2020: THE CANADIAN ENERGY REGULATION YEAR IN REVIEW

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This report is presented annually to the Energy Law Journal by the Canadian Chapter of the Energy Bar Association (EBA). The purpose of this report is to provide a snapshot of developments in Canadian energy regulation during 2020 and 2021. The report focuses on pipeline and electricity transmission projects, particularly those that are cross border, as the United States and Canada are the two most integrated energy economies in the world.

Our mission is not to duplicate the work of the 20 other energy organizations in Canada, but to highlight lessons learned from energy regulators on both sides of the border. For this reason, this report highlights the important regulatory decisions from across Canada and Canadian judicial treatment of those decisions. This report is one small part of the Canadian Chapter's efforts.

The other effort relates to the Canadian Chapter's annual meetings. The first meeting, held on September 24, 2020, was called "The New NAFTA". It featured leading arbitrators from the United States and Canada. The second meeting, held on June 22, 2021 was not what you might expect, as it was entitled "Is Alberta the New Texas?" It featured two former FERC Chairs - Pat Wood and Joe Kelliher-- joined by the former Chair of the Alberta Utilities Commission and the former President of the Alberta Electric System Operator. Pat Wood also shared his expertise as a former Chair of the Public Utility Commission of Texas. This was a lively discussion.

This is the Canadian Chapter's second year. As a new Chapter we are feeling our way. Our first year faced unprecedented challenges as did all EBA Chapters. The Canadian Chapter is open to all EBA members, and we extend an invitation for EBA members to join us.

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I. INTRODUCTION

The year 2020 is unique in two respects. In November 2020 the Federal government enacted legislation setting targets for Canada to achieve net zero greenhouse gas emissions by the year 2050.[1] With that move, Canada joined over 120 other countries committing to net zero emissions by 2050 including the United Kingdom, Germany, France, and Japan.[2] In addition, these countries,

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1. Bill C-12, *An Act respecting transparency and accountability in Canada's efforts to achieve net-zero greenhouse gas emissions by the year 2050*, 2nd Sess, 43rd Parl, 2020, (first reading in the House of Commons 19 Nov. 2020).

2. *Net-Zero Emissions by 2050*, GOV'T OF CAN. (Apr. 29, 2021), https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/net-zero-emissions-2050.html.

among others, have authorized massive public expenditures in light of economic stimulus programs in response to the deadly 2020 coronavirus. Many of these funds are being committed to new carbon reduction technology that will address climate change in what is now called the "green recovery".[3] That effort will have a major impact on energy regulation in both Canada and the United States.

A. A National Climate Policy

In terms of Canadian energy law and policy, the year 2020 ended with a bang. On November 19, 2020, the Government of Canada introduced the *Canadian Net-Zero Emissions Accountability Act* to legislate Canada's target of net-zero greenhouse gas emissions by 2050.[4] On December 11, 2020, the Government subsequently announced its strengthened climate plan entitled *A Healthy Environment and a Healthy Economy*, to accelerate climate change initiatives throughout the country.[5] What first caught people's attention was the proposal to increase the Canadian carbon tax from $50 per tonne in 2022 to $270 per tonne in 2030. That would increase the price of gasoline by almost 40 cents a liter, although most drivers would get it back in the form of a tax rebate.[6] The plan also included 64 different programs to cut pollution and build a clean economy at a cost of $15 billion.[7]

The investments include $2.5 billion for clean power projects over three years, $1.5 billion to develop low carbon fuels, $287 million over two years to promote zero emission vehicles, $3 billion over five years to decarbonize large-scale emitters, $2.6 billion over seven years to improve home energy efficiency, and $3 billion over 10 years to plant 2 billion trees.[8]

B. A National Carbon Pricing Regime

Carbon taxes have long been promoted by economists as an important tool in the battle against climate change.[9] However, there can be significant political and legal repercussions in implementing this policy. In Canada, certain Provinces are hit harder than others because their economies are more dependent on the production of oil and natural gas. The same would be true in the United States.

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3. Andrew Pan, *Greening the recovery from COVID-19: how sustainable will it be?*, OECD ENVIRONMENT FOCUS, (Apr. 20, 2021) https://oecd-environment-focus.blog/2021/04/20/greening-the-recovery-from-covid-19-how-sustainable-will-it-be/.

4. Bill C-12, *supra* note 1.

5. *Prime Minister Announces Canada's strengthened climate plan to protect the environment, create jobs, and support communities*, PRIME MINISTER OF CAN. JUSTIN TRUDEAU (Dec. 11, 2020), https://pm.gc.ca/en/news/news-releases/2020/12/11/prime-minister-announces-canadas-strengthened-climate-plan-protect.

6. John P. Tasker, *Ottawa to hike federal carbon tax to $170 a tonne by 2030*, CBC NEWS (Dec. 11, 2020), https://www.cbc.ca/news/politics/carbon-tax-hike-new-climate-plan-1.5837709.

7. *Healthy Environment and a Healthy Economy*, GOV'T OF CAN. (Apr. 8, 2021), https://www.canada.ca/en/environment-climate-change/news/2020/12/a-healthy-environment-and-a-healthy-economy.html.

8. *Id*.

9. Ian Parry, *Putting a Price on Pollution,* IMF FIN. AND DEV. (Dec. 2019), https://www.imf.org/external/pubs/ft/fandd/2019/12/pdf/fd1219.pdf.

That legal battle over carbon taxes may be coming to an end in Canada. In October 2016, the Federal government announced that it would establish a minimum price of carbon starting at $10 per tonne to increase by $10 per year until it reached $50 per tonne by 2022. Under the *Greenhouse Gas Pollution Pricing Act* [10] there are two components to the charge. The first is a charge on fuel; the second is a charge on emissions from carbon-intensive industrial facilities.

The Federal legislation is a backstop regime, establishing minimum national standards of greenhouse gas price stringency to reduce greenhouse gas emissions. The provinces can implement their own pricing mechanism provided it results in the same or greater carbon reduction targets as set out in the Federal plan.[11] British Columbia and Quebec proceeded with their own plans at the very beginning of the policy.[12] New Brunswick and Prince Edward Island introduced their own plans later.[13] However, four provinces--Alberta, Saskatchewan, Manitoba and Ontario--challenged the constitutionality of the legislation.[14]

On March 25, 2021, the Supreme Court of Canada ruled on the constitutional validity of the legislation.[15] Leading up to the Supreme Court of Canada decision were the decisions of the Courts of Appeal in Alberta[16], Saskatchewan[17] and Ontario.[18] The Courts of Appeal of Saskatchewan and Ontario upheld the constitutionality of the statute. The Alberta Court of Appeal came to a different conclusion, holding that the Greenhouse Gas Pollution Pricing Act was unconstitutional.

The Supreme Court of Canada decision brought to a close nearly 3 years of legal wrangling over carbon taxes. In a 6/3 split decision the Court found the Federal government has jurisdiction to enact greenhouse gas pricing laws on the basis that it is matter of "national concern" falling within Parliament's power to legislate in respect of peace, order and good government of Canada.[19] This authority persists even if a particular matter otherwise falls within the jurisdiction of the provinces. This is the first time since its 1997 decision in *R. v. Hydro Quebec* that the Supreme Court of Canada has updated its jurisprudence with respect to the "national concern" doctrine of the Constitu-

10. Greenhouse Gas Pollution Pricing Act, S.C. 2018, c 12, s 186 (Can.).

11. ENV'T AND CLIMATE CHANGE CAN., TECHNICAL PAPER ON FEDERAL CARBON PRICING BACKSTOP (2017), https://www.canada.ca/content/dam/eccc/documents/pdf/20170518-2-en.pdf.

12. Jason Maclean, *Climate Change, Constitutions and Courts: The Reference re Greenhouse Gas Pollution Pricing Act and Beyond*, 82-2 SASK. L. REV. 147 (2019)

13. *Id*.

14. *Id.*

15. References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11 (Can.); Nigel Bankes, Andrew Leach and Martin Z Olszynski, *Supreme Court of Canada Re-writes the National Concern Test and Upholds Federal Greenhouse Gas Legislation*, 9 ENERGY REGUL. Q. (July 2021).

16. Reference re Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74 (Can.).

17. Reference re Greenhouse Gas Pollution Pricing Act, 2019 SKCA 40 (Can.).

18. Reference re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 544 (Can.).

19. References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11 (Can.).

tion's Peace Order and Good Government ("POGG") power.[20] Prior to this decision, it had been rarely invoked.

The majority found that the Provinces were incapable of addressing climate change effectively on their own, stating that the provincial failure to act directly threatens Canada as a whole. The Chief Justice writing for the majority began his reasons by stating that climate change was real and is caused by greenhouse gas emissions resulting from human activities.[21] He further stated that climate change was a grave threat to the future of humanity and the only way to address that threat was to reduce greenhouse gas emissions.[22] He conceded that federal jurisdiction should be found to exist only when the evidence establishes that the Provinces are unable to deal with the matter. Chief Justice Wagner noted that "no one province, territory or country can address the issue of climate change on its own. Addressing climate change requires collective national and international action. This is because the harmful effects of GHGs are, by their very nature, not confined by borders."[23]

There were three dissenting judges. Two found that the Act was ultra vires and an infringement on the provinces' exclusive authority over natural resources.[24] The third dissenting justice agreed that the problem at hand was a matter of national concern but that the legislation was unconstitutional in its current form because it granted too much power to the executive without a meaningful check by the legislature.[25]

The issue now turns to how the provinces will comply with this decision. Currently the federal government is collecting the carbon tax in Alberta, Saskatchewan, Manitoba and Ontario.[26] Those provinces will likely prefer to collect the tax themselves and distribute the taxes collected as they see fit. Currently the federal government remits the tax revenues back to the individual taxpayers in the Province.[27] The next battle will be what qualifies as a legitimate provincial program. Manitoba submitted a plan that the federal government rejected.[28] Manitoba has challenged that rejection by commencing an application for judicial review in Federal Court in April 2019.[29] A decision has yet to be delivered, and Manitoba's Premier has indicated the province will move forward with its carbon tax challenge despite the recent ruling from the Supreme Court of Cana-

20. R. v. Hydro-Québec, [1997] 3 S.C.R. 213 (Can.).

21. References re Greenhouse Gas Pollution Pricing Act, *supra* note 15, ¶ 2.

22. *Id*.

23. *Id.* ¶ 12.

24. *Id.* ¶¶ 296-616.

25. References re Greenhouse Gas Pollution Pricing Act, *supra* note 15, ¶ 223.

26. OFFICE OF THE PARLIAMENTARY BUDGET OFFICER, REVIEWING THE FISCAL AND DISTRIBUTIONAL ANALYSIS OF THE FEDERAL CARBON PRICING SYSTEM (Feb. 24, 2020), https://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/RP-1920-024-S/RP-1920-024-S_en.pdf.

