

## RECENT LEGISLATIVE AND REGULATORY DEVELOPMENTS OF INTEREST TO ENERGY LAWYERS

ROSA TWYMAN, LAURA-MARIE BERG,  
AND MARLÈ RILEY\*

*This article provides a high-level overview of regulatory and legislative developments in Canada from mid-April 2020 to the end of March 2021. We reviewed statutes, regulations, case law, regulatory decisions, and industry practices from provincial, territorial, and federal authorities. The topics of note include the challenges related to climate change and decarbonization, the opportunities that decarbonization provides for evolving technology and mechanisms for low carbon energy through the use of hydrogen and small scale nuclear, and the regulatory gaps related thereto. We address developments in regulatory efficiency, set out how the Vavilov decision has been applied to energy regulatory decisions, discuss energy regulators' obligations to consider the honour of the Crown outside of the "duty to consult," and lastly, discuss the potential effects on project approvals and achieving reconciliation with Indigenous peoples.*

### TABLE OF CONTENTS

I.	CLIMATE CHANGE, DECARBONIZATION, AND CARBON TAXES . . . . .	528
A.	CANADA AND THE CLIMATE CHANGE CHALLENGE . . . . .	528
B.	CONSTITUTIONALITY OF FEDERAL CARBON PRICING LAW . . . . .	529
C.	PROPOSED FEDERAL LEGISLATION AND REGULATIONS . . . . .	532
D.	INDUSTRY'S RESPONSE TO A LOWER CARBON FUTURE . . . . .	534
E.	WHAT IS HAPPENING IN ALBERTA? . . . . .	534
F.	DECARBONIZATION IN THE CONTEXT OF FACILITIES PROCEEDINGS . . . . .	536
II.	HYDROGEN . . . . .	537
A.	FEDERAL <i>HYDROGEN STRATEGY</i> . . . . .	538
B.	ALBERTA NATURAL GAS VISION AND STRATEGY . . . . .	538
C.	ENBRIDGE GAS INC.: CITY OF MARKHAM HYDROGEN BLENDING PROJECT . . . . .	539
D.	ATCO FORT SASKATCHEWAN HYDROGEN BLENDING PROJECT . . . . .	540
E.	THE WAY FORWARD FOR HYDROGEN . . . . .	541
III.	SMALL SCALE NUCLEAR . . . . .	542
A.	CLEAN, LOW-COST, AND OFF-GRID ENERGY . . . . .	542

---

\* Rosa Twyman is an energy regulatory lawyer and the owner of Regulatory Law Chambers in Calgary, Alberta. Marlè Riley is a Student-at-Law at Regulatory Law Chambers. Regulatory Law Chambers is a boutique law firm, specializing in energy and utility regulated matters. Laura-Marie Berg specializes in energy regulatory law, and has worked on energy projects in private practice, in-house for companies in the electricity sector, and as counsel for energy regulators. We gratefully acknowledge: Tim Boston, VP Public Policy and Government Relations, ENMAX Corporation for his comments on decarbonization matters; Greg Caldwell, Director, Energy Systems Innovation, ATCO Gas for his contribution to the summary and information relating to the ATCO hydrogen Alberta project and the regulation of hydrogen in general; and Sandy Carpenter, the Co-Founder at Canadian Regulatory and Indigenous Law, who provided input on the Indigenous and Aboriginal Law section. We also gratefully acknowledge the contributions of Stephanie Hryciw, Nathan Wellsman, and Leon Kniebel of Regulatory Law Chambers. We made certain updates to the Regulatory Efficiency and Standards of Review under *Vavilov* sections herein, based on information that became available up and until approximately June 2021 prior to finalizing this article for publication.

B.	REGULATION OF SMALL NUCLEAR REACTORS .....	543
IV.	REGULATORY EFFICIENCY .....	546
A.	THE <i>RED TAPE REDUCTION ACT</i> AND <i>RED TAPE REDUCTION IMPLEMENTATION ACTS</i> .....	546
B.	AUC PROCEDURES AND PROCESSES REVIEW .....	548
C.	AUC'S CHANGES TO RULES .....	549
D.	AER REGULATORY EFFICIENCY IMPROVEMENTS .....	549
E.	AER BULLETIN 2020-07 CHANGES .....	550
V.	STANDARD OF REVIEW UNDER <i>VAVILOV</i> .....	550
A.	<i>COLDWATER INDIAN BAND</i> <i>v. ATTORNEY GENERAL OF CANADA</i> .....	550
B.	STATUTORY APPEALS: AER AND THE AUC .....	551
C.	APPLICATION OF THE REASONABLENESS STANDARD: THE ENVIRONMENTAL APPEAL BOARD AND ALBERTA ENVIRONMENT AND PARKS .....	552
D.	REGULATORS' REVIEW OF THEIR OWN DECISIONS .....	554
VI.	ABORIGINAL AND INDIGENOUS ISSUES .....	555
A.	OVERVIEW OF ABORIGINAL AND INDIGENOUS LAW ISSUES .....	555
B.	HONOUR OF THE CROWN AND ASSESSMENT OF PUBLIC INTEREST .....	556
C.	<i>UNITED NATIONS DECLARATION ON THE</i> <i>RIGHTS OF INDIGENOUS PEOPLES</i> .....	557
D.	COASTAL GASLINK PIPELINE AND <i>UNDRIP</i> .....	559

## I. CLIMATE CHANGE, DECARBONIZATION, AND CARBON TAXES

### A. CANADA AND THE CLIMATE CHANGE CHALLENGE

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

The *Paris Agreement*<sup>1</sup> has the objective of keeping global warming below 2°C, or preferably below 1.5°C, when compared to pre-industrial levels.<sup>2</sup> At 1.5°C of warming, the world will still experience severe climate impacts, but at 2°C, climate impacts are expected to be catastrophic.<sup>3</sup> The current efforts around the world have lowered the end-of-century projected warming to 2.9°C. We are presently experiencing 1.1°C of warming and will likely overshoot the targeted 1.5°C unless all emissions can be zeroed by 2040.<sup>4</sup> The COVID-19 pandemic resulted in a 7 percent drop in global emissions in 2020. To keep warming below

<sup>1</sup> *Paris Agreement*, UNFCCC/COP, 21st Sess., Annex 1, UN Doc FCCC/CP/2015/10/Add.1 (2015), 55 ILM 740 (entered into force 4 November 2016) [*Paris Agreement*]. The *Paris Agreement* was adopted by 196 countries.

<sup>2</sup> *Ibid.*, art 2(1)(a).

<sup>3</sup> Alan Buis, "A Degree of Concern: Why Global Temperatures Matter," (19 June 2019), online: <climate.nasa.gov/news/2865/a-degree-of-concern-why-global-temperatures-matter/>.

<sup>4</sup> Climate Action Tracker, "Temperatures," online: <climateactiontracker.org/global/temperatures/>.

1.5°C, compared to pre-industrial levels, the world needs to keep cutting emissions by an additional 7 percent every year for the next decade.<sup>5</sup>

Canada ratified the *Paris Agreement* in 2016 and has recently committed to reducing its greenhouse gas (GHG) emissions by 40–45 percent below 2005 levels by 2030.<sup>6</sup>

## B. CONSTITUTIONALITY OF FEDERAL CARBON PRICING LAW

The 2018 *Greenhouse Gas Pollution Pricing Act*<sup>7</sup> came into force on 21 June 2018.<sup>8</sup> The federal government developed the *GGPPA* to achieve meeting Canada's obligations under the *Paris Agreement*.<sup>9</sup> Carbon pricing is used to reduce emissions, and to fulfil Canada's current goal of reducing emissions to 40–45 percent below 2005 levels by 2030 and achieve net-zero emissions by 2050.<sup>10</sup>

The purpose of the *GGPPA* is to implement stringent pricing mechanisms designed to reduce GHG emissions by creating incentives for that behavioural change.<sup>11</sup> The Supreme Court states that “Part 1 of the *GGPPA* establishes a fuel charge that applies to producers, distributors and importers of various types of carbon-based fuel. Part 2 sets out a pricing mechanism for industrial GHG emissions by large emissions-intensive industrial facilities.”<sup>12</sup> The intent of the output-based pricing system (OBPS) under Part 2 is “to provide a lower average cost of emissions pricing to firms with exposure to international markets, while also maintaining a financial incentive to undertake investments to reduce the emissions-intensity of production.”<sup>13</sup>

In considering the constitutionality of Part 1 and Part 2 of the *GGPPA*, on 25 March 2021, the Supreme Court of Canada held that Parliament has jurisdiction to enact the *GGPPA* as a matter of national concern under the “Peace, Order, and good Government” (POGG) of section 91 of the *Constitution Act, 1867*,<sup>14</sup> and that the levies imposed by the *GGPPA* are constitutionally valid regulatory charges.<sup>15</sup>

---

<sup>5</sup> Climate Action Tracker, “Global Update: Paris Agreement Turning Point” (1 December 2020), online: <[climateactiontracker.org/publications/global-update-paris-agreement-turning-point/](https://climateactiontracker.org/publications/global-update-paris-agreement-turning-point/)>.

<sup>6</sup> Prime Minister Trudeau announced Canada's latest nationally determined contribution target at an international Leaders Summit on Climate. Prime Minister of Canada, “Prime Minister Trudeau Announces Increased Climate Ambition” (22 April 2021), online: <[pm.gc.ca/en/news/news-releases/2021/04/22/prime-minister-trudeau-announces-increased-climate-ambition](https://pm.gc.ca/en/news/news-releases/2021/04/22/prime-minister-trudeau-announces-increased-climate-ambition)>.

<sup>7</sup> *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 [*GGPPA*].

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*, Preamble.

<sup>10</sup> Environment and Climate Change Canada, *Progress Towards Canada's Greenhouse Gas Emissions Reduction Target: Canadian Environmental Sustainability Indicators*, Catalogue No En4-144/48-2021E-PDF (Gatineau: Environment and Climate Change Canada, 3 March 2021) at 5.

<sup>11</sup> *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 28 [*GGPPA Reference*]. This is the purpose of the *GGPPA* as set out by the Supreme Court, with reference to paragraphs 12–16 of the *GGPPA*'s 16-paragraph preamble.

<sup>12</sup> *Ibid.* at para 26.

<sup>13</sup> Nigel Bankes, Andrew Leach & Martin Olszynski, “Supreme Court of Canada Re-writes the National Concern Test and Upholds Federal Greenhouse Gas Legislation: Part I (The Majority Opinion)” (28 April 2021) at 2, online (blog): <[ablawg.ca/wp-content/uploads/2021/04/Blog\\_NB\\_AL\\_MO\\_SCC\\_GGPPA\\_Ref\\_Part1.pdf](https://ablawg.ca/wp-content/uploads/2021/04/Blog_NB_AL_MO_SCC_GGPPA_Ref_Part1.pdf)>.

<sup>14</sup> *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5. Under section 91 of the *Constitution Act, 1867*, the federal government has the authority to legislate on matters of national concern that are not explicitly mentioned in the *Constitution Act, 1867*.

<sup>15</sup> *GGPPA Reference*, *supra* note 11 at paras 4–5.

In making these findings, the Supreme Court held the following: “the true subject matter of the *GGPPA* is establishing minimum national standards of GHG price stringency to reduce GHG emissions”;<sup>16</sup> the legal effects of the *GGPPA* are “centrally aimed at pricing GHG emissions nationally”;<sup>17</sup> and “Parliament acted with a remedial mindset in order to address the risks of provincial non-cooperation on GHG pricing by establishing a national GHG pricing floor.”<sup>18</sup>

In finding the *GGPPA* is *intra vires* Parliament on the basis of the national concern doctrine,<sup>19</sup> the Supreme Court held that:

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

...

The matter is specific, identifiable and qualitatively different from any provincial matters. As well, federal jurisdiction is necessitated by the provinces’ inability to address the matter as a whole through cooperation, which exposes each province to grave harm that it is unable to prevent.

...

[T]here is a real, and not merely nominal, federal perspective on the fact situation of GHG pricing: Canada can regulate GHG pricing from the perspective of addressing the risk of grave extraprovincial and international harm associated with a purely intraprovincial approach to GHG pricing.... [T]he matter’s impact on the provinces’ freedom to legislate and on areas of provincial life that would fall under provincial heads of power is qualified and limited.

...

[P]rovincial jurisdiction is not eroded more than necessary.

...

[T]he matter’s impact on areas of provincial life that would generally fall under provincial heads of power is also limited.<sup>20</sup>

Accordingly, when provinces do not charge a minimum GHG emissions price, they become subject to the backstop *GGPPA* GHG pricing. Provinces can develop a tax or cap-and-trade system that meet minimum standards set under the *GGPPA*. Provinces that do not create such pricing systems are subject to the federal minimum carbon price, which includes a “fuel charge” on gasoline and other fuels and a separate pricing system for large industrial

---

<sup>16</sup> *Ibid* at para 57.

<sup>17</sup> *Ibid* at para 71.

<sup>18</sup> *Ibid* at para 82.

<sup>19</sup> *Ibid* at para 207.

<sup>20</sup> *Ibid* at paras 171, 192, 198, 200, 201.

emitters. The federal minimum price effective 1 April 2021 is \$40 per tonne of emissions. The Liberal government intends to keep raising the carbon price up to \$170 per tonne by 2030.<sup>21</sup>

We further note that various findings in the *GGPPA Reference*<sup>22</sup> can be expected to provide fertile ground for legal consideration, law making, and potential litigation proceedings:

- The relevant Minister has discretion about who to distribute revenues to from the fuel charge and excess emission charge payments, including the discretion to distribute such revenues to the province<sup>23</sup> — this should incentivize provinces to collect GHG emission charges under their own systems.
- The Supreme Court held that in the context of GHG price stringency to reduce GHG emissions, “stringency ... is not limited to the charge per unit of GHG emissions. It encompasses the scope or breadth of application of the charge in the sense of the fuels, operations and activities to which the charge applies and the authority to implement regulatory schemes that are necessary in order to implement such a charge.”<sup>24</sup> However, the *GGPPA* does not define the word “stringency.”<sup>25</sup> This lack of definition could mean that the meaning of “stringency” will be developed through case law.
- The Supreme Court points out that the mischief is not GHG emissions generally, or to take over the field of regulating GHG emissions, “but rather the effects of the failure of some provinces to implement GHG pricing systems or to implement sufficiently stringent pricing systems.”<sup>26</sup> We can expect the “stringency” of any provincial system, or consideration of the provinces’ design and pricing instruments will require an assessment of meeting the purpose under the *GGPPA* to reduce GHG emissions through changed behaviours tied to Canada’s obligations under the *Paris Agreement*.
- The Governor in Council (GIC) has the discretion under Part 2 of the *GGPPA* to “make orders adding GHGs to, or deleting them from, [Schedule 3] or amending the global warming potential of any gas.”<sup>27</sup> Again, any such discretion will be subject to legal challenges to assess if the discretion is exercised in accordance with meeting the purpose of the *GGPPA*. An outcome that also will need to be defined, quantified, and compared with reference to provinces’ systems on an ongoing basis. Should all provinces’ systems have the actual outcome of a proportionately measured criteria to make the same contributions towards GHG emissions

---

<sup>21</sup> Environment and Climate Change Canada, *A Healthy Environment and a Healthy Economy: Canada’s Strengthened Climate Plan to Create Jobs and Support People, Communities and the Planet* (Gatineau, Environment and Climate Change Canada, 2020) at 26.

