RECENT LEGISLATIVE AND REGULATORY DEVELOPMENTS OF INTEREST TO ENERGY LAWYERS

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EXECUTIVE SUMMARY

The past year saw a number of important energy-related regulatory and legislative changes in Canada. Tensions continued to increase among those with competing views of what Canada's energy-resource-related laws and regulatory bodies should be accomplishing. Major market access pipelines, notably the Trans Mountain Expansion Project, pressed forward in their continued

struggle to progress. Climate change concerns drove legislative change in the form of Bill C-69 and the federal carbon price. One common thread is that Canadians are becoming increasingly involved in the regulatory decisions that shape the future of Canada's resources and the direction of industry.

This paper provides a high-level overview of key regulatory and legislative developments across Canada between the start of June 2019 and mid-April 2020. In preparing this paper, the authors reviewed decisions, regulation, policy and both federal and provincial legislation.

1. *VALIVOV* AND THE NEW STANDARD OF REVIEW

On December 19, 2019, the Supreme Court of Canada ("**SCC**") issued its highly anticipated decision in *Canada (Minister of Citizenship and Immigration) v Vavilov* ("***Vavilov***")[2] where the SCC once again reconsidered the approach to the standard of review of administrative decisions.

1.1 Determining the Standard of Review

The standard of review analysis now (formally) begins with a presumption that the standard is reasonableness, without the need for a contextual analysis. The legislature created a statutory decision-maker, and presumably intended that decision-maker to fulfil its mandate with minimal interference.[3] The presumption can be rebutted in either of the following two circumstances, both of which occur in multiple ways.

1. Where the *statutory language* requires a different standard of review. For this circumstance to apply, one of the following two conditions must be met: the statute dictates the standard of review; or, the statute creates a statutory appeal (including where leave or permission to appeal is required).
2. Where the *rule of law* requires a correctness standard of review because the issue being reviewed relates to: a constitutional question; a question of importance to the legal system as a whole; or, a question about the jurisdictional boundaries between two or more administrative bodies.

The SCC did not identify any other situations where it would be appropriate to deviate from the reasonableness standard. The SCC refused to "close" the list but did warn that rebutting the presumption of reasonableness would require exceptional circumstances.[4]

1.2 Rebutted by Statutory Language

Statutory language will rebut the presumption that the standard of review is reasonableness in two circumstances. The first is where the statute clearly sets out the standard of review, in which case that standard should be applied, subject to limits imposed by the rule of law.[5] The second is where the statute creates a statutory appeal (including where leave or permission to appeal is required), in which case the appellate standard of review, set out by the SCC in *Housen v Nikolaisen*,[6] applies.

The appellate standard of review incorporates two different standards of review, one for questions of law and another for questions of fact.

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[2] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].
[3] *Ibid* at para 24.
[4] *Ibid* at paras 69-70.
[5] *Ibid* at paras 34-35.
[6] *Housen v Nikolaisen*, 2002 SCC 33.

1. Questions of law, including interpretation of the decision maker's home statute, will be reviewed on a correctness standard.
2. Questions of fact will be reviewed on a "palpable and overriding error" standard.[7]

In many cases, statutory appeals of administrative decision makers are limited to questions of law or jurisdiction,[8] in which case the standard of review will be correctness.

In *Vavilov*, the SCC concluded that there was no reason to give different meanings to the word "appeal" in the administrative law context than in the criminal or commercial context. The SCC also concluded that using the appellate standard of review for statutory appeals also helps explain why some statutes provide for both statutory appeals and judicial review, since that suggests the legislatures envisioned two different roles for reviewing courts.[9] For example, the *Canadian Energy Regulator Act* [10] (the "**CERA**") provides for a statutory appeal from a decision or order from the Canadian Energy Regulator (the "**CER**") on questions of law or jurisdiction,[11] and a judicial review from decisions by the Governor in Council ("**GiC**") following a report from the CER.[12]

The introduction of the appellate standard of review represents a significant shift in the standard of review analysis. This shift may impact whether leave to appeal is granted from decisions issued by the Alberta Utilities Commission (the "**AUC**") or the Alberta Energy Regulator (the "**AER**"). The Alberta Court of Appeal (the "**ABCA**") considers the standard of review as a factor in determining whether to grant permission to appeal. The ABCA has historically been less likely to grant permission to appeal where a more deferential standard of review would apply.[13]

Ultimately, it will be up to the various legislatures to decide whether any legislative changes are required as a result of *Vavilov*. However, at present, the standard of review of a statutory appeal from an administrative tribunal on a question of law or jurisdiction is correctness. The ABCA has confirmed that the correctness standard applies to statutory appeals from AER decisions on a point of law.[14]

1.3 Rebutted by the Rule of Law

Where there is no statutory appeal, reasonableness will be the presumptive standard of review, even for questions of law. However, there will be three circumstances where the rule of law requires courts to apply a correctness standard, rebutting the presumption that the standard of review is reasonableness. The SCC confirmed that constitutional questions[15] and questions of central importance to the legal system as a whole (now regardless of whether they are within the administrative decision maker's expertise)[16] should be reviewed on a correctness standard.

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[7] *Vavilov*, *supra* note 2 at paras 36-37.
[8] See for example: *Canadian Energy Regulator*, SC 2019, c 28, s 72 [CERA], *Alberta Utilities Commission Act*, SA 2007, c A-37.2, s 29 [AUCA], *Responsible Energy Development Act*, SA 2012, c R-17.3, s 45 [REDA], and *Ontario Energy Board Act*, SO 1998, c 15, Sch B, s 33 [OEBA].
[9] *Vavilov*, *supra* note 2 at para 44.
[10] CERA, *supra* note 8.
[11] *Ibid*, s 72.
[12] *Ibid*, s 188.
[13] See for example: *Wood Buffalo (Regional Municipality) v Alberta (Energy and Utilities Board)*, 2007 ABCA 192 at para 5, *Equs Rea Ltd v Alberta (Utilities Commission)*, 2019 ABCA 277 at para 12, and *Cymaluk v TransAlta Corporation*, 2018 ABCA 429 at para 24.
[14] *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163 at para 29 [*Fort McKay*].
[15] *Vavilov*, *supra* note 2 at para 55.
[16] *Ibid* at para 58.

Additionally, the SCC finally did away with the category of "true questions of jurisdiction,"[17] replacing it with questions about the jurisdictional boundaries between two or more administrative bodies that must be reviewed on a correctness standard to ensure predictability and certainty in administrative law.[18]

1.4 Application of the reasonableness standard

A reasonableness review considers both the outcome and the process. A reviewing court should refrain from deciding the issues themselves, or from ascertaining the "range" of reasonable outcomes.[19] As a court should not decide the issue itself, a reviewing court can arguably no longer avoid discussing standard of review by concluding that the decision is correct and therefore should be upheld regardless of the standard of review. Similarly, a reviewing court should arguably refrain from concluding that an administrative decision was incorrect (in the sense that the reviewing court would have come to a different conclusion) but still reasonable.

The SCC confirmed that reasonableness is a single standard; a reviewing court should not change the level of scrutiny depending on the context.[20]

Where reasons are provided, they will be the primary mechanism to demonstrate whether the decision is reasonable.[21]

Generally, there will be two types of flaws that lead to an unreasonable decision; either the reasoning is not rational, or the decision cannot be justified considering the factual or legal circumstances or both.[22]

When reasons are not provided (and not required by procedural fairness), the court must look to the record before the decision maker, which may reveal a rational for the decision. The analysis may inevitably focus more on the outcome rather than the reasoning process when there are no reasons to review.[23]

When a decision is unreasonable, the reviewing court will typically remit the matter to the administrative decision maker to reconsider the issues in a manner consistent with the reviewing court's reasons.[24] However, in certain circumstances a court may conclude that the outcome is inevitable, in which case it may not be useful to remit the matter to the statutory decision maker.[25]

2. FEDERAL REGULATORY CHANGES

The past year has seen significant changes to the federal regulatory landscape because of the passing of Bill C-69 and Bill C-48 by the federal government. This section explores these changes and the notable Enbridge Mainline System ("**EMS**") decision from the Canadian Energy Regulator ("**CER**").

[17] *Ibid* at para 65.
[18] *Ibid* at paras 63-64.
[19] *Ibid* at para 83.
[20] *Ibid* at para 61.
[21] *Ibid* at para 81.
[22] *Ibid* at para 101.
[23] *Ibid* at paras 137-8.
[24] *Ibid* at para 141.
[25] *Ibid* at para 142.

2.1 Bill C-69

Bill C-69[26] came into force on August 28, 2019 repealing the NEB *Act*[27] (the "**NEBA**") and the *Canadian Environmental Assessment Act, 2012*[28] (the "**CEAA, 2012**") and replacing them with the CERA, and the *Impact Assessment Act*[29] (the "**IAA**") respectively. This resulted in the replacement of the National Energy Board (the "**NEB**") with the CER.

The CERA introduces a new governance structure, separating adjudication and administrative functions. Under the administrative function, the CER will be governed by a Board of Directors appointed by Federal Cabinet with at least one director being an Indigenous person. The Commission of the CER (the "**CER Commission**") will assume the adjudicative and regulatory functions formerly performed by the NEB and is an independent tribunal housed within the CER.

The CERA maintains the same basic structure as the NEBA, subject to some notable amendments. Two of the most notable amendments are what the CER Commission must consider for recommending projects and the IAA review panel requirement for projects formerly under the NEB jurisdiction.

The list of considerations that the CER Commission must consider has been significantly expanded from the factors the NEB was required to consider under the NEBA.[30] These factors relate to the inclusion of gender considerations along with environmental concerns and indigenous rights.

Additionally, the CERA now requires all "designated projects" under the IAA to be assessed by an IAA review panel, not the CER, with at least one member of the review panel being a CER Commissioner.[31] This review panel requirement is entirely new[32] for projects that are regulated by the CER.

The *Physical Activities Regulations*[33] of the IAA provides the list of "designated projects" and includes the construction of a new pipeline requiring 75 km or more of new right of way.[34] For such projects, the list of factors that must be considered under the IAA (section 22(1)) is much longer than the list of factors under the CERA (section 183(2)). Furthermore, as outlined below, the IAA requires the Minister of Environment, when considering whether a designated project is in the public interest, to consider broad factors, such as the extent to which the project hinders or contributes to Canada's ability to meet its environmental obligations in respect of climate change.

Other notable changes in the CERA include the codification of the "polluter pays" principle[35] and the establishment of a new "orphan pipeline" funding mechanism, which allows the CER to fund

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[26] Bill C-69: *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st Session, 42nd Parliament, (Assented to June 21, 2019), SC 2019, c 28.
[27] RSC 1985, c N-7 [*NEBA*].
[28] SC 2012, c 19, s 52 [*CEAA*, 2012].
[29] SC 2019, c 28, s 1 [*IAA*].
[30] CERA, *supra* note 8, s 183(2)(a)-(e) and (k). Subsections 183(2)(f) - (i) and (l) repeat the factors in section 52(2) of the NEBA, *supra* note 27.
[31] CERA, *supra* note 8, s 185.
[32] Under CEAA, 2012, the NEB was the "responsible authority" for designated projects that included activities regulated by the NEB: CEAA, *supra* note 28, s 15(b).
[33] SOR/2019-285.
[34] *Ibid*, Schedule s 41. These regulations came into force on August 28, 2019 concurrent with Bill C-69.
[35] CERA, *supra* note 8, ss 137-142.

the abandonment and clean-up of pipelines where the certificate holder cannot be found or no longer exists.[36]

The "directly affected" standing test for interveners in pipeline applications has also been removed from CERA. The Act states that the CER can consider public comments in a manner specified by the Commission.[37]

The CERA made notable changes in terms of its relationship with Indigenous peoples including the codification of the CER's duty to consult and to consider impacts of decisions on the rights of Indigenous peoples,[38] providing for collaborative processes involving the CER and "Indigenous governing bodies,"[39] and requiring permission to be obtained from the Band Council to conduct work on reserve lands.[40] The NEBA made no specific reference to Aboriginal and Indigenous peoples of Canada, although the NEB routinely dealt with projects that affected traditional territories and considered impacts on Aboriginal and Indigenous peoples of Canada.

Finally, the CERA codified new review and approval timelines for CERA applications (i.e. not subject to IAA panel review).[41]

The CER has generally adopted the regulations of the NEB, updating references to the NEB to the CER. Substantive amendments have been made to the *Onshore Pipeline Regulations*[42] and regulations related to international and interprovincial power lines. For the latter, the *Power Line Crossing Regulations*[43] have been replaced by two regulations, the *International and Interprovincial Power Line Damage Prevention Regulations - Authorizations*[44] and the *International and Interprovincial Power Line Damage Prevention Regulations – Obligations of Holders of Permits and Certificates*.[45]

2.1.1 IAAC and IAA

Bill C-69 also repealed and replaced the CEAA, 2012 with the IAA, thereby replacing the Canadian Environmental Assessment Agency with the Impact Assessment Agency of Canada ("**IAAC**").

