RECENT LEGISLATIVE AND REGULATORY

DEVELOPMENTS OF INTEREST TO ENERGY LAWYERS

2021 CELF Conference

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This article provides a high-level overview of regulatory and legislative developments in Canada from mid-April 2020 to the end of March 2021.[1] We reviewed statutes, regulations, case law, regulatory decisions and industry practices from provincial, territorial, and federal authorities. Topics of note include the challenges related to climate change and decarbonization, and the opportunities decarbonization provides for evolving technology and mechanisms to provide low carbon energy through use of hydrogen and small scale nuclear, and the regulatory gaps related thereto. We address developments in regulatory efficiency. We set out how the Vavilov[2] decision has been applied to energy regulatory decisions. We discuss energy regulators' obligations to consider the honour of the Crown outside the "duty to consult". Lastly, we also discuss the potential effects on project approvals and achieving reconciliation with our Indigenous peoples assuming the federal passage of Bill C-15, an Act respecting the United Nations Declaration on the Rights of Indigenous Peoples.

* We gratefully acknowledge: Mr. Tim Boston, VP Public Policy and Government Relations ENMAX Corporation for his comments on decarbonization matters; Mr. Greg Caldwell, Director, Energy Systems Innovation, ATCO Gas for his contribution to the summary and information relating to the ATCO hydrogen Alberta project and the regulation of hydrogen in general; and Mr. Sandy Carpenter, the Co-Founder at Canadian Regulatory and Indigenous Law, who provided input on the Indigenous and Aboriginal Law section.

* We also gratefully acknowledge the contributions of Stephanie Hryciw, Nathan Wellsman, and Leon Kniebel, all of Regulatory Law Chambers.

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1 We made certain updates based on information that became available prior to publication of this paper.

2 *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65.

CLIMATE CHANGE, DECARBONIZATION AND CARBON TAXES

I. CANADA AND THE CLIMATE CHANGE CHALLENGE

In late 2020 and early 2021, federal and provincial governments continued to grapple (and sometimes battle) over the issue of climate change. Legislation and regulations designed to address Canada's international climate change commitments continue to drive significant change in the energy sector.

The Paris Agreement[3] (the "**Paris Agreement**") has the objective of keeping global warming below 2˚ C, or preferably below 1.5˚ C, when compared to pre-industrial levels.[4] At 1.5˚ C of warming, the world will still experience severe climate impacts, but at 2˚ C, climate impacts are expected to be catastrophic.[5] Current efforts around the world have lowered the end-of-century projected warming to 2.9˚ C. We are presently experiencing 1.1˚ C of warming and will likely overshoot the targeted 1.5˚ C unless all emissions can be zeroed out by 2040.[6] The COVID-19 pandemic resulted in a 7 percent drop in global emissions in 2020. To keep warming below 1.5˚ C, compared to pre-industrial levels, the world needs to keep cutting emissions by an additional 7 percent every year for the next decade.[7]

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3 *Paris Agreement*, (12 December 2015), 1/CP.21 (entered into force 4 November 2016), online: <unfccc.int/sites/default/files/english_paris_agreement.pdf> [Paris Agreement]. The Paris Agreement was adopted by 196 countries.

4 *Ibid*, Article 2(a).

5 Global Climate Change; Alan Buis, (19 June 2019), A Degree of Concern: Why Global Temperatures Matter [*Part 2: Selected Findings of the IPCC Special Report on Global Warming*]. online: <climate.nasa.gov/news/2865/a-degree-of-concern-why-global-temperatures-matter/>.

6 "Temperatures", (December 2020), online: *Temperatures | Climate Action Tracker*, online: <climateactiontracker.org/global/temperatures/>.

7 "Global update: Paris Agreement Turning Point", (1 December 2020), online: *Global update: Paris Agreement Turning Point | Climate Action Tracker* <climateactiontracker.org/publications/global-update-paris-agreement-turning-point/>.

Canada ratified the Paris Agreement in 2016, and has recently committed to reducing its greenhouse gas ("**GHG**") emissions by 40 to 45 percent below 2005 levels by 2030.[8]

II. CONSTITUTIONALITY OF FEDERAL CARBON PRICING LAW

The 2018 *Greenhouse Gas Pollution Pricing Act*[9] ("***GGPPA***") came into force on June 21, 2018.[10] The federal government developed the *GGPPA* to achieve meeting Canada's obligations under the Paris Climate Accord.[11] Carbon pricing is used to reduce emissions and to fulfil Canada's current goal of reducing emissions to 40-45 percent below 2005 levels by 2030, and to achieve net-zero emissions by 2050.[12]

The purpose as set out in the *GGPPA* is to implement stringent pricing mechanisms designed to reduce GHG emissions by creating incentives for that behavioural change.[13] Part 1 of the *GGPPA* establishes a fuel charge that applies to producers, distributors and importers of various types of carbon-based fuel. Part 2 sets out a pricing mechanism for industrial GHG emissions by large emissions-intensive industrial facilities.[14] The intent of the output-based pricing system ("**OBPS**") under Part 2 is "to provide a lower average cost of emissions pricing to firms with exposure to

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8 Prime Minister Trudeau announced Canada's latest nationally determined contribution ("**NDC**") target at an international Leaders Summit on Climate. See "Prime Minister Trudeau announces increased climate ambition" (22 April 2021), online: <https://pm.gc.ca/en/news/news-releases/2021/04/22/prime-minister-trudeau-announces-increased-climate-ambition>.

9 *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12 [*GGPPA*].

10 *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*GGPPA Reference*] at para 25.

11 *GGPPA*, *supra* note 9, s 186, Preamble.

12 Canada, Environment and Climate Change. "Progress towards Canada's greenhouse gas emissions reduction target", (3 March 2021), online: Canada.ca <www.canada.ca/en/environment-climate-change/services/environmental-indicators/progress-towards-canada-greenhouse-gas-emissions-reduction-target.html>.

13 *GGPPA Reference*, *supra* note 10 at para 28. This is the purpose of the *GGPPA* as set out by the SCC, with reference to paragraphs 12-16 of the *GGPPA*'s 16-paragraph preamble.

14 *Ibid* at para 26.

international markets, while also maintaining a financial incentive to undertake investments to reduce the emissions-intensity of production."[15]

In considering the constitutionality of Part 1 and Part 2 of the *GGPPA*, on March 25, 2021, the Supreme Court of Canada ("**SCC**") majority held that Parliament has jurisdiction to enact the *GGPPA* as a matter of national concern under the "Peace, Order, and good Government" ("**POGG**") of s. 91 of the *Constitution Act, 1867*[16] (the "***Constitution***"), and that the levies imposed by the *GGPPA* are constitutionally valid regulatory charges.[17]

In making these findings, the SCC held that: the true subject matter of the *GGPPA* is establishing minimum national standards of GHG price stringency to reduce GHG emissions;[18] the legal effects of the *GGPPA* are centrally aimed at pricing GHG emissions nationally;[19] and Parliament acted with a remedial mindset in order to address the risks of provincial non-cooperation on GHG pricing by establishing a national GHG pricing floor.[20]

In finding the *GGPPA* is *intra vires* Parliament on the basis of the national concern doctrine,[21] the SCC held that:[22]

> … establishing minimum national standards of GHG price stringency to reduce GHG emissions is of concern to Canada as a whole. This matter is critical to our response to an existential threat to human life in Canada and around the world. As a result, it … warrants consideration as a possible matter of national concern. …

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15 Nigel Bankes, Andrew Leach & Martin Olszynski, "Supreme Court of Canada Re-writes the National Concern Test and Upholds Federal Greenhouse Gas Legislation: Part I (The Majority Opinion)" (April 28, 2021), online: ABlawg <http://ablawg.ca/wp-content/uploads/2021/04/Blog_NB_AL_MO_SCC_GGPPA_Ref_Part1.pdf> at p 2.

16 *Constitution Act*, 1867 (UK), 30 & 31 Victoria, c 3 [*Constitution*]. Under section 91 of the *Constitution* the federal government has the authority to legislate on matters of national concern that are not explicitly mentioned in the *Constitution*.

17 *GGPPA Reference*, *supra* note 10 at paras 4 and 5.

18 *Ibid* at para 57, 69 and 80.

19 *Ibid* at para 71.

20 *Ibid* at para 82.

21 *Ibid* at para 207.

22 *Ibid* at para 171, 192, 198, 200 and 201.

> The matter is specific, identifiable and qualitatively different from any provincial matters. As well, federal jurisdiction is necessitated by the provinces' inability to address the matter as a whole through cooperation, which exposes each province to grave harm that it is unable to prevent. …
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> … there is a real, and not merely nominal, federal perspective on the fact situation of GHG pricing: Canada can regulate GHG pricing from the perspective of addressing the risk of grave extraprovincial and international harm associated with a purely intraprovincial approach to GHG pricing. … the matter's impact on the provinces' freedom to legislate and on areas of provincial life that would fall under provincial heads of power is qualified and limited. …
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> … provincial jurisdiction is not eroded more than necessary. …
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> … the matter's impact on areas of provincial life that would generally fall under provincial heads of power is also limited.

Accordingly, under the *GGPPA*, when provinces do not charge a minimum GHG emissions price, it triggers the province becoming subject to the backstop *GGPPA* GHG pricing. Provinces can develop a tax or cap-and-trade system, that meet minimum standards set under the *GGPPA*. Provinces that do not create such pricing systems are subject to the federal minimum carbon price, which includes a "fuel charge" on gasoline and other fuels, and a separate pricing system for large industrial emitters. The federal minimum price effective April 1, 2021 is $40 per tonne of emissions. The Liberal government intends to keep raising the carbon price up to $170 per tonne in 2030.[23]

We further note that various findings in the SCC *GGPPA Reference* decision[24] can be expected to provide fertile ground for legal consideration, law making and potential litigation proceedings:

- The relevant Minister has discretion about who to distribute revenues to from the fuel charge and from excess emission charge payments, including the discretion to distribute

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[23] Canada, Environment and Climate Change, *A Healthy Environment and A Healthy Economy,* (2020), online: <www.canada.ca/content/dam/eccc/documents/pdf/climate-change/climate-plan/healthy_environment_healthy_economy_plan.pdf> at PDF pp 25-27.

[24] *GGPPA Reference*, s*upra* note 10.

such revenues to the province[25] - this should incent provinces to collect GHG emission charges under their own systems.

- The SCC held that in the context of GHG price stringency to reduce GHG emissions, "… stringency … is not limited to the charge per unit of GHG emissions. It encompasses the scope or breadth of application of the charge in the sense of the fuels, operations and activities to which the charge applies and the authority to implement regulatory schemes that are necessary in order to implement such a charge".[26] However, the *GGPPA* itself does not define the word "stringency".[27] This could mean that the meaning of "stringency" will be developed through case law.

- The SCC points out that the mischief is not GHG emissions generally, or to take over the field of regulating GHG emissions, but rather the effects of the failure of some provinces to implement GHG pricing systems or sufficiently stringent pricing systems.[28] We can expect the "stringency" of any provincial system, or consideration of the provinces' design and pricing instruments will require an assessment of meeting the purpose under the *GGPPA* to reduce GHG emissions through changed behaviours tied to Canada's obligations under the Paris Agreement.

- The Governor in Council ("**GIC**") has the discretion under Part 2 of the *GGPPA*, to make orders adding GHGs to or deleting them from Sch. 3, or to amend the global warming potential of any gas.[29] Again, any such discretion will be subject to legal challenges to assess if the discretion is exercised in accordance with meeting the purpose of the

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25 See *GGPPA Reference*, *supra* note 10 at para 31 and 35.
26 *Ibid* at para 119.
27 *Ibid* at para 73.
28 *Ibid* at para 61 and 65.
29 *Ibid* at para 76.

> *GGPPA*, an outcome that also will need to be defined, quantified and compared with reference to provinces' systems on an ongoing basis. Should all provinces' systems have the actual outcome of a proportionately measured criteria to make the same contributions towards GHG emissions reductions? If a system is initially found to meet the relevant stringency requirements, and subsequently found not to, how is that remedied? How do we measure meeting the federal government's outcome-based targets[30] on an ongoing basis to give effect to the purpose of the *GGPPA*?

How will testing of equivalency (comparable stringency) be measured and assessed on a case by case basis against the overall purpose of the *GGPPA* and then be compared against other cases? Will political agendas or favoritism play a role where for example a system for industrial emitters for one province relies on a carbon tax and another on a cap and trade, when considering if the prices under each system is equivalent to what would be expected to be achieved under the federal minimum GHG emission pricing?[31] The *GGPPA* will raise significant legal and policy concerns, as the federal government and the provinces grapple with how to manage GHGs going forward, in a manner where Canada achieves its NDC climate targets. Carbon price increases can be expected to have a greater impact on the provinces that produce oil and gas and have large industrial facilities. Not implementing GHG pricing to reduce GHGs on the other hand, can have a disproportionate negative effect on more vulnerable communities and regions in Canada. It is important to manage the desired GHG reduction behaviour changes in a manner that creates federal-provincial unity and coordination, rather than by exacerbating federal-provincial divisions and conflicts. Managing these conflicts and the effects that allows for the continued competitive production of Canadian oil and gas and industrial facilities' products will be critical, while also considering and avoiding and/or mitigating GHG emissions impacts generally. This includes the

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30 *Ibid* at para 206.

31 This concern was raised in dissent in the *GGPPA Reference*, *supra* note 10 at para 609.

impacts on more vulnerable communities and regions, as Canada and the world transition to low carbon economies.

III. PROPOSED FEDERAL LEGISLATION AND REGULATIONS

As stated, the *GGPPA*'s purpose is to provide incentives to change behaviour to reduce GHG emissions in two parts: a regulatory charge on fossil fuels or "fuel charge" and an OBPS[32] for industrial facilities. To operationalize meeting the purpose of the *GGPPA*, target accountability legislation and regulations to create a federal offset system and fuel standards have been drafted.

