

Comments to the Energy and Utilities Board on Matter EL 002-2025
Renewables Integration and Grid Security Project

3.3.2.a

I am James Emberger. I am writing as Spokesperson for the New Brunswick Anti-Shale Gas Alliance, Inc. (NBASGA)

3.3.2.b

NBASGA is an alliance of civil society groups across the province, formed in 2010, and formally incorporated in 2013, to oppose the development of shale gas in the province. Having helped to secure a moratorium, the group continued with a dual mandate - to keep unconventional oil and gas out of the province, and to promote the transition to a clean energy economy.

The RIGS gas/diesel electricity plant is a direct challenge to both of our mandates and is of great interest to our membership and followers. Historically, we have taken legal action as appropriate to fulfill our mandate, starting with a 2013 suit against the Province, which we feel helped lead to the shale gas moratorium.

Later we intervened on the side of the federal government at the Saskatchewan Court of Appeal and the Supreme Court of Canada, which successfully established the constitutionality of carbon pricing by the federal government.

Most recently we (and co-plaintiffs Ecology Action Centre) successfully sued the Province of Nova Scotia concerning improprieties in its Environmental Impact Assessment procedure stemming from a proposed LNG export terminal in Goldboro, NS. The project did not proceed

All of the above had real and/or potential impacts on NBPower ratepayers, New Brunswick taxpayers, and NBASGA members, and affected the prudence of future energy policy choices. As the RIGS project will have similar effects, NBASGA is clearly focused on the outcome of this hearing.

3.3.2.c

[Note on reading this document: To shorten the length and improve readability, the following methods are used in lieu of standard footnoting.

● **Anything in bold is my added emphasis**

- *"Anything in quotes and italics is quoted from the International Court of Justice's 2025 Advisory Opinion on Obligations of States in respect of Climate Change"*

- “Anything in plain text and quotes is from numerous experts in international law who have reviewed the advisory opinion. All sources are provided at the end of the document.”]

Judicial decisions and legal trends may soon directly affect the financial position, as well as the availability of fossil fuels for NBPower, the Province, and Canada.

Historically, the EUB has narrowly interpreted its mandate to ensure the safe, adequate, secure and reliable supply of electricity within New Brunswick at the lowest cost of service. It appears that the Board has historically treated underlying factors, such as environmental damages or climate change, as “externalities”, to be dealt with by others.

This, despite the self-evident facts that weather and climate events, caused or enhanced by climate change, directly affect the cost, availability and reliability of electricity supply. Examples are not hard to come by:

- Storm damage to energy infrastructure, and need for overtime repair work
- Exceptional heatwaves and cold spells increasing demand
- Drought causing low river flow from dams supplying hydro energy
- High water temperatures restricting the cooling of nuclear and other power plants
- All the above leading to expensive imports of electricity, and/or increased cost of producing electricity within the province.

The Provincial government is aware of these climate related issues, and has created plans to deal with climate change. Unfortunately, those plans do not appear to be in synch with the EUB mandate, despite the obvious connections.

We believe that the EUB must now, by necessity, expand its definition of risks to the finance and availability of electricity, because of emerging judicial principles in the world and Canada concerning climate and fossil fuels, which directly affect the prudence of energy decisions.

In particular, the **International Court of Justice’s 2025 Advisory Opinion on Obligations of States in respect of Climate Change** has ushered in an entirely new perspective for all fossil fuel issues.

This far reaching judicial opinion by the International Court of Justice (ICJ) is only the 5th unanimous opinion in the court’s 88 year history. It declares:

"Failure of a state to take appropriate action to protect the climate system, may constitute an internationally wrongful act" attributable to the state or states involved."

Such acts include, *"Fossil-fuel production, **consumption**, the granting of exploration licences or the provision of subsidies "*

Though non-binding, this advisory opinion was hailed as a turning point in international climate law, as it rests on the application of existing treaty obligations and customary international law, *and* multiple findings that any new oil and gas projects globally would be "incompatible" with limiting global warming to 1.5C.

It clarifies that climate "harms" and obligations can be clearly linked to both **greenhouse gas (GHG) emitters** and fossil-fuel producers. "The advisory opinion carries moral weight and authority, and **can influence domestic decision-making around new fossil-fuel projects."**

"Perhaps most importantly, it stated that **countries can face liability for climate harms, opening the door to potential "reparations" for loss and damage, and can require that a country in breach of its obligations stop its polluting activity**, and ensure that such activities do not occur in the future."

"It could shift the conversation from voluntary climate finance to legal obligations to repair harm, particularly for vulnerable communities and states already suffering loss and damage."