The IAAC is now the single agency responsible for conducting all federal "impact assessments" for all designated projects under the *Physical Activities Regulations*[46] and projects that are designated by the Minister of Environment on his or her request or own initiative.[47] One of the first major projects being reviewed by the IAAC is a 780 km natural gas pipeline between northeastern Ontario and Saguenay, Quebec (the "**Gazoduq Project**"). This pipeline would bring liquified natural gas ("**LNG**") to the Énergie Saguenay LNG terminal for export.[48]

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[36] *Ibid*, ss 243-246.
[37] *Ibid*, s 183(3).
[38] *Ibid*, s 58(2.1).
[39] *Ibid*, s 76.
[40] *Ibid*, s 317.
[41] *Ibid*, ss 183(4), 214(4), 262(5), 298(5) and 346 (1).
[42] SOR/99-294.
[43] SOR/95-500.
[44] SOR/2019-347.
[45] SOR/2020-49.
[46] *Physical Activities Regulation*, *supra* note 33, s 2.
[47] IAA, *supra* note 29, s 9.
[48] Énergie Saguenay, "Project Summary" online: <https://energiesaguenay.com/en/project/project-summary/>.

Contrary to CEAA, 2012, and similar to the CERA, the IAA requires consideration of impacts of a designated project beyond environmental to health, social and economic and Indigenous impacts and imports considerations, such as the impact of the project on the federal government's ability to meet its commitments on climate change and the intersection of sex and gender with other identity factors.[49]

Under the IAA, the political-decision making structure set out in CEAA, 2012 is largely retained, with final approval coming from the Minister or GiC. However, consistent with the use of "impact assessment" in the IAA, the focus of the Minister's decision under the IAA is whether the proposed project is "in the public interest,"[50] rather than whether the project causes "significant adverse environmental effects." This requires consideration of sustainability, Indigenous groups and the extent to which the project hinders or contributes to Canada's ability to meet its environmental obligations in respect of climate change.[51]

Like CERA, there is no test for standing in the IAA.[52] This creates uncertainty for proponents' designated projects. However, the IAA does include improved timelines for assessments that are favorable to proponents, including reducing the maximum timeline and ministerial decision timeline for a standard assessment and review panel assessment, although these legislated timelines can be increased or suspended by the GiC.[53] It therefore remains to be seen whether these new deadlines will have any real impact on the timeline for regulatory approvals from the IAAC.

The IAA includes provisions that allow the assessment processes of another jurisdiction (e.g. provinces and Indigenous jurisdictions[54]) to be substituted for the federal process.[55] However, any substituted process will have to consider the impacts of proposed projects beyond environmental impacts and must address the opinions of relevant federal authorities and Indigenous peoples in addition to considering regional impacts.

2.2 CER – Enbridge Mainline Decision and other notable decisions

One of the most notable decisions of the CER in the past year was its decision to quash the open season of Enbridge Energy Inc. ("**Enbridge**") related to contract carriage on the Enbridge Mainline System ("**EMS**").

The EMS is the only major Canadian oil pipeline to operate entirely as a common carrier.[56] This contrasts with other major pipelines in the country that utilize a "contract carriage" model where two categories of service are offered: committed (or firm) and uncommitted (spot or interruptible).

For contract carriage pipelines, the NEB found that the common carrier requirement in the NEBA[57] was satisfied when an oil pipeline company conducted a reasonable open season[58] for firm contract service with some capacity available to shippers for uncommitted service.

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[49] IAA, *supra* note 29, s 22(1).
[50] *Ibid*, s 60.
[51] *Ibid*, s 63.
[52] *Ibid*, ss 11, 27 and 99.
[53] *Ibid*, ss 28(7) and 37.
[54] *Ibid*, s 2, defining "jurisdiction".
[55] *Ibid*, ss 31-33.
[56] NEB Report, "Western Canadian Crude Oil Supply, Markets, and Pipeline Capacity" (December 2018) at 17, online: <https://www.cer-rec.gc.ca/nrg/sttstc/crdlndptrlmprdct/rprt/2018wstrncndncrd/2018wstrncndncrd-eng.pdf>.
[57] NEBA, *supra* note 27, s 71(1) (now s 239 in CERA).
[58] A process where a pipeline company openly offers pipeline capacity (existing or new) to the market and receives bids for that capacity.

On August 2, 2019, Enbridge announced that it was holding an open season to allow shippers to enter into long-term contracts for firm service on the EMS.[59]

In response, Suncor Energy Inc. ("**Suncor**") filed a complaint and application with the NEB requesting a declaration that Enbridge may not offer contract carriage service on the EMS until such contract carriage, and associated terms and conditions, including tolls, are approved by the NEB in Enbridge's EMS tariff.[60] The CER also received submissions from Shell Canada Limited, The Explorers and Producers Association of Canada and Canadian Natural Resources Limited, all requesting similar relief.[61]

On September 27, 2019, in one of its first formal decisions, the CER Commission granted the relief requested by Suncor, effectively quashing the open season.[62] The CER Commission emphasized that it was guided by the established regulatory framework, including past decisions of the NEB regarding toll and tariff regulation, the importance of fairness and transparency in open season processes, and the prevention of abuse of market power, both in substance and appearance.[63] As one legal scholar highlighted in his review of this decision, this display of regulatory continuity from the CER should come as a relief to the industry and investors.[64]

The CER Commission agreed with Suncor and the other objecting parties that Enbridge's open season was unfair to shippers. It noted that many shippers had no choice but to participate, with some having to do so in order to maintain existing business operations, and that the open season had given a broad cross-section of the market an apprehension that Enbridge may have exercised its market power.[65] The CER Commission concluded that potential shippers would benefit from a regulatory review of the terms and conditions of firm service on the EMS prior to making contract decisions. The CER emphasized that Enbridge's specific and unique circumstances put Enbridge "in a dominant position in the market"[66] that necessitated the CER Commission's intervention in the open process, but such intervention should be rare, agreeing with its predecessor (the NEB) that it was not in the industry's best interest for it to be dictating the terms and processes of open seasons, "unless it is necessary in the circumstances".[67]

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[59] Enbridge News Release, "Enbridge to Hold Open Season for Transportation Services on Canadian Mainline Pipeline System" (August 2, 2019), online: < https://www.enbridge.com/media-center/news/details?id=123583&lang=en>.

[60] Suncor Energy Inc., *Suncor Compliant and Application, Re: Enbridge Pipelines Inc. Canadian Mainline Open Season* (23 August 2019), at para 1(a). Available online: <https://apps.cer-rec.gc.ca/REGDOCS/Item/Filing/C01156>.

[61] Complaints from Suncor, Shell, EPAC and CNRL, concerning Enbridge's open season can be found online at: <https://apps.cer-rec.gc.ca/REGDOCS/Item/Filing/C01156> (Suncor); <https://apps.cer-rec.gc.ca/REGDOCS/Item/Filing/C01179> (Shell); <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3817266> (Explorers and Producers Association of Canada); <https://apps.cer-rec.gc.ca/REGDOCS/Item/Filing/C01212> (Canadian Natural Resources Limited).

[62] Canada Energy Regulator, *Suncor Energy Inc. (Suncor), Shell Canada Limited (Shell), The Explorers and Producers Association of Canada (EPAC), and Canadian Natural Resources Limited (CNRL) Complaints regarding Enbridge Pipelines Inc. (Enbridge) Mainline Open Season*, File OF-Tolls-Group1-E101-TFGen 01 (27 September 2019) at 2 [*Suncor's Open Season Decision*]. Available online: < https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3828616>

[63] *Ibid*, at 1-2.

[64] Nigel Bankes, "The Canadian Energy Regulator Shuts Down the Open Season for Enbridge's Mainline" (4 October 2019), online: <https://ablawg.ca/2019/10/04/the-canadian-energy-regulator-shuts-down-the-open-season-for-enbridges-mainline/>.

[65] *Suncor's Open Season Decision*, *supra* note 62, at 2.

[66] Such specific and unique circumstances included the fact that Enbridge controlled over 70 per cent of the oil transportation capacity out of the Western Canadian Sedimentary Basin, the lack of alternative transportation options for potential shippers, that the proposed model would reduce uncommitted oil pipeline capacity from 80% to 15% of the total available capacity for transport out of Western Canada, and the considerable opposition to the proposed model by market participants: *Suncor's Open Season Decision*, *supra* note 62, at 2.

[67] *Ibid*, at 3 [emphasis in original].

This decision is welcome news for shippers on major pipelines in Canada. The lack of capacity that has plagued the shipment of oil from Western Canada to other markets has given companies that operate such pipelines a very favourable market position and the potential to exercise market power. This decision acknowledges that the CER will be alert to the concerns of shippers regarding the exercise of such market power or the apprehension of such an exercise.

In the past year, the CER Commission has also approved the expansion of the NOVA Gas Transmission Limited[68] ("**NGTL**") transmission system (the "**NGTL System**") and the tolling methodology, including the tolling methodology for the new North Montney Mainline.[69] In both cases the CER Commission applied existing principles set by the NEB. This is a promising signal to industry that there will be continuity of well-established principles. However, both applications were initiated under the NEBA, and the CER Commission decided those applications under the NEBA and not the CERA,[70] so it remains to be seen whether that will hold true for decisions decided under the CERA.

2.3 Provincial reception of Bill C-69

Alberta and several other provincial and territorial jurisdictions have expressed strong concerns about the new impact assessment regime implemented by Bill C-69.[71]

In September 2019, the Government of Alberta filed a reference with the ABCA to challenge the constitutionality of Bill C-69.[72] Alberta raised two issues with respect to Bill C-69: whether the IAA is unconstitutional as it is beyond the legislative authority of the federal government; and whether the *Physical Activities Regulation* is unconstitutional because its environment assessment requirement relates to a matter entirely within the authority of the provinces.[73] The Governments of Saskatchewan and Ontario both indicated their intention to intervene in this matter in support of Alberta, and were given intervenor status by the ABCA on March 4, 2020.[74]

2.4 Bill C-48

On June 21, 2019, Bill C-48[75] received royal assent concurrently with Bill C-69. Bill C-48, now the *Oil Tanker Moratorium Act*, prohibits oil tankers from stopping or unloading at ports along the

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[68] NGTL is a wholly-owned subsidiary of TC Energy Corporation ("TC Energy") which was formerly TransCanada Corporation.
[69] CER, Canada Energy Regulator Report, NOVA Gas Transmission Ltd., GH-003-2018 at 12. Available online: <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90550/554112/3422050/3575553/3575989/3905746/C04761-1_Canada_Energy_Regulator_Report_-_NOVA_Gas_Transmission_Ltd._GH-003-2018_-_A7D5G0.pdf?nodeid=3905626&vernum=-2>; Canada Energy Regulator, Reasons for Decision RH-001-2019 and Orders TG-001-2020 and TG-002-2020 – NOVA Gas Transmission Ltd., NGTL System Rate Design and Services, (C05448) 25 March 2020. Available online: <https://apps.cer-rec.gc.ca/REGDOCS/File/Download/3912507>.
[70] Pursuant to the transitional provision in section 36 of transitional provisions to the CERA, *supra* note 8, in Bill C-69, *supra* note 26.
[71] In June 2019, the Premiers of Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and the Northwest Territories wrote a joint letter to Prime Minister Justin Trudeau, in which they stated Bill C-69 "would make it virtually impossible to develop critical infrastructure, depriving Canada of much needed investment." (House of Commons, *House of Commons Debate*, Vol 148, Number 432, 1st Session, 42nd Parliament (12 June 2019) at 29013. Available online: <https://www.ourcommons.ca/Content/House/421/Debates/432/HAN432-E.PDF>.
[72] Province of Alberta, *Order in Council*, OC 160/2019 (9 September 2019) online: <https://s3.amazonaws.com/tld-documents.llnassets.com/0015000/15151/ref(a)-1901-0276acper cent20(1).pdf>.
[73] *Ibid*.
[74] *Reference re Impact Assessment Act*, 2020 ABCA 94. See also, Government of Canada, "Briefing Book for the Minister of Intergovernmental Affairs" (14 February 2020), online: <https://www.canada.ca/en/intergovernmental-affairs/corporate/transparency/briefing-documents.html>.
[75] Bill C-48: *An Act respecting the regulation of vessels that transport crude oil or persistent oil to or from ports or marine installations located along British Columbia's north coast*, 1st Session, 42nd Parliament, 65-65-66-67-68 Elizabeth II (Assented to June 21, 2019).

northern coast of BC if they contain more than 12,500 metric tons of crude oil;[76] it also prohibits vessels from transporting crude oil between tankers, floating ports or marine installations.[77] Contravention of the Act could result in penalties of up to five million dollars.[78]

The governments of Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and the Northwest Territories have expressed strong concerns that Bill C-48 will discourage investment and negatively impact their economies.[79] Alberta has been particularly critical of the Bill and while Premier Jason Kenney stated he intended to challenge the constitutional validity of Bill C-48, Alberta has yet to do so.[80]

3. MARKET ACCESS: NOT JUST A PIPE-DREAM

Construction of energy infrastructure to improve market access continues to be a challenge for Canadian energy companies. However, in the past year some of these companies have made small gains towards achieving market access for their major pipeline projects.