<sup>22</sup> *GGPPA Reference*, *supra* note 11.

<sup>23</sup> *Ibid* at paras 31, 35.

<sup>24</sup> *Ibid* at para 119.

<sup>25</sup> *Ibid* at para 73.

<sup>26</sup> *Ibid* at paras 61, 65.

<sup>27</sup> *Ibid* at para 76.

reductions? If a system is initially found to meet the relevant stringency requirements, and subsequently found not to, how is that remedied? How do we measure meeting the federal government's outcome-based targets<sup>28</sup> on an ongoing basis to give effect to the purpose of the *GGPPA*?

How will testing of equivalency (comparable stringency) be measured and assessed on a case-by-case basis against the overall purpose of the *GGPPA*, and then be compared against other cases? Will political agendas or favouritism play a role where for example a system for industrial emitters for one province relies on a carbon tax and another on a cap-and-trade program, when considering if the prices under each system is equivalent to what would be expected to be achieved under the federal minimum GHG emission pricing?<sup>29</sup> The *GGPPA* will raise significant legal and policy concerns, as the federal government and the provinces grapple with how to manage GHGs going forward, in a manner where Canada achieves its nationally determined contribution climate targets. Carbon price increases can be expected to have a greater impact on the provinces that produce oil and gas and have large industrial facilities. Not implementing GHG pricing to reduce GHGs, on the other hand, can have a disproportionate negative effect on more vulnerable communities and regions in Canada. It is important to manage the desired GHG reduction behaviour changes in a manner that creates federal-provincial unity and coordination, rather than by exacerbating federal-provincial divisions and conflicts. Managing these conflicts and the effects that allow for the continued competitive production of Canadian oil and gas and industrial facilities' products will be critical, while also considering and avoiding (or mitigating) GHG emissions' impacts generally. This includes the impacts on more vulnerable communities and regions, as Canada and the world transition to low carbon economies.

### C. PROPOSED FEDERAL LEGISLATION AND REGULATIONS

As stated, the *GGPPA*'s purpose is to provide incentives to change behaviour that reduce GHG emissions in two parts: a regulatory charge on fossil fuels or "fuel charge" and an OBPS<sup>30</sup> for industrial facilities. To meet the purpose of the *GGPPA*, target accountability legislation and regulations to create a federal offset system and fuel standards have been drafted.

#### 1. CANADIAN NET-ZERO EMISSIONS ACCOUNTABILITY ACT

The *Canadian Net-Zero Emissions Accountability Act* was introduced as Bill C-12 on 19 November 2020.<sup>31</sup> The purpose of Bill C-12 is to require the setting of national targets for

<sup>28</sup> *Ibid* at para 206.

<sup>29</sup> This concern was raised in dissent in the *GGPPA Reference* (*ibid* at para 609).

<sup>30</sup> Department of Environment, *Greenhouse Gas Offset Credit System Regulations*, (2021) C Gaz I, vol 155, Number 10 (*Greenhouse Gas Pollution Pricing Act*) [Canada Gazette]. The government states that "facilities in the federal OBPS do not pay the fuel charge on fuels that they purchase but instead are required to provide compensation on an annual basis for any GHG emissions exceeding their respective emissions limit during a compliance period. Federal offset credits are one of three types of compliance units specified under the *GGPPA* that facilities in the OBPS may provide as compensation for excess emissions" (*ibid*).

<sup>31</sup> Bill C-12, *An Act respecting transparency and accountability in Canada's efforts to achieve net-zero greenhouse gas emissions by the year 2050*, 2nd Sess, 43rd Parl, 2020–2021, (assented to 29 June 2021), SC 2021, c 22.

the reduction of GHG emissions and to promote transparency and accountability in relation to achieving those targets. Bill C-12 intends to achieve net-zero emissions in Canada by 2050, fulfilling Canada's international commitments in respect of mitigating climate change.<sup>32</sup> Practically, Bill C-12 envisions the establishment of an emissions reduction plan for each target period to reach set emissions reduction targets.<sup>33</sup>

We expect Bill C-12, if passed, will keep Canada on track to meet its nationally set targets to reduce GHG emissions and will be a factor when considering if provincial GHG pricing legislation meets the minimum standards set under the *GGPPA* (whether that is through a carbon tax or cap-and-trade system).

## 2. GREENHOUSE GAS OFFSET CREDIT SYSTEM REGULATIONS

The *Output-Based Pricing System Regulations*<sup>34</sup> govern the OBPS.<sup>35</sup> On 6 March 2021, the federal government published the proposed *Greenhouse Gas Offset Credit System Regulations (Federal Credit Offset Regulations)*.<sup>36</sup> The *Federal Credit Offset Regulations* introduce a federal GHG offset credit system, which incentivizes actions to reduce GHG emissions by sending a pricing signal to increase reductions that are not required under existing regulations or covered by other measures related to carbon pollution pricing.<sup>37</sup>

## 3. CLEAN FUEL REGULATIONS

Section 139(1) of the *Canadian Environmental Protection Act, 1999* provides that “[n]o person shall produce, import or sell a fuel that does not meet the prescribed requirements.”<sup>38</sup> On 19 December 2020, the federal government published its proposed federal *Clean Fuel Regulations*<sup>39</sup> to give effect to section 139(1) of the *CEPA*. The *Federal CF Regulations* aim to reduce GHG emissions through a reduction in the lifecycle carbon intensity of liquid fossil fuels used in Canada “by 12 grams of carbon dioxide equivalent per megajoule (gCO<sub>2</sub>e/MJ) by 2030.”<sup>40</sup> The *Federal CF Regulations* intend to incentivize low carbon fuel uptake, end-use fuel switching in transportation, and process improvements in the oil and gas sector. Under the *Federal CF Regulations*, producers and importers of liquid fossil fuels will have

<sup>32</sup> *Ibid*, Preamble, cls 6–10.

<sup>33</sup> *Ibid*, cls 6–7, 9.

<sup>34</sup> SOR/2019-266.

<sup>35</sup> Canada Gazette, *supra* note 30.

<sup>36</sup> *Ibid*. The *Federal Credit Offset Regulations* are made pursuant to sections 192 and 195 of the *GGPPA* and provide for public input for the 60-day period after the date of publication (*ibid*).

<sup>37</sup> Canada Gazette, *ibid*. The *Federal Credit Offset Regulations* intend to broaden the reach of the federal carbon pollution price signal that is set out in the *GGPPA (ibid)*. To achieve this, the Minister of Environment issues “federal offset credits to project proponents for GHG reductions from projects that meet eligibility criteria and that are implemented in accordance with federal offset protocols” (*ibid*).

<sup>38</sup> SC 1999, c 33, s 139(1) [*CEPA*].

<sup>39</sup> Department of Environment, *Clean Fuel Regulations*, (2020) Gaz I, Vol 154, Number 51 (*Canadian Environmental Protection Act, 1999; Environmental Violations Administrative Monetary Penalties Act*) [*Federal CF Regulations*].

<sup>40</sup> *Ibid*. This represents a decrease of approximately 13 percent in carbon intensity when compared to 2016 levels (*ibid*).

to reduce the lifecycle carbon intensity of the liquid fossil fuels they produce or import into Canada.<sup>41</sup>

#### D. INDUSTRY'S RESPONSE TO A LOWER CARBON FUTURE

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

Project proponents in the oil and gas sector consider various ways in which to reduce GHG emissions, including for example compressor station electrification, renewable electricity generation and backstop resources (pumped hydro storage), investing in nuclear refurbishments, advancing low carbon fuels (renewable natural gas and hydrogen), and exploring carbon management initiatives (for example, carbon capture, utilization and sequestration, and other market-driven solutions such as carbon offsets).<sup>42</sup> Proponents also collaborate with compression equipment suppliers to capture methane emissions from normal operations and recycle them back into transmission systems. In addition, proponents engage in “government, industry and academic collaborations dedicated to improving field research and adoption of emissions detection, quantification, mitigation, and conservation technologies.”<sup>43</sup>

#### E. WHAT IS HAPPENING IN ALBERTA?

##### 1. TECHNOLOGY INNOVATION AND EMISSIONS REDUCTION REGULATION

The *Technology Innovation and Emissions Reduction Regulation*<sup>44</sup> applies to large industrial emitters as of 1 January 2020.<sup>45</sup> Technology Innovation and Emissions Reduction (TIER) facilities are exempt from paying the federal fuel charge under the *GGPPA*. On 28

<sup>41</sup> Most producers and importers “are corporations that own refineries and upgraders” (*ibid*). The *Federal CF Regulations* would “establish annual lifecycle [carbon intensity] limits per type of liquid fossil fuel, expressed in grams of carbon dioxide equivalent per megajoule (gCO<sub>2</sub>e/MJ)” (*ibid*). The liquid fossil fuels that will be subject to the “annual [carbon intensity] reduction requirement are gasoline, diesel, kerosene and light and heavy fuel oils” (*ibid*). The *Federal CF Regulations* include a limited number of exemptions from the annual compliance obligation, such as “aviation fuel, fossil fuel exported from Canada, fossil fuel used in scientific research, and fossil fuel sold or delivered for use in competition vehicles” (*ibid*). Finally, the *Federal CF Regulations* will establish a credit market scheme, where each credit would be equivalent to a lifecycle emission reduction of one tonne of CO<sub>2</sub>e (*ibid*). For each compliance period (typically a calendar year), a supplier will be obliged to demonstrate compliance with its “reduction requirement by creating credits or acquiring credits from other creators, and then using the required number of credits to establish compliance” (*ibid*).

<sup>42</sup> See e.g. *NOVA Gas Transmission Ltd. (NGTL) NGTL West Path Delivery 2023 Project (Project) Hearing Order GH-002-2020* (29 January 2021), File OF-Fac-Gas-N081-2020-07 02, Supplemental Filing No 3 at 2, online (pdf): <docs2.cer-rec.gc.ca/1l-eng/llisapi.dll/fetch/2000/90464/90550/554112/3901587/3968941/4004779/4040052/C11301-1\_NGTL\_West\_Path\_Delivery\_2023\_Project\_Supplemental\_Filing\_No.\_3\_-\_A7Q9E3.pdf?nodeid=4040053&vnum=-2>.

<sup>43</sup> *Ibid*.

<sup>44</sup> Alta Reg 133/2019 [*TIER Regulation*].

<sup>45</sup> Earlier the *Specified Gas Emitters Regulation* (Alta Reg 139/2007) and thereafter the *Carbon Competitiveness Incentive Regulation* (Alta Reg 255/2017) applied.



July 2020, the *TIER Regulation* was amended to provide for the following: (i) TIER voluntary opt-in eligibility; (ii) administrative requirements for conventional oil and gas facilities regulated under the *TIER Regulation*; and (iii) administrative requirements to reduce regulatory burden and further implement the TIER regulatory framework.<sup>46</sup> On 3 November 2020, the TIER credit amount was set<sup>47</sup> so that the amount of money that a person responsible must contribute to the TIER fund to obtain one fund credit is \$30 for 2020 and \$40 for 2021 or a subsequent year. As demonstrated below, this falls well short of the contributions the federal government intends to establish under the *GGPPA* from 2023 onward.<sup>48</sup>

	Alberta Carbon Tax per CO <sub>2</sub> e	Federal Carbon Tax per CO <sub>2</sub> e <sup>49</sup>
2021	\$40/tonne	\$40/tonne
2022	\$40/tonne	\$50/tonne
2023	\$40/tonne	\$65/tonne
2024	\$40/tonne	\$80/tonne
2025	\$40/tonne	\$95/tonne
2026	\$40/tonne	\$110/tonne
2027	\$40/tonne	\$125/tonne
2028	\$40/tonne	\$140/tonne
2029	\$40/tonne	\$155/tonne
2030	\$40/tonne	\$170/tonne

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

## 2. CARBON CAPTURE

Fully operational from 2 June 2020, the Alberta Carbon Trunk Line (ACTL) system is designed as the backbone infrastructure needed to support a lower carbon economy in Alberta. The "ACTL system captures industrial emissions and delivers the CO<sub>2</sub> to mature

<sup>46</sup> OC 233/2020, (2020) (*Emissions Management and Climate Resilience Act*), online: <[www.qp.alberta.ca/documents/Orders/Orders\\_in\\_Council/2020/2020\\_233.html](http://www.qp.alberta.ca/documents/Orders/Orders_in_Council/2020/2020_233.html)>.

<sup>47</sup> Ministerial Order 36/2020, (2020) A Gaz I (*Emissions Management and Climate Resilience Act*).

<sup>48</sup> Government of Canada, "Pricing Carbon Pollution" at 2, online: <[www.canada.ca/content/dam/eccc/documents/pdf/climate-change/climate-plan/annex\\_pricing\\_carbon\\_pollution.pdf](http://www.canada.ca/content/dam/eccc/documents/pdf/climate-change/climate-plan/annex_pricing_carbon_pollution.pdf)>.

