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# Alternative Energy & Power 2022

Introduction

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# INTRODUCTION

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*Contributed by: Glenn Zacher, Stikeman Elliott LLP*

This is the fourth release of the Chambers Global Practice Guide for Alternative Energy & Power, which was launched in 2018 amid a transformation of the global electrical energy and power industry. The factors driving change when this guide was released in 2018 – climate change, new technologies, threats to grid security, increasingly proactive energy consumers, among others – continue to drive change and challenge market and regulatory structures. Added to these, this edition of the Guide is being released amid the world’s emergence from the COVID-19 pandemic and the war in Ukraine – global events which have had and are having profound impacts on energy trade and usage.

## **De-carbonising and the Transition to Net Zero**

The desire to de-carbonise has been and continues to be a focus in many jurisdictions around the globe. Renewable generation, demand-response resources and energy-efficiency technologies in their various forms are viewed largely as the way of the future and are garnering more government attention and investor interest than ever before. Carbon phase-out and renewable energy/demand reduction targets are commonplace, as are corresponding incentive and subsidy programmes.

Such change does not occur without creating regulatory, technical and commercial challenges. Governments are assessing their current regulatory, market and rule structures to determine how best to adapt, and are doing so within the framework of existing long-lived transmission and distribution infrastructure investment that also needs to adapt to dynamic changes in power supply and consumption. At the same time, the increasing risks to grid security from cyber-attacks and natural disasters have imposed new

imperatives on investment in “grid hardening” and resilience.

## **Sector Evolution**

Evolution within the electricity and power industry is a constant. A decade or two ago, many jurisdictions contemplated and experienced material changes in the form of “unbundling” the then-predominant vertically integrated electrical utility model. There was a need to adapt or create regulatory, market and rule structures to accommodate the unbundling of electrical utilities into a mixture of generation, transmission and distribution segments, while also developing and implementing retail and wholesale supply and market regimes. However, the drivers for today’s transformation, as well as the scope and magnitude of that transformation, are significantly different.

## **Unbundling Utilities and Unprecedented Technological Change**

The changes relating to the unbundling of electrical utilities were largely driven by government policy, with the goal of reducing the price of power for consumers through the creation, and opening, of markets in order to incentivise competition from both new and different investment. Today’s drivers are multifaceted and complex. They include: geopolitical factors; the social and environmental awareness and involvement of consumers combined with reciprocal social and environmental government policy; and technological advancements in almost all aspects of the industry, including at the consumer level. That is, whereas the changes in the electricity industry that were experienced in the recent past were largely driven top-down through government policy, today’s changes are in response to both top-down and bottom-up stimuli.

# INTRODUCTION

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The unbundling of electrical utilities involved altering the regulatory and commercial models that existed but did not involve much, if any, change to existing electrical infrastructure and how that infrastructure physically delivered electricity to the consumer. In contrast, the changes occurring and being contemplated today are triggered by the development and implementation of new and varied types of generation-and-demand side technologies which require integration with existing infrastructure. Indeed, the desire to replace dispatchable or steady-state carbon-based generation with distributed, non-dispatchable and intermittent renewable generation, like wind and solar, as well as demand response, storage and other technologies, raises reliability and integration challenges at a time when consumers in developed countries view a reliable electricity service as a right and not a privilege.

The integration of smaller-scale distributed technologies, like storage (eg, electric car batteries) or aggregated demand response, raises further integration challenges. For this reason, these new technologies have the potential to materially disrupt market designs, market and regulatory structures and the physical infrastructure that is in place today.

## **Global Need**

Even in the face of efforts to de-carbonise and the push for renewables to replace carbon-based generation, globally, the need for carbon-based generation (either coal or natural gas), including new generation, will remain for some time. The International Energy Agency (IEA) forecast that between 2017 and 2040, global energy needs will expand by 30% and during the same period, presumably to meet the expanding need for energy, a net global addition of 400 GW of coal generation is forecast. At the same time, the IEA estimated that between 2017 and 2040, renewable energy generation will capture two thirds of global investment in electricity generation.

This explosive growth in renewable energy (primarily solar and wind) will result, in the IEA's estimation, in renewable power generation representing 40% of global generation by 2040. In the European Union, this number is estimated to be twice that, at 80%.

Globally, the electrical energy and power industry is changing and evolving at an unprecedented rate. This means there is, and will continue to be, plenty of opportunity for those in the industry, including legal experts, to develop and apply their expertise. Flexibility and innovation, on the part of all, will be necessary for success.

# INTRODUCTION

*Contributed by: Glenn Zacher, Stikeman Elliott LLP*

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# Alternative Energy & Power 2022

Canada: Law & Practice  
Glenn Zacher, Dennis Langen,  
Erik Richer La Flèche and Maxime Jacquin  
Stikeman Elliott LLP

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## Law and Practice

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## 1. GENERAL STRUCTURE AND OWNERSHIP OF THE POWER INDUSTRY

### 1.1 Principal Laws Governing the Structure and Ownership of the Power Industry

The structure and ownership of the power industry varies among Canada's ten provinces; each has its own legislature making laws governing the industry within the province, including the mandate and authority of the provincial utility regulator. Eight provinces maintain the traditional vertically integrated utility structure. In all but two of those provinces, the electrical utility is a provincially owned corporation (a Crown corporation) that, for the most part, provides monopoly generation, transmission, distribution and retail supply services. Two provinces, Alberta and Ontario, have unbundled industry structures with their own unique features.

The Canadian federal government does not play a role in the structure and ownership of the power industry in Canada. The federal government has jurisdiction over the export of electricity from Canada and the construction and operation of international transmission lines and designated transmission lines that cross provincial boundaries. Federal jurisdiction over these matters is exercised by the Canada Energy Regulator, pursuant to the Canadian Energy Regulator Act. Certain federal jurisdiction also applies to the operation and production of power at nuclear facilities.

#### Structure and Ownership of the Power Industry in Canada

##### *Western Canada*

- Province and approximate population – Alberta 4,262,635.
  - (a) Crown, private or municipal ownership – private and some municipal.
  - (b) Vertically integrated or unbundled – un-

bundled.

- (c) Primary legislation – Electric Utilities Act, Hydro and Electric Energy Act.
- (d) Utility regulator – Alberta Utilities Commission.
- Province and approximate population – British Columbia 5,145,785.
  - (a) Crown, private or municipal ownership – Crown and some private.
  - (b) Vertically integrated or unbundled – vertical.
  - (c) Primary legislation – Utilities Commission Act, Clean Energy Act.
  - (d) Utility regulator – British Columbia Utilities Commission.
- Province and approximate population – Manitoba 1,342,153.
  - (a) Crown, private or municipal ownership – Crown.
  - (b) Vertically integrated or unbundled – vertical.
  - (c) Primary legislation – Public Utilities Board Act.
  - (d) Utility regulator – Public Utilities Board.
- Province and approximate population – Saskatchewan 1,132,505.
  - (a) Crown, private or municipal ownership – Crown.
  - (b) Vertically integrated or unbundled – vertical.
  - (c) Primary legislation – Power Corporation Act.
  - (d) Utility regulator – no regulator.

##### *Central Canada*

- Province and approximate population – Ontario 14,223,942.
  - (a) Crown, private or municipal ownership – Crown, private and municipal.
  - (b) Vertically integrated or unbundled – unbundled.
  - (c) Primary legislation – Electricity Act, Ontario Energy Board Act (OEB Act).
  - (d) Utility regulator – Ontario Energy Board.



- Province and approximate population – Quebec 8,501,833.
  - (a) Crown, private or municipal ownership – Crown and some municipal.
  - (b) Vertically integrated or unbundled – vertical.
  - (c) Primary legislation – *Loi sur Hydro-Québec* (Hydro-Québec Act), *Loi sur la Régie de l'énergie* (Act respecting the Régie de l'énergie).
  - (d) Utility regulator – *Régie de l'énergie*.

#### *Atlantic Canada*

- Province and approximate population – New Brunswick 775,610.
  - (a) Crown, private or municipal ownership – Crown.
  - (b) Vertically integrated or unbundled – vertical.
  - (c) Primary legislation – Electricity Act, Energy and Utilities Board Act.
  - (d) Utility regulator – New Brunswick Energy and Utilities Board.
- Province and approximate population – Newfoundland and Labrador 510,550.
  - (a) Crown, private or municipal ownership – Crown and private.
  - (b) Vertically integrated or unbundled – vertical.
  - (c) Primary legislation – Electrical Power Control Act, Public Utilities Board Act.
  - (d) Utility regulator – Newfoundland and Labrador Board of Commissioners of Public Utilities.
- Province and approximate population – Nova Scotia 969,383.
  - (a) Crown, private or municipal ownership – private and some municipal.
  - (b) Vertically integrated or unbundled – vertical.
  - (c) Primary legislation – Public Utilities Act, Utility and Review Board Act, Electricity Act.
  - (d) Utility regulator – Nova Scotia Utility and Review Board.

