

# 2019: THE CANADIAN ENERGY REGULATION YEAR IN REVIEW

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**Editor’s Introduction:** In September 2019, the Energy Bar Association (EBA) Board of Directors approved a Charter for a Canadian Chapter. The names of the first Board of Directors are set out at the end of this article. Most are well-known Canadian energy regulators. This is an important initiative for the EBA. We are reminded by the nightly newscasts in the middle of a worldwide coronavirus pandemic that the Canada–U.S. border is the longest undefended land border in the world. Many American energy companies have long been active in Canada and, as one section of this article points out, Canadian investment in the United States is growing.

The Editors of the *Energy Law Journal* thought we should throw our support behind this new initiative and invite the new Canadian Chapter to provide an annual report on important developments in Canadian energy regulation. This is it. The lead author is the first president of the Canadian Chapter and a former director of the EBA. The junior author is the young lawyer representative on the Canadian Chapter Board.

We should add that the first annual meeting of the Canadian Chapter was scheduled to take place in Washington, D.C. in April at the same time as the EBA Annual Meeting. The coronavirus cancelled that, but we look forward to next year’s meeting and next year’s annual review of Canadian energy regulation.

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## I. PIPELINE POLITICS

Canada may soon receive the worldwide prize for being the most difficult jurisdiction in which to build energy projects. This is particularly the case with pipelines. In the last five years, investors have walked from four major projects.<sup>1</sup> In total they accounted for over \$50 billion in investment.<sup>2</sup> Those four projects were the TransCanada Energy East pipeline, the Enbridge Northern Gateway

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1. Peter Kujawinski, *Canada's Troubled Pipeline Projects*, N.Y. TIMES (May. 30, 2018), <https://www.nytimes.com/2018/05/30/opinion/canadas-troubled-pipeline-projects.html>; Amanda Coletta, *Canada's Teck Resources Withdraws Application for Controversial Mine Days Before Government Decision*, WASH. POST (Feb. 24, 2020), [https://www.washingtonpost.com/world/the\\_americas/canadas-teck-resources-withdraws-application-for-controversial-mine-days-before-government-decision/2020/02/23/fcc0abda-56b0-11ea-8efd-0f904bdd8057\\_story.html](https://www.washingtonpost.com/world/the_americas/canadas-teck-resources-withdraws-application-for-controversial-mine-days-before-government-decision/2020/02/23/fcc0abda-56b0-11ea-8efd-0f904bdd8057_story.html).

2. \$15.7 billion for Energy East, \$7.9 billion for Enbridge Northern Gateway, \$7.4 billion for Trans Mountain expansion, and \$20.6 billion for Teck Frontier oil sands project. See Meenal Vamburkar, *TransCanada terminates plan for \$15.7 billion Energy East pipeline*, FIN. POST (Oct. 5, 2017), <https://business.financialpost.com/commodities/energy/transcanada-terminates-plan-for-energy-east-pipeline>; Ryan Lemiski, *The Enbridge Northern Gateway Project: Grand Vision, Missed Opportunity* (July 29, 2018), <https://s3.ca-central-1.amazonaws.com/media.jwnenergy/reports/Northern%20Gateway%20Pipeline%20Paper%20-%20FINAL.pdf>; The Canadian Press, *Cost of Trans Mountain pipeline rises to \$7.4 billion*, MACLEAN'S (Mar. 9, 2017), <https://www.macleans.ca/economy/cost-of-trans-mountain-pipeline-rises-to-7-4-billion/>; REUTERS, *TECK DROPS C\$20.6 BILLION OIL SANDS FRONTIER PROJECT, TO TAKE WRITEDOWN* (Feb. 23, 2020), <https://www.reuters.com/article/us-teck-resources/teck-drops-c20-6-billion-oil-sands-frontier-project-to-take-writedown-idUSKCN20I06E>.

pipeline, the Kinder Morgan Trans Mountain expansion and the Teck Frontier oil sands mine located between Fort McMurray and Fort Chipewyan.<sup>3</sup>

Kinder Morgan was saved at the last minute when the Government of Canada made the decision to buy the pipeline for \$4.5 billion.<sup>4</sup> Teck Resources has regulatory approval for its proposed Frontier oil sands project and a federal cabinet decision on the project was expected at the end of February.<sup>5</sup> However, just a week before the expected cabinet decision, the company withdrew the application, no doubt influenced by the blockade that was ongoing at the time on the Canadian National Railway across the country by aboriginal groups opposed to the Coastal GasLink project.<sup>6</sup>

The four projects still inching forward are the Trans Mountain Expansion project (TMX), Keystone XL, Coastal GasLink and Enbridge Line 3.<sup>7</sup> Before we look at the current status of these four, it is useful to examine what happened in the two failed projects, Energy East and Northern Gateway.<sup>8</sup>

## II. THE FAILED PROJECTS

In April 2013, TransCanada filed an application to build the Energy East pipeline, a 4,500 km pipeline from Alberta to the east coast of Canada at a cost of \$15.7 billion.<sup>9</sup> The rationale was sound enough. Canada's east coast refiners relied on imported crude for 80% of their requirements.<sup>10</sup> Alberta crude could replace the imported crude.<sup>11</sup>

3. Kujawinski, *supra* note 1; Coletta, *supra* note 1.

4. DEPT. OF FIN. CAN., AGREEMENT REACHED TO CREATE AND PROTECT JOBS, BUILD TRANS MOUNTAIN EXPANSION PROJECT (May 29, 2018), <https://www.canada.ca/en/departement-finance/news/2018/05/agreement-reached-to-create-and-protect-jobs-build-trans-mountain-expansion-project0.html>.

5. REUTERS, CANADIAN REGULATORS RECOMMEND APPROVING NEW TECK OIL SANDS MINE (July 26, 2019), <https://www.reuters.com/article/us-canada-energy-teck-resources/canadian-regulators-recommend-approving-new-teck-oil-sands-mine-idUSKCN1UL2FW>.

6. Letter from Don Lindsay, President/CEO, Teck Res. Ltd., to Jonathan Wilkinson, Minister, Env't and Climate Change Canada (Feb. 23, 2020), <https://www.teck.com/media/Don-Lindsay-letter-to-Minister-Wilkinson.pdf>. In addition to withdrawing, the letter alludes to a growing debate around resource development and climate change, pointing out that "Questions about the societal implications of energy development, climate change and Indigenous rights are critically important ones for Canada, its provinces and Indigenous governments to work through." *Id.*

7. N. AM. OIL & GAS PIPELINES, TRANS MOUNTAIN, ENBRIDGE LINE 3 MAKE PROGRESS AMID REGULATORY UNCERTAINTY (Mar. 17, 2020), <https://napipelines.com/trans-mountain-enbridge-line-3-make-progress-amid-regulatory-uncertainty/>; TC ENERGY, TC ENERGY TO BUILD KEYSTONE XL PIPELINE (Mar. 31, 2020), <https://www.tcenergy.com/operations/oil-and-liquids/keystone-xl/Project-Updates/Updates-feed/2020/tc-energy-to-build-keystone-xl-pipeline/>; COASTAL GASLINK, MARCH CONSTRUCTION UPDATE (Mar. 17, 2020), <https://www.coastalgaslink.com/whats-new/news-stories/2020/march-construction-update/>.

8. Kujawinski, *supra* note 1.

9. CANADA ENERGY REGULATOR, ENERGY EAST AND EASTERN MAINLINE PROJECTS, <https://www.cer-rec.gc.ca/pp/ctnflng/mjrpp/nrgyst/index-eng.html>. See also BBC NEWS, TRANSCANADA ABANDONS ENERGY EAST, EASTERN MAINLINE PROJECTS (Oct. 5, 2017), <https://www.bbc.com/news/world-us-canada-41488956>.

10. Sandy Fielden, *Don't Let the Sun Go Down on Me – East Coast Refining Part 1*, RBN ENERGY (June 20, 2012), <https://rbnenergy.com/don%E2%80%99t-let-the-sun-go-down-on-me-east-coast-refining-part-1>.

11. NAT. RES. CAN., PIPELINES ACROSS CANADA (July 25, 2016), <https://www.nrcan.gc.ca/our-natural-resources/energy-sources-distribution/clean-fossil-fuels/pipelines/pipelines-across-canada/18856>.

Things went off the rails, however, when the National Energy Board (NEB) suspended hearings in order to rule on a motion that two panel members hearing the case were biased.<sup>12</sup> Eventually the NEB agreed and replaced the two panel members.<sup>13</sup> The case started over with new panel members who threw out all of the decisions the previous panel had made.<sup>14</sup> The real nail in the coffin was a change in government policy.<sup>15</sup> The new panel issued a decision indicating that for the first time, the panel would consider in its evaluation of the project the cost of greenhouse gas emissions resulting from the increased production and consumption of oil caused by the project.<sup>16</sup> That was enough for TransCanada and in October 2017, the company canceled the project<sup>17</sup>.

The Enbridge Northern Gateway pipeline also ran into unexpected and unprecedented developments. That pipeline was to run 1,178 kilometers from Bruderheim, Alberta, to a marine terminal in Kitimat, B.C. and cost \$7.9 billion.<sup>18</sup> There were two lines at issue. One would transport 525,000 barrels per day of Alberta oil west to tidewater.<sup>19</sup> The other would bring 193,000 barrels of condensate to Alberta used in processing Alberta bitumen<sup>20</sup>.

The NEB joint review panel issued its report to the federal cabinet on December 19, 2013, and recommended approval subject to over 200 conditions.<sup>21</sup> The federal cabinet accepted the panels' recommendations in June 2014 and ordered the NEB to issue the necessary Certificate of Public Convenience and Necessity to start construction.<sup>22</sup>

One of the conditions of the joint review panel was that Enbridge engage in consultations with the First Nations.<sup>23</sup> Those consultations inched along until June 2016 when the Federal Court of Appeal<sup>24</sup> in a 2-1 split decision, ruled that

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12. Giuseppe Valiante, *National Energy Board Suspends Hearings into Energy East*, CTV NEWS (Aug. 31, 2016), <https://atlantic.ctvnews.ca/national-energy-board-suspends-hearings-into-energy-east-1.3051815?cache=yesclipId104062%3FclipId%3D1745623>.

13. CANADIAN PRESS, NEB CONFIRMS REVIEW PANEL FOR ENERGY EAST PIPELINE PROPOSAL (Jan. 10, 2017), <https://www.cbc.ca/news/canada/calgary/neb-national-energy-board-energy-east-panel-members-trans-canada-pipeline-1.3928721>.

14. Ruling No. 1 – Consequences of the Energy East Hearing panel's recusal and how to recommence the Energy East Hearing, File OF-Fac-Oil-E266-2014001 02, Nat'l Energy Bd. (Jan. 27, 2017).

15. Donald Savoie, *Politics Killed the Energy East pipeline*, THE GLOBE AND MAIL (Oct. 16, 2017), <https://www.theglobeandmail.com/opinion/politics-killed-the-energy-east-pipeline/article36606985/>.

16. Appendix 4 - Eastern Mainline – draft Environmental Assessment Factors Document, File OF-Fac-Oil-E266-2014001 02 2, Nat'l Energy Bd. (May 10, 2017).

17. *TransCanada*, File OF-Fac-Oil-E266-2014001 02, Nat'l Energy Bd. (Oct. 5, 2017).

18. NAT'L ENERGY BD., CONSIDERATIONS, REPORT OF THE JOINT REVIEW PANEL FOR THE ENBRIDGE NORTHERN GATEWAY PROJECT VOLUME 2, 3 (2013), [https://iaac-aeic.gc.ca/050/documents\\_staticpost/cearref\\_21799/97178/Considerations\\_-\\_Report\\_of\\_the\\_Joint\\_Review\\_Panel\\_for\\_the\\_Enbridge\\_Northern\\_Gateway\\_Project\\_\(Volume\\_2\).pdf](https://iaac-aeic.gc.ca/050/documents_staticpost/cearref_21799/97178/Considerations_-_Report_of_the_Joint_Review_Panel_for_the_Enbridge_Northern_Gateway_Project_(Volume_2).pdf).

19. *Id.*

20. *Id.*

21. *Id.* at 12.

22. GOV'T OF CAN., DECISION STATEMENT ISSUED UNDER SECTION 54 OF THE CANADIAN ENVIRONMENTAL ASSESSMENT ACT, 2012 AND PARAGRAPH 104 (4) (B) OF THE JOBS, GROWTH AND LONG-TERM PROSPERITY ACT (June 17, 2014), <https://iaac-aeic.gc.ca/050/evaluations/document/99423>.

23. NAT'L ENERGY BD., *supra* note 18, at 371.

24. *Gitxaala Nation v. Canada*, [2016] 4 F.C.R. 418 (Can.).

the consultations were inadequate.<sup>25</sup> The Court's decision overturned the federal cabinet's June 14, 2013, approval of the Northern Gateway pipeline.<sup>26</sup>

A second and even bigger problem resulted when the federal government decided in late 2015 to issue a moratorium on crude oil traffic off the B.C. north coast.<sup>27</sup> The view by many was that the moratorium served only one purpose, namely to cancel the Northern Gateway project.<sup>28</sup> It turned out they were right. Late in 2016, the federal government announced it would not approve Northern Gateway.<sup>29</sup>

### III. THE REMAINING PROJECTS

Four projects remain under various states of regulatory approval: Trans Mountain, Keystone XL, Coastal GasLink, and Enbridge Line 3.<sup>30</sup>

#### A. *Trans Mountain Expansion*

As indicated, the federal government purchased the Trans Mountain expansion from Kinder Morgan for \$4.5 billion.<sup>31</sup> On February 22, 2019, the NEB released its reconsideration report on the project, recommending again that it proceed.<sup>32</sup> The federal cabinet accepted that recommendation and approved the project.<sup>33</sup> Construction of the project officially began on December 3, 2019.<sup>34</sup> Shortly thereafter, on January 16, 2020, the Supreme Court of Canada

25. *Id.* at 11.

26. *See generally id.*

27. Letter from Rt. Hon. Justin Trudeau, P.C., M.P., Prime Minister of Canada to Mr. Garneau, Minister of Transp. (Nov. 12, 2015), <https://pm.gc.ca/en/mandate-letters/2015/11/12/archived-minister-transport-mandate-letter>.

28. *See, e.g.*, CBC, CRUDE OIL TANKER BAN FOR B.C.'S NORTH COAST ORDERED BY TRUDEAU (Nov. 13, 2015), <https://www.cbc.ca/news/canada/british-columbia/crude-oil-tanker-traffic-moratorium-bc-north-coast-1.3318086>. "This ban ends the dangerous Northern Gateway pipeline proposal," said Karen Mahon, from ForestEthics, an environmental group that advocates for the protection of B.C.'s coast. "Without tankers, crude oil has no place to go, that means no pipelines, no oil trains moving tarsands to the northern B.C. coast." *Id.*

29. Justin Trudeau, Prime Minister of Canada, *Prime Minister Trudeau's Pipeline Announcement* (Nov. 29, 2016), <https://pm.gc.ca/en/news/speeches/2016/11/29/prime-minister-justin-trudeaus-pipeline-announcement>.

30. N. AM. OIL & GAS PIPELINES, *supra* note 7; TC ENERGY *supra* note 7; COASTAL GASLINK, *supra* note 7.

31. DEPT. OF FIN. CAN., *supra* note 4.

32. NATIONAL ENERGY BD., TRANS MOUNTAIN PIPELINE ULC, APPLICATION FOR THE TRANS MOUNTAIN EXPANSION PROJECT, NATIONAL ENERGY BD. RECONSIDERATION OF ASPECTS OF ITS OH-001-2014 REPORT AS DIRECTED BY ORDER IN COUNCIL P.C. 2018-1177, MH-052-2018 (Feb. 2019), [https://docs2.cer-rec.gc.ca/l-eng/lisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/3614457/3751789/3754555/A98021-1-NEB-\\_-NEB\\_Reconsideration\\_Report\\_-Reconsideration\\_-Trans\\_Mountain\\_Expansion\\_-MH-052-2018\\_-A6S2D8.pdf?nodeid=3754859&vernum=-2](https://docs2.cer-rec.gc.ca/l-eng/lisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/3614457/3751789/3754555/A98021-1-NEB-_-NEB_Reconsideration_Report_-Reconsideration_-Trans_Mountain_Expansion_-MH-052-2018_-A6S2D8.pdf?nodeid=3754859&vernum=-2).

33. News Release, Office of the Prime Minister, *Trans Mountain Expansion will fund Canada's future clean economy* (June 18, 2019), <https://pm.gc.ca/en/news/news-releases/2019/06/18/trans-mountain-expansion-will-fund-canadas-future-clean-economy>.

34. THE CANADIAN PRESS, TRANS MOUNTAIN PIPELINE CONSTRUCTION OFFICIALLY UNDERWAY, JWN ENERGY (Dec. 4, 2019), <https://vancouverisland.ctvnews.ca/trans-mountain-pipeline-construction-officially-underway-1.4714846>.

unanimously dismissed the B.C. attempt to claim jurisdiction on this project<sup>35</sup> upholding an earlier decision by the B.C. Court of Appeal.<sup>36</sup>

On February 4, 2020, a unanimous Federal Court of Appeals dismissed the most recent legal challenges to the project, which is proceeding.<sup>37</sup> The court was clear, first, that Indigenous groups have no veto and, second, that courts should defer to the governments that make the initial decision on whether the duty to consult has been met.<sup>38</sup>

### B. *Keystone XL*

The Keystone XL pipeline, a \$5 billion project, was first proposed by TransCanada in 2008 to transport oil from Canada through the Midwest and Texas to the Gulf of Mexico.<sup>39</sup> The U.S. Department of State reviewed the pipeline for nearly seven years.<sup>40</sup> The Canadian portion of the line obtained NEB approval in 2010.<sup>41</sup> The United States approval was finally obtained in late 2019.<sup>42</sup>

American approval was held up by a huge environmental lobby<sup>43</sup> notwithstanding the U.S. State Department's January 2014 Environmental Impact Statement, which concluded that the pipeline is unlikely to significantly increase the rate of oil sands drilling or heavy crude demand.<sup>44</sup> The report also found that the pipeline is only one part of the larger global greenhouse gas emissions picture and that tar sands oil will likely be extracted whether or not the pipeline is built<sup>45</sup>.

In May 2012, TransCanada filed a new application for a Presidential Permit with the U.S. Department of State.<sup>46</sup> That review has been held up by ongoing

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

36. Reference re Environmental Management Act, 2019 BCCA 181 (Can.).

37. Coldwater Indian Band v. Canada (Att'y Gen.), 2020 FCA 34 (Can.).

38. *Id.* at paras. 36, 53.

39. NAT'L ENERGY BD., PRELIMINARY INFORMATION PACKAGE (July 2008), [https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/418396/550305/523332/540851/523361/A1G1W7\\_-\\_Keystone\\_XL\\_Preliminary\\_Information\\_Package.pdf?nodeid=523362&vernum=-2](https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/418396/550305/523332/540851/523361/A1G1W7_-_Keystone_XL_Preliminary_Information_Package.pdf?nodeid=523362&vernum=-2).

40. STATE.GOV, NEW KEYSTONE XL PIPELINE APPLICATION (May 4, 2012), <https://2012-keystonepipeline-xl.state.gov/index.htm>.

41. Reasons for Decision in re TransCanada Keystone XL Pipeline - OH-1-2009, Nat'l Energy Bd. (Mar. 2010).

42. In re Application No. OP-0003, 303 Neb. 872 (Aug. 23, 2019).

43. See generally REGULATIONS.GOV, NOTICE OF AVAILABILITY OF THE DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED KEYSTONE XL PIPELINE; PUBLIC MEETING ANNOUNCEMENT, DOCKET ID: DOS-2019-0033, <https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&dct=PS&D=DOS-2019-0033> (showing over 1000 comments, many against the proposed pipeline).

44. U.S. DEP'T OF STATE, BUREAU OF OCEANS AND INT'L ENV'T'L AND SCIENTIFIC AFFAIRS, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE KEYSTONE XL PROJECT 16 (Jan. 2014), <https://2012-keystonepipeline-xl.state.gov/documents/organization/221135.pdf>.

45. *Id.* at 13.

46. US DEP'T OF STATE, APPLICATION OF TRANSCANADA 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 (May 4, 2012), <https://2012-keystonepipeline-xl.state.gov/documents/organization/189504.pdf>.

litigation in the Nebraska courts.<sup>47</sup> In 2012, Nebraska's governor signed into law a statute that enabled major oil pipeline carriers to obtain approval from the state's governor for pipeline routes across the state rather than from Nebraska's Public Service Commission.<sup>48</sup> The governor then approved the route proposed by TransCanada allowing TransCanada to exercise eminent domain to acquire the necessary land.<sup>49</sup> Nebraska landowners then challenged the decision before the Commission.<sup>50</sup>

In November 2014, the U.S. House of Representatives passed legislation and approved Keystone XL for the ninth time.<sup>51</sup> The bill was subsequently defeated in the Senate by one vote.<sup>52</sup> Midterm elections in November saw the Republicans regain a majority in both the House and Senate for the first time in eight years.<sup>53</sup> A January vote passed the House and Senate but failed to get the two-thirds majority vote required to prevent a presidential veto.<sup>54</sup> President Obama then exercised his veto to defeat the legislation.<sup>55</sup>

TransCanada opposed the Obama veto with a constitutional challenge<sup>56</sup> and a North American Free Trade Agreement (NAFTA) claim.<sup>57</sup> Before those could be heard, President Trump was elected.<sup>58</sup> One of President Trump's first decisions in office was to approve Keystone XL.<sup>59</sup> Further regulatory challenges along the pipeline route at the state level were largely resolved in 2019.<sup>60</sup> On April 15, 2020, a Federal judge blocked the United States Army Corp of Engineers issuance of a Nationwide Permit 12 for the pipeline.<sup>61</sup>

### C. *Coastal GasLink*

The Coastal GasLink pipeline project is owned and operated by TC Energy.<sup>62</sup> The \$6.6 billion project starts near Dawson Creek and, if completed,

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47. S. REP. NO. 114-1, (Jan. 12, 2015).

