

# ***17<sup>th</sup> WCCAS COMMERCIAL ARBITRATION CONFERENCE***

*May 7, 2024*

*8:30 am - 6:00 pm*

*Ranchmen's Club*

*710 - 13th Avenue, S.W.*

*Calgary, AB*

# WCCAS Arbitration Conference Case Law Update

David Gruber, Bennett Jones LLP

Elizabeth Whitsitt, University of Calgary

# Stay in Favour of Arbitration

- Third Parties
- Technical Prerequisites
- Statutory Exceptions
- Partial Stays

# Third Parties

***Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc, 2023 ABKB 545***

“When Husky decided to enforce the subcontractor’s contractual warranty, it necessarily agreed to resolve any warranty disputes via arbitration. Again, the warranty right was not provided on any other terms”. (para 91)

# Third Parties

## ***Orica Canada Inc v ARVOS GmbH, 2024 ABKB 97***

“The competence-competence principle is not absolute... [t]his exception is justified by the particular expertise that courts have in deciding such questions... it allows a legal argument relating to the arbitrator’s jurisdiction “to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate”.” (para 32 citing *Peace River*)

# Arbitration Agreements

## ***Husky Food Importers & Distributors v JH Whitakker & Sons, 2023 ONCA 260***

“Standard for establishing technical prerequisites, including existence of arbitration agreement is an “arguable case”.” (paras 28-30)

# Arbitration Agreements

## ***Ismail v First York Holdings*, 2023 ONCA 332**

“The agreement to arbitrate cannot “survive” where there was no contract to survive from...” (para 46)

# Post-Uber Reverberations

## ***Williams v Amazon.com Inc.*, 2023 BCCA 314**

“Unconscionability requires a finding of inequality of bargaining power and a resultant improvident bargain. The public policy analysis is also multi-factorial and inequality of bargaining power is but one of the relevant considerations. Moreover, the analysis under both doctrines is contextually informed.” (para 129)



# Post-Uber Reverberations

## ***Lochan v Binance Holdings Limited, 2023 ONSC 6714***

“The Plaintiffs... signed an unnegotiable ‘click’ contract where not only were the details, including the changeable location, of the arbitration clause were buried out of sight, and the logistical complexity and expense of arbitration were not revealed anywhere...”

The inequality of information and inequality of power in the bargaining relationship that resulted from this informational deficit was at a maximum”. (paras 50-51).

# Post-Uber Reverberations

## ***Pokornik v SkiptheDishes*, 2024 MBCA 3**

“...the only decisions relating to section 7 of the Act that can be appealed, in light of section 7(6), are findings that the dispute is not governed by an arbitration clause under section 7(1). Such a decision ousts the application of the Act completely. A decision granting a stay pursuant to section 7(1) cannot be appealed. A refusal to grant a stay pursuant to section 7(2) cannot be appealed”. (para 73)

# Partial Stays

## ***Davidson v Lyra Growth Partners Inc.*, 2024 BCCA 133**

“...the question of whether the stay is to be partial or complete is a matter of discretion for the judge of first instance. One of the non-exclusive factors to be considered will be whether the arbitrable and non-arbitrable issues are so intertwined that they must be heard together, in which case a complete stay of action will be appropriate... [a]nother factor will be whether the core of the claim concerns non-arbitrable matters, in which case a partial stay may be more appropriate”. (para 108)

# Challenging Awards

- New Evidence
- Arbitrator Independence & Impartiality
- Procedural Fairness

# New Evidence

## ***Russian Federation v Luxtona Limited*, 2023 ONCA 393**

“Because the court retains the final say over questions of jurisdiction, it necessarily follows that the court must be...  
“unfettered by any principle limiting its fact-finding ability”. (para 38)

“However, that comes with a significant caveat... where a party has participated fully in the arbitration, its failure to raise a piece of evidence before the tribunal may be relevant as to the weight the court should assign that evidence”. (para 42)

# Arbitrator Independence & Impartiality

## ***Vento Motorcycles Inc v United Mexican States,*** **2023 ONSC 5964**

“In considering whether to exercise its discretion, the court can examine factors such as the seriousness of the breach, the potential impact of the breach on the result, and the potential prejudice flowing from the need to redo the arbitration were the award to be set aside”. (para 123)

# Procedural Fairness

## ***Mattamy (Downsview) Limited v KSV Restructuring Inc. (Urbancorp), 2023 ONSC 3013***

“Mattamy was unable to present a full case in response to the New Issue raised for the first time by the Arbitrator at the hearing and that the decision not to admit the Handbook excerpts was not the product of a thorough procedure. Section 46(1)6 of the Act expressly authorizes the court to intervene in such circumstances to prevent the unfair treatment of parties and to protect the integrity of the arbitral process”.

# Appeals on Questions of Law

## ***Puppet Killer Productions Inc. v Industry Works Studios Inc.*, 2024 BCCA 135**

“It is not apparent that the arbitrator failed to apply the legal test or applied an incorrect legal principle. In my view, the arbitrator’s decision to decline to order special costs was a discretionary decision, which does not raise a question of law appealable under s. 59(2) of the Arbitration Act”. (para 20)



# Appeals on Questions of Law

## ***Creative Energy Vancouver Platforms Inc. v Concord Pacific Developments Ltd., 2024 BCCA 128***

“...there is a high degree of particularity to some of the questions put forward... [t]he grounds for appeal, while framed broadly, cannot be understood without reference to the particular and unique circumstances of this case. ...[T]he lack of precedential value to the resolution of questions posed, suggests that the challenges... are better characterized as questions of mixed fact and law”. (para 55)

Questions?