- Province and approximate population – Prince Edward Island 154,331.
  - (a) Crown, private or municipal ownership – private.
  - (b) Vertically integrated or unbundled – vertical.
  - (c) Primary legislation – Electric Power Act, Island Regulatory and Appeals Commission Act.
  - (d) Utility regulator – Island Regulatory and Appeals Commission.

#### *Provinces that Have a Vertically Integrated Utility Structure*

Of the eight provinces that have a vertically integrated utility structure, four have populations greater than one million people.

British Columbia's vertically integrated utility, British Columbia Hydro and Power Authority (BC Hydro), was established as a Crown corporation by statute. BC Hydro is responsible for generating, purchasing, distributing and selling electricity throughout most of the province, as well as the construction and operation of most of the transmission system in the province. Public utilities in British Columbia are regulated by the British Columbia Utilities Commission (BCUC), pursuant to the Utilities Commission Act. The BCUC regulates the rates charged by electrical utilities and is responsible for regulating the construction and operation of facilities by electrical utilities.

SaskPower was established as a vertically integrated Saskatchewan Crown corporation, pursuant to the Power Corporation Act. SaskPower is responsible for and has the exclusive right to supply, transmit, distribute and sell electricity in Saskatchewan. Saskatchewan does not have a public utilities regulator.

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Manitoba's vertically integrated Crown corporation is Manitoba Hydro, which was established by the Manitoba Hydro Act. It is responsible for and has the exclusive right to supply, transmit, distribute and sell electricity in Manitoba. Manitoba Hydro is regulated by the Public Utilities Board, which exercises its authority pursuant to the Public Utilities Board Act.

Hydro-Québec is Quebec's vertically integrated Crown corporation, which was established by the *Loi sur Hydro-Québec* (Hydro-Québec Act). Hydro-Québec has a monopoly on the distribution of electricity in Quebec throughout nearly the entire province. It is regulated by the Régie de l'énergie, pursuant to the *Loi sur la Régie de l'énergie* (Act respecting the Régie de l'énergie).

## *Alberta*

In 1995, the Electric Utilities Act was enacted to restructure the Alberta electricity industry by unbundling the vertically integrated electrical utilities into three functional units: generation, transmission and distribution. While the generation, transmission and distribution functions would remain subject to rate regulation, the policy objective of the Alberta government was to deregulate generation.

In 2001, an unregulated wholesale electricity market (the power pool) was established, where prices were and continue to be set by competitive market forces, based on price and quantity bids from generators to the power pool and the demand for electricity purchased by load customers from the power pool.

Except for a limited number of municipalities that own generating facilities and transmission facilities, all such facilities in Alberta are investor-owned. Similarly, except for distribution systems owned by municipalities within their boundaries and by rural electrification associations (co-

operatives) within their service areas, all distribution systems in Alberta are investor-owned.

The Alberta Utilities Commission (AUC) is the public utilities regulator in Alberta. It regulates the power industry pursuant to its authority under the Electric Utilities Act, the Hydro and Electric Act and the Public Utilities Act.

## *Ontario*

Ontario's electricity sector was formerly vertically integrated with virtually all generation and transmission owned and operated by provincially owned Ontario Hydro, and distribution owned and operated by Ontario Hydro as well as more than 300 municipal utilities. From 1999–2002, the Ontario electricity sector was competitively restructured. Ontario Hydro was broken up into Ontario Power Generation (OPG), which continued to own and operate most of Ontario Hydro's generation assets; Hydro One Networks Inc (HONI), which continued to own and operate Ontario Hydro's transmission assets; and the Independent Market Operator, since renamed the Independent Electricity System Operator (IESO), which was mandated by the then-newly enacted Electricity Act, 1998, to manage the reliability of the provincial transmission grid, administer Ontario's wholesale electricity market and undertake electricity system planning.

The restructuring also resulted in the consolidation of more than 300 distribution utilities. Today there are fewer than 70, some of which are investor-owned and some of which remain municipally owned; government policy continues to encourage further consolidation.

Transmission and distribution utilities are rate-regulated by the Ontario Energy Board (OEB) under the OEB Act. The OEB also regulates the construction of transmission and distribution infrastructure. Several years ago, the Ontario government took steps to privatise HONI; today,

the government owns less than 50% of HONI. There have also been recent initiatives to introduce new entrants and competition into the transmission sector.

There has been significant government intervention in the electricity sector since market opening in 2002, including various price freezes and other forms of price regulation; this effectively undermined any merchant generation market. Almost all new generation since 2002 has, as a result, been procured by the IESO (and its predecessor, the Ontario Power Authority) pursuant to government directives.

When the market was restructured, it was intended that OPG, which owned most of the generation in the province, would further divest its generation assets; in the interim, OPG was subject to a market power mitigation framework. This planned OPG divestiture did not transpire and today, most OPG generation is rate-regulated by the OEB.

## **1.2 Principal State-Owned or Investor-Owned Entities**

### **Alberta**

There are approximately 426 generating units in Alberta. The principal investor-owned power generation entities are TransAlta Corporation, Heartland Generation and Capital Power. ENMAX (wholly owned by the City of Calgary) owns power generation facilities both in and outside Calgary. The City of Medicine Hat owns and operates a power plant within its boundaries.

There are three investor-owned transmission companies, AltaLink, ATCO Electric and Alberta PowerLine, which own the bulk of the transmission facilities in Alberta. Transmission facilities are also owned by ENMAX, EPCOR (wholly owned by the City of Edmonton) and the City of Medicine Hat. Montana Alberta Tie owns and operates a merchant intertie that enables the

import and export of electricity between Alberta and Montana, USA.

There are two investor-owned distribution companies that serve most of Alberta outside the larger Alberta municipalities, FortisAlberta and ATCO Electric. The municipalities of Edmonton (through EPCOR), Red Deer, Calgary (through ENMAX), Medicine Hat and Lethbridge own and operate their own distribution systems.

### **British Columbia**

Approximately 80% of the generation capacity in British Columbia is owned by BC Hydro and Columbia Power Corporation, also a Crown corporation. The remaining 20% is owned by private investors, including independent power producers that either consume electricity on-site for industrial operations or, as required, sell it to BC Hydro. Approximately 92% of the transmission assets and approximately 93% of the distribution assets in British Columbia are owned by BC Hydro. FortisBC, an investor-owned corporation, owns the approximate 8% of remaining transmission assets and 4% of the distribution assets in the province. The remaining distribution assets are owned by municipalities.

### **Saskatchewan**

The transmission, distribution, and retail segments of the power industry in Saskatchewan, as well as almost all generation, are owned by SaskPower. Approximately 20% of installed generation is privately owned. Each of these projects sells electricity to SaskPower under long-term agreements.

### **Manitoba**

Virtually all generation in Manitoba and the entirety of the transmission, distribution and supply segments are owned by Manitoba Hydro. There are two privately held wind power projects that sell electricity under long-term agreements to Manitoba Hydro.

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## Ontario

The former generation arm of Ontario Hydro, OPG, continues to own the majority of provincial generation capacity (principally nuclear and hydro generation). OPG is owned by the province. The balance of provincial generation is owned by a mix of investor-owned companies.

Approximately 98% of provincial transmission assets are owned by HONI, which until several years ago was owned by the province. The province now owns a minority stake in HONI. There have been some recent initiatives aimed at introducing new entrants and competition in the transmission sector.

Distribution facilities are owned by HONI (mainly rural distribution networks) and over 60 local distribution companies, some of which are investor-owned and some of which remain municipally owned.

Most electricity end-use consumers are served by local distribution utilities. Competitive electricity retailers serve some commercial and residential end-use consumers; however, government legislation and regulations have largely driven competitive retailers out of the low-volume residential market.

## Quebec

More than 90% of electricity production and nearly all transmission and distribution facilities are owned and operated by Hydro-Québec. The remaining facilities are owned by the private sector, municipalities and co-operatives. Of all electricity produced in Quebec, approximately 99% is from renewable sources. With an installed capacity of approximately 37.2 GW, Hydro-Québec is one of the world's largest producers of clean energy.

## 1.3 Foreign Investment Review Process Investment Canada Act

Foreign investment in Canada's power industry (and most other industries) is subject to the federally regulated provisions of the Investment Canada Act (ICA), enacted by the federal government of Canada. Under the ICA, subject to certain exemptions, every acquisition of control by a non-Canadian of a Canadian business, even where the business is already controlled by a foreign investor, requires either a notification or detailed review under the ICA to ensure it is likely to be of "net benefit" to Canada.

A notification involves the filing of a form with prescribed information and is typically an administrative formality; it can be filed at any time up to 30 days after implementation of the investment. A review, on the other hand, is typically a pre-closing process that requires positive approval by Canada's Minister of Industry and/or Canadian Heritage ("the Minister") before proceeding.

### Thresholds for Review

Whether a transaction is subject to notification or to pre-closing review depends on whether certain enterprise value or asset thresholds are satisfied. These thresholds generally depend on a number of factors, the most relevant of which to the power industry are as follows.