48. NEB. REV. STAT. § 57-1101 (2012).

49. 2012 Neb. Laws, L.B. 1161.

50. *Thompson v. Heineman*, No. CI122060, 2014 WL 631609 (Neb. Dist. Ct. Feb. 19, 2014).

51. H.R. 5682, 113th Cong. (2014).

52. S. 2280, 113th Cong. (2014).

53. THE ECONOMIST, THE REPUBLICANS WIN THE SENATE (Nov. 4, 2014), <https://www.economist.com/graphic-detail/2014/11/04/the-republicans-win-the-senate>.

54. S. 1, 114th Cong. (2015); H.R. 3, 114th Cong. (2015).

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

56. *TransCanada Keystone Pipeline LP v. Kerry*, No. 16-cv-36, *complaint filed* (S.D. Tex. Jan. 6, 2016).

57. *TransCanada Corp. v. The Gov't of the United States of Am.* (North American Free Trade Agreement January 6, 2016), <https://www.italaw.com/sites/default/files/case-documents/ITA%20LAW%207030.pdf>.

58. TIME, DONALD TRUMP WINS THE 2016 ELECTION (Nov. 9, 2016), <https://time.com/4563685/donald-trump-wins/>.

59. DONALD J. TRUMP, OFFICE OF THE PRESIDENT, PRESIDENTIAL PERMIT, ENERGY & ENV'T (Mar. 29, 2019), <https://www.whitehouse.gov/presidential-actions/presidential-permit/>.

60. *In re Application No. OP-0003*, 303 Neb. 872 (Aug. 23, 2019).

61. *Northern Plains Resource Council, et al., v. U.S. Army Corps of Engineers, et al.*, Order CV-19-44-GF-BMM, (D. Mont. Apr. 15, 2020).

62. TCENERGY, COASTAL GASLINK (2020), <https://www.tcenergy.com/operations/natural-gas/coastal-gaslink/>.

would run approximately 420 miles southwest to a liquefaction plant near Kitimat.<sup>63</sup> The pipeline, as planned, would pass through the traditional territories of several First Nations.<sup>64</sup> It has long been opposed by multiple Wet'suwet'en hereditary chiefs, although a number of First Nations groups support the project.<sup>65</sup> In fact, twenty elected bands along the pipeline route have endorsed the project and have an ownership interest.<sup>66</sup>

In December 2018, the Supreme Court of British Columbia granted an injunction preventing blockades of the pipeline.<sup>67</sup> More recently, blockades have occurred across Canada led in part by Mohawks of the Bay of Quinte of Belleville in Ontario.<sup>68</sup> The blockades across Canada have resulted in a nationwide stoppage of rail traffic in Canada.<sup>69</sup> As a result, the pipeline has halted all construction and the Canadian National Railway has laid off 450 workers in eastern Canada and cancelled over 400 trains.<sup>70</sup>

There has been one element of good news for the Coastal GasLink pipeline. In July 2019, the NEB released its decision ruling that the pipeline—including the export terminal in Kitimat—was under provincial not federal jurisdiction.<sup>71</sup> The NEB concluded that the pipeline would transport natural gas within B.C., although it would also facilitate international exports, providing some clarity to the earlier Supreme Court of Canada decision in *West Coast Energy* on provinces right to control works and undertakings within their boundaries.<sup>72</sup>

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 majority stake in the Coastal GasLink.<sup>73</sup> The blockade was finally removed and work on the line continues.<sup>74</sup>

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63. *Id.*

64. COASTAL GASLINK, INDIGENOUS RELATIONS (2020), <https://www.coastalgaslink.com/sustainability/indigenous-relations/>.

65. CBC, WHY 2 DIFFERENT KINDS OF WET'SUWET'EN LEADERS SUPPORT AND OPPOSE THE GAS PIPELINE (Feb. 19, 2020), <https://www.cbc.ca/news/indigenous/blockade-railway-mowhak-wet-suwet-en-1.5467234>.

66. See, e.g., Coastal GasLink Pipeline Project Natural Gas Pipeline Benefits Agreement, Doig River First Nation-Province of British Columbia, Pt. 3, section 3.1, Apr. 16, 2015; see also BRITISH COLUMBIA, NATURAL GAS BENEFITS AGREEMENTS, <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/natural-gas-pipeline-benefits-agreements>.

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

68. CN, CN INITIATING PROGRESSIVE AND ORDERLY SHUTDOWN OF ITS EASTERN CANADIAN NETWORK (Feb. 13, 2020), <https://www.cn.ca/en/news/2020/02/cn-initiating-progressive-and-orderly-shutdown-of-its-eastern-ca/>.

69. *Id.*

70. *Id.*

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

72. *Id.* (citing *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 SCR 322 (Can.)).

73. COASTAL GASLINK, TC ENERGY ANNOUNCES THE PARTIAL MONETIZATION OF THE COASTAL GASLINK PIPELINE PROJECT (Dec. 26, 2019), <https://www.coastalgaslink.com/whats-new/news-stories/2019/Partial-Monetization-of-CGL-Announced/>.

74. NATURAL GAS INTELLIGENCE, NATIVE RIGHTS GROUP BLOCKADE ENDS; COASTAL GASLINK CONSTRUCTION TO RESUME (Feb. 10, 2020), <https://www.naturalgasintel.com/articles/120999-native-rights-group-blockade-ends-coastal-gaslink-construction-to-resume>.



### D. Enbridge Line 3

The Enbridge Line 3 runs from Hardisty, Alberta to Superior, Wisconsin and has been operating since 1968.<sup>75</sup> Over the years it became apparent that part of the pipeline had to be replaced if Enbridge wished to restore it to its historical capacity and move 800,000 barrels per day.<sup>76</sup> The necessary authorization was obtained from regulatory bodies in Canada,<sup>77</sup> North Dakota, and Wisconsin.<sup>78</sup> However, the project ran into problems in Minnesota where environmentalists and native groups opposed the project.<sup>79</sup> Nevertheless, in June 2018 the Minnesota Public Utilities Commission approved the route and granted the necessary permits.<sup>80</sup> However, a year later that decision was overturned by the Minnesota Court of Appeal that found that the environmental impact statement placed before the Commission was inadequate.<sup>81</sup> On February 3, 2020, the Minnesota regulators approved a revised environmental review resolving the last regulatory hurdle for the project.<sup>82</sup>

## IV. THE NEW NAFTA

The most important development in Canadian energy regulation in 2019 may have little to do with provincial or federal energy regulators. It concerns the renegotiation of a twenty-six-year-old treaty between Canada, the United States, and Mexico.<sup>83</sup>

It is often said that the border between Canada and the United States is the longest undefended border in the world.<sup>84</sup> That is certainly true. But it is also true that the two countries are the most integrated countries in the world.<sup>85</sup>

75. ENBRIDGE, LINE 3 REPLACEMENT PROJECT SUMMARY, [https://www.enbridge.com/~media/Enb/Documents/Projects/Line%203/ProjectHandouts/ENB\\_Line3\\_Public\\_Affairs\\_ProjectSummary.pdf?la=en](https://www.enbridge.com/~media/Enb/Documents/Projects/Line%203/ProjectHandouts/ENB_Line3_Public_Affairs_ProjectSummary.pdf?la=en).

76. *Id.*

77. *In re Enbridge Pipelines Inc.*, Application dated 5 November 2014 for the Line 3 Replacement, Vol. I: Our Decisions and Recommendations, OH-002-2015, Nat'l Energy Bd. (Apr. 25, 2016).

78. Letter from Benjamin Callan, Water Management Specialist, State of Wisconsin Department of Natural Resources, to Rachael Shetka, Enbridge Energy, LP (Aug. 30, 2016), <https://dnr.wi.gov/files/PDF/pubs/ea/EA0228.pdf>.

79. Dan Kraker, *Line 3 project delay leaves supporters, opponents hopeful*, MPRNEWS (Mar. 5, 2019), <https://www.mprnews.org/story/2019/03/05/line-3-project-delay-leaves-supporters-opponents-hopeful>.

80. MINN. PUB. UTIL. COMM'N, LINE 3 REVIEW PROCESS, <https://mn.gov/puc/line3/process/> (“On June 28, 2018, the Commission, in a verbal decision granted a certificate of need contingent on specific modifications and route permit for the Applicant’s Preferred Route with modifications for the Line 3 Replacement Project. An official order on this matter is forthcoming.”).

81. *In re Applications of Enbridge Energy, LP*, 930 N.W.2d 12, 36 (Minn. App. 2019).

82. Dan Kraker, *Minnesota utility regulators give key approvals to Line 3 pipeline project*, MPRNEWS (Feb. 3, 2020), <https://www.mprnews.org/story/2020/02/03/minnesota-utility-regulators-approve-updated-line-3-environmental-review>.

83. Kimberly Amadeo, *Trump’s NAFTA Changes*, THEBALANCE (Mar. 31, 2020), <https://www.thebalance.com/donald-trump-nafta-4111368>; Anne Sraders, *What Is NAFTA? History, Purpose and What It Means in 2019*, THESTREET (Aug. 22, 2019), <https://www.thestreet.com/politics/nafta-north-american-free-trade-agreement-14651970>.

84. Stuart Wachowicz, *The Longest Undefended Border*, TOMORROW’S WORLD (May-June 2012), <https://www.tomorrowworld.org/magazines/2012/may-june/the-longest-undefended-border>.

85. George Hoberg, *Canada and North America Integration*, CANADIAN PUBLIC POLICY (2000), [http://qed.econ.queensu.ca/pub/cpp/SE\\_english/Hoberg.pdf](http://qed.econ.queensu.ca/pub/cpp/SE_english/Hoberg.pdf).

This is particularly true of the energy industry. Much of the Alberta energy industry starting with the first well in Turner Valley in 1946 was developed by American companies.<sup>86</sup> For over eighty years, until the United States developed a shale industry most of the energy imports into the United States came from Canada.<sup>87</sup> Enbridge, based in Calgary, is today the largest pipeline operator in North America with assets on both sides of the border.<sup>88</sup>

When NAFTA was first negotiated the focus was on the North American automobile industry.<sup>89</sup> That concern remains in the renegotiated agreement as does concerns with dairy products, the steel industry, and intellectual property.<sup>90</sup> However, the major concern for the energy sector is the agreement to phase out the investor state dispute mechanism in the original NAFTA agreement.<sup>91</sup>

It will be surprising to some that the Americans appear to be the most vocal when it comes to criticizing NAFTA.<sup>92</sup> As of January 1 2018, there have been forty NAFTA decisions, seventeen in Canada, eleven in the United States, and twelve in Mexico.<sup>93</sup> Canada has managed to lose nine cases, and Mexico has lost five cases.<sup>94</sup> The United States has lost none.<sup>95</sup>

There certainly were problems with NAFTA, but the economics of NAFTA are impressive. When NAFTA came into force on January 1, 1994, it created the world's largest international free trade zone.<sup>96</sup> The elimination of trade barriers between Canada, the United States, and Mexico led to a substantial increase in trade between the three countries.<sup>97</sup> The growth in bilateral trade between Canada and the United States is significant. Today it can be said:

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86. ALBERTA, TURNER VALLEY PERIOD: 1914-1946, <http://history.alberta.ca/energyheritage/oil/the-waterton-and-the-turner-valley-eras-1890s-1946/turner-valley-period-1914-1946/default.aspx>.

87. Paul W. Parfomak & Michael Ratner, *The U.S.-Canada Energy Relationship: Joined at the Well*, Cong. Res. Serv. (June 17, 2011), <https://fas.org/sgp/crs/row/R41875.pdf>.

88. ENBRIDGE, OUR HISTORY, <https://www.enbridge.com/about-us/our-history>.

89. Will Kenton, *North American Free Trade Agreement (NAFTA)*, Investopedia (Feb. 16, 2020), <https://www.investopedia.com/terms/n/nafta.asp>.

90. Ana Swanson & Jim Tankersley, *Trump Just Signed the U.S.M.C.A. Here's What's in the New NAFTA*, NYTIMES (Jan. 29, 2020), <https://www.nytimes.com/2020/01/29/business/economy/usmca-deal.html>.

91. PUBLICCITIZEN, FACT SHEET: NAFTA 2.0 AND INVESTOR STATE DISPUTE SETTLEMENT (ISDS) (Oct. 12, 2018), <https://www.citizen.org/article/nafta-2-0-and-investor-state-dispute-settlement/>.

92. Bruce Stokes, *Views of NAFTA less positive – and more partisan – in U.S. than in Canada and Mexico*, PEW RES. CTR. (May 9, 2017), <https://www.pewresearch.org/fact-tank/2017/05/09/views-of-nafta-less-positive-and-more-partisan-in-u-s-than-in-canada-and-mexico/>.

93. Scott Sinclair, *Canada's Track Record Under NAFTA Chapter 11 North American Investor-State Disputes to January 2018*, CANADIAN CTR. FOR POLICY ALTS. 4, Figure 3 (Jan. 2018), <https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2018/01/NAFTA%20Dispute%20Table%20Report%202018.pdf>.

94. *Id.*

95. *Id.*

96. Amadeo, *supra* note 1.

97. *Id.*

- Canada is the largest trading partner and largest customer of the United States – Bilateral trade in goods and services is over \$880 billion a year;<sup>98</sup>
- Canada remains the largest supplier of U.S. energy needs;<sup>99</sup>
- Canada is the top export destination of thirty-five U.S. states;<sup>100</sup>
- The United States accounts for over 50 percent of foreign direct investment in Canada representing over \$400 billion a year.<sup>101</sup>

However, the NAFTA agreement also gave private investors the right to bring claims directly and unilaterally in the host country.<sup>102</sup> This was unique at a time when the arbitration world was dominated by state-to-state proceedings.

Major corporations quickly learned how they could put this new remedy to work to reduce regulatory risk.<sup>103</sup> Governments on both sides of the border were quick to respond that private corporations were using NAFTA to curtail the right of governments to regulate in the public interest.<sup>104</sup>

The real concern may be that we have inadvertently created an ‘Appeal Court of the Last Resort.’ In most cases, NAFTA parties first litigate in domestic courts and then appeal to NAFTA. NAFTA offers definite advantages. Damages are available under NAFTA, something that does not always exist under domestic administrative law. . . .

Mercer International went first to the BC Utility Commission. When that did not work out, they went to NAFTA. Mobil Investments first appealed the Newfoundland Board R&D directive to the local courts. When they lost they went to NAFTA, where they succeeded.

To make matters worse, NAFTA is a unique appeal court. Only foreign investors can bring cases. Consider the cases involving the Ontario ban on wind generation. An American company, Windstream, obtained a C\$28 million judgment from a NAFTA panel when Ontario cancelled the programme. Trillium Wind, a Canadian company with the same complaint, was out of luck in the Ontario courts. The same thing happened in *Sky Power*. There the judge remarked: ‘While it may seem unfair when rules are changed in the middle of a game, but that is the nature of the game when one is dealing with government programs.’<sup>105</sup>

This controversy in the NAFTA world was joined by another controversy driven by the economic nationalism of the Trump administration

98. JUSTIN TRUDEAU, PRIME MINISTER OF CANADA, FACT SHEET: CANADA-UNITED STATES: NEIGHBOURS, PARTNERS, Allies (Mar. 10, 2016), <https://pm.gc.ca/en/news/backgrounders/2016/03/10/fact-sheet-canada-united-states-neighbours-partners-allies>.

99. U.S. ENERGY INFO. ADMIN, TODAY IN ENERGY, CANADA IS THE UNITED STATES’ LARGEST PARTNER FOR ENERGY TRADE (Mar. 1, 2017), <https://www.eia.gov/todayinenergy/detail.php?id=30152#>.

100. Lloyd Braun, *This is how much each US state depends on Canada as trading partner (MAP)*, DAILYHIVE (Jan. 26, 2017), <https://dailyhive.com/vancouver/canada-top-import-us-state-map-2017>.

101. SELECT USA, FOREIGN DIRECT INVESTMENT (FDI): CANADA (Dec. 2019), <https://www.selectusa.gov/servlet/servlet.FileDownload?file=015t0000000LKLr>.

102. James McBride & Andrew Chatzky, *How Are Trade Disputes Resolved*, COUNCIL ON FOREIGN RELATIONS (Jan. 6, 2020), <https://www.cfr.org/backgrounders/how-are-trade-disputes-resolved>.

103. Paul Meyer et al., *North American Dispute Resolution*, 34 Can.-U.S. L.J. 399, 419 (2010).

104. Jose Alvarez, *Is Investor State Arbitration Public?*, 7 J. INT’L DISP. SETTLEMENT 534-576 (2016); Stephen M Schwebel, *The Outlook for Continued Vitality or the lack thereof in Investor State Arbitration*, 32 ARB. INT’L 1-15 (2016).

105. Global Arbitration Review, *The Guide to Energy Arbitrations* 290-91 (J William Rowley QC et al., 3rd ed. 2019).

in the United States. The issue became not a states right to regulate, but a states right to eliminate trade deficits. It put NAFTA under a new spotlight that targeted the Chapter 11 dispute resolution mechanism.<sup>106</sup> That dispute mechanism has been a major force in the Canadian energy sector as the following section demonstrates.

## V. THE ENERGY ARBITRATIONS

### A. *Newfoundland Offshore Oil*

In August 2007, two American companies, Mobile Investment Canada and Murphy Oil Corporation filed a NAFTA claim for \$60 million against Canada.<sup>107</sup> The two U.S. companies were partners in an offshore drilling project off the coast of Newfoundland, which was regulated jointly by the federal government and the province through the Canada Newfoundland Offshore Petroleum Board (CNLOPB).<sup>108</sup>

In order to obtain a license to drill, the companies had been required to submit proposals to the Board to approve their development plan.<sup>109</sup> The plan included commitments regarding research and development.<sup>110</sup> The Board had provided guidelines, none of which contained specific expenditure amounts required in of investors.<sup>111</sup> However, the Board changed this practice in 2004 and introduced new guidelines with specific expenditure targets.<sup>112</sup>

The Claimants objected to the new guidelines on the basis that they represented a fundamental shift in regulation that undermined the project.<sup>113</sup> Mobile first went to the courts.<sup>114</sup> When that failed Mobile brought a NAFTA claim.<sup>115</sup>

106. N. AM. FREE TRADE AGREEMENT, art. 1121 (Nov. 30, 2016).

107. GLOBAL AFFAIRS CAN., CASES FILED AGAINST THE GOVERNMENT OF CANADA, MOBIL INVESTMENTS INC. AND MURPHY OIL CORPORATION V. GOVERNMENT OF CANADA (Dec. 19, 2017), <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/mobil.aspx?lang=eng>.

108. *Id.*

109. Reference re Canada–Newfoundland and Labrador Atlantic Accord Implementation Act, S.C. 1987, c 3, § 138 (Can.).

110. Reference re Canada–Newfoundland and Labrador Atlantic Accord Implementation Act, S.C. 1987, c 3, § 45(3)(c) (Can.) (“[E]xpenditures shall be made for research and development to be carried out in the Province and for education and training to be provided in the Province.”).

111. Decision on Liability and on Principles of Quantum, Mobile Investment Canada Inc. & Murphy Oil Corp. v. Canada, ICSID Case No. ARB (AF)/07/4 para. 41-44 (NAFTA May 22, 2012).

112. CAN.-NEWFOUNDLAND OFFSHORE PETROLEUM BD., GUIDELINES FOR RESEARCH AND DEVELOPMENT EXPENDITURES (Oct. 2004), [https://www.cnlopb.ca/wp-content/uploads/ibguide/guidelines\\_for\\_research\\_and\\_development\\_expenditures.pdf](https://www.cnlopb.ca/wp-content/uploads/ibguide/guidelines_for_research_and_development_expenditures.pdf).

113. The claimants stated that the “guidelines [were] far more restrictive than local content measures that existed in 1994.” Request for Arbitration, Mobile Investment Canada Inc. and Murphy Oil Corp. v. Canada, ICSID case No. ARB (AF) /07/4 para. 3 (NAFTA Nov. 1, 2007).

114. Hibernia Management and Development Co. v. Canada Newfoundland Offshore Board, [2007] NJ No. 168; Hibernia Management and Development Co. v. Canada Newfoundland Offshore Board, [2008] NJ No. 310.

115. Request for Arbitration, Mobile Investment Canada Inc. and Murphy Oil Corp. v. Canada, ICSID case No. ARB (AF) /07/4 para. 3 (NAFTA Nov. 1, 2007).

In May 2012, the Tribunal majority found that Canada had violated NAFTA Article 1106<sup>116</sup> and ordered damages three years later of \$132 million.<sup>117</sup> A set-aside application by Canada was dismissed by the courts.<sup>118</sup>

After the decision, Mobile brought a second claim for future damages relating to the 2012 to 2015 time period, which was not covered in the original award.<sup>119</sup> Despite Canada's objections that the second claim was barred by the three-year time limit under NAFTA and the doctrine of *res judicata*, the panel allowed the claim to proceed.<sup>120</sup> The parties subsequently extended the damage time period to 2036, which is when the Mobile Oil projects in Canada would end.<sup>121</sup>

Subsequently the parties reached a settlement, which was incorporated into a Consent Order issued by the tribunal on February 4, 2020, granting damages of \$35 million.<sup>122</sup>

#### A. *Ontario Onshore Wind*

In 2011, Mesa Power Group, a US corporation owned by Texas oil tycoon T Boone Pickens, filed a C\$775 million claim against Canada relating to the Province of Ontario's policy of awarding power purchase agreements under the Ontario feed-in tariff programme for the supply renewable energy.

Mesa claimed that Canada adopted discriminatory measures, imposed minimum domestic content requirements, and failed to provide Mesa with the minimum standard treatment, in violation of NAFTA's investment provisions. In the end, the tribunal dismissed all of Mesa's claims and ordered Mesa to bear the cost of the arbitration as well as a portion of Canada's legal costs of nearly C\$3 million.

