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Authors are drawn from a roster of individuals with diverse backgrounds who are acknowledged leaders in the field of energy regulation. Other authors are invited by the managing editors to submit contributions from time to time.

EDITORIAL POLICY

The ERQ is published online by the Canadian Gas Association (CGA) to create a better understanding of energy regulatory issues and trends in Canada.

The managing editors will work with CGA in the identification of themes and topics for each issue. They will author editorial opinions, select contributors, and edit contributions to ensure consistency of style and quality. The managing editors have exclusive responsibility for selecting items for publication.

The ERQ will maintain a “roster” of contributors and supporters who have been invited by the managing editors to lend their names and their contributions to the publication. Individuals on the roster may be invited by the managing editors to author articles on particular topics or they may propose contributions at their own initiative. Other individuals may also be invited by the managing editors to author articles on particular topics.

The substantive content of individual articles is the sole responsibility of the respective contributors. Where contributors have represented or otherwise been associated with parties to a case that is the subject of their contribution to ERQ, notification to that effect will be included in a footnote.

In addition to the regular quarterly publication of Issues of ERQ, comments or links to current developments may be posted to the website from time to time, particularly where timeliness is a consideration.

The ERQ invites readers to offer commentary on published articles and invites contributors to offer rebuttals where appropriate. Commentaries and rebuttals will be posted on the ERQ website (www.energyregulationquarterly.ca).

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EDITORIAL

Managing Editors

Rowland J. Harrison QC and Gordon E. Kaiser

Initiatives to address climate change continue to permeate developments in energy regulation, with significant implications for both regulators and the industries they regulate. This issue of *Energy Regulation Quarterly* includes three articles analyzing current and emerging issues and illustrating the pervasiveness of various measures directed towards the widely-adopted goal of “net zero” carbon emissions.

The federal *Impact Assessment Act*¹ (still often referred to as “Bill C-69”) is now law and, while the controversy that accompanied Bill C-69 continues, attention is turning to the Act’s application and its implications for project developers. As David V. Wright notes in the lead article in this issue on “Climate Change Considerations in the Federal *Impact Assessment Act*: Step Forward or Business As Usual?”, while the Act contains prominent climate-related requirements in both the assessment and decision-making phases, the statutory provisions themselves are “relatively succinct.” Wright discusses key features of the guidance to support implementation of the Act’s climate change provisions found in the federal government’s “strategic assessment on climate change” released in July 2020 and updated in October.

Some jurisdictions have enacted legislation that explicitly adopts the net zero goal for carbon emissions, often drawing support for such steps by reference to the 2015 Paris Agreement. For example, Nova Scotia’s 2019 *Sustainable Development Goals Act*² states that the government’s goal is that “greenhouse gas emissions in the Province are...by 2050, at net zero...” In introducing the legislation, the Minister of the Environment told the legislature that the goals were being established because “they are in line with the recommendations made by the United Nations

Intergovernmental Panel on Climate Change.” The potential implications of explicitly drawing such links are discussed by Melanie Gillis and James MacDuff in their article “When Climate Change and Construction Collide: How Net Zero Legislation Might Be Used to Challenge High-Emitting Infrastructure Projects.”

In “The New World of Climate Change and ESG Disclosure,” Elisabeth DeMarco *et al* observe that many policy responses and economic stimuli that are intended to facilitate economic recovery from the COVID-19 pandemic have “green strings” attached, in the form of enhanced climate change and environmental, social, and governance (ESG) disclosure obligations. For example, recipient companies under the federal government’s Large Employer Emergency Financing Facility (LEEFF) are required to demonstrate a long-term commitment to addressing climate change and commit to publish annual climate-related financial reports in accordance with the Task Force on Climate-related Financial Disclosures (TCFD). In the authors’ view, “it is only a matter of time before the TCFD requirements and related carbon consumer protection standards become mandatory.”

Electricity market contracts are also the subject of Nathan Lev’s “Enabling Bilateral Contracting in Ontario’s Electricity Market.” He concludes that “Ontario’s resource adequacy framework would benefit from enabling a robust bilateral market, characterized by increased contracting activity from demand-side participants...in contrast to the current model where the IESO is *de facto* the only viable contractual counterparty in the province.”

Positive Energy is a research and engagement program at the University of Ottawa that

¹ SC 2019, c 28, s 1.

² SNS 2019, c 26.

seeks to strengthen public confidence in Canadian energy decision-making through evidence-based research and analysis, engagement and recommendations for action.³ Articles based on Positive Energy research projects have been published in *ERQ* from time to time.⁴ Positive Energy is now undertaking a collaborative research project with the Canadian Association of Members of Public Utilities (CAMPUT) that seeks to identify successful innovations and opportunities in energy regulatory decision-making. In “What Drives Energy Regulatory Innovation?”, Patricia Larkin and Brendan Frank report the findings from an online survey that focused on regulatory innovation. The survey was jointly designed by Positive Energy and CAMPUT.

Pursuant to a Ministerial Directive to undertake a targeted review of existing generation contracts for viable cost-lowering opportunities, the Ontario Independent Electricity System Operator (IESO) commissioned the Boston consulting firm Charles River Associates, which submitted its report “Independent Electricity System Operator: Contract Savings Review” in February, 2020. The Report is reviewed in this issue of *ERQ* by Ron Clark. Clark notes that the report was submitted to the IESO before the COVID-19 pandemic had taken hold. He suspects that, given the likely reduction in energy consumption for the foreseeable future, resulting from the pandemic, some of the options presented “could very well be more expensive than forecast in the report.” Further, “even using the pre-COVID figures, it is clear that efforts to reduce current electricity costs would have severe costs in the long-term, often outweighing the short-term benefits.”

The 2019 decision of the Supreme Court of Canada now known as the *Vavilov*⁵ decision significantly reshaped the law of judicial review of administrative actions, with clear implications for future challenges to the decisions of energy regulators. Jonathan Drance *et al* provide a case comment in “The SCC *Vavilov* Decision: Will it Increase Regulatory Risk?”⁶ ■

³ See Positive Energy, online: <www.uottawa.ca/positive-energy>. One of *ERQ*'s Managing Editors, Rowland Harrison, is a member of the Positive Energy Faculty.

⁴ See e.g. Michael Cleland & Monica Gattinger, “Canada’s Energy Future in an Age of Climate Change: Public Confidence and Institutional Foundations for Change” (2019) 7:3 *Energy Regulation Q* 19.

⁵ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

⁶ *Vavilov* was analyzed in an earlier issue, See David Mullan, “2019 Developments in Administrative Law Relevant to Energy Law and Regulation”, (2020) 8:1 *Energy Regulation Q* 28.

CLIMATE CHANGE CONSIDERATIONS IN THE FEDERAL *IMPACT ASSESSMENT ACT*: STEP FORWARD OR BUSINESS AS USUAL?

*David V. Wright**

INTRODUCTION

After many years of inconsistency in assessing greenhouse gas emissions (GHG) in federal environmental assessments,¹ integration of climate change considerations is now explicitly required under the new *Impact Assessment Act* (*IAA* or the Act).² The Act contains prominent climate-related requirements in both the assessment and decision-making phases.³ As one might expect, the statutory provisions themselves are relatively succinct; details are left to guidance that was not initially in place when the Act came into force in August 2019. In July 2020, the federal government released its final “strategic assessment on

climate change” (SACC),⁴ updated in October 2020,⁵ which contains the final guidance to support implementation of the Act’s climate change provisions. This article presents and discusses key features of this guidance, as well as remaining areas of uncertainty and concern.

Overall, the final SACC is an important step forward for implementation of the *IAA* as it provides some — but far from complete — clarity with respect to what the *IAA*’s climate change provisions will mean in practice. For example, as discussed below, the SACC will guide proponents in providing information regarding project-specific GHG emissions and the new 2050 net-zero emissions

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¹ See Mark Friedman, “Assessing Greenhouse Gas Emissions in the Oil Sands: Legislative or Administrative (in) Action?”, (2016) 6:3 *Western J Leg Studies* 5; See also Flavia Vierira de Castro, “Canada’s Climate Change Mitigation Commitments and the Role of the Federal Impact Assessment Act” (2020) 33:3 *J Envtl L & Prac* 211.

² *Impact Assessment Act*, SC 2019, c. 28, s 1, ss 22, 63 [*IAA*]; See also Toby Kruger, “The Canadian Environmental Assessment Act and Global Climate Change: Rethinking Significance” (2009) 47:1 *Alta L Rev* 161.

³ *Ibid*; For a general discussion of the new regime, see Evan W, Dixon et al, “Bill C-69: Introducing the Canadian Energy Regulator and the Impact Assessment Agency” (2019) 7:4 *Energy Regulation Q* 31, online (pdf): <www.energyregulationquarterly.ca/wp-content/uploads/2020/01/ERQ_Volume-7_Issue-4-2019.pdf>.

⁴ Canada, Environment and Climate Change Canada, *Final strategic assessment of climate change* (July 2020), online (pdf): <www.strategicassessmentclimatechange.ca/16736/widgets/65686/documents/40845>.

⁵ Canada, Environment and Climate Change Canada, *Revised Strategic Assessment of Climate Change* (October 2020) [SACC], online: <www.strategicassessmentclimatechange.ca/16736/widgets/65686/documents/40846>.

commitment,⁶ it explains what information must be provided with respect to emissions intensity and best-available technology, and it clarifies when upstream emissions data will be required. However, the guidance does not provide complete clarity, and there are several features that are cause for concern, particularly with respect to use of carbon offsets and the ability of a proponent to discuss how a project “may displace emissions internationally” without providing a downstream emissions analysis. Forthcoming technical guidance will no doubt provide further clarity on some of these areas. However, to the extent that one is looking to the SACC, and the *IAA* regime in general, as a tool for achieving Canada’s international climate change commitments, it remains uncertain how implementation of the *IAA* will assist Canada in achieving its commitments in respect of climate change. In many ways, the SACC sets a basis for business as usual.

BACKGROUND AND CONTEXT

Since the 2015 election, the Trudeau government has engaged in a number of initiatives to

address climate change and GHG emissions. These include the *Pan-Canadian Framework on Clean Growth and Climate Change*,⁷ *Canada’s mid-century long-term low-greenhouse gas development strategy*,⁸ a commitment to achieve net-zero emissions by 2050,⁹ accelerated phase out of coal-fired electricity,¹⁰ and inclusion of climate change considerations in the *Impact Assessment Act*. This set of initiatives aims to, among other things, put Canada on track to achieve its emissions reduction commitments in the Paris Agreement¹¹ and deeper reductions beyond.

After a lengthy and at times contentious law reform process,¹² which included input from the Canadian public, industry, experts, and Indigenous communities and individuals,¹³ the *IAA* came into force in August 2019, bringing with it the first ever explicit climate-related statutory provisions in the federal assessment regime. While the *IAA* does not represent a wholesale redesign of the previous regime under the *Canadian Environmental Assessment Act, 2012*,¹⁴ (*CEAA 2012*), one area of significant change is with respect to climate change considerations.

⁶ Environment and Climate Change Canada, News release, “Government of Canada releases emissions projections, showing progress towards climate target” (20 December 2019), online: <www.canada.ca/en/environment-climate-change/news/2019/12/government-of-canada-releases-emissions-projections-showing-progress-towards-climate-target.html>; See also Privy Council, “Speech from the Throne to open the First Session of the Forty-Third Parliament of Canada” (5 December 2019), online: <www.canada.ca/en/privy-council/campaigns/speech-throne/moving-forward-together.html>.

⁷ Environment and Climate Change Canada, *Pan-Canadian Framework on Clean Growth and Climate Change* (Gatineau, Quebec: Environment and Climate Change Canada, 2016) [Pan-Canadian report], online (pdf): [Government of Canada <publications.gc.ca/collections/collection_2017/eccc/En4-294-2016-eng.pdf>](http://publications.gc.ca/collections/collection_2017/eccc/En4-294-2016-eng.pdf).

⁸ Environment and Climate Change Canada, *Canada’s Mid-Century Long-Term Low-Greenhouse Gas Development Strategy* (Gatineau, Quebec: Environment and Climate Change Canada, 2016) [Gas Development Strategy], online (pdf): [Government of Canada <publications.gc.ca/collections/collection_2017/eccc/En4-291-2016-eng.pdf>](http://publications.gc.ca/collections/collection_2017/eccc/En4-291-2016-eng.pdf).

⁹ Jonathan Arnold & Nancy Olewiler, “Getting to zero: Canada plans to hit net-zero emissions by 2050. What’s next?” (21 January 2020), online (blog): [Canadian Institute for Climate Choices <climatechoices.ca/getting-to-zero-canada-plans-to-hit-net-zero-emissions-by-2050-whats-next>](http://climatechoices.ca/getting-to-zero-canada-plans-to-hit-net-zero-emissions-by-2050-whats-next).

¹⁰ Environment and Climate Change Canada, News release, “Canada’s coal power phase-out reaches another milestone” (12 December 2018), online: [Government of Canada <www.canada.ca/en/environment-climate-change/news/2018/12/canadas-coal-power-phase-out-reaches-another-milestone.html>](http://www.canada.ca/en/environment-climate-change/news/2018/12/canadas-coal-power-phase-out-reaches-another-milestone.html).

¹¹ *Paris Agreement*, 22 April 2016, Can TS 2016/9 (entered into force 4 November 2016) at Article 4(3) [Paris Agreement].

¹² See Government of Canada, “Environmental and Regulatory Reviews” (11 September 2019), online: <www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews.html> (Environment and Climate Change Canada explaining the law reform process and input); See e.g. Maura Forrest, “New environmental assessment process a compromise between industry, activists”, *National Post* (8 February 2018), online: <nationalpost.com/news/politics/government-reveals-far-reaching-new-review-process-for-major-resource-projects> (media coverage outlining some of the tensions in the law reform process).

¹³ See e.g. Canada, Canadian Environmental Assessment Agency, *Review of Environmental Assessment Processes* (2017), online (pdf): <s3.ca-central-1.amazonaws.com/ehq-production-canada/documents/attachments/649ccce3c9cfabb07a79b718f7c63837c735e322/000/007/065/original/Summary_of_What_Weve_Heard.pdf?1501167178>.

¹⁴ See Martin Olszynski, “In Search of #BetterRules: An Overview of Federal Environmental Bills C-68 and C-69” (15 February 2018), online (blog): [ABlawg <ablawg.ca/2018/02/15/in-search-of-betterrules-an-overview-of-federal-environmental-bills-c-68-and-c-69>](http://ablawg.ca/2018/02/15/in-search-of-betterrules-an-overview-of-federal-environmental-bills-c-68-and-c-69).

Specifically, the Act now includes explicit reference to climate change in the preamble:

Whereas the Government of Canada recognizes that impact assessment contributes to Canada’s ability to meet its environmental obligations and its commitments in respect of climate change...¹⁵

More consequentially, the Act explicitly requires that climate change considerations be taken into account during the assessment phase:

22 (1) The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors:

...

(i) the extent to which the effects of the designated project hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change.

The Act also makes climate considerations a core factor in final decision-making. Specifically, the *IAA* features a new public interest determination that turns on several explicit factors, one of which is climate change:

63 The Minister’s determination under paragraph 60(1)(a) in respect of a designated project referred to in that subsection, and the Governor in Council’s determination under section 62 in respect of a

designated project referred to in that subsection, must be based on the report with respect to the impact assessment and a consideration of the following factors:

...

(e) the extent to which the effects of the designated project hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change.

When the Act came into force it was unclear what these provisions would mean in practice — i.e. what information proponents would have to provide, how the Agency or review panel would use and assess that information, and how all of that analysis would then be used by decision-makers. With the July 2020 final SACC, and an unexpected update in October 2020,¹⁶ some clarity — but not complete clarity — has arrived. Further details are set to be released with forthcoming technical guides.¹⁷

Before moving on to discuss the structure and specific features of the SACC, it is important to point out that the SACC is a “strategic assessment” in name only. It does not resemble what typically constitutes a strategic assessment, which would, for example, include a comprehensive review of Canada’s existing and future policies, plans, and programs with respect to climate change and GHG emissions reductions.¹⁸ Rather, the SACC process was simply an exercise in developing guidance for implementing the provisions of the *IAA* that explicitly mention climate change.¹⁹ This narrow

¹⁵ *IAA*, *supra* note 2, preamble.

¹⁶ SACC, *supra* note 5.

¹⁷ *Ibid* at 4 (Section 2.2).

¹⁸ Robert B. Gibson, Karine Pélouff & Meinhard Doelle, “Challenges and Opportunities of a Forthcoming Strategic Assessment of the Implications of International Climate Change Mitigation Commitments for Individual Undertakings in Canada” (2018) 10:10 Sustainability 3747, DOI: <<https://doi.org/10.3390/su10103747>> (Providing an in-depth discussion of what the SACC might have looked like under a broader approach).

¹⁹ *IAA*, *supra* note 2, ss 22(1)(i), 63(e).

scope is evident in the opening description in the SACC executive summary (at i):

“This strategic assessment of climate change:

- describes the greenhouse gas (GHG) and climate change information that project proponents need to submit at each phase of a federal impact assessment;
- requires proponents of projects with a lifetime beyond 2050 to provide a credible plan that describes how the project will achieve net-zero emissions by 2050; and
- explains how the Impact Assessment Agency of Canada (IAAC) or lifecycle regulators, with support from expert federal authorities, will review, comment on and complement the climate change information provided by proponents.”

In other words, the SACC *does not*:

- take stock of Canada’s existing climate change laws, policies, plans and programs;
- review and assess what additional measures need to be put in place to achieve Canada’s Paris Agreement Commitment (30% below 2005 levels by 2030) and the goal of net-zero emissions by 2050;
- recommend or dictate what projects or types of projects ought to be assessed under the IAA (e.g. those that are most likely to have high GHG emissions);

- set out any kind of explicit ‘climate test’ that a project must satisfy in order to be approved; or²⁰
- consider tools of integrating the monetized costs of GHG emissions into the assessment process.²¹

To be fair, the 2016 *Pan-Canadian Framework on Clean Growth and Climate Change* does include a relatively thorough inventory of emission reduction measures across the country.²² However, that framework is already outdated, did not offer a detailed roadmap for future policies and tools, and included no mention at all of federal impact assessment let alone the role it is expected to play. In any event, whatever view one takes regarding what constitutes a proper strategic assessment, the Minister of Environment and Climate Change has now spoken. Pursuant to the deeming provision in section 95(2) of the *IAA*, Minister Wilkinson has deemed the SACC to be a strategic assessment under section 95(1) of the Act, meaning it must be taken into account at certain stages of the impact assessment process, including Ministerial designation of a project,²³ agency screening decisions,²⁴ and in the assessment itself.²⁵ This clears up any ambiguity that may have arisen due to the SACC being commenced prior to the *IAA* coming into force.

The remainder of this article sets aside these high-level concerns and focuses on the substance of the final SACC, offering commentary along the way.

STRATEGIC ASSESSMENT ON CLIMATE CHANGE

Basic Structure and Application

The final guidance will apply to all designated projects undergoing a federal impact

²⁰ Anna Johnston, “A strategic assessment, a climate test, and the spaces in between: who is left holding the SACC?” (19 August 2020), online (blog): *West Coast Environmental Law* <www.wcel.org/blog/strategic-assessment-climate-test-and-spaces-in-between-who-left-holding-sacc> (for discussion of climate test).

²¹ See David V. Wright & Meinhard Doelle, “Social Cost of Carbon in Environmental Impact Assessment” (2019) 52:3 UBC L Rev 1007.

²² Pan-Canadian report, *supra* note 7 at 9–26, Annex II.

²³ *IAA*, *supra* note 2, s 9(2).

²⁴ *Ibid* s 16(2)(e).

²⁵ *Ibid* s 22(1)(p).

assessment.²⁶ This would include projects on the project list under the *Physical Activities Regulations*²⁷ and any project designated by the Minister as requiring an assessment pursuant to section 9 of the *IAA*.²⁸ Proponents will be expected to provide an initial estimate in the initial project description submitted early in the planning phase,²⁹ and then more detailed updated information as part of the detailed project description that will inform the assessment phase.³⁰ The basic requirement to provide such information flows from the above-cited *IAA* provisions and *Information and Management of Time Limits Regulations*,³¹ which state that for both the initial and detailed project descriptions the proponent must provide “[a]n estimate of any greenhouse gas emissions associated with the project.”³² Early examples of such descriptions are observable in the first projects proceeding under the new Act,³³ such as the Gazoduq natural gas pipeline project.³⁴

To summarize at a high level, the final guidance provides details on what information must be submitted during each phase of the assessment process. The first substantive part of the guidance sets out how a proponent is to quantify a project’s GHG emissions, including with respect to “net emissions”³⁵ as well as upstream emissions.³⁶ It also clarifies that estimates of downstream emissions are not required.³⁷ The remaining parts of the guidance are set out sequentially according to each phase of the assessment process, from the planning

phase through to the post-decision phase.³⁸ Rather than walking through each phase, the balance of this article focuses on key features of the guidance, offering commentary throughout.

Emissions Intensity

Proponents will be required to estimate the GHG emissions intensity of a project for each year of the operation phase of the project.³⁹ This information will be used to “compare the project to similar high-performing, energy-efficient project types in Canada and internationally.”⁴⁰ The guidance invites proponents to explain why the emissions intensity of the project is different from comparators.⁴¹ While this type of information veers away from the pure megatonnes calculations required for the Agency and decision-makers to directly assess the extent to which the effects of the designated project hinder or contribute to the Government of Canada’s ability to meet its climate change commitments, it is presumably included to introduce some relativity in the assessment process that may inform Agency analysis of mitigation measures and development of project approval conditions. This requirement will no doubt increase the reporting burden on proponents; however, it should provide a more robust basis for the Agency to track the accuracy of operator forecasts and actual emissions throughout the operations phase. It may also encourage proponents to incorporate better technologies where feasible, which

²⁶ SACC, *supra* note 5.

²⁷ *Physical Activities Regulations*, SOR/2019-285.

²⁸ *IAA*, *supra* note 2, s 9.

²⁹ SACC, *supra* note 5 at 10.

³⁰ *Ibid.*

³¹ *Information and Management of Time Limits Regulations*, SOR/2019-283.

³² *Ibid.*, Schedule 1 at 23; Schedule 2 at 23.

³³ See e.g. Gazoduq Inc., “Gazoduq Project: Initial Project Description Summary” (October 2019), online (pdf): <ceaa-acee.gc.ca/050/documents/p80264/132884E.pdf>.

³⁴ Canadian Impact Assessment Agency of Canada, “Gazoduq Project” (1 September 2020) online: <iaac-aeic.gc.ca/050/evaluations/proj/80264>; For early observations, see Niall Fink & David V. Wright, “Climate Change in Federal Impact Assessment: An Early Look at Two Energy Projects” (28 August 2020) online (blog): *ABlawg* <ablawg.ca/2020/08/28/climate-change-in-federal-impact-assessment-an-early-look-at-two-energy-projects>.

