

CANADIAN ENERGY REGULATION: THE ANNUAL REVIEW

*Gordon Kaiser and Aweis Osman***

I.	The Pipelines.....	2
	A. The Trans Mountain Expansion	3
	B. Coastal GasLink.....	4
	C. Enbridge Line 3.....	5
	D. Enbridge Line 5.....	7
	E. Enbridge Main Line Contracting	8
II.	Key Regulatory Decisions.....	9
	A. EV Charging Networks.....	10
	B. The Duty to Disclose.....	12
	1. Background	13
	2. The Legal Principles for Acceptance of a Settlement Agreement	15
	3. New Developments	19
	C. Technology Write Offs	20
	D. Deregulation.....	23
	E. New Rules of Practice and Procedures	27
	1. The Application.....	27
	2. The Hearing.....	28
	3. The Argument	28
	4. The Decision	29
	5. The Issues List.....	29
	6. Information Requests	30
	7. Prehearing Motions	30
	8. Participation	31
	9. Expert Evidence	32

* Editors' Note: while the Canadian Chapter report does not have the usual number of supporting citations, we are satisfied that, given their extensive and first-hand experience, the chapter members who have put the report together have done so accurately and that the value of the information in the report to practitioners in this limited instance warrants some limited relaxation of our citation practices.

* Gordon Kaiser is an Arbitrator, Mediator and Counsel at Energy Law Chambers in Toronto. He is a former Vice Chair of the Ontario Energy Board and former Market Surveillance Administrator, Province of Alberta. He is Editor of the Energy Regulation Quarterly and the Canadian Competition Law Review. He was the first President of the Canadian Chapter of the Energy Bar Association. Parts of this Report appeared in the Energy Regulation Quarterly.

Aweis Osman is an associate in Gowling WLG's Ottawa office, practicing in the advocacy department. He is experienced in handling complex commercial litigation and arbitration matters focusing on contractual disputes, as well as product and professional liability. He represents diverse clientele in all levels of the Ontario courts, along with administrative tribunals, arbitration hearings and mediations. Aweis' legal commentary has been cited by judges and academics.

	10. Confidential Evidence	32
	11. Constitutional Issues.....	33
	12. Documentary Evidence	33
	13. Cross Examination	34
	14. Review and Variance.....	34
	15. Wide Discretion.....	35
	16. Are the Rules Working?.....	37
	17. Future Amendments	38
III.	In the Courts.....	39
	A. Constitutional Issues	39
	1. Reference re Impact Assessment Act.....	39
	2. The Alberta Natural Resources Transfer Agreement	43
	a. Section 92A: The Resources Amendment.....	44
	B. Jurisdiction Decisions	45
	C. Aboriginal Property Rights	53
	D. The No Harm Test.....	56
IV.	The Energy Arbitrations.....	59
	A. The Past Decisions	59
	1. Mobil Oil Corporation.....	59
	2. Mesa Power Group.....	60
	3. Windstream Energy	60
	4. Mercer International	61
	5. Westmoreland Coal	62
	B. The Outstanding Cases.....	63
	1. Lone Pine Resources	63
	2. Tennant Energy	63
	C. The New Cases.....	65
	1. Geophysical Service Inc.....	65
	2. Koch Industries	66
	3. Keystone XL No. 2.....	67
	4. The Michigan Arbitration.....	68

I. THE PIPELINES

In the last five years, investors have walked from four major pipeline projects in Canada. The four projects were the TransCanada Energy East pipeline, the Enbridge Northern Gateway pipeline, the Kinder Morgan Trans Mountain Expansion and Keystone XL. In total, they accounted for over \$60 billion in investment.¹ Three projects are still moving forward. They are the Trans Mountain Expansion

1. James Rose, *Yesterday's blockbuster deal indicates Alberta's mass exodus of multinational oil companies continues*, BOE REPORT (Mar. 30, 2017), <https://boereport.com/2017/03/30/albertas-mass-exodus-of-multinational-oil-companies-continues/>.

project (TMX), Coastal GasLink, and Enbridge Line 5. Enbridge Line 3 was recently completed.²

A. *The Trans Mountain Expansion*

In 2018, the Canadian federal government purchased the TMX from Kinder Morgan for \$4.5 billion.³ On February 22, 2019, the NEB released its reconsideration report on the project, recommending again that it proceed.⁴ The federal cabinet accepted that recommendation and approved the project.⁵ Construction of the project officially began on December 3, 2019.⁶ Shortly thereafter, on January 16, 2020, the Supreme Court of Canada unanimously dismissed the attempt by British Columbia to claim jurisdiction over this project⁷ upholding an earlier decision by the British Columbia Court of Appeal.⁸

On February 4, 2020, a unanimous Federal Court of Appeal dismissed a serious legal challenge to the project.⁹ Six Indigenous communities challenged whether the Government of Canada had adequately “fulfil[led] its duty to consult” with Indigenous peoples in approving the TMX.¹⁰ The Court made it clear that the government’s duty to consult Indigenous peoples did not provide them with a veto over projects such as this one¹¹ and that courts should defer to the governments that make the initial decision on whether the duty to consult has been met.¹² Three Indigenous groups appealed the Federal Court of Appeal’s decision.¹³

In May 2020, the Province of British Columbia issued an amended Environmental Assistance Certificate in response to the British Columbia Court of Appeal’s decision in September 2019.¹⁴ In July 2020, the Supreme Court of Canada

2. *Line 3 Replacement Project Substantially Completed and Set to Be Fully Operational*, ENBRIDGE (Sept. 29, 2021), <https://www.enbridge.com/media-center/news/details?id=123692&lang=en>.

3. *Trans Mountain Pipeline System Purchase Agreement FAQs*, CANADA ENERGY REGULATOR (Sept. 29, 2020), <https://www.cer-rec.gc.ca/en/applications-hearings/view-applications-projects/trans-mountain-expansion/trans-mountain-pipeline-system-purchase-agreement-faqs.html>.

4. *NEB releases Reconsideration report for Trans Mountain Expansion Project*, CANADA ENERGY REGULATOR (Sept. 29, 2020), <https://www.cer-rec.gc.ca/en/about/news-room/news-releases/2019/neb-releases-reconsideration-report-trans-mountain-expansion-project.html>.

5. *Certificate of Public Convenience and Necessity OC-65 to Trans Mountain Pipeline ULC in respect of the Trans Mountain Expansion Project*, C. GAZ. (June 22, 2019), <https://gazette.gc.ca/rp-pr/p1/2019/2019-06-22/html/sup1-eng.html>.

6. *Trans Mountain Marks the Start of Pipeline Construction*, TRANS MOUNTAIN (Dec. 3, 2019), <https://www.transmountain.com/news/2019/trans-mountain-marks-the-start-of-pipeline-construction>.

7. Reference re Environmental Management Act, 2020 S.C.C. 1 (Can.).

8. Reference re Environmental Management Act, 2019 B.C.C.A. 181 (Can.).

9. *Coldwater Indian Band v. Canada (Att’y Gen.)*, 2020 FCA 34 (Can.).

10. *Id.* at para. 4.

11. *Id.* at para. 55.

12. *Id.* at para. 83.

13. *Coldwater Indian Band v. Attorney General of Canada*, S.C.C. 39111 (Can.).

14. MINISTRY OF ENVIRONMENT, TRANS MOUNTAIN EXPANSION PROJECT GRANTED ENVIRONMENTAL ASSESSMENT APPROVAL (Jan. 11, 2017), <https://projects.eao.gov.bc.ca/api/public/document/58923181b637cc02bea16432/download/Information%20Bulletin%20dated%20January%2011%2C%202017.pdf>.

denied leave to the three First Nations seeking to appeal the Federal Court of Appeal's February 2020 decision.¹⁵ The most recent decision by the Supreme Court of Canada to deny leave to appeal to the three indigenous groups means there are no outstanding legal challenges to the project.¹⁶

In February 2022 the government of Canada announced that “it will [not provide] any further public funding for the [TMX]” because the cost has increased “70% to C\$21.4 billion.”¹⁷ “In 2018, [when] the Canadian government bought [the pipeline] for C\$4.5 billion” the cost was estimated at C\$4.5 billion.¹⁸ On completion, the TMX will nearly triple the capacity of the pipeline shipping “890,000 barrels per day” to the Pacific Coast for export.¹⁹

B. *Coastal GasLink*

The Coastal GasLink pipeline project is owned and operated by TC Energy.²⁰ The \$6.6 billion project starts near Dawson Creek and will run 416 miles southwest to a liquefaction plant near Kitimat.²¹ The pipeline goes through the traditional territories of several First Nations.²² It has long been opposed by multiple hereditary chiefs, although a number of First Nations groups support the project and have an ownership interest.²³ In December 2018, the Supreme Court of British Columbia granted an injunction preventing blockades of the pipeline.²⁴

In July 2019, the NEB released its decision that the pipeline—including the export terminal in Kitimat—was under provincial, and not federal, jurisdiction.²⁵ The NEB concluded that the pipeline would transport natural gas within British Columbia, although it would also facilitate international exports, providing some clarity to the earlier Supreme Court of Canada decision in *West Coast Energy*²⁶ on provinces' rights to control works and undertakings within their boundaries.

15. *Coldwater Indian Band v. Attorney General of Canada*, S.C.C. 39111 (Can.).

16. *Id.*

17. Nia Williams, *Canada govt to stop funding Trans Mountain oil line project as costs soar 70%*, REUTERS (Feb. 18, 2022), <https://www.reuters.com/business/energy/trans-mountain-sees-expansion-project-cost-almost-doubling-ceo-retire-2022-02-18/>.

18. *Id.*

19. *Id.*

20. *Coastal GasLink*, TC ENERGY, <https://www.tcenergy.com/operations/natural-gas/coastal-gaslink/>.

21. *Id.*

22. *Id.*

23. Braela Kwan, *Indigenous activists fight British Columbia's pipelines to the last mile*, CROSSCUT (Mar. 18, 2021), <https://crosscut.com/environment/2021/03/indigenous-activists-fight-british-columbias-pipelines-last-mile>.

24. *Coastal GasLink Pipeline Ltd. v. Huson*, 2018 BCSC 2343 (Can.).

25. *Jurisdiction over the Coastal GasLink Pipeline Project*, NATIONAL ENERGY BOARD (July 26, 2019), https://docs2.cer-rec.gc.ca/l1-eng/l1is-api.dll/fetch/2000/90464/90550/90715/3615343/3715570/3809973/C00715-1_NEB_%E2%80%93_Letter_Decision_%E2%80%93_Coastal_GasLink_%E2%80%93_MH-053-2018_-_A6W4A5.pdf?nodeid=3809655&vernum=-2.

26. *Westcoast Energy Inc. v. Nat'l Energy Bd.*, [1998] 1 S.C.R. 322 (Can.).

In December 2019, the Alberta Investment Management Corp., the Alberta public pension manager, teamed up with one of the largest American investment companies to acquire a majority stake in the Coastal GasLink project.²⁷

In February 2022, TC Energy Corp. announced that the Coastal GasLink pipeline will go significantly over budget and will not meet the expected completion date.²⁸ In July 2022, the company reported that the price tag had increased from \$6.6 billion to \$11.2 billion.²⁹ The pipeline is currently 75% complete.³⁰ When completed the project will “move 2.1 billion cubic feet per day (bcf/d) of natural gas” to LNG Canada’s terminal at Kitimat BC where it will be converted into a liquefied state for export to global markets.³¹

TC Energy Corp. did say however, that it “expects the pipeline to be finished ahead of the LNG Canada’s export terminal . . . currently under construction.”³² TC Energy has agreed to provide \$ 3.3 billion in additional temporary bridge financing to cover the cost overruns.³³ The \$40 billion LNG Canada export terminal at Kitimat is now more than 70% fully complete.³⁴ LNG Canada is a joint venture of the subsidiaries of Royal Dutch Shell, Petronas, PetroChina Canada, Mitsubishi Corporation and Korea Gas Corporation.³⁵

C. Enbridge Line 3

The Enbridge Line 3, which runs from Hardisty, Alberta to Superior, Wisconsin, has been operating since 1968.³⁶ Over the years it became clear that parts of the pipeline had to be replaced if Enbridge wished to restore it to its historical capacity and move 800,000 barrels per day.³⁷ The necessary authorization was

27. Jeffrey Jones, *Alberta pension plan to buy stake in Coastal GasLink pipeline*, GLOBAL AND MAIL, INC. (Dec. 26, 2019), <https://www.theglobeandmail.com/business/article-aimco-kkr-to-buy-majority-stake-in-canda-coastal-gaslink-pipeline/>.

28. Amanda Stephenson, *Coastal GasLink pipeline to go 'significantly' over budget, says TC Energy*, CBC.CA (Feb. 15, 2022, 7:34 PM), <https://www.cbc.ca/news/canada/calgary/coastal-gaslink-pipeline-tc-energy-lng-canada-bevin-wirzba-1.6353238>.

29. *Cost of Coastal GasLink pipeline leaps 70% to \$11.2B as TC Energy settles dispute*, CBC.CA (July, 18, 2022, 4:57 PM), <https://www.cbc.ca/news/canada/calgary/tc-energy-coast-gaslink-1.6535594>.

30. *October Construction Update*, COASTAL GASLINK (Oct. 28, 2022), <https://www.coastal-gaslink.com/whats-new/news-stories/2022/2022-10-28-october-construction-update/>.

31. *About Coastal GasLink*, COASTAL GASLINK, <https://www.coastalgaslink.com/about/>.

32. Stephenson, *supra* note 28.

33. Amanda Stephenson, *TC Energy Corp. commits to up to \$3.3B to cover Coastal GasLink cost increases*, CTV NEWS CALGARY (Nov. 5, 2021), <https://calgary.ctvnews.ca/tc-energy-corp-commits-to-up-to-3-3b-to-cover-coastal-gaslink-cost-increases-1.5654231>.

34. Meghan Potkins, *LNG Canada, country's \$40-billion 'second chance' at becoming a global LNG leader, takes shape*, YAHOO! FINANCE (Oct. 4, 2022), <https://finance.yahoo.com/news/lng-canada-countrys-40-billion-110357120.html>.

35. *JV Participants Give Green Light to Invest in LNG Canada Project*, OFFSHORE ENERGY (Oct. 2, 2018), <https://www.offshore-energy.biz/jv-participants-give-green-light-to-invest-in-lng-canada-project/>.

36. ENBRIDGE, LINE 3 REPLACEMENT PROJECT SUMMARY 5, https://www.enbridge.com/~media/Enb/Documents/Projects/Line%203/ProjectHandouts/ENB_Line3_Public_Affairs_ProjectSummary.pdf.

37. Kenny Bruno, et al., *Enbridge Over Troubled Water*, WORLD.350, <https://world.350.org/kishwaukee/files/2017/09/Enbridge-Over-Troubled-Water-Report.pdf>.

obtained from regulatory bodies in Canada,³⁸ North Dakota, and Wisconsin.³⁹ However, the \$3 billion project ran into problems in Minnesota where environmentalists and native groups opposed the project.⁴⁰

In June 2018, the Minnesota Public Utilities Commission (Minnesota Commission) approved the route and granted the necessary permits.⁴¹ However, a year later that decision was overturned by the Minnesota Court of Appeals, when it found that the environmental impact statement placed before the Minnesota Commission was inadequate.⁴² In February 2020, the Minnesota regulators approved a revised environmental review, thus removing the last regulatory hurdle for the project.⁴³

The US portion of the Line 3 project involved replacing 364 miles of pipeline.⁴⁴ Most of the work was in Minnesota with 27 miles located in North Dakota and Wisconsin.⁴⁵ The replacement project is connected to an existing 1097-mile crude oil pipeline installed in the 1960s that runs from central Canada to Wisconsin.⁴⁶

The capital cost of the Line 3 replacement project, including the Canadian segment already in service, has cost C\$9.3 billion compared to the original estimate of C\$8.2 billion.⁴⁷ The Enbridge Line 3 is one of the few successful projects in recent years.⁴⁸ When it came into service in October 2021, the project added “370,000 additional barrels per day of crude oil export capacity from Western Canada to refineries in the US Midwest.”⁴⁹

38. *Project Information Line 3 Replacement Program*, CANADA ENERGY REGULATOR (Sept. 29, 2020), <https://www.cer-rec.gc.ca/en/applications-hearings/view-applications-projects/line-3-replacement/project-information.html>.

39. Amy Koch, *The Approval of Enbridge Line 3 Should be a No-Brainer*, STAR TRIBUNE (Nov. 10, 2020), <https://www.startribune.com/the-approval-of-enbridge-line-3-should-be-a-no-brainer/573034981/>.

40. Fiona McLeod, *Pressure Mounts Against Line 3 Pipeline Project*, EARTH ISLAND JOURNAL (Jan. 27, 2021), <https://www.earthisland.org/journal/index.php/articles/entry/pressure-mounts-against-line-3-pipeline-project/>.

41. *Line 3 Review Process*, MINN. PUB. UTIL. COMM’N, <https://www.dnr.state.mn.us/line3/index.html>.

42. *In re Enbridge Energy*, 930 N.W.2d 12, 36 (Minn. Ct. App. 2019).

43. *Minnesota Regulator Rules Environmental Statement Adequate for Enbridge Line 3 Oil Pipeline*, REUTERS (Feb. 3, 2020), <https://www.reuters.com/article/canada-pipeline-enbridge-inc/minnesota-regulator-rules-environmental-statement-adequate-for-enbridge-line-3-oil-pipeline-idINL1N2A30DL>.

44. *Permitting, Regulations Add \$867M and 3 Years to Enbridge Line 3 Project*, TEAMSTERS NATIONAL PIPELINE (Feb. 16, 2021), <https://www.teamsterspipeline.com/permitting-regulations-add-867m-and-3-years-to-enbridge-line-3-project/>.

45. *Line 3 Replacement Project*, ENBRIDGE, <https://www.enbridge.com/projects-and-infrastructure/public-awareness/minnesota-projects/line-3-replacement-project>.

46. *Id.*

47. TEAMSTERS NATIONAL PIPELINE, *supra* note 44.

48. Nia Williams, *Enbridge’s Long-Delayed Line 3 Oil Pipeline Project to Start Up Oct. 1*, REUTERS, (Sept. 29, 2021), <https://www.reuters.com/business/energy/enbridge-completes-line-3-oil-pipeline-replacement-project-starts-linefill-2021-09-29/>.

49. *Enbridge Says Line 3 ‘Substantially Complete,’ Will Be In Service on Friday*, CANADIAN PRESS (Sept. 30, 2021), <https://boereport.com/2021/09/30/enbridge-says-line-3-substantially-complete-will-be-in-service-on-friday/>.

D. Enbridge Line 5

Enbridge is also replacing Line 5, which runs from Superior, Wisconsin to Sarnia, Ontario.⁵⁰ The state of Michigan is opposing the underwater segment, which runs under the Straits of Mackinac in the Great Lakes.⁵¹ The concern relates to environmental damage that could result from a leak in the pipe that currently sits on the lakebed.⁵² The project was approved by the former governor of Michigan but his successor, Governor Whitmer, challenged the constitutional validity of the project in 2018.⁵³

The Michigan District Court ruled the legislation constitutional in October 2019 and that decision was upheld by the Michigan Court of Appeals in January 2020.⁵⁴ In January 2021, the Governor of Michigan ordered Enbridge to cease operating the segment the pipeline under the Straits of Mackinac by May 2021.⁵⁵ Enbridge argues that the 645-mile pipeline has been operating safely for 65 years.⁵⁶ However, to address the concerns, Enbridge is now proposing to place the pipe in a tunnel underneath the lake bed at a cost of \$500 million.⁵⁷

Line 5 part is part of the Enbridge mainline system that transports crude from Alberta and Saskatchewan to refineries in Michigan, Ohio, Pennsylvania, Ontario, and Québec.⁵⁸ Enbridge has argued that those refineries will see their capacity drop by 45% if Line 5 it is not maintained.⁵⁹ On January 29, 2021, “[t]he Michigan Department of Environment Great Lakes and Energy (EDLE) . . . approved [the] Enbridge . . . application for [the] permits required to build the utility tunnel under the Straits of Mackinac.”⁶⁰

The November 2020 decision by Governor Whitmer of Michigan to revoke the 1953 easement has led to lengthy litigation, first in the state courts and more

50. *What is Line 5?*, ENBRIDGE, <https://www.enbridge.com/projects-and-infrastructure/public-awareness/line-5-answering-your-questions/what-is-line-5>.

51. *Overview*, MICHIGAN.GOV, <https://www.michigan.gov/egle/about/featured/line5/overview>.

52. Hilary Beaumont, *Line 5: Everything You Need to Know About the International Dispute Over a Pipeline Under the Great Lakes*, NARWHAL (Oct. 6, 2021), <https://thenarwhal.ca/enbridge-line-5-dispute-explained/>.

53. *Overview*, *supra* note 51.

54. *Id.*

55. *Governor Whitmer Takes Action to Shut Down the Line 5 Dual Pipelines Through the Straits of Mackinac After a Reasonable Transition Period to Protect the State’s Energy Needs*, MICHIGAN.GOV (Nov. 13, 2020), <https://www.michigan.gov/whitmer/news/press-releases/2020/11/13/governor-whitmer-takes-action-to-shut-down-the-line-5-dual-pipelines-through-the-straits-of-mackina>.

56. *What is Line 5?*, *supra* note 50.

57. *The Great Lakes Tunnel Project*, ENBRIDGE, <https://www.enbridge.com/projects-and-infrastructure/public-awareness/line-5-michigan/great-lakes-tunnel-project>.

58. *The Impact of a Line 5 Shutdown*, ENBRIDGE, https://www.enbridge.com/~media/Enb/Documents/Factsheets/FS_Without_Line5_econ_impact.pdf.

59. *Id.*

60. *EGLE Approves Permits For Proposed Mackinac Straits Tunnel*, MICHIGAN.GOV, (Jan. 29, 2021), <https://www.michigan.gov/egle/newsroom/press-releases/2021/01/29/egle-approves-permits-for-proposed-mackinac-straits-tunnel>.

recently in the federal courts.⁶¹ All of that led to a decision by Canada on 4 October 2021 to invoke a 1977 pipeline treaty with the US.⁶² That treaty contains a mandatory negotiation process pursuant to Article 9 of the 1977 treaty before formal binding arbitration proceedings can take place.⁶³ Canada has intervened in support of Enbridge, as have the states of Louisiana and Ohio.⁶⁴ The court proceedings have been put on hold pending the negotiations, which are still underway.⁶⁵

E. Enbridge Main Line Contracting

In late November 2021, the Canadian Energy Regulator released its decision denying an application by Enbridge pipelines to contract up to 90% of its transportation capacity on the Canadian mainline oil pipeline for firm transportation service.⁶⁶ The Commission found that the proposal was contrary to Enbridge's common carrier responsibilities and was unjustly discriminatory and would result in unjust and unreasonable rates.⁶⁷

The Enbridge mainline pipeline is the largest crude oil pipeline in Canada accounting for approximately 70% of the total transportation capacity in the country.⁶⁸ The application proposed largely fixed tolls with long-term contracts that would lock-in volumes for up to 20 years.⁶⁹ The Commission found that the application was not consistent with Enbridge's common carrier obligations under section 239 of the *CER Act*⁷⁰ and was likely unjust discrimination contrary to section 235.⁷¹

As a result, the existing tolls on the Enbridge mainline continue to remain in place as interim rates.⁷² Enbridge is continuing to consult with the stakeholders to

61. MICHIGAN.GOV, *supra* note 55.

62. Louis Myers, *United States: Canadian Government Invokes 1977 Pipeline Treaty in Ongoing Line 5 Pipeline Dispute*, LIBRARY OF CONGRESS (2021), <https://www.loc.gov/item/global-legal-monitor/2021-11-15/united-states-canadian-government-invokes-1977-pipeline-treaty-in-ongoing-line-5-pipeline-dispute/>.