### Transaction structure

Indirect transactions in which the purchaser acquires the voting shares of a non-Canadian corporation that controls a Canadian business are generally exempt from a pre-closing review.

### Identity of purchaser or vendor

Where the purchaser or vendor is ultimately controlled by nationals of a WTO member country, and the purchaser is not a state-owned enterprise, a pre-closing review is only triggered where the Canadian business has an enterprise value equal to or more than CAD1.141 billion.

That threshold rises to CAD1.711 billion where the purchaser or vendor is ultimately controlled by nationals of a “trade agreement” country, which includes the USA and EU countries.

#### *Involvement of state-owned enterprises*

If the purchaser is a “state-owned enterprise”, broadly defined to include entities that are influenced directly or indirectly by a foreign government, a pre-closing review is required where the book value of the assets of the Canadian business is equal to or more than CAD454 million.

#### **Review Process**

Where a transaction is reviewable, the purchaser must file an application for review prior to implementing the investment and the parties are prohibited from implementing the investment until the Minister confirms that they are satisfied or are deemed to be satisfied that the investment is likely to be of “net benefit to Canada”. This decision is based on certain factors set out in the ICA and in view of any legally binding undertakings the purchaser is willing to make, which are typically required.

Information in an ICA application for review includes benchmark data about the Canadian business, such as historical, current and forecast revenues, employment levels and capital expenditures, as well as information about the citizenship of existing officers and directors. The purchaser is required to describe its future plans for the Canadian business with reference to these benchmarks.

Once the purchaser has filed a complete application for review, the Minister has a 45-day period within which to make a “net benefit” determination. This period may be (and often is) unilaterally extended by the Minister for an additional 30 days and may be extended further with the consent of the purchaser. During this time, counsel to the purchaser will typically answer questions

from the Investment Review Division and engage in negotiations over the legally binding undertakings that the purchaser is willing to accept with respect to its plans for the Canadian business. Such undertakings often include committing to maintaining a Canadian head office and specified minimum levels of Canadian senior management, capital expenditures, employment levels and various other matters.

#### **National Security Reviews**

Irrespective of the value of an investment, the acquisition of control of a Canadian business or investment to establish a new Canadian business may be subjected to a national security review under the ICA. Purchasers that receive notice of a potential or actual national security review are prohibited from implementing a proposed investment pending the outcome of the review.

Where the Minister, after consultation with the Minister of Public Safety and Emergency Preparedness, is satisfied that the investment would be “injurious to national security”, the Governor-in-Council may “take any measures it considers advisable” to protect national security, including prohibiting implementation of the investment or requiring written undertakings from the purchaser.

The government has issued guidelines containing a non-exhaustive list of factors that will be considered in determining whether an investment would be injurious to national security. They include the potential impact of the investment on the security of Canada’s critical infrastructure, the supply of critical goods and services to Canadians, and the potential of the investment to enable foreign surveillance or espionage.

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## 1.4 Principal Laws Governing the Sale of Power Industry Assets

Depending on the applicable legislation in the provinces that have a vertically integrated structure, utilities may require the approval of their regulator or the provincial government in order to dispose of utility assets outside the ordinary course of business or to enter into specified transactions.

### Alberta

The sale of generation assets requires the approval of the AUC, pursuant to the Hydro and Electric Energy Act. The owners of larger-scale transmission and distribution system assets in Alberta have been designated by regulation as an “owner of a public utility” under the Public Utilities Act, which, among other matters and subject to certain conditions, prohibits the issuance of shares or debt, the sale of assets outside the ordinary course of business and a change in control, unless prior approval of the AUC is obtained.

For dispositions involving a change in control of a transmission or distribution utility or the sale of assets outside the normal course of business, the AUC conducts a public interest assessment and applies a “no-harm” test under which it considers, among other matters, the industry experience and financial metrics of the proposed purchaser to ensure the continued safe and adequate service to customers at just and reasonable rates. The sale of transmission and distribution businesses in Alberta is not common. When such sales have occurred, the AUC has conducted a hearing process before issuing the necessary approvals. If a transaction involves an asset sale rather than a sale of shares, the AUC’s approval under the Hydro and Electric Energy Act would also be required.

### Ontario

The OEB has authority to review and approve the sale or lease of transmission or distribution assets, or a change in control of licensed transmission and distribution companies. All amalgamations by transmitters or distributors are reviewable pursuant to the provisions of the OEB Act; these provisions are referred to as the MAAD (mergers, acquisitions, amalgamations and divestitures) provisions. In reviewing MAAD applications, the OEB applies a “no harm” test, which requires the applicant to show that rate-payers will not be worse off as a result of the transaction.

Generators are also required to notify the OEB before purchasing any interest in transmission or distribution facilities; likewise, transmitters and distributors are required to notify the OEB of any proposed acquisition of generation facilities. The OEB has the discretion to undertake a review of such transactions.

## 1.5 Central Planning Authority

In the provinces that have a vertically integrated utility structure, the overall planning of the electricity system regarding reliability and sufficiency of supply may be managed by or among the utility, its regulator, or the provincial government.

### Alberta

The Electric Utilities Act established the independent system operator, which operates as the Alberta Electric System Operator (AESO). The AESO has numerous statutory responsibilities to, among others, assess the current and future needs of market participants and plan the capability of the transmission system to meet those needs, and make arrangements for the expansion of and enhancement to the transmission system. Every second year the AESO produces a long-term transmission plan (LTP) for the entire province, which identifies the timing and location of current and future transmission needs over a

20-year period. The AESO also produces a long-term outlook every two years that forecasts electricity demand and generation in the province, looking forward 20 years, which helps inform the LTP. Transmission needs identified in the LTP or arising out of the AESO's obligation to provide "system-access service" on the transmission system are addressed by transmission utilities under direction from the AESO and approval by the AUC.

The AESO has limited authority to arrange for the development or retirement of generation to meet the forecast electricity needs of Alberta. This is intended to be driven by economics through price signals from Alberta's competitive wholesale electricity market.

The AESO is also responsible for making detailed rules and reliability standards regarding the safe, reliable and economic operation of the Alberta interconnected electricity system, as well as the operation of the competitive market.

### Ontario

The IESO and provincial government, along with input from local distribution utilities, are responsible for bulk and regional electricity system planning. The IESO and government regularly issue a long-term energy plan (LTEP), which identifies provincial bulk system needs, and regional plans, which identify regional system needs. Generation needs identified in the LTEP or regional plans have to date been addressed through government-directed procurements. Going forward, more generation will be procured through market solutions.

Transmission and distribution needs identified in the LTEP and regional plans are addressed by transmission and distribution utilities that must apply to the OEB, with the support of the IESO, to construct new transmission and distribution facilities, and include the costs of such facilities

in their base rate. Recently, Ontario's Electricity Act was amended to also enable the IESO, pursuant to government directive, to procure the development, construction and operation of transmission projects.

## 1.6 Recent Material Changes in Law or Regulation

### Alberta

The Alberta government, AUC, and AESO are all currently undertaking major reviews of issues that may result in significant shifts in policy for:

- self-supply facilities (ie, exemptions available for on-site generators that serve on-site load);
- storage facilities (ie, tariff treatment, market participation and alternative use to transmission facilities); and
- owners of distribution facilities (ie, planning for the integration of new technologies).

In May 2022, under the Electricity Statutes (Modernizing Alberta's Electricity Grid) Amendment Act, 2022, the Alberta government introduced the following changes:

- removing the prohibition for unlimited self-supply with export to the grid;
- defining "energy storage" within the legislative framework and introduces requirements for regulatory approvals;
- allowing owners of transmission and distribution facilities to own energy storage in certain circumstances; and
- requiring owners of distribution facilities to prepare long-term plans to modernise Alberta's distribution system given the development and integration of new technologies.

## 1.7 Announcements Regarding New Policies

See **3.1 Principal Climate Change Laws and/or Policies** and **3.2 Principal Laws and/or Poli-**

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## **cies to Encourage the Development of Alternative Energy Sources.**

### **1.8 Unique Aspects of the Power Industry**

In response to announced and expected solicitations by states in the north-eastern USA for the delivery of incremental “clean energy”, there are significant opportunities in Canada to develop major transmission infrastructure to deliver electricity from Canadian hydro and wind sources in response to requests for proposals.

## **2. MARKET STRUCTURE, SUPPLY AND PRICING**

### **2.1 Structure of the Wholesale Electricity Market**

Only Alberta and Ontario have established wholesale markets through which electricity is exchanged, and the wholesale price of electricity is set by competition. The other provinces have vertically integrated utilities, and the prices (ie, rates) paid by consumers for delivered electricity reflect the bundled costs of generation, transmission and distribution, approved by the provincial regulator. In provinces that provide for the purchase of electricity by the utility from independent power producers (IPPs), the approved cost of electricity purchased from IPPs is included in consumer electricity rates.

