

RESOURCES

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2021 ENERGY REGULATORY FORUM

An opportunity for justices, administrative tribunals, academics and members of the public to discuss the practice of energy regulatory law in Calgary, Alberta (May 20, 2021)

These articles are detailed summaries of Energy Regulatory Forum presentations prepared by University of Calgary and University of Alberta JD students.

Alastair Lucas, QC, Editor ♦

Opening Address

Dr. Jack M. Mintz, President's Fellow of the School of Public Policy, University of Calgary

In this forum, Dr. Mintz reviewed economic principles behind energy regulations. He explained that although historically, Canada has been successful in developing sound policies in energy regulation, recently it has been falling short in this area. This observation has been made by two international economic organizations: World Bank Group and Organization for Economic Co-Operation and Development (OECD). The performance metrics for this statement are the times to grant permits for projects, transporting goods and completing contracts. In evaluating energy regulation from an economic perspective, three main principles must be considered: efficiency, effectiveness, and fairness.

Efficiency is described as imposing the least possible administrative and compliance costs. Effectiveness is determined by the degree to which objectives are met. Fairness means that the players should be put into an even playing field and the regulations should not have undue distributive impacts.

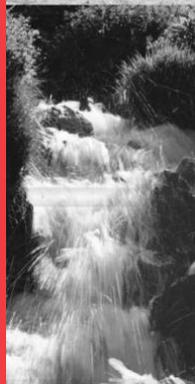
The efficiency of an energy regulatory policy can be assessed using the so-called Cost-Benefit Analysis (CBA). The complexity of the CBA lies in being applied in the context of both social and distributive objectives. The CBA can typically be conducted by weighting consumers and stakeholders according to their specific characteristics. The CBA is more like an art than a science as the selection of its assumptions can greatly change the outcomes. For instance, the social discount rate can be calculated with different ranges of values based on the type of underlying methodology. The pre-tax cost of finance or market interest rate depends on whether household or foreign savings is used. It can also be assumed that the social discount rate is zero, according to some literature. Nonetheless, CBA is a useful tool since it can determine the types of data needed to evaluate energy regulations. Dr. Mintz suggests that in the context of social cost of carbon production, the assumptions for future or current social generations should be weighted equally.

In his opening, Dr. Mintz suggested three main areas of energy policy improvements for Canada:

1) *The Mandates for Reducing Natural Gas and Oil Emissions*

Canada's regulatory policy hinges on introducing carbon pricing (*i.e.*, a tax) in a number of regulations with the objective of a reduction in Greenhouse Gas (GHG) emissions. However, in certain cases, this strategy is questionable as it introduces a number of additional administrative costs. For instance, increasing the carbon price to \$170 per tonne by 2030 while at the same time introducing a carbon field standard will bring additional administration costs. Carbon fuel pricing is a complex trading scheme with a narrow application of carbon taxation to gasoline, diesel and some other fuels. It excludes some other sources of carbon energy, unlike the carbon tax. This raises the question whether these adopted policies are an optimal approach to the reduction of GHG emissions. The alternative question is why not increase the carbon tax further rather than imposing new regulations that would add more administrative costs? In addition, the problem with the current carbon policy is the lack of evaluation of alternatives to carbon reduction. A more in-depth scenario analysis needs to be conducted into this, where the alternatives are evaluated from an economic standpoint.

There is a dilemma between the choice of target and the methods to achieve this target. It is not clear whether the 2050 net zero emission target is appropriate. It is also not clear if the path to achieve this target is properly evaluated. By comparison, New Zealand has evaluated alternatives and conducted CBA analysis for each option, according to a 2017 report. For instance, the choice between reliance on carbon taxation versus investing in a technology to minimize the cost required to reach the net zero target in 2050 is described on the basis of real GDP.





Dr. Mintz suggested that an analysis similar to New Zealand's must be done in Canada. This is particularly important for the carbon taxation policy, which requires the public to pay higher taxes. The public might be resistant to carbon policy if they do not understand whether the policy is appropriate in terms of pace for meeting the net zero target.

2) Resource Development and Transportation

Canada's energy regulatory system encompasses various areas such as water, electricity production, resource development, agriculture, and minerals. Bill 69 adopts an overbearing approach to energy regulation that requires individual project analyses to account for a host of factors, even when some of these are quite difficult to be included. It is one thing to evaluate a project based on its technical merits, such as impact on the environment and economy, but another to include factors such as social impact, which are often subject to evaluation by political judgement. Dr. Mintz proposes that a regulatory issue needs to focus on a narrow set of questions and leave other questions, such as inequality, gender issues and so on to other public policy instruments. A mathematical theorem confirms the hypothesis that one can best maximize a multi-objective function by having as many control variables as objectives. Relying on one instrument (*i.e.*, the regulatory body) to solve all problems is an unreasonable strategy.

By comparison with other commonwealth countries, Australia seems to have a more efficient approach with respect to regulation of transportation projects and electrical transmission projects. Only projects that carry a specific issue, such as Indigenous agreements, land rights, infrastructure, and general environmental issues are extensively evaluated. Other projects are approved based solely on their individual objectives. Then each project in a first round is evaluated in terms of technical feasibility and their specific characteristics. As a result, it is much easier to get approval for projects involving construction of highways, railways, transmission lines, and pipelines in Australia than in Canada. Dr. Mintz suggests that Bill C-69 [including the *Canadian Energy Regulator Act*, SC 2019, c 28 s 10; and the *Impact Assessment Act*, SC 2019 c 28, s 1] be revamped by adopting an approach similar to Australia's.

