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.

EDITORIAL POLICY

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

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

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

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

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

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

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Rowland Harrison K.C. and Gordon E. Kaiser

This year marks the Tenth Anniversary of *Energy Regulation Quarterly*, the first issue of which was released in the fall of 2013. In "The Energy Regulation Quarterly Reaches Ten Years," Gordon Kaiser, one of the founding Managing Editors of *ERQ*, reflects on the origins of the journal and some of its features over the intervening decade. His retrospective includes tributes from senior regulators in British Columbia, Alberta and Nova Scotia.

A regular (and eagerly anticipated) feature of *ERQ*, beginning with the first issue in 2013, has been Professor David Mullan's annual survey of judicial developments in administrative law relevant to energy law and regulation. This issue of *ERQ* includes a bonus contribution from Professor Mullan, in "Administrative Law and Canadian Energy Regulators: The Big Changes Over the Last Decade."

Energy policy and regulation continue to focus on clean and renewable energy initiatives at the forefront of efforts to adapt to climate change and meet commitments to reduce greenhouse gas emissions. In "The New National Program to Increase Investment in Clean & Renewable Energy," contributors from McMillan LLP examine several such measures included in the federal government's Budget 2023, aimed at attracting "clean and renewable investments in the Canadian energy industry, in the face of severe competition from the U.S. in light of the American *Inflation Reduction Act, 2022*. These include Carbon Contracts for Difference (CCfD) and several new investment tax credits.

In "Energy Policy Assessments and EVs Meet at the Intersection," Dr. Ron Wallace presents a highly critical review of the federal government's proposed *Regulations Amending the Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations*. Dr. Wallace concludes that Canadian energy policies are being designed and introduced in the absence of valid assessments of their cost and benefits:

> Policies for Canadian energy production and transmission, with a sole focus on emissions, are being enacted with scant attention paid to the direct and unpredictable effects on the economy. The proposed EV regulations inadequately consider many factors, not the least of which is the assumption of widespread public acceptance of a significantly altered transportation fleet.

Meanwhile, rising, already-high electricity costs in some jurisdictions are argued to be slowing progress on electrification and present a challenge to energy suppliers and regulators that is exacerbated by the rising costs of mitigation, compensation and maintaining and replacing infrastructure in the face of events such as wildfires. In "New Electricity Rate Reform in California," Meredith Fowlie examines a recent California law requiring that residential electricity prices be reduced: revenues not covered in a per-kWh charge will be collected in a fixed monthly charge that increases with household income. As with most "reforms," however, "there will be winners and losers."

This issue of *ERQ* concludes with reviews of two books that, each in their respective way, push back against prevailing narratives promoting overly simplistic "solutions" to the challenges presented by climate change. Kenneth Barry reviews *The Unpopular Truth: About Electricity and the Future of Energy*, by Dr. Lars Schenikau and Prof. William H Smith, which Barry concludes is "a blunt, straight-from-the-shoulder espousal of the authors' concerns about overreliance on renewable energy technologies — a trend that, they fret, has been overhyped in political, green-advocacy, and media circles." Rowland Harrison reviews Dennis McConaghy's *CARBON CHANGE: Canada on the Brink of Decarbonization*, in which McConaghy argues that decarbonization "is simply too costly for the risk that the world actually faces." ■

THE ENERGY REGULATION QUARTERLY REACHES TEN YEARS

Gordon E. Kaiser, David Morton, Bob Heggie, and Peter Gurnham, K.C.

THE BACKGROUND

The First Day. Gordon Kaiser[1]

A little over ten years ago on a bright fall afternoon in Ottawa a thousand copies of a new publication called the *Energy Regulation Quarterly* came off the printing press. The next day they went out to the group of energy lawyers and energy regulators across Canada. This was an ambitious project. The new journal which became known as the *ERQ* was distributed free of charge in both French and English. The first editorial of the new journal laid out the framework of the new publication.

> This is the first issue of the *Energy Regulation Quarterly*. Readers may wonder why we need another energy journal. The answer is, simply, that this country does not have one, at least not one dedicated to energy regulation.
>
> Lots of things are regulated in Canada — the environment, broadcasting, securities, zoning, taxicabs, lawyers, telephones and railways. Over the years energy regulation has climbed to the top of the pile.
>
> There are energy regulators in every province as well as at the federal level. That's because the business of energy production, transportation and distribution is growing in importance, not just in Canada, but throughout the world. And it's a sector that is increasingly challenged by technological innovation, which as it happens is a dominant theme in many of the decisions reviewed in this first issue.

ERQ takes a unique approach. Each issue will feature an article or articles by a leading commentator. In this first issue it is David J. Mullan, Emeritus Professor of Law at Queen's University. David, who needs no introduction to the North American legal world, reviews 10 years of lectures he gave to energy regulators every summer at the CAMPUT energy regulation course hosted by his university.

Aside from bringing thought-provoking articles, each issue promises a series of case comments. Our goal here is to kick start a serious discussion on significant decisions energy regulators. That rarely happens now.

This issue offers important case comments by Dr. Michal Moore of the University of Calgary, Glenn Zacher of Stikeman Elliott in Toronto, and Jeff Christian of Lawson Lundell in Vancouver, as well as a

[1] Gordon Kaiser is an arbitrator and mediator at Regulation Law Chambers in Toronto where he specializes in disputes involving energy and competition law. He is a former Vice Chair of the Ontario Energy Board, Market Surveillance Administrator for the Province of Ontario and Special Counsel to the Atty. Gen. Canada on competition law disputes. He is also a co-managing Editor at the *ERQ*.

commentary on the recent National Energy Board TransCanada Mainline decision by Gordon Kaiser, and one on the Maritime Link decision of the Nova Scotia Utility and Review Board by Rowland Harrison.

The TransCanada Mainline decision, like many of the case comments, highlights the challenges that new technology brings to energy regulators. The technology at the root of the issues in that case was the combination of hydraulic fracturing and horizontal drilling — which in less than a decade has managed to transform the gas supply market with economic recovery of massive reserves of gas from shale deposits across North America.

That new production has changed the picture on affordability of natural gas — and with it the industry and the regulatory landscape. TransCanada as the operator of the Mainline and many of its principal distribution company customers are facing significant challenges in adjusting to the new market environment. New regulatory solutions are required.

The other case comments noted above highlight some other areas where innovation in the use of technology is at issue — be it green energy technology, electric cars, or opportunities to bring natural gas into the transportation market. All provide serious challenges to regulators.

Technological innovation is not the only new development being faced by energy regulators. A sometimes related challenge is the changing energy geography of North America and the need for new transmission — for liquid gaseous and electric energy. Be it oil pipelines to western, eastern or southern (US) coasts to move to new markets, gas, LNG and pipelines in western, eastern and central regions to ensure the economic delivery of supply, or electric transmission between markets never before connected, the movement of energy is a more public concern than arguably at any time in our history.

This issue of *ERQ* examines some of these issues through the lens of the recent Nova Scotia decision on Maritime Link. The project is intended to provide a new link for Newfoundland to the North American electricity market and to give Nova Scotia access to electricity from Labrador. Through a series of transactions, the power from Muskrat Falls on the Churchill River will move to mainland Newfoundland by the Labrador-Island Link, and then through the Maritime Link to Nova Scotia and on to New England. Rowland Harrison's comment offers interesting insights on the decision.

Case comments by authors are important. But so are comments by the readers. Each issue of *ERQ* going forward will devote a section to those comments. We invite you to participate in this dialogue.

We hope *ERQ* will not become a Canadian backwater publication. To address the non-Canadian side, we have conscripted Robert Fleishman, a well-known commentator from Washington, to an American Report in each issue. And in the second issue we will introduce the first of what we hope will be regular European commentaries.

We realize Canada is not an island in terms of energy regulation. Energy is an international product. Most energy companies operate worldwide. And Canadian regulatory procedures often borrow from those developed abroad.

In a way, *ERQ* is the third leg of a long crafted stool. Ten years ago, Canadian energy regulators together with utilities and the Energy Bar started two important educational initiatives. The first was the above-noted annual CAMPUT summer course. Each year for the past decade, regulators from across Canada have shown up for a weeklong session that has produced lively discussion and instruction. A number of those who lectured came

year after year in a fine gesture of public service.

At the same time, the Energy Law Forum was created. It meets every May at locations across Canada. So far it has stopped at Kelowna BC, Lake Louise Alberta, St. Andrews by-the-Sea New Brunswick, Val David Quebec, Salt Spring Island BC, La Malbaie Quebec and Toronto, Ontario.

In both of those initiatives, speakers often delivered first-class papers. There was always a concern that none were published. With Professor Mullan's piece here we demonstrate how the *ERQ* can provide a forum to remedy that shortcoming.

But *ERQ*'s real purpose is to provide timely public discussion on important regulatory decisions. And to that end, we have assembled a roster of contributors — leading practitioners, academics and other experts who will author the case comments and other articles. We appreciate their commitment. Some have contributed to this first issue, others have their names listed on the masthead and we look forward to their comments in subsequent issues.

The very first edition of the publication highlighted an interesting group of characters. The first article by David Mullan of Queen's University was called *Regulators and the Courts: A Ten Year Perspective*[2]. As David pointed out in the article, his article reflected his experience at the new course for energy regulators at Queen's University where he was the lead speaker for the entire decade. As it turns, out David has followed that tradition and continued it to this very day. In fact, this issue of the *ERQ* contains another article bearing the same title. As in the past it will be the first article in this issue of the *ERQ*.

David was not the only regulator regular contributor. Robert Fleishman a senior partner at the law firm of Kirkland & Ellis in Washington DC contributed an essay called *The Washington Report*.[3] It was the last article in that issue of the *ERQ* and continue to be in the first issue of every year. There were other regular contributors of note. One was another American called Scott Hempling. One of his articles called *From Streetcars to Solar Panels: Stranded Costs Policy in the United States*[4] turned out to be the most read article in ERQ history. Equally popular were other five articles he contributed over the decade.

Another article often quoted was from the only Court of Appeal judge that wrote for the *ERQ*. That was the article called *The Joy of Decision Writing*[5] by Mr. Justice David Brown of the Ontario Court of Appeal. One energy regulator chair also contributed. The late Willie Grieve sent us a gem called *One Hundred Years of Public Utility Regulation in Alberta*.

THE REGULATORS

In marking the 10th anniversary of the *ERQ*, we thought it best to touch base with the people that the *ERQ* was designed to inform. The goal from the beginning, as stated in the first editorial set out above, was to see if we could improve the state of energy regulation in Canada with a better analysis of the court and regulatory decisions in Canada. We asked the leaders of the three energy regulators across Canada who contributed the most to the *ERQ* over the years. Starting with the Pacific Ocean and ending with the Atlantic Ocean, these were David Morton, the Chair of the British Columbia Utility Commission, Bob Heggie, the Chief Executive Officer of the Alberta Utilities Commission, and Peter Graham, the Chair of the Nova Scotia Utilities and Review Board. Their comments follow.

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[2] David J. Mullan, "Regulators and the courts: A Ten Year perspective", (November 2013) 1 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/articles/regulators-and-the-courts-a-ten-year-perspective-1>.

[3] Robert S. Fleishman "The Washington Report", (April 2021) 9:1 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/regular-features/the-washington-report-8>.

[4] Scott Hempling "From streetcars to solar panels: Stranded cost policy in the United States", (7 September 2015) 3:3 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/articles/from-streetcars-to-solar-panels-stranded-cost-policy-in-the-united-states>.

[5] Justice David M. Brown, "The Joy of Decision Writing", (November 2014) 2 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/articles/the-joy-of-decision-writing>.

British Columbia: David Morton[6]

On behalf of the BCUC — and indeed the entire regulatory community — congratulations to *ERQ* on its 10th anniversary.

I was a relatively newly minted Commissioner when I read the inaugural issue in 2013. The first editorial opened with the statement "Readers may wonder why we need another energy journal. The answer is, simply, that this country does not have one, at least not one dedicated to energy regulation." My curiosity was piqued.

I remember turning the pages with growing interest as I realized the quality of the writing, the depth of analysis and the scope of the material. Of course, it helped that a recent BCUC decision on Natural Gas for Transportation was featured. So, this new publication was also both timely and relevant to me.

Over the intervening ten years, the *ERQ* has not disappointed. Filled with thoughtful analysis, it informs and supports the regulatory community, bringing us together in spite of the challenges of geography and differences of jurisdiction.

This is a time of unprecedented change in the energy and utility industry in Canada and around the world. It has never been more important to have access to the very best of the work of our peers. When I look at recent articles in the *ERQ* I see titles like:

- Agile Regulation for Clean Energy Innovation: Examining the Early Experience of Two Canadian Institutions[7]
- Cumulative Effects can Infringe Treaty Rights[8]
- Reconciliation: The Public Interest and a Fair Deal[9]
- British Columbia Reduces Regulatory Barriers to Hydrogen Investment[10]

I am very pleased to see the *ERQ* moving with the times — deftly and effectively. The content remains as fresh as it was that first day. That first editorial stated: "*ERQ*'s real purpose is to provide timely public discussion on important regulatory decisions." Mission accomplished. Keep up the good work *ERQ*!

Alberta: Bob Heggie [11]

I am honored to write this foreword in recognition of the significant achievement of the tenth anniversary of the *Energy Regulation Quarterly*. The journal remains a singular and unique publication in Canada with its unique perspective of fostering discussion of energy regulation and the decisions of energy regulators, both in Canada and the United States.

ERQ was launched in 2013, thanks to the visionary minds of Gordon Kaiser, Mike Cleland and Rowland Harrison. As with all new ventures, seed capital was required and provided by the Canadian Gas Association. From its humble beginnings as a five issue "pilot project," *ERQ* has achieved its ambition of providing timely public discussion on important regulatory decisions.

The requirement for a particular kind of periodical focused on energy regulation arises from the fact that this branch of study cuts across many legal and policy categories including public law, private law, contract law, economics, environmental, safety and energy policy. Over the last decade there has been a related increasing intensity of energy regulation

[6] Dave Morton is Chair and CEO of the BC Utilities Commission. He has served in the capacity since 2017.

[7] Colleen Kaiser & Geoff McCarney, "Agile Regulation for Clean Energy Innovation: Examining the early experience of two Canadian institutions", (December 2021) 9:4 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/articles/agile-regulation-for-clean-energy-innovation-examining-the-early-experience-of-two-canadian-institutions>.

[8] Maya Stano et al., "Cumulative Effects can Infringe Treaty Rights", (December 2021) 9:4 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/articles/cumulative-effects-can-infringe-treaty-rights1>.

[9] Gordon E. Kaiser, "Reconciliation: The public Interest and a Fair Deal", (December 2021) 9:4 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/regular-features/reconciliation-the-public-interest-and-a-fair-deal>.

[10] Eric Bremermann et al., "British Columbia Reduces Regulatory Barriers to Hydrogen Investment", (October 2021) 9:3 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/articles/british-columbia-reduces-regulatory-barriers-to-hydrogen-investment>.

[11] Bob Heggie is the CEO of the Alberta Utilities Commission.

as regulators attempt to balance economic, social and environmental considerations in the public interest. A good example of this complexity and diversity is the high degree of legal and economic issues presented by the regulation, or restructuring of electricity network systems.

Since its inception, the journal has operated and continues to operate through an era of climate change. In recent years, the subject of climate change has attracted considerably more attention and the *ERQ* continues to be a leading vehicle in this complicated discussion. The same comment could be made in relation to the impact of energy development on Indigenous populations and the growing area of energy justice. The high degree of diversity in the field of energy regulation underscores the importance of developing a core literature and the *ERQ* has and will continue to fill that need as these issues mature.

Without authors there would be no journal. By my count, since its foundation the *ERQ* has published upward of 300 articles. As a devoted reader, I am grateful to the community of authors, editors, reviewers, and sponsors who collectively support the project, have kept its reputation high and have nurtured thought-provoking discussions for a decade.

Not every publication will be successful. Success is earned, article by article, edition by edition. To succeed the journal must attract authors that will, through the published content, establish credibility with readers and practitioners in their day-to-day work. In this tenth anniversary celebratory issue it is clear the *ERQ* has met that challenge and has achieved the aims it set for itself. I look forward to reading *ERQ*'s pages over the next ten.

Nova Scotia: Peter Gurnham[12]

Congratulations to the *ERQ* on its tenth anniversary.

The *ERQ* has become an important resource for Canadian Energy Regulators and is part of their toolbox. There is no other journal in Canada that focusses on energy regulation in the way the *ERQ* does.

David Mullan's yearly update on administrative law is a must read and always provided a one stop, concise, thoughtful update on leading decisions from the courts and certain regulators. David helped us understand many important issues such as our role with respect to the Duty to Consult. His timely and well researched advice was and is much appreciated.

Gordon Kaiser's annual update on important regulatory decisions from provincial boards keeps us in touch with the challenges fellow board members are dealing with across the country. His frank analysis of our decision was welcome, if at times humbling.

The Editorial by Gordon Kaiser and Rowland Harrison is something I read in each edition and very much look forward to it.

Beyond these regular features there has been a treasure trove of excellent articles and analysis on energy issues, book reviews, information from the United States and much more.

To Gordon Kaiser, Rowland Harrison, Tim Egan, and all of those responsible for the *ERQ*, please know that you have provided an excellent and appreciated public service to the regulatory community, those interested in energy issues, academics and others.

I have no hesitation in saying that I and others like me were better regulators because of what we learned in the *ERQ*.

GOING FORWARD

As we look forward to the next decade, we thank the many energy lawyers and energy regulators that over the years contributed to the *ERQ*. Every three months we managed to produce three or four articles and a couple of book reviews and more recently webinars. Webinars, it turns out, have proved to be very popular particularly for young lawyers. Over the next 10 years we will likely add podcasts which we expect will be equally important.

[12] Peter Gurnham, K.C. was Chair of the Nova Scotia Utility and Review Board from 2004 to 2022. He is currently Special Advisor to the First Nations Financial Management Board with respect to water and wastewater regulation for First Nations Communities.

As always we ask our loyal readers to let us know if there is anything we can do to improve the *ERQ*. The Canadian energy industry is changing rapidly and we will strive to review the change as it happens. In the next 10 years both Canadian energy regulators and the *ERQ* will face greater challenges than in the first 10 years. The transition to a low carbon economy will involve a significant investment in new technology. That will involve a more complicated and demanding form of regulation and careful analysis on the part of the *ERQ*. ■

ADMINISTRATIVE LAW AND CANADIAN ENERGY REGULATORS: THE BIG CHANGES OVER THE LAST DECADE

*David J. Mullan**

INTRODUCTION

In 2013, in the first issue of the *Energy Regulation Quarterly*, the editors were kind enough to publish my paper, "Regulators and the Courts: A Ten Year Perspective."[1] This paper drew on presentations that I had made over the previous ten years at the annual CAMPUT (Canada's Energy and Utility Regulators) Energy Regulation Course, as well as a chapter in the recently published *Energy Law and Policy*, edited by Gordon Kaiser and Bob Heggie.[2] A further ten years have passed and I am once again privileged to be part of the tenth anniversary of the *Energy Regulation Quarterly*, and to provide my reflections on the major changes in Canadian Administrative Law over the past ten years that have had an impact on Energy Law and Regulation.

I have selected seven topics. Some arise directly from energy regulatory proceedings such as the emerging duty of candour applicable to participants in regulatory hearings; others deal with more general issues that have implications for the law affecting energy regulation, such as the standard of review applied by the courts in statutory appeals from and applications for judicial review of the decisions of statutory and prerogative bodies.

I. LEARNING TO LIVE WITH *VAVILOV* AND THE SPIES AMONG US

The most important Administrative Law judgment that the Supreme Court of Canada released during the first decade of the *Energy Regulation Quarterly* was undoubtedly *Canada (Citizenship and Immigration) v Vavilov*[3] (to be read along with its companion judgment released the same day: *Bell Canada v Canada (Attorney General)*).[4] In what could be described as more in the nature of a legislative than a judicial exercise, the Supreme Court stated its objective in these appeals from the Federal Court of Appeal as reforming and clarifying the principles governing judicial review of administrative action on substantive[5] (but not procedural grounds[6]) with a view to "ensur[ing]

* 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] David J. Mullan, "Regulators and the Courts: a Ten Year Perspective" (2013) 1 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/articles/regulators-and-the-courts-a-ten-year-perspective-1>.

[2] "Administrative Law and Energy Regulation" in Kaiser and Heggie (eds), *Energy Law and Policy* (Toronto: Carswell, 2011) at 35.

[3] 2019 SCC 65, [2019] 4 SCR 653.

[4] 2019 SCC 66, [2019] 4 SCR 845.

[5] *Supra* note 3 at paras 2, 10–11, 16, 23.

[6] *Ibid* at para 23.

that the framework it adopts accommodates all types of administrative decision-making."[7]

In this segment, given the extensive case law and professional and academic discussion that the judgment has attracted, I will do no more than provide by way of a list an overview of the recalibration of substantive review engineered by the majority of the Supreme Court. I will then comment briefly on the extent to which the Court's ambition of a comprehensive reform of the principles of judicial review of administrative action has fallen short.

1. The presumption of reasonableness review which formerly existed for administrative decisions that reached the superior courts by way of statutory appeal is repudiated. Henceforth, absent legislative prescription to the contrary, the standard of review for such decisions is correctness in the instance of pure questions of law and "palpable and overriding error" for questions of fact and mixed fact and law from which there is no "readily extricable" pure question of law, this being the standard[8] that attaches to civil appeals from first instance judges. (This has an impact on a range of energy and other regulators the decisions of which are subject to statutory appeals to superior courts. Thereafter, their decisions became subject to correctness rather than reasonableness review on questions of law. Obviously, this has the potential to increase their exposure to successful challenges.[9])

2. Jurisdictional error is condemned as a category of judicial review. (This too has an impact on regulators that are subject to appeals to the superior courts on questions of both law and **jurisdiction** in that the statutory reference to jurisdiction is effectively or impliedly repealed or merged with review for error of law[10] as a consequence of the recalibration of the common law of judicial review.)

3. As a consequence of 2, jurisdiction disappeared as a category under which the normal presumption of reasonableness review for questions of law is rebutted. The number of such situations where the presumption is rebutted was seemingly further reduced by the Court's omission from its list of three questions of law in which both superior courts and a tribunal or agency have first instance authority over the relevant issues of law.[11] Remaining in the rebutted category are various constitutional questions, general questions of law of fundamental importance to the legal system as a whole, and situations involving competing claims to authority over the issues of law under consideration.

Stated in this form, the Court's recalibration seems pretty thin gruel for what was an ambitious project. Nevertheless, there were mixed reviews of the Court's overturning of precedents (including its own) in which the presumption of deferential reasonableness review had attached to statutory appeals as well as applications for judicial review. There were also concerns about gaps and lack of clarity in the reach of the changes.