27. *Id.*

28. Her Majesty the Queen in Right of Manitoba v. Governor in Council, et al., F.C., Court File No.: T-685-19 (Can.).

29. *Id.*

da.[30] The plans proposed by British Columbia and Quebec were approved early in the process.[31] More recently, the provinces of New Brunswick and Prince Edward Island reached an agreement with the Federal government.[32] They proposed that they would enact the carbon tax at the federal rate but offset it by eliminating a tax in the same amount that each province currently pays for highways in the province. Manitoba and Saskatchewan have indicated they may do something similar.[33]

Just prior to the decision of the Supreme Court of Canada, the government of Canada increased the amount of the carbon tax.[34] Originally, the legislation established a minimum price starting at $10 per ton in 2018 and increasing by $10 a year until the rate reached $50 per ton in 2022. The Federal government has now mandated that the tax will increase by $15 per ton starting in 2022 until the price reaches $170 per ton in 2030.[35]

C. The Electric Vehicle Revolution

At the provincial level in Canada the focus was on electric vehicles. Québec announced it would abandon the sale of new gas powered cars starting in 2035.[36] British Columbia committed to following suit in 2040.[37] This followed an earlier California state executive order in September 2020 that would ban the sale of gas powered cars and trucks by 2035[38] and the announcement by the United Kingdom in November 2020 that it would ban the sale of new gas and diesel cars starting in 2030.[39]

Car manufacturers around the world watched these developments closely. They were also watching Tesla. In 2020 that company reached a market capitalization of $880 billion, more than Toyota, Volkswagen, Daimler, General Mo-

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30. Sarah Petz, *Manitoba Will Still Push Forward with Carbon Tax Challenge despite Supreme Court Ruling,* CBC NEWS (Mar. 21, 2021), https://www.cbc.ca/news/canada/manitoba/brian-pallister-manitoba-carbon-tax-supreme-court-1.5963884.

31. *Putting a Price on Pollution: Carbon Pollution Pricing Systems across Canada*, GOV'T OF CAN. (July 12, 2021), https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work.html.

32. *Id.*

33. Terry Davidson, *Manitoba, Saskatchewan react to Supreme Court carbon tax ruling*, THE LAWYER'S DAILY (Mar. 26, 2021), https://www.thelawyersdaily.ca/articles/25642/manitoba-saskatchewan-react-to-supreme-court-carbon-tax-ruling.

34. ENV'T AND CLIMATE CHANGE CAN., A HEALTHY ENVIRONMENT AND A HEALTHY ECONOMY (2020), https://www.canada.ca/content/dam/eccc/documents/pdf/climate-change/climate-plan/healthy_environment_healthy_economy_plan.pdf.

35. *Id.*

36. *The 2030 Plan for a Green Economy*, GOV'T OF QUEBEC (Mar. 11, 2021), https://www.quebec.ca/en/government/policies-orientations/plan-green-economy/.

37. Zero-Emission Vehicles Regulation, B.C. Reg. 196/2020 (Can.).

38. Cal. Executive Order N-79-20 (Sept. 23, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/09/9.23.20-EO-N-79-20-Climate.pdf.

39. *PM Outlines His Ten Point Plan for a Green Industrial Revolution for 250,000 Jobs*, PRIME MINISTER'S OFFICE, 10 DOWNING STREET (Nov. 18, 2020), https://www.gov.uk/government/news/pm-outlines-his-ten-point-plan-for-a-green-industrial-revolution-for-250000-jobs.

tors, BMW, Honda, Hyundai, and Ford combined.[40] The Europeans have responded however. Volkswagen plans to sell 1 million electric or hybrid cars in 2021, ten times the number sold in 2019. The day following this announcement the price of Volkswagen stock increased by 29%.[41]

In Canada, Ford announced it would spend $1.8 billion to produce electric vehicles at its Oakville plant in Ontario.[42] General Motors responded by announcing it would phase out gas-powered vehicles entirely by 2035 and invest $1 billion to produce electric commercial vans in Ingersoll, Ontario.[43] Chrysler announced it would spend $1.5 billion to produce electric vehicles in Windsor, Ontario.[44]

D. New Charging Networks

Electric vehicles require electric charging. During 2020, electric vehicle charging networks became a reality in Canada. Tesla led the pack with 584 locations and 1400 chargers across Canada.[45] In January 2020, Canadian Tire announced a plan to construct a network of 240 fast chargers at 90 Canadian Tire retail locations across Canada.[46]

The electric utilities were also active. By the end of 2020 BC Hydro had expanded its network to over 70 charging locations across British Columbia,[47] while a partnership between Ontario Power Generation and Hydro One committed to installing 160 fast chargers in Ontario by the end of 2021.[48] The im-

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40. John Rice and Nigel Martin, *Can Tesla's Share Price Be Justified? Probably Not*, CANADIAN MANUFACTURING (Jan. 28, 2021), https://www.canadianmanufacturing.com/features/can-teslas-share-price-be-justified-probably-not/.

41. Christoph Rauwald, *VW Surges 29% after laying plans to dethrone Tesla by mid-decade*, BNN BLOOMBERG (Mar. 16 2021), https://www.bnnbloomberg.ca/vw-surges-29-after-laying-plans-to-dethrone-tesla-by-mid-decade-1.1577580.

42. *New commitment to battery-electric vehicle manufacturing in Ontario*, PRIME MINISTER OF CAN. JUSTIN TRUDEAU (Oct. 8, 2020), https://pm.gc.ca/en/news/news-releases/2020/10/08/new-commitment-battery-electric-vehicle-manufacturing-ontario.

43. *General Motors To Invest C$1 Billion To Convert CAMI into Canada's First Large-Scale Commercial Electric Vehicle Manufacturing Plant*, GENERAL MOTORS (Jan. 15, 2020), https://media.gm.ca/media/ca/en/gm/home.detail.html/content/Pages/news/ca/en/2021/Jan/0115_brightdrop.html.

44. Ilya Barnes and Gabrielle Coppola, *Fiat Chrysler to invest up to $1.5 billion in Windsor plant to build electric vehicles*, BLOOMBERG NEWS (Oct. 15, 2020), https://financialpost.com/transportation/autos/fiat-chrysler-avoids-canada-strike-with-last-minute-deal.

45. Luke Sarabia, *Canada's EV charging networks are growing at pace, but more is needed*, ELECTRIC AUTONOMY CANADA (Mar. 2, 2020), https://electricautonomy.ca/2020/03/02/canadas-ev-charging-networks-2020/#/analyze?country=CA&fuel=ELEC&ev_levels=all&show_map=true.

46. *Canadian Tire to Host One of the Largest Electric Vehicle Fast Charging Networks in Canada*, CANADIAN TIRE (Jan. 15, 2020), https://corp.canadiantire.ca/English/media/news-releases/press-release-details/2020/Canadian-Tire-to-Host-One-of-the-Largest-Electric-Vehicle--Fast-Charging-Networks-in-Canada/default.aspx.

47. *BC Hydro's fast charging network*, BC HYDRO (https://electricvehicles.bchydro.com/charge/public-charging/our-fast-charging-network (last visited Nov. 10, 2021).

48. *Hydro One and OPG launch new company to deliver electric vehicle fast-charger network*, ONTARIO POWER GENERATION (Feb. 14, 2020), https://www.opg.com/media_release/hydro-one-and-opg-launch-new-electric-vehicle-fast-charger-network/.

portance of this new network became apparent in September 2020 when the American EV charging network company, ChargePoint, went public at a valuation of $2.4 billion.[49] The investors included Chevron, BMW, Siemens, and the Canada Pension Plan Investment Board.

E. Green Capital

The year 2020 saw a important shift in financial markets. Renewable energy now dominates capital markets in both Canada in the United States. Next Era Energy, the world's largest supplier of wind power, replaced Exxon Mobil and Chevron Corporation to become the world's most valuable energy company.[50] In August 2020, Exxon Mobil disappeared from the Dow Jones industrial average. It had been a member since the company was Standard Oil of New Jersey in 1928.[51]

Companies are now required to disclose their climate impact, which is called their ESG (environmental social and governance) value.[52] Carbon-based companies are also being blacklisted by pension funds.[53] ESG investment has doubled over the past four years.[54] Price Waterhouse Cooper now estimates that 60% of mutual fund assets will be ESG by 2025.[55] Reporting and transparency with respect to ESG values is driving both capital markets and climate change initiatives.[56]

The tide has changed. The zero carbon revolution has been creeping forward over the past decade, but the year 2020 proved to be the proverbial fork in the road. The Canadian energy sector will be very different going forward. Energy regulation will also be very different.

Private corporations have entered the renewable energy market in a significant fashion. In April 2020, BlackRock, one of America's largest venture firms,

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49. *EV charging network ChargePoint to go public at $2.4 billion valuation*, REUTERS (Sept. 24, 2020), https://www.autoblog.com/2020/09/24/chargepoint-public-stock-exchange-spac-valuation-official/.

50. Will Wade and Brian Eckhouse, *NextEra Now More Valuable Than Exxon as Clean Power Eclipses Oil*, BLOOMBERG NEWS (Oct. 7, 2020), https://financialpost.com/pmn/business-pmn/nextera-now-more-valuable-than-exxon-as-clean-power-eclipses-oil.

51. Stephen Gandel, *Exxon Mobil dropped from the Dow after nearly a century*, CBS NEWS (Aug. 25, 2020), https://www.cbsnews.com/news/dow-jones-exxon-mobil-pfizer-raytheon-replaced-salesforce-amgen-honeywell/.

52. Alexandra Thornton and Tyler Gellasch, *The SEC Has Broad Authority To Require Climate and Other ESG Disclosures*, CENTER FOR AMERICAN PROGRESS (June 10, 2021), https://www.americanprogress.org/issues/economy/reports/2021/06/10/500352/sec-broad-authority-require-climate-esg-disclosures/.

53. *World's biggest wealth fund blacklists 4 Canadian firms for greenhouse emissions*, REUTERS (May 12, 2020) https://www.reuters.com/article/norway-swf-idUSL4N2CV03O.

54. Sophie Baker, *Global ESG-data driven assets hit $40.5 trillion*, PENSIONS & INVESTMENTS (July 2, 2020), https://www.pionline.com/esg/global-esg-data-driven-assets-hit-405-trillion.

55. Alastair Marsh, *Almost 60% of mutual fund assets will be ESG by 2025, PwC says*, BNN BLOOMBERG (Oct. 19, 2020), https://www.bnnbloomberg.ca/almost-60-of-mutual-fund-assets-will-be-esg-by-2025-pwc-says-1.1509837.

56. Boffo, R., and R. Patalano, *ESG Investing: Practices, Progress and Challenges*, OECD PARIS (2020), www.oecd.org/finance/ESG-Investing-Practices-Progress-and-Challenges.pdf.

raised $5 billion for its Global Energy Infrastructure fund.[57] In January 2020, Microsoft launched a new climate innovation fund to invest $1 billion over the next four years,[58] while in June 2020, Amazon pledged an initial $2 million in funding for its venture investment program.[59]

Canadian pension plans have been very active. By September 30, 2020, the Canada Pension Plan Investment Board had committed an investment of $9 billion to renewable energy globally.[60] In 2020, the fund closed the transaction to acquire all of the renewable assets of Pattern Energy for $6 billion which included a portfolio of 28 renewable energy projects with an operating capacity of over 4 GW in the United States, Canada, and Japan.[61]

The following review of decisions by Canadian energy regulators highlights the shift toward zero carbon and the development of renewable energy options.

II. CROSS BORDER PIPELINES

In Canada, two key metrics measure the health of the energy sector. The first is the price of oil. The second is the state of pipeline projects in development. There are new pipeline projects, like Keystone XL. Others, like Trans Mountain, are projects to expand the capacity of an existing pipeline.[62] Some are projects designed to replace aging facilities, such as the Enbridge Line 5 project.[63] As the following review indicates, all have faced numerous legal challenges and delays.