#### **Alberta**

The AESO operates and administers the power pool in accordance with the Electric Utilities Act. The Alberta power pool currently operates as an hourly auction, where all generators (above 5 MW) must offer all of their power into the market and must comply with the AESO’s dispatch instructions. Generators are dispatched in order of ascending price offers to meet the demand in real-time, with the marginal dispatched gen-

erator setting the system marginal price every minute.

All generators are paid the “pool price” for their delivered volume of energy, which is the weighted average of the system marginal price for an hour. Prices are set province-wide and there is no locational or nodal pricing in Alberta.

#### **Ontario**

The wholesale electricity market, administered by the IESO, includes an hourly spot market. Amendments to the Electricity Act replaced Ontario’s short-lived wholesale market with a “hybrid market”, whereby new generation was developed through government-directed procurements.

Generation continues to be scheduled and dispatched through the IESO spot market; however, generators are paid for their output pursuant to long-term power purchase agreements (PPAs). Generators thereby receive both IESO market settlements and out-of-market top-up payments for the difference between what they earn in market revenues and what they are owed pursuant to their PPAs. Likewise, OPG receives market settlements from the IESO and top-up payments to reflect the difference between what OPG earns in market revenues, and what it is owed pursuant to generation rates set by the OEB.

The out-of-market adjustment payments that are made to generators and other suppliers are referred to as the “Global Adjustment”. The commodity price of electricity in Ontario is therefore composed of the hourly wholesale market spot price, the Global Adjustment and other upliftment charges (costs for ancillary services, administrative price charges, etc).

The Electricity Act and the OEB Act mandate a regulated price plan (RPP) to reduce residen-



tial and small business consumers' exposure to price volatility.

## 2.2 Imports and Exports of Electricity

### Federal

The export of electricity from Canada is regulated by the Canada Energy Regulator through the issuance of blanket electricity export permits. There are no federal permits required for electricity imports.

Imports and exports between Canadian provinces are permitted, subject to market rules and tariff terms and conditions applicable in the importing and exporting provinces.

### Ontario

IESO market rules provide for inter-jurisdictional energy trade. At present, market participants that wish to export electricity from Ontario to other jurisdictions must successfully bid into the IESO spot market and correspondingly offer into neighbouring markets (the same goes for imports). Market participants may purchase financial transmission rights in the IESO transmission rights market as a hedge against transmission congestion on the interties.

### Quebec

Hydro-Québec operates 15 existing interconnections with the Province of Ontario, the Province of New Brunswick, the State of New York, and New England. Hydro-Québec is developing two additional interconnections with the north-eastern states, the Hertel-New York interconnection project and the New England Clean Energy Project. On 14 April 2022, the New York State Public Service Commission approved the contract between Hydro-Québec and the New York State Energy Research and Development Authority (NYSERDA) for the annual delivery of 10.4 TWh of electricity to New York City by way of the Champlain Hudson Power Express (CHPE) line which has now begun construc-

tion. The project will also involve building a new 400 kV underground direct-current line in Quebec, the Hertel-New York interconnection line, that will connect to the CHPE line. The governmental approval process is currently underway, and construction of the new interconnection is expected to begin in spring 2023.

On the other hand, New England Clean Energy Connect (NECEC) has halted construction of the new 1,200 MW interconnection linking Quebec to Massachusetts via Maine and New Hampshire as a result of the rejection of the project by the Maine population in a referendum vote held on 2 November 2021. The fate of the project remains uncertain at this stage pending the resolution of the legal challenges.

## 2.3 Supply Mix for the Entire Market

### Canadian Electricity Supply Mix 1

#### *Jurisdiction – Canada total*

Total 2021 generation (TWh) – 636.8.

- Hydro – 59.7%.
- Natural gas – 11.9%.
- Coal – 7.4%.
- Nuclear – 12.9%.
- Wind – 5.8%.
- Solar – <1%.
- Petroleum – <1%.
- Biomass/fuel geothermal – <2%.

#### **Western Canada**

#### *Jurisdiction – Alberta*

Total 2021 generation (TWh) – 85.1.

- Hydro – 2.4%.
- Natural gas – 54.7%.
- Coal – 35.6%.
- Nuclear – 0%.
- Wind – 4.9%.
- Solar – <1%.
- Petroleum – <1%.
- Biomass/fuel geothermal – 1.9%.

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## *Jurisdiction – British Columbia*

Total 2021 generation (TWh) – 62.5.

- Hydro – 89.8%.
- Natural gas – 2.1%.
- Coal – 0%.
- Nuclear – 0%.
- Wind – 2.7%.
- Solar – <1%.
- Petroleum – <1%.
- Biomass/fuel geothermal – 5.2%.

## *Jurisdiction – Manitoba*

Total 2021 generation (TWh) – 34.0.

- Hydro – 96.9%.
- Natural gas – <1%.
- Coal – 0%.
- Nuclear – 0%.
- Wind – 2.6%.
- Solar – <1%.
- Petroleum – <1%.
- Biomass/fuel geothermal – <1%.

## *Jurisdiction – Saskatchewan*

Total 2021 generation (TWh) – 25.2.

- Hydro – 14.6%.
- Natural gas – 43.3%.
- Coal – 38.6%.
- Nuclear – 0%.
- Wind – 3.1%.
- Solar – 0%.
- Petroleum – <1%.
- Biomass/fuel geothermal – <1%.

## **Central Canada**

### *Jurisdiction – Ontario*

Total 2021 generation (TWh) – 146.4.

- Hydro – 24.7%.
- Natural gas – 9.5%.
- Coal – 0%.
- Nuclear – 52.9%.

- Wind – 10.8%.
- Solar – 1.5%.
- Petroleum – <1%.
- Biomass/fuel geothermal – <1%.

### *Jurisdiction – Quebec*

Total 2021 generation (TWh) – 212.0.

- Hydro – 94.1%.
- Natural gas – <1%.
- Coal – 0%.
- Nuclear – 0%.
- Wind – 5%.
- Solar – <1%.
- Petroleum – <1%.
- Biomass/fuel geothermal – <1%.

## **Atlantic Canada**

### *Jurisdiction – New Brunswick*

Total 2021 generation (TWh) – 15.4.

- Hydro – 19.4%.
- Natural gas – 8.8%.
- Coal – 15.4%.
- Nuclear – 32%.
- Wind – 6.7%.
- Solar – 0%.
- Petroleum – 14.5%.
- Biomass/fuel geothermal – 3.3%.

### *Jurisdiction – Newfoundland and Labrador*

Total 2021 generation (TWh) – 46.6.

- Hydro – 96.7%.
- Natural gas – <1%.
- Coal – 0%.
- Nuclear – 0%.
- Wind – <1%.
- Solar – 0%.
- Petroleum – 2.1%.
- Biomass/fuel geothermal – 0%.

### *Jurisdiction – Nova Scotia*

Total 2021 generation (TWh) – 7.3.

- Hydro – 13.7%.
- Natural gas – 9.1%.
- Coal – 60.4%.
- Nuclear – 0%.
- Wind – 14.4%.
- Solar – 0%.
- Petroleum – <1%.
- Biomass/fuel geothermal – 1.7%.

#### *Jurisdiction – Prince Edward Island*

Total 2021 generation (TWh) – 1.0.

- Hydro – 0%.
- Natural gas – 0%.
- Coal – 0%.
- Nuclear – 0%.
- Wind – 94.8%.
- Solar – 0%.
- Petroleum – 4.9%.
- Biomass/fuel geothermal – <1%.

## **2.4 Principal Laws Governing Market Concentration Limits**

### **Federal**

Federal competition law is governed by the Competition Act. Transactions that involve a “merger” may be subject to review by and/or may require certain clearances from the Commissioner of Competition (the “Commissioner”). The Competition Act defines “merger” very broadly as “the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person”. The substantive test applied by the Commissioner in deciding if a merger will ultimately be challenged following a review is whether it “prevents or lessens, or is likely to prevent or lessen, competition substantially” in a relevant market.

Certain large transactions, measured primarily based on transaction-size and party-size thresholds being exceeded, trigger mandatory pre-merger notification filings with the Commissioner and such transactions cannot close until a statutory waiting period has expired and/or the Commissioner’s review has been completed.

### **Alberta**

In Alberta, “offer control” is capped. Offer control means the ultimate control and determination by a market participant of the “price-quantity” offers made to the power pool in respect of the maximum capability of one or more generating units. Offer control is set by regulation at a maximum of 30% of the sum of the maximum capability of generating units in Alberta and is determined by the Market Surveillance Administrator (MSA) at least annually.

### **Ontario**

As part of the deregulation of the Ontario electricity sector and the opening of the market in 2002, the province mandated that OPG be required to further divest its generation assets. In the interim, OPG was subject to a market power mitigation framework, under which OPG was required to rebate to ratepayers revenues in excess of a weighted average spot market price. As a result of ensuing policy and regulatory changes, OPG did not end up divesting its generation portfolio.