In this year's survey article,[12] I highlighted two such important matters. First, why did the Court distance itself from considering the contentious question of the relevance of standard of review analysis to issues of procedural fairness? Secondly, at a general level, were the new prescriptions ones that attached

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[7] *Ibid* at para 11.

[8] Outlined by the Supreme Court in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235.

[9] For an early example where Paul Daly argues that the change may have impacted the outcome, see Paul Daly, "Rates and Reserves: *Manitoba (Hydro-Electric Board) v Manitoba (Public Utilities Board)*, 2020 MBCA 60" (13 October 2023), online: Administrative Law Matters <www.administrativelawmatters.com/blog/2020/10/13/rates-and-reserves-manitoba-hydro-electric-board-v-manitoba-public-utilities-board-2020-mbca-60>.

[10] And presumably also palpable and overriding error in the domains of review of findings of fact, and mixed law and fact, and, more generally, reasonableness review.

[11] This category was restored in 2022 in *SOCAN v Entertainment Software Association*, 2022 SCC 30.

[12] David J. Mullan, "2022 Developments in Administrative Law Relevant To Energy Law and Regulation" (2023) 11:1 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/regular-features/2022-developments-in-administrative-law-relevant-to-energy-law-and-regulation>.

simply to the tribunal and regulatory agency decision-making, or did they also extend to review of various forms of legislative and executive decision-making and, especially, rule-making stretching from formal subordinate legislation (regulations and by-laws) to internal policies? Putting it in terms of judicial review and issues concerning standard of review, was review of these instruments still on the basis of jurisdictional error's near cousin, *ultra vires*, and, even if so, did it now take place with reference to *Vavilov*'s prescriptions and especially conceptions of reasonableness?

As for the matter of procedural fairness, the Supreme Court provided a partial answer in 2022 in *Law Society of Saskatchewan v Abrametz*.[13] With respect to the issue of whether *Vavilov* and it ambition for a comprehensive approach to substantive review has swept up the concept of *ultra vires* and decision-making to which it has customarily been applied, controversy continues. Further detail on each of these issues is contained in my annual survey of 2022 developments.

Rather than repeating that analysis here, let me now turn to what, at the end of the day, may be the most transformational aspect of *Vavilov*. In addition to simplifying the process of assigning the appropriate standard of review for decisions under review, the Court identified, as a second part to its mission, the provision of "additional guidance for reviewing courts to follow when conducting reasonableness review."[14]

Given the relative lack of attention that the Supreme Court had paid in earlier jurisprudence to the operational or detailed aspects of assessing the reasonableness of decisions under review, there is no doubting that this was a laudable initiative on the Court's part. It is also the case that all the components of the Court's lengthy list of considerations that bear on the reasonableness of a decision are not only sound at least when viewed in isolation but also extremely useful to lower courts in their assessment of the reasonableness of the decision under review. More generally, they provide an excellent road map for high quality reasons writing.

This starts with a general proposition, not new in *Vavilov* but endorsed by the Court. The duty to provide reasons requires decision-makers to meet the standards of "justification, intelligibility and transparency."[15] As a further incentive to high quality reasons, the Court also emphasized that, in the conduct of judicial review, the primary focus of the reviewing court should be on the reasons provided. There is a "reasons first"[16] policy.

However, there are also dangers lurking when one aggregates the various components of the Court's full checklist of considerations that go into the writing of a decision that will withstand reasonableness scrutiny. Consider the potential impact of the following partial synopsis from *Vavilov*:

- Formal reasons for a decision should be read in light of the record with due sensitivity to the administrative setting in which they were given.[17]

- A reasonable decision is one that is both based on an internally coherent reasoning and justified in light of the legal and factual constraints that bear on the decision.[18]

- An unreasonable decision is one that fails to deal with key arguments and central issues as well as to address precedents both judicial and of the tribunal.[19]

- A reasonable decision is rooted in the modern rules of statutory interpretation and their focus on text, context, and purpose.[20]

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[13] 2022 SCC 29.

[14] *Supra* note 3 at para 2.

[15] *Ibid* at (*inter alia*) para 100, citing to *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47.

[16] *Ibid* at paras 84, 143.

[17] *Ibid* at para 103.

[18] *Ibid* at paras 85, 105.

[19] *Ibid* at para 127.

[20] *Ibid* at paras 118, 120.

- Among the legal and factual constraints are: the governing statutory scheme, other statutory and common law, principles of statutory interpretation, and the evidence before the decision-maker.[21]

Writing a decision that satisfies all the listed admonitions can quite easily be seen by a decision-maker as a daunting task and one that leads to excessively long decisions and a threat to the efficient management of the tribunal's docket. For the entire range of administrative decision-makers, pitfalls exist around every corner.

Certainly, in *Vavilov*, the Court recognizes the dangers of going too far down this rabbit hole, and these cautionary warnings have been taken up by lower courts with statements such as "Although the reasons are brief, they are adequate to explain and justify the decision."[22]

An even bigger danger, assuming one accepts the *Vavilov* Court's justification of the principle of deference,[23] is that following all these precepts in the writing of decisions will give rise to a reviewing or appellate court in effect conducting correctness review of the decision-maker's final product. This is not surprising in that the Court's list of reasonableness criteria is just as easily transferrable to the writing of decisions review of which will be on the basis of correctness. It is more in the nature of a guide to good reasons writing **irrespective** of whether the decision will ultimately be subject to correctness or reasonableness review. In fact, there is more than the slightest hint of this in the dissenting judgment of Abella J. (generally, at least in theory, a strong proponent of deference) in *Vavilov*'s companion case, *Bell Canada v Canada (Attorney General)*.[24] A more recent example can also be found in *Morningstar v Workplace Safety and Insurance Appeals Tribunal*.[25] The more the decision-maker tries to cover the reasonableness bases, the greater the chance of exposure to judicial review even where the standard of review is deferential reasonableness.

In short, the bottom line may be that there will be very little practical difference in terms of outcomes between correctness review on pure questions of law in the instance of statutory appeals and reasonableness review in the context of applications for judicial review. It still, however, remains to be seen whether this possibility has become a reality, and is the stuff of empirical research into all levels of judicial or appellate review of administrative action or inaction. An early April judgment of the Alberta Court of Appeal does, however, provide a further valuable illustration of this possibility.

In *ATCO Electric Ltd v Alberta Utilities Commission*,[26] the Alberta Utilities Commission had been confronted by the destruction wrought by the Fort McMurray 2016 wildfires.[27] What impact should the losses to ATCO facilities have on the tariffs that the Commission established under the *Electric Utilities Act*?[28]

ATCO was seeking to recover its uninsured, undepreciated capital losses resulting from the fires in the rates charged to customers. The Commission refused to allow recovery of those losses ruling that they should be borne not by customers but by the company's shareholders. Stated at its simplest, the Commission saw the situation as the converse of that which the Supreme Court of Canada had addressed on a correctness basis in *ATCO Gas & Pipelines Ltd v Alberta (Energy and Utilities Board)*,[29] the controversial *Stores Block* judgment. Were

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[21] *Ibid* at paras 105–26.

[22] *Ratman v Workplace Safety and Insurance Appeal Tribunal*, 2022 ONSC 3923 (Div Ct) at para 13 (*per* Swinton J). For a further example (also by Swinton J), see *Radzevicius v Workplace Safety and Insurance Appeals Tribunal,* 2020 ONSC 319 (Div Ct) at paras 17–20, 56–58.

[23] As articulated in *Vavilov*, *supra* note 3 at para 30 and elsewhere in the judgment.

[24] *Supra* note 4 at paras 94–96.

[25] 2020 ONSC 319 (Div Ct).

[26] 2023 ABCA 129.

[27] *ATCO Electric Ltd Z Factor Adjustment for the 2016 Regional Municipality of Wood Buffalo Wildfire* (2 October 2019), 21609-D01-2019.

[28] SA 2003 c E-5.1.

[29] 2006 SCC 4, [2006] 1 SCR 140.

customers entitled to the benefit of sales of assets removed from the rate base on the basis that they were no longer used or required to be used as part of the calculation of ATCO's rate base? The Court, in a ruling subsequently reinforced by the Alberta Court of Appeal on a reasonableness basis in *FortisAlberta v Alberta (Utilities Commission)*,[30] held that any proceeds from the sales of any such assets were for the benefit of the company's shareholders, not its customers.

By reference to these two decisions, in the present matter, the AUC had ruled that principles of symmetry dictated that losses on rate base assets by reason of such extraordinary asset retirements should be borne not by the customers but by the shareholders. The losses arising out of such retirements from the rate base should not be corrected by the rate-setting process. In terms of the Act, they should no longer be treated as costs and expenses reasonably incurred even though they had initially and until the fires been treated as such.

ATCO sought and obtained permission to appeal on two grounds:

a. Did the Commission err in law by fettering its discretion regarding the recovery of the prudent costs of the assets destroyed by the wildfires?

b. Did the Commission err in its interpretation of the *Electric Utilities Act* by incorporating inapplicable concepts from gas utility legislation or by disregarding provisions that require ATCO be provided a reasonable opportunity to recover the prudent costs and investments it had incurred to provide safe and reliable service to customers?[31]

As a prelude to considering the merits of the appeal, in a judgment delivered by the Court, the panel of Watson, Slatter, and Kirker JJA located its role within the principles laid down in *Vavilov* and, in doing so, articulated important nuances to those principles. The Court commenced by acknowledging that, in the wake of *Vavilov*, the standard of review on matters coming to the Court by way of appeal on questions of law and jurisdiction was that of correctness for questions of law.[32] Deference had no role to play. As for jurisdiction, in a footnote, the panel in effect excised "jurisdiction" from the statute:

> All jurisdictional errors are errors of law. Reference to "law and jurisdiction" in the statute is merely a historical anomaly[.] Since there is no longer any presumptive difference in the standard of review the distinction is usually of no importance.[33]

The panel then proceeded to provide a road map for managing the transition from a primarily reasonableness standard of review to review conducted by reference to the standards of civil appeals. While apparently accepting that the overall standard for questions of law in statutory appeal settings, absent legislation to the contrary, would be that of correctness, the Court questioned whether in "replacing"[34] common law judicial review mechanisms with a right of appeal, the legislature had paid any heed to standard of review issues. Building on this assumption, the panel stated that the adoption of such an appellate regime, should not be seen as the legislature directing the Court, "to take over the management of the electrical distribution and transmission system in Alberta."[35] The panel supported this assertion by reference to a statement in *FortisAlberta*, where, within a now repudiated standard of reasonableness review, the Court had stated that regulatory decision-making of this kind

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[30] 2015 ABCA 295, 28 Alta LR (6th) 252, leave to appeal refused [2016] 1 SCR ix, and commented on in my review of 2015 developments: David J. Mullan, "2015 Developments in Administrative Law Relevant to Energy Law and Regulation" (March 2016) 4:1 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/articles/2015-developments-in-administrative-law-relevant-to-energy-law-and-regulation>.

[31] *Supra* note 26 at para 14.

[32] *Ibid* at para 16.

[33] *Ibid*.

[34] *Ibid*, where the Court describes the appeal provision as having "replaced" common law judicial review.

[35] *Ibid*.

had "political and economic aspects"[36] on which Courts were "poorly positioned to opine."[37] This led the Court to then recognize that within a context where appeals were restricted to questions of law,

> …the Court should not be quick to identify extricable questions of law in what are more properly categorized as mixed questions of fact and law, questions of policy, or matters of discretion.[38]

The message seems clear: While there is no room for deference on pure questions of law, in all other such regulatory contexts, deference still rules. The Court then referenced[39] the judgment of Swinton J for the Ontario Divisional Court in *Planet Energy (Ontario) Corp. v Ontario Energy Board*[40] to the effect that a regulator's reasons for decision have a significant role to play in the appellate court's determination of correctness.

The Court then[41] concluded this analysis by cautioning against the disregard of decisions as no longer precedential when decided under a different standard of review. Just because the Court in *FortisAlberta* had upheld the Commission's decision on a standard of reasonableness did not mean that the decision would have been different had the standard been correctness. In fact, there were many indicators in the judgment that the Court would also, if necessary, have held that the decision passed muster by reference to a correctness standard. Underlying this and other assertions was a more general sense that Courts should be respectful of otherwise binding authorities and presumptively treat them as continuing to be authoritative precedents.[42]

As for the specific grounds on which permission to appeal was given, the Court spent some time dealing with the general parameters of review for fettering of discretion. In particular, the Court insisted that as a ground of review, as its name indicates, fettering comes into play only when there is discretion.[43] Where the issue is a pure question of law, there is no discretion. Thus, even if a regulator or a lower court states that it is bound by a prior decision, that does not amount in and of itself to a case of fettering of discretion; it is a statement to the effect that "I am applying the law because I am bound by it." It is an interpretation and application of

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[36] *Ibid*.

[37] *Ibid*.

[38] *Ibid*. This raises a serious question as to whether, in such situations, judicial review remains an alternate route for such mixed questions of fact and law, and factual determinations. It seems implicit that such a route has been removed by the legislation but *cf* Nigel Bankes, "Statutory Appeal Rights in Relation to Administrative Decision-Maker Now Attract an Appellate Standard of Review: A Possible Legislative Response", (3 January 2020), online (pdf): *Ablawg* <ablawg.ca/wp/-content/uploads/2020/01/Blog_NB_Vavilov.pdf>. I am also grateful to Professor Bankes for providing me with the originating application for judicial review in *Benga Mining Limited v Alberta Energy Regulator*, in which the applicant for judicial review is applying to the Alberta Court of King's Bench for judicial review of a decision on an unreasonableness basis on the grounds of factual error and error with respect to mixed questions of law and fact, neither coming within the scope of the statutory appeal provision applicable to the review of decisions of the Alberta Energy Regulator with leave on questions of law and jurisdiction: *Responsible Energy Development Act*, SA 2012 c R-17.3, section 45(1). It remains to be seen whether this application survives any motion to strike on the basis that it is excluded implicitly by the statutory appeal provision. If residual access to judicial review as a matter of interpretation is precluded, then, as posited in my conversation with Professor Bankes, the only apparent justification for the application for judicial review would be based on a constitutional guarantee in the sense of a modified version of *Crevier v Quebec (AG)*, [1981] 2 SCR 220, with *Crevier*'s guarantee of review for jurisdictional error now read as replaced by a guarantee of access to a superior court with review for unreasonableness or possibly all errors of law.

[39] *Ibid*.

[40] 2020 ONSC 598 (Div Ct) at paras 26, 31. I discussed the implications of this judgment in David J. Mullan, "2020 Developments in Administrative Law Relevant to Energy Law" (2021) 9:1 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/regular-features/2020 developments-in-administrative-law-relevant-to-energy-law1>.

[41] *Supra* note 26 at paras 17–18.

[42] For a convincingly critical analysis of this aspect of the Court's judgment, see Nigel Bankes "*Stores Block Meets Vavilov*: The Status of Pre-*Vavilov* ABCA Decisions" (1 May 2023), online: Ablawg <ablawg.ca/2023/05/01/stores-block-meets-vavilov-the-status-of-pre-vavilov-abca-decisions>.

[43] *Supra* note 26 at para 21. The whole question of fettering also featured in a case on which I commented in David J. Mullan, "2021 Developments In Administrative Law Relevant to Energy Law And Regulation" (May 2022) 10:1 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/regular-features/2021-developments-in-administrative-law-relevant-to-energy-law-and-regulation#sthash.SqpSsi2k.dpbs>; See also *AltaLink Management Ltd v Alberta (Utilities Commission)*, 2021 ABCA 342.

the law. Only where a decision-maker asserts incorrectly that either it has no discretion or is bound when it is not will there be an error of law. This led the Court to in effect dismiss this ground of appeal as not being well-founded by reference to fettering of discretion principles:

> The issue on this appeal is therefore not whether the Commission fettered its discretion, but whether it correctly applied the legal standards that governed in the circumstances.[44]

This characterization, with which I have no quarrel, was to provide the methodology by which the merits of the appeal were to be evaluated.[45] Did the Commission err in law in its understanding and application of the *Stores Block* and *FortisAlberta* judgments? Did the Commission as a matter of law correctly discern the legal principles on which the decision in each of those two cases were based, and, in fact, were the principles on which the Commission determined the second ground of the permission to appeal legally correct? In short, the argument from symmetry failed, *Stores Block* and *FortisAlberta* did not provide the path to success, and all depended on whether, in these extraordinary circumstances, the utility could continue to rely upon a right to recover costs prudently required as established by the Act. The failure to understand that undermined the Commission's decision as a matter of law. Nonetheless, to the extent that the overall determination was a discretionary one, the appropriate disposition was to remit the matter to the Commission to be dealt with on a proper understanding of the *Act* and the precedents as well as competing policy considerations.[46]

In this context, I will not engage further with the merits of the judgment except to say that, despite the Court's flirtation with reasonableness within correctness review, the substance of the reasons for the Court's conclusion on the merits is unadulterated correctness review from a purely legal perspective. Nonetheless, in this still transitional period from *Dunsmuir*[47] to *Vavilov*, it does provide some important insights into how, even in statutory appeals on pure questions of law, there may nonetheless be occasions for elements of deference.

II. THE STANDARD OF REVIEW ON APPEALS FROM FIRST INSTANCE COURT DECISIONS ON APPLICATIONS FOR JUDICIAL REVIEW AND STATUTORY APPEALS – THE TENTACLES OF *VAVILOV*

In *Agraira v Canada (Public Safety and Emergency Preparedness)*,[48] a matter that originated as an application for judicial review to the Federal Court from a ministerial decision, LeBel J for the Supreme Court confronted the issue of the standard of review that should be applied on an appeal from the judgment of a first instance superior court, in this case, an appeal to the Federal Court of Appeal and subsequently to the Supreme Court of Canada on leave. Quoting[49] from a Federal Court of Appeal judgment, LeBel J held that

> …the question for the appellate court to decide is simply whether the court below identified the appropriate standard of review and applied it correctly. The appellate court is not restricted to asking whether the first-level court committed a palpable and overriding error in its application of the appropriate standard.[50]

This meant that, in this particular context, the normal principles governing appeals from first instance determinations in civil litigation as established in 2002 in *Housen v Nikolaisen*,[51] did

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[44] *Ibid* at para 22.

[45] *Ibid* at para 23.

[46] *Ibid* at para 62, as directed by section 29(11)(c) of the *Alberta Utilities Commission Act* providing that where the Court directs the variation of a decision, "the Court shall refer the matter back to the Commission for further consideration and determination". I have previously discussed the question of "When to Remit" in David J. Mullan, "2020 Developments in Administrative Law Relevant to Energy Law" (2021) 9:1 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/regular-features/2020 developments-in-administrative-law-relevant-to-energy-law1>.

[47] *Dunsmuir v New Brunswick*, *supra* note 15.

[48] 2013 SCC 36, [2013] 2 SCR 559 at paras 45–46.

[49] *Ibid* at para 45.

[50] *Telfer v Canada Revenue Agency*, 2009 FCA 23 at para 18.

[51] *Supra* note 8 at para 37.

not apply. The appellate courts were required to step into the shoes of the first instance court and ask on a correctness basis whether that court had established the appropriate standard of review. If it had, the appellate court would then determine whether that standard of review had been applied correctly. Indeed, even in situations where the first instance court had not correctly identified the appropriate standard of review, it was still up to the appellate court to itself apply the now established correct standard to the decision made.

Some people did not approve of that ruling.[52] Among them was at least one Federal Court of Appeal Justice — Stratas JA.[53] In fact, the Supreme Court itself appeared to be having doubts about *Agraira*. Without mentioning *Agraira* by name, in *Canada (Citizenship and Immigration) v Harkat*,[54] the Court, in a majority judgment delivered by McLachlin CJ, applied *Housen* in its review of the factual components of a Federal Court determination that the issuance of a security certificate was reasonable, a conclusion that subjected Harkat to a removal from Canada order. The standard to be applied to the factual components of the determination was "palpable and overriding error" as established by *Housen*.

Subsequently, in *Mahjoub v Canada (Citizenship and Immigration)*,[55] Stratas JA, for the Federal Court of Appeal, followed *Harkat*. The only relevant difference from *Agraira* on the standard to be applied was that *Harkat* in effect started not with an application for judicial review in the Federal Court but as a reference to a judge of that Court by the involved Ministers for a determination as to the reasonableness of their issuance of a "certificate of inadmissibility." It is a nice question whether that should have been enough to differentiate this context from *Agraira* and its prescription that the appeal court "step into the shoes" of the first instance court in reviewing for reasonableness even the factual conclusions on which the certificate was issued. In practical terms, what all this probably means for litigants is that review on the basis of reasonableness might well be a standard that is less deferential than that of "palpable and overriding error."

Subsequently, in a case previewed by Mancini,[56] *Northern Authority v Horrocks*,[57] Brown J, delivering a 6-1 judgment of the Supreme Court, declined to reconsider the stance taken by the Court in *Agraira*.[58] As in *Agraira*, the context was an application for judicial review, and Brown J in effect refused to respond to arguments that it was more appropriate to apply *Housen v Nikolaisen* to appeals from the first instance judicial review outcome than to maintain the *Agraira* approach. *Agraira* was "a recent decision of the Court and remains good law."[59] The consequence of this, in a duelling jurisdiction case (one of the exceptional categories where *Vavilov* prescribes correctness review), was that the role of the appellate Court remained not only correctness in the selection of the standard of review but also correctness in the application of that mandated standard to the issues of both law and fact. The only exception that Brown J was willing to acknowledge as a possibility for the overall application of the *Housen* principles was in situations where the reviewing judge, "acts as a decision maker of first instance."[60] Though it is not mentioned, *Harkat* might technically have been such a case.

Following *Horrocks*, it still seems as though there are logical and policy-based inconsistencies in the overall scheme not to mention some unanswered questions. Let us assume that *Vavilov* was justified to, in

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[52] See the extensive discussion by Mark Mancini, "Horrocks: What Happens to Agraira?" (9 March 2020), online: *Double Aspect* <doubleaspect.blog/2020/03/09/horrocks-what-happens-to-agraira>.

[53] See Mancini, *ibid*, citing to page 60 of the then current version of Justice Stratas' "The Canadian Law of Judicial Review: Some Doctrine and Cases" (Last updated 28 October 2022), online: *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=2924049>; See also his judgment in *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at paras 74–78. Incidentally, Stratas JA was not on the *Telfer* panel of the Federal Court of Appeal.

[54] 2014 SCC 37, [2014] 2 SCR 33 at para 108.

[55] 2017 FCA 157, [2018] 2 FCR 344 at paras 56–58.

[56] *Supra* note 52.

[57] 2021 SCC 42.

[58] *Ibid* at para 12.

