ENERGY REGULATION QUARTERLY

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MISSION STATEMENT

The mission of Energy Regulation Quarterly (ERQ) is to provide a forum for debate and discussion on issues surrounding the regulated energy industries in Canada, including decisions of regulatory tribunals, related legislative and policy actions and initiatives and actions by regulated companies and stakeholders. The role of the ERQ is to provide analysis and context that go beyond day-to-day developments. It strives to be balanced in its treatment of issues.

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.

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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.

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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 Harrison K.C. and Gordon E. Kaiser

This is the first issue of the *Energy Regulation Quarterly* (*ERQ*) for the year 2023. This is our tenth year of publication. We start this tenth year just as we did in our first year with an article by David Mullan, Emeritus Professor of Law at Queen's University, one of Canada's leading experts in administrative law. That first article was a 46-page blockbuster called "Regulators and the Courts: A Ten Year Perspective."[1]

The first section of the Mullan article in this issue of *ERQ* deals with this question: Given *Vavilov's*[2] apparent exclusion of questions of procedural fairness from its standard of review template, what standards are applied to such challenges?

The leading case is *Abrametz*,[3] a decision of the Supreme Court of Canada that revisited the question of administrative delay which was first addressed by the court in 2000 in *Blencoe*.[4] Following a very thoughtful analysis of the cases, Mullan concludes that the decisions of the last three years lead to the seven principles that he outlines. They deserve careful reading.

The next issue that Mullan reviews is the judicial review that is appropriate in the case of subordinate legislation. There he looks at *Green v Law Society of Alberta*[5] and *West Fraser Mills v British Columbia*[6]as well as *Innovative Medicines*, a decision of the Federal Court on December 5, 2020.[7]

Mullan concludes that the controversy may be much about nothing but nonetheless the speculation should be put to an end and hopefully in the near future the Supreme Court will have an opportunity to do so.

Next Mullan turns to the question- what is the standard review for regulatory takings or what we more often call expropriation? This was a lively in issue in *Annapolis Group Inc. v Halifax*[8] where the Regional Municipality of Halifax rezoned property and prevented the owner from certain development leading to claims of unjust enrichment, misfeasment in public office and improper use of regulatory powers for the purpose of seizing land for use as a public park without compensation.

Mullan proceeds next to discuss procedural fairness and legitimate expectation in the issuance of issuance of ministerial guidelines which became centre stage in *TransAlta General Partnership*.[9] That case involved rulings by the Alberta government against the owners of coal-fired electricity generation facilities that the government decided to shut down. The question at issue was whether there should be depreciation adjustments arising out of the reduction of coal-fired emissions as part of the off coal agreement the utilities had entered

[1] David J. Mullan, "Regulators and the Courts: a Ten Year Perspective" (2013) 1:1 ERQ, online: <https://energyregulationquarterly.ca/articles/regulators-and-the-courts-a-ten-year-perspective-1#sthash.MF7dllrP.iVhBQg4A.dpbs>.

[2] 2019 SCC 65.

[3] Law Society of Saskatchewan 2000 SCC 44.

[4] *Blencoe v British Columbia*, 2000 SCC 44.

[5] 2017 SCC 20.

[6] 2018 SCC 22.

[7] *Innovative Medicines Canada v Canada*, 2022 FCA 2010.

[8] 2022 SCC 36.

[9] 2022 ABCA 381.

into with the government. Also at issue was the procedural fairness of the guidelines that eliminated that provision. The question was whether any level of procedural fairness was reviewable. The real question became whether the guidelines were a legislative function or administrative in nature.

That analysis also involved a decision of the Ontario government in *Tesla Motors*[10] where that government cancelled a subsidy program for those purchasing electric cars but established a two month grace period. It turned out that the government did not allow the Tesla customers to take advantage of the grace period. The Court of Appeal case noted the uncertainty of whether the doctrine of legitimate expectation could generate a right to a hearing in the case of legislative functions to which no such obligation would otherwise attach.

Another important discussion in this article concerns the recent development of the duty of candour by utilities that arose in the decision of the Alberta Utilities Commission in *ATCO Electric*[11] where the Commission fined ATCO Electric $31 million because they concealed relevant information in order to recover certain costs. The decision noted that ATCO had breached its fundamental duty of honesty and candour to its regulator, a duty that required that the information it provided to the Commission be "full fair and accurate." This is a decision that will have wide application across Canada. As always, the Mullan article is a must read textbook of the important developments in administrative law as it applies to energy regulation.

The second article in this issue of the *ERQ* written by Melanie Gillis and Noah Entwisle of the Halifax law firm, McInnes Cooper, concerns three important developments in the province of Nova Scotia. The first is a very significant expansion of the net metering program to support the development of solar energy. The second is a very aggressive new policy to develop green hydrogen projects. The third relates to the decision by the government of Nova Scotia to put a cap on the rates Nova Scotia Power can charge its customers.

Nova Scotia has had a net metering program to promote the development of solar energy since 2010. It has proved to be very popular with residential customers but less so with commercial customers because of the of 100 kW cap on the size of commercial installations.

The solar energy policy in Nova Scotia first attracted attention last year when Nova Scotia Power decided to charge customers a system access charge of eight dollars per kilowatt each month on net metered installations. The utility claimed that homeowners who generate their own electricity using solar panels were being subsidized by other customers. The government opposed the new charge and the utility subsequently withdrew the proposal

As the article explains the government introduced a new policy increasing the net metering capacity cap for commercial customers from 100 kW to 1 MW. In addition, any Nova Scotia customer now has the right to self generate electricity with solar panels and install up to 27 kW nameplate capacity of renewable electricity generation and storage without approval from the utility. The amended regulations also require Nova Scotia Power to process net metering applications in a timely matter and approve all net metering applications unless there are reasonable grounds to deny them.

The article also addresses a new very significant initiative Nova Scotia to develop green hydrogen. Currently there are six active green energy hydrogen projects in Nova Scotia including four projects to deliver the product to Europe. The new legislation provides much needed clarity on the environmental assessment obligations that hydrogen projects are now subject to.

The next section of this article addresses a very controversial policy introduced by the Nova Scotia government in 2022. That was the cap the government placed on the rate increases that the energy regulator in Nova Scotia could grant the utility, Nova Scotia Power. Nova Scotia Power had applied for a 14 per cent rate increase over two years. The provincial

[10] *Tesla Motors Canada v Ontario*, 2018 ONSC 5062.

[11] Alberta Utilities Commission, *Notice of enforcement proceeding*, 29 November 2021 (Application of the AUC Enforcement Staff for the commencement of a proceeding pursuant to sections 8 and 63 of the *Alberta Utilities Commission Act*).

government responded by passing legislation that limited the rate increase to 1.8 per cent over the next two years.

The article indicates that in the end the utility reached an agreement with its major customers that established an average rate increases of 6.9 per cent across all customer classes in 2023 and 2024. The Board approved those rates[12] because it was concerned about the credit downgrades Nova Scotia Power had incurred as a result of the rate cap. The regulator also stated that it had a legal obligation to grant rate increases where they were just and reasonable.

The regulator's reaction to the rate cap was also influenced by the utility's decision in response to the cap to stop making investments in a new transmission line called the Atlantic Loop. This $5 billion transmission project would give Nova Scotia greater access to hydroelectricity generated in Labrador and Québec. That renewable energy was considered essential if Nova Scotia was to eliminate its dependence on coal-fired electricity generation.

The next article in this issue the *ERQ* written by Jason Kroft and Ghazal Hamedani of the Toronto law firm, Miller Thomson, deals with the various carbon tax regime across Canada. It deals with provinces of Québec, Ontario, Alberta, British Columbia and the Atlantic Provinces. It also contrasts the development in Canada with the carbon tax regimes in the U.S. and Europe

As the article points out, the attempt by the Canadian government to impose carbon taxes in all provinces has faced years of legal challenges. In the end the Supreme Court of Canada concluded that the *Greenhouse Gas Pollution Act*[13] was constitutional and the federal government had the authority to establish the tax regime across Canada.[14]

The article also makes it clear that the policies that many provinces have put in place are not acceptable to the federal government and negotiations are still underway in some provinces. It is also true that experts in some quarters question the efficiency of carbon taxes as an economic instrument. The conclusion of this article is that the ability of carbon taxes to meet goals established for carbon reduction in Canada is by no means clear.

This issue of the *ERQ* has two book reviews. The first book, "California Burning" is by Katherine Blunt. It is has been reviewed by Ahmad Faruqui, a well-known energy economist who until recently was practising with the Brattle Group in San Francisco. Faruqui notes in his opening sentence that the subtitle of this book, "The Fall of PG&E and what it means for the American power grid" is very telling. The book, he notes, " reads like a corporate obituary."

Faruqui also notes that the book has a razor-sharp focus on the wildfires that were caused by PG&E over the last few years, several which resulted in criminal charges being filed and upheld against the company.

The book is well worth reading. It does a very good job of describing the complexity that large utilities like PG&E face these days. He notes that much of the colour is missing in this book because it is based mostly on interviews with victims of the company's disasters such as wildfires and pipeline explosions.

Faruqui concludes that even with these limitations the book is a must read. It documents in great detail the numerous blunders that tarnished the image of one of the largest electricity and gas utilities in America. He also notes that other utility executives should read this book. It will help them come to know what to do and what not what to do.

The second book being reviewed in this issue, The Guide to Energy Arbitration, is a collection of contributions from some of the leading energy arbitrators in the world. This book which is now in its fifth edition is edited by J William Rowley, Doak Bishop and Gordon Kaiser.

The author of the book review is Ralph Cuervo-Lorens, a partner in the McMillan law firm in Toronto. Lorenz points out in this review that the energy sector is the poster boy of global arbitration. Much of this book relates not to domestic energy policy but rather to

[12] Nova Scotia Utility and Review Board re General Rate Application by Nova Scotia Power, 2023, NSUARB 12.

[13] SC 2018 C12.

[14] *Reference re: Green House Gas Pollution Pricing Act*, 2021 SCC 11.

the activities of the multinationals that move energy between countries or search for energy in foreign jurisdictions. Given the importance of energy in the arbitration world, this book has proven to be essential to energy counsel and arbitrators alike. That no doubt is why it is now in its fifth edition.

The book tracks the development of arbitration under different treaties including NAFTA and more recently the USMCA as well as the complexity of price review arbitrations under a number of treaties. That may be why many well know energy arbitrators have five copies of this book on their bookshelf. Ralph Cuervo-Lorens we should point out provides an in depth analysis of the content. Readers will find it very helpful. ■

2022 DEVELOPMENTS IN ADMINISTRATIVE LAW RELEVANT TO ENERGY LAW AND REGULATION

*David J. Mullan**

I. GENERAL INTRODUCTION

That *Canada (Citizenship and Immigration) v Vavilov*[1] would put to rest all significant standard of review selection and application problems was always hoping for too much. After much judicial, professional, and academic quarreling over a range of issues arising out of or left unresolved by *Vavilov,*[2] during 2022, ending a period of abstinence, the Supreme Court of Canada returned to the fray and endeavoured (with varying levels of success) to settle some of the more significant questions arising out of its 2019 judgment. This annual survey is dedicated principally to a discussion of the relevant judgments each of which in different ways has significance for Energy Law and Regulation.

In the second half of the survey, I move away from standard of review and identify a number of other judgments, principally but not exclusively of the Supreme Court of Canada, dealing with a range of other issues that have resonance in an Energy Law and Regulation setting: the reach of the obligation of procedural fairness and the application of the doctrine of legitimate expectation in the context of regulation-setting or legislative-type functions, the nascent duty of candour in the course of regulatory proceedings, the range of remedies available for abusive and/or procedurally unfair delay in the processing of administrative proceedings, and the Supreme Court of Canada's elaboration or refinement of the criteria for recognizing public interest standing in both constitutional and administrative law challenges.

II. VARIATIONS ON A THEME OF *VAVILOV*

i. Introduction

One of the apparent ambitions of *Vavilov*[3] was the adoption of a standard of review template that would cover the universe of judicial review of administrative action on substantive grounds[4] Whether a challenge to administrative action came before a court by

* David J. Mullan, Emeritus Professor, Faculty of Law, Queen's University. Parts of this paper owe much to exchanges with John M. Evans, former Justice of the Federal Court of Appeal.

[1] 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*].

[2] *Ibid*.

[3] *Ibid*.

[4] In describing its mission, the majority judgment in *Vavilov, ibid* at paras 2,10–11, 16, 23, speaks of reforming and clarifying the law respecting judicial review of administrative action on substantive grounds in the most general of terms. The only apparent qualification is that review on natural justice and/or procedural fairness grounds is not included: see para 23 (though see my fuller discussion in David J. Mullan, "2020 Developments in Administrative Law Relevant to Energy Law" (2021) 9:1 Energy Regulation Q 21, online: ERQ <energyregulationquarterly.ca/regular-features/2020 developments-in-administrative-law-relevant-to-energy-law1#sthash.GE4Qu5Ra.dpbs>). That qualification aside, however, the majority, at para 11, stated its objective as "ensur[ing] that the framework it adopts accommodates all types of administrative decision-making."

way of an application for judicial review, a statutory appeal, or, presumably, a collateral challenge,[5] *Vavilov*[6] established criteria for determining the appropriate standard of review, and, thereafter, the considerations by which a court should conduct review in its application of the appropriate standard.

In the now over three years since *Vavilov* was decided,[7] not surprisingly, there has been significant judicial teasing out of a number of the aspects of both standard of review selection and the contextual adaptation of the various standards of review outlined in the majority judgment in *Vavilov*[8] For example, did the previous exception to the presumption of reasonableness review for questions of law in the case of matters that were potentially subject to scrutiny at first instance by both a court and an administrative agency still apply? Was the Supreme Court majority's omission of this category from its limited list of situations where the presumption of reasonableness review was rebutted deliberate or accidental? Given *Vavilov*'s emphasis on the primacy of reasons in the search for unreasonableness, how should a reviewing court assess reasonableness with respect to decisions for which reasons were not required or otherwise not provided by the decision-maker?

In the instance of the former, the Court, without admitting responsibility, has "restored" the exception to the list of situations where the presumption of reasonableness review is rebutted and questions of law are reviewed on a correctness standard.[9] As for the latter, various courts have provided extensive guidance on how reasonableness review is to be conducted in the absence of reasons.[10]

However, given the majority's ambition that the *Vavilov* principles should apply across the spectrum of administrative decision-making on substantive grounds, there are at least two domains where that qualified universality of approach has been questioned seriously but in somewhat different ways:

1. Given *Vavilov*'s apparent exclusion of questions of procedural fairness from its standard of review template, what standards are to be applied to such challenges? Is it even appropriate to speak in terms of standards of review for procedural questions?[11]

2. In the case principally but not exclusively of subordinate legislation, are there other situations where the universality of *Vavilov*'s approach to substantive review is compromised and where judicial scrutiny is still conducted by reference to traditional *ultra vires* standards or some variant thereof?

Moreover, it is relevant that there are contexts where these two questions elide as in the instance of challenges, direct or collateral, to legislated procedural rules on the basis that they do not comply with the principles of procedural fairness.[12]

In 2022, the Supreme Court provided a partial but still not definitive answer to the first question. While the second question has attracted considerable attention, both judicial and academic, we still await a resolution of which of two competing conceptions (or perhaps a merger of the two) should prevail. In this section of the survey, I will deal with both

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[5] Though, on this issue, see the later discussion in II (iv), "What Gives?", *below*.

[6] *Supra* note 1.

[7] *Ibid*.

[8] *Ibid*.

[9] *SOCAN v Entertainment Software Association*, 2022 SCC 30 In dissent on this issue, Karakatsanis and Martin JJ (at paras 115–19) rejected the creation of a further category under which the presumption of reasonableness review is rebutted. The three existing categories recognized in *Vavilov* were exhaustive).

