibid* at 197–235.
288 *Ibid* at 236–45.
289 *Ibid* at 146–87.
290 *Ibid*.
291 *FIPA*, *supra* note 284, art 5.
292 *Ibid*, art 4.
293 *Ibid*, art 10.
294 *Ibid*, art 8.
295 Alta Reg 156/2014 [*EOR Royalty Regulation*].
296 *Supra* note 182.
297 *Supra* note 295, ss 4–5.
298 Alberta Energy, "Enhanced Oil Recovery Program (EORP) Guidelines," (Edmonton: AE, August 2014), online: <www.energy.alberta.ca/Oil/docs/EORP_Guidelines_2014.pdf>.
299 *Supra* note 295.

2. PROSPER PETROLEUM LTD. OIL SANDS EXPLORATION PROGRAM

On 5 November 2014, the AER issued decision 2014 ABAER 013,[300] approving the Prosper Petroleum Ltd. oil sands exploration (OSE) program. The decision marks the first regulatory appeal under the *REDA*,[301] and only the second time the AER has held a hearing for an OSE program.

Prosper's OSE program is located in an area of importance to the Fort McKay First Nation (Fort McKay). While Fort McKay did raise concerns about the OSE program at the time the program was proposed, it did not issue a formal objection. Prosper applied for, and was granted *Public Lands Act*[302] approvals from the ESRD and well licences from the then-Energy Resources Conservation Board on a routine basis.

Following the introduction of *REDA*, Fort McKay challenged such licences on the basis that it had raised concerns with the OSE program when the program was proposed, and that Prosper should have applied for the program on a non-routine basis. The AER agreed with Fort McKay that Prosper should have applied for the program on a non-routine basis, and granted a regulatory appeal. After a failed attempt at AER-directed alternative dispute resolution, and at the request of both parties, a hearing was conducted by way of a written process.

In reaching its decision, the AER concluded that the effects of the OSE program are "localized, temporary, and of relatively short duration" and in light of the use of minimal disturbance techniques and seasonal access, the program's contribution to regional cumulative effects are negligible.[303] Further, "Fort McKay did not provide sufficient evidence on how its traditional and cultural activities were specifically affected by the … program."[304]

The AER noted that regional management frameworks, such as the Lower Athabasca Regional Plan, are the appropriate mechanisms to address concerns related to regional effects of oil sands development.[305] The AER reinstated the well licences at issue on the basis that they "meet all AER regulatory requirements and are in the public interest."[306]

3. CANADIAN NATURAL RESOURCES LTD. DISPOSAL APPLICATION APPROVAL

On 21 August 2012, Canadian Natural Resources Ltd. (CNRL) received the AER's approval to dispose produced and saline water into the Dina Formation in an existing well.[307]

---

300 *Prosper Petroleum Ltd Regulatory Appeal of 24 Well Licences and a Letter of Authority Undefined Field* (5 November 2014), 2014 ABAER 013, online: AER <www.aer.ca/documents/decisions/2014/ 2014-ABAER-013.pdf> [*Prosper OSE Approval*].

301 *Supra* note 180.

302 *Supra* note 181.

303 *Prosper OSE Approval*, *supra* note 300 at para 131.

304 *Ibid* at para 132.

305 *Ibid* at para 121.

306 *Ibid* at para 140.

307 *Canadian Natural Resources Limited, Application for Disposal Lloydminster Field* (28 July 2014), 2014 ABAER 008 at paras 2–3, online: AER <www.aer.ca/documents/decisions/2014/2014-ABAER-008.pdf> [*CNRL Disposal Approval*].

Ener T Corporation (Ener T) raised concerns about the impacts of the disposal location, and in response, CNRL modified its disposal plan to the Moberly and Cooking Lake formation and obtained the AER's approval on 23 April 2013. CNRL subsequently discovered that the Moberly and Cooking Lake formations had poor injectivity, and submitted Application No. 1774949 to the AER requesting approval to dispose into the Dina Formation.[308]

Ener T argued that CNRL's proposed disposal location in the Dina Formation will contribute to higher volumes and pressures in the reservoir, and will have detrimental effects on Ener T's operations. The AER ultimately rejected Ener T's argument, and held that while there is potential for some effects to Ener T's injection operations, injection into the Dina Formation will not result in significant adverse effects to Ener T's operations. The AER rescinded the Moberly and Cooking Lake formation approvals, and approved Application No. 1774949 to dispose fluids into the Dina Formation through an existing well.[309]