Canadian Net-Zero Emissions Accountability Act

The *Canadian Net-Zero Emissions Accountability Act*[33] ("***Bill C-12***") was introduced on November 19, 2020. The purpose of *Bill C-12* is to require the setting of national targets for the reduction of GHG emissions and to promote transparency and accountability in relation to achieving those targets. *Bill C-12* intends achieving net-zero emissions in Canada by 2050, fulfilling Canada's international commitments in respect of mitigating climate change.[34] Practically, *Bill C-12* envisions the establishment of an emissions reduction plan for each target period to reach set emissions-reduction targets.[35]

We expect that if *Bill C-12* is passed, keeping Canada on track to meet its nationally set targets to reduce GHG emissions will be a factor when considering if provincial GHG pricing legislation

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[32] In general, facilities in the federal OBPS do not pay the fuel charge on fuels that they purchase but instead are required to provide compensation on an annual basis for any GHG emissions exceeding their respective emissions limit during a compliance period. Federal offset credits are one of three types of compliance units specified under the *GGPPA* that facilities in the OBPS may provide as compensation for excess emissions. See: Impact Statement under the heading "Issues".

[33] See: Bill C-21, *An Act respecting transparency and accountability in Canada's efforts to achieve net-zero greenhouse gas emissions by the year 2050,* 2nd Sess, 43rd Parl, 2020, (first reading 19 November 2020) [Bill C-12].

[34] *Ibid*, Preamble and cls 6 to 10.

[35] *Ibid*, cls 6, 7 and 9.

meets the minimum standards set under the *GGPPA,* whether that is through a carbon tax or cap-and-trade system.

Greenhouse Gas Offset Credit System Regulations

The *Output-Based Pricing System Regulations*[36] regulates the OBPS.[37] On March 6, 2021, the federal government published the proposed *Greenhouse Gas Offset Credit System Regulations*[38] ("***Federal Credit Offset Regulations***"). The *Federal Credit Offset Regulations* introduces a federal GHG offset credit system which in turn incents actions to reduce GHG emissions, by sending a pricing signal to increase reductions that are not required under existing regulations or covered by other measures related to carbon pollution pricing.[39]

Clean Fuel Regulations

Section 139(1) of the *Canadian Environmental Protection Act*[40] ("***CEPA***") provides that no person shall produce, import or sell a fuel that does not meet the prescribed requirements. On December 19, 2020, the federal government published its proposed federal *Clean Fuel Regulations*[41] ("***Federal CF Regulations***") to give effect to section 139(1) of the *CEPA*. The *Federal CF Regulations* aim to reduce GHG emissions through a reduction in the lifecycle carbon intensity of liquid fossil fuels used in Canada by 12 grams of carbon dioxide equivalent per megajoule

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36 SOR/2019-266.

37 Regulatory Impact Analysis Statement published with the *Federal Credit Offset Regulations* ("**Impact Statement**") under the heading "Issues".

38 *Greenhouse Gas Offset Credit System Regulations*, (6 March 2021) Gaz I, Vol 155 Number 10, online: <canadagazette.gc.ca/rp-pr/p1/2021/2021-03-06/html/reg1-eng.html>.

The *Federal Credit Offset Regulations* are made pursuant to sections 192 and 195 of the *GGPPA*. The *Federal Credit Offset Regulations* provides for public input for the 60-day period after the date of publication.

39 The Federal Credit Offset Regulations intends to broaden the reach of the federal carbon pollution price signal that is set out in the GGPPA. To achieve this, the Minister of Environment issues federal offset credits to project proponents for GHG reductions from projects that meet eligibility criteria and that are implemented in accordance with federal offset protocols. See: Impact Statement under the heading "Objective".

40 SC 1999, c 33.

41 *Clean Fuel Regulations*, (19 December 2020) Gaz I, Vol 154 Number 51 online: <gazette.gc.ca/rp-pr/p1/2020/2020-12-19/html/reg2-eng.html>.

(gCO_2e/MJ) by 2030.[42] The *Federal CF Regulations* intend to incent low carbon fuel uptake, end-use fuel switching in transportation, and process improvements in the oil and gas sector. Under the *Federal CF Regulations*, producers and importers of liquid fossil fuels will have to reduce the lifecycle carbon intensity of the liquid fossil fuels they produce or import into Canada.[43]

IV. INDUSTRY'S RESPONSE TO A LOWER CARBON FUTURE

Given the legislation in force providing for a minimum carbon price and further proposed legislation and regulation that makes emitting carbon progressively more expensive, we can expect to see technology and process advancements that provide for reliance on lower carbon fuels. We also expect to see the building of "energy" facilities not necessarily because the economics for the sale of the energy makes sense, but because such a project will reduce net carbons as part of a larger portfolio or other more carbon intensive activities. We can also expect further innovation in production and process improvements in the oil and gas sector.

Project proponents in the oil and gas sector consider various ways in which to reduce GHG emissions, including for example compressor station electrification, renewable electricity generation and backstop resources (pumped hydro storage), investing in nuclear refurbishments, advancing low carbon fuels (renewable natural gas and hydrogen), and exploring carbon management initiatives (such as carbon capture, utilization and sequestration and other market-

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[42] This represents a decrease of approximately 13% in carbon intensity when compared to 2016-levels. See: Regulatory Impact Analysis Statement published with the *Federal CF Regulations* ("**CF Regulations Impact Statement**"), under the heading "Objective".

[43] Most producers and importers are corporations that own refineries and upgraders. The *Federal CF Regulations* would establish annual lifecycle carbon intensity limit per type of liquid fossil fuel, expressed in grams of carbon dioxide equivalent ("**CO_2e**") per megajoule ("**g CO_2e/MJ**") The liquid fossil fuels that will be subject to the annual carbon intensity reduction requirement are gasoline, diesel, kerosene and light and heavy fuel oils. The *Federal CF Regulations* include a limited number of exemptions from the annual compliance obligation. Such exemptions include aviation fuel, fossil fuel exported from Canada, fossil fuel used in scientific research, and fossil fuel sold or delivered for use in competition vehicles. Finally, the *Federal CF Regulations* will establish a credit market scheme, where each credit would be equivalent to a lifecycle emission reduction of one tonne of CO_2e. For each compliance period (typically a calendar year), a supplier will be obliged to demonstrate compliance with its reduction requirement by creating credits or acquiring credits from other creators, and then using the required number of credits to establish compliance. [See: CF Regulations Impact Statement, *ibid*, under the heading "Description".]

driven solutions such as carbon offsets).[44] Proponents also collaborate with compression equipment suppliers to capture methane emissions from normal operations and recycle them back into transmission systems. In addition, proponents engage in government, industry and academic collaborations dedicated to improving field research and adoption of emissions detection, quantification, mitigation, and conservation technologies.[45]

V. WHAT IS HAPPENING IN ALBERTA?

TIER Regulation

The *Technology Innovation and Emissions Reduction Regulation*[46] ("***TIER Regulation***") applies to large industrial emitters as of January 1, 2020.[47] Technology Innovation and Emissions Reduction ("**TIER**") facilities are exempt from paying the federal fuel charge under the *GGPPA*. On July 28, 2020, the *TIER Regulation* was amended to provide for:[48] (i) TIER voluntary opt-in eligibility; (ii) administrative requirements for conventional oil and gas facilities regulated under the *TIER Regulation*; and (iii) administrative requirements to reduce regulatory burden and further implement the TIER regulatory framework. On November 3, 2020 the TIER credit amount was set[49] so that the amount of money that a person responsible must contribute to the TIER fund to obtain one fund credit is: (i) $30.00 for the year 2020, and (ii) $40.00 for the year 2021 or a

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44 See for example: *NOVA Gas Transmission Ltd. NGTL West Path Delivery 2023 Project Application*, Canada Energy Regulator File OF-Fac-Gas-N081-2020-07 02, Ex. C11301-1, GHG Emissions and Climate Change Supplemental Filing No. 3 from NGTL (29 January 2021), PDF p 2.

45 See for example: *Ibid*, PDF p 3.

46 Alta Reg 133/2019 [*TIER Regulation*].

47 Earlier the *Specified Gas Emitters Regulation*, Alta Reg 139/2007 and thereafter the *Carbon Competitiveness Incentive Regulation*, Alta Reg 255/2017 applied.

48 See: *Province of Alberta*, OIC 233/2020, (2020) A Gaz II, 115 (*Emissions Management and Climate Resilience Act*), online: < https://www.qp.alberta.ca/documents/Orders/Orders_in_Council/2020/2020_233.html>.

49 Pursuant to section 21 (2) of the *TIER Regulation*, Ministerial Order 36/2020 was issued, repealing Ministerial Order 58/2019.

subsequent year. As demonstrated below, this falls well short of the contributions the federal government intends to establish under the *GGPPA* from 2023 onward:[50]

	Alberta Carbon Tax per CO_2e	Federal Carbon Tax per CO_2e[51]
2021	$40/tonne	$40/tonne
2022	$40/tonne	$50/tonne
2023	$40/tonne	$65/tonne
2024	$40/tonne	$80/tonne
2025	$40/tonne	$95/tonne
2026	$40/tonne	$110/tonne
2027	$40/tonne	$125/tonne
2028	$40/tonne	$140/tonne
2029	$40/tonne	$155/tonne
2030	$40/tonne	$170/tonne

Because the SCC found the *GGPPA* constitutional, it can be expected that the Alberta government will make changes to the TIER cost of emissions, after ongoing consultation. The Alberta government may follow the carbon cost up to $50/tonne (for 2022). Doing so will ensure Alberta's ability to have the discretion about how to distribute such revenues for the relevant time period rather than being subject to the federal government's discretion on the distribution of the proceeds for charges levied under the *GGPPA*, while also providing for more generous opt in opportunities for large emitters. It is also expected that Alberta will develop its own approach to address Part 1 of the *GGPPA*, although it is presently unclear what form this would take (i.e. consumer carbon tax, or a cap-and-trade program).

Carbon Capture

Fully operational from June 2, 2020, the Alberta Carbon Trunk Line ("**ACTL**") system is designed as the backbone infrastructure needed to support a lower carbon economy in Alberta. The ACTL

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[50] See: Government of Canada "Pricing Carbon Pollution" at PDF p 2, online (pdf): <https://www.canada.ca/content/dam/eccc/documents/pdf/climate-change/climate-plan/annex_pricing_carbon_pollution.pdf>.

[51] Federal Carbon price rises April 1st of each year. It is currently at $40/tonne. April, 2022 it will be $50/tonne.

system captures industrial emissions and delivers the CO_2 to mature oil and gas reservoirs for use in enhanced oil recovery and for permanent storage.[52] The ACTL is the world's largest capacity pipeline for CO_2 from human activity. The ACTL is capable of transporting up to 14.6 million tonnes of CO_2 per year, representing approximately 20 percent of all current oil sands emissions or the impact of capturing the CO_2 from more than 3 million cars in Alberta.[53] The construction of the ACTL was funded, amongst other sources, by the Government of Alberta (through payments under the *Carbon Capture and Storage Funding Act*[54]) and the federal government (through its ecoENERGY Technology Initiative[55] and the Clean Energy Fund[56]).

VI. DECARBONIZATION IN THE CONTEXT OF FACILITIES PROCEEDINGS

At the federal level in Canada, impact assessment requirements take Canada's GHG emissions targets into account.[57] In October 2020 the federal government released the final version of *Strategic Assessment of Climate Change*[58]("**SACC**"). The SACC describes how federal environmental assessments, including those undertaken by, for example, the Canada Energy Regulator ("**CER**"), are to consider climate change.[59] These requirements were incorporated into

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52 Alberta Carbon Trunk Line. "The ACTL System", online: *The ACTL System* <https://actl.ca/>.

53 Government of Alberta, Carbon Capture and Storage, online: *Emissions management and reduction programs* <www.alberta.ca/carbon-capture-and-storage.aspx>.

54 SA 2009, c 2.5.

55 Government of Canada, ecoENERGY Innovation Initiative, (21 November 2016), online: *Supplementary Information Tables* <www.nrcan.gc.ca/nrcan/transparency/reporting-accountability/plans-performance-reports/ecoenergy-innovation-initiative/19036>.

56 *Ibid*.

57 The *Impact Assessment Act*, SC 2019 c 28, s 1 [*Impact Assessment Act*] provides that the scope of factors to be assessed includes at section 22(1)(i) and section 60((1)(e) "the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change;". Similar provisions are also found in the *Canadian Energy Regulator Act,* SC , s 183(2)(j), s 262(2)(f) and 298(3)(f).

58 Government of Canada, "Strategic Assessment of Climate Change" (Revised October 2020), online (pdf): *Strategic Assessment of Climate Change* <https://www.strategicassessmentclimatechange.ca/16736/widgets/65686/documents/40846> [SACC].

59 See for example SACC, *ibid* at para 1.2, PDF p 7.

the August 6, 2020 version of the CER Filing Manual[60] ("**CER Filing Manual**"). The CER Filing Manual's GHG and Climate section includes the following addition to Table A-2: "… for proponents of projects with a lifetime beyond 2050, project applications must include a credible plan to achieve net-zero emissions by 2050".[61] It is not clear yet, how the CER will assess this filing requirement.[62]

The importance of establishing some clarity in how GHG emissions will be evaluated in the context of facility approvals is illustrated by a March 22, 2021 decision by the United States of America's ("**USA**")'s Federal Energy Regulatory Commission ("**FERC**"),[63] which included an assessment of the significance of a proposed natural gas pipeline project's GHG emissions and contribution to climate change for the first time.[64] As referenced in the FERC decision, a U.S. Court of Appeals for the District of Columbia Circuit judgment held that a proposed interstate natural gas pipeline's reasonably foreseeable GHG emissions are relevant to whether the pipeline is required by the public convenience and necessity.[65] In relying on this decision, FERC assessed the significance of a project's GHG emissions or those emissions' contribution to climate change. This departs from the FERC's previous decisions where it held that it would not conduct such

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60 Canada Energy Regulator, *Filing Manual*, online (pdf): <https://www.cer-rec.gc.ca/en/applications-hearings/submit-applications-documents/filing-manuals/filing-manual/filing-manual.pdf> [CER Filing Manual]. See CER Filing Manual, Guide A.2 - Environmental and Socio-economic Assessment at PDF pp 59-126.