<sup>49</sup> Federal Carbon price rises April 1st of each year. It is currently at \$40/tonne. April 2022 it will be \$50/tonne.

oil and gas reservoirs for use in enhanced oil recovery and for permanent storage” and is “the world’s largest capacity pipeline for CO<sub>2</sub> from human activity.”<sup>50</sup> The ACTL is “capable of transporting up to 14.6 million tonnes of CO<sub>2</sub> per year, representing approximately 20% of all current oil sands emissions or equal to the impact of capturing the CO<sub>2</sub> from more than 3 million cars in Alberta.”<sup>51</sup> The construction of the ACTL was funded, amongst other sources, by the Government of Alberta (through payments under the *Carbon Capture and Storage Funding Act*<sup>52</sup>) and the federal government (through its ecoENERGY Technology Initiative<sup>53</sup> and the Clean Energy Fund<sup>54</sup>).

## F. DECARBONIZATION IN THE CONTEXT OF FACILITIES PROCEEDINGS

At the federal level in Canada, impact assessment requirements take Canada’s GHG emissions targets into account.<sup>55</sup> In October 2020, the federal government released the final version of Strategic Assessment of Climate Change,<sup>56</sup> which describes how federal environmental assessments, including those undertaken by the Canada Energy Regulator (CER), are to consider climate change.<sup>57</sup> These requirements were incorporated into the 6 August 2020 version of the CER *Filing Manual*.<sup>58</sup> The CER *Filing Manual*’s GHG and Climate section includes the following addition to Table A-2: “[F]or proponents of projects with a lifetime beyond 2050, project applications must include a credible plan to achieve net-zero emissions by 2050.”<sup>59</sup> It is not clear yet how the CER will assess this filing requirement.<sup>60</sup>

The importance of establishing some clarity in how GHG emissions will be evaluated in the context of facility approvals is illustrated by a 22 March 2021 decision by the United States’ Federal Energy Regulatory Commission (FERC),<sup>61</sup> which included an assessment of

<sup>50</sup> Alberta Carbon Trunk Line, “Celebrating 1 Million Tonnes of CO<sub>2</sub> Captured and Sequestered,” online: <actl.ca/>.

<sup>51</sup> *Ibid.*

<sup>52</sup> SA 2009, c C-2.5.

<sup>53</sup> Natural Resources Canada, “ecoENERGY Innovation Initiative” (21 November 2016), online: <www.nrcan.gc.ca/nrcan/transparency/reporting-accountability/plans-performance-reports/ecoenergy-innovation-initiative/19036>.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Impact Assessment Act* (SC 2019, c 28, s 1) provides that the scope of factors to be assessed include “the extent to which the effects of the designated project hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change” (*ibid.*, ss 22(1)(i), 63(e)). Similar provisions are also found in the *Canadian Energy Regulator Act* (SC 2019, c 28, ss 183(2)(j), 262(2)(f), 298(3)(f)).

<sup>56</sup> Environment and Climate Change Canada, *Strategic Assessment of Climate Change: Revised October 2020*, Catalogue No En14-417/2021E-PDF (Gatineau: Environment and Climate Change Canada, 2021). *Ibid.* at paras 1, 18.

<sup>57</sup> Canada Energy Regulator, *Filing Manual* (Calgary: Canada Energy Regulator, 2020) at 59–126, online: <www.cer-rec.gc.ca/en/applications-hearings/submit-applications-documents/filing-manuals/filing-manual/filing-manual.pdf> [CER *Filing Manual*].

<sup>58</sup> *Ibid.* at 86.

<sup>59</sup> *Ibid.* at 86.

<sup>60</sup> The CER *Filing Manual* sets out the elements for the submission of an assessment of GHGs for both construction and operation of a project and, in certain cases, an upstream assessment as well. As explained in the CER *Filing Manual*, “[a]pplicants should indicate if the upstream emissions associated with the project are likely to be above or below the applicable threshold presented in Section 3.2 of the Strategic Assessment of Climate Change” (*ibid.* at 88).

<sup>61</sup> Regulation of the environment in the US is highly complex and varies significantly from state to state. We draw on this decision from FERC, as it is a federal regulator (albeit perhaps with questionable jurisdiction on this issue), and it does illustrate some of the issues Canada faces with policy across the border.

the significance of a proposed natural gas pipeline project's GHG emissions and contribution to climate change for the first time.<sup>62</sup> As referenced in the *FERC Decision*, the US Court of Appeals for the District of Columbia Circuit has held that "a proposed interstate natural gas pipeline's reasonably foreseeable GHG emissions are relevant to whether the pipeline is required by the public convenience and necessity."<sup>63</sup> In relying on this decision, FERC assessed the significance of a project's GHG emissions or those emissions' contribution to climate change. This decision departs from the FERC's previous decisions where it held that it would not conduct such assessments.<sup>64</sup> However, as with all decisions, the devil is in the details. FERC noted that the *National Environmental Policy Act*:

[D]oes not require that the studies, metrics, and models—scientific and otherwise—on which an agency relies be universally accepted or otherwise uncontested. Instead, NEPA permits agencies to rely on the best available evidence, quantitative and qualitative, even where that evidence has certain limitations.<sup>65</sup>

FERC outlined that it would determine whether a project's emissions were significant by comparing "the project's reasonably foreseeable GHG emissions to the total GHG emissions of the United States as a whole."<sup>66</sup> The FERC decision was controversial with two Commissioners dissenting on the GHG measurement issue. Commissioner Danly wrote the following:

This order represents regulatory malfeasance at its most arbitrary and capricious. We leave the public and the regulated community—including investors upon whom we rely to provide billions of dollars for critical infrastructure—with no discernible principles by which the Commission intends to consider proposed projects. We announce this dramatic change of direction without notice, in an obscure docket that is likely not to be appealed.<sup>67</sup>

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

## II. HYDROGEN

In addition to the challenges, there are opportunities associated with addressing climate change. For example, since "combustion of hydrogen emits only water, blending hydrogen

---

<sup>62</sup> *Northern Natural Gas Company*, 174 FERC 61,189, Docket No CP20-487-000 at paras 29–36 [*FERC Decision*].

<sup>63</sup> *Ibid* at para 30. In the *FERC Decision*, the Commission explains a case where the project's indirect GHG emissions were reasonably foreseeable and needed to "include a discussion of the 'significance' of this indirect effect as well as the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions" (*ibid* at 11, n 45).

<sup>64</sup> *Ibid* at para 29.

<sup>65</sup> *Ibid* at para 33.

<sup>66</sup> *Ibid* at para 34. The project at issue would emit 20,006 metric tons of GHGs from construction and operation. When compared to the 5.903 billion metric tonnes of CO<sub>2</sub>e emitted at the national level in 2018, the project would increase CO<sub>2</sub>e emissions by 0.0003 percent, and in subsequent years, by 0.000006 percent (*ibid*).

<sup>67</sup> *Ibid* at para 2, Danly dissenting.

into natural gas reduces the [GHG] intensity of the natural gas stream.”<sup>68</sup> In the following section, we briefly address the development of hydrogen as a mechanism for addressing GHG emissions in Canada. We outline strategies published by the federal government and Government of Alberta and provide details on some recent projects where hydrogen is being blended with natural gas. We conclude by outlining some regulatory gaps that need to be addressed for this industry to continue to develop.

### A. FEDERAL HYDROGEN STRATEGY

In December 2020, the federal government published its hydrogen strategy for Canada.<sup>69</sup> The Federal *Hydrogen Strategy* notes that there are “gaps in existing codes [and] standards that need to be addressed to enable adoption” of hydrogen as part of the integrated energy system in Canada.<sup>70</sup> According to the federal government, applications that have not yet been piloted in Canada, and are in the pre-commercial stage, represent important areas of focus. For example, blending of hydrogen into natural gas systems has been demonstrated around the world to lower GHG emissions when compared to traditional power-to-gas projects. The lack of developed and adopted codes and standards in Canada related to this end-use application is currently one of the main limiting steps. One of the changes envisioned is the setting of hydrogen blending limits.

### B. ALBERTA NATURAL GAS VISION AND STRATEGY

In October 2020, the Government of Alberta published its Natural Gas Vision and Strategy.<sup>71</sup> The Alberta NG Strategy identifies hydrogen as a potential source of “significant economic value for Alberta and Canada, while advancing critical environmental outcomes.”<sup>72</sup> The Alberta government set several ambitious targets, not the least of which include building pathways to cross policy barriers in the short term, passing hydrogen-deployment-enabling legislation in the medium term (2021–2023), and “exploring opportunities for broader hydrogen transportation utilizing existing natural gas infrastructure and pipeline corridors” in the long term.<sup>73</sup> Also, in the long term, to secure a world-scale hydrogen energy export project in Alberta. The learnings from hydrogen pilot projects are valuable to assess and direct future GHG reduction actions through the use of hydrogen.

---

<sup>68</sup> Emissions Reduction Alberta, “Fort Saskatchewan Hydrogen Blending: ATCO Gas and Pipelines Ltd.” (2020), online: <eralberta.ca/projects/details/fort-saskatchewan-hydrogen-blending/>.

<sup>69</sup> Natural Resources Canada, *Hydrogen Strategy for Canada: Seizing the Opportunities for Hydrogen: A Call to Action*, Catalogue No M134-65/2020E-PDF (Natural Resources Canada, 2020) [Federal *Hydrogen Strategy*].

<sup>70</sup> *Ibid* at 98. This was reiterated by Aaron Hoskin (Natural Resources Canada) “Clean Hydrogen: Leveraging Bilateral Opportunities in Canada & Japan Webinar” (Webinar hosted by the Globe Series, 17 March 2021).

<sup>71</sup> Government of Alberta, *Getting Alberta Back to Work: Natural Gas Vision and Strategy* (6 October 2020), online: <open.alberta.ca/dataset/988ed6c1-1f17-40b4-ac15-ce5460ba19e2/resource/a7846ac0-a43b-465a-99a5-a5db172286ae/download/energy-getting-alberta-back-to-work-natural-gas-vision-and-strategy-2020.pdf> [Alberta *NG Strategy*].

<sup>72</sup> *Ibid* at 23.

<sup>73</sup> *Ibid* at 25.

### C. ENBRIDGE GAS INC.: CITY OF MARKHAM HYDROGEN BLENDING PROJECT

On 31 March 2020, Enbridge Gas Inc. (Enbridge Gas) filed an application to the Ontario Energy Board (OEB) to construct approximately 755 meters of natural gas pipeline, three stations, and two network disconnects in the City of Markham for a cost of approximately \$5.23 million.<sup>74</sup> Under this pilot project, Enbridge Gas intends to blend the standard natural gas that it currently distributes with up to 2 percent of hydrogen gas (blended gas) for distribution within an isolated portion of Enbridge Gas' existing distribution system, consisting of approximately 3,600 existing customers, called the Blended Gas Area (BGA) (the Enbridge Project). The purpose of the Enbridge Project is to provide insight into the use of hydrogen as a method for decarbonizing natural gas to reduce GHG emissions and expand such blending to other locations within the distribution system, and determine if hydrogen blending should be pursued at a large scale. Enbridge Gas estimated that the "GHG reductions associated with using blended gas having 2% hydrogen by volume in the BGA would be between 97–120 tonnes of carbon dioxide equivalent (tCO<sub>2</sub>e) per year."<sup>75</sup>

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

- *Benefits of the Enbridge Project:* The Enbridge Project is "expected to provide detailed information on the impact of hydrogen blending on the level of carbon reduction, the risk to the distribution system and customers' equipment, the potential for the expansion of hydrogen blending into other areas of its distribution system, and details on the hydrogen gasification process."<sup>76</sup>
- *Safety and Technical Risks:* The low levels of hydrogen proposed for the Enbridge Project (2 percent versus projects in other jurisdictions with hydrogen concentrations of up to 20 percent by volume)<sup>77</sup> posed no significant risk to the distribution system, and Enbridge Gas' customers or their equipment.<sup>78</sup>
- *Impact on Consumers:* Approximately half of Enbridge Gas' customers indicated that they would support "a small increase in their natural gas bill to pursue low carbon initiatives," even though most customers are not familiar with low carbon initiatives.<sup>79</sup>

<sup>74</sup> *Enbridge Gas Inc: Application for leave to construct natural gas pipelines and associated facilities in the City of Markham, Regional Municipality of York* (29 October 2020), EB-2019-0294, online: <[www.oeb.ca/none/2774](http://www.oeb.ca/none/2774)> [OEB Decision]. This application was brought under section 90 of the *Ontario Energy Board Act, 1998* (SO 1998, c 15, Sch B.)

<sup>75</sup> *Ibid* at 1.

<sup>76</sup> *Ibid* at 7.

<sup>77</sup> *Ibid*. The Federation of Rental-Housing Providers of Ontario "expressed safety concerns about hydrogen embrittlement in steel pipelines and the detection of leaks from pipelines carrying blended gas — especially at higher concentrations of hydrogen gas and higher pipeline operating pressures" (*ibid* at 8). The OEB's concern:

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

<sup>78</sup> *Ibid*.

<sup>79</sup> *Ibid* at 9.

- *Hydrogen Procurement*: Enbridge Gas intended to procure hydrogen from an affiliate of Enbridge Gas to keep ratepayers' cost neutral. The "price paid for hydrogen would be the same price paid for traditional natural gas and would fluctuate according to market conditions. Enbridge Gas is proposing to recover this commodity cost from all customers in the [same rate zone] until rebasing, after which time the costs would be recovered from all its ratepayers."<sup>80</sup>
- *Consumption Impact*: Hydrogen has approximately one-third of the heating power of natural gas.<sup>81</sup> Enbridge Gas proposed to offset any potential impacts from BGA customers consuming "a larger volume of blended gas to get the same amount of energy as contained in a smaller volume of standard natural gas ... by including annual rate riders that would credit customers in the BGA for the cost associated with the increase in volumetric requirements."<sup>82</sup>
- *Intellectual Property of the Project*:<sup>83</sup> The OEB indicated that it expects Enbridge Gas to notify them "if any benefits arise from the intellectual property as part of the Project, for a determination by the OEB at its rebasing application on how these benefits will be treated."<sup>84</sup>

#### D. ATCO FORT SASKATCHEWAN HYDROGEN BLENDING PROJECT

In a unique project for Alberta, ATCO<sup>85</sup> "will blend hydrogen into a subsection of its Fort Saskatchewan natural gas distribution system at a concentration of up to five percent, by volume" (ATCO Project).<sup>86</sup> ATCO intends to use hydrogen derived from natural gas to support the "ongoing exploration and production of Alberta's abundant natural gas resources and [to demonstrate] the safe and effective blending of hydrogen into the natural gas distribution system."<sup>87</sup> The ATCO Project was expected to get underway in September 2020, starting with commercial and community activities. Construction commenced in the first quarter of 2021<sup>88</sup> with an estimated cost of \$5.7 million.<sup>89</sup>

The ATCO Project differs from the Enbridge Project in some respects: (1) the ATCO Project is limited to the distribution level, which means that concerns in relation to pipeline

---

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.* at 11.