[10] See *Vavilov*, *supra* note 1 at para 138. In such cases, attention inevitably turns to the outcome.

[11] Or, stating it another way, are courts to deal with issues of procedural fairness on a non-deferential correctness basis? However, for an earlier judgment to the effect that standard of review has no role to play in procedural unfairness challenges, see *Moreau-Bérubé v Nouveau-Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 SCR 249 at para 74 (*per* Arbour J delivering the judgment of the Court).

[12] I use "legislated" here to cover the entire range of statutorily authorized instruments: *e.g.*, Governor or Lieutenant Governor in Council regulations, procedural rulemaking by administrative agencies and tribunals, municipal by-laws. However, as will be seen, the approach to judicial review of such instruments may not be universal. There may also be an issue with respect to the review of various soft or internal procedural instruments not specifically authorized by statute.

issues from the perspectives of both precedent and principle.

ii. Procedural Unfairness – Standard of Review – The Impact of *Abrametz*

In *Law Society of Saskatchewan v Abrametz,*[13] the Supreme Court revisited review for delay in administrative proceedings, an issue last confronted by the Court in its 2000 judgment in *Blencoe v British Columbia (Human Rights Commission)*.[14] In the course of disciplinary proceedings initiated by the Law Society, Abrametz had applied for a stay on the basis of delay amounting to an abuse of process.[15] The Hearing Committee had denied his application and he appealed that decision to the Saskatchewan Court of Appeal as provided for by section 56(1) of *The Legal Profession Act, 1990.*[16] The hearing of an appeal under section 56(1) required leave from a judge of the Court of Appeal but was not restricted as to grounds. On that appeal, Abrametz was successful, and a stay was issued.[17] The Law Society sought and obtained leave to appeal to the Supreme Court.

Parenthetically, it is relevant that the underlying setting for the hearing of this appeal to the Supreme Court was different from that in *Blencoe.*[18] In *Blencoe*[19] the matter came to the courts by way of a petition for judicial review under the British Columbia *Judicial Review Procedure Act*,[20] filed after the human rights complaint had been set down for a hearing. In his petition requesting a stay, Blencoe alleged excessive delay in the processing of a human rights complaint against him such as to amount to both a denial of procedural fairness and an abuse of process.[21] In contrast to *Abrametz,*[22] there had been no formal request for a stay within the administrative process. There was no internal decision on that issue for the British Columbia Supreme Court to review. Rather, the Court in effect conducted a trial at first instance of Blencoe's excessive delay allegation.[23] Issues of standard of review were simply not relevant as the Court was not reviewing a decision. It was also an era when the notion of a reviewing court deferring to a tribunal on procedural issues would have had little traction. Even *Dunsmuir v New Brunswick*[24] was still seven years away. Consequently, the failure of the Supreme Court to say anything about standard of review was unsurprising.

In contrast, in *Abrametz,*[25] there was an actual decision to be judicially reviewed within the framework of a statutory appeal regime. In fact, it is likely that today a Canadian court would hesitate to allow such a judicial review petition or application to proceed without the appellant or applicant having first raised the matter formally with the designated regulator or the hearing tribunal.[26] More pertinently, it was also the case that, in an era of increasing attention to the standard of review issue, there had been some Supreme Court attention to the question of its relevance to judicial review on procedural grounds.

Until *Abrametz*, the leading precedent on the standard of review to be applied to allegations of procedural unfairness was the judgment of LeBel J in *Mission Institution v Khela*.[27] Khela was involuntarily transferred back to a maximum security penitentiary and sought

[13] 2022 SCC 29 [*Abrametz*].

[14] 2000 SCC 44, [2000] 2 SCR 307 [*Blencoe*].

[15] Abrametz did not argue that the delay had given rise to hearing unfairness but confined his challenge to abuse of process: *supra* note 13 at paras 41–42.

[16] SS 1990-91, c L-10.1.

[17] 2020 SKCA 81.

[18] *Supra* note 14.

[19] *Ibid.*

[20] RSBC 1996, c. 241.

[21] *Ibid.*

[22] *Supra* note 13.

[23] 49 B.C.L.R. (3d) 216.

[24] 2008 SCC 9, [2008] 1 SCR 190.

[25] *Supra* note 13.

[26] See the judgment of Rowe J for the majority in *Abrametz*, *supra* note 13 at para 79.

[27] 2014 SCC 24, [2014] 1 SCR 502 [*Khela*].

judicial review of that decision by way of an application for *habeas corpus* to the British Columbia Supreme Court. When the matter reached the Supreme Court, LeBel J addressed the issue of the standard by which a reviewing court should assess procedural questions. Initially, his position seemed straightforward:

> The standard of review for determining whether the decision maker complied with the duty of procedural fairness will continue to be "correctness".[28]

However, thereafter, in responding to the argument that there had been procedural unfairness resulting from the denial of access to certain relevant materials based on a warden's "risk" assessment, LeBel J went on to say:

> The Commissioner, or her or his representative, is in the best position to determine whether such a risk could in fact materialize. As a result, the Commission, or the warden, is entitled to a margin of deference on this point. Similarly, the warden and the Commissioner are in the best position to determine whether a given source or informant is reliable. Some deference is accordingly owed on this point as well.[29]

Obviously, how to reconcile these two statements together poses a problem. The initial statement as to the continuation of correctness review for questions of procedural fairness is not focussed simply on the threshold determination of whether there is an entitlement to any level of procedural fairness; it extends to the details of any such procedural fairness entitlement. Yet, in the second statement, LeBel J seems to accept that there are at least some situations where the decision-maker is entitled to deference in the evaluation of arguments pertaining to the content of procedural fairness entitlements in a particular case. In this instance, that evaluation was whether to derogate from normal entitlements to access to relevant material based on a risk assessment.

In the following year, 2015, Stratas JA in *Bergeron v Canada (Attorney General)*[30] without purporting to resolve the *Khela* dilemma, provided an account of what he described as a "jurisprudential muddle" on the issue of the role of deference in the domain of procedural fairness. Since then, he has continued to document the perpetuation of this state of confusion in his regularly updated (and now including *Abrametz*), "The Canadian Law of Judicial Review: Some Doctrine and Cases."[31]

As noted above, the procedural context for *Abrametz*[32] was a statutory appeal with leave to the Saskatchewan Court of Appeal. Rowe J, delivering the judgment of an 8-1 majority reversing the Saskatchewan Court of Appeal and refusing a stay of proceedings, seemed to be very careful to limit the scope of the ruling on the issue of standard of review to the context of statutory appeals. In other words, one is led to speculate immediately as to why he did not include within the ambit of his brief discussion consideration of the role of standard of review for assertions of procedural unfairness questions on applications for judicial review especially.

> This case allows the Court to clarify the standard of review applicable to questions of procedural fairness and abuse of process in a statutory appeal…This does not depart from *Canada (Citizenship and*

[28] *Ibid* at para 79.

[29] *Ibid* at para 89.

[30] 2015 FCA 160 at paras 67–71.

[31] David Stratas, "The Canadian Law of Judicial Review : Some Doctrine and Cases" (2022) at 88–95, online (pdf) : *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=2924049>. More explicitly judgmental was a former justice of the Federal Court of Appeal in John M. Evans, "Fair's Fair: Judging Administrative Procedures" (2018) 28 CJAL&P 112, and now, with reference to *Abrametz*, see his "View from the Top: Administrative Law in the Supreme Court of Canada, 2022", a supplement to Brown and Evans, *Judicial Review of Administrative Action in Canada*, (Toronto: Thomson Reuters, 1998) (loose-leaf updated 2022).

[32] *Supra* note 13 at 4.

> *Immigration) v. Khosa*[33]…and *Khela*[34]…as those decisions related to judicial review and to the granting of the prerogative writs.[35]

Putting this in an energy regulatory setting, the judgment explicitly covers regulatory regimes where, as in the case of the Alberta Utilities Commission, there is an appeal on questions of law and jurisdiction with leave to the Alberta Court of Appeal[36] but not the situation in jurisdictions where access to judicial review from an energy regulator is not by way of statutory appeal but through the regular application for judicial review process[37]. In that limited context, Rowe J acknowledged that *Vavilov*[38] was a case of substantive, not procedural review but asserted that, in the case of statutory appeals to the courts, *Vavilov* was "categorical."[39] Both substantive and procedural challenges were to be dealt by reference to "appellate standards of review"[40]: correctness for questions of law and "palpable and overriding error for questions of fact and of mixed law and fact."[41]

It is implicit in Rowe J's judgment that, where there is a right of appeal to a court from an administrative decision, the **scope** of that appeal provision includes procedural unfairness challenges, at least where it is open-ended, (and presumably also when it is restricted to questions of law and jurisdiction though there may be a question about fact-based procedural determinations). However, why the majority was of the view that *Vavilov* was "*categorical*" as to the applicability of appellate standards is not at all clear. What makes the situation with respect to the standard of review "categorical" in the case of statutory appeals based on procedural unfairness but seemingly uncertain in the case of the application of the *Vavilov* standards of review in the context of judicial review on procedural grounds? More generally, how can it be said that the *Vavilov* majority was categorical as to the application of the standards of review to procedural unfairness **in an appellate setting** when the majority stated specifically that its realignment of standard of review principles related to substantive review and did not include procedural unfairness challenges? In short, it would appear to be more accurate to characterize the application of statutory appeal standards to procedural unfairness challenges as an addition or extension to, and not an application of *Vavilov*. It answered partially a question left open by *Vavilov.*[42]

The disclaimer that the Court was not "depart"ing from *Khosa*[43] and *Khela*[44] because they were procedurally instances of judicial review and not a statutory appeal is not useful especially given the level of controversy over the standard of review for procedural unfairness challenges commenced by way of applications for judicial review and the very meaning of *Khela.*[45] Given that state of affairs, it was scarcely appropriate for the Supreme Court to so confine its judgment on the issue of standard of review. A justification based on a principle that appellate courts should not expand unduly the reach of their rulings when not required to resolve the dispute would have sounded somewhat hollow here.

It is even more surprising that the majority chose not to respond explicitly to the detailed challenge issued by Côté J in her dissenting judgment.[46] She did not accept as "categorical"

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[33] 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*]. At para 43, purportedly relying upon *Dunsmuir*, Binnie J, delivering the judgment of the majority, asserted that procedural fairness review is conducted on a correctness basis.

[34] *Supra* note 27.

[35] *Supra* note 13 at paras 26, 28.

[36] *Alberta Utilities Commission Act*, SA, c A-37.2, ss 29(1) and (2).

[37] See *e.g. Energy and Utilities Board Act*, SNB, c E-9.18, s 52(1).

[38] *Supra* note 1.

[39] *Abrametz*, *supra* note 13 at para 27.

[40] *Ibid*.

[41] *Ibid* at para 29. As established in the context of civil litigation by *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235.

[42] *Supra* note 1.

[43] *Supra* note 33 at 8.

[44] *Supra* note 27.

[45] *Ibid*.

[46] *Abrametz*, *supra* note 13 at 160–85, Part A of which is headed "Inconsistency with *Khela.*"

the application of *Vavilov* standards to questions of procedural fairness in any context be it a statutory appeal or an application for judicial review. She also called into question the somewhat glib assertion by Rowe J that the majority was not calling into question *Khela*[47] and *Khosa.*[48] As for the application of the *Vavilov* standards, there is also a disconnect that arises out of the following statement by the majority:

> 30. Whether there has been an abuse of process is a question of law. Thus, the applicable standard of review is that of correctness.[49]

When, however, the majority judgment comes to the merits of the abuse of process challenge, the primary focus is not so much on the guiding legal principles on abuse of process but, in a fact-suffused setting, the evaluation of the relevant facts and the application of the law to those facts. This is the domain of "palpable and overriding error," not correctness, and Rowe J acknowledges as much.[50]

In contrast to the majority's folding in of questions of procedural fairness into the *Vavilov* review formula generally applicable to appellate scrutiny of administrative action, Côté J took the position that the law governing procedural fairness was largely a common law construct existing apart from but foundational to the merits of administrative decision-making and substantive review of such decision-making on the now prevalent standard of reasonableness. Moreover, she claimed that

> …the application of common law principles falls squarely within the expertise of the judiciary[51]

As such, she held that *Vavilov* had no direct application to questions of procedural fairness, and it was not appropriate to engraft on to a statutory appeal regime the *Housen* standards of review for challenges alleging procedural unfairness. Across the entire range of statutory decision making, the standard of review (unless modified statutorily and in compliance with constitutional norms[52] for procedural unfairness review was that of correctness. There was no principled difference between review of decision-making on procedural grounds in a statutory appeal regime and/or by way of an application for judicial review. *Khosa*[53] and *Khela*[54] still reigned. Procedural fairness was a legal standard for which the overall standard of review was that of correctness.[55]

However, Côté J did not leave it there. In her introductory analysis, she states:

> Admittedly, the majority's approach usually leads to the same result where the enabling statute establishes an appeal mechanism.[56]

Why she thought that was so is developed along the way in the next two sections of her dissenting judgment and is most directly manifest in her attempt to reconcile the seemingly inconsistent statements by LeBel J in *Khela*[57] As the dissent progressed, she qualified her adoption of an overall standard of correctness by making a distinction between the identification and application of the relevant legal principles, on the one hand, and the decision-maker's "underlying findings of fact,"[58] on the other. On the latter, as in *Khela*[59] and its risk assessment aspect, the decision-maker was entitled to deference.[60] She also instanced procedural rulings in situations

[47] *Supra* note 27 at 6.

[48] *Supra* note 33.

[49] *Abrametz*, *supra* note 13 at para 30.

[50] *Ibid* at paras 103–24, and especially para 124.

[51] *Ibid* at para 168.

[52] *Ibid* at para 172.

[53] *Supra* note 33.

[54] *Supra* note 27.

[55] *Abrametz, supra* note 13 at paras 165–69.

[56] *Ibid* at para 169.

[57] *Supra* note 27.

[58] *Abrametz*, *supra* note 13 at para 174.

[59] *Supra* note 28 at para 6.

[60] *Abrametz*, *supra* note 13 at para 174.

where the decision-maker had room for choice. Provided the process adopted came within the "bounds of fairness," the decision maker was entitled to "considerable deference" in its choice between or among procedures.[61]

In terms of Côté J's objectives, this part of her judgment does provide a credible, indeed convincing basis for reconciling LeBel J's seemingly inconsistent statements in *Khela*[62] As such, it recognizes justifiably that there are elements of procedural fairness review when, despite correctness being the overarching standard of review, there will be room for deference to aspects of the decision-making process that are subject to procedural unfairness challenges. While Côté J does not characterize this sense of deference as the formal equivalent of *Vavilov* review of the reasonableness of elements of a decision-making process, that may be of little moment. What really matters is that she accepts there is no principled objection to the application of different standards to different parts of a decision-making process that is under review on procedural grounds. Outside of the zones of correctness review, whether the process is described in terms of "reasonableness," "deference" or "palpable and overriding error" may not really matter. In fact, Côté J herself asserts that, in a practical sense, there may not be that much difference between outcomes based on the majority's statutory appeal-based test and her minority blend of correctness and deference.[63]

However, there is one aspect of the Côté J approach that might have led to more intrusive review on procedural unfairness grounds than would result from the majority's application of the *Housen*[64] formula as adopted in *Vavilov*. Under *Housen*, questions of mixed fact and law are reviewed on a palpable and overriding error standard. In contrast, Côté J appears to see no room for deference beyond the review of "underlying findings of fact." This seems confirmed by her statement:

> I reiterate that the application of a legal standard to the facts is a question of law subject to correctness review.[65]

Unless there is a difference (and I cannot see one) between the process of applying law to the facts as found and the determination of questions of mixed law and fact, on this point, there are significant differences as between the two judgments and their sense of where correctness yields to "palpable and overriding error" or, its apparent equivalent, deference.