³⁵ SACC, *supra* note 5 at 5 (As defined by the calculation set out in 3.1.1).

³⁶ *Ibid.* at 8–9 (Section 3.2).

³⁷ *Ibid.* at 5 (Section 3).

³⁸ *Ibid.* at 2.

³⁹ *Ibid.* at 5 (Section 3).

⁴⁰ *Ibid.* at 5 (Section 3.1.2); See also *ibid.* at 17 (Section 6).

⁴¹ *Ibid.* at 13 (Section 5.1.4).

complements the SACC direction to provide detailed consideration of best available technologies and best environmental practices (BAT/BEP).⁴²

Inclusion of emissions intensity in the SACC is a step forward in generating project-specific climate-related data; however, a close look at the formula for calculating emissions intensity raises a significant concern. The equation states: emissions intensity equals net GHG emissions divided by units produced.⁴³ This is problematic because, as discussed below, the final SACC allows for unlimited use of offset credits for the purposes of calculating net GHG emissions. This could render the emission intensity calculation meaningless because the GHGs per units produced would not actually represent the performance of the project itself. Instead, Equation 2 would generate more useful projections if it were as follows: emissions intensity equals net GHG emissions (*not including offset credits*) divided by units produced. This calculation would generate figures that allow for meaningful comparison of “the project to similar high-performing, energy-efficient project types in Canada and internationally.”⁴⁴ At the very least both calculations (i.e. with and without offsets) ought to be required. Perhaps the forthcoming technical guide on the quantification of net GHG emissions will correct this oddity.

Offset Credits

The SACC explains the role of offset credits in the *IAA* regime and directs proponents with respect to informational requirements. For example, the SACC explains that credits must be “sourced from a project that is registered in a Canadian regulatory offset program that aligns with the best practices outlined in the Canadian Council of Ministers of the Environment

Pan-Canadian Offsets Framework.”⁴⁵ This should provide proponents with a reasonably clear methodology for generating, using and calculating offset credits, and presumably further details will be provided in forthcoming technical guidance. As one would expect, the SACC also explicitly requires that offset credits must be verified “to a reasonable level of assurance.”⁴⁶ Offset credits are also distinct from “avoided domestic GHG emissions,” a concept that was significantly expanded in the October 2020 SACC revision to allow proponents to count non-project, “corporate level” action taken elsewhere in Canada as part of net emissions calculations.⁴⁷ The SACC also clarifies that credits must not be more than five years old, and must be issued on the basis that the GHG reductions and removals have already occurred.⁴⁸

The SACC also sets parameters on where the credits come from, and, in so doing, it explicitly speaks to the linkage between the *IAA* regime and the Paris Agreement. Specifically, the guidance indicates that offset credits must be sourced from offset projects within Canada unless the offsets “fully comply with rules for Internationally Transferred Mitigation Outcomes (ITMOs) established under Article 6 of the Paris Agreement, and applicable decisions adopted by the Conference of the Parties” and any further criteria developed by Environment and Climate Change Canada.⁴⁹ Article 6 is sometimes referred to as the “carbon markets” part of the Paris Agreement, and the emerging international rules will govern countries’ use of several mechanisms available for the purposes of meeting Paris targets (e.g. emissions trading and offset credits). An explicit aim of Article 6 is the “avoidance of double counting,” whereby two countries try to claim the same emissions reduction as their own.⁵⁰ The SACC provides helpful clarity on this issue by transparently presenting the linkage between the *IAA* regime

⁴² *Ibid* at 14 (Section 5.1.4.1).

⁴³ *Ibid* at 8 (Equation 2: Emission intensity calculation)

⁴⁴ *Ibid* at 8 (Section 3.1.2).

⁴⁵ *Ibid* at 7 (Section 3.1.1).

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ For a good overview, see Simon Evans & Josh Gabbatiss, “In-depth Q&A: How ‘Article 6’ carbon markets could ‘make or break’ the Paris Agreement” (29 November 2019) online: *CarbonBrief* <www.carbonbrief.org/in-depth-q-and-a-how-article-6-carbon-markets-could-make-or-break-the-paris-agreement>.

and the Paris Agreement rules. This is critical for avoiding double-counting. While Article 6 rules are still fluid and under development,⁵¹ this is a welcome explicit clarification in the SACC that presumably will be fleshed out further as the international rules and further *IAA* guidance are finalized.

Further on the point of double-counting, the SACC also clarifies that offset credits must not have been used for compliance with any other regulatory requirement, nor any other voluntary or compliance purposes.⁵² This appears to set the basis for credits generated under other federal or sub-national regimes to be used by proponents of designated projects so long as those credits have not been used for other compliance or voluntary programs.

The most surprising feature of the SACC regarding offsets comes from what is not included: limits on use. The SACC includes no limits on the amount of credits a project proponent can use to calculate net emissions. Where the draft SACC left some ambiguity around whether offset credits could be applied in calculating net emissions or whether they were confined to just mitigation measures,⁵³ the final SACC provides clarity by opening the door wide open to unlimited use of offset credits in calculating net emissions. Under this guidance, a proponent could theoretically use credits to offset all of a project's GHG emissions, thus achieving net-zero emissions today without actually changing the physical project as proposed. In a significant shift from the draft SACC, this feature of the final

guidance is in part facilitated by removal of the reference to ISO-14064⁵⁴ and The Greenhouse Gas Protocol, *A Corporate Accounting and Reporting Standard*,⁵⁵ which were included in the draft SACC.⁵⁶ Those standards would not actually permit such broad and unlimited reliance on offset credits in net-emissions calculations. For example, the GHG protocol states, “[t]he uncertainties that surround GHG project accounting make it difficult to establish that an offset is equivalent in magnitude to the internal emissions it is offsetting... This is why companies should always report their own internal emissions in separate accounts from offsets used to meet the target, rather than providing a net figure.”⁵⁷

At a broader policy level, unrestricted access to offsets in the *IAA* regime is likely to raise long-standing concerns around the use of GHG offsets, particularly with respect to credibility and verification of the emission reductions (i.e. does the credit actually represent real emission reductions?), fairness between regions that continue to emit and those that host the offset, and a perception that offsets allow jurisdictions and firms to carry on with carbon-intensive behavior.⁵⁸

Notwithstanding such concerns, offset programs are taking root in Canada, as outlined in a recent ECCC report setting out options for a federal GHG offset system.⁵⁹ In this context, the offset credit aspect of the *IAA* stands to have a significant impact both in terms of supply and demand for credits. For example, a large renewable energy project

⁵¹ Yamide Dagnet et al, "COP 25: What We Needed, What We Got, What's Next" (23 December 2019) online: *World Resources Institute* <www.wri.org/blog/2019/12/cop25-what-we-needed-what-we-got-whats-next>.

⁵² SACC, *supra* note 5 at 7 (Section 3.1.1).

⁵³ The text of the draft SACC was rather confusing on this point, but seemed to confine to only the latter (see *ibid* at 8).

⁵⁴ International Organization for Standardization, "ISO 14064-1:2018" (December 2018), online: <www.iso.org/standard/66453.html>.

⁵⁵ Greenhouse Gas Protocol, "A Corporate Accounting and Reporting Standard" (2015), online (pdf): <ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf>.

⁵⁶ Environment and Climate Change Canada, *Draft strategic assessment of climate change* (2019) at 6 (Section 3.1.1), online (pdf): *Government of Canada* <www.canada.ca/content/dam/eccc/documents/pdf/sacc/Draft_Strategic_Assessment_of_Climate_Change.pdf>.

⁵⁷ Greenhouse Gas Protocol, *supra* note 55 at 82.

⁵⁸ See this explainer for succinct overview: Umair Irfan, "Can you really negate your carbon emissions? Carbon offsets, explained." *Vox* (27 February 2020) online: <www.vox.com/2020/2/27/20994118/carbon-offset-climate-change-net-zero-neutral-emissions>.

⁵⁹ Environment and Climate Change Canada, *Carbon Pollution Pricing: Options for a Federal GHG Offset System*, (Gatineau, Quebec: Environment and Climate Change Canada, 2019) online (pdf): *Government of Canada* <www.canada.ca/content/dam/eccc/documents/pdf/climate-change/pricing-pollution/Options-GHG-Offset-System.pdf>.

reviewed under the *IAA* could likely generate credits by demonstrating emission reductions that are additional to what would have occurred in the absence of the project, and large conventional energy projects may well seek to use offset credits to reduce net emissions. There will be many details to work out in future technical guides, but this is a significant and consequential feature in the new *IAA* regime.

UPSTREAM EMISSIONS ASSESSMENT

The SACC employs a threshold-based approach that dictates whether a proponent is to prepare estimates of upstream GHG emissions.⁶⁰ These thresholds change each decade, lowering over time.⁶¹ For example in the 2020–2029 period, only projects with upstream emissions above 500 kt CO₂/year must complete an upstream emissions assessment. This threshold lowers to 300 kt CO₂/year in 2030–2039, 200 in 2040–2049, and 100 in 2050 and beyond. Whether an upstream assessment is required for a particular project will be definitively set out in the Tailored Impact Statement Guidelines issued by the IAAC at the end of the planning phase.⁶² Subject to significant breakthroughs in specific sectors and technologies, logic would suggest that the cascading thresholds will mean more projects will be required to conduct upstream assessments in decades to come. Presumably, this information will be helpful to the government as it monitors progress toward the 2050 commitment. Again, further guidance is forthcoming on upstream GHG emissions.⁶³ It should be noted that a proponent's plan to achieve net-zero emissions does not need to include upstream emissions,⁶⁴ and the final SACC confirms that downstream emissions

analyses are not required (though see related discussion below).⁶⁵

IMPACT OF THE PROJECT ON FEDERAL EMISSIONS REDUCTION EFFORTS AND GLOBAL GHG EMISSIONS

Under the final guidance, proponents must provide information regarding how the project could impact global GHG emission reductions and how it may impact Canada's efforts to reduce GHG emissions.⁶⁶ While this applies to all projects, the final SACC acknowledges that “[f]or some projects, there will be nothing to add in this section.”⁶⁷ Regarding the global emissions aspect, the guidance invites proponents to “describe how the project is likely to result in global emission reductions,” and then points to “a project that enables the displacement of high-emitting energy abroad with lower-emitting energy produced in Canada could be considered as having a positive impact.”⁶⁸

This feature of the SACC is interesting and concerning on several fronts. First, it creates dissonance within the guidance by on one hand scoping out analysis of downstream emissions⁶⁹ while on the other hand providing this basis for a proponent to selectively present data about a project's downstream impacts. For a proponent to comment on displacement of emissions internationally, they must engage in some degree of downstream emissions analysis with respect to their own products' emissions and with respect to the other jurisdiction's emissions. For example, if a proponent of a liquefied natural gas (LNG) export facility were to suggest that the project will result in

⁶⁰ SCAA, *supra* note 5 at 8 (Section 3.2: Upstream GHG emissions are defined as, “domestic and non-domestic emissions from all stages of production, from the point of resource extraction or utilization, to the project under review”).

⁶¹ *Ibid* at 9 (Table 1: Upstream GHG emissions thresholds for conducting an upstream GHG assessment).

⁶² *Ibid* at 11 (Section 4.2).

⁶³ *Ibid* at 4 (Section 2.2).

⁶⁴ *Ibid* at 16 (Section 5.3).

⁶⁵ *Ibid* at 5 (Section 3).

⁶⁶ *Ibid* at 13 (Section 5.1.3).

⁶⁷ *Ibid*.

⁶⁸ *Ibid*.

⁶⁹ *Ibid* at 5 (Section 3.1.1).

displaced emissions elsewhere,⁷⁰ that proponent must calculate the emissions from combusting the product and compare that figure to emissions that would have come from burning a different fuel source (e.g. coal). It is hard to see this as anything but an exercise in estimating downstream emissions.

Further, given that this part of the SACC is framed as optional,⁷¹ information generated under this part of the regime is likely to be imbalanced. The Agency, or review panel as the case may be, is likely to receive detailed information on this matter from projects where proponents expect ensuing emissions reductions downstream, whereas proponents of projects that are likely to increase emissions internationally would rationally choose to not comment on this aspect.

Finally, as ECCC and the Agency develop the more detailed guidance on these aspects of GHG calculations, it may be difficult to sustain this dissonance. One key aspect is how this project-specific “displacement” calculation (in addition to the above-described offsets dimension) relates to the international rulebook that is being negotiated to implement Article 6 of the Paris Agreement. In the new Canadian *IAA* context, subject to details emerging from the UNFCCC Conference of the Parties negotiations, ECCC and the Agency will need to ensure that if product from a Canadian project (e.g. LNG) results in emissions reductions in a foreign country (i.e. “displaces emissions internationally”) and that destination country claims those reductions for the purposes of achieving its own climate change commitments, then those same reductions must not be claimed by Canada for the purpose of achieving its

own reductions. Put another way, from a Paris Agreement rules perspective it may ultimately be fine for a Canadian project proponent to point to expected global emissions reductions benefits in a narrative way for the purposes of securing project approval in the domestic realm. However, Canada may not then count those foreign emissions reductions as emissions reductions achieved by Canada, nor should a Canadian project proponent expect to obtain the monetary value for those emissions reductions other than through whatever premium is already priced in by the global energy market. And it must be noted that all of this may be moot, given the tenuous nature of the assertion that exported Canadian LNG will actually result in global emission reductions.⁷²

Net-Zero by 2050

The Trudeau government has set a target of net-zero carbon emissions by 2050,⁷³ a target pledged by numerous jurisdictions around the world, including New Zealand, the United Kingdom, the EU, Japan and others.⁷⁴ This target now figures prominently in the *IAA* regime through incorporation into the final SACC, building on reference to Canada’s Paris Agreement commitments and Canada’s Mid-Century Long-Term Low-Greenhouse Gas Development Strategy.⁷⁵

The SACC directs “proponents of projects with a lifetime beyond 2050 to provide a credible plan to achieve net-zero emissions by 2050.”⁷⁶ This is then integrated throughout key stages of the *IAA* process. Specifically, the Tailored Impact Assessment Guidelines, which are issued at the end of the planning phase, will direct “[p]roponents of projects with a lifetime

⁷⁰ As has been asserted in recent years. See Peter Kent, “LNG Canada’s export terminal will enable coal-reliant customer nations to reduce GHG Emissions” (14 January 2019) online: *LNG Canada* <www.lngcanada.ca/news/lng-canadas-export-terminal-will-enable-coal-reliant-customer-nations-to-reduce-ghg-emissions-1>; See also Rob Shaw, “B.C. and Alberta find common ground on international LNG credits” *Vancouver Sun* (3 December 2019) online: <vancouver.sun.com/news/politics/b-c-and-alberta-find-common-ground-on-international-lng-credits>.

⁷¹ SACC, *supra* note 5 at 13 (Section 5.1.3; *could*).

⁷² See Jason Dion, “No Canada cannot get credit for its low-carbon exports” (17 June 2019) online: *Ecofiscal* <ecofiscal.ca/2019/06/17/no-canada-cannot-get-credit-low-carbon-exports>; see also “No, Canada can’t save the planet by exporting more natural gas” *The Globe and Mail* (12 December 2019), online: <www.theglobeandmail.com/opinion/editorials/article-no-canada-cant-save-the-planet-by-exporting-more-natural-gas>.

⁷³ Privy Council, *supra* note 6.

⁷⁴ Kelly Levin & Chantal David, “What Does “Net Zero Emissions” Mean? 6 Common Questions, Answered” (17 September 2019), online: *World Resources Institute* <www.wri.org/blog/2019/09/what-does-net-zero-emissions-mean-6-common-questions-answered> (twenty countries as of June 2020).

⁷⁵ See e.g. Pan-Canadian report, *supra* note 7; Gas Development Strategy, *supra* note 8.

⁷⁶ SACC, *supra* note 5 at 1.

beyond 2050” to “provide a credible plan for the project to achieve net-zero emissions by 2050.”⁷⁷ In the impact statement phase, proponents of such projects will be required to “provide a credible plan that describes how the project will achieve net-zero emissions by 2050” and that plan “will need to demonstrate how the net GHG emission[s]...will equal 0 kt CO₂e / year by 2050 and thereafter for the remainder of the lifetime of the project.”⁷⁸ Interestingly, the SACC also provides a basis for proponents to “identify any supportive actions by the Government that they would need in order to be able to achieve net-zero emissions...for example, identifying the need for the construction of a grid intertie to enable access to clean electricity.”⁷⁹

The October 2020 revision provided additional information regarding the “credible plan” concept, indicating that: “[a] net-zero plan does not need to describe every technology or practice the project will implement over time to achieve net-zero emissions...A net-zero plan should describe emissions reductions at specified intervals up to 2050 and seek to maximize absolute emissions reductions in the earlier years of a project’s lifespan.”⁸⁰ The revision also added that a credible plan “can refer to the corporate’s [*sic*] net-zero emissions plan.”⁸¹ This latter point revives a conclusion of the Kearn Oil Sands joint review panel, reconvened in 2008, finding that despite the proponent not developing a project-specific GHG management plan, the proponent’s corporate energy efficiency program along with other measures, were “an effective surrogate.”⁸² In this way, the October 2020 SACC revision to the net-zero guidance, coupled with the above-mentioned reference to corporate level action in relation to avoided domestic

GHG emissions, offers significant latitude for proponents to point to actions and operations far removed from the specific project at issue.

Turning to the assessment phase, which is when the content of the net-zero plans will be assessed, the SACC indicates that the “IAAC or the lifecycle regulator will review the proponent’s plan to achieve net-zero emissions by 2050 and will also consider the supportive government actions identified by the proponent in order for the project to be able to achieve net-zero emissions.”⁸³ In the decision-making phase, the SACC clarifies that conditions attached to a project approval “may also include a reporting program in which the proponent would demonstrate progress towards implementing these mitigation measures and the plan for reaching net-zero emissions by 2050 for projects with a lifetime beyond 2050.”⁸⁴ Similarly, in the post-decision phase, a proponent may be required “to report progress in implementing these GHG mitigation measures and in implementing the plan for reaching net-zero emissions by 2050 for projects with a lifetime beyond 2050.”⁸⁵ Surprisingly, the October 2020 revision stated that “[t]he submission of a plan that does not specify how a project will achieve net-zero emissions by 2050 will not disqualify a project from proceeding through the impact assessment process,” and that if such a without-plan project is approved the Minister may impose a project approval condition requiring updated plans from the proponent over time.⁸⁶

Taken together, these parts of the SACC clarify expectations of the regime in several ways. First, they clarify which project proponents need to provide information in relation to the 2050 commitment — only proponents of projects

⁷⁷ *Ibid* at 11 (Section 4.1.3).

⁷⁸ *Ibid* at 16 (Section 5.3).

⁷⁹ *Ibid*.

⁸⁰ *Ibid*.

⁸¹ *Ibid*.

⁸² Canadian Environmental Assessment Agency, “Joint Panel Report Kearn Oil Sands Project Addendum to EUB Decision 2007-013 Additional rationale for the joint review panel’s conclusion on air emissions” (6 May 2008), online: <aeic-iaac.gc.ca/052/document-html-eng.cfm?did=26766> (this was the finding of the joint review panel after it was forced to reconvene following the decision in *Pembina Institute for Appropriate Development v Canada (Attorney General)*, 2008 FC 302)

⁸³ SACC, *supra* note 5 at 17 (Section 6).

⁸⁴ *Ibid* at 18 (Section 7).

⁸⁵ *Ibid*.

⁸⁶ *Ibid* at 16–17 (Section 5.3).

with a lifetime beyond 2050. Second, they also describe in general terms what information such proponents must provide. Though there is ambiguity in the “credible plan” standard, the October 2020 revision provided additional details,⁸⁷ even if those additions further weakened the net-zero plan requirements (i.e. no plan actually required, and the plan may simply refer to a corporate net-zero emissions plan). Third, the requirements provide a formal basis upon which this information will be considered in the assessment and decision-making phases. As discussed below, however, it remains unclear precisely how the assessment and final decision-making will relate the project information to Canada’s ability to meet its commitments in respect of climate change, but the SACC at least articulates the general basis for doing so. Fourth, by indicating a link between reporting programs in project approval conditions and a proponent’s plan for reaching net-zero emissions, the SACC sets out a basis for ongoing monitoring and accountability that could ensure proponents follow through. Fifth, the SACC clarifies that the “commitments in respect of climate change” language in the *IAA* includes the new 2050 net-zero commitment. Finally, the SACC reveals that the federal government will, at least to some extent, use the *IAA* as a tool to pursue longer term emissions reductions by requiring that designated projects have a plan in line with the net-zero commitment.

ASSESSMENT OF GHG INFORMATION AND DECISION-MAKING

The SACC is relatively thin with respect to how all of the project-specific information will be reviewed and analyzed by the Agency,⁸⁸ and how the Governor in Council will then use the information in making a final decision as to whether the project is in the public

interest.⁸⁹ The guidance explains in quite general terms what is going to be done — i.e. review of the project’s GHG information, including mitigation measures, and relating of that information to Canada’s emissions “targets and forecasts.”⁹⁰ However, there is minimal information about *how* this will be done. Given that it is during these stages of the assessment process that the Agency and decision-makers will really be considering the core climate-related requirement of the *IAA* — i.e. “the extent to which the effects of the designated project hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change” — it is interesting to see such thin coverage, particularly with respect to the assessment phase.

Regarding the assessment phase, it is unclear how the Agency or review panel will conclude and formulate a recommendation on the extent to which any particular project contributes to or hinders Canada achieving its commitments with respect to climate change. While there are analytical approaches available such as carbon budgeting and decarbonization pathways,⁹¹ these are not mentioned in the guidance beyond reference to “Canada’s emissions targets and forecasts, such as Canada’s 2030 emissions targets, Canada’s Mid-Century Long-Term Low-Greenhouse Gas Development Strategy, and Canada’s goal for achieving net-zero emissions by 2050,”⁹² and an indication that the analysis “may include considering, for example, whether the project’s emissions are built into the sector projections in ECCC’s national forecast in Canada’s National Communications and Biennial Reports submitted to the United Nations Framework Convention on Climate Change.”⁹³ This dimension is also not listed as the focus of future technical guides.⁹⁴ Furthermore,

⁸⁷ *Ibid.*

⁸⁸ *Ibid* at 18 (Section 7).

⁸⁹ *Ibid.*

⁹⁰ *Ibid* at 17–18.

⁹¹ See detailed discussion Robert Gibson et al., “From Paris to Projects: Clarifying the implications of Canada’s climate change mitigation commitments for the planning and assessment of projects and strategic undertakings” (January 2019), online (pdf): <uwaterloo.ca/paris-to-projects/sites/ca.paris-to-projects/files/uploads/files/p2p_full_report_23jan19.pdf>; See also Meinhard Doelle, “Integrating Climate Change into Environmental Impact Assessments: Key Design Elements” (26 October 2018), online: SSRN <papers.ssrn.com/sol3/papers.cfm?abstract_id=3273499>.