Contact Us:

David Gruber: [GruberD@bennettjones.ca](mailto:GruberD@bennettjones.ca)

Elizabeth Whitsitt: [eawhitsi@ucalgary.ca](mailto:eawhitsi@ucalgary.ca)

***17<sup>th</sup> WCCAS COMMERCIAL ARBITRATION CONFERENCE***

**II. Mining Disputes: Practical Tools and Approaches for Modern Challenges**

***Presented by:***

**Rachel Howie**, (Chair) FCI Arb., Partner, Dentons, Calgary

**Alison FitzGerald**, Partner, Bennett Jones LLP, Ottawa/Toronto

**Richa Bhagrath**, CBV, Partner, Deloitte, Calgary

**Laura Cundari**, FCI Arb., Partner, Blakes, Vancouver

## ***17<sup>th</sup> WCCAS COMMERCIAL ARBITRATION CONFERENCE***

### **III. Electrification and Dispute Resolution**

***Presented by:***

**Bob Heggie**, (Chair) Chief Executive, Alberta Utilities Commission

**Francis Bradley**, President and CEO, Electricity Canada

**Brian Duguid**, K.C. FCIArb., Partner, JSS Barristers

**Vincent Light**, Legal Counsel, Regulatory, TransAlta



# Electrification and dispute resolution

## Market background

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WCCAS Conference - May 7, 2024



# How does regulation work in Canada

## Jurisdictional Division of Responsibility

### Provincial/Territorial Governments

- Resource management within provincial boundaries
- Intra-provincial trade and commerce
- Intra-provincial environmental impacts
- Generation and transmission of electrical energy
- Conservation and demand response policies

### Federal Government

- Resource management on frontier lands
- Nuclear safety
- Inter-provincial and international trade
- Trans-boundary environmental impacts
- Environmental impacts where federal lands, investment or powers apply
- Codes, standards and labeling relating to conservation and demand
- Other policies of national interest

# Electricity Market Structure in Canada

## NWT

- Vertically-integrated Crown Corporation.
- Investor-owned distribution utility provides service in several communities.

## Yukon

- Vertically-integrated Crown Corporation.
- Investor-owned distribution utility provides service in several communities.

## BC

- Wholesale and industrial open access
- Vertically-integrated Crown Corporation serves 94% of customers

## Alberta

- Mandatory Power Pool
- Wholesale & retail open access (2001)
- Fully competitive wholesale market

## Saskatchewan

- Wholesale open access
- Vertically-integrated Crown corporation

## Manitoba

- Wholesale open access
- Vertically-integrated Crown corporation

## Ontario

- Industry unbundling (1998)
- Wholesale & retail open access (2002)
- Hybrid regulation and competition model

## Nunavut

- Vertically-integrated Crown Corporation.

## Newfoundland

- Vertically-integrated Crown Corporation and investor-owned distribution utility.

## PEI

- Procures electricity from New England market and long-term contracts with New Brunswick.

## Nova Scotia

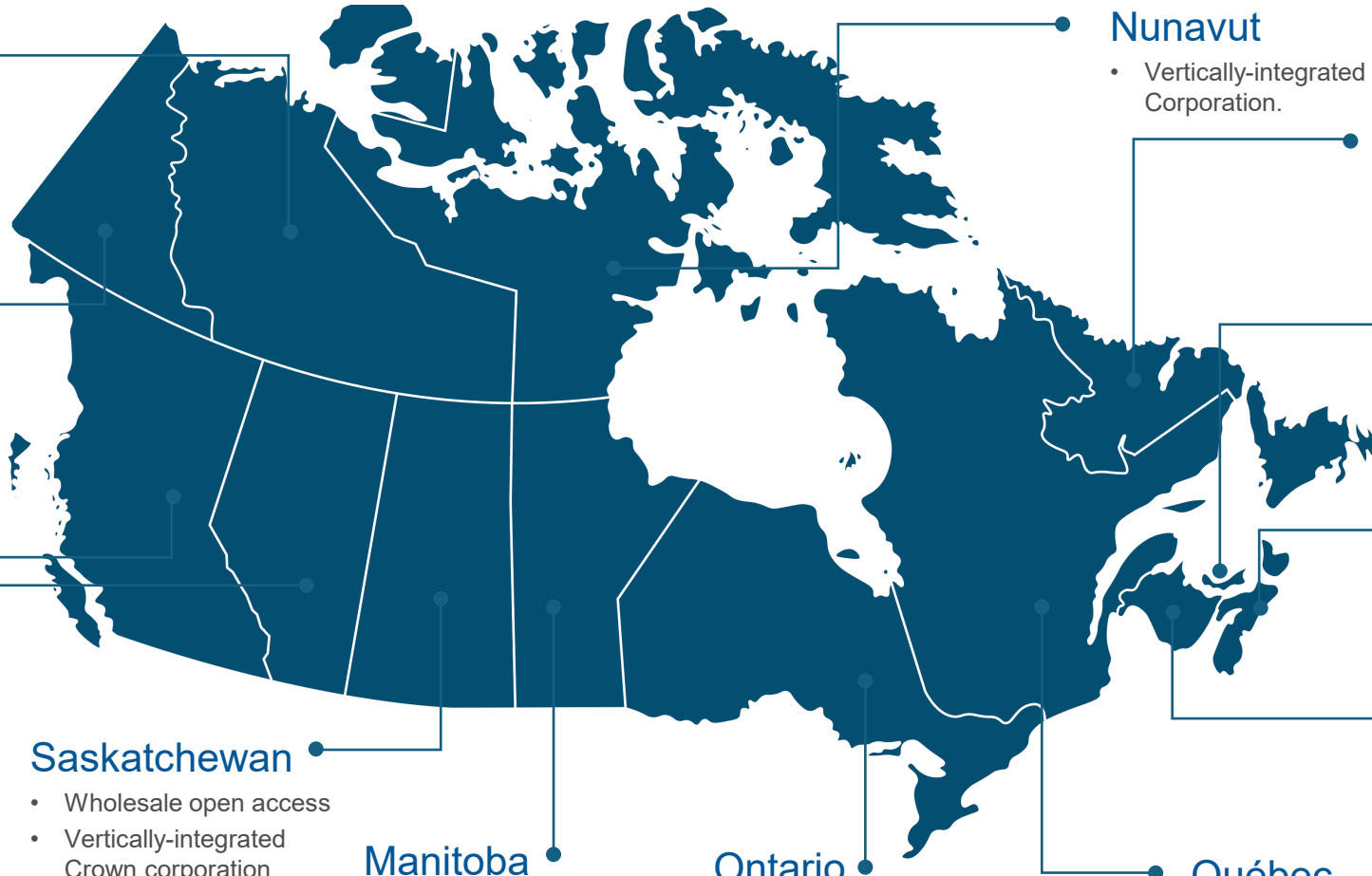
- Wholesale open access
- Investor-owned utility regulated on cost-of-service