Côté J also places store in the notion that in procedural fairness review the role of the Court is not a search for an optimal procedure. A reviewing court is in effect concerned with whether the minimum standard for satisfying the scope of the overall obligation of procedural fairness has been satisfied.[66] I can, however, find nothing in the majority judgment that would suggest that the application of the *Vavilov* statutory appeal test for review on procedural fairness grounds would lead to anything more than the minimum required by the obligation of procedural fairness. Once the minimum has been achieved, the case is over. There is no precedent for "While I accept that you have met the minimum standards, you surely could have done better than that."

Where does this leave the state of the law on the standard of review applicable to procedural unfairness claims?

1. Where the context is a statutory appeal, unless modified statutorily, the proper standard of review for procedural fairness is now extended to that established in *Vavilov* for review on substantive grounds in an appellate setting — correctness for questions of law, and palpable and overriding error for questions of fact and mixed questions of law and fact.[67]

2. Where the context is an application for judicial review and perhaps any

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[61] *Ibid* at paras 176–77 (citing once again *Khela*, and, *inter alia*, *Council of Canadians with Disabilities v VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 SCR 650 at para 231, and *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at para 27).

[62] *Supra* note 27.

[63] *Abrametz*, *supra* note 13 at para 164.

[64] *Supra* note 41.

[65] *Abrametz*, *supra* note 13 at para 182.

[66] *Ibid* at paras 178–79.

[67] Including presumably procedural challenges on *Charter* violation grounds.

collateral challenge including an action for damages, *Khosa* and *Khela* remain good law with correctness being the overarching standard of review for procedural fairness.

3. However, *Khela* and both the majority and the minority in *Abrametz* accept that there is room for some form of deference to fact-based determinations by decision-makers relevant to any claim of procedural unfairness.

4. In the preceding context, it is probably the case that there is no significant difference between "deference" as articulated in both *Khela* and the minority judgment in *Abrametz*, and the respect that is implicit in the *Abrametz* majority's deployment of the "palpable and overriding" error standard for such fact-based determinations.

5. At least in the context of statutory appeals, the *Abrametz* majority judgment (as opposed to that of the minority) extends this deferential posture necessarily implicit in the "palpable and overriding error" standard to mixed questions of law and fact.

6. It is unlikely that, in the context of applications for judicial review or collateral challenges, correctness would be the standard for review of a decision-maker's application of law to the facts and, its equivalent, the determination of a mixed question of law and fact.

7. Given the majority's failure to engage clearly with the earlier Supreme Court judgments in *Khosa* and *Khela*, there may nonetheless be lingering doubts as to correctness as the umbrella or general standard or starting point for the conduct of judicial review for procedural unfairness in the context of applications for judicial review and collateral attack.

It is also important to recognize in any analysis of the standard of review for procedural unfairness that, whether by way of appeal, application for judicial review, or collateral attack, there are varying contexts in which such issues will be raised.

While not frequent nowadays, there may be issues as to whether the threshold for a right to procedural fairness has even been crossed.[68] Thereafter, one of the most common scenarios for a procedural unfairness allegation will, as in *Khosa*, *Khela*, *Blencoe*, and *Abrametz*, arise out of the range of the various historic common law components of the content of procedural fairness such as an absence of bias, access to relevant materials, representation by counsel, and, of course, even though unusually, excessive delay and abuse of process. Generally, on both the threshold and the content, there are established tests that have evolved over time. Identifying successfully the relevant tests is properly seen as a question of law, but whether it is always a question of law on which the courts hold the upper hand is a quite different matter.

Current law including the majority judgment in *Abrametz* on balance favours the position that such identification exercises should be reviewed, irrespective of context, on a correctness basis. However, once one moves away from common law-established standards to challenges to the deployment of statutory or even internal procedural policies, the situation possibly changes.

To state the issue in its perhaps starkest form: Assume a set of regulatory procedures authorized by statute that has been forged in the cauldron of both internal and stakeholder consultations and finds justification in policy and position papers. Is it appropriate for a reviewing court to scrutinize on a correctness standard the detail of those procedures (whether in the context of a direct challenge or their application to a particular proceeding) in terms of compliance with common law procedural norms and appealing to the pre-eminence of the courts in matters of procedure? Has the case been made for denying to the tribunal or agency the respect to which they are generally entitled in the context of the exercise of their substantive discretionary powers? What makes their judgment on often context-specific

[68] See, however, in an energy regulatory context, *TransAlta Generation Partnership v Alberta (Minister of Municipal Affairs)*, 2022 ABCA 381 at paras 88–102, and rejecting the application of the principles of procedural fairness to the issuance of statutorily authorized Guidelines. I will discuss this aspect of *TransAlta Generation* later in this survey.

procedural questions any more suspect than their exercises of statutorily-conferred substantive discretionary powers?

Provided the tribunal identifies correctly the common law tests or criteria relevant to such requests (as, for example, in the case of a request for representation by counsel), there is a strong argument, whether the setting be a statutory appeal or an application for judicial review, that respect should be accorded to a tribunal's reasoned application of the correctly identified test to the relevant facts of a contested procedural request.

In conclusion, I would simply suggest that there are more nuanced questions to be addressed by the courts in this whole domain and involving an argument for deferential review of procedural rules and rulings beyond the limited categories identified in *Khela* and *Abrametz*. It is also important to keep in mind that, whether it be by way of primary or subordinate legislation or soft law, procedural obligations are by far and away now the product of "legislative" exercises, the outcome of which has involved frequently an integrated assessment of procedural needs in light of a full understanding of the detail and complexities of the substantive objectives of the relevant regulatory regime.

iii. Judicial Review of Subordinate Legislation – and Duelling Courts of Appeal – Herding *Katz*

In several judgments delivered during 2022, Courts of Appeal took differing positions on the relevance of *Vavilov* and its standard of review methodology to review engaging subordinate legislation in all of it various manifestations. This disagreement was paralleled in the academic and professional commentary on the case law and the appropriate judicial stance for the conduct of such review exercises.[69]

At the centre of the controversy (judicial, professional, and academic) is the issue whether, in the wake of *Vavilov*, judicial review of subordinate legislation defined broadly fits within the presumption of reasonableness review endorsed by the majority. Or, do pre-*Vavilov*ian precedents that conducted review by reference to the concept of *ultra vires* still prevail or, at the very least, have a claim to legitimacy?

For Stratas JA of the Federal Court of Appeal, in two judgments in particular,[70] the answer to this question was seemingly straightforward. *Vavilov*'s objective was to establish a template for discerning the appropriate standard of review for substantive (but not procedural) challenges across the entire spectrum of administrative decision-making. Unlike the situation with procedural unfairness challenges, there were no express substantive review exclusions from the reach of the *Vavilov* majority judgment. While the majority did not deal explicitly with this issue, as pointed out by Stratas JA,[71] in *Vavilov,*[72] the majority, in the context of rejecting the continued existence of true questions of jurisdiction,[73] incorporated references to Supreme Court precedents on the conduct of judicial review of subordinate legislation.[74]

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[69] References to much of the relevant professional and academic analysis as well as case law are to be found in the judgment of the Alberta Court of Appeal in *TransAlta Generation Partnership v Alberta (Minister of Municipal Affairs)*, *ibid* at paras 45–49, and the judgment of Stratas JA in *Innovative Medicines Canada v Canada (Attorney General)*, 2022 FCA 210 at paras 26–29, 43.

[70] *Portnov v Canada (Attorney General)*, 2021 FCA 171, and *Innovative Medicines Canada v Canada (Attorney General)*, *ibid*, responding to a contrary position taken by the Alberta Court of Appeal in *Auer v Auer*, 2022 ABCA 375 and *TransAlta Generation Partnership*, *supra* note 68.

[71] See *Innovative Medicines Canada*, *ibid* at para 34.

[72] *Supra* note 1 at paras 65–67.

[73] In *Dunsmuir*, the majority, *supra* note 24 at para 59, had cited *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19, [2004] 1 SCR 485, a case involving a challenge to the validity of a municipal by-law, as an example of a true question of jurisdiction subject to correctness review.

[74] *Vavilov*, *supra* note 1 at para 66, in which the majority appears to use the difficulty of distinguishing between correctness *vires* or jurisdictional review of subordinate legislation and its exercise, and the "unremarkable application of an enabling statute", the best example being the case of a broad grant of authority to promulgate subordinate legislation in accordance with the objectives of the empowering act. All this was in support of the excision of the concepts of jurisdiction and *vires* from the rubric of Canadian judicial review law.

In each of these two precedents, *Green v Law Society of Alberta*[75] and *West Fraser Mills Ltd. v British Columbia (Workers' Compensation Appeal Tribunal),*[76] the Court at least in part engaged in review by reference to standards of reasonableness. Moreover, there was no suggestion in this part of the *Vavilov* analysis that review of subordinate legislation was beyond the judgment's reach and ambitions, and the universality of the recalibrated template. Rather, for Stratas JA, the compelling inference was that it too comes within the template and that the traditional modality of review under the rubric of *ultra vires* and involving in effect correctness review did not survive *Vavilov*. More specifically, *Vavilov* represented an implicit overruling of *Katz Group Canada Inc. v Ontario (Health and Long-Term Care),*[77] an earlier 2013 judgment of the Court, in which Abella J reviewed subordinate legislation by reference to the *ultra vires* principle, and, in effect, conducted correctness review, a form of analysis now seemingly rejected by *Vavilov*. Put simply, for Stratas JA, *Katz* was no longer good law and the principles of precedent dictated that he apply *Vavilov*[78] and subject the subordinate legislation in each of the two cases to reasonableness review.

There are, however, complications. In *Innovative Medicines*, on December 5, 2022, Stratas JA delivered the judgment of a panel of the Federal Court of Appeal otherwise consisting of Locke JA and Woods JA. While Woods JA concurred with the holding that the challenged regulation survived challenge, she dissociated herself[79] from those parts[80] of Stratas JA's judgment in which he justified his application of *Vavilov* on the merits as well as on the basis of binding precedent.

The waters were muddied further when the very next day de Montigny JA delivered the judgment of the Federal Court of Appeal in *International Air Transport Association v Canadian Transportation Agency.*[81] In this judgment, with which Pelletier and Locke JJA concurred, de Montigny JA worried about the assertion that *Katz* was no longer good law.[82] In particular, he referenced[83] the 2021 energy regulation judgment of the Supreme Court of Canada in *Reference re: Greenhouse Pollution Pricing Act.*[84] There, the majority considered whether the extensive discretionary powers conferred on the Governor in Council to, among other things, make regulations in effect permitted unconstitutional impingement on the jurisdiction of the provinces. In rejecting that argument, the majority of the Court relied on both *Katz* (and *Vavilov*), in support of the conclusion that any such exercise of executive power had to be consistent with the otherwise constitutional objectives of and other specific provisions in the *Act*. Failure in that regard would expose the exercise of authority to judicial review. There was nary a mention of reasonableness or deference. At least in that context and for those purposes, *Katz* survived.[85]

De Montigny JA also asserted that unreasonableness review in the model of *Vavilov* was a difficult fit for the review of subordinate legislation[86]. In this context, he referenced favourably[87] the extra-judicial position taken by his former colleague, Evans JA. Evans

[75] 2017 SCC 20, [2017] 1 SCR 360.

[76] 2018 SCC 22, [2018] 1 SCR 635.

[77] 2013 SCC 64, [2013] 3 SCR 810.

[78] And, in the second of the cases, *Innovative Medicines Canada*, *supra* note 69 at para 27, that, as required by the Federal Court of Appeal precedential rules, he apply his own previous judgment for the Court of Appeal in *Portnov*, *supra* note 70 at paras 26–27.

[79] *Ibid* at para 67.

[80] *Ibid* at paras 28–43.

[81] 2022 FCA 211.

[82] *Ibid* at paras 186–90.

[83] *Ibid* at para 190.

[84] 2021 SCC 11. In dissent, at paras 600–07, Rowe J located the review of regulations on division of powers grounds as a matter of *ultra vires*. However, more generally, Rowe J would apply the *Vavilov* reasonableness methodology to the review of subordinate legislation.

[85] *Ibid* at para 73 and 87 particularly. It is however worth noting that both Stratas JA in *Innovative Medicines*, *supra* note 45 at para 69, and de Montigny, *supra* note 81 at para 191, made a point of stating that the outcome would have been the same irrespective of the methodology adopted.

[86] *Ibid* at para 189.

[87] *Ibid*.

is of the view that, as the promulgators of subordinate legislation are not explicitly or even implicitly bestowed with the capacity to decide questions of law, the *Vavilov* template for judicial review should not apply. *Ultra vires* review should persist in the domain of attacks on delegated legislation; it is not the same as the now repudiated review for jurisdictional error applicable to other forms of administrative decision-making.[88]

It was also in another Energy Regulatory context that the Alberta Court of Appeal in *TransAlta Generation Partnership v Alberta (Minister of Municipal Affairs),*[89] applied the *Katz ultra vires* standards to the review of a statutorily based Ministerial Guideline on the basis that *Katz* had not been overtaken or modified. In so doing,[90] the Court drew upon both *Vavilov* and *Reference re: Greenhouse Gas Pollution Pricing Act* in support of the holding that *Katz* had not been overruled and that the traditional modalities of *ultra vires* review had survived *Vavilov*.

With respect to the continuing authority of *Katz*, the Court of Appeal[91] referred to two paragraphs in the majority judgment in *Greenhouse Gas Pollution Pricing*.[92] In both, the majority cited *Katz* approvingly and with particular reference to the paragraph in *Katz* containing the following statement:

> A successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate.[93]

What is, however, confusing is that the majority in *Greenhouse Gas Pollution Pricing* cites *Vavilov* along with *Katz* for the proposition that

> …the Governor in Council's discretion is limited both by the statutory purpose of the [*Act*] and by specific guidelines set out in the statute for listing decisions[94].

While, on its face, this might be interpreted as speaking to *ultra vires* review, the paragraph cited from *Vavilov* appears in that portion of the majority judgment identifying the contextual considerations that form the *Vavilov*ian reasonableness criteria.[95] It also raises the question whether the Supreme Court has folded a version of traditional *ultra vires* review into the *Vavilov* template for assessing the reasonableness of decisions (including the promulgation of subordinate legislation). If that is so, the reality may be that all the controversy is much ado about nothing. That may be too cynical. However, if this analysis is correct, in domains when the reach of the governing statutory scheme is in issue as expressed in terms of "the rationale and purview of the statutory scheme under which it is adopted,"[96] there may be little, if any difference between correctness review in the name of *Katz* and reasonableness review of subordinate legislation in the name of *Vavilov*. Nonetheless, the time for putting an end to this kind of speculation has surely arrived. It is therefore to be hoped that, in the near future, the Supreme Court has the opportunity to put all of this to rest.

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[88] John M Evans, "Reviewing Delegated Legislation After *Vavilov*: *Vires* or Reasonableness?" (2021) 34 CJAL&P 1. It is unclear whether Evans would also exclude from *Vavilov*'s reach all decision makers that lack the capacity to deal with questions of law or whether it is simply an add on to the legislative character of the decision-making as a reason for characterizing the review of subordinate legislation as appropriately classified as an example of *ultra vires* review. See also *Auer v Auer*, *supra* note 70, where Pentelechuk JA (Crighton JA concurring), expresses many of the same arguments and concerns in rejecting the argument that *Vavilov* has inferentially overruled *Katz*. While agreeing with the majority that the relevant statutory guidelines were valid, Feehan JA reached that conclusion on the basis of a blend of *Vavilov*'s criteria for reasonableness review and criteria derived from *Katz*.

