

TORYS

Recent Legislative and Regulatory Developments of Interest to Energy Lawyers

Lou Cusano, Q.C., David Wood, Gino Bruni
and Taylor Campbell



Vavilov
& the New Standard of Review

- Under *Vavilov* the standard of review is presumptively reasonableness. The presumption of reasonableness is rebutted in two circumstances:
 - (1) Where the **language of the statute** dictates the standard
 - (2) Where the **rule of law** requires a correctness standard
- Most applications of *Vavilov* so far seem to be a relatively straightforward application.
 - However, in *FortisAlberta Inc v. Alberta (Utilities Commission)*, 2020, the ABCA was less clear on how the court will apply the new standard of review to statutory appeals from decisions from the Alberta Utilities Commission (“**AUC**”).

Federal Regulatory Changes

Bill C-69 received royal assent on June 21, 2019

1. Canada Energy Regulator

- NEB replaced with CER and *NEBA* replaced with *CERA*
- These changes introduce a new governance structure for the CER, separating their adjudicative and administrative functions (CER Commission and the Board of Directors).
- The *CERA* maintains the same basic structure as the *NEBA*, with two notable amendments:
 - Expanded set of factors to consider (e.g., gender considerations, indigenous rights, climate change).
 - Designated projects under *Impact Assessment Act* to be assessed by IAA review panel with at least one member of CER Commission

2. Impact Assessment Agency of Canada

- CEEA replaced with IAAC and *CEEA, 2012* replaced with *IAA*.
- The IAAC is now solely responsible for conducting all federal “impact assessments”.
- Same political-decision making structure as *CEEA*, but focus shift.
 - **Expanded set of factors:** sustainability, indigenous rights and the extent to which the project hinders or contributes to Canada’s ability to meet its environmental obligations in respect of climate change.
 - ***Strategic Assessment of Climate Change*** (July 16, 2020)
- **Gazoduc Project:** natural gas pipeline between northern Ontario and Saguenay, Quebec that would bring LNG to the Energie Saguenay LNG terminal for export.
 - Integrated review panel (at least one CER Commissioner)
 - Planning phase of impact assessment process complete.
 - Now entering assessment phase with 420-day time limit.

Provincial Reception to Bills C-69 & C-48

- **Bill C-69:** Alberta reference to ABCA (September, 2019)
 - **Intervenors:** Saskatchewan and Ontario (in support of Alberta) and various First Nations groups which will intervene on both the Alberta and Ottawa side of the court challenge.
 - Likely another year until we know the outcome of this challenge.

- **Bill C-48 (*Oil Tanker Moratorium Act*)** prohibits oil tankers from stopping or unloading at ports along northern coast of BC if they contain more than 12,500 tonnes of crude oil; levying penalties of up to \$5 million for lack of compliance.
 - Several provincial governments have expressed concerns but no constitutional challenges to date.

-
- One of the most notable decisions of the CER in the past year was its decision to quash the open season of Enbridge Pipelines Inc. related to contract carriage on the Enbridge Mainline System (EMS).
 - **August 2, 2019:** Enbridge announces open season to offer firm service on EMS.
 - **August 23, 2019:** Suncor Energy Inc. files a complaint with 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
 - **September 27, 2019:** CER issues decision, agreeing with Suncor.

Main findings of CER:

- **Enbridge's open season was unfair to shippers.**
 - Many shippers had no choice but to participate, with some having to do so in order to maintain existing business operations.

- **The regulators intervention in open season processes should be rare but was warranted in the circumstances.**
 - Enbridge's specific and unique circumstances put Enbridge in a dominant position in the market, necessitating intervention.
 - Enbridge controls over 70% of oil transportation out of the Western Canadian Sedimentary Basin.
 - Proposal would reduce uncommitted oil capacity from 80% to 15% of total capacity available.