<sup>82</sup> *Ibid.* "This treatment would apply to ratepayers in the BGA until rebasing or until such earlier time that a different treatment is appropriate based on future developments" (*ibid.* at 12).

<sup>83</sup> *Ibid.* at 12.

<sup>84</sup> *Ibid.* "Enbridge Gas is also expected to comment on the proposed sharing of benefits from the intellectual property when it seeks any changes to, or expansion of, the Project" (*ibid.*).

<sup>85</sup> ATCO, "ATCO to Build Alberta's First Hydrogen Blending Project with ERA Support" (21 July 2020), online: <[www.atco.com/en-ca/about-us/news/2020/122900-atco-to-build-alberta-s-first-hydrogen-blending-project-with-era.html](http://www.atco.com/en-ca/about-us/news/2020/122900-atco-to-build-alberta-s-first-hydrogen-blending-project-with-era.html)> [ATCO, "Alberta's First Hydrogen Blending Project"]. Canadian Utilities, an ATCO company, was awarded "\$2.8 million in funding from Emission Reductions Alberta's (ERA) Natural Gas Challenge to advance a first-of-its-kind hydrogen blending project in Fort Saskatchewan" (*ibid.*).

<sup>86</sup> Emissions Reduction Alberta, *supra* note 68.

<sup>87</sup> *Ibid.*

<sup>88</sup> ATCO, "Alberta's First Hydrogen Blending Project," *supra* note 85.

<sup>89</sup> Emissions Reduction Alberta, *supra* note 68.

embrittlement<sup>90</sup> (which is only relevant to high pressure gas pipelines) are not relevant; (2) ATCO intends to absorb the cost of the ATCO Project not covered by funding from Emissions Reduction Alberta's Natural Gas Challenge, subject to potential future legislative changes that may allow ATCO to recover such costs in its revenue requirement; (3) the hydrogen will be sourced from natural gas activities as opposed to electrolysis as used in the Enbridge Project; thereby, reducing the price of the hydrogen and increasing the available quantity; and (4) ATCO intends a hydrogen blend of 5 percent as opposed to 2 percent used in the Enbridge Project. ATCO decided on a blend of 5 percent because this would result in statistically significant reductions in GHG emissions and still satisfy ATCO's internal safety parameters and remain affordable.

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

## **E. THE WAY FORWARD FOR HYDROGEN**

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

Some regulatory and policy questions will have to be answered. (1) To what extent do we take into account the reduction of GHG emissions as a sufficient rationale to justify the construction or adaption of present facilities? Do we take into consideration as a factor that a project aimed at reducing GHG emissions is "needed" within the context of regulated facility applications? (2) Do we accept that the increased cost of maintenance and possibly system expansion is justified in reaching this greater goal of reducing GHG emissions? In other words, do we accept that the expenses to be incurred are "prudent" when considering that the cheapest option is to do nothing for current generations, but perhaps not for future generations? (3) Can a pan-Canadian approach create a nationally integrated hydrogen market in the Canadian public interest? And (4) do we have potential stranded asset risks, for things like the gas distribution systems (or can these systems be repurposed)? Who covers the costs of potential stranded assets, upgraded, or new assets (for example, utility shareholders, ratepayers, or taxpayers)?

Some of the practical challenges for the deployment of hydrogen on a large scale may be summarized as follows. (1) Whilst there are blanket statements that the use of hydrogen will reduce GHG emissions (and it is certainly beyond doubt that on its own) because burning

---

<sup>90</sup> ATCO, "Fort Saskatchewan Hydrogen Blending Project," online: <[www.atco.com/en-ca/projects/fort-saskatchewan-hydrogen-blending-project.html](http://www.atco.com/en-ca/projects/fort-saskatchewan-hydrogen-blending-project.html)>.

hydrogen as a fuel source does not release GHG emissions, the fact remains that free hydrogen does not exist in large quantities other than deep underground. This means that there will be a cost to extract hydrogen (whether from underground, water, or other substances). At present that cost exceeds the cost of extracting natural gas by a significant margin. (2) Hydrogen is not as an efficient heating medium as, for instance, natural gas. The inescapable conclusion is that we will have to extract more hydrogen than natural gas and transport increased volumes of hydrogen on our systems to meet the same needs currently met by natural gas. This transportation cannot, in the long run, be limited to distribution systems and as such concerns relating to pipeline embrittlement will have to be resolved. (3) Once we have taken into account the process to extract sufficient quantities of hydrogen and have transported the hydrogen in pipelines (that may require significantly more maintenance than at present), we will still need to resolve what effect converting hydrogen into energy will have on consumers' appliances. And (4) the question begs, once we have considered the net effect of hydrogen blending, do we still in fact reduce GHG emissions to a sufficient level to justify the costs?

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

### III. SMALL SCALE NUCLEAR

#### A. CLEAN, LOW-COST, AND OFF-GRID ENERGY

Another opportunity presented by the climate change challenge is the development of small-scale nuclear projects. In 2018, Natural Resources Canada brought together provincial and territorial governments, industry, utilities, and other interested stakeholders for a ten-month, pan-Canadian conversation on Canada's Small Modular Reactor (SMR) opportunity. SMRs are nuclear fission reactors that are being designed to be built at a smaller size, but in larger numbers than most of the world's current nuclear fleet. They are small, in both power output and physical size, modular, meaning they are factory constructed, portable and scalable, reactors, meaning that they use nuclear fission to produce energy for the following: "electricity, hybrid energy systems, district heating, water desalination, and high quality steam for heavy industry applications."<sup>91</sup>

In November 2018, the Canadian SMR Roadmap Steering Committee<sup>92</sup> published an SMR Roadmap Report taking the view that Canada's regulatory framework and waste management regime is well positioned to respond to the SMR paradigm shift, but

---

<sup>91</sup> Canadian Nuclear Association, "Canadian Small Modular Reactor: SMR Roadmap" (2018), online: <smrroadmap.ca>. Canadian Small Modular Reactor Roadmap Steering Committee, "A Call to Action: A Canadian Roadmap for Small Modular Reactors" (November 2018), online: <smrroadmap.ca/wp-content/uploads/2018/11/SMRroadmap\_EN\_nov6\_Web-1.pdf?x647737>.

<sup>92</sup> *Ibid.*  
The Steering Committee is a group of Canadian provincial governments, territorial governments, and power utilities interested in the potential for development, demonstration, and deployment of SMRs in Canada. The findings and recommendations of this report reflect the views of the voting members of the Steering Committee. Natural Resources Canada supports the Steering Committee in a convening role and participates as a non-voting member. Atomic Energy of Canada Limited participates in the SMR Roadmap Steering Committee as a non-voting member.



acknowledging that some modernization is necessary.<sup>93</sup> In December 2019, the provinces of Ontario, New Brunswick, and Saskatchewan signed a memorandum of understanding (MOU) to collaborate on the development and deployment of SMRs. Alberta signed the MOU on 14 April 2021.<sup>94</sup> Their main objective is to provide clean, low-cost energy to off-grid and on-grid communities and industries to decarbonize the energy sector as much as possible. In December 2020, the federal government published an SMR Action Plan<sup>95</sup> (the SMR Action Plan) to advance the safe and responsible development and deployment of SMRs.<sup>96</sup> The Government of Alberta was a contributor to the SMR Action Plan.<sup>97</sup> The research by the Alberta Geological Survey and initial exploration by Alberta companies have identified uranium deposits across the province, particularly in northeast and southern Alberta, which may have the potential to contribute to the uranium supply chain (a feedstock needed for SMR development and deployment). As part of Alberta's Recovery Plan, the province will focus on sector strategies to diversify the economy, including a minerals strategy.<sup>98</sup> The minerals strategy will help position Alberta as a destination of choice for mineral investment, exploration, and development that will create a competitive and attractive environment for responsible mineral development, including uranium.<sup>99</sup>

## B. REGULATION OF SMALL NUCLEAR REACTORS

The federal government has jurisdiction over nuclear energy due to its declaratory power under section 92(10)(c) of the *Constitution Act* and the national concern branch of the POGG power under section 91.<sup>100</sup> The regulation of SMRs therefore fall under the *Nuclear Safety and Control Act*,<sup>101</sup> under which the Canadian Nuclear Safety Commission (CNSC) was established. One of the objects of the CNSC is to regulate the development, production, and use of nuclear energy and nuclear substances, and prescribed equipment and prescribed

<sup>93</sup> *Ibid.*

<sup>94</sup> Government of Alberta, "Alberta Signs Small Modular Nuclear Reactor MOU" (14 April 2021), online: <[www.alberta.ca/release.cfm?x10=779532BE17742](http://www.alberta.ca/release.cfm?x10=779532BE17742)>.

<sup>95</sup> Canadian Nuclear Association, "Canada's Small Modular Reactor: SMR Action Plan" (7 May 2021), online: <[smractionplan.ca/](http://smractionplan.ca/)>. "Canada's Small Modular Reactor (SMR) Action Plan is Canada's plan for the development, demonstration and deployment of SMRs for multiple applications at home and abroad" (*ibid.*). See also Natural Resources Canada, *Canada Outlines Next Steps for Progress on Small Modular Reactor Technology* (Ottawa: Natural Resources Canada, 18 December 2020), online: <[www.canada.ca/en/natural-resources-canada/news/2020/12/canada-outlines-next-steps-for-progress-on-small-modular-reactor-technology.html](http://www.canada.ca/en/natural-resources-canada/news/2020/12/canada-outlines-next-steps-for-progress-on-small-modular-reactor-technology.html)> [NRC, *Next Steps for Progress*].

<sup>96</sup> NRC, *Next Steps for Progress*, *ibid.*:

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

<sup>97</sup> Government of Alberta, "Alberta Innovates: SMR Action Plan" (18 December 2020), online: <[smractionplan.ca/content/alberta](http://smractionplan.ca/content/alberta)> [Government of Alberta, "Alberta Innovates"]. "The government of Alberta intends to take the following actions: (1) connection of SMRs to the Alberta innovates strategic priorities; (2) support for SMR technology or knowledge development initiatives; (3) contributions to knowledge; (4) mineral development [based on Alberta having] significant geological potential for many non-energy minerals, including uranium, lithium, vanadium, and rare earth elements" (*ibid.*).

<sup>98</sup> Government of Alberta, "Alberta's Recovery Plan," online: <[www.alberta.ca/recovery-plan.aspx](http://www.alberta.ca/recovery-plan.aspx)>.

<sup>99</sup> Government of Alberta, "Alberta Innovates," *supra* note 97.

<sup>100</sup> *Normtek Radiation Services Ltd v Alberta Environmental Appeal Board*, 2020 ABCA 456 at para 22 [Normtek]. See also *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327.

<sup>101</sup> *Nuclear Safety and Control Act*, SC 1997, c 9 [NSCA]. See definition of a nuclear facility under the NSCA (*ibid.*, s 2).

information.<sup>102</sup> The *Canadian Nuclear Safety Commission Rules of Procedure*<sup>103</sup> along with *Class I Nuclear Facilities Regulations*<sup>104</sup> under which SMRs are classified,<sup>105</sup> prescribes the process which a party is to follow in applying for a licence to conduct any of the actions for which approvals under section 26 of the *NSCA* are required.<sup>106</sup> The Nuclear Energy Agency<sup>107</sup> noted the following in relation to the suitability of current regulatory and legal frameworks for the deployment of SMRs:

The features that could make SMRs a game-changer for cost-effective decarbonisation are also the ones that require a simpler and more efficient nuclear licensing process, one that considers lessons learnt by current regulatory practices to meet safety goals and requirements. Nuclear regulatory authorities are carefully evaluating what the appropriate framework is to assess the safety case for SMRs while still taking advantage of their unique features and inherent safety. As a result, SMRs in general, and non-LWR [Light Water Reactor] SMRs in particular, face significant regulatory uncertainties. The regulatory framework needed for the acceptance of the factory assembly of SMRs is also still under consideration.

The success path of SMRs assumes the commercialisation in series or, in other words, the manufacture and installation of a relatively large number of identical modules or reactors probably in multiple countries. This strategy necessitates the development of a licensing regime based on multi-national reciprocally agreed-upon rules to allow the timely and cost-effective issue of licenses and permits for a given SMR concept in multiple jurisdictions.

The use of modularisation and factory-fabrication, as well as the need for a robust global supply chain meeting consistent codes and standards, may also be sources of regulatory uncertainty with significant potential to slow down the wide commercialisation of the SMR concept.

The current legal framework for nuclear installations will also require specific attention in the case of SMRs. For instance, when it comes to national and international third party nuclear liability regimes for transportable nuclear power plants or the applicability of environmental protection and public participation legislation.<sup>108</sup>

The CNSC, in its report on SMRs, recognized it may be “asked to review proposals for relocatable reactors and for locating SMRs on multiple sites [or] across multiple jurisdictions within Canada.”<sup>109</sup> It also recognized the value of a consistent regulatory approach across

<sup>102</sup> *Ibid*, s 26.

<sup>103</sup> SOR/2000-211.

<sup>104</sup> SOR/2000-204. A class 1 Nuclear Facility is defined as a “Class IA nuclear facility and a Class IB nuclear facility,” which is in turn is further defined (*ibid*, s 1).

<sup>105</sup> Canadian Nuclear Safety Commission, “Small Modular Reactors” (19 November 2020), online: <[www.cnsccsn.gc.ca/eng/reactors/research-reactors/other-reactor-facilities/small-modular-reactors.cfm](http://www.cnsccsn.gc.ca/eng/reactors/research-reactors/other-reactor-facilities/small-modular-reactors.cfm)> [CNSC, “Small Modular Reactors”].

<sup>106</sup> In addition to providing the information set out in section 3 of the *General Nuclear Safety and Control Regulations* (SOR/2000-202), licence applications for a Class I nuclear facility have to be made in respect of the preparation of the site, construction, and operation. Application for a licence to decommission (or abandon) also have to be made, should such a facility be decommissioned.