In the last five years, investors have walked away 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, last but not least, Keystone XL. In total, they accounted for over $50 billion in investment. Last year we examined the first three. Below we consider the Keystone XL project, which came to an end recently.

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57. Michael Shellenberger, *Biden Climate Plan Risks Putting China And BlackRock Before The American People*, FORBES (Dec. 3, 2020), https://www.forbes.com/sites/michaelshellenberger/2020/12/03/biden-climate-plan-risks-putting-china-and-blackrock-before-the-american-people/?sh=226df9a84c9f.

58. *Climate Innovation Fund*, MICROSOFT, https://www.microsoft.com/en-us/corporate-responsibility/sustainability/climate-innovation-fund (last visited Nov. 10, 2021).

59. *The Climate Pledge Fund*, AMAZON, https://sustainability.aboutamazon.com/about/the-climate-pledge/the-climate-pledge-fund (last visited Nov. 10, 2021).

60. *CPP Investments establishes Renewable Power Capital to focus on European Renewables*, CPP INVESTMENTS (Dec. 9, 2020), https://www.cppinvestments.com/public-media/headlines/2020/cpp-investments-establishes-renewable-power-capital-to-focus-on-european-renewables.

61. *Pattern Energy Enters Agreement to be Acquired by Canada Pension Plan Investment Board*, CPP INVESTMENTS (Nov. 4, 2019), https://www.cppinvestments.com/public-media/headlines/2019/pattern-energy-enters-agreement-be-acquired-canada-pension-plan-investment-board.

62. *Expansion Project*, TRANS MOUNTAIN, https://www.transmountain.com/project-overview (last visited Nov. 10, 2021).

63. *Line 5 and the Great Lakes Tunnel*, ENBRIDGE, https://www.enbridge.com/Line5 (last visited Nov. 10, 2021).

A. *Keystone XL*

The Keystone XL pipeline, a $20 billion project that TransCanada proposed in 2008, was designed to transport 800,000 barrels of oil per day from Alberta to Nebraska and then into an existing pipeline that would carry the oil to the Gulf Coast.[64] The border crossing between the United States and Canada was completed last year along with 90 miles of pipeline within Canada.[65]

The United States Department of State reviewed the pipeline for nearly seven years. The Canadian portion of the line obtained approval from the National Energy Board (NEB) in 2010.[66] In May 2012, TransCanada filed an application for a Presidential permit with the United States Department of State.[67] This permit is required from the United States President whenever a pipeline crosses an international boundary. That permit was held up by ongoing litigation in the Nebraska courts.[68] In February 2015, the United States House of Representatives approved Keystone XL for the ninth time.[69] However, President Obama then exercised his veto to defeat the project.[70]

TransCanada challenged the Obama veto with a constitutional claim[71] and a North American Free Trade Agreement (NAFTA) claim of $15 billon.[72] Before either case could be heard, President Trump was elected. President Trump approved Keystone XL, issuing the Presidential permit in March of 2019. [73]

However, TransCanada was not in the clear once President Trump issued the permit to allow the pipeline to cross the Canada-US border in 2017. The November 2020 election in the United States saw a new president elected. President Biden was sworn in on January 21, 2021. In one of his first executive orders, he canceled the Presidential permit President Trump had granted.[74] The decision by President Biden did not come as a great surprise. The Biden cam-

64. *Keystone XL pipeline project*, GOV'T OF ALBERTA, https://www.alberta.ca/keystone-xl-pipeline-project.aspx (last visited Nov. 10, 2021).

65. *US/Canada border crossing complete*, TC ENERGY (May 25, 2020) https://www.tcenergy.com/operations/oil-and-liquids/keystone-xl/Project-Updates/Updates-feed/2020/us-canada-border-crossing-completed/.

66. TransCanada Keystone Pipeline GP Ltd., OH-1-2009, (Nat'l Energy Bd. Mar. 2010) (Can.).

67. U.S. DEPT. OF STATE, APPLICATION OF TRANSCANDA KEYSTONE PIPELINE, L.P. FOR A PRESIDENTIAL PERMIT AUTHORIZING THE CONSTRUCTION, CONNECTION, OPERATION, AND MAINTENANCE OF PIPELINE FACILITIES FOR THE IMPORTATION OF CRUDE OIL TO BE LOCATED AT THE UNITED STATES-CANADA BORDER (2012).

68. Thompson v. Heineman, 857 N.W.2d 731 (Neb. 2015); *see also A chronological history of controversial Keystone XL pipeline project*, CBC NEWS (Jan. 24, 2017), https://www.cbc.ca/news/politics/keystone-xl-pipeline-timeline-1.3950156.

69. Keystone XL Pipeline Approval Act, S. 1, 114th Cong. (Failed to pass over veto, Mar. 4, 2015).

70. S. DOC. NO. 114-2 (Feb. 24, 2015).

71. TransCanada Keystone Pipeline LP v. Kerry, No. 4:16-cv-00036 (S.D. Tex. filed Jan. 6, 2016).

72. TransCanada Corp. v. The Gov't of the United States of Am. (filed January 6, 2016)

73. Authorizing TransCanada Keystone Pipeline, 84 Fed. Reg. 13101 (Ex. Office of the Pres. Mar. 29, 2019) (final construction approval); *see also* Construction of the Keystone XL Pipeline, 82 Fed. Reg. 8663 (Ex. Office of the Pres. Jan. 30, 2017) (inviting resubmission of project).

74. Protecting Public Health and the Environment, 86 Fed. Reg. 7037 (Ex. Office of the Pres. Jan. 20, 2021).

paign platform supported climate change initiatives including the cancellation of Keystone XL.

Alberta had invested $1.5 billion in equity and guaranteed a $6 billion project loan in 2020.[75] The pipeline is backed by shippers as well as by TransCanada; Cenovus Energy is responsible for $100 million and Suncor Energy for $142 million.[76]

To complicate matters, NAFTA came to an end on July 1, 2020. It was replaced by a new agreement, the United States-Mexico-Canada Agreement (USMCA).[77] The USMCA does not contain the investor state arbitration remedy available under NAFTA. As such, Canadian investors would not be permitted to sue the United States government and recover damages for the government's breach of its NAFTA obligations. There are transition provisions under the USMCA permitting legacy claims and a three-year period to file those claims, but the incident on which the claim is based would have to take place prior to July 1, 2020. There is also the availability of state-to-state claims under Chapter 20 of the new USMCA, although TransCanada and/or the Alberta government would have to convince the Canadian government to bring the claim.[78] That may not be that easy.

That is not the end of the difficulties. Arguably TransCanada knew and understood the ground rules. The Presidential permit contained an express condition that the permit could be terminated or revoked or amended at any time at the sole discretion of the President.[79] This term is designed to limit NAFTA liability. A NAFTA claim could result in long and uncertain litigation.

The Canadians are not the only ones upset with President Biden's decision regarding Keystone XL. Two weeks after the decision, the Montana and Texas Attorney Generals, along with 18 other States, filed a claim in the US District Court for the Southern District of Texas[80] arguing that the President's action was unconstitutional. They claim that the power to regulate foreign and interstate commerce belongs to Congress, not the President.[81] This is not a new argument. TransCanada raised it in 2016[82] after President Obama revoked the Keystone XL permit. That lawsuit was dropped when President Trump restored the permit in his second week in office.

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75. Keystone XL pipeline project, *supra* note 63.

76. *Biden's Keystone XL cancellation continues to plague oil companies, with Canadian Natural eating $143M charge*, CBC NEWS (Mar. 4 2021), https://www.cbc.ca/news/canada/calgary/canadian-natural-takes-keystone-xl-pipeline-charge-raises-dividend-1.5936858.

77. *A new Canada-United States-Mexico Agreement*, GOV'T OF CAN. (June 7, 2021) https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng.

78. Iris Antonios, Paul Blyschak, Michael McCachen, FCIArb., & Skye A. Sepp, *USMCA Eliminates Investor-State Arbitration for Canada – What It Means for Investors*, BLAKES LLP (Oct. 3, 2018) https://www.blakes.com/insights/bulletins/2018/usmca-eliminates-investorstate-arbitration-for-can.

79. Authorizing TransCanada Keystone Pipeline, *supra* note 72.

80. Texas v. Biden, No. 3:21-cv-00065 (S. D. Tex. filed Mar. 17, 2021).

81. *Id.*

82. TransCanada Keystone Pipeline v. Kerry, *supra* note 70.

On June 9, 2021, TransCanada terminated the Keystone project and filed a NAFTA claim one month later under the legacy provisions. The claim related to discriminatory treatment on the ground that the constant delay and lengthy review was different from the expedited review domestic pipeline projects received and there was no evidence of serious environmental, safety or health concerns. The province of Alberta has joined the NAFTA litigation, and will seek to recover the $1.3 billion it invested in 2020.[83]

Four projects are still moving forward. They are the Trans Mountain Expansion project (TMX), Coastal GasLink, Enbridge Line 3, and Enbridge Line 5. The status of those projects is set out below.

B. *Trans Mountain Expansion*

In 2018, the federal government purchased the Trans Mountain Expansion from Kinder Morgan for $4.5 billion.[84] On February 22, 2019, the NEB released its reconsideration report on the project, recommending again that it proceed.[85] The federal cabinet accepted that recommendation and approved the project.[86] Construction of the project officially began on December 3, 2019.[87] Shortly thereafter, on January 16, 2020, the Supreme Court of Canada unanimously dismissed the attempt by British Columbia to claim jurisdiction over this project[88] upholding an earlier decision by the British Columbia Court of Appeal.[89]

On February 4, 2020, a unanimous Federal Court of Appeal dismissed the most recent legal challenge to the project.[90] At least six Indigenous communities challenged whether the Government of Canada had adequately fulfilled its duty to consult with Indigenous peoples in approving the TMX. 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 one[91] and that courts should defer to the governments that make the initial decision on whether the duty to consult has been met.[92] Three Indigenous groups appealed the Federal Court of Appeals decision.

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83. Geoffrey Morgan, *A 'long and Expensive' Challenge: Alberta to Join TC Energy's $15B NAFTA Claim over Keystone XL Rejection*, FINANCIAL POST (July 7, 2021), financialpost.com/commodities/a-long-and-expensive-challenge-alberta-to-join-tc-energys-15b-nfta-claim-over-keystone-xl-rejection.

84. *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.

85. *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.

86. *Certificate of Public Convenience and Necessity OC-65 to Trans Mountain Pipeline*, P.C. 2019-820, (2019) C. Gaz. I, 153 (*National Energy Board Act*) (Can.).

87. *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.

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

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

90. Coldwater Indian Band v. Canada (Att'y Gen.), 2020 F.C.A. 34 (Can.).

91. *Id.* ¶ 55.

92. *Id.* ¶ 83.

In May 2020, the Province of British Columbia issued an amended EAC in response to the British Columbia Court of Appeal's decision in September 2019.[93] In July 2020, the Supreme Court of Canada denied leave to the three First Nations seeking to appeal the Federal Court of Appeal's February 2020 decision.[94] The most recent decision by the Supreme Court of Canada to deny leave to appeal to the three indigenous groups means there are no more outstanding legal challenges to the project.[95]

C. *Coastal GasLink*

The Coastal GasLink pipeline project is owned and operated by TC Energy. The $6.6 billion project starts near Dawson Creek and, if completed, would run approximately 420 miles southwest to a liquefaction plant near Kitimat. The pipeline, as planned, would pass through the traditional territories of several First Nations. It has long been opposed by multiple hereditary chiefs, although a number of First Nations groups support the project and have an ownership interest.[96] In December 2018, the Supreme Court of British Columbia granted an injunction preventing blockades of the pipeline.[97]

In July 2019, the NEB released its decision that the pipeline–including the export terminal in Kitimat–was under provincial, and not federal, jurisdiction.[98] 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*[99] on provinces' rights to control works and undertakings within their boundaries.