Mesa argued that the reason it did not receive any FIT contracts was that the programme was mismanaged and Mesa was discriminated against when Ontario granted unwarranted preferences to two other applicants. Windstream really turned on the legitimacy of the moratorium issued by Ontario to defer all offshore wind generation and the conduct of the Ontario government following the announcement of that moratorium.

The OPA had launched the FIT programme in October 2009. During the first round of contacts, the OPA reviewed 337 applications and granted 184 contracts, for a total of 2500MW of capacity. The second round of contracts took place in February 2011. Forty FIT contracts for a total of 872MW were issued. The third round of contracting took place in July 2011, resulting in 14 contracts totaling 749MW.

Mesa Power filed six applications under the FIT programme but was unsuccessful in all three rounds of contracting. The problem was that all the

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116. *Mobile Investment Canada Inc. and Murphy Oil Corp. v. Canada*, ICSID Case No. ARB (AF)/07/4, (NAFTA May 22, 2012).

117. *Mobile Investment Canada Inc. and Murphy Oil Corp. v. Canada*, ICSID Case No. ARB (AF)/107/4, (NAFTA Feb. 20, 2015).

118. *Attorney General of Canada v. Mobile Investment Canada Inc.*, 2016 ONSC 790 (Can.).

119. *Notice of Intent to Submit A Claim to Arbitration Under NAFTA Chapter Eleven, Mobile Investment Canada Inc. v. Canada*, ICSID Case No. ARB/15/6 (NAFTA Oct. 16, 2014).

120. *Decision on Jurisdiction and Admissibility, Mobile Investment Canada Inc. v. Government of Canada*, ICSID Case No. ARB/15/6 para. 100 (NAFTA July 13, 2018).

121. *Id.* at para. 75.

122. *Mobile Investment Canada Inc. v. Government of Canada*, ICSID Case No. ARB/15/6 para. 6 (NAFTA Feb. 4, 2020).

MESA projects were located in Bruce County. In order to obtain a contract, all applicants had to demonstrate that they had the right to connect to the transmission system. Mesa was unable to obtain transmission connection because of the transmission constraints in Bruce County.

Mesa also argued that the failure to acquire transmission access was because of flaws in the contracting process and preferences granted to two other parties, namely Next ERA Energy (an affiliate of Florida Light and Power) and the Korean Consortium led by Samsung.<sup>123</sup>

Mesa argued that this conduct amounted to a breach of Article 1105(1) of NAFTA, which reads: "Each Party shall accord to investments of investors of another Party treatment in accordance with International law, including fair and equitable treatment and full protection and security."<sup>124</sup>

The tribunal rejected the allegation that the OPA had mismanaged the programme and did not treat all applicants fairly, noting that the OPA had retained an independent monitor to administer the FIT programme.

The tribunal also discounted the charge that NextEra had met with government officials, noting that this was common practice in the industry and there was no evidence of any preference. NextEra was given access to transmission facilities in Bruce County at one point, but apparently Mesa was also offered the opportunity.

The most contentious part of the Mesa allegations related to the Korean Consortium agreement. Mesa had argued that the agreement between Ontario and the Korean Consortium unfairly diminished the prospects for other investors including Mesa that were already participating in the renewable energy programme by setting aside transmission capacity for the Korean Consortium that was intended for FIT applicants.

Mesa also argued that Ontario was less than transparent in negotiating the agreement, and issued inaccurate and incomplete information. Canada responded that there was nothing manifestly arbitrary or unfair when a government enters into an investment agreement that grants advantages to an investor in exchange for investment commitments.<sup>125</sup>

### *B. Ontario Offshore Wind*

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

The panel accepted Windstream's argument that the government's decision frustrated Windstream's ability to obtain the benefits of the 2010 contract it had signed with the Ontario Power Authority (OPA).

In November 2009, Windstream submitted 11 feed-in tariff (FIT) applications for wind power projects, including an application for a 300MW 130 turbine offshore wind project near Wolfe Island in Lake Ontario. The OPA offered Windstream a FIT contract in May 2010, which Windstream signed in August of that year. Under the contract, the OPA would pay Windstream a fixed price for power for 20 years. In total, the contract was worth C\$5.2 billion.

During this period, the Ontario government was conducting a policy review to develop the regulatory framework for offshore wind projects, including a proposed 5km shoreline exclusion zone. The policy review ceased on 11

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123. Global Arbitration Review, *supra* note 105, at 173-74.

124. N. Am. Free Trade Agreement art. 1105, Dec. 8, 1993.

125. Global Arbitration Review, *supra* note 36, at 175.

February 2011, when the government of Ontario decided to suspend all offshore wind development until further research was completed.

The main ground for the Windstream claim was that the Ontario decision was arbitrary and was based on political concerns that the wind contracts would increase electricity rates. Windstream argued that the government really had no intention of pursuing scientific research.

Canada, in response, said that Ontario was entitled to proceed with caution on offshore wind development and that NAFTA does not prohibit reasonable regulatory delays.

Windstream made a number of claims under the NAFTA. The most important (and the only one that succeeded) was a breach of Article 1105(1), the Minimum Standard of Treatment provision, which reads: 'Each Party shall accord to investments of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.'

In finding that there was a breach, the tribunal questioned whether the real rationale for the moratorium was the need for more scientific research. Just as important was the tribunal finding that Ontario made little, if any, efforts to accommodate Windstream, and seemed to deliberately keep Windstream in the dark.<sup>126</sup>

There was a further claim by Windstream that Ontario had violated Article 1102 of NAFTA by granting Windstream less favourable treatment than was accorded to other entities in similar circumstances. It was argued that the treatment of Windstream was less favourable than the treatment Ontario granted to TransCanada.

Both TransCanada and Windstream were parties to power purchase agreements with the OPA that guaranteed a fixed price for electricity. Both contracts were terminated. However, when Ontario terminated the TransCanada contract, Ontario awarded TransCanada a new project and compensated TransCanada for the costs of the cancellation. In contrast, Ontario failed to do the same thing for Windstream following the offshore moratorium.

The tribunal rejected Windstream's argument, noting that Article 1102 deals with national treatment and most favoured nation treatment. However, the tribunal concluded that TransCanada was not in like circumstances. Unlike TransCanada, Windstream had a FIT contract for offshore wind.

There is no question that the TransCanada project was different from the Windstream project. TransCanada had a contract with the OPA to build a gas generation plant in Mississauga, near Toronto. The local residents were not happy with this, and the Liberal government cancelled the project in the heat of the provincial election. To keep TransCanada happy, the OPA negotiated an agreement that reimbursed them for their costs and gave them a new contract in another area.

The circumstances were different and so was the government's response. In TransCanada there was extensive negotiation, whereas in Windstream there was none. The tribunal concluded that the two projects were totally different and, therefore, did not result in like circumstances. TransCanada does not even provide renewable energy, which is the basis of all FIT contracts.

Accordingly, the tribunal ruled that the moratorium and related measures did not apply to TransCanada in the first place. TransCanada was not affected by the moratorium on offshore wind. Moreover, the tribunal ruled that the moratorium was not applied in a discriminatory manner because it resulted in the cancellation of all offshore wind projects. Windstream had the only contract for offshore wind and the tribunal therefore concluded that it could not agree

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126. *Id.* at 171.

that Windstream had been treated less favourably than other developers of offshore wind.<sup>127</sup>

### C. *Quebec Fracking*

In September 2013, Lone Pine Resources, a U.S.-based all gas and exploration launched a US\$119 million challenge against Canada under NAFTA.<sup>128</sup> The claim relates to the Province of Québec's suspension of oil and gas exploration under the St. Lawrence River.<sup>129</sup> The moratorium is part of a wider Québec suspension of fracking, a form of horizontal drilling that has already been suspended in different U.S. states and Canadian provinces.<sup>130</sup>

Québec declared the moratorium in 2011, in order to conduct environmental impact studies concerning the use of the chemicals involved and the impact on groundwater.<sup>131</sup> This was of particular concern given that the permits that Lone Pine had acquired cover land directly under the St. Lawrence River.<sup>132</sup>

Lone Pine alleged that the moratorium contravenes Article 1105 (minimum standard of treatment) and 1110 (expropriation).<sup>133</sup> More specifically, the claimant alleged that the passing of the legislation that created the moratorium was arbitrary, unfair and inequitable, and was based on political and populist grounds rather than actual environmental research.<sup>134</sup> The claimant alleged that the revocation of the license expropriated its investment without compensation.<sup>135</sup>

The government of Canada has responded that the action is a legitimate measure in the public interest that applies indiscriminately to all holders of exploration licenses that are located under or near the St. Lawrence River.<sup>136</sup> Canada argues that the legislation was enacted by a fundamental democratic institution in Québec and was preceded by numerous studies that established the need to achieve an important public policy objective, namely the protection of the St Lawrence River.<sup>137</sup>

Canada argues that the minimum standard treatment guaranteed in Article 1105 of NAFTA does not protect investors' legitimate expectations.<sup>138</sup> Even if this were the case, Canada says no representative of the government of Québec

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127. *Id.* at 172-73.

128. Notice of Arbitration Under the Arbitration Rules of The United Nations Commission on International Trade Law and Chapter Eleven of the North American Free Trade Agreement, Lone Pine Resources Inc. v. Gov't of Canada, No. UNCT/15/2 (NAFTA Sept. 6, 2013).

129. *Id.* at para. 10.

130. *Id.* at para. 12.

131. *Id.*

132. *Id.* at para. 10.

133. Notice of Arbitration Under the Arbitration Rules of The United Nations Commission on International Trade Law and Chapter Eleven of the North American Free Trade Agreement, Lone Pine Resources Inc. v. Gov't of Canada, No. UNCT/15/2, para. 14 (NAFTA Sept. 6, 2013).

134. *Id.* at para. 11.

135. *Id.*

136. Arbitrage en Vertu du Chapitre Onze de L'accord de Libre-Echange Nord-Americain et du Reglement D'Arbitrage de la Cnudci, Lone Pine Resources Inc. v. Gov't of Canada, No. UNCT/15/2 (NAFTA Feb. 27, 2015).

137. *Id.*

138. *Id.*



communicated to the claimant any guarantee, promise, or specific assurance that could create legitimate expectations relating to the development of hydrocarbon reserves and resources that may be found beneath the St. Lawrence River.<sup>139</sup>

Canada has also argued that the disputed measure does not substantially deprive Lone Pine of its investment because the legislation only revokes one of five exploration licenses granted.<sup>140</sup> Finally, Canada points out that the act is a legitimate exercise of the government of Québec's police power and accordingly the measure cannot constitute expropriation.<sup>141</sup>

#### D. International Pipelines

In most of the NAFTA energy arbitrations the United States is the Claimant and Canada is playing defense. The one exception took place in 2016 when TransCanada, a company based in Calgary, Alberta, filed a \$15 billion NAFTA investor claim against the United States after former President Barack Obama rejected their application for a presidential permit to approve the construction of the Keystone XL pipeline.<sup>142</sup>

In January 2015 both the House and the Senate passed legislation that approved Keystone XL, but failed to get the two-thirds majority required to override a presidential veto.<sup>143</sup> When President Obama exercised his veto, TransCanada filed a claim under NAFTA arguing that the denial of the presidential permit for Keystone XL was arbitrary, unjustified, and breached the U.S. Administration's NAFTA obligations.<sup>144</sup> A presidential permit was required for Keystone XL because the pipeline crossed an international boundary.<sup>145</sup>

This all turned around when Donald J. Trump won the next election and moved into the White House.<sup>146</sup> One of the first acts by the new president was to sign an Executive Order approving the 1179-mile line.<sup>147</sup> TransCanada filed a new application two days later and withdrew the NAFTA claim.<sup>148</sup>

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139. *Id.*

140. *Id.*

141. Arbitrage en Vertu du Chapitre Onze de L'accord de Libre-Echange Nord-Americain et du Reglement D'Arbitrage de la Cnudci, Lone Pine Resources Inc. v. Gov't of Canada, No. UNCT/15/2 (NAFTA Feb. 27, 2015).

142. *TransCanada Corporation v. TransCanada Pipelines Limited*, Notice of Intent (Jan. 6, 2016).

143. S. Doc. No. 114-2 (Feb. 24, 2015).

144. Ethan Lou, *TransCanada's \$15 billion U.S. Keystone XL NAFTA suit suspended*, REUTERS (Feb. 28, 2017), <https://www.reuters.com/article/us-canada-pipeline-lawsuit/transcanadas-15-billion-u-s-keystone-xl-nafta-suit-suspended-idUSKBN1671W1>.

145. EVERYCRSREPORT, PRESIDENTIAL PERMITS FOR BORDER CROSSING ENERGY FACILITIES, <https://www.everycrsreport.com/reports/R43261.html> (last updated Aug. 1, 2017).

146. TIME, *supra* note 58.

147. DONALD J. TRUMP, OFFICE OF THE PRESIDENT, PRESIDENTIAL PERMIT, ENERGY & ENVIRONMENT (Mar. 29, 2019).

148. THE CANADIAN PRESS, TRANSCANADA SUSPENDS \$15BILLION NAFTA SUIT ON KEYSTONE XL PIPELINE (Feb. 28, 2017), <https://www.thestar.com/business/2017/02/28/transcanada-suspends-15-billion-nafta-suit-on-keystone-xl-pipeline.html>.

### *E. Alberta Electricity Generation*

In August 2019, Westmorland Mining, a U.S. company, filed the \$470 million damage claim against the government of Canada for breaches by the province of Alberta of article 1102 and 1105 of NAFTA.<sup>149</sup>

In 2013, Westmoreland acquired a number of coalmines, including the “mine-mouth” operations in Alberta at issue in this dispute. Mine-mouth coal operations are coalmines developed adjacent to and in conjunction with a power plant so that the coal can be delivered to the power plant economically.<sup>150</sup>

The value of Westmoreland’s investment was threatened in November 2015 when a new Alberta provincial government announced its “Climate Leadership Plan.” Alberta, which historically had relied primarily on its abundant coal supply to fuel its power plants, decided that it wanted to eliminate all power emanating from coal by 2030.<sup>151</sup>

“Alberta agreed to pay out nearly \$1.4 billion to three coal-consuming power utilities, all of which were Albertan companies. Two of the three, TransAlta and Capital Power, also owned interests in mine-mouth coal mines,” and the compensation valued those assets.<sup>152</sup> Westmoreland, unlike the three Alberta companies, was not compensated for the early closure of its mines.<sup>153</sup>

When the coal payouts were issued to the companies, Alberta’s Energy Minister stated that they were intended to compensate for the “economic disruption to their capital investments” caused by the sudden policy shift and to “provide investor confidence and encourage them to participate in Alberta’s transition from coal.”<sup>154</sup>

Westmorland argued that Alberta’s plan to “compensate Albertan coalmine operators for the loss of their investments, to the exclusion of the only American coalmine operator, denied Westmoreland national treatment under Article 1102 and treated the company unfairly and inequitably, in violation of NAFTA Article 1105.”<sup>155</sup> An arbitration panel has yet to be appointed.

### *F. British Columbia Electricity Pricing*

In 2012 Mercer International, a U.S. company, filed a \$250 million NAFTA claim against Canada.<sup>156</sup> The claim related to the company’s investment in a

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149. Notice of Arbitration and Statement of Claim Under the Rules of Arbitration of the United Nations Commission on International Trade Law and Chapter Eleven of the North American Free Trade Agreement, *Westmorland Mining Holdings v. Government of Canada* (NAFTA Apr. 12, 2019).

150. *Id.* at para. 5.

151. *Id.* at para. 6.

152. *Id.* at para. 8.

153. *Id.* at para. 11.

154. Kris Kasawski, *Update on the Alberta Coal Phase Out*, PARKPOWER (Dec. 5, 2016), <https://parkpower.ca/update-alberta-coal-phase-out/>.

155. Notice of Arbitration and Statement of Claim Under the Rules of Arbitration of the United Nations Commission on International Trade Law and Chapter Eleven of the North American Free Trade Agreement, *Westmorland Mining Holdings v. Government of Canada* para. 13 (NAFTA Apr. 12, 2019).

156. Notice Of Intent To Submit A Claim To Arbitration Under Chapter Eleven And Articles 1503(2) And 1502(3)(A) Of The North American Free Trade Agreement, *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB (AF) 12/3 (NAFTA Jan. 26, 2012).

pulp mill located in Castlegar, British Columbia.<sup>157</sup> The mill also operated an energy generation facility fueled by biomass, which qualified as renewable energy in British Columbia regulation.<sup>158</sup>

The claim related to the actions of BC Hydro, a government owned utility, that provided electricity to most of British Columbia and the BC Utilities Commission (BCUC), which regulated the distribution of electricity in that province.<sup>159</sup> There are two utilities that provide electricity in British Columbia.<sup>160</sup> The first is BC Hydro, which serves most of British Columbia.<sup>161</sup> The second is Fortis, which provides electricity to a small portion of the province including the Mercer pulp mill in Castlegar.<sup>162</sup>

The central issue in this case was that Mercer was engaged in the arbitrage of power and BC Hydro and the BCUC took steps to prevent it.<sup>163</sup> Mercer required a significant amount electricity for its own use at its mill.<sup>164</sup> For some time, Mercer was allowed to purchase that electricity from Fortis at low cost-based rates.<sup>165</sup> At the same time, Mercer was able to sell the renewable electricity generated at its facility using biomass at market rates.<sup>166</sup>

Mercer alleged that BC Hydro and BCUC through their joint action had a created new regulatory regime that required Mercer to use its own self-generated electricity first before selling electricity to the grid at market prices.<sup>167</sup> This removed the arbitrage profit.<sup>168</sup>

Mercer argued that the other pulp mills in British Columbia were doing the same thing and it was being discriminated against, contrary to NAFTA Articles 1102, 1103, and 1503.<sup>169</sup> The tribunal ruled against Mercer and ordered Mercer to pay Canada's costs of \$9 million.<sup>170</sup>

There were a number of complexities in this case. First, Canada argued that the BC Hydro conduct was shielded by the government procurement protections in Article 1108(7) of NAFTA<sup>171</sup>.

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157. *Id.* at para. 1.

158. *Id.* at para. 2.

159. *Id.* at para. 3.

160. *Id.* at para. 6.

161. Notice Of Intent To Submit A Claim To Arbitration Under Chapter Eleven And Articles 1503(2) And 1502(3)(A) Of The North American Free Trade Agreement, *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB (AF) 12/3 para. 6 (NAFTA Jan. 26, 2012).

162. *Id.*

163. In The Arbitration Under Chapter Eleven Of The North America Free Trade Agreement, *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB (AF) 12/3 para. 2.6-2.7 (Mar. 6, 2018).

164. *See generally id.*

165. *Id.* at para. 2.32.

166. *Id.* at para. 2.4.

167. In The Arbitration Under Chapter Eleven Of The North America Free Trade Agreement, *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB (AF) 12/3 para. 7.53 (Mar. 6, 2018).

168. *Id.* at para. 7.38.

169. *Id.* at para 2.2.

170. *Id.* at para 9.7.

171. *Id.* at para 2.58.

The panel also questioned whether the Commission ruling was discriminatory contrary to Article 1102, 1103, and 1503 of NAFTA.<sup>172</sup> It turned out that Mercer was the only pulp mill buying electricity from Fortis BC, the others were being served by BC Hydro, and therefore they were not on the same footing or subject to the same regulatory ruling<sup>173</sup>.

There was also question of whether Mercer was late filing its claim and violated the three-year time limit under article 1116 and 1117 of NAFTA.<sup>174</sup> The limitation period involved a review of the earlier NAFTA decision in Grand River.<sup>175</sup> The question about was what was the date that the investor first acquired or should have acquired knowledge of the alleged breach and the resulting damage.<sup>176</sup> The panel ultimately found that some of the claims were time barred<sup>177</sup>.

It should be noted that Mercer first raised this complaint before the BC Utility Commission which ruled against it.<sup>178</sup> The Commission decision effectively ruled that self-generating customers had to first supply their requirements from their own production before they could purchase embedded low-cost power from Fortis.<sup>179</sup>

Mercer was the only pulp mill buying electricity from Fortis.<sup>180</sup> The other pulp mills were purchasing from BC Hydro under a different regulatory regime.<sup>181</sup> The panel ruled that the facts did not support a finding of discriminatory treatment, dismissing the application and awarding costs against Mercer.<sup>182</sup>

### *G. Going Forward*

The original NAFTA agreement was negotiated over five years.<sup>183</sup> An agreement in principle was signed by President Reagan and Prime Minister Mulroney at the Shamrock Summit in Québec City in 1985.<sup>184</sup> It was called the

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172. In *The Arbitration Under Chapter Eleven Of The North America Free Trade Agreement, Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB (AF) 12/3 para. 7.40 (Mar. 6, 2018).

173. *Id.* at para. 7.45-7.46.

174. *Id.* at para. 2.56.

175. See *Decision on Objections to Jurisdictions, Grand River Enterprises Six Nations Ltd. v. United States of America*, UNCITRAL (July 20, 2006).

176. *Id.* at para. 3.

177. In *The Arbitration Under Chapter Eleven Of The North America Free Trade Agreement, Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB (AF) 12/3 para. 8.3 (Mar. 6, 2018).

178. In the *Matter the Utilities Commission Act, R.S.B.C. 1996, Chapter 473 and An Application by British Columbia Hydro and Power Authority to Amend Section 2.1 of Rate Schedule 3808 ("RS 3808") Power Purchase Agreement*, Order No. G-48-09 (British Columbia Util. Comm'n May 6, 2009).

179. *Id.*

180. In *The Arbitration Under Chapter Eleven Of The North America Free Trade Agreement, Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB (AF) 12/3 para. 2.31 (Mar. 6, 2018).

181. *Id.*

182. *Id.* at para. 8.5.

183. NATIONAL POST, FIVE KEY MILESTONES IN BRIAN MULRONEY'S FORMATIVE RELATIONSHIP WITH U.S. (Dec. 5, 2018), <https://nationalpost.com/pmnl/news-pmn/canada-news-pmn/five-key-milestones-in-brian-mulroneys-formative-relationship-with-u-s>.