## New Brunswick

- Wholesale open access
- Vertically-integrated Crown corporation

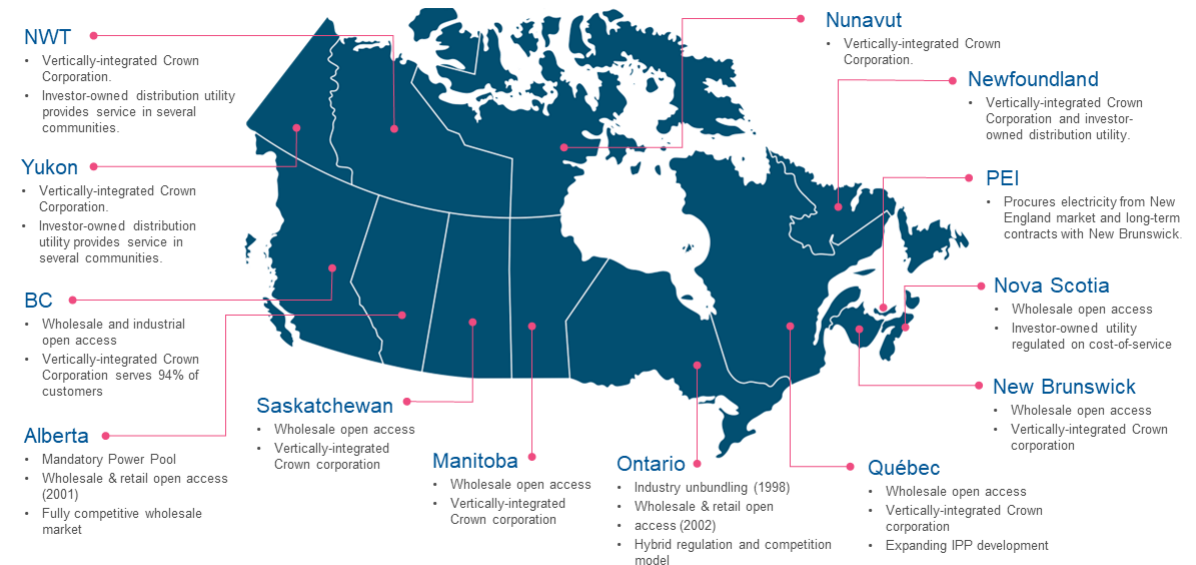
## Québec

- Wholesale open access
- Vertically-integrated Crown corporation
- Expanding IPP development



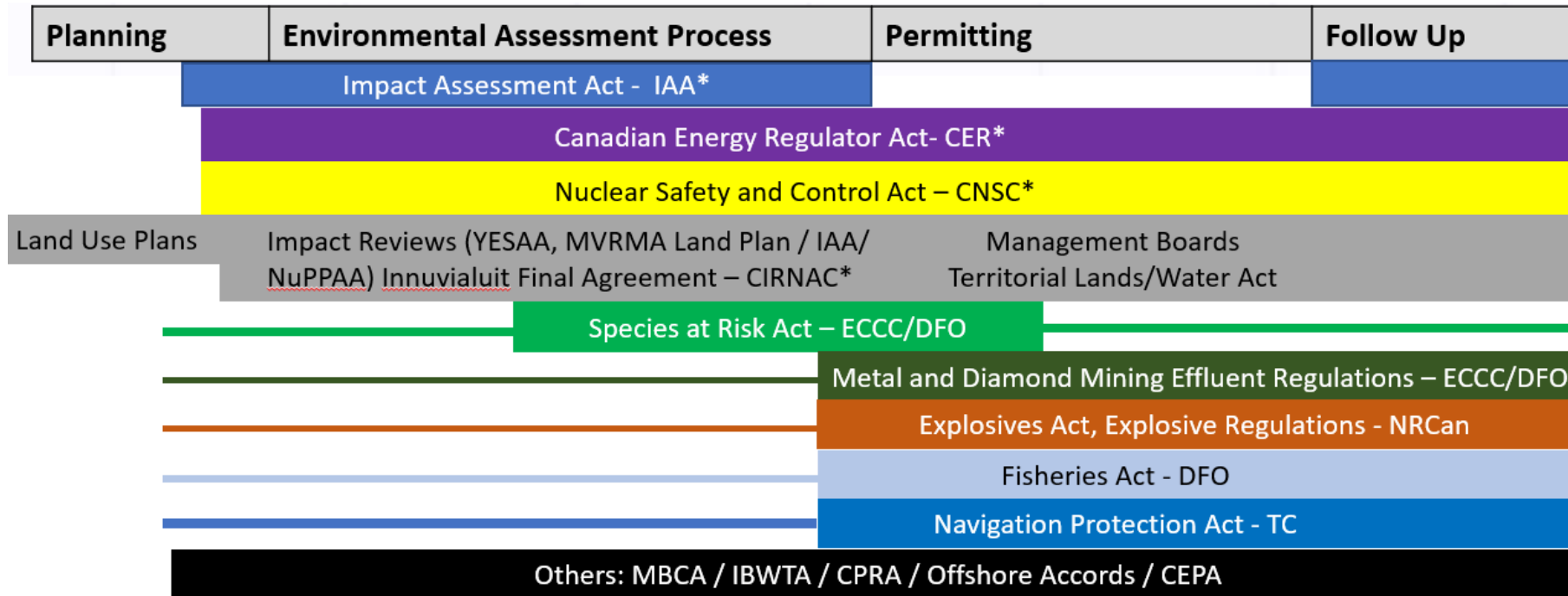
# How everything works together

- Each province and territory has its own system, running on different models
  - Crown owned
  - Privately run
  - Hybrids
- There is even more disparate local and regional systems of regulation.
- One level of government sets policy direction, and other levels of government react... and regulators offer interpretations of what can and can't be done





# Canada's Regulatory Regime for Large Energy Projects



\*Permits required under other Acts trigger IAA OGD participants | Illustrative – some components would not apply to same project  
**YESAA** – Yukon Environmental and Socio-Economic Assessment Act / **MVRMA** – Mackenzie Valley Resource Management Act / **MBCA** – Migratory Birds Convention Act / **IBWTA** – International Boundary Waters Treaty Act / **CPRA** – Canadian Petroleum Resource Act / **Offshore Accords** – Canada – NS and NFLD Offshore Accords / **CEPA** – Canadian Environmental Protection Act / **NuPPAA** – Nunavut Planning and Project Assessment Act (NuPPAA)