<sup>107</sup> NEA, “About Us,” online: <[www.oecd-nea.org/jcms/tro\\_5705/about-us](http://www.oecd-nea.org/jcms/tro_5705/about-us)>. *Ibid*:

The OECD Nuclear Energy Agency (NEA) is an intergovernmental agency that facilitates co-operation among countries with advanced nuclear technology infrastructures to seek excellence in nuclear safety, technology, science, environment and law. The NEA operates within the framework of the Organisation for Economic Co-operation and Development (OECD) and is located just outside Paris, France.

<sup>108</sup> NEA, “Small Modular Reactors,” online: <[www.oecd-nea.org/jcms/pl\\_26297/small-modular-reactors](http://www.oecd-nea.org/jcms/pl_26297/small-modular-reactors)>.

<sup>109</sup> Canadian Nuclear Safety Commission, *What We Heard Report – DIS-16-04* (Canadian Nuclear Safety Commission, 15 September 2017), online: <[nuclearsafety.gc.ca/eng/acts-and-regulations/consultation/completed/dis-16-04.cfm](http://nuclearsafety.gc.ca/eng/acts-and-regulations/consultation/completed/dis-16-04.cfm)>.

multiple international jurisdictions. The CNSC undertook to take these considerations into account when developing its regulatory approach to licencing SMRs and identified the following steps regarding the regulatory framework when considering amendments to the *Nuclear Security Regulations*:<sup>110</sup> (1) provide greater clarity on the application of the graded approach;<sup>111</sup> (2) provide greater clarity on licencing for SMRs; and (3) review certain identified CNSC regulatory documents.<sup>112</sup>

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

The CNSC's current approach to regulating SMRs is to apply the same criteria used to regulate traditional reactor facilities. This approach typically entails the CNSC taking a risk-informed approach through "applying resources and regulatory oversight commensurate with the risk associated with the regulated activity."<sup>113</sup> According to the CNSC, some of the challenges that arise in the regulation of SMRs include "different reactor concepts, new deployment models, new operating concepts, modularity in design, new types of fuel, and factory fabrication."<sup>114</sup> Additional challenges exist in the regulatory process itself. Presently, the CNSC has established a 24-month timeline for regulatory activities such as applying for

---

<sup>110</sup> SOR/2000-209.

<sup>111</sup> Kevin W Lee, "The Canadian Nuclear Safety Commission's Readiness to Regulate Small Regulate Small Modular Reactors" (2020) 9:1 CNL Nuclear Rev 99 at 109.

CNSC requirements and guidance for reactor facilities are generally articulated to be technology neutral and where possible permit the use of the graded approach. The graded approach enables applicants to establish and propose the stringency of design measures, safety analyses, and provisions for conduct of their activities commensurate with the level of risk posed by the reactor facility, subject to approval by the CNSC (*ibid* at 99–100).

The CNSC places more regulatory scrutiny on activities that may present greater risk through the application of a graded approach. The degree of scrutiny is informed by: technical assessments of submissions, the safety performance history of the licensee, relevant research, information supplied by parties relevant to Commission proceedings, international activities that advance knowledge in nuclear and environmental safety, and cooperation with other regulatory bodies (*ibid* at 100).

<sup>112</sup> *Ibid* at 102. These are (1) Regulatory Guide G-323, Ensuring the Presence of Sufficient Qualified Staff at Class I Nuclear Facilities – Minimum Staff Complement; (2) RD-336, Accounting and Reporting of Nuclear Material; (3) RD-346, Site Evaluation for New Nuclear Power Plants; (4) RD-367, Design of Small Reactor Facilities; (5) RD/GD-369, Licence Application Guide: Licence to Construct a Nuclear Power Plant; (6) REGDOC-2.4.2, Safety Analysis: Probabilistic Safety Assessment (PSA) for Nuclear Power Plants; (7) REGDOC-2.5.2, Design of Reactor Facilities: Nuclear Power Plants; (8) REGDOC-3.5.1, Licensing Process for Class I Nuclear Power Plants and Uranium Mines and Mills (*ibid* at 104).

<sup>113</sup> CNSC, "Small Nuclear Reactors," *supra* note 105.

<sup>114</sup> Canadian Nuclear Safety Commission, *The Canadian Nuclear Safety Commission's Strategy for Readiness to Regulate Advanced Reactor Technologies*, Catalogue No CC172-223/2019E-PDF (Ottawa: CNSC, December 2019) at 2.

a licence to prepare a site for a Class I nuclear facility.<sup>115</sup> The timelines for further regulatory steps are currently as follows:<sup>116</sup>

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

It may defeat the purpose of having modular (in other words, movable and scalable) technology at your disposal if you have to wait more than two years to move your reactor. A possible solution may be to adopt some of the International Atomic Energy Agency's *Regulations for the Safe Transport of Radioactive Material*.<sup>117</sup> The safe transport of radioactive material, however, relies on the design of the transport package. This would, in the context of SMRs, mean that the construction of an SMR may be subject to different safety considerations than the traditional nuclear reactors. As a point of interest, another challenge related to SMRs is meeting security requirements. A significant number of fully trained and equipped security personnel protect high-security sites from theft or terrorism.<sup>118</sup> The current regulatory framework requires changes to effectively regulate SMRs and achieve the objectives of reliance on SMRs as part of a lower carbon future.

#### IV. REGULATORY EFFICIENCY

##### A. THE RED TAPE REDUCTION ACT AND RED TAPE REDUCTION IMPLEMENTATION ACTS

The *Red Tape Reduction Act*<sup>119</sup> was passed in 2019<sup>120</sup> as a mechanism for assessing the effectiveness of current regulations. The government noted that they wanted to focus on outcomes instead of processes to ensure that all regulations are “necessary, effective, efficient and proportional to their intended outcome.”<sup>121</sup> It set a goal to reduce red tape by one-third,<sup>122</sup> with the view that such a reduction in the regulatory burden would increase

<sup>115</sup> Canadian Nuclear Safety Commission, *REGDOC-3.5.1, Licensing Process for Class I Nuclear Facilities and Uranium Mines and Mills, Version 2* (25 April 2017), online: <nuclearsafety.gc.ca/eng/acts-and-regulations/regulatory-documents/published/html/regdoc3-5-1-v2/index.cfm>.

<sup>116</sup> *Ibid* (table found under section 8.2.1).

<sup>117</sup> Canadian Nuclear Safety Commission, *Regulating the Packaging and Transport of Nuclear Substances in Canada* (September 2010), online: <nuclearsafety.gc.ca/eng/resources/fact-sheets/packaging-and-transport-of-nuclear-substances.cfm>.

<sup>118</sup> *Nuclear Security Regulations*, *supra* note 110.

<sup>119</sup> SC 2015, c 12.

<sup>120</sup> Bill 25, *Red Tape Reduction Implementation Act, 2019*, 1st Sess, 30th Leg, Alberta, 2020 (assented to 5 December 2019); Bill 22, *Red Tape Reduction Implementation Act, 2020*, 2nd Sess, 30th Leg, Alberta, 2020 (assented to 23 July 2020); Bill 48, *Red Tape Reduction Implementation Act, 2020 (No. 2)*, 2nd Sess, 30th Leg, Alberta 2020 (assented to 9 December 2020).

<sup>121</sup> Government of Alberta, “Cutting Red Tape,” online: <www.alberta.ca/cut-red-tape.aspx>.

<sup>122</sup> Alberta, Associate Minister of Red Tape Reduction, *Annual Report Red Tape Reduction 2019-2020* (November 2020) at 4, online: <open.alberta.ca/dataset/ecd877d0-79f9-4379-9bc9-b35a9ad50522/resource/daf6e897-0185-485a-a7b5-9960669ecad1/download/tbf-red-tape-reduction-annual-report-2019-2020.pdf> [2020 Annual Red Tape Reduction Report].

investment, economic growth, innovation, and business competitiveness in Alberta.<sup>123</sup> The red tape reduction affected energy regulation directly through changes to multiple pieces of legislation. These include the *Land and Property Rights Tribunal Act*,<sup>124</sup> *Historical Resources Act*,<sup>125</sup> *Small Power Research and Development Act*,<sup>126</sup> *Hydro and Electric Energy Act*,<sup>127</sup> *Surface Rights Act*,<sup>128</sup> *Mines and Minerals Act*,<sup>129</sup> *Oil Sands Conservation Act*,<sup>130</sup> *Public Lands Act*,<sup>131</sup> and *Energy Efficiency Alberta Act*.<sup>132</sup>

The red tape reduction initiatives led to a significant change to the regulatory framework for land compensation, with the amalgamation of the Land Compensation Board, Municipal Government Board, and Surface Rights Board to all be under the Land and Property Rights Tribunal.<sup>133</sup>

The red tape reduction also led to other significant changes, which included the following: (1) changes to the *OSCA* by removing the “requirement for Cabinet approval of oil sands schemes or operations above 2,000 barrels per day production capacity prior to approval by the Alberta Energy Regulator (AER)”;<sup>134</sup> (2) implementation of the TIER system, which estimated to achieve emissions reductions comparable to the *Carbon Competitiveness Incentive Regulation*<sup>135</sup> reductions while allowing “smaller conventional oil and gas facilities to voluntarily enter the regulatory system”;<sup>136</sup> and (3) an updated proponent guide for First Nations and Métis settlement consultation procedures, and a streamlined process to provide proponents with an understanding of their role when they have a legal duty to consult Indigenous communities.<sup>137</sup>

While improving the efficiency of the government is a laudable goal, there is still an open question regarding whether some of these changes will ultimately lead to better decision-making and governance. For example, while time may theoretically be saved in the oil sands approval process through the removal of the need for Cabinet approval, the Crown must still

<sup>123</sup> C Kemm Yates, David J Mullan & Rowland J Harrison, *Report of the AUC Procedures and Processes Review Committee* (14 August 2020) at 3, online: <[www.auc.ab.ca/Shared%20Documents/2020-10-22-AUCReviewCommitteeReport.pdf](http://www.auc.ab.ca/Shared%20Documents/2020-10-22-AUCReviewCommitteeReport.pdf)> [*AUC Procedures and Processes Review Report*].

<sup>124</sup> SA 2020, c L-2.3.

<sup>125</sup> RSA 2000, c H-9.

<sup>126</sup> RSA 2000, c S-9.

<sup>127</sup> RSA 2000, c H-16.

<sup>128</sup> RSA 2000, c S-24.

<sup>129</sup> RSA 2000, c M-17.

<sup>130</sup> RSA 2000, c O-7 [*OSCA*].

<sup>131</sup> RSA 2000, c P-40.

<sup>132</sup> SA 2016, c E-9.7.

<sup>133</sup> The land and property rights tribunal was established under the *Land and Property Rights Tribunal Act*. This Act came into effect 9 December 2020, with some exceptions. Implementation of the Land and Property Rights Tribunal means that the following boards are amalgamated: (1) Land Compensation Board (*Expropriation Act*, *Historical Resources Act*, *Property Rights Advocate Act*, *Water Act*, and all other acts that were under the jurisdiction of the Land Compensation Board); (2) Municipal Government Board (*Municipal Government Act*); (3) Surface Rights Board (*Surface Rights Act*, *Drainage Districts Act*, *Environmental Protection and Enhancement Act*, *Pipeline Act*, *Oil and Gas Conservation Act*, *Public Lands Act*). The Land and Property Rights Tribunal’s jurisdiction includes complaints and disputes: (1) Referred to in the *Expropriation Act*; (2) under Part 12 of the *Municipal Government Act*; and (3) with respect to any matter under, or referred to, in the *Surface Rights Act*.

<sup>134</sup> 2020 Annual Red Tape Reduction Report, *supra* note 122 at 11.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid* at 14.

fulfill all of its constitutional obligations to First Nations and Métis communities.<sup>138</sup> The “streamlined process” for Indigenous consultation may speed up consultation for project proponents, but only if the consultation is meaningful.

As noted in a previous section of this article, the *TIER Regulation* will likely require amendments following the *GGPPA Reference*.

## B. AUC PROCEDURES AND PROCESSES REVIEW

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

In May 2020 (Bulletin 2020-17), the AUC appointed an expert Procedures and Process Committee (the Committee) to assist in improving the efficiency of rate proceedings. The 14 August 2020 Report of the Committee concluded that significant improvements in efficiency and effectiveness could be made within the AUC’s existing legal framework. The Committee made 30 recommendations that could make the AUC’s processes more efficient. The Committee recommended that the AUC apply an overarching and assertive case-management approach to its process to significantly reduce regulatory lag and solve AUC processes and procedural issues.<sup>139</sup>

In Bulletin 2020-33 (22 October 2020), the AUC announced that it had accepted 29 of the 30 recommendations made by the Committee.<sup>140</sup> A number of the recommendations were adopted immediately, and together with changes forced by the COVID-19 pandemic, created immediate changes to AUC hearings.

These immediate changes included the following: (1) a strong presumption that “all [AUC] rate-setting hearings be conducted in writing”; (2) limit cross-examination to areas and issues that the AUC “considers to be necessary to inform its judgment on the application before it”; (3) discourage non-expert opinion evidence through the “reduction of costs allowed to utilities and eligible interveners”; (4) “a rebuttable presumption of following precedents set by previous decisions in respect of previous rulings on similar motions”; (5) “oral argument to be delivered within three business days of the close of the hearing record, using the top-down/bottom-up format”; and (6) “management of oral argument including utilization of time limits, stipulation of topics on which it will hear argument, or other measures as it deems necessary.”<sup>141</sup>

---

<sup>138</sup> Nigel Banks, “Oil Sands Approvals and Bill 22, the *Red Tape Reduction Implementation Act, 2020*” (15 June 2020), online (blog): <ablawg.ca/2020/06/15/oil-sands-approvals-and-bill-22-the-red-tape-reduction-implementation-act-2020/>.

<sup>139</sup> *AUC Procedures and Processes Review Report*, *supra* note 123 at 1.

<sup>140</sup> Alberta Utilities Commission, *AUC Bulletin 2020-33* (22 October 2020), online: <www.auc.ab.ca/News/2020/Bulletin%202020-33.pdf>. The AUC did not accept the recommendation that a legislated tightening of AUC decision-making timeframes is unnecessary.

<sup>141</sup> *Ibid* at 2.