63. *Id.*

64. Jena Brooker, *Can a Pipeline Company Defy a Governor's Orders? Gretchen Whitmer is About to Find Out*, GRIST (Apr. 7, 2021), <https://grist.org/accountability/can-a-pipeline-company-defy-a-governors-orders-gretchen-whitmer-is-about-to-find-out/>.

65. Kelly House, *Hoping to Avoid Enbridge Line 5 Shutdown, Canada Asks U.S. to Negotiate*, BRIDGE MICHIGAN (Oct. 12, 2021), <https://www.bridgemi.com/michigan-environment-watch/hoping-avoid-enbridge-line-5-shutdown-canada-asks-us-negotiate>.

66. *Enbridge Pipeline Inc., Mainline Open Season*, Decision RH-001-2020, CANADA ENERGY REGULATOR, https://docs2.cer-rec.gc.ca/ll-eng/llis-api.dll/fetch/2000/90465/92835/155829/3773831/3890507/3901808/3930130/3899934/C04330-2_CNRL_Submission_-_Fundamental_Conversion_Issue_-_A7C9E9.pdf?nodeid=3899094&vernum=-2.

67. *Id.*

68. *Id.*

69. *Id.*

70. Canada Energy Regulator Act, S.C. 2019 c 28 (Can.).

71. *Enbridge Pipeline Inc., Mainline Open Season*, *supra* note 66.

72. *Enbridge Reports Strong Third Quarter 2022 Financial Results and Secures B.C. Pipeline Expansion*, ENBRIDGE (Nov. 4, 2022), <https://www.enbridge.com/media-center/news/details?id=123742>.

establish new rates and terms for the Canadian mainline service.⁷³ Enbridge hopes to file a new application in the fall of 2022 and have new rates approved by the Commission in early 2023.⁷⁴

II. KEY REGULATORY DECISIONS

Over the past year, energy regulators across Canada faced a number of new challenges. This section of the report will discuss several cases that address those challenges.

The first issue concerned electric vehicle (EV) charging. There is a concern that Canadian charging networks are failing to keep up with the demand given the number of new EVs.⁷⁵ There is a continuing debate in different Canadian jurisdictions whether charging networks should be regulated or not.⁷⁶ While most jurisdictions have elected not to regulate, in a January 2022 decision, the British Columbia Utilities Commission turned down an application by BC Hydro to set new EV charging rates.⁷⁷

The second case relating to ATCO Ltd., resulted in the highest fine ever issued by a Canadian energy regulator.⁷⁸ It was heard in Alberta and was the first time a case was brought to an energy regulator by a whistleblower.⁷⁹

The next case involving Nova Scotia Power deals with a technology write off in Nova Scotia. In the last annual review, we pointed to the difficulties that regulators in Nova Scotia, Ontario, and British Columbia were having with the adoption of new technology.⁸⁰ It turns out there is an even bigger problem when regulators discover that technology will not work and a write off is necessary.

The third Alberta decision relating to Calgary District Energy Inc. discussed below suggests that new technology may require more deregulation particularly in areas such as district energy. The last case a hearing by the Alberta Utilities Commission Process review Committee. It relates to a very substantial overhaul of the Alberta Commission's rules of practice and procedure that was conducted at the

73. *Id.*

74. *Id.*

75. Don Pittis, *Canadian Businesses Rush to Plug a Gap in Electric-Vehicle Charging*, CBC NEWS (Feb. 24, 2020), <https://www.cbc.ca/news/business/electricity-fuel-disruption-1.5468360>.

76. John Lorinc, *As EV charger reliability lags, Canadian Drivers Ask: Who Is Responsible?*, ELECTRIC AUTONOMY CANADA (Oct. 3, 2022), <https://electricautonomy.ca/2022/10/03/ev-charger-reliability-responsibility-canada/>.

77. British Columbia Hydro and Power Authority Public Electric Vehicle Fast Charging Service Rates Application Decision and Order G-18-22 (Jan. 26, 2022), https://docs.bcuc.com/Documents/Other/2022/DOC_65431_G-18-22-BCH-EV-Fast-Charging-Rates-Decision.pdf.

78. Enforcement Staff of the Alberta Utilities Commission Allegations against ATCO Ltd., Decision 27013-DO1-2022 (June 29, 2022).

79. *Id.*

80. Gordon Kaiser, *Canadian Energy Regulators and New Technology: The Transition to a Low Carbon Economy*, ENERGY REGUL. Q. (2021), <https://energyregulationquarterly.ca/articles/canadian-energy-regulators-and-new-technology-the-transition-to-a-low-carbon-economy#sthash.z7VjF7MG.dpbs>; Christopher Bystrom, *The Future of Gas Utilities in a Low Carbon World: Canada's First Public Utility Administered Green Innovation Fund*, ENERGY REGUL. Q. (2020), <https://energyregulationquarterly.ca/articles/the-future-of-gas-utilities-in-a-low-carbon-world-canadas-first-public-utility-administered-green-innovation-fund#sthash.zhPvhDBI.dpbs>.

request of the Alberta government under the new *Red Tape Reduction Act*.⁸¹ Alberta has completely revamped its rules of practice and procedure. They appear to have resulted in some impressive efficiency gains.

A. EV Charging Networks

The introduction of electric vehicles in Canada has exceeded the expectations of most people. There is however, a serious concern whether the charging networks will be sufficient to meet the demand.

“As of May 2022, Canadian EV drivers ha[d] access to 16,000 chargers at over 6000 [locations].”⁸² Of these, only 1200 [are for] DC fast charging according to Ernst & Young Canada who claim Canada has an insufficient charging infrastructure.⁸³ Canada ranks eighth in the ten leading car markets when it comes to charging infrastructure.⁸⁴

The regulatory structure for charging networks varies from province to province.⁸⁵ In Ontario, charging networks are deregulated.⁸⁶ In British Columbia, however, the structure for charging networks is regulated as far as the regulated utilities are concerned.⁸⁷ Recently the British Columbia Utilities Commission (BCUC) turned down an application by BC Hydro with respect to their proposed rates for public electric vehicle fast charging service across British Columbia.⁸⁸ BC Hydro was directed to file a new application for permanent rates no later than December 31, 2022.⁸⁹ In the meantime, the current interim rates will remain in place.⁹⁰

The BCUC found that BC Hydro’s proposed rates were designed to only recover electricity costs and ignore other incremental cost including operating maintenance and capital costs.⁹¹ Accordingly, the Commission found that the proposed rates were not just and reasonable.⁹² The Commission found that the subsidized rates proposed by BC Hydro would contribute to an uneven playing field,

81. Red Tape Reduction Act, S.A. 2019, c R-8.2 (Can.).

82. Rafe Wright, *New Electric Vehicle Charging Stations Coming to P.E.I.*, SALTWIRE (July 25, 2022), <https://www.saltwire.com/atlantic-canada/news/new-electric-vehicle-charging-stations-coming-to-pe-100756509/>.

83. Kajal Mangesh Pawar, *How Accessible are EV Charging Stations across Canada?*, CBC (June 23, 2022), <https://www.cbc.ca/news/canada/ask-electric-vehicles-faq-1.6451121#:~:text=As%20of%20May%202022%2C%20Canadian.>

84. *Id.*

85. Chris Hummel & Ian Mondrow, *Are Electric Vehicle Charging Services Regulated ‘Suppliers’ of Electricity? Provincial Energy Regulators Are Saying No*, GOWLING WLG (May 27, 2021), <https://gowlings.com/en/insights-resources/articles/2021/regulation-of-electric-vehicle-charging-services/>.

86. *Id.*

87. *Id.*

88. British Columbia Hydro and Power Authority Public Electric Vehicle Fast Charging Service Rates Application, *supra* note 77.

89. *Id.*

90. *Id.*

91. *Id.*

92. British Columbia Hydro and Power Authority Public Electric Vehicle Fast Charging Service Rates Application, *supra* note 77.

which may have a detrimental impact on achieving the objectives of increasing EV adoption across British Columbia.⁹³

The BCUC noted that in a new application filed for permanent rates, the BCUC would only consider rates based on a levelized recovery of all costs which must reflect all the cost required to provide the service.⁹⁴

It should be noted that the BCUC determined that time-based rates, rather than energy based rates, are currently the only option for EV charging service because there are currently no approved Measurement Canada standards to measure how much electricity is consumed at fast charging stations.⁹⁵ As a result, BC Hydro was directed to apply for an exemption from the *Electricity and Gas Inspection Act* to obtain the ability to charge energy based rates in the future.⁹⁶

On March 23, 2021, the BCUC approved interim rates for BC Hydro's public EV fast charging service as follows: "\$0.12 per minute for EV charging service at 25 kWh stations; \$0.21 per minute for EV charging service at 50 kW stations; and \$0.27 per minute for EV fast charging service at 100 kW stations."⁹⁷

The BCUC has also been active in approving EV charging services and rates proposed by FortisBC Energy Inc. (Fortis).⁹⁸ In the fall of 2020, the BCUC resumed its hearings in the Fortis Application.⁹⁹ Fortis applied for a rate of \$0.26 per minute for its 50 kW charging stations, \$0.54 per is 100 kW charging stations.¹⁰⁰ Fortis claimed that these prices would fully recover the cost of the services on a levelized basis over 13 and 10 years respectively.¹⁰¹ The BCUC approved this proposed pricing by final order on November 24, 2021.¹⁰²

As indicated above, Ontario does not regulate the rates for EV charging.¹⁰³ It has however taken steps to reduce the cost of EV charging.¹⁰⁴ In March 2022, the

93. *Id.* at 36.

94. *Id.*

95. *Id.* at 7.

96. British Columbia Hydro and Power Authority Public Electric Vehicle Fast Charging Service Rates Application, *supra* note 77.

97. *BCUC Approves Interim Rates for BC Hydro Public Electric Vehicle Fast Charging Stations*, BRITISH COLUMBIA UTILITIES COMMISSION (Mar. 23, 2021), <https://www.newswire.ca/news-releases/bcuc-approves-interim-rates-for-bc-hydro-public-electric-vehicle-fast-charging-stations-877206243.html>.

98. British Columbia Utilities Commission, *BCUC to Approve Electric Vehicle Fast Charging Rates for FortisBC Stations*, CISION (Nov. 24, 2021), <https://www.newswire.ca/news-releases/bcuc-to-approve-electric-vehicle-fast-charging-rates-for-fortisbc-stations-862647033.html>.

99. *Id.*

100. FortisBC Inc., Application for Approval of Rate Design and Rates for Electric Vehicle Direct Current Fast Charging Service, Decision and Order G-341-22 (Nov. 24, 2021), https://docs.bcuc.com/Documents/Other/2021/DOC_64973_G-341-21-FBC-EV-DCFC-Rates-and-Rate-Design-Decision-and-Order.pdf.

101. *Id.* at 5.

102. *Id.* at 24.

103. Chris Hummel & Ian Mondrow, *Are Electric Vehicle Charging Services Regulated 'Suppliers' of Electricity? Provincial Energy Regulators Are Saying No*, GOWLING WLG (May 27, 2021), <https://gowl-lingwlg.com/en/insights-resources/articles/2021/regulation-of-electric-vehicle-charging-services/>.

104. ONTARIO ENERGY BD., DESIGN OF AN OPTIONAL ENHANCED TIME-OF-USE PRICE, (Mar. 31, 2022), <https://www.oeb.ca/sites/default/files/Report-Design-of-an-Optional-Enhanced-Time-of-Use-Price-20220331.pdf>.

OEB released a report proposing low cost overnight rates.¹⁰⁵ The proposed overnight rate is 2.5 cents per kWh for the low overnight period (11PM – 7 AM) compared to 11.3 cents per kWh for mid-peak period (7 AM – 4 PM and 9 PM -11 PM) and 25.3 cents per kWh for on-peak period (4 PM – 9 PM).¹⁰⁶ The rationale of this initiative is based on the belief that 80% of EV drivers will charge their cars at home at night.¹⁰⁷ It is expected that the new rates will be in place by April 2023.¹⁰⁸

B. *The Duty to Disclose*

A recent decision of the Alberta Utilities Commission (AUC) relating to ATCO Electric Ltd. reinforces a principle of public utility law - regulated companies have a responsibility and a duty to disclose all relevant information to the regulator. In Canada, this principle was first set out in a decision of the Ontario Energy Board in *West Coast Energy*¹⁰⁹ in 2008 where the Board set out the standard of disclosure required of utilities and sanctioned a utility with a cost penalty for failure to comply stating as follows:

Public utility in Ontario with a monopoly franchise is not a garden-variety corporation. It has special responsibilities which form part of what the courts have described as the “regulatory compact.” One aspect of that regulatory compact is an obligation to disclose material facts on a timely basis

Failure to disclose [can lead] to unfortunate consequences. First, it can only result in less than optimal Board decisions. Second, it adds to the time and cost of proceedings. Neither of these are in the public interest.

A publicly regulated corporation is under a general duty to disclose all relevant information relating to the Board proceedings it is engaged in unless the information is privileged or not under its control. In doing so utilities should err on the side of inclusion. Furthermore, the utility bears the burden of establishing that there is no reasonable possibility that withholding the information would impair a fair outcome in the proceeding. This onus would not apply where the nondisclosure is justified by the law of privilege but no privilege is claimed here.¹¹⁰

The recent ATCO decision was more complicated than the Ontario case. On November 29, 2021, the AUC Enforcement Staff filed an Application before the AUC asking it to commence a proceeding pursuant to sections 8 and 63 of the *Alberta Utilities Commission Act* to determine whether Atco Electric had acted unlawfully in a rate setting case and should pay an administrative penalty.¹¹¹

It was alleged that Atco Electric had transferred to ratepayers the cost of a contract it had entered into at above fair market rates to benefit its nonregulated affiliate.¹¹² The Report of the Enforcement Branch claimed that Atco Electric had

105. *Id.*

106. *Id.* at 13.

107. *Id.* 52.

108. DESIGN OF AN OPTIONAL ENHANCED TIME-OF-USE PRICE, *supra* note 104, at 58.

109. *West Coast Energy*, Ontario Energy Bd., EB-2008-0304 (Nov. 19, 2008).

110. *Id.* at 10.

111. ALBERTA UTILITIES COMM’N, ALLEGATIONS AGAINST ATCO ELECTRIC LTD. 1 (June 29, 2022), <https://efiling-webapi.auc.ab.ca/Document/Get/719764>.

112. *Id.*

documented the scheme in such a way that concealed the relevant facts and other important information from the AUC.¹¹³ The Enforcement staff argued that Atco Electric had breached “its fundamental duty of honesty and candour” to its regulator.¹¹⁴ A good summary of this decision is set out by Vice-Chair Larder QC, the sole panel member, in the first three paragraphs of the decision:

This proceeding is the result of a pattern of self-dealing and deception perpetrated by ATCO Electric Ltd. to benefit its shareholders as well as the shareholders of an ATCO affiliate at the cost of Alberta ratepayers.

In the course of building a regulated transmission line, ATCO Electric took advantage of its position as a regulated utility to benefit its unregulated affiliate, ATCO Structures & Logistics Ltd. (ASL). ATCO Electric knowingly sole-sourced a major contract for the Jasper Interconnection Project transmission line at rates above fair market value, to secure a contract and a financial benefit for ASL. ATCO Electric then sought recovery of millions of dollars in above fair market costs from ratepayers for that sole-source contract. Further, ATCO Electric created a misleading paper trail justifying its decision and concealing critical information about why it sole-sourced the contract – namely, to benefit its unregulated affiliate ASL – in an attempt to avoid Commission detection of its actions and improperly recover those above fair market costs from Alberta ratepayers.

Prompted by a whistleblower complaint, Alberta Utilities Commission Enforcement staff investigated ATCO Electric’s dealings over the last five years. Enforcement staff then requested the Commission commence a proceeding to consider whether ATCO Electric contravened its legal obligations. Enforcement staff and ATCO Electric subsequently requested the opportunity to attempt to settle the issues in this proceeding, which the Commission allowed. Ultimately the parties reached a settlement agreement, which was objected to by the Consumers’ Coalition of Alberta (CCA). In this decision, the Commission considers whether approval of the settlement agreement is in the public interest, in accordance with the standards for considering settlement agreements set out in Section 3.2 of this decision.¹¹⁵

1. Background

ATCO Electric is the owner of an electric utility regulated by the [AUC]. . . . The Jasper Interconnection Project . . . [was] a transmission . . . project assigned to Atco Electric by the Alberta System Operator (AESO), [that was] approved by the Commission in 2018” and completed by Atco Electric using in 2019. . . .¹¹⁶ The Jasper Project required ATCO Electric to conduct access and matting work.

The conduct complained of is set out at paragraphs 11 and 12 of the Commission decision:

ATCO Electric originally estimated the costs of its portion of the Jasper project at approximately \$84 million, \$6.6 million of which was estimated for access matting costs. When ATCO Electric returned to the Commission to ask for recovery from ratepayers of the actual costs of the project in 2021, it claimed the project cost \$119 million, \$31 million of which was for access matting services. ATCO Electric attributed the cost increase to scope changes.

113. *Id.*

114. *Id.* at 15.

115. ALLEGATIONS AGAINST ATCO ELECTRIC LTD., *supra* note 111, at 1.

116. *Id.* at 3. “Matting is a service involving the placement of large mats that can support heavy equipment in work areas, required to mitigate potential environmental impacts while a transmission line is built.” *Id.* at 3, n.6.

As eventually came to light, a significant portion of the overage (estimated by ATCO Electric to be \$10.8 million) was the result of ATCO Electric improperly sole-sourcing a contract for matting services for the Jasper project to benefit ASL in relation to the operation of work camps for the pipeline project. That is, ATCO Electric sole-sourced the matting services contract because to do otherwise would have jeopardized ASL's joint venture with Simpco Resources LLP. ATCO Electric then attempted to improperly over-recover millions of dollars from ratepayers that it had incurred purely to benefit its affiliate. What occurred here was ultimately the result of placing the demands of Simpco and ASL above ATCO Electric's regulatory obligations.¹¹⁷

Further details are set out in the following paragraphs of the decision:

In its initial deferral account application, ATCO Electric indicated that the Backwoods contract was sole-sourced but did not provide the real reasons for that decision, omitting material information. When directly asked about matting costs for the Jasper project (by both the CCA and the Commission through information requests), ATCO Electric stated that rates under the Backwoods contract were market competitive and that matting work was directly awarded to the only entity capable of completing the work. Neither of those statements were true, and ATCO Electric knew it.

.....
ATCO Electric provided none of that information in its responses to the information requests, choosing instead to falsely assert that rates under the Backwoods contract were market competitive.

ATCO Electric provided none of that information in its responses to the information requests, choosing instead to falsely assert that matting work was directly awarded to the only entity capable of completing the work. ATCO Electric made no effort to disclose its wrongdoing; the only reason these events came to light was through the actions of a whistleblower

Section 7.6 of the Code of Conduct requires ATCO Electric to prepare regular compliance reports, which should include a comprehensive description of instances of material non-compliance with the code and any steps taken to correct such non-compliance.

ATCO Electric filed its compliance reports for 2018, 2019 and 2020 stating that it had complied with the Code of Conduct during that year, with no mention of any of the information set out above. ATCO Electric did not file an exception report until November 29, 2021, after it had been contacted by Enforcement staff.

The AESO conducted a compliance audit of the Jasper project, and did not identify any suspected contraventions of Section 9.1.5 of the ISO Rules, which required ATCO Electric to have solicited bids from at least three arm's-length bidders for the project. However, the AESO was not provided with critical information, such as the reasons for the sole-sourcing of the Backwoods contract or any other facts set out at paragraph 44 of this decision.

No ATCO Electric employee or management personnel reported any concerns regarding the contraventions discussed in this decision to senior regulatory personnel responsible for preparing the deferral account application.

Instead, the events forming the basis for the contraventions were only brought to Enforcement staff's attention through a whistleblower who was an employee of ATCO Electric with direct knowledge of the events surrounding the Backwoods contract. The Commission acknowledges the integrity and courage required for the whistleblower to bring these events to the Commission's attention; the Commission is grateful to this individual on its own behalf and on behalf of Alberta ratepayers.¹¹⁸

117. *Id.*

118. *Id.* at 11-12.

2. The Legal Principles for Acceptance of a Settlement Agreement

The ATCO decision contains a detailed analysis of the standard a Commission should apply when accepting a settlement agreement particularly where there is an agreement between the prosecutor and the party charged. The main elements are set forth in paragraphs 65, 66, 70, and 73:

The Saskatchewan Court of Appeal and many Canadian tribunals that administer disciplinary schemes adopted the approach to joint sentencing submissions described in *R v GWC*. The Commission then stated in Decision 3110-D03-2015:

20. Taking guidance from the foregoing, the Commission must not ask itself if the proposed consent order is the order that it would have issued. Rather, the Commission must decide if the consent order is fit and reasonable and falls within a range of acceptable outcomes given the circumstances. When making this assessment, the Commission is guided by the factors set out in Rule 013: Rules on Criteria Relating to the Imposition of Administrative Penalties (Rule 13) and other applicable sanctioning principles.

Since the decision in *R v GWC* and the Commission's application of its principles in Decision 3110-D03-2015, the Supreme Court of Canada has addressed the legal test trial judges should apply in deciding whether it is appropriate in a particular case to depart from a joint submission on sentence. This test has since been adopted by a number of regulatory and disciplinary tribunals in Canada. In *R v Anthony-Cook*, the Supreme Court of Canada concluded that the proper test for trial judges assessing whether to depart from joint submissions on sentencing is "whether the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest." This "public interest test" (notably similar to that articulated in *R v GWC* and adopted by the Commission in Decision 3110-D03-2015) sets an "undeniably high threshold" for rejecting a joint submission on penalty. As explained in *Anthony-Cook*:

[33] . . . [A] joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system" . . .

[34] [A] joint submission should not be rejected lightly . . . Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. [emphasis added]

. . . .
In the settlement agreement, ATCO Electric admits that it contravened the ISO Rules, the Code of Conduct, and the *Electric Utilities Act*. ATCO Electric admits that it sole-sourced the matting, brushing and hydrovac work for the Jasper project (violating the ISO Rules respecting competitive procurement), at above fair market rates to the benefit of its unregulated affiliate (violating the spirit, intent and letter of the Code of Conduct), and deliberately concealed those actions from the Commission in an attempt to recover those above fair market rates from Alberta ratepayers (violating its fundamental duty of honesty and candour under the *Electric Utilities Act*).

. . . .
Having regard for the seriousness of the contravention and the harm caused, and taking into account that the purpose of the Commission's sanctioning authority is protective and preventative, not punitive, the Commission considers that the \$31 million penalty and associated terms and conditions in the settlement fall within a range

of acceptable outcomes, and it is in the public interest to approve the settlement agreement. The \$31 million administrative monetary penalty falls within a range of acceptable outcomes and is proportionate to the severity of the contraventions.¹¹⁹

The concern that the AUC had with the conduct of ATCO Electric turned on the length of time that the deception took place, the number of people involved, and the contravention of a well-established Code of Conduct designed to prevent precisely this activity:

The issue is not whether a particular ATCO Electric employee preparing an information response in the deferral account proceeding was actively intending to deceive the Commission at the time. Rather, the issue is that multiple employees had previously created and shared a set of records underlying the project (the REFs and backgrounders) in a manner inconsistent with ATCO Electric's normal practices, to ensure that those records were not discoverable by the Commission in its regulatory process. These employees did so with the knowledge and/or prompting of senior management, or in many cases were senior management. Further, as it fully admitted in the settlement agreement, ATCO Electric is responsible for the conduct of its employees.

