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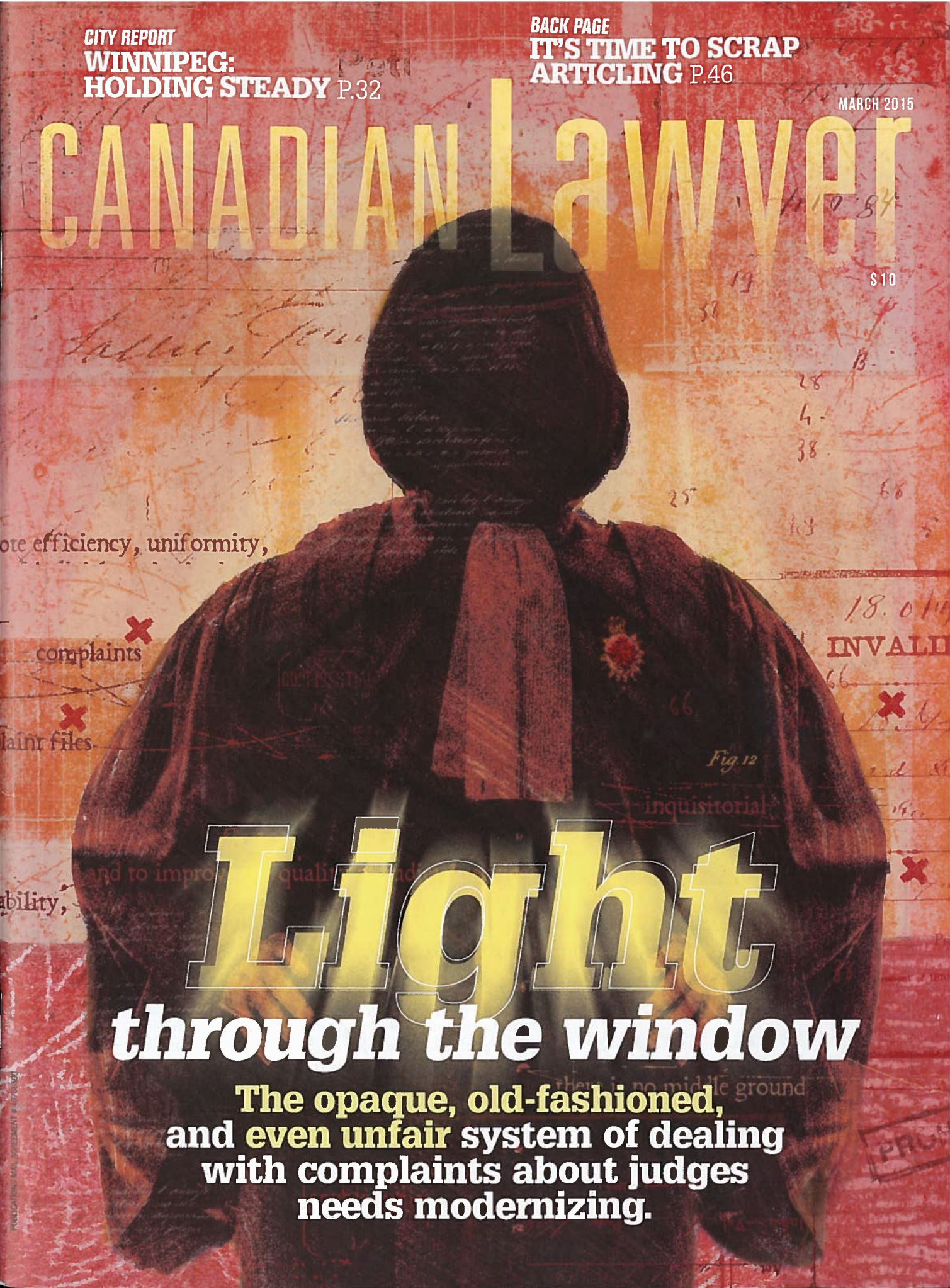

Light through the window

The opaque, old-fashioned, and even unfair system of dealing with complaints about judges needs modernizing.

Kink in the lines

Legal and non-legal issues surrounding proposed energy pipelines are making approval processes long and complex.