61 *Ibid*, Guide A.2 - Environmental and Socio-economic Assessment, Table 2 GHG Emissions and Climate Change at second bullet in the left column at PDF p 106.

62 The CER's Filing Manual sets out the elements for the submission of an assessment of GHGs for both construction and operation of a project and, in certain cases, an upstream assessment as well. As explained in the CER's Filing Manual, applicants should indicate if the upstream emissions associated with the project are likely to be above or below the applicable threshold presented in Section 3.2 of the Strategic Assessment of Climate Change document released by Environment and Climate Change Canada. See: CER Filing Manual, Guide A, Facilities Applications, Guide A.2 Environmental and Socio-economic Assessment.

63 Regulation of the environment in the United States is highly complex and varies significantly from state to state. We draw on this decision from FERC, as it is a federal regulator (albeit perhaps with questionable jurisdiction on this issue), and it does illustrate some of the issues Canada faces with policy across the border.

64 174 FERC 61,189, United States of America Federal Energy Regulatory Commission, Northern Natural Gas Company, Docket No. CP20-487-000 [*FERC Decision*] at paras 29 to 36, PDF pp 11-14.

65 See: *Birckhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir. 2019); *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) at 1374 where the Court explains that because the project's indirect GHG emissions were reasonably foreseeable FERC needed to "include a discussion of the "significance" of this indirect effect as well as the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions"

assessments.[66] However, as with all decisions, the devil is in the details. FERC noted that the *National Environmental Policy Act*:[67]

> …does not require that the studies, metrics, and models—scientific and otherwise—on which an agency relies be universally accepted or otherwise uncontested. Instead, NEPA permits agencies to rely on the best available evidence, quantitative and qualitative, even where that evidence has certain limitations.

FERC outlined that it would determine whether a project's emissions were significant by comparing the project's reasonably foreseeable GHG emissions to the total GHG emissions of the USA as a whole.[68] The FERC decision was controversial, with two Commissioners dissenting on the GHG measurement issue. Commissioner Danly wrote that "This order represents regulatory malfeasance at its most arbitrary and capricious," leaving "… the public and the regulated community - including investors upon whom we rely to provide billions of dollars for critical infrastructure - with no discernible principles by which the Commission intends to consider proposed projects. We announce this dramatic change of direction without notice, in an obscure docket that is likely not to be appealed."[69]

It appears that under the metric adopted by the majority, no FERC-regulated project built in the USA would ever be deemed significant from a GHG perspective. Even though different criteria apply in Canada, and "small" amounts of GHG emissions in Canada can be expected to be considered significant, the FERC decision highlights the importance of creating clear principles by which regulators intend to consider proposed projects in order to provide a level of certainty to the investment community in the interest of the whole of Canada.

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66 *FERC Decision*, *supra* note 64 at para 29, PDF p 11.

67 *Ibid* at para 33.

68 *Ibid* at para 34. The project at issue would emit 20,006 metric tons of GHGs from construction and operation. When compared to the 5.903 billion metric tonnes of CO_2e emitted at the national level in 2018 the project would increase CO_2e emissions by 0.0003%, and in subsequent years, by 0.000006%.

69 *Ibid* at para 2.

HYDROGEN

In addition to challenges, there are also opportunities associated with addressing climate change. Because combustion of hydrogen emits only water, blending hydrogen into natural gas reduces the GHG intensity of the natural gas stream.[70] In the section which follows, we briefly address the development of hydrogen as a mechanism for addressing GHG emissions in Canada. We outline strategies published by the federal government and Alberta and provide details on some recent projects where hydrogen is being blended with natural gas. We conclude by outlining some regulatory gaps that need to be addressed for this industry to continue to develop.

I. FEDERAL HYDROGEN STRATEGY

On December 16, 2020, the federal government published its Hydrogen Strategy for Canada (the "**Federal Hydrogen Strategy**").[71] The Federal Hydrogen Strategy notes that there are gaps in existing codes and standards that need to be addressed to enable adoption of hydrogen as part of the integrated energy system in Canada.[72] According to the federal government, applications that have not yet been piloted in Canada, and are in the pre-commercial stage, represent important areas of focus. For example, blending of hydrogen into natural gas systems has been demonstrated around the world to lower GHG emissions when compared to traditional power-to-gas projects. Lack of developed and adopted codes and standards in Canada related to this end-

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70 Emissions Reduction Alberta, "Fort Saskatchewan Hydrogen Blending-ATCO Gas and Pipelines Ltd." (2020), online: *Emissions Reduction Alberta* <eralberta.ca/projects/details/fort-saskatchewan-hydrogen-blending/>.

71 Government of Canada - Natural Resources Canada, "The Hydrogen Strategy" (January 6, 2021), online: *Government of Canada* <https://www.nrcan.gc.ca/sites/nrcan/files/environment/hydrogen/NRCan_Hydrogen%20Strategy%20for%20Canada%20Dec%2015%202200%20clean_low_accessible.pdf>.

72 *Ibid* at p 122. This was reiterated by Mr. Aaron Hoskin of Natural Resources Canada at the recent Clean Hydrogen: Leveraging Bilateral Opportunities in Canada & Japan webinar, held on March 17 & 18, 2021, hosted by the Globe Series.

use application is currently one of the main limiting steps. One of the changes envisioned is the setting of hydrogen blending limits.

II. ALBERTA NATURAL GAS VISION AND STRATEGY

On October 6, 2020 the Government of Alberta published its Natural Gas Vision and Strategy ("**Alberta NG Strategy**").[73] The Alberta NG Strategy identifies hydrogen as a potential source of significant economic value for Alberta and Canada, while advancing critical environmental outcomes.[74] The Alberta government set itself several ambitious targets, not the least of which include building pathways to cross policy barriers in the short-term and passing hydrogen-deployment-enabling legislation in the medium term (2021 throughout 2023).[75] In the long-term the Alberta government intends to explore opportunities for broader hydrogen transportation utilizing existing natural gas infrastructure and pipeline corridors among other actions to secure a world-scale hydrogen energy export project in Alberta. Learnings from hydrogen pilot projects are valuable to assess and direct future GHG reduction actions through the use of hydrogen.

III. ENBRIDGE GAS INC. - CITY OF MARKHAM HYDROGEN BLENDING PROJECT

On March 31, 2020, Enbridge Gas Inc. ("**Enbridge Gas**") filed an application to the Ontario Energy Board ("**OEB**") for an order granting it leave to construct approximately 755 meters of natural gas pipeline, three stations and two network disconnects in the City of Markham at a cost of approximately $5.23 million.[76] Under this pilot project Enbridge Gas intends to blend the standard

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[73] Alberta Government, "Getting Alberta Back to Work: Natural Gas Vision and Strategy", (October 6, 2020), online (pdf): *Alberta Government*, < https://open.alberta.ca/dataset/988ed6c1-1f17-40b4-ac15-ce5460ba19e2/resource/a7846ac0-a43b-465a-99a5-a5db172286ae/download/energy-getting-alberta-back-to-work-natural-gas-vision-and-strategy-2020.pdf>.

[74] *Ibid* at PDF p 23.

[75] *Ibid* at PDF p 25.

[76] *Enbridge Gas Inc. Application for leave to construct natural gas pipelines and associated facilities in the City of Markham, Regional Municipality of York* (29 October 2020), EB-2019-0294 [*OEB Decision*]. This application was brought under s 90 of the *Ontario Energy Board Act*, SO 1998, c 15, Sched B.

natural gas that it currently distributes with up to two percent of hydrogen gas (blended gas) for distribution within an isolated portion of Enbridge Gas' existing distribution system, consisting of approximately 3,600 existing customers, called the Blended Gas Area ("**BGA**") (the "**Enbridge Project**"). The purpose of the Enbridge Project is to provide insight into the use of hydrogen as a method for decarbonizing natural gas for the purpose of reducing GHG emissions with the view to expand such blending to other locations within the distribution system and to determine if hydrogen blending should be pursued at a large scale. Enbridge Gas estimated that the GHG reductions associated with using blended gas having 2 percent hydrogen by volume in the BGA would be between 97-120 tonnes of CO_2e per year.[77]

The OEB approved Enbridge Gas' pilot program after considering the following factors:

- Benefits of the Enbridge Project:[78] The Enbridge Project is expected to provide detailed information on the impact of hydrogen blending on the level of carbon reduction, the risk to the distribution system and customers' equipment, the potential for the expansion of hydrogen blending into other areas of its distribution system, and details on the hydrogen gasification process.

- Safety and Technical Risks:[79] The low levels of hydrogen proposed for the Enbridge Project (two percent versus projects in other jurisdictions with hydrogen concentrations up to twenty percent by volume),[80] posed no significant risk to the distribution system, Enbridge Gas' customers or their equipment.

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77 *Ibid* at para 2, PDF p 4.

78 *Ibid* at paras 35 and 36, PDF pp 8-10.

79 *Ibid* at paras 37 to 40, PDF pp 10-11.

80 The Federation of Rental-Housing Providers of Ontario expressed safety concerns about hydrogen embrittlement in steel pipelines and the detection of leaks from pipelines carrying blended gas - especially at higher concentrations of hydrogen gas and higher pipeline operating pressures.

- Impact on Consumers:[81] Approximately half of Enbridge Gas' customers indicated that they would support a small increase in their natural gas bill to pursue low carbon initiatives, even though most customers are not familiar with low carbon initiatives.

- Hydrogen Procurement:[82] Enbridge Gas intended to procure hydrogen from an affiliate of Enbridge Gas and in order to keep ratepayers' cost-neutral. The price paid for hydrogen would be the same price paid for traditional natural gas and would fluctuate according to market conditions. Enbridge Gas intends to recover this commodity cost from all customers in the same rate zone until rebasing, after which time the costs would be recovered from all its ratepayers.

- Consumption Impact:[83] Hydrogen has approximately a third of the heating power of natural gas. Enbridge Gas proposed to offset any potential impacts from BGA customers consuming a larger volume of blended gas to get the same amount of energy as contained in a smaller volume of standard natural gas, by including annual rate riders that would credit customers in the BGA for the cost associated with the increase in volumetric requirements.[84]

- Intellectual Property of the Project:[85] The OEB indicated that it expects Enbridge Gas to notify it if any benefits arise from the intellectual property as part of the Enbridge Project,

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The OEB's concern about the safety and technical risks associated with the proposed pilot led to its request to have submissions from the Technical Standards and Safety Authority ("**TSSA**"). The TSSA's review of Enbridge's plans and the Risk Assessment Report led to its conclusion that Enbridge has done sufficient assessment and that, at the low levels of hydrogen proposed in this pilot, there is no significant risk to the distribution system, Enbridge's customers or their equipment.

81 *OEB Decision*, *supra* note 76 at paras 41 and 42, PDF pp 11-12.

82 *Ibid* at paras 43 to 50, PDF p 12-14.

83 *Ibid* at paras 51 and 52, PDF p 14.

84 This treatment would apply to ratepayers in the BGA until rebasing or until such earlier time that a different treatment is appropriate based on future developments.

85 *OEB Decision*, *supra* note 76 at paras 53 to 58, PDF pp 14-15.

for a determination by the OEB at its rebasing application on how these benefits will be treated.[86]

IV. ATCO FORT SASKATCHEWAN HYDROGEN BLENDING PROJECT

In a first of its kind project for Alberta, ATCO[87] ("**ATCO**") will blend hydrogen into a subsection of its Fort Saskatchewan natural gas distribution system at a concentration of up to five percent, by volume (the "**ATCO Project**").[88] ATCO intends to use hydrogen derived from natural gas to support the ongoing exploration and production of Alberta's abundant natural gas resources and to demonstrate the safe and effective blending of hydrogen into the natural gas distribution system.[89] The ATCO Project was expected to get underway in September 2020 starting with commercial and community activities. Construction commenced in the first quarter of 2021[90] with an estimated cost of $5.7 million.[91]

The ATCO Project differs from the Enbridge Project in some respects: (a) The ATCO Project is limited to the distribution level. This means that concerns in relation to pipeline embrittlement[92] (which is only relevant to high pressure gas pipelines) are not relevant; (b) ATCO intends to absorb the cost of the ATCO Project not covered by funding from Emissions Reduction Alberta's

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86 Enbridge Gas is also expected to comment on the proposed sharing of benefits from the intellectual property when it seeks any changes to, or expansion of, the Enbridge Project.

87 Canadian Utilities Ltd., an ATCO company, was awarded $2.8 million in funding from Emission Reductions Alberta's (ERA) Natural Gas Challenge to advance a first-of-its-kind hydrogen blending project in Fort Saskatchewan. See: ATCO, "ATCO to Build Alberta's First Hydrogen Blending Project with ERA Support" (21 July 2020), online: atco.com <www.atco.com/en-ca/about-us/news/2020/122900-atco-to-build-alberta-s-first-hydrogen-blending-project-with-era.html>.

88 Emissions Reduction Alberta, "Fort Saskatchewan Hydrogen Blending-ATCO Gas and Pipelines Ltd." (2020), online: *Emissions Reduction Alberta* <eralberta.ca/projects/details/fort-saskatchewan-hydrogen-blending/>.