4. PLAY-BASED REGULATION PILOT

The AER is conducting a pilot project near Fox Creek in the Duvernay resource play to learn how play-based regulation (PBR), a framework for regulating unconventional oil and gas development in Alberta, will work and where improvements can be made.[310] PBR encourages energy companies to submit a single application for multiple energy development activities within a project, including multiple wells, pipelines, facilities, access roads, and water use, rather than applying on an activity-by-activity basis.[311] A complete, single PBR application includes project information, a stakeholder engagement plan, a comprehensive risk management plan, and a reporting plan, in accordance with the Play-Based Regulation Pilot Application Guide.[312] Applicants will be required to engage stakeholders and First Nations in the entire project plan.[313]

The intent of PBR is "orderly and responsible development, reduced land, water and air impacts, collaboration among operators in an area or play, and enhanced stakeholder engagement."[314]

---

308 *Ibid* at paras 3–4.

309 *Ibid* at para 82.

310 Alberta Energy Regulator, "Play-based Regulation — Piloting a New Approach to Oil and Gas Development" (Calgary: AER, January 2015), online: <https://www.aer.ca/documents/about-us/PBR_Brochure.PDF> [PBR Approach].

311 *Ibid* at 1–2.

312 Alberta Energy Regulator, "Manual 009: Play-based Regulation Pilot Application Guide" (Calgary: AER, 14 July 2015) at 7–8, online: <https://www.aer.ca/documents/manuals/Manual009.pdf>.

313 *Ibid* at 3.

314 PBR Approach, supra note 310 at 2.

C. NOVA SCOTIA AND NEWFOUNDLAND AND LABRADOR

1. *CANADA-NOVA SCOTIA OFFSHORE PETROLEUM RESOURCES ACCORD IMPLEMENTATION (NOVA SCOTIA) ACT (AMENDED), CANADA-NEWFOUNDLAND AND LABRADOR ATLANTIC ACCORD IMPLEMENTATION ACT*

Amendments, adding Part III.2 to the *Nova Scotia Offshore Act*, came into effect on 31 December 2014.[315] Parallel amendments were adopted federally under the *Offshore Health and Safety Act*[316] and provincially in Newfoundland and Labrador under the *Newfoundland Atlantic Act.*[317] The amendments establish one set of occupational health and safety rules for the offshore oil and gas industry in Nova Scotia, protecting workers engaged in offshore oil and gas activities and those who are in transit to, from, or between workplaces in offshore areas.[318] The amendments also clarify the roles and responsibilities of governments, regulators, employers, and employees for occupational health and safety.[319]

VII. RENEWABLE ENERGY AND POWER

A. FEDERAL

1. WIND TURBINE NOISE AND HEALTH STUDY

On 6 November 2014, Health Canada released a summary of the results from its Wind Turbine Noise and Health Study.[320] The Turbine Study was launched by Health Canada, in collaboration with Statistics Canada and external experts, in July 2012. The purpose of the Turbine Study was to explore the relationship between exposure to wind turbine noise and the extent of health effects reported by, and objectively measured in, those living near wind turbines.

The Turbine Study found no linkage between exposure to wind turbine noise and illness, chronic disease, stress, or sleep quality for those individuals who live near wind turbines. The findings of the Turbine Study are preliminary pending peer review and publication in a journal.

As outlined in Health Canada's summary, the Turbine Study had three main objectives: (1) to investigate the prevalence of health effects or health indicators among a sample exposed to wind turbine noise using both self-reported and objectively measured health outcomes; (2) to apply statistical modelling in order to derive exposure response relationships between wind turbine noise levels and self-reported and objectively measured health

---

315 *Supra* note 278.
316 SC 2014, c 13.
317 *Supra* note 277.
318 *Nova Scotia Offshore Act, supra* note 278, s 210.003.
319 *Ibid*, ss 210.01, 210.036.
320 Health Canada, Environmental and Workplace Health, "Wind Turbine Noise and Health Study: Summary of Results" (10 March 2014), online: <www.hc-sc.gc.ca/ewh-semt/noise-bruit/turbine-eoliennes/summary-resume-eng.php> [Turbine Study].

outcomes; and (3) to investigate the contribution of low frequency noise and infrasound from wind turbines as a potential contributing factor towards adverse community reaction.[321]

The Turbine Study targeted homes within a certain proximity to 12 wind turbine developments in Ontario and six in Prince Edward Island. Data was collected from 1,238 households using three methodologies. First, information was collected using an in-person questionnaire, which was given to randomly selected participants living at various distances from the wind turbines. Data was also taken from a collection of physical health measures that assessed stress levels (for example, hair cortisol, blood pressure, and resting heart rate) as well as sleep quality. Third, data was collected from more than 4,000 hours of wind turbine noise measurements.[322] Health Canada's summary outlined a number of key findings related to illness and chronic disease, stress, sleep, annoyance, and quality of life.