The Commission considers this contravention of the Electric Utilities Act to be deeply serious and finds that it has caused significant harm in the form of a breach of trust, both of the public and the Commission.

Second, the Code of Conduct is designed precisely to avoid this type of behaviour, where benefits are sought for unregulated affiliates at the expense of ratepayers. The Code of Conduct governs relationships and transactions between regulated and non-regulated affiliates within the ATCO Group of companies, to anticipate and adjust for the potential misalignment of interest between shareholders and utility customers, and avoid uncompetitive practices between utilities and their affiliates, which may be detrimental to the interests of utility customers.

The Code of Conduct stresses "the need to respect the spirit and intent behind the Code

. . . .

Fourth, Section 9.1.5.2 of the ISO Rules required ATCO Electric to "solicit written bids from not less than three arm's length suppliers," as the Jasper project fell into the category of acquisitions where the cost of a specific item exceeds \$50,000. This was a clear contravention; there were concerns from the outset within ATCO Electric that the direct-award to Backwoods would violate the ISO Rules, and ATCO Electric decided to do it anyway, in pursuit of a "larger pot of gold" for its unregulated affiliate, ASL.¹²⁰

The AUC then determined whether a \$31 million penalty was the correct amount.¹²¹ It concluded it was, for the reasons set out below:

The second aspect of the harm to ratepayers is difficult to quantify, but very serious. There is a broader harm to ratepayers and all other participants in the regulatory system resulting from ATCO Electric's actions. In making its decisions, the Commission must be able to rely on the information presented by the utility as full, fair and accurate. This is a fundamental premise of the *Electric Utilities Act* and our regulatory system more generally, as set out above. ATCO Electric's contraventions represent an egregious breach of trust, which has eroded the public's trust and confidence in the Commission's regulatory process, and the Commission's trust of ATCO Electric. Regardless of the financial harm suffered, this harm is in and of itself material and significant.

119. ALLEGATIONS AGAINST ATCO ELECTRIC LTD., *supra* note 111, at 13-16.

120. *Id.* at 17-18.

121. *Id.* at 19-20.

.....
 The Commission finds that the \$31 million penalty is significant. The parties indicated that as far as they are aware, the high watermark for similar sanctions (administrative monetary penalties) in Canada is \$33 million; in that case the misconduct was deemed to be “at the highest end of the scale of seriousness.” In Decision 3110-D03-2015, the administrative penalty portion of the final sanction approved by the Commission was \$25 million. The Supreme Court of Canada has commented that in determining the magnitude of monetary penalties, the amount “should reflect the objective of deterring non-compliance with the administrative or regulatory scheme,” and must be large enough that it is not merely a “cost of doing business,” or, as the Alberta Court of Appeal put it, a “licencing fee.”

The Commission considers that the \$31 million penalty does not reflect merely a cost of doing business for ATCO Electric in this case. The Commission notes that the \$80-100 million “larger pot of gold” in camp contracts that ATCO Electric attempted to gain on behalf of ASL through its misconduct represents capital costs, not profit, and also that the \$31 million penalty is imposed alongside ATCO Electric’s obligation to amend its deferral account application to exclude all costs above fair market value for the Jasper project (a currently estimated reduction of \$10.8 million). This means that the Commission can be reasonably assured that the benefit gained by ATCO Electric through this contravention does not outweigh the proposed penalty, nor render the \$31 million penalty a mere licencing fee. Instead, the magnitude of the penalty encourages both general and specific deterrence – the penalty sends a message to all utilities operating under the Commission’s jurisdiction that this type of conduct will not be taken lightly and carries significant repercussions.¹²²

In its decision, the AUC relied on principles affirmed by courts relating to joint sentencing submissions in the context of judicial review from administrative tribunals.¹²³ The Report also referenced the *Report of the AUC Procedures and Processes Review Committee*.¹²⁴ The recommendations in that Report were aimed at reducing regulatory burden to create a more efficient regulatory process.¹²⁵ The process was initiated because Alberta utilities complained that the process had become unduly long.¹²⁶ Accordingly, AUC staff argued that it was even more important that information provided by regulated utilities be fair and accurate in a new regulatory environment where the Board would limit discovery and oral evidence as requested by the utilities.¹²⁷ Enforcement staff argues that the benefits of a more efficient regulatory proceeding could only be achieved if regulated utilities were prepared to be transparent, honest, and candid in their regulatory filings.¹²⁸

Subsequently the AUC Enforcement staff and counsel for ATCO Electric reached a settlement agreement and asked the Commission to approve that settlement agreement.¹²⁹ Under that Settlement Agreement and an Agreed Statement

122. *Id.*

123. ALLEGATIONS AGAINST ATCO ELECTRIC LTD., *supra* note 111, at 13-14.

124. C. KEMM YATES ET AL., REPORT OF THE AUC PROCEDURES AND PROCESSES REVIEW COMMITTEE (2020), <https://media.www.auc.ab.ca/prd-wp-uploads/2021/12/2020-10-22-AUCReviewCommitteeReport-1.pdf>.

125. *Id.* at 3.

126. *Id.* at 20.

127. *Id.* at 36

128. REPORT OF THE AUC PROCEDURES AND PROCESSES REVIEW COMMITTEE, *supra* note 124.

129. ALLEGATIONS AGAINST ATCO ELECTRIC LTD., *supra* note 111, at 1.

of Facts, ATCO Electric agreed to pay an administrative penalty of \$31 million.¹³⁰ In the Agreed Statement of Facts ATCO admitted it had contravened the *Electric Utilities Act* and breached a regulated utility's duty to be honest and not misleading in their submission to the regulator.¹³¹

The Joint Submission makes reference to an agreed statement of facts and contraventions whereby the parties reiterate much of what was in the earlier Application by Enforcement staff.¹³² The regulator is entitled to assume that the information submitted by a utility is full, fair, and accurate.¹³³ ATCO Electric admitted it took steps to omit relevant information in filings with the AUC in its deferral account proceeding and acknowledged a lack of transparency and the impact this had on the Commission and the public in the deferral account proceeding.¹³⁴

The Joint Submission also outlined at length whether the Commission in approving the Settlement Agreement should follow the principles developed by courts with respect to joint submissions on sentencing in a criminal law context.¹³⁵ This principle generally is that where the Crown prosecutor and the accused have come to an agreement the court or the regulator should accept it unless it clearly is contrary to the public interest.¹³⁶

On June 29, 2022, the Commission issued a decision approving the Settlement Agreement ordering that “[the] negotiated settlement agreement between Enforcement staff and ATCO Electric, attached as Appendix 2 to th[e] decision, [would be] approved without variation.”¹³⁷ ATCO Electric was ordered to “pay an administrative penalty of \$31 million pursuant to section 63[] of the *Alberta Utilities Commission Act*.”¹³⁸ ATCO was also required to pay the cost of the Commission’s “external legal counsel for [both] the investigation and [the] hearing.”¹³⁹

It is important to note that this case came to the Commission as a result of a whistleblower complaint.¹⁴⁰ Alberta has legislation that allows for whistleblower claims with respect to conduct relating to the public service sector.¹⁴¹ The AUC also has a document entitled *AUC Policy for Third Party Complaints*, which sets

130. *Id.* at 15.

131. *Id.*

132. *Id.* at Appendix 2, 14.

133. ALLEGATIONS AGAINST ATCO ELECTRIC LTD., *supra* note 111, at 19.

134. *Id.* at Appendix 2, 33.

135. *Id.* at 13.

136. *Id.* at 14.

137. ALLEGATIONS AGAINST ATCO ELECTRIC LTD., *supra* note 111, at 14.

138. *Id.* at 22.

139. *Id.* at 23.

140. *Id.* at 1.

141. *Public sector whistleblower protection*, ALBERTA, <https://www.alberta.ca/public-sector-whistleblower-protection.aspx#:~:text=The%20legislation%20provides%20a%20process,employees%20when%20they%20disclose%20wrongdoing>.

out the practice and procedure with respect to whistleblower complaints.¹⁴² While the Securities Commissions receive/adjudicate many whistleblower complaints, this case represents the first whistleblower complaint filed with a utility regulator.

3. New Developments

Alberta is not the only energy regulator interested in the concept of the duty to disclose or the duty of candor. Recently the Federal Regulatory Commission (Commission) in Washington, DC created a Notice of Proposed Rulemaking¹⁴³ that addressed this issue. A Commission Staff Presentation noted that the Commission intended to amend its existing rule in a manner that would significantly increase the scope of the situations that were covered stating:

This existing patchwork of requirements is insufficient to encompass all of the situations in which the Commission must be assured that it is receiving accurate communications that are necessary for it to adequately conduct its regulatory oversight and fulfill its statutory obligations.

The proposed rule is a broad duty of candor intended to capture many communications that have not been explicitly included in these existing requirements, but nonetheless are important to the effective execution of the Commission's statutory obligations. The proposed rule is based on 18 C.F.R. § 35.41(b), which governs communications by Sellers of electricity with market-based rate authority to: the Commission, regional transmission organizations, independent system operators, and their market monitors, and jurisdictional transmission providers. That regulation has been in force, in different forms, for nearly 20 years.

The proposed rule broadens the application of the requirement of accurate and truthful communications by providing that all entities communicating with the Commission or other specified organizations related to a matter subject to the jurisdiction of the Commission submit accurate and factual information and not submit false or misleading information or omit material information. As with section 35.41(b), an entity is shielded from violation of the proposed regulation if it exercises due diligence to prevent such occurrences.

Communications to the following organizations would be covered by the proposed rule: the Commission (including Commission staff), Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, jurisdictional transmission or transportation providers, and the Electric Reliability Organization and its associated Regional Entities.¹⁴⁴

[T]he Commission proposed that the following rule be added to 18 CFR part 1d: Any entity must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved re-

142. ALBERTA UTILITIES COMM'N, AUC POLICY FOR THIRD PARTY COMPLAINTS, https://media.auc.ab.ca/prd-wp-uploads/regulatory_documents/Reference/AUC%20Policy%20for%20Third%20Party%20Complaints.pdf#:~:text=1.6.%20The%20AUC%20has%20received%20complaints%20from%20third,wrongdoing%20or%20misconduct%20by%20a%20company%20it%20regulates.

143. Notice of Proposed Rulemaking, *Duty of Candor*, 180 FERC ¶ 61,052 (2022).

144. *Staff Presentation: Duty of Candor NOPR*, FERC (July 28, 2022), <https://www.ferc.gov/news-events/news/staff-presentation-duty-candor-nopr>.

gional transmission organizations, Commission-approved independent system operators, jurisdictional transmission or transportation providers, or the Electric Reliability Organization and its associated Regional Entities, where such communication relates to a matter subject to the jurisdiction of the Commission, unless the entity exercises due diligence to prevent such occurrences.

....
 [T]he proposed rule imposes a duty of candor on communications between market participants, such as pipelines and shippers, on matters subject to further jurisdiction. [It also] allows for an affirmative defense where an entity is accused of providing false information or communications but nonetheless exercised due diligence to ensure that the communication [was] accurate.¹⁴⁵

The existing rule has been challenged from time to time but has been upheld.¹⁴⁶

The Commission's Notice also provided interpretive guidance for the proposed rule. For [example], . . . "entity" [is defined as] including individuals and businesses, and the duty applies both to the entity making the communication as well as the entity responsible for the communication.¹⁴⁷

[The] "communications" [will] include "informal [or] formal communications, verbal or written and via any method that may be used for transmission. . . .

....
 Comments on the proposed rule [are] due 60 days from the date the Notice is published in the Federal Register.¹⁴⁸

Given the experience of the AUC in the ATCO Electric case described above, Canadian energy regulators may be considering similar rules to provide greater clarity on this important issue.

C. *Technology Write Offs*

Energy regulators today live in a new world. Worldwide energy regulators face a \$31 trillion investment in new technologies designed to reduce the amount of carbon in the production, distribution and use of electricity.¹⁴⁹ Picking winners and losers in new technology is not easy. It is always a challenge.

Approving a technology pilot is just the first challenge. The second challenge arises when regulators must respond to technology failures. The first decision addressing this particular problem surfaced in Nova Scotia recently.¹⁵⁰ There, the energy regulator faced an application by Nova Scotia Power to write off significant

145. Mark R. Haskell, *FERC Proposes Expansion of Duty of Candor Obligations*, BLANKROME (Aug. 2, 2022), <https://www.blankrome.com/publications/ferc-proposes-expansion-duty-candor-obligations>; see 180 FERC ¶ 61,052.

146. 180 FERC ¶ 61,052 at P 18.

147. Haskell, *supra* note 145.

148. *Id.*

149. INT'L RENEWABLE ENERGY AGENCY, WORLD ENERGY TRANSITIONS OUTLOOK 28 (2021) https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2021/Jun/IRENA_World_Energy_Transitions_Outlook_2021.pdf.

150. Paul Withers, *Nova Scotia Power to pull plug on tidal station, seeks \$25M from Ratepayers*, CBC (Feb. 23, 2021), <https://www.cbc.ca/news/canada/nova-scotia/nova-scotia-power-annapolis-generating-station-1.5924509>.

costs related to a new technology pilot that after many years proved not to be commercially viable.¹⁵¹

The project is known as the Annapolis Tidal Generation Station.¹⁵² At the time of its commissioning in the mid-1980s the Station was intended “to be a short-term research initiative . . . to test [the viability of] tidal barrage technology . . . in the Bay of Fundy.”¹⁵³ In recent years the utility that was operating the project, “[Nova Scotia] Power . . . experienced [significant] operational and maintenance [costs] with the Generating Station.”¹⁵⁴ Capital costs were increasing significantly while at the same time the amount of power generated was declining.¹⁵⁵

The application by Nova Scotia Power asked the Commission to approve the amortization of the undepreciated value and the remaining construction work in progress over ten-year period.¹⁵⁶ Nova Scotia Power did not apply for decommissioning at the same time.¹⁵⁷

The Board’s decision and the reasoning shows how complicated these cases can become. Nova Scotia Power asked the Board to find that the project was no longer used and useful.¹⁵⁸ It turns out that is not a simple question to answer.

There is no question that at the time of the application the generating station was not being used.¹⁵⁹ The question was whether the technology could be useful in the future. The Commission pointed to the arguments of the intervenor groups at paragraph 32:

The closing submissions of the Small Business Advocate, the Industrial Group, the Consumer Advocate, and the Town of Annapolis Royal all expressed concerns relating to NS Power’s assertion that the retirement of the Generating Station is the lowest cost option to customers. All four stakeholders noted that they do not agree that NS Power has put forth a sufficiently comprehensive analysis to convince them that there is no viable future use of the assets in question for public utility purposes.¹⁶⁰

The analysis by the Commission is best set out in the following paragraphs:

In this case, given the significant amount of the undepreciated cost remaining in rate base, NS Power proposed a 10-year amortization period. No party challenged the proposed length of the amortization period. It was supported by both Mr. Reed and Grant Thornton. The Board agrees that, if decommissioning is established as the least cost option, a 10-year amortization period appears to create a reasonable balance between negative impacts to current ratepayers and intergenerational equity considerations.

The substantive issue in dispute in this case is whether NS Power has shown that decommissioning of the Generating Station is the least cost option for ratepayers. The Board recognizes that in preparing its case NS Power took several steps in this application which are appropriate. The use of external consultants to supplement in-

151. *Id.*

152. *Id.*

153. In the matter of Annapolis Tidal Generation Station, 2022 NSUARB 2 (Can. N.S.).

154. *Id.* at para. 2.

155. *Id.* at para. 14.

156. *Id.* at para. 5.

157. *Annapolis Tidal Generation Station*, 2022 NSUARB at para. 6.

158. *Id.*

159. *Id.* at para. 86.

160. *Id.* at para. 32.

house expertise follows Board guidance. The Board acknowledges these consultants support the approach set out in the application. As well, the use of probabilistic modelling was appropriate in this case, given the number of uncertainties which could impact cost estimates. That said, the Board has determined it does not have enough information to find that decommissioning is, in fact, the least cost option. The Board therefore finds NS Power has not met the burden of proof to obtain the accounting treatment relief sought in this matter.

The Board is in general agreement with the Intervenor, based on the evidence filed by Midgard and MS Consulting, that there are too many cost variables which have not been sufficiently addressed, or have been addressed in an inconsistent manner across the various options. The Board acknowledges there is contention between NS Power and MS Consulting as to the actual impact of certain inputs on the modelling results, including certain inputs used by MS Consulting. The Board also recognizes that Midgard's ultimate recommendation was that the LEM option be kept alive. This could theoretically be done by approving the current application and revisiting the issue, if necessary, when a decommissioning application is filed.

That said, given the magnitude and scope of the unaddressed issues, the Board concludes approval of the accounting treatment at this point is premature. The evidence indicates there are varying levels of class estimates for the different options. In particular, the spread in NPVRR values between the LEM option and the decommissioning option are not that wide. In certain scenarios, the LEM option might actually be more cost-effective, although with greater risk.

It is therefore important that, as far as it is possible, there be an apples-to-apples comparison between the LEM option and the decommissioning option. The Board is concerned that if the accounting treatment is approved now, there may be a tendency to focus on having the decommissioning option approved. This may create less incentive to continue robustly assessing the LEM option.¹⁶¹

The Commission concluded that it did not have sufficient information to make a decision.¹⁶² The complexity of the issues that face regulators in this type of case is evident in the Commission's direction to Nova Scotia Power regarding the additional information that is required to properly address the issue:

While it will not direct NS Power to undertake any specific studies, it would seem to the Board that the following information would be of assistance in determining the least cost option in this matter:

1. A more fulsome assessment of LEM costs;
2. A more fulsome assessment of the new technology option, including:
 - a. A more thorough assessment of options and costs to change station capacity under the new technology option; and
 - b. Solicitation of pricing from multiple manufacturers for the new technology option;
3. A more fulsome assessment of sedimentation issues and costs associated with the decommissioning option;
4. Completion of environmental studies needed to assess environmental risks and costs associated with each alternative;
5. A more fulsome assessment of station asset disposal options;
6. A detailed explanation of why capital cost estimates for the decommissioning option have decreased so dramatically from the estimates included in NS Power's 2018 Hydro Asset Study;
7. Engagement with DFO personnel on if NS Power can satisfactorily present alternative studies or data on fish migratory periods and fish mortality for the site,

161. *Annapolis Tidal Generation Station*, 2022 NSUARB at paras. 89-93.

162. *Id.* at para. 118.

short of returning the Generating Station into operation, including potentially modifying its operation to reduce or mitigate the potential impacts on fish so as to avoid the requirement for a DFO Authorization;

8. Engagement with DFO personnel on whether it would consider any compliance plan with an accompanying request for authorization. If DFO will entertain such a request, NS Power could estimate the cost of preparing and implementing a compliance plan in its Decision Analysis;

9. Engagement with DFO personnel and the Province on any Fisheries Act or environmental compliance issues under the Decommissioning option with respect to restoring the area to its original condition (i.e., with no water flow through the causeway at the location of the Generating Station and any resulting decommissioning compliance costs related to the sluice gates, causeway, and fish passages). The results of these discussions could be incorporated into the Decommissioning option in the Decision Analysis; and

10. With respect to the above initiatives, engagement with Indigenous communities respecting the various options (including LEM, New Technology and Decommissioning), to better inform the potential costs to be incorporated into the Decision Analysis.¹⁶³

The Board concluded that until it received this information in a new application it was unable to make a decision stating at paragraph 118:

The Board has determined that it has insufficient evidence at this time to find that decommissioning of the Generating Station is the least cost option for ratepayers. It therefore is not able to find that the asset is not used and not useful in accordance with Accounting Policy 6350. Therefore, the Board will not approve the application at this time. The Board believes the best way of proceeding is to reconsider the application for accounting treatment approval along with a decommissioning application. That said, NS Power is at liberty to reopen the matter if it is in a position to address the Board's concerns.¹⁶⁴

D. Deregulation

Decisions involving deregulation are not that common. The leading decision is likely the Ontario Energy Board decision in 2006 in the *NGEIR* proceeding.¹⁶⁵ *NGEIRA* was a two-year inquiry on the interpretation of section 29 of the *Ontario Energy Board Act* which reads as follows:

On an application or in a proceeding the Board shall make a determination to refrain in whole or part from exercising any power or performing any duty under this Act if it finds as a question of fact that the licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest.¹⁶⁶

In *NGEIR*, the Ontario Energy Board found that the energy storage market was workably competitive and that “neither Union nor Enbridge ha[d] market power in the storage market.”¹⁶⁷ The Board determined that it would “cease regulating the prices charged for [certain] storage services.”¹⁶⁸ The exception was the

163. *Id.* at para 99.

164. *Id.* at para 118.

165. *Natural Gas Electricity Interface Review*, Ontario Energy Bd., EB-2005-0551 (Nov. 7, 2006).

166. *Id.* at 3.

167. *Id.* at 41.

168. *Id.* at 3.

“rates for storage services provided to Union’s and Enbridge’s distribution customers [which] continue to be regulated. . . .”¹⁶⁹

This issue has risen recently in Alberta with respect to a class of service known as a district energy service. The Alberta decision may have implications for decisions in other jurisdictions dealing with this class of service.

[In] March . . . 2022, the . . . AUC issued a decision exempting Calgary District Energy Inc. (CDHI) and the Downtown District Energy Center (DDEC) from certain provisions of the *Public Utilities Act* including the regulation of its rates and certain reporting requirements. . . .

DDEC was originally constructed and operated by Enmax Corporation [which was wholly owned by the City of Calgary.]

DDEC . . . provides thermal energy, in the form of central heating and hot water services, to commercial , municipal and residential buildings in downtown Calgary. . . .

DDEC was statutorily exempt[] from a large portion of the *Public Utilities Act* in Alberta and for this reason was not subject to AUC oversight and regulation. [For some time], the AUC did not have any direct role in regulating the operations of DDEC or in setting rates charged to DDEC customers.

[I]n April 2021, the AUC approved the sale of DDEC to CDHI.

Following the sale of the DDEC, CDHI brought an application requesting an order pursuant to sections 8 and 9 of the *Alberta Utilities Commission Act* and section 79 of *Public Utilities Act* declaring that certain provisions of the Public Utilities Act would not apply to either CDHI or DDEC.

CDHI [argued] that requested exemptions were in the public interest and represented a flexible and proportionate form of light-handed regulation that was responsive to the unique nature of district energy services. The [parties agreed that] . . . [t]he AUC would retain oversight of the services provided by CDHI and DDEC on complaint basis.¹⁷⁰

The most important aspect of that argument was that district energy services were highly competitive in the City of Calgary.¹⁷¹ The same is true in many Canadian markets.

In the hearing, the Commission had to deal with the objection of ATCO, the only intervenor that opposed the status that CDHI was seeking. ATCO provided competing services in the City of Calgary. The Commission responded to the ATCO arguments as follows in paragraph 25 of the decision:

The Commission disagrees that a departure from prospective economic regulation would necessarily frustrate the purpose of the Public Utilities Act or undermine the intent of legislature. The Commission finds that the overarching purpose of the legislative scheme is to safeguard the public interest in a service environment that is susceptible to abuses of monopoly power. The legislature has equipped the Commission with the tools required to fulfil this purpose, including the ability to fix rates and to exercise general oversight of the operation of public utilities. Given the nature of public utilities (which tend to be highly capital intensive, such that duplication of services by different providers is inefficient), they are often natural monopolies. In

169. *Natural Gas Electricity Interface Review*, *supra* note 165, at 3.