184. *Id.*

Shamrock Summit because the two Irishmen treated their dinner guests to a fine rendition of the song, *When Irish Eyes are Smiling*.<sup>185</sup> Twenty-four years later when Prime Minister Trudeau and President Trump signed the new NAFTA agreement in Buenos Aires, no one was singing.<sup>186</sup>

The original NAFTA agreement really began with the *Canada US Free Trade Agreement* that came into force on January 1, 1989.<sup>187</sup> However, shortly after, President Bush—eager to increase American investment in Mexico but worried about Mexican nationalization—started negotiations with Mexico.<sup>188</sup> That was really the origin of the famous Chapter 11 provision granting unusual rights to private investors.<sup>189</sup> The Canadians then joined in and NAFTA resulted.<sup>190</sup>

Negotiations of the new NAFTA agreement were not easy. Like the first version it took almost four years.<sup>191</sup> The U.S. administration wanted more U.S. steel in automobiles and access to Canadian poultry and dairy markets which had long been protected by Marketing Boards.<sup>192</sup>

Both Canada and the United States wanted out of the Chapter 11 process.<sup>193</sup> The Canadians believed that they had lost too many NAFTA arbitrations.<sup>194</sup> The

185. *Id.*

186. Jen Kirby, *USMCA, Trump's new NAFTA deal, explained in 600 words*, VOX (Feb. 4, 2020), <https://www.vox.com/2018/10/3/17930092/usmca-mexico-nafta-trump-trade-deal-explained>.

187. GOV'T OF CANADA, CANADA-U.S. FREE TRADE AGREEMENT, [https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/united\\_states-etats\\_unis/fta-ale/background-contexte.aspx?lang=eng](https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/united_states-etats_unis/fta-ale/background-contexte.aspx?lang=eng).

188. Kimberly Amadeo, *NAFTA's Purpose and Its History*, THE BALANCE (Mar. 31, 2020), <https://www.thebalance.com/history-of-nafta-3306272>.

189. Citizen.org, *NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy, Lessons for Fast Track and the Free Trade Area of the Americas* (Sept. 2001), <https://www.citizen.org/wp-content/uploads/acf186.pdf>.

190. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA), <https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta>.

191. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, USTR: TRUMP ADMINISTRATION ANNOUNCES INTENT TO RENEGOTIATE THE NORTH AMERICAN FREE TRADE AGREEMENT (May 18, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/ustr-trump-administration-announces>.

192. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, UNITED STATES–MEXICO–CANADA TRADE FACT SHEET AGRICULTURE: MARKET ACCESS AND DAIRY OUTCOMES OF THE USMC AGREEMENT (Apr. 18, 2019), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/october/united-states%E2%80%93mexico%E2%80%93canada-trade-fact>; OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, ESTIMATED IMPACT OF THE UNITED STATES MEXICO-CANADA AGREEMENT (USMCA) ON THE U.S. AUTOMOTIVE SECTOR 4 (Apr. 18, 2019), <https://ustr.gov/sites/default/files/files/Press/Releases/USTR%20USMCA%20Autos%20White%20Paper.pdf>; Khamla Heminthavong, *Canada's Supply Management System*, PARLIAMENT OF CANADA (Dec. 17, 2015), [https://lop.parl.ca/sites/PublicWebsite/default/en\\_CA/ResearchPublications/2015138E](https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/2015138E).

193. Doug Beazley, *Why the U.S. agreed to scrap NAFTA's Chapter 11*, CBA/ABC NATIONAL, (Oct. 5, 2018), <https://nationalmagazine.ca/en-ca/articles/law/hot-topics-in-law/2019/why-the-u-s-agreed-to-scrap-nafta-s-chapter-11>.

194. Jessica Vomiero, *Why some experts say scrapping part of NAFTA's Ch. 11 is Canada's biggest win with USMCA*, GlobalNews (Oct. 5, 2018), <https://globalnews.ca/news/4519161/usmca-chapter-11-investor-state-dispute-settlement/>.

U.S. administration was not crazy about Chapter 11 either.<sup>195</sup> They were not particularly interested in promoting foreign investment.<sup>196</sup> They were more interested in building a wall along the Mexican border, increasing tariffs on Chinese imports, and withdrawing from the Paris Climate Accord.<sup>197</sup>

It is worth seeing where we ended up. Chapter 11 is history, but no one is crying about that. In fact, a remedy created by the Supreme Court of Canada in 2018 may provide investors with even greater protection than Chapter 11 of NAFTA provided. In *Lorraine v. Quebec* the Supreme Court created a common law remedy for de facto expropriation.<sup>198</sup> Unlike the Chapter 11 remedy, this can be used by both foreign and domestic investors.<sup>199</sup> In fact, the first application is an energy case involving LGX Oil and Gas.<sup>200</sup> There LGX brought a \$60 million claim against Canada on the basis that an order two years earlier by Environment Canada under the Species at Risk Act had devalued their oil and gas wells in southern Alberta.<sup>201</sup> That order prohibited construction and noise activities in April and May of each year, which was the mating season for the greater sage grouse.<sup>202</sup>

It is important, however, that the state to state dispute settlement process in Chapter 20 has been maintained.<sup>203</sup> In fact, the parties made an improvement to this provision.<sup>204</sup>

The dispute provisions in the original Chapter 20 had a major flaw. That chapter allowed either party to block the formation of a panel in a state to state dispute settlement case by either not engaging in the meeting of the Free Trade Commission of Ministers which was required to be approved the panel, or by refusing to agree to the proposed roster of panelists from which the panelists were required to be selected.<sup>205</sup>

The updated dispute settlement provision solves this problem. In the new provision, panels are automatically established upon request, bypassing the Commission of Ministers.<sup>206</sup> Going forward, if the government parties cannot reach consensus agreement on the roster of panelists within one month, the roster

195. Beazley, *supra* note 165.

196. *Id.*

197. Kimberly Amadeo, *President Donald Trump's Policies and Economic Plan*, THE BALANCE (Apr. 13, 2020), <https://www.thebalance.com/donald-trump-economic-plan-3994106>.

198. *Lorraine (Ville) v. 2646-8926 Quebec Inc.*, 2018 SCC 35 (Can.).

199. Dan Healing, *LGX Oil sues federal government for \$60 million over sage grouse order*, CALGARY HERALD (Dec. 4, 2015), <https://postmedia.us.janrainso.com/static/server.html?origin=https%3A%2F%2Fcalgaryherald.com%2Fbusiness%2Fenergy%2F1gx-oil-sues-federal-government-for-60-million-over-sage-grouse-order%2F>.

200. *Id.*

201. *Id.*

202. *Id.*

203. UNITED STATES-MEXICO-CANADA AGREEMENT, INTELLECTUAL PROPERTY RIGHTS-USMCA CHAPTER 20, <https://usmca.com/intellectual-property-rights-usmca-chapter-20/>.

204. *Id.*

205. Lester S. Manik, *Access to Trade Justice: Fixing NAFTA's Flawed State to State Dispute Settlement Process*, 18 WORLD TRADE REVIEW 63-79 (2019).

206. UNITED STATES-MEXICO-CANADA AGREEMENT, INTELLECTUAL PROPERTY RIGHTS-USMCA CHAPTER 20, *supra* note 170.

will be formed automatically from the individuals proposed by each government.<sup>207</sup>

The difficulty under the former Chapter 20 explains why no dispute settlement panel has been formed under NAFTA Chapter 20 since 2000 when the United States blocked the establishment of a panel in the U.S.-Mexico sugar dispute.<sup>208</sup>

Another important point is that the new NAFTA as a sunset clause promoted by the United States.<sup>209</sup> However, it was increased from the five years originally propose by the United States to sixteen years.<sup>210</sup> There is however an automatic review of the agreement every six years.<sup>211</sup> During those reviews the agreement can be extended for another sixteen years.<sup>212</sup>

The new NAFTA was first signed by leaders of the three NAFTA countries on November 30, 2018, at a G7 meeting.<sup>213</sup> At that time, it was unclear how long the ratification process would take. Subsequent discussions led to the three countries agreeing to amendments on December 10, 2019, which took the form of a 27-page Protocol of Amendments to the original USMCA signed a year earlier.<sup>214</sup>

The Mexican Senate ratified the deal on December 12, 2019,<sup>215</sup> and the U.S. President signed the agreement into law on January 29, 2020.<sup>216</sup> On March 13, 2020, the agreement was passed by both the Canadian House of Commons and the Canadian Senate and was given Royal assent.<sup>217</sup> It will enter into force in Canada on a date to be determined by Order in Council. It is not clear when that order will be issued,<sup>218</sup> but the most likely date for the agreement to come into force is July 1, 2020.

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207. *Id.*

208. Manik, *supra* note 172.

209. Jen Kirby, *USMCA, Trump's new NAFTA deal, explained in 600 words*, VOX (Feb. 4, 2020), <https://www.vox.com/2018/10/3/17930092/usmca-mexico-nafta-trump-trade-deal-explained>.

210. *Id.*

211. *Id.*

212. *Id.*

213. GOV'T OF CANADA, CANADA SIGNS NEW TRADE AGREEMENT WITH UNITED STATES AND MEXICO (Nov. 30, 2018), <https://www.canada.ca/en/global-affairs/news/2018/11/canada-signs-new-trade-agreement-with-united-states-and-mexico.html>.

214. JUSTIN TRUDEAU, PRIME MINISTER OF CANADA, CANADA SIGNS AGREEMENT ON AMENDMENTS TO THE NEW NAFTA (Dec. 10, 2019), <https://pm.gc.ca/en/news/news-releases/2019/12/10/canada-signs-agreement-amendments-new-nafta>.

215. SECRETARÍA DE GOBERNACIÓN, DIARIO OFICIAL DE LA FEDERACIÓN (Jan. 21, 2020), <https://sidof.segob.gob.mx/notas/5584425>.

216. H.R.5430, 116th Congress (2019-2020).

217. An Act to implement the Agreement between Canada, the United States of America and the United Mexican States, S.C. 2020, c 4 (Can.).

218. Statement by the Deputy Prime Minister on Canada's ratification of the new NAFTA, (April 3, 2020), <https://pm.gc.ca/en/news/statements/2020/04/03/statement-deputy-prime-minister-canadas-ratification-new-nafta>.

## VI. REGULATORY REFORM

*A. The Alberta Capacity Market*

On November 23, 2016, the Government of Alberta announced that Alberta would implement a capacity market.<sup>219</sup> The Alberta Electric System Operator (AESO) filed an application for the approval of rules to implement the capacity market on January 31, 2019.<sup>220</sup> An oral hearing was held by the Alberta Utilities Commission (AUC) from April 22, 2019 to June 11, 2019.<sup>221</sup>

The opponents argued that the capacity market and the rules the AESO proposed to operate that market were not in the public interest and that the application should be rejected in its entirety.<sup>222</sup> There were three main grounds to the arguments:

- The proposal was based on provisional rules, which do not create the certainty necessary to encourage investment.
- There is no need for a capacity market and the uncertainty a new and complicated regulatory process would have been sure to bring. The analysis that the AESO presented in support of the initial capacity market recommendation was flawed.
- Improvements to the energy market, in particular the implementation of shortage pricing that was recommended by three experts in the AUC's proceeding, should be implemented instead.<sup>223</sup>

On July 24, 2019, the Government of Alberta announced that Alberta would not be proceeding with a capacity market, and that the industry would remain with an energy-only design before the AUC could reach a decision.<sup>224</sup> On the government's instructions the AESO withdrew the application before the AUC.<sup>225</sup>

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219. Press Release, Government of Alberta (Nov. 23, 2016), <https://www.alberta.ca/release.cfm?xID=44880BD97DCDC-D465-4922-25225F9F43B302C9>.

220. ALBERTA UTIL. COMM'N, PROCEEDING 23757, APPLICATION 23757-X0284, APPLICATION FOR APPROVAL OF CAPACITY MARKET RULES (Jan. 31, 2019), [https://www2.auc.ab.ca/Proceeding23757/ProceedingDocuments/23757\\_X0284\\_ApplicationforApprovalofCapacityMarketRu\\_0335.pdf](https://www2.auc.ab.ca/Proceeding23757/ProceedingDocuments/23757_X0284_ApplicationforApprovalofCapacityMarketRu_0335.pdf).

221. ALBERTA UTIL. COMM'N, PROCEEDING 23757, APPLICATION 23757-X0578, APPLICATION 23757-A001 CONSIDERATION OF ISO RULES TO IMPLEMENT AND OPERATE THE CAPACITY MARKET (Apr. 16, 2019), [https://www2.auc.ab.ca/Proceeding23757/ProceedingDocuments/23757\\_X0578\\_UpdatedHearingProcessLetterApril2019\\_0669.pdf](https://www2.auc.ab.ca/Proceeding23757/ProceedingDocuments/23757_X0578_UpdatedHearingProcessLetterApril2019_0669.pdf).

222. ALBERTA UTIL. COMM'N, PROCEEDING 2357, APPLICATION 23757-A001, APPLICATION BY THE ALBERTA ELECTRIC SYSTEM OPERATOR FOR THE APPROVAL OF THE FIRST SET OF ISO RULES TO ESTABLISH AND OPERATE THE CAPACITY MARKET, FINAL ARGUMENT OF THE MARKET SURVEILLANCE ADMINISTRATOR (June 21, 2019), <https://static1.squarespace.com/static/5d88e3016c6a183b1bcc861f/t/5d8e70c8804a337291aaf137/1569616075441/Final+Argument+of+the+MSA.pdf>.

223. *Id.*

224. Letter from Sonya Savage, Minister, to Will Bridge, Board Chair, Alberta Electric System Operator (July 25, 2019), <https://www.aeso.ca/assets/Uploads/Alberta-Energy-Direction-to-AESO-07-25-19.pdf>.

225. MARKET SURVEILLANCE ADMINISTRATOR, ALBERTA ELECTRIC SYSTEM OPERATOR, SUBMISSION RELATED TO ELECTRICITY MARKET REFORMS (Nov. 1, 2019), <https://www.aeso.ca/assets/Uploads/MSA2-Submission-Related-to-Electricity-Market-Reforms-20191101.pdf>.



In late July 2019 the AESO received direction from the Alberta Ministry of Energy:

... to provide advice regarding market power and market power mitigation by November 29, 2019. Additionally, the AESO was directed to provide any analysis and recommendations on whether any changes to the energy only market are needed, including changes to the price floor/ceiling and shortage pricing, by July 31, 2020. The AESO recognizes that there is a strong linkage between market power mitigation, the price floor/ceiling and shortage pricing, and will consider this connection as it undertakes its work.<sup>226</sup>

On October 8, 2019, the AESO issued a request for input from the Market Surveillance Administrator, market participants, and other interested parties on market power mitigation due by October 29, 2019.<sup>227</sup> The AESO provided a report to the minister by November 29, 2019, which has not been made public.<sup>228</sup>

On February 12, 2020, the AESO held a stakeholder consultation.<sup>229</sup> The first round of comments were due by February 26, 2020.<sup>230</sup> The AESO's objectives are to:

evaluate the ability of the current pricing framework in the energy market to maintain resource adequacy and economic efficiency in both the short and long term, and explore options to address deficiencies or increase efficiency in the current energy-only market pricing framework. Administrative price mechanisms, such as the current price cap, offer cap and price floor, must be set at levels to allow for efficient market outcomes while also protecting consumers from cost risk.<sup>231</sup>

### B. A New Federal Regulator

Early in 2018, the federal government introduced Bill C-69, new legislation that would replace the NEB with the Canadian Energy Regulator (CER).<sup>232</sup> The CER is much more complex than NEB. Its scope is much greater.<sup>233</sup> Its jurisdiction goes beyond federally regulated pipelines and includes potential offshore renewable energy projects.<sup>234</sup>

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226. Letter from Nicole LeBlanc, Director, Markets & Tariff, Alberta Elec. System Operator, to Market Surveillance Admin., Market Participants, and Other Interested Parties (Oct. 8, 2019), <https://www.aeso.ca/assets/Uploads/Mitigation-Stakeholder-Letter-v6.pdf>.

227. *Id.*

228. ALBERTA ELECTRIC SYS. OPERATOR, LETTER OF NOTICE FOR STAKEHOLDER INPUT ON MARKET POWER MITIGATION WEBPAGE, <https://www.aeso.ca/market/market-updates/letter-of-notice-for-stakeholder-input-on-market-power-mitigation/> (last visited April 8, 2020).

229. ALBERTA ELEC. SYS. OPERATOR, AESO INITIATIVES ENGAGEMENT (Feb. 12, 2020), <https://www.aeso.ca/event/2020-02-12-review-of-price-cap-price-floor-and-shortage-pricing>.

230. ALBERTA ELEC. SYS. OPERATOR, STAKEHOLDER COMMENT MATRIX – FEB. 12, 2020 (Feb. 18, 2020), <https://www.aeso.ca/assets/Uploads/PWX-Pricing-Framework-Comment-Matrix-Session-Redacted.pdf>.

231. *Id.*

232. An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts, S.C. 2019, C-69 (Can.).

233. Evan W. Dixon et al., *Bill C-69: Introducing the Canadian Energy Regulator and the Impact Assessment Agency*, 7 ENERGY REG. Q. 31 (Jan. 2020), <https://www.energyregulationquarterly.ca/articles/bill-c-69-introducing-the-canadian-energy-regulator-and-the-impact-assessment-agency#sthash.h03vSXkA.dpbs>.

234. *Id.*

Also, there are now four institutional components to the regulatory framework.<sup>235</sup> First is the Board of Directors of the CER that is responsible for providing strategic direction and advice.<sup>236</sup> Second is the Commission of the CER, the members of which will conduct hearings.<sup>237</sup> Third, and most critically, is the Chief Executive Officer (CEO), who is responsible for the management of the CER's day-to-day business and affairs.<sup>238</sup> The CEO reports to the Minister, not the Board of Directors.<sup>239</sup> Fourth, there is the federal cabinet, which will make decisions based on the recommendations of the Commission of the CER.<sup>240</sup>

To complicate matters, the factors that this new institution must consider are much wider than the NEB ever faced, or for that matter, any Canadian energy regulator currently faces. The new legislation requires that the review process consider environmental, gender, and Indigenous considerations or what is described as the intersection of sex and gender with other identity factors including Canada's ability to meet its environmental obligations and its commitments with respect to climate change.<sup>241</sup> All that, will keep the industry guessing for years.

One senior Alberta regulator has been critical of the governance structure created by Bill C-69 stating that, "the recent movement to a three-legged governance model for adjudicative agencies seems largely based on theoretical corporate governance, with little consideration for the existing governance, accountability mechanisms and complexities of operating a quasi-judicial agency in the parliamentary system."<sup>242</sup>

The first decision by the CER was handed down on September 27, 2019.<sup>243</sup> The decision concerns the Enbridge mainline system, the largest crude oil pipeline in Canada with the capacity of almost 3 million barrels per day.<sup>244</sup> It connects Edmonton, Alberta with major markets in eastern Canada and the midwestern United States.<sup>245</sup> This line is currently operated as a common carrier rather than on a contract carriage basis.<sup>246</sup> Under the common carrier model, capacity is allocated on the basis of monthly nominations rather than long term

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235. Canadian Energy Regulator Act, S.C. 2019, c. 28 (Can.).

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. CANADIAN ENERGY REGULATOR, GOVERNANCE OF THE CANADA ENERGY REGULATOR – MANDATE, ROLES AND RESPONSIBILITIES, <https://www.cer-rec.gc.ca/bts/whwr/gvrnnc/mndtrlsrspnsblts/index-eng.html?&wbdisable=true> (last visited Apr. 9, 2020).

241. Canadian Energy Regulator Act, S.C. 2019, c. 28 (Can.).

242. Bob Heggie, *Governance of Administrative Agencies*, 7 ENERGY REG. Q. 15 (Oct. 2019).

243. Letter from L. George, Secretary of the Commission, Canada Energy Regulator, to Suncor, Shell, EPAC, and CNRL (Sept. 27, 2019) <https://apps.cer-rec.gc.ca/REGDOCS/File/Download/3829179>.

244. ENBRIDGE, THE ENBRIDGE MAINLINE, MAINLINE SYSTEM CAPACITY (2020), <https://www.enbridge.com/reports/2020-liquids-pipelines-customer-handbook/mainline>.

245. *Id.*

246. Enbridge, Enbridge To Hold Open Season for Transportation Services on Canadian Mainline Pipeline System (Aug. 2, 2019) <https://www.enbridge.com/media-center/news/details?id=123583&lang=en>.

contracts.<sup>247</sup> Common carriage has, in effect, been required on federal oil pipelines since the NEB was established in 1959, subject to the ability of the NEB, and now the Commission, to grant exceptions.<sup>248</sup>

At issue is the decision by Enbridge to change its operations from a common carrier model to a contract carriage model whereby 90% of the capacity will be under long term contracts, with the remaining 10% allocated on the traditional basis.<sup>249</sup> The Alberta shippers are split in their affiliation with some supporting the new regime and others opposed.<sup>250</sup>

The main concern argued by opponents is that the changes proposed by Enbridge would allow it to abuse its market power.<sup>251</sup> The allegation is that, under the new regime, there will be a lack of transportation options for many shippers.<sup>252</sup> The CER observed in its initial decision that the Enbridge system controlled 70% of capacity out of Alberta and that it was concerned about the perception of abuse of Enbridge's market power.<sup>253</sup>

On December 19, 2019, Enbridge filed a comprehensive "Canadian Mainline Contracting Application" with the CER for approval of a new service and tolling framework, to take effect on the expiration of the current service and tolling framework on June 30, 2021.<sup>254</sup> The proposed new framework would convert 90% of capacity to contract carriage, with 10% reserved for uncommitted volumes.<sup>255</sup> The Commission of the CER has announced that it will conduct an oral hearing on the application commencing on a date to be announced.<sup>256</sup>

### C. The Ontario Energy Board

The province of Ontario elected a Conservative government in June 2018, replacing the Liberal government that had governed the province for fifteen

247. CANADA ENERGY REGULATOR, REGULATION OF PIPELINE TRAFFIC, TOLLS AND TARIFFS, <https://www.cer-rec.gc.ca/bts/whwr/rspnsblt/trffctlltrff-eng.html>.