No evidence was found to support a link or association between wind turbine noise and any of the self-reported illnesses and chronic conditions, self-reported stress, or multiple objective measures of stress and exposure to wind turbine noise, self-reported or measured sleep quality, or quality of life and satisfaction with health as assessed through the World Health Organization's Quality of Life scale. An association was found between increasing levels of wind turbine noise and people reporting to be very or extremely annoyed. A separate link was found between long-term high annoyance and health effects such as blood pressure and migraines. The Turbine Study points out that there is no causal link between wind turbine noise and such potential health effects, noting that these potential associations were not dependent on noise levels or distance from turbines.[323]

B. ALBERTA

1. BLUEARTH RENEWABLES INC. BULL CREEK WIND PROJECT

In June 2012, 1646658 Alberta Ltd. (BluEarth), a wholly owned subsidiary of BluEarth Renewables Inc., filed an application with the Alberta Utilities Commission (AUC) to construct and operate the Bull Creek Wind Project.[324] The initial hearings concluded on 22 November 2013[325] and the project was approved on 20 February 2014.[326] The AUC considered evidence regarding noise, health, and environmental effects of wind turbines and concluded that the project was in the public interest. The project was initially approved as a 46 turbine 115 megawatt wind project located in the Municipal District of Provost approximately 20 kilometres northeast of Provost and 60 kilometres southeast of Wainwright.[327]

---

321 *Ibid*.
322 *Ibid.*
323 *Ibid*.
324 *Approval No U2014-64* (20 February 2014), online: AUC <www.auc.ab.ca/applications/orders/ utility-orders/Utility%20Orders/2014/U2014-64.pdf>.
325 BluEarth Renewables Inc, "Bull Creek Wind Project: Newsletter No 1" (January 2014), online: <www.bluearthrenewables.com/wp-content/uploads/2014/09/BluEarth_Newsletter_Bull-Creek_Web.pdf>.
326 BluEarth Renewables Inc, "Bull Creek Wind Project: Newsletter No 2" (August 2014), online: <www.bluearthrenewables.com/download/bull-creek-project-info/project_newsletters/BluEarth_Newsletter_Bull%20Creek%20No.%202_WEB.pdf>.
327 *Approval No U2014-64*, *supra* note 324.

Following initial AUC approval, BluEarth reassessed the size and design of the project. It filed an amendment application with the AUC to reduce the model and number of turbines on 18 November 2014.[328] BluEarth anticipates completion of permitting and beginning of construction to occur in May 2015, and commercial operation in December 2015.[329]

C. BRITISH COLUMBIA

1. SITE C CLEAN ENERGY PROJECT

On 1 May 2014, the Joint Review Panel, which was struck by an agreement between the Federal and British Columbia governments pursuant to the *CEAA 2012*[330] and the British Columbia *Environmental Assessment Act*,[331] released its report on BC Hydro's proposed *Site C Clean Energy Project*.[332] The *Site C Clean Energy Project* consists of a proposed third dam and hydroelectric generating station on the Peace River in northeast British Columbia. The project is anticipated to provide 1,100 megawatts of capacity, and produce about 5,100 gigawatt hours of electricity each year.[333] The cost of the project presented to the Panel was $7.9 billion.[334]

The panel report considered a number of issues, including: impacts on the aquatic environment; fish and fish habitat; vegetation and ecological communities; wildlife resources; current use of lands and resources for traditional purposes; asserted or established Aboriginal rights or Treaty rights; land and resource use; community life; human health; heritage resources; environmental protection and management; and the need for the project based on available alternatives. Ultimately the Panel made 50 recommendations for the project.[335]

On 14 October 2014, the Province of British Columbia issued an environmental assessment certificate for the *Site C Clean Energy Project*. The certificate was subject to 77 legally binding conditions.[336] The conditions included such things as establishing a fund of $20 million to compensate for lost agricultural lands, and in collaboration with the Cultural Heritage Resources Committee — which includes Aboriginal groups — to develop and implement mitigation measures to manage effects on cultural resources.[337]

---

328 BluEarth Renewables Inc, "Bull Creek Wind Project: Newsletter No 3" (November 2014), online: <www.blueearthrenewables.com/wp-content/uploads/2014/09/BluEarth_Newsletter_Bull-Creek-No.-3_FINAL.pdf>.

