



How is Canadian Energy Regulation Evolving to Support Canadian Prosperity?

Legal and Policy Context of Current Public Policy Discussions
An Atlantic Canadian Perspective

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Public Policy Discussions

1. Decarbonization
2. Meet increasing demands for electricity
3. Indigenous participation in energy projects



Overview: Legal & Policy Context

1. Constitutional Context
 - a) Division of Powers
 - b) Duty to Consult
2. Statutory Context
 - a) The Role of Regulators
 - b) Coordinated Cooperation





Constitutional Context: *Division of Powers*

- *Constitution Act* (ss. 91-95)

Provincial	Federal
92(13): Property & civil rights	91(2): Trade & commerce
92(16): Merely local or private matters	91(10): Navigation and shipping
92(10): Local works & undertakings*	91(12): Sea Coast and inland fisheries
92A(1): <ul style="list-style-type: none">- Non-renewable natural resources- Forestry- Electricity	92(10)(a): Federal works and undertakings
92A(2): Export of non-renewable natural resources, forestry resources, and electricity	92(10)(c): Works and undertakings declared for the advantage of 2+ provinces (subject to declaration)
	POGG



Constitutional Context: *Division of Powers*

- Court Interpretation
 - [...] the provisions of the *Constitution Act, 1867* that distribute legislative power between the central Parliament and the provincial Legislatures are now overlaid by such an accumulation of cases that it would be unthinkable to attempt to ascertain the relevant rules by recourse to the Act alone.

- Peter Hogg & Wade K Wright, *Constitutional Law of Canada*, 5th supplemented (Toronto: Thomson Reuters Canada Limited, 2022), s 1:8.

Constitutional Context: *Duty to Consult*

- Source: *Canadian Constitution Act, 1982*, s 35(1):
 - *The existing aboriginal and treaty rights of the aboriginal people in Canada are hereby recognized and affirmed.*
- When:
 - The Crown is aware of an existing or potential Aboriginal or Treaty right
 - The Crown is contemplating executive action
 - The Crown's contemplated action could adversely affect the Aboriginal or Treaty right
- Scope:
 - A spectrum, depending on the strength of the claim and the amount of potential impact on the protected right
 - Consultation must be meaningful
 - Can require accommodation
 - A right to a process, not to an outcome

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES



United Nations

Constitutional Context: *Beyond the Duty to Consult*

UNDRIP

- **Article 19:** States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their **free, prior and informed consent** before adopting and implementing legislative or administrative measures that may affect them.

UNDRIPA

- Purpose:
 - a) affirm the Declaration as a universal international human rights instrument with application in Canadian law; and
 - b) provide a framework for the Government of Canada's implementation of the Declaration. (s 4)
- 2023 – 2028 Action Plan

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Constitutional Context: *Duty to Consult*

- *Peace and Friendship* Treaties (1700s)
- 2016: Elsipogtog (Mi'kmaq) First Nation Title Claim
- 2021: Wolastoqey Nation Title Claim
- July 2025: Mi'kmaq Nation Title Claim

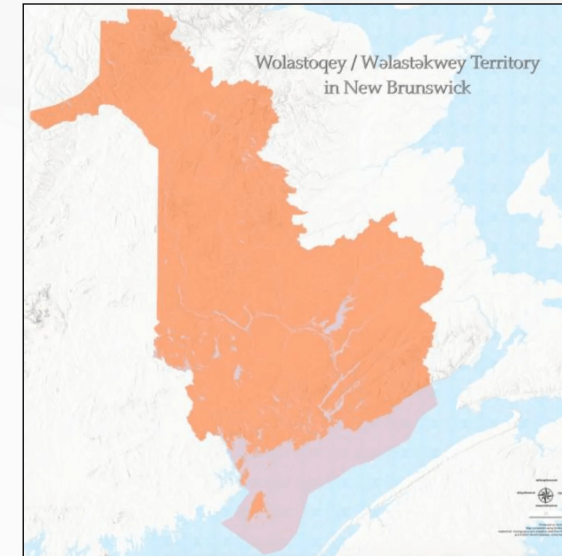


Image source: OKT Law

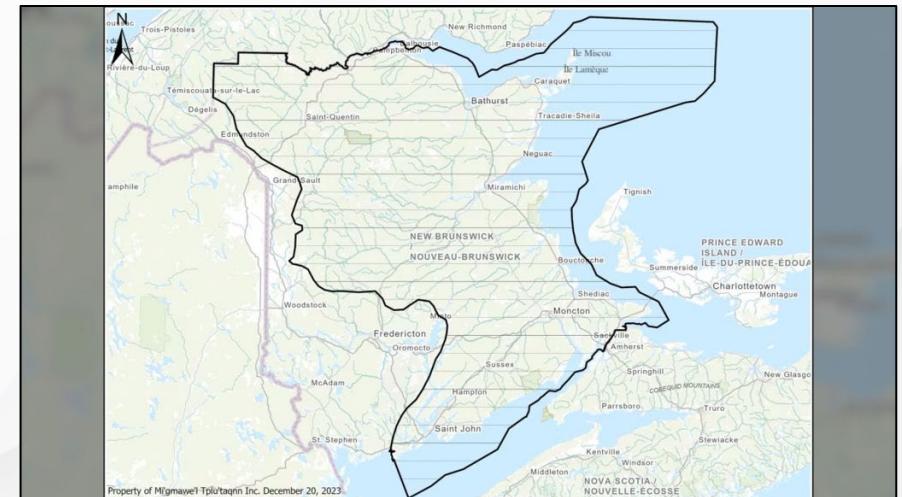


Image source: APTN News

Statutory Context: *Tools*



- Acts
- Regulations
- Policy
- Regulators

Statutory Context: *The Role of Regulators*

- Legislator vs Regulator
 - **Speed** → Wasoqonatl Reliability Intertie
 - **Values: Economic, Social, Environmental** → M12282
 - **Power vs Stability** → freezing rates vs credit rating
- Indigenous Participation
- Division of Powers



Statutory Context: *Coordinated Cooperation*

Ex: Wind West

- Proposal: Develop clean electricity from wind in Nova Scotia's offshore, to be distributed westwards
 - Leases for up to 5 GW in first call for bids (2025)
- *Building Canada Act*:
 - A National Interest Project?



Statutory Context: *Coordinated Cooperation*



- Indigenous Participation
 - Consultation
 - Equity Partners
 - CIB

Statutory Context: *Coordinated Cooperation*



- Division of Powers:
 - NS Offshore
 - Jurisdictional Challenges; Joint Regulation
 - Interprovincial Power Lines
 - Room for federal input?
 - Provincial Experience
 - NB-PEI
 - Maritime Link
 - NS-NB (Wasoqonatl) Intertie
 - Allocation of Costs

Conclusion

- The legal and policy context means that evolution of Canadian energy regulation will necessarily be somewhat piecemeal – but, through coordination, it is possible to achieve prosperity!
- This piecemeal approach offers an opportunity for many voices to be heard, thereby helping to ensure that the transition to clean energy is a *just transition*

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