# Electricity's big moment: provincially



Hydro-Québec released Action Plan 2035

\$185 billion in new generation, transmission, and reliability upgrades between now and 2035



BC Hydro revisited its Integrated Resource Plan for 2040



MOUs were signed between Ontario Power Generation and SaskPower and Capital Power to explore the introduction of Small Modular Reactors

# Electricity's big moment: Federal Budget 2023



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\$1 in \$8 in new spending to  
go to clean electricity projects

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Funding for the Canada  
Infrastructure Bank

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Smart Renewables  
Electrification Pathways fund

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Carbon Contracts for  
Difference



# Electricity's Big Moment: Federal Budget 2024

- 5 billion towards an Indigenous Loan Guarantee program
- Measures to clarify and reduce timelines for major projects
- New Federal Permitting Coordinator
- Investment Tax credits to move forward



# Federal and provincial governments: getting to net zero

- No one in leadership in Canada, provincially or federally, is disputing the need for electrification as a long-term solution
- The issues in dispute are:
  - Methods
  - Timeline
- The Clean Energy Regulations have brought to light differences
- Relationship between federal and provincial governments is geopolitics

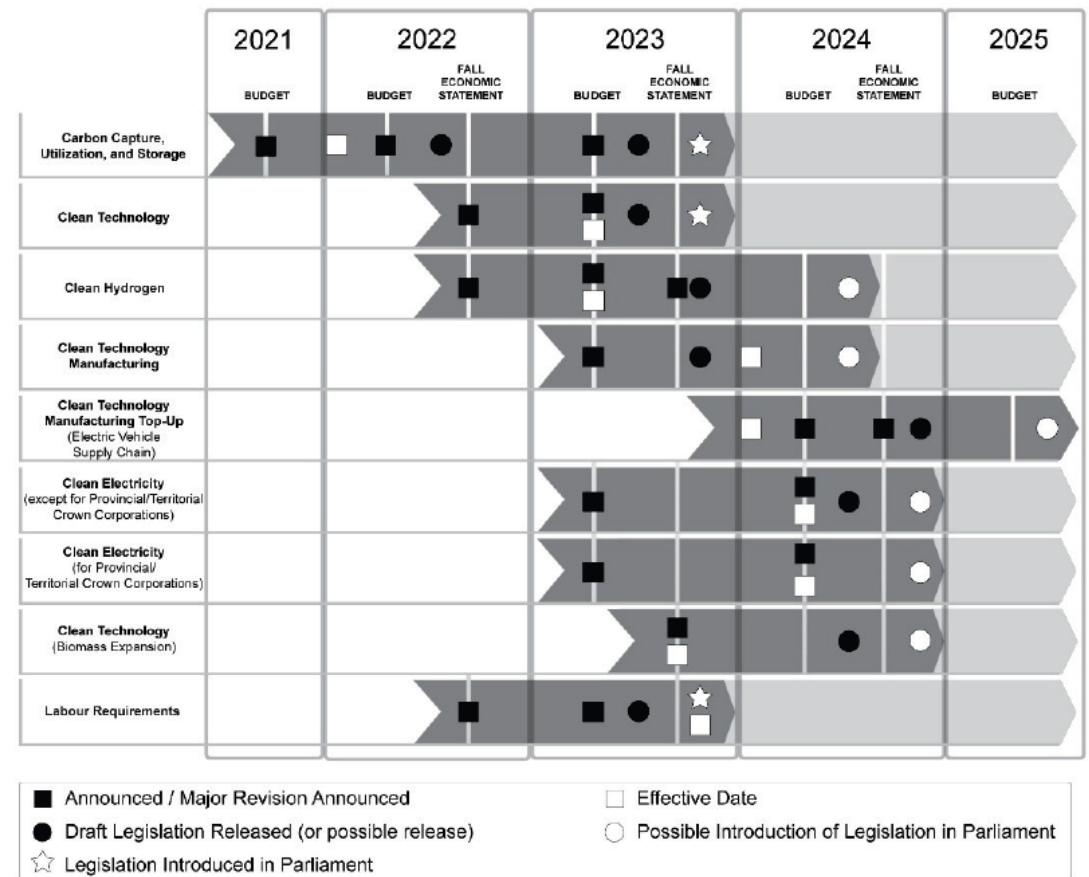


# Technology on the move

- The government plans to release legislation for Manufacturing, Clean Electricity, and Clean Technology
- Small modular reactor roll-outs happening in Canada and the Federal government announced a three-year plan
- Important work being done with hydrogen and clean technology
- This will require ALL forms of technology

Figure 4.5

**Delivery Timeline for Major Economic Investment Tax Credits**





# | Getting to yes

- One project, one review framework
- Expand and implement Investment Tax Credits,
- Consider the costs of extreme weather mitigations in rate filings
- Changes to the Federal Impact Assessment Act
- Clean Electricity Strategy
- Make electricity more affordable for Canadians





# Q&A

Submit questions via the Questions panel

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transalta™

# Power Project Financing

Western Canada Commercial Arbitration Society

May 2024



# Takeaways

1

Project finance is the common method of financing infrastructure projects; project-generated cash flows supports debt servicing

2

TransAlta has used Project Finance as the company's primary financing vehicle since 2015

3

This structure allows developers to monetize revenue streams and form a self-sustainable method to permanently finance projects

4

Lender's return is limited to the repayment and the interest/coupon on the debt

5

Structured with minimum risk (Investment-grade)