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

### C. AUC'S CHANGES TO RULES

The AUC made various changes to its rules to improve regulatory efficiency. These changes included the removal of various requirements to facilitate faster and more efficient processes and the rephrasing of rules to enhance clarity. The amendments to Rule 007, Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations, and Hydro Developments and Gas Utility Pipelines serve as an example. Not only does the amendment include further details regarding applications for battery storage facilities, requirements for solar glint and glare assessments for solar plant applications, and requirements for the shadow flicker impact assessments for wind power plant applications, it also provides that the provisions of Rule 020, Rules Respecting Gas Utility Pipelines, will be merged into the new Rule 007.<sup>142</sup> From an efficiency perspective, the introduction of wiki-style form-based applications, prescribed information to be provided in facility applications and changes to consultation radius, will likely prove to be the most significant factors in reducing the processing time of applications.

Another example may be found in the amendments to Rule 005, Annual Reporting Requirements of Financial and Operational Results with an effective date of 31 March 2021. Rule 005 sets out the detailed financial and operational information that is required to be filed annually by utilities, default supply providers, and regulated rate providers. The proposed changes focused on streamlining the reporting of a utility's annual finances and operations by removing schedules or reporting requirements that the AUC considers may no longer be required or that contain information that is publicly available through other means. "The goal was to streamline the reporting of a utility's annual finances and operations, while ensuring the provision of a sufficient level of detail."<sup>143</sup>

The AUC also recently amended Rule 016, Review of Commission Decisions. It has removed errors of law or jurisdiction from the scope of a Commission's review, and has advised that this revision is "designed to minimize overlap with [the] Court of Appeal ... based on the nature of the question under review or appeal."<sup>144</sup>

### D. AER REGULATORY EFFICIENCY IMPROVEMENTS

The AER launched a regulatory efficiency initiative in 2018. The AER, like the AUC, is eliminating or amending duplicate and obsolete requirements to improve application timelines and ensure modern and effective regulation. The changes with the widest range of

---

<sup>142</sup> Alberta Utilities Commission, "Consultation for Rule 007 – Applications for Power Plants, Substations, Transmission Lines and Industrial System Designations, Hydro Developments and Gas Utility Pipelines" (5 March 2021), online: <[www.auc.ab.ca/regulatory\\_documents/Consultations/2021-03-05-Announcement.pdf](http://www.auc.ab.ca/regulatory_documents/Consultations/2021-03-05-Announcement.pdf)>.

<sup>143</sup> Alberta Utilities Commission, *Bulletin 2021-07* (31 March 2021) at 1, online: <[www.auc.ab.ca/News/2021/Bulletin%202021-07.pdf](http://www.auc.ab.ca/News/2021/Bulletin%202021-07.pdf)>. The effective date of the amendment is 31 March 2021.

<sup>144</sup> Alberta Utilities Commission, *Bulletin 2021-11* (6 May 2021) at 1, online: <[www.auc.ab.ca/News/2021/Bulletin%202021-11.pdf#search=Bulletin%202021%2D11](http://www.auc.ab.ca/News/2021/Bulletin%202021-11.pdf#search=Bulletin%202021%2D11)>.

impact are the implementation and expansion integrated decision approach, the OneStop Program and changes to the *OSCA*.

## E. AER BULLETIN 2020-07 CHANGES

The AER has been publishing its regulatory changes, including those not related to the government's red tape reduction initiative in its Regulatory Change Report<sup>145</sup> and a Log of Regulatory Changes.<sup>146</sup> We have already briefly reviewed some of the changes that were made pursuant to the *Red Tape Reduction Implementation Act, 2020*.<sup>147</sup> The AER has also sought to improve the application process through an integrated decision approach (OneStop).<sup>148</sup>

## V. STANDARD OF REVIEW UNDER *VAVILOV*<sup>149</sup>

In December 2019, the Supreme Court issued its decision on *Canada (Minister of Citizenship and Immigration) v. Vavilov*,<sup>150</sup> which again addressed the standard of review to be applied in administrative decisions. Canadian courts have had over a year to apply the *Vavilov* framework. We provide a summary regarding the application of *Vavilov* in energy tribunal appeals.

## A. *COLDWATER INDIAN BAND V. ATTORNEY GENERAL OF CANADA*

*Coldwater Indian Band v. Attorney General of Canada*<sup>151</sup> involved the judicial review of the second approval by the GIC of the Trans Mountain Pipeline Expansion Project. The first approval by the GIC in 2016 was successfully challenged.<sup>152</sup> The applications for judicial review were limited to questions on the duty to consult with Indigenous peoples. The Federal Court of Appeal held the following: while the Supreme Court had held that questions regarding the scope of Aboriginal and treaty rights under section 35 of the *Constitution Act, 1982*<sup>153</sup> require a final answer from the courts and review on a standard of correctness, all

<sup>145</sup> Alberta Energy Regulator, "Regulatory Change Report," online: <[www.aer.ca/regulating-development/rules-and-directives/regulatory-change-report](http://www.aer.ca/regulating-development/rules-and-directives/regulatory-change-report)>.

<sup>146</sup> *Ibid.*

<sup>147</sup> SA 2020, c 25.

<sup>148</sup> Alberta Energy Regulator, "Integrated Decision Approach," online: <[www.aer.ca/regulating-development/project-application/integrated-decision-approach](http://www.aer.ca/regulating-development/project-application/integrated-decision-approach)>. With the integrated decision approach and OneStop, "companies can submit one integrated application that covers activities over the life of the project and receive separate decisions," instead of submitting separate applications for each project (*ibid*). Companies can also choose to submit one integrated application that leads to all decisions being dealt with in a single approval document (*ibid*). This helps the AER focus more on higher-risk activities by automatically evaluating a project based on built-in risk assessment rules to determine if additional review is needed. This attempts to limit the amount of manual reviewing of applications to the more complicated, uncertain, and higher risk activities. Companies can also submit one integrated application and receive decisions in a single approval document (an integrated approach).

<sup>149</sup> There have been a number of articles on the application of *Vavilov* over the past year. See Paul Daly "One Year of *Vavilov*" (Paper delivered at CLEBC Annual Administrative Law Conference, 20 November 2020), online: <[papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3722312](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3722312)>.

<sup>150</sup> 2019 SCC 65 [*Vavilov*].

<sup>151</sup> 2020 FCA 34 [*Coldwater*].

<sup>152</sup> *Tsleil-Waututh Nation v Attorney General of Canada*, 2018 FCA 153.

<sup>153</sup> Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.



parties agreed on the scope of the duty to consult under section 35, and that was therefore not an issue for the Federal Court of Appeal.<sup>154</sup> On the impact of *Vavilov*, the Court found:

This is a statutory judicial review, not a statutory appeal. In such circumstances, there is a presumption that the standard of review is reasonableness (*Vavilov*, paras. 23-32), and none of the exceptions to reasonableness review identified in *Vavilov* apply.

...

In conducting this review, it is critical that we refrain from forming our own view about the adequacy of consultation as a basis for upholding or overturning the Governor in Council's decision. In many ways, that is what the applicants invite us to do. But this would amount to what has now been recognized as disguised correctness review, an impermissible approach.

...

Rather, our focus must be on the reasonableness of the Governor in Council's decision, including the outcome reached and the justification for it. The issue is not whether the Governor in Council could have or should have come to a different conclusion or whether the consultation process could have been longer or better. The question to be answered is whether the decision approving the Project and the justification offered are acceptable and defensible in light of the governing legislation, the evidence before the Court and the circumstances that bear upon a reasonableness review.

...

In *Vavilov*, the Supreme Court emphasized that reasonableness review is to be conducted by appreciating the decision, the reasons for it, and the context in which it was made. This requires us to consider the reasons offered in justification of the decision in light of the evidentiary record.<sup>155</sup>

The Court found the GIC's decision to be reasonable. The evidentiary record demonstrated efforts to identify key concerns of the applicants, engage in communications, and consider and sometimes agree to accommodations. The Court found the consultation process to be consistent with the concepts of reconciliation and honour of the Crown.<sup>156</sup>

## B. STATUTORY APPEALS: AER AND THE AUC

Both the *Responsible Energy Development Act*<sup>157</sup> and the *Alberta Utilities Commission Act*<sup>158</sup> provide a statutory right of appeal on a question of jurisdiction or a question of law. It follows that when permission to appeal is granted for decisions of the AER or AUC, the standard of review is correctness.<sup>159</sup> This standard of correctness was applied by the Alberta

<sup>154</sup> *Coldwater*, *supra* note 151 at para 27.

<sup>155</sup> *Ibid* at paras 26, 28–29, 31.

<sup>156</sup> *Ibid* at para 76.

<sup>157</sup> SA 2012, c R-17.3, s 45 [*REDA*]. The “Regulator” under the *REDA* is the AER.

<sup>158</sup> SA 2007, c A-37.2, s 29 [*AUCA*]. The “Regulator” under the *AUCA* is the AUC.

<sup>159</sup> A notable exception is Justice O’Ferrell’s minority opinion in *Dorin v Epcor Distribution and Transmission Inc*, 2020 ABCA 391.

Court of Appeal in *Fort McKay First Nation v. Prosper Petroleum Ltd.*,<sup>160</sup> where the Court considered the question of whether the AER committed an error of law or jurisdiction by failing to consider the honour of the Crown.<sup>161</sup>

The application of the standard of correctness has had an impact on the outcome of some cases. In a Manitoba Court of Appeal decision involving the Public Utilities Board,<sup>162</sup> the Board sought to create a zero electricity rate for First Nations residential customers on reserves. Applying a “correctness” approach, the Court held that the Board did not have the power to create such a rate. Paul Daly has noted that under a pre-*Vavilov* deferential approach, the result in that case may well have been different.<sup>163</sup>

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

1. *NORMTEK RADIATION SERVICES LTD.  
V. ALBERTA ENVIRONMENTAL APPEAL BOARD*

In *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*,<sup>164</sup> the Alberta Court of Appeal allowed the appeal of a decision of the Alberta Environmental Appeal Board (EAB) to refuse to hear an appeal of an approval permitting Secure Energy Services Inc. (Secure Energy) to accept and dispose of certain naturally occurring radioactive material (NORM) in a landfill located near Drayton Valley, Alberta. The EAB had declined to hear the appeal because it found that Normtek Radiation Services Ltd. (Normtek Services) was not “directly affected” by the Director’s decision.

Normtek Services submitted a statement of concern to the Director regarding Secure Energy’s proposal to landfill radioactive waste material with a radioactivity concentration of higher than 5–10 Bq/g rather than dispose of it in a subterranean geological formation. Secure Energy’s proposal was to landfill NORM up to 70 Bq/g.<sup>165</sup> Normtek Services argued that “generally-accepted industry standards and national and international guidelines” indicated that radioactive wastes higher than 5–10 Bq/g ought to be disposed of in a “secure subterranean geological formation.”<sup>166</sup>

Having regard to *Vavilov*, the parties agreed that the standard of reasonableness applied to the EAB’s decision.<sup>167</sup> The Court of Appeal of Alberta made note of passages from *Vavilov*, which require that a reasonableness review “ensure that the decision as a whole is transparent, intelligible and justified,”<sup>168</sup> and that with respect to statutory interpretation, “the merits of an administrative decision maker’s interpretation of a statutory provision must be

<sup>160</sup> 2020 ABCA 163 [*FMFN Decision*].

<sup>161</sup> *Ibid* at paras 28–29.

<sup>162</sup> *Manitoba (Hydro-Electric Board) v Manitoba (Public Utilities Board)*, 2020 MBCA 60.

<sup>163</sup> Daly, *supra* note 149.

<sup>164</sup> *Normtek*, *supra* note 100.

<sup>165</sup> A Bq or Becquerel is a measure of radioactivity.

<sup>166</sup> *Normtek*, *supra* note 100 at para 13.

<sup>167</sup> *Ibid* at para 70.

<sup>168</sup> *Ibid* at para 71, citing *Vavilov*, *supra* note 150 at para 15.

consistent with the text, context and purpose of the provision.”<sup>169</sup> It also made note that reasonableness “requires the decision-maker to take into account the evidentiary record which bears on the decision and its decision must be reasonable in light of that factual matrix.”<sup>170</sup> The Court rejected the EAB’s characterization of Normtek Services’ concerns as being primarily economic and speculative:

The economic interest which [Normtek] argued was directly affected was based on its interest in ensuring that naturally occurring radioactive materials are managed in accordance with generally accepted regulatory standards to which it said it was required to adhere. Properly understood, Normtek’s concern was as much regulatory concern as it was an economic or commercial concern. Normtek argued that the Director’s decision directly affected its interest, as an industry participant, in a regulatory regime which governed its industry in the interests of protecting the environment. It is hard to think of a better basis for standing before the Environmental Appeals Board than a concern about a regulatory decision which is alleged to adversely impact a party economically and which also may have implications for environmental protection, particularly when the regulatory decision permits an activity which involves the disposal of a substance of concern under the *Environmental Protection and Enhancement Act* (i.e. radiation). The foregoing, of course, assumes that there is merit to Normtek’s substantive submissions which the Board, at the urging of the Director and approval-holder, ignored.<sup>171</sup>

The Court allowed the appeal and remitted the matter back to the EAB. While noting that it was the EAB that needed to determine the matter of standing in this case, it could not do so by employing the same restrictive definition of “directly affected.” Going forward, the EAB would need to determine how to interpret the phrase “directly affected” and that such a determination would need to be done in accordance with its governing legislation.<sup>172</sup>

In our view, *Normtek* provides a clear example of a regulatory decision that was not intelligible or justified,<sup>173</sup> and was overturned as a result. Since this decision does not change the application of “directly affected,” it underscores the importance for tribunals to be attentive to the underlying purposes of their legislation as well as the facts in the cases before them.

## 2. *ALEXIS V. ALBERTA (ENVIRONMENT AND PARKS)*

In *Alexis v. Alberta (Environment and Parks)*,<sup>174</sup> the Alberta Court of Appeal considered whether a judicial review judge erred in declining to set aside a decision of the Director under the *Environmental Protection and Enhancement Act*.<sup>175</sup> This case involved a decision that Wayfinder Corp. (Wayfinder), “the proponent of the Big Molly silica-sand project, was not required to submit ... an environmental impact assessment report.”<sup>176</sup> The Director provided no reasons for her decision. The lack of reasons were not an issue in the appeal for

---

<sup>169</sup> *Ibid* at para 72, citing *Vavilov*, *ibid* at para 120.

<sup>170</sup> *Ibid* at para 74.