Market Access: Not Just a Pipedream

-
- The Alberta *Preserving Canada's Economic Prosperity Act* (the “**Prosperity Act**”) gives the Alberta Minister of Energy powers to control the export of natural gas, crude oil, and refined fuels from Alberta.
 - The Attorney General of BC challenged the constitutionality of the *Prosperity Act* before the Federal Court of Canada (the “**FCC**”). The FCC granted an injunction preventing Alberta's Minister of Energy from exercising her discretion under the *Prosperity Act* until the courts can decide whether it is constitutionally valid. The Government of Alberta has appealed the injunction to the FCA. The FCC action is in abeyance pending the outcome of that appeal.

 - The BC government posed a reference question to the British Columbia Court of Appeal (“**BCCA**”) on its constitutional authority to make regulations under the *Environmental Management Act* to restrict the flow of heavy oil into BC.
 - The BCCA unanimously held that the proposed regulation was unconstitutional.
 - The SCC unanimously upheld that decision, on the same day the appeal was heard.

Trans Mountain Pipeline (“TMX”)

TORYS

Operator	Trans Mountain Corporation
Route	From Strathcona County, Alberta to Burnaby, British Columbia
Approvals Obtained	GIC approval – June 2019
Resolved Regulatory or Court Proceedings	<p>FCC upheld second federal cabinet approval for TMX in <i>Coldwater First nation v Canada (AG)</i> – February 2020.</p> <p>SCC denied Coldwater Indian Band leave to appeal – July 2020.</p> <p>BCCA required the BC government to reconsider its environmental assessment certificate – June 2019</p> <p>BC government issued a new environmental assessment certificate – May 2020</p>
Outstanding Regulatory or Court Proceedings	Detailed route hearing.
Most recent estimate for in-service dates	December 2022

Keystone XL Pipeline



Operator	TC Energy
Route	Proposed crude oil pipeline to deliver 830,000 bpd from Western Canada and shale oil from North Dakota and Montana to Nebraska for delivery to Gulf Coast refineries.
Approvals Obtained	South Dakota Public Utilities Commission grants permit – February 2010. NEB approval – March 2010. Trump issued new presidential permit for project – March 2019.
Recent Developments	District Court of Montana cancelled key Nationwide Permit 12 – April 2020 (upheld by Supreme Court – July 2020) Joe Biden plans to rescind presidential permit. Kenny thinks he can convince him otherwise. In March 2020, Alberta announced a \$1.5 billion investment in pipeline in 2020 followed by a \$6 billion loan guarantee in 2021. Construction began on Canada portion in April.
Most recent estimate for in-service dates	2023

To the AER and Beyond!

www.torys.com

TORYS

AER under investigation by Alberta Government

- The Government of Alberta announced it would be reviewing the AER
- Reports by Ethics Commissioner, Public Interest Commissioner and Auditor General:
 - AER acted outside its mandate in building the International Centre for Regulatory Excellence and key AER management acted improperly
- **Outcomes:**
 - New board of directors and CEO
 - Increased board oversight, including updated whistleblowing policies
 - *Responsible Energy Development Act* was amended on June 26, 2020 to allow the government to establish maximum timelines for the AER to review applications
 - New Liability Management Framework – details to come

Honour of the Crown and Prosper Petroleum's Rigel Oil Sands Project

- Proposed project is within the Moose Lake Access Management Plan (“**MLAMP**”) area, the purpose of which is to allow Fort McKay First Nation to practice its Aboriginal and Treaty 8 rights, while still allowing for sustainable resource development.
 - MLAMP has not yet been implemented, despite almost 20 years of negotiations.
- The AER approved the Rigel project in June, 2018, subject to Cabinet authorization, without considering the ongoing negotiations surrounding MLAMP.
- Cabinet never issued a decision on the Rigel project. The ABQB ordered Cabinet to make a decision within 10 days, but that order was stayed by the ABCA pending appeal.
- The AER approval was overturned by ABCA on April 24, 2020 and remitted back to AER.
 - The AER has an obligation to consider the Honour of the Crown, which is broader than the duty to consult, as part of its public interest mandate