Consequently, in 2006, most OPG generation (nuclear and hydro) was made subject to OEB cost-of-service rate regulation. Moreover, the plan for OPG to divest itself of generation assets and reduce its market share has not transpired. While OPG was precluded for some time from participating in certain new-generation procurement and development programmes, these restrictions have now waned. Notably, in spring 2020, OPG closed a CAD2.8 billion acquisition of interests from TC Energy in three Ontario natural

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gas-fired power plants (ie, the 683 MW Halton Hills generating station, the 900 MW Napanee generating station and TC Energy's interest in the 550 MW Portland Energy Centre).

## 2.5 Agency Conducting Surveillance to Detect Anti-competitive Behaviour

### Federal

At the federal level, the Competition Bureau of Canada is the agency responsible for the surveillance of anti-competitive behaviour and the enforcement of antitrust legislation in Canada.

### Alberta

The MSA, established by the Alberta Utilities Commission Act, has the responsibility to carry out surveillance in respect of the supply, generation, transmission, distribution, trade, exchange, purchase or sale of electricity in Alberta. The MSA has authority to investigate:

- possible contraventions of legislation governing the electricity industry;
- when it appears to the MSA that the conduct of a market participant does not support the fair, efficient and openly competitive operation of the electricity market; and
- any matter that relates to or affects the structure and performance of the electricity market.

The MSA has the authority to enter and inspect premises, make enquiries of employees and former employees, demand the production of records, temporarily remove documents and make copies, and request access to computer systems to obtain records from data. The MSA has the authority to refer non-compliance matters to the AUC for consideration and potential enforcement measures.

### Ontario

There are two agencies that monitor anti-competitive behaviour and undertake enforcement activity:

- the Market Surveillance Panel (MSP), a panel of the OEB; and
- the Market Assessment and Compliance Division (MACD), a division of the IESO.

The MSP monitors, investigates, and reports on IESO market design and structural issues, and on the activities and behaviour of market participants, which may include market manipulation and gaming. The MSP records its findings and recommendations in semi-annual reports published by the OEB.

The MACD monitors the operation of the market and compliance with applicable market rules and reliability standards. The MACD does this through prevention, monitoring, auditing, investigation and enforcement activities. Furthermore, the MACD enforces compliance with the IESO's general conduct rule that proscribes conduct aimed at undermining, manipulating, interfering with or exploiting the market.

## 3. CLIMATE CHANGE LAWS AND ALTERNATIVE ENERGY

### 3.1 Principal Climate Change Laws and/or Policies

#### Federal

In June 2018, the federal government enacted the Greenhouse Gas Pollution Pricing Act (GGPPA), a federal backstop carbon emissions pricing scheme for provinces without a satisfactory carbon emissions pricing system. The federal carbon emissions pricing system – which was upheld by the Supreme Court of Canada

in March 2021 – consists of two distinct components:

- a carbon levy applied to fossil fuels, currently set at CAD50/tonne, increasing by CAD15 per year until the carbon price reaches CAD170/tonne in 2030; and
- an output-based pricing system for large facilities producing 50,000 tonnes or more of carbon emissions per year, which include most thermal generation facilities.

In December 2020, the federal government published a comprehensive climate-change strategy entitled *A Healthy Environment and a Healthy Economy*, driven by the objective for Canada to achieve net-zero emissions by 2050. This strategy introduced changes, including an increase in the yearly carbon levy from CAD10 to CAN15 starting in 2023. The goals of this strategy were enacted into law through the *Canadian Net-Zero Emissions Accountability Act*, which received royal assent in June 2021. This Act creates a framework for achieving Canada's net-zero goal by 2050.

In March 2022, the federal government introduced the 2030 Emissions Reduction Plan. This plan outlines a roadmap for greater climate action until 2030 and requirements for climate action plans following 2030.

### **Alberta**

In May 2019, Alberta repealed its *Climate Leadership Act*, which had enacted portions of its *Climate Leadership Plan*, including a carbon emissions pricing regime for consumers. In the absence of an Alberta carbon pricing scheme, the federal GGPPA applies to consumers, as discussed above.

Alberta's carbon pricing scheme for industry came into effect on 1 January 2020. The *Technology Innovation and Emissions Reduction*

*Regulation* requires facilities emitting more than 100,000 tonnes of CO<sub>2</sub> equivalent per year (or facilities that opt-in so they may apply for a carbon levy exemption) to meet specific emissions intensity benchmarks. Most benchmarks are based on industry-wide standards set by regulations, or facility-specific standards based on an existing facility's baseline emissions in prior years. Where emissions for a facility exceed the benchmark, the facility must reduce its net emissions by applying emissions offsets, emissions performance credits or fund credits against its actual emissions level.

### **British Columbia**

In 2008, British Columbia enacted the *Carbon Tax Act*, which applied a broad-based carbon tax. As of 1 April 2022, the carbon tax rate is CAD50/tonne of carbon dioxide equivalent. For large emitters, British Columbia enacted the *Greenhouse Gas Industrial Reporting and Control Act* in 2016, establishing performance standards across different industrial sectors, and establishing mechanisms for emissions offsets through the purchase of credits or through emission offsetting projects. The *Greenhouse Gas Emission Reporting Regulation* requires facilities emitting more than 10,000 tonnes of CO<sub>2</sub> equivalent per year to report their emissions.

In 2010, British Columbia enacted the *Clean Energy Act*, which established a mandate for BC Hydro to pursue the province's energy objectives of energy self-sufficiency, demand-side management and conservation measures to reduce electricity consumption by 66% and to generate at least 93% of electricity in British Columbia from clean or renewable resources, among other targets. The province has also set targets to achieve emissions reductions of up to 80% below 2007 levels by 2050 under the *Climate Change Accountability Act*.

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## Saskatchewan

The Management and Reduction of Greenhouse Gases Act and associated regulations in Saskatchewan were passed in 2010, with portions of the Act coming into force on 1 January 2018. The Act provides for the provincial government to set greenhouse gas emission baselines and annual reduction targets for emitters producing in excess of 1.5 million tonnes of CO<sub>2</sub> equivalent per year.

## Manitoba

On 8 November 2018, Manitoba introduced the Climate and Green Plan Act (CGPA), which replaced and repealed the Climate Change and Emissions Reductions Act and the Sustainable Development Act. The CGPA mandates the Minister to establish a greenhouse gas emissions reduction goal for Manitoba every five years, beginning after the first year that the act has been in force. If a greenhouse gas emissions reduction goal has not been achieved in a given five-year period, the amount of the emissions reduction shortfall is to be added to the emissions reduction goal in the next five-year period.

## Ontario

As of 1 April 2019, Ontarians have been subject to the federal carbon tax. Since January 2022, eligible emitters in Ontario have been subject to a provincial Emissions Performance Standards Program governed by the Emissions Performance Standards Regulation (O Reg 241/19) in lieu of the federal OPBS.

## Quebec

In 2013, Quebec adopted a cap-and-trade system for greenhouse gas emissions allowances. The system is currently linked to California's cap-and-trade system. Most recent Hydro-Québec PPAs provide that "green credits", if any, are for the benefit of Hydro-Québec.

## New Brunswick

Effective as of 1 April 2020, New Brunswick has enacted a provincial carbon tax to replace the federal government's backstop carbon pricing system. The new carbon tax was introduced by way of amendments to the Gasoline and Motive Fuel Tax Act.

## Nova Scotia

On 1 January 2019, Nova Scotia implemented a cap-and-trade programme to help reduce greenhouse gas emissions in the province. The new programme was enacted through amendments to the Environment Act and the adoption of cap-and-trade programme regulations.

## 3.2 Principal Laws and/or Policies Relating to the Early Retirement of Carbon-Based Generation

### Federal

The government of Canada has enacted regulations limiting the intensity of emissions from new and old coal-fired generation projects to 420 tonnes per GWh per year. Coal-fired generation plants must meet these emissions standards or retire at the end of their useful life, currently set by regulation at 50 years.

### Alberta

The provincial government, as part of its 2018 Climate Leadership Plan, entered into off-coal agreements with the owners of all six coal-fired power plants in Alberta with anticipated service lives beyond 2030, to cease operations by 2030 in exchange for approximately CAD1.3 billion in total compensation. Under the agreements, the provincial government has agreed to make annual payments to the owners until 2030 to cover the expected remaining undepreciated value of the generation assets beyond 2030, in exchange for commitments to reinvest certain amounts in the electricity industry in Alberta, as well as the maintenance of a significant business presence in Alberta.

### British Columbia

British Columbia's Clean Energy Act restricts the operation and use of thermal generation by BC Hydro, except in cases of emergency or for transmission support services.

### Ontario

Pursuant to the Cessation of Coal Use Regulation (2007), Ontario mandated the retirement of all coal-based generation facilities, or their conversion to cleaner-burning fuels by 2015, and, in accordance with the Regulation, Ontario phased out its last remaining coal-fired generation facility in 2014. Ontario has since enacted the Ending Coal For Cleaner Air Act, which stipulates that coal cannot be used in the future to generate electricity in Ontario.