By Peter Small

ALEXEI VELLA

When Brian Grindey was in-house counsel for energy giant Enbridge more than a decade ago, pipeline applications were much less troubled than today. "Once the National Energy Board approved the project, there was little sense it would get derailed," he says. Now the game has changed dramatically, says Grindey, of Field Law in Edmonton. "There's a lot of uncertainty that wasn't there even 10 or 15 years ago."

Four Canadian pipeline proposals face fierce opposition: Keystone XL, Northern Gateway, Trans Mountain, and Energy East.

Aboriginal groups, environmentalists, and some cities are lining up against them, complicating legal issues. At least 18 court challenges have been filed against Northern Gateway. Dozens were arrested in November near Vancouver protesting Trans Mountain. Applications are soaring to participate in hearings before the National Energy Board.

Hearings for the 529-kilometre Canadian leg of the Keystone XL pipeline in 2009 saw just 29 intervenors. The following year, 206 intervened in hearings for the 1,178-kilometre Enbridge Northern Gateway Project between the Alberta oilsands and the British Columbia coast. In ongoing hearings for the 1,150-kilometre Trans Mountain Expansion Project from Edmonton to Burnaby, B.C., 1,040 applied to intervene; a record 400 were accepted.

Lawyers say two accidents in 2010 have sharpened public anxiety: the Enbridge diluted bitumen pipeline leak into the Kalamazoo River in Michigan and the Deepwater Horizon spill in the Gulf of Mexico. A Harris/Decima poll shows only 32 per cent of Canadians trust the federal government to adequately respond to oil spills on land. Opposition has also grown around greenhouse gas emissions.

And the *Tsilhqot'in Nation v. British Columbia* decision by the Supreme Court of Canada in June 2014 has given Aboriginal groups powerful leverage over development on their claimed territory.

Federal reforms in 2012 to streamline regulatory reviews have provoked a backlash. Under the changes, the NEB is generally limited to 15 months to consider a proposal. A rejection will no longer be final, but can be overturned by cabinet. In addition, the NEB must limit public participation in hearings to directly affected "interested parties" or people with relevant information or expertise.

Jessica Clogg, executive director of West Coast Environmental Law, calls these modifications part of a massive rollback of federal environmental legislation. "The legislative changes were designed to push through pipeline projects in a more expeditious way, but in fact some of the limitations in the processes have effectively resulted in conflict and delay," she says.

Vancouver-based ForestEthics Advocacy Association mounted an unsuccessful constitutional challenge against the limits placed on participation in recent hearings for Enbridge's Line 9 pipeline reversal and expansion between Sarnia and Montreal. Federal Court of Appeal Justice David Stratas, in his ruling, called ForestEthics a "classic 'busybody'" for not seeking standing at the hearings before going on to challenge the NEB's refusal to consider upstream and downstream emissions.

He also rejected objections by author Donna Sinclair, who lives far from the pipeline, to being barred from writing a letter of comment. "Board hearings are not an open-line radio show where anyone can dial in and participate," Stratas wrote.

Clayton Ruby, who acted for ForestEthics and Sinclair, says the federal government has changed the law to help the NEB avoid hearing from Canadians. "It's easier and easier for pipelines to get approval," he says. NEB spokeswoman Sarah Kiley counters that public participation has increased. "Our hearings are no less rigorous and thorough than they were in the past."

Although the NEB approved the Line 9 application, the Chippewas of the Thames are seeking a Federal Court of Appeal declaration the Crown should have consulted them and not delegated consultations to the NEB, says their lawyer, Scott Robertson. "There is a huge flaw in the system."

Canada's four major pipeline projects all face hurdles:

Keystone XL, by TransCanada Corp., already approved in Canada, is mired in controversy over its 1,351-kilometre U.S. leg to southern Nebraska. The Republican controlled Congress is determined to push it through, but President Barack Obama, under pressure from environmentalists, says he won't approve the pipeline until it's determined to be in the national interest.

The Nebraska Supreme Court left hanging in a January ruling whether, as some landowners claim, the local law approving the pipeline route breaches the state's constitution. Landowners subsequently filed two new lawsuits. "It's probably more than likely that ultimately the legislation gets struck down as unconstitutional." says University of Nebraska law professor Anthony Schutz.

Regardless of whether Obama rejects the pipeline, it will likely return attached to other legislation, says University of Houston Law Center professor Tracy Hester. "This thing is just going to be like a toothache. It's going to keep going and going."