3) Federalism and Regulation

Provinces own resources and are responsible for their management, while the federal and provincial governments share environmental responsibility. The federal government is responsible for order, good governance and international treaties. Sharing environmental responsibility between two jurisdictions has brought about conflicts between these heads of power. Dr. Mintz suggests that instead of looking to resolve this issue in court, multiple policy instruments must be offered to the provinces with the freedom to choose between them.

In addition, Dr. Mintz suggests that whenever the federal government shares responsibility with the provinces, it is better for both jurisdictions to agree on the objectives than leave the choice to provinces to select the method to achieve these objectives. For instance, the federal and provincial governments can agree on targets for GHG emission reduction, and provinces can have the flexibility to choose their preferred approach for achieving this objective. One of the key goals is to reduce work duplication in the regulatory process and provide greater certainty for the project proponents.

Dr. Mintz concluded that the current approach towards achieving net zero carbon emissions by 2050 is not appropriately implemented in Canada as compared to other international parties to the Paris Agreement, such as Australia and New Zealand. Putting the emphasis on efficiency within energy regulation can assist in overcoming the challenges currently facing Canada.

Summary by Mona Abdolrazaghi, JD Student, University of Alberta

Administrative Law Update

Matthew Lewans, Professor, Faculty of Law, University of Alberta

The updates include two main areas: a standard framework for substantive judicial review and the Crown's duty to consult (DTC). While the Supreme Court of Canada's (SCC) 2019 decision in *Vavilov*¹ has made some changes to substantive judicial review, those changes are incremental in practice rather than fundamental thus far. With respect to the Crown's DTC and implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)², the shifts are much more significant. However, Dr. Lewans stated that it is still difficult to say with certainty what is going to change with respect to the regulatory process that implicates Aboriginal interests under s. 35 of the *Constitution Act, 1982*.³ However, early signals from British Columbia (BC) might offer some ideas.

A bird's eye view of some of the landmark changes in Canadian administrative law was given from the perspective of substantive judicial review, starting with the early 1970s changes in *Nicholson*⁴ and *CUPE*⁵ prior to the *Canadian Charter of Rights and Freedoms*,⁶ then *Dunsmuir*⁷ in 2008 and, most recently, *Vavilov*⁸ in 2019. Similarly, an overview from the First Nations rights development perspective and s. 35 analysis was provided, starting with *Guerin v The Queen*⁹ in 1984, *Baker*¹⁰ in 1999, *Haida Nation*¹¹ in 2004, *Gitxaala*¹² in 2016 and *Tsleil-Waututh*¹³ in 2018. While the case law is evolving in this period, the fundamental features in Canadian administrative law have remained the same. The hallmarks of judicial deference and restraint with respect to administrative interpretation of the law, as well as the constitutional fiduciary relation between the Crown and Indigenous peoples, remained in place over the above span of time.

¹ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov].

² United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

³ *Constitutional Act, 1982*, being Schedule B of the Canada Act 1982 (UK), 1982, c11.

⁴ *Nicholson v Haldimand-Norfolk Police*, 1979 1 SCR 311 [Nicholson].

⁵ *CUPE v NB Liquor Corporation*, [1979] 2 SCR 227 [CUPE].

⁶ Canadian Charter of Rights and Freedoms, Part I of the Constitutional Act, 1982, being Schedule B of the Canada Act 1982 (UK), 1982, c11 [Charter].

⁷ *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 [Dunsmuir].

⁸ *Vavilov*, *supra* note 1.

⁹ *Guerin v The Queen*, [1984] 2 SCR 335 [Guerin].

¹⁰ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [Baker].

¹¹ *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 [Haida Nation].

¹² *Gitxaala Nation v Canada*, [206] 4 FCR 418 [Gitxaala].

¹³ *Tsleil-Waututh v Canada (Attorney General)*, [2019] 2 FCR 3 [Tsleil-Waututh]



I) Standard Framework for Substantive Judicial Review (*Vavilov*)

The last update on this was provided at the 2019 Energy Regulatory Forum. *Dunsmuir*¹⁴ has been the governing standard for substantive judicial review. Analyzing the *Vavilov*¹⁵ issue by reviewing substantive judicial review from 1970s to the present shows that one of the main problems was the notion of deference and judicial restraint.

Respecting both judicial restraint and correctness oversight, judges vacillated between two approaches: very deferential and very interventionist. This is a perennial issue in law. The SCC understands that an administrative institution has legitimate statutory powers to interpret the law but finds it difficult to reconcile this statutory mandate with a court's role in conducting an independent oversight of administrative actions. Sometimes this tension leads to confusion, and even a bit of doublespeak in the judicial standard of review. *Vavilov*¹⁶ is no different from other administrative law cases in this aspect.

At a general level, in *Vavilov*¹⁷ there is a significant tension between the majority opinion that reads as a way of expanding the correctness of oversight of administrative decisions, and the concurring opinion that is worried that these tweaks to the law of substantive review will roll back the deference and judicial restraint which have been a hard-fought position since *CUPE*¹⁸ in 1970s.