[59] *Ibid*.

[60] *Ibid* citing (*inter alia*) the Hon. J.M. Evans, "The Role of Appellate Courts in Administrative Law" (2007) 20 CJALP 1 at 30–34. Evans JA (as he then was) delivered the judgment of the Federal Court of Appeal in *Telfer*, *supra* note 50.

general, differentiate between the standard of review for pure questions of law depending on whether the question arose in the context of an application for judicial review (presumptively reasonableness subject to three or four exceptions) or a statutory appeal ("correctness"). What might that intuitively tell us?

I would suggest that it tells us that, in the case of the latter, any subsequent judicial assessment should evaluate the correctness of the decision under further appeal. In contrast, in the former context, an appeal to a higher court from an initial judicial review, unless there are reasons for giving up on the deferential standard of reasonableness review for pure questions of law the higher one gets in the judicial hierarchy,[61] the assessment should be whether the initial reviewing court's determination can withstand the appeal court's assessment of the reasonableness of its decision.[62] If one accepts that, then I would suggest it would be contrary to the overall scheme of *Vavilov* to substitute *Housen* appellate standards of correctness review for questions of law for the current presumption of reasonableness as the first instance standard of scrutiny on applications for judicial review. In other words, the starting point for the initial court encounter is critical. Stated more bluntly, *Housen* should not be adopted with respect to appeals from first instance court judicial reviews on questions of law at least as long as one wants as a matter of policy to perpetuate presumptive deferential review of decision-makers' determinations of questions of law[63] outside of statutory appeal regimes.

In contrast, however, my sense is that there is much to be said for a more nuanced approach to the review of mixed questions of law and fact, and factual or evidential findings. Here, it makes little sense to differentiate at the appellate court level in favour of more rigorous standards for intervention in the case of statutory appeals than in the instance of applications for judicial review. If one assumes that "reasonableness" is a less deferential standard than "palpable and overriding error," then applying the latter as the test in the domain of appeals from first instance court decisions on a statutory appeal is inconsistent with *Vavilov*'s assessment of the place of statutory appeals. Appeals from determinations of fact and inextricably bound mixed questions of law and fact become that much more difficult to maintain than reasonableness review of such questions in the context of a judicial review (as opposed to appellate regimes). In short, there should generally either be parity or the roles reversed with "palpable and overriding error" the standard in the context of appeals in judicial review-initiated proceedings and "reasonableness" in the context of appeals from initial court determinations in appellate-based review regimes.[64] In short, maybe the current state of confusion results from the fact that the two critical questions have attracted back to front answers. In that regard, *Vavilov* offers a tentacle of foundational principles to grasp in forging a path through the mire.

This proposition does, however, beg the question as to whether, in the context of applications for judicial review, substituting the test of "palpable and overriding error" for "reasonableness" on questions of fact or mixed law and fact from which there is no readily extricable pure question of law, would fly in the face of *Vavilov*. If one assumes that the general philosophy of *Vavilov* is to provide greater room for judicial evaluation of decisions in the case of statutory appeals but more restrained scrutiny in the context of applications for judicial review, that policy stance is compromised when, on questions of fact and mixed law and fact, the standards are more intrusive in the instance of applications for judicial review than in the case of statutory appeals.

If that argument from the general philosophy of *Vavilov* withstands scrutiny, then, at the very least, the standard of appellate scrutiny of

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[61] And, there may be!

[62] I would hesitate, however, to impose a further layer of reasonableness review at this level as manifest in the question: Was it reasonable for the first instance court to determine that the answer provided to a question of law by the decision-maker was reasonable?

[63] Including mixed questions of law and fact from which there is a readily extricable pure question of law.

[64] I unashamedly acknowledge the influence that Mark Mancini has had on my thinking about this knotty problem including "Horrocks: What Happens to Agraira?", *supra* note 52, and Keith Brown & Mark Mancini "Post-*Horrocks* Judicial Review Appeals: Deference on Questions of Evidence?" (20 December 2022), online: *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=4284018>, scheduled to appear in the Canadian Journal of Administrative Law and Practice. See also for commentary on *Horrocks* in Paul Daly, "Steady as She Goes: *Northern Regional Health Authority v Horrocks*, 2021 SCC 42", online: <www.administrativelawmatters.com/blog/2021/10/22/steady-as-she-goes-northern-regional-health-authority-v-horrocks-2021-scc-42>.

findings of fact and mixed law and fact should be the same for both categories. Flowing from that is also the proposition that, in both instances, higher-level courts on appeals should actually ask the same question irrespective of whether the initial court encounter was by way of review or appeal: Did the first instance court err in finding (or not, as the case may be) that there was (or was not) a palpable and overriding error on an issue fact or mixed law and fact from which there was no readily extricable pure question of law?[65]

III. ENERGY REGULATORS AND CONSTITUTIONAL INCLUDING *CHARTER* QUESTIONS

By 2013 and the first issue of the *Energy Regulation Quarterly*, the Supreme Court had already set the broad parameters of the current general position on the role of administrative decision-makers when confronted by constitutional (including *Charter*) issues.[66] After considerable vacillation, the Court in 2003 in *Nova Scotia (Workers' Compensation Board) v Martin*[67] had established that, absent legislative intervention, administrative decision-makers with either express or implicit authority to determine questions of law had not just the jurisdiction but generally[68] the obligation to determine questions of constitutional law that arose in the course of their decision-making. This extended to considering and opining on the validity of legislation though not the making of formal declarations of invalidity of legislation. At the same time, the Court, in *Paul v British Columbia (Forests Appeal Commission)*,[69] held that the same was true for issues of Indigenous Peoples' rights and title.[70] Seven years later, in *R v Conway*,[71] the Court also held that where an adjudicative tribunal had jurisdiction to deal with constitutional question, it generally would be considered a "court of competent jurisdiction" for the

[65] Of course, this argument assumes that the relevant legislation does not speak directly or explicitly to the role of the first instance court, as in the case where the first instance court is confined in either setting to review of questions of law. In that context, the problem is finessed.

[66] See my account in David J. Mullan "Regulators and the Courts: a Ten Year Perspective" (November 2013) 1 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/articles/regulators-and-the-courts-a-ten-year-perspective-1>.

[67] 2003 SCC 54, [2003] 2 SCR 504.

[68] Admittedly, this begs the question as to which administrative decision-makers are implicitly authorized to deal with questions of law. All decision-makers subject to a duty of procedural fairness in their decision-making? If the class is more expansive than that, where is the line to be drawn? What about those performing legislative or executive functions such as rule-making or the promulgation of subordinate legislation? How much is to be read into the acceptance by Rothstein J (for the Court) in *Canadian National Railway v Canada (Attorney General)*, 2014 SCC 40, [2014] 2 SCR 135 at paras 33–37, 48–49 to the effect that the Governor in Council in hearing appeals from the Canadian Transportation Agency has the authority to not only determine broad questions of policy and fact, but also questions of law. For a recent recognition of this holding, see *Sagkeeng v Government of Manitoba*, 2021 MBCA 88 at paras 31, 96–97. More generally, for an analysis in the immediate aftermath of *Martin* and *Paul*, see John M. Evans, "Principle and Pragmatism: Administrative Agencies' Jurisdiction over Constitutional Issues" in Grant Huscroft and Michael Taggart (eds), *Inside and Outside Canadian Administrative Law* (Toronto: University of Toronto Press, 2006) at 377.

[69] 2003 SCC 55, [2003] 2 SCR 585.

[70] More recently, however, doubt has been raised as to whether there is an exact parallel between questions of Indigenous rights and other constitutional questions for these purposes. In *Ktunaxa Nation v British Columbia (Forest, Lands and Natural Resources Operations)*, 2017 SCC 54, [2017] 2 SCR 386 at para 85, McLachlin CJ and Rowe J for the majority, stated:

> **Without specifically delegated authority**, administrative decision makers cannot themselves pronounce upon the existence or scope of Aboriginal Rights, although they may be called upon to assess the *prima facie* strength of unproved Aboriginal claims and the adverse impact of proposed government actions on those claims in order to determine the depth of consultation required [emphasis added].

The extent to which this detracts from the general principles established in *Martin* and *Paul*, and, more specifically, the duty of consultation remains uncertain. However, it seems likely that this statement has to be understood in light of the context in which it was made. The application for judicial review was with respect to the adequacy of consultation in a process leading to ministerial approval of a development. Within that judicial review framework, it would not have been within the authority of the Minister to have moved on to consider whether the as yet unproven claim was established on the merits. That was for a court as part of a trial of the issue respecting the validity of the Nation's as yet unproven claim. It is, however, unfortunate that the Court did not cite and explain why Paul did not apply. See the discussion of this issue in Heckman, Mullan, Promislow, and Van Harten, *Administrative Law: Cases, Text, and Materials* (Toronto: Emond, 8th ed, 2022), ch 13, The Jurisdiction of Tribunals to Decide Constitutional Questions, at 765–66.

[71] 2010 SCC 22, [2010] 1 SCR 765.

purposes of providing a remedy under section 24(1) of the *Charter*.

Even by 2013, however, there had been legislative intervention in at least two provinces. In British Columbia, the *Administrative Tribunals Act* enacted in 2004[72] created three categories of tribunal — those with jurisdiction to consider all constitutional questions,[73] those with no jurisdiction to decide constitutional questions,[74] and those without jurisdiction to decide *Charter* questions.[75] The Act was subsequently amended to include detailed provisions and alternatives for jurisdiction over the province's *Human Rights Code*.[76]

In Alberta, as of 2006, by virtue of the *Administrative Procedures and Jurisdiction Act*,[77] only those tribunals designated by regulation had jurisdiction to consider constitutional questions and then only to the extent prescribed.

As far as this affected energy regulators, there was a clear distinction between the situation in British Columbia and that in Alberta. In British Columbia, amendments to their constitutive statutes meant that both the Utilities Commission[78] and the Mediation and Arbitration Board under the *Petroleum and Natural Gas Act*[79] were designated as subject to both sections 44 and 46(3) of the *Administrative Tribunals Act*, meaning that they had no jurisdiction to decide constitutional questions or to apply the provisions of the *Human Rights Code*. That continues to this day with the Mediation and Arbitration Board rebranded as the Surface Rights Board.

In contrast, under the Alberta regime, the then Alberta Energy and Utilities Board, the Alberta Utilities Commission, and the then Energy Resources Conservation Board were designated as having jurisdiction to deal with all constitutional questions (as defined in the *Act*). That too is perpetuated today with respect to the Alberta Utilities Commission and the Alberta Energy Regulator. However, in the energy regulation context, there is one significant restriction. Under section 21 of the *Responsible Energy Development Act*, the Alberta Energy Regulator's constitutive statute, it is provided that the Regulator

> …has no jurisdiction with respect to assessing adequacy of Crown consultation associated with the rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*.

That role and, more generally, the management of Indigenous consultation processes under the *Responsible Energy Development Act* is vested in the Aboriginal Consultation Office,[80] an office established within the Alberta Ministry of Indigenous Relations though not having a specific statutory root.

While in other provinces, there are a few provisions dealing with the capacity of individual tribunals to deal with constitutional issues, the only other jurisdiction in which there is a statutory regime similar to that of either Alberta or British Columbia is Manitoba. Under section 2 of it's *The Administrative Tribunal Jurisdiction Act*, enacted as recently as 2021 and proclaimed in force as from

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[72] SBC 2004 c 45.

[73] *Ibid*, s 43

[74] *Ibid*, s 44.

[75] *Ibid*, s 45.

[76] *Ibid*, ss 46.1–46.3. The application of these provisions was and is left to amendments to the constitutive statutes of tribunals governed by the Act.

[77] RSA 2000 c A-3 (as amended).

[78] See *Utilities Commission Act*, (as amended by *Administrative Tribunals Act*) RSBC 1996 c 473 s 2(4)).

[79] See *Petroleum and Natural Gas Act* (as amended by *Administrative Tribunals Act*) RSBC 1996 c 361 s 13(6)).

[80] Though the *Alberta Utilities Commission Act* contains no such limitation, in 2016, the Alberta Utilities Commission ruled that it did not have authority to evaluate the sufficiency of the Crown's consultations at least when the Crown was not before it either as an applicant or other participant. See Alberta Utilities Commission, Proceeding 20130, Ruling on jurisdiction to determine the questions stated in Notice of Questions of Constitutional Law, October 7, 2016. For details as to the functioning of the Aboriginal Consultation Office, see "Proponent-led Indigenous consultations", online: *Government of Alberta* <www.alberta.ca/proponent-led-indigenous-consultations.aspx>.

January 1, 2022, an administrative tribunal (as defined) "does not have jurisdiction to determine a question of constitutional law" unless conferred with that authority by a regulation made under the Act. Nonetheless, here too, as with Alberta, under section 1 of the *Administrative Tribunal Jurisdiction Regulation*, Manitoba's principal energy regulator, the Public Utilities Board,

> …has jurisdiction to consider all questions of constitutional law.

In contrast, however, by virtue of section 2 of the Regulation, the province's Surface Rights Board's jurisdiction over constitutional questions as defined is confined to

> …a question of constitutional law that involves the distribution of powers under the Constitution of Canada between the federal government and provincial governments.

What is also relevant in determining the reach of any such restrictions is that statutory language matters. Thus, in 2010, in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*[81], McLachlin CJ, for a unanimous Court, held that the British Columbia Utilities Commission was not precluded from evaluating whether the Crown had fulfilled its duty to consult affected Indigenous interests in the context of an application for a rescoping order. The definition of "constitutional question" in section 1 of the *Administrative Tribunals Act* referentially incorporated the notice provisions in section 8 of the British Columbia *Constitutional Question Act*.[82] It provides for the giving of notice where the "constitutional validity or constitutional applicability of any law is challenged" or "an application has been made for a constitutional remedy." According to McLachlin CJ, the statutory language and structure did not amount to "a clear intention on the part of the legislature to exclude" the Commission's capacity and duty to evaluate whether the Crown had "discharged its duty to consult with holders of relevant Aboriginal interests."[83]

In 2020, this precedent was relied upon by the Alberta Court of Appeal in *Fort McKay First Nation v Prosper Petroleum Ltd.*[84] The case involved a challenge by the First Nation to a refusal by the Alberta Energy Regulator to consider whether a project approval was undermined by reference to the Honour of the Crown. In justification of its refusal, the Alberta Energy Regulator pleaded section 21 of the *Responsible Energy Development Act.* However, the Court rejected this argument primarily on the basis that the Honour of the Crown had dimensions beyond the parameters of the obligation to consult. As the First Nation was not premising its case on the duty to consult, the prohibition in section 21 was not applicable.

The Court also asserted that the Alberta Act's definition of "constitutional law" did not cover the entire range of constitutional questions or issues that a particular regulatory initiative might implicate. Beyond the reach of the definition, the raising of these other constitutional norms, including the extent of treaty rights, triggered the authority of the Alberta Energy Regulator "over all constitutional questions."

As for the duty to consult specifically, in matters otherwise coming within the jurisdiction of the Alberta Energy Regulator, the Aboriginal Consultation Office was the designated authority as established the previous year (2019) by the judgment of the Alberta Court of Appeal in *Athabasca Chipewyan First Nation v Alberta (Minister of Aboriginal Relations, Aboriginal Consultation Office)*.[85]

More generally, the principles with respect to authority over the duty to consult Indigenous Peoples were clarified in two 2017 judgments of the Supreme Court in an energy regulatory

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[81] 2010 SCC 43, [2010] 2 SCR 650.

[82] RSBC 1996, c 68.

[83] *Supra* note 81 at para 72.

[84] 2020 ABCA 163. I discuss this judgment in David J. Mullan, "2020 Developments in Administrative Law Relevant to Energy Law" (2021) 9:1 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/regular-features/2020 developments-in-administrative-law-relevant-to-energy-law1>.

[85] 2019 ABCA 401, affg 2018 ABQB 262, a judgment discussed in David J Mullan, "2018 Developments in Administrative Law Relevant to Energy Law and Regulation" (2019) 7:1 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/articles/2018-developments-in-administrative-law-relevant-to-energy-law -and-regulation>.

context: *Clyde River (Hamlet) v Petroleum Geo-Services*,[86] and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*[87] I discussed the impact of these decisions in my review for 2017 and, in this context, will simply summarize the conclusions that the Court reached:

1. While the duty to consult remains the overall responsibility of the Crown, the Crown may download, subject to overall Crown review, to others the task of conducting consultation. Thus, as seen already, in Alberta, this includes not just the Alberta Utilities Commission but also the Aboriginal Consultation Office, an internal office within the relevant government ministry. The Crown may also deploy proponents in aspects of the consultation process.

2. Notwithstanding concerns about threats to the independence of regulatory agencies such as Public Utilities and Energy Boards expressed by Iacobucci J, in delivering the 1994 judgment of the Supreme Court of Canada in *Quebec (Attorney General) v Canada (National Energy Board)*,[88] when carrying out responsibilities with respect to consultation reposed in them by legislation and executive action, such regulatory bodies are the vehicles through which the Crown acts in the discharge of its constitutional responsibilities. In so doing and in discharging the constitutional obligations of the Crown, regulators are not otherwise compromised as independent decision-makers such as to give rise to a reasonable apprehension of bias. The context within which they function is also characterized as fulfilling the requirement for the presence of a duty to consult of "contemplated Crown conduct."

3. To justify reliance in whole or in part on such regulatory processes, the Crown must have regard to the statutory or executive regime (substantive, procedural, and remedial) within which the regulator operates, and its overall institutional expertise.

4. For their part, regulators also generally have the capacity and the obligation to assess the Crown's own meeting of the duty to consult, an obligation that, contrary to earlier precedent and a decision of the Alberta Utilities Commission, applies irrespective of whether the Crown in its own right is a party to the proceedings before the regulator.

5. Regulators and those to whom responsibility to conduct consultation has been bestowed by the Crown may also through their own processes meet in whole or in part the constitutional obligation.

6. Similarly, both the Crown and those acting on behalf of the Crown are entitled to rely upon the consultation efforts of proponents in evaluation of whether alone or in combination with their own efforts, the duty has been met.

In summary, what emerges from *Clyde River* and *Chippewas of the Thames* is a nigh on comprehensive template for the fashioning of a range of regulatory processes which will overall meet the extent of the constitutional obligation and also establish structural norms within which the assessment of consultation efforts will take place. Beyond this, there is, of course, the spectre of judicial review or statutory appeal. However, with the creation of the framework, court proceedings are now more often concerned with an assessment of the procedures advanced in justification of the fulfillment of the duty than with issues of authority and the appropriateness of the structure within which a consultation regime exists.

IV. CONSTITUTIONAL LIMITATIONS ON JUDICIAL RECOGNITION OF THE DUTY TO CONSULT

In late 2014, Hughes J of the Federal Court, to the surprise of many, held that the duty to consult could be invoked in the context of

[86] 2017 SCC 40, [2017] 1 SCR 1069.

[87] 2017 SCC 41, [2017] 1 SCR 1099.

[88] [1994] 1 SCR 159.

primary legislation where there was a sufficient possibility that the legislation could have an adverse impact on the rights and interests of Indigenous Peoples. While it did not reach the preparation of primary legislation and the introduction of that legislation in Parliament, once introduced, the duty to consult was triggered. The extent of the duty would depend on the nature of the impact and the likelihood of the feared harm occurring. Given constitutional norms, it would, however, not be appropriate for a reviewing court to issue an injunction; rather, a declaration to the effect that the duty had not been met was the most that a court could do.[89]

Virtually two years to the day later, the Federal Court of Appeal allowed an appeal from that judgment with the majority holding that, in terms of the *Federal Courts Act*, the legislative process did not implicate a "federal board, commission or other tribunal." More generally, impressing the parliamentary process with such an obligation would involve, by reference to the unwritten constitutional principle of separation of powers, impermissible judicial interference with the operations of the legislative branch.[90]

Almost another two years later, leave to appeal having been given, a majority of the Supreme Court affirmed the Federal Court of Appeal in holding that the courts did not have jurisdiction to impress on parliamentary processes a duty to consult when the rights, interests, and claims of Indigenous Peoples were in jeopardy in legislation before Parliament.[91]

All nine judges accepted that the proceedings had been brought improperly in the sense advanced by the Court of Appeal. Applications for judicial review were available only with respect to the proceedings of a "federal board, commission or other tribunal" generally, and, by virtue specifically of section 2(2) of the *Federal Courts Act*, the Governor in Council or Parliament did not qualify. As for section 17(1) of the *Federal Courts Act*, conferring concurrent jurisdiction on the Federal Court "in all cases in which relief is claimed against the Crown," it did not apply to the actions of members of the executive branch when exercising legislative power in the form not just of preparing and introducing legislation but also any further steps in Parliament on the path to enactment.

A majority[92] of the Court, in the course of three different judgments, then went on to hold that, in any event, the duty to consult did not directly attach to the actions of the executive and the legislative branches at any stage of the legislative process through preparation to introduction to enactment. In justification of this proposition, the majority judgments in varying ways explained their position referencing parliamentary privilege, separation of powers, parliamentary sovereignty, and Canadian common law to the effect that legislative functions, absent statutory direction, do not attract the benefit of procedural fairness protections. However, at least four of the nine judges posited that a failure to consult might, in the context of subsequent attacks on the constitutionality and application of legislation, be relevant at the justificatory stage of the relevant analysis.

For the moment, however, it remains to be seen if such speculation is endorsed in any further judicial consideration of whether consultation is any way relevant to the enactment and implementation of primary legislation.

Moreover, a further layer may have been added by the enactment in June of 2021 of the *United Nations Declaration on the Rights of Indigenous Peoples Act*.[93]

Article 19 of the *Declaration* provides:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing **legislative** or administrative measures that may affect them [emphasis added].

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[89] *Mikisew Cree First Nation v Governor in Council*, 2014 FC 1244.

[90] *Canada (Governor General in Council) v Mikisew Cree First Nation,* 2016 FCA 311, [2017] 3 FCR 298

[91] *Mikisew Cree First Nation v Canada (Governor in Council)*, 2018 SCC 40, [2018] 2 SCR 765.

[92] Abella J, Martin J concurring, accepted that the constitutional to consult could be impressed in the name of the Honour of the Crown in the process of enacting legislation.

[93] SC 2021, c 14.

This commitment finds reinforcement in the preamble to the *Act*:

> Whereas the Government of Canada is committed to taking effective measures — including **legislative**, policy and administrative measures — at the national and international level, in **consultation** with Indigenous peoples, to achieve the objectives of the *Declaration* [emphasis added].