[89] *Supra* note 69 at paras 40–53, following *Auer v Auer.*

[90] *Ibid* at para 48. The Court, at para 45, also cited the Evans JA article as had Pentelechuk JA in *Auer*, *ibid* at para 39.

[91] *Ibid*.

[92] *Supra* note 84 at paras 73, 87.

[93] *Katz*, *supra* note 77.

[94] *Reference re: Greenhouse Pollution Pricing Act*, *supra* note 84 at para 73.

[95] *Vavilov*, *supra* note 1 at para 108.

[96] *Ibid*, citing *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5 at para 15.

iv. What Gives – No Standard of Review for Regulatory Takings?

In *Annapolis Group Inc. v Halifax Regional Municipality,*[97] by a five to four majority, the Supreme Court of Canada widened the scope of the principles governing the right to compensation for the constructive taking of private property, a matter of interest in the realm of energy regulation.[98] The allegation of constructive taking arose out of the *Halifax Regional Municipality* ("*HRM*") rezoning the property in question and, thereafter, refusing applications by the owner for various forms of development, actions for which the *HRM* refused the *Annapolis Group* compensation. Eventually, this led to Annapolis commencing an action against *HRM* pleading unjust enrichment, misfeasance in public office, and improper use of regulatory powers for the purposes of constructively seizing *Annapolis Group*'s land for use as a public park without compensation. The matter reached the Supreme Court of Canada in the context of a motion by *HRM* for a striking out of the third of those grounds, the improper use of regulatory powers, and the ultimate disposition was that, in the light of the majority's expansion of the scope of what counted as constructive taking, the matter should proceed to trial on this as well as the other two grounds on which *HRM* had conceded.

From one perspective, this was *Roncarelli v Duplessis*[99] and *Canada (Attorney General) v TeleZone Inc.*[100] territory — civil claims for compensation for the alleged use of statutory powers for an improper purpose — but they were not cited by either the majority or the minority. Similarly, in neither judgment was there any attention paid to the fact that what was at stake here was the review, albeit in a civil liability context, of a range of decisions taken under statutory powers. Access to judicial review is not raised as a possibility nor as required[101] before the adjudication of any civil action for the improper use of statutory power. Rather, the matter proceeded in the manner of a regular civil action in which a question of law was critical to *Annapolis Group*'s prospects of success on the facts. In short, what were the relevant law and tests respecting constructive or regulatory takings, and, in view of that law, did *Annapolis Group* have any reasonable prospect of success on the claim for compensation or damages?

Here too, questions arise as to the universality of the substantive review principles set out in *Vavilov*. Moreover, in this instance, there appears to be no recognition that *Vavilov* might have relevance and that the *HRM* in its assessment of the scope and application of the rules governing constructive or regulatory takings might be entitled to a measure of deference or reasonableness review.

Why that is so must of necessity be a matter of conjecture. One possibility is that the law respecting expropriation is *sui generis*, and, especially in the context of constructive or regulatory takings, the product of a historically distinctive body of common law principles that are engrafted on to the relevant exercises of statutory power. In this respect, there may be an implicit link with *Vavilov* especially to the extent that the majority in *Vavilov*[102] brings within the categories of decision-making subject to review for unreasonableness interpretations of statutory power that are "inconsistent with applicable common law principles."

III. MISCELLANY

i. Procedural Fairness, Legitimate Expectation, and Ministerial Guidelines

In *TransAlta General Partnership,*[103] the Alberta Court of Appeal dealt with a challenge to the validity of subordinate legislation (in the form

[97] 2022 SCC 36.

[98] From the position taken by the Court in 1996 in *Canadian Pacific Railway Co. v Vancouver (City)*, 2006 SCC 5, [2006] 1 SCR 227.

[99] [1959] SCR 121.

[100] 2010 SCC 62, [2010] 3 SCR 585.

[101] In fact, Binnie J, delivering the judgment of the Court in *TeleZone*, *ibid* at paras 18–23, would not have classified this as a form of collateral attack or, on the facts of that case, requiring as a prerequisite an application for judicial review.

[102] *Supra* note 1 at para 111.

[103] *Supra* note 69.

of ministerial guidelines authorized by statute) and an allegation of procedural unfairness arising out of the issuance of those guidelines. The guidelines set standards for the charging of depreciation in establishing the value of regulated industrial properties for municipal taxation purposes. The four applicants operated coal-fired electricity generation plants. Though the evidence before the Court was not definitive, there were probably at least two other such operations in the province. All four applicants had entered into "off-coal" agreements with the provincial government under which they received substantial annual sums. Under the ministerial guidelines, it was provided that there would be no depreciation adjustments arising out of the cessation or reduction of coal-fired emissions as part of an off-coal agreement, or provincial or federal legislation.

The four companies challenged this aspect of the guidelines on various substantive grounds but also on the basis that they had been denied procedural fairness prior to the issuance of the guidelines. They further alleged that they had had a legitimate expectation of consultation, and that that expectation had not been met. Both at first instance[104] and in the Alberta Court of Appeal, it was accepted that the standard of review for determination of the procedural questions was that of correctness.[105]

The allegation of procedural unfairness raised the threshold question of whether the four applicants were entitled to any level of procedural fairness or participatory rights prior to the promulgation of the impugned guideline. Was this an excluded "legislative" function according to the relevant case law?[106] Or, was it "administrative" in nature thereby triggering an entitlement to at least some level of procedural fairness?

In further elaboration, the Court quoted from Brown and Evans, *Judicial Review of Administrative Action in Canada*.[107] The relevant characteristics of a "legislative" function were that it be

> …of general application and when exercised will not be directed at a particular person [and] that its exercise is based essentially on broad considerations of public policy, rather than on facts pertaining to individuals or their conduct.[108]

In the current context, the Court of Appeal was seemingly not impressed by the argument that the applicants were only four in number and the whole specific group at present no more than two more. They would apply to all other property owners subject to an "off-coal" agreement. This meant the guidelines were "rules of general application and not directed at an individual entity."[109] It mattered not that the guidelines might affect them differently from other property owners.[110]

For these purposes, the Court of Appeal advanced as a counterpoint *Tesla Motors Canada ULC v Ontario (Ministry of Transportation)*.[111] There, the Ontario Government had cancelled a subsidy programme for those purchasing electric cars but established a two-month transition period. However, without holding any kind of hearing, the Minister sent a letter to Tesla to the effect that its customers could not take advantage of the grace period. There, the effect on *Tesla* was "distinct and unique"[112] and was the result of "intentional…targeting…for irrelevant purposes."[113] In contrast, no such argument existed in *TransAlta* for transforming the Minister's legislative act into an "administrative decision" subject to the principles of procedural fairness.

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[104] 2021 ABQB 37.

[105] *Supra* note 69 at para 8.

[106] The relevant authorities are found, *ibid* at para 88.

[107] (Toronto: Thomson Reuters, 1998) (loose-leaf updated 2022), ch 7 at p 38.

[108] *Supra* note 69 at para 90.

[109] *Ibid* at para 94.

[110] *Ibid* at para 98.

[111] 2018 ONSC 5062 [*Tesla*].

[112] *Supra* note 69 at para 97, citing *Tesla*, *ibid* at para 59.

[113] *Ibid* at para 98.

As for the argument based on legitimate expectation, the Court of Appeal noted the uncertainty as to whether the doctrine of legitimate expectation could generate a right to a hearing in the case of legislative functions to which no such obligation would otherwise attach.[114] However, given that, in any event, the evidence before the Court did not "establish a clear, unambiguous, and unqualified representation,"[115] the claim was doomed. While the Court does not dwell on the evidence on which the applicants relied, as stated in the allegations, the best that could be said is that there had been discussions of various kinds with a range of government officials on the part of some of the four applicants but nothing that could qualify as a sufficiently explicit representation as to further engagement.[116]

While this case represents a conventional analysis and application of the procedural fairness threshold test and the principles of legitimate expectation, it is nonetheless, given binding precedents, restrained in responding to the applicants' arguments and any wider conceptions of the law respecting the triggering of both procedural fairness and legitimate expectation.

Where the border lies between general and specific for the purposes of triggering an obligation of procedural fairness could have been teased out more fully. Moreover, the deployment of *Tesla* is problematic. The fact that *Tesla* was "intentionally targeted by a minister for irrelevant purposes"[117] may certainly strengthen the applicant's case but more so in the direction of a free-standing ground of review. Whether decision- making calls for procedural fairness is not necessarily or even relevantly linked in any way to considerations of misconduct on the part of a government official. Even more importantly, the judgment illustrates that, without legislative endorsement or voluntary acceptance, notice and comment processes have little or no role to play in crossing the threshold for procedural fairness entitlements. The common law continues to be unresponsive to that challenge.

In focussing on whether there had been "a clear, unambiguous, and unqualified representation"[118] that there would be consultation, the Court of Appeal (and perhaps this was the fault of counsel) never considers explicitly whether this is a situation where the conduct (as opposed to the words) of government officials might have generated a legitimate expectation claim. Here too, of course, facts are crucial, and it may be that they did not provide any realistic bases for such an argument. More generally, the case perpetuates the conservative position that the Canadian courts have taken to the reach of the principles of legitimate expectation. It also makes clear that Canadian law is still far from recognizing legitimate expectation as a basis for a substantive claim at least in exceptional cases.[119]

ii. The Duty of Candour

In last year's survey,[120] I discussed the application by the Alberta Utilities Commission's (AUC) Enforcement Staff to the Commission itself under sections 8 and 63 of the *Alberta Utilities Commission Act*[121] for the commencement of regulatory enforcement proceedings against ATCO under various corporate entities and specifically ATCO Electric Ltd. for violations

[114] *Ibid* at para 102. However, the Court does reference the dissenting judgment of Evans JA in *Apotex Inc. v Canada (Attorney General)*, [2000] 4 FC 264 (CA) at paras 99–127, in which he indicated support for the application of the legitimate expectation principle even where the function was legislative and a duty of procedural fairness did not otherwise arise. Subsequently, the Evans position was again rejected in *Canadian Union of Public Employees v Canada (Attorney General)*, 2018 FC 518 at paras 56, 84, 157.

[115] *Ibid*, taken from *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504 at para 68.

[116] *Ibid* at paras 34–36.

[117] *Tesla*, *supra* note 111 at para 98.

[118] At least, the Court of Appeal does cite *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559 at para 95; *Ibid* at para 100, recognizing that a legitimate expectation can arise out of conduct including past practices as well as representations.

[119] As first recognized in England over twenty years ago in *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213. Compare the Canadian position as set out in the judgment, *ibid* at para 101, rejecting the possibility.

[120] David J. Mullan, "2020 Developments in Administrative Law Relevant to Energy Law" (2021) 9:1 Energy Regulation Q 21, online: *ERQ* <energyregulationquarterly.ca/regular-features/2020 developments-in-administrative-law-relevant-to-energy-law1#sthash.GE4Qu5Ra.dpbs>.

[121] SA 2007, c A-37.2.

of the Alberta *Electric Utilities Act*[122] in the context of a rate deferral application that it had made to the Commission.[123] Among the allegations asserted by AUC Enforcement Staff in its application for permission to commence enforcement proceedings was that ATCO had acted in such a way as to conceal relevant information in order to minimize the possibility of regulatory disallowance. In support of its allegations, AUC Enforcement Staff, in addition to specific allegations, asserted that ATCO had, more generally, breached its "fundamental duty of honesty and candour to its regulator,"[124] a duty that required that the information it provided to the Commission be "full, fair and accurate,"[125]

The culmination of this matter in 2022 was Commission approval of a settlement agreement entered into between AUC Enforcement Staff and ATCO Electric.[126] This agreement required ATCO, among other sanctions, to pay an administrative penalty of $31 million. In the reasons provided by Vice-Chair Doug Larder for approving the settlement agreement, he endorsed Enforcement Staff's acceptance and description of the duty of honesty and candour resting upon those participating in regulatory proceedings conducted by the Commission.[127] He also located the existence of such a duty within the ISO Rules, the Inter-affiliate Code of Conduct, and the *Electric Utilities Act*, violation of all of which had been admitted by ATCO.[128]

Vice-Chair Larder also elucidates powerfully the extent to which this failure to act with candour and transparency generated, in addition to financial costs, its own separate form of harm to ratepayers:

> The second aspect of the harm to ratepayers is difficult to quantify, but very serious. There is a broader harm to ratepayers and all other participants in the regulatory system resulting from ATCO Electric's actions. In making its decisions, the Commission **must** be able to rely on the information presented by the utility as full, fair and accurate. This is a fundamental premise of the *Electric Utilities Act* and our regulatory system more generally, as set out above. ATCO Electric's contraventions represent an egregious breach of trust, which has eroded the public's trust and confidence in the Commission's regulatory process, and the Commission's trust of ATCO Electric. Regardless of the financial harm suffered, this harm is in and of itself material and significant.[129]

Vice-Chair Larder's statement speaks for itself and represents an important accretion to and justification for the underlying good faith obligations of regulated entities in the context of regulatory hearings, and perhaps, more generally, within the regulatory process.[130]

The duty of candour is also one that could cut both ways as argued by Paul Daly in a recent blog[131] describing the extent to which, in jurisdictions other than Canada, government (conceived broadly) respondents have a duty of

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[122] SA 2003, c E-5.1.

[123] Application of AUC Enforcement Staff for the commencement of a proceeding pursuant to sections 8 and 63 of the *Alberta Utilities Commission Act*, 29 November 2021, online (pdf) : <efiling-webapi.auc.ab.ca/Document/Get/719764>.

[124] *Ibid* at para 2(d).

[125] *Ibid* at para 141.

[126] AUC Decision 27013-D01-2022.

[127] *Ibid* at paras 70–74, 91.

[128] *Ibid* at para 70.

[129] *Ibid* at para 91.

[130] The settlement agreement in fact raises other questions with Administrative Law dimensions which could also have formed part of this survey: the extent to which the law respecting the approval of settlement agreements in Criminal Law matters has resonance in the domain of regulatory enforcement proceedings (see paras 64–69 and also AUC Rule 013; *Rules on Criteria Relating to the Imposition of Administrative Penalties*); the participation of public interest bodies in the settlement process; and the appropriateness of the sanctions imposed.

[131] Paul Daly, "An Introduction to the Duty of Candour" (5 January 2023), online: Administrative Law Matters <www.administrativelawmatters.com/>; See also, Paul Daly, "The Prospects for Candour in Canada: The Importance of the 'Record'" (23 January 2023), online: <www.administrativelawmatters.com/>.

candour in the sense of "full and fair disclosure" for the benefit of both the reviewing court and applicants for judicial review.[132] This is, of course, an obligation elements of which lawyers already owe in the context of civil, criminal, and administrative proceedings. However, it is also useful to locate it as an obligation of the respondent entity itself in the context of all forms of judicial review proceedings and not just in the prosecution of criminal charges. Daly obviously hopes for Canadian precedents to add to the list of English, Irish, Northern Irish, and Australian courts that have recognized and expanded upon such a duty. It will therefore be interesting to see whether this has any resonance in the conduct of judicial review in Canada.

iii. Remedies for Delay in the Exercise of Administrative Duties and Powers

In each of the two leading cases, *Blencoe*[133] and *Abrametz,*[134] on delay in the exercise of administrative powers, the factual context was one in which the applicant or appellant was facing allegations of misconduct. *Blencoe* arose out of a complaint of violation of a human rights code and *Abrametz* a failure to meet professional conduct standards. Exposure to such processes, which, in *Abrametz*, the majority described as "*sui generis*" at least in the case of professional disciplinary proceedings and certainly not criminal,[135] nonetheless implicated reputational and other career affecting considerations for those seeking judicial review. They also are proceedings where the most significant remedial response hoped for by the applicant or appellant is a permanent stay.