With respect to expanding the correctness review theme, the majority in this case eliminated the contextual approach to determining the standard of review and suggested a categorial approach to determine the standard of review. They rejected the idea that expertise is a contextual factor that needs to be weighted in determining the appropriate standard of review. Eliminating expertise as a relevant consideration in determining the standard of review, the suggestion is that the court can get more involved in the administrative decision. In addition, the majority's opinion in developing a more categorial approach seems to expand the scope of correctness review, particularly in relation to administrative decisions on questions of law that are subject to a statutory right of appeal.

Dr. Lewans stated that this was a real surprise when the ruling came out since the Supreme Court of Canada has consistently held, since *Southam*,¹⁹ that administrative decisions should follow a more deferential approach by courts, where the issue is on questions of law that are subject to the statutory right of appeal and where the administrative decisions involve expertise on those questions. There is also an open-ended list of scenarios, in which the court in *Vavilov*²⁰ says that rule of law demands correctness of oversight. This includes issues regarding constitutional questions such as treaty rights. Dr. Lewans added that there have been some speculations that the court might in a later case reverse course on deference for other constitutional issues under the Canadian *Charter of Rights and Freedoms*.

Beyond the standard of review there is a robust methodology for conducting a substantive review. The majority's opinion reads like a catalogue of administrative decisions that may go off the rails and require judicial intervention. This section reads as though the court is imagining these situations.

Beyond the *ratio decidendi* in *Vavilov*,²¹ there are some signs that courts still hang on to the idea of deference and judicial restraint. For instance, expertise is not completely eliminated. While it might be no longer relevant to the standard of review, it can still be relevant to the judicial assessment of reasonableness. Even with respect to administrative decisions that are subject to a statutory right of appeal, such administrative decisions concern mixed questions of law and fact. The appellant standard of review is even more deferential because the appellate standard of review for mixed questions of law and fact is palpable and overriding error, not reasonableness. Dr. Lewans added that many commentators have expressed that this way is a more deferential approach. Recent case law (*i.e.*, post *Vavilov*²²) in many Canadian courts suggests a tendency to keep the court deferential with respect to administrative decisions. The lower courts have not radically changed their approach.

Dr. Lewans concluded that *Vavilov*²³ has introduced some important changes to the standard of review. But early case law suggests that in practice, not much has changed. The administrative decision maker must still earn judicial deference by rendering decisions that are fair, transparent, intelligible and reasonably justified. While the onus or burden may weigh heavily on the administrative decision maker in the future, there have not been radical shifts. However, this is open to further changes by the SCC in the future.

II) *Crown's Duty to Consult Indigenous Grounds under s. 35*

The SCC has recently reaffirmed the Crown's constitutional DTC under s. 35 of the *Constitution Act, 1982 in Clyde River*.²⁴ The jurisprudence in the context of DTC has not shown any fundamental differences. There is still some ambiguity with respect to determining the spectrum of how demanding DTC will be in every case since *Haida Nation*.²⁵ Dr. Lewans explained that the Crown's DTC is an evolving area, and notwithstanding the decision of the Federal Court of Appeal in *Coldwater*,²⁶ major changes have occurred outside of the courtroom, in particular, the memorandum of understanding between the Wet'suwet'en and BC,²⁷ and the implementation of UNDRIP²⁸ by the BC Government.

In an unprecedented development, a memorandum of understanding between Canada, BC and Wet'suwet'en First Nation group was formed. This memorandum deals with numerous factors between the government and the First Nation group in areas of child

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Clyde River (Hamlet) v Petroleum Geo-services Inc.*, [2017] 1 SCR 1069 [*Clyde River*].

²⁵ *Haida Nation*, *supra* note 11.

²⁶ *Coldwater First Nation v Canada (Attorney General)*, FCA 34 [*Coldwater*].

²⁷ Memorandum of Understanding Between Canada, British Columbia and Wet'suwet'en as agreed on February 29, 2020: online (url): Government of Canada <<https://www.rcaanc-cimac.gc.ca/>> [perma.cc/MJN9-64TM].

²⁸ UNDRIP, *supra* note 2.

¹⁴ *Dunsmuir*, *supra* note 7.

¹⁵ *Vavilov*, *supra* note 1.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *CUPE*, *supra* note 4.

¹⁹ *Hunter et al v Southam Inc.*, [1984] 2 SCR 145 [*Southam*].

²⁰ *Vavilov*, *supra* note 1.



and family welfare, water, wildlife, fish, land use planning, lands, resources, revenue sharing, and informed decision making.

The BC Government enacted legislation that implements UNDRIP. UNDRIP contains repeated references to freedom and prior consent of Indigenous peoples. The province of BC went further down the road than any other province in Canada. They have adjusted their environmental assessment (EA) procedure for projects, which sets a low bar for Indigenous peoples to participate in the EA processes, as well as requiring ongoing consent of Indigenous groups alongside the regulatory process for project development.

It is possible to see further development in case law within this area in the future. It is perhaps too early to see the implications of how the implementation of UNDRIP may affect energy projects. It may bring about a more demanding DTC framework, for instance, including the right to withhold consent on project development by First Nations stakeholders.