There then follows a commitment to "the protection of Aboriginal and treaty rights — recognized and affirmed by section 35 of the *Constitution Act, 1982*."[94]

Will this provide a springboard to the judicial recognition of participatory rights in the processes of the enactment of primary legislation affecting Aboriginal rights such as the duty to consult, a concept that finds its origins in the Honour of the Crown? For these purposes, one of the critical questions is whether the *Act* gives rise to judicially enforceable rights. Or does the action plan committed to in sections 5 to 7 of the *Act* represent the totality of the legal mechanisms through which the promises of the *Act* will be effectuated, a legal mechanism that does not explicitly contemplate the participation of the courts?

Another way of analyzing the impact of the Act on domestic law is to ask whether the preamble's recognition of the *Declaration* "as a source for the interpretation of Canadian law" does no more than speak to the deployment of the *Act* and the *Declaration* in the interpretation of existing Canadian law. Is it simply a commitment to have regard as a matter of interpretation to the *Declaration* when Courts and others are evaluating Crown action by reference to the *Declaration*, the *Act*, and other sources of Indigenous law? Or does section 4(a) of the *Act*, with its affirmation that the *Declaration* is "a universal international human rights instrument with **application** in Canadian law [emphasis added]" promise more than that. Rather, is section 4(a) a source of normative, legally enforceable rights which, in the case of the duty to consult, supersedes the *Mikisew* Court's characterization of the legislative process as a "no go" arena?

It can also be argued that *Mikisew Cree First Nation* leaves dangling the important question of whether the duty to consult can be invoked with respect to the promulgation of various forms of subordinate legislation. Rowe J's was the only judgment (with which Moldaver and Côté JJ concurred) that referred to (and then obliquely) the Canadian common law precedents in which the Supreme Court established that the implied duty of procedural fairness did not reach "legislative" functions of any species. In their dissenting judgment, Abella and Martin JJ certainly spoke generally to the issue:

> Although the law of judicial review, which applies to the exercise of statutory powers or the royal prerogative, is often implicated in consultation cases, the duty to consult itself attaches to all exercises of Crown power, including legislative action.[95]

In seeming contrast, Rowe J stated (case references omitted):

> With respect to the duty to consult, the Crown's actions are reviewable by the courts under the general principles of judicial review… These principles do not allow for courts to review decisions of a legislative nature on grounds of procedural fairness… As a general rule, no duty of procedural fairness is owed by the government in the exercise of any legislative function.[96]

While he never says so explicitly, this dangling paragraph begs the question: Why include such a statement if not as an opinion that,

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[94] See also section 2(2) of the Act declaring that the Act is to be construed as upholding the rights of Indigenous Peoples as recognized and affirmed in section 35 of the *Constitution Act, 1982*.

[95] *Supra* note 91 at para 75.

[96] *Ibid* at para 168.

at least generally,[97] the duty to consult does not attach to the formulation and enactment of subordinate legislation? Whatever, given that this represents the position of only three judges in a nine-judge panel, it would be unwise to treat this statement as binding or even persuasive authority on this question. While it may state the law accurately with respect to other than the situation respecting the duty to consult, the duty to consult rests on different foundations than the common law principles respecting the application of the duty of procedural fairness. It can also be seen as flying in the face of *Tsuu T'ina Nation v Alberta (Environment)*[98] in which the Alberta Court of Appeal held that the duty to consult attached to the adoption by way of Order in Council of a water management plan, clearly a legislative decision.

It is also possible to construct a majority of the Court in support of the proposition that the duty to consult does apply to subordinate legislation. Abella and Martin JJ's judgment to the effect that it applies to primary legislation obviously implies that it of necessity also applies, where otherwise called for, to subordinate legislation. Karakatsanis J (with whom Wagner CJ and Gascon J concurred) specifically stated that her conclusions with respect to primary legislation did not apply to subordinate legislation. This adds up to five members of the Court supporting directly or inferentially the duty to consult's threshold application to other than primary legislation. Provided later Courts do not see this combination of otherwise opposing views on the matter of primary legislation as simply *dicta*, that could have resolved the issue. It may, however, be unwise to rely on this as settling what otherwise might appear to be an ongoing debate.[99]

It also is the case that the constitutional underpinnings to the proposition that the duty to consult does not attach to the process of enactment of primary legislation do not have the same resonance in the case of subordinate legislation. To the extent that they are based on the privileges and prerogatives of Parliament or the Legislative Assemblies and qualified legislative supremacy, they do not transcend that arena and give rise to immunities on the part of the executive branch in the exercise of delegated legislative authority.

V. COMMON LAW TRIGGERING OF PROCEDURAL FAIRNESS OBLIGATIONS

Cabinet Appeals and Approval Processes

As noted in the previous section, in justification of his position that the duty to consult did not arise in the context of legislation both primary and subordinate, Rowe J relied[100] in part on at least one judgment in which the Supreme Court had rejected on common law grounds a claim to procedural fairness in the context of a Cabinet appeal, in that instance an appeal from the Canadian Radio-television and Telecommunications Commission (CRTC) to the Governor in Council. In *Attorney General of Canada v Inuit Tapirisat of Canada*, Estey J characterized the Cabinet's function as legislative and not subject to review on the basis of procedural unfairness.[101] It is, however, doubtful that *Inuit Tapirisat* has survived at

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[97] In fact, three of the four precedents deployed by Rowe J involved arguments for participatory rights in the context of the introduction and passage of primary legislation: *Reference re Canada Assistance Plan*, [1991] 2 SCR 525 at 558; *Wells v Newfoundland*, [1999] 3 SCR 199 at para 59, and *Authorson v Canada (Attorney General)*, 2003 SCC 39, [2003] 2 SCR 40 at para 41. The sole exception was *Attorney General of Canada v Inuit Tapirisat of Canada*, [1980] 2 SCR 735 at 758–59, a judgment rejecting the application of the duty of procedural fairness in the context of an appeal to the Governor in Council from a decision of the CRTC.

[98] 2010 ABCA 137.

[99] See the discussion of this issue under the heading "Does the Duty Apply to Legislative Action?" in Heckman, Mullan, Promislow, and Van Harten, *Administrative Law: Cases, Text, and Materials* (Toronto: Emond, 8th ed., 2022), ch 8, The Duty to Consult and Accommodate Aboriginal Peoples, 391 at 407–10. More recently, see the partially dissenting judgment of Corbett J in *Association of Iroquois and Allied Indians v Ontario (Minister of Environment, Conservation and Parks)*, 2022 ONSC 5161 (Div Ct) at paras 19–31, analysing *Mikisew*. Swinton J (Penny J concurring), at para 1 of her judgment, concurred with Corbett J on the holding in his judgment in which this issue was discussed. Corbett J also notes (at para 21), Karakatsanis J's favourable reference (at para 51) to Nigel Bankes "The Duty to Consult and the Legislative Process: But What About Reconciliation?" (21 December 2016), online: *ABlawg* <ablawg.ca/2016/12/21/the-duty-to-consult-and-the-legislative-process-but-what-about-reconciliation>.

[100] *Supra* note 91 at para 168.

[101] *Attorney General of Canada v Inuit Tapirisat of Canada*, *supra* note 97.

least with respect to the classification of an appeal to the Governor in Council from a regulatory agency as legislative in nature.

In *Canadian National Railway Co v Canada (Attorney General)*,[102] Rothstein J, delivering the judgment of the Court, expressed doubts as to the continuing status of *Inuit Tapirisat* on the issue of procedural fairness[103] with respect to Cabinet appeals, and stated that the Governor in Council "does not act in a legislative capacity" when determining appeals from the Canadian Transportation Agency.[104] It "engages in its own substantive **adjudication** of the issue brought before it [emphasis added]."[105] Albeit in the context of evaluating the application of standard of review analysis to the substantive review of a Governor in Council decision, the Court opened the door to challenges to Cabinet appeal processes on the grounds of procedural unfairness.

The Duty to Consult Indigenous Peoples

To the extent that the duty to consult is seen as a common law construct aimed at the effectuation of the written and unwritten constitutional protections possessed by Indigenous peoples, it operates on a different and broader canvas than the general common law principles of procedural fairness. With the controversial exception of direct enforcement in the context of the enactment of primary legislation just discussed, it is a duty that has resonance across the entire universe of statutory and prerogative decision-making. In both the standards for its invocation and the intensity of its requirements, it stands apart from the extent to which common law procedural fairness is impressed upon governmental decision-making.

This proposition is encapsulated in the albeit dissenting judgment of Abella (and Martin JJ) in *Mikisew Cree Nation*:

> Because the honour of the Crown infuses the entirety of the government's relationship with Indigenous peoples, the duty to consult must apply to all exercises of authority which are subject to scrutiny under s. 35.[106]

Moreover, the reach of the duty to consult is probably at its most relevant and effective in the domain of executive and policy decisions that engage Aboriginal rights, a domain that is normally off limits for the common law duty of procedural fairness. In other ways, as I have argued already, the threshold for the triggering of the duty to consult is of a quite different character than the general common law threshold requirements for the duty to act in a procedurally fair manner. Thus, where what is at stake is an as yet definitively established right or claim, the application of the duty as well as the intensity of the procedural obligations that it imposes depend in large measure on the court's analysis of the strength of the as yet undetermined or unsettled claim. That is so whether the decision-making context is legislative, executive, or adjudicative action on the part of or implicating the Crown, or, in terms of the common law procedural fairness threshold, decision-making "on broad grounds of public policy."[107] It is also reflective of the reality that claims to the benefits of the duty to consult are for the greater part collectively based and concerned with decision-making or action that is general in its impact.

It should, however, be acknowledged that, even when the degree of consultation is required to be deep, as illustrated by the judgment of the Federal Court of Appeal in *Gitxaala Nation v Canada*,[108] the evaluation of the level of consultation can look very much like the analysis courts apply in reviewing compliance with common law procedural standards in response to allegations of bias, the adequacy of reasons, and, more generally, notice, disclosure and other potential sources of procedural unfairness.

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[102] 2014 SCC 40, [2014] 2 SCR 135.

[103] *Ibid* at para 39. It "may not represent the current law."

[104] *Ibid* at para 51.

[105] *Ibid* at para 52.

[106] *Supra* note 91 at para 63, and cited by Corbett J in *Association of Iroquois Indians*, *supra* note 99 at para 25.

[107] See *Martineau v Matsqui Institution*, [1980] 1 SCR 602 at 628.

[108] 2016 FCA 187, [2016] 4 FCR 418.

Common Law Principles Respecting the Invocation of the Duty of Procedural Fairness

While this paper is concerned largely with changes and evolutions in Administrative Law that have an impact on energy law and regulation, I read that as not precluding evaluation of domains where there has in fact been little or no change. For the most part, the threshold for the application of the common law of procedural fairness is one such domain. As outlined above, the one clear exception is in the context of appeals to the Governor in Council from regulatory decision-making, a process now classified as "adjudicative" in nature. Procedural obligations may also attach to the Governor in Council and subordinate legislation generally where the duty to consult is triggered. However, more generally, in *Mikisew*, Rowe J accurately describes the current state of the law. *Inuit Tapirisat*, from 1980, is still authoritative on the general principle even if no longer governing in the instance of Cabinet appeals:

> As a general rule, no duty of procedural fairness is owed by the government in the exercise of any legislative function.[109]

In a thorough-going canvassing of this issue in 2018[110], Kane J of the Federal Court reaffirmed this aspect of *Inuit Tapirisat* and made it clear that, for these purposes, legislative action included the Governor in Council in the making of subordinate legislation. Kane J also relied on another 1980 Supreme Court judgment that is accepted as authoritative in this domain: *Martineau v Matsqui Institution (No. 2)*.[111] There, Dickson J (in a judgment with which Laskin CJ and McIntyre J concurred) stated:

> A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection.[112]

This suggests an even broader limitation on the reach of implied procedural fairness. Subsequently, in 1990, in *Knight v Indian Head School Division No. 19*,[113] L'Heureux-Dubé J characterized this concept in terms of a distinction between decision-making powers of a "legislative and general nature" which did not attract the duty to act in a procedurally fair manner and those of a "more administrative and specific manner" which generally did trigger the obligation. In further elaboration, in 2002, Oland JA, delivering the judgment of the Nova Scotia Court of Appeal in *Potter v Halifax Regional School Board*,[114] described the distinction as existing on a sliding scale in terms of levels of generality with decisions directed at a particular individual at one end and decision-making having broad policy dimensions and creating norms rather than deciding on their application to particular situations.

It was on the basis of this articulation that in 2022 in *TransAlta Generation Partnership v Alberta (Minister of Municipal Affairs)*,[115] the Alberta Court of Appeal in an energy regulatory setting determined that the issuance of ministerial guidelines setting depreciation standards did not attract a duty of procedural fairness albeit that the particular aspect of the guidelines that was under challenge affected a discrete and limited number of coal-fired electricity generation plants. In doing so, the Court of Appeal distinguished[116] the judgment of the Ontario Superior Court in *Tesla Motors Canada ULC v Ontario (Ministry of Transportation)*.[117] There, in cancelling a subsidy programme for the purchase of electric vehicles, the Minister had created a grace period but in a letter to Tesla had indicated that it

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[109] *Supra* note 97 at para 168.

[110] *Canadian Union of Public Employees v Canada (Attorney General)*, 2018 FC 518 at paras 119–34.

[111] [1980] 1 SCR 602.

[112] *Ibid* at 628.

[113] [1990] 1 SCR 653 at para 26.

[114] 2002 NSCA 88 at para 40

[115] 2022 ABCA 381.

[116] *Ibid* at paras 95–98.

[117] 2018 ONSC 5062.

could not take advantage of the grace period. In holding that *Tesla* was distinguishable, the Alberta Court of Appeal stated:

> There, a single entity was intentionally targeted by a Minister for irrelevant purposes. That is not the case here. The fact that the *2027 Linear Guidelines* may affect the interests of coal-fired electric power generation property owners differently than they affect the owners of other types of properties does not transform the Minister's legislative act into an "administrative" decision attracting a duty of procedural fairness.[118]

On such narrow margins may the application of the standard test rest.

It was also of note that, in *TransAlta*, the Court of Appeal rejected the argument that, if the common law did not trigger an obligation of procedural fairness, the affected companies could nonetheless assert the application of the doctrine of legitimate expectation. In terms of the standard test for a finding of legitimate expectation,

> …the evidence relied upon by the appellants fails to establish a clear, unambiguous, and unqualified representation that the appellants would be consulted on the impugned provision.[119]

On its face, this would seem to impose a high evidential burden resting on those asserting a "legitimate expectation" and one that raises questions as to the making out of a legitimate expectation arising out of conduct such as in the case of departures from long-standing practices.

When one adds to this the continued admonition that the Canadian version does not extend to the deployment of legitimate expectation as a path to a substantive (as opposed to a procedural) right,[120] as well as uncertainty as to whether it can even be invoked with respect to decision-making not otherwise subject to a common law duty of procedural fairness,[121] the current prognosis for the health of this doctrine cannot be favourable.

VI. ETHICAL DIMENSIONS OF REGULATORY PROCESSES

In my past two annual surveys,[122] I have discussed the Alberta Utilities Commission's enforcement proceedings with respect to the ATCO group of companies and, more specifically, arising out of a contract entered into by ATCO. The allegations arose in the context of a rate application by ATCO Electric. They involved, at a general level, an allegation of lack of frankness or candour on the part of ATCO Electric in its justification of it rates application and what was alleged to involve a strategy to transfer to ATCO Electric's ratepayers the costs of a contract that ATCO Electric had entered into at above fair market value in order to benefit a non-regulated affiliate.

There is no doubt that this is the stuff of which scandals are made and ATCO was quick to respond once the Commission's Enforcement Staff applied to the Commission to authorize the commencement of enforcement proceedings under sections 8 and 63 of the *Alberta Utilities Commission Act* with a view to determining whether ATCO had violated any provisions of the relevant legislation, and,

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[118] *Supra* note 115 at para 98.

[119] *Ibid* at para 102, a test endorsed by the Supreme Court of Canada in *Agraira v Canada (Public Safety and Emergency Preparedness)*, *supra* note 48 at para 95, citing D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* at 7:1710.

[120] *Ibid* at para 101, citing (*inter alia*) *Agraira*.

[121] *Ibid* at para 102.

[122] David J. Mullan, "2021 Developments In Administrative Law Relevant to Energy Law And Regulation" (May 2022) 10:1 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/regular-features/2021-developments-in-administrative-law-relevant-to-energy-law-and-regulation>; See also David J. Mullan, "2020 Developments in Administrative Law Relevant to Energy Law" (2021) 9:1 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/regular-features/2020 developments-in-administrative-law-relevant-to-energy-law1>.

if so, should pay an administrative penalty. Enforcement Staff's application was made after an investigation on November 29, 2021.[123] On November 30, 2021, ATCO released the results of its own internal investigation. To quote a news report from that same day:

> An internal investigation undertaken by ATCO showed that failures in the company's procedures and disclosure processes resulted in contraventions of the Inter-Affiliate Code of Conduct, a set of rules ATCO's regulated companies follow to ensure fair business practices and proper disclosure.[124]

The then Alberta Energy and Utilities Board had approved that Code on May 22, 2003.[125] First among the list of underlying objectives set out in section 1.1 of the Code is the following:

> a. Creating a clearly defined set of rules designed to enhance inter-affiliate transparency, fairness and senior management accountability with respect to inter-affiliate interactions impacting regulated businesses.

In its online introduction to its own Inter-Affiliate Code of Conduct, Fortis Inc is more blunt. The Code

> …ensures that all transactions between FortisAlberta and our affiliates are conducted a fair and transparent manner.[126]

Despite ATCO's *mea culpas* and justifications for actions that it said were essentially for the benefit of a First Nation community, the other party to the relevant contract, the matter proceeded and eventually resulted in Commission approval of a settlement agreement that Enforcement Staff had negotiated with ATCO.[127] That agreement, as recounted in my 2022 survey article, sustained Enforcement Staff's allegation that ATCO had breached its "fundamental duty of honesty and candour to its regulator"[128] and amounted to a failure to ensure that the information that it provided to the Commission was "full, fair and accurate."[129] Among the sanctions imposed under the settlement agreement was payment by ATCO of an administrative penalty of $31 million.

Whether the sanctions imposed on ATCO were appropriate, I will leave to others to debate.[130] However, what is more significant is the message sent not just by the extent of the penalty but also the precedent that it sets in its recognition that failures to meet ethical and legal standards of conduct in a regulatory context have consequences. In this respect, I repeat from my 2022 survey article the powerful statement of Vice-Chair Larder for the Commission approving the settlement:

> 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

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[123] Application of AUC Enforcement Staff for the commencement of a proceeding pursuant to sections 8 and 63 of the *Alberta Utilities Commission Act*, (30 November 2021), online (pdf): <mma.prnewswire.com/media/1699659/ATCO_Ltd__ATCO___Canadian_Utilities_Announce_Regulatory_Shortfal.pdf>.

[124] "ATCO & Canadian Utilities Announce Regulatory Shortfalls and Propose Corrective Actions" (30 November 2021), online: *newswire.ca* <www.newswire.ca/news-releases/atco-amp-canadian-utilities-announce-regulatory-shortfalls-and-propose-corrective-actions-875746622.html>.

[125] "ATCO Group Inter-Affiliate Code of Conduct" (22 May 2003) Appendix 5 to EUB Decision 2003-040, online (pdf): *ATCO* <www.atco.com/content/dam/web/for-home/natural-gas/atco-group-affiliate-code-of-conduct.pdf>.

[126] "Compliance", online : *FortisAlberta* <www.fortisalberta.com/about-us/our-company/compliance>.

[127] AUC Decision 27013-D01-2022.

[128] *Supra* note 119 at para 2(d).

[129] *Ibid* at para 141.

[130] For a critical analysis of financial penalties imposed by the Alberta Energy Regulator for violation of the terms of a regulatory approval order, AER *Administrative Penalty 202304-03, Ovintiv Canada ULC*, see Drew Yewchuk, "Administrative Penalties at the Alberta Energy Regulator: A Gentle Slap on the Wrist for Ovintiv" (12 April 2023), online (pdf): *ABlawg* <ablawg.ca/wp-content/uploads/2023/04/Blog_DY_AER_Penalties.pdf>

> 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.[131]

Undoubtedly, this represents a clarion call as to the responsibilities of those who in varying capacities rely on the even-handedness of regulatory processes. Without candour and transparency on the part of all participants, the compact on which those processes are based can be gravely, if not fatally compromised. It also elevates the status of regulatory codes of conduct and recognition of duties of candour and transparency to more than an acknowledged but seldom invoked component of a corporate website into documents that have meaning and is truly reflective of a commitment to underlying values.

Moreover, the principles are ones that should apply not just to the participants in regulatory hearings. As illustrated by the ongoing furore over the Alberta Energy Regulator's delay in releasing information about a serious tailings point leak especially affecting local Indigenous communities,[132] regulators themselves have responsibilities of candour and transparency. Calls for the dismantling of the Alberta Energy Regulator and expressions of a loss of confidence in the regulator are rooted in the same values that were at stake in the ATCO transgressions.[133]

VII. DEFENDING DECISIONS – THE ROLE OF THE DECISION-MAKER

Under our traditional litigation model, courts do not appear as parties to appeals from their decisions. Conventional wisdom is that their decisions and the formal record of their proceedings form the basis on which the appeal or review is to be conducted. It is unseemly and inappropriate for them to be heard otherwise in justification of the merits of their decisions.

In 1979, those same principles were for the most part adopted by the Supreme Court of Canada in *Northwestern Utilities Ltd. and al. v Edmonton*,[134] a rate application proceeding before the then Alberta Public Utilities Board. Northwestern asserted that, at least on the particular facts of this matter, the Board should take into account pre-application losses in a rate-setting exercise. The Board accepted that argument. Edmonton appealed that decision successfully to the Appellate Division of the Alberta Supreme Court.[135] The City also prevailed on a secondary argument that the Board had not fulfilled a statutory obligation to provide reasons for its decision. On Northwestern's appeal to the Supreme Court of Canada, Estey J, delivering the judgment of the Court, upheld on both grounds the judgment of the Appellate Division.[136]

Estey J then moved on to consider the role that counsel for the Board had taken before the Supreme Court, a role that Estey J described

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[131] *Supra* note 127 at para 91.

[132] See Emma Graney, "Alberta didn't reveal Imperial Oil leak for months, says Environment and Climate Change Canada" (9 March 2023), online: *The Globe and Mail* <www.theglobeandmail.com/business/article-imperial-oil-leak-indigenous> and "First Nations call on Ottawa to oversee investigation on Imperial Oil industrial leak" (18 April 2023), online: *The Globe and Mail* <www.theglobeandmail.com/business/article-first-nations-call-on-ottawa-to-oversee-investigation-on-imperial-oil>; See also Drew Yewchuk "The Alberta Energy Regulator and the Disclosure Without Delay Rule in *FOIP*" (6 March 2023), online: *ABlawg* <ablawg.ca/2023/03/06/the-alberta-energy-regulator-and-the-disclosure-without-delay-rule-in-foip>. In the context of applications for judicial review, see Paul Daly, "The Prospects for Candour: Solutions for the Limited Record Problem" (12 April 2022), online: *Administrative Law Matters* <www.administrativelawmatters.com/blog/2023/04/12/the-prospects-for-candour-in-canada-solutions-for-the-limited-record-problem>.