3.1 Curtailment in Alberta

In 2018, Alberta produced more oil than it could export by rail or pipeline, which led to increased storage levels. Faced with low oil prices and large price differentials between West Texas Intermediate and Western Canadian Select, the Government of Alberta introduced the *Curtailment Rules*[81] in late 2018 to limit production from both conventional oil fields and oil sands.[82] The *Curtailment Rules* allow the Minister of Energy to issue orders limiting the amount of oil that a company can produce.

The *Curtailment Rules* were originally set to expire at the end of 2019. However, the *Curtailment Rules* have been extended to December 31, 2020.[83] Since the *Curtailment Rules* were brought in to address a lack of pipeline capacity, the extension may have been prompted by permitting delays to Enbridge's Line 3 Replacement Project which caused the company to delay the projected in-service date from late 2019 to the second half of 2020.[84]

In October 2019, the *Curtailment Rules* were amended to allow the Minister of Energy to grant special production allowances to operators who demonstrate that additional production will be shipped by new rail capacity.

In December 2019, the Government of Alberta exempted new conventional oil wells from curtailment to encourage the drilling of new wells, which would create jobs. This contrasts with the initial policy behind curtailment, which was to limit production to reduce storage levels, at least until additional capacity to transport the product to market was established. This recent

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[76] *Oil tanker Moratorium Act*, SC 2019, c 26, s 4.
[77] *Ibid.*
[78] *Ibid*, s 25.
[79] David Akin, "In 'Urgent Letter,' 6 Premiers Tell Trudeau National Unity Would be Threatened if Bills C-48, C-69 Become Law" (10 June 2019), online: <https://globalnews.ca/news/5374642/ford-kenney-moe-pallister-higgs-letter-to-trudeau/>.
[80] Shaughn Butts, "Watch: Premier Kenney Will Fight Bill C-48 and Bill C-69 in Court" (22 June 2019), online: <https://edmontonjournal.com/news/local-news/watch-premier-kenney-will-fight-bill-c-48-and-bill-c-69-in-court/>.
[81] Alta Reg 214/2018.
[82] Alberta, "Oil Production Limits", online: <https://www.alberta.ca/oil-production-limit.aspx>
[83] Province of Alberta, *Order in Council*, OC 155/2019 (2 August 2019), online: <https://www.qp.alberta.ca/documents/Orders/Orders_in_Council/2019/2019_155.pdf>.
[84] Enbridge, "State of Minnesota Provides Permitting Timeline for Line 3 Replacement Project" (1 March 2019), online: <https://www.enbridge.com/media-center/news/details?id=123564&lang=en>.

change suggests that the Government of Alberta's primary policy goal may be shifting away from limiting capacity and towards increasing production and creating jobs.

The Government of Alberta has not currently announced any further action as Western Canadian Select prices drop amid coronavirus concerns.

3.2 Trans Mountain Pipeline Project

As expected, in the past year, the controversial Trans Mountain Expansion Project ("**TMX**") has faced further legal challenges. At a municipal level**,** the City of Vancouver challenged the validity of the project's environmental assessment certificate to the BC Supreme Court, which dismissed its arguments on May 24, 2018.[85] Vancouver appealed the dismissal to the BCCA, which remitted the certificate back to the Minister for reconsideration in light of the new NEB report on September 17, 2019.[86] As of April 18, 2020 the province is still reviewing the conditions.

TMX has also faced legal challenges to the second federal approval for the project. The Federal Cabinet first approved TMX on November 29, 2016[87] but this approval was quashed by the Federal Court of Appeal ("**FCA**") on August 30, 2018 in *Tsleil-Waututh Nation v Canada* ("***Tsleil-Waututh***").[88] The FCA remitted the matter back to GiC citing two concerns: the NEB's decision not to review increased tanker traffic as a result of the project's construction, which led to deficiencies in its report and recommendation for the expansion; and the GIC's failure to adequately discharge its duty to consult.[89]

The Federal Cabinet approved the TMX for a second time on June 18, 2019,[90] after considering a new NEB report and further – more extensive – crown consultations.[91]

3.2.1 FCA Challenges to Second Federal Cabinet Approval of Project

On September 4, 2019, in *Raincoast Conservation Foundation v Canada* ("***Raincoast***"),[92] the FCA granted leave to six of the twelve applicants who applied to judicially review the second federal approval on the issue of whether the Federal Government's further consultation with Indigenous peoples was adequate to address the shortcomings identified in *Tsleil-Waututh*. In exercising its

[85] *Vancouver (City) v. British Columbia (Environment),* 2018 BCSC 843.
[86] *Vancouver (City) v. British Columbia (Environment),* 2019 BCCA 332.
[87] Canada, National Energy Board, *Certificate OC-064* (Calgary: NEB, 2016).
[88] 2018 FCA 153.
[89] *Ibid,* at paras 5-6. In its decision, the FCA determined that in Phase III of the Crown consultation the Crown played the role of a note-taker in that it simply collected Indigenous concerns and conveyed those back to the decision-makers without meaningful two-way dialogue. Accordingly, the FCA stated that "Canada must re-do its Phase III consultation" (at paras 768 – 771).
[90] Order in Council PC. 2019-0820 dated June 18, 2019, (2019) C. Gaz. I, Vol. 153, No. 25.
[91] Following the FCA decision to quash Cabinet approval, federal government re-initiated Phase III consultations using its new 'comprehensive approach,' which supplemented its original approach with a series of guiding principles for 'meaningful consultation.' These include: mutual respect and trust, transparency, responsiveness, flexibility and openness, mutuality (i.e. recognition of reciprocal obligations), and a "Whole-of-Government Approach" that would involve multiple other federal programs and initiatives, relating to reconciliation, in the consultation process. See: Government of Canada, "Trans Mountain Expansion Project, Crown Consultation and Accommodation Report" (June 2019), online: *Canada* <https://www.canada.ca/content/dam/nrcan-rncan/site/tmx/TMX-CCAR_June2019-e-accessible.pdf> at 11.
[92] *Raincoast Conservation Foundation v Canada (Attorney General),* 2019 FCA 224 at para 4 [*Raincoast*].

discretion to give reasons,[93] the FCA held that those six parties[94] had a "fairly arguable" case that the further consultation was hurried and of poor quality.[95]

On February 4, 2020, the FCA upheld the second federal approval for TMX in *Coldwater First Nation v Canada* ("***Coldwater***").[96] The court applied a reasonableness standard of review (applying *Vavilov*[97]), finding that it was reasonable for the Federal Cabinet to conclude that the Government of Canada had remedied the flaws in consultation earlier identified by the FCA in *Tsleil-Waututh* and had engaged in adequate and meaningful consultation with Indigenous peoples.[98] Further, the FCA found that the reapproval of the project was not a ratification of the earlier approval, but a second approval with amended conditions that flowed directly from renewed consultation.[99]

The FCA extensively reviewed the nature of the duty to consult and clarified that:[100]

- reasonable and meaningful consultation does not give Indigenous groups a *de facto* veto right;
- accommodation can be satisfied by imposing conditions, it does not guarantee outcomes; and,
- if Indigenous groups continue to oppose a project despite adequate consultation, their concerns may be balanced against "competing societal interests."[101]

On April 7, 2020 the Coldwater Indian Band First Nations announced it was seeking leave to appeal *Coldwater* to the SCC.[102]

3.2.2 Legislative developments arising from TMX in Alberta and BC

The TMX has also faced continued political opposition from the government of BC.

In April 2019, the BC government initiated a reference question to the British Columbia Court of Appeal ("**BCCA**") that sought clarity on the scope of the province's constitutional jurisdiction to make new regulations for the *Environmental Management Act* (the "**EMA**")[103] that would restrict the flow of heavy oil into the province (resulting in significant impacts for TMX).

On May 24, 2019, the British Columbia Court of Appeal ("**BCCA**") in *Reference re Environmental Management Act (British Columbia*) (the "***BC Reference* Decision**")[104] held that the regulation of an interprovincial pipeline is in pith and substance a federal undertaking. While environmental regulation is governed federally and provincially, the proposed regulations would

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[93] *Ibid* at para 7.
[94] The successful parties were the Aitchelitz, Skowkale, Shxwhá:y Village, Soowahlie, Squiala First Nation, Tzeachten, Yakweakwioose; Chief Ron Ignace and Chief Rosanne Casimir, on their own behalf and on behalf of all other members of the Stk'emlupsemc Te Secwepemc of the Secwepemc Nation; the Coldwater Indian Band; the Squamish Nation, the Tsleil-Waututh Nation; and the Upper Nicola Band: *Ibid* at para 71.
[95] *Ibid* at paras 52 and 55 and 64.
[96] *Coldwater First Nation v Canada,* 2020 FCA 34 [*Coldwater*].
[97] *Vavilov*, *supra* note 2.
[98] *Coldwater*, *supra* note 96 at paras 75 and 158.
[99] *Ibid* at para 77.
[100] *Ibid* at paras 40, 46, 57, 58, and 78.
[101] *Ibid* at para 57.
[102] Tsleil-Waututh Nation Sacred Trust, "Press Release and Legal Backgrounder: First Nations Launch Fight of TMX Project Approval to Supreme Court of Canada" (7 April 2020). Available online: <https://twnsacredtrust.ca/press-release-and-legal-backgrounder-first-nations-launch-fight-of-tmx-project-approval-to-supreme-court-of-canada/>.
[103] SBC 2003, c 54 [EMA].
[104] 2019 BCCA 181 [*Reference* Decision].

have interfered substantially with the federal government's jurisdiction over interprovincial undertakings.[105]

The Government of BC appealed the decision to the SCC. On January 16, 2020 the appeal was unanimously dismissed by the SCC, on the same day, without reasons[106] which was seen by many as a clear rebuke of the BC government by the SCC.

3.2.3 Bill 12: Preserving Canada's Economic Prosperity Act

Preserving Canada's Economic Prosperity Act[107] (the "***Prosperity Act***"), which gives the Alberta Minister of Energy sweeping powers to control the export of natural gas, crude oil and refined fuels from Alberta using export licences, was proclaimed into force on April 30, 2019, the same day the current United Conservative Party ("**UCP**") formed the government. The UCP government proclaimed the *Prosperity Act* in retaliation to the BC government's opposition to the TMX and its proposed amendments to the EMA's regulations.

The BC government wasted no time in challenging the *Prosperity Act* with an application to the Alberta Court of Queen's Bench ("**ABQB**") on May 1, 2019. But on June 19, 2019, the ABQB stayed the action citing lack of jurisdiction to determine whether the Attorney General of BC (the "**AGBC**") had standing from the ABQB regarding the constitutionality of Alberta legislation.[108] The ABQB concluded that question would be more properly addressed by the Federal Court, where the AGBC would have standing as of right.[109]

The AGBC also brought its action before the Federal Court of Canada (the "**FCC**") seeking a declaration that the *Prosperity Act* was unconstitutional.[110] To date, the FCC has not held a hearing on the constitutionality of the *Prosperity Act* but has released a decision on two motions. The first motion, brought by Alberta to strike BC's action on the basis that it was not within the jurisdiction of the Federal Court and was premature, was struck down by the FCC. The FCC found that it had jurisdiction under section 19 of the *Federal Courts Act*,[111] which grants it optional jurisdiction over interprovincial disputes.[112]

The second motion, brought by BC for an interlocutory injunction preventing Alberta's Minister of Energy from exercising her discretion under section 2(2) of the *Prosperity Act* was granted. This discretion would otherwise have allowed the Minister to require certain persons to obtain a licence to export natural gas, crude or refined fuels from Alberta. The FCC found the validity of the *Prosperity Act* to be a serious issue and agreed that an embargo, if it occurred, would cause irreparable harm to BC's residents.[113] The FCC rejected Alberta's argument that the harm was speculative[114] and held the balance of convenience was in BC's favour, given the strength of its case and the absence of any clear and identifiable negative consequences for Alberta that could result from the granting of the injunction.[115]

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[105] *Ibid* at para 101.
[106] 2020 SCC 1.
[107] SA 2018, c P-21.5.
[108] *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 ABQB 550 at paras 9 and 55.
[109] *Ibid* at para 54.
[110] *Attorney General of British Columbia v Attorney General of Alberta*, 2019 FC 1195 [*BC v AB* (2019, FCC)].
[111] RSC 1985, c F-7.
[112] *BC v AB* (2019, FCC), *supra* note 110at para 6.
[113] *Ibid* at para 7.
[114] *Ibid*.
[115] *Ibid*.