Dr. Lewans noted that the federal government tabled legislation that mirrors some of BC's approach (enacted as the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021 c. 14). It does not have as much substance as the BC regulatory reforms, but it seems to be moving in the same direction. The legislation asks the relevant minister to come up with an action plan to enable the Crown to comply with its obligations under UNDRIP. In addition, there are several precedents in Canadian administrative law where courts used legislation to perform substantive review of regulatory decisions. The federal legislation's attempts under UNDRIP may suggest an extension of judicial review of regulatory scope whenever First Nations interests are in play.

Summary by Mona Abdolrazaghi, JD Student, University of Alberta

Litigated Proceedings in a COVID and Post-COVID World: Permanent Change or Transient Blips?

Moderators: Luigi A. Cusano, QC (Partner, Torys LLP), Randall W. Block, QC (Partner, Borden Ladner Gervais LLP).

Panel: Bill Kennedy (General Counsel, NRCB), Michael A. Marion (Partner, Borden Ladner Gervais LLP), Paul Lee (Vice President, Projects, AltaLink).

Randall Block: The COVID-19 Pandemic has changed our lives in many ways. Many anticipate that some of the changes that the pandemic has driven will be permanent. The way our decision-makers have managed their regulatory and litigation processes from filings to hearings has not escaped this unpredicted change agent. We have three panelists who will discuss what has become of our litigated processes as we move forward. They will discuss the issues and challenges they have encountered in the litigation process in the pandemic and how they have been addressed.

Paul Lee: At AltaLink, we have had to adapt our ongoing operations and execute and consult on projects while providing safe, reliable, and affordable electricity. Due to the pandemic, there has been accelerated use of technology, which has led to gaining many efficiencies. There have been many trade-offs, such as face-to-face communication and tactile feedback from seeing and discussing with people in the same room. It is now difficult to read body language.

An excellent example of one of the challenges that AltaLink has had to overcome in the past year is with its Wildfire Mitigation Plan. This plan ensures that AltaLink operates its assets so as not to cause or contribute to wildfires. The operational component of the Wildfire Mitigation Plan is the Public Safety Power Shutoff (PSPS). The PSPS involves AltaLink de-energizing its lines during rare and extreme weather conditions like extreme heat, dryness and very high winds, which can alleviate wildfires.

When the PSPS was first rolled out in 2019 at Crowsnest Pass, it involved spending a significant amount of time working closely with the communities, holding town halls and face-to-face communication with emergency responders, community leaders and the community itself. It involved a lot of face-to-face communication and getting tactile/real-time feedback from the communities on moving forward with the concept. When COVID occurred, AltaLink had to pause and regroup to determine how to engage the other communities that the program still had to get to and determine how to get feedback and buy-in on the approach. AltaLink had to set up virtual sessions that were very clunky for a start. We could no longer hold town hall meetings and, we are still trying to work through that, but through the virtual settings, we have been able to get on the phone with a good number of people and have webcam sessions.

Bill Kennedy: The *Natural Resources Conservation Board Act*²⁹ established the Natural Resources Conservation Board (NRCB) as a tribunal in 1991. The Board now has two distinct mandates: to determine whether specified large projects are in the public interest and, to regulate the environmental and nuisance effects associated with agricultural confined feeding operations. The NRCB's mandates, in both cases, involve public hearings. Until about a year ago, those hearings followed the same format that NRCB has been using since 1991. However, the COVID pandemic and the attendant restrictions have caused the NRCB to adapt and revisit long-established procedures. Before COVID, the NRCB had not conducted virtual hearings. However, upon consultation with other tribunals like the Alberta Utilities Commission (AUC) and the Alberta Energy Regulator (AER), the NRCB held its first virtual pre-hearing in late 2020. To date, participants to NRCB hearings have not expressed concerns about the virtual hearing process; in all cases participants did all that they could to ensure the procedural success of the virtual hearings.

The NRCB uses Zoom for its proceedings, and technology has not been a barrier. For the Regulator and from a corporate perspective, virtual hearings cost less for all parties. There are no travel expenses and no hotel and hearing room bookings for the Regulator. Logistics are significantly reduced. Virtual hearings also allow for a little more flexibility in scheduling hearings as parties and their experts can attend hearings remotely. Also, transparency is increased with live webcam feeds and recorded daily sessions available on YouTube.

That said, we do have some challenges. More NRCB staff are engaged in virtual hearings, primarily associated with document management. Bandwidth can also be an issue as many hearing participants live in rural or remote areas where internet connectivity can be an issue. Also, virtual hearings make connecting to stakeholders more challenging because NRCB staff that typically

²⁹ *Natural Resources Conservation Board Act*, RSA 2000, c N-3.



provide information sessions on the NRCB review process to communities can no longer do so. Moving forward, this may be a case of the NRCB reaching out and doing this virtually. Also, the inability to reach and assist parties with no legal representation to answer their questions about the Board's procedure has been an issue. Finally, a significant loss is that virtual hearings do not allow the NRCB to promote interactions and dialogue that engender dispute settlement between parties.

In the future, technology will advance and offer us more options. From a corporate budget perspective, the cost savings achieved with virtual hearings are attractive and are likely to become more attractive as Boards face budgetary constraints. The NRCB has always had hearings in communities where projects are located as it promotes confidence and trust in the Board and should remain the first-choice option. That said, regardless of whether we are conducting a traditional or virtual hearing, we should consider the benefits of increased transparency achieved through webcasting. For the post-COVID era, when we are scheduling traditional hearings we now have the flexibility to incorporate virtual elements to accommodate greater accessibility.