[133] For other media commentary on regulator failings that can lead to a loss of confidence on the part of the regulated and the public generally, see in a securities regulation context Ken Kivenko and Ed Waitzer, "OSC needs to take accountability seriously or risk losing public confidence", *The Globe and Mail*, (30 January 2023), and Nicolas Van Praet, "Quebec securities regulator says it has overhauled how it does investigations", *The Globe and Mail*, (15 February 2013).

[134] [1979] 1 SCR 684 [*Northwestern Utilities*].

[135] (1977) 3 AR 317 (SCAD).

[136] *Supra* note 134 at 708–11.

as "active and even aggressive participation."[137] Despite the fact that section 65 of the *The Public Utilities Board Act*[138] entitled the Board "to be heard upon the argument of any appeal," this did not mean that the Board had the same participatory rights as the parties who had appeared before it. In the absence of explicit statutory recognition that the Board had parity of status with the contesting parties on the appeal or a provision that provided for full or partial decision-maker submissions, its role was more in the nature of that of an *amicus curiae*. In concrete terms, this meant that the Board's participation was an "explanatory" one with reference to the record before the Court and "to the making of representations relating to jurisdiction."[139] For these purposes, issues of natural justice and compliance with the statutory obligation to provide reasons did not count as matters of jurisdiction nor did the reach and interpretation of the relevant statutory provision respecting past losses cross that threshold; it went to the merits of the matter and was not jurisdictional in nature.[140]

The core of Estey J's concerns with more active Board engagement in the hearing of the appeal on either of the two issues is captured well in the following statement:

> Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.[141]

In my earlier commentary on this issue,[142] I trace the case law in which slowly but surely the wheel turned. Both the Supreme Court and appellate courts (including appeals from and judicial review of energy regulators) began to recognize that this issue was not resolved satisfactorily by imposing blanket or "categorical" bans on tribunal participation based on the concept of jurisdiction and an acceptance that issues of natural justice or procedural fairness were jurisdictional in nature.

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[137] *Ibid* at para 708.

[138] RSA 1970 c 302. The current successor to this provision is section 29(12) of the *Alberta Utilities Commission Act*, SA 2007 c A-37(2). For other provisions dealing with the status of the decision-maker on applications for judicial review of or appeals from their decisions, see *eg* section 72(4) of the *Canadian Energy Regulator Act*, SC 2019,c 28, section 33(3) of the *Ontario Energy Board Act, 1998* SO 1998 c 15 Sched B, and, more generally applicable to tribunals, section 15(1)(b) of the British Columbia *Judicial Review Procedure Act*, SBC 1996 c 241 section 9(2) of the Ontario *Judicial Review Procedure Act*, RSO 1990 c J.1, and sections 2 and 109(1) of the *Federal Court Rules*, SOR/98-106, which read in combination provide for the participation of tribunals as interveners in appeals from or judicial reviews of their decisions. Suffice it to say that irrespective of the way tribunal participatory rights are formulated in any of these provisions, courts have generally held that, as in *Northwestern Utilities*, the common law principles governing tribunal participation are treated as implicitly read into the relevant provision. See, in particular, *Ontario (Energy Board) v Ontario Power Generation*, 2015 SCC 44, [2015] 3 SCR 147 at paras 58–59 (*per* Rothstein J) with reference to the Ontario provision. For more recent applications in the context of the *Alberta Utilities Commission Act*, see *Milner Power Ltd v Alberta (Utilities Commission)*, 2019 ABCA 127 at paras 26–29 (*per* O'Ferrall JA) and *TransAlta Corp v Alberta (Utilities Commission)* 2022 ABCA 37 at para 14. It should, however, be noted that the restrictions on participation do not apply where a tribunal or regulatory agency is being sued at common law or under the *Charter* for damages, as in *Ernst v Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 SCR 3 at para 54. Somewhat ironically Cromwell J saw this exposure as one of the justifications for a statutory immunity from liability. The regulator would not have to justify itself, something that could "compromise the decision-maker's impartiality or the finality of his or her decision."

[139] *Supra* note 134 at 709.

[140] *Ibid* at 709–11.

[141] *Ibid* at 709.

[142] David J. Mullan, "2015 Developments in Administrative Law Relevant to Energy Law and Regulators" (2016) 4:1 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/articles/2015-developments-in-administrative-law-relevant-to-energy-law-and-regulation>.

Especially influential in the evolution in the jurisprudence were judgments of Goudge JA of the Ontario Court of Appeal in 2005[143] and Stratas JA of the Federal Court of Appeal in 2010.[144] More generally, the movement in Canadian judicial review law away from the concept of jurisdiction as a boundary setter required a rethinking of the "categorical" approach in this domain. The more that standard of review case law evolved, the more it became clear that jurisdiction was far from a bright-line basis for determining what was allowable as a matter of discretion and what was not.

The culmination came in 2015 and the judgment of Rothstein J for a majority of the Supreme Court of Canada in *Ontario (Energy Board) v Ontario Power Generation Inc*.[145] Here, the Court rejected explicitly the categorical approach to determining the role of the decision-maker in court challenges to its decisions. In its place, Rothstein J held that the proper approach was one which treated the issue as a matter of discretion for the reviewing or appellate court in which various factors, at times conflicting, should be weighed in determining the extent, if any, of the decision-maker's role.

On one side of this balancing exercise were the concerns about the maintenance of impartiality and the principle of finality that Estey J articulated so strongly in the extract from his judgment that I quoted earlier and that Rothstein J acknowledged.[146] However, there were countervailing concerns rooted in the importance of the appellate or reviewing court having the benefit of the best defence of the tribunal's decision, something that would at least on occasion require access to "useful and important information and analysis" available to the tribunal but not otherwise apparent from the record of the hearing.[147]

Obviously, as in *Northwestern Utilities*,[148] the decision under review was that of an energy regulator. However, as opposed to *Northwestern Utilities*, where the contesting parties before the Board were active participants in the two court proceedings, there was no party defending the Board's decision in the Divisional Court in *Ontario Power Generation*.[149] For Rothstein J, this was an important consideration in the evaluation of the decision-maker's role in the judicial review, and it remains so to this day whenever issues as to the decision-maker's participation are raised. Without the unlikely presence of the Attorney General or the appointment of an *amicus curiae*, the Board's decision would otherwise not have been defended.

It does, however, bear pointing out that in another appeal heard in parallel with *Ontario Power Generation*, a regulator made submissions in defence of the adequacy of its reasons and the appropriate standard of review despite the presence of a party defending the merits of its decision. This was in *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)*,[150] involving a successor to the Alberta Public Utilities Board, the decision-maker in *Northwestern Utilities*, and the participation in support of the Commission's decision of the Utilities Consumer Advocate. In its judgment in that case, the Supreme Court was silent on the appropriateness of the Commission making submissions given the presence of the Consumer Advocate. This remains puzzling especially given that Slatter JA, delivering the judgment of the Alberta Court of Appeal had been very critical of the scope of the Commission's submissions.[151] However, at the very least, in the spirit of

[143] *Ontario (Children's' Lawyer) v Goodis* (2005) 75 OR (3d) 309 (CA).

[144] *Canada (Attorney General) v Quadrini*, 2010 FCA 246, [2012] 2 FCR 3. See also the judgment of Robertson JA in *United Brotherhood of Carpenters and Joiners of America, Local 1386 v Bransen Construction Ltd.*, 2002 NBCA 27, 249 NBR (2d) 93.

[145] *Supra* note 138 at paras 42–72 [*Ontario Power Generation*].

[146] *Ibid* at paras 41, 52.

[147] *Ibid* at para 52.

[148] *Supra* note 134.

[149] *Supra* note 134 at para 60.

[150] 2015 SCC 45, [2015] 3 SCR 219.

[151] *ATCO Gas and Pipelines Ltd v Alberta Utilities Commission*, 2013 ABCA 310, 556 AR 736 at paras 12–13.

Rothstein J's judgment, it is implicitly clear that, under participation standards that are contextual and nuanced in nature, the presence of a party arguing in defence of the board or tribunal's decision remains a consideration but, neither now nor even under *Northwestern Utilities* for that matter, disqualifying of the decision-maker's participation.

What does put distance between *Northwestern Utilities* and the new regime is Rothstein J's acceptance that, on the facts of *Ontario Power Generation*, with one minor exception, the Board did not exceed the permissible reach of its participatory licence when making submissions to the Supreme Court as to the reasonableness of the decision under review.[152] This was certainly not something that Estey J would have countenanced in *Northwestern Utilities*. What is also of significance is that Estey J appeared to lump all administrative tribunals together for the purposes of establishing ground rules for the role of the decision-maker in judicial review and statutory appeal proceedings. Not so, asserted Rothstein J in *Ontario Power Generation*. The nature of the tribunal proceedings was relevant in considering the weight to be assigned to concerns about impartiality and the ultimate assignment of capacity to participate in an appeal or judicial review:

> Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised.[153]

In this regard, the Ontario Energy Board was clearly in the latter category and thus deserving of greater tolerance when appearing in defence of its decision or elements thereof.

Nonetheless, it is important to recognize that the characterization of a tribunal as one that resolves conflicts between two adversarial parties rather than one that is more focussed on policy making and public interest regulation does not mean that tribunal participation in defence of its decisions is necessarily truncated. Beyond the realm of energy regulation, a clear example exists in the context of workers' compensation claims adjudications. There, the nature of the process is much closer to traditional adjudicative functions than, for say, rate setting regulation. However, it is also the case that, quite frequently, on an appeal from or judicial review of such benefit allocations, there will be no one appearing in support of the tribunal's decision. In that context, the calculus may appear to be somewhat different yet, nonetheless, the courts since *Ontario Power Generation* do recognize greater participation than would ever have been acceptable to Estey J in *Northwestern Utilities*. This is apparent from a series of British Columbia Workers' compensation judgments in which there was no one appearing in support of the decision under review. This opened the door to the Workers' Compensation Appeal Tribunal being permitted to make representations as to the correctness of the decision under review.[154]

Even where there is a party appearing in support of the decision under appeal or review, there may be occasions on which limited participation of the tribunal will be allowed. This is well illustrated by an Ontario judgment involving that province's equivalent of the British Columbia Workers' Compensation Appeal Tribunal. In *Hydro Ottawa v Ontario (Workplace Safety and Insurance Appeal Tribunal*,[155] the Court allowed the Tribunal, despite the presence of a party defending its decision, to

> …present arguments concerning the applicable standard of review, jurisdictional issues, policy considerations, and the interrelationship of legislative provisions [in two relevant Acts].[156]

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[152] *Supra* note 138 at para 60.

[153] *Ibid* at para 59.

[154] See *CS v British Columbia (Workers' Compensation Appeal Tribunal)*, 2019 BCCA 406, 31 BCLR (6th) 1 at para 48. More recently the same position was taken in *Pereira v British Columbia (Workers' Compensation Appeal Tribunal)*, 2022 BCSC 1654 at paras 22–23, and *Ahluwalia v British Columbia (Workers' Compensation Appeal Tribunal)*, 2022 BCSC 2139 at paras 18–21.

[155] 2019 ONSC 4898.

[156] *Ibid* at para 7.

However, the Court indicated that it would not be taking into account those portions of the Tribunal's factum in which it addressed "the reasonableness of the decision."[157]

Some might lament the change from the categorical approach to the issue of decision-maker participation in defence of its decisions as a retreat from certainty. However, once one accepts the porous nature of jurisdiction as a controlling concept and the inherent uncertainty of the precise boundaries of an explanatory role, it should be obvious that, under the *Northwestern Utilities* principles, appeals to the advantages of certainty over contextual discretion lose much of their impact. What is also clear is that the relevant contextual factors will interact in varying ways in the search for an appropriate delineation of the precise role of the decision-maker.

A useful illustration is provided by *TransAlta Corp v Alberta (Utilities Commission)*.[158] In the context of a proceeding in which the critical issue was the application and interpretation of the principles of *res judicata*, the Court recognized the status of the Commission to make submissions on the merits of that issue. Despite that there were other parties to the appeal,[159] each of those parties had conceded that they lacked the capacity to defend this aspect of the Commission's decision.[160] However, the Court was careful to make it clear that this did not amount to a licence to supplement its reasons in resistance to possible concerns about their adequacy. This would have amounted to impermissible "bootstrapping" as a result of which the Court indicated that it was not going to take into account anything in the Commission's factum that elaborated upon the reference in the Commission's decision to "previous [unnamed] rulings." The matter turned on a pure question of law that could and should be addressed on the basis of the formal record of the proceedings "as exists and without additions."[161]

In fact, if there is any trace of a categorical approach to the issue of tribunal participation, it lies in the recognition that bootstrapping or the making of entirely new arguments is not permissible. This , of course, as Rothstein J makes clear in *Ontario Power Generation*,[162] is not a prohibition that attaches only to submissions made by a tribunal subject to an appeal or an application for judicial review. It has a much broader reach than that and applies as a principle of general application in the context of strictures on what any party to an appeal or an application for judicial review is permitted to do.

However, in the context of tribunal participation in appeals and applications for judicial review, the principles against bootstrapping and the making of new arguments have to be differentiated from other forms of representation that are permissible especially in the context of regulatory and policy-focussed agencies. As outlined by Rothstein J in *Ontario Power Generation*,[163] the prohibition on bootstrapping does not prevent arguments that are implicit in the reasons given for the decision now under attack, or, more generally, that provide explanations, interpretations, and background to that decision. Provided there is no inconsistency with the reasons for decision or an attempt to provide variations or qualifications to those

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[157] *Ibid*.

[158] *Supra* note 138.

[159] Normally, the presence of other parties defending the decision under attack will mean that the decision-maker's role will be "significantly restricted": *The Office of the Utilities Consumer Advocate v Alberta (Utilities Commission)*, 2021 ABCA 282 at para 3 (*per* Slatter JA), in the context of a successful application by three utilities to be added as parties to an application for leave to appeal. However, it is noteworthy that in *Consumer Advocate v Newfoundland and Labrador (Board of Commissioners of Public Utilities)*, 2022 NLCA 39 at paras 11–27, the Court allowed the Board to argue the merits in the context of an application for leave to appeal despite the participation of Newfoundland Power arguing in support of the Board's decision and against the grant of leave to appeal. (Interestingly, in *Fortis Alberta Inc v Alberta (Utilities Commission)*, 2020 ABCA 271 at paras 72–78, Watson JA, in refusing to hear oral submissions from the Commission called into question any Commission defence of its decision in the context of an application for leave to appeal.)

[160] *Ibid* at para 14.

[161] *Ibid* at para 16.

[162] *Supra* note 138 at para 63.

[163] *Ibid* at paras 63–72.

reasons, explanatory submissions should generally be permitted.

Obviously, given the extent of the case law largely interpreting but, in some instances, building upon *Ontario Power Generation*, at the margins there are still outstanding issues as well as differing views on how to apply the Rothstein principles. As already emphasised given the contextual variations under which this issue can arise, that is not surprising. I believe it is also fair to say that some judges have at an intuitive level less tolerance for tribunal defence of their decisions than others. Nonetheless, the movement away from the rule-bound approach in *Northwestern Utilities*[164] has resulted in an appropriately more nuanced and situation-specific approach to this important issue and that is a good thing.

CONCLUSIONS

Much of the discourse about Administrative Law over the past decade and the life of the *Energy Regulation Quarterly* has continued to centre on the standard of review. That attention became even more focussed with the judgment of the Supreme Court of Canada in *Vavilov*. For those who for whatever reason favoured a lessening of judicial deference to statutory and prerogative decision-making, there was certainly some comfort to be taken from *Vavilov* albeit that the judgment's most discussed change — no longer any deference for pure questions of law in statutory appeals — has not proved to be the game changer that was anticipated. Moreover, to the extent that the Court stated explicitly that it was conducting an exercise that would establish standards for the universe of administrative action, that ambition was not achieved. Uncertainty still exists over standard of review templates for judicial review for procedural unfairness and, even more significantly, judicial review of subordinate legislation and other manifestations of executive power.

However, if we change our attention from the intricacies of standard of review and the frequent follies that have attended the evolution of that aspect of judicial review law to a more process-oriented perspective, there is much to celebrate in the developments of the last decade. For all its warts with respect to standard of review, the lasting impact of *Vavilov* may rest in its articulation of the various elements that underpin reasonableness review. In general, the deference project was one that I signed on to and I do worry about the extent to which *Vavilov* involves a rejection of expertise as a restraining influence on judicial review. Nonetheless, the Court's articulation of the factors that should be the focus of administrative decision-makers wishing to avoid judicial review also provides a first-rate checklist for the writing of high quality reasons. Surely, no one can quarrel with that.

Early in the ten years under review, there was another significant focus on process that has contributed to the effective conduct of judicial review proceedings. I refer here to the judgment of Rothstein J in *Ontario Power Generation* that moved the law away from a formalistic, categorical to a functional approach in determinations of the extent to which tribunals themselves could participate in the judicial review process. At last, there was recognition that there were many situations where at least some level engagement on the part of the decision-maker could lead to better informed decision-making.

At the regulatory agency level, the Supreme Court aided in some measure by Courts of Appeal and the agencies themselves, continued to establish procedural norms for the duty to consult and, where required, accommodate Indigenous Peoples whose rights, claims and interests were affected by regulatory proceedings. Once again, functionalism and pragmatism informed much of this evolution.

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[164] An aspect of Estey J's judgment that does survive is his seeming condemnation of "active and even aggressive participation" on the part of the decision-maker presumably even on the then permissible grounds of jurisdiction and explanation: *supra* note 134. Rothstein JA, *supra* note 138 at paras 71–72 (citing Goudge JA in *Goodis*, *supra* note 143 at para 61, cautions the Board (and its lawyers) as to the "tone" in which they defend their decisions. They should not adopt the "aggressive partisanship of an adversary" (quoting Goudge JA). In this regard, Rothstein J (at para 72) criticized the Board for asserting that even if the Board's position on the central question was rejected, on any remission, this would not affect the overall outcome. It is, however, uncertain as to what in other circumstances would amount to "aggressive" participation and what the sanctions would be for an overly adversarial factum or oral submission. In the latter regard, Rothstein J (at para 72) speaks of taking steps "to limit tribunal standing so as to safeguard this principle." However, he tantalizingly leaves dangling the nature of any such limitation. Perhaps, a caution to "tone it down" in the case of oral submissions and a striking of offensive parts of a factum.

Remarkably, the same spirit has not generally informed judicial encounters with attempts to move the threshold for invoking the duty to act fairly from other than formulaic incantations to a more functional and expansive approach to participatory opportunities. In this respect, one should be thankful for the extent to which legislators, both primary and subordinate, as well many but unfortunately not all agencies and tribunals through their rulemaking authority have contributed to the procedural fairness project.

I also trust that the recent Alberta Utilities Commission disciplinary proceeding against ATCO will lead to a greater awareness that it is in the interests of all participants in regulatory processes (including the agencies themselves) that transparency and candour is the expected and accepted norm. Commitment to the protection of the public interest demands no less and should lead to the recognition of a new regulatory compact even within the regulation of what at times are highly competitive markets. ■

THE NEW NATIONAL PROGRAM TO INCREASE INVESTMENT IN CLEAN & RENEWABLE ENERGY[1]

*Mike Richmond, Ted Thiessen, Julia Loney, and Ryan Johnson**

Clean and renewable energy initiatives are at the forefront of global action and government policy as efforts are made to adapt to climate change and meet commitments to reduce greenhouse gas emissions. Consistent with this, the Government of Canada (the "**Government**") has strengthened its commitment to the foregoing through its recently announced Budget 2023. Principally, the Government has made advancements in establishing Canada as a "safe, smart, and competitive place to do business"; seeking to attract clean and renewable investments in the Canadian energy industry, in the face of severe competition from the U.S. in light of the American *Inflation Reduction Act of 2022*.

Canada's renewed commitment is structured to offer investment certainty through a number of initiatives, including Carbon Contracts for Difference, and a multitude of Investment Tax Credits for clean electricity projects, clean technology acquisition, clean technology manufacturing, critical mineral extraction and processing, and projects for carbon capture, utilization and storage.

Together, CCfDs and the various ITCs are intended to foster a new national program aimed at securing investment in carbon reduction projects and growing an enhanced economy based in the cleantech and clean energy sectors.

A) CARBON CONTRACTS FOR DIFFERENCE ("CCFD")

According to Budget 2023, CCfD will provide a new investment tool with which the $15B Canada Growth Fund can support clean growth projects. Canadian businesses considering decarbonisation projects and technological innovation are hesitant to make the needed investments because of the uncertainty associated with revenues from selling carbon reductions or excess allowances, since future carbon prices are difficult to predict. This is particularly true because the technological advancements are occurring in parallel and carbon markets remain at an early stage of development.

CCfD are intended to address this uncertainty by bridging financial and regulatory gaps to encourage low carbon technologies and renewable energy projects. CCfD are contracts by which a government agrees with the counterparty on a fixed carbon price over a fixed period of time. During this period, the counterparty is guaranteed the contracted price for any sales of carbon emission reductions or excess allowances generated by the project. If

[1] This article is a revised and combined version of (i) Ted Thiessen, "Budget 2023: Clean Energy Incentives and Resource Sector Measures" (23 March 2023), online: *McMillan LLP* <mcmillan.ca/insights/budget-2023-clean-energy-incentives-and-resource-sector-measures>; and (ii) Julia Loney & Mike Richmond, "Canada's Budget 2023: Compromise and Competition – Climate, Carbon and CCfDs", online: *McMillan LLP* <mcmillan.ca/insights/canadas-budget-2023-compromise-and-competition-climate-carbon-and-ccfds>.

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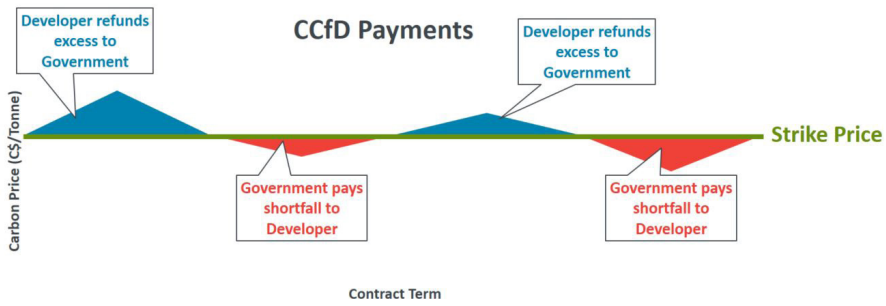

the carbon market price at which the credit is sold is higher that the contracted strike price, the counterparty returns the additional revenue to the government. If the carbon market price is lower than the strike price, the counterparty receives the difference.

