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The CER Approves the Negotiated Settlement for TMX's Tolls and Tariffs: One More Taxpayer Subsidy for Oilsands Producers

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Decision Commented On: Canadian Energy Regulator, [Approval of Trans Mountain Pipeline ULC](#), Negotiated Settlement, September 28, 2026

On September 28, 2026 the Canadian Energy Regulator (CER) approved a negotiated settlement between [Trans Mountain](#) and shippers (largely oilsands producers) on the Trans Mountain Expansion project ([TMX](#)). While one shipper took no position on the application, all other shippers filed letters in support of the application. One intervenor, the Tsleil-Waututh Nation (TWN) (not a shipper), objected to the settlement.

This post addresses one specific question: how could the CER, as a matter of law, approve a settlement that, according to TMX's own filed evidence, is only expected to afford the publicly owned TMX a rate of return between 5.5% and 6% over the life of the current contracts "below what might be considered a competitive return" for a regulated company? How could such a settlement result in the just and reasonable rates required by s 230 of the Canadian Energy Regulator Act, [SC 2019, c 28, s 10](#) (*CERA*)? In addressing this question, I seek to locate the CER's decision in the broader context of public utility law. From a legal perspective this decision is not a decision about "Building Canada", or whether TMX is in the national or public interest, it is, first and foremost, a decision about just and reasonable rates.

This post proceeds as follows. First, I canvass the CER's duty to establish just and reasonable rates for the pipelines that it regulates. Such rates may be established on the basis of a contested rate hearing or on the basis of a negotiated settlement. Second, I examine two elements of the CER's decision: the CER's characterization of TWN's participation, and the CER's treatment of TMX's target internal rate of return (IRR), including its treatment of TWN's comments on the proposed settlement, and its comments on TMX's filed evidence. Third, I canvass the applicable rules for the judicial supervision of CER decisions. The final section considers the possible implications of the TMX settlement decision for the recently announced Pacific Link pipeline project.

Just and Reasonable Tolls

As prescribed by the opening words of s 230 of the *Canadian Energy Regulator Act*, [SC 2019, c 28, s 10](#) (*CERA*) the CER, like its predecessor the National Energy Board (NEB), has the statutory responsibility to ensure that "all tolls" of a regulated pipeline "must be just and reasonable". The

balance of s 230 is concerned (like s 235) with the idea that the tolls of a regulated pipeline must not be discriminatory – an issue that is not directly related to a utility’s revenue requirement.

230 All tolls must be just and reasonable, and must always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate.

235 A company must not make any unjust discrimination in tolls, service or facilities against any person or locality.

The Act does not define “just and reasonable”, but the case law on utility regulation has consistently held that just and reasonable rates, at least with respect to a utility’s revenue requirement, are rates that are fair to both the utility’s customers and fair to the utility’s shareholders. But what does that mean? Justice Lamont put it this way in a leading decision dealing with Alberta’s public utilities board:

The duty of the Board was to fix fair and reasonable rates; rates which, under the circumstances, would be fair to the consumer on the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested. By a fair return is meant that the company will be allowed as large a return on the capital invested in its enterprise (which will be net to the company) as it would receive if it were investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company's enterprise. ... To properly fix a fair return the Board must necessarily be informed of the rate of return which money would yield in other fields of investment. (*Northwestern Utilities Ltd. v Edmonton (City)*, [1929 CanLII 39 \(SCC\)](#), [1929] SCR 186 at 192 – 193)

While the term “just and reasonable” is certainly open textured, it does not include any additional political direction or content. There is no suggestion in s 230 or elsewhere in the Act, that the CER should apply a different standard to just and reasonable rate-making decisions when the pipeline company is a Crown corporation. Furthermore, there is nothing resembling the long list of socio-economic and nation-building considerations that must inform the decisions of the Canadian Radio and Telecommunications Commission (CRTC) under the *Telecommunications Act*, [SC 1993, c 38](#). Neither does the CER’s statute contain any provision allowing the executive power, the Governor in Council, to issue directions to the CER – either generally or in those circumstances where the CER is assessing the rates of a crown corporation. Parliament could do so, and in the case of the CRTC it has clearly chosen to do so, but it did not do so for the NEB, and it has not done so for the NEB’s successor, the CER. The CER does have a broader public interest jurisdiction when assessing the project approval decision (i.e., the public convenience and necessity decision under s 183 of the Act), but this does not carry over to the part of the Act dealing with rate setting. If that were parliament’s intention it would have said so.