170. Dennis Langen & Larissa Lees, *No Complaint to Complaint Based Regulation: Alberta Utilities Commission Decision 26717-D01-2022*, JDSUPRA (Mar. 14, 2022), <https://www.jdsupra.com/legalnews/no-complaint-to-complaint-based-4502777/>.

171. *Id.*

these circumstances, prospective economic regulation serves important functions, including the protection of customers. The Commission does not accept, however, that protecting the public interest, or upholding the legislative scheme, necessitates that any public utility must be subject to prospective economic regulation, regardless of its particular characteristics or the context in which it operates.¹⁷²

The AUC observed that “[i]t would not benefit the public interest to require prospective economic regulation of any entity meeting the definition of [a] ‘public utility’ . . . where the facts established, as they do in this case, that such regulation is not necessary to protect sophisticated customers in a competitive environment. . . in the light of other available regulatory mechanisms.”¹⁷³

The alternative regulatory mechanisms that the AUC referenced were that the rates of CDHI Calgary in the new environment would only come under review if a customer complained about the rates.¹⁷⁴ CDHI agreed that if the customers did complain regarding rates, they would submit to the Commission’s jurisdiction to regulate their rates.¹⁷⁵

In approving this light-handed regulation proposed by CDHI the Commission concluded at paragraph 39 as follows:

The Commission finds that CDHI operates in an environment that is sufficiently competitive that its customers have a degree of choice about their service provider that is not present in a traditional monopolistic industry. Specifically, customers of CDHI can elect to take service from the DDEC or acquire a boiler (powered by either gas or electricity) from a variety of providers to meet their thermal energy needs. In the future, given that CDHI has no exclusive franchise, its customers may elect to take service from new entrants to the district energy market. The services agreements executed between CDHI and its customers for the provision of district energy are based on mutually acceptable terms negotiated between sophisticated commercial parties. Further, in the event that they are dissatisfied with the rates they pay, or service they receive, CDHI customers retain the ability to raise a complaint with the Commission. Taken together, the Commission considers that these factors are sufficient to ensure that the rates paid by CDHI customers will be just and reasonable, in the sense that they are fair to both customers and the utility, as intended by the legislative scheme.¹⁷⁶

In fact, the Commission concluded that district energy projects were public utilities within the meaning of the Public Utilities Act, but at the same time they should be able to take advantage of flexible and proportionate forms of light-handed regulation to accommodate the particular needs of district energy markets.¹⁷⁷ This is an important development. The concept of light-handed case-by-

172. ALBERTA UTILITIES COMM’N, CALGARY DISTRICT HEATING INC. EXEMPTION FROM PROVISIONS OF THE PUBLIC UTILITIES ACT, Decision 26717-D01-2022 (Mar. 2, 2022) https://www2.auc.ab.ca/Proceeding26717/ProceedingDocuments/26717_X%5b%5d_26717-D01-2022%20CDHI%20Exemption%20from%20Provisions%20of%20the%20Public%20Utilities%20Act_000069.pdf.

173. *Id.* at 26.

174. *Id.* at 37.

175. *Id.*

176. CALGARY DISTRICT HEATING INC. EXEMPTION FROM PROVISIONS OF THE PUBLIC UTILITIES ACT, *supra* note 172, at para. 39.

177. *Id.* at paras. 5, 12, 27.

case regulation will be increasingly important in new energy markets and services like district energy. While the original rationale for deregulation in this market was municipal ownership, it now becomes a question of whether there is sufficient competition to protect the public interest. This is essentially the test that the Ontario Energy Board applied in the *NGEIR* case.¹⁷⁸

To be fair to the AUC, the CDHI decision is not really deregulation. It is regulation by complaint.¹⁷⁹ The AUC retains complete discretion to regulate rates at any time.¹⁸⁰ This is different from the Ontario procedure under section 29 of the *Ontario Energy Board Act*, as explained by the following sections in the *Union Gas LNG* decision:

As several parties observed, the use of the word “shall” in section 29(1) means that the OEB has a positive obligation to forbear from regulation where it finds that there is or will be competition sufficient to protect the public interest. If the factual record indicates that there is sufficient competition, the OEB has no discretion and must refrain (in whole or in part) from regulating the activity.

In considering section 29, the OEB is further guided by its statutory objectives. Of particular note is the OEB’s first objective with respect to natural gas: “to facilitate competition in the sale of gas to users.”

...

There does not appear to be any serious dispute between the parties that the LNG service Union proposes is or will be competitive. Most of the elements of the section 29 are not actively contested. It is agreed by Northeast and Union that the relevant product market is the market for motor vehicle transportation fuel. Currently the chief competitor for LNG as a motor vehicle transportation fuel is diesel fuel, which is widely available. It is also generally agreed that the relevant geographic market is Ontario, Quebec, and portions of the Northeast and Midwest United States. . . .

...

Section 29 is clear that where the OEB finds that there is, or will be, competition sufficient to protect the public interest; it will refrain (in whole or in part) from regulation. The OEB has found that the new service is subject to competition sufficient to protect the public interest. It therefore has little choice but to refrain from regulation, whatever the difficulties.¹⁸¹

Complaint-based regulation differs from deregulation in that under complaint-based regulation, a utility has a right to set rates without prior approval of the regulator. However, in the event of a complaint, the regulator may consider whether the rate is just and reasonable and set new rates on a retroactive basis.¹⁸² This type of light-handed regulation has enjoyed some success in telecommunications.¹⁸³ It will likely be used more often in the energy sector as energy regulators

178. *Natural Gas Electricity Interface Review*, *supra* note 165, at 24.

179. *CALGARY DISTRICT HEATING INC. EXEMPTION FROM PROVISIONS OF THE PUBLIC UTILITIES ACT*, *supra* note 172.

180. *Id.* at paras. 17, 27.

181. *In the Matter of the Ontario Energy Board Act*, Ontario Energy Bd., EB-2014-0012 at 5-6 (Apr. 9, 2015).

182. *Nova v. Amoco Can. Petroleum Co.*, [1981] S.C.R. 437 (Can.).

183. *Bell Canada v. Canada Radio-Television and Telecomms. Comm'n*, [1989] S.C.R. 1722 (Can.).

introduce new technology to decarbonize the production and distribution of electricity.

E. New Rules of Practice and Procedures

On May 3, 2021, the AUC approved very substantial amendments to its rules of practice.¹⁸⁴ The amendments became effective on May 17, 2021.¹⁸⁵ When the new Conservative government came into power in 2019 one of their first steps was to enact the *Red Tape Reduction Act*, which was applicable to all regulatory agencies in the province.¹⁸⁶ It turns out that the AUC was the most aggressive agency in reacting to it.

The first thing that the AUC did was to hold a hearing.¹⁸⁷ It invited all of the companies they regulate as well as other regulatory agencies in the energy sector.¹⁸⁸ The utilities' main complaint was "scope creep" and the resulting delays in the decisions of the Commission.¹⁸⁹

The AUC's first response was to establish an independent panel to write a report and make recommendations.¹⁹⁰ It was a first-class panel consisting of a retired senior counsel who had represented major utilities before both the National Energy Board and the AUC for many years, a former member of the National Energy Board, and Canada's leading administrative law professor.¹⁹¹ Their Report made 30 recommendations.¹⁹² The AUC adopted 29 of them.¹⁹³ They are considered below.

1. The Application

An application to the AUC can be commenced by any person if it complies with section 6 of the rules, by the Market Surveillance Administrator by filing a notice under *Act*, or by the Commission on its own initiative, or at the direction of the Government of Alberta.¹⁹⁴

184. John Gormley et al., *Alberta Utilities Commission amends Rules of Practice to promote efficiency*, OSLER (May 7, 2021), <https://www.osler.com/en/resources/regulations/2021/alberta-utilities-commission-amends-rules-of-practice-to-promote-efficiency>.

185. *Id.*

186. Red Tape Reduction Act, S.A. 2019, c R-8.2 (Can.).

187. C. KEMM YATES ET AL., *supra* note 124.

188. *Id.*

189. *Id.* at 6.

190. Letter from C. Kemm Yates, Committee Chair, Processes Review Committee to Carolyn Dahl Rees, Chair, Alberta Utilities Comm'n (Aug. 14, 2020).

191. C. Kemm Yates, Q.C., WESTERN ARB. CHAMBERS, <https://www.westernarbitrationchambers.ca/c-kemm-yates-q-c> (last visited Nov. 9, 2022); Rowland J. Harrison, Q.C., OGEL, <https://www.ogel.org/about-author-a-z-profile.asp?key=3251> (last visited Nov. 9, 2022); David Mullan, IRWIN LAW, <https://irwinlaw.com/contributor/david-mullan/> (last visited Nov. 9, 2022).

192. C. KEMM YATES ET AL., *supra* note 124.

193. ALBERTA UTILITIES COMM'N, RULE 001: RULES OF PRACTICE (2021), <https://media.auc.ab.ca/prd-wp-uploads/2022/01/Rule001.pdf>.

194. *Id.* at 6-7.

The new Rules provide that if an application is not complete when filed, the Commission may submit information requests to the applicant and “direct the applicant to provide [the] additional information the [AUC] requires to accept the application.”¹⁹⁵ This is an important amendment, in that it clarifies the evidence upfront, and prevents subsequent disagreement among the participants to the proceeding.

Where the AUC identifies a material deficiency in the application, the Commission can “dismiss the application with an explanation of the deficiency and close the proceeding.”¹⁹⁶ “If an applicant does not take any steps with respect to an application within [the] time specified by the [AUC], the [AUC] may declare the application be withdrawn” unless acceptable reasons are provided.¹⁹⁷ The new rules also provide that the AUC at any time during the proceedings may suspend an application or determine that it cannot process the application and close the proceeding.¹⁹⁸

2. The Hearing

Unless otherwise directed by the AUC, the development of the evidentiary record in rate cases must be conducted through a written process.¹⁹⁹ Any party that wants to establish an oral hearing in a rate case must make this request as early as possible and convince the AUC that an oral hearing is necessary.²⁰⁰ It should be noted “[w]hen the [AUC] holds a written hearing, it may dispose of the proceeding[s] on the basis of the documents filed by the parties.”²⁰¹

“When the [AUC] holds an oral hearing [in a rates case], no party may question a witness unless the party obtains approval from the [AUC] in advance.”²⁰² “[The] request to question a witness in a rates [case] must be made as [soon as possible] and be supported by a description of the witness[] to be questioned, the time required for questioning, the issues that the question[s] will address, [and] an explanation of how the question[] will [assist the AUC].”²⁰³

3. The Argument

“Unless otherwise [ordered] by the [AUC], argument shall be delivered orally” unless it can be demonstrated that written argument would be more efficient.²⁰⁴ No argument may be received by the [AUC] unless it complies with the directions issued by the AUC with respect to “the scope, format, or content of the

195. *Id.* at 7.

196. *Id.*

197. RULE 001: RULES OF PRACTICE, *supra* note 193, at 9.

198. *Id.* at 11.

199. *Id.* at 23.

200. *Id.* at 24.

201. RULE 001: RULES OF PRACTICE, *supra* note 193.

202. *Id.* at 24.

203. *Id.*

204. *Id.* at 28.

argument including directions [on] page limits for written arguments or time limits for oral argument[s].”²⁰⁵

4. The Decision

The AUC is required to issue decisions “in accordance with its performance standards.”²⁰⁶ “If the [AUC] is unable to issue [a] decision” within that standard, it is required to “notify all registered parties in advance.”²⁰⁷ Alberta is not the only Canadian jurisdiction to feature immediate notification of a failure to meet established deadlines for the delivery of final decisions. Every decision of the Nova Scotia Board features on its first page a table that identifies when the hearing started, when the hearing finished, and when the decision was issued.

“The [AUC] may, without notice, correct typographical, spelling and calculation errors and other similar types of errors made in any of its rulings, orders, decisions or directions.”²⁰⁸ With respect to decisions or orders, “[t]he [AUC] may, no later than 60 days from the date that the [AUC] issued a decision or order and without notice, correct typographical, spelling and calculation errors and other similar types of errors and post the corrected decision or order on its website and the eFiling System.”²⁰⁹

Another unique feature under the new Alberta rules provides that the AUC now has authority to issue a corrigenda decision.²¹⁰ The corrigenda decision corrects substantive errors that are not a typographical, spelling, or a calculation error.²¹¹ Under this section the AUC can also correct errors “detected more than 60 days [after] the date of issuance of the decision.”²¹² “The corrigenda decision will indicate the changes required and attach an amended form of the original decision.”²¹³

5. The Issues List

The new Rules provide that “[w]hen the [AUC] serves a notice of hearing [in] a rate[] proceeding, the [AUC] shall also issue directions on procedure which may include [the] establish[ment] [of] a preliminary list of issues for the hearing.”²¹⁴ Setting out the issues in writing in advance of the hearing has been standard practice in Ontario, and instrumental in reducing “scope creep” for over 10 years. In Ontario, the list of issues forms part of a Procedural Order early in the proceeding and is strictly enforced throughout the hearing. The new Alberta Rules adopts a similar procedure.

205. RULE 001: RULES OF PRACTICE, *supra* note 193.

206. *Id.* at 28.

207. *Id.*

208. *Id.* at 29.

209. RULE 001: RULES OF PRACTICE, *supra* note 193, at 29.

210. *Id.*

211. *Id.*

212. *Id.*

213. RULE 001: RULES OF PRACTICE, *supra* note 193, at 29.

214. *Id.* at 10.

6. Information Requests

A party in a hearing is entitled to make an information request in order to clarify documentary evidence filed by the applicant.²¹⁵ In rate cases the rules provide that these questions must be directly related to the issues set out in the issues list.²¹⁶ In addition, the questions must “be directed to a party adverse in interest from the requesting party.”²¹⁷ This is an attempt to eliminate what are known as “sweetheart” information requests, whereby a party seeks to elicit information from a party aligned in interest in order to bolster their similar views.

In the new Rules, Information requests (or IRs) are limited in rate cases to questions that relate directly to the issues identified in the Issues List.²¹⁸ When a party refuses to answer the information request, the requesting party must attempt to resolve the matter with the other party before bringing a motion.²¹⁹ If the parties are unable to settle the matter, the motion must be brought “no later than 5 business days [after] the date on which the information request” was made.²²⁰ The motion can “be no greater than 10 pages in length.”²²¹

The party responding to a motion must file a response “no later than 3 business days from the date [that] the motion [was] filed.”²²² “[The] response to a . . . motion must be no greater than 10 pages in length.”²²³ The Commission is required to “issue its ruling on a . . . motion no later than 10 business days [after] the date on which the time limit for filing a reply . . . lapsed.”²²⁴ Detailed rules also exist where motions relate to confidential information.²²⁵

The new Alberta Rules seek to remove some of the delay caused by Information Requests, which are a fundamental yet time-consuming part of all Canadian rate cases. As indicated the new Rules provide that the Commission may impose limits on the number of information requests each party may ask.

7. Prehearing Motions

The new AUC rules set out specific provisions with respect to prehearing motions.²²⁶ Prehearing motions can be critical to clearing up important legal issues like jurisdiction up front. Prehearing motions must be brought in writing and be “no greater than 10 pages in length.”²²⁷ They must describe the decision and order sought, the grounds for the motion and interestingly “any relevant prior rulings of

215. *Id.* at 15.

216. *Id.* at 16.

217. RULE 001: RULES OF PRACTICE, *supra* note 193, at 15.

218. *Id.* at 16.

219. *Id.* at 17.

220. *Id.*

221. RULE 001: RULES OF PRACTICE, *supra* note 193, at 18.

222. *Id.* at 18.

223. *Id.*

224. *Id.*

225. RULE 001: RULES OF PRACTICE, *supra* note 193, at 19-22.

226. *Id.* at 18-19.

227. *Id.* at 18.

the Commission dealing with the issue raised or relief requested.”²²⁸ The motion must also contain any evidence and documents that support the motion.²²⁹

An interesting new feature is the requirement in section 29.4 that the party bringing the motion must identify any inconsistent prior rulings of the AUC on the same issue and has the onus of demonstrating why the commission should depart from the prior ruling.²³⁰

If a party “to whom a written motion is directed wishes to respond” they have 3 business days from the date on which the motion was filed.²³¹ The response must provide any evidence and documents in support of the response.²³² If the party who brought the motion wishes to reply to the response, it has 3 days to do so.²³³

As is common in many of the new rules time limits are also established regarding the date of the AUC decision.²³⁴ The AUC is required to issue its ruling “no later than 10 business” days after the date of the reply.²³⁵

Under the new rules, the AUC reserves the right to proceed directly to ruling on a motion if it determines that is required.²³⁶

8. Participation

Any party wishing to participate in a hearing must file an intent to participate statement with the AUC.²³⁷ The AUC will allow the party to attend if it determines that the party has demonstrated that the Commission’s decision in the proceeding will directly and adversely affect that party’s rights.²³⁸ It should be noted that the AUC “may, on its own initiative or at the request of a party, issue a notice requiring a person to [either] produce . . . documents [or] attend an oral hearing as a witness.”²³⁹

If the AUC believes it is necessary the AUC can call as a witness a member of staff or an independent witness to participate in the hearing to present evidence, question a witness, or submit argument.²⁴⁰ The Crown may also “participate in a proceeding” and “may file a written statement in evidence in a proceeding” which is not subject to questioning.²⁴¹

228. *Id.*

229. Rule 001: Rules of Practice, *supra* note 193, at 18.

230. *Id.*

231. *Id.*

232. *Id.*

233. Rule 001: Rules of Practice, *supra* note 193, at 19.

234. *Id.*

235. *Id.*

236. *Id.*

237. Rule 001: Rules of Practice, *supra* note 193, at 9.

238. *Id.*

239. *Id.* at 25.

240. *Id.* at 27.

241. Rule 001: Rules of Practice, *supra* note 193, at 28.

9. Expert Evidence

The new Rules provide the parties may call independent experts.²⁴² That evidence however must include the instructions that were provided to the independent witness, an acknowledgement of the witness's duty to provide evidence that is fair, objective and nonpartisan and a list of all documents on which the evidence is based.²⁴³

In the case of evidence that is provided "in response to another [expert witness the evidence must include] a summary of the points of agreement and disagreement with the other [expert witness].²⁴⁴ In addition, the AUC "may require independent witnesses from different parties to confer with each other in advance of a hearing to narrow issues, identify points on which their views differ or agree and to prepare joint written statements to be admissible as evidence."²⁴⁵

10. Confidential Evidence

Claims of confidentiality are a common objection to the production of documents in hearings. Under the new Alberta rules, a party may file a motion objecting to production of documents based on confidentiality in writing in which they must describe "the specific harm that would result if the confidential information was placed on the public record."²⁴⁶ The AUC

may grant a motion for confidential treatment of information on any terms that it considers necessary if it finds that:

granting the request is necessary to prevent a serious risk to an important public interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and the benefits of granting the request outweigh its harmful effects including the effects on the public interest in open and accessible proceedings.²⁴⁷

Where the AUC "grants a motion for confidentiality" the confidential ruling will extend to any review or appeal in which the Commission's decision on the confidential ruling is being considered.²⁴⁸

The new rules set out a new procedure in which the AUC may adopt in dealing with confidential information.²⁴⁹ "If the [AUC] grants a motion" for confidentiality, it can under the rules

adopt any process or procedure the Commission considers reasonable or necessary in the public interest for considering the confidential information, including:

(a) receiving and considering the confidential information in confidence to the exclusion of any party to the proceeding on terms the Commission considers to be in the public interest; and

242. *Id.* at 12-13.

243. *Id.*

244. *Id.* at 13.

245. RULE 001: RULES OF PRACTICE, *supra* note 193, at 13.

246. *Id.* at 19-20.

247. *Id.* at 21.

248. *Id.* at 21-22.

249. *See generally* RULE 001: RULES OF PRACTICE, *supra* note 193.

(b) issuing a decision in which the confidential information is redacted and providing an unredacted copy of the decision only to the disclosing party and any person who has been permitted access to the confidential information.²⁵⁰

This is a new and important procedure may help solve some difficult situations.

11. Constitutional Issues

Notice must be provided with respect to constitutional issues.²⁵¹ “A party who intends to raise a question of constitutional law before the Commission in an oral argument must give written notice of the party’s intention to do so at least 14 days before the oral hearing starts.”²⁵² “A party who intends to raise a question of constitutional law in the written hearing must” also give 14 days not day’s notice, there are also serious penalties for late filing of evidence.²⁵³

12. Documentary Evidence

“[D]ocumentary evidence in a proceeding must be directly relevant to the proceeding and must be filed in accordance with [AUC’s] directions.”²⁵⁴ In addition, “documentary evidence filed in a proceeding must be accompanied with a statement setting out the qualifications of the person who prepared the” document in evidence, “the qualification of the purpose of the person under whose direction or control the evidence was prepared, and an explanation of how such qualifications are directly relevant to the issues addressed in the evidence.”²⁵⁵ This is a new requirement in Canadian energy regulations.²⁵⁶

The AUC “may, on any terms it determines, allow the revision or removal of all or any part of the document; or order the revision or removal of all or any part of a document that in the opinion of the [AUC], is not relevant” to the proceedings or “necessary for the purpose of [the] hearing.”²⁵⁷

The AUC “may, on its own initiative or at the request of a party, issue a notice requiring a person to produce certain documents . . . or attend an oral hearing as a witness.”²⁵⁸

Where a party “intends to use a document that has not been filed in the proceeding as an aid to question a witness at an oral hearing” that party “must provide a copy of that aid” to the witness at least “24 hours before the witness is to be questioned.”²⁵⁹

250. *Id.* at 21.

251. *Id.* at 22.

252. *Id.* at 22.

253. RULE 001: RULES OF PRACTICE, *supra* note 193, at 22.

254. *Id.* at 12.

255. *Id.*

256. *Id.*

257. RULE 001: RULES OF PRACTICE, *supra* note 193, at 14.

258. *Id.*

259. *Id.* at 25.

13. Cross Examination

Cross-examination is also more tightly controlled under the new rules.²⁶⁰ Where a party intends to use a document to cross-examine the witness and that document has not been previously filed that witness or his representative must be provided with a copy of that document no less than 24 hours before the witness appears.²⁶¹ This addresses a long-abused practice by counsel.²⁶² “Any witness who intends to provide an opening statement as part of the evidence presented in an oral hearing must file a copy of the opening statements at least 24 hours in advance.”²⁶³

14. Review and Variance

The rule amendments discussed to this point have all been amendments to Rule 001 approved by the Commission on April 27, 2021.²⁶⁴ The most important amendment may be the amendment to Rule 016 approved a short time later on May 6, 2021.²⁶⁵

For many years parties appearing before the AUC had the opportunity to apply to the Commission if they didn’t like the Commission decision.²⁶⁶ It was called an application for Review & Variance or R&V.²⁶⁷ If the parties did not like the Commission’s R&V decision, they then had an opportunity to go to the Alberta Court of Appeal or at least apply for leave.²⁶⁸

[T]he new rule eliminates errors of law or jurisdictions as grounds for R&V [application]. A R&V application continues to exist, but the amendments “accelerate the deadline for filing an R&V application from 60 days to 30 days.