Although new to Canadian markets, CCfD are commonly used in Europe. In Canada, CCfD offer opportunities in the renewable energy industry, such as for hydrogen, wind and solar energy projects. The CCfD is favourable for generators and other interested parties because it guarantees a set revenue for the carbon credits (whether carbon emission reductions or excess allowances) that are generated by the project.

In addition to acting as a hedging tool for future carbon prices and to stabilize revenues for renewable energy projects, they also provide regulatory credibility to fledgling industries. This is because governments are incentivized to help keep carbon market prices high so that the financial cost of the underlying CCfD will be lower. This then provides assurances to those developing and utilizing new innovations — both in terms of government support but also that markets will exist for their energy, products and technology.

CCfD do have their limitations, however:

- They are likely to be awarded to specific renewable energy projects — not for specific sources of renewable energy as a whole.
- They may need to be tailored for particular industries or geographies to reflect regional differences. Moreover, some CCfD could reflect collaboration between the federal and provincial levels of government, particularly if the governments are jointly providing funding and sharing risks.
- They guarantee the price of the credit, but not the volume of credits. Thus exposure to regulatory changes could detract from the volume of credits generated by a project, even though the price is secured.
- They may have restrictions on trading or other conditions.
- They only capture the carbon revenue stream. All other revenues of a project would need to be considered and documented and associated risks would also need to be considered and mitigated as part of the project's contract portfolio.
- The regulatory details regarding a competitive procurement or tendering process will need to be determined. The process may focus on certain specific technologies, or more broadly. In addition, the process may take into account different technologies used at different stages of the energy lifecycle (such as exploration and production, midstream, downstream, and end-of-life or reclamation (*i.e.* circular economy) considerations).
- They can be administratively burdensome, particularly at the early stages.
- They will need to be used by the Federal Government in coordination with other contractual and financial tools in order to provide for financial competitiveness.

B) INVESTMENT TAX CREDITS

i. Clean Electricity Investment Tax Credit

As Canada has structured a significant portion of Budget 2023 around investment in clean and renewable energy, an increased reliance on a clean electric grid is paramount. With the

nation's electricity demand expected to double by 2050, Canada's electric grid and capacity must increase by 2.2 to 3.4 times its current state. The Government posits investment tax credits as the anchor in which significant investments in the clean energy evolution will occur. An investment tax credit for clean electricity will function as the vehicle for such targets.

The clean electricity investment tax credit (the "**CE Credit**") introduces a 15 per cent refundable tax credit for eligible investments in:

- Non-emitting electricity generation systems: wind, concentrated solar, solar photovoltaic, hydro (including large-scale), wave, tidal, nuclear (including large-scale and small modular reactors);
- Abated natural gas-fired electricity generation (which would be subject to an emissions intensity threshold compatible with a net-zero grid by 2035);
- Stationary electricity storage systems that do not use fossil fuels in operation, such as batteries, pumped hydroelectric storage, and compressed air storage; and
- Equipment for the transmission of electricity between provinces and territories.

The CE Credit is proposed to become available on Budget Day 2024 for projects that did not begin construction prior to March 28, 2023. The CE Credit is scheduled to remain in effect through 2034, and no phase-out period was referenced in the budget materials.

Eligibility for the full CE Credit rate will be dependent on adherence to certain labour requirements, as described below. Failure to adhere to the prescribed labour requirements would see the applicable CE Credit rate reduced to 5 per cent.

Access to the credit will also require a commitment by a competent authority that the federal funding will be used to lower electricity bills, and a commitment to achieve a net-zero electricity sector by 2035. Additional details regarding these commitments and any other requirements can be expected to emerge following consultations between the federal government and its provincial and territorial counterparts.

ii. Clean Hydrogen Investment Tax Credit

Canada has made significant strides in diversifying its energy production. As noted above, clean electricity is a cornerstone in the country's energy evolution. Attached to these developments is the utility of clean hydrogen as a fuel source for trucking, marine, and aviation transport. As with the development of clean technology, hydrogen's practicality hinges on increased investment.

To spur such growth, Budget 2023 implemented the clean hydrogen investment tax credit (the "**CH Credit**"), a refundable tax credit on the cost of purchasing and installing "eligible equipment" for projects that produce hydrogen from (i) electrolysis, or (ii) natural gas, so long as emissions are abated using carbon capture, utilization and storage (CCUS).

The CH Credit ranges from 15 to 40 per cent of project costs, depending on the carbon intensity of the hydrogen produced, as assessed pursuant to the *Fuel Life Cycle Assessment Model* maintained by Environment and Climate Change Canada, and submitted to the government for verification:

Carbon Intensity (kg of CO_2e per kg of H)	CH Credit Rate
<0.75 kg	40%
0.75 kg to <2.0 kg	25%
2.0 kg to <4 kg	15%
≥ 4 kg	0%

The CH Credit is available in respect of eligible equipment that is acquired, and becomes available for use in Canada, on or after March 28, 2023, but is reduced by half for property acquired and available for use in 2034, and eliminated after 2034. In order for equipment to be eligible, all or substantially all of its use must be to produce hydrogen through either electrolysis or from natural gas. Equipment used to produce hydrogen from natural gas would only qualify if it does not otherwise qualify for the CCUS Credit (discussed further below).

For projects that rely on ammonia production, the CH Credit permits a 15 per cent tax credit toward equipment used to convert hydrogen into ammonia for transportation purposes.

Paired with the credit are the prescribed labour requirements, which if not met, will reduce the credit rate by 10 percentage points.

iii. Clean Technology Investment Tax Credit

The Clean Technology Investment Tax Credit (the "**CT Credit**"), originally announced in the Government's *2022 Fall Economic Statement* (FES 2022), has been expanded. The CT Credit is a refundable tax credit equal to 30 per cent of the cost of eligible property that is acquired, and becomes available for use, on or after March 18, 2023 and before 2035. The CT Credit rate is reduced to 15 per cent in 2034 and will be eliminated in 2035.

FES 2022 provided the following list of eligible property for the CT Credit:

- Electricity Generation Systems, including solar photovoltaic, small modular nuclear reactors, concentrated solar, wind, and water (small hydro, run-of-river, wave, and tidal);
- Stationary Electricity Storage Systems that do not use fossil fuels in their operation, including but not limited to: batteries, flywheels, supercapacitors, magnetic energy storage, compressed air storage, pumped hydro storage, gravity energy storage, and thermal energy storage;
- Low-Carbon Heat Equipment, including active solar heating, air-source heat pumps, and ground-source heat pumps; and
- Industrial zero-emission vehicles and related charging or refueling equipment, such as hydrogen or electric heavy-duty equipment used in mining or construction.

Budget 2023 expands the initially proposed list to include equipment described in subparagraph (d)(vii) of Class 43.1 and used primarily for the purpose of generating electrical energy, heat energy, or both, solely from geothermal energy. Examples of such equipment would include piping, pumps, heat exchangers, steam separators, and electrical generating equipment. It is important to note that equipment used for geothermal energy projects that co-produce fossil fuels are not eligible for the CT Credit.

As is the case for the CH Credit, eligibility for the full CT Credit rate is dependent on adherence to certain prescribed labour requirements. The CT Credit rate is reduced to 20 per cent (or 10 per cent in 2034) for businesses that fail to meet the prescribed requirements, which are discussed in more detail below.

iv. Clean Technology Manufacturing Investment Tax Credit

Critical minerals are the contemporary focus of the Canadian energy sector, with *The Canadian Critical Minerals Strategy* (the "**Strategy**") released in December 2022. The Strategy emphasizes the intersection of critical minerals and modern technology — this sentiment having been reproduced in Budget 2023 in the form of an investment tax credit for clean technology manufacturing (the "**CTM Credit**").

While the CT Credit is designed to encourage the adoption of clean technologies, the CTM Credit is targeted to those that are manufacturing or processing clean technologies and their precursors.

The CTM Credit is a 30 per cent refundable investment tax credit for investments in new machinery and equipment used to manufacture or process key clean technologies, or to extract, process, or recycle key critical minerals, as well as related control systems.

The CRM Credit is available in respect of the capital cost of certain eligible depreciable property all or substantially all of the use of which is for any of the following eligible activities:

- manufacturing of certain renewable (solar, wind, water, or geothermal) and nuclear energy equipment;
- processing or recycling of nuclear fuels and heavy water;
- manufacturing of nuclear fuel rods;
- manufacturing of electrical energy storage equipment used to provide grid-scale storage or other ancillary services;
- manufacturing of equipment for air- and ground-source heat pump systems;
- manufacturing of zero-emission vehicles, including conversions of on-road vehicles; as well as manufacturing of batteries, fuel cells, recharging systems,

and hydrogen refuelling stations for zero-emission vehicles;

- manufacturing of equipment used to produce hydrogen from electrolysis;

- manufacturing or processing of upstream components, sub-assemblies, and materials provided that the output would be purpose-built or designed exclusively to be integral to other eligible clean technology manufacturing and processing activities, such as anode and cathode materials used for electric vehicle batteries; and

- extraction and certain processing activities related to lithium, cobalt, nickel, graphite, copper, and rare earth elements.

v. Carbon Capture, Utilization, and Storage Tax Credit

Carbon Capture, Utilization, and Storage ("**CCUS**") technology centres on capturing carbon dioxide emissions from the atmosphere to either relocate in storage or use in other manufacturing processes. First featured in Budget 2022, the Carbon Capture, Utilization, and Storage Investment Tax Credit (the "**CCUS Credit**") will now include dual-use equipment that produces heat and/or power, or uses water, and is used for both CCUS as well as another process (provided that such equipment satisfies all other conditions of the CCUS Credit). In order for dual-use power and/or heat production equipment to be eligible, CO_2 emissions would need to be captured, stored or used, and such equipment would need to be primarily used to support either the CCUS process or hydrogen production that is eligible for the CH Credit.

In addition, other updates to the CCUS Credit include:

- that in addition to Saskatchewan and Alberta, it will also now be available to projects that would store CO_2 using dedicated geological storage in British Columbia;

- providing eligibility for certain refurbishment costs incurred in the 20-year period immediately following commencement of project operation; and

- requiring that the process for using and storing CO_2 be validated by a qualified third party (rather than approved by Environment and Climate Change Canada) prior to such process constituting an eligible use for CCUS Credit purposes.

vi. Labour Requirements for CE, CH and CT Credits

Eligibility for the full benefit of each of the CE Credit, CH Credit, and CT Credit is dependent on the recipient's adherence, beginning on October 1, 2023, to certain labour requirements relating to wage and apprenticeship targets in respect of the project benefiting from the applicable credit. The labour requirements apply to workers (whether employees or contractors) primarily engaged in manual or physical labour, and do not apply to those in administrative, clerical, supervisory, or executive roles.

The wage requirement generally requires that workers involved in the project be paid at or above a "relevant wage" (taking into account the monetary value of standard benefits and pension contributions) as specified in an "eligible collective agreement". In Québec, such an agreement would be one negotiated in accordance with provincial law. For territories and provinces other than Québec, an "eligible collective agreement" would be the most recent multi-employer collective bargaining agreement between a trade union and a group of employers that may reasonably be considered the industry standard for the given trade in the particular region, province or territory.

The apprenticeship requirement generally requires that, subject to applicable labour laws and collective agreements, not less than 10 per cent of the total labour hours of covered workers on a particular project be performed by registered apprentices. "Covered workers" in this context refers to workers whose duties correspond to those performed by a journeyperson in a Red Seal trade.

vii. Situations Involving Multiple Tax Credits

Given the nature of the eligibility criteria underlying each credit regime, it is certainly possible for a single piece of equipment or property to meet the criteria for multiple credits. Budget 2023 provides that, in such cases, only one credit may be claimed in respect of the relevant piece of property or equipment. Accordingly, taxpayers should carefully analyze which credit offers the greatest benefit in their circumstances having regard to the eligibility

requirements. The highest credit rate available is under the CH Credit regime, which provides a 40 per cent credit for eligible costs where the project achieves the lowest carbon intensity threshold and fully complies with the prescribed labour conditions.

C) OTHER TAX INCENTIVES

i. Continued Reduced Tax Rates for Zero-Emission Technology Manufacturers

Budget 2021 introduced reduced tax rates on eligible zero-emission technology manufacturing and processing income for qualifying manufacturers. Budget 2023 provides that, for years beginning after 2023, eligible income would include income from the manufacturing of nuclear energy equipment, processing or recycling of nuclear fuels and heavy water, and manufacturing of fuel rods.

Budget 2023 also extends the availability of the reduced rates by an extra three years. The rates will now be subject to a phase-out beginning in 2032, with elimination scheduled for 2034.

ii. Inclusion of Lithium from Brines as a Critical Mineral

Budget 2023 proposes to include lithium from brines as a mineral resource and a critical mineral for purposes of the *Tax Act*. Beginning March 18, 2023, expenses related to lithium from brines will be eligible for qualification as Canadian exploration expense or Canadian development expense, and be eligible for the Canadian mineral exploration tax credit that was introduced in Budget 2022.

D) PIECING THE NARRATIVE TOGETHER

CCfDs coupled with the tax incentives signify that the Canadian energy industry is playing a central role in the Government's plans for economic growth. At the same time, it is important to be mindful of potential risks and the keys to successful implementation.

Beginning with CCfDs, their practicality and effectiveness in Canada is limited, although their widespread use and acceptance in Europe is promising. Further, the administrative complexity and potential restrictions of a CCfD and a regulatory system that must adapt to these changes could be significant hurdles. Further, their effectiveness may be limited depending on how they are awarded, and given that they only provide price certainty for one element of the financial model.

Complications with respect to the tax incentives are less apparent at this point, though it will be necessary for project managers and investors to become familiar with the eligibility requirements which will determine whether the tax credits can be maximized.

Budget 2023 equips Canada with the foundational tools and a strategic plan to increase investment in clean and renewable energy projects and technology. If such continued efforts have the anticipated impact of supporting the burgeoning clean energy sector, there may be lasting effects on the march towards a dynamic green and clean economy. ■

ENERGY POLICY ASSESSMENTS AND EVS MEET AT THE INTERSECTION

*Ron Wallace, Ph.D.**

INTRODUCTION

Regulations and policies for energy have material consequences for the Canadian economy. Increasingly, energy policy decisions have been predicated on cost benefit analyses that are wholly deficient. This has resulted in material consequences for consumers and the economy. Good energy policies should be based upon sound analyses. Instead, many, not just Canadian, energy policies are being justified without proper assessment of the true costs and benefits with significant economic and social consequences.

In March 2022, the Government of Canada issued its 2030 Emissions Reduction Plan (ERP)[1] in accordance with international climate commitments agreed under the Paris Agreement. The objective is to reduce national GHG emissions by 40 to 45 per cent below 2005 levels by 2030 and to reach net-zero emissions by 2050. The ERP includes a plan to introduce a regulated zero-emission vehicles (ZEV) sales target that will require 100 per cent of passenger car and light truck sales to be ZEVs by 2035, with interim targets of at least 20 per cent by 2026 and at least 60 per cent by 2030. The proposed new "*Regulations Amending the Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations*"[2] was, with remarkable temerity for such a consequential policy, announced with little fanfare by a Parliamentary Secretary immediately prior to Christmas in 2022.

Under the authority of the *Canadian Environmental Protection Act (1999)*, the Federal Departments of Environment and Climate Change and Health have completed a Regulatory Impact Analysis Statement (RIAS or Statement) based upon an earlier Cost-Benefit Statement (CBS). A consultation period, which lapsed on March 16, 2023, was established by government to receive comments to the proposed Regulation.

ENERGY POLICIES AND COST-BENEFIT ANALYSES

Here it is argued that the conclusions reached to justify implementation of the proposed ZEV regulations are substantially flawed because they ignore material, associated costs that impact the Canadian economy. In addition to concerns about rising demands on our

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[1] "Canada's 2030 Emissions Reduction Plan" (12 July 2022), online: *Government of Canada* <www.canada.ca/en/services/environment/weather/climatechange/climate-plan/climate-plan-overview/emissions-reduction-2030/plan.html>.

[2] Government of Canada, Public Works and Government services Canada. "Canada Gazette, Part I, Volume 156, Number 53: Regulations Amending the Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations", (30 December 2022), online: *Canada Gazette* <gazette.gc.ca/rp-pr/p1/2022/2022-12-31/html/reg1-eng.html>.

electrical generation and transmission systems, the proposed EV regulation constitutes a significant diminishment of consumer choice and will be accompanied by higher taxes, reduced government revenues, traffic-related disruptions and escalating insurance coverage for motorists.

The resultant limitations for consumer choice alone will have material economic consequences for Canadians. Meanwhile, the projected "benefits" will be largely limited to urban areas close to hydroelectric, nuclear or electrical transmission sites, while the costs and inconveniences that will befall many rural, northern and Indigenous communities are downplayed, or ignored. Hence, the proposed regulation falls far short of a proper public interest determination for the national interest.

The CBS incorporates several flawed assumptions. For instance, the cost-benefit analysis claims a net benefit of $28.6 billion, of which $19.2 billion is attributed to "avoided global damages."[3] In effect, this assumes an infinite pool of climate change-related damages against which any assumed "benefits" may be assessed. However, the RIAS presents no analysis of the $19.2 billion of claimed benefits while nonetheless claiming that the figure might be "conservative". Unreferenced "academic literature" is used to assess the social cost of carbon which subsequently attributes benefits of $9.4 billion to result from energy savings from the use of ZEVs. In effect, the "avoided global damages" used in the Statement assumes a bottomless pit of economic costs against which any proposed policy could be justified. The RIAS also estimates that (2026 to 2050) of the proposed amendments will have projected incremental costs for ZEV vehicles and home chargers of $24.5 billion resulting in savings in net energy costs approaching $33.9 billion and with cumulative reductions in GHG emissions of 430 megatons (Mt). The conclusion is that this would result in net benefits of $28.6 billion, while "working to assist Canada in reaching its GHG emissions reduction targets of 40 per cent below 2005 levels by 2030 and net-zero emissions by 2050."[4]

Experts, such as Dr. McKitrick, who have assessed other policies such as the Low Carbon Fuel Standard and the biofuels mandates, conclude that such comparisons typically used to justify climate change policies are irrelevant.[5] His testimony to the Natural Resources Committee[6] studying the biofuels mandate indicated that proper comparisons must consider (on one hand) the costs of climate change over the forecast horizon without the policy, versus (on the other hand) the costs of climate change over the forecast horizon with the policy, plus the cost of the policy. For the proposed regulations (even if such an analysis could be done) it is likely that the difference in the costs of climate change between the "do nothing" case and the "do something" case (with or without implementation of significantly more rigorous emissions reductions by mandating ZEV's) faces the inevitable, and significant, problem of carbon leakage across international borders. This alone would invalidate any further conclusions because the alleged $19.2 billion in "avoided global damages" cannot be accorded any statistical significance. The inescapable conclusion is that global increases in emissions from international sources will more than offset any Canadian reductions, including all those from the transportation sector.

Significantly for the EV assessment, while government contends that its analysis may actually underestimate the damages from climate change, it admits that: "*The Department is in the process of updating its SCC estimates"* with *"results (that) are not yet available*."[7] This is a material omission because this unavailable data, even if shown to be reasonable and correct, is fundamental to the determination of the findings and conclusions in the Statement. In effect, the assessment is based on debatable "estimates" that are unconfirmed.

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[3] *Ibid*.

[4] *Ibid*.

[5] Ross McKitrick, "Economic Analysis of the 2022 Federal Clean Fuels Standard" (6 September 2022), online (pdf): *LFX Associates* <www.lfxassociates.ca/uploads/4/8/0/8/4808045/cfs_report_2022.pdf>.

[6] "Ross McKitrick, Ph.D. Professor of Economics University of Guelph...", online (pdf): *Presentation to House of Commons Standing Committee on Natural Resources* <www.ourcommons.ca/Content/Committee/432/RNNR/Brief/BR11467603/br-external/McKitrickRoss-e.pdf>.

[7] *Supra* note 2.

Environment and Climate Change Canada's updated use[8] of the "social cost of carbon" has since been criticized[9] by Canadian economist Ross McKitrick as "a brand new model that no one has ever seen before, and it's spit out this completely different social cost of carbon estimate that flies in the face of all the research that's been done up to this moment."

Then there is the issue of required electrical output. The Statement argues that a small increase of Canadian electrical output, ranging from 2.6 to 4.8 per cent would be required to achieve a 100 per cent national conversion to electric vehicle fleets by 2035 and that the rise in electrical pricing would not be "significant". While this may be the case, by choosing to focus solely on the requirements needed to support a national electrified vehicle fleet, the RIAS ignores other material factors involved in the proposed transition to net zero and apparently omits considerations of issues associated with an expanded electrical generation and transmission system that would be required to achieve the "transition."

Relying on multiple studies, the Canadian Climate Institute recently noted that the Canadian electricity system will need to double, or triple, its generating capacity by 2050:

> *"Specifically, studies show that electricity demand will be 1.6 to 2.1 times larger in 2050 compared to today, on a path to net zero. Meanwhile, the capacity of Canadian electricity systems — the maximum amount of electricity that a system can technically produce — needs to grow even more, at least doubling, if not more than tripling, over the same time frame. Aggressive improvements in energy efficiency are needed so Canada's electricity systems meet electricity demand that is "right sized." Yet even with significant efficiency improvements, electricity systems must grow substantially for a net zero world. In fact, Canada must, on average, grow system capacity at a rate 3 to 6 times faster to 2050 compared to the previous decade, in order to support rising electricity demand associated with net zero."*[10]

Having effectively discounted the sweeping changes that will befall the Canadian electrical generation and transmission systems in a transition to net zero, the proposed regulation attempts to implement a "one-size fits all" solution to reduce emissions generated throughout the entire Canadian transportation fleet. Furthermore, the Statement admits that in rural, or remote, locations the adoption of EV's may face significant resistance because such communities: "*may have lower access to public charging infrastructure*" and because "*prolonged periods of cold temperatures…may affect the range of battery-powered EVs*." Not only are rural communities to be affected but so will low-income households as there are: "*rental units which may not be suitable for at-home-charging equipment*" and that such "*low-income households would likely be disproportionately and negatively affected*."[11] [Emphasis added].