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.

D. *Enbridge Line 3*

The Enbridge Line 3 runs from Hardisty, Alberta to Superior, Wisconsin, and has been operating since 1968. Over the years it became apparent that part of the pipeline had to be replaced if Enbridge wished to restore it to its historical

93. ENV'T ASSESSMENT OFFICE, MINISTRY OF THE ENV'T, GOV'T OF B.C., TRANS MOUNTAIN EXPANSION PROJECT GRANTED ENVIRONMENTAL ASSESSMENT APPROVAL, 2017ENV0001-000047 (Jan. 11, 2017), https://projects.eao.gov.bc.ca/api/public/document/58923181b637cc02bea16432/download/Information%20Bulletin%20dated%20January%2011%2C%202017.pdf.

94. Coldwater Indian Band, et al. v. Attorney General of Canada, et al., S.C.C. Case No. 39111, leave to appeal dismissed (Can.).

95. *Id.*

96. Chantelle Bellrichard & Jorge Barrera, *What you need to know about the Coastal GasLink pipeline conflict*, CBC NEWS (Feb. 5, 2020), https://www.cbc.ca/news/indigenous/wet-suwet-en-coastal-gaslink-pipeline-1.5448363; *see also About Coastal GasLink*, COASTAL GASLINK, https://www.coastalgaslink.com/about/ (last visited Nov. 10, 2021).

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

98. Jurisdiction over the Coastal GasLink Pipeline Project, MH-053-2018 (Nat'l Energy Bd. July 26, 2019) (Can.).

99. Westcoast Energy Inc. v. National Energy Board, [1998] 1 S.C.R. 322 (Can.).

capacity and move 800,000 barrels per day. The necessary authorization was obtained from regulatory bodies in Canada,[100] North Dakota, and Wisconsin. However, the $3 billion project ran into problems in Minnesota where environmentalists and native groups opposed the project.

In June 2018 the Minnesota Public Utilities Commission (Minnesota Commission) approved the route and granted the necessary permits.[101] 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.[102] On February 3, 2020, the Minnesota regulators approved a revised environmental review, thus removing the last regulatory hurdle for the project.

The US portion of the Line 3 project involves replacing 364 miles of pipeline. Most of the work lies in Minnesota with 27 miles located in North Dakota and Wisconsin. The replacement project is connected to an existing 1097 mile crude oil pipeline installed in the 1960s that runs from central Canada to Wisconsin. Enbridge now estimates that the capital cost of the Line 3 replacement project, including the Canadian segment already in service, will end up at $9.3 billion compared to the original estimate of $8.2 billion. Enbridge now estimates that Line 3 will be in service by the fourth quarter of 2021.

E. Enbridge Line 5

Enbridge is currently replacing Line 5 which runs from Superior, Wisconsin to Sarnia, Ontario. The state of Michigan is opposing the underwater segment which 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 lake bed. The project was approved by the former governor of Michigan but his successor, Gov. 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 lake bed at a cost of $500 million.

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. Enbridge has argued that those refineries will see their capacity drop by 45% if Line 5 it is not maintained. On. January 29, 2021, the

100. *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.

101. *Line 3 Review Process*, MINN. PUB. UTIL. COMM'N, https://mn.gov/puc/line3/process/ (last visited Nov. 10, 2021).

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

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. However, permits from the Michigan Public Service Commission and the US Army Corps of Engineers are still required.

III. CROSS BORDER TRANSMISSION

Earlier we outlined in some detail, disputes with respect to pipeline construction. Similar disputes have been taking place in electricity transmission. These disputes usually involve Hydro Quebec, Canada's largest public utility. Over the last four years, three projects have faced difficulty. There is a growing demand for Québec hydropower driven by ambitious US goals with respect to renewable energy. New York has some of the most ambitious goals in the country having committed to 70% renewable energy by 2030 and 100% renewable energy by 2040. The problem is that there is inadequate transmission on both sides of the border.

A. The Champlain Hudson Power Express

In October 2020, Hydro Québec submitted a bid to supply New York City with clean energy. This became possible as a result of a change in New York state standards which qualified hydroelectricity as clean energy. The proposed Champlain Hudson Power Express is a $2 billion transmission line that will be laid under Lake Champlain and the Hudson River to supply New York City with 1500 MW of renewable energy. In May 2020, the Champlain Hudson Power Express received approval from the US Federal Energy Regulatory Commission and the Canada US Internal Boundary Commission. Construction activities are expected to begin in 2021 with commercial operation in 2025.

B. New England Clean Energy Connect

The second project is known as New England Clean Energy Connect or NECEC. This is a 1200 MW transmission line from Québec to Massachusetts which Hydro Québec is building in cooperation with Central Maine Power. It will supply 9.5 TW hours of power for 20 years. Most of the power will be consumed in Massachusetts but Maine has been guaranteed 500,000 MWh per year as an incentive to allow NECEC to pass through the state.

This project has been underway for three years and most state and federal permits have been obtained. In November 2020 United States Army Corps of Engineers issued a federal environmental permit for the project which paves the way for Central Maine Power to begin construction.[103]

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103. U.S. Army Corps of Engineers, N.E. District, NAE-2017-01342 2020a. Department of the Army Environmental Assessment and Statement of Findings for the Above-Referenced Standard Individual Permit Application; Central Maine Power Company (CMP); New England Clean Energy Connect (NECEC); File No. (November 4, 2020).

On January 15, 2021 the project received a presidential permit from the US Department of Energy.[104] The project is still awaiting approvals in the US from the ISO New England. In Canada, the project has received the necessary approvals from the Regie in Montreal.[105] However on January 15, 2021 the US Court of Appeals for the First Circuit in Boston issued an injunction suspending work on the route, based in part on the challenges of a number of environmental groups that one of the federal permits was improperly issued.[106]

C. The Northern Pass Project

Hydro Québec has faced opposition in its attempt to build transmission facilities to export electricity to the United States. In 2019, a New Hampshire Court blocked the project known as Northern Pass that would have delivered 1100 MW of power to New Hampshire.[107] Northern Pass was a 192 mile transmission line that would connect Hydro Québec's electrical system with the New England electrical grid. The 20 year contract was part of clean energy procurement authorized by Massachusetts in 2018 to help the state meet its mandated greenhouse gas emission reduction goals.[108]

The US Department Energy approved a Presidential Permit for the project in November 2017.[109] However, in February 2018 the New Hampshire Site Evaluation Committee rejected the project based on the land use effects during construction. On appeal, the New Hampshire Supreme Court upheld the Evaluation Committee and struck down the Northern Pass transmission permit.[110]

D. Cross Border Transactions

Québec is not the only province that has attempted to expand its transmission activities into the United States. At one time the Ontario transmission utility was known as Ontario Hydro and, like Québec Hydro, was owned entirely by the government.[111] However, in 2017 the government sold part of its sharehold-

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104. U.S. DEP'T OF ENERGY, PRESIDENTIAL PERMIT. NECEC TRANSMISSION LLC. ORDER NO. PP-438 (Jan. 14, 2021).

105. Demande d'autorisation d'Hydro-Québec [Hydro-Québec authorization request], D-2020-083 (Régie de l'énergie [Energy Management] 3 July 2020) (Can.).

106. Sierra Club, et al. v. U.S. Dep't of the Army Corps of Engineers, et al., No. 20-2195 (1st Cir. 2021).

107. Appeal of Northern Pass Transmission, LLC, No. 2018-0468 (N.H. July 19, 2019).

108. *Baker-Polito Administration Announces Selection of Project to Bring Clean Energy to the Commonwealth*, GOV'T OF MASS. (Jan. 25, 2019) https://www.mass.gov/news/baker-polito-administration-announces-selection-of-project-to-bring-clean-energy-to-the, see also *Correspondence to the EDCs regarding the status of the Northern Pass Project*, MASS. CLEAN ENERGY, https://macleanenergy.com/83d/ (last visited Nov. 10, 2021).

109. *Department of Energy Approves Presidential Permit for Northern Pass Transmission Line Project*, DEP'T OF ENERGY (Nov. 16, 2017), https://www.energy.gov/articles/department-energy-approves-presidential-permit-northern-pass-transmission-line-project.

110. Iulia Gheorghiu, *New Hampshire Supreme Court strikes down appeal for Northern Pass transmission permit*, UTILITY DIVE (July 22, 2019) https://www.utilitydive.com/news/new-hampshire-supreme-court-strikes-down-appeal-for-northern-pass-transmiss/559221/, see also *Appeal of Northern Pass Transmission, LLC*, 214 A.3d 590 (Sup. Ct. N.H. 2019).

111. *About Hydro One*, HYDRO ONE, https://www.hydroone.com/about (last visited Nov. 10, 2021).

ing, while still maintaining control over the utility.[112] Shortly thereafter, the subsequent entity Hydro One, offered to purchase Vista Corporation, a utility based in the Pacific Northwest which provided electricity service to 379,000 customers and natural gas service to 300,000 customers in Washington, Idaho, Montana, Oregon, and Alaska.[113]

The $6.7 billion deal was unsuccessful when state regulators in Washington State and Idaho refused to approve the acquisition (even though the regulators in Alaska and Montana approved the deal).[114] The reason for their rejection was the risk of interference by the Ontario government. At the time, the Ontario government owned only 47% of the shares and had the right to appoint only 40% of the members of the board.[115] However, certain provisions in the government's agreement with Hydro One permitted the province to require the replacement of the entire board.[116] That is exactly what happened during the provincial election just prior to the regulatory proceedings in the United States, as noted below.

In 2018, the government in Ontario not only announced it was getting rid of the Board of Directors, it also mandated a 12% percent reduction in Hydro One's rates.[117] The regulatory Commission in Washington concluded that these facts completely undermined assurances that had been given regarding potential interference by the province of Ontario.[118] The parties agreed to terminate the transaction and Hydro One paid Avista a $103 million termination fee.[119]

E. Lake Erie Connector

As this report went to press, the Government of Canada announced that it will finance through the Canada Infrastructure Bank (CIB) a $1.7 billion transmission line across Lake Erie.[120] The line will cover 100 km and transmit 1000 Mw of electricity between Canada and the Unites States. The CIB is providing a low-interest long-term loan of $655 million.[121]

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112. *Ontario sells what it expects to be final offering of Hydro One shares, says $3B could be raised*, GLOBAL NEWS (May 8, 2017), https://globalnews.ca/news/3436254/hydro-one-shares-sale-update/.

113. *Hydro One signs blockbuster deal to buy Avista for $6.7B in cash*, CBC NEWS (July 19, 2021), https://www.cbc.ca/news/business/hydro-one-avista-1.4213159.

114. Hydro One Limited v. Avista Corporation, U-170970 (Wash. Utils. and Transp. Comm'n Dec. 3 2018).

115. *Id.*

116. *Id.*

117. Geoff Zochodne, *Hydro One shares tumble after utility strikes deal with Doug Ford to replace board, CEO*, FINANCIAL POST (July 12, 2018), https://financialpost.com/commodities/energy/hydro-one-shares-tumble-after-utility-strikes-deal-with-doug-ford-to-replace-board-ceo.