# Key Players in Project Finance



- **Developer**  
• Corporate parent developing the Project



- **Issuer**  
SPV of the Corporate Parent that holds the Project



- **Off-taker**  
Consumer under a PPA



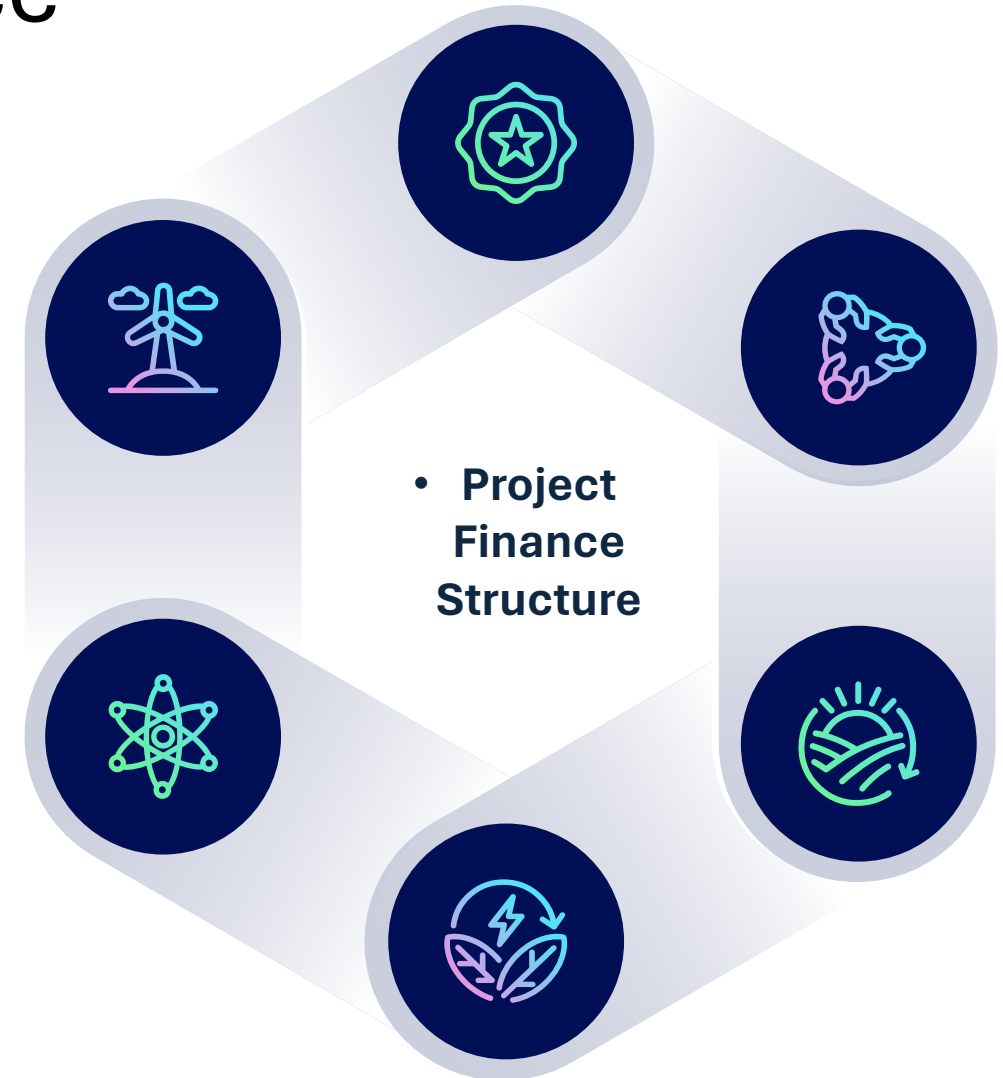
- **Lender**  
Party (or more often, parties) providing financing to Issuer



- **Trustee**  
Party acting on behalf of the lender(s).



- **Material Contracts**  
PPA, Long Term Service Agreements, Land Agreements, etc.



# Examples of TransAlta Project Financings



- **New Richmond**
- 68 MW
- 2016



- **Kent Hills**
- 167 MW
- 2017



- **Big Level & Antrim**
- 119 MW
- 2019



- **Windrise**
- 207 MW
- 2021

# Project Finance 101

## Non-Recourse Debt

All risk and any lenders claims are 'ring-fenced' solely to the SPV.

Lenders would have security over all assets owned by the SPV (e.g. Windrise).

## Investment Grade

Structured with minimum risk.

Long term PPA agreement with a highly rated offtaker.

Third party validation of all aspects of Project.

Debt Service Coverage Ratio ("DSCR") is used to determine the amount of debt the Project can support (Wind P90 production).

## Lender's Return

Limited to the repayment and interest/coupon on the debt itself.



- SPV owns, develops and operates the Project



- Long Term Offtake Agreement (PPA)



- Third Party Validation of all aspects of Project



- Structured with minimum risk





## Project Finance – Typical Terms & Requirements

- Must operate the Business in compliance with all Applicable Laws, follow Good Engineering and Operating Practices;
- Provide Operating and Capex Plan annually with a reconciliation between actuals and budget of the prior year, including quarterly financial statements;
- Provide written notice the Trustee of Events of Default or Material Adverse Effect (including under any material contracts or litigation);
- The Issuer will **not** lease (as lessor), sell, transfer or otherwise dispose of any part of the Project, or enter into any new contract or agreement (or amendments, waivers or assignments thereto) if the entering into of such agreement or any subsequent breach or termination would reasonably be expected to result in a Material Adverse Effect; and
- Lenders may have the option to step in and assume control and operation of the Project after an Event of Default after all applicable cure periods have expired.

# Thank you

- **Vincent Light**

Legal Counsel, Regulatory





***17<sup>th</sup> WCCAS COMMERCIAL ARBITRATION CONFERENCE***

***Guest Speaker:***

**Professor Jonathan Schaeffer, University of  
Alberta, Department of Computing Science**

***Topic:***

**Artificial Intelligence and the Legal Profession**



# Introduction to AI and Legal Practice

**Jonathan Schaeffer**

jonathan@ualberta.ca

Professor, Computing Science, University of Alberta

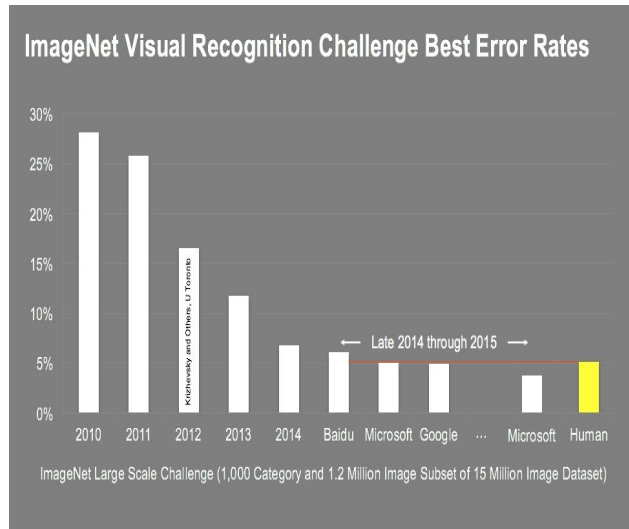
May 7, 2024

# Artificial Intelligence (AI)

One of the most profound contributions of the 20<sup>th</sup> century is the realization that intelligent behavior can be realized by non-human information processing architectures.