The elimination of errors of law and jurisdiction as grounds for an R&V application requires the parties that question the legality of an AUC decision to apply directly to the Court of Appeal under s[ection] 29 of the *AUC Act*. . . . [T]his appears to be consistent with the Supreme Court of Canada decision in *Vavilov*, which interprets provisions such as s[ection] 29 as intending that the Court, . . . not the [administrative tribunal is required to decide] the correct interpretation of the law.²⁶⁹

There was also an efficiency argument.²⁷⁰ The Commission states that this reform is designed to minimize overlap with the Court of Appeal with respect to questions under review or appeal.

The amended rule 016 applies to all R&V applications filed after June 15, 2021. It is [not clear] whether eliminating errors of law and jurisdiction as grounds for [an] R&V

260. *Id.*

261. RULE 001: RULES OF PRACTICE, *supra* note 193, at 26.

262. *Id.* at 25.

263. *Id.* at 26.

264. *Id.* at 1.

265. *Alberta Utilities Commission takes aim at rules of practice and review proceedings*, BLG (May 11, 2021), <https://www.blg.com/en/insights/2021/05/alberta-utilities-commission-takes-aim-at-rules>.

266. *Id.*

267. *Id.*

268. *Id.*

269. BLG, *supra* note 265.

270. *Id.*

[application will lead to greater efficiency]. . . . [I]t remains to be seen [if] the Court of Appeal will continue to expect appellants to exhaust all remedies before pursuing an appeal.²⁷¹

In cases where applicants are seeking to review a decision based on fact or changed circumstances and a question of law or jurisdiction, they will be required to file both a R&V application with the Commission and seek permission to appeal from the court within 30 days of the challenged decision.²⁷²

15. Wide Discretion

The new Rule 001 grants the AUC wide discretion when it comes to administering the practice and procedures relating to hearings under its jurisdiction.²⁷³ The following 12 sections detail that discretion.

2.3 The Commission may, at any time before making a decision on a proceeding, issue any directions it considers necessary for the fair, expeditious and efficient determination of an issue.

2.4 The Commission may dispense with, vary, or supplement all or any part of these rules if it is satisfied that the circumstances of any proceeding, or the fair, expeditious and efficient resolution of any issue, require it.

. . . .

2.5 The Commission may set time limits for doing anything provided for in these rules and may extend or abridge a time limit set out in these rules or by the Commission, on any terms that it considers reasonable, before or after the expiration of the time limit.

. . . .

6.3 If an application is not complete when filed, the Commission may

- (a) make an information request to the applicant;
- (b) direct the applicant to provide any additional information the Commission requires in order to accept the application; or
- (c) in the case where the Commission identifies a material deficiency, dismiss the application with an explanation of the deficiency in the application and close the proceeding.

. . . .

12.3 If an applicant does not take any steps with respect to an application within a time specified by the Commission, the Commission may declare the application to be withdrawn by a certain date, unless the applicant shows cause before that date why the application should not be declared to be withdrawn.

. . . .

14.5 The Commission may issue whatever directions on procedure it considers necessary, including restricting the scope of a hearing and imposing limits on the number of information requests each party may ask.

. . . .

17.1 The Commission may, at any time during a proceeding,

- (a) place an application into abeyance and suspend the proceeding; or

271. *Id.*

272. *Id.*

273. RULE 001: RULES OF PRACTICE, *supra* note 193.

(b) in the case where the Commission determines that it cannot continue to process an application, dismiss the application with an explanation of the dismissal and close the proceeding.

....

23.1 The Commission may direct a party to file such further information, documents or material as the Commission considers necessary to permit a full and satisfactory understanding of an issue in a proceeding.

....

24.1 Despite any other provision in these rules, the Commission may, on any terms it determines,

- (a) allow the revision or removal of all or any part of a document; or
- (b) order the revision or removal of all or any part of a document that in the opinion of the Commission, is
 - (i) not relevant or may tend to prejudice or delay a proceeding on the merits, or
 - (ii) necessary for the purpose of hearing and determining the pertinent questions at issue in the proceeding;

....

36.4 When the Commission holds a written hearing, it may

- (a) dispose of the proceeding on the basis of the documents filed by the parties;
- (b) require additional information and material from the parties; or
- (c) decide, at any time during the written hearing, to hold an oral hearing.

....

36.7 When the Commission holds an oral hearing for a rates proceeding, no party may question a witness unless the party obtains approval from the Commission in advance.

....

36.9 Questioning of witnesses in a rates proceeding shall be restricted to the specific witnesses, issues and time limits approved by the Commission in advance.

....

38.1 The Commission may, on its own initiative or at the request of a party, issue a notice requiring a person to

- (a) produce the documents and material out in the notice; or
- (b) attend an oral hearing as a witness.²⁷⁴

The revised Rule 016 adds the following:

“2(1) Notwithstanding sections 3 to 5 of these rules, the Commission may review a decision, in whole or in part, on its own motion at any time for any reason.”²⁷⁵

274. *Id.*

275. ALBERTA UTILITIES COMM'N, REVIEW OF COMMISSION DECISIONS 2 (May 6, 2021) <https://media.www.auc.ab.ca/prd-wp-uploads/2021/12/Rule016.pdf>.

16. Are the Rules Working?

Pursuant to the *Red Tape Reduction Act*, the AUC is responsible for tracking, reporting and monitoring its progress to the Department of Energy.²⁷⁶ Direction to the AUC regarding its responsibilities was received by the AUC by way of Ministerial Order 181/2020.²⁷⁷ The order states as follows:

RED TAPE REDUCTION DIRECTION

The Alberta Utilities Commission (AUC) shall

I. Establish a red tape reduction task force within the AUC, instructed specifically to:

- a) Create a Red Tape Reduction Work Plan outlining how the AUC will achieve a one-third reduction in regulatory requirements by 2023;
- b) Review AUC regulations, directives, rules, policies and forms to find efficiencies and duplications;
- c) Work with the Department of Energy to assess and implement red tape recommendations; and
- d) Assist the Department of Energy with any ad hoc red tape reduction information and reporting requests relating to the AUC.²⁷⁸

2. Report on the progress the AUC has made on red tape reduction to the Minister during the first week of each month.²⁷⁹

The AUC retained an independent consultant to benchmark the performance of the AUC against other comparable North American regulators.²⁸⁰

As of the end of fiscal year 2021-22 the AUC was able to considerably improve its processing timelines across all application types.²⁸¹

For example, specific improvements resulting from the *Regulation Review Report* recommendations have resulted in the AUC averaging about 7.4 months from the filing of a complex rates application to the issuance of a final decision. This represents a 41 per cent improvement in the time it takes to review complex rate cases. The AUC now ranks among the top two quartiles of peer North American regulators when comparing the time it takes to review an application.²⁸²

This is in relation to the benchmarking study undertaken in 2020.²⁸³

Improvements have also been realized over all other application types. Assertive case management has been applied to 738 proceeding improving the average full cycle time by approximately 33%.

276. Red Tape Reduction Direction (Alberta Utilities Comm'n), S.A. Ministerial Order 181/2020 (Can.).

277. *Id.*

278. *Id.*

279. *Id.*

280. "Fastest turnaround times in North America": *Alberta Utilities Commission adopts assertive efficiency measures for regulatory hearings*, OSLER HOSKIN & HARCOURT LLP, <https://www.lexology.com/library/detail.aspx?g=3cd4d42f-0f5a-4001-9b2b-f01c14eac899>.

281. *Shortened timelines and increased accountability for issuing cost claim and review and variance decisions*, ALBERTA UTILITIES COMM'N (Mar. 30, 2021), <https://www.auc.ab.ca/shortened-timelines-and-increased-accountability-for-issuing-cost-claim-and-review-and-variance-decisions/>.

282. ALBERTA UTILITIES COMM'N, 2021-2022 REPORT CARD (FEB. 2022), <https://media.www.auc.ab.ca/prd-wp-uploads/News/2022/2022-06-27-Announcement.pdf>.

283. *Id.*

In addition to adopting assertive case management, the AUC has introduced other application streamlining initiatives, including checklist applications, expedited processes for compliance filing and other strategies that have been applied to 387 proceedings, improving average full cycle time by 49.9%.

In terms of red tape reduction, the AUC has achieved a 48.2 per cent reduction in red tape since the benchmark regulatory count was established in 2019. This is far ahead of schedule and well above the target of reducing red tape by one-third by 2023.

Lastly, while many of the resulting benefits of regulatory efficiency improvements are not easily expressed in dollar amounts, the AUC has, where possible, attempted to identify direct cost savings related to its work. As of March 31, 2022, the cumulative internal and industry red tape reduction and efficiency cost savings are an estimated \$9.2 million.

17. Future Amendments

The Alberta rule reform process is not finished.²⁸⁴ Three developments are expected in the next year. First, the AUC advised that in coming months it will release practice notes with respect to the rules.²⁸⁵ This is an important but new concept for energy regulators. Energy regulation has become a lot more complicated in recent years. The issuance of practice notes on an annual basis would be a welcome addition. The process has long been used in the court system.

The Commission is also required to advise the Minister of Energy on a monthly basis with respect to the efficiency gains resulting from the rule amendments. This is the first time in the history of Canadian energy regulation that any regulator has been required to provide monthly reports on the efficiency of its hearing process.

There is another regulatory reform in Alberta that is likely to unfold over the next year.²⁸⁶ The AUC like many Canadian regulators does not have a very robust settlement process.²⁸⁷ The exception is Ontario that has a long-standing panel of mediators. Settlements and mediations are now commonplace in all court proceedings across the country. There is no reason why it cannot happen in energy hearings. As part of the red tape regulation reform, the AUC has received an expert report on settlements.²⁸⁸ That report recommended seven amendments to the

284. ALBERTA UTILITIES COMM'N, AMENDMENTS TO AUC RULE 001 (May 3, 2021), <https://media.www.auc.ab.ca/prd-wp-uploads/News/2021/Bulletin%202021-10.pdf>.

285. *Id.*

286. GOV'T OF ALBERTA, ANNUAL REPORT: ENERGY (June 4, 2021), <https://open.alberta.ca/dataset/cbd7147b-d304-4e3e-af28-78970c71232c/resource/4da34006-a913-46e7-b7cc-eb8d66e2e999/download/energy-annual-report-2020-2021.pdf>.

287. *Id.* at 79.

288. ALBERTA UTILITY COMM'N, CCA RESPONSE TO THE JANUARY 7, 2022, AUC – LIST OF ROUNDTABLE DISCUSSION ITEMS, (Mar. 2, 2022), https://ehq-production-canada.s3.ca-central-1.amazonaws.com/b19604962a9734a4364b0c84b8e7a6ddba6720c1/original/1646253450/52a0fbc8884c34cf75ff534a71344d9b_CCA_commentso_on_AUC_January_7_List_of_roundtable_discussion_items_final.pdf?X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIA4KKNQAKIOR7VAOP4%2F20221108%2Fca-central-1%2Fs3%2Faws4_request&X-Amz-

current Rule 018, rules on negotiated settlements.²⁸⁹ The Commission is in the process of developing new rules in this area. This will also become an important milestone.

The final development we can expect over the next year is a review of the cost rules in rate cases.²⁹⁰ There is a link between the cost initiative and new settlement procedures.²⁹¹ Bulletin 2022 – 10 deals with the draft amendments to Rule 0022 and points out that parties appearing before the Commission should be encouraged to participate in cost-effective programs such as negotiated settlements.²⁹² The AUC received comments on the draft rules on August 10, 2022.²⁹³ A decision is expected shortly.²⁹⁴

III. IN THE COURTS

A. Constitutional Issues

1. Reference re Impact Assessment Act

“The Alberta Court of Appeal recently” issued a major constitutional decision relating to the energy sector in a reference case regarding the *Federal Impact Assessment Act*²⁹⁵ (*IAA*).²⁹⁶ As in the *Greenhouse Gas Pollution* case decided in 2020,²⁹⁷ the Alberta Court of Appeal declared this legislation unconstitutional.²⁹⁸ And as in the case of *Greenhouse Gas Pollution*, the federal government has signalled that they will appeal the decision to the Supreme Court of Canada.²⁹⁹

“[The IAA as] Bill C-69 . . . received royal assent in June 2019” and was quickly labelled “No More Pipelines Act” by the Alberta Premier.³⁰⁰ The legislation:

Date=20221108T044558Z&X-Amz-Expires=300&X-Amz-SignedHeaders=host&X-Amz-Signature=7ca9b9e14d5efbe0683ba244d73b57d859b308228d821b6404eb83cfb3d74032.

289. *Id.*

290. ALBERTA UTILITY COMM’N, REQUEST FOR COMMENTS ON DRAFT AMENDMENTS TO RULE 022: RULES ON COSTS IN UTILITY RATE PROCEEDINGS (June 30, 2022), <https://media.www.auc.ab.ca/prd-wp-uploads/News/2022/Bulletin%202022-10.pdf>.

291. *Id.*

292. *Id.*

293. *Id.*

294. REQUEST FOR COMMENTS ON DRAFT AMENDMENTS TO RULE 022: RULES ON COSTS IN UTILITY RATE PROCEEDINGS, *supra* note 290.

295. Federal Impact Assessment Act, SC 2019 c.28. s. 1.

296. Reference re Impact Assessment Act (2022), A.R. 165.

297. Reference re Greenhouse Gas Pollution Act (2020), A.R. 74.

298. *The Rhetoric of Property and Immunity in the Majority Opinion in the Impact Assessment Reference*, ABLAWG (June 8, 2022), <https://ablawg.ca/2022/06/08/the-rhetoric-of-property-and-immunity-in-the-majority-opinion-in-the-impact-assessment-reference/>.

299. *Reference re Greenhouse Gas Pollution Act*, *supra* note 297.

300. Jeremy Barretto et al., *Alberta Court of Appeal: Climate Change Not A Basis “To Tear Apart the Constitutional Division of Powers”*, CASSELS (May 12, 2022), <https://cassels.com/insights/alberta-court-of-appeal-climate-change-not-a-basis-to-tear-apart-the-constitutional-division-of-powers/>.

establish[ed] various types of federal assessments for projects, depending on whether or not the project meets the criteria of a “Designated project.” If a federal assessment is required, the Impact Assessment Agency, a joint review panel established [by the legislation] . . . will conduct the assessment to determine the environmental effects of the project. Where [it is] determine[d] that the project is likely to result in a significant adverse environmental impact, the [government] may decide if the emissions are justified. . . .³⁰¹

The Alberta government argued in the reference case before the “Court of Appeal that this was an overreach of federal jurisdiction that ‘threaten[ed] to [eliminate any] provincial authority over resource development.’”³⁰²

[T]he *Constitution Act, 1867* does not assign the environment to either Parliament or the provincial legislatures. [The federal government] can pass environmental legislation in the area of federal jurisdiction. . . . The federal government argued that the IAA relates to areas within federal jurisdiction. Alberta [on the other hand] argued that the IAA provided a complete federal veto over the development of natural resources which is an area of provincial jurisdiction.³⁰³

“[T]he Court of Appeal held that the [main purpose of the IAA] was to regulate any [program]” subject to federal jurisdiction and oversight, “not[ing] that the IAA . . . target[s] activities that generate greenhouse gas emissions” which is an “extremely broad” category.³⁰⁴ Like the *Greenhouse Gas Pollution Pricing Act* this legislation is headed to the Supreme Court Canada.³⁰⁵ There the arguments will likely be similar to those raised in the *Greenhouse Gas Pollution* case.³⁰⁶

The decision of the majority starts with a lengthy history of the complaints that Alberta has had over the years with federal jurisdiction with respect to natural resources.³⁰⁷ The tenor of the debate can be best be seen through the following paragraphs:

Sustainable economic development cannot be achieved without a sustainable healthy environment and society. Since we all want a healthy biosphere in which to live, we expect our governments to make informed decisions about proposed larger scale projects in this country in a careful and precautionary manner. The utility therefore of environmental impact assessments of such projects to determine their environmental, social, economic and health impacts is undisputed. That has been unanimously recognized by the four governments and all intervenors who participated in this Reference. Indeed, without exception, every government in this country has, in aid of responsible stewardship of the environment, enacted comprehensive environmental assessment processes to evaluate the benefits and burdens of significant proposed infrastructure and resource activities.

Times of great change often lead to pressures to centralize power. Popular thinking may consider a central government best suited to manage whatever change dominates public discourse. Today, that discourse most certainly includes climate change. The increasing frequency of weather events related to climate change and their detrimental effects are evident; the need to act with urgency on this front undeniable. But this should not be confused with the issue at stake here.

301. *Id.*

302. *Id.*

303. *Id.*

304. Barretto et al., *supra* note 300.

305. *Reference re Greenhouse Gas Pollution Act*, *supra* note 297.

306. *Reference re Impact Assessment Act*, *supra* note 296.

307. *Reference re Greenhouse Gas Pollution Act*, *supra* note 297.

This Reference is not about the legitimate concerns all governments and citizens have today about climate change nor how best to address them. Nor is it about the anxiety many rightly feel about this subject. Rather, the issue before this Court is whether Parliament has overstepped the limits of its constitutional mandate under Canada's Constitution. . . .

. . . .
For reasons explained in this Opinion, the Act and Regulations are unconstitutional.

Climate change constitutes an existential threat to Canada. But climate change is not the only existential threat facing this country. The *IAA* involves another existential threat – one also pressing and consequential – and that is the clear and present danger this legislative scheme presents to the division of powers guaranteed by our Constitution and thus, to Canada itself. This Reference shines a spotlight on the crucial feature of federalism built into our constitutional framework. History teaches that government by central command rarely works in a geographically large country with a diverse population and divergent regional priorities. In most major democratic countries in the world, federalism and its associated principle, subsidiarity, have been insisted upon by the governed. That includes Canada which, by deliberate choice, is a federation not a unitary state. . . .

. . . .
Under the Constitution, the “environment” is not a head of power assigned to either Parliament or provincial Legislatures: *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 63 [Oldman River]. That being so, when either government level legislates for purposes relating to the environment, that legislation must be linked to a specific head of power within its jurisdiction. A meritorious motive – protection of the environment – does not by itself found constitutional jurisdiction for either level of government. Accordingly, Parliament is not entitled, on the basis that Canadians nationally share legitimate concerns about the environment and climate change, to legislate and regulate on the environment generally. Nor is Parliament entitled to require federal oversight and approval of intra-provincial activities otherwise within provincial jurisdiction on the basis of the environmental effects of those projects, and factors, not linked, or not sufficiently linked, to a federal head of power. And yet this legislative scheme authorizes just that.

There is a long history here. The *IAA* is a classic example of legislative creep. The federal government appears to have taken the Supreme Court decision in *Oldman River* upholding the federal government's *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467 [*Guidelines Order*] as a license to systematically expand federal powers under the environmental umbrella. The *IAA*, with its intrusions into provincial jurisdiction, is far removed from the federal environmental assessment legislation that the Supreme Court found constitutional in *Oldman River*. The assessment process under the *Guidelines Order* did not include the usurpations of provincial jurisdiction embedded in the *IAA*. It was also procedural only, a planning tool and integral component of sound decision-making. Its purpose was to provide the federal decision maker with an objective basis for granting or denying permits or approvals required for a proposed development under federal legislation. But the *IAA* extends well beyond this. . . .

. . . .
Through this legislative scheme, Parliament has also imposed a regulatory regime on all intra-provincial designated projects on provincially owned as well as provincially controlled lands. That has been accomplished through a number of means including a public interest determination by the federal executive and related decision statement. In the result, the *IAA* regulates matters within provincial competence as well as federal competence. . . .

. . . .
Parliament has the authority to legislate to protect the environment. However, it must do so in accordance with the Constitution. For reasons explained in detail in

this Opinion, we have concluded that the subject matter of the *IAA* is properly characterized as “the establishment of a federal impact assessment and regulatory regime that subjects all activities designated by the federal executive to an assessment of all their effects and federal oversight and approval”. When applied to intra-provincial designated projects, this subject matter does not fall under any heads of power assigned to Parliament but rather intrudes impermissibly into heads of power assigned to provincial Legislatures by the *Constitution Act*, 1867.

Accordingly, the *IAA* is *ultra vires* Parliament. Intra-provincial activities requiring a federal permit under other valid and applicable federal laws remain subject to those laws but in accordance with the terms of such laws, not this legislative scheme.

In summary, the federal government’s invocation of concerns about the environment and climate change that all provincial governments and Canadians share is not a basis on which to tear apart the constitutional division of powers. . . .

. . . .
Where natural resources are involved, it is each province that is concerned with the sustainable development of its natural resources, not the federal government. It is the province that owns those natural resources, not the federal government. And it is the province and its people who lose if those natural resources cannot be developed, not the federal government. The federal government does not have the constitutional right to veto an intra-provincial designated project based on its view of the public interest. Nor does the federal government have the constitutional right to appropriate the birthright and economic future of the citizens of a province.

For these reasons, we have concluded that the *IAA* is *ultra vires* Parliament.

. . . .
We ought never lose sight of the great genius of our constitutional structure which has produced a free and secure democracy, one that has served Canadians well for 155 years. Our ancestors chose a federal, not unitary, structure for a purpose – to unify separate colonies and create a country. The negotiated division of powers lies at the heart of what makes this country what it is, and why, despite significant tensions from time to time, Canada has been able to survive and prosper since Confederation. It remains one of this country’s greatest strengths. It will continue to benefit present and future generations as we face the environmental, economic and security challenges ahead providing that we respect the principles on which Canada has been founded: federalism, responsible government and the Rule of Law.³⁰⁸

Justice Greckol dissented from the opinion, concluding as follows:

It is my opinion that the *IAA*, establishing a federal environmental impact assessment regime, is a valid exercise of federal constitutional authority. The answers to the questions are: Is Part 1 of *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, S.C. 2019, c. 28, unconstitutional in whole or in part, as being beyond the legislative authority of the Parliament of Canada under the Constitution of Canada? No. Is the *Physical Activities Regulations*, SOR/2019-285, unconstitutional in whole or in part by virtue of purporting to apply to certain activities listed in Schedule 2 thereof that relate to matters entirely within the legislative authority of the Provinces under the Constitution of Canada? No.

The federal environmental assessment regime in the *IAA* and *Regulation* prohibits projects on the Project List that may have *effects in federal jurisdiction* – on fish and fish habitat, aquatic species, migratory birds, on federal lands or federally funded projects, between provinces, outside Canada, and with respect to Indigenous peoples – from proceeding unless and until the proponents engage the process and a decision is made that an assessment is unnecessary or that it is in the public interest for the project to proceed.

308. *Id.* at paras. 1-3, 5-6, 9-10, 14, 31-33, 424-425, 434.

The *IAA* and *Regulation* are the product of broad community consultation and the result of effectuating the collective views of many stakeholders, including Indigenous groups, NGOs, provinces, territories and municipalities, industry associations and companies. The *IAA* and *Regulation* comprise Canada's effort to move towards sustainability while balancing the interests of the economy, communities, Indigenous peoples, and international commitments. Regulation of environmental impacts to capitalize upon the earth's resources with minimal impact is the way of the future in a world where fresh air and clean water will be seen as fundamental human rights, requiring a balance between the interests of a thriving economy and the interests of protecting the environment and people from its harmful effects.

In a thought-provoking *cri de coeur* written prior to promulgation of the *IAA* and *Regulation*, environmental academics envisioned a future where sustainability assessments are responsive to the interests of both the economy and the citizenry, calling for harmonization of environmental assessment regimes among multiple jurisdictional actors, including the federal government, provinces, territories, municipalities, Indigenous peoples, NGOs, academia, project proponents and industry groups, as well as the Canadian public. This approach is anticipated to have "the potential not only to resolve intensifying multijurisdictional disputes over the direction of energy and economic development in Canada in a manner that is effective, efficient, and socially inclusive, but also to develop widely-shared commitments about Canada's future".