⁹² SACC, *supra* note 5 at 17–18.

⁹³ *Ibid* at 17.

⁹⁴ *Ibid* at 4 (Section 2.2).

there is little additional detail provided in a new “policy context” document published by the Agency: *Policy Context: Considering Environmental Obligations and Commitments in Respect of Climate Change under the Impact Assessment Act*.⁹⁵ That document does explain that the Agency analysis will look at “whether a project’s effects could hinder or contribute to the Government of Canada’s ability to meet an environmental obligation or climate change commitment” and “the extent to which these effects could hinder or contribute to the Government of Canada’s ability to meet the applicable obligation or commitment.” However, it fails to meaningfully explain what parameters would be applied in such an analysis.

Regarding final decision-making, the thin detail in this regard is perhaps not surprising given considerations such as Cabinet confidentiality, the poly-centric nature of the *IAA* public interest determination, and the associated broad discretion granted by the Act. The Agency has also released the document *Policy Context: Public Interest Determination under the Impact Assessment Act*,⁹⁶ however, the discussion of climate change simply refers one back to the SACC and the other climate change policy context piece. While this lack of detail may make it challenging for the public, industry, and interested parties to understand how project-specific GHG information affect project approvals (or rejections) and associated approval conditions, over time these concerns should be addressed through the requirement under *IAA* section 65 for “detailed reasons” to accompany public interest determinations. It is speculative to say, but one might anticipate that future Governor in Council reasons accompanying a high-emitting oil and gas project could look like the description from the federal government explaining how carbon pollution from the TMX project “is already accounted for in Canada’s national emissions projections.”⁹⁷

CONCLUDING COMMENTS

In some ways, the SACC and resulting final guidance represent a significant step forward in the impact assessment realm. Jurisdictions around the world have struggled for many years with integrating climate change considerations into project-level assessments. Canada is now engaged in something of a trailblazing exercise and the SACC is an important part of the path ahead. Given that a key purpose of any project assessment regime is to generate information for informed decision-making, the final guidance will help guide proponents in generating detailed information that will serve as a key basis for decision-makers in determining whether a project is in the public interest. A number of highlights stand out, such as the direction to proponents with respect to emissions intensity, BAT/BEP, and upstream emissions.

However, there are significant reasons for concern. First and foremost, it remains unclear precisely how a project’s GHG information will be assessed by the Agency (or a review panel, as the case may be) and then used in final decision-making. The framework for such assessment, to the extent it is articulated in the SACC and other policy context documents, contains an enormous amount of room for the assessment to maneuver toward recommending that a project will not hinder achievement of Canada’s climate change commitments. There is also an enormous amount of room to maneuver for proponents, including unlimited use of offset credits in net emissions calculations, emissions intensity equation allowing offsets to be integrated into the net emissions figure, the exclusion of downstream emissions analysis while allowing for discussion of how a project “may displace emissions internationally,” and the ability of proponents to point to corporate level actions outside the scope of the project being assessed. Taken together, the content

⁹⁵ Impact Assessment Agency of Canada, “Policy Context: Considering Environmental Obligations and Commitments in respect of Climate Change under the Impact Assessment Act” (17 January 2020), online: *Government of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/considering-environmental-obligations.html>.

⁹⁶ Impact Assessment Agency of Canada, “Policy Context: Public Interest Determination under the *Impact Assessment Act*” (10 January 2020), online: *Government of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/public-interest-determination-under-impact-assessment-act.html>.

⁹⁷ Environment and Climate Change Canada, “Greenhouse gas emissions from the Trans Mountain project” (18 June 2019), online: *Government of Canada* <www.canada.ca/en/environment-climate-change/news/2019/06/green-house-gas-emissions-from-the-trans-mountain-project.html>.

of the SACC sets the stage for approval of carbon-intensive projects well into the future.

Putting all this in real terms, aside from generating additional GHG information (which, in fairness, does have value on its own) and feeding forthcoming domestic and international offset markets, the SACC structures the entire regime to more or less facilitate business as usual. As such, implementation of this part of the *IAA* does not stand to have a significant role in helping Canada meet its climate change commitments. Put another way, the SACC does not meaningfully act on the above cited preambular provision recognizing “that impact assessment contributes to Canada’s ability to meet its environmental obligations and its commitments in respect of climate change.” While project-level impact assessment was never likely to be the primary part of Canada’s climate change action (indeed there was no mention of it in the Pan-Canadian Framework), the new Act and the explicit climate change provisions raised expectations and provided a basis for the *IAA* to play a significant role.

In months and years to come, it will be interesting to observe implementation of the climate change-related requirements of the *IAA* as fleshed out in the final guidance. Unfortunately, a recent preliminary analysis suggests that the Agency has taken steps inconsistent with the final guidance by allowing proponents to sidestep information requirements in the planning phase of the assessment.⁹⁸ One would hope that practice improves in the near and long term. While the new regime is bound to experience growing pains, loose or weak implementation of the climate change provisions of the *IAA* risks undermining public confidence and regulatory certainty, values that were at the core of the law reform initiative that led to the *IAA*.⁹⁹ Forthcoming technical guidance

and the first five-year review of the SACC, coupled with federally legislated five-year emissions reduction milestones,¹⁰⁰ will be key opportunities for generating further clarity and coherence. As jurisdictions around the world work to implement the Paris Agreement, which is premised on a “managerial” approach to compliance that is rooted in trust and good faith efforts by all parties,¹⁰¹ the stakes are high and Canada needs to follow through on its commitments. ■

⁹⁸ See Fink & Wright, *supra* note 34.

⁹⁹ Justin Trudeau (Prime Minister of Canada), “Minister of Environment and Climate Change Mandate Letter” (12 November 2015), online: <pm.gc.ca/en/mandate-letters/2015/11/12/archived-minister-environment-and-climate-change-mandate-letter>.

¹⁰⁰ Environment and Climate Change Canada, News release, “Government of Canada releases emissions projections, showing progress towards climate target” (20 December 2019), online: *Government of Canada* <www.canada.ca/en/environment-climate-change/news/2019/12/government-of-canada-releases-emissions-projections-showing-progress-towards-climate-target.html>.

¹⁰¹ See Vegard Torstad, “Evaluating the Effectiveness of the Paris Agreement: An Integrative Approach” (January 2018), online: *ResearchGate* <www.researchgate.net/publication/326709177_Evaluating_the_Effectiveness_of_the_Paris_Agreement_An_Integrative_Approach>.

WHEN CLIMATE AND CONSTRUCTION COLLIDE: HOW NET ZERO LEGISLATION MIGHT BE USED TO CHALLENGE HIGH-EMITTING INFRASTRUCTURE PROJECTS

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INTRODUCTION

In the ever-evolving narrative of environmental law, the interplay between environmental legislation and the common law has become a central motif. The dialectic between these two forces invites a core dilemma: how will the steady march of jurisprudence, advanced incrementally by a judiciary staunchly guided by the cornerstone of *stare decisis*, confront environmental policies designed to radically shift human behaviour?

Some argue that the common law by its very nature is not nimble enough to respond to the multi-faceted and capricious policy issues inherent to the climate change arena. However, while judges cannot create policy, they are well-placed to hold governments to adhere to and account for policies once they are made.

Indeed, in many ways courts are best placed to be the arbiters of decisions that may run counter to public sentiment or are inherently

polarizing: the type with impacts not felt within our neat 4–5 year election cycles, but rather 20, 30, or 100 years into the future. Courts routinely make the difficult, unpopular, long-sighted, controversial decisions — a category which so aptly captures issues pertaining to climate change.

Of course, the *potential* for courts to fulfill this role is not the same as their *willingness* to do so. A recurring theme among judicial circles is, after all, a longstanding reluctance to engage in anything that could be construed as policy-making. As new policy trends emerge, courts are confronted anew with the contest between judicial activism, and judicial restraint.

One of the latest trends in environmental policy-making is “net zero” legislation.

As with any radical policy change, net zero legislation has resulted in certain flash points where this lofty long-term goal clashes with the more immediate demands of the present. These

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flash points have occurred most recently in the construction development space. In particular, net zero legislation has become a potential impediment to large-scale, high-emitting infrastructure projects thought to be massive enough to derail the achievement of net zero targets.

This paper offers a case study of one such flash point that occurred recently in relation to the construction of a runway at Heathrow Airport in London, England, where litigation arose out of a concern that the project would offend the United Kingdom's new net zero policy, and culminated in the Court of Appeal decision of *R (Friends of the Earth) v Secretary of State for Transport and others*¹ (the "Heathrow Case"). As net zero legislation is a relatively new phenomenon (and case law applying it is therefore scant), the Heathrow Case could be a harbinger of things to come on the net zero front. Based on the holdings from the Heathrow Case, combined with the existing Canadian jurisprudence considering environmental challenges to infrastructure projects, we offer an analysis of how Canadian courts may encounter similar challenges to infrastructure projects based on net zero policies and legislation.

THE RISE OF NET ZERO

To properly set the stage for the Heathrow Case, we must first understand the international policy matrix that underscores it.

On December 12, 2015, a new Paris Agreement on climate change was adopted by 195 states, plus the European Union.² Meinhard Doelle

provides a high-level summary of the Paris Agreement as follows:

...The Paris Climate Agreement was concluded in Paris in December, 2015, was ratified by Canada in short order, and came into force in November, 2016. It commits the global community to keeping global temperature increases to well below 2 degrees while making efforts to keep them to 1.5 degrees above the pre-industrial norm. It does this by mandating all member States to set nationally determined mitigation, adaptation, and finance contributions that will be subject to 5-year review cycles for global adequacy along with a commitment from States to increase their ambition over time. Canada's nationally determined contribution was set by the previous federal government and adopted by the present government at 17% below 2005 levels for 2020 and 30% for 2030.³

Since its adoption, much has been written about the Paris Agreement. As author Daniel Bodansky writes, "[t]he Paris Agreement has been hailed as "historic," a "landmark," the "world's greatest diplomatic success," a "big, big deal," citing a number of different news articles published on the heels of the adoption of the agreement.⁴ Of course, academics disagree on the degree of success the Paris Agreement is expected to herald in. For example, Bruce Pardy calls the Paris Agreement a "progressive fairy tale" and praises the United States withdrawal from it.⁵ Sandrine Maljean-Dubois and Matthieu Wemaere characterize it as "...a starting point of a new era of climate action."⁶ Lavanya Rajamani calls it "...a product of a

¹ [2020] EWCA Civ 214 [Heathrow Case].

² *The Paris Agreement*, 22 April 2016, Can TS 2016 No 9 (entered into force 4 November 2016) [*Paris Agreement*].

³ Meinhard Doelle, "Toward a Principled Design of Carbon Pricing Systems: Lessons from Nova Scotia's Proposal to Meet the Carbon Pricing Requirement in the Pan-Canadian Framework for Climate Change" (2018) 31 J Envtl L & Prac 293 at 295.

⁴ Daniel Bodansky, "The Paris Climate Change Agreement: A New Hope?" (2016) 110 Am J Intl L 288 at 289.

⁵ Bruce Pardy, "Paris is a Progressive Fairy Tale: In Praise of American Withdrawal" (2018) 32 J Envtl L & Prac 19.

⁶ Sandrine Maljean-Dubois & Matthieu Wemaere, "The Paris Agreement, a starting point towards achieving climate neutrality?" (2016) 10:1 Carbon and Climate Law Review 1 at 4.

deeply discordant political context” with a “carefully calibrated mix of hard, soft and non-obligations...”⁷ Robert Falkner calls it “...a major breakthrough in international climate diplomacy.”⁸ Clearly, the Paris Agreement has sparked a firestorm of discourse around what the next 50–100 years of climate policy should look like in order to transform the dire outlooks projected by the Intergovernmental Panel on Climate Change (IPCC).

While parsing the contents (and merits) of the Paris Agreement would (and does) fill an entire book,⁹ significant to this article is the Paris Agreement’s discussion on net zero targets.

Though the definition of “net zero” is far from universal, in general, net zero means a total output (accounting for offsetting) of zero emissions, where gross negative emissions match the gross positive emissions:

"Net zero" refers to achieving an overall balance between emissions produced and emissions taken out of the atmosphere. Like a bath with the taps on, an approach to achieving this balance can be either to turn down the taps (the emissions) or to drain an equal amount down the plug (removals of emissions from the atmosphere, including storage for the emissions such as "carbon sinks").

In contrast to a gross-zero target, which would reduce emissions from all sources uniformly to zero, a net-zero emissions target is more realistic because it allows for some residual emissions. These are emissions produced by "hard-to-treat" sectors where emission abatement is prohibitively expensive. These residual emissions are allowed as long as they are offset by gross negative emissions, achieved

by removing emissions using natural or engineered sinks. A situation of net-zero emissions then occurs when the gross negative emissions match the gross positive emissions.¹⁰

Article 4(1) of the Paris Agreement states as follows:

In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to **achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.**¹¹ [emphasis added]

As Robert Falkner describes, this Article invites signatory countries to adopt the ambitious goal of reaching carbon neutrality, or net zero emissions, between 2050 and 2100:

Significantly, the Paris Agreement also includes a long-term emissions goal, a key demand by civil society groups and developing countries. Article 4(1) states that ‘Parties aim to reach global peaking of greenhouse gas emissions as soon as possible’ and to achieve ‘a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century’. The notion of emissions balance, which was

⁷ Lavanya Rajamani, “The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations” (2016) 28:2 *J Envtl L* 337 (abstract).

⁸ Robert Falkner, “The Paris Agreement and the New Logic of International Climate Politics” (2016) 92:5 *Intl Affairs* 1107 at 1123.

⁹ See Daniel Klein et al, *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford: Oxford University Press, 2017).

¹⁰ Josh Burke, “What does Net Zero Mean?” (2 May 2019), online: <www.greenbiz.com/article/what-does-net-zero-mean>.

¹¹ *Paris Agreement*, *supra* note 2 at art 4(1).

referred to in an earlier draft of the treaty as ‘emissions neutrality’, suggests that GHG emissions will need to come down to a ‘net zero’ level between 2050 and 2100; UNEP had previously called for this to be achieved for CO₂ emissions by 2070. In contrast to the Kyoto Protocol, which lacked long-term targets, the Paris Agreement thus sends an important signal to global markets, and especially to institutional investors, though it is weakened by the lack of a specific timetable and uncertainty over the future use of carbon sinks. Achieving the Paris goals will require global investment in carbon sequestration programmes, but large-scale afforestation is bound to create food security concerns, while the technical and economic viability of carbon capture and storage remains uncertain.¹²

Wolfgang Obergassel et al review the lead-up to the inclusion of this Article as follows:

...In the climate negotiations, the [European Union] and [Independent Association of Latin America and the Caribbean] furthermore called for the achievement of zero net emissions of CO₂ and other long-lived greenhouse gases (GHGs) by the end of the century, while [Alliance of Small Island States] and the [least developed countries] called for global emission reductions of at least 70–90 per cent by 2050. Some [Small Island Developing States] also called for full decarbonisation by 2050. By contrast, in particular Arab and other oil exporting countries opposed including any language

on decarbonisation or emission neutrality at all.

The penultimate negotiation draft still included a reference to ‘reaching greenhouse gas emissions neutrality in the second half of the century’. In the final hours of negotiation, compromise language was included which had also been used in the Convention and practically represents a scientific definition of the term ‘greenhouse gas neutrality’. Parties agreed to:

...aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.¹³

By including this ambitious objective, the Paris Agreement prompted governments around the world to take action towards achieving net zero, ranging from actual legislative changes to the adoption of policy positions. For example, author Megan Darby’s worldwide review of net zero carbon goals included Austria, Chile, Denmark, Costa Rica, France, Japan, New Zealand, and several others.¹⁴ Included on the roster of countries that have made net zero commitments are Canada and the United Kingdom. However, while Canada’s net zero

¹² Falkner, *supra* note 8 at 1118.

¹³ Wolfgang Obergassel et al, “Phoenix from the Ashes: An Analysis of the Paris Agreement to the United Nations Framework Convention on Climate Change — Part II” (2016) 28:1 *Envtl L & Mgmt* 3 at 243.

¹⁴ Megan Darby & Isabelle Gerretsen, “Which countries have a net zero carbon goal?” (17 September 2020), online: *Climate Home News*: <www.climatechangenews.com/2019/06/14/countries-net-zero-climate-goal>.

by 2050 target remains a policy direction,¹⁵ the United Kingdom has actually enshrined theirs into law.

On June 12, 2019, an order (the “Order”)¹⁶ was laid before the British Parliament to amend section 1(1) of the *Climate Change Act (CCA)*¹⁷ to include a target for at least a 100 per cent reduction of greenhouse gas emissions (compared to 1990 levels) by 2050 (the earlier wording had a target of 80 per cent).¹⁸ As Chris Skidmore, UK Minister for Energy and Clean Growth, stated on the Floor of the House of Commons, the Order “...would constitute a legally binding commitment to end the United Kingdom’s contribution to climate change.”¹⁹

The Order came into force on June 27, 2019 pursuant to section 2(1) of the *CCA* which allows for the Secretary of State to amend the target (either the percentage or the baseline year) through secondary legislation.²⁰ The Order was inspired by the Committee on Climate Change’s May 2, 2019 report, which recommended the legislative change.²¹

THE HEATHROW CASE

A) Factual Background

The Heathrow Case revolves around the longstanding debate among Londoners about whether the Heathrow Airport should be expanded to include a third runway. As author Christopher Clement-Davies notes, “[t]he debate about a new runway has raged on for well over a decade now. Talk about the need for new capacity at Heathrow dates back to

the 1960s...”²² As the Court of Appeal notes, the proposed addition has become intensely political due to rising environmental concerns clashing with economic ones.

Heathrow is a major international airport – the busiest in Europe, and the busiest in the world with two runways. Each year it handles about 70% of the United Kingdom’s scheduled long-haul flights, 80 million passengers, and up to 480,000 air traffic movements. Gatwick is the busiest single runway airport in the world and each year handles about 11% of the United Kingdom’s scheduled long-haul traffic. If the United Kingdom is to maintain its status as a leading aviation “hub”, it is argued that its aviation capacity must increase. Whether this increase in capacity should be supported in national policy, and in particular whether it should involve the construction of a third runway at Heathrow, has long been a matter of political debate and controversy, intensified by concerns over the environmental cost of achieving it, and more recently by the concerted global effort to combat climate change by reducing carbon emissions...²³

On June 26, 2018, the Government enacted a policy called the Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England (the “ANPS”) designated by the

¹⁵ Environment and Climate Change Canada, News Release, “Government of Canada releases emissions projections, showing progress towards climate target” (20 December 2019), online: *Government of Canada* <www.canada.ca/en/environment-climate-change/news/2019/12/government-of-canada-releases-emissions-projections-showing-progress-towards-climate-target.html>.

¹⁶ *Climate Change Act 2008 (2050 Target Amendment) Order 2019* (UK), SI2019/1056.

¹⁷ *Climate Change Act* (UK), 2008 c 27.

¹⁸ Sara Priestley, “Net zero in the UK” (December 16, 2019), *House of Commons Library*, at 1.

¹⁹ HC Deb 24 June 2019, vol 662, col. 506.

²⁰ UK, House of Commons, *Net zero in the UK* (Briefing Paper No CBP8590) at 7 by Sara Priestley (London: House of Commons Library, 2019).

²¹ Committee on Climate Change, “Net Zero: the UK’s contribution to stopping global warming” (2 May 2019), online (pdf): <www.theccc.org.uk/wp-content/uploads/2019/05/Net-Zero-The-UKs-contribution-to-stopping-global-warming.pdf>.

²² Christopher Clement-Davies, “A third runway at Heathrow? Understanding the Court of Appeal’s decision” (2020) *Intl Energy L Rev* 1 at 1-2.

²³ Heathrow Case, *supra* note 1 at para 2.

Secretary of State for Transport pursuant to section 5 of the *Planning Act 2008*.²⁴ Significantly, section 5(8) of the *Planning Act* requires the Secretary of State, in making designations, to take into account government policy:²⁵

5(1) The Secretary of State may designate a statement as a national policy statement for the purposes of this Act if the statement

(a) is issued by the Secretary of State, and

(b) sets out national policy in relation to one or more specified descriptions of development.

(8) The reasons must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change.

On the same day, the Secretary of State published “The Airports National Policy Statement: Post Adoption Statement” explaining how environmental considerations and consultation responses had been taken into account.

This policy designation became the subject of judicial review by five local authorities, the Mayor of London, Greenpeace Ltd, Friends of the Earth Ltd and Plan B Earth.²⁶

B) Analysis

The Heathrow Case dealt with appeals from judicial reviews on a number of different issues as follows:

The main issues for us to decide, as agreed by the parties, fall into four groups: first, issues on the

operation of EC Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (“the Habitats Directive”); second, issues on the operation of EC Council Directive 2001/42/EC on the assessment of the effect of certain plans and programmes on the environment (“the SEA Directive”); third, issues relating to the United Kingdom’s commitments on climate change; and fourth, relief.²⁷

For our purposes, the relevant portions of the Court of Appeal’s analysis deal with the climate change issues, which the Court summarized as follows:

184. The issues concerning the United Kingdom’s commitments on climate change can conveniently be simplified, and dealt with, under four principal headings: “Climate change issues (3), (4), (5) and (6) – did the Government’s commitment to the Paris Agreement constitute government policy on climate change, which the Secretary of State was required to take into account?”; “Climate change issue (1) – whether the designation of the ANPS was unlawful because the Secretary of State acted in breach of section 10(3) of the *Planning Act*”; “SEA Directive issue (4) – whether the Secretary of State breached the SEA Directive by failing to consider the Paris Agreement”; and “Climate change issue (2) – did the Secretary of State err in his consideration of non-CO₂ impacts and the effect of emissions beyond 2050?” (see paragraphs 12 and 13 above).

185. As we have said, the Climate Change Act set a “carbon target” for the United Kingdom to reduce its greenhouse gas emissions by 80%

²⁴ *Ibid* at para 3.

²⁵ *Planning Act* (UK), 2008 c 29, s 5(8).

²⁶ Elisa de Wit, Noni Shannon & Sonali Seneviratne, “Climate change commitments lead to invalidity of Heathrow Airport extension policy” (28 February 2020), online: *Norton Rose Fulbright* <www.nortonrosefulbright.com/en/knowledge/publications/74cb9a68/climate-change-commitments-lead-to-invalidity-of-heathrow-airport-extension-policy>.