### Saskatchewan

SaskPower currently has three coal power plants, accounting for approximately 30% of power produced. SaskPower's goal is to reduce emissions of CO<sub>2</sub> from facilities by at least 50% from 2005 levels by 2030. To reach this goal, SaskPower is working to institute green technologies such as carbon capture and storage.

## 3.3 Principal Laws and/or Policies to Encourage the Development of Alternative Energy Sources

### Alberta

The provincial government established the Renewable Electricity Program (REP), pursuant to the Renewable Electricity Act, in an effort to achieve its target of obtaining at least 30% of electricity production from renewable sources by 2030 (being approximately 5,000 MW). Three REP procurement competitions were completed in 2017 and 2018, resulting in the AESO procuring 1,358.6 MW of renewables. In June 2019, the Alberta government announced that there would be no further procurement competitions under the REP.

Renewable generation projects are eligible for emissions performance credits under the Technology Innovation and Emissions Reduction Regulation, which can be consumed to offset emissions costs from other operations or sold in the marketplace to other regulated emitters.

Certain small-scale renewable generation projects are eligible under the Small Scale Generation Regulation, for the removal of responsibility for participation in the competitive market for those project proponents that enter into a benefit agreement with a community group.

### British Columbia

Pursuant to the Clean Energy Act, BC Hydro is obliged to develop and file with the provincial government an integrated resource plan with a view to meeting the government's target of 93% renewable electricity generated on an annual basis.

BC Hydro established the Standing Offer and Micro Standard Offer Programs to encourage the development of small clean or renewable electricity projects throughout British Columbia. However, BC Hydro announced on 14 February 2019 that it was suspending the two programmes indefinitely, and would not be accepting new applications, nor awarding new electricity purchase agreements, except for five new First Nations clean energy projects announced on 14 March 2018.

### Saskatchewan

SaskPower has committed to a target of 50% generation capacity from renewables by 2030, including 30% from wind power, despite no legislated requirement to do so. Included in its plans for procuring new renewables are competitive procurement processes for up to 120 MW of solar projects by 2025 and 1,600 MW of wind projects by 2030. The first competitions closed in the fourth quarter of 2017 and awarded

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long-term power purchase agreements for a 10 MW solar project and a 200 MW wind project. A second round of procurement for a 10 MW solar project SaskPower began in January 2019, and a 200 MW wind project began in November 2019.

In 2021, the 10 MW Highfield Solar project, the province's first utility-scale solar generation project began operation. In 2022, two wind generation projects began operation, the 200 MW Golden South Wind Energy project and the 175 MW Blue Hill Wind Facility.

## **Ontario**

In December 2018, the Green Energy Repeal Act (GERA) received royal assent, which, as its name suggests, repealed the Green Energy and Economy Act (GEEA). The centrepiece of the former GEEA was a feed-in tariff (FIT) programme, which provided stable, standard-offer prices for electricity generated from renewable resources, with costs borne by ratepayers. The effort to repeal the former act was made after the Province elected not to proceed with 758 wind and solar contracts on the basis that these contracts were not required and would result in higher rates.

In the spring of 2022, Ontario released Ontario's Low-Carbon Hydrogen Strategy (the "Strategy"). The Strategy was issued following the publication of other hydrogen policies throughout Canada, including by the federal government and by provincial governments in Quebec, Alberta and British Columbia. The Strategy is grounded in eight immediate actions to increase the province's capacity to produce green hydrogen and blue hydrogen. Many of the actions seek to develop the low-carbon hydrogen industry by leveraging Ontario's clean electricity capabilities.

## **Quebec**

On 14 July 2021, the government of Quebec issued an order-in-council launching calls for tender for a 300 MW block of wind energy and a 480 MW block of renewable energy. The deadline for submitting proposals is 21 July 2022. In addition, Hydro-Québec announced as part of its 2020–2029 strategic plan that it is looking to add an additional 5,000 MW (in addition to the above-noted calls for tender) production capacity by 2035, of which 3,000 MW will be sourced from wind energy projects to be developed in partnership with private and local partners which will be awarded by private agreements prior to 2026, and the remaining 2,000 MW will originate from improvements to Hydro-Québec's hydro-electric facilities.

On 19 April 2022, Hydro-Québec announced the formation of a partnership with Énergir and Boralex Inc. for the development of three wind energy projects totalling 1,200 MW on the territory of the Seigneurie de Beaupré. As a result, it is expected that 1,800 MW remain available as part of the 3,000 MW block earmarked for wind energy projects with private and local partners.

## **Nova Scotia**

In February 2022, Nova Scotia's procurement administrator issued a request for proposals for wind and solar energy projects that will generate 350 MW of electricity. This procurement is intended to supply 10% of Nova Scotia's electricity and will reduce the province's greenhouse gas emissions by over one million tonnes each year. Up to five projects are expected to be selected to receive a 25-year power purchase agreement with Nova Scotia Power.



## 4. GENERATION

### 4.1 Principal Laws Governing the Construction and Operation of Generation Facilities

#### Federal

The construction and operation of a federally regulated power plant, such as an offshore wind project, requires the approval of the CER pursuant to the Canadian Energy Regulator Act. Depending on the size and scope of the project, the proponent may also be required to conduct an impact assessment before the Impact Assessment Agency under the Impact Assessment Act.

#### Alberta

The construction and operation of a power plant in Alberta requires the approval of the AUC, pursuant to the Hydro and Electric Energy Act. Before the AUC can approve the construction of a hydroelectric project, the provincial legislature must first pass a bill authorising the hydroelectric development, following which the AUC can issue the requisite approval. Generation projects having a capacity of 100 MW or greater that use a non-gaseous fuel, and hydroelectric developments having a capacity of 100 MW or greater, require an environmental impact assessment to be conducted in accordance with the Environmental Protection and Enhancement Act. The use of water from a water body or the diversion of water will require approval under the Water Act.

#### Ontario

The construction and operation of generation facilities is primarily governed by the Environmental Assessment Act (EAA) and the Environmental Protection Act (EPA).

### 4.2 Regulatory Process for Obtaining All Approvals to Construct and Operate Generation Facilities

The legislative and regulatory requirements for approvals to construct and operate a generation facility vary between provinces. Depending on the scale of a project, an environmental screening or an environmental assessment may be required. In some jurisdictions, the regulator may conduct public hearings or proceedings to consider applications before issuing approvals.

#### Federal

The construction and operation of a federally regulated power plant, such as an offshore wind project, requires the approval of the CER pursuant to the Canadian Energy Regulator Act. The CER considers a number of factors in determining whether to approve an application, including:

- the project's environmental effects;
- safety and security considerations;
- the health, social and economic effects;
- the rights, interests and concerns of the indigenous peoples of Canada; and
- the effects on climate change commitments.

#### Alberta

The construction and operation of a power plant in Alberta requires the approval of the AUC, pursuant to the Hydro and Electric Energy Act. The AUC must have regard to the social, economic and environmental effects of a project to determine whether it is in the public interest. Because Alberta's wholesale electricity market is intended to send price signals for generation development and retirements, the AUC must not consider the economics of a project and whether the electricity to be produced by a generator is needed in Alberta. Larger-scale generation projects that are opposed by affected parties may be subjected to a public hearing process. The AUC endeavours to issue a decision within three months of concluding the process.

## Ontario

Non-renewable generation facilities must undertake an environmental assessment under the EAA and Ontario Regulation 116/01: Electricity Projects. Depending on the type and size of the facility, it may be necessary to undertake a full environmental assessment under the EAA or a more limited environmental screening report. In addition to completing an environmental assessment, it will be necessary to obtain specific environmental compliance approvals under the EPA. For example, a gas-fired generation facility will require an environmental compliance approval for air and noise emissions.

To construct and operate a renewable generation facility, a proponent must obtain a renewable energy approval under the EPA. This regime is intended as a “one-window” approach that eliminates the need to undertake an environmental assessment and obtain separate environmental compliance approvals.

### 4.3 Terms and Conditions Imposed in Approvals to Construct and Operate Generation Facilities

Regulators and government agencies generally have the authority to impose conditions in approvals that are intended to reasonably mitigate potential adverse effects on the environment and on people. Related to mitigation of adverse effects, regulators and agencies normally have the authority to prescribe conditions pertaining to construction methods, equipment to be used, reclamation and maintenance.

### 4.4 Proponent’s Eminent Domain, Condemnation or Expropriation Rights

In some provinces where the use of public land (Crown land) is needed, land use authorisations may be obtained from the provincial government. Where a generating facility is proposed to be built on private land, the proponent may negotiate a lease or land purchase with the land-

owner. In some provinces, the legislation enables a proponent to expropriate land.

The forced taking of land typically carries with it the obligation of the proponent to compensate the landowner based on the fair market value of the land in addition to that for right-of-entry orders, the value of the loss of land use, any adverse effect on the remaining land, and any damage to land.