89 See: ATCO Ltd. "Fort Saskatchewan Hydrogen Blending" (2021), online: *atco.com* <www.atco.com/en-ca/for-home/natural-gas/hydrogen.html#blend>.

90 ATCO Ltd., "ATCO to Build Alberta's First Hydrogen Blending Project with ERA Support" (July 21, 2020), online: <www.atco.com/en-ca/about-us/news/2020/122900-atco-to-build-alberta-s-first-hydrogen-blending-project-with-era.html>.

91 See: Emissions Reduction Alberta, "Fort Saskatchewan Hydrogen Blending, ATCO Gas and Pipelines Ltd." (2020), online: *eralberta.ca* <eralberta.ca/projects/details/fort-saskatchewan-hydrogen-blending/>.

92 See *supra* note 89.

Natural Gas Challenge, subject to potential future legislative changes that may allow ATCO to recover such costs in its revenue requirement; (c) The hydrogen will be sourced from natural gas activities as opposed to electrolysis as used in the Enbridge Project - thereby reducing the price of the hydrogen and increasing the available quantity; and (d) ATCO intends a hydrogen blend of five percent as opposed to the two percent used in the Enbridge Project. ATCO decided on a blend of five percent as this would result in statistically significant reductions in GHG emissions and still satisfy ATCO's internal safety parameters and remains affordable.

Given expected carbon tax costs on natural gas, it is forecasted that price parity between hydrogen and natural gas will be reached by 2030. In the interim, it is a policy question of how the higher cost of hydrogen is to be paid for. A possible solution is that a portion of the bill be paid from the federal carbon levy (or provincial equivalents) to eliminate any impact on consumers' bills.

V. THE WAY FORWARD FOR HYDROGEN

All levels of government appear to have concluded that hydrogen is a fuel source for the future. This optimism however requires temperance with certain present realities. One of the most glaring barriers to large-scale hydrogen deployment is the lack of any clearly legislated imperative to convert our present reliance on natural gas to hydrogen. Another consideration is more practical - what will the long-term cost (for example, infrastructure cost and volume of hydrogen compared to natural gas) of hydrogen-blending entail (and who will pay for it)?

Some of the regulatory and policy questions which will have to be answered include: (a) To what extent do we take into account the reduction of GHG emissions as a sufficient rationale to justify the construction or adaption of present facilities? Do we take into consideration as a factor that a project aimed at reducing GHG emissions is 'needed' within the context of regulated facility applications? (b) Do we accept that the increased cost of maintenance and possibly system

expansion is justified in reaching this greater goal of reducing GHG emissions? In other words, do we accept that the expenses to be incurred are ‘prudent’ when considering that the cheapest option is to do nothing, for current generations, but perhaps not for future generations? (c) Can a pan-Canadian approach create a nationally integrated hydrogen market in the Canadian public interest? and (d) Do we have potential stranded asset risks, for example, for the gas distribution systems or can the systems be repurposed? Who covers the costs of potential stranded assets, upgraded or new assets - utility shareholders, ratepayers, or tax payers?

Some of the practical challenges for the deployment of hydrogen on a large scale may be summarised as follows: (a) Whilst there are blanket statements that the use of hydrogen will reduce GHG emissions and it is certainly beyond doubt that on its own, burning hydrogen as a fuel source does not release GHG emissions, the fact remains that free hydrogen does not exist in large quantities other than deep underground. This means that there will be a cost to extract hydrogen (whether from underground, from water or other substances). At present that cost exceeds the cost of extracting natural gas by a significant margin; (b) Hydrogen is not as an efficient heating medium as, for instance, natural gas. The inescapable conclusion is that we will have to extract more hydrogen than natural gas and transport increased volumes of hydrogen on our systems to meet the same needs currently met by natural gas. This transportation cannot, in the long run, be limited to distribution systems and as such concerns relating to pipeline embrittlement will have to be resolved; (c) Once we have taken into account the process to extract sufficient quantities of hydrogen and have transported the hydrogen in pipelines that may require significantly more maintenance than at present, we still need to resolve what effect converting hydrogen into energy will have on consumers’ appliances; and (d) The question begs, once we have considered the net effect of hydrogen blending, do we still in fact reduce GHG emissions to a sufficient level to justify the costs?

For hydrogen to play a significant role in the future, it is imperative for all levels of government to legislate policy decisions into practical and enabling legislative requirements, if policy dictates greater reliance on hydrogen as part of meeting GHG reduction objectives.

SMALL SCALE NUCLEAR

I. CLEAN, LOW-COST, OFF GRID ENERGY

Another opportunity presented by the climate change challenge is the development of small-scale nuclear projects. In 2018, Natural Resources Canada brought together provincial and territorial governments, industry, utilities and other interested stakeholders for a 10-month, pan-Canadian conversation on Canada's Small Modular Reactor ("**SMR**") opportunity. SMRs are nuclear fission reactors that are being designed to be built at a smaller size but in larger numbers than most of the world's current nuclear fleet. They are: Small – in both power output and physical size; Modular – meaning they are factory constructed, portable and scalable; and Reactors – using nuclear fission to produce energy: energy for electricity, hybrid energy systems, district heating, water desalination, and high-quality steam for heavy industry applications.[93]

In November 2018, the Canadian SMR Roadmap Steering Committee[94] published an SMR Roadmap Report,[95] taking the view that Canada's regulatory framework and waste management regime is well-positioned to respond to the SMR paradigm shift but acknowledging that some modernisation is necessary. In December 2019, the provinces of Ontario, New Brunswick, and

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93 Canadian Small Modular Reactor (SMR) Roadmap Steering Committee "A Call to Action: A Canadian Roadmap for Small Modular Reactors" (November 2018), online (pdf): *Canadian Nuclear Association* <smrroadmap.ca/>.

94 The Steering Committee is a group of Canadian provincial governments, territorial governments, and power utilities interested in the potential for development, demonstration, and deployment of SMRs in Canada. The findings and recommendations of this report reflect the views of the voting members of the Steering Committee. Natural Resources Canada supports the Steering Committee in a convening role and participates as a non-voting member. Atomic Energy of Canada Limited participates in the SMR Roadmap Steering Committee as a nonvoting member.

95 Found at: Canadian Small Modular Reactor (SMR) Roadmap Steering Committee "A Call to Action: A Canadian Roadmap for Small Modular Reactors" (November 2018), online (pdf): *Canadian Nuclear Association* <smrroadmap.ca/>.

Saskatchewan, signed a memorandum of understanding ("**MOU**") to collaborate on the development and deployment of SMRs. Alberta also signed the MOU on April 14, 2021.[96] Their main objective is to provide clean, low-cost energy to off-grid and on-grid communities and industries to decarbonize the energy sector as much as possible. In December 2020, the federal government published an SMR Action Plan[97] (the "**SMR Action Plan**") to advance the safe and responsible development and deployment of SMRs.[98] The government of Alberta was a contributor to the SMR Action Plan.[99] Research by the Alberta Geological Survey and initial exploration by Alberta companies have identified uranium deposits across the province, particularly in northeast and southern Alberta, which may have the potential to contribute to the uranium supply chain, a feedstock needed for SMR development and deployment. As part of Alberta's Recovery Plan, Alberta will focus on sector strategies to diversify the economy, including a minerals strategy.[100] The minerals strategy will help position Alberta as a destination of choice for mineral investment, exploration, and development and create a competitive and attractive

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96 Government of Alberta, "Alberta signs small modular nuclear reactor MOU" (14 April 2021) online: alberta.ca <https://www.alberta.ca/announcements.cfm?xID=779532BE17742-9A86-61A0-8EE237BE8A6450E0>.

97 Canada's Small Modular Reactor (SMR) Action Plan is Canada's plan for the development, demonstration and deployment of SMRs for multiple applications at home and abroad. See: "Canada's Small Modular Reactor smr action plan" (7 May 2021), online: smractionplan.ca <https://smractionplan.ca/>.

See also: Government of Canada, Natural Resources Canada "Canada Outlines Next Steps for Progress on Small Modular Reactor Technology" (18 December 2020), online: canada.ca <https://www.canada.ca/en/natural-resources-canada/news/2020/12/canada-outlines-next-steps-for-progress-on-small-modular-reactor-technology.html>.

98 The SMR Action Plan provides for actions for the Government of Canada to: (a) ensure robust policy, regulatory and legislative frameworks are in place to protect people and the environment; (b) accelerate innovation; (c) continue meaningful engagement with Indigenous communities and all Canadians; and (d) develop international partnerships and open up new markets.

99 The government of Alberta intends to take the following actions: (a) Connection of SMRs to the Alberta Innovates Strategic Priorities; (b) Support for SMR Technology or Knowledge Development Initiatives; (c) Contributions to Knowledge; (d) Mineral development based on Alberta having significant geological potential for many non-energy minerals, including uranium, lithium, vanadium, and rare earth elements.

100 Government of Alberta "Alberta's Recovery Plan" (June 2020) at PDF p 21, online (pdf): https://www.alberta.ca/assets/documents/alberta-recovery-plan.pdf>.

environment for responsible mineral development including uranium, a potential feedstock for SMRs.[101]

II. REGULATION OF SMALL NUCLEAR REACTORS

The federal government has jurisdiction over nuclear energy by virtue of its declaratory power under section 92(10)(c) of the *Constitution* and the national concern branch of the POGG power in section 91.[102] Regulation of SMRs therefore fall under the *Nuclear Safety and Control Act*[103] ("***NSCA***"), under which the Canadian Nuclear Safety Commission ("**CNSC**") was established. One of the objects of the CNSC is to regulate the development, production and use of nuclear energy and the production, possession and use of nuclear substances, prescribed equipment and prescribed information.[104] The *Canadian Nuclear Safety Commission Rules of Procedure*[105] along with *Class IA Nuclear Facilities Regulations*[106] under which SMRs are classified,[107] prescribes the process which a party is to follow in applying for a licence to conduct any of the actions for which approvals under section 26 of the *NSCA* are required.[108] The Nuclear Energy Agency[109] noted

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101 See: Government of Alberta, Alberta Innovates "Alberta SMR Action Plan" (December 18, 2020), online: *Alberta SMR Action Plan* <smractionplan.ca/content/alberta>.

102 *Normtek Radiation Services Ltd v Alberta Environmental Appeal Board*, 2020 ABCA 456 at para 22. See also: *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327.

103 *Nuclear Safety and Control Act*, SC 1997, c 9 [*NSCA*], s 2, p 2. See *NSCA* definition of a nuclear facility.

104 *Ibid*, section 26.

105 *Canadian Nuclear Safety Commission Rules of Procedure*, SOR/2000-211.

106 *Class I Nuclear Facilities Regulations*, SOR/2000-204. A class 1 Nuclear Facility is defined as a Class IA nuclear facility and a Class IB nuclear facility, which is in turn is further defined.

107 Canadian Nuclear Safety Commission, "Small modular reactors" (November 19, 2020), online: *Canadian Nuclear Safety Commission* <www.cnsc-ccsn.gc.ca/eng/reactors/research-reactors/other-reactor-facilities/small-modular-reactors.cfm>.

108 In addition to providing the information set out in section 3 of the *General Nuclear Safety and Control Regulations,* SOR/2000-202, licence applications for a Class I nuclear facility have to be made in respect of the preparation of the site, construction and operation. Application for a licence to decommission (and/or abandon) also have to be made, should such a facility be decommissioned.

109 The Nuclear Energy Agency ("**NEA**") is an intergovernmental agency that facilitates co-operation among countries with advanced nuclear technology infrastructures to seek excellence in nuclear safety, technology, science, environment and law.

The NEA operates within the framework of the Organisation for Economic Co-operation and Development and is located just outside Paris, France. See: NEA, "About us" (2020) online: *NEA* <www.oecd-nea.org/jcms/tro_5705/about-us>.

the following in relation to the suitability of current regulatory and legal frameworks for the deployment of SMRs:[110]

> The features that could make SMRs a game-changer for cost-effective decarbonisation are also the ones that require a simpler and more efficient nuclear licensing process, one that considers lessons learnt by current regulatory practices to meet safety goals and requirements. Nuclear regulatory authorities are carefully evaluating what the appropriate framework is to assess the safety case for SMRs while still taking advantage of their unique features and inherent safety. As a result, SMRs in general, and non-LWR [Light Water Reactor] SMRs in particular, face significant regulatory uncertainties. The regulatory framework needed for the acceptance of the factory assembly of SMRs is also still under consideration.
>
> The success path of SMRs assumes the commercialisation in series or, in other words, the manufacture and installation of a relatively large number of identical modules or reactors probably in multiple countries. This strategy necessitates the development of a licensing regime based on multi-national reciprocally agreed-upon rules to allow the timely and cost-effective issue of licenses and permits for a given SMR concept in multiple jurisdictions. The use of modularisation and factory-fabrication, as well as the need for a robust global supply chain meeting consistent codes and standards, may also be sources of regulatory uncertainty with significant potential to slow down the wide commercialisation of the SMR concept.
>
> The current legal framework for nuclear installations will also require specific attention in the case of SMRs. For instance, when it comes to national and international third party nuclear liability regimes for transportable nuclear power plants or the applicability of environmental protection and public participation legislation.

The CNSC, in its report on SMRs,[111] recognised it may be asked to review proposals for relocatable reactors and for locating SMRs on multiple sites and/or across multiple jurisdictions within Canada. It also recognized the value of a consistent regulatory approach across multiple international jurisdictions. The CNSC undertook to take these considerations into account when developing its regulatory approach to licensing SMRs. The CNSC identified the following steps regarding the regulatory framework when considering amendments to the *Nuclear Security*

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[110] See: NEA, "Small modular reactors" (2020) online: *NEA* <www.oecd-nea.org/jcms/pl_26297/small-modular-reactors>.