²⁷ Heathrow Case, *supra* note 1 at para 10.

from their level in 1990 by 2050 (section 1). This was consistent with the global temperature limit in place in 2008, which was 2°C (see paragraph 17 above). In contrast, the Paris Agreement enshrines a firm commitment to restricting the increase in the global average temperature to “well below 2°C above preindustrial levels and pursuing efforts to limit the temperature increase to 1.5°C above preindustrial levels” (article 2(1)(a)) (see paragraph 23 above).

186. It is common ground that the Secretary of State did not take the Paris Agreement into account in the course of making his decision to designate the ANPS.²⁸

The Court of Appeal found on the evidentiary record that “...it was the Government’s expressly stated policy that it was committed to adhering to the Paris Agreement to limit the rise in global temperature to well below 2°C and to pursue efforts to limit it to 1.5°C.”²⁹ It went on to set out in detail how this clearly formed part of the UK’s “government policy” that had to be taken into account according to the plain wording of section 5(8) of the *Planning Act*:

228. In our view, the Government’s commitment to the Paris Agreement was clearly part of “Government policy” by the time of the designation of the ANPS. First, this followed from the solemn act of the United Kingdom’s ratification of that international agreement in November 2016. Secondly, as we have explained, there were firm statements re-iterating Government policy of adherence to the Paris Agreement by relevant Ministers, for example the Rt. Hon. Andrea

Leadsom MP and the Rt. Hon. Amber Rudd MP in March 2016.

229. It is important to stress that this means no more than that the executive must comply with the will of Parliament, as expressed in the terms of section 5(8).

230. Furthermore, it simply requires the executive to take account of its own policy commitments. After all, the acts of negotiating, signing and ratifying an international treaty are all acts which under the British constitution are entrusted to the executive branch of the State – the Crown. This distinction between the functions of the Crown and Parliament is what underlies the dualist character of our legal system (see, for example, the speech of Lord Oliver of Aylmerton in *J. H. Rayner (Mincing Lane) Ltd.*, at p.500) and explains why the ratification of an international treaty cannot, without more, change domestic law; if it could, the Crown would be able to change the law of this country without the consent of Parliament. But requiring the Crown to comply with what has been enacted by Parliament (in this case the obligations in section 5(8) of the *Planning Act*) is an entirely conventional exercise in public law.

231. We repeat that the duty in section 5(8) does not even require the executive to conform to its own policy commitments, simply to take them into account and explain how it has done so.³⁰

The Court of Appeal ultimately held that the Secretary of State’s failure to take the Paris Agreement into account at all “...was enough to vitiate the designation.”³¹ Importantly, the Court of Appeal held that taking the Paris Agreement into account included the

²⁸ *Ibid* at paras 184–86.

²⁹ *Ibid* at para 216.

³⁰ *Ibid* at paras 228–31.

³¹ *Ibid* at para 233.

consideration of the effects of emissions beyond 2050:

Mr. Maurici submitted that the effect of emissions beyond 2050 was a matter closely bound up with the aspiration in the Paris Agreement to achieve net zero greenhouse gas emissions in the second half of this century. He submitted, by reference to the witness evidence of Ms. Low, that it would be sensible to assess the impact of airport expansion against current climate change targets and that, as and when carbon reduction targets are developed for the post-2050 period, all those concerned will have to comply with the obligations which result when, and to the extent that, they apply. This point is closely related to the fundamental submission made by Mr. Maurici, that there was no obligation on the Secretary of State to take into account the Paris Agreement at all. For the reasons we have already given, we reject that submission. It follows therefore that these two additional aspects of the case, being closely bound, as Mr. Maurici submitted they are, with the Paris Agreement issue, will need to be considered in the exercise that the Secretary of State must perform according to law.³²

An appeal of the Heathrow Case to the Supreme Court is now pending.³³

Needless to say, this is an extremely new decision, and it is unclear how future courts will rely upon the Court of Appeal's holdings in relation to climate change. However, the commentary emerging on the Heathrow Case is indicative of the fact that it may very well be a watershed case for the common law's enforcement of international climate change commitments in relation to large-scale

infrastructure projects. For example, Edward Mitchell writes as follows:

Aside from the implications for construction of a third runway at Heathrow, the case has implications for both the designation of future NPSs and for the review of other extant NPSs. The case will clarify if the PA 2008 obliges the Secretary of State to take into account international commitments to which the Government has expressed a "policy of adherence" when deciding to designate future NPSs. The case will be important for extant NPSs because a court can consider a challenge to a decision by the Secretary of State not to carry out a review. At the time of writing, three possible claimants have indicated that they will challenge any failure to review the NPSs for major energy infrastructure projects following the CCA Amendment. That claim may be strengthened if the Supreme Court agrees that designation of the ANPS was unlawful: the Secretary of State might then be required to consider whether the Paris Agreement would also have made a material difference to the basis on which policy in the energy NPSs was decided.

...

The legal implications of the 2015 Paris Agreement and the UK's commitment to decarbonisation and climate change mitigation are gradually being worked out. The case discussed here will not compel UK Government Ministers to avoid decisions that might be incompatible with the UK's domestic and international decarbonisation and climate change mitigation commitments. However, the case will confirm if the Secretary of State should, when he decided to designate the ANPS, have considered

³² *Ibid* at para 256.

³³ See *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd*, UKSC 2020/0042; See also *R (on the application of Friends of the Earth Ltd and others) v Arora Holdings Ltd*, UKSC 2020/0047, online (pdf): <www.supremecourt.uk/docs/permission-to-appeal-2020-05.pdf>.

the policy in that statement in the context of the commitments in the Paris Agreement. This might have important implications for the designation of other NPSs if the court's judgment suggests that the Secretary of State should consider international commitments to which the Government has expressed a "policy of adherence". Alongside other current litigation, the case will also clarify the relevant considerations when the Secretary of State either decides to review a designated NPS or applies the policy in a designated NPS to grant development consent for a major infrastructure project.³⁴

Some consider the potential impact on the approval of infrastructure projects to be significant. One legal update from Norton Rose Fulbright on the Heathrow Case stated as follows:

This decision has the potential to have broad implications for the approval and financing of large infrastructure projects. It illustrates that where required by statute to consider climate change policies in making planning instruments or determining approvals for major infrastructure projects, decision-makers may be required to consider any commitments made under international agreements such as, the Paris Agreement. This is the case even where those commitments are stricter than the commitments adopted under domestic laws. However, the weight given to those commitments will be a matter for the decision-maker.³⁵

Of course, commentators have been quick to contain the scope of the Heathrow Case, and point out the fact that the decision was purely

procedural and not policy-driven. For example, Christopher Clement-Davies writes as follows:

Somewhat predictably, the Court of Appeal's ruling met with some over-excited misinterpretations. It was handed down to a packed courtroom that exploded with delight at the result (*sic*). Campaigners outside hailed it as "historic" and "amazing". "It shows that the Paris Agreement has teeth", said one excited demonstrator on television. This view was echoed by an assistant professor of law at Leiden University in Holland, Margareta Wewiruka, who thought that the decision could have "global implications". "For the first time, a (*sic*) court has confirmed that the Paris Agreement's temperature goal of pursuing efforts to keep warming below 1.5C has binding effect", she said. She concluded that it could "inspire similar litigation in other countries that have signed the Paris Agreement". Some of the environmental campaigners in court seem to have interpreted the judgment as a form of general policy statement designed to block any further airport expansion in the UK.

It was, of course, nothing of the sort. It is not for the courts to make policy on behalf of governments or citizens, or to reach their own conclusions about what steps should be taken to tackle the climate emergency. The judgment was about a procedural question, on judicial review, not a substantive policy one...³⁶

Indeed, the Court of Appeal itself was quick to qualify its decision in this respect as well:

...[the judicial review proceedings] do not face us with the task of deciding whether and how Heathrow should be expanded. That is not the kind of decision that courts can make, and is ultimately a political

³⁴ Edward Mitchell, "Climate change and nationally significant infrastructure projects" (2020) 22:2 Environmental L Rev 125 at 131–32.

³⁵ de Wit, *supra* note 26.

³⁶ Clement-Davies, *supra* note 22.

question for the Government of the day. Rather, we are required to consider whether the Divisional Court was wrong to conclude that the Government's policy in favour of the development of a third runway at Heathrow was produced lawfully. That is the question here. It is an entirely legal question.³⁷

However, no matter how curtailed the court and commentary is, there remains much anticipation for the Supreme Court's decision. And while the specific legislative matrix in question in the Heathrow Case was endemic to the United Kingdom, countries around the world share the UK's stated policy of curtailing emissions to net zero by 2050, including Canada. As such, an interesting question is whether courts in Canada, where a similar policy statement regarding net zero emissions has been made, will follow the Court of Appeal's lead in the Heathrow Case, and if so, what that may mean for the approval of large-scale, high-emitting infrastructure projects.

POTENTIAL IMPLICATIONS IN CANADA

A) Policies will Not Cut It

The Heathrow Case is of course not binding law in Canada. Also, Canada has yet to have a decision such as the Heathrow Case decided, where a large-scale infrastructure project approval is overridden on the basis that it failed to take net zero emissions policy into account.

Canada has had a series of cases decided by courts and regulatory boards where infrastructure projects are halted due to the government's failure to take certain environmental considerations into account. However, they have been reluctant to recognize policies based on unimplemented international obligations as binding on government decision-makers.

The UK Court of Appeal made the leap from legislation to policy. That is, they held that the UK Government's commitment to the Paris

Agreement was part of "Government policy" based on the fact that the Paris Agreement had been ratified, and based on the fact that the Government had made "firm statements re-iterating Government policy of adherence to the Paris Agreement by relevant Ministers."³⁸

This leap from holding governments to account for policies enacted in furtherance of international environmental agreements that have not been incorporated into domestic legislation has not been one that Canadian courts or regulatory boards have yet been willing to take.

The traditional approach taken by Canadian courts to international environmental agreements was described by author Elizabeth Brandon as follows:

Until more recently, Canadian judges and litigators have made only limited use of international law in legal argument, particularly in the area of environmental litigation. Toope notes that, despite Canada's internationalist self-perception, it lags behind other developed states in recognizing the direct relationship between international law and domestic law...³⁹

Michael Slattery describes the basis for this traditional approach as one grounded in the principle of crown prerogative:

The inherent nature of a Crown prerogative is that it is discretionary. Originally a right exclusive to the King of England, the prerogative has evolved over time to become a common law power exclusive to the executive. The exercise of the prerogative, however, has been maintained as reviewable by courts under certain circumstances since the seventeenth century. According to Hogg, Monahan, and Wright, judicial review of the Crown's exercise of the prerogative follows a consistent pattern of investigation.

³⁷ Heathrow Case, *supra* note 1 at para 2.

³⁸ *Ibid* at para 228.

³⁹ Elizabeth Brandon, "Does International Law Mean Anything in Canadian Courts?" (2001) 11 J Envtl L & Prac 399 at 401.

First, the courts will determine whether a prerogative power asserted by the Crown does in fact exist and, if so, establish its limits and whether those limits have been complied with, and whether the power has been displaced by statute. Second, the courts will require not only that prerogative powers be exercised in accordance with the Canadian Charter of Rights and Freedoms and other constitutional rules, but also that administrative law rules such as limits on delegation and the duty of fairness be observed.⁴⁰

Slattery goes on to discuss how the principle of crown prerogative effectively estops courts from weighing into commitments made under international treaties, which traditionally have been seen as pure policy decisions that fall beyond the review of the courts:

This emissions target policy would be the one to be litigated under an Urgenda-style theory. Problematically, the Supreme Court of Canada in *Just v. BC* made it clear that “[t]he duty of care should apply to a public authority unless there is a valid basis for its exclusion. A true policy decision undertaken by a government agency constitutes such a valid basis for exclusion.” Indeed, the Prime Minister’s ratification of the Paris Agreement and commitment to a corresponding GhG emissions target is an exercise of the Crown’s prerogative power in international matters. Absent legislation giving effect to the commitment, this exercise of the prerogative in relation to a commitment made under a treaty appears to be a pure policy decision of the executive falling beyond the review of the courts....⁴¹

The “Urgenda” case Slattery mentions is another novel decision out of the Netherlands wherein a Dutch non-profit successfully sued the Government of the Netherlands for having a negligently inadequate climate change emissions reduction target.⁴² Notably, as Slattery summarizes, the Netherlands court linked its negligence analysis to the Government’s commitments under international environmental law:

One can read the case as a decision with three novel elements. First, the court found it had the authority to review the state’s GHG emissions policy. Second, it developed a duty of care specific to climate change emissions standards, which interweaves private and public law principles. Third, its analysis linked international, European, and national law together into a continuous legal chain to establish the standard of care.⁴³

This reluctance to find policies based on unimplemented international environmental treaties is prevalent in the Canadian jurisprudence. Author Natasha Affolder describes this reticence by summarizing several cases where courts, in reviewing government approvals of infrastructure projects, are either silent on, or expressly dismissive of, arguments based on international environmental law.⁴⁴ For example, Affolder notes the Federal Court’s silence in *Pembina Institute for Appropriate Development v Canada (Minister of Fisheries and Oceans)*,⁴⁵ which involved a challenge to the regulatory approval granted to an open pit coal mine a few kilometres outside Jasper National Park:

The Pembina Institute, along with other regional, provincial, and national conservation groups represented by the Sierra Legal Defence Fund (together, the “Conservation

⁴⁰ Michael Slattery, “Pathways from Paris: Does Urgenda Lead to Canada?” (2017) 30:3 J Envtl L & Prac 241 at 262–63.

⁴¹ *Ibid* at 261–62.

⁴² *Ibid* at 243.

⁴³ *Ibid* at 245.

⁴⁴ Natasha Affolder, “Domesticating the Exotic Species: International Biodiversity Law in Canada” (2006) 51:2 McGill LJ 217.

⁴⁵ 2005 FC 1123.

Groups”), sought an order to quash the project authorization and to compel the Department of Fisheries and Oceans to prepare an environmental assessment of project modifications. In their submissions, the Conservation Groups argued that the Federal Government’s 2004 authorization of the first part of the mine should be quashed because of the mine’s potential to destroy sensitive migratory bird habitat in violation of the *Migratory Birds Convention Act*. Their argument advanced a purposive interpretation of the *Migratory Birds Convention Act* reflective of Canada’s commitments under the Migratory Birds Convention to not only protect species, but also the “lands and waters on which they depend.” The Conservation Groups argued that the *Migratory Birds Convention Act* should be interpreted in a manner consistent with Canada’s international obligations, and an interpretation that fulfills Canada’s treaty commitments should be preferred over one that does not...

...In rejecting the Conservation Groups’ applications, the Federal Court was entirely silent on these points of international law and the presumption of legislative conformity.⁴⁶

Affolder also notes the case of *Wellington Centre and Malpeque Bay Concerned Citizens Committee Inc. v Prince Edward Island (Minister of Environment)*,⁴⁷ which involved an application for judicial review of an approval of a new waste management facility. Affolder notes that despite hearing arguments that the environmental assessment that was conducted failed to consider Canada’s obligations under the Ramsar Convention (an international convention for the protection of wetlands),

Justice Jenkins held that there was no duty upon the responsible minister to do so:

Justice Jenkins of the Prince Edward Island Supreme Court held that the Minister’s decision was not patently unreasonable, that appropriate considerations were addressed, and that “[t]he consultant and the Minister had no duty to make special mention regarding the Ramsar Convention.”⁴⁸

B) Legislation Setting Net Zero Targets

It is fairly clear from the Canadian jurisprudence that courts are unwilling to hold governments to policy statements based on unimplemented international environmental obligations. However, domestic legislation expressly setting out actual net zero emissions targets will almost certainly create obligations on the part of government decision-makers to consider those targets when rendering approval decisions in relation to infrastructure projects.

For example, Nova Scotia’s new *Sustainable Development Goals Act*,⁴⁹ (*SDGA*) sets out the following net zero emissions target:

The Government’s goals in relation to greenhouse gas emissions reductions are that greenhouse gas emissions in the Province are

- (a) by 2020, at least 10 per cent below the levels that were emitted in 1990;
- (b) by 2030, at least 53 per cent below the levels that were emitted in 2005; and
- (c) by 2050, at net zero, by balancing greenhouse gas emissions with greenhouse gas removals and other offsetting measures.

⁴⁶ Affolder, *supra* note 44 at 225–26.

⁴⁷ [1996] 148 Nfld & PEIR 41, [1996] PEIJ No 104.

⁴⁸ Affolder, *supra* note 44 at 227.

⁴⁹ SNS 2019, c 26.

While the *SDGA* has yet to be considered by any court or tribunal, it may present an avenue for environmental groups to by-pass the obstacle of crown prerogative that has shielded government decision-makers from scrutiny for failing to consider international environmental obligations when approving infrastructure projects.

In the Heathrow Case, the UK Court of Appeal held that a government policy based on the Paris Agreement was sufficient to require the Minister in that case to take into account the Paris Agreement. With the *SDGA*, there will be an actual legislated target.

As noted by Elizabeth Brandon, domestic legislation brings the treaty into direct legal effect in the implementing jurisdiction:

The challenges of Canada's federal system aside, it is possible to make extensive use of a treaty once it is considered implemented into domestic law. When specific implementing legislation is in place, the treaty immediately becomes of direct legal effect to domestic law. It follows that the provisions of the treaty that have been reproduced in the relevant statute would be applied directly by the courts in the same manner as ordinary legislation. If an ambiguity in the statute should arise, one is entitled to seek clarification from the treaty itself, viewing the document as a whole to understand the context in which it was created.

...

There is often uncertainty as to whether a treaty has been implemented, or the extent of its implementation (whether partial or full). While it is difficult to ascertain the exact legal status of these treaties, at a minimum they remain relevant to the process of statutory interpretation. A treaty that has been partially implemented — for example, where its provisions have been emulated in domestic legislation or its goals met

through policy measures — may even be viewed as directly applicable. While the direct applicability may be restricted to those provisions implemented, the rest of the treaty must be considered as part of the legal context and thus relevant.⁵⁰

Brandon goes on to note that, while traditionally the domestic legislation had to incorporate the relevant international treaty by express language in the legislation, this traditional view has since evolved:

As noted above, the traditional approach to implementation of international law insists that specific implementing legislation is required for a treaty to have domestic effect. However, as van Ert observes, judicial thinking has now evolved to the point where an implementing statute need not make any mention at all of the treaty it implements. He contends that “the task of determining whether an act seeks to implement a treaty is no different than that of discerning the legislature’s intent more generally.” Thus a statute that does not rely directly on the text of the treaty but simply effects legal changes adequate to fulfill Canada’s treaty obligations, would be acceptable.⁵¹

The *SDGA* does not contain express language incorporating the Paris Agreement. However, when introducing the *SDGA* for second reading in the House of Assembly, Nova Scotia Minister of the Environment, the Honourable Gordon Wilson, expressly stated that the goals thereunder were chosen based on the recommendations by the United Nations Intergovernmental Panel on Climate Change:

These goals, Mr. Speaker, are based on science. **We choose them because they are in line with recommendations made by the United Nations Intergovernmental Panel on Climate Change.** They ensure that Nova Scotia continues to do its fair share to fight climate

⁵⁰ Brandon, *supra* note 39 at 407.

⁵¹ *Ibid* at 409.

change. The legislation also directs us to plan for how we will achieve these important goals. By the end of next year, we will produce a new climate change strategy to set out exactly how we will do that.⁵² [emphasis added]

of large-scale, high-emitting infrastructure projects, and will provide environmental groups with another tool in their arsenal for challenging project approvals. ■

It is much too soon to tell how the *SDGA* will be relied upon in Nova Scotia. However, based on the fact that the Nova Scotia government clearly intended to enact legislation that would follow from the recommendations from the United Nations, there could be an argument that the *SDGA* incorporates the Paris Agreement. Beyond this, and quite apart from whether it brings international environmental law into domestic operation, the *SDGA*'s net zero target will almost certainly be relied upon by environmental groups as a basis to challenge approvals of large-scale, high-emitting infrastructure projects. In short, it provides a clear statutory foothold for such arguments that the law has staunchly resisted when they were based solely on unimplemented international obligations, or mere government policy.

CONCLUSION

There is a clear desire for stronger and clearer environmental targets. However, the judiciary's role in helping to enforce the government's adherence to these targets remains to be seen. However, based on the Heathrow Case out of the UK, coupled with the growing trend of the implementation of net zero policies and legislation, the volume of net zero-related litigation is likely to grow exponentially over the next decade. This will raise a number of challenging issues for lawyers and courts alike navigating this new category of environmental policy/legislation. Beyond the jurisdictional and policy-related issues, there is also a question of remoteness: how is a court to discern whether a certain infrastructure project today will place the government in contravention of its net zero obligations which project 50 years into the future? Also, as net zero includes carbon offsets in its equation, there is a further element of remoteness introduced. However, one thing is certain: net zero targets will almost certainly create yet another hurdle for proponents

⁵² Nova Scotia, House of Assembly, *Hansard Debates and Proceedings*, 63-2, No 19-62 (24 October 2019) at 4661.

THE NEW WORLD OF CLIMATE CHANGE AND ESG DISCLOSURE

*Elisabeth DeMarco, Jonathan McGillivray and Daniel Vollmer**

The COVID-19 pandemic is anticipated to trim global economic growth by 3–6 per cent in 2020, result in levels of unemployment not experienced since the Great Depression of the 1930s, and curtail global trade by 13–32 per cent.¹ Virtually all of the governments of the more than 200 countries affected by the pandemic have enacted fiscal and/or monetary policies that are intended to facilitate economic recovery from the pandemic. Many of those policy responses and economic stimuli have “green strings” in the form of enhanced climate change and environmental, social, and governance (ESG) disclosure obligations. Canada is no exception.

On May 11, 2020, the federal Government released the Large Employer Emergency Financing Facility (LEEFF), to provide Canada’s largest employers² that are impacted by the COVID-19 pandemic with liquidity relief. Companies are required to demonstrate a long-term commitment to addressing climate change and commit to publishing annual climate-related financial reports in accordance with the Task Force on Climate-related Financial Disclosures (TCFD). The government’s stated

intent of mandating TCFD was to ensure that recipient corporations are (i) thinking about the challenges that climate change will pose to the company’s future and have a response for it, and (ii) disclosing their climate footprint, and the related challenges that they may face to their shareholders. While there is no reported uptake of the LEEFF to date, its existence and its climate-related disclosure obligations are consistent with recovery programs in other jurisdictions.

The EU has also tied its economic recovery programs to stronger climate-related financial disclosure and support for the goals of the Paris Agreement. On May 27, 2020 the EU released its Next Generation EU Plan, which basis the EU economic recovery largely on the EU New Green Deal and includes climate disclosure obligations.³ It includes a €750 billion recovery plan that relies heavily on sustainable and digital transitions to COVID-19 economic recovery and climate resilience. The spending will be guided by a sustainable finance taxonomy (the “Taxonomy”) aimed to channel private investments into technologies and solutions that contribute to at least one of six pre-defined

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¹ Congressional Research Service, “Global Economic Effects of COVID-19” (21 September 2020), online (pdf): <fas.org/sgp/crs/row/R46270.pdf> (“**CRS COVID Report**”).