Recent Changes to Aboriginal Law

The *Athabasca Chipewyan First Nation v Alberta* decision

- Aboriginal Consultation Office (“**ACO**”) found there was no duty to consult the Athabasca Chipewyan First Nation on a pipeline project. The Athabasca Chipewyan First Nation challenged the ACO’s decision, but not the approval of the project.
- The ABQB and ABCA (affirmed) held that the ACO has the authority to decide whether the duty to consult is triggered and that the mere taking up of Treaty land by the Crown is not sufficient to trigger the duty to consult; there must be the potential for adverse impacts

The Duty to Consult with Aboriginal Groups in AUC proceedings

- AUC ruled it has jurisdiction to consider whether duty to consult has been met and granted intervener standing to Alexis Nakota Sioux First Nation in the Cascade Power Plant Project facility application.
- Reversal of AUC’s prior position in response to the 2017 SCC decisions confirming that a regulatory decision can trigger the duty to consult and that the Crown can rely on the regulatory process to meet the duty consult (*Chippewas of the Thames First Nation v Enbridge Pipelines Inc* and *Clyde River (Hamlet) v Petroleum Geo-Services Inc*).

Updates to Utilities & Electricity Regulation in Alberta

New AUC Chair and Market Surveillance Administrator

- Carolyn Dahl Rees appointed chair of the AUC on June 24, 2020
- Derek Olmstead appointed Administrator and chief executive of the MSA on April 22, 2020

UCP Rescinds NDP programs

- Citing investor concerns of uncertainty, UCP reversed the former NDP Government's plan to introduce a capacity market to the current "energy-only" market by passing an amending act that removed all references to the capacity market from the *Alberta Utilities Commission Act*, the *Electric Utilities Act* and the *Hydro and Electric Energy Act*
- Renewable Electricity Program cancelled. Alberta government favours a market-driven renewable power model.
 - Federal RFI (April 15, 2020): power purchase contracts to support Alberta's creation of renewable generation capacity; proposals for new installations must be capable of 200-280 MWh to displace emissions of electricity consumed by federal facilities in and outside Alberta

Hydroelectric projects no longer require standalone Act:

- *Red Tape Reduction Implementation Act, 2019* – hydroelectric project approvals no longer require standalone Act.

Notable Developments in Other Canadian Jurisdictions

Notable Developments in other Canadian Jurisdictions

British Columbia

- In 2019, the BC Oil and Gas Commission implemented new methane regulations and fugitive emissions guidelines as well as amendments to the *Pipeline Regulation* requiring permit holders to implement damage prevention and integrity management programs for the pipeline's entire lifecycle
- Bill 17, the *Clean Energy Amendment Act, 2020*, would abolish the self-sufficiency requirement, and allow BC to increase its trade-in clean electricity with AB and the US in pursuit of 100% clean energy

Nova Scotia

- Changes announced in 2019 to the *Marine Renewable-energy Act* promoting tidal energy projects in the Bay of Fundy and D'Or Lake

Prince Edward Island

- PEI Energy made a preliminary application for the expansion and development of a 30 MW wind farm in the rural municipality of Eastern Kings which would materially reduce PEI's dependence on electricity imports

Newfoundland and Labrador

- The Churchill Falls power plant saga continues with most recent ruling of the QCCA overturning the QCSC ruling on the Power Contract renewal → Hydro-Québec is not entitled to *all* energy produced by Churchill Falls power plant; constrained to a yearly cap

-
- Canadians and Indigenous Peoples in Canada are increasingly active (in support and opposition) in energy projects, which is a trend we expect to continue.
 - *Fort McKay v Prosper Petroleum* opens the door to a larger role for Honour of the Crown in regulatory decisions.
 - Red Tape Reduction Initiative: Alberta has passed two omnibus red tape reduction acts in its first 1.5 years in office, and will likely continue to look for ways to streamline processes.
 - Notable files to watch: Alberta's liability management framework, legal challenges to Bill C-69 and ongoing challenges (legal and otherwise) to large pipeline projects.
 - Impact of COVID-19.
-

Thank you

Lou Cusano, QC

Partner

lcusano@torys.com

David Wood

Senior Counsel

dwood@torys.com

Gino Bruni

Senior Associate

gbruni@torys.com

Taylor Campbell

Associate

tcampbell@torys.com

www.torys.com

TORYS