# Computing, Data, Learning

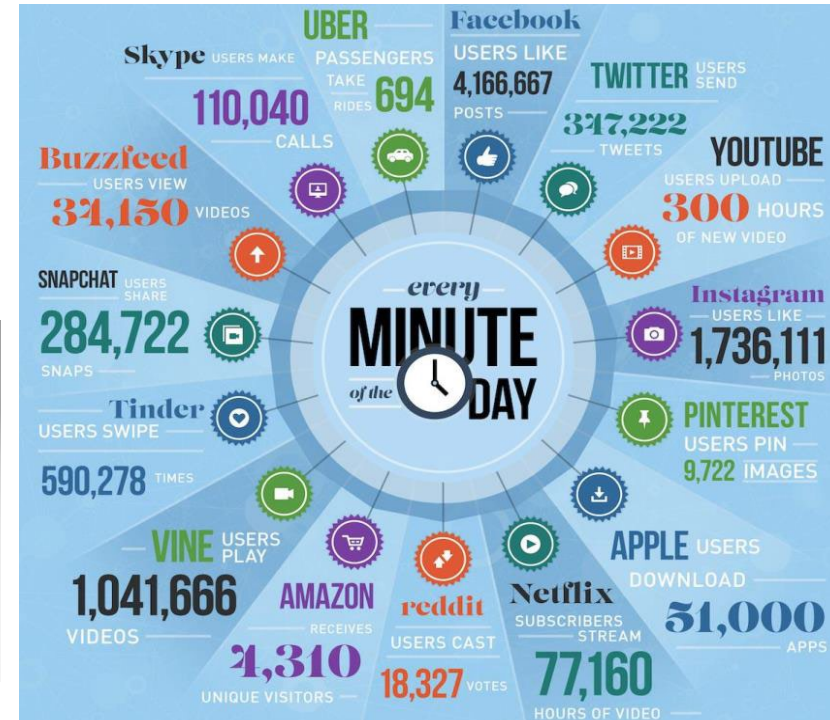
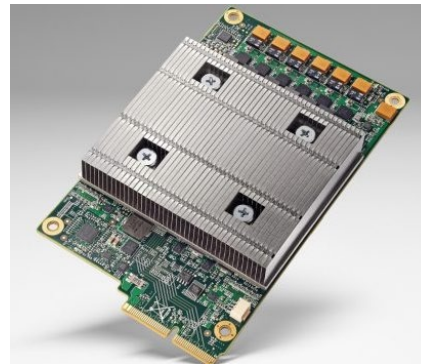
Triumvirate of the modern information age:



Search for patterns & correlations (“machine learning”)

Lots of data (“big data”)

Fast, inexpensive, & plentiful computing (“cloud computing”)



# Artificial Intelligence (AI)

Artificial intelligence is not artificial and not intelligence.

The field of AI creates *the illusion of intelligence*.

No resemblance to human methods.

Biology provided the inspiration for humankind to reach for the sky, but technology provided the solution.

**It's the result that counts, not how you achieved it.**



# AI Successes



Yesterday



Today



- AI *will* revolutionize society.
- Computers/robots do tasks we don't want to do (boring, dangerous, expensive, etc.).
- Automate tasks (driving).
- Enhance human decision making (e.g., medical).
- Improve quality of life.
- If done right... **AI == Augmented Intelligence.**



- Technology advancing at an accelerating pace.
- Inability for government – even society – to keep up with.
- Like nuclear and medical technology, AI raises ethical issues.
- Why is AI different?

AI will touch almost everything.

AI and **X**. Choose your **X**.

# Ethics and Laws

- Nuclear had a few decades of time to figure out the ethics and laws, and adopt global standards.
- Medical had decades of practice before ethics and laws started being enforced.
- AI does not have the luxury of time.
- We are seeing the hockey stick phenomenon.



# Ethics Standards?

- >100 proposed ethics standards.
- Montreal Declaration for the Responsible Development of AI  
*montrealdeclaration-responsibleai.com*
- Most are not adopted or have lip service paid to them.
  - Trust? Voluntary basis by companies/individuals?
  - Legal? Do we need government to legislate?

# AI & Everyday Life

- Data, data, and data:
  - Gathering, usage, and privacy of data.
  - Bias of data.
- Companies/governments add AI and then market/use it without understanding the consequences.
- Misuse of AI technology (deliberate and unintended).
- Examples of real problems today:
  - Amazon: hiring practices (sex bias).
  - China: with using AI to identify people and track them.
  - Politics: fake images or news stories.

# New Laws?

- EU is leading the way
  - General Data Protection Regulation (GDPR) (2018).
  - AI Act (draft approved in 2023).
  - Accountable, training data, explainable, risk... of machine-learned decisions.
  - Proactive.
- Canada?
  - AI and Data Act (AIDA) – 2025? But still needs more detail.
  - Reactive.
- **Must think beyond data!**

# Real World Issues...

- Potential examples:
  - Bails and sentencing.
  - Judge and jury: research "success" on well-defined legal subsets.
  - Police usage: Facial recognition; prediction; surveillance.
- Tools must be carefully scrutinized (by who?).
  - Data sources audited.
  - Bias testing.
  - Decisions explainable.



Beware! Commercial products usually promise more than they can deliver.

“Killer robots are nothing compared to bias in AI.”

Charlotte Han, Nvidia



A major leap forward in creating the illusion of intelligent dialogue.

Must understand what it's doing...

- No intelligence in its answer.
- "Hallucinations" are fundamental to the approach.

... and avoid the problems...

- ChatGPT/Bing/Bard/Co-Pilot/... Applying Band Aids to mask the problems.



# Is This Really Me?

Jonathan Schaeffer is a renowned computer scientist, best known for his contributions to the field of artificial intelligence and computer games. He was born on September 8th, 1955, in New York City, United States. Schaeffer grew up in a Jewish family, and his father was a mathematician, which sparked his interest in mathematics and science from an early age.