² The LEEFF program will be open to large for-profit businesses – with the exception of those in the financial sector – as well as certain not-for-profit businesses, such as airports, with annual revenues generally in the order of \$300 million or higher. To qualify for LEEFF support, eligible businesses must be seeking financing of about \$60 million or more, have significant operations or workforce in Canada, and not be involved in active insolvency proceedings; See Prime Minister of Canada, News Release, “Prime Minister announces additional support for businesses to help save Canadian jobs” (11 May 2020), online: <pm.gc.ca/en/news/news-releases/2020/05/11/prime-minister-announces-additional-support-businesses-help-save>.

³ See European Commission, Press Release, “Europe’s moment: Repair and prepare for the next generation” (27 May 2020), online: <ec.europa.eu/commission/presscorner/detail/en/ip_20_940>.

environmental objectives: (i) climate change mitigation, (ii) climate change adaptation, (iii) sustainable use and protection of water and marine resources, (iv) transition to a circular economy, (v) pollution prevention control, and (vi) protection and restoration of biodiversity and ecosystems.⁴ The taxonomy sets performance thresholds for economic activities. The standards and thresholds set are anticipated to inform the EU's proposed carbon border adjustment mechanism (CBAM) and shape new tariffs on higher emission products imported into the EU.⁵ In Canada, the Canadian Standards association is also developing a Green Taxonomy for sustainable finance.⁶

All of these recovery plans include climate disclosure obligations consistent with the recommendations of financial leaders including Mark Carney, the former governor of the Bank of England, who has identified the recovery from COVID-19 as a “chance to avoid returning to the status quo.”

This article outlines the existing requirements and developing trends in climate-related and ESG financial disclosure in Canada and other jurisdictions during this time of COVID-19 economic recovery. We postulate

that enhanced climate related financial disclosures and standards may form the basis for sector specific GHG emission standards and potential carbon-related border measures. We expect similar requirements to emerge in this increasingly trade protectionist context that is shaping the global pandemic economic recovery and the Paris Agreement pathway to a carbon neutral world in or around 2050.

I. EXISTING REQUIREMENTS FOR CLIMATE-RELATED FINANCIAL RISK DISCLOSURE

There are a number of climate related standards and requirements,⁷ but global consensus appears to be emerging around the TCFD.⁸ Support for the TCFD has grown to include over 1,027 organizations, with a market capitalization of over \$12 trillion as of the beginning of 2020.⁹ TCFD requires climate-related disclosure in four core areas¹⁰:

1. **Governance.** Disclose the organization's governance around climate-related risks and opportunities. The guidance affirms that the tone from the top is critical. A recent legal opinion for the Climate Law Initiative confirmed that directors are legally obligated to address climate

⁴ See EU Technical Expert Group on Sustainable Finance, “Taxonomy” (2020), online (pdf): <ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200309-sustainable-finance-teg-final-report-taxonomy_en.pdf>.

⁵ See European Commission, “Commission launches public consultations on energy taxation and a carbon border adjustment mechanism” (23 July 2020), online: <ec.europa.eu/taxation_customs/news/commission-launches-public-consultations-energy-taxation-and-carbon-border-adjustment-mechanism_en>.

⁶ See Canadian Standards association, “Sustainable Finance-Defining Green Taxonomy for Canada” (24 April 2019), online: *Standards Council of Canada* <www.scc.ca/en/standards/notices-of-intent/csa/sustainable-finance-defining-green-taxonomy-for-canada>.

⁷ The Financial Stability Board's Task Force on Climate-related Financial Disclosure (TCFD), the Sustainability Accounting Standards Board (SASB), the United Nations Sustainable Development Goals (SDGs), Canada's Expert Panel on Sustainable Finance (Expert Panel), the World Bank's Principles of Responsible Investment (PRI), the Carbon Disclosure Project (CDP), the Climate Disclosure Standards Board (CDSB), the Global Real Estate Sustainability Benchmark (GRESB)/Green Building Certification Institute (GBCI), the Global Reporting Initiative (GRI), the Science Based Targets Initiative (SBT), and Renewable Energy 100 (RE 100).

⁸ Task Force on Climate-related Financial Disclosures (TCFD) was established by the Financial Stability Board to develop voluntary, consistent climate-related financial risk disclosures for companies to use when providing information to investors, lenders, insurers and other stakeholders. Sustainability Accounting Standards Board (SASB) is an independent, non-profit private sector standards-setting organization dedicated to enhancing the efficiency of capital markets by fostering high-quality disclosure of industry-specific sustainability information. United Nations Sustainable Development Goals (SDGs) are a collection of 17 goals set by the United Nations General Assembly to be a blueprint to achieve a better and more sustainable future for all by addressing the global challenges we face, including those related to climate change, poverty, inequality, environmental degradation, peace and justice.

⁹ Task Force on Climate-Related Financial Disclosures, “TCFD Supporters” (September 2020), online: <www.fsb-tcfd.org/tcfd-supporters>.

¹⁰ Task Force on Climate-related Financial Disclosures, “Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures” (June 2017) at 18, online (pdf): <assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf>.

change risk and opportunities as part of their oversight of the companies they serve.¹¹ In the context of climate change risks, directors and officers that exhibit conscious disregard or wilful ignorance of the material financial risks of climate change may be liable for breach of their fiduciary duty of trust and duty of loyalty.¹² Failure to consider climate change risks may lead to liability and actions against the corporation, and in some cases, personal liability for directors and officers.¹³ Accordingly, securities disclosure requirements necessitate that material risks associated with climate change be disclosed. Stakeholders, broadly defined, are increasingly demanding that directors and officers understand, measure, mitigate, and report on the risks associated with climate change.

2. **Strategy.** Disclose the actual and potential impacts of climate-related risks and opportunities on the organization's businesses, strategy, and financial planning where such information is material.
3. **Risk Management.** Disclose how the organization identifies, assesses, and manages climate-related risks.
4. **Metrics and Targets.** Disclose the metrics and targets used to assess and manage relevant climate-related risks and opportunities where such information is material.

Canadian Securities Administrators (CSA) and the Ontario Securities Commission (OSC) have each promulgated instruments supporting

climate-related financial risk disclosure. The CSA issued Staff Notice 51-358 Reporting of Climate Change-related Risks (the "Notice") in August 2019, which expressly cites the TCFD recommendations and provides guidance on preparing disclosure of material climate-related risks.¹⁴ The Notice follows and expands upon CSA Staff Notice 51-333 Environmental Reporting Guidance, issued in 2010.¹⁵

The Notice was motivated by (i) increased investor interest, (ii) room for improvement in disclosure, and (iii) domestic and global developments, including the recommendations of the TCFD and domestic voluntary disclosure frameworks. It organizes climate-related risks into two categories:

1. Physical risks which are acute (event-driven), and chronic (longer-term shifts in climate patterns).
2. Transition risks which include reputational, market, regulatory, policy, legal, and technological risks.

The Notice recognizes that climate risks are difficult to quantify but encourages: (i) issuers to carefully consider if they have any material exposure to climate risks; and (ii) boards and management to adopt relevant, clear, and understandable entity-specific disclosure of how the business is specifically affected by all material risks resulting from climate change.

The OSC has emphasized that "companies already have an obligation to disclose material environmental and governance information," and has committed to "continue to monitor the appropriateness of disclosure being provided"

¹¹ Canada Climate Law Initiative & Hansell LLP, "Putting Climate Change Risk on the Boardroom Table" (25 June 2020), online (pdf): <law-ccli-2019.sites.olt.ubc.ca/files/2020/06/Hansell-Climate-Change-Opinion-1.pdf>.

¹² See *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69; See also *Peoples Department Stores Inc. (Trustee of) v Wise*, 2004 SCC 68.

¹³ Janis Sarra & Cynthia Williams, "Directors' Liability and Climate Risk: Canada - Country Paper" (April 2019) at 13, online (pdf): *Commonwealth Climate and Law Initiative* <www.smithschool.ox.ac.uk/research/sustainable-finance/publications/CCLI-Canada-Paper-Final.pdf>.

¹⁴ Canadian Securities Administrators, "Staff Notice 51-358: Reporting on Climate Change-related Risks" (1 August 2019), online (pdf): *Ontario Securities Commission* <www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20190801_51-358_reporting-of-climate-change-related-risks.pdf>.

¹⁵ Canadian Securities Administrators, "Staff Notice 51-333: Environmental Reporting Guidance" (27 October 2010), online (pdf): *Ontario Securities Commission* <www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20101027_51-333_environmental-reporting.pdf>.

and “determine the need for a regulatory response” to the TCFD.¹⁶

II. DEVELOPING TRENDS IN CLIMATE CHANGE RELATED OVERSIGHT AND DISCLOSURE

Over 1,010 companies have committed to taking science-based targets toward achieving a maximum of 1.5 degrees of global warming in accordance with the Science Based Targets initiative and guidance documents for various sectors, including the financial sector.¹⁷ A number of large multinationals including Unilever, Microsoft, Mars, Maple Leaf Foods, Google, Nike, HSBC, Swiss Re have committed to making their business operations carbon neutral. And any number of entities are purchasing carbon offsets in the voluntary carbon market in order to achieve those targets. These developments herald a new age of climate commitment veracity that are certain to require additional climate-related financial disclosures to both shareholders, investors, and ultimately, end-use customers.

While standards do exist for the voluntary carbon markets,¹⁸ a number of new initiatives are pushing toward enhanced standardization, harmonization and transparency. These initiatives address some but not all potential customer confusion around net zero, carbon neutrality, carbon offsets and include:

- The Mark Carney lead Task Force on Scaling Voluntary Carbon Markets;¹⁹
- The Environmental Defence Fund and ENGIE initiatives around the voluntary market;²⁰ and

- The International Organization for Standardization (ISO) 14030 initiatives around green finance.²¹

There are a breadth of issues, terminologies, and a corresponding increase in demand for corporate entities to achieve the goals of the Paris Agreement, even in the face of a member state’s failure to do so. As a result, we do not see the demand for increased standardization and climate related disclosure diminishing. In fact, it is our view that it is only a matter of time before the TCFD requirements and related carbon consumer protection standards become mandatory. The increasing interest of consumer protection agencies and competition/anti-trust bodies also signals the growing trend.

We expect this trend to follow a hockey stick increase in importance should the Taxonomy and/or the related ISO standards be used to support border measures including the CBAM set out in EU New Green Deal and/or carbon border related measures in other jurisdictions. In conclusion, the “carbon writing on the wall” is clear: enhanced climate related disclosures are here to stay and will increasingly become a part of stakeholder expectations and integrated financial disclosures. ■

¹⁶ Ontario Securities Commission, “Notice 11-781: Notice of Statement on Priorities for Financial Year to End of March 31, 2019” (5 July 2018), online (pdf): <www.osc.gov.on.ca/documents/en/Securities-Category1/sn_20180705_11-781_rfc-sop-end-2019.pdf>.

¹⁷ See Science Based Targets, “Meet the companies already setting their emissions reduction targets in line with climate science” (2020), online: <sciencebasedtargets.org/companies-taking-action>.

¹⁸ See e.g. International Carbon Reduction & Offset Alliance (ICROA), online: <www.icroa.org>; Verified Carbon Standard (Verra), online: <verra.org/project/vcs-program>; American Carbon Registry (ACR), online: <americancarbonregistry.org>; Climate Action Reserve (CAR), online: <www.climateactionreserve.org>.

¹⁹ Taskforce on Scaling Voluntary Carbon Markets, “Private Sector Voluntary Carbon Markets Taskforce Established to Help Meet Climate Goals” (2 September 2020), online: *Institute of International Finance* <www.iif.com/tsvcm/Main-Page/Publications/ID/4061/Private-Sector-Voluntary-Carbon-Markets-Taskforce-Established-to-Help-Meet-Climate-Goals>.

²⁰ Environmental Defence Fund, “Committed to Net Zero? Navigating the Post-Paris Voluntary Carbon Market with Your Sanity Still Intact” (21 September 2020), online (pdf): <www.edf.org/sites/default/files/content/MVCM%20Climate%20Week%20NYC%20Event%20Brochure.pdf>.

²¹ International Organization for Standardization, “Climate Change Mitigation” (October 2020), online (pdf): <www.iso.org/files/live/sites/isoorg/files/store/en/PUB100271.pdf>.

ENABLING BILATERAL CONTRACTING IN ONTARIO'S ELECTRICITY MARKET

*Nathan Lev**

INTRODUCTION

Nearly two decades after Ontario deregulated “hydro” and introduced a competitive wholesale electricity market, Ontario’s electricity industry continues to grapple with how to efficiently and reliably ensure resource adequacy for electricity consumers.¹ Indeed, the costs associated with Ontario’s electricity system have been repeatedly scrutinized, and the Independent Electricity System Operator (IESO) continues to consult the industry on implementing additional resource adequacy mechanisms, mainly capacity auctions and competitive procurement by Requests for Proposals (RFP).² Currently, Ontario relies on the combination of rate-regulated heritage resources, a wholesale spot market, and government-backed contracts to meet provincial resource adequacy requirements, which are set by the North American Electric Reliability Corporation (NERC). This paper

posits that Ontario’s resource adequacy framework would benefit from enabling a robust bilateral contracting market where demand-side participants, specifically loads and retailing entities, contract for their own electricity supply needs.³ For clarity, bilateral contracts are contracts entered into for the purchase and sale of electricity or electricity-related products, typically between a generator as one party and an offtaker (i.e., purchaser of a production facility’s output) as the counterparty.⁴ A robust bilateral market is an efficacious and cost-effective resource adequacy mechanism because first, it enables demand-side participants (i.e., loads and retailing entities) to add to system capacity by acting as offtakers providing secure revenues for the development of new resources. And second, demand-side participants can provide additional revenue streams for existing resources that are economically managed, enabling them to stay in operation longer and deferring the need for

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¹ Resource adequacy is the ability of the electric grid to reliably produce and deliver electricity to Ontario’s consumers (e.g., residential, commercial & industrial, government, etc.). Deregulation refers to the implementation of the *Energy Competition Act, 1998*, SO 1998, c 15 as it appeared on 30 October 1998, which restructured Ontario’s electricity supply chain by breaking up the vertically integrated Ontario Hydro and creating an independent system operator to administer a spot market.

² IESO, “Resource Adequacy Engagement” (28 September 2020), online (pdf): <www.ieso.ca/-/media/Files/IESO/Document-Library/engage/rae/ra-20200928-presentation.pdf?la=en>.

³ Loads refers to commercial, industrial, institutional (i.e., large) electricity consumers. Retailing entities refers to both electricity distributors with standard supply obligations and commercial retailers.

⁴ An electricity-related product may be electric energy, capacity (including demand response), ancillary services such as reserves and frequency regulation, or some combination of those (See Ezra Hausman, Rick Hornby & Allison Smith, “Bilateral Contracting in Deregulated Electricity Markets: A Report to the American Public Power Association” (18 April 2008), online (pdf): *Synapse Energy Economics* <citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.179.1344&rep=rep1&type=pdf>; In addition to the physical products described, bilateral contracts can be used for financial hedging as forward contracts).

the construction of new resources, which is generally more costly. As a result, enabling a robust bilateral market should be considered as an additional resource adequacy mechanism for Ontario in the IESO's Resource Adequacy consultation, and one that is complementary to existing and planned resource adequacy mechanisms in Ontario. This paper proceeds by first elaborating on how a robust bilateral contracting market is an effective resource adequacy mechanism because it supports the development of new resources when needed and defers the need for new resources if there are existing cost-effective resources available, followed by an examination of Ontario's bilateral market under the existing resource adequacy framework where the IESO is the only viable contractual counterparty in Ontario, and finally presenting how a robust bilateral market can work in Ontario by addressing obstacles arising out of Ontario's system cost allocation and industry structure.

BILATERAL CONTRACTING SUPPORTS THE DEVELOPMENT OF NEW RESOURCES AND EXTENDED OPERATION OF COST-EFFECTIVE EXISTING RESOURCES

A robust bilateral contracting market as envisioned in this paper entails increased activity for the purchase and sale of electricity or related products transacted through bilateral contracts between generators and loads or retailing entities as counterparties. These contracts typically contain legal terms addressing duration of contract, price of performance, times of performance, delivery location, and other terms which may be applicable to the transaction.⁵ For example, it is typical for Power Purchase Agreements (PPAs), a common type of bilateral contract, to contain a contractual term spanning 10–25 years. As the development of new generation resources often require stable, multi-year revenues to obtain project financing, bilateral contracts are an effective tool for supporting new resources. Indeed, in its report to the American Public Power Association on the role of bilateral contracting in deregulated U.S.

electricity markets, Synapse Energy Economics found that the development of new resources has been supported on the basis of long-term contracts.⁶ For example, Load Serving Entities (LSEs) in the U.S. enter into bilateral contracts with generators as part of integrated system planning to secure capacity for their mandated standard supply obligations. Further, loads and competitive retailers use bilateral contracts to hedge against spot price volatility by securing a long-term fixed energy price directly from a generator; this activity is especially prevalent in jurisdictions with energy-only markets such as Alberta and Texas, where spot price volatility is high.

Collectively, this type of transactional activity is referred to as a bilateral market, and unless a transaction is subject to a regulatory proceeding (e.g., part of integrated system planning or designing a standard offer program), the terms are often kept confidential between the parties to the contract. Moreover, bilateral contracts are increasingly being used by companies and utilities to secure bundled renewable energy in support of corporate sustainability and policy (e.g., renewable portfolio standards) objectives, respectively. In fact, from 2016–2019 it is approximated that the development of an additional 20 GW of renewable energy capacity has been supported by corporate offtakers in the U.S.⁷ Many of these contracts contain terms spanning 8–12 years, which have proven viable for obtaining financing and supporting the development of new resources.

Without long-term contracts or regulated rates, developers depend on merchant opportunity, characterized by sufficiently high spot market revenues, or capacity payments to recover capital costs for new resources. While the IESO plans to implement a capacity auction (CA) starting December 2020, the current design only contemplates a 1-year commitment period, as opposed to the multi-year revenues often required for new resources.⁸ Further, since deregulation Ontario has been using long-term government-backed contracts to de-risk the development of new resources through

⁵ Hausman, *supra* note 4.

⁶ *Ibid* at 11.

⁷ Renewable Energy Buyers Alliance, "Deal Tracker", (last visited June 2020), online: <rebuyers.org/deal-tracker>

⁸ IESO, "Market Manual 12.0: Capacity Auctions" (16 September 2020), online (pdf): <www.ieso.ca/-/media/Files/IESO/Document-Library/Market-Rules-and-Manuals-Library/market-manuals/capacity-auction/Capacity-Auction.pdf?la=en>.

fixed-price or out-of-market settlements to support cost recovery, which along with over-procurement of supply resources has contributed to diminishing merchant opportunities.⁹

Furthermore, existing resources require periodic capital investment throughout their lifetime to maintain reliable operation. This means that in the absence of sufficient merchant opportunity, existing resources also require additional revenue streams to recover the costs of incremental investment required to maintain operation, otherwise be “mothballed” (i.e., cease operations and take their capacity off the system) if not profitable. This way a robust bilateral market provides additional liquidity for generators to acquire necessary revenue streams following the expiration of any initial contracts. By extending the operation of existing resources that are economically managed, a robust bilateral market can defer the need for the construction of new resources, which is generally more costly and carries with it the additional risk of becoming stranded.

While capacity markets were introduced in several deregulated U.S. jurisdictions specifically to address this issue by providing additional revenue through capacity payments, a robust bilateral market offers at least two advantages.¹⁰ First, freely negotiated bilateral contracts allow for better price discovery, as the purchaser is able to indicate its willingness to pay as opposed to a capacity auction, which uses a demand curve based on a target reserve margin and a reference price, where the reference price is a proxy for the cost of new entry of a reference resource (e.g., simple cycle gas turbine is most common). Second, there is long-standing criticism that capacity

markets over-procure resources and lead to overall cost increases. To illustrate this point consider evidence put forward during the Alberta Utilities Commission’s capacity market proceeding (23757).¹¹ In analyzing the Alberta Electric System Operator’s (AESO) proposed demand curve parameters, ENMAX, supported by the Market Surveillance Administrator (MSA), found that the capacity market would clear an excess of 127–443 MW of capacity resulting in \$401 million to \$1.134 billion per year more capacity cost to Alberta.¹²

The following section will discuss the current condition of Ontario’s bilateral market.

ONTARIO’S BILATERAL MARKET UNDER THE EXISTING FRAMEWORK AND THE IESO AS THE ONLY VIABLE COUNTERPARTY

Under the current statutory framework, The Minister of Energy (currently, Minister of Energy, Northern Development and Mines (MENDM)) and the IESO are responsible for system planning.¹³ The IESO administers a competitive wholesale market and assists the MENDM in preparing a Long-Term Energy Plan (LTEP) by publishing planning documents such as outlooks and forecasts, and identifying system needs. Meanwhile, the MENDM is statutorily required to publish LTEPs every 3 years, although a proposed amendment has been issued to revoke the timing requirement.¹⁴ It also possesses the authority to direct the IESO (by issuing Ministerial Directives) to engage in competitive procurement initiatives or directly enter into contracts with generators or electricity service providers. The latter mandate was adopted by the IESO as it was merged by statutory amendment with the

⁹ Despite the retirement of Ontario’s coal fleet, the procurement of over 4000 MW of near-zero marginal cost resources significantly contributed to decreasing the average hourly wholesale price.

¹⁰ Capacity markets were introduced to address the “missing money problem,” as it is known in the economic literature. The main U.S. jurisdictions where capacity markets were introduced are ISO-NE, PJM, and NYISO.

¹¹ On June 4, 2020 the United Conservative Party reversed the previous government’s mandate to implement a capacity market, which ended the proceeding.

¹² ENMAX Energy Corporation, “Rebuttal Evidence” (22 May 2019), online (pdf): <www2.auc.ab.ca/Proceeding23757/ProceedingDocuments/23757_X0517.01_23757-X0517.012019-05-23RevisedRebuttalE_0877.PDF#search=23757%2DX0517%2E01> (AUC Exhibit Number 23757-X0517.01).

¹³ The current statutory framework is governed by the *Electricity Act, 1998*, SO 1998, c 15, Schedule A and *Ontario Energy Board Act, 1998*, SO 1998, c 15, Schedule B, as amended by the *Electricity Restructuring Act, 2004*, SO 2004, c 23, and *Energy Statute Law Amendment Act, 2016*, SO 2016, c 10.

¹⁴ The MENDM filed a proposed amendment in the Environmental Registry of Ontario to revoke *Long-term Energy Plans*, O Reg 355/17, which sets the timeframe for publishing the LTEP and is consulting on further changes: ero.ontario.ca/notice/019-2149.