248. *Id.*; CANADA ENERGY REGULATOR, OUR HISTORY, <https://www.cer-rec.gc.ca/bts/whwr/rhstry-eng.html>.

249. Steven Weiler, *Enbridge Open Season Terminated by Canada Energy Regulator*, JD SUPRA (Oct. 8, 2019), <https://www.jdsupra.com/legalnews/enbridge-open-season-terminated-by-35351/>.

250. Nia Williams, *Dozens of Enbridge Oil Shippers Wade into Dispute over Proposed Pipeline Overhaul*, REUTERS (Sept. 5, 2019), <https://www.reuters.com/article/us-canada-enbridge-pipeline/dozens-of-enbridge-oil-shippers-wade-into-dispute-over-proposed-pipeline-overhaul-idUSKCN1VQ2NW>.

251. Steven Weiler, *supra* note 113.

252. *Id.*

253. Letter from L. George, Secretary of the Comm'n, Canada Energy Regulator, to Suncor, Shell, EPAC, and CNRL, *supra* note 107.

254. Letter from L. George, Secretary of the Com'n, Canada Energy Regulator, to Jennifer, Nichols, Margery Fowke, Enbridge, & D.G. Davies, Norton Rose Fulbright Canada LLP (Feb. 24, 2020), [https://docs2.cer-rec.gc.ca/l-eng/lisapi.dll/fetch/2000/90465/92835/155829/3773831/3890507/3908468/3910006/C04811-1\\_CER\\_-\\_Notice\\_of\\_Public\\_Hearing\\_and\\_Registration\\_to\\_Participate\\_Instructions\\_-\\_Enbridge\\_Canadian\\_Mainline\\_Contracting\\_Application\\_-\\_A7D5Y6.pdf?nodeid=3910007&vernum=-2](https://docs2.cer-rec.gc.ca/l-eng/lisapi.dll/fetch/2000/90465/92835/155829/3773831/3890507/3908468/3910006/C04811-1_CER_-_Notice_of_Public_Hearing_and_Registration_to_Participate_Instructions_-_Enbridge_Canadian_Mainline_Contracting_Application_-_A7D5Y6.pdf?nodeid=3910007&vernum=-2).

255. *Id.*

256. *Id.*

years.<sup>257</sup> One of the major election issues was the Conservative Party's criticism of the Liberal government with respect to managing energy policy in the province.<sup>258</sup> This was largely based on the claim that Ontario's electricity prices had increased by 71% between 2008 and 2016, while—during this period—the average increase across Canada was less than half of that amount, or 34%.<sup>259</sup> The new government concentrated on abolishing the green energy projects developed by the liberals, including a number of renewable energy projects.<sup>260</sup> In March of 2019, the new government turned its attention to reforming energy regulation in general and the Ontario Energy Board (OEB) in particular.<sup>261</sup>

On March 21, 2019, the Ontario government introduced the OEB Act.<sup>262</sup> Some of the changes were to be implemented through proposed legislative amendments set out in Bill 87.<sup>263</sup> Other changes were implemented through regulatory and policy updates. Bill 87 was passed by the Ontario government on May 9, 2019.<sup>264</sup> Among other things, it amended the OEB's governance structure and operations. These changes were based on the OEB *Modernization Report* by OEB's Modernization Review Panel.<sup>265</sup>

Like the federal reforms, the OEB will now be governed by a Board of Directors with a chief commissioner reporting directly to the chair of the Board.<sup>266</sup> The report recommends necessary changes to ensure that the Board operates more effectively, in particular that it prioritizes its regulatory agenda and be evaluated against key performance indicators that relate to matters such as decision time cycle, stakeholder satisfaction, and organizational excellence.<sup>267</sup>

The panels' concern is that the Board of Directors will be charged with "ensuring the independence . . . of the adjudication process."<sup>268</sup> However, the President and the Board of Directors can be expected to have a close relationship with the government, and it is the government that is the source of challenges to independence. Specifically the panel heard from stakeholders that they "felt that the OEB needs to be appropriately independent from government. Several

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257. Ian Austen, *Doug Ford Leads Ontario conservatives to Victory*, NY TIMES (June 7, 2018), <https://www.nytimes.com/2018/06/07/world/canada/ontario-premier-election.html>.

258. *Id.*

259. Taylor Jackson et al., *Electricity Price Growth in Ontario*, FRASER INSTITUTE (2017), <https://www.fraserinstitute.org/sites/default/files/evaluating-electricity-price-growth-in-ontario.pdf>.

260. NATIONAL POST, ONTARIO PC GOVERNMENT CANCELS 758 RENEWABLE ENERGY CONTRACTS, SAYS IT SAVES \$790M (July 14, 2018), <https://nationalpost.com/news/politics/ontario-government-cancels-758-renewable-energy-contracts-says-it-will-save-millions>.

261. David Stevens, *Ontario Government Releases Its Plan to Reform the OEB and Reduce Electricity Costs*, ENERGY INSIDER (Mar. 22, 2019), <https://www.airdberlis.com/insights/blogs/energyinsider/post/ei-item/ontario-government-releases-its-plan-to-reform-the-oeb-and-reduce-electricity-costs>.

262. Ontario Energy Board Act, S.O. 1998, c 15, Sched. B (Can. Ont.).

263. Bill 87, An Act to amend various statutes related to energy, S.O. 2019, c 6 (Can. Ont.).

264. Legis. Assemb. Ont., Bill 87, Fixing the Hydro Mess Act, 2019, <https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-87/status>.

265. ONTARIO ENERGY BD. MODERNIZATION REVIEW PANEL, FINAL REPORT (Oct. 2018), <https://files.ontario.ca/endm-oeb-report-en-2018-10-31.pdf>.

266. *Id.* at 12.

267. *Id.* at 13.

268. *Id.* at 15.

stakeholders noted that prescriptive directives to the OEB may compromise its independence".<sup>269</sup>

The report does not address perhaps the largest problem in the sector, which is the lack of regulatory oversight of procurement of capacity.<sup>270</sup> This problem and its financial consequences have been noted by the Auditor General.<sup>271</sup> The report does not address how the OEB's mandate should be changed to provide oversight.<sup>272</sup> Ontario is one of the very few jurisdictions without oversight over procurement and the cost consequences have been concerning.<sup>273</sup>

To date, the new government has appointed a board chair but is still searching for a chief commissioner.<sup>274</sup> As in the case of the CER, there has been considerable criticism of the new structure, but only time will tell if it works.<sup>275</sup> The main criticism is that the energy regulator is no longer independent of the government.<sup>276</sup> Of course, others will argue it never was independent in any event.

## VII. DISTRIBUTED ENERGY RESOURCES

In 2019 regulatory Commissions across Canada were struggling to define the regulatory treatment for Distributed Energy Resources (DERs).<sup>277</sup> In Alberta, the subject is being reviewed by both the AUC and the AESO in parallel.<sup>278</sup>

Virtually all studies focus on at least three major issues, customer owned generation, energy storage, and Electric Vehicle (EV) charging. Each are considered below.

269. *Id.* at 46-47.

270. George Vegh, *Electricity Procurements in Ontario: Time for a New Approach*, ONTARIO 360 (Feb. 27, 2020), <https://on360.ca/policy-papers/electricity-procurements-in-ontario-time-for-a-new-approach/>.

271. *Id.*

272. *Id.*

273. Office of the Auditor General of Ontario stated one of their significant observations was "that electricity consumers have had to pay \$9.2 billion more for renewables over the 20-year contract terms under the Ministry's current guarantee- price renewable program than they would have paid under the previous procurement program." OFFICE OF THE AUDITOR GEN. OF ONTARIO, ANNUAL REPORT 2015, 214, [https://www.auditor.on.ca/en/content/annualreports/arreports/en15/2015AR\\_en\\_final.pdf](https://www.auditor.on.ca/en/content/annualreports/arreports/en15/2015AR_en_final.pdf).

274. NETNEWSLEDGER, MINISTER RICKFORD ANNOUNCES INTENTION TO APPOINT RICHARD DECERNI CHAIR OF OEB (Jan. 31, 2020), <http://www.netnewsledger.com/2020/01/31/minister-rickford-announces-intention-to-appoint-richard-decerni-chair-of-oeb/>.

275. The Canadian Press, *Ontario PCs Introduce Legislation to End Liberal Hydro Plan*, CBC RADIO-CANADA (Mar. 21, 2019), <https://www.cbc.ca/news/canada/toronto/ontario-hydro-rates-1.5066634>.

276. Mark Winfield & Amanda Gelfant, *Distributed Energy Resource Development in Ontario: A Socio-Technical Transition in Progress?*, 7 ENERGY REG. Q. 11 (Jan. 2020).

277. See, e.g., Letter from Ont. Energy Board to All Participants in EB-2018-0287 and EB-2018-0288, All Licensed Electricity Distributors, Natural Gas Distributors and Electricity Transmitters, All Other Interested Stakeholders (March 15, 2019) (available at <https://www.oeb.ca/sites/default/files/OEB-Ltr-Remuneration-DER-20190315.pdf>).

278. ALBERTA ELEC. SYS. OPERATOR, ENERGY STORAGE, <https://www.aeso.ca/market/current-market-initiatives/energy-storage>; ALBERTA UTIL. COMM'N, OVERVIEW, <http://www.auc.ab.ca/Pages/distribution-system-inquiry.aspx>.

On March 29, 2019, the AUC established a Distribution System Inquiry asking market participants to make submissions relating to:

emerging trends in technology and innovation potentially affecting distribution systems, including distribution system design, operation, capital requirements and the cost of providing service. This module will also consider how innovation and technological change create the opportunity for new market entry within a monopoly franchise, including self-supply.<sup>279</sup>

This proceeding is ongoing. Future phases will consider the following questions:

- Is there under-investment in certain key technologies in the Alberta electricity distribution sector?
- Would additional investment make the Alberta electricity distribution sector more cost effective?
- Is the electricity local distribution company an important instrument of change?
- Are there regulatory barriers to innovation and new technologies?
- and
- How should the regulatory framework be transformed in order to increase investment and efficiency in the Alberta electricity distribution sector?<sup>280</sup>

DERs are also under consideration by the OEB:<sup>281</sup>

On March 15, 2019, the OEB announced that it was starting a consultation process to look at how the electricity sector in Ontario should respond to DERs and encourage utilities and regulated service providers to “embrace innovation” in their operations and customer service.<sup>282</sup> The stated aims of the consultation were to drive lower costs, improve service, and offer more consumer choice “by encouraging utilities and other service providers to embrace innovation,” and to “secure the benefits of sector transformation and mitigate any adverse consequences.”<sup>283</sup>

On July 17, 2019, the OEB issued a letter explaining its “refreshed” approach to stakeholder engagement for its previously-announced consultation

279. Letter from Alberta Util. Comm’n, to Parties currently registered on Proceeding 24116 and other interested parties 3 (Mar. 29, 2019), [http://www.auc.ab.ca/Shared%20Documents/Projects/24116\\_X0106-AUCletter-Scopeandprocess.pdf](http://www.auc.ab.ca/Shared%20Documents/Projects/24116_X0106-AUCletter-Scopeandprocess.pdf).

280. ALBERTA UTIL. COMM’N, DISTRIBUTION SYSTEM INQUIRY, PROCEEDING 24116, SUBMISSION OF THE MARKET SURVEILLANCE ADMINISTRATOR, MODULE ONE 6 (July 17, 2019), [https://www2.auc.ab.ca/Proceeding24116/ProceedingDocuments/24116\\_X0160\\_MSADSIModuleOneSubmission\\_0172.pdf](https://www2.auc.ab.ca/Proceeding24116/ProceedingDocuments/24116_X0160_MSADSIModuleOneSubmission_0172.pdf).

281. Letter from Ontario Energy Bd., to All Participants in EB-2018-0287 and EB-2018-0288, All Licensed Electricity Distributors, Natural Gas Distributors and Electricity Transmitters, All Other Interested Stakeholders (Mar. 15, 2019), <https://www.oeb.ca/sites/default/files/OEB-Ltr-Remuneration-DER-20190315.pdf>.

282. *Id.* at 2.

283. *Id.*

processes on Utility Remuneration and Responding to DERs.<sup>284</sup> Among other things, the OEB's updated approach was intended to "enhance the opportunity for stakeholder perspectives to inform subsequent steps in relation to these initiatives following the OEB's transition to its new structure."<sup>285</sup>

On August 13, 2019, the OEB issued a letter launching a review of the requirements for licensed electricity distributors to connect distributed energy resources (DER Connections Review).<sup>286</sup> The DER Connections Review is a companion initiative to the OEB's ongoing Responding to DERS consultation.<sup>287</sup>

The OEB has heard from stakeholders about what should be addressed in the Responding to DERs consultation.<sup>288</sup> OEB staff will provide a report describing stakeholder perspectives and setting out a proposal outlining objectives, issues, and guiding principles for the Responding to DERs consultation to proceed.<sup>289</sup> However, before that report is issued, OEB staff has convened an additional session—in February 2020—where they outline and seek input on OEB staff's current thinking of the scope of the consultation.<sup>290</sup>

#### A. Customer Owned Generation

The last 10 years have seen a dramatic increase in local generation compared to central generation. New technology has made it possible to locate generation closer to the customers it serves, reducing transmission costs including line losses. The technology at issue is mostly gas generation known as combined heat and power (CHP) and solar generation.<sup>291</sup> The attraction of both technologies is driven by a rapid reduction in cost these technologies have experienced over the past decade. For example, in 2019 the AUC granted approval for a \$500 million solar project, the largest of its kind in Canada.<sup>292</sup> That facility, once completed in 2021, will generate 400 MW, enough to supply power to over 100,000 homes.<sup>293</sup>

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284. Letter from Ontario Energy Bd., to All Licensed Electricity Distributors and Transmitters and All Rate-regulated Natural Gas Distributors, All Participants in EB-2018-0287 and EB-2018-0288, All Other Interested Stakeholders (July 17, 2019), <https://www.oeb.ca/sites/default/files/Ltr-UR-RDER-Refreshed-Consultation-20190717.pdf>.

285. *Id.* at 1.

286. Letter from Ontario Energy Bd., to All Licensed Electricity Distributors, All Licensed Electricity Generators, All Licensed Storage Companies, All Other Interested Parties (Aug. 13, 2019) <https://www.oeb.ca/sites/default/files/Ltr-Kick-off-DER-Connections-Review-20190813.pdf>.

287. *Id.*

288. *Id.* at 3.

289. *Id.*

290. Letter from Ontario Energy Bd., to All Licensed Electricity Distributors and Transmitters and All Rate-Regulated Natural Gas Distributors, All Participants in EB-2018-0287 and EB-2018-0288, All Other Interested Stakeholders (Jan. 21, 2020), <http://www.rds.oeb.ca/HPECMWebDrawer/Record/665567/File/document>.

291. *See generally* POWER, COMBINED HEAT AND POWER: A SLEEPING GIANT MAY BE WAKING (Mar. 1, 2019), <https://www.powermag.com/combined-heat-and-power-a-sleeping-giant-may-be-waking/>.

292. ALBERTA UTIL. COMM'N, GREENGATE POWER CORPORATION, TRAVERS SOLAR PROJECT (Aug. 26, 2019), [http://www.auc.ab.ca/regulatory\\_documents/ProceedingDocuments/2019/24502-D01-2019.pdf#search=greengate](http://www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2019/24502-D01-2019.pdf#search=greengate).

293. *Id.*

The important regulatory issues faced in customer owned generation are:

- “Should community generation be limited to behind-the-fence operations?”
- “Should community generators have access to regulated electric Local Distribution Company (LDC) lines to distribute electricity within the LDC service area?”
- “Should regulated electric LDCs be allowed to offer local generation as a rate-based service? If so, what measures are necessary to protect competing suppliers?”
- “Should community generators be allowed to sell excess power to the grid? If so, on what terms?”<sup>294</sup>

Under Alberta’s Micro-generation Regulation, eligible alternative and renewable generators are allowed to receive credit for any power they send to the grid.<sup>295</sup> The regulation defines eligible microgeneration facilities to be less than 5 MW in size.<sup>296</sup>

The latest data from the AESO (March 2020) show that there is approximately 74 MW of micro-generation capacity installed in Alberta, about 93% of which is solar.<sup>297</sup> This is up from less than 6 MW five years earlier, an increase of approximately nine times.<sup>298</sup>

In Ontario, there has been substantial investment in distributed energy resources over the past fifteen years. Much of this investment has been made by investors under contract with a government entity, first the Ontario Power Authority and now the Independent Electricity System Operator (IESO).<sup>299</sup> There are 33,671 contracts that have a total capacity of 3,588.8 MW that account for 13.4% of total capacity as of March 31, 2019.<sup>300</sup> The prices in these contracts were set in a variety of ways, including competitive bidding, standard offers (for example, under Feed-in-Tariff programs), and negotiations.<sup>301</sup> This data does not include more than 30,000 “microFIT” contracts (maximum of 10 kW capacity) that have a total capacity of about 260 MW, virtually all of which is solar.<sup>302</sup>

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294. ALBERTA UTIL. COMM’N, *supra* note 144, at 21.

295. Microgeneration Regulation, section 7(5), “(5) Subject to subsection (5.1), a micro-generator’s service provider shall credit the micro-generator for electric energy supplied out of the micro-generator’s micro-generation site at the following rates: (a) in the case of small micro-generation, at the rate the service provider charged the micro-generator for electric energy supplied to the micro-generation site; (b) in the case of large micro-generation, at the pool.” Electric Util. Act, Micro-Generation Reg., Alta. Reg. 27/2008 8 (Can.); *see also* ALBERTA.CA, MICRO-GENERATION, [HTTPS://WWW.ALBERTA.CA/MICRO-GENERATION.ASPX](https://www.alberta.ca/micro-generation.aspx).

296. *Id.*

297. ALBERTA ELEC. SYS. OPERATOR, SMALL DISTRIBUTION-CONNECTED GENERATION RESOURCES IN ALBERTA (Feb. 12, 2020), <https://www.aeso.ca/market/market-and-system-reporting/micro-and-small-distributed-generation-reporting/>.

298. *Id.*

299. INDEP. ELEC. SYS. OPERATOR, A PROGRESS REPORT ON CONTRACTED ELECTRICITY SUPPLY (Q4-2019), <http://www.ieso.ca/en/Learn/Ontario-Power-System/A-Smarter-Grid/Distributed-Energy-Resources>.

300. *Id.* at 11.

301. *Id.* at 21.

302. *Id.* at 32.



In both Alberta and Ontario, the generic proceedings have, to some degree, been overtaken by more specific proceedings arising in rate cases and related matters. The leading example is Alberta, where in September 2019, the AUC launched a consultation on generation self-supply and power export.<sup>303</sup> The consultation was prompted by three recent decisions in which the AUC for the first time restricted the circumstances in which the owner of a generating unit is allowed to both consume electricity produced by that unit on its own property and export that electricity to the power pool.<sup>304</sup> The existing exemptions that permit the self-supply and export of electricity to the power pool are related to (i) owners of industrial systems and (ii) micro-generators.<sup>305</sup> Currently, these type of generators account for approximately 5,000 MW<sup>306</sup> of generation capacity out of a total of 15,570 MW of capacity in Alberta.<sup>307</sup> This is a significantly greater proportion than exists elsewhere in Canada.<sup>308</sup>

The Bulletin asked respondents to address three options:

- Option 1: Status Quo;
- Option 2: Limited self-supply and export; and
- Option 3: Unlimited self-supply and export.<sup>309</sup>

The consultation attracted considerable interest; 33 stakeholders submitted comments in response.<sup>310</sup> Most of them favored Option 3.<sup>311</sup> In January 2020, the AUC issued a second Bulletin that requested parties to comment on submissions provided by two of the respondents, Capital Power and AltaLink.<sup>312</sup>

The parties were asked in the Commission's January 9, 2020, Bulletin to respond to the concerns raised by Capital Power as follows:

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303. ALBERTA UTIL. COMM'N, BULLETIN 2019-16 (Sept. 13, 2019), <http://www.auc.ab.ca/News/2019/Bulletin%202019-16.pdf>.

304. *EPCOR Water Services Inc. re E.L. Smith Solar Power Plant*, Decision 23418-D01-2019, Alberta Util. Comm'n (Feb. 20, 2019); *Advantage Oil and Gas Ltd. re Glacier Power Plant Alteration*, Decision 23756-D01-2019, Alberta Util. Comm'n (Apr. 26, 2019); *International Paper Canada Pulp Holdings ULC re Request for Permanent Connection for 48-Megawatt Plant*, Decision 24393-D01-2019, Alberta Util. Comm'n (June 6, 2019).

305. *EPCOR Water Services Inc. re E.L. Smith Solar Power Plant*, Decision 23418-D01-2019, para. 101, Alberta Util. Comm'n (Feb. 20, 2019).

306. E-mail from AltaLink Mgmt. Ltd., to Trevor Richards, Alberta Util. Comm'n 4 (Oct. 11, 2019), [http://www.auc.ab.ca/regulatory\\_documents/Consultations/2019-10-11-SelfSupplyandExport-AltaLinkManagementLtd.pdf](http://www.auc.ab.ca/regulatory_documents/Consultations/2019-10-11-SelfSupplyandExport-AltaLinkManagementLtd.pdf).

307. MARKET SURVEILLANCE ADMIN., 2019 MARKET SHARE OFFER CONTROL REPORT 3 (Sept. 24, 2019), <https://static1.squarespace.com/static/5d88e3016c6a183b1bcc861f/t/5d8cf795c3fa58146f1f13ad/1569519510719/2019+Market+Share+Offer+Control+Report.pdf>.