Hence, not only will consumers, especially lower-income families, be faced with "disproportionate" negative economic effects but opportunities to offset these economic impacts will almost certainly be circumscribed by diminished consumer choice in the marketplace. The regulation also presumes that future EVs will have an added price differential of $3,300 over current internal combustion vehicles based upon assumptions that economies of scale and technological and manufacturing innovations will produce cost-effective solutions to restrain pricing. While this may be correct, it does not consider other factors that could disrupt such assumptions, like increased demand for rare earth minerals for EV batteries resulting

[8] Social cost of greenhouse gas emissions, online: *Government of Canada* <www.canada.ca/en/environment-climate-change/services/climate-change/science-research-data/social-cost-ghg.html>.

[9] ANALYSIS: Behind Guilbeault's 'Social Cost of Carbon' Speech, online: *The Epoch Times* <www.theepochtimes.com/analysis-behind-guilbeaults-social-cost-of-carbon-speech_5216490.html>.

[10] "The Big Switch: Powering Canada's Net Zero Future" (4 May 2022), online (pdf): *Canadian Climate Institute* <www.climateinstitute.ca/wp-content/uploads/2022/05/The-Big-Switch-May-4-2022.pdf>.

[11] *Supra* note 2.

in escalating prices. Moreover, the Statement further admits that:

> "*Manufacturing costs for ZEVs tend to be higher than those for non-ZEVs and are expected to be passed directly to consumers who switch to ZEV purchases in the regulatory scenario, although price differences are expected to decrease over time.* [Emphasis added].[12]

Hence, the assumed incremental cost of $15.3 billion to achieve 100 per cent turnover to electric vehicles is most probably highly conservative. While price reductions among some EVs are presently occurring, they tend to be made for higher-end, expensive models. Another factor is that it generally costs more to insure EVs than traditional vehicles (some data indicate rates as much as 27 per cent higher). Even more concerning is the cost for vehicle repair. Because EV's currently represent but a small fraction of vehicles on the road, insurance industry-wide data are far from definitive. However, trends are emerging that show low-emission automobiles are increasingly being written off after incurring minor damage. Battery packs can cost tens of thousands of dollars and represent up to 50 per cent of an EV's price tag, often making replacement uneconomic. Because battery packs have been incorporated as "structural" components of these vehicles, insurers appear to be facing few options to assess, repair or certify battery packs damaged after even minor accidents. Not only does this undercut imputed economic gains from EVs, there is the emerging spectre of significant environmental costs as damaged battery packs are sent to scrapyards. This constitutes an expensive gap in the presumed "circular economy." Worse, EV battery recycling facilities, where damaged or discarded battery packs can be stored in specialised containers, are either non-existent, or in their infancy.

AN EXAMINATION OF ALLEGED COST BENEFITS FROM NET ZERO POLICIES

The passage of the *US Inflation Reduction Act* (*IRA*) with its material decarbonization economic initiatives has caused a global reaction among trade partners, including Canada.[13] In a parallel development the Trudeau government announced C$80 billion in tax credits for clean technology over the next decade, including C$25 billion for investments in clean electricity. Notwithstanding that the US is off-target to reach the goal of a 50 per cent reduction in greenhouse gas emissions by 2030 (based on 2005 levels), western governments continue to accelerate policies aimed at achieving the transition to a net zero economy.

Nevertheless, western governments including Canada and the EU have embraced the concepts of "build back better" associated with a "green economic recovery," largely based on attempts to reduce GHG emissions from all sources. For instance, in addition to pending and existing regulatory proposals, the 2023 Canadian budget[14] expanded measures first announced in the 2022 Fall Economic Statement to include new incentives:

- Clean Electricity Investment Tax Credit
- Clean Technology Manufacturing Tax Credit
- Clean Hydrogen Investment Tax Credit
- An expanded Carbon Capture, Utilization, and Storage Investment Tax Credit
- Clean Technology Investment Tax Credit

These policies, which some believe embrace questionable concepts of central planning, have recently been brought into question by the National Bureau of Economic Research

[12] Chris Randall, "Ford raises prices for the F-150 Lightning by up to $8,500", (10 August 2022), online: *electrive.com* <www.electrive.com/2022/08/10/ford-raises-prices-for-the-f-150-lightning-by-up-to-8500/#google_vignette>.

[13] Maura Forrest, "Canada's C$80B response to U.S. clean energy push: 'We will not be left behind'", (29 March 2023), online: *Politico* <www.politico.com/news/2023/03/29/canada-u-s-clean-energy-ira-00089284>.

[14] "Budget 2023 A Made-in-Canada Plan: Strong Middle Class, Affordable Economy, Healthy Future" (last modified 28 March 2023), online: *Government of Canada* <www.budget.canada.ca/2023/home-accueil-en.html>.

(NBER)[15] with a study that concludes that, for the US at least, these policies may impose significant costs on their economy. Given the acceleration of GHG-reduction legislations in Canada, measures that include not just a carbon tax but numerous other GHG-reduction initiatives such as regulatory standards for clean fuel, electrical generation and the proposed EV Regulations, this study may also have material implications for Canada. It concludes that for the US the annual recurring costs of green policies could reach USD $483 billion per year with forecast real GDP and consumption "*2–3 per cent less in the long run if policies are implemented as stated, underscoring the opportunity costs of achieving green objectives when resources might be more efficiently deployed*".[16] The authors also warn of the perils associated with implementation of policies that embrace high ideals without the benefit of well-considered, realistic analyses:

> *"Political platforms are not detailed policy proposals, but directional documents intended to provide a vision of political leadership. Many details are filled in later, if voters invest their votes in the vision articulated in the platform. The analysis presented here highlights the importance of that policy design and implementation step. If implemented literally without adjustment or nuance, the bold transformation of the energy system articulated in the Biden plan, or variants more closely adhering to the Green New Deal, promise substantial economic opportunity costs."*[17]

There are growing signs that the economic analyses employed to justify the material capital expenditures behind these policy goals may be misleading, if not misplaced. For instance, in face of continued assertions of a net benefit derived from the Canadian federal fuel charge,[18] Canada's Parliamentary Budget Officer recently reported that:

> *"When the economic impact is combined with the fiscal impact the net cost increases for all households, reflecting the overall negative economic impact of the federal fuel charge. Taking into consideration both fiscal and economic impacts, we estimate that most households will see a net loss, paying more in the federal fuel charge and GST, as well as receiving lower incomes, compared to the Climate Action Incentive payments they receive and lower personal income taxes they pay (due to lower incomes).*
>
> *Given the structure of the federal fuel charge, the overall budgetary impact will effectively be limited to the economic impact of lower income tax revenues. We estimate that the federal fuel charge will reduce the budgetary balance (that is, increase the budgetary deficit) by $1.8 billion in 2023–24 and ultimately by $7.1 billion in 2030–31."*[19]

Given the magnitude of deficit spending on these "transition" programs, all of which directly impact the energy sector, the Parliamentary Budget Office report should raise concerns, not just about the validity of the presumed cost benefits of these regulatory initiatives, but the value of accelerating, much less continuing with, these expenditures:

> *"Canada has followed through on its Paris commitments over the past seven years by taking action, investing over $120 billion to reduce emissions, protect the environment, spur clean technologies and innovation, and help*

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[15] Timothy Fitzgerald & Casey B. Mulligan, "The Economic Opportunity Cost of Green Recovery Plans" (2023) National Bureau of Economic Research Working Paper No 30956.

[16] *Ibid*

[17] *Ibid.*

[18] Spencer Van Dyk "Guilbeault defends carbon price, says on average, households will pay more but rich will shoulder burden", (2 April 2023), online: *CTV News* <www.ctvnews.ca/politics/guilbeault-defends-carbon-price-admits-average-household-will-pay-more-even-after-rebates-1.6338974>.

[19] Office of the Parliamentary Budget Officer, *A Distributional Analysis of the Federal Fuel Charge under the 2030 Emissions Reduction Plan*, (30 March 2023), online: <www.pbo-dpb.ca/en/publications/RP-2223-028-S--distributional-analysis-federal-fuel-charge-under-2030-emissions-reduction-plan--analyse-distributive-redevance-federale-combustibles-dans-cadre-plan-reduction-emissions-2030>.

> *Canadians and communities adapt to the impacts of climate change."*[20]

In this regard the Fraser Institute cautioned:

> *"According to the government's 271-page emissions-reduction plan: "Putting a price on pollution is widely recognized as the most efficient means to reduce greenhouse gas emissions." The obvious corollary — other policies, such as $120 billion in spending, are widely recognized as relatively inefficient and therefore unnecessarily expensive means to reducing greenhouse gas (GHG) emissions."*[21]

The Canadian government's intent to attain net zero GHG emissions by 2050 through the use of multiple policy options, including clean-fuel standards and bans on single-use plastics has been shown not just to be costly but perhaps unattainable. Others[22] have cautioned that, even if its Canadian "net-zero" policies were effective, the economic pain would be offset by accelerating emissions from China and India. China alone has approved plans to add a total 8.63 gigawatts (GW) of new coal power plants in the first quarter of 2022, with emissions that are projected to swamp all of Canada's efforts to achieve "net-zero."

Meanwhile, the Canadian government, echoing most economists who maintain that pricing mechanisms like a carbon tax are most efficient way to reduce GHG emissions, are nonetheless pursuing additional policies. A recent (April 1, 2023) example are new guidelines requiring concrete of more than $10 million used in federal projects to be "10 per cent less GHG-intensive" than a regional average.[23] Once again, the government has supplied no cost-benefit analysis to justify these measures.

Even when economic analyses for alternative energy projects are provided, there are indications that the modeling used in the projections may be questionable. Recent studies[24] in the UK that compared governmental price modelling against actual results from wind producers have found "surprising irregularities." Although the UK's Department of Energy predicted that capital expenditure per MW of offshore wind would fall by more than 50 per cent between 2018 and 2025 and that operation and maintenance costs would fall by a factor of four (with average output at 51 per cent installed capacity over the course of a turbine's lifetime), it has been shown that the cost of installing and operating windfarms actually increased throughout the 2010's. In fact, the operation costs per MW for new offshore turbines quadrupled between 2008 and 2018 while capital expenditures doubled.

More broadly, the Manhattan Institute has challenged even the most basic assumptions that underlie claims that wind, solar, and EVs have attained cost parity with traditional energy sources, or other transportation modes:

> *"Even before the latest period of rising energy prices, Germany and Britain, both further down the grid transition path than the U.S., have seen average electricity rates rise 60%–110% over the past two decades. The same pattern is visible in Australia and Canada. It's also apparent in U.S. states and regions where mandates have resulted in grids with a higher share of wind/solar energy. In general, overall U.S. residential electricity costs rose over the past 20 years. But those rates should have declined because of the collapse in the cost of natural gas and coal — the two energy sources that, together, supplied nearly 70% of electricity in that period. Instead, rates have been pushed*

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[20] Environment and Climate Change Canada, Canada's Eighth National Communication and Fifth Biennial Report on Climate Change (2 January 2023), online: <www.canada.ca/en/environment-climate-change/services/climate-change/greenhouse-gas-emissions/fifth-biennial-report-climate-change-summary.html>.

[21] Matthew Lau, "Federal government's climate spending tab excludes costs you'll pay", (8 February 2023), online: *Fraser Institute* <www.fraserinstitute.org/article/federal-governments-climate-spending-tab-excludes-costs-youll-pay>.

[22] Kenneth P. Green, "Federal government continues nonsensical 'net-zero' policy", (27 July 2022), online: *Fraser Institute* <www.fraserinstitute.org/article/federal-government-continues-nonsensical-net-zero-policy>.

[23] Matthew Lau, "Ottawa's new rules for suppliers will concretize greenflation", (30 March 2023), online: *Financial Post* <financialpost.com/opinion/ottawa-new-rules-suppliers-concretize-greenflation>.

[24] Gordon Hughes, *Wind Power Economics: Rhetoric & Reality*, vol 1 (Salisbury, UK: Renewable Energy Foundation, 2020), online (pdf): <www.ref.org.uk/Files/performance-wind-power-uk.pdf>.

> *higher thanks to elevated spending on the otherwise unneeded infrastructure required to transmit wind/solar-generated electricity, as well as the increased costs to keep lights on during "droughts" of wind and sun that come from also keeping conventional power plants available (like having an extra, fully fueled car parked and ready to go) in effect by spending on two grids. None of the above accounts for the costs hidden as taxpayer-funded subsidies that were intended to make alternative energy cheaper. Added up over the past two decades, the cumulative subsidies across the world for biofuels, wind, and solar approach about $5 trillion, all of that to supply roughly 5% of global energy."*[25]

At least in Canada, there appears to be an unmistakable trend among some agencies not to actively examine, or explain, the emerging differences between projected and real-world experience with energy production. Is it possible that this is a consequence of their failing to meet imposed statutory requirements for net zero? Meanwhile, consumers are bearing the costs of mounting electrical and heating bills. In the EU, energy prices reached record levels in 2022 as producer and consumer prices more than doubled.[26] This has forced governments throughout the EU to implement price caps, interventions that are projected to cost more than USD $500 billion.[27] The Bruegel think-tank noted that the European Union and United Kingdom have committed €280 billion ($280 billion) to offset energy price increases to consumers, while the German government announced a €65 billion ($65 billion) aid package for energy costs. In sum, recent energy subsidies in the EU and the UK have reached more than €500 billion.

The inescapable conclusion is that current global increases in emissions from international sources will be more than offset even with the most stringent Canadian reductions in emissions from the transportation sector. Indeed, Canada's global contribution to GHG's is relatively miniscule (less than 2 per cent). Hence, the imputed value of $19.2 billion used for "avoided global damages" in the Statement will be entirely overtaken by rising international emissions, not the least of which will emanate from China and India. In effect, any Canadian aspirations for "climate leadership" by curbing domestic emissions will be trumped by the certain growth in international emissions while material economic and social costs will cascade onto Canadians — with no reductions in global GHG's.

CONCLUSION

Policies for Canadian energy production and transmission, with a sole focus on emissions, are being enacted with scant attention paid to the direct and unpredictable effects on the economy. The proposed EV regulations inadequately consider many factors, not the least of which is the assumption of widespread public acceptance of a significantly altered transportation fleet. Many would consider the regulatory assessment as a veiled attempt to justify policies that are beset with unattainable goals and unpredictable consequences. In short, is this an energy and transportation policy designed to reduce Canadian emissions or to selectively eliminate an entire class of transportation technologies?

Canadian energy policies are being designed and introduced in the absence of valid assessments of their costs and benefits as Federal expenditures and deficits are ballooning. This has left the Parliamentary Budget Office with the unenviable task of producing independent, retroactive assessments of enacted legislation. Even dispassionate observers would probably conclude that Canadian consumers and taxpayers are becoming worse off as a result of these, largely unconsidered, policies. McKitrick provided a clear, but stark, assessment of the consequences of ill-considered energy policies:

> *"In Ontario we are living with the consequences of a series of bad policy decisions made between 2004 and*

[25] Mark P. Mills, "The "Energy Transition" Delusion A Reality Reset", *Manhattan Institute* (30 August 2022), online: <www.manhattan.institute/article/the-energy-transition-delusion>.

[26] Council of the European Union, "Infographic - Energy price rise since 2021" (last modified 28 March 2023), online: *European Council* <www.consilium.europa.eu/en/infographics/energy-prices-2021>.

[27] Anna Cooban & Lauren Kent, "Price of war: UK and EU throw $500 billion at energy subsidies", (8 September 2022), online: *CNN Business* <www.cnn.com/2022/09/08/business/liz-truss-energy-price-cap-europe/index.html>.

> *2014 concerning the electricity sector. Enthusiasm for phasing out coal power and adding large amounts of wind and solar capacity, combined with uncritical acceptance of claims that doing so would create jobs without raising costs, put us on a path of rapidly rising electricity commodity prices relative to competing jurisdictions. The Province of Ontario began subsidizing electricity to stem an exodus of manufacturing and relieve hardships on households. A new report from the CD Howe Institute estimates that these measures now cost the province $6.5 billion annually. This is $700 million more than Ontario spends annually on Long Term Care facilities."*[28]

Canadians, not just the Parliamentary Budget Officer, should be paying attention to energy policy. ■

[28] *Supra* note 6.

NEW ELECTRICITY RATE REFORM IN CALIFORNIA

*Meredith Fowlie**

EDITOR'S INTRODUCTION

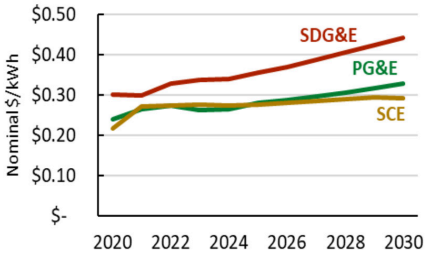
Electric utilities across Canada and the United States have faced significant cost pressures over the last five years related to investments in renewable energy required to meet carbon reduction goals established by federal, provincial and state governments. California is at the top of the list.

California is not alone, however. The wildfire costs California utilities faced were also experienced in Alberta. And the tension between California electric utilities and the solar operators also took place in Canada recently in the feud between the Nova Scotia government and Nova Scotia Power.

This article is a crisp analysis of an innovative new plan to limit the rate increases resulting from the great energy transition. There may be some important lessons for Canadian energy regulators.

THE NEW CALIFORNIA PLAN

California just moved one step closer[1] to changing the way households pay for electricity. If all goes according to these newly proposed plans,[2] Californians will be paying lower electricity prices and an "income-graduated" fixed charge by 2025. The impetus for electricity rate reform? California's retail electricity prices are high and rising. There is a forecasted increase in residential electric rates for all three electric utilities: San Diego Gas and Electric, Pacific Gas and Electric, and Southern California Edison.



Note: An accelerating increase in bundled residential electric rates is forecast for all three IOUs.[3]

We have argued that these prices are too high because we're effectively taxing grid electricity consumption to pay for costs that don't vary with usage (e.g. rising costs of wildfire risk

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* Meredith Fowlie is a professor and Director of the Haas Energy Institute at the University of California at Berkeley. An earlier version of this article was published by the Haas Energy Institute in its monthly Energy Bulletin, see: energyathaas.wordpress.com/2023/04/17/whos-afraid-of-retail-electricity-rate-reform.

[1] Danielle Echeverria, "Californians' Electricity Bills could see huge change if PG&E proposal goes through", (1 June 2023), online: *San Francisco Chronicle* <www.sfchronicle.com/bayarea/article/pge-utility-electricity-bills-restructure-plan-17895445.php>.

[2] California Public Utilities Commission. (7 April 2023) online (pdf): <docs.cpuc.ca.gov/PublishedDocs/SupDoc/R2207005/5911/505748665.pdf>.

[3] Ankit Jain, "Key Takeaways from the CPUC Rates and Costs En Banc Hearing and Update on Affordability Metrics", (10 June 2021), online (pdf): *CPUC* <ww2.arb.ca.gov/sites/default/files/2021-06/cpuc-metrics_sp_kickoff-electricity_june2021.pdf >.

mitigation, compensating wildfire victims, infrastructure costs, public purpose programs).[4] These too-high electricity prices are slowing progress on electrification and straining the pocketbooks of lower-income households.

In response to these challenges, a new California law requires that residential electricity prices be reduced.[5] Revenues not recovered in a per-kWh charge will be collected in a fixed monthly charge that increases with household income. By how much should electricity prices be reduced? How should income-graduated fixed charges be set? These are the issues being debated now.

Under this kind of reform, there will be winners and losers. Most low-income households will "win" reductions in their electricity bills. Households like mine — higher-income households with rooftop solar — are the biggest losers. No one likes to pay more, so some rooftop solar advocates — among others — are pushing back.

We love solar panels. It's amazing that we can charge our electric vehicle (EV) with homemade kWhs. Anyone who wants to invest in generating their own solar electricity should be able to do so. But the way we currently pay for electricity is broken and needs fixing. So, this article offers a pro-solar — and pro-rate reform — perspective.

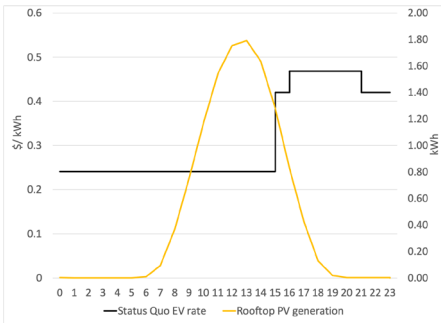
WHAT DOES ROOFTOP SOLAR HAVE TO LOSE?

Before diving into the specifics of the different proposals on the table, it's worth reviewing how we currently compensate rooftop solar generation in California, why the status quo is broken, and what the utility-proposed electricity rate structures would do to a solar photovoltaic (PV) owner's electricity bill.

Status quo rooftop solar compensation

Last year, our solar panels generated more than 4,300 kWhs. When we consumed our homemade solar electricity, we avoided paying the retail rate for grid electricity. Under net metering, when we exported our excess supply back to the grid, we were compensated at the retail rate minus a charge of about 2 cents/kWh. What we "earn" from our solar exports, offsets most of the cost of the grid electricity we consume when the sun goes down.

The graph below plots our average hourly solar PV production in 2022 and the time-of-use EV rate averaged across hours of the year. Accounting for non-bypassable charges, our solar PV generation reduced our bills by over $1,200 in 2022!



Note: The black line represents our retail electricity price averaged across hours of the year. We're on a PG&E EV rate that features low off-peak rates to promote vehicle charging during off-peak hours. The yellow line summarizes our hourly PV generation which we can track on mysunpower.com.

What's wrong with this picture?

In California, we use retail electricity prices to raise revenues to cover a long list of non-incremental expenses I described earlier. This means that only a fraction of the savings I see on my bill are savings that my solar panels are actually generating for the world. A significant fraction of my cost "savings" are just cost-shifted onto someone else's bill since these costs still need to be paid.

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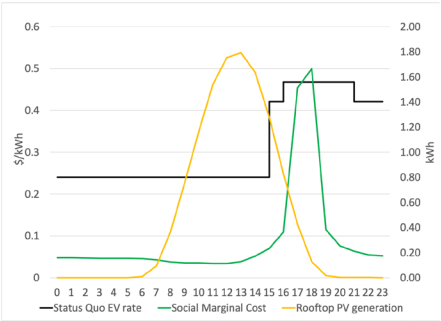
[4] Energy Institute at Haas, UC Berkeley, "Designing Electricity Rates for An Equitable Energy Transition", (23 February 2021), online (pdf): <www.next10.org/sites/default/files/2021-02/Next10-electricity-rates-v2.pdf>; see also Energy Institute at Haas, University of California, "Paying for Electricity in California: How Residential Rate Design Impacts Equity and Electrification", (22 September 2022), online (pdf): <www.next10.org/sites/default/files/2022-09/Next10-paying-for-electricity-final-comp.pdf>.

[5] US, AB 205, *Committee on Budget. Energy*, 2021-22, Reg Sess, Cal, 2021, ch 61 (enacted).