[111] CNSC, "What We Heard Report - DIS-16-04, Small Modular Reactors: Regulatory Strategy, Approaches and Challenges" (15 September 2017), online: *CNSC* <www.cnsc-ccsn.gc.ca/eng/acts-and-regulations/consultation/completed/dis-16-04.cfm>.

Regulations:[112] (a) provide greater clarity on the application of the graded approach;[113] (b) provide greater clarity on licensing for SMRs; and (c) review certain identified CNSC regulatory documents.[114]

The modular nature of SMRs is not clearly contemplated under the current regulatory scheme, which contemplates large-scale, immovable nuclear facilities. Whilst most of the regulatory language appears to be technologically agnostic, this does not detract from the fact that SMRs raise entirely new practical considerations. Would the owner of two separate SMRs originally deployed on two different locations be allowed to scale operations by moving one SMR to the site of another? Would moving an SMR from a factory to a site, or from site to site require decommissioning? Abandoning a large-scale nuclear facility would not escape regulatory notice, however, the surreptitious abandoning of a single SMR unit in a remote part of the country may be plausible.

The CNSC's current approach to regulating SMRs is to apply the same criteria used to regulate traditional reactor facilities. This typically entails that the CNSC takes a risk-informed approach

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112 *Nuclear Security Regulations*, SOR/2000-209.

113 CNSC requirements and guidance for reactor facilities are generally articulated to be technology neutral and where possible permit the use of the graded approach. The graded approach enables applicants to establish and propose the stringency of design measures, safety analyses, and provisions for conduct of their activities commensurate with the level of risk posed by the reactor facility, subject to approval by the CNSC.

The CNSC places more regulatory scrutiny on activities that may present greater risk through the application of a graded approach. The degree of scrutiny is informed by: (a) technical assessments of submissions; (b) the safety performance history of the licensee; (c) relevant research; (d) information supplied by parties relevant to Commission proceedings; (e) international activities that advance knowledge in nuclear and environmental safety; and (f) cooperation with other regulatory bodies.

See: Canadian Nuclear Laboratories, "The Canadian Nuclear Safety Commission's Readiness to Regulate Small Modular Reactors" (July 7, 2020) online: *Canadian Nuclear Laboratories* <pubs.cnl.ca/doi/full/10.12943/CNR.2019.00005>.

114 These are: (i) *CNSC*, Regulatory Guide G-323, Ensuring Presence of Sufficient Qualified Staff at Class I Nuclear Facilities – Minimum Staff Complement; (ii) *CNSC*, RD-336, Accounting and Reporting of Nuclear Material; (iii) *CNSC*, RD-346, Site Evaluation for New Nuclear Power Plants; (iv) *CNSC*, RD-367, Design of Small Reactor Facilities; (v) *CNSC*, RD/GD-369, Licence Application Guide: Licence to Construct a Nuclear Power Plant; (vi) *CNSC*, REGDOC-2.4.2, Probabilistic Safety Assessment (PSA) for Nuclear Power Plants; (vii) *CNSC*, REGDOC-2.5.2, Design of Reactor Facilities: Nuclear Power Plants; (viii) *CNSC*, REGDOC-3.5.1, Licensing Process for Class I Nuclear Power Plants and Uranium Mines and Mills.

through "applying resources and regulatory oversight commensurate with the risk associated with the regulated activity".[115] According to the CNSC, some of the challenges which arise in the regulation of SMRs include different reactor concepts, new deployment models, new operating concepts, modularity in design, new types of fuel, and factory fabrication.[116] Additional challenges lie in the regulatory process itself. Presently, the CNSC has established a 24-month timeline for regulatory activities such as applying for a licence to prepare a site for a Class I nuclear facility. [117] The timelines for further regulatory steps are currently as follows: [118]

Licensing Stage	**Timeline (months)**
License to prepare site	24
Licence to construct	32
Licence to construct and operate	40
Licence to operate	24
Licence to decommission	24

It may defeat the purpose of having modular (in other words, movable and scalable) technology at your disposal if you will have to wait more than two years to move your reactor. A possible solution may be to adopt some of the International Atomic Energy Agency's *Regulations for the Safe Transport of Radioactive Material*.[119] The safe transport of radioactive material however

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115 See: Government of Canada - Canadian Nuclear Safety Commission "Small modular reactors" (19 November 2020), online: *CNSC* <www.cnsc-ccsn.gc.ca/eng/reactors/research-reactors/other-reactor-facilities/small-modular-reactors.cfm> under heading "How will the CNSC regulate SMRs?".

116 See: Government of Canada - Canadian Nuclear Safety Commission "Strategy for Readiness to Regulate Advanced Reactor Technologies" (11 December 2019) online: *CNSC* <www.cnsc-ccsn.gc.ca/eng/reactors/research-reactors/other-reactor-facilities/readiness-regulate-advanced-reactor-technologies.cfm> at s 2. "Challenges".

117 See: Government of Canada - Canadian Nuclear Safety Commission "REGDOC-3.5.1, *Licensing Process for Class I Nuclear Facilities and Uranium Mines and Mills*, version 2" (25 April 2017) online: *CNSC* <nuclearsafety.gc.ca/eng/acts-and-regulations/regulatory-documents/published/html/regdoc3-5-1-v2/index.cfm> at s 81 "Regulated timelines for initial regulatory approvals".

118 See: Government of Canada - Canadian Nuclear Safety Commission "REGDOC-3.5.1, *Licensing Process for Class I Nuclear Facilities and Uranium Mines and Mills*, version 2" (25 April 2017) online: *CNSC* <nuclearsafety.gc.ca/eng/acts-and-regulations/regulatory-documents/published/html/regdoc3-5-1-v2/index.cfm> at s 8.2.1 "Class IA nuclear facilities: Timelines for regulatory reviews of applications".

119 As referred to and discussed by the Government of Canada - Canadian Nuclear Safety Commission "Regulating the packaging and transport of nuclear substances in Canada" (September 2010) online: *CNSC* <nuclearsafety.gc.ca/eng/resources/fact-sheets/packaging-and-transport-of-nuclear-substances.cfm>.

relies on the design of the transport package. This would, in the context of SMRs, mean that the construction of an SMR may be subject to different safety considerations than the traditional nuclear reactors. As a point of interest, another challenge related to SMRs is meeting security requirements. Significant numbers of fully trained and equipped security personnel protect high security sites from theft or terrorism.[120] The current regulatory framework requires changes to effectively regulate SMRs and to achieve the objectives of reliance on SMRs as part of a lower carbon future.

REGULATORY EFFICIENCY

I. THE RED TAPE REDUCTION ACT AND RED TAPE REDUCTION IMPLEMENTATION ACTS

The *Red Tape Reduction Act*[121] was passed in 2019[122] as a mechanism for assessing the effectiveness of current regulations. The government noted that it wanted a focus on outcomes instead of processes to ensure all regulations are "necessary, effective, efficient and proportional to their intended outcome".[123] It set a goal to reduce red tape by one third,[124] with the view that such a reduction in the regulatory burden to would increase investment, economic growth, innovation and Alberta business competitiveness.[125] The red tape reduction affected energy

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120 *Nuclear Security Regulations,* SOR/2009-209.

121 SC 2015, c 12.

122 Bill 25 *The Red Tape Reduction Implementation Act* came into force on December 5, 2019. Bill 22, the *Red Tape Reduction Implementation Act* received royal assent on July 23, 2020, and Bill 48 *The Red Tape Reduction Implementation Act (No. 2)* 2020 came into force on December 9, 2020.

123 Government of Alberta, *Cutting Red Tape*, (25 February 2021), online: *Government of Alberta* <www.alberta.ca/cut-red-tape.aspx#:~:text=The%20Red%20Tape%20Reduction%20Act,proportional%20to%20their%20intended%20outcome>.

124 Alberta, Treasury Board and Finance, Associate Minister of Red Tape Reduction. *Annual Report Red Tape Reduction 2019-2020: Associate Minister of Red Tape Reduction.* [Edmonton], 2020 <*open.alberta.ca/dataset/ecd877d0-79f9-4379-9bc9-b35a9ad50522/resource/daf6e897-0185-485a-a7b5-9960669ecad1/download/tbf-red-tape-reduction-annual-report-2019-2020.pdf*> at PDF p 4 [2020 Annual Red Tape Reduction Report].

125 C. Kemm Yates, David J. Mullan and Rowland J. Harrison, "Report of the AUC Procedures and Process Review Committee" (14 August 2020) at PDF p 11, online (pdf): AUC < https://www.auc.ab.ca/Shared%20Documents/2020-10-22-AUCReviewCommitteeReport.pdf> [AUC Procedures and Process Review Report].

regulation directly through changes to multiple pieces of legislation. These include the *Land and Property Rights Tribunal Act*;[126] the *Historical Resources Act*;[127] the *Small Power Research and Development Act*;[128] the *Hydro and Electric Energy Act*;[129] the *Surface Rights Act*;[130] the *Mines and Minerals Act*;[131] *Oil Sands Conservation Act*[132] ("***OSCA***"); *Public Lands Act*;[133] and the *Energy Efficiency Alberta Act*.[134]

The red tape reduction initiatives led to a significant change to the regulatory framework for land compensation, with the amalgamation of the Land Compensation Board, Municipal Government Board, and Surface Rights Board, to all be under the Land and Property Rights Tribunal.[135]

The red tape reduction also led to other significant changes, which included: (a) changes to the *OSCA* by removing the requirement for Cabinet approval of oil sands schemes or operations above 2000 barrels per day production capacity prior to approval by the Alberta Energy Regulator ("**AER**");[136] (b) implementation of the TIER system, estimated to achieve emissions reductions comparable to the *Carbon Competitiveness Incentive Regulation*[137] reductions while allowing

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126 *Land and Property rights Tribunal Act*, SA 2020, c L-2.3.

127 *Historical Resources Act,* RSA 2020, c H-9.

128 *Small Power Research and Development Act*, RSA 2000, c S-9.

129 *Hydro and Electric Energy Act*, RSA 2000, c H-16.

130 *Surface Rights Act*, RSA 2000, c S-24.

131 *Mines and Minerals Act*, RSA 2000, c M-17.

132 *Oil Sands Conservation Act*, RSA 2000, c O-7.

133 *Public Lands Act,* RSA 2000, c P-40.

134 *Energy Efficiency Alberta Act*, SA 2016, c E-9.7.

135 Establishment of the land and property rights tribunal under the *Land and Property Rights Tribunal Act*. This Act came into effect December 9, 2020, with some exceptions. Implementation of the land and property rights tribunal means that the following boards are amalgamated: (i) Land compensation board (*Expropriation Act*, *Historical Resources Act*, *Property Rights Advocate Act*, *Water Act*, and all other acts that were under the jurisdiction of the Land Compensation Board); (ii) Municipal government board (*Municipal Government Act*); (iii) Surface rights board (*Surface Rights Act*, *Drainage Districts Act*, *Environmental Protection and Enhancement Act, Pipeline Act*, *Oil and Gas Conservation Act*, *Public Lands Act*). Land and Property Rights tribunal jurisdiction includes complaints and disputes: (i) Referred to in the *Expropriation Act*; (ii) Under Part 12 of the *Municipal Government Act*; and (iii) With respect to any matter under, or referred to, in the *Surface Rights Act*.

136 2020 Annual Red Tape Reduction Report, *supra* note 124 at PDF p 11.

137 *Ibid* at PDF p 11.

smaller conventional oil and gas facilities to voluntarily enter the regulatory system;[138] and (c) an updated proponent guide to First Nations and Métis settlement consultation procedures, and a streamlined process to provide proponents with an understanding of their role when they have a legal duty to consult Indigenous communities.[139]

While improving the efficiency of government is a laudable goal, there is still an open question regarding whether some of these changes will ultimately lead to better decision making and governance. By way of example, while time may theoretically be saved in the oil sands approval process through the removal of the need for Cabinet approval, the Crown must still fulfill all of its constitutional obligations to First Nation and Métis communities.[140] The "streamlined process" for Indigenous consultation may speed up consultation for project proponents, but only if the consultation is meaningful.

As noted in a previous section of this paper, the *TIER Regulation* will likely require amendments following the SCC's *GGPPA Reference* decision.

II. AUC PROCEDURES AND PROCESSES REVIEW

The Alberta government's red tape initiative has led Alberta regulatory bodies to review their own processes and procedures. The Alberta Utilities Commission ("**AUC**") has proactively addressed regulatory efficiency.

In May 2020 (Bulletin 2020-17), the AUC appointed an expert Procedures and Process Committee (the "**Committee**") to assist in improving efficiency of rates proceedings. The August

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138 *Ibid* at PDF p 11.

139 *Ibid* at PDF p 14.

140 Nigel Bankes, "Oil Sands Approvals and Bill 22, the *Red Tape Reduction Implementation Act, 2020"* (15 June 2020), online (blog): ABLawg https://ablawg.ca/2020/06/15/oil-sands-approvals-and-bill-22-the-red-tape-reduction-implementation-act-2020/.

14, 2020 Report of the Committee concluded that significant improvements in the efficiency and effectiveness could be made within the AUC's existing legal framework. The Committee made 30 recommendations that could make the AUC's processes more efficient. The Committee recommended that the AUC apply an overarching, assertive case management approach to its process to significantly reduce regulatory lag and solve AUC processes and procedures issues.[141]

In Bulletin 2020-33 (October 22, 2020), the AUC announced that it had accepted 29 of the 30 recommendations made by the Committee.[142] A number of the recommendations were adopted immediately, and together with changes forced by the COVID-19 pandemic, created immediate changes to AUC hearings.