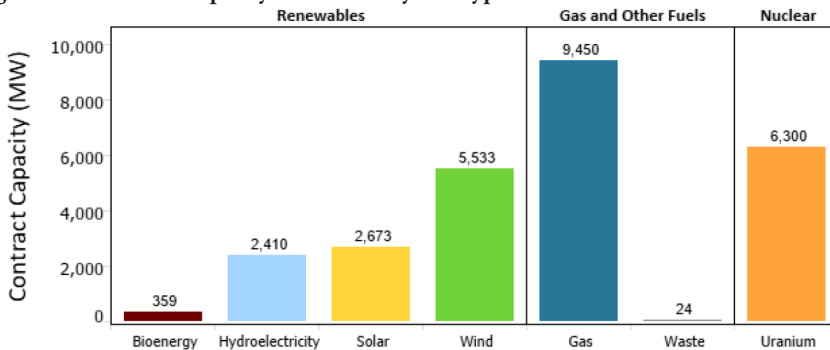
Ontario Power Authority (OPA) in 2015, retaining the IESO name.

Since its inception in 2005 the OPA under Ministerial Directives has engaged in numerous competitive procurement initiatives and entered into contracts (most of which contain a 20-year term) with generators either directly or through standard offer programs. According to the IESO’s Contracted Electricity Supply Progress Report, the IESO held 26,750 MW of contracted capacity at the closing of June 2020.¹⁵ Although this makes up more than half of Ontario’s 2019 installed capacity of 40,500 MW, it does not include Ontario Power Generation’s (OPG) rate-regulated assets (but does include its natural-gas fired facilities), heritage assets, and Non-Utility Generation (NUG) contracts held by the Ontario Energy Finance Corporation.¹⁶ The fuel supply mix of generation contracted with the IESO is comprised mainly of natural gas (9,450 MW), nuclear (6,300 MW), wind (5,333 MW), solar (2,673 MW), hydropower (2,410), with smaller amounts of bioenergy and waste (see Figure 1).

A closer examination of the performance and compensation provisions contained in the IESO/OPA contracts demonstrates how they

provided full cost recovery to generators.¹⁸ For example, Clean Energy Supply (CES) contracts were designed to provide “capacity style” payments to natural gas-fired generation facilities on a \$/MW-month basis during which the generator must offer its energy into the spot market.¹⁹ The determination of the sum was based on a Net Revenue Requirement (NRR) provided in the proponent’s economic bid statement and valuation of revenues and costs.²⁰ Effectively, the CES contract payments functioned such that if the generator operated according to its contractual profile (i.e., deemed dispatch), then it would earn its required level of cost recovery and profit. Further, consider the example of Feed-in-Tariff (FIT) contracts, which were designed to compensate renewable resources (mainly, solar, wind, biomass, and hydroelectric) based on a \$/MWh of energy supplied to the grid. Since these are variable output generation resources, the contract was designed such that the generator first settles through the spot market as a price-taker, and subsequently the IESO would provide additional payments to the generator based on the difference between the market-settled revenue and a guaranteed revenue amount prescribed by the contract.

Figure 1: Contracted capacity in Ontario by fuel type¹⁷



¹⁵ IESO, “A Progress Report on Contracted Electricity Supply, Second Quarter 2020” (2020), online (pdf): <www.ieso.ca/-/media/Files/IESO/Document-Library/contracted-electricity-supply/Progress-Report-Contracted-Supply-Q2-2020.pdf?la=en>.

¹⁶ *Ibid.*

¹⁷ *Ibid.* at 10.

¹⁸ For a full discussion on the OPA/IESO’s various contracts, see Ron Clark, Scott Stoll & Fred Cass, *Ontario Energy Law: Electricity* (Toronto: LexisNexis, 2012).

¹⁹ The contract stipulated a Contingent Support Payment (CSP) from the OPA to the generator or a Revenue Sharing Payment (RSP) from the generator to the OPA depending on whether market revenues were sufficient and the generator performed in accordance to the contract.

²⁰ For full compensation formula, see *Clark, supra* note 18.

In fact, the primary objective for the creation of the OPA under the *Electricity Restructuring Act, 2004* was to create a centralized planning and procurement agency that can enter into contracts as a financial counterparty. To cover the costs arising out of contract payments made to generators, the *Electricity Restructuring Act, 2004* additionally created the Global Adjustment (GA) charge, which is levied against all electricity consumers.²¹ However, providing contractually guaranteed, out-of-market payments to generators contributed to a negative feedback loop that diminished merchant opportunity for generators, diminished the value of bilateral contracting for loads and retailing entities, and *de facto* established the IESO as the only viable counterparty in Ontario.

Specifically, out-of-market payments enabled a significant number of price-setting generators to offer their energy into the wholesale market potentially below the marginal cost of

production. This, coupled with a substantial uptake of near-zero marginal cost wind and solar resources during flatlining demand consequently contributed to lowering the average Hourly Ontario Energy Price (HOEP) (i.e., spot price) and leading to diminished merchant opportunity. Subsequently, given the inverse relationship between GA and HOEP due to the design for resource compensation contained in the IESO contracts and increased contracting by the IESO pursuant to Ministerial Directives, the proportion of GA in relation to HOEP has grown substantially. For example, in 2019 GA comprised approximately 80–85 per cent of the wholesale energy cost (see Figure 2).²² Since the GA portion is largely fixed and under *Ontario Regulation 429/04*²³ and the GA charge cannot be avoided through a retail transaction, there is little value to be gained by entering into a bilateral contract to only hedge against the HOEP. This also effectively diminishes the business case for engaging in competitive electricity retailing in Ontario.²⁴

Figure 2: Average HOEP Plus GA²⁵



²¹ The GA also covers costs related to OPG’s rate-regulated nuclear and hydroelectric generation resources, as well as conservation, demand management, and other provincial electricity programs.

²² This only includes HOEP and GA and excludes other costs such as uplift charges and any transmission and distribution-related charges.

²³ *Adjustments under section 25.33 of the Act*, O Reg 429/04.

²⁴ Similarly, Synapse Energy Economics study found that terms offered by competitive retailers are too short to support new capacity, see Hausman, *supra* note 4.

²⁵ IESO, “Price Overview” (2020), online: <ieso.ca/power-data/price-overview/global-adjustment>.

As mentioned, the negative feedback loop described above continues to reinforce the IESO as the only viable counterparty in Ontario. This is further complicated by a feature of Ontario’s industry structure, where Local Distribution Companies (LDCs), despite having a standard supply obligation under the Ontario Energy Board’s (OEB) Standard Supply Service Code, do not have an obligation to secure resource adequacy or hedge energy prices for their customers in contrast to LSEs in the U.S. and thus, among other reasons, do not contract for generation.

The following section will discuss how a robust bilateral market can be enabled in Ontario by addressing the obstacles to contracting by demand-side entities.

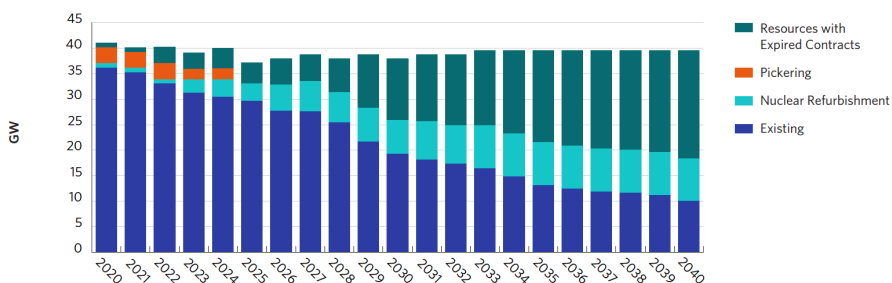
ENABLING A ROBUST BILATERAL MARKET IN ONTARIO TO SUPPORT INCREASED DEMAND-SIDE CONTRACTING

Despite the IESO’s decision to include the continued use of government-backed contracts in the Resource Adequacy framework, further entering into additional contracts for future resource adequacy needs could prove difficult

for the IESO given the high amount of fixed costs in the GA.²⁶ Indeed, this reason was likely a significant driver behind the interest for implementing a capacity market in Ontario ever since the Market Renewal Program (MRP) was announced in 2016.²⁷ That said, according to the latest Planning Outlook, the IESO does not anticipate a capacity need to occur until the mid-2020s at least (notwithstanding the forecast impacts of the COVID-19 pandemic), largely attributed to supply factors such as nuclear units coming offline for refurbishment and expiring contracts (see Figure 3).²⁸ This presents an opportune time to consider enabling a robust bilateral market in Ontario to be used alongside the existing and planned resource adequacy mechanisms.

In order to enable a robust bilateral market in Ontario, the obstacles that currently hinder demand-side participants from engaging in bilateral contracting must be addressed. As discussed above, the main obstacles are system cost allocation (i.e., the GA charge) and the role of electricity distributors (i.e., LDCs) in Ontario. While this paper does not purport to offer original solutions to these obstacles, it does refer to two options that have been separately proposed for Ontario as a springboard for

Figure 3: Installed Capacity by Commitment Type 2020–2040²⁹



²⁶ IESO, *supra* note 2.

²⁷ Originally announced as the Incremental Capacity Auction (ICA), which was subsequently removed from the scope of MRP and currently planned as an evolving Capacity Auction (CA).

²⁸ IESO, “Annual Planning Outlook – A view of Ontario’s electricity system needs” (January 2020), online (pdf): <www.ieso.ca/-/media/Files/IESO/Document-Library/planning-forecasts/apo/Annual-Planning-Outlook-Jan2020.pdf?la=en>.

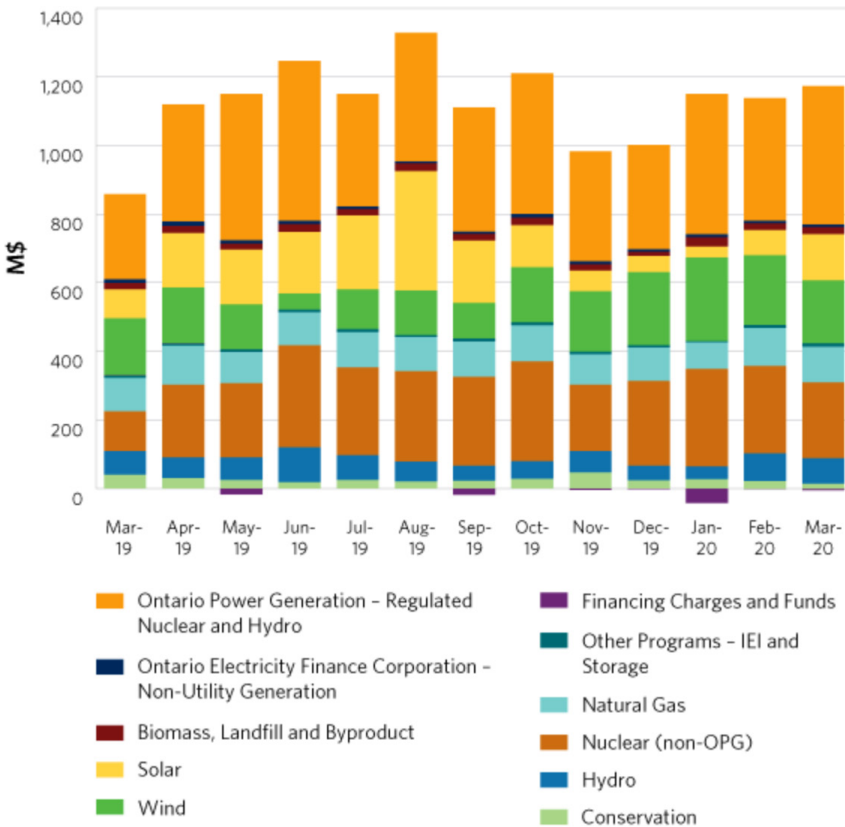
²⁹ *Ibid* at 12.

further discussion. The first option, presented by Brian Rivard at the Ivey Energy Policy and Management Centre involves breaking up the GA into three separate components (i.e., capacity costs, an OPG energy price hedge, and system-wide fixed costs) and applying a different cost recovery method to each component (see Figure 4).³⁰ The second option, presented by the Ontario Energy Association (OEA) involves creating a regulatory model for LSEs in Ontario that would enable LDCs to voluntarily take on the role of LSEs and

engage in resource adequacy and contracting activities.³¹ As will be elaborated below, the first option is aimed at addressing the challenges associated with the GA charge and the second option is aimed at addressing the challenges associated with Ontario’s industry structure, where LDCs as electricity distributors do not engage in bilateral contracting.

Rivard argues that the GA can be seen as being comprised of three different categories and sources of system costs. The first category is

Figure 4: Monthly Global Adjustment by Component (March 2019 – March 2020)³²



³⁰ Brian Rivard, “Don’t leave me stranded: What to do with Ontario’s Global Adjustment?” (July 2019), online (pdf): www.ivey.uwo.ca/cmsmedia/3787293/dont-leave-me-stranded-what-to-do-with-ontario-s-global-adjustment.pdf.

³¹ Power Advisory LLC & Aird & Berlis LLP, “Policy Case: Recommendations for an Ontario Load-Serving Entity Model” (September 2018), online (pdf): energyontario.ca/wp-content/uploads/2018/09/OEA-LSE-Report-September-2018-Final.pdf (Discussion paper prepared for the Ontario Energy Association).

³² IESO, “Electricity pricing” (2020), online: www.ieso.ca/en/Learn/Electricity-Pricing/Global-Adjustment-Costs.

generation capacity costs, which are the costs incurred to secure and maintain resources. Given that the need for additional resources is driven by metered customers who consume electricity from the grid during peak times, it is recommended that this portion be recovered through a proportional demand charge to consumers who drive the need for additional resources. The second category is the OPG energy price hedge, which was created in order to share revenues earned by and above OPG's heritage assets' revenue requirements, but given the high resource costs and declining HOEP (i.e., wholesale energy price) turned from a rebate to a cost. It is recommended that this be recovered volumetrically from all consumers. The third category is system-wide fixed costs, which involve costs incurred in connection with governmental social or environmental policy objectives. It is recommended that this be recovered through a mix of fixed and volumetric charges or be removed from the GA altogether and shifted into the tax base.

Meanwhile, the OEA's Recommendations for an Ontario LSE Model paper posits that Ontario can benefit from the creation of a regulatory model for LSEs to provide LDCs with the option to voluntarily transition and become LSEs, defined by the obligation to secure incremental resource capacity for their respective distribution service territories. In practice, voluntary LSEs would be responsible for creating Integrated Resource Plans (IRPs) beyond their usual Distribution System Plans (DSPs) that would consider incremental supply resources. Another important element is the necessary coordination that would need to occur between LSEs and the IESO. Specifically, IRPs created by the LSEs would need to be considered as inputs for Capacity Auctions or competitive procurements (e.g., RFPs), where any LSE procurement would need to be accounted and adjusted for in the capacity target for the appropriate capacity zone.

Rivard's GA allocation proposal presents a window into how barriers arising out of system cost allocation can be addressed to promote bilateral contracting by loads. For example, consider a solution where loads can enter into bilateral contracts in coordination with the IESO, and if the resource contributes to system capacity, the load should be allowed

to reduce a portion of its GA costs on the basis of one of the components identified by Rivard. While on one hand, this may seem as an inequitable cost-shifting mechanism rather than cost-reducing mechanism, on the other hand, the addition of the load's contracted resource may lead to the deferral or avoidance of otherwise needed system investment costs. This example is presented for illustrative purposes and requires a closer analysis to determine the trade-off between cost and benefit of implementing such a program. Similarly, the LSE paper presents a much more direct solution to the challenges associated with the role of LDCs in Ontario's industry structure. By adopting a resource adequacy obligation, LDCs as LSEs will be required to become active demand-side participants in the bilateral market to secure incremental resources. Given that Ontario's system cost allocation electricity industry structure is governed by legislation, addressing these obstacles may require legislative amendments or amendments to other regulatory instruments (e.g., OEB Codes and Licenses). Both of these Demand-side entities can design contracts that offer payments in concert with wholesale market revenues similar to the IESO contracts and thus make bilateral contracting work in Ontario without further inflating the GA. For example, virtual PPAs (also known as financial PPAs or contract-for-differences) are based on an agreed upon strike price that is settled between two parties in relation to the spot price.

Finally, as stated, a robust bilateral market can work alongside Ontario's other existing and planned resource adequacy mechanisms, which are the IESO-administered markets, including the planned capacity auctions, competitive procurements (e.g., RFPs), and the Government's ability to direct the IESO to solicit a competitive procurement or directly enter into agreements for identified system needs. With respect to market mechanisms, a robust bilateral market can function alongside a capacity market as is the case in northeast U.S. deregulated markets such as PJM, NYISO, and ISO-NE.³³ Although, in those jurisdictions capacity markets remain the primary resource adequacy mechanisms with bilateral contracts used mainly for hedging against future price risk and to support the development of renewable resources to meet procurement policy objectives (e.g.,

³³ Power Advisory LLC, *supra* note 27.

Renewable Portfolio Standard). This enables generators to stagger and hedge their capacity by offering a portion into the capacity market for a shorter-term obligation and contracting out a portion for a longer-term commitment. Similarly, a more robust bilateral market would not interfere with the IESO's ability to enter into contracts if a need arises that requires a more centralized solution.³⁴

CONCLUSION

This paper presented the position that Ontario's resource adequacy framework would benefit from enabling a robust bilateral market, characterized by increased contracting activity from demand-side participants, specifically loads and retailing entities. This in contrast to the current model where the IESO is *de facto* the only viable contractual counterparty in the province. With a robust bilateral market, demand-side participants could enter into agreements with new resources or existing resources that are economically managed, thereby contributing to system capacity by bringing new generation projects online or deferring the need for them if existing resources are more cost-effective. A robust bilateral market could also bring additional benefits such as innovative energy solutions using emerging technologies (e.g., generation paired with storage) and increased buy-side competition. To enable a robust bilateral market, the obstacles that currently hamper the ability of demand-side participants would need to be addressed. Specifically, two potential areas of exploration are system cost allocation and industry structure related to the role of LDCs in Ontario. That said, a fundamental restructuring such as that which ensued by deregulation is likely not necessary as a robust bilateral market can function properly alongside the current (i.e., energy market, Directive powers and IESO contracting ability) and planned (i.e., capacity market and RFPs) resources adequacy mechanisms used in the province. Thus, enabling a bilateral market should be considered in the IESO's Resource Adequacy Engagement as it can help efficiently and reliably manage electricity supply for Ontario consumers. ■

³⁴ Although most contracts were awarded by the OPA/IESO through competitive procurement processes, the OPA/IESO also took the position that it could enter directly into an agreement with a selected generator under certain circumstances. For example, Goreway Station and Portlands Energy Centre were entered into under a non-competitive process due to urgent local reliability issues.

WHAT DRIVES ENERGY REGULATORY INNOVATION? AN ONLINE SURVEY FROM POSITIVE ENERGY AND CAMPUT

*Patricia Larkin PhD and Brendan Frank**

To successfully chart Canada's energy future in an age of climate change, it is crucial to strengthen public confidence in the roles and responsibilities of our public authorities. The context in which these authorities operate is highly dynamic. Innovations will be essential both to catch up and keep up with the pace of change. Energy regulators are facing multiple challenges: technological transformation in the upstream production, delivery, and end use of energy; an expanding range of stakeholder groups requesting a seat at the table; operational emphasis on risk-based regulatory delivery; and growing policy uncertainty. To deal with these realities, regulators must modernize and reinvent the ways they engage with stakeholders and with policymakers.

Collaborative research project between Positive Energy and CAMPUT

A new collaborative research project between the University of Ottawa's Positive Energy program¹ and Canada's Energy and Utility Regulators (CAMPUT) seeks to identify successful innovations and opportunities to scale these up in energy regulatory decision-making. Through this project, we hope to support energy regulators across Canada by

improving understanding of shared challenges and opportunities and suggesting actions to enhance policymaker-regulator relationships and public engagement approaches.

This project seeks to answer two key questions. First, what is the nature of two-way interactions between policymakers and regulators, and what mechanisms can strengthen policy and regulation while maintaining regulatory independence? Second, what types of public engagement processes can help regulators ensure diversity in information and viewpoints considered in regulatory development, application processes, and oversight? In this article, we report on the first phase of the research: findings from an online survey completed in June 2020 that focused on drivers of regulatory innovation. The next phase of the project involves detailed case studies of innovations.

June 2020 Survey Results

To understand what regulators and the groups they engage with think about the state of regulatory innovation, Positive Energy and CAMPUT co-designed and administered an original survey to over 160 representatives

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¹ Positive Energy is a research and engagement program at the University of Ottawa that seeks to strengthen public confidence in Canadian energy decision-making through evidence-based research and analysis, engagement and recommendations for action (See also: <www.uottawa.ca/positive-energy>).

from a diversity of organizations, including regulators, utilities, environmental and other non-government organizations, large and small customers, policymaking authorities, Indigenous organizations, law firms and universities.

We received 50 responses from a broad cross-section of regulatory players and observers. Seventy-eight per cent of respondents indicated the emphasis of their work is at the provincial level (Ontario, Nova Scotia and British Columbia were the most represented provinces) and 51 per cent said their work is primarily focused on rate regulation. The remaining respondents came from a variety of backgrounds, including safety regulation, rate and infrastructure regulation, non-government organizations, municipal utilities, or executive training. Participants noted that they serve a variety of different sectors in their work: some focus on publicly-owned utilities, regulatory agencies, or policymakers (17 per cent each), 12 per cent serve the private sector, and a quarter of respondents serve a combination of these options.

Our results reveal broad agreement on the need for innovation in regulatory decision-making, both for regulator-policymaker interactions and for public engagement. Although 88 per cent of survey participants saw the need for innovation in these areas, fewer reported actually observing them in their day-to-day work: 40 per cent for policy-regulatory interactions and 70 per cent for public engagement.

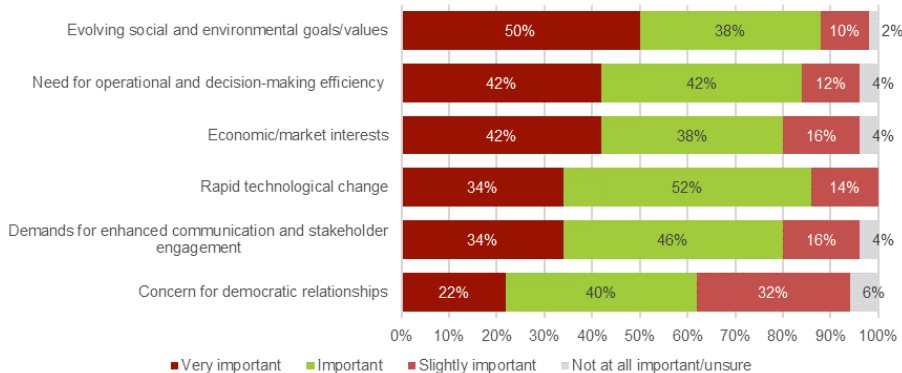
In this article, we analyze results for participants as a whole, as well as for different geographic or stakeholder groups. The “East” includes

participants from Atlantic Canada (there were no respondents from Newfoundland and Labrador); the “West” includes those working in Manitoba, Saskatchewan, Alberta, British Columbia and the Northwest Territories. Ontario and Quebec are identified individually. Additional findings reflect “regulatory” and “non-regulatory” respondents.