"Last, but absolutely not least, it was important, from a climate justice perspective, to hear from the court that one cannot simply game the climate change regime without legal consequences. **Those consequences may take time to materialize, but they very likely will.**" **"If states and corporations fail to transition away from fossil fuels, their risk for liability increases."**

The opinion "recognized the principle of liability for climate harm as actionable under the existing rules. **We can expect that to be widely litigated around the world."**

As the EUB itself emphasized in its October decision emphasizing prudence, "every expense [NB Power] incurs ultimately must be recovered from one of two sources: NB Power's ratepayers or its shareholder, the Crown in Right of New Brunswick — effectively the people of New Brunswick."

The Board itself has cautioned that the arrangement (with RIGS Energy) does not ensure that the project is prudent, nor does it shield NB Power from the regulatory consequences of an imprudent project — consequences that may arise years or decades into the future.

Canada is a Prime Target

Michael Byers, a professor of global politics and international law at the University of British Columbia noted, “other courts will rely on this one as a “highly authoritative statement” on the law.

“Canada, as a medium-sized country in a highly interdependent world, relies on international law in every domain—from enabling trade, foreign investment, banking, and transportation, to fighting drug trafficking, terrorism, tax evasion, and corruption, to cooperating with NATO allies under a collective security guarantee,” he writes. “You cannot pick and choose between different parts of the international legal system.”

“Those “now-clear risks”, he adds, “have changed the parameters of viable public and corporate policy overnight.” “For the Canadian government, that means eliminating supports for the oil and gas industry now, or risking having to pay hundreds of billions of dollars in compensation to developing countries later,” Byers says.

Why is Canada a prime target?

1. The ICJ makes clear that both current and historical actions can be counted.

- Canada is the current number 10 largest emitter of GHG in the world. (Though even small contributors can be held responsible for their share of climate harm.)
- It is the only country in the G7 group of advanced economies that has never met a climate target, and whose GHG emissions are actually increasing.
- It is one of the very top emitters of GHG per capita, both currently and historically.

2. Canada has greater obligations.

- Developed countries have *"additional obligations to take the lead in combating climate change"*, the ICJ notes. **Degree of care expected of a State with a well-developed economy and human and material resources and with highly evolved systems and structures of governance is different from States which are not so well placed.**

3. Canada should know better

- Due diligence also **requires States to actively pursue the scientific information necessary for them to assess the probability and seriousness of harm**, *"in conformity with the common but differentiated responsibilities and respective capabilities principle."* The standard of due diligence may also become more demanding in the light of new scientific or technological knowledge.

4. The availability of technological means to prevent or mitigate relevant harm influences what can reasonably be expected of a State.

- ***"Where a risk can be addressed with readily available technologies, States are expected to use them."***

5. States must do due diligence as the required standard of conduct.

- *"As far as climate change is concerned, such appropriate rules and measures include, but are not limited to, **regulatory mitigation mechanisms that are designed to achieve the deep, rapid, and sustained reductions of GHG emissions** that are necessary for the prevention of significant harm to the climate system. **These rules and measures must regulate the conduct of public and private operators within the States' jurisdiction or control.**"*

Where does the RIGS project fit in?

In the worst case scenario, RIGS would become the 2nd or 3rd largest emitter of GHG in the province. In any scenario, it will be increasing GHG emissions. NBPower's existing plans for additional fossil fuel generators make it hard to believe its rhetoric that RIGS will only burn gas 8% of the time. Private interests and Utilities in NB, PEI and Nova Scotia have announced similar plans. **As the ICJ notes, States must consider the cumulative effects of all projects in their jurisdiction when evaluating any individual project.**

Neither NB, the Atlantic Provinces, or Canada are meeting their climate goals. The addition of substantial gas/diesel fired generation would render climate goals unachievable. The RIGS project has a multi-decade lifespan.

Alternatives to fossil fuel generators exist, as other interveners will attest, and we suspect they will be competitively priced. **But even if somewhat more expensive, our obligations under international law clearly indicate that we pursue them unless they are clearly, prohibitively priced.**

Canada is well acquainted with the harms caused by climate change and would be hard pressed to refute claims of damage from others. The Supreme Court and several provincial Courts of Appeal have categorically stated that climate change is an existential threat.

It is notable that the advisory opinion allows no exceptions for a small relative size of an infraction, nor for the assertion that it is a 'group' of states that are responsible for harms, nor for private industry projects.

Legal Maneuvering Has Already Begun in Canada

In Canada, we are already seeing litigation that relies on the ICJ opinion. In September, in the case of, "Dini Ze' Lho'imggin v. His Majesty the King in Right of Canada", the Federal Court became one of the first domestic courts to engage directly with the ICJ Advisory Opinion.