It is noticeable that sometimes rate-making statutes, alive to the need to regulate Crown corporations differently than investor-owned utilities, make special provisions in the statute for this possibility. Such is the case, for example with the rate regulation of BC Hydro by the British Columbia Utilities Commission (BCUC) (see *Utilities Commission Act*, [RSBC 1996, c 473](#), s 3

and the numerous special directions issued to the BCUC under that Act). Other historical examples include the special regimes applicable to Alberta Gas Trunk Line/NOVA (not a Crown corporation, but incorporated under a special provincial statute and very much an instrument of public policy) under Alberta's utility legislation. Such is not the case under the *CERA* or under the predecessor legislation of the NEB. Under *CERA* the same rules apply whether the utility is investor owned or a Crown corporation.

The default mechanism for establishing just and reasonable rates under *CERA* is a contested rate or cost of service hearing in which the regulated utility (in this case TMX) presents a set of rates and supporting evidence which it considers will meet the statutory requirements of ss 225 - 240 of *CERA*. Explicitly or implicitly, this is a two-step process. The first step in establishing just and reasonable rates is to establish the utility's revenue requirement, that is to say, the money that the utility needs to recover from its shippers or customers to cover both its operating costs and its capital costs.

The capital costs of a utility represent the cost of the monies invested in its "rate base" – the facilities required (pipelines, compressor stations, etc.) to deliver the promised services. In order to assess the cost of capital for a utility, the regulator considers the capital structure of the utility in terms of debt and equity. Sometimes the regulator will adopt a deemed capital structure for a utility. Each element of the capital structure requires a return. The cost of debt is fixed by the utility's debt instruments and is typically taken as a given by the regulator. The cost of equity (usually greater than the cost of secured debt given the risks entailed) is always contested between the utility (on behalf of shareholders) and its customers. Utility regulators (including, historically the NEB/CER) sometimes attempt to address the contested nature of these applications by holding generic cost of capital proceedings to establish a baseline rate that can then be adjusted to the risk circumstances of individual utilities. The CER no longer follows this practice although it does continue to publish an annual rate of return on common equity (ROE) letter of advice. The most recent version ([December 2025](#)) adopted a benchmark ROE of 8.10%.

But while a contested rate hearing may be the default approach to establishing a regulated utility's revenue requirement and the tolls to deliver on that revenue requirement, utility regulators also encourage negotiated settlements between the utility and its customers. In some cases, utility statutes may expressly authorize negotiated settlements. Such is the case, for example, with Alberta's utility statutes: see *Electric Utilities Act*, [SA 2003, E-5.1](#), ss 132 – 137, and the *Gas Utilities Act*, [RSA 2000, c G-5](#), ss 28.51 – 28.8. In other cases, the statute may be silent leaving a regulator to develop its own standards and policies within the framework of its constituent legislation. Such is the case with the NEB/CER, and to that end the NEB adopted (and the CER continues to endorse) [Guidelines for Negotiated Settlements of Traffic, Tolls and Tariffs](#), (Revised Guidelines), most recently revised in 2002.

This was ultimately the route that TMX and its shippers followed as TMX sought to finalize tolls for the expansion project once it entered into service.

The CER's predecessor, the NEB, first engaged with TMX's tolls back in 2012 – 2013 when Trans Mountain, then an investor-owned utility (owned by Kinder Morgan), applied for approval of its proposed tolling methodology for the expansion, even though it had yet to apply for

permission to construct the pipeline (i.e., an application for a certificate of public convenience and necessity) – a highly unusual move. TMX’s methodology application was based on a series of bilateral negotiations with individual shippers based on long term (20 year) contracts and not on the cost of service principles outlined above. However, because of the bilateral nature of the negotiations its application was not presented by Trans Mountain - or treated by the NEB - as a negotiated settlement within the meaning of the Revised Guidelines (NEB, [Reasons for Decision, RH-001-2012](#) at 1).