308. In Ontario, by way of example, this generation accounts for 10% of total supply compared to 30% in Alberta. Specifically, in Ontario at the end of 2019 there was approximately 3,400 MW of local, distribution-connected generation capacity and another 37,500 MW of transmission-connected generation capacity. See INDEP. ELEC. SYSTEM OPERATOR, ONTARIO'S SUPPLY MIX, <http://www.ieso.ca/en/Learn/Ontario-Supply-Mix/Ontario-Energy-Capacity>.

309. Alberta Util. Comm'n, *supra* note 165.

310. ALBERTA UTIL. COMM'N, POWER PLANT SELF-SUPPLY AND EXPORT CONSULTATION, <https://engage.auc.ab.ca/Self-SupplyAndExport>.

311. *Id.*

312. ALBERTA UTIL. COMM'N, BULLETIN 2020-01 (Jan. 9, 2020), <http://www.auc.ab.ca/News/2020/Bulletin%202020-01.pdf>.

Allowing an exemption for some energy reduces the amount of supply competing to be dispatched. Further, an expanded amount of self-supply and export reduces market visibility of both available supply and load to be served inhibiting price discovery. Exempting supply or some energy from pool participation reduces the effectiveness of and benefits from having a competitive market.<sup>313</sup>

The Market Surveillance Administrator (MSA),<sup>314</sup> which has been described by the Alberta Court of Appeal as the independent “watchdog” of Alberta’s electricity market, was one of the interveners, argued that:

In effect, there are two related markets: the self-supply market and the non-self-supply market. The latter is the Power Pool. Both have existed for some time.

If the Commission adopts option 3, “unlimited self-supply and export,” it is likely that the self-supply market will expand. That will not necessarily reduce the size of the non-self-supply market or the degree of competition between those suppliers. It will, however, expand the options available to consumers in Alberta and that will increase competition in that segment of the market. Further, customer-owned generation that does not have a legislated exemption from participating in the power pool (e.g., industrial systems and micro-generation) could easily be required to explicitly participate in the power pool by making offers and receiving dispatch. The MSA remains of the view that option 3 will increase competition not decrease it.

The MSA does not believe it is necessary that the generator be behind-the-fence. Nor should community generation be disadvantaged. The fact that the generator is owned by several customers as opposed to one customer should not matter if the cost allocation for rates is done correctly. There are cost allocation issues with respect to a single customer behind-the-fence generator. Those same issues exist where a community generator serves a number of customers.

Another question that should be addressed is whether the local generation facility must be owned by a consumer or whether it can be owned by a third-party. The MSA believes that the local generation market should be open to third-parties. This will increase competition which will support fair, efficient, and open competition.

Local generation can bring a number of economies and benefits to the Alberta electricity system. They are, by definition, closer to the customer and transmission and distribution costs are reduced.

Local generation is the product of new, more efficient technology that did not exist when much of the current regulatory framework was put in place. This new technology offers significant cost reductions. The Commission should remove, not create, artificial barriers to entry.

Local generation, including community generation, constitutes a form of market entry. New market entry has been central to the competitiveness of Alberta’s electricity market. Entry not only constrains the exercise of market power in generation, but can also promote productivity improvements in the distribution industry.

New entry is particularly important in Alberta at the present time. The Power Purchase Arrangements will come to an end in one year, and it is generally agreed that their expiration will lead to increased concentration and market power in

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313. E-mail from Colin Robb, Senior Advisor, Regulatory & Environmental Policy, Capital Power, to Trevor Richards, Alberta Util. Comm’n, (Oct. 11, 2019), [http://www.auc.ab.ca/regulatory\\_documents/Consultations/2019-10-11-SelfSupplyandExport-CapitalPower.pdf](http://www.auc.ab.ca/regulatory_documents/Consultations/2019-10-11-SelfSupplyandExport-CapitalPower.pdf).

314. MARKET SURVEILLANCE ADMIN., ABOUT US, <https://www.albertamsa.ca/about-us>.

Alberta. New entry through customer owned generation will reduce market concentration.<sup>315</sup>

The discussions concerning customer-owned generation can also lead to a similar analysis on customer owned storage. In part, this is driven by the FERC decision in 2018 in Order 841, which directed the removal of barriers to storage participation in electricity markets.<sup>316</sup> In the end, the real issue with respect to customer-owned generation is not whether it should be allowed, but whether it should be restricted to behind the meter applications, generation owned by customers as opposed to third parties, and what rates these generators should pay to transmitters and distributors who provide grid access when they wish to sell excess power to the grid.

All of those issues are currently in front of the AUC, which will provide a recommendation to the government by the end of March 2020.<sup>317</sup>

### B. Energy Storage

Regulatory agencies across Canada have all been trying to promote storage over the last few years. There are good reasons for this: First, energy infrastructure is built to handle peak loads.<sup>318</sup> If the peaks can be reduced the related capital investments can be reduced with cost savings.<sup>319</sup>

Secondly, the generation of electricity worldwide is moving from carbon-based energy to green energy.<sup>320</sup> A significant difference between the two is green energy like wind and solar is highly variable.<sup>321</sup> Not surprisingly, planners have discovered the advantage of marrying solar plus storage in particular as outlined in a recent Brattle study in December 2019.<sup>322</sup>

315. Letter from Market Surveillance Admin., to Trevor Richards, Alberta Util. Comm'n 3 (Feb. 14, 2020), <https://static1.squarespace.com/static/5d88e3016c6a183b1bcc861f/t/5e5e922e69266155eee537dd/1583256113481/2020-02-14+MSA+Self-Supply+Submission.pdf>.

316. In its feedback to the Independent Electricity System Operator (IESO) some stakeholders referenced FERC 841. See, e.g., ENERGY STORAGE CAN., COMMENTS ON IESO DRAFT NERSC REPORT 2 (Mar. 18, 2019), <http://www.ieso.ca/-/media/Files/IESO/Document-Library/working-group/market-renewal/nersc/nersc-20190318-energy-storage-canada.pdf?la=en> (recommending the IESO focus on FERC Order 841); ALBERTA ELEC. SYS. OPERATOR, ENERGY STORAGE ROADMAP: UPDATE TO STAKEHOLDERS (Nov. 18, 2019), <https://www.aeso.ca/assets/Uploads/Energy-Storage-Roadmap-update-to-stakeholders-final.pdf> (listing FERC as a credible 3rd party source of useful information and referencing FERC Order 841).

317. ALBERTA UTIL. COMM'N, POWER PLANT SELF-SUPPLY AND EXPORT CONSULTATION, <https://engage.auc.ab.ca/Self-SupplyAndExport>.

318. NATURAL RESOURCES CANADA, ABOUT ELECTRICITY, <https://www.nrcan.gc.ca/energy/electricity-infrastructure/about-electricity/7359>.

319. Robert Walton, *The Value of Less: Quantifying the benefit of peak demand savings*, UTILITYDIVE (Nov. 4, 2015), <https://www.utilitydive.com/news/the-value-of-less-quantifying-the-benefit-of-peak-demand-savings/408565/>.

320. REN21, RENEWABLES 2019 GLOBAL STATUS REPORT, A COMPREHENSIVE ANNUAL OVERVIEW OF THE STATE OF RENEWABLE ENERGY (2019), <http://www.ren21.net/gsr-2019/>.

321. Ashley J. Lawson, *Variable Renewable Energy: An Introduction*, CONG. RES. SERV. (June 25, 2019), <https://crsreports.congress.gov/product/pdf/IF/IF11257>.

322. Ryan Hledik et al., *Solar-Plus-Storage: The Future Market for Hybrid Resources*, THE BRATTLE GROUP (Dec. 2019), [https://brattlefiles.blob.core.windows.net/files/17741\\_solar\\_plus\\_storage\\_economics\\_-\\_final.pdf](https://brattlefiles.blob.core.windows.net/files/17741_solar_plus_storage_economics_-_final.pdf).

Another rationale for the increase emphasis on storage that is stimulating demand is the growth of Behind-the-Meter (BTM) storage as customers attempt to curtail their costs.<sup>323</sup> BTM energy storage today represents only 70 MW or 15% of the U.S. energy storage market.<sup>324</sup> By 2022 it will represent 1300 MW or 30% of the market.<sup>325</sup> There are significant similarities between local generation and local storage. Both may be customer-owned and can offer excess capacity to other customers. This service will increase efficiency in the Alberta energy sector and bring significant cost savings.

The next important factor driving this demand is recognition by utilities that storage can be an important grid asset to reduce costs. This was likely fueled at least in the United States by FERC's determination in Order No. 841 that helps remove regulatory barriers for storage in FERC-regulated markets.<sup>326</sup>

BTM storage is an issue in the recent consultation initiated by the AUC.<sup>327</sup> It was also addressed in the recent Toronto hydro rate case, where Toronto Hydro attempted to include storage in its rate base.<sup>328</sup> That request was turned down by the OEB, which concluded that the matter be deferred to the boards DERs consultation.<sup>329</sup>

Finally, it is important to recognize the significant decrease in cost that has taken place in the storage markets over the last few years. Between 2010 and 2018 the average price of a lithium ion battery pack dropped from \$1,160 per kilowatt-hour to \$176 per kilowatt-hour – an 85% reduction in just eight years.<sup>330</sup> Within the next few years, Bloomberg New Energy Finance (BNEF) predicts a further drop to \$94 per kilowatt-hour in 2024 and \$61 per kilowatt-hour in 2030.<sup>331</sup>

It has been suggested by BNEF that the global energy storage market will grow to 2,857 GWh by 2040 and attract over \$620 billion in investment over the next twenty years.<sup>332</sup> In Ontario, the IESO has used a number of competitive processes to develop over twenty-five storage projects resulting in over 50 MW

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323. Peter Maloney, *How Behind-the-Meter Storage Could Make Up 50% of the U.S. Market by 2021*, UTILITYDIVE (Jan. 31, 2017), <https://www.utilitydive.com/news/how-behind-the-meter-storage-could-make-up-50-of-the-us-market-by-2021/434882/>.

324. *Id.*

325. GTM RES. AND ENERGY STORAGE ASS'N, U.S. ENERGY STORAGE MONITOR: Q4 2017 FULL REPORT (Dec. 2017).

326. *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 162 F.E.R.C. ¶ 61,127 at P 68 (2018).

327. ALBERTA UTIL. COMM'N, *supra* note 173.

328. *Toronto Hydro-Electric System Ltd.*, Application for Electricity Distribution Rates beginning January 1, 2020 until December 31, 2024, EB-2018-0165, Ontario Energy Bd. (Feb. 20, 2020).

329. *Toronto Hydro-Electric System Ltd.*, EB-2018-0165, Ontario Energy Bd. (Dec. 19, 2019).

330. Logan Goldie-Scot, *A Behind the Scenes Take on Lithium-Ion Battery Prices*, BLOOMBERGNEF (Mar. 5, 2019), <https://about.bnef.com/blog/behind-scenes-take-lithium-ion-battery-prices/>.

331. BLOOMBERGNEF, BATTERY PACK PRICES FALL AS MARKET RAMPS UP WITH MARKET AVERAGE AT \$156/KWH IN 2019 (Dec. 3, 2019), <https://about.bnef.com/blog/battery-pack-prices-fall-as-market-ramps-up-with-market-average-at-156-kwh-in-2019/>.

332. BLOOMBERGNEF, *Energy Storage is a \$620 Billion Investment Opportunity to 2040* (Nov. 6, 2018), <https://about.bnef.com/blog/energy-storage-620-billion-investment-opportunity-2040/>.

of capacity.<sup>333</sup> In December 2018, the IESO published a report titled *Removing Obstacles for Storage Resources in Ontario*.<sup>334</sup> This was followed by an OEB initiative in March 2019 to similar effect and a study by Energy Storage Canada in May 2019 entitled *Maximizing Value and Efficiency through Energy Storage*.<sup>335</sup> This was in some respects similar to the AESO study a year earlier called *Dispatchable Renewables and Energy storage*.<sup>336</sup>

### C. Electric Vehicle Charging

The total number of [Electric Vehicles] (EVs) on the road, globally, reached 3.1 million in 2017, up 57 per cent from the previous year. China and the United States had the highest sales volume in 2017, and Norway is the world leader in terms of sales share with EVs accounting for more than 39 per cent of new sales in 2017. Nine countries, including France, the United Kingdom and Norway, have plans to phase out all gasoline powered-vehicles between 2025 and 2050.<sup>337</sup>

Although just 2.2% of the world's vehicles are electric, a record 2.2 million EVs were sold last year.<sup>338</sup> BNEF predicts that EVs will reach 19% of light vehicle sales in China by 2025 compared to 14% in Europe and 11% in the United States.<sup>339</sup> Currently, those numbers are 4% in China, 2% in Europe, and 2% in the United States.<sup>340</sup> BNEF predicts that EVs will reach 55% of global vehicle sales by 2040.<sup>341</sup> It is estimated that by 2020, the price of EVs in Europe will be less than the price of internal combustion engine vehicles.<sup>342</sup> That goal will be reached in China by 2023 and in the United States by 2025.<sup>343</sup>

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333. INDEP. ELEC. SYS. OPERATOR, ENERGY PROCUREMENT PROGRAMS AND CONTRACTS, <http://www.ieso.ca/en/Sector-Participants/Energy-Procurement-Programs-and-Contracts/Energy-Storage>.

334. INDEP. ELEC. SYS. OPERATOR, REMOVING OBSTACLES FOR STORAGE RESOURCES IN ONTARIO (Dec. 19, 2018), <http://www.ieso.ca/en/Sector-Participants/IESO-News/2018/12/IESO-report-outlines-next-steps-to-leveling-playing-field-for-energy-storage>.

335. ENERGY STORAGE CANADA, MAXIMIZING VALUE AND EFFICIENCY FOR RATEPAYERS THROUGH ENERGY STORAGE: A ROADMAP FOR ONTARIO, <https://energystoragecanada.org/highlights/2019/5/29/maximizing-value-and-efficiency-for-ratepayers-through-energy-storage-a-roadmap-for-ontario>.

336. ALBERTA ELEC. SYS. OPERATOR, DISPATCHABLE RENEWABLES AND ENERGY STORAGE (May 31, 2018), <https://www.aeso.ca/assets/Uploads/AESO-Dispatchable-Renewables-Storage-Report-May2018.pdf>.

337. INDEP. ELEC. SYS. OPERATOR, THE ROAD AHEAD; MEETING THE E-MOBILITY CHALLENGE (July 8, 2019), <http://www.ieso.ca/en/Powering-Tomorrow/Technology/The-road-ahead-meeting-the-challenge-of-electrified-transportation>.

338. GREENTECH MEDIA, ELECTRIC VEHICLE SALES SET TO CRASH IN 2020 AMID CORONAVIRUS AND OIL PRICE Shocks (Apr. 8, 2020), [greentechmedia.com/articles/read/electric-vehicle-sales-set-to-crash-in-2020-as-coronavirus-bites-and-oil-stays-cheap](https://greentechmedia.com/articles/read/electric-vehicle-sales-set-to-crash-in-2020-as-coronavirus-bites-and-oil-stays-cheap); Michael J. Coren, *Automakers may have completely overestimated how many people want electric cars*, QUARTZ (Jan. 25, 2019), <https://qz.com/1533976/automakers-may-overproduce-14-million-electric-cars-by-2030/>.

339. BLOOMBERGNEF, ELECTRIC VEHICLE OUTLOOK 2019 (2019), <https://about.bnef.com/electric-vehicle-outlook/>.

340. *Id.*

341. *Id.*

342. Adam Cooper & Kellen Schefter, Electric Vehicle Sales Forecast and the Charging Infrastructure Required Through 2030, EDISON ELEC. INST. (Nov. 2018).

343. Jasper Jolly, *2020 set to be year of the electric car, say industry analysts*, THE GUARDIAN (Dec. 25, 2019), <https://www.theguardian.com/environment/2019/dec/25/2020-set-to-be-year-of-the-electric-car-say-industry-analysts>.

Edison Electric Institute (EEI) estimates that by 2030 the number of EVs in the United States will reach 18.7 million compared to 1 million at the end of 2018.<sup>344</sup> It took eight years to sell 1 million EVs in the United States and EEI predicts that the next 1 million will be sold in three years.<sup>345</sup> It is predicted that the annual sales of EVs in the United States will exceed 3.5 million in 2030, accounting for more than 20% of annual vehicle sales.<sup>346</sup> It should also be noted that it is estimated that 9.6 million charging ports will be required to support the 18.7 million EVs in the United States in 2030.<sup>347</sup>

“Canada has seen significant expansion in the EV market, with Ontario, Quebec, and British Columbia accounting for 97% of all plug-in vehicles sold in Canada between 2013 and 2018. Between 2017 and Q3 2018, sales increased by about 80%” with the result that the national EV market share is now 2.5% compared to less than 1% in 2017.<sup>348</sup> Sales in Ontario by the end of 2018 were more than 6,000, a 209% increase over the same period in 2017.<sup>349</sup> Ontario accounts for 44% of all new EV sales in Canada.<sup>350</sup>

The recent phase 2 report by the British Columbia Utilities Commission in its *Electric Vehicle Service Inquiry* (June 2019) sets out an excellent review of the current Canadian situation, stating:

Due to initiatives by the federal, provincial, and municipal governments, as well as utilities and private firms, public charging infrastructure is continuing to grow in Canada. By the end of December 2017, there were approximately 5,843 EV charging stations in Canada, of which 5,168 were Level 2, 483 DCFC, and 190 Tesla Superchargers. This represented a 38 percent increase in public charging infrastructure installations across Canada in 2017 compared to 2016.

Recent private sector developments include the formation of Electrify Canada, a partnership formed by Electrify America in cooperation with Volkswagen Group Canada to build DCFC infrastructure, in July 2018. It plans to build 32 fast charging stations in in southern B.C., Ontario, and Quebec, with operations expected to start mid-2019. In February 2019, PetroCanada announced it is building a network of 50 DC fast chargers across Canada from Halifax, Nova Scotia, to Vancouver, with the first station opened in Ontario.

Federal initiatives have been led by Natural Resources Canada (NRCan), in collaboration with a variety of other partners, which has supported the construction of more than 500 EV fast chargers to date. In 2017, NRCan collaborated with three private companies in 2017 to install 34 fast-charging stations along the Trans-Canada Highway in Ontario and Manitoba. NRCan’s ongoing Electric Vehicle and Alternative Fuel Infrastructure Deployment Initiative (NRCan EV Initiative) offers repayable contributions to support the construction of a coast to coast EV fast charging network. The NRCan EV Initiative will pay up to 50% of the total project costs to a maximum of fifty thousand dollars (\$50,000) per charging unit. BC Hydro received funding for 21 stations under its Phase 1 implementation, out of a national total of 102.

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344. Cooper & Schefter, *supra* note 2, at 1.

345. *Id.*

346. *Id.*

347. *Id.*

348. INDEP. ELEC. SYS. OPERATOR, *supra* note 305.

349. *Id.*

350. *Id.*

At the provincial level, the Governments of Ontario, Quebec, and B.C. have actively supported the development of EV charging infrastructure. Hydro-Quebec's Electric Circuit, launched in 2012, was Canada's first public charging network for EVs, offering both 240-volt and 400-volt charging stations. By early 2019 the Circuit included 1,700 stations, including 176 fast-charging stations. The stations are installed in the parking lots of the Circuit's numerous partners across Québec and in the North-East of Ontario, and operated by Hydro-Quebec. In 2019, Hydro Quebec announced it had received funding for 100 new stations from the Federal government to be installed before the end of 2019 and have long-term plans to build 1600 fast charging stations over the next 10 years.

In Alberta the NRCan EV Initiative supported an initial three EV fast charging stations at Canadian Tire locations in 2017, while in February 2019 the Alberta Government announced plans to provide \$1.2 million to co-fund the Peak to Prairies EV network, in collaboration with local partners, and the Federation of Canadian Municipalities. The network will consist of 20 fast-charging stations that will be installed across southern Alberta by the end of 2019. Long term ownership and operation of the charging infrastructure will be carried out by ATCO.<sup>351</sup>

A variety of regulatory models are used in other jurisdictions. Ontario, California, Washington, Oregon, New York, and a number of other U.S. states exempt EV charging from energy regulation.<sup>352</sup> Those jurisdictions permit re-sale of electricity without prior approval, and prices are set by the market.<sup>353</sup> B.C. and "some other U.S. states require EV charging service providers to become public utilities, subject to all other aspects of energy regulation, including pricing."<sup>354</sup>

"[S]ome jurisdictions allow public utilities to provide EV charging services and recover costs through rates."<sup>355</sup> "[O]ther jurisdictions do not allow public utilities to deliver EV charging services or only allow them to deliver EV charging services as a non-rate-based venture."<sup>356</sup>

The status of EV charging in a variety of North American jurisdictions is surveyed below.

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351. BRITISH COLUMBIA UTIL. COMM'N, INQUIRY INTO THE REGULATION OF ELECTRIC VEHICLE CHARGING SERVICE, PHASE TWO REPORT (June 24, 2019), [https://www.bcuc.com/Documents/Proceedings/2019/DOC\\_54345\\_BCUC%20EV%20Inquiry%20Phase%20Two%20Report-web.pdf](https://www.bcuc.com/Documents/Proceedings/2019/DOC_54345_BCUC%20EV%20Inquiry%20Phase%20Two%20Report-web.pdf).

352. NC CLEAN ENERGY TECH. CTR., THE 50 STATES OF ELECTRIC VEHICLES: STATES FOCUS ON TRANSPORTATION ELECTRIFICATION PLANNING, CHARGING STATION REGULATION IN Q2 2019 (Aug. 7, 2019), <https://nccleantech.ncsu.edu/2019/08/07/the-50-states-of-electric-vehicles-states-focus-on-transportation-electrification-planning-charging-station-regulation-in-q2-2019/>.