<sup>171</sup> *Ibid* at para 118.

<sup>172</sup> *Ibid* at paras 154–55.

<sup>173</sup> *Vavilov*, *supra* note 150 at paras 15, 86.

<sup>174</sup> 2020 ABCA 188 [*Alexis*].

<sup>175</sup> RSA 2000, c E-12 [*EPEA*].

<sup>176</sup> *Ibid* at para 1. Please note that following legislative amendments, this decision was later stayed by the Court of Appeal, by way of oral decision delivered on 28 May 2020.

the Court's majority decision,<sup>177</sup> which found that this was a statutory interpretation case.<sup>178</sup> Relying on *Vavilov*, the majority further noted that in finding the Director's decision irrational and unreasonable, it did not need to remit the matter back for reconsideration:

An order directing the statutory delegate to reconsider a question taking into account the reasons for judgment of the judicial review court or the appeal court makes no sense if there is only one rational solution to the question before the statutory delegate. In those circumstances, why issue a remedial order that wastes the time of the parties, the statutory delegate and potentially the court, should the statutory delegate misunderstand the court's order and commit the same mistake again. As the *Vavilov* opinion states, "it would serve no useful purpose in such a case to remit the interpretive question to the original decision maker."<sup>179</sup>

The majority ordered the Director to notify Wayfinder that it must submit an environmental impact assessment report under section 44(1)(a) of *EPEA*.<sup>180</sup>

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

When reasons for a decision "contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision": *Vavilov* at para 96.<sup>181</sup>

#### D. REGULATORS' REVIEW OF THEIR OWN DECISIONS

A number of energy tribunals<sup>182</sup> allow for internal reviews or appeals of their own decisions. The Alberta Court of Appeal recently addressed such internal appeals in *Yee v. Chartered Professional Accountants of Alberta*<sup>183</sup> and *Moffat v. Edmonton (City) Police Service*.<sup>184</sup> *Yee* and *Moffat* involved internal appeals of disciplinary proceedings. In *Yee*, the Court noted that the appeal tribunal failed to recognize that it could apply its own experience and expertise to the findings of what constituted professional misconduct.<sup>185</sup> It applied a reasonableness standard, which the Court found to be an error:

When reviewing the decision of a discipline tribunal, the appeal tribunal should remain focused on whether the decision of the discipline tribunal is based on errors of law, errors of principle, or is not reasonably sustainable. The appeal tribunal should, however, remain flexible and review the decision under appeal holistically, without a rigid focus on any abstract standard of review: *Halifax (Regional Municipality) v Anglican Diocesan Centre Corporation*.

<sup>177</sup> *Ibid* at para 38.

<sup>178</sup> *Ibid* at para 40.

<sup>179</sup> *Ibid* at para 37 [footnotes omitted].

<sup>180</sup> *Supra* note 175.

<sup>181</sup> *Ibid* at para 190. See also Daly, *supra* note 149 at 41 regarding this decision.

<sup>182</sup> The AUC has a framework for reviews of decisions, while the AER has a framework for regulatory appeal.

<sup>183</sup> 2020 ABCA 98 [*Yee*].

<sup>184</sup> 2021 ABCA 183 [*Moffat*].

<sup>185</sup> *Supra* note 183 at para 32.

...

In this case the Appeal Tribunal erred in applying a universal standard of reasonableness, resulting from its overreliance on *Dunsmuir*.<sup>186</sup>

In *Moffat*, the Court found that it was appropriate for the Law Enforcement Review Board to apply a reasonableness standard on an internal appeal and made it clear that the *Vavilov* framework did not determine internal standards of review:

Accordingly, the judicial review framework cannot settle the standard of review as it relates to internal administrative appeals. Instead, determining an internal standard of review is primarily a question of interpreting the relevant legislative regime to discern the respective roles given to the first instance decision-maker and the appellate administrative tribunal.<sup>187</sup>

*Yee* and *Moffat* were not energy tribunal decisions and involved appeal tribunals as opposed to internal reviews. It is therefore uncertain whether it will have any impact on internal reviews for energy tribunals. However, these cases suggest that in some situations, the panel examining the review or appeal might apply less deference to the findings of the original panel. This approach contrasts with the approach of the AUC, which typically applies a high degree of deference in its first stage of review decisions.<sup>188</sup>

In a recent Commission-initiated proceeding that reviewed and altered an earlier AUC decision,<sup>189</sup> the AUC also cited an Alberta Court of Appeal minority decision in support of its view that Courts should give deference to the AUC's interpretation of its own legislation.<sup>190</sup> Parties have sought permission to appeal this AUC decision, which should provide further clarity on the application of *Vavilov*.

## VI. ABORIGINAL AND INDIGENOUS ISSUES<sup>191</sup>

### A. OVERVIEW OF ABORIGINAL AND INDIGENOUS LAW ISSUES

There have been a number of important Aboriginal law cases over the past year, including cases on the duty to consult.<sup>192</sup> However, in this section, we focus on a case regarding the

<sup>186</sup> *Ibid* at para 35 [citations omitted].

<sup>187</sup> *Moffat*, *supra* note 184 at para 54.

<sup>188</sup> See e.g. *EPCOR Energy Alberta GP Inc.: Application for Review and Variance of Decision 22853-D01-2018 and Decision 24034-D01-2019 2018-2020 Regulated Rate Tariff* (27 July 2020), Decision 25540-D01-2020 at 7, online: AUC <[www.auc.ab.ca/regulatory\\_documents/ProceedingDocuments/2020/25540-D01-2020.pdf](http://www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2020/25540-D01-2020.pdf)>.

<sup>189</sup> *Alberta Electric System Operator: 2018 Independent System Operator Tariff* (22 September 2019), Decision 22942-D02-2019, online: AUC <[www.auc.ab.ca/regulatory\\_documents/ProceedingDocuments/2019/22942-D02-2019.pdf](http://www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2019/22942-D02-2019.pdf)>. This decision was varied by Decision 25848-001-2020 and 24932-D01-2020. In the variance, the AUC advised that it would examine contributions in aid of construction in a further proceeding.

<sup>190</sup> *Commission-Directed Examination of Distribution Facility Owner Payments under the Independent System Operator Tariff Customer Contribution Policy* (23 April 2021), Decision 26061-D01-2021 at para 20, online (pdf): AUC <[efiling-webapi.auc.ab.ca/Document/Get/698335](http://efiling-webapi.auc.ab.ca/Document/Get/698335)>.

<sup>191</sup> We would like to thank Sandy Carpenter for his thoughts and feedback on this section of the article.

<sup>192</sup> *Coldwater*, *supra* note 151; *Redmond v British Columbia (Forests, Lands, National Resource Operations and Rural Development)*, 2020 BCSC 561; *Gamlaxeltxw v British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2020 BCCA 215.

honour of the Crown; the federal government's plans to adopt the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* through Bill C-15 (*An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*),<sup>193</sup> and the uncertainty of issues regarding Indigenous governance, as illustrated in early 2020 by a dispute involving the construction of the Coastal GasLink pipeline.

## B. HONOUR OF THE CROWN AND ASSESSMENT OF PUBLIC INTEREST

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

The facts of this case involved a lengthy history of negotiations between the provincial government and the FMFN regarding the Moose Lake Reserves, and a commitment by the government to create a ten km buffer zone around the Reserves where the approved Rigel Project was to be located. Negotiations between FMFN and Alberta regarding a Moose Lake Access Management Plan (MLAMP) began in 2003. In March 2015, Premier Jim Prentice and Chief Jim Boucher signed a Letter of Intent (the March 2015 LOI) confirming the mutual commitment and interest in an expedited completion of the MLAMP. The March 2015 LOI contemplated the MLAMP portion covering the area within ten km of the Moose Lake Reserves by 30 September 2015, with the full draft MLAMP to be completed and approved by 31 March 2016. Notwithstanding the March 2015 LOI, which FMFN referred to as the "Prentice Promise," the MLAMP had still not been finalized at the time that the AER issued its decision approving the Rigel Project.<sup>194</sup> In June 2018, the AER found the Rigel Project "to be in the public interest and approved the project on conditions, subject to authorization by" the provincial Cabinet.<sup>195</sup> In its consideration of the public interest, the AER panel did not consider the MLAMP negotiations that contemplated the ten km buffer zone, the Prentice Promise, and whether these considerations implicate the honour of the Crown.<sup>196</sup> Section 21 of *REDA* prohibits the AER from assessing Crown consultation, and at the time of the *FMFN Decision*, the provincial Cabinet had not yet issued an authorization, which was the subject of separate litigation.<sup>197</sup>

Notwithstanding section 21 of *REDA* and the need for provincial Cabinet authorization, the Alberta Court of Appeal concluded that the AER has broad implied jurisdiction to consider constitutional issues, including the honour of the Crown, when it assesses the public interest. It noted that the question raised by the appeal was "whether the AER should have considered the honour of the Crown in relation to the MLAMP negotiations as part of [the

---

<sup>193</sup> Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Sess, 43rd Parl, 2021 (assented to 21 June 2021).

<sup>194</sup> MLAMP has since been finalized. See Alberta, Environment and Parks, *Moose Lake Access Management Plan* (8 February 2021), online: <[open.alberta.ca/publications/moose-lake-access-management-plan](http://open.alberta.ca/publications/moose-lake-access-management-plan)>.

<sup>195</sup> *FMFN Decision*, *supra* note 160 at para 23.

<sup>196</sup> *Ibid* at para 26.

<sup>197</sup> *Prosper Petroleum Ltd v Her Majesty the Queen in Right of Alberta*, 2020 ABCA 85.

public interest] assessment.”<sup>198</sup> The Court found that the issues which the FMFN put before the AER went beyond the adequacy of Crown consultation (which the AER is prohibited from assessing pursuant to section 21 of *REDA*), and noted that the “duty to consult” is not the only situation where the honour of the Crown arises.<sup>199</sup> This case raised broader issues, which included the Crown’s relationship with FMFN and reconciliation.<sup>200</sup> It held the following:

We are satisfied that there was no basis for the AER to decline to consider the MLAMP process as part of its assessment of the public interest rather than deferring the issue to Cabinet. *The public interest mandate can and should encompass considerations of the effect of a project on aboriginal peoples*, which in this case will include the state of negotiations between the FMFN and the Crown. To preclude such considerations entirely takes an unreasonably narrow view of what comprises the public interest, particularly given the direction to all government actors to foster reconciliation.<sup>201</sup>

The case was remitted back to the AER. The MLAMP was approved following the appeal. Prosper subsequently advised that it was withdrawing its application for the Rigel Project, and the proceeding was cancelled by the AER at Prosper’s request.<sup>202</sup>

The *FMFN Decision* provides an indication of how the Alberta Court of Appeal may address cases involving Indigenous issues going forward. Notwithstanding section 21 of *REDA*, the Court reviewed the existing jurisprudence and found the honour of the Crown goes beyond the adequacy of consultation and sent a strong message that regulators are expected to deal with the difficult Aboriginal questions that come before them, and that governments need to follow through on their commitments to achieve reconciliation.

### C. *UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES*

The *United Nations Declaration on the Rights of Indigenous Peoples* was adopted by the United Nations on 13 September 2007 to address issues faced by Indigenous peoples around the world.<sup>203</sup> It consists of 46 articles covering a wide range of topics, which includes the primary interactions between governments and Indigenous peoples. The Truth and Reconciliation Commission and the National Inquiry into Missing and Murdered Indigenous Women and Girls called for the adoption and implementation of *UNDRIP* in Canada as a

---

<sup>198</sup> *FMFN Decision*, *supra* note 160 at para 43.

<sup>199</sup> *Ibid* at para 53.

<sup>200</sup> *Ibid* at para 57.

<sup>201</sup> *Ibid* at para 68 [emphasis added].

<sup>202</sup> On 7 May 2021 the AER cancelled the hearing, after authorizing the withdrawal of Prosper’s applications under the *OSCA* (*supra* note 130) and the *EPEA* (*supra* note 175). *Notice of Cancelled Hearing - Proceeding 350 Redetermination: Prosper Petroleum Ltd.: Prosper Rigel Project* (7 May 2021), online: <[www.aer.ca/regulating-development/project-application/notices/application-1778538-3](http://www.aer.ca/regulating-development/project-application/notices/application-1778538-3)>.

<sup>203</sup> GA Res 61/295, UNGAOR, 61st Sess, Sup No 53, UN Doc A/61/295 (2007) [*UNDRIP*].

framework for reconciliation.<sup>204</sup> While not unanimous, the adoption of *UNDRIP* has the support of many prominent Indigenous groups.<sup>205</sup>

In response, the federal government recently introduced Bill C-15. Bill C-15 became law in Canada in 2021. Among other things, the legislation as drafted affirms *UNDRIP* as a source for the interpretation of Canadian law.<sup>206</sup> The federal government issued a backgrounder to Bill C-15 (the Backgrounder), which noted that the purpose of Bill C-15 is to affirm “the Declaration is a universal international human rights instrument with application in Canadian law” and provide a framework for the Government of Canada’s implementation of the Declaration.<sup>207</sup> On one of the more controversial aspects of *UNDRIP*, the issue of free, prior and informed consent (FPIC), the Backgrounder states the following:

[Free, prior, and informed consent] is about working together in partnership and respect. In many ways, it reflects the ideals behind the relationship with Indigenous peoples, by striving to achieve consensus as parties work together in good faith on decisions that impact Indigenous rights and interests. Despite what some have suggested, it is not about having a veto over government decision-making.<sup>208</sup>

Certain legal analysis finds Canada’s proposed adoption of *UNDRIP* to be “a judicious balance between substance and process and as such . . . a measured contribution to the debate and actions necessary to achieve reconciliation.”<sup>209</sup> However, *UNDRIP* has also been characterized as a “blunt instrument, developed in an international setting, that is not reflective of Canada’s world-leading legal protections for Indigenous rights” and the adoption of *UNDRIP* in its entirety could create new uncertainties that could actually hinder the pursuit of reconciliation.<sup>210</sup>

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

<sup>204</sup> National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Volume 1A, Catalogue No CP32-163/2-1-2019E-PDF, at 135, online: <[www.mmiwg-ffada.ca/wp-content/uploads/2019/06/final\\_Report\\_Vol\\_1a-1.pdf](http://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/final_Report_Vol_1a-1.pdf)>.