These immediate changes included the following: (a) a strong presumption that all AUC rate-setting hearings be conducted in writing; (b) limiting cross-examination to areas and issues that the AUC considers to be necessary to inform its judgment on the application before it; (c) discouraging non-expert opinion evidence through reduction of costs allowed to utilities and eligible interveners; (d) a rebuttable presumption of following precedents set by previous decisions in respect of previous rulings on similar motions; oral argument to be delivered within three business days of the close of the hearing record, using the top-down/bottom-up format; and (e) management of oral argument including utilization of time limits, stipulation of topics on which it will hear argument, or other measures as it deems necessary.[143]

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141 AUC Procedures and Process Review Report, *supra* note 125 at PDF pp 6, 10, 14, 16, and 18.

142 The AUC did not accept the recommendation that a legislated tightening of AUC decision-making timeframes is unnecessary. See AUC Bulletin 2020-33: *Process Improvements to AUC Rate Proceedings* (22 October 2020), online (pdf): <www.auc.ab.ca/News/2020/Bulletin%202020-33.pdf>.

143 *Ibid*.

These changes have increased the efficiency of AUC regulatory proceedings, and it is hoped that the significant regulatory lag that existed (in particular with regard to rate proceedings) prior to these and other changes will be addressed going forward.

III. AUC CHANGES TO RULES

The AUC made various changes to its Rules to improve regulatory efficiency. These changes included the removal of various requirements to facilitate faster and more efficient processes and the rephrasing of rules to enhance clarity. The amendments to Rule 007: *Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations and Hydro Developments* ("***Rule 007***") serve as example. Not only does the amendment include further details regarding applications for battery storage facilities, requirements for solar glint and glare assessments for solar plant applications, and requirements for the shadow flicker impact assessments for wind power plant applications, it also provides that the provisions of Rule 020: *Rules Respecting Gas Utility Pipelines* will be merged into the new *Rule 007*.[144] From an efficiency perspective, the introduction of wiki-style form-based applications, prescribed information to be provided in facility applications and changes to consultation radius will likely prove to be the most significant factors in reducing the processing time of applications.

Another example may be found in the amendments to Rule 005: *Annual Reporting Requirements of Financial and Operational Results* ("***Rule 005***") with an effective date of March 31, 2021. *Rule 005* sets out the detailed financial and operational information that is required to be filed annually by utilities, default supply providers, and regulated rate providers. The proposed changes focused on streamlining the reporting of a utility's annual finances and operations by removing schedules

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[144] See AUC "Consultation for Rule 007 - Applications for Power Plants, Substations, Transmission Lines and Industrial System Designations, Hydro Developments and Gas Utility Pipelines" (5 March 2021), online: auc.ab.ca <www.auc.ab.ca/regulatory_documents/Pages/ConsultationsRule007.aspx>

or reporting requirements that the AUC considers may no longer be required or that contain information that is publicly available through other means. The goal was to streamline the reporting of a utility's annual finances and operations while ensuring the provision of a sufficient level of detail.[145]

IV. AER REGULATORY EFFICIENCY IMPROVEMENTS

The AER launched a regulatory efficiency initiative in 2018. The AER, like the AUC, is eliminating or amending duplicate, obsolete requirements to improve application timelines, and to ensure modern and effective regulation. The changes with the widest range of impact are the implementation and expansion integrated decision approach, the OneStop Program and changes to the *OSCA*.

V. AER BULLETIN 2020-07 CHANGES

The AER has been publishing its regulatory changes, including those not related to the government's red tape reduction initiative in its Regulatory Change Report[146] and a Log of Regulatory Changes.[147] We have already, briefly, reviewed some of the changes that were made pursuant to the *Red Tape Reduction Implementation Act,* 2020.[148] The AER has also sought to improve the application process through an integrated decision approach/OneStop.[149]

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145 AUC "Amendments to AUC Rule 005 will Reduce Regulatory Burden and Improve Efficiency" (31 March 2021), AUC Bulletin 2021-07, online (pdf): <https://www.auc.ab.ca/News/2021/Bulletin%202021-07.pdf>. The effective date of the amendment is March 31, 2021.

146 AER "Regulatory Change Report" (last visited 14-May-2021), online: aer.ca https://www.aer.ca/regulating-development/rules-and-directives/regulatory-change-report>.

147 *Ibid*.

148 *Red Rape Reduction Implementation Act, 2020*, SA 2020, c 25.

149 With the integrated decision approach and OneStop, companies can submit one integrated application that covers activities over the life of the project and receive separate decisions, instead of submitting separate applications for each project. Companies can also choose to submit one integrated application that leads to all decisions being dealt with in a single approval document. This helps the AER focus more on higher-risk activities by automatically evaluating a project based on built-in risk assessment rules to determine if additional review is needed. This attempts to limit the amount of manual reviewing of applications to the more complicated, uncertain and higher risk activities. Companies can also submit one integrated application and receive decisions in a single approval

STANDARD OF REVIEW UNDER *VAVILOV*[150]

In December 2019, the SCC issued its decision in *Vavilov*[151] ("***Vavilov***") which again addressed the standard of review to be applied in administrative decisions. Canadian courts have had over a year to apply the *Vavilov* framework. We provide a summary regarding the application of *Vavilov* in energy tribunal appeals.

I. *COLDWATER V CANADA (ATTORNEY GENERAL)*

Coldwater First Nation v Canada (Attorney General)[152] ("***Coldwater***") involved the judicial review of the second approval by the GIC of the Trans Mountain Pipeline Expansion Project. The first approval by the GIC in 2016 was successfully challenged.[153] Applications for judicial review were limited to questions on the duty to consult with Indigenous peoples. The Federal Court of Appeal ("**FCA**") noted that, while the SCC had held that questions regarding the scope of Aboriginal and treaty rights under section 35 of the *Constitution Act, 1982*[154] require a final answer from the courts and review on a standard of correctness, all parties agreed on the scope of the duty to consult under section 35, and that was therefore not an issue for the FCA.[155] On the impact of *Vavilov,* the FCA noted:[156]

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document (an integrated approach). A more detailed explanation of the integrated decision approach can be found at AER, "Integrated Decision Approach", online: <www.aer.ca/regulating-development/project-application/integrated-decision-approach>.

150 There have been a number of papers on the application of *Vavilov* over the past year. See Paul Daly "One Year of *Vavilov*" CLEBC Annual Administrative Law Conference (20 November 2020) [Daly] online (pdf): <https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3722312_code1456096.pdf?abstractid=3722312&mirid=1> [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3722312].

151 *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*].

152 *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 [*Coldwater*].

153 *Tsleil-Waututh Nation v Canada (Attorney General),* 2018 FCA 153.

154 Enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), which came into force on April 17, 1982.

155 *Coldwater, supra* note 152 at para 27.

156 *Ibid* at paras 26-31.

> 26 This is a statutory judicial review, not a statutory appeal. In such circumstances, there is a presumption that the standard of review is reasonableness (Vavilov, paras. 23-32), and none of the exceptions to reasonableness review identified in Vavilov apply. …
>
> 28 In conducting this review, it is critical that we refrain from forming our own view about the adequacy of consultation as a basis for upholding or overturning the Governor in Council's decision. In many ways, that is what the applicants invite us to do. But this would amount to what has now been recognized as disguised correctness review, an impermissible approach…
>
> 29 Rather, our focus must be on the reasonableness of the Governor in Council's decision, including the outcome reached and the justification for it. The issue is not whether the Governor in Council could have or should have come to a different conclusion or whether the consultation process could have been longer or better. The question to be answered is whether the decision approving the Project and the justification offered are acceptable and defensible in light of the governing legislation, the evidence before the Court and the circumstances that bear upon a reasonableness review. …
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> 31 In *Vavilov*, the Supreme Court emphasized that reasonableness review is to be conducted by appreciating the decision, the reasons for it, and the context in which it was made. This requires us to consider the reasons offered in justification of the decision in light of the evidentiary record.

The FCA found the GIC's decision reasonable. The evidentiary record demonstrated efforts to determine key concerns of the applicants, considering those concerns, engaging in communications and considering and sometimes agreeing to accommodations. The FCA found the consultation process consistent with the concepts of reconciliation and honour of the Crown.[157]

II. STATUTORY APPEALS: ALBERTA ENERGY REGULATOR AND THE ALBERTA UTILITIES COMMISSION

Both the *Responsible Energy Development Act*[158] ("***REDA***") and the *Alberta Utilities Commission Act*[159] provide a statutory right of appeal on a question of jurisdiction or a question of law. It follows that when permission to appeal is granted for decisions of the AER or AUC, the standard of review is correctness.[160] This standard of correctness was applied by the Court of Appeal of Alberta

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157 *Ibid* at para 76.

158 *Responsible Energy Development Act,* SA 2012, c R-17.3, s 45. The "Regulator" under the *REDA* is the AER.

159 *Alberta Utilities Commission Act,* SA 2007, c A-37.2 [*AUCA*], s 29. The "Regulator" under the *AUCA* is the AUC.

160 A notable exception is Justice O'Farrell's minority opinion in *Dorin v Epcor Distribution and Transmission Inc.,* 2020 ABCA 391.

("**ABCA**") in *Fort McKay First Nation v Prosper Petroleum Ltd.*[161] ("***FMFN Decision***") in its consideration of the question of whether the AER committed an error of law or jurisdiction by failing to consider the honour of the Crown.[162] More creative arguments occur at the permission to appeal stage.[163]

III. APPLICATION OF THE REASONABLENESS STANDARD: THE ENVIRONMENTAL APPEAL BOARD AND ALBERTA ENVIRONMENT AND PARKS

Normtek Radiation Services Ltd v Alberta Environmental Appeal Board

The *Environmental Protection and Enhancement Act*[164] ("***EPEA***") established the Environmental Appeal Board ("**EAB**"). The EAB hears appeals under *EPEA,* and for certain matters,[165] provides a report to the Minister which includes the EAB recommendations on the appeal. The Minister may confirm, reverse, or vary the decision made, as well as make other directions or orders.[166] There is no statutory right of appeal under the *EPEA.*

In *Normtek Radiation Services Ltd v Alberta Environmental Appeal Board*[167] *("**Normtek**")* a judicial review upheld a decision of the EAB to refuse to hear an appeal of an approval permitting Secure Energy Services Inc. ("**Secure Energy**") to accept and dispose of certain naturally occurring radioactive material ("**NORM**") in a landfill located near Drayton Valley, Alberta. The EAB declined

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161 *Fort McKay First Nation v Prosper Petroleum Ltd.,* 2020 ABCA 163 [*FMFN Decision*].

162 *Ibid* at paras 28 and 29.

163 See for example *FortisAlberta Inc. v. Alberta (Utilities Commission)* 2020 ABCA 271, where Fortis attempted to argue that the AUC had applied inconsistent reasoning because it had made a different decision in a different tariff proceeding. The ABCA noted that following *Vavilov,* "a specific tribunal decision may now be subject to judicial review on the basis of being unjustifiable or incoherent when reviewed in light of an established prior record of interpretations of the same legal question by the same or similar tribunals"(at para 25). However, in this case, the ABCA rejected the argument.

164 *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [*EPEA*].

165 *Ibid,* s 99(1).

166 *Ibid,* s 100(1).

167 *Normtek Radiation Services Ltd v Alberta Environmental Appeal Board,* 2020 ABCA 456 [*Normtek*].

to hear the appeal because it found that Normtek Radiation Services Ltd. ("**Normtek Services**") was not "directly affected" by the Director's decision.

Normtek Services submitted a statement of concern to the Director indicating its concerns with Secure Energy's proposal to landfill radioactive waste material with a radioactivity concentration of higher than 5-10 Bq/g rather than dispose of it in a subterranean geological formation. Secure Energy's proposal was to landfill NORM up to 70 Bq/g.[168] Normtek Services argued that generally-accepted industry standards and national and international guidelines indicated that radioactive wastes higher than 5-10 Bq/g ought to be disposed of in a secure subterranean geological formation.[169]

Having regard to *Vavilov,* the parties agreed that the standard of reasonableness applied to the EAB's decision.[170] The ABCA made note of passages from *Vavilov,* which require that a reasonableness review "ensure that the decision as a whole is transparent, intelligible and justified",[171] and that with respect to statutory interpretation, "the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context, and purpose of the provision."[172] It also made note that reasonableness "requires the decision-maker to take into account the evidentiary record which bears on the decision and its decision must be reasonable in light of that factual matrix."[173] The ABCA rejected the EAB's characterization of Normtek Services' concerns as being primarily economic and speculative:[174]

> The economic interest which Normtek argued was directly affected was based on its interest in ensuring that naturally occurring radioactive materials are managed in accordance with generally accepted regulatory standards to which it said it was required

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168 A Bq or Becquerel is a measure of radioactivity.

169 *Normtek*, *supra* note 167 at paras 13-14.

170 *Ibid* at para 70.

171 *Ibid* at para 71

172 *Ibid* at para 72.

173 *Ibid* at para 74.

174 *Ibid* at paras 106 and 118.

> to adhere. Properly understood, Normtek's concern was as much regulatory concern as it was an economic or commercial concern. Normtek argued that the Director's decision directly affected its interest, as an industry participant, in a regulatory regime which governed its industry in the interests of protecting the environment. It is hard to think of a better basis for standing before the Environmental Appeals Board than a concern about a regulatory decision which is alleged to adversely impact a party economically and which also may have implications for environmental protection, particularly when the regulatory decision permits an activity which involves the disposal of a substance of concern under the *Environmental Protection and Enhancement Act (*i.e. radiation). The foregoing, of course, assumes that there is merit to Normtek's substantive submissions which the Board, at the urging of the Director and approval-holder, ignored.