118. Hydro One Limited, *supra* note 113.

119. Geoff Zochodne, *For Hydro One, costs of failed Avista deal go well beyond US$103 million break fee*, FINANCIAL POST (Jan. 25, 2019), https://financialpost.com/news/fp-street/for-hydro-one-costs-of-failed-avista-deal-go-well-beyond-us103-million-break-fee.

120. *The CIB and Private Sector Partners to Invest $1.7 Billion in Lake Erie Connector*, CAN. INFRASTRUCTURE BANK (Apr. 13, 2021), https://cib-bic.ca/en/the-cib-and-private-sector-partners-to-invest-1-7-billion-in-lake-erie-connector/.

121. *Id.*

The project is being led by Michigan-based ITC holdings, a subsidiary of Fortis Inc, a distributor of electricity and gas in Canada and the United States. ITC claims the new project will help both countries reach their carbon reduction goals and will save Ontario $100 million in electricity costs each year and reduce carbon by two million tonnes. The hope is that building cross border transmission between Ontario and Michigan will prove easier than transmission lines between Quebec and New England.[122]

IV. REGULATORY REFORM

A. Net Metering

During 2020, regulators in both Canada and the United States looked at reforming net metering. The goal was essentially to determine if net metering could be expanded from a single customer to a group of customers. Net metering has been around for almost 10 years, but has caught on in Canada in only Ontario and British Columbia. Net metering is attractive, particularly from a political perspective, because it promotes renewable energy and can potentially reduce the cost of electricity to ratepayers. Utilities that were not eager to lose demand or customers have opposed net metering proposals.[123]

The most ambitious program took place in British Columbia. On April 20, 2019, BC Hydro submitted an application to the British Columbia Utilities Commission (BCUC) to amend its net metering program. This resulted in interventions by 14 parties, over 200 letters of comment, and a 52 page final decision a year later in June 2020.[124] The most contentious part of the preceding was BC Hydro's request to limit the amount of the electricity generated through net metering to the customers' annual load. Utilities throughout North America have long argued that customers engaging in net metering should not be able to generate a profit. The basic concept was that customer should be able to offset the cost of electricity they bought from the utility with the revenue they received from selling electricity to the utility. BC Hydro's evidence was that some customers were making a significant profit, but that profit was a small percentage of the total. In the end the BCUC rejected the BC Hydro proposal and refused to adopt a maximum generation volume.[125]

The Ontario regulatory initiative was in one sense more aggressive in its exploration of community net metering. In October 2020, the Ontario Minister of Energy established a consultation to determine the viability of community net

122. LAKE ERIE CONNECTOR PROJECT, https://www.itclakeerieconnector.com/faq (last visited Nov. 10, 2021).

123. *The Economics of Solar Power in Canada*, CAN. ENERGY REGUL. (Sept. 29, 2020), https://www.cer-rec.gc.ca/en/data-analysis/energy-commodities/electricity/report/solar-power-economics/index.html.

124. *The British Columbia Hydro and Power Authority, Application to Amend Net Metering Service,* R.S. 1289, (B.C. Util. Commission June 23, 2020) (Can.).

125. *Id.*

metering.[126] Garden-variety net metering consists of an individual customer exchanging electricity with the utility. Community net metering, on the other hand, involves groups of customers acting together as a community or organization. The government asked interested parties to make submissions by November 22, 2020, addressing such questions as what constitutes a community, how should the credits be structured, and how should utilities recover any costs incurred? To date no report has been issued by the government or the Ontario Energy Board.[127]

In the United States many States have adopted some form of net metering. California, for example, has recently adopted changes to its net metering program. In California, net metering is driven by solar generation established by households. However, the total amount of net metering has been restricted so that it cannot exceed 5% of total solar generation.[128] More recent changes in California may have implications for future changes in both Ontario and British Columbia.

The first California change was a requirement that net metering customers switch to time of use pricing. The highest rates are charged in times of peak demand, which is late afternoon or early evening. The lowest rates are charged at off-peak times-- late at night and early in the morning--when electricity usage is low.[129] The implication for net metering is that the value of the credit for energy sold to the grid varies based on the Time-of-use rate. This means that to get the highest net metering credits, consumers need to sell the maximum energy to the grid during peak demand time.

The other change which is relevant to Canada is the implementation of a new component of electricity rates known as non-bypass charges or NBC. This is a small charge of $0.02-$0.03 per kilowatt hour which is added to energy charges. This amount is not credited to consumers, which means that consumers earn a bit less then they pay for electricity. This has not limited the demand for net metering because the NBC makes up a small portion of the overall bill. In addition, customers with generation systems under mega 1 MWh have to pay a one time interconnection fee to connect their systems to the grid. This cost is generally between $75 and $150.[130]

It will be interesting to see where Ontario goes with community net metering. This of course has implications for customer owned generation throughout Canada. Increasingly there is a demand by large industrial customers to be able to sell their excess electricity to other customers in what are essentially private

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126. *Changes to Ontario's Net Metering Regulation to Support Community-Based Energy Systems*, Proposal ERO 019-2531 (Ministry of Energy Oct. 8, 2020) (Can.), https://ero.ontario.ca/notice/019-2531.

127. *Id.*

128. *Net Energy Metering*, CAL. PUB. UTIL. COMMISSION, https://www.cpuc.ca.gov/industries-and-topics/electrical-energy/demand-side-management/net-energy-metering (last visited Nov. 10, 2021).

129. *Id.*

130. *Id.*

power purchase agreements.[131] A detailed report on net metering is now before the Alberta government.[132]

B. Pipeline Construction Reform

It is not often that we hear governments proposing some form of deregulation in the energy sector, particularly when it comes to pipelines. However, on January 20, 2021 the Ontario Minister of Energy proposed such a possibility.[133] Section 90 of the *Ontario Energy Board Act* (OEBA) requires that anyone constructing a pipeline in Ontario obtain a leave to construct order from the Ontario Energy Board if the pipeline:

- is more than 20 km in length
- will cost more than $ 2 million
- has a pipe size of 12 inches or more
- has an operating pressure of 280 psi or more[134]

The Ontario government is proposing to change O.Reg 328/03 under the OEBA to increase the cost threshold from $2 million to $10 million. However, an OEB leave to construct order will still be required for any pipeline that does not meet any of the other requirements outlined in section 90 of the OEBA. In addition, any party constructing a pipeline will still be required to obtain the existing authorizations from government Ministries or Municipalities. Further, any reduction to the existing requirements would not apply to the construction of pipelines crossing an Ontario border which are regulated by the Canadian Energy Regulator or an addition to a pipeline that is part of an existing interprovincial pipeline.[135]

The government estimates that the increase of the threshold from $2 million to $10 million would, based on the OEB LTC applications received between 2017 and 2020, reduce the number of projects requiring a LTC from the Board by 24%. This could result in a significant reduction in regulatory costs which are ultimately borne by the ratepayers.[136]

C. Small Utility Regulation

Ontario is different than most Canadian jurisdictions when it comes to electricity regulation. Canada is generally dominated by large government owned utilities that provide generation, transmission, and distribution. However, in On-

131. This continues to be a major issue before the Alberta energy regulator which we discussed in last year's issue.

132. ALBERTA UTILITIES COMMISSION, SELF-SUPPLY AND EXPORT - ALBERTA UTILITIES COMMISSION DISCUSSION PAPER, https://www.auc.ab.ca/regulatory_documents/Reference/Self-supply%20and%20export%20%E2%80%93%20AUC%20discussion%20paper.pdf.

133. Proposed Revision to Ontario Energy Board (OEB) Leave to Construct Cost Threshold for Hydrocarbon Pipelines, Proposal ERO 019-3041 (Ministry of Energy Jan. 29, 2021) (Can.). https://ero.ontario.ca/notice/019-3041

134. Ontario Energy Board Act, 1998, SO 1998, c 15, Sch B (Can.).

135. Proposed Revision, *supra* note 131.

136. *Id*.

tario, most of the distribution has traditionally been done by municipally owned distributors. While, recently, there has been a high degree of consolidation among Ontario distributors, there are still 31 small distributors each with less than 20,000 customers.[137] In 2020 the OEB announced a new initiative to streamline the regulatory process for these small distributors.[138] It started with a stakeholder meeting on January 28, 2021, and will conclude with a report issued in time to set the 2023 rates.

D. Green Industrial Rates

As 2020 came to an end, the British Columbia government announced new Green Energy Incentive Rates for industrial customers in the province.[139] There are two new rate plans: the Clean Industry and Innovation Rate and the Fuel Switching Rate. Both rates are available until March 31, 2030 and customers can enjoy these discounted rates for seven years. The discount is 20% for the first five years, 13% in the sixth year and 7% in the seventh year.[140]

Under the Clean Industry and Innovation Rate, power costs are lowered for eligible industrial customers involved in carbon sequestration, hydrogen production, synthetic fuel production and carbon capture and storage. In addition, innovation customers setting up data centers with over 70 GWh a year of electricity demand are eligible to benefit from these lower rates.[141]

The Fuel Switching Rate is available to existing and new industrial customers switching from fossil fuels to electricity to power their operations. To qualify, a customer must demonstrate that the electrification will reduce greenhouse gas emissions. The discounted rate applies only to the fuel switching portion of the electric load. The Fuel Switching Rate is not available to oil pipelines, oil refineries, methanol production or natural gas liquefaction facilities. There is also a minimum energy demand requirement. The increase in electricity demand from fuel switching must be at least 20 GWh a year.[142]

In addition to the new BC Hydro Incentive rates discussed above, the province of British Columbia has allocated $84 million in federal green infrastructure funding to establish an electrification fund for qualifying industrial customers including those in the oil and gas sector.[143] BC Hydro will provide funding of up

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137. *Licensed companies and licensing information*, ONTARIO ENERGY BOARD, https://www.oeb.ca/industry/licensed-companies-and-licensing-information (last visited Nov. 10, 2021).

138. ONTARIO ENERGY BOARD, LETTER RE: CONSULTATION ON UPDATES TO FILING REQUIREMENTS FOR ELECTRICITY DISTRIBUTION COST OF SERVICE APPLICATIONS (Apr. 15, 2021), https://www.oeb.ca/sites/default/files/ltr-consultation-filing-reqs-costofservice-20210415.pdf

139. *Province Helping Industry Power up with Clean Electricity*, OFFICE OF THE PREMIER, GOV'T OF BC (Jan. 28, 2021) https://news.gov.bc.ca/releases/2021PREM0006-000153.

140. *Industrial electrification rates*, BC HYDRO, https://app.bchydro.com/accounts-billing/rates-energy-use/electricity-rates/electrification-rates.html (last visited Nov. 10, 2021).