In contrast, where the applicant or appellant alleging delay is the "victim" of the alleged misconduct, the relevant perspectives will often be somewhat different. In those contexts, their concerns about delay will be based among other considerations on the threat delay poses to the integrity and ultimate viability of the proceedings and their desire for vindication and recompense. They will want the complete opposite of a permanent stay of proceedings. For them, relief in the form of a mandatory injunction or an order in the nature of *mandamus* directing an expedited hearing will be the most effective form of relief.

The same remedial response will also predominate in cases where an applicant or appellant is seeking a benefit or licence from the state. Their interest is in obtaining that benefit or licence as soon as possible or, at the very least, an order that there be no further delay in the actual taking of a decision as opposed to the actual awarding of the licence or benefit.

Surprisingly, however, especially given the glacial speed with which the wheels of state often turn, there are few precedents involving benefit or licence seekers applying for such forms of mandatory relief. However, in an energy regulatory context, the 2020 judgment of Romaine J in *Prosper Petroleum Ltd. v Her Majesty the Queen in Right of Alberta,*[136] involving an application for approval of an oil sands project, provides an example. In June 2018, the Alberta Energy Regulator had found the project to be in the public interest and the matter then proceeded for approval to Cabinet as required by the relevant statute. More than nineteen months later, Cabinet had still not issued a decision despite demands by the proponent.

Romaine J, applying the standard tests for a mandatory interlocutory injunction and relief in the nature of *mandamus*, and rejecting the argument that, at least in this context, these amounted to impermissible remedies against the Crown,[137] held, that on a balance of convenience, Prosper Petroleum had established its case that there had been reviewable abusive delay. In this context, Romaine J noted that the applicant was not seeking an order that there be a decision in its favour but that the Cabinet actually make a decision.[138] The Court therefore granted a mandatory interim injunction and an order of *mandamus* directing that the Cabinet take that decision within ten days.

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[132] Citing Donaldson MR in *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941 at 945.

[133] *Supra* note 14.

[134] *Supra* note 13.

[135] *Ibid* at para 54.

[136] 2020 ABQB 127.

[137] *Ibid* at paras 3–31.

[138] *Ibid* at paras 24, 29.

While this proved to be a somewhat Pyrrhic victory in that Strekaf JA[139] then granted the Crown's application for a stay of proceedings pending the disposition of an appeal to the Court of Appeal from Romaine J's decision.[140] Nonetheless, that did not call into question the principles on which Romaine J based the award of relief. Strekaf JA made it clear that she was not opining on the merits of the appeal beyond holding that, in terms of the test for the grant of a stay pending appeal, Alberta had crossed the threshold of a "serious" question to be tried.[141] In what may have partially assuaged Prosper Petroleum's disappointment, Strekaf JA also took into account that Alberta committed to proceed with the appeal on an expedited basis should it obtain the stay.[142]

What is now significant as a result of *Abrametz* is that, without any qualifications or confining to the context of professional discipline or other forms of complaint processes, Rowe J in *Abrametz* endorsed the use of *mandamus* and an order for an expedited hearing as remedies for abusive or procedurally unfair delay. He also accepted that, provided internal avenues of recourse had been exhausted, such orders could be available "even before an abuse of process exists," something that could avoid worries as to whether the applicant might fail because of undue delay in seeking relief.[143]

The question left dangling is the extent to which benefit or licence seekers have access to such relief when there is systemic delay at a high volume tribunal. When might it be appropriate for a reviewing court to order a clearance of the backlog or, alternatively, the granting of the benefit or licence being sought? Is it ever appropriate except where constitutional rights are in play for a court to order directly the expenditure of resources to rectify a systemic delay? That however is an issue that is unlikely to occur in an energy regulatory setting.[144]

iv. I'm Still Standing

In *British Columbia (Attorney General) v Council for Canadians with Disabilities,*[145] in the context of a *Charter* challenge to the constitutionality of legislation affecting involuntarily detained mental health patients, the Supreme Court of Canada revisited its decade earlier judgment on public interest standing in constitutional litigation: *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society).*[146] In upholding the Council's standing to continue to trial on its constitutional challenge, the Supreme Court refined and expanded upon its elaboration of the relevant principles in *Downtown Eastside Sex Workers*.

In his "View from the Top: Administrative Law in the Supreme Court of Canada, 2022,"[147] John Evans provides a comprehensive analysis of the judgment. Rather than repeat let alone summarize that analysis, I will confine myself to highlighting four points.

1. While the judgment does not deal with the matter specifically, Evans JA argues that it can be inferred that the Supreme Court's judgment also speaks to public interest standing in administrative law challenges.

2. As exemplified by *Downtown Eastside Sex Workers,*[148] those bringing challenges in

[139] *Prosper Petroleum Ltd. v Her Majesty the Queen in Right of Alberta*, 2020 ABCA 85 [*Prosper*].

[140] For further litigation involving this project, see *Fort McKay First Nation v Prosper Petroleum Ltd.*, 2020 ABCA 163, involving a First Nation challenge to the AER's approval decision, with the decision of Cabinet still awaited at that point. I discussed this aspect of the proceedings in "2020 Developments in Administrative Law Relevant to Energy Law", (2021) 9:1 Energy Regulation Q 21, online: ERQ <energyregulationquarterly.ca/regular-features/2020-developments-in-administrative-law-relevant-to-energy-law1#sthash.hKAGIQNa.dpbs>.

[141] *Prosper*, *supra* note 139 at para 20.

[142] *Ibid* at para 29.

[143] *Supra* note 12 at paras 78–82, and especially para 80.

[144] Outside of the criminal law setting, the question of remedies for systemic delay has found fertile ground in the domain of judicial salary commissions. For a relatively recent judgment, see *Newfoundland and Labrador Assn. of Provincial Court Judges v Newfoundland and Labrador*, 2018 NLSC 140.

[145] 2022 SCC 27 [*Council for Canadians*].

[146] 2012 SCC 4, [2012] 2 SCR 524.

[147] *Supra* note 31.

[148] In addition to the Society, a long-time, former sex trade worker was also a plaintiff.

the name of the public interest in order to enhance their claim to standing will add as a party someone who is directly affected. In the present case, the two such litigants had dropped out. However, the Supreme Court stated that it was not necessary that there also be before the court an applicant or plaintiff who meets normal standing requirements.[149] As a general matter, such a party was not required, and, even where the grant of public interest standing turned on the existence of a "concrete and well-developed factual setting,"[150] there were clearly surrogates for a directly affected co-applicant or plaintiff. Nonetheless, the presence of such an applicant or plaintiff could be relevant and helpful in the providing of a sufficient factual context to meet the standards required by the Court on that score.

3. As opposed to the British Columbia Court of Appeal,[151] the Supreme Court, after a lengthy analysis,[152] concluded that considerations of legality and access to justice did not attract "particular weight"[153] among the factors bearing upon the *Downtown Eastside Sex Workers* template for evaluating public interest standing claims. "[N]o one purpose, principle or factor takes precedence in the analysis."[154]

4. Especially in situations where a public interest standing issue is dealt with in the setting of a motion to strike out, favourable determinations may still be subject to re-evaluation at later stages in the litigation.[155]

All these aspects of the judgment contribute to a valuable elaboration of the principles and practical imperatives for evaluating a public interest standing claim whether in the context of either a constitutional or administrative law proceeding. ■

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[149] *Council for Canadians*, *supra* note 145 at paras 63–67.

[150] *Ibid* at para 66.

[151] 2020 BCCA 241, 41 BCLR (6th) 47.

[152] *Council for Canadians, supra* note 145 at paras 28–59.

[153] *Ibid* at para 56.

[154] *Ibid* at para 59.

[155] *Ibid* at paras 69–70.

ONWARDS AND UPWARDS: NEW NOVA SCOTIA ENERGY POLICY TARGETS SOLAR, HYDROGEN AND THE ATLANTIC LOOP

*Gordon E. Kaiser, Melanie Gillis, and Noah Entwisle**

2022 was an eventful year for Nova Scotian energy policy. Nova Scotian lawmakers ushered in a bevy of legislative changes to advance their environmental/energy agenda for the province. The changes focused mainly on sparking the development of more renewable energy generation.

Just like many provinces across Canada, Nova Scotia has ambitious emission reduction targets. Nova Scotia's *Environmental Goals and Climate Change Reduction Act* calls for a reduction of greenhouse gas emissions by 53 per cent below 2005 levels by 2030, and the achievement of net-zero greenhouse gas emissions ("GHGs") by 2050.[1] A tall order by any measure, but one that Nova Scotia's conservative government seems dedicated to achieving based on the flood of new legislative changes they passed this past year.

In addition to the environmental-based legislative changes, the Nova Scotia government also ushered in legislation to cap electricity rate increases.

This article considers three key legislative developments that occurred in 2022: a) the amendments to Nova Scotia's *Electricity Act*[2] and *Renewable Electricity Regulations*[3] to expand the net-metering program; b) the changes to the Electricity Act and liquid fuel legislation to promote the development of green hydrogen projects; and c) the amendments to the *Public Utilities Act*[4] to impose a 1.8 per cent cap on Nova Scotia Power Inc.'s ("NSPI") net rate increases in 2022, 2023 and 2024.

THE NEW SOLAR NET-METERING PROGRAM

The Existing Program

Since 2010, Nova Scotia's net-metering program has provided a proven channel for Nova Scotian homeowners, businesses, and institutions to install renewable electricity systems. Specifically,

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[1] *Environmental Goals and Climate Change Reduction Act*, SNS 2021, c 20, s.6.

[2] *Electricity Act*, SNS 2004, c. 25.

[3] *Renewable Energy Regulations*, NS Reg 155/2010.

[4] *Public Utilities Act*, RSNS 1989, c. 380.

the metering program allows Nova Scotia Power Incorporated customers to:

- Install and interconnect eligible renewable energy generators to the grid. Eligible technologies include wind, solar, tidal and biomass; currently, solar photovoltaic represents the overwhelming majority of renewable energy generators installed under net metering programs;
- Reduce their electricity bills by an amount equivalent to the amount of energy that they produce;
- Receive credit for any excess energy injected into the electricity grid.

Hundreds, if not thousands, of Nova Scotia Power customers have taken advantage of the net-metering program.

However, while some commercial and institutional customers have participated in the net-metering program, to date most participants have been residential homeowners. The 100 kW cap on installed nameplate capacity limited uptake by commercial and institutional players.

Recent Amendments to *Electricity Act*

Effective April 22, 2022, the Nova Scotia Department of Natural Resources and Renewables announced amendments to the *Electricity Act*.[5] The amendments expanded, protected, and built upon the Nova Scotia's net-metering and other renewable electricity programs by, among other things:

- Eliminating the previous 100 kW nameplate capacity cap to enable more commercial and institutional customers to use the program;
- Prohibiting Nova Scotia Power from introducing any fee structures or system access charges that discourage participation in net-metering programs;
- Introducing provisions that subject Nova Scotia Power to greater regulatory oversight by the Nova Scotia Utilities and Review Board in administering the net-metering programs; and
- Introducing a "right to self-generate" that enables any Nova Scotian to install up to 27 kW nameplate capacity of renewable electricity generation and storage equipment without NSP approval.

Amendments to Renewable Electricity Regulations

Effective October 28, 2022, the Nova Scotia Department of Natural Resources and Renewables announced amendments to the *Renewable Electricity Regulations*[6] that, among other changes, create a more viable net-metering stream for commercial and institutional customers.

Specifically, the amendments increased the net-metering cap from 100 kW to up to 1 MW of nameplate capacity. The amended regulations will therefore allow eligible commercial, institutional, agriculture or aquaculture customers to install one or more eligible renewable energy generators of up to 1 MW (or 1,000 kW) of installed capacity per distribution zone.

Eligible customers include:

- Customers that pay a demand charge as part of their existing rate (corresponding to ratepayers under the General, Industrial or Municipal Tariff Codes);
- Customers that own or operate a winery registered under the *Agriculture and Marketing Act*;
- Customers that own or operate a farm registered under the *Farm Registration Act*; and
- Customers that own or operate a licensed aquaculture plant under the *Fisheries and Coastal Resources Act*.

All other customers can install eligible renewable energy generators of up to 200 kW of nameplate capacity per distribution zone.

[5] *Supra* note 2.

[6] *Supra* note 3.

The amendments also streamline net-metering application processes for customers with multiple different locations and/or generators by allowing customers with multiple locations to install one or more renewable electricity generators under a single net-metering agreement, provided:

- The generators are all installed within the same distribution zone;
- The generators are all subject to the same rate or tariff; and
- The total nameplate capacity of these generators doesn't exceed the applicable caps set by the *Electricity Act* and the *Renewable Electricity Regulations*.

The amended regulations also enhance transparency and oversight by requiring NSPI to submit both of the following for approval by the Nova Scotia Utility and Review Board ("NSUARB"):

- The terms and conditions of the program, including the requirements for participating in net-metering and the grounds on which Nova Scotia Power can deny an application; and
- A standard form net-metering agreement that governs the sale of renewable, low-impact electricity to NSPI.

NSPI's Application for approval of its new net-metering program is currently before the NSUARB.[7] NSPI is not permitted to make any further changes to its net metering program(s) without first obtaining Board approval.

The amended regulations also require Nova Scotia Power to process net-metering applications in a "timely" manner and approve all net-metering applications unless there are "reasonable grounds" to deny them. These changes serve as a legislative basis to expedite net-metering application processing times and reduce processing barriers to net metering application approval, system commissioning, and interconnection.

Finally, the amended regulations provide that, upon request by a customer, Nova Scotia Power must register all "renewable energy certificates" associated with a customer's renewable energy generator(s) with an internationally accredited organization on an annual basis. Upon request by a customer, Nova Scotia Power must furnish the customer with renewable energy certificates describing the volume and vintage of renewable electricity generated by the customer's generator(s) on an annual basis, at which time the certificates will be considered retired.

The amended regulations further provide that Nova Scotia Power can count the total output of all renewable energy generated under a net-metering program and all residential net-metering customers to meet its renewable electricity performance standards.

The interaction of these provisions suggests that commercial or institutional net-metered customers can apply the renewable energy certificates resulting from their renewable energy generator(s) against their internal renewable electricity performance and reporting requirements. Concurrently, Nova Scotia Power can apply the energy generated by all net-metered systems against its legislated renewable energy standard. If a commercial customer wished to register, sell, or assign the renewable energy certificates associated with its system independently, it must do so outside the context of the net-metering program.

Overall, the changes to the *Electricity Act* and *Renewable Electricity Regulations* are intended to expand the net-metering program to more commercial participants, streamline the application process, and lend greater transparency and accountability to NSPI's application review process.

GREEN HYDROGEN DEVELOPMENT

In recent years, the excitement around the potential of hydrogen as a green energy source has been gaining momentum. Hydrogen as an energy source attracted considerable attention globally throughout 2022, and Atlantic Canada was no exception. Indeed, Atlantic Canada has positioned itself to become a key export hub for

[7] Nova Scotia Utility and Review Board, *In the Matter of an Application by Nova Scotia Power Incorporated for approval of a new Commercial Net-Meting Program (M10872)*, Hearing Order (NSUARB, 2022), online (pdf): <www.nsuarb.novascotia.ca/sites/default/files/M10872%20-%20Notice%20of%20Paper%20Hearing.pdf>.

hydrogen and has been holding its own in this burgeoning sector. For example, in August 2022, Canada and Germany held a hydrogen summit in Newfoundland and signed a "joint declaration of intent" to begin investing in the creation of a "transatlantic Canada-Germany supply corridor" to allow for the export of hydrogen produced in Atlantic Canada to Germany.[8]

In Nova Scotia, there are at least six active green hydrogen projects, including four large export projects to deliver low-carbon energy to markets in Europe, and two smaller projects for domestic use.[9]

The recent legislative amendments in Nova Scotia are targeted at facilitating the development of green hydrogen projects.