353. N. AM. ENERGY WORKING GRP., GUIDE TO FEDERAL REGULATION OF SALES OF IMPORTED ELECTRICITY IN CANADA, MEXICO, AND THE UNITED STATES (Jan. 2005), [https://www.energy.gov/sites/prod/files/oeprod/DocumentsandMedia/Guide\\_to\\_Sale\\_of\\_Imported\\_Electricity.pdf](https://www.energy.gov/sites/prod/files/oeprod/DocumentsandMedia/Guide_to_Sale_of_Imported_Electricity.pdf).

354. BRITISH COLUMBIA UTIL. COMM'N, SUBMISSION TO THE INQUIRY INTO THE REGULATION OF ELECTRIC VEHICLE CHARGING SERVICE 7 (Mar. 15, 2018), [https://www.bcuc.com/Documents/Proceedings/2018/DOC\\_51065\\_C19-2\\_MEMPR\\_Written-Evidence.pdf](https://www.bcuc.com/Documents/Proceedings/2018/DOC_51065_C19-2_MEMPR_Written-Evidence.pdf).

355. BRITISH COLUMBIA UTIL. COMM'N, REPORT, PHASE 1 44 (Nov. 26, 2018), [https://www.bcuc.com/Documents/Arguments/2018/DOC\\_53093\\_2018-11-26-PhaseOne-Report.pdf](https://www.bcuc.com/Documents/Arguments/2018/DOC_53093_2018-11-26-PhaseOne-Report.pdf).

356. *Id.*

### 1. British Columbia

On November 26, 2018, the British Columbia Utilities Commission (BCUC) issued its Phase I Report from its *Inquiry into the Regulation of Electric Vehicle Charging Service*.<sup>357</sup> In this report, the BCUC found “that the public EV charging market does not exhibit monopoly characteristics” and economic regulation is not required to protect consumers.<sup>358</sup> The BCUC recommends that the B.C. government issue an exemption with respect to the BCUC’s regulation of EV charging services, but retain oversight of safety.<sup>359</sup>

The BCUC’s inquiry evolved out of an application by FortisBC Inc. for approval of an EV charging rate for service at FortisBC-owned charging stations.<sup>360</sup> The BCUC approved the requested rate on an interim basis in January 2018, but also adjourned the FortisBC application in favor of conducting the general inquiry into whether and how EV charging in British Columbia should be regulated.<sup>361</sup>

The Phase 2 inquiry focused on non-exempt public utilities (BC Hydro and FortisBC) and found that there is no obligation on non-exempt utilities to build charging stations.<sup>362</sup>

### 2. California

In 2018, California authorized the state’s three investor-owned utilities to recover \$738 million for EV charging infrastructure.<sup>363</sup> San Diego Gas & Electric adopted a \$137 million rebate program for 60,000 Level 2 home-based charging stations (240V chargers similar to an electric dryer or oven) and an EV-only variable hourly energy rate.<sup>364</sup> Pacific Gas and Electric adopted a \$22 million program supporting 234 fast-charging stations at fifty-two sites and make-ready infrastructure at a minimum of 700 sites to support the electrification of at least 6,500 medium- or heavy-duty vehicles.<sup>365</sup> Southern California Edison adopted a \$343 million program to install the make-ready infrastructure at a minimum of 870 sites to support the electrification of at least 8,490 medium- or heavy-duty vehicles and three new time-of-use rates for commercial customers with EVs.<sup>366</sup>

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357. See generally *id.*

358. *Id.* at 22.

359. *Id.* at 41.

360. *Id.* at 1.

361. BRITISH COLUMBIA UTIL. COMM’N, FORTISBC INC. RATE DESIGN AND RATES FOR ELECTRIC VEHICLE DIRECT CURRENT FAST CHARGING SERVICE APPLICATION ~ PROJECT NO. 1598940 ~ TEMPORARILY ADJOURNED, <https://www.bcuc.com/ApplicationView.aspx?ApplicationId=611>.

362. BRITISH COLUMBIA UTIL. COMM’N, *supra* note 319.

363. CAL. PUB. UTIL. COMM’N, DECISION ON THE TRANSPORTATION ELECTRIFICATION STANDARD REVIEW PROJECTS (May 31, 2018), <https://www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=6442457637>

364. *Id.* at 53.

365. *Id.* at 104.

366. *Id.*



### 3. Nova Scotia

In Nova Scotia, the Utility and Review Board denied a request from Nova Scotia Power Incorporated to recover from ratepayers the cost of purchasing and installing twelve EV fast-charging stations at locations across Nova Scotia, as the board found that EV charging stations are similar to other equipment on customers' premises and need not be ratepayer assets.<sup>367</sup>

### 4. Ontario

Ontario regulators have not been kind to EV charging. In 2012, the OEB denied a request for \$600,000 to fund an electric vehicle pilot project.<sup>368</sup> The impetus for the application was the Ontario Government's 2009 pronouncement that one in twenty vehicles would be electric by 2020.<sup>369</sup> Toronto hydro proposed that it would use the money to install and monitor between thirty and forty EV charging stations in the city.<sup>370</sup> "[T]he OEB . . . allowed \$200,000 in costs associated with this activity provided the money was not used to 'fund a provision of the service to the public.' The OEB, however, cautioned that policy development regarding ownership and operation of EV charging had yet to take place and that it was premature" to conclude the charging infrastructure should be included in Toronto Hydro's rate base.<sup>371</sup>

That conclusion was repeated in 2019 in response to the Toronto Hydro application for 2020-24 electric distribution rates and charges.<sup>372</sup> Again, the OEB concluded that the decision was premature and the matter should be deferred to the ongoing inquiry by the board with respect to distribution energy resources.<sup>373</sup> It should be added that one of the things the new Conservative government did when they came to power was to cancel electric vehicle incentive program and the rebates for EV purchases that the previous Liberal government had implemented.<sup>374</sup>

## VIII. CYBER SECURITY CHALLENGES

Most Canadian energy regulators have some responsibility to monitor and penalize breaches of reliability standards. In Ontario by way of example those

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367. In the Matter of the Public Utilities Act and In the Matter of an Application by Nova Scotia Power Inc, 2018 NSUARB 1 (Can.).

368. Glenn Zacher, *The Toronto Hydro Electric Vehicle Charging Decision*, 1 ENERGY REG. Q. 51 (Nov. 2013).

369. MINISTRY OF TRANSP., A PLAN FOR ONTARIO: 1 IN 20 BY 2020, THE NEXT STEPS TOWARDS GREENER VEHICLES IN ONTARIO (July 2009), <https://news.ontario.ca/mto/en/2009/07/a-plan-for-ontario-1-in-20-by-2020.html>.

370. Zacher, *supra* note 230, at 51.

371. *Id.* at 52.

372. *Toronto Hydro-Electric System Ltd.*, EB-2018-0165, Ontario Energy Bd. (Dec. 19, 2019).

373. *Id.* at 203.

374. Allison Jones, *Sales of electric vehicles plummet in Ontario now that province has cancelled rebate*, THE CANADIAN PRESS (Dec. 17, 2019), <https://www.cbc.ca/news/canada/toronto/year-ont-electric-vehicles-1.5397190>.

responsibilities fall to the IESO<sup>375</sup> although the OEB has some oversight.<sup>376</sup> In Alberta it is the AESO's responsibility to propose the reliability standards for approval by the AUC based on standards set by the North American Electric Reliability Corporation (NERC).<sup>377</sup> The AESO conducts audits on the market participants and refers suspected contraventions to the MSA, which can issue specified penalties defined by the AUC.<sup>378</sup> The complexity of this regulatory regime increased more recently with the introduction of the Critical Infrastructure Protection (CIP) standards introduced by the NERC in 2010.<sup>379</sup> They were adopted by Ontario in 2016 and by Alberta in 2017.<sup>380</sup>

The CIP standards have introduced a new complexity and for the most part concern cyber security risks.<sup>381</sup> The most recent example is a closing of an unnamed American pipeline based on a cyber-attack.<sup>382</sup>

In 2017, for the first time, a Canadian regulator established a regulatory hearing to deal with certain issues relating to these new cyber security standards.<sup>383</sup> The proceeding was prompted by a submission by the MSA to the AUC in October 29, 2019, in connection with the Commission's 2019-22 Strategic Plan.<sup>384</sup> The particular issues raised concern the use of guidelines that have been established by NERC but are not in use in Alberta, and the degree of publicity that should be attached to the penalties or fines awarded by the MSA with respect to breaches of the cyber security standards by market participants and the AESO.<sup>385</sup> In Alberta the MSA has the unique responsibility for auditing the AESO.<sup>386</sup> The AUC Rules relating to these standards require the MSA to publicly post the specified penalties it issues.<sup>387</sup> The MSA has refrained from doing so because of security risks.<sup>388</sup> This same issue concerns American

375. INDEP. ELEC. SYS. OPERATOR, ONTARIO RELIABILITY COMPLIANCE PROGRAM, <http://www.ieso.ca/en/Sector-Participants/System-Reliability/Ontario-Reliability-Compliance-Program>.

376. Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B, section 59 (Can. Ont.).

377. ALBERTA ELEC. SYS. OPERATOR, ALBERTA RELIABILITY STANDARDS, <https://www.aeso.ca/rules-standards-and-tariff/alberta-reliability-standards/>.

378. ALBERTA MARKET SURVEILLANCE ADMIN., ALBERTA – US COMPARATOR (Oct. 11, 2019), <https://www.nerc.com/AboutNERC/keyplayers/ProvincialSummaries/Alberta.pdf>.

379. N. AM. ELEC. RELIABILITY CORP., CRITICAL INFRASTRUCTURE PROTECTION STANDARDS, <https://www.nerc.com/pa/Stand/Pages/CIPStandards.aspx>.

380. Gordon Kaiser, *Submission Related to the Commission's 2019-2022 Strategic Plan*, MARKET SURVEILLANCE ADMIN. (Oct. 29, 2019), <https://static1.squarespace.com/static/5d88e3016c6a183b1bcc861f/t/5db8996ffdc9618d1fdd83a/1572378995553/MSA+Submission+related+to+the+AUC%27s+2019-2022+Strategic+Plan.pdf>.

381. *Id.*

382. U.S. DEP'T OF HOMELAND SECURITY CISA, RANSOMWARE IMPACTING PIPELINE OPERATIONS (Feb. 18, 2020), <https://www.us-cert.gov/ncas/alerts/aa20-049a>

383. ALBERTA UTIL. COMM'N, BULLETIN 2020-03, STAKEHOLDER COMMENTS SOUGHT ON SUGGESTED CHANGES TO AUC RULE 027 (Jan. 31, 2020), <http://www.auc.ab.ca/News/2020/Bulletin%202020-03.pdf>.

384. Kaiser, *supra* note 242.

385. *Id.* at 2.

386. Alberta Util. Comm'n Act, S.A. 2007. c A-37.2, sec. 39 (Can. Alta.).

387. *Id.*

388. FED. ENERGY REG. COMM'N & N. AM. ELEC. RELIABILITY CORP., JOINT STAFF WHITE PAPER ON NOTICES OF PENALTY PERTAINING TO VIOLATIONS OF CRITICAL INFRASTRUCTURE PROTECTION RELIABILITY

regulatory authorities.<sup>389</sup> A joint staff white paper regarding penalty disclosures was released in 2019 by FERC and NERC.<sup>390</sup>

#### A. Critical Infrastructure Protection (CIP)

Today there are eleven CIP standards, which set out cyber security requirements to protect the bulk power system.<sup>391</sup>

Canadian regulators have faced regulatory challenges under these new CIP standards. “Compared to the traditional reliability standards that the market participants have been dealing with since 2010, the CIP standards are much more complicated and the security risks they address are more significant. As a result, there is a significant backlog in Alberta and other Canadian jurisdictions.”<sup>392</sup>

Cyber security is a rapidly evolving field in any industry, not just electricity. As a result, the NERC CIP standards are evolving at a pace that far exceeds the development pace of the other NERC Standards. Since 2010 NERC has moved from version 0 to version 6 which is currently in effect. Version 7 and 8 of some of the CIP standards will be effective in 2020.

Alberta adopted version 5 as its first version of the CIP Standards with an effective date of 2017. The AESO has chosen to adopt the CIP standards as close to “as is” as possible. However, there are certain elements that have been removed from the NERC CIP Standards in Alberta, for example the Table of Compliance Elements and the Guidelines and Technical Basis.

Across North America, the adoption of the first version of the CIP standards or significant changes to the content with new versions of the CIP standards, has typically resulted in a significant increase in reported potential violations, either self-reported or determined through monitoring. This is generally attributed to the relatively new concepts that are being introduced to the electric industry through the standards and the complexity of the CIP standards.<sup>393</sup>

#### B. The Alberta Consultation

In Alberta, the MSA proposed significant rule changes involving “Sanction Guidelines developed by NERC that can reduce the cost and delays related to CIP standards being incurred by both the MSA and market participants.”<sup>394</sup> On October 29, 2019, the MSA asked the AUC to hold a consultation to resolve a number of outstanding issues.<sup>395</sup> That submission was made in a proceeding the AUC established to review its 2019-22 Strategic Plan.<sup>396</sup>

The consultation asked market participants to respond to the following questions:

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STANDARDS (Aug. 27, 2019), <https://www.ferc.gov/media/news-releases/2019/2019-3/AD19-18-000-Joint-White-Paper-NoFR.pdf>.

389. *Id.*

390. *Id.*

391. ALBERTA ELEC. SYS. OPERATOR, ALBERTA RELIABILITY STANDARDS, <https://www.aeso.ca/rules-standards-and-tariff/alberta-reliability-standards/>.

392. Kaiser, *supra* note 242, at 2.

393. *Id.* at 5.

394. *Id.* at 2.

395. *See generally id.*

396. *Id.* at 2.

- “Should AUC Rule 027 be amended to allow the MSA to rely on NERC Sanction Guidelines in determining specified penalties for breaches of the CIP reliability standards?”<sup>397</sup>
- “Should AUC Rule 027 be amended to allow the MSA to rely on NERC’s Table of Compliance Elements to determine the severity of breaches of CIP reliability standards?”
- “Should the MSA be authorized to make preliminary determinations of breaches of CIP reliability standards to be followed by a review procedure conducted by the MSA before making a final determination?”<sup>397</sup>

This consultation was announced on January 31, 2020 and interested parties are expected to file their submissions by February 29, 2020.<sup>398</sup>

### C. *The Disclosure Problem*

AUC Rule 027 requires the MSA to publish any specified penalty issued for a contravention of a reliability standard no later than 45 days after the penalty has been issued and post the penalty to the MSA’s website.

There is, however, a wide-ranging controversy in Canada and the United States about whether this provision is appropriate in the case of CIP penalties. The CIP penalties relate mainly to cyber security breaches which can result from deliberate attempts by third parties to damage critical infrastructure. The question is whether the publication contemplated would assist those third-parties in targeting certain facilities that have been found to have inadequate protection. The MSA has on previous occasions advised the AUC of its concerns in this regard. To date, the MSA has not published any CIP breaches on its website awaiting further clarification from the Commission.

More recently, [as noted earlier], a Joint Staff White Paper has been published by FERC and NERC. Those agencies are currently carrying out a consultation on this matter. There may be merit in the Alberta approach on publication of CIP breaches complying with the US approach that is ultimately determined.<sup>399</sup>

The MSA has proposed that a consultation be held to address the following question:

- Should AUC Rule 027 be amended to limit the publication of breaches of CIP reliability standards to the publication standard proposed by the Joint FERC-NERC Staff White Paper?<sup>400</sup>

The Commission deferred its consultation until FERC has issued its findings.<sup>401</sup>

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397. ALBERTA UTIL. COMM’N, RULE 027: SPECIFIED PENALTIES FOR CONTRAVENTION OF RELIABILITY STANDARDS, [https://engage.auc.ab.ca/AUC\\_Rule\\_27](https://engage.auc.ab.ca/AUC_Rule_27).

398. *Id.*

399. Letter from Gordon Kaiser, Market Surveillance Admin., to Douglas A. Larder, General Counsel, Alberta Util. Comm’n 13 (Feb. 28, 2020), [https://static1.squarespace.com/static/5d88e3016c6a183b1bcc861f/t/5e6931f995285f1fb6c566ef/1583952386743/4.3.\\_MSA\\_Rule\\_027\\_Submission.pdf](https://static1.squarespace.com/static/5d88e3016c6a183b1bcc861f/t/5e6931f995285f1fb6c566ef/1583952386743/4.3._MSA_Rule_027_Submission.pdf).

400. *Id.*

401. ALBERTA UTIL. COMM’N, *supra* note 351.

## IX. IN THE COURTS

A. *The B.C. Alberta Blockade*

Earlier in this report we discussed the opposition to the Trans Mountain expansion project to expand capacity by twinning the existing pipeline system with 987 kilometers of new pipe to transport oil sands production from Edmonton, Alberta to Burnaby, B.C.<sup>402</sup> The project includes an expanded marine terminal in Burnaby with a significant increase in tanker traffic under the Lions Gate Bridge.<sup>403</sup>

That led to fierce opposition from the Mayor of Burnaby and the Premier of B.C.<sup>404</sup> The province, in an attempt to stop the project, proposed an amendment to the Environmental Management Act.<sup>405</sup> Canada objected on the basis that the act was unconstitutional because it interfered with the federal government's exclusive jurisdiction over interprovincial pipelines.<sup>406</sup> The British Columbia Court of Appeal agreed.<sup>407</sup> B.C. then appealed to the Supreme Court of Canada which upheld the British Columbia Court of Appeal decision.<sup>408</sup> On January 16, 2020, the Chief Justice read a unanimous decision from the bench dismissing the case on the same basis as the British Columbia Court of Appeal.<sup>409</sup>

Before the court decisions, escalation of tension between Alberta and B.C. led to Alberta indicating that it was not going to buy B.C. wine<sup>410</sup> or electricity from the new B.C. Site C hydro facility.<sup>411</sup> Alberta was also going to stop supplying gas to heat B.C. homes.<sup>412</sup> A temporary injunction was obtained.<sup>413</sup> This blockage has also disappeared with the recent Supreme Court of Canada decision on January 16, 2020.<sup>414</sup>

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402. Catherine Levesque, *Trans Mountain pipeline's rising cost will kill project, opposition groups warn*, GLOBAL NEWS (Feb. 19, 2020), <https://globalnews.ca/news/6567871/trans-mountain-pipeline-costs-opposition/>.

403. TRANSMOUNTAIN, WESTRIDGE MARINE TERMINAL UPGRADE AND EXPANSION, <https://www.transmountain.com/wmt-port-permit> (last visited Apr. 9, 2020).

404. Sheila Scott, *Burnaby politicians react to Trans Mountain expansion plans*, CTV NEWS (June 19, 2019), <https://bc.ctvnews.ca/burnaby-politicians-react-to-trans-mountain-expansion-plans-1.4473233>.

405. Environmental Management Act, S.B.C. 2003, c 53 (Can.).

406. Reference re Environmental Management Act (British Columbia), 2019 BCCA 181, para. 3 (Can. B.C.).

407. *Id.*

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

409. *Id.*

410. ALBERTA GAMING, LIQUOR, AND CANNABIS, STATEMENT FROM PREMIER NOTLEY REGARDING BRITISH COLUMBIA WINES (Feb. 6, 2018), <https://aglc.ca/news/statement-premier-notley-regarding-british-columbia-wines>.

411. Dirk Meissner, *Payback or coincidence? Pipeline tensions between Alberta and B.C. ramp up*, THE CANADIAN PRESS (Feb. 14, 2018), <https://www.cbc.ca/news/politics/payback-or-coincidence-pipeline-tensions-between-alberta-and-b-c-ramp-up-1.4536177>.

412. Rhianna Schmunk, *B.C. wins injunction blocking Alberta's turn-off-the-taps legislation over oil*, CBC NEWS (Sept. 24, 2019), <https://www.cbc.ca/news/canada/british-columbia/turn-off-the-taps-legislation-bc-suspended-1.5295354>.

413. *Id.*

414. Reference re Environmental Management Act, 2020 SCC 1, Docket 38682 (Can.).

### B. *The Carbon War*

While the B.C. and Alberta governments were fighting with each other, the provinces of Alberta, Ontario, New Brunswick, and Saskatchewan were fighting with the federal government regarding the federal government's proposed carbon tax.<sup>415</sup> The federal government had enacted legislation requiring each province to legislate a carbon tax meeting certain standards.<sup>416</sup> For those provinces that refused, the federal government would impose its own mandatory pricing carbon scheme on that province.<sup>417</sup>

The opposition of the provinces was threefold: First they didn't believe the carbon tax would be effective.<sup>418</sup> Second, they felt it imposed significant cost on commuters that drive to work every day.<sup>419</sup> Third, they believed it was unconstitutional.<sup>420</sup>

During 2019, the cases wound their ways through the courts. In May 2019, the Saskatchewan Court of Appeal issued a 3-2 majority decision that found that the federal government did have the constitutional authority to implement a carbon tax.<sup>421</sup> A month later, the Ontario Court of Appeal in a 4-1 majority decision came to the same result.<sup>422</sup> Both decisions found that the federal carbon tax legislation was a valid exercise of the federal governments' authority under the federal governments' peace, order, and good government (POGG) authority indicated in the constitution.<sup>423</sup>

Ontario and Saskatchewan have both appealed those decisions to the Supreme Court of Canada, which has now adjourned previously scheduled cases in March, April, and May with respect to Covid-19.<sup>424</sup>

To confuse matters, the Alberta Court of Appeal ruled on February 24, 2020, that the carbon tax was unconstitutional.<sup>425</sup> This was a 4-1 decision led by the Chief Justice of the province.<sup>426</sup> The Alberta decision does a good job of explaining the differences between the Alberta court and the courts in Ontario

415. John Paul Tasker, *What you need to know: Federal carbon tax takes effect in Ont., Manitoba, Sask. and N.B. today*, CBC News (Apr. 1, 2019), <https://www.cbc.ca/news/politics/tasker-federal-carbon-tax-explainer-1.5077445>.