141. *Id.*

142. *Id.*

143. *Facilities Electrification Fund*, BC HYDRO, https://www.bchydro.com/powersmart/business/programs/electrification-fund.html?utm_source=direct&utm_medium=redirect&utm_content=electrificationfund (last visited Nov. 10, 2021).

to 50% of the eligible costs to a maximum of $15 million per project, with the customer responsible for the balance of the cost.[144]

To qualify, projects must switch from carbon-based fuel to electricity, support public infrastructure and construct interconnection facilities. The work must also be completed by spring 2027.[145]

Customers must meet certain minimum thresholds based on customer type. Industrial customers have a 5 MW minimum threshold with a minimum interconnection cost of $5 million. Applications for transporting bulk environmental customers with a minimum interconnection cost of $2 million will be reviewed on a first-come first-served basis.[146]

E. New Capacity Auctions

Ontario was slow to recognize the benefits of competitive bidding. That concept was ignored in the years of Feed In-Tariff (FIT) contracts which were based on the concept of first come first serve.[147] The FIT Program was developed in 2009 to promote the greater use of renewable energy sources by providing a guaranteed price for a fixed contract term. This program was met with all kinds of complaints about illegal preferences as not all FIT applications were approved, leading to a number of lawsuits and international arbitrations (some of which are still proceeding).[148]

Good news arrived on December 10, 2020, when the Independent Electricity System Operator (IESO) announced the results of a new capacity auction under which 1000 MW of capacity was secured at a price which was 26% below the price paid per the 2019 demand response auction.[149]

The total number of bidders was not announced but over 1700 MW of resources enrolled in the auction. The auction also included storage assets which was particularly welcome given the regulatory struggles to determine where storage fits into the Ontario marketplace. The capacity auction results are before the Ontario Energy Board.[150]

Participants have committed to provide capacity for summer 2021 to help manage peak seasonal loads. The next capacity auction is scheduled for December 2021. The IESO states it intends to explore additional enhancements to enable additional resources to compete.[151]

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144. *Id*.

145. *Id.*

146. *Id.*

147. *Feed In-Tariff Program*, INDEPENDENT ELECTRICITY SYSTEM OPERATOR, https://www.ieso.ca/en/Sector-Participants/Feed-in-Tariff-Program/FIT-Archive (last visited Nov. 10, 2021).

148. Gordon Kaiser, *The New NAFTA and Canadian Energy Regulators*, ENERGY REGUL. Q., Sept. 2020.

149. *Capacity Auction Results Demonstrate the Value of Competition*, INDEPENDENT ELECTRICITY SYSTEM OPERATOR (Dec. 10, 2020), https://ieso.ca/en/Sector-Participants/IESO-News/2020/12/Capacity-Auction-Results-Demonstrate-the-Value-of-Competition.

150. *Id.*

151. *Id.*

V. KEY REGULATORY DECISIONS

A. Energy Storage

The development of energy storage in terms of regulation has been moving slowly in Canada compared to the United States. In January 2020 the OEB issued the Toronto Hydro rate case decision[152] rejecting an application to include storage in the utility's rate base, stating that the applicant should pursue a policy change in the Board's ongoing consultation on distributed energy resources.[153] However, in August 2020 a Board Staff report suggested that Ontario local distribution companies may operate behind the meter energy storage and treat it as part of regulated operations if the purpose is to remediate poor service reliability.[154] There is still some confusion regarding the status of what appears to be a new policy instrument.

The storage market is moving more quickly in the United States. Readers will recall that in 2018 FERC issued a final rule, Order No. 841,[155] which was designed to incorporate storage more fully into the marketplace. There were a number of appeals and challenges to this Order but ultimately, in August 2020 FERC accepted MISO's proposal to allow cost recovery for energy storage projects that address transmission system needs.[156] Interestingly, the OEB Staff Report on energy storage was released at the same time.[157] Other US RTO/ISO agencies are now developing proposals to promote the integration of energy storage solution to address different transmission issues.[158]

The August 10 FERC approval of the MISO proposal allowed, for the first time and under certain circumstances, electric storage facilities to qualify as transmission only assets eligible for full cost of service rates.[159] At the same time, merchant energy storage is developing in both Canada and the United States using battery energy storage systems. Broad Reach Power has begun con-

152. Toronto Hydro – Electric System, EB-2018-0165 (Ontario Energy Board December 19,2019) (Can.).

153. *Id.*

154. ONTARIO ENERGY BOARD, BULLETIN RE: OWNERSHIP AND OPERATION OF BEHIND-THE-METER ENERGY STORAGE ASSETS FOR REMEDIATING RELIABILITY OF SERVICE (Aug 6, 2020), https://www.oeb.ca/sites/default/files/OEB-Staff-Bulletin-ownership-of-BTM-storage-20200806.pdf.

155. Final Rulemaking*, Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operator*s, 83 Fed. Ref. 9580 (2018) (codified at 18 C.F.R. § 35).

156. *Midcontinent Independent System Operator*, Inc., 170 FERC ¶ 61,186 (2020).

157. Ontario Energy Board, *supra* note 136.

158. Sharon Thomas, *Storage as a Transmission Asset is Gaining Traction in Many RTOs/ISOs*, ENERGY STORAGE ASSOCIATION (Dec. 15, 2020) https://energystorage.org/storage-as-a-transmission-alternative-is-gaining-traction-in-many-rtos-isos/.

159. *Midcontinent Independent System Operator*, *Inc*., 172 FERC ¶ 61,132 (2020).

struction of two separate 100 MW facilities in Texas,[160] while WCSB Power is developing a 20 MW facility in Alberta.[161]

B. *Innovation Funding*

In the past Canadian energy regulators have been reluctant to fund through rates projects that were considered to be research or experimental in nature. For example, both the Ontario and Nova Scotia regulators previously denied applications to fund EV charging.[162] Things have changed.

The year 2020 saw energy regulators in British Columbia, Ontario, and Nova Scotia take dramatic steps in funding new technology through ratepayer dollars.[163] We turn first to British Columbia.

In June 2020 the BCUC issued a decision in response to an application by Fortis BC to establish a Clean Growth Innovation Fund.[164] The utility actually proposed two funds - one for a gas utility and one for an electricity utility. The application by the electricity utility failed but the one by the gas utility succeeded.[165]

The utility proposed a charge of $0.30 per customer per month for the electric utility and $0.40 per customer per month for the gas utility. The anticipated annual funding based on the number of forecasted customers was $ 4.9 million for the gas utility and $ .5 million for the electric utility.[166]

The BCUC approved the innovation fund for the gas utility because FortisBC Energy Inc "demonstrated that [it] needs to accelerate its innovation activities in order to meet the ambitious targets pertaining to renewable gas outlined in the CleanBC Plan".[167]

The decision represents a key milestone for innovation funding. Previous applications were directed at specific projects. However, the FortisBC application created a fund for projects that would be considered from time to time. The application also proposed a governance model to ensure that the funds were applied to innovations that would benefit customers. The decision also addressed accountability and annual reporting by the utility.

The starting point in the Board's analysis was a determination of the demand for funding. The BCUC relied on the evidence from the utility that point-

160. *Broad Reach Power to Begin Development of Two 100-Megawatt Battery Storage Projects in Texas*, BROAD REACH POWER (Sept. 15, 2020), https://broadreachpower.com/broad-reach-power-to-begin-development-of-two-100-megawatt-battery-storage-projects-in-texas/.

161. *WCSB Power Announces the Construction of Canada's Largest Battery Energy Storage System*, WCSB POWER (Oct. 6, 2020), https://wcsbpower.com/wcsb-power-announces-the-construction-of-canadas-largest-battery-energy-storage-system/.

162. Toronto Hydro Electric, EB-2010-0142 (Ontario Energy Board February 22,2012) (Can.);, *Nova Scotia Power*, 2018 N.S.U.A.R.B. 1 (Can.).

163. Gordon E. Kaiser, *Canadian Energy Regulators and New Technology: The Transition to a Low Carbon Economy,* 9 ENERGY REGUL. Q. (July 2021).

164. Fortis BC Energy, Decision G-165-20 (B.C. Util. Commission June 22, 2020) (Can.).

165. *Id.*

166. *Id.*

167. *Id* at pp. 155-156.

ed to Canada's commitment to reduce GHG emissions by 30% between 2005 and 2030 and BC's commitment to reduce the emissions 40% by 2030 and 80% by 2050. To this were added commitments by the City of Vancouver. The panel concluded that the utility had demonstrated the need to accelerate its innovation activities in light of governmental climate policies with respect to decarbonization and electrification.[168]

The BCUC faced a major hurdle when one of the interveners argued that it did not have jurisdiction to set the rate increases proposed by the utility. This is not a unique argument. In the past, Canadian energy regulators have faced continual objections regarding rates for special classes including (most recently) indigenous customers[169] and (previously) rates for low income consumers.[170]

In this case the BCUC found that the innovation fund did not offend cost of service principles, relying on section 59 of the *Utilities Commission Act* that gave the BCUC broad discretion to use any mechanism or method for setting a rate that it considered advisable. The Commission concluded that a fixed rate adder to support the innovation fund was one such mechanism.[171] This decision will be closely watched by regulators throughout Canada.

C. Smart Grid Pilots

The British Columbia regulator was not alone in financing new technology in 2020. In December 2019 Nova Scotia Power submitted an application to the Nova Scotia Utility and Review Board to approve a $7 million capital expenditures on a smart grid pilot. The purpose of the pilot was to determine if new software developed by Siemens could monitor and manage distributed energy resources (DERs) in a fashion that would increase grid reliability and reduce costs.[172]

The project was driven by the growing importance of distributed energy resources in the operations of Canadian electricity utilities. The distributed Energy Resources used in this project were solar generation, battery storage, and electric vehicle charging.[173]

The overall cost of the pilot project was $19 M but, of that amount, nearly $12 million was external funding. The remaining one third was proposed to be funded by Nova Scotia Power customers. The criteria the Board applied in determining whether this capital investment was justified was called the Innovation Justification Criteria (ITC). The ITC test was – can the project be reasonably expected to produce valuable data and learning to develop a business case prior to full-scale development?[174]

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168. Fortis BC Energy, *supra* note 164, at pp. 155-156.
169. Manitoba Hydro Electric Board v. Manitoba Public Utilities Board, 2020 MBCA 60 (Can.).
170. Dalhousie Legal Aid Service v. Nova Scotia Power, 2006 NSCA 74 (Can.).
171. *Id.*
172. Nova Scotia Power, 2020 NSUARB 63 (May 7, 2020) (Can.).
173. *Id*.
174. *Id*.

One of the issues the Board had to contend with was a concern by interveners about the lack of competitive bidding in putting the project together. In particular, there was a significant reliance on one vendor, Siemens, with respect to software. This was discounted when it was explained that Siemens was largely responsible for obtaining the federal funding which was supporting the project. There was also some concern about potential cost overruns. The Board made it clear that its decision approving the pilot project was limited to the expenditure of $7 million and recovery of any cost overruns would require Board approval.[175]

This decision by the Nova Scotia Board[176] is a rare but important example of ratepayer funding of new technology. The Board's decision was clearly influenced by significant funding from outside sources such that only one third of the total capital cost was being borne by ratepayers as was the condition that the utility was at risk for any cost over runs. The Board also established a meaningful compliance and reporting structure that will be instructive to other regulators examining similar ventures. The extensive evidence from independent outside experts also provides some useful lessons for future applicants.[177]

D. Hydrogen Blending Pilots

On October 29, 2020, the Ontario Energy Board issued a decision[178] approving an application from Enbridge Gas to construct a pilot project, which blends hydrogen into conventional natural gas, to be distributed in an area north of Toronto. The Board approved the application and allowed Enbridge to construct the necessary facilities and set rates related to the project. The rates were designed to ensure that the ratepayers that receive blended gas did not pay more than other Enbridge gas customers.[179]

The objective of the pilot is to reduce the GHG emissions relating to the sale of natural gas. Hydrogen has no carbon emissions when it is burned. As a result, combining hydrogen with natural gas reduces the overall carbon footprint.[180]

In this pilot, 2% of the total product will be hydrogen. Because hydrogen has a lower heating value than conventional natural gas, it takes a greater volume of hydrogen to provide the same energy content. The result is that customers receiving blended gas must consume a higher volume than customers receiving conventional natural gas. This requires a price adjustment, which the Board approved, to compensate customers in the blended gas district for the cost of the extra gas.[181]

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175. *Id*.