Michael A. Marion: From the court's perspective, there was the initial chaos and shutting down followed quickly by adapting. The Court of Appeal quickly recovered as it was well-positioned from a technological perspective to accommodate the remote hearings. Some others and I attended a lengthy conference before a panel of five related to the reference on the *Impact Assessment Act* at the Court of Appeal last spring. As for the Court of Queen's Bench, they went through a myriad of stages but are now at a stage where pre-trial matters or matters that do not require live witnesses are presumed to be going ahead remotely. For cases that require a trial, the presumption is that trials are held with witnesses in person.

For cases that require a trial, you can seek leave of the Court to have people attend remotely. The Court is eager for people to either be fully remote or entirely in-person. From the technological perspective, the hybrid trial is the real challenge. As the technological framework in the Courts improves, hybrid proceedings will likely be easier.

Arbitrators adapted very quickly and filled the gap because of their streamlined process. I know of matters that were set for court proceedings that went to arbitration.

From counsel's perspective, and this is a theme that runs through everything, I must say that it is pretty hard and much more difficult to read the decision-maker when you cannot look them in the eye and sometimes you cannot see all of them or their body language. The second thing that might be of interest to this group is instances where the courts have had to grapple with questions of fairness, access to justice and so on. Again, looking at some quotes from Judges regarding these questions, it is evident that the old days are over for court processes or administrative tribunal processes. Moving forward, the real dividing line is when there are witnesses involved and whether or how important it is to look those witnesses in the eye.

Aside from the benefit of having cases settled through face-to-face interactions between parties, the courts will likely develop a test for determining whether a case should be conducted in person. For example, if you look at a case from the Ontario Court of Appeal that

was dealing with whether they should do the appeal in person or instead base it on written arguments, the court considered:

1. whether the issues and the evidence can be adequately addressed through remote methods;
2. whether a delay to allow an in-person process would be prejudicial to anyone; and
3. whether proceeding by video or remote would give a litigation advantage to any party.

It would be up to the counsel to convince the decision-maker why in the case of a trial or hearing involving witnesses, the presumption of in-person testimony should be rebutted, when it is argued that it should be done remotely.

The band-aid has been ripped off for the court system. The fear of the unknown in the remote process is over. We now all know how it works, and we know its limitations. It is somewhat uncertain moving forward, but I believe it will be more hybrid-type trials or hearings.

Lou Cusano: Although our litigated processes pre-COVID were long, complicated, and expensive, we still have a fundamental obligation to procedural fairness that must be honoured. So what does procedural fairness look like as we advance? Or was everything perfect pre-COVID, and we should get back to where we were before as quickly as we can?

Bill Kennedy: While regulators have a little more flexibility than the courts regarding what process we adopt, fairness is a deep part of whichever process we apply. Our boards are always looking for ways of shortening timelines without leaving people behind, and I think that is where we are going as we move forward. For the NRCB, we have not had concerns expressed by parties in terms of which fairness components might be lost through conducting virtual proceedings. However, cross-examination looks quite different when done in a virtual hearing than in a live hearing, and I am not sure that it is effective.

Lou Cusano: Michael, how about from the formal litigation perspective?

Michael A. Marion: I think there is enormous value to the cost savings and efficiency in streamlining the pre-trial processes. I can see us eventually having two streams: an in-person courtroom and a virtual courtroom. The actual challenge is when a decision-maker needs to see the dynamics of the witness, especially in cases where credibility is an issue, and it will be based on the specific facts of the case and how parties wish to pitch the fairness element. It is going to be difficult reading a person from this two-dimensional viewpoint. Some of the statements by the courts suggest that parties and counsel may overblow that a bit and a lot can be done remotely.

Lou Cusano: Michael, the issue of procedural fairness has always involved a bit of a balancing act between competing interests. Do you see that being complicated or easier to manage in a remote context?

Michael A. Marion: From a counsel's practical perspective, I think it is in many ways more difficult to manage. For example, the rule that you must usually give the exhibits you want to use to the witness in advance, so they know what is coming is not always followed. Also, working with electronic documents is a challenge for many people,



although I have transitioned, and I think it is quite doable. So, I think it is complex in some ways, but it can be efficient because there is easier access for people. But it will be interesting to see the first set of appeals that go up to the Court of Appeal where someone claims they have been denied a fair trial because their counsel was not allowed to cross-examine in person.

Randall Block: Paul, there is a direct connection between litigated proceedings and consultation. The more acceptance for a project, the less litigation you have. Most commentators, including Justice Woolley of the Court of Queen's Bench, would say that personal engagement is critical to project acceptance. So, what have you lost in project advancement by not engaging with people in person?

Paul Lee: We are still trying to engage personally in the world of COVID restrictions as it is required of us. Although we have changed the medium through which we engage our landowners, stakeholders, customers, etc. We now rely on phone calls and virtual meetings (80% teleconferencing and 20% in person). We have tried to continue to be accommodating, flexible and adapt to the ever-changing restrictions that the Government of Alberta has imposed.