What macro-trends are creating the need for innovations in energy regulation? The overarching answer respondents identified is the need to make decisions in a rapidly evolving social and environmental context. We asked participants to rate the relative importance of seven drivers for innovation in energy regulatory decision-making in recent years. Figure 1 shows our overall findings for all drivers. Asked to describe which drivers are “very important,” 50 per cent said evolving social and environmental goals or values; 42 per cent said the need for operational decision-making efficiency; 42 per cent identified economic interests; 34 per cent said rapid technological change; 34 per cent said demands for enhanced communication and stakeholder engagement; and 22 per cent said concerns for democratic relationships. With the option to add additional drivers, 8 per cent of participants identified the need to address inter-jurisdictional alignment and cooperation.

We observed importance differences on the relative importance of drivers across different sectors. For example, non-regulators identified economic and market interests as the most important driver of regulatory innovation, while regulators described it as the least important. Conversely, regulators identified demands for enhanced communication and stakeholder

Figure 1: Relative importance of broad drivers of regulatory innovation



engagement as the most important driver, compared with non-regulator participants who ranked it fifth.

Differences in opinion across regions on the broad drivers of regulatory innovation are subtler. A greater number of participants from the West described evolving social and environmental goals as “very important”, more so than any other driver, while respondents from the East and Ontario said this driver is of roughly equal importance to rapid technological change.

There is broad agreement across regions *and* sectors that the need for operational efficiency is a driver of innovation. It emerged as the second most important driver for participants as a whole, and also across regions and sectors. On the other hand, concern for democratic relationships is also of lower relative importance at the national, sectoral and regional levels.

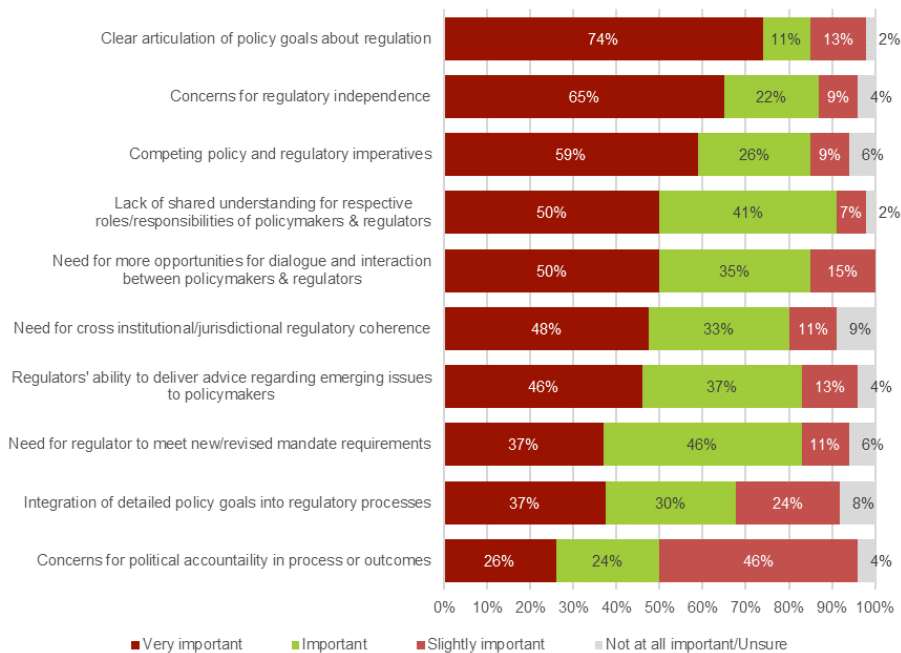
We turn now to the first of our two research questions: drivers of innovation in two-way interactions between regulators and associated policymaking authorities (Figure 2). The driver most often cited as “very important” was the need for clear articulation of policy goals that

drive regulation (74 per cent of respondents noted it was “very important”).

The second most important driver (65 per cent said “very important”) was regulatory independence. Not surprisingly, participants who self-identified as regulators said this driver was the most important. The third most important driver (59 per cent) was competing policy and regulatory imperatives (e.g., market, environment, Indigenous, security, affordability concerns). This factor was cited less often among respondents from Ontario and Quebec, particularly when compared to Eastern participants.

Again, we note interesting differences in opinion between regulators and non-regulators, with smaller differences across regions. For example, a lack of shared understanding of the respective roles of policymakers and regulators was very important to non-regulators, but less important for regulators. On the other hand, regulators were more likely than non-regulators to say that the need for more interaction between policymakers and regulators was an important driver. The area of least concern among all respondents was political accountability in regulatory processes

Figure 2: Relative importance of drivers for innovation between regulators and associated policymaking authorities



or outcomes. Ontario was an outlier in this regard, with respondents identifying this as the third most important driver.

We also asked survey participants for examples of useful innovations in policymaker-regulator interactions that help advance any number of objectives — informing public policy, facilitating general knowledge exchange, or helping build relationships. Responses included regulators' formal ad hoc reviews and assessments of legislative proposals; the use of ministerial directives or memoranda of understanding between government departments and the regulator; active adjudication; and single-window regulatory institutional design. Other initiatives include efforts to attend non-government and industry forums or workshops focused on specific project proposals; briefings and board member outreach; and open and transparent hearings. While these suggestions may seem somewhat obvious, the challenge lies in operationalizing them and turning them into habits. Recall that far more respondents agreed on the need for regulatory innovation, but significantly fewer respondents reported seeing innovation in their day-to-day work.

The final section of the survey asked participants about the relative importance of 11 drivers for our second research question: regulators' innovation in public engagement. Reconciling the need for public confidence and accessibility with effective decision-making appears to be the heart of the issue. As Figure 3 shows, when asked which drivers were "very important" for innovation in public engagement, 61 per cent of respondents said public trust in energy decision-making; 57 per cent said interaction and transparent decision-making; 57 per cent said operational and decision-making efficiency; 57 per cent said maintaining neutrality while providing opportunities for public outreach; and 50 per cent said removing real or perceived regulatory barriers to participation. Respondents identified the need to collect and consider views of individuals and organizations without expertise or defined interests as the least important driver.

The need to address public trust and understanding in energy related decision-making was one of the top three drivers across all regions and sectors. The need for a more interactive and transparent decision-making process was the most important driver for non-regulators, the East,

and Ontario; regulators and respondents in Quebec said it was less important. The need for operational and decision-making efficiency, including a workable balance between breadth and depth of engagement, was less important in Ontario and most important in Quebec. There was broad agreement across regions and sectors on the need for regulators to remain neutral and be perceived as neutral while providing opportunities for education and public outreach. Regulators and respondents in the West said this was the second most important driver, while other participants ranked it lower.

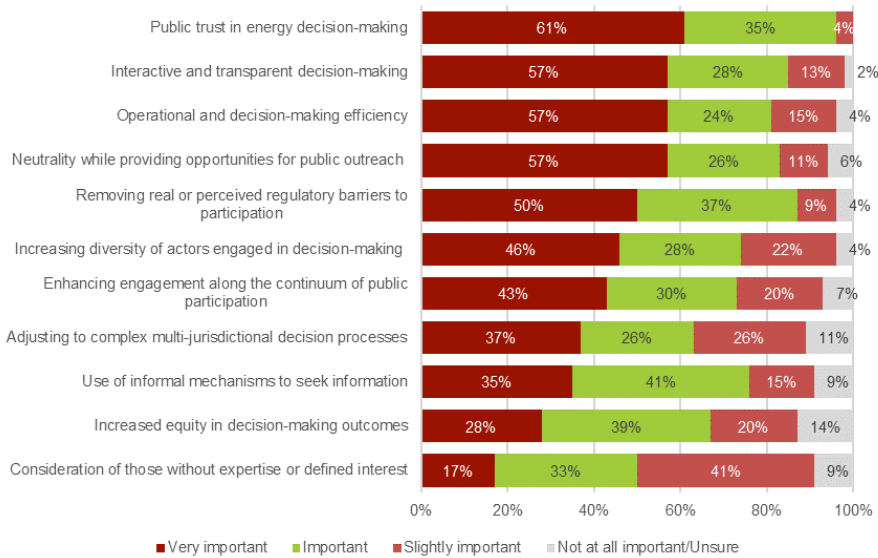
A few notable regional differences emerged for the less important drivers in Figure 3. The need to enhance public engagement along the continuum of public participation — that is, to inform, consult, involve, collaborate, empower — was more important in the West and much less important in Ontario. Respondents in Ontario instead pointed to the need for increased equity in decision-making outcomes relatively to other regions. Respondents in Quebec placed much higher priority on the need to adjust to increasingly complex multi-jurisdictional decision processes. The need to collect and consider views of individuals and organizations without expertise or defined interest was the least important driver for all groups.

Asked for innovative practices in regulatory engagement, multiple respondents highlighted examples of well-received Indigenous engagement. Other examples included: outreach and engagement *pre-hearing* for potentially affected communities, sandboxing, intervenor funding initiatives, non-regulator engagement with communities, and additional survey research undertaken by regulators to uncover best practices in their engagement processes.

We also asked a number of open-ended questions to capture additional ideas for research questions and to identify some broader trends. Many participants noted the need to clarify the role of regulators in unresolved policy issues, including reconciliation with Indigenous Peoples, and lack of policy alignment between environment, energy and economic development.

With respect to two-way interactions between policymakers and regulators, respondents raised concerns over the role that enabling legislation plays in framing public engagement process. A clear example was the debate over the federal

Figure 3: Relative importance of drivers for regulators’ innovation in public engagement



government’s Bill C-69², which likely coloured many Canadians’ views of regulatory processes before it was even enshrined into law. Others noted the importance of sustaining corporate memory in order to advise on the separation of policy and regulatory functions. While some respondents emphasized transparency, others noted the challenges to innovation within the confines of regulatory independence. Still others pointed to external perceptions of poor relations and oversight between policymakers, regulators and the courts.

With respect to regulatory engagement, respondents cited the challenges of creating stable, predictable, equitable decisions that are procedurally fair and consider the effects of decision-making not just for ratepayers in general, but particularly for low-income and vulnerable Canadians. Respondents of all backgrounds said they wish to see more opportunities for meaningful engagement and offered up a number of ideas including asking stakeholders how they wish to be engaged and strengthening intervenor participation while leveling the playing field with funding to help less experienced stakeholders navigate

the complexities of regulatory applications. Other ideas included enhancing the depth of stakeholder participation beyond outreach, education, and the ability to provide brief comments, and the use of a layered approach for input into decision-making (e.g., provincially for policymaking, regionally for land-use planning, and locally for project decisions).

Positive Energy’s research over the last five years has identified two key principles that regulators should consider when innovating. The first is “informed reform.” Energy decision-making comprises an ever-changing, organic system of multiple component parts operating within the market-based and physical energy systems. Innovations in energy decision-making that do not carefully consider both the short and long-term and that fail to account for intended and unintended interconnections are likely to fail. Second, innovations must strike a “durable balance” between economic, environmental, social and security imperatives that stands the test of time. These imperatives can come into conflict and demand trade-offs and balance. Innovations to decision-making must forge a durable balance or they are likely to fail.

² Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019), SC 2019, c 28.

What comes next for the study?

Positive Energy's collaborative project with CAMPUT is ongoing and is part of a broader research agenda exploring the roles and responsibilities of policymakers, regulators, the courts, Indigenous governments and municipalities in charting Canada's energy future in an age of climate change. Other projects explore energy federalism, the evolution of regulatory independence over time, the role of public authorities in final investment decisions for LNG projects, and the impacts of new technologies on policy and regulatory decision-making.

Next steps for Positive Energy's collaboration with CAMPUT involves in-depth qualitative case studies to identify key success factors in regulatory innovation, along with recommendations to scale up successful innovations. Specifically, one case is investigating innovations in formal policy-regulatory interactions, drawing on a range of examples across Canada. The second is examining regulators' public engagement practices for distributed energy resources, with a focus on potential applications to other topic areas.

Finding a path forward on Canada's energy and climate imperatives will require a clear, predictable and stable regulatory environment. Innovation will be vital. With this research, we intend to identify successful innovations and help the energy decision-making system scale them up across Canada. ■

THE ONTARIO GENERATION CONTRACT REVIEW REPORT

*Ron Clark**

EDITOR'S INTRODUCTION

From time to time the ERQ publishes reports that will be of interest to our readers. We often provide an independent review of those reports. The first one appeared in 2019 and consisted of report on the status of energy storage in both Canada and the United States. That report was authored by two law firms, one in Canada and another in the United States.¹

More recently the ERQ analyzed a report published by KPMG regarding cloud computing.² That report, sponsored jointly by the Canadian Gas Association and the Canadian Electricity Association, argued that utilities should be able to include the expenses relating to cloud computing in rate base or through an accounting process that would result in a similar cost recovery.

The Report addressed in this article was prepared by the Charles River, consulting firm

in Boston, at the request of the Independent Electricity System Operator (IESO). The IESO in turn was responding to a request of the Minister of Energy pursuant to a Directive issued in November 2019.³

This Directive followed by almost a year a Directive by the same Minister directing the IESO to terminate a number of wind and solar contracts.⁴ Pursuant to that directive the IESO terminated three wind contracts which in total accounted for 90 MW and 752 solar contracts accounting for 333 MW. An earlier ERQ article outlines those developments in detail.⁵

The most recent Directive asks the IESO to review the existing contracts and identify changes that might result in cost savings. As indicated, the IESO turned to Charles River. That Report can be accessed by readers [here](#). Charles River made a number of recommendations. They are assessed by Ron Clark, a well-known Toronto energy lawyer,

* Ron Clark is a partner with Aird & Berlis LLP in Toronto, Canada. Ron's energy law practice involves counselling stakeholder groups, retailers, distributors and generators on legislative and policy matters relating to electricity markets. Ron has been retained in connection with power procurement arrangements, development of generation and cogeneration facilities and the Ontario government's clean energy supply and renewable energy supply RFPs and contracts. Ron has a background in public international law and previously served as a diplomat with the Canadian Department of Foreign Affairs, with postings in Ottawa and Brussels. He is a co-author of *Ontario Energy Law: Electricity* (co-authored with Fred D. Cass and Scott A. Stoll), LexisNexis Canada, December 2012 and author of *Regulation and Governance of Municipally-Owned Corporations in Ontario*, LexisNexis Canada, January 2019. Ron is admitted to the bar in New York and Ontario. He received an LL.M. in International Legal Studies from New York University, an LL.B. from Osgoode Hall Law School and a B.A. in Political Science from Carleton University.

¹ Paul Kraske et al., "Electric Storage in North America" (2019) 7:1 Energy Regulation Q 55.

² KPMG, "Capitalizing the Cloud" (March 2020), online (pdf): *Energy Regulation Quarterly* <www.energyregulationquarterly.ca/wp-content/uploads/2020/04/CEA_CGA_-Capitalizing-the-Cloud-Report-EN_04.23.20.pdf>.

³ OIC 1499/2019, online: *Ontario* <www.ontario.ca/orders-in-council/oc-14992019>; See also Directive dated November 6, 2019 to the IESO to undertake a targeted review of existing generation contracts for viable cost-lowering opportunities, online: *Ontario* <www.ontario.ca/page/ministers-directive-order-council-14992019>.

⁴ OIC 1003/2018, online: *Ontario* <www.ontario.ca/page/ministers-directive-order-council-10032018>.

⁵ Gordon Kaiser, "Ontario Cancels Wind and Solar Contracts" (2018) 6:3 Energy Regulation Q 17.

in the following Commentary. A few months after the Charles River Report was released, a presentation was made jointly by the IESO and Charles River. That presentation can be found [here](#). The most interesting aspect of that presentation was the acknowledgment by the IESO that it had no mandate from the government to enact any of the Charles River recommendations.

COMMENTARY

As indicated, the Generation Contract Review report was prepared in response to a directive issued by the Ontario Minister of Energy to the IESO to retain an expert “to undertake a targeted review of existing generation contracts to identify opportunities to lower electricity costs within such generation contracts.” The Directive was issued in connection with the Premier Ford’s pledge⁶ to reduce electricity bills by 12 per cent (beyond the 25 per cent reduction promised by the Liberals, as described below).

In connection with the Report, the IESO consulted with stakeholders, including by sending letters to all contracted generators that hold larger contracts or a larger portfolio of contracts, requesting identification of viable cost-lowering opportunities.⁷

Between 2008 and 2016, consumers in Ontario saw significant increases on their electricity bills.⁸ Residential electricity prices increased by 71 per cent during this period.⁹ An important factor in these increases was attributable to long term generation contracts (many entered into without competition), the phase-out of coal

energy, and a growing electricity supply and exporting electricity at a loss.¹⁰

Under the Ontario *Fair Hydro Plan Act* (the “*Fair Hydro Plan*”),¹¹ introduced by then Ontario Premier Kathleen Wynne, on March 2, 2017,¹² consumer electricity bills were to be reduced by 25 per cent. However, electricity generators would still need to be paid. In order to fund this shortfall, a trust created by Ontario Power Generation Inc. borrowed the money at market rates of interest. The Financial Accountability Office of Ontario, an officer of the Provincial Legislative Assembly, estimated that the *Fair Hydro Plan* would cost the Province \$45 billion over 29 years while providing savings of about \$24 billion to eligible ratepayers¹³ and questioned the accounting practices used in its creation.¹⁴

In legislation introduced on March 21, 2019, Premier Ford’s Conservatives adopted legislation such that funding obligations in the *Fair Hydro Plan* moved from the IESO to the Province, shifting the obligation from the ratepayer to the taxpayer.¹⁵

Magnitude of Payments

Between 2005 and 2016, at the direction of the Ontario government, the Ontario Power Authority (and later the IESO) entered into over 30,000 Renewable Energy Supply (RES), Renewable Energy Standard Offer Program (RESOP), Feed-in Tariff (FIT), microFIT and Large Renewable Procurement (LRP) contracts representing over 7,000 MW of additional contracted capacity.¹⁶

⁶ Ted Raymond, “Ford renews promise to lower hydro rates despite upcoming hike”, *CTV News* (24 October 2019) online: <ottawa.ctvnews.ca/ford-renews-promise-to-lower-hydro-rates-despite-upcoming-hike-1.4653526>.

⁷ IESO, “Contract Review Directive Report” (28 February 2020) at 12, online (pdf): <www.ieso.ca/-/media/Files/IESO/Document-Library/contract-review/Contract-Review-Directive-Report.pdf?la=en>.

⁸ Taylor Jackson et al., “Evaluating Electricity Price Growth in Ontario” (20 July 2017) at 2, online (pdf): *Fraser Institute* <www.fraserinstitute.org/sites/default/files/evaluating-electricity-price-growth-in-ontario.pdf>.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ontario Fair Hydro Plan Act*, 2017, SO 2017, c 16, Schedule 1.

¹² Office of the Premier, Statement, “Premier’s Statement on Ontario’s Fair Hydro Plan” (2 March 2017), online: *Newsroom Ontario* <news.ontario.ca/en/statement/43892/premiers-statement-on-ontarios-fair-hydro-plan>.

¹³ Financial Accountability Office of Ontario, *An Assessment of the Fiscal Impact of the Province’s Fair Hydro Plan*, by Matt Gurnham & Matthew Stephenson, (Toronto: Queen’s Printer for Ontario, 2017) at 1, online (pdf): *Financial Accountability Office of Ontario* <www.fao-on.org/web/default/files/publications/Fair%20Hydro/Fair%20Hydro%20Plan.pdf>.

¹⁴ *Ibid.*

¹⁵ *Fixing the Hydro Mess Act, 2019*, SO 2019, c 6.

¹⁶ IESO, *supra* note 7 at 6.

Payments by the IESO to generators under major contracts (excluding the Bruce Power Refurbishment Agreement) amount to approximately \$7 billion, or 32 per cent of total annual costs of the Ontario electricity system.¹⁷

AVAILABLE OPTIONS TO LOWER COSTS

Three Options

The IESO's consultant (Charles River Associates) examined three options with respect to the IESO's generation contract:

- The “buy-out” consists of a lump sum payment by the IESO to a contracted generator for the anticipated, future net revenue and terminating the contract.
- The “buy-down” option consists of the IESO paying a lump-sum for a reduction of the contracted generator's projected future contract payments while leaving the contract in place.
- Finally, “blend and extend” means the term of the existing contracts would be extended (e.g. 25 or 30 years, instead of the current 20-year term) in return for lowering the rates paid to the generator under the contract.

“Buy-Out” Option

Under the buy-out option, following the termination of the IESO contract, the facility owner would then be free to make decisions on the future of the facility, such as operating the facility as a merchant generator, permanently shutting it down or selling it.

To finance the buy-out, the IESO would need to borrow funds (on behalf of ratepayers) and would repay the loan over time through charges to ratepayers. The potential savings to the ratepayer would come from the anticipated difference between the IESO's borrowing costs and the contract generator's cost of capital on the stream of future cash flows.

“Buy-Down” Option

The “buy-down” option is similar to the buy-out option in that the IESO would need to finance a lump-sum payment to the generator in lieu the IESO's obligation to make future payments to the generator. However, it is different in that the contract remains in place and the generator must continue to provide electricity generation under the contract's provisions for the remainder of the term. In other words, instead of “buy now, pay later,” it is “pay now, get electricity later.”

“Blend and Extend”

Underlying the “blend and extend” option is the assumption that, once the contract expires, the contracted facility can continue to operate at a lower cost and thus accept a lower price under the contract. By, in effect, moving forward a portion of the lower costs post-termination (contract payments during the remainder of the contract terms can be reduced) at the cost of higher prices (than would have applied otherwise) during the extension period (after the current termination date).

According to the report, this opportunity is better suited for contracts that are set to expire in the near term, as the value of blending the expected lower prices in the extended term gets increasingly diluted over longer periods of existing term.

Other Savings Opportunities

The report also considered various other opportunities to lower IESO contract payments. These included monetizing “environmental attributes” (akin to carbon credits), enhanced dispatch agreements with generators under Non-Utility Generator (NUG) contracts (legacy contracts that were entered into by Ontario Hydro and are currently managed by the Ontario Electricity Financial Corporation), gas distribution & management (GD&M) services (related to certain contracts with gas-fired generators), and various contract-specific opportunities.

¹⁷ *Ibid* at 11.