3.3 Enbridge Energy: Line 3, Line 5 and the EMS

3.3.1 Progress on Line 3

The existing Enbridge Line 3 pipeline extends from Edmonton, Alberta to Superior, Wisconsin. Enbridge has proposed to replace the existing Line 3 pipeline with a new wider pipeline (the "**Line 3 Replacement Project**").[116] The US portion goes through North Dakota, Minnesota and Wisconsin.

On December 1, 2016, the Canadian portion of the Line 3 Replacement Project received regulatory approval from the NEB, and construction of the Canadian portion of the project was completed in December 2019.[117]

The North Dakota segment received approval from the North Dakota Industrial Commission on February 1, 2019; while the Minnesota Public Utilities Commission granted Enbridge a Certificate of Need and a Route Permit for Line 3 on February 3, 2020.[118] Construction of the line will begin once Enbridge receives and finalizes all necessary permits.[119]

In a recent statement, Enbridge announced that it will continue to work with permitting agencies, in Minnesota and federally, to finalize its permits before starting construction on the US portion of the Line 3 Replacement Project.[120] To date, construction has not begun.

3.3.2 Line 5 progress

Enbridge is currently replacing Line 5, a crude oil and LNG pipeline running from Enbridge's Superior Terminal in Superior, Wisconsin, to Sarnia, Ontario.[121] The State of Michigan and the Bad River Band of the Lake Superior Tribe of Chippewa Indians (the "**Bad River Band**") have opposed the line and its replacement.

Michigan opposed the underwater segment of the line, which runs under the Straits of Mackinac in the Great Lakes, due to the environmental damage that would occur in the event of a leak.[122] The State originally supported the line under former Governor Rick Snyder and provided for its approval through an enactment known as 2018 PA 359 (November 2018).[123] His successor, Governor Gretchen Whitmore, challenged the constitutional validity of 2018 PA 359 and on May

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[116] Enbridge, "Line 3 Replacement Project" online: <https://www.enbridge.com/projects-and-infrastructure/public-awareness/minnesota-projects/line-3-replacement-project>.

[117] As of January 2020, most of the line was complete except less than 100 km through Saskatchewan and Manitoba. See: Enbridge, "Line 3 Replacement Program (Canada)" online: <https://www.enbridge.com/projects-and-infrastructure/projects/line-3-replacement-program-canada>.

[118] Enbridge initially applied to the Minnesota PUC on March 23, 2015. Despite challenges to the adequacy of environmental considerations, the Minnesota PUC issued an approval for the modifications to Line 3 on January 23, 2019. However, on June 3, 2019, the Minnesota Court of Appeals overturned this approval, finding the environmental impact statement insufficient, and remanded the matter back to the Minnesota PUC. The Line 3 Project finally received regulatory approval on February 3, 2020.

[119] Enbridge, "Environmental Permitting" online: <https://www.enbridge.com/projects-and-infrastructure/public-awareness/minnesota-projects/line-3-replacement-project#projectdetails:environmental-permitting>.

[120] Enbridge, "Minnesota Public Utilities Commission Approves/Accepts Line 3RP Revised FEIS and Reaffirms Certificate of Need and Routing Permits" (3 February 2020), online: <https://www.enbridge.com/media-center/news/details?id=123608&lang=en&year=2020>.

[121] Enbridge, "Line 5 Segment Replacement Project: St. Clair River Crossing", online: <https://www.enbridge.com/~/media/Enb/Documents/Factsheets/FS_Line5_St_Clair_HDD-Factsheet_Feb_2018.pdf>

[122] Devon Mahieu,"Michigan judge rules in favor of Enbridge" (31 October 2019), online: <https://upnorthlive.com/news/local/michigan-judge-rules-in-favor-of-enbridge>. Nia Williams & Rod Nickel, "Michigan sues Enbridge in US, seeks to shut oil pipeline through Great Lakes" (27 June 2019), online: <https://www.reuters.com/article/us-michigan-enbridge-pipeline/michigan-sues-enbridge-in-u-s-seeks-to-shut-oil-pipeline-through-great-lakes-idUSKCN1TS2G2>.

[123] State of Michigan in the Court of Claims, "State Defendants' Motion for Summary Dismissal" (27 June 2019), in *Enbridge Energy et al v State of Michigan et al*, No 19-000090-MZ.

28, 2019, the attorney general of Michigan deemed the Act unconstitutional.[124] Enbridge reacted by filing a suit with the Michigan District Court to establish Act 359's constitutionality.[125]

In October 2019, the Michigan District Court ruled the legislation constitutional.[126] This decision was echoed by the Michigan Court of Appeal in January 2020, following appeal of the District Court decision by Governor Whitmer.

Enbridge was also embroiled in litigation instituted by the Bad River Band, who sued Enbridge seeking removal of the line in June 2019 because of fears of environmental pollution and degradation.[127] Ongoing attempts to settle the litigation have been unsuccessful[128] and Enbridge has begun preparations for rerouting the line.[129]

3.4 The Coastal GasLink Project

The Coastal GasLink Pipeline is owned and will be operated by Costal GasLink Pipeline Ltd. ("**Coastal GasLink**"), a subsidiary of TC Energy. The proposed project will deliver natural gas to a proposed LNG facility operated by LNG Canada Development Inc. ("**LNG Canada**")[130] near Kitimat, BC. Between May 2015 and April 2016 Coastal GasLink obtained the necessary permits for construction as a provincial undertaking in BC.[131]

However, the regulatory status of the pipeline was complicated by a constitutional challenge that argued the pipeline should be federally regulated.[132]

On July 26, 2019, the NEB released its decision on the jurisdictional question, finding that the Coastal GasLink Pipeline is a local work and undertaking under provincial jurisdiction.[133]

The NEB applied the well-known two-part test from the decision in *Westcoast Energy Inc. v Canada (NEB)* ("***Westcoast***") which asks whether the pipeline: (a) forms part of a 'single federal work or undertaking' (the "**First Branch**"); or (b) is 'essential, vital and integral' to a federal work or undertaking (the "**Second Branch**").

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[124] State of Michigan, Office of the Governor, *Executive Directive No. 2019-13*, (28 March 2019), online: *Michigan.gov* <https://www.michigan.gov/documents/whitmer/ED_2019-13_Public_Act_359_of_2018_650679_7.pdf>.

[125] Enbridge, "Enbridge Seeks Court Ruling on Enforceability of Line 5 Tunnel Agreements" (6 June 2019), online: <https://www.enbridge.com/media-center/media-statements/line-5-legal-action>.

[126] Natasha Blakely, "Line 5 Agreement Upheld: Michigan court says Enbridge tunnel project is constitutional" (1 November 2019), online: <https://www.greatlakesnow.org/2019/11/enbridge-line-5-michigan-court-ruling-constitutional/>.

[127] *Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v Enbridge Inc. et aI*, 3:19-cv-00606 at para 2. Available online: <https://www.wpr.org/sites/default/files/7-23-19_lawsuit.pdf>.

[128] *Bad River Band of the* Enbridge, "Settlement offer to Bad River Band of Lake Superior Chippewa" (30 September 2019), online: <https://www.enbridge.com/projects-and-infrastructure/public-awareness/line-5-in-northern-wisconsin/settlement-offer-to-bad-river-band>.

[129]Enbridge, "Line 5 in Northern Wisconsin" online: <https://www.enbridge.com/projects-and-infrastructure/public-awareness/line-5-in-northern-wisconsin>.

[130] LNG Canada is a joint venture company comprised of the following five global energy companies: Shell Canada Energy, North Montney LNG Limited Partnership, PetroChina Kitimat Canada Partnership, Diamond LNG Canada Partnership and Kogas Canada LNG Ltd.

[131] *Letter Decision: Jurisdiction over the Coastal GasLink Pipeline Project*, MH-053-2018, Decision of the National Energy Board, 26 July 2019 at 1 [Letter Decision]. Available online:<https://www.airdberlis.com/docs/default-source/default-document-library/c00715-1-neb-letter-decision-coastal-gaslink-mh-053-2018---a6w4a56ed43a826168616da574ff000044313a.pdf?sfvrsn=f7bc5bd5_0>.

[132] A93296 Michael Sawyer, Application re jurisdiction over TCPL CGL project, online: <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3594963>.

[133] Letter Decision, *supra* note 131 at 46-47.

The NEB concluded that the Coastal GasLink Pipeline did not meet the First Branch of the test as it was not sufficiently functionally integrated with[134] or subject to common management, control and direction as the federally regulated NGTL System. It reached this conclusion for the following reasons:

- The main purpose of the pipeline was to transport gas within BC as feedstock supply to the provincially regulated LNG Canada terminal.[135] The NEB rejected the argument to extend the purpose of the pipeline to marine shipping and export of LNG from Canada.
- The mere physical connection (or probable future physical connection) of the provincial undertaking with a federal undertaking was not sufficient to find federal jurisdiction. Nor was a close commercial relationship or some level of coordinated operations sufficient.[136]
- The NEB found the Coastal GasLink Pipeline is exclusively dedicated to the downstream LNG terminal not the upstream NGTL System[137] and there is no dependence or interdependence between the two systems.[138] The NEB also concluded that the different business models for the two systems (single shipper closed access system for the Coastal GasLink Pipeline and common carrier open access system for the NGTL System) meant that they were not operating as a single enterprise.[139]
- The NEB found that there is some level of common management, control and direction between the two systems, but this did not meet the threshold to conclude that the Coastal GasLink Pipeline formed part of the NGTL System. Rather, the NEB found there is substantial control and direction by LNG Canada over the design, construction, day-to-day operation, access to capacity and potential expansion of the Coastal GasLink Pipeline, which differed from the NGTL system[140] While TransCanada Pipelines Limited, through its affiliate Coastal GasLink, does play a role in providing this service to the LNG Canada, it did not have unilaterally control nor did this alter the exclusive nature of the service provided.[141]

For the Second Branch of the test from *Westcoast*, the NEB found that there was no basis in evidence or law to conclude that the Coastal Gaslink Pipeline was "essential, vital or integral" to the federal work or undertaking (the NGTL System).[142] The NEB also concluded that there was no basis for LNG Canada's LNG facility to be brought under federal jurisdiction because the NEB regulates the international export of LNG from the provincially regulated LNG terminal.[143]

This decision from the NEB emphasizes that the threshold remains high for finding that a local provincial project, physically connected to or likely to be physically connected to a federal undertaking, will form part of a federal undertaking.

[134] *Ibid*, pages 33-34.
[135] *Ibid* at 27.
[136] *Ibid* at 30.
[137] *Ibid*, at 32.
[138] *Ibid*, at 32.
[139] *Ibid*, at 32-33
[140] *Ibid* at 38.
[141] *Ibid*, at 37.
[142] *Ibid* at 40.
[143] *Ibid* at 41.

3.5 Permitting for the Keystone XL pipeline project

The proposed Keystone pipeline would transport crude oil from western Canada and shale oil from North Dakota and Montana to Nebraska for delivery to Gulf Coast refineries. However, despite the significant benefits of Keystone, its development has been widely opposed, with challenges to the Presidential Permit required for the pipeline to cross the Canada-US border and challenges to other permits and approvals required for construction of the pipeline.

The project has a long regulatory history, starting in 2008, largely dealing with the US Presidential Permit and associated environmental review.

On March 29, 2019, President Trump issued a new Presidential Permit[144] to replace the initial Presidential Permit that was issued by the Trump administration in 2017.[145] A new Final Supplemental Environmental Impact Statement ("**2019 FSEIS**") was issued on December 20, 2019, along with a new biological assessment and order, superseding the earlier Final Supplemental Environmental Impact Statement (the "**2014 FSEIS**").

Keystone has faced several court challenges, including ongoing challenges in the Montana District Court. On November 8, 2018, the Montana District Court found that the 2014 FSEIS was out of date and required supplementation to account for new information and developments, particularly with respect to new greenhouse gas emissions modelling and updates to policies relating to accidental release of hazardous materials.[146] The 2019 FSEIS resolved this issue[147] but did not end litigation in Montana. There are currently five ongoing and unresolved court actions against TC Energy and Keystone XL in the United States.[148]

Keystone suffered a significant setback on April 15, 2020 when the District Court of the State of Montana cancelled the key Nationwide Permit 12 ("**NWP 12**") because the US Army Corps of Engineers inadequately considered endangered species when issuing the permit.[149] An NWP 12 is required for Keystone XL to construct and operate where it crosses the Yellowstone and Cheyenne Rivers in Montana.[150] This ruling is not expected to shut down construction work that began in early April for the project at the US-Canada border crossing in Montana.

Despite the recent legal obstacles for Keystone, the most promising recent event for Keystone occurred on March 31, 2020 when the Alberta government announced a significant investment of up to $7.5 billion in the pipeline.[151] Whether this was a sound investment remains to be seen.