Enbridge Northern Gateway was approved by Ottawa last June, subject to 209 conditions. But the $7.9-billion twin pipeline carrying diluted bitumen from Bruderheim, Alta., to Kitimat, B.C., faces 18 Federal Court of Appeal challenges.

Living Oceans Society, Raincoast Conservation Foundation, and ForestEthics Advocacy claim the hearing panel inadequately protected the humpback whale and failed to balance economic benefits with environmental impacts. "Canada has so dismally failed at its climate change obligations that the pipeline hearings are becoming proxies for that failure," says Ecojustice's Barry Robinson, who acts for the groups.

The Haida Nation, in its lawsuit, claims the federal Crown did not properly consult. Their meeting was only three hours, says Haida lawyer Terri-Lynn Williams-Davidson: "You can't get to accommodation and deep consultation in three hours."

Despite such legal challenges, Northern Gateway spokesman Ivan Giesbrecht says the company believes in "meaningful dialogue, rather than litigation" and has reached equity partnership agreements with 26 First Nation and Metis communities.

The Trans Mountain Expansion Project by Kinder Morgan is still undergoing mainly written hearings. Burnaby, B.C., has been in a losing court battle to stop the contentious expansion. Meanwhile, the Tsleil-Waututh Nation, near Burnaby, is asking the Federal Court of Appeal to set aside the hearing process, claiming the band was not properly consulted.

Scott Smith, of Gowling Lafleur Henderson LLP who acts for Tsleil-Waututh Nation, says the Crown is trying to rely on NEB hearings to satisfy its duty to consult and accommodate First Nations. "I think that's a legally deficient approach that is creating a lot of risk and will likely lead to a substantial number of lawsuits being filed after those hearings have been completed."

The NEB is to rule on the $5.4-billion project by Jan. 25, 2015.

Energy East Pipeline, proposed by TransCanada, would carry 1.1 million barrels of crude per day from Alberta and Saskatchewan to refineries and shipping terminals in Quebec and New Brunswick.

Public interest groups are readying for battle at upcoming hearings. Lakehead University law professor Jason Maclean, acting for the Council of Canadians, calls the NEB "utterly one-sided" for generally restricting participation and refusing to consider upstream or downstream emissions. Even the Quebec National Assembly has passed a motion deploring the NEB for ignoring greenhouse gas emissions and climate change. The NEB's Kiley counters it does consider upstream and downstream emissions, but only when they are directly tied to the project under scrutiny.

Quebec Premier Philippe Couillard and Ontario Premier Kathleen Wynne have jointly set "seven principles" for backing the $12-billion project, including "world leading contingency planning and emergency response programs." This is despite the fact Ottawa has the final say.

Stikeman Elliott's Erik Richer La Flèche calls such moves "policy on the fly" that introduces a new, non-legislative element: social acceptability. "The role of lawyers at this stage is to be re-defined," he says. Borden Ladner Gervais LLP's Alan Ross says this quasi-legal notion of social licence is a sleeper issue. "There has been a significant politicization of pipeline projects. Lawyers need to be savvy to non-legal issues."

Other emerging questions, says Ross, are the policy and legislative changes under Ottawa's Responsible Resource Development plan, including the new Pipeline Safety Act, which would establish enhanced liability without proof of fault for larger pipelines.

Lawrence Smith, of Bennett Jones LLP, says some groups believe they have a veto over infrastructure projects. "Let's say the mayor of Mississauga decides, like the Black Knight in *Monty Python*, to say: 'Thou shalt not pass.' Well, we wouldn't have very many roads or railways or pipelines." Higher court decisions, like *Tsilhqot'in*, are clarifying such issues, says Smith. "Some of the areas that were being exploited, in my mind, for uncertainty are being rendered certain."

BLG's Peter Bryan says lawyers need to tackle important but lower-profile issues like commercial arrangements with shippers, supply contracts, capital cost risk sharing, debt and equity funding, and cost sharing related to abandonment and reclamation. Demand for lawyers with pipelines expertise is likely to rise, says Bull Housser & Tupper's Matthew Keen. "Pipeline law is getting more complex. It's the intersection of energy regulatory issues, First Nations issues, and environmental issues." CL