All this to say, the complexities and urgency of the climate crisis call for cooperative, interlocking environmental protection regimes among multiple jurisdictions, each functioning at its highest and best within their constitutional jurisdiction.

In my opinion, in enacting the *IAA* and *Regulation*, Parliament has established a federal environmental assessment regime designed to regulate *effects within federal jurisdiction* caused by physical activities or designated projects; and to authorize such projects when it is in the public interest to do so, in cooperation with other jurisdictions that bear responsibility for the environment, especially the provinces and First Nations. The *IAA* confines its reach to protection of the environment and the health, social and economic conditions within Parliament's legislative authority from the adverse environmental effects of select activities that in its view, have the greatest potential for adverse effects on areas of federal jurisdiction. Having done so, the legislative regime prescribed in the *IAA* and *Regulation* is a valid exercise of Parliament's authority and compliant with the *Constitution Act, 1867*, as amended.³⁰⁹

2. The Alberta Natural Resources Transfer Agreement

The purpose of the Alberta NRTA of 1930 was to vary s 21 of the *Alberta Act* and to put Alberta in a position of *equality* with the other Provinces of Confederation "with respect to the administration and control of its natural resources."

This was achieved by stipulating that all Crown lands within the province shall henceforward "belong" to the province subject to the same conditions as are contained in s 109 (trusts and interests other than those of the Crown), plus the obligation to observe the terms and condition of interests (e.g., leases) that the Dominion had created. Certain lands were also excluded from the transfer including Indian reserves and national parks as listed in a schedule to the Agreement. In addition, ss 20 – 22 of the NRTA provided some financial terms including compensation to be paid to Alberta as decided by a joint commission of inquiry. . . . This compensation (albeit a rough and ready calculation) was intended to represent the "net revenue which the province would probably have obtained from those portions of its resources alienated or otherwise disposed of by the Dominion during the course of its twenty-five year administration."

309. *Id.* at paras. 760-765.

The NRTA did not amend s 92 of the *Constitution Act, 1867* since, as observed above, Alberta already had all the legislative powers of the original provinces of Confederation.

What did the majority opinion say about the Alberta NRTA?

Again, the majority's opinion generally tracks this account, although the majority again suggests that the province "gained a number of significant new powers," which we would argue is not the case. The province did not obtain new legislative powers via the NRTA, although the transfer did place the now-provincial public lands and resources within the legislative ambit of s 92(5). Furthermore, the majority makes no reference to the financial terms of the Agreement as part of putting Alberta in a position of equality with the original provinces of Confederation.³¹⁰

a. Section 92A: The Resources Amendment

Section 92A, the focus of much of the discussion in the majority opinion, reads as follows:

- 92A (1) In each province, the legislature may exclusively make laws in relation to
- (a) exploration for non-renewable natural resources in the province;
 - (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
 - (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.
- (2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.
- (3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.
- (4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of
- (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
 - (b) sites and facilities in the province for the generation of electrical energy and the production therefrom, whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

Primary production

- (5) The expression *primary production* has the meaning assigned by the Sixth Schedule.
- (6) Nothing in subsections (1) – (5) derogates from any power or rights that a legislature or government of a province had immediately before the coming into force of this section.

Section 92A was added to the *Constitution Act, 1867* in 1982 at the time that the constitution was patriated from the United Kingdom, the *Charter of Rights and Freedoms* was adopted, constitutional recognition was afforded to Aboriginal and treaty rights, and a constitutional amending formula was added.

310. *The Rhetoric of Property and Immunity in the Majority Opinion in the Impact Assessment Reference*, *supra* note 298.

Subsection (1) of s 92A provides that the provinces have the exclusive power to make laws with respect to the exploration for non-renewable natural resources (s 92A(1)(a)), the “development” (a word the significance of which the majority emphasizes at para 415), conservation, and management of non-renewable and forest resources including “the rate of primary production therefrom” (s 92A(1)(b)), and in relation to sites for the generation and production of electrical energy (s 92A(1)(c)).

...

Section 92A adds nothing to provincial proprietary rights. While s 92A(6) makes it clear (see para 413 & n 204) that the section does not derogate from provincial proprietary rights, there is nothing in s 92A that affords additional protection to provincial property rights. At the risk of stating the obvious, s 92A – like all other legislative heads of powers – is about assigning the authority to *make laws* in relation to certain classes of subjects. Laws that are in “pith and substance” about managing natural resources in the province fall within s 92A’s legislative authority. Those that are not, do not.

...

Section 92A does not provide for exclusive provincial jurisdiction over resource projects. The majority decision in *Westcoast Energy Inc v Canada* . . . states that the language of s 92A(1)(b) “does not refer to jurisdiction over ‘sites and facilities’, but more generally to jurisdiction over ‘development, conservation and management of non-renewable resources’” (at para 84). The exclusivity in s 92A refers to the subject matter of legislation. Laws affecting resource projects may be validly enacted by the federal government. In fact, the majority contradicts its own assertion that the provinces have exclusive jurisdiction with respect to major projects in note 109, when it quotes the opinion of Justice Ian Binnie in *Moses*, which held that federal fisheries legislation could validly restrict the development of an intra-provincial project because “the mining of non-renewable mineral resources aspect falls within provincial jurisdiction, but the fisheries aspect is federal.” The fact that a federal law affects a resource project in a province offer no grounds upon which to judge the validity of that federal law. On the contrary, as Chief Justice Beverley McLachlin wrote in *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 (CanLII), it is “untenable to argue that a valid federal law becomes invalid if it affects a provincial subject” (at para 51).³¹¹

B. Jurisdiction Decisions

Jurisdiction decisions are fairly common, as well as an important category of court decisions for energy regulators.³¹² Similar to last year, there are six jurisdiction decisions discussed in this report.³¹³

The first was a decision of the Ontario Superior Court of Justice in *Waterloo Hotel*.³¹⁴ *Waterloo Hotel* had applied for electricity rebates that were available to electricity customers under a new Ontario government program.³¹⁵ The rebate

311. *Id.*

312. *Court Challenges to Canada Energy Regulator or Governor in Council Decisions*, CANADA ENERGY REGUL., <https://www.cer-rec.gc.ca/en/applications-hearings/court-challenges/index.html> (last updated Aug. 11, 2022).

313. *See infra* section III.B.

314. *Vista Waterloo Hotel Inc. v. Kitchener Wilmot Hydro* (2021) O.R. 2724 (Can. Ont. Sup. Ct. J.).

315. *Id.*

program was being administered by the electricity distributor in each market which in this case was Kitchener Wilmont Hydro (KWH).³¹⁶

KWH refused to grant Waterloo Hotel the requested discount.³¹⁷ Waterloo Hotel then brought a motion before the Superior Court.³¹⁸ KWH requested a stay of the proceedings on the basis that the Superior Court of Justice did not have jurisdiction to hear the matter.³¹⁹ “The Ontario Energy Board agree[d] with” the KWH position because the dispute at issue was within the “exclusive jurisdiction of the Ontario Energy Board.”³²⁰

“KWH determined that the applicant was not eligible for rebate” under the program the “consumers living in the hotel did not meet the definition of a consumer living in a residential complex.”³²¹ “[T]hey were living in the hotel on a long-term basis and had no other residential address.”³²² When the hotel was refused it applied to the court for a declaration that it was included in the definition of an eligible customer in the legislation.³²³

The court rejected the applicant’s claim because it found that the “OEB ha[d] exclusive jurisdiction in this matter” and the court application should be stayed.³²⁴ The court relied on section 19 of the *OEB Act* that grants the Board exclusive jurisdiction in respect of all matters in which jurisdiction is conferred by its legislation.³²⁵ The Board referenced a long line of authorities on this point as set out below.³²⁶

The Ontario Energy Board Act, Section 19 sets out the basic provision concerning exclusive jurisdiction:

1. The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.

2. The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act.

At section 112.3, the OEB Act states,

If the Board is satisfied that a person has contravened or is likely to contravene an enforceable provision, the Board may make an order requiring the person to comply with the enforceable provision and to take such action as the Board may specify to,

(a) remedy a contravention that has occurred; or

(b) prevent a contravention or further contravention of the enforceable provision.

In *Garland v Consumers’ Gas Company Ltd*, the Ontario Court of Appeal expressly accepted that, given the exclusive nature of the OEB’s jurisdiction as confirmed by [s]ection 19(6) of the Act, “there can be no issue of concurrent jurisdiction in the courts and the Board.” This position was confirmed in *Snopko v. Union Gas*, where the court held that the Board maintained exclusive jurisdiction even though

316. *Id.*

317. *Id.* at para. 4.

318. *Vista Waterloo Hotel Inc.* (2021) O.R. 2724 at para. 2.

319. *Id.* at para. 1.

320. *Id.*

321. *Id.* at para. 4.

322. *Vista Waterloo Hotel Inc.* (2021) O.R. 2724 at para. 4.

323. *Id.*

324. *Id.* at 11.

325. *Id.* at 18.

326. *Vista Waterloo Hotel Inc.* (2021) O.R. 2724 at 12-18.

there were properly pleaded, common law claims of breach of contract, negligence, unjust enrichment and nuisance that were otherwise within the jurisdiction of the court. As the court noted, “if the substance of the claim falls within the ambit of s[ection] 38 the Board has jurisdiction, whatever legal label the claimant chooses to describe it.”

Canadian courts have consistently held that where the subject matter involves a complex regulatory scheme and there is a body created by statute for, amongst other matters, the adjudication of disputes involving the interpretation of the provisions of that scheme, the courts should defer to the administrative body.

In *Mahar v. Rogers Cablesystems Ltd*, the court outlined three situations where the courts are reluctant to permit jurisdiction to be divided between the regulatory body or tribunal and the courts:

[1.] where there is a regulatory framework with the legislature choosing a specific public body to supervise that regulatory framework;

[2.] where the courts have granted the administrative body at issue a curial deference with respect to their decisions; and

[3.] where Parliament or the legislature has created a statutory regime, which includes both rights and a procedure for their resolution.³²⁷

The next jurisdiction case is the decision of the Ontario Supreme Court Justice in *West Whitby Waterloo Hotel* decision.³²⁸ This case limits the court review of an energy regulator. West Whitby was a property developer that ran into a dispute with the local energy distributor, Elixicon Energy, and the Ontario Energy Board.³²⁹

The property developer needed electricity for a new property being developed and sought an electricity connection.³³⁰ The cost of supplying electricity to the new property by Elixicon depended on whether the project was classified as an “enhancement” or an “expansion.”³³¹ There was a big difference in the cost.

West Whitby decided to get an opinion from the Ontario Energy Board.³³² The interesting point was this: the parties entered into an Offer to Connect Agreement in which they agreed to refer any dispute about whether the work was an extension or enhancement under the Code to the OEB and that decision would be final and binding.³³³ They also agreed that if the project was an “expansion,” West Whitby would pay.³³⁴ If it was an “enhancement,” Elixicon would pay.³³⁵

The staff issued two opinions.³³⁶ Both opinions agreed with Elixicon’s position that the project work was considered to be an expansion.³³⁷ West Whitby then asked the Ontario Superior Court to order the Ontario Energy Board to hold a hearing.³³⁸ For the reasons set out below, the Court rejected the request:

327. *Id.*

328. *West Whitby Landowners Group Inc. v. Elixicon Energy*, 2022 ONSC 1035 (Can.).

329. *Id.* at para 1.

330. *Id.* at para 8.

331. *Id.* at para 9.

332. *West Whitby Landowners Group Inc.*, 2022 ONSC at para 10.

333. *Id.* at para 9.

334. *Id.*

335. *Id.* at para 13.

336. *West Whitby Landowners Group Inc.*, 2022 ONSC at para 13.

337. *Id.*

338. *Id.* at para 1.

For the reasons below, the application for judicial review is dismissed. I agree with the respondents' preliminary arguments. In my view, this Court does not have jurisdiction over the OEB's opinion that the project is primarily an expansion because this was not the exercise of a statutory power of decision. In addition, WWLG does not have standing to compel the OEB to hold a hearing or to challenge the OEB's assessment of its complaint. At most, WWLG would have standing to compel the OEB to deal with its complaint, which the OEB did.

.....
 The respondents argue that the Divisional Court does not have jurisdiction over the application because the Board did not exercise a statutory power of decision. They approach this issue from two different perspectives. First, they argue that the Board did not make a decision because it only provided an opinion for the purpose of helping the parties resolve their differences. Second, they argue that, even if the Board made a decision, the only decision it made was not to refer the matter for a hearing. WWLG does not have standing to challenge such a decision.

.....
 One of the challenges in this case is to tease out the role of the agreement between the parties from the OEB's statutory functions. While the parties can agree to be bound by an OEB opinion or determination, they have no power to require the OEB to do anything or follow any process that is not provided for by statute or regulation. Accordingly, the agreement is irrelevant to the issue of what the OEB should have done and how it should have handled the communications from the parties, and, therefore, ultimately irrelevant to the issue of whether WWLG can challenge the OEB's opinion and decision not to refer the issue to a hearing.

.....
 As reviewed above, section 105(a) of the Ontario Energy Board Act gives the OEB the power to receive complaints and section 105(b) gives the OEB the power to "make inquiries, gather information and attempt to mediate or resolve complaints". Therefore, the starting point for assessing this Court's jurisdiction over the application for judicial review is whether this Court has jurisdiction to consider an application for judicial review of a decision made by the OEB over how to deal with a complaint under section 105 of the Act.

.....
 On the first issue, in my view, WWLG has no standing to ask this Court to compel the OEB to hold a hearing. Looking at section 105 in combination with the provisions in Part VII.1, it is evident that, while WWLG can make a complaint, it has no standing to require that the Board hold a hearing if it is not satisfied with the manner in which the Board has handled the complaint. As reviewed above, the *Ontario Energy Board Act* sets out a clear process leading to a hearing. That process provides that the OEB can conduct an investigation and make an order against an electricity provider, after which the provider can request a hearing to challenge the order. There is nothing in this process that gives a complainant status to request or compel a hearing. The wording of section 112.2(1) of the Ontario Energy Board Act is clear; it provides that an "order under section 112.3, 112.4 or 112.5 may only be made on the Board's own motion" [emphasis added]. As held in *Ocean Port Hotel Ltd. v. British Columbia*, 2001 SCC 52, at para. 22, the principles of natural justice can be ousted by clear and unambiguous language. Here, the legislature has made it clear that only the OEB can trigger the process leading to a hearing into a concern that an electricity provider is not complying with the law, including the Code. In *Graywood Investments Ltd. v. OEB*, 2005 CanLII 2763 (Div.2022 ONSC 1035 (CanLII) Ct.)1, at para. 22, Molloy J. reached a similar conclusion when dealing with predecessor legislation, holding that:

There is no requirement that the Board hold a hearing every time a complaint is referred to it. Rather, the right to a hearing arises only where, after its initial investigation, the Board is inclined to issue a notice of non-compliance. Even then, it is the licensee rather than the complainant who is entitled to request a

hearing. Apart from that, it is entirely within the discretion of the Board whether to hold a hearing in this type of situation. . .

Accordingly, in my view, WWLG has no standing to ask this Court to compel the OEB to hold a hearing.

The OEB opinion is not the exercise of a statutory power of decision

On the second issue, in my view, this Court does not have the jurisdiction to review the OEB's opinion and how it arrived at that opinion.

Section 2(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, provides that on an application for judicial review, the Divisional Court can grant an "order in the nature of mandamus, prohibition or certiorari" or a declaration "in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power".

In my view, the OEB's opinion regarding whether the MS16 is an expansion or an enhancement is not a decision giving rise to the public law remedy of certiorari. While the OEB is a public body that makes many decisions of a public character, in this case, the first factor, namely the character of the matter, weighs heavily against the availability of public law remedies. The parties sought the opinion for the purpose of resolving their private dispute. The fact that they agreed to be bound by the OEB's opinion does not turn the opinion into a decision of a public character. Ultimately, the only decision made by the OEB was not to refer the matter for further investigation or not to make an order against Elexicon which, as reviewed above, is a decision that WWLG does not have standing to challenge.

The analysis is similar if WWLG had sought declaratory relief under section 2(1)2 of the *Judicial Review Procedure Act*. Section 1 of the Act defines the "exercise of a statutory power of decision" as follows:

"statutory power of decision" means a power or right conferred by or under a statute to make a decision deciding or prescribing,

(a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or

(b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not, and includes the powers of an inferior court.

The OEB and Elexicon argue that the OEB did not exercise a statutory power of decision and the Court therefore cannot review the decision. They point to a distinction in the case law between different complaint regimes and submit that the OEB complaint process falls into the category of cases where courts have found that a decision not to take further steps in relation to a complaint is not the exercise of a statutory power of decision.

....

From the perspective of the statutory scheme, WWLG is in no different position than any member of the public who makes a complaint against an electricity supplier. Pursuant to section 105 of the *Ontario Energy Board Act*, the OEB is given broad discretion over how it will handle the complaint. This includes the ability to help the parties resolve the complaint, which is what the OEB did here by providing its opinion. However, this does not mean that a complainant can seek to judicially review the OEB's opinion. The only statutory decision the OEB makes when receiving a complaint is whether to conduct an investigation and, ultimately, whether to make an order against a regulated entity. The Act makes clear that only the OEB has the power to make such an order and members of the public have no right to compel an investigation or an order against a regulated entity.

Accordingly, in my view, the OEB's opinion on whether the MS16 is an enhancement or an expansion is not subject to judicial review. This was not the exercise of a statutory power. The OEB provided this opinion to the parties because they requested that it do so as part of their dispute resolution process. In addition, WWLG has no standing to challenge the decision of the OEB not to conduct an investigation and not to make an order against Elexicon. At most, if the OEB had not processed the complaint, Elexicon could have challenged its failure to do so. But there is no

legal basis on which WWLG can seek to judicial review the process the OEB followed in handling the complaint or the opinion given by the OEB on the nature of the MS16.

For the reasons above, the application for judicial review is dismissed.³³⁹

The next decision involving jurisdiction is a decision of the Alberta Court of Appeal in September 2021 in *Utility Consumer Advocate*.³⁴⁰ It involved a decision by the AUC to extend the period in time that the AUC's decision on the approved rate of return would apply.³⁴¹ That rate of return had initially been approved in 2019 and the AUC decided that given the difficulties created by COVID-19 the decision would be extended for a number of months beyond the date originally set for its review.³⁴² The Office of the Utilities Consumer Advocate (Consumer Advocate) had been established by the government "to represent the interests of Alberta residential, farm and small business consumers of electricity and natural gas."³⁴³ The Consumer Advocate objected to the extension while the utilities that were affected generally approved the AUC's decision.³⁴⁴ The question before the court was whether the AUC had exceeded its jurisdiction in failing to renew the rate of return that utilities are entitled to earn in accordance with the previously set schedule.³⁴⁵

The AUC and ultimately the court decided that the AUC had the authority to make the decision not to renew the rate of return.³⁴⁶ The Court of Appeal upheld the commission's decision on March 4, 2021 to delay setting of the return on equity "because the economic and market data that would normally be used remained in a state of flux, and any evidence would be clouded by an unusual degree of uncertainty."³⁴⁷ The court ruled that when the commission set a fair rate of return using the same level of proof for 2021 it was probably exercising its discretion stating as set out below:

Test for Permission to Appeal

Pursuant to section 29(1) of the *AUCA*, an appeal lies from a decision or order of the Commission to the Court of Appeal on a question of jurisdiction or on a question of law. In order to succeed, the applicant must demonstrate that the question of law or jurisdiction raises a "serious, arguable point": *TransAlta Corporation v Alberta (Utilities Commission)*, 2021 ABCA 232 at para 16; *Remington Development Corporation v ENMAX Power Corporation*, 2016 ABCA 6 at para 10. . . .

There is no question that the application of the Fair Return Standard is an issue that is of significance to the practice and of significance to the proceeding itself as setting a fair return is an important component in setting the tariff that utilities are allowed to charge their customers and involves hundreds of millions of dollars annually.

Merits of the proposed ground of appeal, the standard of review and delay

339. *Id.* at paras. 4, 25, 27, 29, 31-34, 37-39, 44-46.

340. *The Office of the Utilities Consumer Advocate v. Alberta Utilities Comm'n*, 2021 ABCA 336 (Can.).

341. *Id.* at para. 1.

342. *Id.* at para. 2.

343. *Id.* at para. 1.

344. *The Office of the Utilities Consumer Advocate*, 2021 ABCA at para. 4.

345. *Id.* at para. 10.

346. *Id.*

347. *Id.*

Nowhere in the *Northwestern Utilities* decision is a specific method for the Commission mandated. The majority in *Northwestern Utilities* emphasized that the then Alberta Public Utilities Board had statutory discretion in a given case to select the method, procedure and evidence it considered appropriate to determine a fair return. The Commission in this case enjoys a similar broad discretion as noted by this Court in *AltaGas Utilities Inc v Alberta Utilities Commission*, 2020 ABCA 375 at para 21, and in legislative provisions such as section 37 of the *Gas Utilities Act* that provides the Commission may determine the matters that “in its opinion are relevant” for determination of a fair return.

The Commission had discretion to employ an appropriate method and procedure given the COVID-19 pandemic. It was not required to utilize the intensive process it had used at times past; it could adopt an alternative approach, particularly in light of the COVID-19 pandemic. The applicant acknowledged those unusual circumstances when it initially moved to suspend Proceeding 24110 in the first place. . . .

. . . .
The Commission is given a wide discretion to consider all the facts it finds relevant in exercising its statutory mandate. These decisions involve questions of mixed fact and law: *Alta Gas Utilities Inc v Alberta Utilities Commission* at para 21, citing *TransCanada Pipeline Ventures Ltd. v Alberta (Utilities Commission)*, 2009 ABCA 281 at para 37. . . .

. . . .
The applicant’s argument that the Commission made an error in law by applying the incorrect test and considering irrelevant factors does not raise a question of law permitting this Court to intervene. In settling a utilities’ fair return, the Commission is empowered to weigh the evidence and exercise its judgment, which it did in this case. . . .

. . . .
Accordingly, there is no basis to allow this Court to grant permission to appeal on this proposed ground of appeal. . . .

. . . .
The applicant would have difficulty showing any unfairness arising from the Commission’s decision to depart from its past procedures given the unprecedented circumstances that existed. The applicant was not denied any procedural rights nor was it treated any differently than other parties in the proceedings.

As with the Fair Return Issue, delay is not a concern. However, this ground of appeal does not raise a question of law permitting this Court to grant permission to appeal.³⁴⁸

The next decision was the decision of the Ontario Divisional Court in *Rogers Communication*.³⁴⁹ There the Ontario Divisional court issued a decision dismissing an appeal with respect to a charge approved by the Ontario Energy Board (OEB) for wireline attachments to electricity distribution poles.³⁵⁰ To arrive at a provincewide rate for pole attachment the OEB had conducted review of charges for wireline attachments and issued a final report in March 2018 setting a provincewide rate of \$43.63 with annual adjustments based on an OEB inflation factor.³⁵¹

A group of carriers appealed to the Divisional Court and asked the court to set aside the report arguing that the OEB had failed to follow the provisions of the

348. *The Office of the Utilities Consumer Advocate*, 2021 ABCA at paras. 11-23.

349. *Rogers Communications Canada Inc. v. Ontario Energy Bd.*, 2020 ONSC 6549 (Can.).