The ABCA allowed the appeal and remitted the matter back to the EAB. While noting that it was the EAB that needed to determine the matter of standing in this case, it could not do so by employing the same restrictive definition of "directly affected". Going forward, the EAB would need to determine how to interpret the phrase "directly affected", but that such a determination would need to be done in accordance with its governing legislation.[175]

In our view, *Normtek* provides a clear example of a regulatory decision that was not intelligible or justified,[176] and was overturned as a result. In our view, it does not change the application of "directly affected", but rather underscores the importance for tribunals to be attentive to the underlying purposes of their legislation as well as the facts in the cases before them.

Alexis v Alberta (Environment and Parks)

In *Alexis v Alberta (Environment and Parks)*[177] the ABCA considered whether a judicial review judge erred in declining to set aside a decision of a Director under the *EPEA*. This case involved a Director's decision that Wayfinder Corp. ("**Wayfinder**"), the proponent of the Big Molly silica-sand project, was not required to submit an environmental impact assessment report.[178] The

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175 *Ibid* at para 154-155.

176 *Vavilov, supra* note 151 at paras 15 and 86.

177 *Alexis v Alberta (Environment and Parks),* 2020 ABCA 188 [*Alexis*].

178 *Ibid* at para 1. Please note that following legislative amendments, this decision was later stayed by the Court of Appeal, by way of oral decision delivered on May 28, 2020.

Director provided no reasons for her decision. The lack of reasons was not an issue on the appeal in the ABCA majority decision,[179] which found that this was a statutory interpretation case.[180] Relying on *Vavilov,* the majority further noted that in finding the Director's decision irrational and unreasonable, it did not need to remit the matter back for reconsideration:[181]

> An order directing the statutory delegate to reconsider a question taking into account the reasons for judgment of the judicial review court or the appeal court makes no sense if there is only one rational solution to the question before the statutory delegate. In those circumstances, why issue a remedial order that wastes the time of the parties, the statutory delegate and potentially the court, should the statutory delegate misunderstand the court's order and commit the same mistake again. As the *Vavilov* opinion states, "it would serve no useful purpose in such a case to remit the interpretive question to the original decision maker".

The majority ordered the Director to notify Wayfinder that it must submit an environmental impact assessment report under s. 44(1)(a) of *EPEA.*

The minority judgment focused on the lack of reasons for the Director's decision. She declined to conclude that the project was a quarry (and thereby required an environmental impact assessment report) and would remit the matter back to the Director, in order to respect the distinct role of the decision make. Like the majority, she cited *Vavilov* in support of her decision:[182]

> When reasons for a decision "contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision": *Vavilov* at para 96…

IV. REGULATORS' REVIEW OF THEIR OWN DECISIONS

A number of energy tribunals[183] allow for internal reviews or appeals of their own decisions. The ABCA recently addressed such an internal appeal in *Yee v Chartered Professional Accountants*

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179 *Ibid* at para 38.

180 *Ibid* at para 40.

181 *Ibid* at para 37.

182 *Ibid* at paras 190-192. See Daly, *supra* note 150 at p 41 regarding this decision.

183 The AUC has a framework for reviews of decisions, while the AER has a framework for regulatory appeal.

of Alberta[184] ("***Yee***"). *Yee* involved a professional appeal tribunal hearing an internal appeal of a disciplinary proceeding. The ABCA noted that the appeal tribunal failed to recognize that it could apply its own experience and expertise to the findings of what constituted professional misconduct.[185] It applied a reasonableness standard, which the ABCA found to be an error:[186]

> 35. When reviewing the decision of a discipline tribunal, the appeal tribunal should remain focused on whether the decision of the discipline tribunal is based on errors of law, errors of principle, or is not reasonably sustainable. The appeal tribunal should, however, remain flexible and review the decision under appeal holistically, without a rigid focus on any abstract standard of review: *Halifax (Regional Municipality) v. Anglican Diocesan Centre Corp.,* 2010 NSCA 38 (N.S. C.A.) at para. 23, (2010), 290 N.S.R. (2d) 361 (N.S. C.A.). In this case the Appeal Tribunal erred in applying a universal standard of reasonableness, resulting from its overreliance on *Dunsmuir*.

Yee is not an energy tribunal decision and involved a disciplinary matter, and involves an appeal tribunal as opposed to an internal review. It is therefore uncertain whether it will have any impact on internal AER and AUC reviews. However, it does suggest that in some cases, the panel examining the review or appeal might apply less deference to the findings of the original panel. This contrasts with the approach of the AUC, which typically applies a high degree of deference in its first stage of review decisions:[187]

> 18 The Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.), as recently reaffirmed in *Canada (Minister of Citizenship and Immigration) v. Vavilov* [2019 CarswellNat 7883 (S.C.C.)], determined that the applicable appellate review standard concerning an alleged error of fact, or mixed fact and law is "palpable and overriding error." This guidance was incorporated by the Commission in Decision 2012-124, as reflected in the following paragraph:
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> > 30. ... [F]indings of fact or inferences of fact made by the hearing panel are entitled to considerable deference, absent an obvious or palpable error. In the Commission's view, this approach is consistent with that prescribed by the Supreme Court in *Housen v. Nikolaisen* [2002 SCC 33] and by the Court of Appeal in *Ball v. Imperial Oil* [2010 ABCA 111]. It is also consistent with the general principle that the trier of fact is better

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184 *Yee v Chartered Professional Accountants of Alberta,* 2020 ABCA 98.

185 *Ibid* at para 32.

186 *Ibid* at paras 34, 35.

187 See for example *EPCOR Energy Alberta GP Inc. - Application for Review and Variance of Decision 22853-D01-2018 and Decision 24034-D01-2019 2018-2020 Regulated Rate Tariff* (27 July 2020) [*EPCOR Energy*] online (pdf): AUC <https://www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2020/25540-D01-2020.pdf> at PDF 7.

> situated than a subsequent review authority to make factual findings or draw inferences of fact given the trier of fact's exposure to the evidence and familiarity with the case as a whole.

While the above approach would undoubtedly hold for findings of fact based on evidence provided at an oral hearing, following the ABCA's approach in *Yee,* it is less obvious that it would hold for a hearing conducted entirely in writing. It could be argued that for such a hearing, the review panel has as much expertise as the hearing panel and need not provide any deference to its findings.

We note that in its review decisions, the AUC does typically address its rationale for limiting the scope of where it will provide a full review:[188]

> 19 In light of this guidance, the Commission addressed the role of a review panel and concluded that it should apply the following principles to its consideration of the review applications before it:
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> - First, decisions of the Commission are intended to be final; the Commission's rules recognize that a review should only be granted in those limited circumstances described in Rule 016.
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> - Second, the review process is not intended to provide a second opportunity for parties with notice of the application to express concerns about the application that they chose not to raise in the original proceeding.
>
> - Third, the review panel's task is not to retry the ... application based upon its own interpretation of the evidence nor is it to second guess the weight assigned by the hearing panel to various pieces of evidence. Findings of fact and inferences of fact made by the hearing panel are entitled to considerable deference, absent an obvious or palpable error.

The AUC has provided a solid rationale for its approach to applications for review and developed a review procedure to ensure that it does not have to conduct hearings twice. It remains to be seen if the findings in *Yee* will be used to challenge the AUC's approach.

The AUC recently amended Rule 016: *Review of Commission Decisions* (***"Rule 16"***). It has removed errors of law or jurisdiction from the scope of a Commission's review, and has advised

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[188] *EPCOR Energy*, *supra* note 187 at PDF p 7.

that this revision is "… designed to minimize overlap with the Court of Appeal … based on the nature of the question under review or appeal."[189]

INDIGENOUS AND ABORIGINAL ISSUES[190]

I. OVERVIEW OF ABORIGINAL AND INDIGENOUS LAW ISSUES

There have been a number of important Aboriginal law cases over the past year, including cases on the duty to consult.[191] However, in this section, we focus on a case regarding the honour of the Crown, the federal government's plans to adopt the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**") through Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*[192] ("***Bill C-15***"), and the uncertainty that issues regarding Indigenous governance created in early 2020 in the context of the construction of the Coastal GasLink pipeline.

II. HONOUR OF THE CROWN AND ASSESSMENT OF PUBLIC INTEREST

In the *FMFN Decision* the Court found that the AER had failed to consider the honour of the Crown in assessing the public interest. Fort McKay First Nation ("**FMFN**") appealed an approval from the AER for Prosper Petroleum Ltd.'s ("**Prosper**") Rigel bitumen recovery project (the "**Rigel Project**"), which would be located within 5 km of the FMFN's Moose Lake Reserves.

The facts of this case involved a lengthy history of negotiations between the provincial government and the FMFN regarding the Moose Lake Reserves, and a commitment by the

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189 AUC, Bulletin 2021-11 - *Amendments to AUC Rule 016* (May 6, 2021), online (pdf): <https://www.auc.ab.ca/News/2021/Bulletin%202021-11.pdf#search=Bulletin%202021%2D11>.

190 We would like to thank Sandy Carpenter for his thoughts and feedback on this section of the paper.

191 *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34; *Redmond v British Columbia*, 2020 BCSC 561; *Gamlaxyeltxwv British Columbia (Minister of Forests, Lands & Natural Resource Operations*), 2020 BCCA 215.

192 Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Session, 43rd Parl, 2021 (as amended by committee April 26, 2021).

government to create a 10 km buffer zone around the Reserves where the approved Rigel Project was to be located. Negotiations between FMFN and Alberta regarding a Moose Lake Access Management Plan ("**MLAMP**") began in 2003. In March 2015, Premier Prentice and Chief Boucher signed a Letter of Intent (the "**March 2015 LOI**") confirming the mutual commitment and interest in an expedited completion of the MLAMP. The March 2015 LOI contemplated the MLAMP portion covering the area within 10 km of the Moose Lake Reserves by September 30, 2015, with the full draft MLAMP to be completed and approved by March 31, 2016. Notwithstanding the March 2015 LOI, which FMFN referred to as the "Prentice Promise", the MLAMP had still not been finalized at the time that the AER issued its decision approving the Rigel Project.[193] In June 2018, the AER found the Rigel Project to be in the public interest, and approved the project on conditions, subject to authorization by the provincial Cabinet.[194] In its consideration of the public interest, the AER panel did not consider the MLAMP negotiations that contemplated the 10 km buffer zone, the Prentice Promise, or whether these implicate the honour of the Crown.[195]

On appeal, the ABCA concluded that the AER has broad implied jurisdiction to consider constitutional issues, including the honour of the Crown, when it assesses the public interest. It noted that the question raised by the appeal was "whether the AER should have considered the honour of the Crown in relation to the MLAMP negotiations as part of (the public interest) assessment."[196] The ABCA found that the issues that the FMFN put before the AER went beyond the adequacy of Crown consultation (which the AER is prohibited from assessing pursuant to s. 21 of *REDA*), and noted that the "duty to consult" is not the only situation where the honour of the

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193 MLAMP has since been finalized. See Alberta Environment and Parks, *Moose Lake Access Management Plan*, (Edmonton: 8 February 2021), online: <https://open.alberta.ca/publications/moose-lake-access-management-plan>.

194 *FMFN Decision*, *supra* note 161 at para 23.

195 *Ibid* at para 26.

196 *Ibid* at para 43.

Crown arises.[197] This case raised broader issues, which included the Crown's relationship with FMFN and reconciliation.[198] It concluded that:[199]

> We are satisfied that there was no basis for the AER to decline to consider the MLAMP process as part of its assessment of the public interest rather than deferring the issue to Cabinet. The public interest mandate can and should encompass considerations of the effect of a project on aboriginal peoples, which in this case will include the state of negotiations between the FMFN and the Crown. To preclude such considerations entirely takes an unreasonably narrow view of what comprises the public interest, particularly given the direction to all government actors to foster reconciliation. [Emphasis added]

The case was remitted back to the AER, where it is currently in a further process. Since the appeal, the MLAMP has been approved.[200]

The *FMFN Decision* provides an indication of how the ABCA may address cases involving Indigenous issues going forward. Notwithstanding s. 21 of the *REDA*, the ABCA reviewed the existing jurisprudence and found the honour of the Crown goes beyond the adequacy of consultation and sent a strong message that regulators are expected to deal with the difficult Aboriginal questions that come before them, and that governments need to follow through on their commitments to achieve reconciliation. As a result, proponents need to assess Aboriginal issues carefully and not necessarily simply rely on findings of government.

III. UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

UNDRIP was adopted by the United Nations on September 13, 2007 to address issues faced by Indigenous peoples around the world. It consists of 46 articles covering a wide range of topics covering the primary interactions between governments and Indigenous peoples. The Truth and

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197 *Ibid* at para 53.

198 *Ibid* at para 57.

199 *Ibid* at para 68.

200 *Supra* note 193. The matter was remitted back to the AER, but on May 10, 2021 the AER cancelled the hearing, after authorizing the withdrawal of Prosper's applications under the *Oil Sands Conservation Act* and the *Environmental Protection and Enhancement Act.* Notice of Cancelled Hearing - Prosper Rigel Project, online: < https://static.aer.ca/prd/documents/decisions/2021/2021ABAER009.pdf>.

Reconciliation Commission and the National Inquiry into Missing and Murdered Indigenous Women and Girls' Calls for Justice called for the adoption and implementation of UNDRIP in Canada as a framework for reconciliation.[201] While not unanimous, the adoption of UNDRIP has the support of many prominent Indigenous groups.[202]

In response, the federal government recently introduced *Bill C-15*. It is expected that *Bill C-15* will become law in Canada in 2021. Among other things, the legislation as drafted affirms UNDRIP as a source for the interpretation of Canadian law.[203] The federal government issued a Backgrounder to *Bill C-15*,[204] (the "**Backgrounder**") noting that the purpose of *Bill C-15* is "to affirm the Declaration as a universal international human rights instrument with application in Canadian law and provide a framework for the Government of Canada's implementation of the Declaration." On one of the more controversial aspects of UNDRIP, the issue of free, prior and informed consent ("**FPIC**"), the Backgrounder states:[205]

> Free, prior and informed consent is about working together in partnership and respect. In many ways, it reflects the ideals behind the relationship with Indigenous peoples, by striving to achieve consensus as parties work together in good faith on decisions that impact Indigenous rights and interests. Despite what some have suggested, it is not about having a veto over government decision-making.