Schaeffer completed his undergraduate degree in mathematics at the University of Alberta in 1977. He then went on to earn a Master's degree in computer science from the University of Calgary in 1979. He continued his education at the University of California, Los Angeles (UCLA), where he earned his Ph.D. in computer science in 1983.

After completing his doctoral degree, Schaeffer joined the faculty of the Department of Computing Science at the University of Alberta, where he has been working ever since. He currently holds the position of Professor of Computing Science and the Canada Research Chair in Artificial Intelligence. Schaeffer has also held various administrative positions at the university, including the Chair of the Department of Computing Science and the Vice President (Research).

Schaeffer's research interests lie in the area of artificial intelligence, particularly in the development of algorithms for game-playing programs. In 1989, he began working on a program that would eventually become known as Chinook, a computer program designed to play checkers. Schaeffer and his team worked on Chinook for over a decade, and in 1994, it became the first computer program to win a human world championship in any game.

Schaeffer's work on Chinook was not without controversy, however. In 1996, the World Checkers/Draughts Federation (WCDF) disqualified Schaeffer and Chinook from competing in the world championships, citing a rule that prohibited the use of computers in human tournaments. Schaeffer argued that Chinook was not a human, and therefore the rule did not apply. The controversy ultimately led to the WCDF changing its rules to allow computer programs to compete in human tournaments.

In addition to his work on Chinook, Schaeffer has also made significant contributions to the field of computer poker. In 2003, he co-authored a paper on the game of limit Texas hold 'em, which described an algorithm that could play the game at a world-class level. In 2008, Schaeffer and his team created Polaris, a program designed to play against human opponents in the annual Man vs. Machine poker tournament. Polaris won the tournament in both 2008 and 2009.

Schaeffer's contributions to artificial intelligence and game-playing programs have been widely recognized. He has received numerous awards and honors for his work, including the AAAI Classic Paper Award in 2001 and the IJCAI Computers and Thought Award in 2011. He was also elected a Fellow of the Royal Society of Canada in 2005 and a Fellow of the Association for Computing Machinery in 2009.

Outside of his academic work, Schaeffer is an avid musician, and he has played the trumpet in various jazz ensembles over the years. He is also an avid sports fan, and he has coached youth soccer and hockey teams in his community.

# Always Check ChatGPT!

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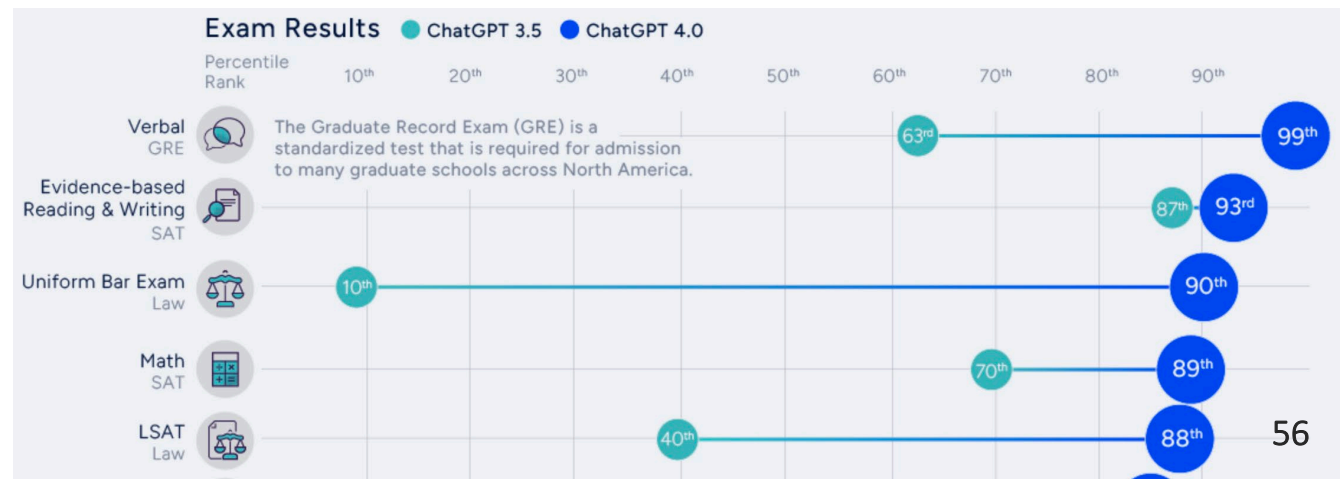
Book author: *Lee Harvey Oswald: A Computational Approach*

# Augmented Law?

"The latest version of the artificial intelligence program ChatGPT has passed the Uniform Bar Examination by 'a significant margin,' earning a combined score of 297 that surpasses even the high threshold of 273 set by Arizona.

"GPT-4 took all sections of the July 2022 bar exam and earned a score so high that it approaches the 90th percentile of test-takers..."

*ABA Journal*  
March 2023



# Should We Be Impressed?

- ChatGPT is a "stochastic parrot."
- Ingests everything on the Internet and combines it in "interesting" ways.
- Does not understand any of its answers.

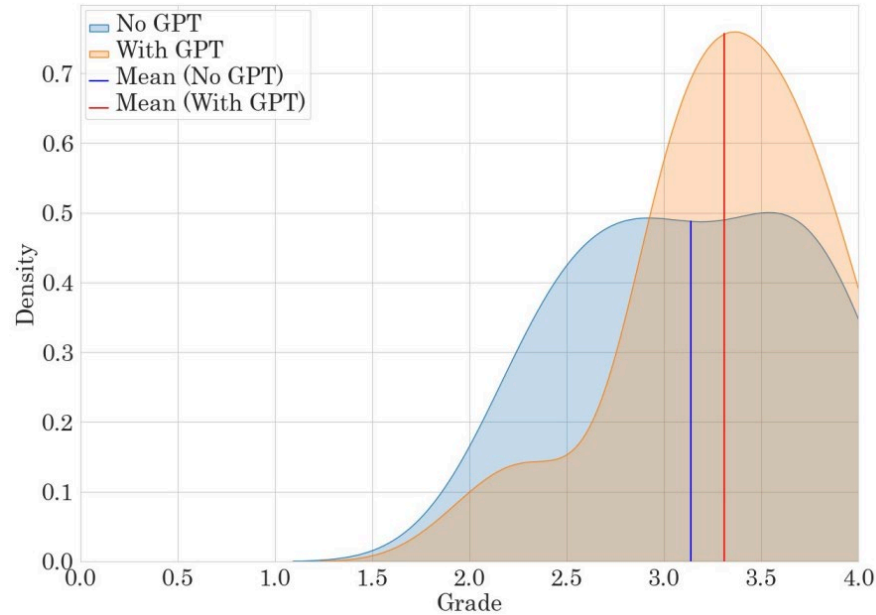
It's so funny to me that the AI people think it's impressive when their programs pass a test after being trained on all the answers.