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[144] Donald J Trump, *Presidential Permit* (29 March 2019), online: <https://www.whitehouse.gov/presidential-actions/presidential-permit/>.
[145] Donald J Trump, *Presidential Permit* (26 January 2017), online:<https://www.state.gov/keystone-pipeline-xl/>.
[146] *Indigenous Environmental Network et al v. United States Department of State et al*, CV-17-GF-BMM; CV-17-GF-BMM. at 51. Online: https://cases.justia.com/federal/district-courts/montana/mtdce/4:2017cv00029/54380/218/0.pdf?ts=1541755316.
[147] EXP Engineering Services Inc., *Keystone XL Pipeline Project: Plan of Development*, Doc No. KXL 1399-EXP-EN-PLN-0061 (17 January 2020) at 15. Available online <https://eplanning.blm.gov/epl-front-office/projects/nepa/1503435/20011515/250015757/BLM_FINAL_POD_20200117_508c.pdf>.
[148] *Indigenous Environmental Network et al v United States Department of State et al*, 4:17-cv-00029-BMM; *Northern Plains Resources Council et al v Shannon et al*, 4:17-cv-00031-BMM; *Rosebud Sioux Tribe et al v United States Department of State et al*, 4:18-cv-00118; *Indigenous Environmental Network et al v Trump et al*, 4:19-cv-00028.
[149] *Northern Plains Resource Council, et al v US Army Corps of Engineers, et al*, 4:19-cv-00044-BMM, Document 130 (filed, 15 April 2020).
[150] *Ibid* at 1.
[151] Alberta, "Investing in Keystone XL Pipeline." Available online: <https://www.alberta.ca/investing-in-keystone-xl-pipeline.aspx>.

4. CARBON TAX LEGISLATION

4.1 The Federal Greenhouse Gas Pollution Pricing Act

Three provinces, Saskatchewan, Ontario and Alberta, asked their Courts of Appeal to rule on the constitutionality of the federal carbon tax legislation, the *Greenhouse Gas Pollution Pricing Act*[152] (the "**GGPPA**"). All three provincial Appellate Courts issued split decisions. Saskatchewan and Ontario both upheld the legislation but the ABCA found the GGPPA unconstitutional. The Saskatchewan and Ontario decisions have both appealed the decisions to the SCC, although the hearings have been deferred due to COVID-19.[153] More information on these decisions can be found in "Federalism in the Patch: Canada's Energy Industry and the Constitutional Division of Power" paper in this year's Energy Law Review.

4.2 Alberta's Technology Innovation and Emissions Reduction Regulation

On January 1, 2020, Alberta replaced its carbon emission regulation relating to large industrial emitters in the province, i.e. the *Carbon Competitiveness Incentive Regulation* ("**CCIR**"),[154] with the *Technology Innovation and Emissions Reduction Regulation* ("**TIER**").[155]

TIER applies to facilities that emitted 100,000 tonnes of CO2 equivalent ("**CO2e**") in 2016 or any subsequent year.[156] Under CCIR, the regulation applied for facilities that had met this threshold of emissions in 2003 or any subsequent year.[157]

Other notable changes in TIER include the following:

- TIER provides an exemption period of up to three years from compliance for new facilities.[158] This treatment is being phased out for electric facilities in 2023.[159]
- TIER has a lower threshold for facilities that may opt-in to the regulation, allowing the opt-in for facilities that have greater than 10,000 tonnes of annual emissions in an emissions-intensive, trade-exposed sector.[160] The threshold was 50,000 tonnes under CCIR.[161]
- TIER applies a different benchmark methodology for emissions intensity than CCIR. TIER has a facility-specific benchmark based on historical emissions and a high-performance benchmark similar to the product-based benchmark under CCIR.[162] For the facility-specific benchmark, the emissions intensity reduction target in 2020 will be 90 per cent of the facility's production weighted average emissions intensity for non-IP (Industrial Process) emissions, tightened by 1% per year after 2020.The high-performance benchmark will not be subject to a tightening rate but will act as the floor for the tightening rate for facility-specific benchmarks.

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[152] RSC 2018, c 12, s 182.
[153] Supreme Court of Canada, *News Release* (16 March 2020), online: <https://decisions.scc-csc.ca/scc-csc/news/en/item/6823/index.do>.
[154] Alta Reg 255/2017 (repealed) [CCIR].
[155] Alta Reg 133/2019 [TIER].
[156] *Ibid*, s 1(1)(cc).
[157] CCIR, *supra* note 154, s 3(1).
[158] TIER, *supra* note 155, s 12(1).
[159] *Ibid*, s 36(7).
[160] *Ibid*, s 4(4).
[161] CCIR, *supra* note 154, s 4(4).
[162] Government of Alberta, "TIER Regulation, Fact Sheet" (December 2019) at 1, online: <https://www.alberta.ca/assets/documents/ep-fact-sheet-tier-regulation.pdf>.

- TIER allows conventional oil and gas facilities to be a designated aggregate facility under the regulation, defined as a group of two or more individual oil and gas facilities, so long as the facilities individually emit fewer than 100,000 tonnes of CO2e and share the same responsible person.[163] *In situ* and mining oil sands facilities are excluded from being an aggregate facility.[164] There is no minimum emission threshold for aggregate facilities under TIER and an aggregated facility will be required to reduce its emission intensity of stationary fuel combustion emissions by 10 per cent relative to the aggregate facility's historical base line. There is no tightening rate for such facilities.[165]

Some things will stay the same. There remains no overall cap on emissions for large emitters; electric facilities will remain subject to a "good-as-best" gas benchmark of 0.37 CO2e/MWh; and compliance options remain the same (on-site emission reductions, use of emission performance credits or emission offsets or payment into a TIER compliance fund at a current rate of $30/tonne of CO2e).

The federal government has confirmed that TIER is compliant with its requirements. On March 5, 2020, the Alberta Government announced that it would increase the compliance amount under TIER in 2021 to $40/tonne CO2e and in 2022 to $50/tonne CO2e to keep in line with federal requirements.[166] It therefore appears that the two levels of government have made peace for now, at least on carbon pricing.

5. TO THE AER AND BEYOND!

The past year has been eventful one for the AER. The regulator has been subject to reviews and investigations, has issued impactful decisions, and is coming to terms with new royalty legislation.

Most recently, the Government of Alberta installed a new Board of Directors effective April 15, 2020 with David Goldie as the new Chair, and Bev Yee, Georgette Habib, Corrina Bryson, Jude Daniels, Gary Leach and Tracey McCrimmon as members of the Board.[167]

5.1 AER under investigation

The Government of Alberta launched a review of the AER in September 2019 to identify potential enhancements to the AER's mandate, governance, and system operations to ensure that Alberta remains a predictable place to invest.[168] The Government accepted feedback until October 14, 2019, which is currently under review. The Government of Alberta has not provided a timeline for completion of the review.[169]

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[163] TIER, *supra* note 155, s 5.
[164] Government of Alberta, "Conventional Oil and Gas TIER Fact Sheet" (January 2020) at 2. Available online: <https://open.alberta.ca/dataset/9af5b5d5-a7d4-41ba-b3f4-14dd708ed124/resource/cc5803e8-d403-47f5-973c-2c28254a2b8d/download/aep-conventional-oil-and-gas-sector-tier-fact-sheet.pdf>.
[165] *Ibid.*
[166] James Keller & Gary Mason, "Alberta to increase its industrial carbon tax in step with Ottawa" (5 March 2020), online: <https://www.theglobeandmail.com/canada/alberta/article-alberta-to-increase-its-industrial-carbon-tax-in-step-with-ottawa/>.
[167] Province of Alberta, *Order in Council*, OC 109/2020, (1 April 2020) online: <https://www.qp.alberta.ca/documents/Orders/Orders_in_Council/2020/2020_109.pdf>.
[168] Alberta "Alberta Energy Regulator Review". Available online: < https://www.alberta.ca/alberta-energy-regulator-review.aspx>
[169] *Ibid.*

In October 2019, reports from the Ethics Commissioner,[170] the Public Interest Commissioner,[171] and the Auditor General[172] became publicly available. All three reports dealt with allegations that the AER and key officials, including the then CEO, Jim Ellis, improperly used public resources (i.e. both time and money) to build the International Centre for Regulatory Excellence ("**ICORE**").

ICORE was created in 2014 to provide training to the AER to turn the AER into a world class regulator. However, over time ICORE's purpose shifted toward generating revenue by training other governments and regulators *outside* Alberta. Thus, ICORE's new function fell outside the AER's mandate to provide efficient, safe, orderly and environmentally responsible development of energy resources in Alberta.[173]

The three reports from the Ethics Commissioner, Public Interest Commissioner and Auditor General all concluded that key AER personnel, including Mr. Ellis, acted inappropriately for their involvement with, and use of public resources in relation to ICORE.

In her report, the Ethics Commissioner concluded that Mr. Ellis made decisions on behalf of the AER, or influenced decisions made by the AER to further his, and other key personnel's, own personal interests.[174] She also found that Mr. Ellis concealed the extent of his involvement with ICORE from the AER Board of Directors, the Minister of Energy, the Deputy Minister of Energy and the Deputy Minister of Executive Council.[175] The Ethics Commissioner recommended further board oversight, including director training, and an internal review into the AER's internal conflict of interest procedures.[176]

In her report, the Public Interest Commissioner concluded that Mr. Ellis 'grossly mismanaged' public funds, assets and the delivery of public services.[177] She found that ICORE's functions fell outside of the AER's mandate, meaning Mr. Ellis breached *REDA*[178] when he authorised activity relating to ICORE.[179] Finally, the Public Interest Commissioner recommended a review of the internal whistleblowing policies and procedures and ensure that AER staff are made distinctly aware of them.[180]

The Auditor General concluded that the AER engaged in activities outside its mandate,[181] inappropriately spent public funds, and had ineffective board oversight, and internal AER management and controls.[182] She also found that ministerial oversight had been ineffective.[183] The

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[170] Honourable Marguerite Trussler, QC, "Report of the Investigation under the *Conflicts of Interest Act* by Hon. Marguerite Trussler, Q.C., Ethics Commissioner into allegations involving Jim Ellis" (14 June 2019). Available online: <https://open.alberta.ca/dataset/2eff9891-6b7f-4f1f-ba60-f0231e680a2a/resource/f4fc8ab2-5baf-4522-8b40-cacdb20e2d9f/download/report-ethics-commissioner-2019-06.pdf> [*Ethics Commissioner Report*].

[171] Public Interest Commissioner, "A Report of the Public Interest Commissioner in Relation to Wrongdoings Within the Alberta Energy Regulator, Case: PIC-18-02777" (3 October 2019). Available online: <https://yourvoiceprotected.ca/wp-content/uploads/2019/10/2019Oct3-Public-Interest-Commissioners-Report-AER-ICORE.pdf> [*PIC Report*].

[172] Auditor General of Alberta, "An Examination of the International Centre of Regulatory Excellence (ICORE)" (October 2019) online: <https://www.oag.ab.ca/reports/aer_icore-oct_2019/> [*Auditor General Report*].

[173] REDA, *supra* note 8, s 2.

[174] *Ethics Commissioner Report*, *supra* note 170 at 28.

[175] *Ethics Commissioner Report*, *supra* note 170 at 29.

[176] *Ibid* at 30-1.

[177] *PIC Report*, *supra* note 171, at 17.

[178] REDA, *supra* note 8.

[179] *PIC Report*, *supra* note 171, at 16.

[180] *Ibid* at 20.

[181] *Auditor General Report*, *supra* note 172 at 21.

[182] *Auditor General Report*, *supra* note 172 at 31.

[183] *Ibid* at 45.