"The Federal Court held that the claim was justiciable and could potentially rest on novel causes of action grounded in customary international law, citing the International Court of Justice's 2025 Advisory Opinion on Obligations of States in respect of Climate Change."

"While reaffirming that the Opinion is not binding, the Court acknowledged its persuasive authority, especially its affirmation that States' duties to protect the climate system arise from both customary international law and human rights obligations. **Notably, it left the door open for new causes of action grounded in customary international law - a significant precedent for future climate litigation for holding governments accountable for climate inaction.**

This ruling is a pioneering step in recognizing climate litigation as justiciable within Canada's constitutional framework and international advisory opinions."

"The Court explicitly references Section 7 Charter rights and so obligates Canadian courts to meaningfully consider the principles underscored by the ICJ Opinion in future Charter-based cases."

One such Charter case is the currently postponed case, "Mathur, et al. v. His Majesty the King in Right of Ontario". If the case continues it is likely to incorporate the ICJ opinion.

Elsewhere:

In Norway, European courts relied on the ICJ opinion to affirm that the government must conduct a full environmental impact assessment, **including greenhouse gas emissions from combustion**, for any new petroleum production.

Also, preceding the ICJ Opinion, the European Court of Human Rights ruled that Switzerland has a responsibility under European law to combat climate change.

The International Tribunal for the Law of the Sea – a UN body – said countries have a legal obligation to safeguard the ocean from greenhouse gas emissions.

European nations have been sued by groups from other nations claiming harm from specific climate actions. The ICJ Opinion reiterates that *"no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein"*.

Indonesians harmed by record flooding are suing their government for damages using the ICJ opinion.

The ICJ affirmed the human right to a "clean, healthy and sustainable" environment – a prerequisite for enjoying universal foundational rights such as life, health, food, water and housing.

"As such, the legal duty to prevent climate catastrophe flows from the entirety of international law, including the UN charter and universal obligations under customary law that obliges all states to prevent serious

transboundary harm to the environment and human rights from activities within its borders.”

“This duty to prevent significant harm to the environment also applies to the climate system, which is an integral and vitally important part of the environment and which must be protected for present and future generations.”

Canadian courts have essentially acknowledged this principle in the decision on carbon pricing. The ICJ Opinion now says that states are legally, not just morally, required to follow it, and can be sued if failing to do so.

Summary and Conclusions

Just as energy markets are changing and evolving, so are the legal frameworks surrounding them and their relationship to climate change.

While political and economic interests may muddy the waters, the world is transitioning away from fossil fuels. Global values, along with the legal constructs that support those values, are clearly changing to reflect that transition.

For example, the International Union for Conservation of Nature, one of the world’s largest conservation organizations, called on governments and civil society to use supply chain measures to phase out fossil fuels in order to protect biodiversity and ecosystems, the first “to explicitly address fossil fuel production as a threat to nature.”

Globally, courts are hearing cases of citizens and governments suing fossil fuel companies for damages and fraud, as well as cases of citizens suing their governments on the basis of the denial of basic human rights, as in Section 7 of the Canadian Charter of Rights and Freedoms.

In this legal arena we now have the entry of the International Court of Justice’s 2025 Advisory Opinion on Obligations of States in respect of Climate Change

Main Points From the Advisory Opinion:

The State’s primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change.

New Brunswick Anti-Shale Gas Alliance, Inc.

- States are legally responsible for their actions, or failures to act, in reducing the use of fossil fuels. Their responsibility is for all government and private actions within their borders.
- They can be sued by individuals, groups, nations or regions - anyone who has suffered climate damage.
- States must stop their polluting activity, which would mean excess greenhouse gas emissions in this case, and ensure that such activities do not occur in the future.
- States must make reparations to affected states in terms of cleanup, monetary payment and apologies, and prevent those activities from reoccurring.
- States must assess the possible cumulative effects of their acts and the planned activities under their jurisdiction or control.

Canada is ripe to be challenged on the basis of this Opinion, as its GHG emissions continue to grow, while it is now actively promoting extractive and fossil fuel industries which will add enormous amounts of GHG.

As we seek new markets, those countries suffering climate harm may choose to sue us, or use the threat of suing as economic leverage. Others, such as the European Union, are implementing carbon border taxes that will make our products - made with fossil fuel generated electricity - more expensive to sell. This could provide incentive for suits from domestic parties suffering economic harm.

Finally, individuals and groups like ours now have additional grounds on which to litigate against new fossil fuel projects.