Amendments to Nova Scotia's Liquid Fuel Legal Regime

In November 2022, Nova Scotia's legislature passed amendments to the *Pipeline Act*[10], the *Gas Distribution Act*[11], and the *Subsurface Energy Storage Act*[12] (formerly known as the *Underground Hydrocarbon Storage Act*). These three pieces of legislation establish rules and standards for the storage, transportation, and distribution of liquid fuels in Nova Scotia. The specific changes that were made include the following:

- hydrogen, ammonia, carbon sequestration and compressed air energy storage have been added to the scope of the *Underground Hydrocarbons Storage Act*;
- pipelines built for hydrogen or hydrogen blends have been included under the *Pipeline Act*; and
- hydrogen is now considered part of a gas distribution system under the *Gas Distribution Act*, and thus subject to Nova Scotia Utility and Review Board oversight under that legislation.

By updating these three pieces of legislation, Nova Scotia has confirmed that its existing legal regime for liquid fuels applies to new hydrogen fuels.

These changes lend certainty to businesses undertaking (or interested in undertaking) new green hydrogen projects, and provides greater clarity on the rules, procedures, and standards they must follow.

New Green Hydrogen Projects in Nova Scotia

In November 2022, the Nova Scotia government introduced Bill 207[13] to amend the *Electricity Act*. Bill 207 will (a) establish a "Hydrogen Innovation Program" to facilitate green hydrogen projects, and (b) allow eligible and participating green hydrogen businesses to buy wholesale electricity on the open market under Nova Scotia's Open-Access Transmission Tariff ("OATT").

Subsection 4FA of the amended *Electricity Act*[14] will require the Minister of Natural Resources and Renewables to "develop and maintain a hydrogen innovation program for the interconnection of a hydrogen facility to the electrical grid of a public utility for the purpose of hydrogen production and processing."

The new amendments will empower the government to pass regulations setting out the terms and conditions for participating in this new program. Owners or operators of hydrogen processing or production facilities will be able to apply to the Minister to participate in the Hydrogen Innovation Program, subject to the

[8] Natural Resources Canada, "Canada and Germany Sign Agreement to Enhance German Energy Security with Clean Canadian Hydrogen" (23 August 2022), online: *Government of Canada* <www.canada.ca/en/natural-resources-canada/news/2022/08/canada-and-germany-sign-agreement-to-enhance-german-energy-security-with-clean-canadian-hydrogen.html>.

[9] Natural Resources and Renewables (Nova Scotia), "Legislation Supports Green Hydrogen Development" (17 October, 2022), online: *Province of Nova Scotia* <www.novascotia.ca/news/release/?id=20221017007>.

[10] *Pipeline Act*, RSNS 1989, c. 345.

[11] *Gas Distribution Act*, SNS 1997, c 4.

[12] *Subsurface Energy Storage Act*, SNS 2001, c 37.

[13] Bill 207, *Electricity Act (amended)*, 1st Sess, 64th Gen Ass, 2022 [Bill 207].

[14] *Supra* note 2.

terms and conditions established by the new regulations passed pursuant to the amendment.

Bill 207 provides relatively few concrete details on the substance of the Hydrogen Innovation Program. However, the regulatory powers created by Bill 207 nonetheless provide several important hints regarding the shape the program is expected to eventually take:

- The program will create a pathway for the owners or operators of hydrogen facilities to interconnect with Nova Scotia's power grid and purchase power on the open market to enable their operations. The purchase and sale of electricity through Nova Scotia Power's grid is enabled by, and subject to, the Open-Access Transmission Tariff, which imposes a fee on buyers and sellers of wholesale electricity who make use Nova Scotia's power grid.

- To take advantage of this program, owners and operators of hydrogen facilities must comply with the program eligibility criteria, data reporting requirements, and performance standards established by regulations passed pursuant to the amended *Electricity Act*.

- Reporting requirements and ongoing compliance obligations for participants in the program will be designed to (among other things): (a) enable the government to monitor and measure the carbon emissions of new hydrogen projects; (b) establish performance standards regarding the carbon intensity of these projects; (c) establish penalties for hydrogen projects that fail to satisfy the performance standards; and (d) establish requirements or conditions for the sale of hydrogen or electricity produced from hydrogen at participating hydrogen facilities.[15]

Further details regarding the Hydrogen Innovation Program will likely be forthcoming in the months after Bill 207 comes into force (Bill 207 received royal assent on November 9, 2022, and will come into force when proclaimed by the Governor in Council).

Clarity on EAs for Hydrogen Projects

Nova Scotia has also changed two sets of regulations to provide clarity to green hydrogen developers about what their environmental assessment obligations will be in relation to these types of projects. The changes were made to the *Environmental Assessment Regulations*[16] and *Activities Designation Regulations*[17], and provide as follows:

- large-scale projects that produce and/or store hydrogen or ammonia require a Class I environmental assessment;

- facilities that produce and/or store hydrogen or ammonia require operational approvals; and

- several operational approvals can be bundled under one clear, facility-level approval for hydrogen facilities

Once again, this legislative change lends greater certainty and predictability to what environmental hurtles will have to be satisfied during the planning stage of hydrogen projects.

THE ATLANTIC LOOP

As indicated, Nova Scotia has incorporated in legislation its goal to reduce greenhouse gas emissions to at least 53 per cent below 2005 levels by 2030 and to achieve net zero emissions by 2050. A big part of achieving these goals is a program to reduce Nova Scotia's dependence on coal to generate electricity.

An important part of this program is a new multi-billion dollar transmission project called the Atlantic Loop which will give Nova Scotia greater access to hydroelectricity generated in Labrador and Québec.

The project's funding structure is still under review. The federal government, the governments of Nova Scotia and Quebec, and Nova Scotia Power, are engaged in ongoing discussions about

[15] *Supra* note 13.

[16] *Environmental Assessment Regulations*, NS Reg 26/95.

[17] *Activities Designation Regulations*, NS Reg 47/95.

the Atlantic Loop project.[18] The Nova Scotia government has taken the position the Atlantic Loop will not be economically feasible without federal funding. Specifically, Karen Gatien, Deputy Minister of the Nova Scotia Department of Natural Resources and Renewables recently stated that "[t]here is no loop without federal support, it's just too costly."[19]

However, the project has faced some uncertainty recently as a result of the recent legislation by the province to limit the rate increases the utility could be granted by the Nova Scotia energy regulator.[20]

On January 27, 2022, Nova Scotia Power brought a General Rate Application seeking overall average smoothed rate increases across rate classes of 3.6 percent beginning August 1, 2022, January 1, 2023, and January 1, 2024. The Fuel Update Nova Scotia Power filed on September 2, 2022 showed a significantly higher forecast for fuel and purchased power costs, representing an increase of $681.5 million over the original forecast for the period from 2022 to the end of 2024. The Province of Nova Scotia agreed to provide some relief to NS Power customers from this amount by exempting NS Power from approximately $165 million of greenhouse gas (GHG) compliance expenses to the end of 2022.

On October 19, 2022 (after the hearing had concluded, but before written closing submissions were filed by the parties), the Nova Scotia Government introduced Bill 212 in the Legislature. The legislation came into effect on November 8, 2022, and limited the non-fuel rate increase to 1.8 per cent over the next two years.[21] The changes to the *Public Utilities Act* also placed limits on the maximum rate of return on equity, being (9.25 per cent compared to the 9.5 per cent requested by Nova Scotia Power), and equity thickness ratio (40 per cent compared to the 45 per cent requested by Nova Scotia Power).[22]

In response to this legislative cap, Nova Scotia Power announced it was putting the Atlantic Loop project on hold.[23] The federal government stated that it is still committed to continuing negotiations on reaching an agreement in principle for the Atlantic Loop project, and that despite Nova Scotia Power pressing pause on its involvement, the federal government remains committed to the project.[24]

On February 2, 2023, The Nova Scotia Utility and Review Board issued its decision in relation to Nova Scotia Power's General Rate Application. The decision largely approved a settlement agreement between Nova Scotia Power and several Intervenors. In the settlement agreement, the parties agreed (subject to Board approval) to average rate increases of 6.9 per cent (across all customer classes in each of 2023 and 2024, and including fuel and non-fuel costs).

The development of the Atlantic Loop, including the funding structure that will be in place for the project, is still under negotiation. It remains unclear what impact, if any, the recent developments will have on the progress of the Atlantic Loop project. However, one thing is certain: the progress of the discussion around the Atlantic Loop will be closely watched by all those with a keen interest in the Atlantic Canadian energy space over the course of 2023.

CONCLUSION

Achieving "net-zero by 2050" is an ambitious goal. It will be difficult to achieve without

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[18] Francis Campbell, "Nova Scotia, others still in the Atlantic loop but little progress being made, deputy minister says", *Saltwire* (11 January 2023), online: <www.saltwire.com/atlantic-canada/news/nova-scotia-others-still-in-the-atlantic-loop-but-little-progress-being-made-deputy-minister-says-100813358/>.

[19] *Ibid*.

[20] Bill No. 212, *An Act to Amend the Public Utilities Act*, 1st Sess, 64th Assembly, Nova Scotia, 2022, online: <www.nslegislature.ca/legc/bills/64th_1st/1st_read/b212.htm>.

[21] *Ibid*.

[22] *Ibid*.

[23] Paul Withers, "Emera is pausing the Atlantic Loop in the wake of power rate cap legislation", *CBC News Nova Scotia*, (21 October 2022), online: <www.cbc.ca/news/canada/nova-scotia/emera-pauses-atlantic-loop-after-ns-power-rate-cap-1.6624183>.

[24] Paul Withers, "Ottawa 'very committed' to Atlantic Loop electricity mega project despite pause", *CBC News Nova Scotia,* (9 November 2022), online: <www.cbc.ca/news/canada/nova-scotia/trudeau-government-atlantic-loop-project-pause-emera-1.6646208>.

sweeping and varied changes to existing legislation: it will take the legislative equivalent of a 'full-court press' to achieve the sort of legislative change required to meet the challenges and opportunities that have been ushered in by the renewable energy transition.

At the same time, these legislative changes must be flexible enough to evolve with the ongoing development of energy alternatives.

Overall, it is increasingly clear that, when it comes to renewable energy, the tides of industry are turning, compelling lawmakers to rise to the challenge of guiding that sea change: Nova Scotia's 2022 story provides an example of one government's multifaceted efforts to meet this challenge. ■

CANADA PROVINCIAL CARBON REGIMES: A MIXED BAG TO FIGHT CLIMATE CHANGE[1]

*P. Jason Kroft and Ghazal Hamedani**

In this article, we provide a high level summary of salient aspects Provincial carbon regimes in Canada. Our goal is to establish a baseline for readers outlining the different Canadian carbon pricing regimes for further consideration in subsequent pieces. This article is not intended to be a comprehensive piece of work on the current legislation in each Province addressing climate change, rather this short article is intended as a survey of certain carbon financing regimes now in effect across each Province.

Each Province's journey started when the Government of Canada published the Pan-Canadian Approach to Pricing Carbon Pollution (the Federal "**Benchmark**") stating that the OBPS would be used as a backstop by any Provinces or Territories that so requested or failed to put in place a system that met the Benchmark.

THE CONSTITUTIONAL LITIGATION

There was no shortage of legal appeals against the *Greenhouse Gas Pollution Pricing Act* (the "***Act***") enacted in 2018, under which the Federal OBPS has been implemented. The Act's constitutionality was challenged by some Provincial governments from its inception. The *Act*, which sets a minimum standard of carbon pricing in an effort to lower greenhouse gas (GHG) emissions, was confirmed to be constitutional by the Supreme Court of Canada (SCC) in 2021. In *Reference re: Greenhouse Gas Pollution Pricing Act*,[2] the SCC explicitly recognized the existential threat of climate change and the importance of carbon pricing in combating same. By confirming that the Federal government has the legal authority to take coordinated, national action and impose a minimum carbon price, Canada can ensure that no Province is a 'stumbling block to progress being made in other parts of the country.'

We need to understand that the *Act* is an environmental and economic piece of law. Fostering an economy with low GHG emissions is one of the many objectives of the *Act*. This goal is advanced within the legislation by providing financial incentives to both consumers and enterprises. Carbon pricing is a way to accomplish this.

The SCC's decision should provide some certainty for business professionals and transactional lawyers that carbon pricing is here to stay (in some form or another) and that climate change and Environmental Social and Governance considerations will become increasingly more important in the context of capital raising and business transactions.

We have provided a summary of key actions each Province in Canada has taken to combat climate change and align itself with the Federal Benchmark.

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[1] This article is a revised version of P. Jason Kroft and Ghazal Hamedani, "Provincial carbon regimes: mixed bag to fight climate change" (9 December 2022), online: Miller Thomson <www.millerthomson.com/en/publications/articles/provincial-carbon-regimes-mixed-bag-to-fight-climate-change/>.

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[2] *Reference re: Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*Reference re GGPPA* (SCC)].

Québec

Québec has adopted a cap-and-trade system, which is set out in the *Regulation respecting a cap-and-trade system for greenhouse gas emission allowances* (the "**C&T Regulation**") under the *Environmental Quality Act*[3] (the "***EQA***") (the "**Québec C&T System**"). Québec's C&T System is administered by the Ministry of Environment and Climate Change and it is linked to California's cap-and-trade system through the Western Climate Initiative (the "**WCI**").

The WCI is a group of U.S. States and Canadian Provinces that have decided to adopt a common approach toward addressing climate change, in particular by developing and implementing a North American system for capping and trading GHG emission allowances. Ontario joined the WCI initiative in 2017 but withdrew one year later when it repealed its cap-and-trade regulation on July 3, 2018. To date, Québec is the only Canadian Province linked to the WCI.

Participation in the Québec C&T System is open to "Emitters" and "Participants" as described in the C&T Regulation. All Emitters and Participants must register with the Québec C&T System by submitting a Compliance Instrument Tracking System Service (CITSS) application to the Minister. The reporting obligations are set out in the Québec's *Regulation respecting mandatory reporting of certain emissions of contaminants into the atmosphere*. It is important to note that the C&T Regulation makes use of various impact formulas based on the global warming potential of each GHG and so Québec facilities must be careful to implement the appropriate quantification measurement technique to accurately report their emissions.

Ontario

In *Reference re: Greenhouse Gas Pollution Pricing Act*, the Supreme Court of Canada explicitly recognized the existential threat of climate change and the importance of carbon pricing in combating same. Following this decision, Ontario, once a backstop jurisdiction, began transitioning from the Federal OBPS to Ontario's Emissions Performance Standards ("**EPS**") program. The EPS program's concept is comparable to the Federal OBPS in that a facility required to register with the program will need to calculate, document, and verify its annual GHG emissions and pay the carbon price per tonne of CO_2 above its applicable limit. Such compensation can also come in the form of "emissions performance units," which are credits a facility earns for generating GHG emissions below the EPS program's annual cap. Depending on the nature of its industrial operations and the volume of its annual GHG emissions, a facility may or may not be obliged to register with the EPS program. All establishments (including Ontario EPS facilities) that engage in a specified GHG activity within the program, as set out in Column 1 of Schedule 2 of the *Ontario Regulation 390/18 (Greenhouse Gas Emissions: Quantification, Reporting and Verification)*, are required to give a report to the director, if the reporting amount in respect of the facility for each calendar year is 10,000 tonnes of CO_2e (carbon dioxide equivalent) or more. Ontario EPS facilities have an additional obligation to get their reports verified by a third party.