Some legal analysis finds Canada's proposed adoption of *UNDRIP* a "judicious balance between substance and process and as such … a measured contribution to the debate and action

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201 Truth and Reconciliation Commission of Canada, *Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2012), National Inquiry into Missing and Murdered Indigenous Women and Girls, "Reclaiming Power and Place, The Final Report of the National Inquiry Into Missing Indigenous Women and Girls, Volume 1A", online (pdf): <www.mmiwg-ffada.ca/final-report/> at p 66, PDF p 72.

202 These groups include the Assembly of First Nations, the Metis National Council, the Native Women's Association of Canada, and the Inuit Tapiriit Kanatami.

203 Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples,* 2nd Sess, 43rd Parl, Preamble (first reading 3 December 2020).

204 Government of Canada, Department of Justice, "Backgrounder: Bill C-15 - *United Nations Declaration on the Rights of Indigenous Peoples Act*" (6 April 2021), online: <www.justice.gc.ca/eng/declaration/about-apropos.html>.

205 *Ibid* at PDF p 4.

necessary to achieve reconciliation."[206] However, UNDRIP has also been characterized as a "… blunt instrument, developed in an international setting, that is not reflective of Canada's world-leading legal protections for Indigenous rights" and the suggestion that the adoption of UNDRIP in its entirety could create new uncertainties that could actually hinder the pursuit of reconciliation.[207]

Even though it is unlikely that UNDRIP will be interpreted to provide a "veto" for Indigenous groups who oppose energy projects, the passing of *Bill C-15* is likely to provide additional legal arguments to Indigenous groups who are opposed to particular projects and thereby create further uncertainty in project development. The early 2020 events around the construction of the Coastal GasLink pipeline (discussed below) illustrate this.

IV. COASTAL GASLINK PIPELINE AND UNDRIP

In December 2019, the British Columbia Supreme Court ("**BCSC**") issued an injunction[208] prohibiting protestors from obstructing construction activities for the approved Coastal GasLink pipeline. Coastal GasLink Pipeline Ltd. ("**Coastal GasLink**"), a wholly-owned subsidiary of TC Energy, had obtained all necessary provincial permits and authorizations to construct a 670 km natural gas pipeline from west of Dawson Creek, British Columbia ("**BC**") to a liquified natural gas export facility near Kitimat, BC.[209] Coastal GasLink had entered into community benefit agreements with all of the 20 elected Indigenous Bands along the pipeline route, with financial

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206 Nigel Bankes, "*Implementing UNDRIP: some reflections on Bill C-262*" (27 November 2018), online: *ABlawg.ca* <ablawg.ca/2018/11/27/implementing-undrip-some-reflections-on-bill-c-262/>. The current Bill C-15 is very similar to Bill C-262. See also Adkins et al, "UNDRIP as a Framework for Reconciliation in Canada: Challenges and Opportunities for Major Energy and Natural Resources Projects" (2020) 58:2 Alberta LR.

207 Thomas Isaac, Arend J.A. Hoekstra, "Implementing UNDRIP in Canada: Challenges with Bill C-262", (01 August 2018), online: *Cassells Brock* <cassels.com/insights/implementing-undrip-in-canada-challenges-with-bill-c-262/>.

208 *Coastal GasLink v Huson,* 2019 BCSC 2264 [*Coastal GasLink*].

209 *Ibid* at para 11.

benefits for the Indigenous Bands expected to exceed $338 million cumulatively over the life of the project.[210]

In 2012, a protest was instigated by a small number of members of the Wet'suwet'en Nation, who set up a blockade on the Morice River Bridge, with the purpose of preventing industrial projects, including the Coastal GasLink project. The BCSC noted that the Wet'suwet'en people have both hereditary and *Indian Act*[211] Band council governance systems. The parties to the protest included some hereditary chiefs from the Wet'suwet'en Nation.[212] The twenty elected band councils along the pipeline that entered into community and benefit agreements with Coastal GasLink, included all five Wet'suwet'en band councils who also entered into Pipeline Benefit Agreements with the province of BC.[213] The hereditary chiefs asserted that the elected band councils could only exercise federal jurisdiction with regard to reserve lands, while the band councils disputed this.[214] The BCSC found that among the Wet'suwet'en there was significant disagreement regarding the Coastal GasLink pipeline project and who had the authority to make decisions on behalf of the Wet'suwet'en people:[215]

> 134 The evidence before me indicates significant conflict amongst members of the Wet'suwet'en nation regarding construction of the Pipeline Project, including disagreements amongst the Wet'suwet'en people as to whether traditional hereditary governance protocols have or have not been followed, whether hereditary governance is appropriate for decision-making that impacts the entire Wet'suwet'en nation and the emergence of other groups, such as the Unist'ot'en, which purports to be entitled to enforce Wet'suwet'en law on the authority of Chief Knedebeas and more recently the WMC, which apparently seeks to challenge the authority of the hereditary chiefs to make decisions for the Wet'suwet'en nation as a whole and the manner in which the traditional governance processes have occurred.
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> 135 The Unist'ot'en, the WMC, the Gidumt'en, the Sovereign Likhts'amisyu and the Tsayu Land Defenders all appear to operate outside the traditional governance structures, although they each assert through various means their own authority to apply and enforce

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210 *Ibid* at para 66.

211 RSC 1985, c I-5.

212 *Coast GasLink*, supra note 208 at paras 53-62.

213 *Ibid* at para 66.

214 *Ibid* at para 67.

215 *Ibid* at paras 134-137.

> Indigenous laws and customs. It is not clear whether the emergence of some of these groups is, as the defendants allege, an attempt by the plaintiff to circumvent the Wet'suwet'en legal process or if it is part of the continuing evolution of Wet'suwet'en governance.
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> 136 The Indigenous legal perspective in this case is further complicated by the fact that the Wet'suwet'en people have both hereditary and Indian Act Band council governance systems and there is dispute over the extent of the jurisdictions of each of those governance systems. The five Wet'suwet'en Bands under the Indian Act have a different perspective with respect to the Pipeline Project and have entered into various project and benefit agreements, which are expected to provide significant and meaningful financial and other benefits to their community.
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> 137 All of this evidence suggests that the Indigenous legal perspective in this case is complex and diverse and that the Wet'suwet'en people are deeply divided with respect to either opposition to or support for the Pipeline Project.

Although the BCSC granted the injunction against the individuals who were blocking access to the Coastal GasLink pipeline route, the injunction led to further conflict. Wet'suwet'en hereditary chiefs refused to abandon the blockade, and were joined by other protestors, some of whom were not Indigenous.[216] Protests and various blockades erupted across the country in support of the Wet'suwet'en hereditary chiefs, including blockades of rail traffic in Ontario and Québec, which disrupted commuter lines and affected the shipment of goods across Canada.[217] After the federal government reached a draft accord with the hereditary chiefs the protests largely ended.[218] A subsequent Memorandum of Understanding between a group of hereditary chiefs, BC, and the

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216 Eric Andrew-Gee, Ian Bailey and Les Perreaux, "Who's leading the pro-Wet'suwet'en blockades, and who's not", *The Globe and Mail* (22 February 2020) online: <www.theglobeandmail.com/canada/article-its-the-people-who-decide-whos-leading-the-pro-wetsuweten/>.

217 Catharine Tunney, "Arrests, travel disruptions as Wet'suwet'en solidarity protests spread across Canada", *CBC* (25 February 2020) online: CBC.ca <www.cbc.ca/news/politics/blockades-continue-hamilton-bc-1.5474916>; Vincenzo Morello, "Rail blockades in Quebec remain despite Wet'suwet'en agreement", *RCI* (4 March 2020) online: Radio Canada International, <www.rcinet.ca/en/2020/03/04/rail-blockades-in-quebec-remain-despite-wetsuweten-agreement/>.

218 Hina Alam, "Wet'suwet'en supporters of pipeline say their message isn't being heard ", *The National Observer* (2 March 2020), online: <www.nationalobserver.com/2020/03/02/news/wetsuweten-supporters-pipeline-say-their-message-isnt-being-heard>.

federal government has been challenged by other members of the Wet'suwet'en Nation, including the Wet'suwet'en Elected Chiefs[219] and members of the Wet'suwet'en Matrilineal Coalition.[220]

The complexity of the Wet'suwet'en Indigenous governance issues which included international coverage was generally not addressed in the media.[221] Perhaps most notably, the United Nations Committee on the Elimination of Racial Discrimination (the "**UN Committee**") issued a letter in December 2019, calling on Canada to halt all construction and suspend all permits and approvals for the Coastal GasLink project until the Wet'suwet'en people granted their consent "following the full and adequate discharge of the duty to consult".[222] However, when it issued this decision, the UN Committee appeared to be unaware of the fact that 20 elected band councils along the pipeline route had participated in five years of consultation, had negotiated agreements, and had consented to the Coastal GasLink pipeline.[223] In November, 2020, the UN Committee issued a further letter regarding the Project, which criticized Canada's approach:[224]

> The Committee regrets the State party interprets the free, prior and informed consent principle as well as the duty to consult as a duty to engage in a meaningful and good faith dialogue with indigenous peoples and to guarantee a process, but not a particular result. In this regard, the Committee would like to draw its attention on the Committee's general

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219 "Statement from Wet'suwet'en Elected Leadership Regarding Wet'suwet'en Memorandum of Understanding" (1 May 2020), online (pdf): <http://www.wetsuweten.com/files/May_1,_2020_Joint_Statement_from_Elected_Bands.docx.pdf>.

220 See *House of Commons Standing Committee on Indigenous and Northern Affairs* (Evidence of Theresa Tait Day) 43rd Parl, 1st Session No. 004 (10 March 2020) at 12:42 pm to 13:18 pm, online: *ourcommons.ca* https://www.ourcommons.ca/DocumentViewer/en/43-1/INAN/meeting-4/evidence. See also Nelson Bennett, "Female hereditary chiefs challenge Wet'suwet'en MOU"*, Prince George Citizen*, (23 November 2020), online: <www.princegeorgecitizen.com/news/local-news/female-hereditary-chiefs-challenge-wet-suwet-en-mou-1.24244057>.

221 Amber Bracken and Lyland Cecco, *"*Canada: protests go mainstream as support for Wet'suwet'en pipeline fight widens*", The Guardian* (14 February 2020), online: <www.theguardian.com/world/2020/feb/14/wetsuweten-coastal-gaslink-pipeline-allies>.

222 *Prevention of Racial Discrimination, Including Early Warning and Urgent Action Procedure* (13 December 2019), Decision 1 (100), online (pdf): UN Committee on the Elimination of Racial Discrimination <tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/INT_CERD_EWU_CAN_9026_E.pdf>.

223 The Canadian Press, "Indigenous pipeline supporters slam human-rights advocates over Coastal GasLink stance", *CBC* (22 January 2020), online: <www.cbc.ca/news/canada/british-columbia/coastal-gaslink-pipeline-indigenous-human-rights-1.5435854>.

224 UN Committee on the Elimination of Racial Discrimination, letter to Leslie Horton, Permanent Representative of Canada to the United Nations Office, Geneva (24 November 2020), online: <tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fALE%2fCAN%2f9296&Lang=en>.

> recommendation No. 23 (1997) on the rights of indigenous peoples, in which it calls upon States parties to ensure that no decisions directly relating to the rights or interests of indigenous peoples is taken without their informed consent.

The Coastal GasLink situation illustrates the potential issues that could be raised if UNDRIP is affirmed through the passage of *Bill C-15*. While the federal government's Backgrounder to *Bill C-15* indicates that FPIC does not amount to a veto, that interpretation does not appear to be shared by the UN Committee. Indigenous governance issues also form a crucial part of UNDRIP, in particular articles 18, 19 and 20.[225] When applying these articles to the Coastal GasLink pipeline project, it is not clear who the representatives of the Wet'suwet'en people are. Are the elected band councils the true representatives? Are the hereditary chiefs? Or should there be a different decision-making process developed by the Wet'suwet'en people? These are complex questions, that must ultimately be addressed by the Wet'suwet'en. These questions may also never be resolved to the satisfaction of all Wet'suwet'en people.

We note that the adoption and implementation of UNDRIP is about far more than energy projects. The recent horrific discovery of the bodies of 215 children in unmarked graves at a residential school in Kamloops, B.C.[226] emphasizes the significance, sensitivity and urgency of Canada's reconciliation efforts with our Indigenous peoples. While we agree that Canada has highly developed jurisprudence in the areas of Aboriginal and Indigenous law, and existing legal frameworks will inform how UNDRIP is interpreted in the Canadian context, we expect that in the energy sector, UNDRIP will lead to additional uncertainty. Canada's well-developed jurisprudence on Aboriginal and Indigenous law in the energy sector will need to continue to evolve to achieve

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[225] These articles address the right to maintain Indigenous decisions making institutions; the obligation of States to consult and cooperate through Indigenous representative institutions, and the right to maintain and develop Indigenous political institutions.

[226] Courtney Dickson, Bridgette Watson, *"Remains of 215 children found buried at former B.C. residential school, First Nation says",* CBC (27 May 2021), online: <https://www.cbc.ca/news/canada/british-columbia/tk-eml%C3%BAps-te-secw%C3%A9pemc-215-children-former-kamloops-indian-residential-school-1.6043778>.

responsible energy development consistent with respect for Indigenous peoples' rights as we continue working towards reconciliation.