329 BluEarth Renewables Inc, "Bull Creek Wind Project: Newsletter No 4" (April 2015), online: <www.blueearthrenewables.com/wp-content/uploads/2014/09/BluEarth-Newsletter-Bull-Creek-No.-4-Final.LR.pdf>.

330 *Supra* note 156.

331 SBC 2002, c 43.

332 Canadian Environmental Assessment Agency, Joint Review Panel, *Report of the Joint Review Panel: Site C Clean Energy Project* (Ottawa: CEAA, May 2014), online: <www.ceaa-acee.gc.ca/050/documents/p63919/99173E.pdf> [*Site C Project Report*].

333 BC Hydro, "Site C Clean Energy Project," online: BC Hydro <https://www.bchydro.com/energy-in-bc/projects/site_c.html>.

334 *Site C Project Report*, *supra* note 332 at 1.

335 *Ibid* at 310–25.

336 BC Ministry of Environment, "Site C project granted environmental assessment approval" *BC Gov News* (14 October 2014), online: <news.gov.bc.ca/stories/site-c-project-granted-environmental-assessment-approval>.

337 *Ibid*.

The *Site C Clean Energy Project* received final approval from the Province of British Columbia on 16 December 2014, with an updated estimated capital cost of $8.335 billion.[338] Construction is expected to begin in the summer of 2015.[339]

D. ONTARIO

1. *DIXON V. ONTARIO (DIRECTOR, MINISTRY OF THE ENVIRONMENT)*[340]

On 29 December 2014, the Ontario Divisional Court released its decision in *Dixon*, confirming the constitutionality of the Renewable Energy Approval (REA) review provisions in Ontario's *Environmental Protection Act*.[341] In this appeal of three Environmental Review Tribunal (ERT) decisions, the appellants argued that the review provisions infringed their rights to security of the person under section 7 of the *Charter*[342] because the test they had to meet under the *EPA* — "serious harm to human health" — was too onerous.[343] The Court rejected the appellants' arguments in full. On 13 January 2015, the appellants, having lost before the Divisional Court, sought leave to appeal to the Ontario Court of Appeal. The Ontario Court of Appeal has refused leave to appeal.[344]

a. Brief Facts

In 2013 and 2014, the Director of the Ministry of the Environment authorized the construction and operation of three wind turbine generation farm projects: the St. Columban Wind Project, the K2 Wind Project, and the Armow Wind Project. The Director issued a REA under section 47.5 of the *EPA* for each project.

Pursuant to section 142.1 of the *EPA*, any person residing in Ontario may require the ERT to hold a hearing to review a decision by the Director to issue a REA on the ground that engaging in the renewable energy project in accordance with the REA will cause "serious harm to human health."[345] In *Dixon*, residents close to the three approved wind turbine project sites required such hearings. In all three cases, the ERT concluded that the residents had not established that engaging in the projects would cause serious harm to human health. The ERT also rejected the various constitutional arguments advanced by the residents. The ERT therefore dismissed the residents' requests for review.

---

338 British Columbia, Office of the Premier, "Site C to provide more than 100 years of affordable, reliable clean power," *BC Gov News* (16 December 2014), online: <https://news.gov.bc.ca/stories/site-c-to-provide-more-than-100-years-of-affordable-reliable-clean-power>.

339 *Ibid*.

340 2014 ONSC 7404, 325 CRR (2d) 226 [*Dixon*].

341 *Supra* note 256, ss 142.1, 145.2.1.

342 *Supra* note 22.

343 *Supra* note 256, s 142.1(3)(a).

344 *Dixon*, *supra* note 340, leave to appeal to Ont CA refused, M44640 (28 May 2015).

345 *Supra* note 256, s 142.1(3)(a). Section 142.1(3)(b) provides that a person may also require a hearing to review an REA decision on the ground that engaging in the renewable energy project in accordance with the REA will cause "serious and irreversible harm to plant life, animal life or the natural environment."

b. Decision

The Divisional Court rejected the Appellants' arguments, holding that the language in sections 142.1(3) and 145.2.1(2) of the *EPA* (that is, the test "will cause serious harm to human health") "closely tracks" the burden imposed on claimants to establish a section 7 *Charter* violation of security of the person.[346] The Court reiterated that the harm envisioned under section 7 is "serious," whether or not the harm in question is psychological or physical.[347] The Divisional Court went on to hold that the ERT does not have the jurisdiction to decide whether a Director's decision in issuing a REA conforms with the *Charter*, since such an analysis would delve into questions of law.[348] The Ontario *EPA* did not grant the ERT jurisdiction to decide questions of law under section 47.5 of the *EPA* or section 54 of the REA Regulation when reviewing a Director's decision in respect of granting a REA. Rather, the *EPA* only grants the ERT a very limited mandate in reviewing a Director's REA decision.[349]