176. Nova Scotia Power, 2020 NSUARB 63 (May 7, 2020) (Can.).

177. *Id*.

178. ONTARIO ENERGY BD., DOCKET NO. EB-2019-0294, ENBRIDGE GAS INC. .,(2020) (Can.) [hereinafter OEB DOCKET NO. EB-2019-0294]..).

179. *Id.*

180. *Id*.

181. *Id*.

The pilot project will deliver blended gas to approximately 3,600 customers in the blended gas area over five years. At the end of that period Enbridge is required to file a detailed report to the regulator that will assess the costs and benefits of the project. Enbridge has indicated that it plans to apply for similar projects in other gas markets it is currently serving in Canada.[182]

E. *Demand Control Tariffs*

In March 2020, the Nova Scotia Utility and Review Board released its decision[183] with respect to a unique demand control tariff for the Nova Scotia Power's largest customer, Port Hawkesbury Paper. The main feature of this new tariff is that the customer gives control of its load to the utility. That means that Nova Scotia Power can increase or decrease the load depending on system conditions. The ability to make those changes can lead to significant savings to the Nova Scotia Power system and, ultimately, to ratepayers.[184]

Under the tariff, the cost savings are divided between the utility and the customer, with 25% of the savings going to the customer in the form of a load shifting credit. The remaining 75% is credited to Nova Scotia Power customers. "The new tariff must provide a minimum of [four dollars per megawatt hour] towards the fixed costs of [Nova Scotia] Power."[185]

It is estimated that the total benefit to Nova Scotia Power customers will range "between $6 million and $13 million annually over the" three-year tariff period for "an average of $10 million."[186] Detailed reporting by Nova Scotia Power to the regulator is required on both a quarterly and monthly basis.[187]

VI. IN THE COURTS

A. *Constitutional Issues*

The year 2020 started out with two constitutional decisions. First, as previously discussed, the Supreme Court of Canada issued a significant decision to uphold the constitutionality of the *Greenhouse Gas Pollution Pricing Act.*[188] Second, on January 16, 2020, the Supreme Court of Canada dismissed British Columbia's attempt to regulate the transportation of heavy oil through the province.[189] The nine-member panel delivered a rare decision from the bench stating that it agreed with the British Columbia Court of Appeal's decision.[190]

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182. OEB DOCKET NO.Enbridge Gas Inc., EB-2019-0294, *supra* note 178. (Ontario Energy Board October 29. 2020) (Can.).

183. Nova Scotia Power, Inc., 2020 NSUARB 44 (Can.).

184. *Id.*

185. *Id.*at 4.

186. *Id*.

187. *Nova Scotia Power, Inc.*, *supra* note 183.

188. Reference re Greenhouse Gas Pollution Pricing Act, 2020 SCC 11 (Can.).

189. Reference re Environmental Management Act, 2020 SCC 1 (Can.).

190. *Id.*

The British Columbia government was attempting to block the Trans Mountain Expansion pipeline that it believed would significantly increase the flow of heavy oil from Alberta to the British Columbia coast.[191] To do this British Columbia proposed to change its *Environmental Management Act* in April 2018. Those changes would prohibit the possession and transportation of heavy oil without a provincial permit. In response to political controversy, the British Columbia Premier referred the matter to the British Columbia Court of Appeal.[192] That Court unanimously held that the amendments were outside the scope of provincial jurisdiction given that they were primarily directed at regulating interprovincial undertakings, which was outside the province's authority.

B. *Intervener Standing*

There was a time when many Canadian energy regulators interpreted standing on a relatively narrow basis.[193] Over time, most energy regulators clarified their standing rules. Standing was generally allowed if the potential intervenor could show that it was "directly affected" by the application.[194]

In December 2020, the Alberta Court of Appeal issued its decision in *Normtek Radiation*,[195] which broadens the standing rule beyond the narrow directly affected concept.

Normtek Radiation was in the business of transporting radioactive material.[196] It opposed a decision approving an amendment of a landfill contract by the Alberta Environmental Appeals Board. The Board had approved the disposal of concentrated radioactive material in a manner Normtek believed was contrary to industry and government standards. Normtek was not directly affected by this ruling, but was concerned that failure to follow industry standards would damage the entire industry, including Normtek.

Normtek's request for standing was rejected because it operated outside the area of environmental impact.[197] The Board accordingly ruled that Normtek was not directly affected. Normtek then appealed the Board's decision to the Alberta Court of Appeal.[198] The court reversed stating that it was not necessary that there be an adverse impact in order for the appellant to be directly affected.[199] The Alberta Court of Appeal held that the general economic impact of the approval was sufficient. In short, the court held that the Board's interpretation of "directly affected" was too narrow. This decision may open the door to a broader interpretation of standing.

191. Reference re Environmental Management Act (British Columbia), 2019 BCCA 181 (Can.).
192. *Id.*
193. Energy Law & Policy 128 (Gordon Kaiser & Bob Heggie eds., 2011).
194. Canada (Att'y Gen.Attorney General) v. Pictou Landing Band Council, 2014 FCA 21 (Can.).
195. Normtek Radiation Serv. v. Alberta Env't Appeal Bd., 2020 ABCA 456 (Can.).
196. Normtek Radiation Serv. Ltd. v. Alberta (Env't Appeals Bd.), 2018 ABQB 911 (Can.).
197. *Id*.
198. *Normtek Radiation Services*, 2020 ABCA 456.
199. *Id.*

C. The Importance of Reasons

The Supreme Court of Canada, in its decision commonly referred to as *Vavilov*,[200] emphasized the necessity of providing reasons in administrative decisions. The Court stated, not only were reasons important, but they also required justification, transparency, and intelligibility. Decisions must be justified, not just justifiable.

The court went on to identify two fundamental flaws that were to be avoided.[201] First, a decision must have internally coherent reasons, and will not be considered reasonable where the decision reached does not follow from the analysis undertaken.[202] The second fundamental flaw relates to the requirement that the decision must be justified in light of the legal and factual constraints that bear on it.[203] Finally, decisions must avoid persistently discordant or contradictory legal interpretations and departures from long-standing practices or established internal authority, without satisfactory explanations for the departure.[204] Without a credible explanation of its failure to follow precedence, a decision will be considered unreasonable.

In October 2020, the Ontario Divisional Court in *Halton Hills Hydro*[205] had an opportunity to decide the first case under this aspect of the *Vavilov* decision. The applicant utility claimed that the Board had erred in its decision on three grounds: (1) the Board had failed to set rates that were just and reasonable; (2), the Board had arbitrarily not followed past practices; and (3) the reasons for the decision were not sufficient.[206]

The Court rejected all three arguments. The decision, with respect to reasons, was particularly interesting. In rejecting on this ground, the Court stated as follows:

> [33] The reasons on this issue are brief but sufficient. The Board did not need to state the history of this issue in the Board's jurisprudence in the way that I have done in these reasons. A specialized tribunal providing reasons to experienced participants in the Board's processes need not explain things that are well known to the parties. Reasons are instrumental, and these reasons conveyed to the parties the basis of the Board's decision. . . . [35] This is not a case where the court has "no idea what prompted the decision". [18] To paraphrase from the Court of Appeal: "[t]he . . . reasons . . . need not be lengthy. They need not be complex. But, as the Divisional Court observed, they must at least answer the question "Why?". [19] The OEB's decision answers the question "why". The reasons are sufficient.[207]

200. Canada (Minister of Citizenship & Immigr.) v. Vavilov, 2019 SCC 65 (Can.).

201. *Id*.

202. *Id*. 102.

203. *Id*. ¶ 105.

204. *Vavilov*, 2019 SCC 65, ¶ 72.

205. Halton Hills Hydro v. Ontario Energy Board, 2020 ONSC 6085 (Can.).

206. *Id*. ¶ 21.

207. *Id*. ¶ 33, 35.

In May 2020, the Ontario Divisional Court struck down a decision of the Ontario Ministry of the Environment in *Nation Rise Wind Farm*[208] The Ministry had issued a permit for the wind farm that was reversed by the Minister on the basis that the project was not in the public interest.[209] The wind farm operator appealed the decision to the Divisional Court. The court found that "the Minister's decision was unreasonable" because the process by which the Minister made "the decision was procedurally unfair."[210] Relying on the Supreme Court of Canada decision in *Vavilov*,[211] the court found that there was a denial of procedural fairness when the Minister failed to grant the operator with an opportunity to address a remedy after the decision was made.[212] The court also found that the failure to advise the operator that a new issue relating to bat colonies was being considered in the appeal and was instrumental in determining that the project was not in the public interest.[213]

A different result was reached by the Yukon Court of Appeal in *Yukon Energy Corporation.*[214] There the utility appealed the decision of the Yukon Utilities Board on the basis that the Board failed to consider certain aspects of the evidence presented by Yukon Energy and had also considered irrelevant factors in concluding that certain costs incurred were not prudent.[215] The court rejected the application stating that the hearing panel was entitled to exercise its discretion when it declined to approve the cost submitted by Yukon Energy, that "the [h]earing [p]anel did not take into account any irrelevant factors in exercising its discretion," and accordingly "did not commit [any] error of law."[216]

D. Jurisdiction Decisions

In *Planet Energy*[217] the Ontario Energy Board had ordered Planet Energy to pay an administrative penalty of $155,000. Planet objected and appealed to the Ontario divisional court on the basis that the Board had no jurisdiction to impose an administrative penalty because the Board had exceeded the time limitation in section 112 of the Ontario Energy Board Act. The court rejected the appeal on the basis that Planet Energy had not raised the issue with the Board, relying on the principle that the court had the discretion to ignore arguments that were not made before the Board in the first instance as set out in the Supreme Court of Canada decision in *Alberta Teachers*,[218] and the Ontario Court of Appeal deci-

208. Nation Rise Wind Farm v. Minister of the Env't, 2020 ONSC 2984 (Can.).
209. *Id.* ¶ 1.
210. *Id.* ¶ 6.
211. 2019 SCC 65 (Can.).
212. *Nation Rise Wind Farm*, 2020 ONSC 2984, ¶ 154.
213. *Id.* ¶ 91.
214. Yukon Energy Corp. v. Yukon Util. Bd., 2021 YKCA 1 (Can.).
215. *Id.* ¶ 19.
216. *Id.* ¶ 33.
217. Planet Energy Corp. v. Ontario Energy Bd., 2020 ONSC 598 (Can.).
218. Alberta Info. & Privacy Comm'r v. Alberta Teachers Assoc., 2011 SCC 61, [2011] 3 S.C.R. 654 (Can.).

sion in *Rowan*.[219] The court noted that while a reviewing court has the discretion to address a new issue raised on judicial review, that discretion will generally not be exercised if the issue could have been raised before the tribunal and was not.[220]

Planet Energy was followed by a decision of the Alberta Court of Appeal, in April 2020, in *Fort McKay First Nations v. Prosper Petroleum.*[221] The Alberta Energy Regulator (AER) had approved Prosper Petroleum's application to build a 10,000 barrel per day bitumen recovery project within 5 km of the FMFN reserve.[222] The question before the regulator was whether or not the project was in the public interest. The panel found that the project was in the public interest but declined to consider the adequacy of consultation and the honor of the Crown.[223] The AER stated that this was the responsibility of the Alberta government.