So what we hope to communicate to the EUB is that it is likely a matter of when, not if, fossil fuel projects are opposed in court, risking financial penalties or cessation of operations.

The EUB may have to make adjustments to its processes or seek legislative approval of changes, but it must address the emerging legal framework surrounding fossil fuels, which will only get more stringent as climate change inexorably worsens.

In the case of RIGS:

To some degree, the 25 year RIGS project will add new GHG to the atmosphere; potentially in great amounts.

In terms of the ICJ opinion, this increase in GHG could be an illegal act, made worse by admitted plans for more gas generators in the near future, and in the knowledge of plans for even more gas/diesel generators in neighbouring provinces.

It would also seem contrary to the ICJ's guidance that states are obligated to consider and adopt non-fossil fuel solutions if available. Several interveners will assert, and provide evidence to the fact, that NBPower has not given serious thought to alternatives, nor has it evaluated them correctly, using current data.

The ICJ also requires states to keep abreast of up-to-date technology. Interveners will present evidence that NBPower has not explored the many ways beyond generating plants that can be used to decrease and manage demand to essentially eliminate or reduce the need for more electricity.

All of the above question the prudence of the RIGS project on the normal basis of financial risk and security of supply. Both fossil fuel prices and availability are predicted to be volatile over the lifespan of this project.

We assert that the international assessment that such actions may also constitute crimes that can be adjudicated, magnifies the conclusion that the RIGS project cannot be considered a prudent plan. These legal concerns will grow during the lifetime of this project.

RIGS should be shelved, and a new, immediate, and agnostic search for a better solution should begin.

We urge the Board to keep this new legal context in mind as it determines the risk to ratepayers and citizens for approving a long term fossil fuel project.

NBPower's plans do not just threaten the climate, but also our financial standing and the longterm reliability of energy supply as fossil fuel projects become legal liabilities as well as stranded assets.

From the ICJ opinion:

"The rapid, deep, and sustained reductions in greenhouse gas emissions—rather than the development of new fossil fuel infrastructure—are obligatory to restore the health of the climate system."

New Brunswick Anti-Shale Gas Alliance, Inc.

Thank you for your consideration.

Sincerely, *James D. Emberger*

Jim Emberger, Spokesperson
New Brunswick Anti-Shale Gas Alliance

Sources

ICJ Court Decision

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Expert Explainers

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<https://www.carbonbrief.org/icj-what-the-world-courts-landmark-opinion-means-for-climate-change/>

'A Day for the History Books': World's Top Court Gives 'Legal Wings' to Climate Rights, Says Failure to Act Could Break International Law

July 23, 2025. Full Story: The Associated Press w/ files from The Energy Mix

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ICJ Advisory Opinion influences climate litigation globally

https://www.linkedin.com/posts/climate-change-legal-initiative_climatelaw-icjao-climatejustice-activity-7381331635520036865-gItz/Climate

Canadian Case and a Canadian Perspective

International Law and Climate Change – Federal Court Decision in Lho'Imggin v. Canada

<https://www.goodmans.ca/insights/article/international-law-and-climate-change---federal-court-decision-in-lho'imggin-v.-canada>

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Lawsuit Risk After UN Court Opinion Puts Carney in 'Tough Spot'

July 28, 2025. Mitchell Beer. The Energy Mix

<https://www.theenergymix.com/lawsuit-risk-after-un-court-opinion-puts-carney-in-tough-spot/>

Perspectives from Elsewhere

Existential and urgent': what impact will ICJ climate ruling have on Cop30?

<https://www.theguardian.com/environment/2025/nov/09/what-impact-will-icj-climate-ruling-have-on-cop30>

The World Court just ruled countries can be held liable for climate change damage – what does that mean for the US?

<https://theconversation.com/the-world-court-just-ruled-countries-can-be-held-liable-for-climate-change-damage-what-does-that-mean-for-the-us-262272>

ICJ ruling expected to shape US climate lawsuits in defiance of Trump

<https://www.climatechangenews.com/2025/08/01/icj-ruling-expected-to-shape-us-climate-lawsuits-in-defiance-of-trump/>

Other Cases and Opinions

European Court of Human Rights Delivers 'Quantum Leap for Climate Accountability'

<https://www.commondreams.org/news/norway-oil>

Swiss court admits Indonesian islanders climate case against Holcim

<https://www.reuters.com/sustainability/cop/swiss-court-admits-indonesia-islanders-climate-case-against-holcim-2025-12-22/>

International Nature Conservation Congress Denounces Fossil Fuels as Threat to Nature October 23, 2025

<https://www.theenergymix.com/international-nature-conservation-congress-denounces-fossil-fuels-as-threat-to-nature/>