The Court further dismissed the appellants' argument that the ERT erred in treating the testimony of "post-turbine witnesses" (witnesses living in the vicinity of existing wind farms) as incapable of proving serious harm or a section 7 *Charter* violation in the absence of expert medical evidence establishing a causal link between the wind turbines and the physical or psychological problems testified to by those witnesses.[350]

In fact, in *Dixon*, the Divisional Court became one of the first courts to comment on the new Health Canada wind energy study released in November 2014, which had found no definitive link between wind turbine noise and human health. The Divisional Court noted that the study states that the "results do not permit any conclusions about causality" and therefore held that the study offered no "new relevant evidence" in the circumstances of the case.[351]

2. *OSTRANDER POINT GP INC. V. PRINCE EDWARD COUNTY FIELD NATURALISTS*[352]

a. Brief Facts

In July 2013, the ERT had, for the first time, revoked a REA issued by the Ontario Ministry of the Environment authorizing Ostrander Point to construct and operate nine wind turbines on a site in Prince Edward County (the Prince Edward Project).[353] The ERT's decision was based solely on its determination that the Prince Edward Project would cause serious and irreversible harm to an endangered species, the Blanding's Turtle, which had

346 *Dixon*, *supra* note 340 at para 60.
347 *Ibid* at para 62.
348 *Ibid* at para 113.
349 *Ibid*.
350 *Ibid* at paras 99–102.
351 *Ibid* at paras 83, 87.
352 2014 ONSC 974, 82 CELR (3d) 86 [*Ostrander Point* SC], aff'd in part 2015 ONCA 269, 90 CELR (3d) 180 [*Ostrander Point* CA].
353 *Alliance to Protect Prince Edward County v Ontario (Director, Ministry of the Environment)* (3 July 2013), 13-002/13-003, online: Environment & Land Tribunals Ontario <elto.gov.on.ca/ert/decisions-orders/>.

been identified in the area.[354] All other grounds of appeal by the Prince Edward County Field Naturalists (PECFN) and the Alliance to Protect Prince Edward County (APPEC) — that is, alleged impacts to human health and to other animal and plant species had been dismissed. The ERT's decision was significant in that, of the many appeals to the ERT seeking to overturn the issuance of a REA for a wind farm, it was the first appeal in which a wind project opponent succeeded in having a REA revoked.

b. Decisions

The Prince Edward Project proponent and the Director appealed the ERT's decision to the Ontario Divisional Court, where the crux of the issue lay with whether the harm to the Blanding's Turtles was "also irreversible" (since the Divisional Court had already held that it "seems unquestionable from the evidence" before the ERT that "there was a risk of serious harm to Blanding's turtle" from the Project).[355] The Divisional Court ultimately found that PECFN had not proven "irreversible harm" to the Blanding's Turtle.

PECFN appealed the Divisional Court's decision to the Ontario Court of Appeal, having been granted a stay of the REA pending the leave to appeal application. The Court of Appeal allowed the appeal in part; it restored the ERT's conclusion that the project will cause serious and irreversible harm to the Blanding's turtle. The Court concluded that the ERT "should have accorded the parties the opportunity to address remedy."[356] The Court explained that, in a REA appeal such as *Ostrander*, "given the broad and varied range of attacks launched against the REA, it was not realistic to expect the parties to address the appropriate remedy at the end of the hearing of the merits without knowing what the Tribunal's findings were in regard to the broad range of alleged harms."[357] Ultimately, in complex ERT appeals such as those challenging a REA, the ERT may be required to conduct a bifurcated hearing — first making a decision on the merits, and second, as a matter of procedural fairness, allowing the parties to lead additional evidence and make additional submissions as to remedy. Otherwise, failure by the ERT to afford the parties procedural fairness on the issue of remedy, may justify a court overturning its decision. The Court remitted the issue of what remedy is appropriate back to the ERT to be decided after the parties have the opportunity to be heard.[358] The ERT is set to hear the matter on an expedited basis.

354 *Ibid* at paras 627–34.
355 *Ostrander Point* SC, *supra* note 352 at para 35.
356 *Ostrander Point* CA, *supra* note 352 at para 86.
357 *Ibid* at para 97.
358 *Ibid* at para 101.