Surplus credits issued to an Ontario facility under the Federal OBPS must be remitted or transferred by February 15, 2023 and failure to do so will make the credits subject to suspension and ineligible for remittance or transfer as compensation for the 2022 or subsequent compliance periods.

Alberta

In Alberta, the regulatory regime governing the pricing of greenhouse gas emissions is created by the *Emissions Management and Climate Resilience Act* ("***EMRCA***") and the related Technology Innovation and Emissions Reduction Regulation (TIER). In connection with a mandatory review of TIER conducted in late 2022, several amendments to TIER were promulgated that became effective January 1, 2023. Included among these amendments was the introduction of a sequestration credit.

As a result, there are now four kinds of credits and offsets in Alberta:

- Emission offsets
- Emission performance credits

[3] CQLR c Q-2, (last visited 15 January 2023), online: <www.canlii.ca/t/55ln6>.

- Fund credits, and
- Sequestration credits.

There are nuanced differences between the different forms of credits and offsets.

Emission offsets are generated by projects that have voluntarily reduced their GHG emissions. Emission offsets are quantified using Alberta-approved methodologies called quantification protocols, and are verified by a qualified third party assurance provider. Emission offset projects must meet the requirements in the TIER Regulation, the Standard for Greenhouse Gas Emission Offset Project Developers, and a relevant Alberta-approved quantification protocol (the "**Quantification Protocols**"). Alberta emission offset projects are registered and publicly listed. Alberta OBPS facilities are required to submit annual compliance reports. Those that emit more than 100,000 tonnes of CO_2e per year are also required to submit an annual forecasting report.

An emission performance credit is generated when the facility's total regulated emissions are less than its allowable regulated emissions by 1 CO_2e tonne. As with emission offsets, emission performance credits can be registered in the Alberta Emission Performance Credit Registry.

A fund credit is a credit that is created by paying money into the Fund at the rate specified by Ministerial Order. On December 1, 2021, the Alberta Minister of Environment and Parks issued Ministerial Order 87/2021,[4] confirming the increase of the cost to obtain Technology, Innovation and Emissions Reduction Fund (Fund) credits under the TIER from C$40 per credit in 2021 to C$50 per credit in 2022 (1 tonne of CO_2e reduced = 1 Carbon Offset = $50/tonne in 2022).

By Ministerial Order 62/2022, the cost of fund credits was further established for 2023 through 2030. The current Order aligns with the carbon pricing requirements under the Federal OBPS. Based on the 2022 result of the assessment of Provincial and Territorial systems against the updated Federal Benchmark as of November 22, 2022, the Federal fuel charge will continue to apply in Alberta.

A sequestration credit is created through the conversion of an emission offset, if the emission offset was created through the net geological sequestration of carbon dioxide, during or after 2022.

Government-approved Quantification Protocols have been developed to support the Alberta offset system. These protocols provide standardized quantification methodologies for specific greenhouse gas emission reduction opportunities in Alberta. The protocols have been developed using the best available science tailored to Alberta conditions, good practice guidance from other jurisdictions, Provincial/national expertise, and experience gained through similar international projects. While quantification protocols serve as a guide for setting up a project and quantifying associated emission reductions/removals, it remains the responsibility of the project developer to demonstrate how the project meets the requirements outlined in the protocol, and that the activity continues to comply with all applicable regulatory requirements.

British Columbia

British Columbia's carbon pricing system has two key parts: (1) a carbon tax for fuel emissions, which is set out in the *Carbon Tax Act and the Carbon Tax Regulation* (Collectively the "**BC Carbon Tax**"); and (2) an OBPS for industrial emissions, which is set out in the *Greenhouse Gas Industrial Reporting and Control Act,*[5] and its regulations (the "**BC Framework**").

The BC Carbon Tax is collected at the point of retail consumption (for example, at the pump for gasoline and diesel). All individuals and businesses must pay the BC Carbon Tax on all uses of fuel, even if the fuel isn't combusted, unless a specific exemption applies. Exemptions are available for, among other things, fuel that is purchased by a Registered Consumer, Registered Air Service or Registered Marine Service (as defined by the *Carbon Tax Act*).

[4] "Ministerial Order 87/2021 [Environment and Parks]: Technology Innovation and Emissions Reduction Fund Credit Amount Order" (last visited 15 January 2023), online: *Government of Alberta* <www.open.alberta.ca/publications/aep-ministerial-order-87-2021#detailed>(Minister of Environment and Parks).

[5] *Greenhouse Gas Industrial Reporting and Control Act* [SBC 2014] c. 29.

The BC Framework applies to facilities that operate in the Liquefied Natural Gas (LNG) sector only and have an annual emissions output that is equal to or greater than 10,000 tonnes of CO_2e. The Director (as defined under the BC Framework) must receive a report from every establishment (including facilities falling within the ambit of the BC Framework) that emits 10,000 tonnes of CO_2e or more for each compliance period (calendar year). This report must include information about the facility's annual GHG emissions and, if applicable, the amount of GHG emissions that were captured and stored from the facility. Reporting facilities that emit over 25,000 tonnes of CO_2e per year have an additional obligation to get their emissions report independently verified by a recognized verification body.

THE ATLANTIC PROVINCES

Similar to Ontario, New Brunswick begun its transition to its own Provincial OBPS as an accepted alternative to the Federal system in 2021. It applies to the same gases as the Federal system and applies the same pricing scale of $50 per tonne in 2022. As a result of this transition, the surplus federal credits issued to a facility in New Brunswick were not eligible compensation for the 2021 or subsequent compliance period if they have not been transferred or remitted by February 15, 2022.

As of July 1, 2023, the Federal OBPS and fuel charge will apply to Nova Scotia, and Prince Edward Island. The pricing plan put forward by these two provinces did not meet the higher standard of carbon pricing coming into effect on January 1, 2023.

Similarly, as of July 1, 2023, the Federal OBPS will be imposed in Newfoundland and Labrador, repealing its Provincial carbon tax system in place since January 2019. The Made-in-Newfoundland-and-Labrador strategy had prevented the imposition of a carbon price on fuel used for home heating as well as a number of other fuel-related purposes. The Government of Newfoundland and Labrador has been outspoken in its opposition to the withdrawal of carbon price exemptions by the Federal government of Canada.

The Governments of all the Atlantic provinces have argued that lower-income households, who spend a larger percentage of their income on heating and electricity prices, are disproportionately affected by the rising energy costs brought on by the new Federal Benchmark. They have also argued thatthe Federal government's stringency in implementing the carbon tax backstop will inevitably limit the Provincial government's financial capacity to provide relief related programs to its residents. Finally they have argued that, in addition to raising the cost of fuel, the new Federal Benchmark also indirectly raises the cost of many other items, including groceries.

CARBON TAXES IN US AND EUROPE

South of the border, the US States have taken matters in their own hands. California runs its own **cap-and-trade** program. A first of its kind in the U.S. when launched in 2013, this program sets a goal of slashing GHG emissions by 40 per cent by 2030. The system provides companies the opportunity to buy or trade credits as well as creating a cap on how much pollution they can produce under the program. A corporation must purchase allowance credits from the State during an auction if it wishes to emit more greenhouse gases than it is permitted to. The money raised from these auctions, which brought in over $2 billion last year, is used to fund other climate projects. Regrettably, a review of the effectiveness of the program, found that companies have purchased and saved approximately 321 million of these pollution-permitting allowances for future use, which may make it challenging for the State to require such businesses to reduce their emissions in order to fulfil the state's 2030 goals.

Correspondingly, nine states on the eastern seaboard have formed their own cap-and-trade conglomerate called the Regional Greenhouse Gas Initiative. The program sets an annual cap for the region's aggregate CO_2 emissions from electric power sector. The cap declines over time in a planned and predictable way (2.5 per cent per year from 2015–2020). Pollution permits (called '**allowances**') are regularly auctioned to covered entities (power plants). One allowance is equivalent to one ton of CO_2.

Similar to the Federal OBSP, the European Union has an **Emissions Trading System (ETS)** that enables companies to buy carbon credits from other companies. Based on the principle of cap-and-trade, the system sets an absolute limit or 'cap' on the total amount of certain GHGs that can be emitted each year by the entities covered by the system. This cap is reduced over time so that total emissions fall. All member states of the European Union (plus Iceland, Liechtenstein, and Norway) are part of the ETS. Except for Switzerland, Ukraine, and

the United Kingdom, all European countries that levy a carbon tax are also part of the ETS. Switzerland has its own emissions trading system, but it has been tied to the ETS since January 2020. As of January 2021, the United Kingdom adopted its own UK ETS as a result of Brexit.

Unfortunately, the ETS has been criticised, amongst other things, for over-allocating permits, price volatility and failing to meet its goals. To combat its pitfalls, the European Union announced the broad outlines of its Carbon Border Adjustment Mechanism (CBAM) on December 13, 2022. CBAM will allow for the taxation of imports from nations with laxer environmental regulations in the most polluting industries (steel, cement, fertilisers, etc.). The goal is to prevent "carbon leakage" and "environmental dumping," which would force industries to move their manufacturing outside of Europe, and to motivate the rest of the world to step up its efforts to decrease GHG emissions.

CONCLUSION

Carbon pricing is gaining momentum globally. We have seen carbon pricing proposals in progress in 47 national jurisdictions worldwide as of October, 2022.[6]

There are certain key elements that are necessary to ensure that a carbon pricing system will be successful. Looking at the different jurisdictions across Canada, it is evident that to advance the domestic carbon-pricing agenda, "readiness" for carbon pricing must be developed first. This involves both political leadership and technical/ institutional preparation. One can argue whether carbon pricing readiness existed in Canada when the Federal Pan-Canadian approach was first adopted in 2018.

We have seen a patch-work of Provincial responses develop since 2018 when the SCC decision was issued. There is still not much uniformity in Canada although there is certainly an emerging carbon pricing signal for business and industry. In Canada, the Federal government has tried to implement a nation-wide carbon price, beginning at $20 per tonne of carbon dioxide equivalent emissions (tCO_2e) in 2019 and raised it to $50 per tonne as of April 1, 2022. This price will increase to $65 per tCO_2e in 2023, and continue to increase by $15 dollars annually, until it reaches $170 per tCO_2e in 2030. Whether there is carbon leakage throughout Canada because of the disparate treatment of GHG emissions is an open question. ■

[6] "Carbon Pricing Dashboard" (last viewed 1 April 2022), online: *The World Bank* <www.carbonpricingdashboard.worldbank.org/map_data>.

KATHERINE BLUNT'S "CALIFORNIA BURNING"

*Ahmad Faruqui**

The subtitle, "The Fall of PG&E — and what it means for America's power grid," is very telling. The book reads like a corporate obituary.

It's a tale of woe from beginning to end, with just a glimmer of hope at the end as one looks at the future of northern California's investor-owned utility under a new CEO.

The book has a razor-sharp focus on the wildfires that were caused by PG&E over the last few years, several of which resulted in criminal charges being filed and upheld against the company. Thus, it delves deeply into the transmission lines that were so poorly maintained that when the fires occurred, the company did not even know how old they were. In one instance, the fire was caused by a tiny hook that broke because it had outlived its life long ago.

That was in 2018. The fire burned down Paradise, a town in Butte County. It prompted an individual to observe that one could count on PG&E to turn paradise into hell. The fire killed 85 people, spread over 150,000 acres and caused $16 billion in damage. The company tried to cover up its culpability but was found guilty and went bankrupt, the second time in two decades.

The book also discusses the explosion of a gas pipeline in San Bruno near the San Francisco airport which had occurred earlier, in 2010. The ensuing fire destroyed 38 homes and damaged 70. It killed eight people, while injuring dozens. When investigations began, it became apparent that the company did not even have any systematic records about the history of its pipelines. Eventually, it was found that the pipe had been laid in 1956 and was poorly welded.

PG&E is probably the only utility that has gone bankrupt twice. A major Hollywood film has been made about it[1] and there is a veiled reference to its foibles in another film. It's a company that for years had not one but two CEO's, one for the parent corporation and one for the utility (which was the only subsidiary).

Its CEO's have come and gone as one crisis has faded and another arisen. Their comings and goings have lent unenviable notoriety to the utility. Every new CEO would come in with much fanfare — four out of five times from other states. Their incredible sign-in bonuses would often make the news. They would leave with opprobrium on their face but with an incredible severance package that softened the hurt. One of them left with a package that amounted to $35 million.

The most notorious CEO was Peter Darbee. PG&E brought him from a telephone company and appointed him as CFO. With time, he rose to become CEO. Darbee, anxious to make his mark, hired Accenture, a very expensive management consulting firm, to remake the culture of the utility by "transforming" it. At least a hundred million dollars were spent on consulting fees with no results to show for the largesse. Mounted between the elevators on every floor was a "transformation" poster that, despite its complexity, said nothing tangible.

Accenture tried to benchmark the company's process against its peer but found that PG&E did not even have data on the condition of its wires and pipelines. Record keeping was not a priority. There was no budget for it.

Darbee's arrogance was legendary. He was widely disliked at PG&E. He surrounded himself with MBAs from top schools and they worked on developing slick presentations that he gave at forums around the country. Another

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[1] The company was found culpable for contaminating ground water.

sign of his arrogance was that executives were given priority when they pushed the elevator button. The elevator immediately came to their floor, sometimes with other employees in it who had wanted to go to a different floor.

In his search for greater glory, Darbee fired as many as 45 officers to transform PG&E. Unfortunately, with their firing, the company lost a lot of institutional knowledge since he mostly replaced them with people from the finance or telecommunications communities.

The book does not delve into the details of his era. From people who worked at the utility, I learned that the new executives could not tell the difference between a kWh or a kW, let alone understand volts, VARs, and reactive power. Demand charges, time-of-use rates, dynamic pricing and real-time pricing were similarly alien concepts.

According to a senior manager at the utility, Darbee was the inspiration for the pointy-hair boss in the cartoon script, Dilbert, whose creator, Scott Adams had worked with Darbee at PacBell.

The book does not discuss why "community choice aggregation" (CCA) began to take off in California, beginning with Marin County. This movement was driven largely by anti-utility sentiment, a concern that its rates were too high and that the power being delivered was neither green nor locally sources.

It's public knowledge that PG&E felt that it would potentially lose all its customers to these new entrants. It fought tooth and nail to ward off the CCA threat, spent millions on its anti-CCA campaign, and failed. A state law was passed to end PG&E's harassment. Today, more than 60 per cent of the customers in its service territory are now served by CCAs.

About a decade ago, droughts became an accepted feature of California's hydrology. The book tells us that PG&E hired an engineering firm, Quanta, to look at the wildfire risk associated with its transmission system. Quanta found that the risk was high since 60 per cent of the transmission system was built between 1920 and 1950 and nearly 30 per cent of the remainder were built in the first two decades of the 20th century. In the midst of this, PG&E was penalized by the California Public Utilities Commission (CPUC) for diverting nearly $500 million intended for vegetation management to shareholders.

The book discusses the rapid turnover of CEOs at the company. After the 2017 wildfire disaster, CEO Geisha Williams, who had been brought in from Florida a few years earlier, was escorted out of the door late on a Sunday. Bill Johnson was brought in from the Tennessee Valley Authority, where he was the most highly paid federal employee. Previously, he had been CEO of Florida Power, which had merged with Duke Power, to create Duke Energy. He was appointed the CEO of Duke Energy but fired within an hour for reasons that were not disclosed. He left with a multimillion dollar severance package.

Johnson instituted the Public Safety Power Shutoff (PSPS) program at PG&E, which meant that thousands of customers had to endure days without power. It would prove to be his undoing. At one public meeting, a woman complained about how much discomfort she and her young children had to endure during a multi-day PSPS event. His response, "at least your house did not burn down," was devoid of empathy and totally tactless.