We have lost a bit of that tactile feedback in person, though not completely, but it has become more of a challenge in the past year. For example, we have a project to widen the right of way or take down trees for the greater good and preserve public safety. It is one thing to look at it on a camera, on a laptop or through an iPad to get a sense of what that view looks like for that landowner compared to sitting in that kitchen with them and seeing what they see and understand their concerns. That is something I would say we have lost.

Randall Block: Paul, you head out in a community to engage with them and inform them that you may have to shut their power off. Are you saying that you need personal engagement with people, one-on-one tactile, as you say to do that?

Paul Lee: If this were to occur in the case of a PSPS, it would be pretty much the same. We would still be there in person, practicing the proper controls the government has put in place to make sure we can have face-to-face interaction. There is that tactile feedback required in the situation of a PSPS.

Lou Cusano: From your perspective, the strict regulatory use of timelines by our decision-makers for cross-examination or argument, are they here to stay? Do they work? Or do they infringe on procedural fairness? And in this latter respect, what can a regulator do in arguments of procedural fairness or natural justice?

Bill Kennedy: Yes, I think timelines are with us to stay. They work and are effective but require a flexible application. Our recent hearing was the first time we used timelines, and we rigidly applied them, but parties were all respectful of the timelines the Board assigned. We assigned those timelines in consultation with the parties. But the Board reminded parties throughout the process of their time use. For the Board, if there is a fair reason to allow parties to go beyond their timeline, it will be allowed. In our most recent experience, once the panel assigns these timelines, they largely leave it to the parties to manage those timelines themselves rather than more active management from the Board's Chair.

Michael A. Marion: For me, it depends on if you are talking about an argument or evidence. For arguments, oral or written, courts have been using time and page restrictions right up to the highest level of our court. It forces counsel to get to the point and be succinct. I do not see any real risk of procedural fairness issue with reasonable limits on time for the arguments.

On the evidence side of things, courts will generally defer to the agreement of parties. I think restricting the time for evidence could give rise to procedural fairness issues if it is too restrictive. Courts generally do not micromanage how much time you have with a witness. The court would only step in when a party is being unreasonable and excessive. The courts want people to have the ability to put their case forward, and if it is excessive, it can be dealt with in the court's mind as a matter of costs. But it is different for tribunals.

Lou Cusano: Directed at Michael and Bill- Is written argument losing favour, and if so, is that a natural evolution or is it being driven by the pandemic and exigencies demanded by a remote process?

Michael A. Marion: My answer is No! Written argument is not losing favour; it still has massive value. The pandemic is moving more towards the importance of the written argument. There is now a desk application process if the parties agree; everyone submits written arguments and nothing else. At the end of a lengthy trial, the most important thing is assembling all the evidence in law and putting it in a concise argument for the court to follow.

Bill Kennedy: I do not know whether it is losing favour, but I can share that the NRCB's approach has always favoured oral argument. That said, COVID has given us flexibility in terms of scheduling. I think the NRCB would continue to favour oral arguments and written arguments on some issues, mainly if there is a complex legal matter you want to put before the Board. Those written arguments can be highly effective, but oral arguments in a public proceeding like NRCB proceedings have their benefits.

Randall Block: Should COVID itself be irrelevant to the discussion? There have been many awful things from COVID, but maybe it pushed us into a more efficient system. What should we keep once we are through with all of this?

Bill Kennedy: Our Board and indeed every board is working to make their process better and more efficient. We know we need to do that, and there are multiple ways and multiple things we need to address. I think COVID has allowed us to think and reflect on what options exist within our public review process. How can we make it better? How can we make it more efficient? And these opportunities do not come along very often. Until COVID, we have been doing hearings the same way we did 30 years ago. Change comes slowly, and at least there is a catalyst.

Paul Lee: Absolutely, we need to keep moving forward in the efficiencies we have gained, and so as a project proponent, we view COVID as a bit of an accelerator. Some of these changes are inevitable and will happen over time, COVID being the catalyst initiating that change. Things like travel time; now we can visit with more landowners and stakeholders any given day. Maybe there are some ways some of the virtual settings can continue, and we can get more frequent touchpoints with our customers and landowners.



Michael A. Marion: I think that the COVID situation has pulled the courts out of the dark ages in many ways. For a start, electronic filing and use of SharePoint sites are finally possible. There is an increase in public access to the courts. Many people could watch that Constitutional Reference at the Court of Appeal from home without driving down to the courthouse. These developments are fantastic and should continue. The part that I think is difficult and where COVID may still be relevant is when a decision-maker is balancing remote versus non-remote; if they can be remote because of a pandemic, that will still be a factor in deciding to proceed with a hearing.

Randall Block: My understanding is that the Court of Appeal is going back to in-person appearances by September 1 but will be implementing a full hybrid procedure going forward (that is, you could choose to be in person or appear over the wire). Is a hybrid proceeding going to be the ultimate model?

Michael A. Marion: I do think that is where it is going, and the biggest impediment is technology. I have attended in court where the Judge is in the room, and we are not, and the Judge is looking at a monitor off on the side, and the Judge is this big, and you cannot see anything. That is a big problem with hybrid proceedings.

Bill Kennedy: I think that is where we are going as well. With that said, I think the decisions can be equally as good, whether you do a live proceeding or a virtual proceeding. But for the NRCB, I have this nagging concern about how credible we will be in communities are affected by our decisions if these are cooked up in virtual proceedings.