Auditor General recommended increased board oversight and training of AER staff on whistleblowing policies. She also recommended the evaluation of whether further public resources belonging to the AER were expended on ICORE, with a view to recovering such resources.[184]

5.2 AER Bearspaw's common carrier & rateable take applications

In January 2017, Bearspaw Petroleum Ltd. ("**Bearspaw**") filed applications with the AER seeking a declaration that Harvest Operations Ltd. ("**Harvest**") is a common carrier of gas produced from the Crossfield Basal Quartz C Pool (the "**Crossfield Pool**") and for a rateable take order against Harvest to distribute gas production among wells in the Crossfield Pool, including Bearspaw's gas well.[185] A common carrier declaration requires a proprietor to share capacity on pipeline system in order to provide owners of oil and gas in the province the opportunity to obtain their share of production and subjects the pipeline to rate regulation by the AUC.[186,187] A rateable take order restricts the amount of gas that may be produced from a given pool in Alberta and is granted when an applicant can show that they are being deprived of the opportunity to obtain its share of production from the pool.[188]

However, on November 14, 2019, before these applications were heard, Harvest filed a motion asking that the AER dismiss, or at least suspend or adjourn, because it was no longer operating the facilities in question and therefore Bearspaw could not meet the requirements for either application. The AER granted Harvest's motion on January 24, 2020.[189]

This decision is notable for two reasons. First, it confirms that the AER has jurisdiction to grant summary judgement.[190] While the AER acknowledged that the *Alberta Energy Regulator Rules of Practice*[191] (the "**AER Rules**") do not directly provide for nor prohibit summary determinations, it held it had discretion to make such a determination where it is necessary in the interest of resolving an issue fairly and efficiently.[192]

The decision is also notable because the AER held that it did not have the jurisdiction to compel Harvest to continue to operate the facilities that would be the subject of these orders against its will. Bearspaw could not satisfy the common carrier application requirements because Harvest was in the process of abandoning a pipeline and compressor that were the subject of application.[193] Bearspaw could not satisfy the rateable take order application because it could not show that drainage was occurring from the Crossfield Pool, which was the subject of the application.[194]

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[184] *Ibid* at 38.
[185] Bearspaw Petroleum Ltd. Common Carrier and Rateable Take Order Applications, Applications 1877294 and 1878333, 2020 ABAER 002 at para 2. Available online: <https://www.aer.ca/documents/decisions/2020/2020ABAER002.pdf>.
[186] AER Directive 065: *Resources Applications/Application for Common Carrier Order (March 2020)* at 1-15. Available online: < https://www.aer.ca/documents/directives/Directive065.pdf>.
[187] *Re: Proceeding 360 Harvest Operations Ltd., Decision on Motion to Dismiss, Bearspaw Petroleum Ltd. Applications 1877294 and 1878333*, (24 January 2020), online: <https://www.aer.ca/documents/decisions/Participatory_Procedural/1877294percent20_20200124.pdf> [AER, *Decision to Dismiss*], at 10.
[188] *Ibid.* at 14-15.
[189] *Ibid.*
[190] *Ibid* at 13.
[191] Alta Reg 99/2013.
[192] AER, *Decision to dismiss*, *supra* note 189 at 16.
[193] *Ibid* at 12.
[194] *Ibid* at 14..

5.3 Prosper Rigel Project Status

Prosper Petroleum Ltd. ("**Prosper**") has applied for its Rigel project to operate a recovery scheme including a central processing facility and cogeneration power plant within the area covered by the Moose Lake Access Management Plan (the "**MLAMP**"). Fort McKay First Nation opposed the application and said that the project would effectively defeat the purpose of the MLAMP.[195]

The MLAMP is a plan to manage access and activities near Namur Lake, a.k.a. Buffalo Lake, and Gardiner Lake, a.k.a. Moose Lake, in northern Alberta to protect Fort McKay First Nation's ability to practice its Treaty and aboriginal rights while still allowing for responsible resource development. The MLAMP has not yet been finalized.

In June 2018, the AER approved the Rigel project, subject to Cabinet approval.[196] In its decision, the AER acknowledged that the Government of Alberta had said that it intended to finalize the MLAMP. However, since it was not finalized, the AER found that it could not guide its decision.[197]

In February 2020, Prosper applied for a mandatory injunction or an order of mandamus directing Cabinet to issue a decision on the Rigel project.[198] The application was heard more than 19 months after the AER issued its decision. The ABQB concluded that since the Rigel project could only proceed with authorization by the Lieutenant Governor in Council (an authorization the Alberta Government has since decided to eliminate in a recently introduced omnibus bill as part of its red tape reduction initiatives),[199] there was an implicit legal duty on Cabinet to exercise its power.[200] The ABQB agreed that Cabinet had discretion in making its decision; however, this did not include the discretion to refuse to make the decision.[201]

The Government of Alberta did not give specific reasons for the delay in making a decision on Prosper's project, citing Cabinet confidentiality. It did note that there was an election resulting in a new government and new Cabinet and urged the ABCA to infer that this was a complex project given the time it took to get through the regulatory process. However, Justice Romaine noted that the new Cabinet had been in place for 10 months and had approved three other oil sands projects in that time. She also noted that there were other factors beyond the complexity of the project that contributed to the regulatory delays, and that the Minister of Environment informed Prosper that Cabinet was well briefed on the topic.[202] Justice Romaine concluded that there was a strong *prima facie* case that Cabinet had breached its legal duty under the *Oil Sands Conservation Act*.

Prosper submitted that this project is its principal asset and without certainty the future of both the project and Prosper would be jeopardized by delay. Justice Romaine accepted that this constituted irreparable harm.[203] Justice Romaine also found there is a strong public interest in ensuring timely

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[195] *Prosper Petroleum Ltd., Rigel Project*, 2018 ABAER 005 (issued, 12 June 2018) at para 91..
[196] *Ibid*.
[197] *Ibid* at para 38.
[198] *Prosper Petroleum Ltd. v Her Majesty the Queen in Right of Alberta*, 2020 ABQB 127.
[199] Bill 22: *Red Tape Reduction Implementation Act, 2020*, 2nd Session, 30th Legislature, 69 Elizabeth II, online: https://docs.assembly.ab.ca/LADDAR_files/docs/bills/bill/legislature_30/session_2/20200225_bill-022.pdf
[200] *Ibid* at para 14.
[201] *Ibid* at para 28.
[202] *Ibid* at paras 46-7.
[203] *Ibid* at paras 61-2.

Cabinet decisions.[204] Ultimately, Justice Romaine granted Prosper's application and directed Cabinet to make a decision within 10 days.[205]

On February 28, 2020, the ABCA stayed Justice Romaine's decision pending the outcome of an appeal that is scheduled to be heard on April 27, 2020.[206] The Government of Alberta's failure to approve Prosper's project comes off as somewhat ironic given their criticisms of the AER[207] and the federal government[208,209] in delaying projects.

However, Cabinet was saved from deciding on Prosper's Rigel project on April 24, 2020 when the ABCA overturned the AER's approval of the Project.[210] The AER concluded that it could not consider the MLAMP for three reasons:

1. section 21 of the REDA prohibits the AER from assessing adequacy of Crown consultations;
2. section 7(3) of the Lower Athabasca Regional Plan (the "**LARP**") prohibits the AER from adjourning, refusing, or rejecting an application because of incompletion of a LARP regional plan; and
3. the AER approval is subject to authorization by Cabinet, which is a more appropriate place to consider the need to finalize MLAMP.[211]

The issue on appeal was whether the honour of the Crown was implicated by the MLAMP process. The ABCA concluded that was different than considering the adequacy of Crown consultation.[212] The honour of the Crown is broader than the duty to consult and includes treaty-making and implementation.[213] The ABCA concluded the issues relating to the MLAMP negotiations were broader than the adequacy of Crown consultation and the AER was not prevented from considering these issues by section 21 of REDA.[214]

The ABCA also concluded that the LARP also did not prohibit the AER from considering the MLAMP negotiations. The MLAMP is a planning initiative that will be assessed for inclusion in LARP implementation is not within the scope of section 7(3) of the LARP.[215]

Finally, the ABCA concluded that the AER was required to consider whether the proposed project was in the public interest. The AER could not decline to address matters that fell within the scope of public interest because it considered that Cabinet was better able to consider those issues.[216] The "public interest" includes adherence to constitutional principles like the honour of the Crown,

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[204] *Ibid* at para 69.
[205] *Ibid* at paras 81.
[206] *Prosper Petroleum Ltd. v Her Majesty the Queen in Right of Alberta*, 2020 ABCA 85.
[207] Government of Alberta, "Promise Made, Promise Kept on the Alberta Energy Regulator" (6 September 2019), online: <https://www.alberta.ca/release.cfm?xID=644204AFFDD87-B96A-D0CF-F64984DCC01E91AD>.
[208] Government of Alberta, "Correction*: Teck Frontier Project Update: Premier Kenney" (23 February 2020), online: <https://www.alberta.ca/release.cfm?xID=68670907E7CA8-F7F5-DC5E-C06FC8F8AF4D9E25>.
[209] Government of Alberta, "TMX Construction Restart: Premier Kenney" (21 August 2019), online: <https://www.alberta.ca/release.cfm?xID=643380E8C23DF-E96D-6FD2-E198C8AFDC2A75BF>.
[210] *Fort McKay*, *supra* note 14.
[211] *Ibid* at para 44.
[212] *Ibid* at para 52.
[213] *Ibid* at para 53.
[214] *Ibid* at para 57.
[215] *Ibid* at para 60.
[216] *Ibid* at para 64.

so the AER is required to consider the MLAMP negotiations to the extent that they implicate the honour of the Crown.[217]

The ABCA concluded that the AER took an unreasonably narrow view of what comprises the public interest when it excluded the negotiations relating to the MLAMP from its consideration[218] and remitted the matter back to the AER for further consideration.[219]

5.4 The *Royalty* Treatment

In its platform, the UCP committed to guaranteeing that the royalty regime that is currently in place when a well is permitted will remain in place for the life of that well (or at least 10 years). To accomplish this, the Government of Alberta passed Bill 12, titled the *Royalty Guarantee Act*[220] on July 18, 2019 which amended the *Mines and Minerals Act*[221] to commit to two things:

1. the royalty regime will not be fundamentally restructured for 10 years after the relevant section comes into force; and
2. subject to the regulations, the royalty regime in place when a well commences production will not change for that well for 10 years.

Of course, Canada inherited a parliamentary supremacy system from the United Kingdom and a fundamental tenant of Canadian democracy is that one government cannot bind future governments. Therefore, a guarantee to maintain a royalty structure for 10 years is only good for as long as the government of the day chooses to honour it.

6. RECENT CHANGES TO ABORIGINAL LAW

6.1 The Alberta Indigenous Opportunities Corporation Act

In November 2019, the Government of Alberta passed the *Alberta Indigenous Opportunities Corporation Act*, which created the Alberta Indigenous Opportunities Corporation (the "**Corporation**").[222] The Corporation's mandate is to facilitate investment by Indigenous groups in natural resource projects and related infrastructure. This may include indigenous groups from outside of Alberta where Alberta indigenous groups hold at least 25 per cent of Indigenous ownership of the project.[223]

Eligible natural resource projects include projects from energy (including oil and gas, renewable energy, electricity, and coal), mining and forestry industries.[224] According to the Corporation's website, this can include projects outside of Alberta, if they benefit Alberta's natural resource sector.[225]

With the approval of the Lieutenant Governor in Council, the Corporation can make loans, issue loan guarantees, purchase equity, and enter into joint ventures and partnerships. The Corporation can also issue grants and contributions in accordance with a grant program approved by the

[217] *Ibid* at para 65.
[218] *Ibid* at para 68.
[219] *Ibid* at para 69.
[220] *Bill 12: Royalty Guarantee Act,* First Session, 30th Legislature, 68 Elizabeth II.
[221] RSA 2000, c M-17.
[222] *Alberta Indigenous Opportunities Corporation Act*, SA 2019, c A-26.3.
[223] The Alberta Indigenous Opportunities Corporation, "The Program" online: < https://www.theaioc.com/the-program>
[224] *Authorized Natural Resource Sectors Regulation,* Ata Reg 27/2020, s 1.
[225] The Alberta Indigenous Opportunities Corporation, "The Program" online: < https://www.theaioc.com/the-program>.

Minister. The grants and contributions cannot be used to purchase or invest in a natural resource project or related infrastructure. The Corporation can issue up to $1 billion in loan guarantees.[226]

Indigenous groups must invest a total of at least $20 million in a specific project before the Corporation can make loans, issue loan guarantees, purchase equity or enter into a joint venture or partnership.[227]

6.2 The *Athabasca Chipewyan First Nation v Alberta* Decision[228]

The Athabasca Chipewyan First Nation sought judicial review of a July 17, 2014 decision from the Aboriginal Consultation Office (the "**ACO**"), which found there was no duty to consult the Athabasca Chipewyan First Nation in relation to a pipeline project.[229] The project was ultimately approved by the AER and the Athabasca Chipewyan First Nation did not challenge the project approval.[230]

While the project proponent did consult the Athabasca Chipewyan First Nation, the ACO concluded that there was no constitutional duty to consult with Athabasca Chipewyan First Nation for this project based on the location of the project, and its assessment of the impacts on the Athabasca Chipewyan First Nation.[231]

The Athabasca Chipewyan First Nation applied to have the ACO decision judicially reviewed by the ABQB. It argued that the ACO did not have the authority to decide whether the duty to consult is triggered, and that the duty to consult is automatically triggered any time land is taken up within its Treaty lands.[232]

The ABQB issued three declarations:

- the ACO has the authority to decide whether the duty to consult is triggered;
- the mere taking up of land by the Crown within a Treaty area is not sufficient to trigger the duty to consult; and
- procedural fairness is engaged in the determination of whether a duty to consult is triggered.[233]

The Athabasca Chipewyan First Nation then appealed the first two declarations from the ABQB to the ABCA.[234] The ABCA held that the ACO did have the authority to assess whether the duty to consult was triggered. The Government of Alberta is not required to create a statute specifically authorising the ACO to assess whether the duty to consult was required.[235]

The ABCA also disagreed that taking up land anywhere within Treaty 8 automatically triggered the duty to consult with Athabasca Chipewyan First Nation. The taking up requires a potential to adversely impact Athabasca Chipewyan First Nation's Treaty rights to be consulted.[236]

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[226] *Ibid*.
[227] *Alberta Indigenous Opportunities Corporation Regulation*, Alta Reg 162/2019, s 1.
[228] *Athabasca Chipewyan First Nation v Alberta*, 2018 ABQB 262 [*Athabasca Chipewyan* (2018)].
[229] *Ibid* at para 1.
[230] *Ibid* at para 3.
[231] *Ibid* at para 2 and 29.
[232] *Ibid* at para 122.
[233] *Ibid* at para 122.
[234] *Athabasca Chipewyan First Nation*, 2019 ABCA 401.
[235] *Ibid* at para 39.
[236] *Ibid* at paras 57 and 61.