In ruling on (and approving) the application, the Board considered that in the case of negotiated arrangements between sophisticated parties, an investor-owned utility was free to set its own internal rate of return (IRR) (*ibid* at 26). It is important to point out that, at the time, Trans Mountain anticipated that the application of its methodology would afford it an IRR within the range of 12 – 15% (*ibid* at 23). Its shippers were comfortable with that approach and that target IRR.

By the time construction was completed and it became necessary to finalize tolls based on the approved methodology, circumstances had fundamentally changed. With costs increasing dramatically, and the prospects of achieving the target IRR disappearing, Kinder Morgan wanted out, and it found a buyer in the form of the Government of Canada (see backgrounder [here](#)). Although the federal government maintains that it has a [long term interest in divesting](#), this (Crown ownership) was the position when the CER [approved interim tolls](#) in time for the commencement of operations in May 2024.

In moving to finalize those interim tolls, the CER subsequently agreed to place TMX’s rate application [in abeyance](#) pending the outcome of negotiated settlement discussions. Unlike the bilateral discussions of 2012 – 2013 that led to the methodology decision, these negotiations fell within the framework of the Revised Guidelines.

The Revised Guidelines include the following directions:

- (i) All parties having an interest in a pipeline company’s traffic, tolls and tariffs should have a fair opportunity to participate and have their interests recognized and appropriately weighed in a negotiated settlement. The settlement process should be open and all interested parties should be invited to participate in the settlement negotiations. ...
- (ii) While the Board believes that a negotiated settlement that involves a full range of interested parties will normally reflect the public interest, a settlement must not fetter the Board’s ability and discretion to take into account any public interest considerations which may extend beyond the immediate concerns of the negotiating parties. The Board will not accept any settlement that contains provisions which are illegal or contrary to the National Energy Board Act, or that are otherwise contrary to the public interest.
- (iii) The settlement process must produce adequate information on the public record for the Board to understand the basis for the agreement, assess its reasonableness, and to

be able to determine that the resulting tolls are just and reasonable and not unjustly discriminatory.

For any settlement ... the applicant must provide a summary of the process by which the settlement was obtained and an explanation of the support for the settlement.

For settlements that address all elements of a pipeline company's tolls application, the applicant will provide the following information:

- an explanation of how the agreed-upon revenue requirement is determined
- ...

(Revised Guidelines at 1)

The Revised Guidelines go on to note that where a settlement is not "opposed by any party":

...the Board would normally be able to conclude that the resultant tolls were just and reasonable and a public hearing would not be required. Only in unusual circumstances, such as in cases where the Board was concerned that there was a broader public interest consideration, would the Board require further evidence and seek to evaluate a proposed settlement in more detail. (*ibid* at 2)

The Revised Guidelines also provide guidance as to how the NEB/CER might approach a contested settlement. I omit those sections of the guidelines on the basis that the CER concluded that TMX's proposed negotiated settlement was not a contested settlement. More on that below.

The CER's Decision to Approve the TMX Negotiated Settlement

Following a lengthy process, the details of which are outlined in TMX's application and the CER's decision, TMX applied for approval of the negotiated settlement "as a package" on July 7, 2026. TMX requested a decision by October 1, 2026. As indicated above, all shippers, bar one, filed letters in support of the settlement. Furthermore, the remaining shipper took no position on the application. The CER issued its [14-page decision](#) on September 28, 2026 (Decision).

For the purposes of this post, I will refer to two issues within that decision: the CER's characterization of TWN's participation, and the CER's treatment of TMX's IRR including treatment of TWN's comments.