<sup>205</sup> These groups include the Assembly of First Nations, the Métis National Council, the Native Women’s Association of Canada, and the Inuit Tapiriit Kanatami.

<sup>206</sup> Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Sess, 43rd Parl 2020, Preamble (first reading 3 December 2020).

<sup>207</sup> Canada, Department of Justice, *United Nations Declaration on the Rights of Indigenous Peoples Act* at 5, online: <[www.justice.gc.ca/eng/declaration/about-apropos.pdf](http://www.justice.gc.ca/eng/declaration/about-apropos.pdf)>.

<sup>208</sup> *Ibid* at 3.

<sup>209</sup> Nigel Bankes, “Implementing UNDRIP: Some Reflections on Bill C-262” (27 November 2018), online (blog): <[ablawg.ca/2018/11/27/implementing-undrip-some-reflections-on-bill-c-262/](http://ablawg.ca/2018/11/27/implementing-undrip-some-reflections-on-bill-c-262/)>. The current Bill C-15 is very similar to Bill C-262. See also Sam Adkins et al, “*UNDRIP* as a Framework for Reconciliation in Canada: Challenges and Opportunities for Major Energy and Natural Resources Projects” (2020) 58:2 *Alta L Rev* 339.

<sup>210</sup> Arend JA Hoekstra & Thomas Isaac, “Implementing UNDRIP in Canada: Challenges with Bill C-262” (1 August 2018), online: <[cassels.com/insights/implementing-undrip-in-canada-challenges-with-bill-c-262/](http://cassels.com/insights/implementing-undrip-in-canada-challenges-with-bill-c-262/)>.



#### D. COASTAL GASLINK PIPELINE AND *UNDRIP*

In December 2019, the British Columbia Supreme Court issued an injunction<sup>211</sup> prohibiting protestors from obstructing construction activities for the approved Coastal GasLink pipeline. Coastal GasLink Pipeline Ltd. (Coastal GasLink), a wholly-owned subsidiary of TC Energy, had obtained all necessary provincial permits and authorizations to construct a 670 km natural gas pipeline from west of Dawson Creek, British Columbia to a liquefied natural gas export facility near Kitimat, British Columbia.<sup>212</sup> Coastal GasLink had entered into community benefit agreements with all of the 20 elected Indigenous bands along the pipeline route, with financial benefits for the Indigenous bands expected to exceed \$338 million cumulatively over the life of the project.<sup>213</sup>

In 2012, a protest was instigated by a small number of members of the Wet'suwet'en Nation, who set up a blockade on the Morice River Bridge, with the purpose of preventing industrial projects, including the Coastal GasLink project. The British Columbia Supreme Court noted that the Wet'suwet'en people have both hereditary and *Indian Act* Band council governance systems.<sup>214</sup> The parties to the protest included some hereditary chiefs from the Wet'suwet'en Nation.<sup>215</sup> The 20 elected Band councils along the pipeline that entered into community and benefit agreements with Coastal GasLink, included all five Wet'suwet'en Band councils who also entered into Pipeline Benefit Agreements with the province of British Columbia.<sup>216</sup> The hereditary chiefs asserted that the elected Band councils could only exercise federal jurisdiction with regard to reserve lands, while the Band councils disputed this.<sup>217</sup> The British Columbia Supreme Court found that among the Wet'suwet'en there was significant disagreement regarding the Coastal GasLink pipeline project and who had the authority to make decisions on behalf of the Wet'suwet'en people:

The evidence before me indicates significant conflict amongst members of the Wet'suwet'en nation regarding construction of the Pipeline Project, including disagreements amongst the Wet'suwet'en people as to whether traditional hereditary governance protocols have or have not been followed, whether hereditary governance is appropriate for decision-making that impacts the entire Wet'suwet'en nation and the emergence of other groups, such as the Unist'ot'en, which purports to be entitled to enforce Wet'suwet'en law on the authority of Chief Knedebeas and more recently the WMC, which apparently seeks to challenge the authority of the hereditary chiefs to make decisions for the Wet'suwet'en nation as a whole and the manner in which the traditional governance processes have occurred.

---

<sup>211</sup> *Coastal GasLink Pipeline Ltd v Huson*, 2019 BCSC 2264 [*Coastal GasLink*].

<sup>212</sup> *Ibid* at para 11.

<sup>213</sup> *Ibid* at para 66.

<sup>214</sup> *Ibid* at 53; RSC 1985, c I-5.

<sup>215</sup> *Coastal GasLink*, *ibid* at paras 53–62.

<sup>216</sup> *Ibid* at para 66.

<sup>217</sup> *Ibid* at para 67.

The Unist'ot'en, the WMC, the Gidumt'en, the Sovereign Likhts'amisyu and the Tsayu Land Defenders all appear to operate outside the traditional governance structures, although they each assert through various means their own authority to apply and enforce Indigenous laws and customs. It is not clear whether the emergence of some of these groups is, as the defendants allege, an attempt by the plaintiff to circumvent the Wet'suwet'en legal process or if it is part of the continuing evolution of Wet'suwet'en governance.

The Indigenous legal perspective in this case is further complicated by the fact that the Wet'suwet'en people have both hereditary and *Indian Act* Band council governance systems and there is dispute over the extent of the jurisdictions of each of those governance systems. The five Wet'suwet'en Bands under the *Indian Act* have a different perspective with respect to the Pipeline Project and have entered into various project and benefit agreements, which are expected to provide significant and meaningful financial and other benefits to their community.

All of this evidence suggests that the Indigenous legal perspective in this case is complex and diverse and that the Wet'suwet'en people are deeply divided with respect to either opposition to or support for the Pipeline Project.<sup>218</sup>

Although the British Columbia Supreme Court granted the injunction against the individuals who were blocking access to the Coastal GasLink pipeline route, the injunction led to further conflict. Wet'suwet'en hereditary chiefs refused to abandon the blockade and were joined by other protestors, some of whom were not Indigenous.<sup>219</sup> Protests and various blockades erupted across the country in support of the Wet'suwet'en hereditary chiefs, including blockades of rail traffic in Ontario and Quebec, which disrupted commuter lines and affected the shipment of goods across Canada.<sup>220</sup> After the federal government reached a draft accord with the hereditary chiefs, the protests largely ended.<sup>221</sup> A subsequent Memorandum of Understanding between a group of hereditary chiefs, the Government of British Columbia, and the federal government has been challenged by other members of the Wet'suwet'en Nation, including the Wet'suwet'en Elected Chiefs<sup>222</sup> and members of the Wet'suwet'en Matrilineal Coalition.<sup>223</sup>

<sup>218</sup> *Ibid* at paras 134–37.

<sup>219</sup> Eric Andrew-Gee, Ian Bailey & Les Perreux, “‘It’s the People Who Decide’: Who’s Leading the Pro-Wet’suwet’en Blockades, and Who’s Not,” *The Globe and Mail* (22 February 2020) online: <[www.theglobeandmail.com/canada/article-its-the-people-who-decide-whos-leading-the-pro-wetsuweten/](http://www.theglobeandmail.com/canada/article-its-the-people-who-decide-whos-leading-the-pro-wetsuweten/)>.

<sup>220</sup> Catharine Tunney, “Arrests, Travel Disruptions as Wet’suwet’en Solidarity Protests Spread Across Canada,” *CBC* (25 February 2020), online: <[www.cbc.ca/news/politics/blockades-continue-hamilton-bc-1.5474916](http://www.cbc.ca/news/politics/blockades-continue-hamilton-bc-1.5474916)>; Vincenzo Morello, “Rail Blockades in Quebec Remain Despite Wet’suwet’en Agreement,” *RCI* (4 March 2020), online: <[www.rcinet.ca/en/2020/03/04/rail-blockades-in-quebec-remain-despite-wetsuweten-agreement/](http://www.rcinet.ca/en/2020/03/04/rail-blockades-in-quebec-remain-despite-wetsuweten-agreement/)>.

<sup>221</sup> Hina Alam, “Wet’suwet’en Supporters of Pipeline Say Their Message Isn’t Being Heard,” *Canada’s National Observer* (2 March 2020), online: <[www.nationalobserver.com/2020/03/02/news/wetsuweten-supporters-pipeline-say-their-message-isnt-being-heard](http://www.nationalobserver.com/2020/03/02/news/wetsuweten-supporters-pipeline-say-their-message-isnt-being-heard)>.

<sup>222</sup> Office of the Wet’suwet’en, “Statement from Wet’suwet’en Elected Leadership Regarding Wet’suwet’en Memorandum of Understanding” (1 May 2020), online: <[www.wetsuweten.com/files/May\\_1\\_2020\\_Joint\\_Statement\\_from\\_Elected\\_Bands.docx.pdf](http://www.wetsuweten.com/files/May_1_2020_Joint_Statement_from_Elected_Bands.docx.pdf)>.

<sup>223</sup> House of Commons Standing Committee on Indigenous and Northern Affairs, *Evidence*, 43-1, No 4 (10 March 2020) at 1240 (Theresa T Day). See also Nelson Bennett, “Female Hereditary Chiefs Challenge Wet’suwet’en MOU,” *Prince George Citizen* (23 November 2020), online: <[www.princegeorgecitizen.com/news/local-news/female-hereditary-chiefs-challenge-wetsuweten-mou-3741963](http://www.princegeorgecitizen.com/news/local-news/female-hereditary-chiefs-challenge-wetsuweten-mou-3741963)>.

The complexity of the Wet'suwet'en Indigenous governance issues that included international coverage was generally not addressed in the media.<sup>224</sup> Perhaps most notably, the United Nations Committee on the Elimination of Racial Discrimination (the UN Committee) issued a letter in December 2019, calling on Canada to halt all construction and suspend all permits and approvals for the Coastal GasLink project until the Wet'suwet'en people granted their consent "following the full and adequate discharge of the duty to consult."<sup>225</sup> However, when it issued this decision, the UN Committee appeared to be unaware of the fact that 20 elected band councils along the pipeline route had participated in five years of consultation, negotiated agreements, and consented to the Coastal GasLink pipeline.<sup>226</sup> In November 2020, the UN Committee issued a further letter regarding the pipeline project, which criticized Canada's approach:

The Committee regrets the State party interprets the free, prior and informed consent principle as well as the duty to consult as a duty to engage in a meaningful and good faith dialogue with indigenous peoples and to guarantee a process, but not a particular result. In this regard, the Committee would like to draw its attention on the Committee's general recommendation No. 23 (1997) on the rights of indigenous peoples, in which it calls upon States parties to ensure that no decisions directly relating to the rights or interests of indigenous peoples is taken without their informed consent.<sup>227</sup>

The Coastal GasLink situation illustrates the potential issues that could be raised by the passage of *UNDRIP*. While the federal government's backgrounder to Bill C-15 indicates that FPIC does not amount to a veto, that interpretation does not appear to be shared by the UN Committee. Indigenous governance issues also form a crucial part of *UNDRIP*, in particular articles 18 to 20.<sup>228</sup> When applying these articles to the Coastal GasLink pipeline project, it is not clear who the representatives of the Wet'suwet'en people are. Are the elected band councils the true representatives? Are the hereditary chiefs? Or should there be a different decision-making process developed by the Wet'suwet'en people? These are complex questions that must ultimately be addressed by the Wet'suwet'en people. These questions may also never be resolved to the satisfaction of all Wet'suwet'en people.

We note that the adoption and implementation of *UNDRIP* will have far more impacts than just energy projects. The recent horrific discovery of the bodies of 215 children in

---

<sup>224</sup> Amber Bracken & Leyland Cecco, "Canada: Protests Go Mainstream as Support for Wet'suwet'en Pipeline Fight Widens," *The Guardian* (14 February 2020), online: <[www.theguardian.com/world/2020/feb/14/wetsuweten-coastal-gaslink-pipeline-allies](http://www.theguardian.com/world/2020/feb/14/wetsuweten-coastal-gaslink-pipeline-allies)>.

<sup>225</sup> Committee on the Elimination of Racial Discrimination, *Prevention of Racial Discrimination, Including Early Warning and Urgent Action Procedure*, Decision 1 (100), 100th Sess (2019), online: <[tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/INT\\_CERD\\_EWU\\_CAN\\_9026\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/INT_CERD_EWU_CAN_9026_E.pdf)>.

<sup>226</sup> The Canadian Press, "Indigenous Pipeline Supporters Slam Human-Rights Advocates over Coastal GasLink Stance," *CBC* (22 January 2020), online: <[www.cbc.ca/news/canada/british-columbia/coastal-gaslink-pipeline-indigenous-human-rights-1.5435854](http://www.cbc.ca/news/canada/british-columbia/coastal-gaslink-pipeline-indigenous-human-rights-1.5435854)>.

<sup>227</sup> Letter from Yanduan Li (Committee on the Elimination of Racial Discrimination) to Leslie Norton (Permanent Representative of Canada to the United Nations Office) (24 November 2020), online: <[tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/INT\\_CERD\\_ALE\\_CAN\\_9296\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/INT_CERD_ALE_CAN_9296_E.pdf)>.

<sup>228</sup> *UNDRIP*, *supra* note 203. These articles address the right to maintain Indigenous decision-making institutions, the obligation of States to consult and co-operate through Indigenous representative institutions, and the right to maintain and develop Indigenous political institutions.

unmarked graves at a residential school in Kamloops, British Columbia<sup>229</sup> emphasizes the significance, sensitivity, and urgency of Canada's reconciliation efforts with Indigenous peoples. While we agree that Canada has highly developed jurisprudence in the areas of Aboriginal and Indigenous law, and existing legal frameworks will inform how *UNDRIP* is interpreted in the Canadian context, we expect that in the energy sector, *UNDRIP* will lead to additional uncertainty. Canada's well-developed jurisprudence on Aboriginal and Indigenous law in the energy sector will need to continue to evolve to achieve responsible energy development consistent with respect for Indigenous peoples' rights as we continue working towards reconciliation.

---

<sup>229</sup> Courtney Dickson & Bridgette Watson, "Remains of 215 Children Found Buried at Former B.C. Residential School, First Nation Says," *CBC* (27 May 2021), online: <[www.cbc.ca/news/canada/british-columbia/tk-emlúps-te-secwépemc-215-children-former-kamloops-indian-residential-school-1.6043778](http://www.cbc.ca/news/canada/british-columbia/tk-emlúps-te-secwépemc-215-children-former-kamloops-indian-residential-school-1.6043778)>.