Paris Marx (@parismarx) March 15, 2023

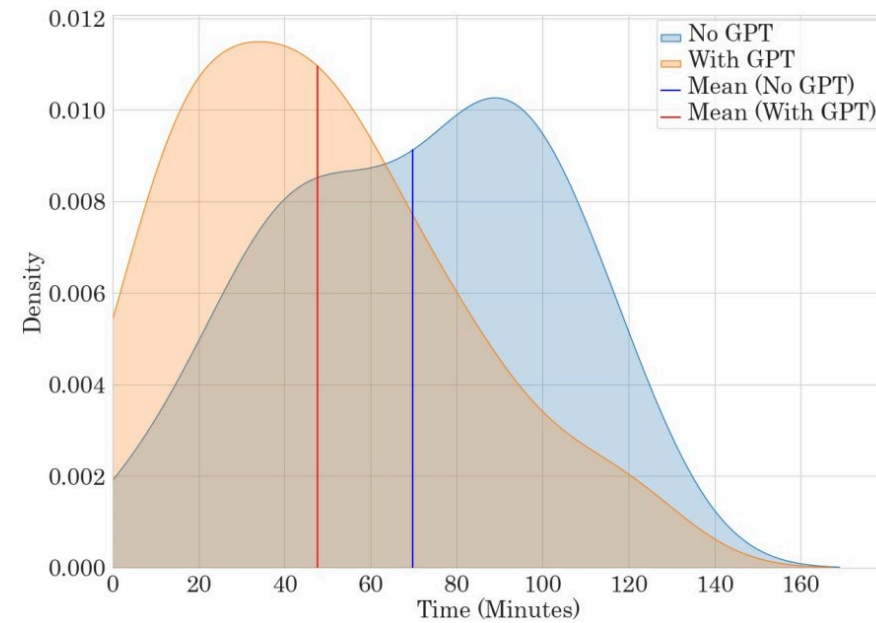
# Upside?

Experiment to determine GPT4 impact on drafting a complaint.

Quality



Time





# Law Firm of the Not-Too-Distant Future?

“Eventually, if not already, **AI will eliminate tasks that junior lawyers at big firms currently do.** AI is already replacing non-lawyer jobs such as legal secretaries and assistants. Large firm clients are starting to realize the efficiency, accuracy and cost effectiveness of AI, and will increasingly demand its implementation in appropriate areas of legal work. The result of increasing reliance on AI by larger firms could be dire for junior lawyers and articling students looking to develop legal skills in these firms...”

# AI Reality Check

AI is getting impressive results in many areas... but “sentient” AI is many decades away.

Need several major technology breakthroughs...

- Learned patterns are bits, not semantics.
- Understanding causality, the relationship between actions and consequences.
- AIs are idiot savants, trained to do one or a small number of related tasks – with no generality.

# AI Obstacles

Lack of people/expertise.

Public challenges.

- Hype
- Fears
- Resistance to change

Regulation.

- Government (in)action
- Industry (in)action
- Public (in)action

- AI *will* revolutionize society.
- The potential benefits are enormous.
- Challenges to keep up with ethical and legal issues.
- Society: be proactive at addressing these issues.
- Legal profession: embrace a *partnership* with AI.

**AI == Augmented Intelligence**

Thank you!

Questions?

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***17th WCCAS COMMERCIAL ARBITRATION CONFERENCE***

**IV. The Battle of Party-Appointed Experts: Practical Alternatives to Obtain Reliable Opinion Evidence**

***Presented by:***

- **Gerry Ghikas, K.C.**, (Chair) Independent Arbitrator, Vancouver Arbitration Chambers, Vancouver
- **Jung Lee**, Sr. VP & General Counsel, Wolf Midstream, Calgary
- **John Logan, K.C.**, Partner, Jenkins Marzban Logan LLP, Vancouver
- **Carl Nilsen, AACI, FRICS, P.App.**, Independent Real Estate Consultant, VanIAC, Vancouver



CS172353



“Your Honour, I call Nigel From The Pub ... expert witness on whatever you like.”

CS407098

© Mike Baldwin/Cornered

BALDWIN



“No, you weren’t there. But in your expert opinion as a certified brainiac, do you *think* he did it?”



*“And, sir, in your expert, professional opinion, was the victim already deceased when the defendant arrived at the scene?”*



STOCK  
COLLECTIONS COMPANY

Rasman

**17<sup>th</sup> WCCAS COMMERCIAL ARBITRATION CONFERENCE**

**V. Costs**

***Presented by:***

**The Hon. Neil Wittmann**, K.C. (Chair), Western Arbitration Chambers, Calgary

**Julie Hopkins**, FCIArb., Western Arbitration Chambers, Calgary

**Scott Hammel**, K.C., Partner, Miller Thomson, Edmonton

**Laura Cundari**, FCIArb., Partner, Blakes, Vancouver

## ***17<sup>th</sup> WCCAS COMMERCIAL ARBITRATION CONFERENCE***

### **VI. Hot Topics**

***Presented by:***

**Tracey Cohen**, K.C., (Co-Chair) Partner, Fasken, Vancouver

**Vasilis Pappas**, FCIArb., (Co-Chair) Partner, Bennett Jones LLP, Calgary/Vancouver

**Mary Comeau**, FCIArb., Comeau Arbitration, Western Arbitration Chambers, Vancouver Arbitration Chambers, Vancouver/Calgary

**Romeo Rojas**, FCIArb., Romeo A. Rojas Professional Corporation, Calgary

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***Thank you!***

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