### 4.5 Requirements for Decommissioning

Applicable environmental laws and regulatory policies in each province govern the requirements for decommissioning power plants. For example, in Alberta, approval from the AUC is required to discontinue operations of a power plant. Pursuant to the Environmental Protection and Enhancement Act, a remediation certificate must be obtained from Alberta Environment and Parks (AEP) to abandon, remediate and reclaim the site of a power plant. AEP may also require applicants for remediation certificates to provide financial or other security or insurance in respect of the remediation certificate.

The terms and conditions of approvals or other orders from AEP frequently identify methods or parameters for carrying out remediation activities. There are no specific obligations in Alberta to fund decommissioning or reclamation activities over the physical life of the power plant.

## 5. TRANSMISSION

### 5.1 Regulation of Construction and Operation of Transmission Lines and Associated Facilities

#### 5.1.1 Principal Laws Governing the Construction and Operation of Transmission Facilities

##### Federal Jurisdiction

The construction and operation of international transmission lines and designated transmission lines that will cross provincial boundaries, dependent on their size and scope, require approval by the CER under the Canadian Energy Regulator Act. Federally regulated power lines may also require an impact assessment by the Impact Assessment Agency of Canada pursuant to the Impact Assessment Act.

##### Alberta

The Hydro and Electric Energy Act governs the construction and operation of transmission lines and associated facilities.

##### Ontario

The construction and operation of transmission lines are governed by the OEB Act. Under the OEB Act, transmission lines are defined as power lines operating at above 50 kV. The EAA governs the environmental assessment process required for power lines that are 115 kV or higher and more than 2 km in length.

#### 5.1.2 Regulatory Process for Obtaining Approvals to Construct and Operate Transmission Facilities

##### Federal Jurisdiction

The CER Act requires federally regulated power lines to be issued a permit, or, in the case of a “designated project”, a certificate issued by the CER and the approval of the Governor in Council. Transmission lines that have a voltage equal to or greater than 345 kV or require 75 km

or more of right of way are considered a “designated project” under the Impact Assessment Act and the Physical Activities Regulations and will require an environmental assessment.

##### Provinces That Have a Vertically Integrated Utility Structure

The legislative and regulatory requirements to construct and operate provincial transmission facilities vary between provinces. Approvals may be required from the provincial electrical utility regulator, along with approvals from the applicable environmental ministry. Depending on the scale of a project, approval by the provincial cabinet or a provincial minister may be required. In some jurisdictions, the regulator may conduct public hearings or proceedings to consider applications before issuing approvals.

##### Alberta

The Hydro and Electric Energy Act sets out a two-part approval process for the construction and operation of a transmission line and associated facilities. When the AESO, as the transmission system planner, determines that there is a need to construct a transmission line, it must prepare a needs identification document (NID) and file it with the AUC for approval of the need for the proposed project.

The transmission utility that will be responsible for constructing and operating the transmission line must file an application with the AUC for approval of the facilities proposed by the AESO in the NID. The NID and transmission facility applications can be considered by the AUC concurrently or sequentially.

Transmission lines that will cross private lands are often considered by the AUC in a public hearing to address matters such as routing, pole or tower design and locations, the effect of poles or towers on land use, visual impacts of the transmission line, and safety. The AUC

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endeavours to issue its decision within three months of concluding a hearing process.

## Ontario

Construction of intra-provincial transmission lines greater than 2 km in length requires a leave-to-construct approval from the OEB. The connection of new transmission facilities to the provincial transmission grid also requires the IESO to undertake a system impact assessment to consider any reliability implications. Lastly, transmission lines that are 115 kV or higher and more than 2 km in length require assessment under the EAA. The level of the environmental assessment depends on the voltage and length of the proposed line.

OEB leave to construct under the OEB Act is the principal approval required to construct a transmission line greater than 2 km in length. The OEB applies a public interest test under which the OEB considers the interests of consumers with respect to prices and the reliability and quality of the electricity service, including whether the proposed transmission facility is needed and whether it is preferable to other alternatives to satisfy the same need. Several years ago, the OEB Act was amended to provide the government with authority to designate priority transmission projects and to designate proponents to develop priority transmission projects.

Priority designation relieves the proponent of the obligation to prove need in order to obtain leave-to-construct approval. Under the EAA, projects may be subject to a class-type environmental screening or a full individual environmental assessment. Transmission lines that are higher voltage and of greater length require full individual environmental assessments.

## 5.1.3 Terms and Conditions Imposed in Approvals to Construct and Operate Transmission Facilities

Regulators and government agencies generally have the authority to impose conditions in approvals that are intended to reasonably mitigate potential adverse effects on the environment and potential effects on people, including land use and disturbance, visual effect and safety. Related to mitigation of adverse effects, regulators normally have the authority to prescribe conditions pertaining to the construction methods and right-of-way maintenance. Proponents are also required to comply with all applicable laws and technical codes and standards.

## 5.1.4 Proponent's Eminent Domain, Condemnation or Expropriation Rights

Each province has its own regime to enable a proponent to obtain access to land to construct, operate, and maintain transmission facilities. In some provinces, where the use of public land (Crown land) is needed, land use authorisations may be obtained from the provincial government. Where a transmission line is proposed to cross private land, the proponent may negotiate a transmission line right-of-way agreement with the landowner, or, failing that, the legislation in several provinces enables a proponent to expropriate land or obtain a right-of-entry order. See **4.4 Proponent's Eminent Domain, Condemnation or Expropriation Rights**.

## 5.1.5 Transmission Service Monopoly Rights

Vertically integrated electrical utilities normally have monopoly rights to provide all utility services in the particular province, including the transmission service required to deliver electricity for sale at the distribution level.

## Alberta

In Alberta, there are no specified transmission service territories. However, and with certain exceptions, legislation requires the AESO to

determine which transmission utility is eligible to apply to the AUC for approval to construct and operate a transmission facility, based on the utility's historical transmission operations within a distribution service area established pursuant to the Hydro and Electric Energy Act. For example, ATCO Electric's transmission business unit has historically operated within the service area established for ATCO Electric's distribution business unit.

### Ontario

In Ontario, OEB transmission licences provide transmitters with the exclusive right to provide transmission services within their service territory. See **1.2 Principal State-Owned or Investor-Owned Entities** for further information on HONI.

## 5.2 Regulation of Transmission Service, Charges and Terms of Service

### 5.2.1 Principal Laws Governing the Provision of Transmission Service, Regulation of Transmission Charges and Terms of Service Alberta

The Electric Utilities Act governs the provision of transmission services and the regulation of transmission rates and terms and conditions of service. The AUC has the responsibility to set just and reasonable rates and terms and conditions (the tariff) in respect of a regulated utility service. Consistent with general rate-making principles widely applied in North America, a tariff approved by the AUC must not be unduly preferential, arbitrary or unjustly discriminatory.

### Ontario

The OEB Act governs the provision of transmission services and the regulation of transmission rates and terms and conditions of service. The OEB has the responsibility to set just and reasonable rates and terms and conditions (the tariff) in respect of a regulated utility service. Transmission rates are intended to recover a

transmitter's predicted revenue requirement, including a return on capital. Consistent with general rate-making principles widely applied in North America, a tariff approved by the OEB must not be unduly preferential, arbitrary or unjustly discriminatory.

### 5.2.2 Establishment of Transmission Charges and Terms of Service Provinces that Have a Vertically Integrated Utility Structure

In the provinces that have vertically integrated utilities, the costs approved by the regulator for transmission services are bundled with the costs approved for generation and distribution services to derive the bundled electricity rates paid by consumers.

Generally, utility rates are set using the traditional cost-of-service methodology to calculate a utility's revenue requirement that is recovered through approved rates. The revenue requirement includes the return on equity, cost of debt, depreciation expense, taxes, and operating and maintenance costs.

Some provinces have a public review process by the provincial utility regulator, which may involve public hearings, with a process for written interrogatories, the filing of written evidence, cross-examination of other parties' witnesses in an oral hearing, and the presentation of arguments. If appeals of a regulator's decisions are permitted, this is usually specified in the regulator's governing legislation.

### Alberta

Pursuant to the Electric Utilities Act, the AESO is responsible for providing "system access service" on the transmission system through the use of the transmission facilities of all transmission facility owners (TFOs). The AESO is required to apply to the AUC for approval of the AESO's tariff, which includes the rates charged for each

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class of system access service and the terms and conditions. The rates charged by the AESO are intended to recover the annual predicted amounts to be paid by the AESO to the TFOs for use of their transmission facilities, the AESO's own administrative costs, the cost of transmission line losses, and the cost of ancillary services obtained by the AESO.

The annual amount the AESO pays each TFO is based on the TFO's annual revenue requirement approved by the AUC on a forecast basis. The rate base of each TFO is set on the basis of historic capital cost, plus capital additions, less depreciation. The typical debt-to-equity capital structure for the rate base and the return-on-equity rates for TFOs are set in a generic cost of capital proceeding at regular intervals.