6.3 The Duty to Consult with Aboriginal groups in AUC proceedings

In September 2019, the AUC granted intervener standing to Alexis Nakota Sioux First Nation in the Cascade Power Plant Project facility application.[237] In doing so, the AUC ruled that it had jurisdiction to consider whether the duty to consult had been met.

The AUC had previously concluded that it did not have an explicit or implicit duty to assess the adequacy of Crown consultation where the Crown is not a participant and there is no Crown decision before the AUC.[238] However, the prior AUC decision was issued before the SCC's decisions in *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*[239] and *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*[240] In those decisions, the SCC confirmed that a regulatory decision can trigger the duty to consult, and that the Crown can rely on the regulatory process to meet the duty to consult.[241]

The AUC also noted that the Government of Alberta confirmed that decisions from regulators like the AUC and the Natural Resource Conservation Board can trigger the duty to consult and that the government relies on the regulator's process to address potentially adverse impacts. Accordingly, the AUC concluded that it had jurisdiction to assess the adequacy of Crown consultation.[242] The AUC's decision was not appealed.

Ultimately, the Alexis Nakota Sioux First was granted standing in the proceeding to consider Cascade Power Plant Project's power plant approval but subsequently withdrew from the proceeding noting that its concerns had been adequately addressed.[243]

7. UPDATES TO UTILITIES & ELECTRICITY REGULATION IN ALBERTA

7.1 Capacity Market

Alberta currently has an "energy-only" market where, with limited exceptions, generators are only paid for the electricity they actually produce. In 2016, the NDP government of Alberta announced that it would transition to a capacity market, with the goal of the market being operational by 2021. The plan was to add a capacity market to the energy-only market where generators would be paid for their ability to produce electricity overall and in real time. The idea was based on a concern of revenue uncertainty and revenue instability in the market caused by the transition to renewable sources of electricity.[244]

In the end, the UCP cancelled the plan for a capacity market on July 24, 2019, citing investors' concerns over uncertainty and the energy-only market's proven track record of providing an affordable and reliable supply of electricity in Alberta.[245] The announcement was made on the eve of a decision from the AUC on the first set of ISO rules essential for the implementation and

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[237] *Re Cascade Power GP ltd*, 2019 CarswellAlta 1988, [2019] AWLD 3758. Available online: <http://www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2019/24081-F0035.pdf> [*Cascade Standing Decision*].
[238] *Ibid* at para 23.
[239] *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41.
[240] *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40.
[241] *Cascade Standing Decision*, supra note 237 at para 25.
[242] *Ibid* at para 26.
[243] AUC Decision 24081-D01-2019, Cascade Power GP Ltd, Cascade Power Plant Project, October 8, 2019, at para 3.
[244] Government of Alberta, "Restoring Certainty in the Electricity System" (24 July 2019), online: <https://www.alberta.ca/release.cfm?xID=642387D0ECA3E-ED8E-6B02-885D35312EBBB3EE>.
[245] *Ibid*.

operation of the capacity market, which were required for a planned first capacity auction in the fall of 2019.

On October 29, 2019, the UCP government passed Bill 18, entitled the *Electricity Statutes (Capacity Market Termination) Amendment Act, 2019*[246] to remove references to the capacity market in the *Alberta Utilities Commission Act* (the "**AUCA**"),[247] *Electric Utilities Act* ("**EUA**")[248] and the *Hydro and Electric Energy Act*, (the "**HEEA**"). The Act came into force on October 30, 2019.[249]

7.2 Renewable Electricity Program (the "REP")

The REP was implemented by the previous NDP government with the goal to add 5,000 MW of renewable electricity capacity by 2030 using a competitive process administered by the Alberta Electric Systems Operator ("**AESO**").

The AESO has contracted for 1360 MW of renewable energy under the program.

Successful proponents of these projects entered into a Renewable Electricity Support Agreement ("**RESA**") with the AESO,[250] which provides a 20-year indexed renewable energy credit covering any difference between the bid price for energy generated from the project and the pool price received by the proponent when the energy enters the Alberta Interconnected Electricity System ("**AIES**").

On June 10, 2019, the Minister of Energy for Alberta, Sonya Savage, informed the AESO, by letter, that her government did not intend to proceed with additional rounds of the REP and that the AESO's efforts should focus on oversight of the projects awarded under the previous rounds of the REP.[251] Minister Savage also encouraged the AESO to continue to work closely with her department to ensure that "market-driven renewable power, without the need for costly direct subsidy, is a part of Alberta's future electricity mix."[252]

However, it is not all bad news for the wind and solar industry in Alberta. On April 15, 2020 the federal government issued a request for information ("**RFI**") regarding Canada's proposal to enter into one or more power purchase contracts to support Canada's electricity requirements and create new renewable generation in Alberta.[253] New installations must be capable of generating net new renewable electricity for the equivalent of 200,000 – 280,000 MWh annually (the amount federal buildings currently consume in Alberta) plus an additional 240,000 – 360,000 MWh to displace emissions of electricity consumed by federal facilities outside of Alberta. RFIs are due on May 1, 2020.

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[246] SA 2019, c 11.
[247] SA 2007, c A-37.2.
[248] SA 2003, c E-5.1.
[249] SA 2019, c 11.
[250] A copy of the RESA for each round of the REP is available online at: <https://www.aeso.ca/market/renewable-electricity-program/rep-results/>.
[251] The Honourable Minister Savage, *Letter from Alberta Energy*, dated 10 June 2019, online: <https://www.aeso.ca/assets/Uploads/GoA-REP-32469signed-letter.pdf>.
[252] *Ibid.*
[253] Public Works and Government Services Canada, "Request For Information (RFI) on Renewable Electricity Generation in Alberta (EW038-210082/A)" (1 May 2020), online: <https://buyandsell.gc.ca/procurement-data/tender-notice/PW-PWZ-219-11016>.

7.3 Co-generators continue to seek clarity on self-supply and export

On February 20, 2019, the AUC issued Decision 23418-D01-2019 (the "**Smith Decision**")[254] that altered the landscape for cogeneration and self-supply units in Alberta.

In the Smith Decision, EPCOR Water Services Inc. ("**EPCOR Water**") applied for approval of a 12 MW solar plant where 70 per cent of the energy output would remain on site and 30 per cent exported to the grid. The AUC held that this proposal was inconsistent with the must offer, must exchange rule.[255]

EPCOR Water attempted to rely on an exemption in subsection 2(1)(b) of EUA which states the Act does not apply if "electric energy produced on property of which a person is the owner or a tenant and consumed solely by that person and solely on that property", arguing that the exemption applies only to the portion of the electric energy produced and consumed by it on its property (*i.e.*, the 70 per cent).

The AUC disagreed, finding that the plain and ordinary meaning of section 2(1)(b) establishes three pre-conditions for the exemption to apply, and EPCOR Water's proposal ran afoul of the final two: (i) the electric energy must be produced on EPCOR Water's property; (ii) the electric energy must be consumed solely by EPCOR Water; and (iii) the electric energy must be consumed solely on EPCOR Water's property. [256]

The AUC also considered two self-supply mechanisms under the EUA that allow a person to self-supply and export excess electric energy, micro-generation[257] and the industrial system designation ("**ISD**").[258] The AUC held that these are examples of express authorization from the legislature that these types of units can self-supply *and* export excess electricity through the AIES, and no such express approval was provided for EPCOR's proposal in section 2(1)(b) of the EUA.

The Smith Decision was followed by three similar decisions in 2019.[259] Notably, in one of these decisions, the AUC rejected the argument that units on one site could be separated into on-site and export power units to get around the must offer must exchange rule.[260]

On September 13, 2019, in response to the Smith Decision and the decisions that followed, the AUC issued Bulletin 2019-16, inviting consultation on three options for the revision of the

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[254] AUC Decision 23418-D01-2019, *EPCOR Water Services Inc., EL Smith Solar Power Plant,* (20 February 2019), online: <http://www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2019/23418-D01-2019.pdf> [Smith Decision]

[255] The rule that generators in Alberta must offer their generation output to and exchange their energy through the power pool pursuant to sections 18(2) and 101 of the EUA, and section 2(f) of the *Fair, Efficient and Open Competition Regulation*, Alta Reg 159/2009.

[256] Smith Decision, *supra* note 254 at para 86.

[257] Section 6 of the *Micro-Generation Regulation*, Alta Reg 27/2008 [*Micro-Generation Regulation*].

[258] See: Nigel Bankes, "Opening a Can of Worms: What are the Applicable Market Rules for Generation Where the Generator Fails to Use the Entire Output?" (5 March 2019) at 4, online: <https://ablawg.ca/wp-content/uploads/2019/03/Blog_NB_Applicable_AUC_Rules_Failure_to_Use_Entire_Output_Mar2019.pdf>.

[259] AUC Decision 23756-D01-2019, Advantage Oil and Gas Ltd. Glacier Power Plant Alteration, April 26, 2019 [*Decision 23756*]; AUC Decision 24393-D01-2019, International Paper Canada Pulp Holdings ULC Request for Permanent Connection for 48-Megawatt Power Plant, June 6, 2019 [*Decision 24393*]; and AUC Decision 24126-D01-2019, Keyera Energy Ltd, Cynthia Gas Plant Power Plant, June 25, 2019.

[260] *Ibid* at para 21.

statutory scheme that prohibits self-supply and export from a generating unit. They are: (1) *status quo*; (2) allow limited self-supply and export; or (3) allow unlimited self-supply and export. [261]

In Bulletin 2019-16, the AUC recognized that the Smith Decision was a departure from its earlier decisions[262] but that it was satisfied that the statutory scheme prohibits self-supply and export unless the owner of generating unit falls within certain limited circumstances, such as when it is a small micro-generation unit or where it has an ISD.

On January 9, 2020 the AUC issued Bulletin 2020-01, outlining the results of stakeholder feedback on three presented options.[263] Most stakeholders preferred the option of unlimited self-supply and export. There was also widespread support for statutory amendments to clarify the availability of self-supply and export to all generators and the AUC has asked stakeholders to comment on the market and tariff implications.[264] No feedback has been published to date.

In Bulletin 2020-01 the AUC also stated that while consultation was ongoing it would not investigate any market participants operating legacy facilities under approvals that allowed them to self-supply and export.[265]

7.4 ISO 2018 tariff decision & construction contributions

In Decision 22942-D02-2019 ("**Decision 22942**"),[266] the AUC approved the 2018 ISO tariff for AESO including approval of a new policy for construction contributions (the "**New Policy**") proposed by AltaLink Management Ltd ("**AltaLink**").[267] Construction contributions are payments made by market participants for the construction and associated costs of transmission facilities required to provide system access service to customers.

The New Policy removes approximately $400 million in construction contribution capital costs from the rate base of FortisAlberta Inc. ("**FortisAlberta**") as a distribution facility owner ("**DFO**") and places these costs into AltaLink's rate base as the transmission facility owner ("**TFO**") in FortisAlberta's service area.[268]

On September 25, 2019, FortisAlberta requested an immediate review and variance (the "**R&V Letter**") of Decision 22942 on the AUC's own motion, citing several implications of the New Policy, including the unwinding of rates, recapitalization of FortisAlberta's balance sheet and significant tax and credit implications of the New Policy.[269] On October 2, 2019, the Commission

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[261] AUC, Bulletin 2019-16 *Consultation on the issue of power plant self-supply and export* (13 September 2019), online: <http://www.auc.ab.ca/News/2019/Bulletin%202019-16.pdf#search=bulletin%202019%2D16>

[262] See for instance *Decision 24393*, *supra* note 259, where the power plant of International Paper Canada Pulp Holdings ULC was initially approved in 1995 and is an example of how self-supply and export arrangements were approved by the AUC's predecessor, the Alberta Energy and Utilities Board.

[263] AUC, Bulletin 2020-01 *Exploring Market Concerns and Tariff Issues Related to Self-Supply and Export Reform* (9 January 2020), online: <http://www.auc.ab.ca/News/2020/Bulletin%202020-01.pdf>.