416. *Id.*

417. Greenhouse Gas Pollution Pricing Act, S.C. 2018, c. 12, s. 166(2)(3) and 189(1)(2) (Can.).

418. CANADA'S ECOFISCAL COMM'N, BRIDGE THE GAP: REAL OPTIONS FOR MEETING CANADA'S 2030 GHG TARGET (Nov. 2019), <https://ecofiscal.ca/wp-content/uploads/2019/11/Ecofiscal-Commission-Bridging-the-Gap-November-27-2019-FINAL.pdf>.

419. Jesse Jenkins, *Why Carbon Pricing Falls Short*, UNIV. OF PENNSYLVANIA, KLEINMAN CTR. FOR ENERGY POLICY (Apr. 24, 2019), <https://kleinmanenergy.upenn.edu/policy-digests/why-carbon-pricing-falls-short>.

420. Reference re *Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74, para. 23 (Can. Alta.).

421. Reference re *Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 (Can. Sask.).

422. Reference re *Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 (Can. Ont.).

423. Reference re *Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, para. 139 (Can. Ont.); Reference re *Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, para. 164 (Can. Sask.).

424. News Releases, *Supreme Court of Canada* (March 25, 2020), <https://decisions.scc-csc.ca/scc-csc/news/en/item/6833/index.do>.

425. Reference re *Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74, para. 23 (Can. Alta.).

426. *Id.* at para. 229.

and Saskatchewan that found the legislation to be within federal jurisdiction.<sup>427</sup> It turns out that it depends on how you define or characterize the carbon tax.<sup>428</sup> The Alberta court ruled that the carbon tax was a policy instrument that regulated natural resources in the province.<sup>429</sup> In reaching that conclusion, the court relied on section 92A which provides that natural resources are exclusively within provincial jurisdiction.<sup>430</sup> The logic was straightforward; Alberta is a one industry province. That industry relates to the exploration and development of the generation and transportation of oil and gas.<sup>431</sup> The proposed federal tax was aimed only at that industry.<sup>432</sup> The contrary Ontario and Saskatchewan decisions have relied on the broad national concern doctrine under the federal parliament's POGG power.<sup>433</sup> Alberta's Chief Justice found that the regulation of greenhouse gas emission does not fall within this doctrine and noted that the POGG was rarely relied upon by the courts and had been used in only three decisions in the entire history of constitutional litigation.<sup>434</sup> Other justices argue that this legislation was a "Constitutional Trojan Horse" that would allow the federal government to exercise control over virtually anything that traditionally fell within provincial jurisdiction.<sup>435</sup>

In the meantime, the provinces of New Brunswick and Prince Edward Island have struck an unusual deal with the Federal government.<sup>436</sup> They proposed that they would enact the federal government carbon tax but eliminate a tax in the same amount that each province currently had in place to pay for highways in the province.<sup>437</sup>

It turns out that the federal government was going to give the provinces the money it received from the carbon tax, so the provinces were revenue neutral under this initiative.<sup>438</sup> What this new scheme did to reduce carbon in these provinces may be a mystery to some.

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427. *Id.* at paras. 114-124.

428. *Id.*

429. *Id.* at para. 345.

430. Reference re *Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74, para. 341 (Can. Alta.); *See also*, Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.).

431. Reference re *Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74, para. 345 (Can. Alta.).

432. *Id.*

433. Reference re *Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, para. 139 (Can. Ont.); Reference re *Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, para. 164 (Can. Sask.).

434. Reference re *Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74, at para. 160 (Can. Alta.).

435. *Id.* at para. 22.

436. Jacques Poitras, *Higgs's carbon tax skips the point to please pump patrons and politicos, experts say*, CBC (Nov. 22, 2019), <https://www.cbc.ca/news/canada/new-brunswick/blaine-higgs-new-brunswick-carbon-tax-1.5369049>.

437. *Id.*

438. Dana Nuccitelli, *Canada passed a carbon tax that will give most Canadians more money*, THE GUARDIAN (Oct. 26, 2018), <https://www.theguardian.com/environment/climate-consensus-97-percent/2018/oct/26/canada-passed-a-carbon-tax-that-will-give-most-canadians-more-money>.

### C. *Stranded Assets Revisited*

In 2016, a wild fire destroyed most of Fort McMurray, Alberta.<sup>439</sup> In 2019, three companies ATCO Gas, ATCO Electric Transmission, and ATCO Electric Distribution brought applications to the AUC to recover approximately \$5 million for assets destroyed in the fire.<sup>440</sup> In three separate decisions the Commission approved or disallowed recovery.<sup>441</sup> Its decision in each case was based upon the Commission's Utility Asset Disposition (UAD) principles related to stranded assets as set out in the *Stores Block* decision.<sup>442</sup> The decisions contained both important dissents and warnings about "the possible deleterious effects" of this principle, with the commission majority itself calling for a "debate on the evolution of public utility regulation in Alberta."<sup>443</sup>

This regulatory uncertainty has a long and interesting history. The UAD principles referenced above had their origins in a 2013 AUC decision, one of several decisions building on and interpreting the Supreme Court of Canada's *Stores Block* decision.<sup>444</sup>

The *Stores Block* case itself started in Alberta when TransAlta a major Alberta Utility sold an office building in downtown Calgary for significant profit.<sup>445</sup> The utility wanted to keep all the profits.<sup>446</sup> The commission said the profits should be shared between the utility and the ratepayers.<sup>447</sup> The Supreme Court of Canada disagreed that ratepayers had no property interest and were simply entitled to service.<sup>448</sup> However, as the Fort McMurray fires demonstrate, the flipside of this can create real problems for utilities. Put simply, if the utility gets to keep all the profits from selling an asset then presumably it has to bear all the cost when an asset is destroyed.

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439. Nicky Woolf, *Fort McMurray: Canada wildfires force evacuation of oil sands city*, THE GUARDIAN (May 4, 2016), <https://www.theguardian.com/world/2016/may/03/wildfire-alberta-canada-fort-mcmurray-evacuation>.

440. *ATCO Gas*, A division of ATCO Gas and Pipelines Ltd., Z Factor Application for Recovery of 2016 Regional Municipality of Wood Buffalo Wildfire Costs, 21608-D01-2018, Alberta Util. Comm'n (June 5, 2018); *ATCO Electric Ltd.*, 2018-2019 Transmission General Tariff Application, 22742-D02-2019, Alberta Util. Comm'n (Oct. 2, 2019); *ATCO Electric Ltd.*, Z Factor Adjustment for the 2016 Regional Municipality of Wood Buffalo Wildfire, 21609-D01-2019, Alberta Util. Comm'n (Oct. 2, 2019).

441. *ATCO Gas*, A division of ATCO Gas and Pipelines Ltd., Z Factor Application for Recovery of 2016 Regional Municipality of Wood Buffalo Wildfire Costs, 21608-D01-2018, Alberta Util. Comm'n (June 5, 2018); *ATCO Electric Ltd.*, 2018-2019 Transmission General Tariff Application, 22742-D02-2019, Alberta Util. Comm'n (Oct. 2, 2019); *ATCO Electric Ltd.*, Z Factor Adjustment for the 2016 Regional Municipality of Wood Buffalo Wildfire, 21609-D01-2019, Alberta Util. Comm'n (Oct. 2, 2019).

442. *ATCO Gas and Pipelines Ltd. v. Alberta* (Energy and Utilities Board), [2006] 1 S.C.R. 140 (Can.).

443. *ATCO Electric Ltd.*, 2018-2019 Transmission General Tariff Application, 22742-D02-2019 para. 91, Alberta Util. Comm'n (Oct. 2, 2019).

444. ALBERTA UTIL. COMM'N, UTILITY ASSET DISPOSITION, (Nov. 26, 2013), [http://www.auc.ab.ca/regulatory\\_documents/ProceedingDocuments/2013/2013-417.pdf](http://www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2013/2013-417.pdf).

445. *ATCO Gas and Pipelines Ltd. v. Alberta* (Energy and Utilities Board), [2006] 1 S.C.R. 140, para. 8 (Can.).

446. *Id.*

447. *Id.* at para. 18.

448. *Id.* at para. 68.



The principle at issue in *Fort McMurray* case affects all Canadian utilities and all Canadian regulators. It is worth repeating the findings of the AUC at paragraphs 129-132 of decision 21609 involving ATCO Electric:

#### 5.4.3.2 Future considerations

129. In the previous section of this decision, the Commission determined that in the circumstances of this proceeding the retirements resulting from the RMWB wildfire were extraordinary. Accordingly, the unrecovered capital investment in the retired assets is for the account of the shareholder of ATCO Electric.

130. The Commission's finding that costs of the retirement event should be allocated to shareholders results in just and reasonable rates. This finding is consistent with the governing legislation, the fundamental property and corporate law principles established by the courts and the guidance of the courts on the allocation of risk and benefits associated with property ownership. This guidance was reviewed by the Commission in the UAD decision and subsequently upheld on appeal. The guidance limits the Commission's flexibility in dealing with cost allocation upon the retirement of utility assets, both those reasonably anticipated and those that are unanticipated. The regulatory framework resulting from this guidance is bounded in part by the following findings by the courts:

The argument that assets purchased are reflected in the rate base should not cloud the issue of determining who is the appropriate owner and risk bearer. . . . the utility absorbs losses and gains, increases and decreases in the value of assets, based on economic conditions and occasional unexpected technical difficulties . . .

The concept of assets becoming "dedicated to service" and so remaining in the rate base forever is inconsistent with the decision in *Stores Block* (at para. 69). Such an approach would fetter the discretion of the Board in dealing with changing circumstances. Previous inclusion in the rate base is not determinative or necessarily important; as the Court observed in *Alberta Power Ltd. v. Alberta (Public Utilities Board)* (1990), 72 Alta. L.R. (2d) 129, 102 A.R. 353 (C.A.) at p. 151: "That was then, this is now."

Past or historical use of assets does not permit their inclusion in rate base unless they continue to be used in the system.

Since the authorities have established that ratepayers cannot share in any of the sales of assets, it follows that holding property within the rate base, once its use has expired, works to the detriment of the ratepayer. . . . since ratepayers cannot share in sale proceeds of utility assets, their protection for fair treatment lies in excluding assets not required for utility operations from the rate base.

. . . the terms of the regulatory compact have always been subject to evolution and the re-balancing of competing interests of consumers and utility companies when times and circumstances change. . . . There is no industry today that is immune to change. Or that enjoys a right to be protected from the consequences of change, whether those arise from legislative choices, deregulation or court decisions.

The Commission provided a reasonable rationale for its conclusion that there is and should be a distinction between ordinary depreciation and unforeseen loss or obsolescence of capital, which was characterized as a form of extraordinary depreciation. I am persuaded that it was reasonable for the Commission to conclude that the extraordinary depreciation situations were outside the definition of what would be a reasonable opportunity of return for utility investors. The Commission, in its expert and policy role, could reasonably conclude that the legislation indicated that whereas ordinary depreciation is a legitimate matter for a form of shared risk between utilities

and ratepayers, these forms of extraordinary depreciation of prudently acquired capital are not risks to be shared with ratepayers.

... In the absence of *Stores Block* and the subsequent jurisprudence from this Court, other policy choices would have been open to the regulator. Although it would be tempting to confine the application of these decisions only to gas utilities, (to minimize what I consider to be deleterious effects on the regulation of utilities in Alberta), the legal principles in *Stores Block* remain good law.

131. Although the Court of Appeal emphasized that the *Stores Block* line of cases remains good law, it also noted that more than a decade of incremental litigation on individual, fact-specific Commission decisions, has arguably resulted in some “deleterious effects on regulation of utilities in Alberta.” In making this observation, the Court indicated that the Commission would have greater flexibility to deal with UAD matters in the absence of this line of court decisions and reminded lawmakers that they have the ability to consider these issues from a broader public policy perspective should they wish to alter the status quo and provide the Commission with greater discretion in addressing UAD fact-specific issues as noted below:

Absent the pronouncements in *Stores Block*, the Commission would likely have greater flexibility on the issue of who bears the undepreciated cost of assets rendered useless as the result of extraordinary events.

The Commission, and this Court, are bound by *Stores Block* and the subsequent decisions from this Court. Only legislative amendment, reconsideration, or a reversal of *Stores Block* by the Supreme Court of Canada can change that.

132. The Commission appreciates the difficulty utilities face operating in an environment where they must anticipate reasonably foreseeable future events, not just to properly align depreciation parameters but also to reduce the risk of shareholder losses due to an extraordinary retirement. Notwithstanding these efforts, utilities recognize that shareholder losses are likely to occur despite having acted prudently in conducting their operations. Similarly, it is not in the interest of customers that they pay higher rates that reflect risk-adjusted returns or depreciation parameters and investment decisions which factor in every possible retirement contingency. It is also not in the interest of customers that utilities incur higher borrowing costs or that the delivery of safe and reliable service be compromised due to financial hardship resulting from an extraordinary retirement. Further, it is in the interest of neither utilities nor customers to engage in continual fractious debate in characterizing retirements. Again, no party benefits if utilities are compelled to respond to negative economic incentives by adopting risk-averse policies that impede regulatory efficiencies or improvements in service or reliability where prudent investment would otherwise occur. These are perhaps some of the possible deleterious effects on the regulation of utilities in Alberta noted by the courts.<sup>449</sup>

### *E. Less Deference*

Two decisions of the Supreme Court of Canada in December 2019 have made significant changes to the manner in which Canadian courts will review decisions of regulatory agencies.<sup>450</sup> At the front line are federal and provincial energy regulators. As indicated, it has long been the case that courts have granted considerable deference to regulators when the issues concern the interpretation of their home statutes. The Supreme Court of Canada heard

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449. ATCO Electric Ltd., *Z Factor Adjustment for the 2016 Regional Municipality of Wood Buffalo Wildfire*, 21609-D01-2019 para. 129-32, Alberta Util. Comm’n (Oct. 2, 2019).

450. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 S.C.C. 65 (Can.); *Bell Canada v. Canada (Attorney General)*, 2019 S.C.C. 66 (Can.).

*Vavilov*<sup>451</sup> and *Bell Canada*<sup>452</sup> together when the parties were seeking leave to appeal earlier decisions. The Court invited the parties to review the standard in *Dunsmuir*,<sup>453</sup> which had become the national standard for the judicial review of administrative action since 2008. Prior to *Dunsmuir*, there were three standards of review- correctness, reasonableness, and patent unreasonable.<sup>454</sup> The *Dunsmuir* court reduced this to two standards- reasonableness and correctness.<sup>455</sup> Reasonableness was a deferential review where the court granted deference to specialized tribunals.<sup>456</sup> Correctness was different.<sup>457</sup> There would be no deference.<sup>458</sup> From the outset the reviewing court would ask whether the decision was right given the facts and the law.<sup>459</sup> In short it would state (and substitute if necessary) its own view on the matter.<sup>460</sup> The *Dunsmuir* court identified the circumstances where correctness should apply, namely constitutional questions, questions of true jurisdiction, questions of law of general application to the legal system, and finally questions where there were regarding jurisdiction between competing regulatory agencies.<sup>461</sup>

*Vavilov* concerned a revocation of Canadian citizenship that turned on an interpretation of the Citizenship Act.<sup>462</sup> *Bell Canada*, also known as the *Super Bowl* case, involved the decision of the Canadian Radio-Television Communications Commission (CRTC), Canada's national telecommunications regulator, that had issued a decision exempting the broadcast of the Super Bowl game from an order requiring the simultaneous substitution of American commercials from the Canadian feed of the American broadcast.<sup>463</sup>

The court's decision in *Bell Canada* dealt strictly with those cases that came to the courts by way of statutory appeal as opposed to a common law or statutory application for judicial review.<sup>464</sup> That is not unusual in energy regulation. Alberta, Ontario, and Nova Scotia energy regulation provide that right,<sup>465</sup> as does federal regulation.<sup>466</sup> In some cases leave is required and in some cases it is

451. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 S.C.C. 65 (Can.). For further information, author Gordon Kaiser has another paper on the impact of *Vavilov* scheduled to appear in *The Advocates' Quarterly*. It deals with some matters not canvassed in this annual review.

452. *Bell Canada v. Canada (Attorney General)*, 2019 S.C.C. 66 (Can.).

453. *Dunsmuir v. New Brunswick*, 2008 S.C.C. 9 (Can.).

454. *Id.* at para. 34.

455. *Id.*

456. *Id.* at para. 40.

457. *Id.*

458. *Dunsmuir v. New Brunswick*, 2008 S.C.C. 9 para. 21 (Can.).

459. *Id.* at para. 74.

460. *Id.* at para. 50.

461. *Id.* at para. 58.

462. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 S.C.C. 65 (Can.).

463. *Bell Canada v. Canada (Attorney General)*, 2019 S.C.C. 66 (Can.).

464. *Id.* at para. 4.

465. See, e.g., *Alberta Util. Comm'n Act*, S.A. 2007, c A-37.2, sec. 29(1)-(2) (Can. Alta.); *Responsible Energy Development Act*, S.A. 2012 c. R-17.3, sec. 45(1)-(2) (Can. Alta.); *Ontario Energy Board Act*, S.O. 1998, c 15, Sched. B, sec. 33(2) (Can. Ont.) (not requiring leave); *Utility and Review Board Act*, S.N.S. 1992, c. 11, sec. 30(1) (Can. N.S.) (not requiring leave).

466. *Canadian Energy Regulator Act*, S.C. 2019, c. 28, ss. 72(1)-(2) (Can.).

not.<sup>467</sup> Both *Vavilov* and *Bell Canada* stated clearly that instead of the deference standard of reasonableness, the non-deference of correctness would apply going forward.<sup>468</sup>

The underlying principle established in *Vavilov* and *Bell Canada* was that in the case of a statutory appeal the court should use the same test that it would in the case of an appeal from a lower court.<sup>469</sup> Put differently, unless the legislature had specified an exception, the courts hearing such appeals were to apply the *Houston*<sup>470</sup> principles. The *Houston* rules are simple enough. There are two principles.<sup>471</sup> When the appeal from a lower court is based on a question of law, the test is correctness.<sup>472</sup> That includes matters of statutory interpretation or the jurisdiction or authority of the regulatory agency.<sup>473</sup> If it is a question of fact, the appellate standard of review for those questions is palpable and overriding error.<sup>474</sup> There is no question that in the twelve years since the *Dunsmuir* decision, courts have shown increasingly more deference to regulatory agencies. That movement has now stopped.

The standard is now to be correctness on pure questions of law.<sup>475</sup> On questions of fact and law, the standard of review would be that of palpable and overriding error.<sup>476</sup> This was a big change. Prior to those decisions, energy regulators on pure questions of law enjoyed a strong presumption of reasonableness review when interpreting their home statute.<sup>477</sup>

Outside of this narrow circumstance, the court reaffirmed that in most cases the standard of review was reasonableness, subject to well-known exceptions such as where the legislature had indicated a different standard, constitutional questions, questions of law important to the legal system, and jurisdictional disputes between regulatory agencies.<sup>478</sup>

While these decisions created a general presumption of reasonableness review for most decisions, where the issue is one of law, mixed law or fact, the decisions became a textbook of the decision-making principles that justified this strong commitment to deference.<sup>479</sup> The court reemphasized the necessity of

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467. Leave is not required in Nova Scotia and Ontario. Ontario Energy Board Act, S.O. 1998, c 15, Sched. B, sec. 33(2) (Can. Ont.) (not requiring leave); Utility and Review Board Act, S.N.S. 1992, c. 11, sec. 30(1) (Can. N.S.) (not requiring leave).

468. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 S.C.C. 65 (Can.); *Bell Canada v. Canada (Attorney General)*, 2019 S.C.C. 66 (Can.).

469. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 S.C.C. 65 (Can.); *Bell Canada v. Canada (Attorney General)*, 2019 S.C.C. 66 (Can.).

470. *Houston v. Nikolaisen*, [2002] 2 SCR 235 (Can.).

471. *Id.* at para. 9.

472. *Id.*

473. *Id.*

474. *Id.*

475. *Bell Canada v. Canada (Attorney General)*, 2019 S.C.C. 66., para. 4 (Can.); *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 S.C.C. 65, para. 7 (Can.).

476. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 S.C.C. 65, para. 37 (Can.).

477. *Id.* at para. 7.

478. *Id.*

479. *Id.* at para. 68.

providing reasons<sup>480</sup> but cautioned that the burden of establishing unreasonableness rests with the challenger.<sup>481</sup> The *Dunsmuir* principles were reinforced.<sup>482</sup> Not only were reasons important, they required justification, transparency, and intelligibility.<sup>483</sup> Decisions must be justified, not just justifiable<sup>484</sup>.

The court went on to identify two fundamental flaws that are to be avoided. A decision must have internally coherent reasons<sup>485</sup> and will not be considered reasonable where the decision reached does not follow from the analysis undertaken.<sup>486</sup> 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.<sup>487</sup> Finally, decisions must avoid persistently discordant or contradictory legal interpretations<sup>488</sup> and departures from long-standing practices or established internal authority without satisfactory explanations for the departure.<sup>489</sup> Without a credible explanation of its failure to follow precedence, a decision will be considered unreasonable.<sup>490</sup> Canadian energy regulators have long believed that they were not bound by precedent or *stare decisis*. That remains the case, but this decision is the first decision of the Supreme Court of Canada that raises a red flag on that point.

In summary, to a degree these important decisions reinforce and preserve the deferential review in the case of statutory interpretation, which come to the courts by way of judicial review as opposed to a statutory appeal. Where this will all end up is hard to say. But one thing is clear – *Bell Canada* and *Vavilov* are manuals on best practices energy regulators should follow in writing their decisions.

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480. *Id.* at para. 84.

481. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 S.C.C. 65, para. 84 (Can.).

482. *Id.*

483. *Id.* at para. 47.

484. *Id.* at para. 86.

485. *Id.* at para. 105.

486. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 S.C.C. 65, para. 103 (Can.).

487. *Id.* at para. 101.

488. *Id.* at para. 132.

489. *Id.* at para. 131.

490. *Id.*

**CANADIAN CHAPTER**

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