The CER's characterization of TWN's participation

As noted above, the only party with standing who opposed the settlement was TWN. TWN's traditional and unceded territory includes the location of TMX's terminus and marine terminal. The CER had granted TWN standing over the objections of TMX on the basis that TWN might have relevant information to present, even though the CER was of the view that TWN would not be directly affected by any tolling decision since it was not a shipper ([CER Process Letter No. 2](#),

August 1, 2023 at 3 – 4). TWN’s [letter of comment](#) argued that TMX had failed to establish that the proposed tolling arrangements would result in just and reasonable tolls. TWN also reiterated a long-standing concern that while the CER’s Revised Guidelines might be appropriate when dealing with parties subject to ordinary commercial discipline, that was not the case for TMX since it is a [federal Crown corporation and a wholly owned subsidiary](#) of the [Canada Development Investment Corporation](#) (CDEV) (TWN letter of comment at 1 – 2). As a result, TWN suggested that the CER’s traditional deference to negotiated settlements should be inapplicable.

Just and reasonable tolls and TMX’s IRR

TMX’s [application for approval](#) of the settlement contains the bald assertion that, taken as a whole “[t]he Settlement reflects a series of negotiated compromises and achieves a reasonable balance between the interests of Trans Mountain and Shippers” and that “[w]hen assessed as a package, the Settlement supports a finding that the resulting tolls and the terms and conditions of service are just and reasonable and not unjustly discriminatory” (TMX, application at para 80). TMX claims that the sponsored evidence of [John Reed of Concentric Energy Advisers](#) (Evidence of John Reed) supports this assessment (*ibid*). Here is what Mr. Reed had to say when asked about the financial implications of the settlement for TMX:

The toll methodology was negotiated as part of the Settlement and the negotiated tolls are not cost-of-service-based tolls. These new tolls reflect the previous commitments made in 2012 under the FSAs and TSAs, and discharge both sides’ responsibilities under the agreements then approved. The financial outcomes from these new tolls also reflect the package deal nature of the Settlement, including the trade-offs between toll levels, increased firm contracting, toll certainty, and resolution of the TMEP audit process, among other considerations. The anticipated internal rate of return is between 5.5% and 6% for the life of the TSAs, with additional earnings expected after the contracts expire. While this figure is below what might be considered a competitive return for the Company in a traditional cost-of-service regulatory context, such a result derives principally from the terms of the original 2012 agreements and the risk allocation that both sides agreed to at that time, all of which framed the starting point for the negotiations. The result of these negotiations should not be considered confiscatory when it maintains the financial viability of the pipeline, as it does here. (Evidence of John Reed at 5 – 31 to 5-32, emphasis added)

In sum, according to TMX’s own evidence, this negotiated settlement does not result in a competitive rate of return for TMX. In other words, had the utility been anybody other than a Crown corporation, there is no world in which the utility would have signed-off on this settlement. While Mr. Reed tells us that the settlement is reasonable when viewed in the context of earlier agreements between TMX and its shippers (i.e. the 2012/2013 agreements), the CER is not bound by those agreements. As the CER’s predecessor, the NEB observed, “[a] contract can inform the Board’s decision but it does not supplant the Board’s jurisdiction under Part IV of the NEB Act to set just and reasonable tolls for the services that provided” (see [NEB Letter Decision, May 26, 2011](#) at 6). And in this case, as previously noted, circumstances had fundamentally changed from when the 2012/2013 agreements were negotiated. TMX was no longer an investor-owned utility. And there is no better illustration of the consequences of this change of ownership than the fact

that while Kinder Morgan had a target IRR of 12 – 15% in mind in 2012/2013, TMX as a Crown corporation was now willing to settle for between 5.5 and 6%.

TWN drew the CER's attention to this part of TMX's testimony (see TWN, letter of comment at 5 – 6) and also pointed to the lack of evidence to support Reed's claim that the settlement would in fact deliver a 5.5 to 6% return (that claim was untested), or the claim that this was a reasonable outcome of the negotiations. TWN summarized its concerns as follows:

... the new toll is approximately 10% lower than the previous toll [i.e. the interim toll based on the methodology decision] and could result in a loss of revenue of approximately \$300 million in 2027. This projects to a Net Present Value (NPV) loss of approximately \$2.5 billion, in addition to the \$20 billion loss estimated in TWN's expert evidence in RH-002-2023. In other words, this new toll represents a potential \$22.5 billion financial shortfall which compromises Trans Mountain's long-term viability and lowers the potential valuation for future buyers. (TWN letter of comment at 2)

Thus, TWN took the position that TMX's interim tolls already offered a non-commercial rate of return and the go-forward tolls under the negotiated settlement further compromised TMX's position.