Summary by Ifeoluwa Osunfisan, JD Student, University of Calgary

Regulatory Reform

Carolyn Dahl Rees, Chair, Alberta Utilities Commission (AUC)

Carolyn Dahl Rees discussed what the AUC's vision is for itself. She went through how the high-level aspirational goal came about, and what it means for the future of the AUC.

The AUC's aspirational goal is to become one of the most effective and efficient regulators in North America. This came about within the context of the 2019 change in government. The new government has a renewed emphasis on reducing regulatory burden, including through the *Red Tape Reduction Act* (June 2019) seeking to cut red tape by one third by 2023.

Dahl Rees noted that "streamlined regulation" was one of the goals for regulators in the 1990s. The idea sounds good, but how can you really get there? This is something the AUC is now solving. The AUC met the goal for a 12 percent reduction in regulatory requirements and is ahead of schedule to meet the 33 percent target by 2023. You never stop pursuing efficiency and streamlining once you start something like this.

In 2019, the AUC held multiple stakeholder roundtables on reducing the regulatory burden, and the AUC Strategic Plan includes efficiency and limiting regulatory burden as a central theme. The stakeholders' largest and clearest concern was the speed and

timeliness of rates proceedings – their number one priority. For example, an ATCO filing showed detailed increase in amount of time taken to get decisions.

Then, in June 2020, the government appointed Dahl Rees as the new chair of the AUC, with a clear message in the press release: "Government expects the AUC to strengthen its work through streamlining processes, reducing red tape, and increasing investor confidence in Alberta's electricity sector." (June 23, 2020).

To achieve this, the AUC sought outside expertise and commissioned three reports. The first was from veteran regulatory lawyers Kemm Yates, QC (Calgary), David Mullan (Queens University), and Rowland Harrison (NEB/CER). The report recommended how processes and procedural steps could be made more efficient or eliminated altogether. The AUC adopted 29 of the report's 30 recommendations, with the one outlier being that the AUC thought legislated time limits may still be needed. The key recommendation was for an "overarching, assertive case management approach."

The second report was for independent benchmarking with North American peers. The AUC had guidelines for different types of proceedings, but this report provided insight into what their peers were doing. The results were that while the AUC is generally in the same ballpark as its peers, on large, complex cases it did not compare favourably. The AUC was in the bottom quartile for rate cases.

The third report was from an independent expert panel on mediated settlements. Courts had started looking to alternative dispute resolution years ago and found it to be effective. The AUC was behind. Mediation/arbitration experts Jack Marshall, QC, Bill Kenny, QC, Doug Crowther, QC and Jim McCartney, C.Arb., C. Med produced this report. The report provided the AUC with information on practices at other regulators, along with recommendations, mediation protocol, timelines, and an initial roster of mediators.

The AUC now has the regular adjudicated process, a settlement process, and a mediated settlement process. The changes are already starting to pay off. The AUC has made gains in processing times across the board.

The AUC got its first mediated settlement agreement, and simplified compliance filings are showing real benefits. The AUC is saving months of time by constraining compliance filings to more mechanical updates and using a streamlined process that eliminates interventions.

The AUC is getting decisions out in less than 90 days in many cases and eliminating two years of regulatory lag by finalizing going-in rates for the distribution utilities under performance-based regulation by the end of 2020. In fiscal 2020-2021 more than 93 per cent of rates-related filings were processed, with the decision issued within 66 days.

In Dahl Rees' closing remarks she noted how the early wins have put a shot in the AUC's arm. A letter from Associate Minister of Natural Gas and Electricity, Dale Nally, recognized the AUC's important work, and made clear that government expects this to be ongoing.



Dahl Rees likened the process to a continuous improvement loop. Like management systems, there is a cycle where you analyze what your issues are, monitor performance, upgrade, and repeat. You can't let up and are always aspirational.

This is a cultural shift for the AUC and for the entire sector. The government doesn't just expect the regulator to shift. Government expects everybody to shift. But culture is a very tough nut to crack.

Question from the floor: Can this agenda be achieved without compromising the integrity of the process?

Answer: Yes. We can maintain a requirement for fairness and tighten up the way we approach it. Take back the process. Own the process. If there's more work upfront for us, then bring parties to bear with the same focus. For example, issues lists, which were used on the gas side of the old Energy and Utilities Board. It's not easy to make people focus really hard at the beginning of a proceeding, and there are risks that you don't catch everything. But the AUC is an expert tribunal, and we have to be able to figure out how big the breadbox is at the beginning.

Summary by Robert Joshi, JD Student, University of Calgary.

CIRL Update:

Allan Ingelson is engaging in and overseeing a variety of research projects, including "Citizens' Guide to the Canada Energy Regulator" by **Alastair Lucas**; "Citizens' Guide to the Alberta Utilities Commission" by **Indra Maharaj**; and "Basic Ecology and Law for Albertans" by **Judy Stewart**. He and Alastair Lucas are co-editing volume 2 of *Environment in the Courtroom*, which will be published by the University of Calgary Press. Allan and **Dr. Laura Ifeoma** – a Research Fellow in the Canadian Institute for Resources Law (CIRL) – have completed two scholarly articles, one examining the role of the *Alberta First Nations Sacred Ceremonial Objects Repatriation Act* in furthering reconciliation in Canada, and the second providing a comparative analysis of sacred ceremonial objects legislation in Canada and South Africa. Allan is also a member of the Natural Resources Law Teachings Committee of the Foundation for Natural Resources and Energy Law (formerly the Rocky Mountain Mineral Law Foundation), of which Alastair Lucas is a trustee and a member of the Grants Committee.