Assessment

Buy-Out and Buy-Down Options

According to the IESO's consultant,¹⁸ both the buy-out and buy-down options have similarities, in that savings are based on the lower interest rates available to the IESO (or the Province) compared with generators' borrowing rates.

For the buy-out option, the amount of this savings opportunity would also depend on any differences in assumptions placed on the value of the facility without an IESO contract. In the case of gas-fired generation facilities, the certainty provided by that contract is essential. Without a contract, the risk that some or all of these plants would not be available when needed would be significant. The consultant's report notes "Absent a robust and proven capacity market mechanism...the risks of extensive facility shutdowns are likely to be unacceptable to the IESO."¹⁹ Thus, the buy-out option is not practicable in respect of gas-fired facilities and is examined further only in the context of contracts for renewable generation.

As noted above, in the context of the buy-down option, the contract (and the generator's obligation under it) remain in place. Therefore, in the context of the gas-fired contracts, the buy-down option would remain viable (at least as far as gas-fired capacity continuing to be available).

As with the termination of any futures or hedging contract, one party (in this case the IESO) would be the "winner" if electricity prices drop (as compared with the forecast

prices used to determine the buy-out amount). The other party (the generator) would be the "winner" if prices increase.

The buy-down option does not place this market risk on either party as the contract is left in place and it does not rely on forecasted future market revenues in the same way as the buy-out option. However, this does not take into account the risk that remains with the contract in place (i.e. that the contract price will be "in the money" or "out of the money"). In other words, if the contract price is higher than the market price over time, the IESO will be seen to have "overpaid," and vice versa.

Thus, the buy-down option relies solely on differences in sovereign vs. private sector borrowing rates for savings in contract payments. There is a long history of debate in the public-private partnerships sector about whether the "delegated" risks of private sector procurement outweigh the higher borrowing costs. Suffice it to say, there is a reason why the private sector pays higher interest rates and it has to do with the risk it takes on.

Figure 1 summarizes potential savings of the buy-out and buy-down options for certain categories of IESO generation contracts.

In a base-case scenario, the net present value of the net savings from the buy-down option ranges from \$303 to \$443 million over the term of the program (in the chart, aggregating wind and solar with gas-fired contracts). However, it would require over \$2.1 billion of new debt to be taken on by the Province or one of its agencies to pay out generators.

¹⁸ *Ibid* at Appendix 2; See also Charles River Associates, "Independent Electricity System Operator Contract Savings Review" (27 February 2020), online (pdf): IESO <www.ieso.ca/-/media/Files/IESO/Document-Library/contract-review/Appendix2-CRA-Third-Party-Report.pdf?la=en>.

¹⁹ Charles River Associates, *supra* note 18 at 16.

Figure 1²⁰

Options	First Year Savings (2021)	Net Present Value of Net Savings Discounted at Various Rates			Debt Requirement
		3%	6%	9%	
Buyout Wind and Solar	\$37 Million	\$253 Million	\$216 Million	\$187 Million	\$1.5 Billion
Buydown Wind and Solar	\$32 Million	\$396 Million	\$323 Million	\$268 Million	\$1.8 Billion
Buydown of Gas-fired	\$5 Million	\$47 Million	\$40 Million	\$35 Million	\$0.3 Billion

“Blend and Extend”

Because of generator’s higher financing costs, depriving generators of future revenues to pay them more in the near term would mean that the IESO would, in effect, have to bear those higher financing costs. Thus, this option, while pushing down costs initially, would result in higher overall payments for ratepayers.

Other Savings Opportunities

For opportunities other than the buy-out and buy-down options and blend and extend, there were not compelling opportunities for savings in the near term. For environmental attributes, markets are neither sufficiently liquid nor certain. For NUG contracts, most of these have already been renegotiated to obtain desired savings. GD&M services generally work well as they are. Finally, contract-specific opportunities may exist, but by their very nature they will require discrete sets of negotiations over time to realize value.

Contract Terminations

Appendix 4 to the Report deals with contract termination.²¹ Can the IESO simply terminate the generation contracts, thus avoiding continuing payments to generators? Yes, but the price would be steep.

In July of 2018, the IESO exercised its termination right for over 750 renewable energy contracts. However, with few exceptions, these

rights were exercised prior to “notice to proceed” or “NTP” (in the case of Feed-In Tariff (FIT) Contracts) or commercial operation (in the case of Large Renewable Procurement (LRP) contracts). NTP (for FIT) and commercial operation (for LRP) are milestones under the contract prior to which IESO liability is limited to pre-construction costs. Thus, the generator is incited to limit its construction and other expenditures prior to this milestone.

However, the vast majority of the projects developed pursuant to IESO contracts have passed the NTP milestone and reached commercial operation. Termination by the IESO after such milestones have been achieved would amount to a breach of contract, giving rise to IESO liability to the generator for damages, negating any cost savings associated with avoiding future payments to the generator under the contract for the remainder of the term.

COMMENTS AND CONCLUSIONS

Can the provincial government simply pass legislation terminating the contracts and depriving generators of a remedy? Interestingly, the IESO report (as made public) does not mention this as an option. However, this possibility has its own hazards. The contracts generally contain a “discriminatory action” clause that provide that, in the event of governmental action that deprives generators of payments, the generator is to be kept whole, again negating any savings resulting from avoiding future payments.

²⁰ IESO, *supra* note 7 at 19.

²¹ *Ibid* at Appendix 4; See also Elliot Smith, “Review of Generation Contracts Directive dated October 25, 2019 (the “Directive”)” (24 February 2020), online (pdf): IESO <www.ieso.ca/-/media/Files/IESO/Document-Library/contract-review/Appendix4Memo-from-Osler-Hoskin-Harcourt-to-IESO.pdf?la=en>.

As noted in the report, “Once a project is operational, in the earlier years of a facility’s life there is often little (if any) costs to be saved by unilaterally terminating the contract, after taking into account incurred costs and the break fees that would normally be incurred in an early termination.”²² Such a calculation would also, in broad terms, apply to discriminatory action by legislation.

The consultant’s report to the IESO was issued before the COVID-19 pandemic had begun to wreak destruction on the economy, people’s health and electricity consumption patterns. One suspects that, given the likely reduction in energy consumption for the foreseeable future, generators would be even more reluctant to barter away or otherwise sell their rights to receive payments under the IESO’s contracts. Thus, the buy-out and buy-down options could very well be even more expensive than forecast in the report.

In any case, even using the pre-COVID figures, it is clear that efforts to reduce current electricity costs would have severe costs in the long term, often outweighing the short-term benefits. ■

²² *Ibid* at 14.

THE SCC *VAVILOV* DECISION: WILL IT INCREASE REGULATORY RISK?

*Jonathan Drance, Glenn Cameron and Rachel Hutton**

In December 2019, the Supreme Court of Canada in *Vavilov*¹ significantly reshaped the law of judicial review of administrative actions. Broadly speaking, the Supreme Court established reasonableness as the presumptive standard for judicial review: but it also expanded the role of a stricter correctness standard in reviewing many legal determinations made by administrative decision-makers — most significantly those involving statutory appeals of administrative actions. Moreover, *Vavilov* called for any reasonableness review to be “robust” and identified a variety of indicia for reasonableness that critics fear could serve as a basis for courts to more strictly supervise administrative decision-makers and more frequently overturn administrative decisions.

THE EARLY IMPACT OF *VAVILOV*

It did not take long for *Vavilov* to have an impact on Canadian energy regulators. Courts in Canada have long granted energy regulators considerable deference particularly when interpreting their home statutes.

In 2013, the Supreme Court of Canada, in a case involving the British Columbia Securities Commission, highlighted the deference that courts should grant to expert tribunals:

The bottom line here, then, is that the Commission holds the interpretative

upper hand: under reasonableness review, we defer to any reasonable interpretation adopted by an administrative decision maker, even if other reasonable interpretations may exist. Because the legislature charged the administrative decision maker rather than the courts with ‘administer[ing] and apply[ing]’ its home statute, it is the decision maker, first and foremost, that has the discretion to resolve a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear. Judicial deference in such instances is itself a principle of modern statutory interpretation.

Accordingly, the appellant’s burden here is not only to show that her interpretation is reasonable, but also that the Commission’s interpretation is unreasonable. And that she has not done. Here, the Commission, with the benefit of its expertise, chose the interpretation it did. And because that interpretation has not been shown to be an unreasonable one, there is no basis for us to interfere on judicial review — even in the face of a competing reasonable interpretation.²

*Jonathan Drance and Glenn Cameron (senior advisors) and Rachel Hutton (partner) with Stikeman Elliott LLP.

¹ *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

² *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 40–41.

The following year, the Alberta Court of Appeal made a similar point with respect to the Alberta Securities Commission:

*The Commission is an expert tribunal, charged with the administration of the Act. The standard of review of its decisions is presumptively reasonableness, particularly where the question relates to the interpretation of its enabling (or 'home') statute. Its findings of fact, findings of mixed fact and law, and credibility findings are also entitled to deference, and will not be overruled on appeal unless they demonstrate palpable and overriding error.*³

Where this will all end up is hard to say. In 2020 both the Manitoba and Ontario courts have applied *Vavilov* to more strictly scrutinize decisions of energy regulators — particularly on statutory appeals.⁴

ENERGY PROJECTS AND REGULATORY RISK

Major energy projects in Canada currently face extraordinary completion risk — whether by way of undue delay, major restructuring or outright abandonment. Judicial review has been a factor — and sometimes a significant factor — in contributing to that completion risk. One need look no further than the delay and restructuring of the Trans-Mountain Expansion project or the abandonment of the Northern Gateway project — each of which was, at the very least, materially affected by the timing and/or outcome of judicial review.

In the case of Northern Gateway, a robust judicial review process took several years to complete and resulted in the original federal

approvals for the project being quashed.⁵ By the time the judgement was rendered the federal government had changed. The new federal government had campaigned explicitly against Northern Gateway. For a variety of reasons — likely including a change in market conditions but certainly not excluding political, regulatory and legal challenges — Northern Gateway was cancelled shortly after the release of the *Gitxaala* decision.

Regarding the Trans-Mountain Expansion, judicial review and associated corrective administrative proceedings and Aboriginal consultations again took several years.⁶ It is somewhere between arguable and probable that only the nationalization of Trans-Mountain by the federal government kept the project alive over the course of the whole judicial review process.

When proposed energy projects are approved by administrative bodies like the Canada Energy Regulator (CER), or equivalent provincial bodies, opponents of those projects frequently appeal or otherwise apply to courts to review and quash those decisions. The questions for administrative decision-makers, and the courts who review those decisions, is what standard must be met to avoid those decisions being overturned.

From the perspective of overall system coherence and efficiency, an optimal outcome would be an administrative law doctrine that encourages a relatively deferential standard of review — and embraces a relatively restrained approach by the courts to reviewing administrative decisions. As a general rule, this type of approach tends to result in greater regulatory finality.

In our previous Completion Risk post,⁷ we had noted there has been widespread uncertainty

³ *Walton v Alberta (Securities Commission)*, 2014 ABCA 273 at para 17.

⁴ See *Manitoba (Hydro-Electric Board) v Manitoba (Public Utilities Board) et al*, 2020 MBCA 60; See also *Enbridge Gas Inc. v Ontario Energy Board*, 2020 ONSC 3616.

⁵ *Gitxaala Nation v Canada*, 2016 FCA 187.

⁶ *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153.

⁷ Jonathan Drance, Glenn Cameron & Rachel Hutton, "Completion Risk, Legal Uncertainty, and Federal Energy Projects" (4 November 2019), online: *Stikeman Elliott* <www.stikeman.com/en-ca/kh/canadian-energy-law/Completion-Risk-Legal-Uncertainty-and-Federal-Energy-Projects>; See also, Jonathan Drance, "Federal Energy Projects Review: Time Lines in Practice" (2018) 6:3 Energy Regulation Q 23.

about the current standard for judicial review of administrative decisions.⁸

We had identified this issue as among a handful of policy, legal and regulatory issues that have contributed to the level of completion risk faced by major energy projects in Canada — particularly those subject to federal jurisdiction.

The principal issues in administrative law roiling the courts for the last decade have been:

- when to apply a relatively deferential reasonableness standard for judicial review and when to subject administrative decision-makers to a more exacting, entirely undeferential, correctness standard of review; and
- if applying a reasonableness standard, what does that mean in practical terms.

These administrative law issues came before the Supreme Court in *Vavilov*, in December 2019. The Supreme Court, in a far-reaching 7 to 2 decision, fundamentally recast the Canadian law of judicial review of administrative decisions.⁹ *Vavilov* extended the role that the undeferential correctness standard of review will play going forward — particularly in the important case of statutory appeals from administrative decisions. It added precision — but also some stringency and exactitude — to the conduct of a reasonableness review. Much will depend on how *Vavilov* is applied over time. Applied

strictly however, *Vavilov* is unlikely to promote, encourage or assist systemic coherence and efficiency in administrative decision-making on major energy projects.

The Standard of Review

In *Vavilov*, the Supreme Court decisively expanded the role of correctness, with respect to certain legal issues. While deciding that reasonableness is the presumptive standard for judicial review, the Supreme Court held the following key issues are to be subject to a full correctness review:¹⁰

- questions of law on statutory appeals
- questions of constitutional law
- questions of law which are of “central importance to the legal system as a whole”
- questions of overlapping jurisdiction

The most significant change in the applicability of a correctness standard of review relates to statutory appeals. Statutory appeal mechanisms are common in Canadian administrative and regulatory law. Hundreds of varied administrative decision-makers may make decisions subject to one form of appeal right or another — indeed a majority of decisions made by senior energy regulators, including the new Canada Energy Regulator, are subject to statutory appeal.¹¹ In all of these cases of appellate review, any deference on legal issues

⁸ See *Dunsmuir v New Brunswick*, 2008 SCC 9; The Honourable David Stratas, “The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency” (2016) 42:1 Queen’s LJ 27 at 29; Paul Daly & Leonid Sirota, *Canadian Journal of Administrative Law and Practice Special Issue - A Decade of Dunsmuir / Les 10 ans de Dunsmuir* (Toronto: Carswell, 2018); Paul Daly, “Struggling Towards Coherence in Canadian Administrative Law – Recent Cases on Standard of Review and Reasonableness” (2016) 62:2 McGill LJ 527; Shaun Fluker, “The Great Divide on Standard of Review in Canadian Administrative Law” (23 July 2018), online (blog): *ABlawg* <ablawg.ca/2018/07/23/the-great-divide-on-standard-of-review-in-canadian-administrative-law>.

⁹ See Paul Daly, “The *Vavilov* Framework and the Future of Administrative Law” (2020) Ottawa Faculty of Law Working Paper No 2020-09; See also Shaun Fluker, “*Vavilov* on Standard of Review in Canadian Administrative Law” (6 February 2020), online (blog): *ABlawg* <ablawg.ca/2020/02/06/vavilov-on-standard-of-review-in-canadian-administrative-law>; David Mullan, “2019 Developments in Administrative Law Relevant to Energy Law and Regulation” (2020) 8:1 Energy Regulation Q 28.

¹⁰ In particular, *Vavilov* subjects statutory rights of appeal to a full appellate standard, including a review for correctness on questions of law. Moreover, *Vavilov* has expanded the scope of correctness review for compliance with rule of law issues to cover a broader range of constitutional questions and has expanded the scope of matters of central importance to the legal system to include areas within the expertise of administrative decision-makers and the interpretation of their home statutes. See *Vavilov*, *supra* note 1 at paras 36–52 (Statutory Appeal Mechanisms), 55–57 (Constitutional Questions) and 58–62 (Questions of Central Importance to the Legal System). To this point, the various rule of law exceptions (and/or their predecessors) imposing a correctness standard of review have been interpreted and applied both rarely and narrowly. See Paul Daly, “*Vavilov* Hits the Road (Updated August 20)” (4 February 2020), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2020/02/04/vavilov-hits-the-road>.

¹¹ Mullan, *supra* note 9 at 29 (See footnote 12).

within the area of expertise of administrative bodies, or in interpreting their home statutes, has entirely disappeared — to be replaced by a standard appellate review on the basis of entire correctness on all matters of law.

Among major national law firms experienced in representing regulated entities — including those in the energy field — the view is wide-spread that the changes in *Vavilov* relating to the standard of review on statutory appeals is significant and materially increases regulatory risk by adversely affecting the finality of administrative decisions.¹²

Conduct of a Reasonableness Review

The Supreme Court in *Vavilov* did not stop there. In addition to its analysis of the applicable standard for judicial review — and likely of equal precedential importance — the Supreme Court went on to describe a set of tests or rules for conducting reasonableness review. The majority in *Vavilov* described their overall reasonableness standard as requiring a “robust” review, as opposed to a restrained one.¹³

The criteria for meeting a reasonableness standard are set out in substantial detail over close to 40 paragraphs in the majority’s reasons.¹⁴ This portion of the judgement is dense with citations and contains well over 20 declarative statements, any one of which could justify a court finding an administrative decision to be unreasonable. A reasonable decision must be based on internally coherent reasoning and must be justified based on a “constellation” of legal and factual factors that constrain and inform the decision-maker. These factors include (a) the governing statutory scheme, (b) other relevant statutory or common laws, (c) principles of statutory interpretation, (d) the evidence

before the decision-maker, (e) the submissions of the parties, (f) the past practices of the decision-maker and (g) the potential impact of the decision on the affected parties.

Of particular importance are the following:

Statutory Scheme: An administrative decision will be unreasonable if it fails to comply with prescribed limitations on the scope of the outcome and is inconsistent with the statutory grant of powers given to the decision-maker.

Statutory Interpretation: Courts will scrutinize administrative decisions for the interpretation of statutes: a decision will be unreasonable if key elements of disputed statutory provisions are ignored or if inferior interpretations are adopted because they are convenient for the administrative decision-maker.

Common or International Law: Administrative decisions will be scrutinized for their application of common or international laws. An administrative decision will be unreasonable if there are unexplained or unjustified departures from commonly accepted legal interpretations.

The minority in *Vavilov* was direct:

We fear however that the majority’s multi-factored, open ended list of ‘constraints’ on administrative decision making will encourage reviewing courts to dissect administrative reasons

¹² See e.g. Maureen Killoran et al., “Supreme Court Majority alters framework for judicial reviews and statutory appeals” (20 December 2019), online (blog): *Osler* <<https://www.osler.com/en/resources/regulations/2019/supreme-court-majority-alters-framework-for-judicial-reviews-and-statutory-appeals>>; See also Scott H. D. Bower, Brynne Harding & Russel J. Kruger, “Supreme Court of Canada Reforms Judicial Review” (3 January 2020), online (blog): *Bennett Jones* <www.bennettjones.com/Blogs-Section/Supreme-Court-of-Canada-Reforms-Judicial-Review>; Jackie VanDerMeulen & Rachel Devon, “Landmark Decision from the Supreme Court: New Framework for Judicial Review” (15 January 2020), online (blog): *Fasken* <www.fasken.com/en/knowledge/2020/01/landmark-decision-from-the-supreme-court>; Steven Mason et al., “The Supreme Court of Canada simplifies the standard of review analysis in historic Super Bowl trilogy” (19 December 2019), online (blog): *McCarthy Tétrault* <www.mccarthy.ca/en/insights/articles/touchdown-supreme-court-canada-simplifies-standard-review-analysis-historic-super-bowl-trilogy>; John A. Terry et al., “SCC re-writes the standard of review” (20 December 2019), online (blog): <www.torys.com/insights/publications/2019/12/scc-re-writes-the-standard-of-review> (For applicable qualifications and limitations, see these various websites).

¹³ *Vavilov*, *supra* note 1 at para 13.

¹⁴ *Ibid* at paras 99–138.

in a 'line by line treasure hunt for error'... These 'constraints' may function in practice as a wide-ranging catalogue of hypothetical errors to justify quashing an administrative decision.¹⁵

Some commentators foresee substantial uncertainty over the application of the reasonableness standards, more ways in which a decision can be found unreasonable and/or an increase in the standard that administrative decisions must meet on a reasonableness review.¹⁶

Vavilov and Regulatory Risk

We see two principal takeaways from *Vavilov*:

- First, the regulatory risk on statutory appeals has clearly and materially increased as all legal issues decided by regulators will now be subject to a full correctness review.
- Second, the regulatory risk flowing from the new guidance on performing reasonableness review has certainly not decreased. If anything, the combination of robustness and the detailed set of indicia of reasonableness create the clear potential for a more exacting review of regulatory decisions. Much will depend on the way the Supreme Court, and various other appellate courts, interpret and apply this portion of *Vavilov* in the next few years.

If *Vavilov* creates, or potentially creates, additional regulatory risk, it also contains the seeds of a solution.

The entire logic underlying the majority opinion is respect for legislative intent, which

the majority says is the “polar star” of judicial review.¹⁷ When the legislative branch has delegated power to an administrative tribunal without specifying a role for the courts, the very fact of that delegation suggests the legislature “intended the administrative decision-maker to function with a minimum of judicial interference.”¹⁸ This justifies a deferential standard of review, such as reasonableness, but also demands compliance with any higher or different standard where the legislature has spoken, either by selecting a different standard of review or an appellate one.¹⁹

The majority is clear that, subject to certain rare issues relevant to the rule of law such as consistency with the constitution and compliance with jurisdictional boundaries, the courts will respect legislative direction in terms of setting an applicable standard of review and policing its application.²⁰

If the application of *Vavilov* should prove unwieldy in fact or if it should unduly restrict the effective exercise of state power, federal and provincial legislatures have a broad power to set appropriate standards and practices both for any statutory appeals and of any judicial review of administrative action.²¹

Arguably this legislative standard-setting is long overdue.²² The economic and policy importance of crisp and effective regulatory decision-making is manifest — at the same time so is the need for judicial standards to protect against abuse of state power. Likely, only an ongoing and focussed dialogue between legislatures and the courts will provide a durable, legitimate and appropriately balanced resolution of this critical issue. ■

¹⁵ *Ibid* at para 284.

¹⁶ See Fluker, *supra* note 9; See also VanDerMeulen, *supra* note 12.

¹⁷ *Vavilov*, *supra* note 1 at para 33.

¹⁸ *Ibid* at para 24.

¹⁹ *Ibid* at paras 32, 34, 36.

²⁰ *Ibid* at paras 32, 36.

²¹ Nigel Bankes, “Statutory Appeal Rights in Relation to Administrative Decision Maker Now Attract an Appellable Standard of Review: A Possible Legislative Response” (3 January 2020), online (blog): *ABlawg* <ablawg.ca/2020/01/03/statutory-appeal-rights-in-relation-to-administrative-decision-maker-now-attract-an-appellate-standard-of-review-a-possible-legislative-response>.

²² Almost a generation ago, Justice Iacobucci called for such a legislative approach. See The Honourable Frank Iacobucci, “Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis”, (2002) 27:2 *Queens LJ* 389 at 876–78.