What did the CER have to say?

The CER's response was two-fold. First, it systematically undermined the standing of TWN to offer comments on the commercial aspects of the settlement. And second, it simply ignored the issue of whether a non-commercial rate of return could ever be consistent with just and reasonable rates.

The CER began by pointing out that while the Revised Guidelines “do not define who is an interested party to a settlement, a party with a commercial interest in a settlement is generally considered an interested party” (Decision at 2). But since, according to the CER, TWN did not have a commercial interest in the pipeline, it was not an interested party within the meaning of the Revised Guidelines (Decision at 7, 9) and therefore TWN's opposition to the settlement did not count, at least in the sense of requiring the CER to characterize the settlement as a contested settlement (Decision at 3, 5). As a result, the CER concluded that its default practice applied such that:

Normally, if a negotiated settlement meets the criteria outlined in the Settlement Guidelines and is not opposed by any interested party, the Commission can conclude without a public hearing that the resultant tolls are just and reasonable and not unjustly discriminatory, as required by sections 230 and 235 of the CER Act. This long-standing regulatory approach is predictable and has been used extensively by pipelines and interested parties for CER-regulated pipelines. (Decision at 3)

Furthermore, even though the CER might have permitted TWN to file comments, the degree of consideration that the CER might accord to any comments varied “in consideration of the degree to which interests were affected” (Decision at 8). And TWN's interests were not affected. The

settlement did not affect “TWN’s aboriginal title or rights” and the CER effectively ruled that any concerns of the Nation with respect to the implications of TMX’s capital impairment on TMX’s ability to respond to an uncontrolled release or similar event were taken care of by the CER’s general rules and regulations and TMX’s bonding requirements (Decision at 9 – 10). If only one could always trust the application of general rules and the adequacy of bonding requirements!

By contrast, the CER gave “significant weight” to the comments of shippers (Decision at 8). Indeed, the CER comes close to saying, if it does not actually do so, that the views of non-commercial parties with respect to commercial issues can either be discounted or effectively ignored:

TWN also made submissions regarding a number of financial matters, including the rate of return, the cost causation principle, and an asserted lack of commercial discipline demonstrated by Trans Mountain. In the Commission’s view, TWN has failed to establish that there are impacts from these matters that extend beyond the interests of the commercial parties, none of whom opposed the Application. These aspects of the Settlement are the outcome of commercial negotiations among parties directly impacted by the tolls. The Commission’s assessment of the Application is fundamentally commercial in nature, absent a clear impact to Indigenous rights or a broader public interest consideration that is at stake, which TWN has not established. While the shippers’ comments were persuasive in support of Trans Mountain’s position that no further process is required, TWN [was] not persuasive in establishing a need for further process. Their failure to establish any interest in the proceeding also resulted in the Commission assigning little to no weight to their submissions on financial matters at stake in the application. (Decision at 10, emphasis added)

In sum, while the CER conceded that further process might be required, even absent opposition from an interested party if the terms of the settlement “raise broader public interest considerations” (Decision at 3 and elsewhere), the CER found that none of the unusual circumstances raised by TWN – including the Crown corporation status of the applicant, the fundamental change in circumstances since 2012/2013, and the non-commercial rate of return – merited further inquiry. The CER gives no reason for dismissing these concerns – other than that the concerns were raised by a non-commercial party. And the CER gives no reason for concluding that a public subsidy to shippers (i.e., the difference between a commercial and a non-commercial IRR) is not a public interest consideration that merited further process. Such process might have included testing the assumptions underlying Mr. Reed’s prepared evidence through cross examination.