He was replaced with Patti Poppe, PG&E's fifth CEO in a decade. She was serving as the CEO of Consumers Energy, the second largest utility in Michigan, which is a third of the size of PG&E. As with the new arrivals at PG&E, she started reshuffling the executive deck, bringing in executives from Florida and Southern California. On social media, she began posting selfies of herself with the rank and file of the company in different locations. Her first year compensation of $51 million made the news.

She is now regularly appearing in the company's ads on TV. In the book, she is quoted as saying that the company cannot do anything to prevent trees from falling on its power lines. Thus, it is going to underground 10,000 miles of distribution lines at a cost of $20 billion. Some experts are of the view that the costs could be even higher, perhaps by another $1520 billion.

In theory, undergrounding would reduce the risk of the lines triggering a fire by touching trees or vegetation and also reduce the need to spend money on vegetation management in perpetuity.

It would allow the company to keep more of its lines energized when the Diablo winds are blowing, avoiding the need to declare PSPS events. But the book makes it clear that undergrounding would not be an easy task. It's unclear whether even half of the lines can be buried. Undergrounding will require extensive

permitting, permissions from landowners (including the federal government), complex engineering, and a large amount of labor. Meanwhile PG&E is being pressed to upgrade its system for electrifying the other 95 per cent of its customers.

Furthermore, undergrounding just the distribution lines will not eliminate the risk of triggering wildfires. Transmission lines are very difficult to bury and are not included in the company's underground plan. Thus, PG&E's wires can still trigger wildfires.

Then comes the issue of cost. The company is already asking the state regulators for $7.6 billion in new investments through 2026, which is likely to raise customer bills by 5 per cent each year. To that will be added $2035 billion for undergrounding the distribution system. All of these investments are likely to raise the rates customers pay by 50 per cent by 2026. But CEO Poppe has this to say, "We know that we have long argued that undergrounding was too expensive. This is where we say it's too expensive not to underground."

Whether the regulators will approve this mammoth amount remains to be seen. What it will do to customer bills is quite certain: they will skyrocket. PG&E already has some of the highest electric rates in the country. What will that rate hike do to the state's goals to replace gas furnaces with electric heat pumps? How much will consumers' energy burdens rise? Will rising bills accelerate the shift to rooftop solar panels and even the departure of customers behind their own microgrids? The book does not discuss these questions.

In many parts of the utility's service territory, the distribution lines are already buried in the ground. Yet they have experienced power outages, even under normal weather conditions.

In areas where the power lines are above ground, wires are often seen running through trees or very close to trees. The poles are often made of wood and many times they are leaning into the roadway at an unsafe angle. Insufficient money has been spent on vegetation management. This is not discussed in the book.

The book also does not investigate why the company has had a culture of arrogance going back to the 1980's, long before the bankruptcies, the San Bruno explosion, and the fire in Paradise. PG&E's disasters have become an irritant for utilities around the globe. One energy expert documented 20 management errors by PG&E that had cost customers billions of dollars (but often made money for shareholders).[2]

Early in PG&E's history, David Roe, an attorney for the Environmental Defense Fund, wrote "Dynamos and Virgins," a critique of the company's business model: build, build and build. That's how all utilities made money. The bias is there even when less expensive options, such as energy efficiency, demand response, and small scale solar can substantially reduce the need to build power plants, transmission lines and distribution lines, along with the associated facilities.

The problems go back further in time, with the construction of the Diablo Canyon nuclear power plant. The original cost estimate was $1 billion. But due to major mistakes in construction, it ended up costing more than five times as much.

Much of this "colour" is missing in Katherine Blunt's book, which is based mostly on interviews with the victims of the company's disasters, the wildfires, and the pipeline explosions; interviews with the prosecutors, the judges, and the juries; and on a diligent review of public documents. The customer dimension is absent. That keeps the book from diving deeply into the company's culture, which was visible long before the wildfires.

Even with these limitations, the book is a must-read. It documents in intimate details the numerous blunders that have tarnished, perhaps irrevocably, the image of one America's largest electric and gas utilities, whose service area includes the renowned Silicon Valley.

Other utility executives should read it as well, so they come to know what not to do. And, most importantly, every regulator should read it. In many ways, the indictment of PG&E laid out in the book is an equally strong indictment of the CPUC. Indirectly, the book also impugns the governors who appointed them and the legislators that passed the laws enabling PG&E's misconduct not once or twice but numerous times. ■

[2] Richard McCann, "PG&E apologizes, yet again" (2019), online (blog): *Economics Outside the Cube* <www.mcubedecon.com/2019/10/14/pge-apologizes-yet-again>.

GUIDE TO ENERGY ARBITRATIONS

*Ralph Cuervo-Lorens**

The Global Arbitration Review's *Guide to Energy Arbitrations*[1] maintains its heavy publication pace with what is now its fifth edition (2022) published in the midst of continuing challenges in the energy markets relating to the aftermath of the COVID-19 pandemic, the disruption of the energy supply caused by Russia's invasion of Ukraine and the impact and responses to Russian sanctions imposed as a result. The field of dispute resolution in the energy sector in troubled times stands to particularly benefit from the deep roots as well as the sheer breadth and scope of this leading compilation edited by J. William Rowley as General Editor together with Doak Bishop and Gordon E. Kaiser, all ably assisted by an array of leading counsel and arbitrators as contributing authors.

This is a book about international arbitration as spanned by its leading sector, energy, "the poster boy of arbitral globalization."[2] There is thus much to learn for any international arbitration practitioner from the insights and experience of the authors and thoroughness of this book.

The book combines useful practical insight and advice, sharp analysis of cases and key developments and valuable predictions for the future all provided by people in the trenches. It aims to be not a textbook, but the essential desktop reference work for practitioners and actors in the field as well as parties and policy-makers.

As in the earlier editions, the foundational chapters in the book have been updated both topically as well as in terms of developments and leading cases. This fifth edition ensures that nothing is missed by the energy arbitration practitioner, from a panorama of the field in the Preface to authoritative decisions from international and national courts and tribunals, to new international instruments and key developments since the last edition in 2020. Reflecting ongoing developments in the international arena, the work adds a chapter on liquefied natural gas (LNG) arbitrations.

Chapter 1 serves as an introduction to the topic and the area for any reader providing an overview of the international energy industry and energy-related investment disputes. The chapter begins with the nature of the energy industry, the role played by supranational organizations such as Organization of the Petroleum Exporting Countries (OPEC), and the evolving roles and influence of "host states" and national oil companies. The second part is devoted to energy related investment disputes touching on topics such as the various applicable international instruments and the role of bilateral investment treaties.

Part I, "Investor-State Disputes in the Energy Sector" (ISDS) consists of a chapter on taxation-related ISDS covering energy investment disputes and "the state's exercise of its sovereign right regarding its tax regime." The piece by three contributors from Dentons focuses on when disputes relating to taxation

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[1] J William Rowley, Doak Bishop & Gordon E Kaiser, *The Guide to Energy Arbitration*, 5th ed (London, UK: Law Business Research Ltd, 2022), online: *Global Arbitration Review* <globalarbitrationreview.com/guide/the-guide-energy-arbitrations/fifth-edition>.

[2] *Ibid*.

can be brought under The Institute of Internal Auditors' (IIA) consideration as to when a taxation measure may be a breach of protection standards under an IIA and then undertaking a thorough review of arbitral decisions from Latin America, India, Mongolia and Africa.

Part II, "Commercial Disputes in the Energy Sector" consist of five chapters with the timely addition of a chapter by K&L Gates lawyers Ben Holland and Steven Sparling on LNG arbitrations. The disputes covered include disputes surrounding energy facilities, offshore vessel construction, regulated utilities, disputes under The North American Free Trade Agreement (NAFTA) and The United States-Mexico-Canada Agreement (USMCA) and the aforementioned LNG related disputes.

Chapter 3, "Construction Arbitrations Involving Energy Facilities" and Chapter 4, "Offshore Vessel Construction Disputes" have been revised and updated. The former concerns itself with commercial arbitrations between participants in construction projects for energy facilities underlining the fact that commercial arbitration has become the principal means for the resolution of this type of dispute. Doug Jones ably teases out the unique commercial considerations applying to energy facilities, including those with political and economic implications such as terms of trade, subsidies and taxes. With respect to offshore vessel construction disputes, the authors from Haynes and Boone begin by explaining why arbitration is the preferred method of resolving maritime related construction disputes, primarily under the London Maritime Arbitrators Association (LMAA), reviewing the types of disputes that most commonly arise with respect to offshore vessel construction as well as how they are resolved. The chapter concludes by offering valuable strategies for successful resolution of this type of dispute by arbitration.

Chapter 5, "Disputes Involving Regulated Utilities" is offered by Gordon E. Kaiser with a slight change of title in this edition, from arbitration of regulated activities to arbitration involving regulators. The chapter reflects the centrality of public utilities, generators, transmitters and distributors, all subject to regulatory oversight and entering into contracts with each other as well as with third parties as part of carrying out their (regulated) activities. Many of these contracts will contain arbitration clauses. Kaiser's focus here then is on the special problems that arise in disputes involving regulated utilities, such as jurisdiction and parallel proceedings, often pitting regulators against arbitrators, and highlighting the contrasting approaches of U.S. and Canadian courts and regulators in the area. Fundamentally, should disputes involving a regulated utility be subject to arbitration? And if so, are there limits or constraints?

The chapter in the last edition titled "NAFTA Energy Arbitrations," also by Kaiser, has been rightly expanded here to include arbitrations under the USMCA, NAFTA's replacement as of July 2020. The author updates NAFTA energy arbitrations to date, including a number of legacy arbitrations under the transitional provisions, and then considers the implication on the energy sector of the elimination in the new agreement of Chapter 11 of the NAFTA which gave private investors the right to bring claims in the host country. The Chapter 11 mechanism in giving foreign investors and the arbitration panels hearing their claims a means to override domestic law had left both Canada and the U.S. unhappy, as Kaiser notes. Cases such as *Mobil Oil,*[3] *Mercer International*[4] and *Mesa Power*[5] starkly illustrate the problem as it arose in the energy sector. The state-to-state dispute resolution process contained in NAFTA's Chapter 20, on the other hand was maintained and even slightly improved. The Chapter concludes with a review of the available remedies for aggrieved investors in the absence of a Chapter 11-like mechanism such as *de facto* or disguised expropriation and other common law basis for relief grounded in concepts such as good faith in contractual performance and misfeasance in public office.

Chapter 7 is new in terms of emphasis. It expands upon a topic introduced earlier reflecting the importance of LNG in today's world. Here, the authors build upon an earlier chapter by Steven P. Finizio and his colleagues

[3] *Mobil Investments Canada Inc. v Canada*, 2020 ICSID ARB/15/6; *Mobil Investments Canada Inc. and Murphy Oil Corporation v Canada*, 2015 ICSID ARB(AF)/07/4 [*Mobil Oil*].

[4] *Mercer International, Inc. v Canada*, 2018 ICSID ARB(AF)/12/3 [*Mercer International*].

[5] *Mesa Power Group LLC (USA) v Government of Canada*, 2016 PCA 2012-17 [*Mesa Power*].

at WilmerHale (in the third edition) providing a detailed overview of arbitrations in this particular sub-sector of the energy market, one which has gained significant geopolitical importance as a result of the invasion of Ukraine with Russia being the world's largest exporter of pipeline natural gas. The conflict has led to significant growth in the LNG market in a short span of time and created a pressing need to build or expand existing facilities for receiving or re-gasifying LNG. The chapter primarily looks at the types of LNG related disputes that may lead to arbitration such as failure to deliver, missed cargo, oversupply effects, rescheduling and diversion, terminal capacity/use issues, pricing disputes, and a variety of *force majeure* circumstances.

Part III is titled "Contractual Terms" and includes, as previous editions did, chapters on the evolution of Natural Gas Price Review Arbitrations and Gas Price Review Arbitrations. In the first, Chapter 8, Stephen P. Anway, George M von Mehren, Michelle Glassman Bock and Max Rockall lay out the evolution of price review arbitrations since the mid-1990s, including an interesting history and analysis of the price review clause, as well as an overview of the current state and the anticipated future of price review arbitration cases, "the highest-value commercial disputes in the world today." In their "Asia-the future is now" section the authors provide an update on what they had earlier predicted would become the new "battleground for LNG price review arbitrations," China, Japan and South Korea, the world's three largest importers of LNG. Citing the impact of external events such as economic crisis and the Russian-Ukrainian conflict, the authors emphasize the outsized role of external events, rather than changes in contractual terms, legal rights or the actions of parties, as the primary drivers of change in this type of energy arbitration.

In Chapter 9, "Gas Price Review Arbitrations," Marco Lorefice of Edison SpA, expands on his previous chapter in the Fourth Edition providing valuable insight based on personal experience in price review cases and long-term gas sales and purchase contracts. After a helpful explanation of the nature of such disputes (distinct from force majeure or economic hardship claims) and of the price review process, Lorefice emphasizes that gas price review arbitrations are "not just a legal dispute." Rather, "a significant part of the dispute…is based on market economics, algebra and sophisticated calculations." The chapter includes new material on triggers, its relationship with the contract sales price as well as a detailed analysis of issue relating to jurisdiction and admissibility.

Closing the book is Part IV, "Procedural Issues in Energy Arbitrations," following previous editions of this work. Chapter 10 contains a comprehensive review and update of major developments on multi-tier dispute resolution clauses as jurisdictional conditions precedent to arbitration, an increasingly important topic in international arbitration of all types, by Bennet Jones lawyers Vasilis F. L. Pappas and Artem N. Barsukov, a topic first covered in the 2017 edition of this work. The authors offer a comprehensive review of the treatment of such clauses by both national courts in various countries as well as by arbitral tribunals. The chapter closes with a useful set of practical guidelines for both arbitration practitioners and transactional lawyers.

The Conclusion in Chapter 11 offers thoughtful and stark commentary by Kaiser. In "The Challenges Going Forward" the author reminds us of earlier comments on the very real challenges faced by energy arbitrations ranging from rising costs, duplicate proceedings, creeping partisanship and what he refers to as the public policy conflict: the rights of private investors colliding with national legislation, at times hampering the ability of host countries to pursue their legislative and policy agendas, a problem most starkly illustrated under NAFTA but not, the author notes, confined to North America. The challenge for international energy arbitration today, Kaiser explains, comes from the shift in the energy landscape from fossil fuels to renewables. Renewable energy has dramatically changed energy markets and policy globally and in Kaiser's view this shift is also changing "the face of arbitration." The impact of incentive programs established by national governments to spur the shift to renewables resulted in a wave of challenging arbitrations (100 cases in two years!) which, together with the aforementioned public policy conflict, has led to a full-blown backlash against international arbitration. The result is states increasingly attempting to micromanage the rules, practice and procedure of international arbitration as reflected in new provisions in the new USMCA limiting the scope of fair and national treatment and full protection and security and, most importantly, in the restriction on the use of the most favoured nation (MFN) clause to import standards and jurisprudence from other treaties. As Kaiser

sees it, the next few years can be expected to be just as challenging as the last few: the consequences of the failure to meet the Paris Agreement emission targets become evident and reverberate through the energy arbitrations world and the full implications (and perhaps the after-math) of war in Europe, will act as incentives to develop new technologies as well as new sources of energy. The anticipated massive new investment in energy will demand a lot from the international arbitration process.

Energy and resources sector arbitrations have made up the majority of international arbitrations in the last few years. This can be expected to continue in the years ahead if not to increase. Global Arbitration Review's *Guide to Energy Arbitrations* as it has been since 2015 continues to be the practitioners timely guide to both legal and macroeconomic developments as well as advocacy and practice in this important area of international arbitration. ■