Fort McKay First Nations appealed to the Court of Appeal that set aside the AER decision, finding that while AER may have been statute barred from assessing the adequacy of crown aboriginal consultation the AER was not relieved of its duty to assess the adequacy of the consultation.[224] The Court of Appeal held that where a tribunal had the power to consider questions of law without clear indication that the Legislature intended to exclude such jurisdiction, tribunals have implied jurisdiction to consider issues of constitutional law. The court noted this is especially the case where the tribunal is assessing the public interest.[225]

The Fort McKay case was followed by the Ontario Divisional Court decision, in May 2020, in *Nation Rise Wind Farm.*[226] There a Director of the Ministry of the Environment had issued an authorization to Nation Rise Wind Farm permitting construction of a 100 MW windfarm near Ottawa. A group of citizens filed a notice of appeal to the Minister who was required to determine if the decision was in the public interest. The Minister found the decision was not in the public interest and revoked the permit. In so doing the Minister relied on evidence that had not been before the Director in the first instance.[227]

In addition, the Minister failed to advise Nation Rise Wind Farm that new evidence and a new issue was being considered.[228] The Divisional Court agreed with Nation Rise that the Minister's decision was unreasonable and that the process by which he reached the decision was procedurally unfair.[229] The court

219. Rowan v. Ontario Sec. Comm'n, 2012 ONCA 208 (Can.).
220. *Alberta Info. & Privacy Comm'r*, [2011] 3 S.C.R. at 655.
221. Fort McKay First Nations v. Prosper Petroleum*,* 2020 ABCA 163 (Can.).
222. *Id.* ¶ 2.
223. *Id.* ¶¶ 23-27.
224. *Id.*
225. *Fort McKay First Nations*, 2020 ABCA 163, ¶¶ 68-71.
226. *Nation Rise Wind Farm*, 2020 OSCN 2984.
227. *Id*.
228. *Id.* ¶ 125.
229. *Id.* ¶ 3.

ruled that the Minister did not have the authority under section 145 of the EPA to confirm, offer, or revoke the decision of the tribunal.[230] The court found that section 145 requires the Minister to deal only with the matters in the appeal that were raised by the party bringing the appeal. The court found the Minister unreasonably concluded that he had authority to add new issues on the appeal.[231]

The next decision was the decision of the Manitoba Court of Appeal in June 2020, in *Manitoba Hydro Electric Board v. Manitoba Public Utility Board*.[232] There the Manitoba Public Utilities Board had ordered Manitoba Hydro to create a new customer class for aboriginals living on First Nations reserves.[233] Manitoba Hydro appealed the Commission's directive creating a special class. The Court of Appeal held that establishing customer classes is an inherent part of setting utility rates.[234] However, while the Public Utilities Board had the authority to create such classification, it had to do so within the statutory limits provided by legislation. The court held that the Public Utilities Board had exceeded its scope of authority in directing the creation of the class stating that the ability to consider factors, such as social policy and bill affordability in approving and fixing rates, is not authority to direct the creation of customer classifications, implementing broader social policy payments and poverty reduction, which have the effect of redirecting Manitoba Hydro's funds and revenues to alleviate such conditions.[235]

The next decision was the decision of the Ontario Divisional Court in *Rogers Communication*,[236] in November 2020. There the Ontario Divisional Court issued a decision dismissing an appeal with respect to a charge approved by the Ontario Energy Board for wireline attachments to electricity distribution poles. To arrive at a province wide rate for pole attachment, the OEB had conducted review of charges for wireline attachments and issued a final report in March 2018 setting a province wide rate of 43.63 with annual adjustments based on a OEB inflation factor.[237]

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 Ontario Energy Board Act requiring the OEB to hold the hearing.[238] 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. The divisional court responded that the use of rental space on a pole by a telecommunication company had nothing to do with retailing or distributing electricity.[239]

230. *Nation Rise Wind Farm*, 2020 OSCN 2984, ¶ 90.
231. *Id.* ¶ 91.
232. 2020 MBCA 60 (Can.).
233. *Id*.
234. *Id*.
235. *Id*.
236. Rogers Commc'ns Canada, Inc. v. Ontario Energy Bd., 2020 ONSC 6549 (Can.).
237. *Id*.
238. *Id*.
239. *Id*.

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. The court concluded the change to the attachment charge was a lawful exercise of the OEB's jurisdiction and did not require OEB hearing. The court also concluded that the process followed by the OEB was procedurally fair.[240]

The next decision with respect to Board jurisdiction was the decision of the Ontario Energy Board in January 2021, relating to a request by Enbridge Gas that the Board order Waterfront Toronto to pay $70 million to cover the cost of new pipeline.[241] Waterfront Toronto is a consortium of three governments: the City of Toronto, the Province of Ontario, and the Government of Canada. Waterfront Toronto responded that it was not requesting the pipeline and that in any event the Board had 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.

Waterfront Toronto relied on earlier decisions[242] that found that the Board's authority to allocate costs for pipeline construction was within the Board's jurisdiction only because it formed part of the Board's ratemaking authority. However, because Waterfront Toronto was not a gas customer, no ratemaking authority was involved.[243] Accordingly, the Board had no jurisdiction to order Waterfront Toronto to pay the cost.[244] The decision has not been appealed.

Another important decision regarding jurisdiction was made by the British Columbia Utilities Commission when it ruled that it had jurisdiction to charge customers $54 million to fund future innovation investments by a British Columba gas utility.[245] That decision also has not been appealed.

The last decision is the decision of February 2021 in *Yukon Energy Corporation*.[246] The Yukon Utilities Board had disallowed certain costs claimed by the utility in a rate case. Yukon Energy argued that the Board had made three errors of law.[247] First, it failed to determined Yukon Energy rate base in accordance with requirements of the Act. Second, it considered irrelevant evidence in determining that the costs were not properly incurred. Finally, the Board failed to consider Yukon's evidence in relation to the cost claim.[248]

The Board decision was reviewed by a Review Panel of the Board, which dismissed the Application on the basis that there had been no error of law.[249]

240. *Rogers Commc'ns Canada, Inc.*, 2020 ONSC 6549.

241. OEB DOCKET NO. EB-2019-0294, *supra* note 178.

242. ONTARIO ENERGY BD., DOCKET NO. EB-2012-0396, NAT. RES. GAS LTD. (2013) (Can.) [hereinafter OEB DOCKET NO. EB-2012-0396].

243. OEB DOCKET NO. EB-2019-0294, *supra* note 178.

244. *Rogers Commc'ns Canada, Inc.*, 2020 ONSC 6549, ¶ 53.

245. BRITISH COLUMBIA UTIL. COMM'N, DOCKET NO. G-165-20, G-166-20, FORTISBC ENERGY, INC. (2020) (Can.) [hereinafter FORTISBC ENERGY, INC.].

246. *Yukon Energy Corp*., 2021 YKCA 1.

247. *Id*. ¶ 19.

248. *Id*.

249. *Id*. ¶ 20.

The Yukon Court of Appeal confirmed that the Board had properly exercised its discretion. The Board had made a determination that the costs incurred were not necessary to provide service to the public. The Board had concluded that Yukon Energy had not acted prudently by incurring these costs. In addition, the court found that the Hearing Panel did not take into account any irrelevant factors in exercising its discretion and accordingly did not commit any error of law.

VII. CONCLUSION

In the introduction to this Annual Review, we indicated that the Canadian energy sector was facing a dramatic shift toward renewable energy driven by climate change concerns. We also indicated that this shift would have a significant impact on Canadian energy regulators. Decisions by both the regulators and the courts in the last year point to two important developments.

The first was the unusual number of challenges to the jurisdiction of Canadian energy regulators. In total, there were ten challenges in 2020. Half of them succeeded,[250] which is more than usual.

The increase in the number of jurisdiction decisions is no doubt a by-product of the *Vavilov* decision[251] by the Supreme Court of Canada in December 2018. It will take a while for the full impact of *Vavilov* to be fully understood.

The other trend, which is equally important, is the increased role of energy regulators in promoting the introduction of new technology. This new technology invariably relates directly or indirectly to climate change and carbon reduction.

The first decision took place on the Pacific coast where the BCUC allowed a gas utility to establish an innovation fund paid for by ratepayers at a cost of \$24 million.[252] Next was the decision of the Ontario Energy Board[253] on an Enbridge application for a pilot project to evaluate the costs and benefits of blending hydrogen with natural gas.

Finally, on the Atlantic coast, we saw the Nova Scotia Board approve a pilot project by Nova Scotia Power to obtain partial funding for a pilot project that would evaluate new software to allow more efficient operation and management of distributed energy resources.[254]

These three cases represent a significant change by Canadian energy regulators. Traditionally energy regulators have been reluctant to use ratepayer dollars to fund new and unproven technology.[255] This caution may come from the long standing Canadian regulatory principle that before assets can become part of the

250. *See* CANADA ENERGY REGUL., RECENT DECISIONS AND CER REPORTS - LAST YEAR, https://apps.cer-rec.gc.ca/REGDOCS/Search/RecentDecisions?p=6 (last visited Nov. 10, 2021).

251. *Vavilov*, 2019 SCC 65.

252. FORTISBC ENERGY, INC., *supra* note 244.

253. OEB DOCKET NO. EB-2019-0294, *supra* note 178.

254. NOVA SCOTIA POWER, SMART GRID NOVA SCOTIA: INVESTING IN OUR FUTURE. EVERY DAY., https://www.nspower.ca/cleanandgreen/innovation/smart-grid-nova-scotia (last visited Nov. 10, 2021).

255. *Toronto Hydro Elec. Ltd.*, *supra* note 162; *Nova Scotia Power*, *supra* note 162.

rate base they must be "used in useful"[256]. But, as we said in the Introduction, the times have changed.

Regulators and governments will want to closely watch these three important decisions. The decisions all involve monitoring programs. It will be important to see how detailed and public the review will be. These three decisions represent a useful change in direction of Canadian energy regulation. We should note that the three decisions took place at the same time in three different provinces before three different regulators, involving both electricity and gas.

Canada and the United States will see more of these applications going forward. New technology is important, but it has high costs. Pilot projects are important. Regulators can bring a unique set of skills to the problem. Regulators are in a good position to direct and evaluate pilot projects and determine the utility of new technology before major financial commitments are made.

The other interesting difference in these three cases is the form of financing. In the British Columbia case, the ratepayers cover all of the costs. In the Nova Scotia case, the ratepayers cover one third of the cost. In the Ontario case, the utility covers all of the cost.[257]

It will be important to evaluate these different funding plans. In a world where there is substantial capital to fund green energy investments, it may not be necessary for ratepayers to fund all of the cost. Having private capital involved, particularly if it is non-utility capital as in the Nova Scotia case, may also offer additional surveillance, review, and verification.

256. B.C. Hydro & Power Auth. v. West Coast Transmission Co., [1981] 2 F.C. 646 (C.A.) (Can.); Alberta Power Ltd. v. Alberta Pub. Util. Bd., 1990 ABCA 33 (Can.).

257. OEB DOCKET NO. EB-2019-0294, *supra* note 178.