In raising these issues TWN was effectively acting in the position of a public interest litigant in addition to its interests as an Indigenous title holder of its unceded territory. As a federal Crown corporation, the TMX has an eye on the national interest; as customers, the shippers were laser focused on self-interest. Neither had an interest in addressing the question of whether a non-commercial IRR was consistent with the CER’s mandate to establish just and reasonable rates. And neither had an interest in addressing whether the implicit public subsidy entailed in a non-commercial IRR was appropriate or in the public interest. And neither had an interest in addressing why a subsidy might be needed to allow shippers to access new markets.

By effectively ignoring TWN's submission ("little to no weight" – by the CER's own admission), the CER failed to discharge its statutory responsibility to reach an independent assessment of just and reasonable rates, or, worse still, delegated that responsibility to the self-interested cabal of carrier and shippers. TWN was entitled to "full standing" to raise these issues, when, to draw on the SCC's jurisprudence on public interest standing and the principle of legality, there were no realistic alternative means of raising the issue: *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, [2012 SCC 45 \(CanLII\)](#), [2012] 2 SCR 524.

There was surely one other issue that the CER should have been attuned to by its own experience, even if not referenced, so far as I can tell, by other parties. I refer to the need to ensure that pipelines serving the same geological basin should compete on a level playing field. A subsidy to one carrier serving a basin distorts the market, and a non-commercial rate of return for one pipeline is a subsidy for shippers on that pipeline. The NEB/CER has addressed a similar issue in the context of natural gas markets and competing pipeline systems in NE British Columbia and Alberta (see this post, [Regulated Tolls in the Competitive Environment of Northeast British Columbia](#)) and it is therefore surprising that this issue passes without any comment in this decision on TMX's settlement. It bears emphasising that in its [Northeast BC decision](#) (NEBC Decision) the NEB reminded parties that it would be alert to these competitive issues even where a pipeline has:

... reached a negotiated settlement with its shippers. As set out in the Board's Guidelines for Negotiated Settlements, settlements do not fetter the Board's ability and discretion to take into account any public interest considerations which may extend beyond the immediate concerns of the negotiating parties. (NEBC Decision at 5)

This becomes relevant when we start to consider the tolling arrangements for a future Pacific Link pipeline.

Judicial Supervision of the CER and the Standard of Review

Decisions of the CER may be appealed to the Federal Court of Appeal, with leave, on a question of law or jurisdiction (*CERA*, s 72). It is usually extraordinarily difficult to identify a discrete question of law or jurisdiction when the CER makes a decision on just and reasonable rates, whether in the context of a contested rate hearing or a negotiated settlement. While one might argue that that a decision to approve a settlement that affords the regulated utility a non-commercial rate of return is an error of law or jurisdiction, there is at least some authority, albeit in a different statutory context, that suggests that a utility regulator has no duty to save a utility from itself: see *ATCO Electric Limited v Alberta (Energy and Utilities Board)*, [2004 ABCA 215 \(CanLII\)](#). If it is possible to isolate a question law, the standard of review on a statutory appeal is correctness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65 \(CanLII\)](#) (*Vavilov*).

But in addition, and in light of the decision in *Democracy Watch v Canada (Attorney General)*, [2026 SCC 28 \(CanLII\)](#), the principle of legality demands that the CER's decision must also be reviewable on reasonableness grounds as articulated in *Vavilov*. Given the limited nature of the appeal right under *CERA* any such application would have to be brought before the Federal

Court as an application for judicial review (see my [post](#) on the risks of parallel appeal and judicial review proceedings after *Democracy Watch*).

In assessing the reasonableness of any decision, *Vavilov* instructs (at paras 83, 84, 96) that we must begin with the reasons offered by the decision-maker: “[r]easons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power ...” (*Vavilov* at para 79) and “demonstrate ‘justification, transparency and intelligibility’” (*ibid* at para 81). “[A] reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*ibid* at para 85). It is not enough that the outcome is *justifiable*, the decision must also be *justified*. At the same time, perfection is not required. Decision-makers are permitted to draw upon guidelines and policies, and a gap in reasoning may be explained by a concession made by opposing parties. (*ibid* at para 94).