[264] *Ibid* at 1.

[265] *Ibid* at 4.

[266] AUC Decision 22942-D02-2019, *Alberta Electric System Operator, 2018 Independent System Operator Tariff* (22 September 2019), online: <http://www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2019/22942-D02-2019.pdf> [AESO Tariff Decision].

[267] *Ibid* at paras 879-892.

[268] *Ibid* at paras 1015 and 1078.

[269] Exhibit 24932-X0001, *2019-09-25 FortisAlberta Review and Variance Application*.

granted FortisAlberta's motion to consider whether Decision 22942 should be confirmed, rescinded or varied.[270]

The Commission held that a review was warranted given the extent of financial readjustments as result of the New Policy "that may not have been completely developed by Fortis or others in the proceeding" but may be material to the company and its customers.[271] This is noteworthy, given the Commission's criticism of FortisAlberta in Decision 22942 that it only provided a general discussion of the implications of the New Policy without identifying any tax consequences[272] and the Commission's conclusion that the effort to implement the New Policy outweighed the significant financial savings to ratepayers (of approximately $40 million for 2018-2022) achieved through the New Policy.[273] It appears that the Commission's concerns on the possible financial effects of the New Policy on FortisAlberta and its customers may now outweigh its previous concerns.[274]

The AUC initially committed to providing a decision on its review in 2019. However, on December 20, 2019, the AUC informed parties that it would not issue a decision in 2019 due to significant uncertainty in the evidence. It therefore requested FortisAlberta and AltaLink to file additional evidence in response to further AUC information requests.[275]

After this evidence was filed, FortisAlberta filed a motion requesting that the AUC conduct an oral proceeding for Proceeding 24932.[276] The AUC has yet to respond to the motion.

7.5 The *HEEA*

As part of its red tape reduction initiatives, on December 5, 2019 the Government of Alberta passed the *Red Tape Reduction Implementation Act, 2019*, which amended several Acts,[277] including the *Hydro and Electric Energy Act*[278] (the "**HEEA**") to streamline the approval process for hydroelectric power plants. Prior to the amendments, a hydroelectric power plant needed three types of approvals before coming into operation:

1. an AUC hearing recommending approval of the hydroelectric power plant;[279]
2. a standalone Act allowing the AUC to approve hydroelectric power plant construction;[280] and
3. Lieutenant Governor in Council approval to operate the hydroelectric power plant.[281]

The requirements for a standalone Act and Lieutenant Governor in Council have been removed, and the AUC can now approve hydroelectrical power plants directly instead of making a

[270] Exhibit 24932-X0004, AUC Process Letter, October 2, 2019.
[271] *Ibid*, at para 4.
[272] AESO Tariff Decision, *supra* note 266 at para 1074.
[273] *Ibid* at para 1076.
[274] Exhibit 24932-X0004, AUC *Process Letter*, dated October 2, 2019, at para 3.
[275] Exhibit 24932-X0053.
[276] Exhibit 24932-X0086.01. On April 2, 2020 FortisAlberta reconfirmed its motion after the AUC's Bulletin 2020-06 on COVID-19 implications.
[277] *Red Tape Reduction Implementation Act*, https://docs.assembly.ab.ca/LADDAR_files/docs/bills/bill/legislature_30/session_1/20190521_bill-025.pdf
[278] RSA 2000, c H-16.
[279] *Ibid*, s 9 (repealed).
[280] *Ibid*, s 9 (repealed).
[281] *Ibid*, s 10 (repealed).

recommendation bringing the regulatory approval process for hydro power plants in line with those for other power plant applications.[282]

8. NOTABLE DEVELOPMENTS IN OTHER CANADIAN JURISDICTIONS

8.1 British Columbia seeking to be safer and greener

In 2019, the BC Oil and Gas Commission (the "**BCOGC**") took steps towards ensuring safer and more environmentally conscience oil and gas operations, by amending the BC *Pipeline Regulations*,[283] and introducing new methane regulations and fugitive emissions guidelines.

Amendments to the *Pipeline Regulation* came into effect on March 9, 2020.[284] They now require permit holders to implement both a damage prevention and an integrity management program,[285] that apply to the pipeline's entire life cycle.[286]

The new methane regulations came into force in January 2020,[287] with the aim of reducing methane emissions to meet BC's emissions reduction target.

The BCOGC also released the *Fugitive Emissions Management Guidelines*[288] (the "***Fugitive Emissions Guidelines***") to clarify new leak detection and repair requirements of the *Drilling and Production Regulation*.[289]

8.2 Nova Scotia

On October 4, 2019, the government of Nova Scotia announced that it would be making changes to the *Marine Renewable-energy Act* (the "**MRA**"),[290] to promote tidal energy projects in the Bay of Fundy and D'Or Lake.[291] The MRA, which came into force on January 23, 2018, previously allowed connected generators in these areas to apply for a demonstration permit ("**DP**"), under which they could connect to the electrical grid of Nova Scotia Power ("**SC Power**") for 15 years at a fixed price.[292]

Amendments to the MRA, which became effective on October 30, 2019,[293] allow *all* licensed developers to sell electricity to the public utility for 15 years at a fixed price without a DP.[294]

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[282] *Ibid*, s 9.
[283] BC Reg. 281/2010.
[284] BCOGC, "Pipeline Regulation Amendments" (18 March 2020): online <https://www.bcogc.ca/node/15885/download>.
[285] BCOGC, "Compliance Assurance Protocol Integrity Management Program for Pipelines" (April 2018) version 1.9. Available online: <https://www.bcogc.ca/node/5950/download>.
[286] For more information, see: <https://www.bcogc.ca/industry-zone/integrity-management-program-compliance-assurance>.
[287] *Regulation of the Board of the Oil and Gas Commission, Oil and Gas Activities Act*, BC Reg 286/2018 (17 December 2018). Available online: <http://www.bclaws.ca/civix/document/id/regulationbulletin/regulationbulletin/Reg286_2018>.
[288] *Fugitive Emissions Management Guidelines*, Version 1.0: July 2019 [*Fugitive Emissions Guidelines*]. Available online: <https://bcogc.ca/node/15539/download>.
[289] BC Reg, 282/2010.
[290] SNS 2015, c 32 [MRA].
[291] Nova Scotia Energy and Mines, "Amendments Support Tidal Energy Industry" *News Release* (4 October 2019) [*News Release*]: online <https://novascotia.ca/news/release/?id=20191004001>.
[292] MRA, *supra* note 290, s 49A.
[293] *An Act to Amend Chapter 32 of the Acts of 2015, the Marine Renewable-energy Act*, Assembly 63, Session 2; Nova Scotia 68 Elizabeth II 2019. Available online: <https://nslegislature.ca/sites/default/files/legc/PDFs/annualper_cent20statutes/2019percent20Fall/c034.pdf>.
[294] MRA, *supra* note 290, s 49A(1).

8.3 Prince Edward Island

In late July 2019, PEI Energy Corporation made a preliminary application for the proposed expansion and development of a 30 MW wind farm development in the rural municipality of Eastern Kings.[295] This proposed project would be instrumental in lowering PEI's dependence on the importation of electricity.

On October 23, 2019 an Environmental Impact Assessment was submitted to the Provincial Department of Environment, Water and Climate Change and a supplemental report considering bird and bat populations was submitted on December 16th, 2019.[296] Additionally, a special permit is required for wind turbine projects under the Eastern Kings *Subdivision and Development Bylaw*.[297] On November 1, 2019, a special permit application was submitted. The project currently awaits approval from the municipal, provincial and federal government levels.[298]

8.4 Newfoundland and Labrador

In June 2019, the Québec Court of Appeal ("**QCCA**") sided in part with Hydro-Québec in the decision *Churchill Falls (Labrador) Corporation Limited v Hydro-Québec* ("***Churchill Falls Decision***"),[299] which considered an appeal by Churchill Falls Labrador Corporation ("**CFLCo**") of a Québec Superior Court decision declaring Hydro-Québec is entitled to all the power produced by CFLCo at Churchill Falls.[300] The decisions of the Québec Superior Court and QCCA related to terms of the 2016 renewal of a 1969 power contract between the parties for the supply of power to Hydro-Québec for up to 65 years (the "**Power Contract**").[301]

In the initial Power Contract, Hydro-Québec undertook to purchase most of the electricity produced by the Churchill Falls power plant (whether needed or not), which allowed CFLCo to use debt financing to construct the plant that was estimated to be worth $20 billion in 2018. Similarly, the contract benefitted Hydro-Québec by allowing it to obtain a right to purchase electricity at a fixed price for the entire term of the contract regardless of the impact of inflation and market forces.[302]

As Newfoundland and Labrador's energy requirements changed along with market forces, the Power Contract became increasingly unprofitable for CFLCo. Following several unsuccessful attempts by CFLCo to renegotiate the terms of the Power Contract with Hydro-Québec, litigation ensued culminating in a 2018 SCC ruling that no court could change the contents of the contract nor require parties to renegotiate it.[303]

The *Churchill Falls Decision* relates to the 2016 renewal of the Power Contract. This renewal imported some important changes that the parties could not agree on, including changes relating to the amount of power Hydro-Québec could purchase. CFLCo contended that the renewal contained monthly and yearly caps on the amount of electricity Hydro-Québec could purchase,

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[295] See: Prince Edward Island Energy Corporation, "2020 Proposed Wind Farm" (10 March 2020), online: <http://www.peiec.ca/2020-wind-farm.html> [PEIEC, Eastern Kings Wind Farm].
[296] *Ibid*.
[297] Community of Eastern Kings, *Subdivision and Development Control Bylaw*, at sections 5.33 and 13.2.4. Available online: https://www.easternkings.ca/uploads/1/2/4/3/124361359/122614-eastern-kings-final-bylaw-20131202_jh.pdf.
[298] PEIEC, Eastern Kings Wind Farm, *supra* note 295.
[299] 2019 QCCA 1072 [*CFLCo v Hydro-Québec*, QCCA].
[300] 2016 QCCS 3746 (corrected on November 8, 2016) [*CFLCo v Hydro-Québec*, QCSC].
[301] *Ibid*.
[302] *Churchill Falls (Labrador) Corporation Limited v Hydro-Québe*c, 2018 SCC 46 at 2.
[303] *Ibid* at paras 6 and 133.

and an entitlement that would allow CFLCo to sell power to third parties on an interruptible basis before and after September 1, 2016.[304]

At the Québec Superior Court, Hydro-Québec sought a declaration supporting its rights to "operational flexibility" under the renewal, which would mean no monthly caps. The Superior Court Justice disagreed with CFLCo's interpretation of the renewal entirely and held that Hydro-Québec was entitled to *all* the energy produced by the plant.[305]

On appeal, the QCCA reversed the Superior Court's decision in part, disagreeing that Hydro-Québec was entitled to *all* the energy produced by the Churchill Falls power plant but was rather constrained by a yearly cap, but agreed that Hydro-Québec would not be bound by monthly caps.[306]

CONCLUSION

With newly created federal regulators, the AER review ongoing, and unsettled constitutional challenges to the federal carbon tax and impact assessment legislation, there is no shortage of "files to watch" in 2020 and 2021.

The Government of Alberta appears committed to its "red tape reduction" initiative, passing into royal assent the *Red Tape Reduction Implementation Act, 2019* on December 5, 2019, with changes to 11 pieces of legislation, and recently introducing on June 11, 2020 a new omnibus bill, Bill 22: *Red Tape Reduction Implementation Act*, 2020, which proposes 14 legislative changes across six different ministries, including removing the requirement for Cabinet approval (by order in council) for oil sands projects under the *Oil Sands Conservation Act* and giving the energy minister (rather than Cabinet) sole approval over changes to royalty rates.[307] We expect the Government of Alberta to continue to identify areas where it can streamline regulatory processes. Where they reduce oversight, these measures are likely to attract criticism.

Pipelines are likely to continue to be divisive both in Canada and in the US and to face continued uncertainty. Project proponents will likely be watching the CER and IAAC closely to see how the new regimes, including new participation provisions, are applied.

Indigenous peoples of Canada are also likely to continue to be actively engaged with energy projects, both as opponents and potential partners, in the courts and in the streets. With decisions like *Fort McKay* we may see more challenges based on the honour of the Crown, and arguments that go beyond the duty to consult.

We can expect to see many of the trends seen in 2019 to continue into 2020. Furthermore, courts and regulators have changed the way they operate during the COVID-19 pandemic, including the use of remote attendance and virtual proceedings. It will be interesting to see whether these will continue to be used after the immediate threat of the pandemic has passed.

[304] *CFLCo v Hydro-Québec*, QCCA, *supra* note 299at para 4, citing the wording of the 2016 – 2041 contract.
[305] *CFLCo v Hydro-Québec*, QCSC, *supra* note300at paras 974-981.
[306] *CFLCo v Hydro-Québec*, QCCA, *supra* note 299 at para 4.
[307] *Supra* note 199.