350. *Id.* at para. 23.

351. *Id.* at para. 19.

Ontario Energy Board Act requiring the OEB to hold the hearing.³⁵² Their position was that the Board's attachment charges were a rate for transmitting electricity or retailing electricity, which required the OEB to hold a hearing.³⁵³ The Divisional Court responded that "the use of [rental] space on a pole by a telecommunication company ha[d] nothing to do with retailing or distribution of electricity."³⁵⁴ The court further noted that previously these rates had been adjusted by amending the license of electricity distributors, which contained a requirement that distributors must allow access to the poles at a specified rate, which was approved by the OEB and included in the distribution license.³⁵⁵ The court concluded that the change to the attachment charge was a lawful exercise of the OEB's jurisdiction and did not require OEB hearing.³⁵⁶ The court also concluded that the process followed by the OEB was procedurally fair.³⁵⁷

The next decision with respect to Board jurisdiction was the decision of the OEB in *Waterfront Toronto* relating to a request by Enbridge that the Board order Waterfront Toronto to pay \$70 million to cover the cost of new pipeline.³⁵⁸

Waterfront Toronto, a consortium of three governments: the City of Toronto, the Province of Ontario, and the government of Canada, argued that it had not requested pipeline and that the Board has no authority to order Waterfront Toronto to pay any or all of the cost of a pipeline because Waterfront Toronto was not a consumer of gas.³⁵⁹ Waterfront Toronto relied on earlier decisions that found that the Board's authority to allocate costs for pipeline construction was within the Board's jurisdiction only where the Board was exercising its ratemaking authority.³⁶⁰ However, in this case, Waterfront Toronto was not a gas customer and no ratemaking authority was involved.³⁶¹ Accordingly, the Board ruled that it had no jurisdiction to order Waterfront Toronto to pay any of the cost of the pipeline.³⁶²

The Board ordered the parties to engage in mediation, and when mediation failed Enbridge withdrew the application.³⁶³ A new application was filed in February 2022, to construct two new gas pipelines in the City of Toronto.³⁶⁴ One pipeline was a temporary 190-meter 20-inch diameter bypass pipeline.³⁶⁵ The other was a permanent 160-meter pipeline.³⁶⁶ "The temporary bypass pipeline would be located on the existing Lake Shore Bridge and would maintain current

352. *Id.* at para. 23.

353. *Rogers Communications Canada Inc.*, 2020 ONSC at para. 32.

354. *Id.* at para. 8.

355. *Id.*

356. *Id.* at para. 33.

357. *Rogers Communications Canada Inc.*, 2020 ONSC at para. 28.

358. *Enbridge Gas Inc.*, Ontario Energy Bd., EB-2020-0198 (Jan. 22, 2021).

359. *Id.* at para. 1.

360. *Id.* at para. 3.

361. *Id.*

362. *Enbridge Gas Inc.*, *supra* note 358, at para. 1.

363. *Id.* at para. 2.

364. *Enbridge Gas Inc.*, Ontario Energy Bd., EB-2022-0003 at para. 3 (July 7, 2022).

365. *Id.* at para. 1.

366. *Id.*

service levels to downtown Toronto while the permanent” pipeline was being constructed.³⁶⁷ The permanent pipeline will be constructed on “a newly designed utility corridor that will be located on the Keating Railway Bridge after” that bridge is upgraded and extended in length as a necessary part of the Waterfront Toronto Flood Protection Project.³⁶⁸

The negotiations between Waterfront Toronto, the City of Toronto, and Enbridge reduced the cost of the project from \$70 million to \$25 million.³⁶⁹ Waterfront Toronto agreed to contribute \$5 million to the project on a voluntary basis resulting in net cost to the Enbridge Gas customers of the \$18.5 million.³⁷⁰ The second application was approved by the Board.³⁷¹

C. *Aboriginal Property Rights*

Last year we saw three decisions which could have a significant effect on the development of the Canadian energy projects. The first of these decisions is the decision of the British Columbia Supreme Court in *Yahey*.³⁷² In that case the BC Supreme Court ruled that the BC government had unjustifiably infringed the treaty rights of the Blueberry River First Nations (BRFN) through the cumulative effects of provincially authorized industrial development over a number of decades.³⁷³ The Court issued a declaration that the province could not continue to authorize further activities until it had reached a satisfactory agreement with the BRFN and the other Treaty 8 First Nations.³⁷⁴

This decision is the first decision that has considered whether the cumulative effects of provincial development on treaty lands can amount to an unjustified infringement of treaty rights.³⁷⁵ The Court found that despite promises made to the BRFN extensive development of oil and gas, hydroelectric, mining, and agriculture had taken place during the last hundred years.³⁷⁶ This decision was a response to a motion brought before the Court by the BRFN to stop further development.

The Court rejected the argument that a treaty was only infringed if the BRFN had no meaningful land rights left.³⁷⁷ In other words, the BRFM did not need to show that they had no ability to exercise any rights, but only that their rights had been significantly diminished.

367. *Id.*

368. *Enbridge Gas Inc.*, *supra* note 364, at para. 1.

369. *Id.* at para. 2.1

370. *Id.*

371. *Id.* at para. 2.2.

372. *Yahey v. British Columbia*, 2021 BCSC 1287 (Can.).

373. *Id.* at para. 41.

374. *Id.* at para. 3.

375. *Id.* at para. 41.

376. *Yahey*, 2021 BCSC at para. 241.

377. *Id.*

The British Columbia government elected not to appeal the decision.³⁷⁸ Instead, they began negotiations with the BRFN as suggested by the Court.³⁷⁹ On October 7, 2020, the province announced that they had reached an agreement that would help provide stability and certainty for oil and gas permit holders in the BRFN traditional territory in the immediate term.³⁸⁰

The Restoration Agreement granted \$35 million to the BRFN to address past conduct including land, water, and infrastructure restoration.³⁸¹ In addition, \$30 million was allocated to support the BRFN's activities to protect its indigenous way of life.³⁸² As part of the agreement 195 forestry and oil and gas projects which had been authorized prior to the Court decision will proceed.³⁸³ However, 20 currently approved authorizations related to development activities in five areas of cultural importance will not proceed without agreement by the BRFN.³⁸⁴

The next case expanding indigenous rights is the decision of the Alberta Court of Appeal in *AltaLink Management*.³⁸⁵ There were two issues in that decision. The first was whether the AUC in approving the sale of transmission facilities to aboriginal groups had applied the no harm test correctly.³⁸⁶

The second and most important issue concerned constitutional issues that involved the concept of reconciliation and whether that concept applied to decision-making by the Commission.³⁸⁷ Two of the three judges limited their decision to the definition of the no harm test and did not address the constitutional issues.³⁸⁸ Justice Feehan offered a lengthy concurrence, in which he agreed with the majority decision but considered it appropriate to carefully explore whether the Commission's decision-making must consider the concept of reconciliation.³⁸⁹ In doing so, he started with section 17 of the *Alberta Utilities Commission Act* that clearly stated that when the Commission is conducting a hearing with respect to an application to construct a transmission line it must determine if the transmission line is in the public interest.³⁹⁰

Justice Feehan at paragraph 113 stated that reconciliation is "a work in progress of rebuilding the relationship between indigenous people and the Crown fol-

378. *Id.* at para. 260.

379. *Id.* at para. 37.

380. *Yahey*, 2021 BCSC at para. 1090.

381. *Blueberry River FN launches new resource business in B.C's north*, WESTERN INVESTOR (2022), <https://www.westerninvestor.com/british-columbia/blueberry-river-fn-launches-new-resource-business-in-bcs-north-5991061>.

382. *Id.*

383. *Id.*

384. *Id.*

385. *AltaLink Management Inc. v. Alberta Utilities Comm'n*, 2021 ABCA 342 (Can.).

386. *Id.* at para. 32.

387. *Id.* at para. 48.

388. *Id.* at para. 3.

389. *AltaLink Management Inc.*, 2021 ABCA at para. 81.

390. *Id.* at para. 104.

lowing historical and continuing injustice by the Crown against indigenous people.”³⁹¹ He further stated at paragraph 114 that “[w]hile reconciliation underlies the honour of the Crown in section 35 rights it is a distinct concept that exist separately from the honour of the Crown and includes both legal and social dimensions.”³⁹²

The following statements in the concurrence deal precisely with the concept of reconciliation.

Reconciliation is a primary consideration where constitutionally protected interests are potentially at stake. The fundamental purpose of s 35 of the Constitution Act, 1982 is to rebuild the relationship between the Crown and Indigenous peoples through reconciliation; legally, morally and socially. The fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of Indigenous peoples and non-Indigenous peoples and their respective claims, interests, and ambitions: *Mikisew Cree*, paras 1, 63. Section 35 supports reconciliation of the assertion of Crown sovereignty over Canadian territory and prior occupation by distinctive Indigenous societies by “bridging Aboriginal and non-Aboriginal cultures”: *R v Van der Peet*, [1996] 2 SCR 507, paras 42–45, 49–50, 137 DLR (4th) 289. The controlling question in all situations is what is required to effect reconciliation with respect to the interests at stake in an attempt to harmonize conflicting interests, and achieve balance and compromise: *Taku River*, para 2.

The concept of reconciliation is illustrated in *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257, para 23:

What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. . . . It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved.

[118] Any consideration of public goals or public interest must “further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective”: *Tsilhqot’in Nation*, 2021 ABCA 342 (CanLII) Page: 29 para 82. Reconciliation requires justification of any infringement on or denial of Aboriginal rights, paras 119, 125, 139, and meaningful consideration of the rights of Indigenous collectives as part of the public interest.³⁹³

The most important paragraphs in Justice Feehan’s concurrence may be at paragraphs 119 and 120 as follows:

As this Court said in *Fort McKay*, the direction to all authorized government entities to foster reconciliation particularly requires that they consider this constitutional principle whenever they consider the public interest, para 68, and requires the Crown to act honourably in promoting reconciliation, such as by “encouraging negotiation and just settlements” with Indigenous peoples: *Mikisew Cree*, para 26; *Fort McKay*, para 81.

Aiming to achieve reconciliation is a continuing obligation, existing separately from honour of the Crown. An important aspect of reconciliation is the attempt to achieve balance and compromise, essential to the consideration of the public good. Reconciliation must be a consideration whenever the Crown or a government entity

391. *Id.* at para. 113.

392. *Id.* at para. 114.

393. *AltaLink Management Inc.*, 2021 ABCA at paras. 115-16, 118.

exercising delegated authority contemplates a decision that will impact the rights of Indigenous peoples.³⁹⁴

Justice Feehan concludes his concurrence with the following two paragraphs:

The Commission is an authorized governmental entity empowered to decide questions of law and constitutional issues and make decisions that are in the public interest. As a result, it has special obligations to consider the honour of the Crown and reconciliation whenever these are raised by the parties and relevant to determining the public interest, and to provide in its decisions an analysis of the impact of such principles upon the orders made. Where one or more of the parties appearing before the Commission is an Indigenous collective which raises the honour of the Crown or reconciliation in its submissions, the Commission should consider whether those constitutional principles are applicable to its decision.

The Commission must take all relevant factors into account in determining the public interest. In exercising its authority, it is required to consider the social and legal impact of its decisions on Indigenous peoples, including doing what is necessary to uphold the honour of the Crown and achieve reconciliation between the Crown and Indigenous peoples.³⁹⁵

A third decision last year also speaks to the expansion of aboriginal rights in Canada and the concept of reconciliation. That is the decision of the Supreme Court of Canada on April 23, 2021 in *R v. Desault*.³⁹⁶

Mr. Desault was a member of the Lakes tribe in Washington State.³⁹⁷ He was charged with hunting without a license in British Columbia.³⁹⁸ He admitted he had shot an elk but argued that as a member of the Lakes tribe he had aboriginal rights protected by section 35 of the *Constitution Act*.³⁹⁹

The Court heard evidence that at one time the Lake tribe ancestral territory was on both sides of the border of what is now British Columbia and Washington state.⁴⁰⁰ The Court ruled that Mr. Desault was a modern day successor of an aboriginal society that occupied Canadian territory at the time of European contact, and the principle of reconciliation required that their aboriginal status should be recognized even if tribe members had been displaced as a result of colonization.⁴⁰¹

D. *The No Harm Test*

In a decision handed down in May 2022 the Alberta Court of Appeal in *AltaLink Management* clarified the meaning of the no context as it applies to transactions in Alberta.⁴⁰² At the same time, the court made it clear that in determining whether a transaction is in the public interest the regulator should consider the impact on aboriginal interests where aboriginal property rights are at issue.⁴⁰³

394. *Id.* at paras. 119-20.

395. *Id.* at paras. 125-26.

396. *R v. Desault*, 2021 SCC 17 (Can.).

397. *Id.*

398. *Id.*

399. *Id.* at para. 17.

400. *Desault*, 2021 SCC at para. 46.

401. *Id.* at para. 33.

402. *AltaLink Management Inc.*, 2021 ABCA at para. 35.

403. *Id.* at para. 102.

The concept of the no harm test was first used in United States by FERC in merger transactions.⁴⁰⁴ It was a reverse onus test stating that the merger would be approved where it would create no harm.⁴⁰⁵ That concept was picked up by the OEB nine years later in what was known as the Joint MAADs case where the OEB set down the basic rules with respect to mergers and acquisitions when it heard a number of merger applications at the same time.⁴⁰⁶

AltaLink Management concerned the activities of AltaLink, a major Alberta electricity transmission company.⁴⁰⁷ AltaLink had purchased a transmission system and expanded it across two first Nations reserves.⁴⁰⁸ There were alternatives to using the first Nations land but that was the lowest cost route.⁴⁰⁹ The First Nations affected agreed to the construction of transmission line on their land “in exchange for an opportunity to obtain an ownership interest in the transmission line.”⁴¹⁰

A few years after the transmission line became operational the first Nations exercised their option to acquire the interest in transmission business.⁴¹¹ AltaLink then filed an application with the AUC for approval of the transfer of the financial interest to the first Nations group as well as approval for the transmission rates.⁴¹²

The AUC approved the transfers on the condition that the partnership agreed not to recover from ratepayers \$60,000 in incremental auditor costs and the cost of the hearing.⁴¹³ The AUC applied the “no-harm test” to measure the positive and negative impacts of the transaction on ratepayers.⁴¹⁴ The AUC rejected the argument that routing the transmission line through First Nations land would save \$32 million and would create benefits for First Nation communities.⁴¹⁵ Instead, the Commission stated that the no harm test is a forward-looking exercise and the AUC can not consider the alleged savings because AltaLink failed to provide sufficient evidence of those benefits.⁴¹⁶

AltaLink then sought and obtained leave to appeal to the Court of Appeal. A majority of Court of Appeal found that the AUC erred in considering only forward-looking benefits stating that there was no legislative basis for that approach.⁴¹⁷ The majority also found that the projects would increase the economic advantages

404. *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, 77 FERC ¶ 61,263 (1996).

405. *Id.*

406. *AltaLink Management Inc.*, 2021 ABCA 342.

407. *Id.*

408. *Id.* at para. 14.

409. *Id.* at para. 20.

410. *AltaLink Management Inc.*, 2021 ABCA at para. 25.

411. *Id.* at para. 29.

412. *Id.* at paras. 31-33.

413. *Id.* at para. 34.

414. *AltaLink Management Inc.*, 2021 ABCA at para. 35.

415. *Id.* at para. 47.

416. *Id.* at para. 39.

417. *Id.* at para. 44.

on reserves which are in the public interest and should be encouraged.⁴¹⁸ The Court of Appeal varied the Commission's decision and allowed the partnership to recover the disputed regulatory costs from ratepayers.⁴¹⁹

The decision also had a concurrence by Justice Feehan. His concurrence addressed the aspect of the application that the majority determined was not necessary to address. The majority concluded its decision as follows:

We allow this appeal and direct the Alberta Utilities Commission to allow two limited partnerships ultimately controlled by the Piikani Nation and the Blood Tribe to pass on audit and hearing costs they incur as utility owners to ratepayers. The Commission had ordered the appellants to absorb these costs. This is the first and only time that the Commission has issued such an order.

The Commission determined that its approval of the electrical transmission asset transfers from AltaLink Management Ltd. to the limited partnership controlled by the Piikani Nation and the Blood Tribe would result in incremental costs to the ratepayers – the consumers of electricity. The transferees would each incur additional annual audit fees payable to external auditors and Commission hearing costs, estimated to be \$60,000. The Commission refused to allow the transferees to pass these costs on to the ratepayers.

The appellant argued that the Commission, when discharging its authority under the Alberta Utilities Act, must take into account the honour of the Crown principle and the reconciliation concept.

These arguments presented five questions.

First, does the honour of the Crown principle apply to the decision-making authority of the Commission?

Second, if so, what is the impact of the honour-of-the-Crown principle on its decision making authority?

Third, what are the legal benchmarks of “reconciliation”?

Fourth, does the reconciliation concept apply to the decision-making authority of the Commission?

Fifth, if so, what is the impact of the reconciliation concept on its decision-making authority?

The Commission committed a legal error by failing to take into account all relevant factors that determine whether a sale is in the public interest. Its decision to ignore the cost savings arising from the routing of the transmission lines across the reserves of the Piikani Nation and the Blood Tribe is an error of law.

We vary the Commission's Decision 22612-D01-2018 by ordering that the transferees be allowed to include the incremental audit and hearing costs in their respective tariff applications and recover them from ratepayers in the usual course.

Given our answer to the first question, we need not answer the other queries. Only one declaration of error is needed to strip the contested order of its legal effect.⁴²⁰

The Feehan concurrence focused on the concept of reconciliation and what obligation that concept placed on energy regulators.⁴²¹ AltaLink, in its argument before the Court of Appeal, had emphasized the benefit that aboriginal groups would gain from the transaction as well as the benefits that AltaLink and ultimately

418. *AltaLink Management Inc.*, 2021 ABCA at para. 59.

419. *Id.* at para. 12.

420. *Id.* at paras. 1-13.

421. *Id.* at para. 4.

the ratepayers obtained by building the transmission line in the lowest-cost manner by using aboriginal lands.⁴²²

In addition to correcting the error the AUC made in its definition of the no harm test, the decision emphasized the importance of considering the impact of a transaction on aboriginal groups in making a determination whether the transaction was in the public interest.

The public interest test and the use of the no harm test in determining if the public interest has been met is a long-accepted standard. The impact of the transaction on aboriginal interests is however a new and important addition. The scope of that inquiry will become more challenging in the future.

IV. THE ENERGY ARBITRATIONS

Not all the decisions in the Canadian energy sector are made by the courts or the energy regulators. Increasingly, a number of the decisions are made by arbitrators. The past year was significant because it saw the start of the legacy cases under the North American Free Trade Agreement (NAFTA).⁴²³ That agreement came to an end on July 1, 2020.⁴²⁴ The new agreement called *United States Mexico Canada Agreement* (USMCA) provided that NAFTA legacy claims could be brought for a period of three years after the date NAFTA came to an end.⁴²⁵ However, the NAFTA breach had to occur while NAFTA was alive.

To date there have been five NAFTA decisions in the energy sector. The latest decision, *Westmorland*, was handed down in January 2022. That case concerned the conduct of the Alberta government in closing the province's electricity generators that used coal.

A. *The Past Decisions*

Before turning to the new cases, we provide below a summary of prior decisions.

1. Mobil Oil Corporation

In August 2007, two U.S. companies, Mobile Investment Canada and Murphy Oil Corporation, filed a NAFTA claim for C\$60 million against Canada. The two US companies were partners in an offshore drilling project off the coast of Newfoundland, which was regulated jointly by the federal government and the province through the Canada Newfoundland Offshore Petroleum Board.

To obtain a licence to drill, the companies had been required to submit proposals to the Board to approve their development plan. That plan included commitments regarding research and development. The Board provided guidelines, none of which required specific expenditure amounts. The Board had changed this practice in 2004 and introduced new guidelines with specific expenditure targets. The claimants objected to the new guidelines, arguing that they represented a fundamental shift in regulation that undermined the project. Mobile first went to the courts. When that

422. *AltaLink Management Inc.*, 2021 ABCA at para 4.

423. THE UNITED STATES-MEXICO-CANADA AGREEMENT (USMCA) (2021), CRS, <https://crsreports.congress.gov/product/pdf/R/R44981>.

424. *Id.*

425. *Id.*

failed, Mobile brought a NAFTA claim. In May 2012, a tribunal majority found that Canada had violated NAFTA Article 1106. Three years later, the tribunal ordered damages of C\$132 million. A set-aside application by Canada was dismissed by the courts.

Mobile brought a second claim for future damages relating to the 2012–2015 period, which was not covered in the original award. Despite Canada’s objections that the second claim was barred by the three-year time limit under NAFTA and the doctrine of *res judicata*, the panel allowed the claim to proceed. The parties subsequently extended the damage period to 2036, the date when the Mobile Oil projects in Canada would end. The parties then reached a settlement. It was incorporated into a consent order issued by the tribunal on 4 February 2020, granting further damages of C\$35 million.⁴²⁶

2. Mesa Power Group

The decision of the NAFTA panel in *Mesa Power* involved claims under Article 1105 of NAFTA. In September 2009, the Ontario Minister of Energy directed the Ontario Power Authority (“OPA”) to create the Feed-In-Tariff (FIT) programme, which established the eligibility criteria, the criteria for evaluating applications, the deadlines for commercial operation and the domestic content requirements. Those domestic content requirements were originally set at 25 per cent but were increased later to 50 per cent. The domestic content requirements were subsequently challenged under another regulatory regime.

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

In 2011, Mesa Power Group, a US corporation owned by Texas oil tycoon T. Boone Pickens, filed a C\$775 million claim against Canada relating to the province of Ontario’s policy of awarding power purchase agreements under the Ontario FIT programme for the supply of renewable energy. Mesa claimed that Canada adopted discriminatory measures, imposed minimum domestic content requirements and failed to provide Mesa with the minimum standard treatment, in violation of NAFTA’s investment provisions. In the end, the tribunal dismissed all of Mesa’s claims and ordered Mesa to bear the cost of the arbitration and a portion of Canada’s legal costs of nearly C\$3 million.⁴²⁷

3. Windstream Energy

In October 2012, Windstream Energy filed a claim against the government of Canada in the amount of C\$475 million. Following a 10-day hearing in February 2016, a panel of three arbitrators issued an award of C\$26 million, resulting from Ontario’s decision in 2011 to suspend all offshore wind development.

The panel accepted Windstream’s argument that the government’s decision frustrated Windstream’s ability to obtain the benefits of the 2010 contract it had signed with the OPA.

In November 2009, Windstream had submitted 11 FIT applications for wind power projects, including an application for a 300MW 130-turbine offshore wind

426. Gordon E Kaiser, *NAFTA and USMCA Energy Arbitrations*, GLOBAL ARBITRATION REVIEW (Aug. 5, 2022), <https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/fifth-edition/article/nafta-and-usmca-energy-arbitrations>.

427. *Id.*

project near Wolfe Island in Lake Ontario. The OPA offered Windstream a FIT contract in May 2010, which Windstream signed in August of that year. Under the contract, the OPA would pay Windstream a fixed price for power for 20 years. In total, the contract was worth C\$5.2 billion.

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

The main ground for the Windstream claim was that the Ontario decision was arbitrary and was based on political concerns that the wind contracts would increase electricity rates. Windstream argued that the government really had no intention of pursuing scientific research. Canada, in response, said that Ontario was entitled to proceed with caution on offshore wind development and that NAFTA does not prohibit reasonable regulatory delays. . . .