The application of these ideas – in particular the requirement that the reasons reveal an internal logic and a rational chain of analysis – to a decision dealing with a negotiated settlement (and a package deal at that) is evidently challenging. A court cannot expect such a decision to unpack the give and take of a negotiated settlement. Yet at the same time, a decision of a regulator with respect to a negotiated settlement cannot be immune from judicial supervision. It might be equally challenging to apply *Vavilov*’s insistence that a decision “must be justified in relation to the constellation of law and facts that are relevant to the decision” (*ibid* at para 105). Here, the open textured nature of the “just and reasonable” criterion may be especially telling. But another contextual element, responsiveness to the submission of the parties, is also relevant:

The principles of justification and transparency require that an administrative decision maker’s reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

Reviewing courts cannot expect administrative decision makers to “respond to every argument or line of possible analysis” (*Newfoundland Nurses*, at para. 25), or to “make an explicit finding on each constituent element, however subordinate, leading to its final conclusion” (para. 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker’s failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39. (*Vavilov* at paras 127 – 128)

I will leave it to the reader to assess whether the CER's "little to no weight" reflections quoted above are sufficiently responsive to the concerns expressed by TWN to survive review against *Vavilov*'s reasonableness standard.

In sum, and to conclude this discussion, CER decisions dealing with the approval (or rejection) of negotiated settlements cannot be immune from judicial supervision in accordance with the principle of legality: *Democracy Watch*. There are two possible approaches. One approach (an appeal to the Federal Court of Appeal) involves the isolation of a discrete point of law (e.g., a non-commercial rate of return is inconsistent with a duty to set just and reasonable rates) reviewed against a standard of correctness. A second approach (judicial review in the Federal Court) would engage the reasonableness of the CER's decision to approve the settlement. Such an approach requires an assessment of the reasons provided by the CER for its decision.

Tolling on the Pacific Link Pipeline

A few days after the CER issued its TMX decision we learned that the federal government had decided [to list](#) the West Coast Oil Pipeline (WCOP, rebranded as the Pacific Link pipeline) as a project of national interest under the terms of the *Building Canada Act*, [SC 2025, c 2, s 4](#). See the [ABlawg post](#) by my colleague David Wright on this decision. According to the [Prime Minister's office](#) "Canada and Alberta will share equal ownership of Pacific Link. Indigenous communities will be offered a minimum of 10% ownership interest, financed through Canada and Alberta's Indigenous Loan Guarantee Programs." The federal [Major Projects Office](#) (MPO) suggests that Alberta's interest will be held by the Alberta Petroleum Marketing Commission (APMC) and Canada's interest will be held by Trans Mountain Corporation (TMC).

In addition, the MPO suggests that Pembina Pipeline Corporation (Pembina) will have a 10% interest in the project with the right to acquire an additional 10% interest. In sum, Pacific Link will largely be funded by public monies with a small (10%) private equity interest, and an option for Indigenous communities to acquire a 10% interest, backed by additional public monies.

What lessons does the TMX experience hold for us in thinking about tolling for the Pacific Link Line? The two governments have already internalized the first lesson: if you use public money to build one pipeline to the west coast, private capital will sit on the sidelines and wait for governments to similarly fund a second line. Second, potential shippers on the Pacific Link Pipeline will expect the same favourable tolling treatment that the public (through its Crown corporation, and with the CER's endorsement) has extended to TMX's shippers. How could it be otherwise?

But that does present something of a conundrum for the proposed financial structure of Pacific Link. If Pacific Link's tolls follow TMX's non-commercial approach, why would an Indigenous community, even with public backing, want to invest in such an enterprise? And even more so, why would a public company like Pembina? We'll have to wait and see how the two governments and Pembina resolve this conundrum. As it stands, Canadians may have been told they are "[going to make a lot of money off the pipeline](#)", but that is far from clear given the precedent set by the TMX settlement. Indeed, if Pacific Link's tolling structure follows the TMX precedent, Canadians won't be making a lot of money on the equity investment in that line. We'd get a better return from

investing in just about any other regulated utility. It is possible that there may be significant net benefits to the Canadian economy from TMX, and even from Pacific Link if there remains a long-term market for the incremental capacity offered by both lines, but that (net benefit to the economy) is not the test for just and reasonable tolls.

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