TFO revenue requirement applications are considered by the AUC in a public hearing process involving written interrogatories to the TFO, intervener evidence, interrogatories regarding intervener evidence, written reply evidence from the TFO, cross-examination of each party's witnesses at the hearing, written arguments and written reply arguments. The AUC endeavours to issue its decision within three months of the completion of arguments.

Comprehensive AESO tariff applications are typically filed every three years and follow a similar process.

Appeals of AUC decisions may be made to the Alberta Court of Appeal with permission from the court on questions of law or jurisdiction. The Alberta Utilities Commission Act also permits AUC decisions to be reviewed by a review panel, for which the AUC has established threshold criteria.

## Ontario

Regulated transmitters' revenue requirement applications are considered by the OEB in a public hearing process involving written interrogatories to the transmitter, intervener evidence, interrogatories regarding intervener evidence, written reply evidence from the transmitter, cross-examination of each party's witnesses at the hearing, written arguments and written reply arguments.

Appeals of OEB decisions may be made to the Ontario Divisional Court on questions of law or jurisdiction, and with leave from the Ontario Divisional Court to the Ontario Court of Appeal. Transmitters or others who are the subject of OEB decisions may, before exercising appeal rights, seek reconsideration by the OEB.

## 5.2.3 Open-Access Transmission Service

British Columbia, Saskatchewan, Manitoba, Quebec, New Brunswick and Nova Scotia each have a form of an Open Access Transmission Tariff (OATT), which is modelled on the USA's Federal Energy Regulatory Commission OATT. The purpose of an OATT is to ensure that users of a transmission system are able to access service on an open, non-discriminatory and non-preferential basis. The electrical utility on Prince Edward Island has applied to its regulator for approval of a form of OATT. The legislature of Newfoundland and Labrador's Electrical Power Control Act requires the provision of simultaneous, open, non-discriminatory and non-preferential access to, interconnection with and use of the transmission system.

## Alberta

The AESO is statutorily obliged to provide system access service on the Alberta transmission system in a manner that provides all market participants wishing to exchange electrical energy a reasonable opportunity to do so. There are no transmission rights in Alberta and access to

the transmission system by market participants is open, non-discriminatory and non-preferential, pursuant to the terms of the AESO's tariff approved by the AUC.

### Ontario

A fundamental principle on which Ontario's restructured electricity market was premised was the principle of "open access" – ie, the obligation by transmitters and distributors to provide generators, retailers and consumers with non-discriminatory access to their transmission and distribution system. This principle is embedded in the Electricity Act. This principle has, in part, been modified by amendments which provide that transmitters provide priority connection for renewable or other non-emitting resources.

## 6. DISTRIBUTION

### 6.1 Regulation of Construction and Operation of Electricity Distribution Facilities

#### 6.1.1 Principal Laws Governing the Construction and Operation of Electricity Distribution Facilities

In most Canadian provinces, the construction and operation of distribution facilities is addressed through agreements between distributors and municipalities. See **6.1.2 Regulatory Process for Obtaining Approvals to Construct and Operate Distribution Facilities.**

#### 6.1.2 Regulatory Process for Obtaining Approvals to Construct and Operate Distribution Facilities

The construction and operation of distribution facilities in Canadian provinces is largely exempt from regulation by the provincial utilities regulator. Instead, the location, construction and operation of distribution facilities within municipal boundaries may be subject to the approval of

the municipality in which the distribution facilities are to be developed. In some provinces, such as Alberta, the right to provide utility services within the boundaries of a municipality is vested in the municipality.

Some municipalities enter into franchise agreements with distribution utilities that grant them the right to construct and operate a distribution system within municipal boundaries.

#### 6.1.3 Terms and Conditions Imposed in Approvals to Construct and Operate

To the extent that a regulatory approval is required to construct and operate distribution facilities, approving authorities generally have authority to require compliance with all applicable laws and technical codes and standards.

#### 6.1.4 Proponent's Eminent Domain, Condemnation or Expropriation Rights

Each province has its own regime to enable a proponent to obtain access to land to construct, operate and maintain distribution facilities. In some provinces, where the use of Crown land is needed, land use authorisations may be obtained from the provincial government. Where a distribution line is proposed to cross private land, the proponent may negotiate a right-of-way agreement with the landowner, or, failing that, the legislation in several provinces enables a proponent to expropriate land or obtain a right-of-entry order. See **4.4 Proponent's Eminent Domain, Condemnation or Expropriation Rights.**

Municipalities may grant access for the construction, operation and maintenance of distribution facilities to be located within their boundaries.

#### 6.1.5 Distribution Service Monopoly Rights

Vertically integrated utilities generally have monopoly rights to provide utility services, including distribution service.

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In Alberta, distribution utilities have monopoly rights to provide service within a service area prescribed by the AUC, pursuant to the Hydro and Electric Energy Act.

In Ontario, no person may own or operate an electricity distribution system unless licensed to do so by the OEB. Distribution licences granted by the OEB provide distributors with the right to provide services within their service territory, which in practice is an exclusive right.

## 6.2 Regulation of Distribution Service, Charges and Terms of Service

### 6.2.1 Principal Laws Governing the Provision of Distribution Service, Regulation of Distribution Charges and Terms of Service Alberta

The provision of electricity distribution in Alberta is governed by the Electric Utilities Act. Pursuant to the Electric Utilities Act, the AUC has the responsibility to set just and reasonable rates and terms and conditions (the tariff) in respect of a regulated utility service. Consistent with general rate-making principles widely applied in North America, a tariff approved by the AUC must not be unduly preferential, arbitrary or unjustly discriminatory.

#### Ontario

The provision of and operation of electricity distribution is governed by the OEB Act. Any person who owns or operates a distribution system must hold a licence pursuant to the OEB Act. The OEB has the responsibility to set just and reasonable rates and terms and conditions (the tariff) in respect of a regulated utility service. Distribution rates are intended to recover a distribution company's predicted revenue requirement, including a return on capital. Consistent with general rate-making principles widely applied in North America, a tariff approved by the OEB

must not be unduly preferential, arbitrary or unjustly discriminatory.

### 6.2.2 Establishment of Distribution Charges and Terms of Service Provinces that Have a Vertically Integrated Utility Structure

Generally, in provinces that have vertically integrated utilities, the costs approved by the regulator for distribution services are bundled with the costs approved for generation and transmission services to derive the approved bundled electricity rates paid by consumers.

Except where a provincial regulator has adopted a different approach to the regulation of distribution service rates, such as performance-based regulation, the traditional cost of service methodology is generally applied to calculate the distribution portion of the utility's revenue requirement for recovery through approved rates charged to consumers. The revenue requirement includes the return on equity, cost of debt, depreciation expense, taxes, and operating and maintenance costs.

Some provinces have a public review process by the provincial utility regulator, which may involve public hearings, with a process for written interrogatories, the filing of written evidence, cross-examination of other parties' witnesses in an oral hearing and the presentation of arguments. If appeals of a regulator's decisions are permitted, this is usually specified in the regulator's governing legislation.

#### Alberta

The deemed debt-to-equity capital structure for rate base and the rate of return on equity for distribution utilities are set by the AUC in a generic cost of capital proceeding at regular intervals. The AUC has adopted a form of performance-based regulation (PBR) to set rates for distribution utilities, rather than the traditional



cost of service methodology, in order to mimic the competition, create incentives for the utility to reduce costs through efficiency and thereby keep distribution service rates lower than might otherwise be the case. Historically, Alberta has five-year PBR terms.

The PBR framework approved by the AUC provides a formulaic rate-setting mechanism that adjusts rates annually due to an inflation indexing mechanism, less a productivity offset. A distribution utility may apply for approval to recover specific costs if they cannot be recovered under the “inflation less productivity” mechanism, and subject to the satisfaction of certain other criteria. The AUC also applies a “capital tracker” mechanism to fund certain capital-related costs.

The AUC typically conducts a public hearing process each time it resets the five-year PBR plans for distribution utilities and when it considers capital tracker applications that may result in the adjustment of rates resulting from approved PBR plans. The AUC endeavours to issue its decision within three months of the completion of the hearing.

In 2022–23, through a public proceeding, the AUC will be reviewing its PBR framework, and this review will result in changes to the historical PBR framework.

Appeals of AUC decisions may be made to the Alberta Court of Appeal with permission from the court on questions of law or jurisdiction. The Alberta Utilities Commission Act also permits AUC decisions to be reviewed by an AUC review panel, for which the AUC has established threshold criteria.

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**Stikeman Elliott LLP** is a global leader in Canadian business law and the first port of call for businesses working in and with Canada. Its offices are located in Montreal, Toronto, Ottawa, Calgary, Vancouver, New York, London and Sydney. The firm provides clients with the highest-quality counsel, strategic advice and workable solutions. Stikeman Elliott LLP has an ex-

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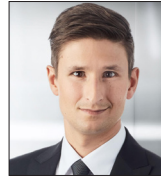
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