In October 2021, the Mikisew Cree First Nation (MCFN) selected CIRL to assist with reviewing and updating the MCFN Consultation Protocol. CIRL Research Fellows **David Laidlaw** and **Sara Jaremko** are working on the project that will consider the Recommendations of the Truth and Reconciliation Commission and recent court judgments relevant to the legal duty to consult First Nations.

Dave V. Wright continues his research on impact assessment, climate change, and major infrastructure projects, recently publishing an article in the *Alberta Law Review* on implications of the 2019 federal *Impact Assessment Act* for Canadian energy projects. He continues his SSHRC-funded research on the implementation of modern treaties, with another article on dispute resolution underway. In recent months, he has presented his research at the annual symposium of the International Association of Impact Assessment, the annual Sustainability Conference of American Legal Educators, and the Vermont Law School Annual Colloquium on Environmental Scholarship, among others. In spring 2021, Professor Wright was an invited expert witness at parliamentary committee hearings regarding Canada's federal net-zero emissions and climate change accountability regime. Professor Wright was also awarded the 2021 University of Calgary Sustainability

Recently Published Occasional Papers available free online:

- ◆ **CIRL Occasional Paper # 73:** "Alberta's Riparian Land Governance System" by Dr. Judy Stewart
- ◆ **CIRL Occasional Paper # 74:** "Can Provincial Governments Stop Interprovincial Pipelines?" by Alastair Lucas, QC
- ◆ **CIRL Occasional Paper # 75:** "Implications of the New Federal Impact Assessment Regime for Energy Projects in Alberta" by David Wright
- ◆ **CIRL Occasional Paper # 76:** "A Citizen's Guide to the Alberta Surface Rights Board" by John McCarthy

For a complete list of Occasional Papers, see CIRL's website: www.cirl.ca

Upcoming Events:

Saturday Morning at the Law School ONLINE!

"Alberta's Provincial Parks and Canada's Commitments: Do they Line Up?" presented by Dave Poulton on February 12, 2022. (10am - noon MDT). [Register online!](#)

Recent Faculty Publications:

Allan E. Ingelson, "Legal Reform To Promote Increased Water Recycling and Reuse from Canadian Shale Oil and Gas Development" (2021) 27(3) Journal of Water Law 89-102 <https://www.lawtext.com/publication/the-journal-of-water-law/contents/volume-27/issue-3>.

Paule Halley & **Allan E. Ingelson** eds., *L'environnement au Tribunal* (Presses de l'Université Laval, 2021). (887 pages)

Allan E. Ingelson & Teresa Castillo Quevedo, "Chapter 13 – Reducing CO2 Emissions through Carbon Capture Use and Storage and Carbon Capture and Storage in Mexico and Alberta, Canada: Addressing the Legal and Regulatory Barriers" (Elsevier, 2021), 245-61 <https://doi.org/10.1016/B978-0-323-85250-0.00015-3>.

Allan E. Ingelson & **Kristen van de Biezenbos**, "Energy Technology and Environment" in William Tilleman et al eds., *Environmental Law and Policy*, 4th ed. (Emond, 2020), 199-227.

William Tilleman, **Alastair R. Lucas**, Sara Bagg, and Patricia Galvao eds., *Environmental Law and Policy*, 4th Ed. (Emond, 2020)

Alastair R. Lucas, "Can Provinces Stop Interprovincial Pipelines?" Canadian Institute of Resources Law Occasional Paper #74 (2021) <https://canlii.ca/t/t99b>.

José Juan González Márquez, **Alastair Lucas** & Diego Almeida, "Energy Cooperation in North America: from CUSFTA to USMCA," in Martha M. Roggenkamp et al. eds., *Elgar Encyclopedia of Environmental Law, Vol. 9, Energy Law, Climate Change and the Environment* (Edward Elgar, 2021), 122-33 <https://doi.org/10.4337/9781788119689.IX.11>.

Alastair R. Lucas & Diego Almeida, "Governance of the Energy Market in Canada," in Martha M. Roggenkamp et al. eds., *Elgar Encyclopedia of Environmental Law, Vol. 9, Energy Law, Climate Change and the Environment* (Edward Elgar, 2021), 180-92 <https://doi.org/10.4337/9781788119689.IX.16>.

Arlene Kwasniak and **Sharon Mascher**, "Purpose, Need, and Alternatives Through the Lens of Sustainability and the Public Interest," in Meinhard Doelle & John Sinclair eds., *The Next Generation of Impact Assessment: A Critical Review of the Canadian Impact Assessment Act* (Irwin Law, 2021), ch. 10 <https://irwinlaw.com/product/the-next-generation-of-impact-assessment/>.

Graduate Programs:

Vitus Ngaanuma, LL.M., "The Regalian Mineral Ownership Regime and its Implications for Public Participation in the Mineral Rights Decision-Making Process in Ghana" (2021) Supervised by **Allan E. Ingelson**

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