. . . .
In finding that there was a breach, the tribunal questioned whether the real rationale for the moratorium was the need for more scientific research. Just as important was the tribunal finding that Ontario made little, if any, efforts to accommodate Windstream, and seemed to deliberately keep Windstream in the dark.⁴²⁸

4. Mercer International

In 2012, Mercer International, a US company, filed a C\$250 million NAFTA claim against Canada. The claim related to the company's investment in a pulp mill located in Castlegar, British Columbia. The mill also operated an energy generation facility fuelled by biomass, which qualified as renewable energy under British Columbia regulation.

The claim related to actions by BC Hydro, a government-owned utility, that provided electricity to most of British Columbia and that regulated the distribution of electricity in that province. A second utility, Fortis, provided electricity to a small portion of the province, including the Mercer pulp mill in Castlegar.

The central issue was that Mercer was engaged in the arbitrage of power and BC Hydro and the British Columbia Utilities Commission ("BCUC") took steps to prevent it. Mercer required a significant amount of electricity for its own use at its mill. For some time, Mercer was allowed to purchase that electricity from Fortis at low cost-based rates. At the same time, Mercer was able to sell the renewable electricity generated at its facility using biomass at market rates.

Mercer alleged that BC Hydro and the BCUC through their joint action had created new regulatory regime that required Mercer to use its own self-generated electricity first before selling electricity to the grid at market prices. This removed the arbitrage profit. Mercer argued that the other pulp mills in British Columbia were doing the same thing and it was being discriminated against, contrary to Articles 1102, 1103 and 1503 of NAFTA. The tribunal ruled against Mercer and ordered Mercer to pay Canada's costs of C\$9 million. . . .

. . . .
There was also a question of whether Mercer was late filing its claim and violated the three-year time limit under Articles 1116 and 1117 of NAFTA. The limitation period involved a review of the earlier NAFTA decision in Grand River. The question was about the date on which the investor first acquired or should have acquired knowledge of the alleged breach and the resulting damage. The panel ultimately found that some of the claims were time barred.⁴²⁹

428. *Id.*

429. *Id.*

5. Westmoreland Coal

Westmoreland Coal was decided in January 2022.

In August 2019, Westmoreland Mining, a US company, filed a C\$470 million damages claim against the government of Canada for breaches by the province of Alberta of Articles 1102 and 1105 of NAFTA. In 2013, Westmoreland had acquired [several] coal mines, including the ‘mine-mouth’ operations in Alberta at issue in this dispute. Mine-mouth coal operations are coal mines located adjacent to power plants so that the coal can be delivered to the power plant economically.

The value of Westmoreland’s investment was threatened in November 2015 when a new Alberta provincial government announced its Climate Leadership Plan. Alberta, which historically had relied primarily on its abundant coal supply to fuel its power plants, decided that it wanted to eliminate all power emanating from coal by 2030. Alberta agreed to pay out nearly C\$1.4 billion to three coal-consuming power utilities, all of which were Albertan companies. Two of the three, TransAlta and Capital Power, also owned interests in mine-mouth coal mines, and the compensation valued those assets. Westmoreland, unlike the three Alberta companies, was not compensated for the early closure of its mines. . . .

. . . .
The discrimination that Westmoreland faced at the hands of the Alberta government was based on the fact that the government offered compensation to the Canadian companies that were affected by the government’s decision to close the coal-fired electricity generators in the province. Some C\$1.4 billion in compensation was paid to the Alberta companies but none was paid to Westmoreland.

[Canada] argued that there was no compensation for the coal mines, just compensation for the electricity generators. It turned out that most of the electricity generators, but not all, owned coal mines nearby. There was some evidence that payments made by the government were compensation for early closure of the coal mines adjacent to the generators as well as compensation for loss of the generation facility.

The . . . problem that Westmoreland faced was whether the complainant in this arbitration was the same party as that affected at the time the Alberta government initiated the closing of the coal mines and the related electricity generators. [As a result], the real issue in *Westmoreland* was whether the tribunal had jurisdiction. Canada claimed it did not.

Canada argued that, in the end, the claimant was not the same party that owned the property interest when the alleged breach of NAFTA took place. The one fact that was clear was the date of the breach of NAFTA. The decision by Alberta to close the coal generators and the coal plants that service them was part of Alberta’s Climate Leadership plan, which was announced on 22 November 2015. . . .

. . . .
Canada argued that Westmoreland was not protected by NAFTA at the time of the alleged breach because the required investment in Canada was in 2019 not 2015. Canada says that the claimant was not a protected investor at the time of the alleged breach because it was not even incorporated at that time and the claimant did not own or control the investment when the contested measures were adopted. . . .

In a decision dated 31 January 2022, the tribunal found that it did not have jurisdiction because the claimant did not exist when the payments in question were made and did not qualify as a successor of an entity that owned the investment at the relevant time, and no assignment of that right to bring a NAFTA claim could have taken place. In short, WMH did not qualify as a protected investor. The tribunal also upheld Canada’s two remaining objections, finding that WMH had not made a *prima facie* damages claim and that the challenged measures did not relate to the claimant or its investment.⁴³⁰

430. Kaiser, *supra* note 426.

B. *The Outstanding Cases*

The following two arbitrations, Lone Pine Resources and Tennant Energy, are still undecided.

1. Lone Pine Resources

In September 2013, Lone Pine Resources, a US-based gas and exploration company, launched a C\$119 million challenge against Canada under NAFTA. The claim related to the Province of Quebec's suspension of oil and gas exploration under the St Lawrence River. The moratorium was part of a wider Quebec suspension of fracking, a form of horizontal drilling that has already been suspended in other US states and Canadian provinces.

Quebec declared the moratorium in 2011, to conduct environmental impact studies concerning the use of the chemicals involved and the effects on groundwater. This was of particular concern given that the permits that Lone Pine had acquired cover land directly under the St Lawrence River.

Lone Pine alleged that the moratorium contravenes Articles 1105 (minimum standard of treatment) and 1110 (expropriation) of NAFTA. More specifically, the claimant alleged that the passing of the legislation that created the moratorium was arbitrary, unfair and inequitable, and was based on political and populist grounds rather than actual environmental research. The claimant alleged that the revocation of the licence expropriated its investment without compensation.

The government of Canada responded that the action was a legitimate measure in the public interest that applied indiscriminately to all holders of exploration licences that are located under or near the St Lawrence River. Canada argued that the legislation was enacted by a fundamental democratic institution in Quebec and was preceded by numerous studies that established the need to achieve an important public policy objective, namely the protection of the St Lawrence River.

Canada argued that the minimum standard treatment guaranteed in Article 1105 of NAFTA does not protect investors' legitimate expectations. Even if this were the case, Canada said no representative of the government of Quebec communicated to the claimant any guarantee, promise or specific assurance that could create legitimate expectations relating to the development of hydrocarbon reserves and resources that may be found beneath the St Lawrence River.

Canada has also argued that the disputed measure does not substantially deprive Lone Pine of its investment because the legislation only revokes one of five exploration licences granted. Finally, Canada pointed out that the act is a legitimate exercise of the government of Quebec's police power and, accordingly, the measure cannot constitute expropriation. A hearing on the merits was held in Toronto in October 2017. In August 2017, the tribunal had accepted an amicus brief filed by the Quebec Center for Environmental Law. Their main argument was that the chemicals used in fracking were not safe for wildlife or humans; a major concern given that half of Quebec City's drinking water came from the St Lawrence River.⁴³¹

2. Tennant Energy

Tennant Energy is a follow-on case to *Mesa Power* and relies on much of the evidence developed in that case. Tennant Energy, based in Napa, California, filed a claim in June 2017 against Canada for C\$116 million relating to a breach of Article 1105 of NAFTA.

As in *Mesa Power*, the claim related to the actions of the province of Ontario in awarding contracts under the FIT contracts developed under the Green Energy Act. Like *Mesa Power*, Tennant claims that the FIT contracting process was unfairly manipulated to favour the Korean consortium to the detriment of all the other applicants.

431. *Id.*

Tennant argues that not only was there unfair manipulation, the province also deliberately failed to release information that would put all parties on a level playing field. These steps, Tennant argues, were inconsistent with Canada's obligations under NAFTA, including Article 1105 of Chapter 11. Tennant claimed for the following wrongful actions:

- Ontario unfairly manipulated the award of access to the electricity transmission grid, resulting in unfair treatment to the investors.
- Ontario unfairly manipulated the dissemination of programme information under the FIT programme.
- Ontario unfairly manipulated the awarding of contracts under the FIT programme.
- Senior officials improperly destroyed necessary and material evidence of their internationally unlawful actions in an attempt to avoid liability for their wrongfulness.

The damages sought had a unique twist. Of the C\$116 million claimed, C\$35 million relating to 'moral damages' that the investor suffered from 'the improper actions of the Respondent, including improper measures to suppress its wrongful conduct and for the gross unconscionable conduct of Ontario in the maladministration of the program resulting in the abuse of process and detriment to the Investment and the Investor.' This is the first NAFTA case claiming moral damages, which appears to be the arbitration version of punitive damages. Not only does this case borrow on the evidence from *Mesa Power*, it also relies on evidence from *Trillium Wind*, a common law tort case discussed in the next section. *Trillium Wind*, *Mesa Power* and *Tennant* are all in the same boat. They are challenging arbitrary acts of the Ontario government in connection with wind projects. Of particular interest is the fact that in *Trillium Wind*, the plaintiff brought an action for spoliation claiming that senior Ontario government officials destroyed documents relevant to the case. Tennant also relies on that evidence to support its claim of wrongful conduct and abuse of process. The matter is currently proceeding before the tribunal. . . .

Tennant argues that it was a protected investor under NAFTA at the time of the alleged breach because it had a beneficial interest as well as control over the protected investments since 2011. Tennant also argued that the claims were submitted in time because Tennant only became aware of the alleged breaches in 2015 (less than three years before the arbitration was initiated), and that it only became aware of the alleged breaches in 2015 with the publication of documents from another NAFTA case, *Mesa Power v. Canada*, which involved claims very similar to the claim that Tennant was bringing. As result, Canada argues that the initiation of the arbitration in 2017 was well within the required time limit.

The ownership question is more complicated. Tennant argues that John Tennant acquired the shares in the wind project from his brother in April 2011 and held the assets from the outset in trust for Tennant. Tennant argues that pursuant to Article 201 of NAFTA, a trust is a recognised form of enterprise. Tennant also argues that the residency of the trust estate is determined by the California residency of John Tennant, and that the US trust qualifies as an investor under NAFTA Article 1139. The claimant argues that a beneficial owner has standing to bring a claim in international law. Tennant also argues that international law permits assignment of claim as long as continuous nationality is maintained. The ownership issue is similar to the issue decided recently by the *Westmoreland* tribunal, although a little more complex.⁴³²

C. *The New Cases*

There are four new arbitration cases. Three are cases against Canada and one is a case Canada brought against the United States.

1. Geophysical Service Inc

On 18 April 2019, Geophysical Service Inc and three US shareholders filed a NAFTA claim against Canada for C\$2.5 billion in damages. Geophysical is a Canadian company that specialises in collecting marine seismic data for offshore oil and gas operations. The company claims that Canada unlawfully confiscated its proprietary information and licenced it to third parties that competed with Geophysical. Geophysical claims that it has been creating and licensing marine-scientific data for 50 years and has spent over C\$781 million creating the database and has existing licence agreements with third parties worth C\$2.5 billion.

Under Canadian law, Geophysical was required to submit confidential information to Canada. The company complied with this obligation. The claimants argue that, in submitting the data, they are entitled to protection under Canadian and international copyright law and that Canada disclosed portions of the data to third parties in violation of this law and failed to adequately inform Geophysical of the disclosure.

The claimants brought an action in the Alberta courts against a number of Alberta oil companies that they believed were wrongfully using their data. The Alberta Court of Queen's Bench held that the *Canadian Petroleum Resources Act* overruled the *Copyright Act*. Accordingly, Canada could disclose the seismic data to third parties including oil and gas companies that were competitors of Geophysical.

The claimants argue that Canada's conduct concealed and misrepresented the extent of the disclosures of its seismic data, thereby violating the minimum standard of treatment required under NAFTA, the performance requirement of NAFTA Article 1106, and that the measures taken by Canada amount to unlawful expropriation.

An unusual but important procedural issue recently developed in this case. As is usually the case, Canada is represented by the Trade Law Bureau of their Department of Justice. The claimant argues that one of Canada's counsels had a conflict of interest. That counsel, before joining the Trade Law Bureau, was working on this case for a company called Vannin Capital, a third-party provider of financial resources to potential claimants, in exchange for a share of the case proceeds.

At the time, the counsel was working in the New York office of Vannin. Geophysical complained about the conflict of interest on the part of the counsel to the Trade Law Bureau, which then temporarily removed that counsel from the file pending receipt of more information. Subsequently the Trade Law Bureau decided to reinstate the counsel because the complainant had not provided enough information regarding the conflict of interest. Two days later, Geophysical filed a motion under Section 17(5) of the Federal Courts Act alleging a conflict of interest.

The court dismissed the application on three grounds – the Federal Court did not have jurisdiction; the matter was best left to the arbitrators; and the matter was a private property dispute with no public interest considerations. . . .

. . . .
In a judgment dated 20 October 2020, Canada's Federal Court declined the claimant's request to disqualify counsel for the reasons stated above. However, the matter then proceeded back to the tribunal. The tribunal found that a request for disqualification should be granted only if there was clear evidence of a material risk that the counsel had received confidential information about the dispute that could be significant in the proceedings. The tribunal concluded that the standard for disqualifying counsel to protect the integrity of the arbitration had been met and ordered the

counsel to be permanently removed from acting for or on behalf of Canada in the arbitration.⁴³³

2. Koch Industries

On 17 December 2020, Koch Supply & Trading filed a NAFTA claim for C\$31.3 million against Canada, relating to certain activities undertaken by the Province of Ontario when the province cancelled its cap and trade programme.

This is the first NAFTA legacy claim. In 2016, the government of Ontario enacted the *Climate Change Mitigation and Low Carbon Economy Act*. The preamble of the Act states that it is intended 'to foster a high-productivity low-carbon economy to create by 2050, a thriving society generating fewer or zero greenhouse gas emissions'. The stated purpose of the Act is to combat climate change, as stated in Section 2(1):

"Recognizing the critical environmental and economic challenge of climate change that is facing the global community, the purpose of this Act is to create a regulatory scheme, (a) to reduce greenhouse gas in order to respond to climate change, to protect the environment and to assist Ontarians to transition to a low-carbon economy; and (b) to enable Ontario to collaborate and coordinate its actions with similar actions in other jurisdictions in order to ensure the efficacy of its regulatory scheme in the context of a broader international effort to respond to climate change."

The Act established the above-mentioned cap and trade programme, a market mechanism that set an economy-wide cap on greenhouse gas emissions. It required major emitters to limit their emissions at or below their allotted cap, or to purchase emissions credits from others with a surplus to sell. Operational aspects of the Act were enacted in the Cap and Trade Program Regulation (the Cap and Trade Regulation), enacted pursuant to the Act.

The Act contains mandatory greenhouse gas emissions reduction targets, to reduce greenhouse gas emissions to below 1990 levels: by 15 per cent by 2020; by 27 per cent by 2030; and by 80 per cent by 2050.

The Act also required the government of Ontario to prepare a climate change action plan to achieve greenhouse gas emission reduction targets and to review this plan every five years. It obliged the Minister of the Environment to prepare annual progress reports pursuant to the government's action plan.

A general election was held in Ontario on 7 June 2018. The incumbent government was defeated and was replaced by the new majority government. A press release issued by the office of the Premier-elect immediately after the election stated that ending the cap and trade programme would be a high priority of the incoming government, and that the 'first act following the swearing-in of [the new] government' would be 'to cancel Ontario's current cap and trade scheme'.

The new government was sworn in on 29 June 2018. That same day, the new government of Ontario enacted a Regulation (the Cancelling Regulation) revoking the *Cap and Trade Regulation*. This had the effect of rendering Ontario's cap and trade programme inoperable. The Cancelling Regulation also made it an offence to engage in transactions under the cap and trade programme on potential pain of imprisonment.

On 31 October 2018, new legislation was passed that stated that nothing done or not done during the cap and trade programme would constitute expropriation.

Just prior to the cancellation, Koch had purchased C\$30 million-worth of emissions allowances. After the Ontario decision in July 2018 to cancel the programme, Koch attempted to get compensation but was refused. When that happened, Koch filed a NAFTA legacy claim.⁴³⁴

433. *Id.*

434. Kaiser, *supra* note 426.

Recently the Canadian government filed its first response to the Koch application. The submission was actually filed in February 2022 but was only made public in early August. Canada claims “that [the] purchases of emission allowances made by . . . Koch Supply and Trading LP, [does not] qualify as a protected investment under the North American Free Trade Agreement.”⁴³⁵ Canada argues that the problem Koch faced was a result of the decision by “the State of California [to] disallow[] incoming transfers of emission allowances from Ontario.”⁴³⁶ Canada further states that “[t]he fact that Koch Supply and Trading was unable to sell the Ontario emission allowances in [California] doesn’t make [it] a[] [legitimate] claim under NAFTA. . . .”⁴³⁷

An additional argument made by Canada is that the “Ontario legislation that created the emission allowances [specifically] provide[] that compensation would not be paid if changes were made to the cap and trade program Those changes were made in June 2018 after new government came in the power. . . .”⁴³⁸ Accordingly, Canada states that “[g]iven the clear provisions in the legislation that created the cap and trade program, the claimants could not reasonably expect that Ontario would offer compensation to anyone in the event of a regulatory change.”⁴³⁹

3. Keystone XL No. 2

TransCanada Corporation and TransCanada Pipelines, made a claim against the United States in 2016 under NAFTA, relating to actions by the Obama administration when President Obama refused to grant the necessary presidential permit. The claim sought compensation of C\$15 billion. Arbitrators were appointed, but the arbitration was discontinued on 24 March 2017 at the parties’ request when the US State Department signed the presidential permit to construct Keystone XL at the direction of President Trump, who had recently taken office.

On 22 November 2021, TC Energy (formerly TransCanada Pipelines) filed a second claim of C\$15 billion in damages against the United States. This time, it was under the legacy provisions of the USMCA. This is the third legacy claim filed under the USMCA.

In January 2021, US President Joseph Biden signed an executive order cancelling the presidential permit for the Keystone XL pipeline that President Trump had issued on his first day of office.

The Keystone XL project was first proposed in 2008. If completed, it could move 800,000 barrels of oil a day from Alberta to Nebraska and then into an existing pipeline structure that would carry the oil to the Gulf Coast refineries. The border crossing between the United States and Canada was completed two years ago, and 90 miles of the pipeline had been built in Canada. A permit from the American president is required whenever a pipeline crosses the Canada–US border, although some believe that jurisdiction belongs to Congress.

Canada and the United States completed the election of the arbitrators in March 2022. Under the legacy provisions of the USMCA, the act complained of must have occurred while NAFTA was still in force. NAFTA was terminated on 1 July 2020.

435. Caroline Simson, *Canada Says Koch Has No Claim In Cap-And-Trade Fight*, LAW360 (Aug. 3, 2022), <https://www.law360.com/articles/1517837/canada-says-koch-has-no-claim-in-cap-and-trade-fight>

436. *Id.*

437. *Id.*

438. *Id.*

439. Simson, *supra* note 435.

President Biden terminated the presidential permit in January 2021. In addition, there are outstanding environmental and aboriginal claims designed to stop the pipeline. In addition, the presidential permit makes it clear that the permit can be revoked at any time at the sole discretion of the president. In short, the pipeline was by no means a sure thing when President Biden overturned the presidential permit granted by President Trump.

The Keystone story gets even more interesting. One year before President Biden cancelled the presidential permit, the government of Alberta decided to acquire C\$1.5 billion in equity in TC Energy and provide a C\$6 billion loan guarantee.

TC Energy and TransCanada launched their arbitration claim on 22 November 2021. On 9 February 2022, the province-owned Alberta Petroleum Marketing Commission launched a NAFTA claim under the USMCA, claiming C\$1.3 billion in damages in legacy claim under USMCA Annex 14C.

The claim has attracted some controversy. A legacy claim is defined as an investment an investor made between 1 January 1994 and the date of termination of NAFTA when USMCA came into force, which was 1 July 2020. Alberta submits that it made its investment in TransCanada on 31 March 2020.

The Alberta Petroleum Marketing Commission (APMC) said that it intends to claim on its own behalf under NAFTA Articles 1116 and 1119, and on behalf of its 100-per-cent-owned Canadian subsidiary under NAFTA Articles 1117 and 1119. The APMC argues that the revocation decision amounts to a violation of NAFTA's national treatment provision because pipelines operated by other investors in pipelines running between Canada and the US did not receive the same treatment with respect to presidential permits.

The APMC says the Keystone XL pipeline has been singled out. Rather than the US cancelling the presidential permit, it should have developed a general policy of reducing oil exports in response to climate change concerns. The APMC also claims that there was a lack of due process because investors were not provided with any opportunity to comment on the impending cancellation. The Biden decision was made without any consultation at all. However, some argue that throughout a long presidential campaign Mr Biden did signal that he intended to cancel the project on his first day in office.⁴⁴⁰

4. The Michigan Arbitration

Most disputes in the energy sector between Canada and the United States have involved NAFTA. There is one important dispute, however, that concerns an arbitration involving a 50-year-old treaty designed for a specific pipeline. This is the four-year-old dispute between the State of Michigan and Enbridge regarding the Enbridge Line 5 pipeline.

Enbridge is currently replacing Line 5, which runs from Superior, Wisconsin to Sarnia, Ontario. The state of Michigan is opposing the underwater segment that runs under the Straits of Mackinac in the Great Lakes. The concern relates to environmental damage that could result from a leak in the pipe that currently sits on the lakebed. The project was approved by the former Governor of Michigan, but his successor, Governor Whitmer, challenged the constitutional validity of the project in 2018.

The Michigan District Court ruled the legislation constitutional in October 2019, and that decision was upheld by the Michigan Court of Appeals in January 2020. In January 2021, the Governor of Michigan ordered Enbridge to cease operating the segment the pipeline under the Straits of Mackinac by May 2021. Enbridge argues that the 645 mile pipeline has been operating safely for 65 years. However, to address the concerns, Enbridge is now proposing to place the pipe in a tunnel underneath the lakebed at a cost of C\$500 million.

440. Kaiser, *supra* note 426.

Line 5 part is part of the Enbridge mainline system that transports crude from Alberta and Saskatchewan to refineries in Michigan, Ohio, Pennsylvania, Ontario and Quebec. Enbridge has argued that those refineries will see their capacity drop by 45 per cent if Line 5 it is not maintained. On 29 January 2021, the Michigan Department of Environment Great Lakes and Energy approved the Enbridge application for the permits required to build the utility tunnel under the Straits of Mackinac. However, permits from the Michigan Public Service Commission and the US Army Corps of Engineers are still required.

The November 2020 decision by Governor Whitmer of Michigan to revoke the 1953 easement has led to lengthy litigation, first in the state courts and more recently in the federal courts. All of that led to a decision by Canada on 4 October 2021 to invoke the 1977 pipeline treaty with the US. That treaty contains a mandatory negotiation process pursuant to Article 9 of the 1977 treaty before formal binding arbitration proceedings can take place. Canada has intervened in supporting Enbridge, as have the states of Louisiana and Ohio. The court proceedings have been put on hold pending the negotiations which are still underway.⁴⁴¹

441. *Id.*