The California Public Utilities Commission (CPUC) uses the E3 Avoided Cost Calculator to estimate the social benefits generated by distributed energy resources.[6] These hourly estimates include avoided fuel costs, benefits associated with reduced greenhouse gas emissions, avoided methane emissions, avoided marginal capacity costs, etc. If you compare these 2022 hourly Social Marginal Cost (SMC) values against my retail rate, the contrast is striking.

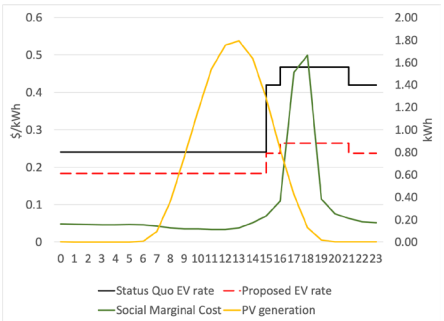


Note: The social marginal cost (SMC) numbers come from this 2022 Distributed Energy Resources Avoided Cost Calculator[7]

During the hours of the day when the sun is shining, my retail price (black) is well above these social marginal cost estimates (green). Valuing our 2022 hourly solar PV production using these SMC estimates adds up to around $185 in avoided costs, far below the $1200 that our family saves. (E3 is working to incorporate some higher estimates of avoided emissions values — but these changes should have a limited impact during hours when my solar panels are cranking).[8]

How would proposed rate reforms change this picture?

PG&E recently released a retail rate reform proposal that would make two important changes to my electricity bills.[9] First, my hourly retail rate would be lowered by more than 30 per cent (averaged across hours). Second, I would pay an income-graduated fixed charge of $92 each month (very low-income households would pay only $12). The graph below shows the EV-Time-Of-Use rate that PG&E has proposed.



Note: The proposed EV2 rate is summarized in red. The original version of this post took numbers from Table 1–4 of the PG&E proposal. These were incorrect and the figure shows the corrected numbers.

These proposed changes will reduce my solar PV "savings" and increase my monthly electricity bills. (The Net Energy Metering reform that just took effect will not change this picture for me and everyone else who already has solar).[10]

Reduced compensation for my solar generation means fewer fixed costs are shifted onto solar have-nots. This seems only fair. I benefit from

[6] California Public Utilities Commission " 2022 ACC Documentation" (22 June 2022), online (pdf) : *CPUC* <www.cpuc.ca.gov/-/media/cpuc-website/divisions/energy-division/documents/demand-side-management/acc-models-latest-version/2022-acc-documentation-v1a.pdf>

[7] "Avoided Cost Calculator for Distributed Energy Resources", online: *Energy and Environmental Economics* <www.ethree.com/public_proceedings/energy-efficiency-calculator>.

[8] California Public Utilities Commission, "Societal Cost Test Impact Evaluation", (January 2022), online (pdf): *CPUC* <www.cpuc.ca.gov/-/media/cpuc-website/divisions/energy-division/documents/integrated-resource-plan-and-long-term-procurement-plan-irp-ltpp/2019-2020-irp-events-and-materials/societal_cost_test_impact_evaluation.pdf>.

[9] California Public Utilities Commission, (April 2023) online (pdf): *CPUC* <docs.cpuc.ca.gov/PublishedDocs/SupDoc/R2207005/5903/505736526.pdf>.

[10] Energy institute at Haas, "Can Net Metering Reform Fix the Rooftop Solar Cost Shift? ", (25 January 2021) online: <energyathaas.wordpress.com/2021/01/25/can-net-metering-reform-fix-the-rooftop-solar-cost-shift>.

wildfire risk reduction like everyone else. I also depend on power system infrastructure to export the solar electricity I don't consume and to keep my lights on when the sun goes down.

Although I don't love the idea of sending more money to PG&E every month, I see this bill increase as a feature — not a bug — of a reform that aims to recover power system costs more efficiently and more equitably. But not everyone agrees with me…

IN DEFENSE OF THE STATUS QUO?

Under the PG&E proposal, my retail electricity rates would be reduced by over 30 per cent. But there are other proposals on the table that advocate for much smaller rate reductions. The Solar Energy Industries Association (SEIA), for example, is recommending that the price per kWh be decreased by only 2 per cent.[11]

Here are the key arguments in defense of keeping retail prices higher (as I understand them).

1. ***We should play by the rules:*** SEIA cites an earlier CPUC decision that fixed charges should only include costs "that are caused simply by the customer's presence on the system." By this narrow definition, fixed charges include only the costs of connecting me to the grid and sending me a complicated utility bill every month. This definition excludes billions of dollars of costs that do not vary with incremental usage (e.g. wildfire mitigation, some power system infrastructure, public purpose programs).

If this is, in fact, the rule on the books, it needs to be changed. Adhering to it locks us into inefficient and regressive retail electricity pricing.

2. ***High prices promote conservation and efficiency:*** The SEIA proposal argues that modest reductions in rates would "retain a strong incentive to conserve energy and use it efficiently."

This argument is misguided. If we are concerned about environmental conservation and efficient energy use, we should be working to accelerate the efficient *electrification* of homes and vehicles. Keeping electricity prices higher than SMC does the opposite by discouraging efficient fuel switching.

3. ***High retail electricity prices support investments in rooftop solar:*** The Sierra Club is recommending that, if rate reforms "unreasonably impair" the payback period for solar and storage, cost elements should be removed from the income graduated fixed charge.

Rooftop solar adopters should be compensated for the benefits they generate for the system. However, under the current rate regime, we are increasingly *over*-compensated. Keeping electricity rates high to keep my solar payback period artificially short would prioritize rooftop solar over other critical objectives such as electrification efficiency, cost-effective grid decarbonization, and affordability.

SOLAR LOSERS, DON'T BE SORE LOSERS

California's retail electricity rates are badly broken. The status quo rate regime distorts incentives, discourages electrification, and disproportionately burdens lower-income households. Absent reforms, the situation is only going to get worse as more high-income households invest in rooftop solar to reduce their utility bills, exacerbating the cost shift onto solar-have-nots.

California now has an opportunity to course correct. Lowering electricity rates and raising revenues with an income-graduated fixed charge will reduce barriers to efficient electrification and shift cost burdens off of households that can least afford to pay. Fellow solar losers, we hope we can all take a step back and recognize this as a big win for California and the climate. ■

[11] California Public Utilites Commission (7 April 2023), online (pdf) : *CPUC* <docs.cpuc.ca.gov/PublishedDocs/SupDoc/R2207005/5907/505462900.pdf>.

"THE UNPOPULAR TRUTH": A COUNTER TO THE GREAT GREEN TRANSITION

*Kenneth A. Barry**

When it comes to *The Unpopular Truth: About Electricity and the Future of Energy* (2022),[1] it's important to clarify first what it is — and isn't. This slender volume (123 pages plus 25 pages of appendices) by Dr. Lars Schernikau and Prof. William H. Smith is a blunt, straight-from-the-shoulder explication of the authors' concerns about over-relying on renewable energy technologies — a trend that, they fret, has been overhyped in political, green-advocacy, and media circles. The book tends to be technical in tone and substance, heavily infused with facts and figures, electricity physics principles, and illustrative graphs. With such spareness — stripped of anecdotes or digressions that might pad the oral delivery of similar material — it reads at times like a synopsis or study aid for a college lecture course. Eschewing the notion that "a spoonful of sugar helps the medicine go down," *The Unpopular Truth* is pretty much the straight medicine.

The advantage of such a barebones, bordering on pile-driving style is that it lends a certain gravitas to the business at hand. And that business is to divert the seemingly headlong march of advanced Western societies towards intermittent but purportedly "clean" energy technologies. The foreboding tone of *The Unpopular Truth* keys on the authors' worry that too heavy dependency on wind, solar, "green" hydrogen, and similar sources of power ignores the physics of the grid and myriad technological, materials sourcing, and efficiency hurdles such dependency entails. The authors also maintain that the full, life-cycle costs of renewables have been grossly underestimated to make them seem both simpler and more competitive vis-à-vis conventional thermal energy.

Dr. Schernikau is identified as an energy economist and commodities trader based in Switzerland and Singapore, while Smith is a professor of earth and planetary sciences at the McDonnell Center for Space Sciences at Washington University in St. Louis, Mo. Clearly, they know a thing or two about energy production and delivery, on both a regional and global scale. In a foreword, Schernikau disclaims any political agenda:

> Reliable and affordable access to energy should never be political. Unfortunately, energy has been misused by both sides of the political spectrum for exactly that, political agendas. It should be [in] any government's interest to have a good energy mix, reduce dependencies, ensure affordability, reliability, and of course limit the environmental footprint. Unfortunately, history is full of examples of exactly the opposite.[2]

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* Kenneth A. Barry is the former Chief Energy Counsel of Reynolds Metals Co. in Richmond, Va. and has served as Counsel in the energy regulatory section of Hunton Andrews Kurth's Washington, D.C. office. He has also been a regular contributor to two national energy law publications.

[1] Lars Schernikau & William Hayden Smith, *The Unpopular Truth: About Electricity and the Future of Energy* (Energeia Publishing, 2022).

[2] *Ibid* at 17.

The title, *The Unpopular Truth,* may evoke former U.S. Vice President Al Gore's celebrated 2006 documentary, *An Inconvenient Truth*.[3] While the book does not quarrel directly with Gore's call to action regarding global warming, it does thoroughly interrogate the underlying premises, as well as technical feasibility, of an abrupt transition away from the carbon-based fuels blamed, in no small part, for climate change. Another dead giveaway to the authors' angle is that they consistently enclose the word "renewable(s)" in quotation marks.

Importantly, the authors have a critical take on the notion that Variable Renewable Energy (VRE) — largely wind and solar power — is as economically competitive or as environmentally benign as it is cracked up to be. Their analysis zooms out to holistically examine the entire "life cycle" costs and quantitative challenges involved in extracting and processing the necessary raw materials, as well as manufacturing and installing the equipment necessary on a grid scale to displace fossil fuels — currently the source of about 80 per cent of the world's electric energy — with wind and solar. They also question whether the effort, given the "low energy density" of wind and solar, is worth the candle. The authors' polestar is always "efficiency," and, in their view, VREs are seriously deficient in this regard.

OVERARCHING AIMS

Schernikau and Smith include an "Executive Summary" (somewhat unconventionally located in the rear of the book) that offers a concise inventory of their aims. They characterize *Unpopular Truth* as an "introduction to electric systems and…costs," but with a "macroeconomic 'energy transition' point of view."[4] And indeed, it addresses electric system fundamentals on the one end (*e.g.*, the need for perfect real-time balancing of supply and demand) and the proposed "energy transition" at the other, with a distinct "macro" point of view. The unavoidable downsides of VRE resources, they emphasize, are numerous and include:

- Low energy densities and efficiencies;
- Low, unpredictable electricity production;
- Conversion, frequency conditioning, and transmission inefficiencies;
- High materials input;
- Short [equipment] lifetime; and
- Recycling difficulties and economics.[5]

This parade of practical disadvantages leads, in the authors' view, to "low net energy efficiency" (a measure which they often abbreviate as "eROI").[6]

Storage of excess wind and solar generation when their production is too much for current demand to absorb is frequently hailed, they note, as the remedy for these technologies' intermittency. But the authors throw cold water on this prospect, asserting:

> …[A]ny storage — which always adds complexity and requires an energy transformation…will always further reduce the eROI and material efficiency of an energy system because it costs or "wastes" energy. However, no grid-scale, long-term storage solution will truly solve the energy problem.[7]

The Executive Summary also broaches the hot topic of emergent geopolitical threats to energy security. The authors observe that 2021 was a watershed year in this debate, when "a shortage of energy raw material supply, insufficient and erratic electricity production from wind and solar, and geopolitical changes" translated into "high prices and volatility in major economies."[8] These points most obviously pertain to the Ukraine invasion by energy superpower Russia

[3] *An Inconvenient Truth* (Paramount Classics 2006) [Director: Davis Guggenheim].

[4] *The Unpopular Truth: About Electricity and the Future of Energy*, *supra* note 1 at 125.

[5] *Ibid* at 126.

[6] *Ibid*.

[7] *Ibid*.

[8] *Ibid* at 125.

and the ripple effects in Western Europe. But the dark shadow of geopolitics is also cast by China in the authors' telling, because "China dominates almost all 'green' raw material processing supply chains, including critical solar PV, wind, and EV production."[9] Here, the book stresses how a rapid transition from fossil fuels to cleaner technologies would give the unpredictable Chinese high cards it otherwise wouldn't have in hand:

> Energy security is about the supply of energy raw materials — namely oil, coal, gas, and uranium — and now also about who controls the supply of short-lifetime 'renewable' energy production capacity and consuming equipment.[10]

Another critical thesis advanced by *Unpopular Truth* is that mid-century "Net Zero" pathways delineated by government institutions rely on an understatement of future demand. These rosy scenarios banking, as they do, on pervasive energy conservation in developed economies soft-pedal, in the authors' view, the growth in electricity demand coming from three distinct drivers: (1) improving standards of living in underdeveloped countries; (2) overall population growth; and (3) the policy of "electrifying" energy usages historically served by direct burning of fossil fuels.[11] Their bottom line flatly rejects any expectation that renewable energy can even come close to meeting consumer demands in the approaching decades:

> It is prudent to assume that wind and solar alone will not be able to generate enough electricity to match the expected total energy demand, and it would be inadvisable to force its grid-scale adoption. It goes without saying that any loss of 'renewable' energy due to conversion for storage or transportation is inefficient, will contribute to warming our biosphere, and has to be avoided at all costs.[12]

Extracted in this manner from the "Executive Summary," such statements may seem starkly conclusory as well as irreconcilably at odds with the consensus of system planners and government policymakers propelling the movement away from coal, natural gas, and oil. Undoubtedly, they are at odds; but in fairness, it should be noted that the authors offer a plethora of data, charts, scientific concepts, and technical study citations to undergird such "unpopular" contentions. They're not, in short, just hurling down thunderbolts from Mount Olympus.

ENERGY SHORTAGES ON THE HORIZON

The bleakness of the authors' outlook, assuming currently ambitious national energy transition policies aren't revised, is nowhere more apparent than in their tableau of "logical economic consequences" which "net zero" pathways will allegedly inflict on societies. They predict that:

- "Widespread adoption" of renewable energy would "reduce humanity's net energy efficiency below the level critical to sustaining our present advanced civilization"; and
- Storage solutions to capture wind and solar generation in periods of excess can't be expected to rescue the situation because "no viable, long-term, grid-scale energy shortage solution has yet been found."[13]

The book illustrates these predictions with citations to relatively recent energy system stress in economically developed regions. In late 2021 and into 2022, articles in mainstream media began popping up about shortages of electricity or gas — and the concomitant ballooning of energy costs.[14] The impacts on industries dependent on competitive energy costs as well as on small retail customers hard-pressed to pay their utility bills are noted in these articles, excerpts of which are briefly quoted in this chapter. The section is capped with this sobering observation:

> **We have shown why the 'energy transition' to variable 'renewable' forms of energy such as wind and**

[9] *Ibid* at 127.

[10] *Ibid*.

[11] *Ibid* at 102–103.

[12] *Ibid*.

[13] *Ibid* at 105.

[14] *Ibid* at 108–109.

> **solar will result in higher electricity costs.** Energy-transition-supporting strategy consultant McKinsey… confirms and also summarizes: 'A Net-Zero transition would have significant and often front-loaded effect on demand, capital allocation, costs, and jobs' [emphasis in original].[15]

Accompanying this warning is a section documenting how capital investment in conventional generation has dwindled while Western countries — Germany is this chapter's poster child — have overseen massive investments in wind and solar, leading, the authors maintain, to critical energy shortages already emerging in this decade. The book then suggests that developed nations will have little choice but to reverse the tide, quoting a December 2020 study declaring that "by 2030, investment levels [in oil and gas] will need to rise by at least US$ 225 billion from 2020 levels to stave off a crisis."[16]

BUT WHAT ABOUT GLOBAL WARMING?

With concerns about too much CO_2 from power and industrial sources in the atmosphere driving climate change, Schernikau and Smith can't ignore the elephant in the room. And they don't, at least not entirely. They first enter a general disclaimer — *viz.*, "It is not the subject of this book to quantify the cause or impacts of a warming planet"[17] — but proceed to include some broad strokes to combat the popular notion that a massive, precipitous transition to non-carbon electricity sources is warranted.

Their approach is rather more oblique than head-on. They don't deny that the planet is warming or that CO_2 emissions from human activities have something to do with it. But they counter with several arguments. Besides noting that the earth has been warming since well before modern, industrialized civilization began amping up greenhouse gas (GHG) emissions, they suggest that energy consumption itself emits heat — warming the "biosphere" — regardless of its production method. Quoting from a study, they state:

> 'Climate neutrality does not come from decarbonized economies,' since the consumed energy ends up in high-entropy, low-value heat (see Chapter 3.3) which warms our biosphere. The more inefficient our energy systems are, logically, the more we warm our planet to utilize the same amount of useful energy.[18]

In addition to implying, in this manner, that switching away from fossil fuels may not get you very far in terms of reducing planetary warming, the authors observe that CO_2 and GHG concentrations in the atmosphere vary over time and are driven by non-human as well as human causes.[19] It is therefore difficult, they posit, to sort out how much of the observed warming in the late 20th and early 21st centuries derives from human activities. They also cite Steven Koonin's 2021 book, *Unsettled*, for the proposition that climate models attempting to predict the future trajectory of temperatures if GHG emissions aren't abated disagree considerably among themselves.[20]

Another way the book casts doubt on the thesis that the earth is careening towards a climate crisis is to raise the "undisputed — though less known" principle that the *temperature impact* of GHG concentration in the atmosphere declines as the amount of concentration increases (in other words, the global temperature impact of mounting emissions is not linear)[21]. But the authors insist, above all, that the enormous financial commitments being lined up to arrest climate change — they cite estimates of the cost ranging from $3–4 trillion per year to over $9 trillion per year in U.S. dollars — are being spent "misguidedly," given the uncertainty as to

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[15] *Ibid* at 109.

[16] *Ibid* at 106. The 2020 study is by the Boston Consulting Group and the International Energy Forum.

[17] *Ibid* at 111.

[18] *Ibid* at 112. Readers will note the scientific flavour of such arguments as well as the authors' oft-repeated emphasis on "efficiency" as the hallmark of a sound energy production and delivery system viewed holistically.

[19] *Ibid*.

[20] Kenneth A. Barry, "Review of Steven Koonin's *Unsettled*" (2022) 10:1 Energy Regulation Q, online: *ERQ* <www.energyregulationquarterly.ca/book-reviews/review-of-steven-koonins-unsettled1>.

[21] *Ibid*.

why "the climate has warmed and cooled over the past millennium" and the questionable (in the authors' eyes) "assumption that the entire putative warming over the past 150 years is due to human actions…"[22]

A "REALISTICALLY" SUSTAINABLE ENERGY FUTURE

The book's final chapter is mostly a tease. The authors don't have a blueprint for how to get to get to the Promised Land of sustainability beyond fossil fuels. They merely point in the direction: the future, they say, lies in "possibly a combination of fusion or fission, solar, tidal, geothermal, or presently unknown energy source[s]…It would likely harness the power of the nuclear force, the power of our planetary system…and the energy from within our planet."[23] But, they caution:

> "It will have little to do with today's wind and photovoltaic technologies due to the physical limits of energy density…and — mostly importantly, their intermittency."[24]

They also recommend investment in energy system education and basic research.[25]

In the meantime, the authors take one last lick at the imprudence, in their view, of an energy policy that neglects security and affordability of supply — two critical policy goals — by devoting itself almost exclusively to a third goal, environmental protection, enabled by "decarbonization…replacing fossil fuels with net energy inefficient wind and solar".[26] They also reprise their warning that cost estimates for generation focusing on the *levelized cost* of wind and solar (versus their counterpart conventional sources of power) miss the forest for the trees. Schernikau and Smith champion another, broader measure — labeled the "*full cost of electricity*" — that takes into account the entire life cycle and value chain of wind and solar, including their space requirements and back-up costs.[27]

CONCLUSION

One cannot help but be impressed by the earnestness of the authors' concerns about energy policies fixated on radically shrinking the role of fossil fuels in the energy mix. Of course, much of *The Unpopular Truth's* argument goes against the grain of a great deal of contemporary thinking by experts and policymakers, in and out of government. Schernikau and Smith would suggest there is a lot of *wishful* thinking underlying the more popular versions of our energy roadmap to the future.

What readers can do is to reflect on whether the authors' deep reservations about heavy reliance on intermittent energy technologies deserve more visibility and debate within the expert communities qualified to weigh in on them. At the least, the authors have presented a *prima facie* case for deliberating more thoroughly, and with traditional scientific skepticism, the engineering foundations and calculations underlying advocacy for a full-on "renewables" transition. *The Unpopular Truth*, like most such books, favours but one side of the argument. Getting to the truth, unpopular or not, requires maximum ventilation.

There are several ways the current edition of the book could be improved. Some of the charts and graphs, however intriguing, are too dense and finely printed to be readily legible. Occasionally, passages descend into technical concepts or jargon that may elude a number of readers. But for the most part, the writing is coherent and sufficiently simplified for a general audience with some energy issues background to digest. And if the narrative often gets repetitious, the authors probably felt it was vital to hammer home their most salient points in this way. ■

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[22] *Ibid* at 116. See in an adjacent argument, the book suggests that EU leaders may have been better informed to have declared "coal and nuclear" as acceptably "green" technologies rather than natural gas generation, since (they allege) methane escaping from the LNG value chain is responsible for more GHG impact than CO_2 at 117.

[23] *Ibid* at 122.

[24] *Ibid*.

[25] *Ibid*.

[26] *Ibid* at 119.

[27] *Ibid* at 120. The book does not, however, undertake the very complicated task of developing and comparing the "full cost of electricity" for various fuel choices. That is left for another day.

CARBON CHANGE: CANADA ON THE BRINK OF DECARBONIZATION, DENNIS MCCONAGHY, DUNDURN PRESS TORONTO, 2022

*Rowland J. Harrison, K.C.**

In his 2019 book *BREAKDOWN: The Pipeline Debate and the Threat to Canada's Future*,[1] Dennis McConaghy argued that, despite the polarization that has emerged in the climate policy debate, Canada "can and must, find a consensus that balances credible and proportionate climate policy."[2] Three years on, it is clear from McConaghy's most recent book,[3] *CARBON CHANGE: Canada on the Brink of Decarbonization*, that, in his view, Canada is far from having achieved that balance.

It is to be emphasized at the outset that McConaghy is no climate change denier. On the contrary: "Climate change risk is real and serious…and it is clearly attributable, for the most part, to human activity."[4]

However, he is just as unequivocal that the current focus of climate policy on "decarbonization" — meaning that "hydrocarbons could no longer be produced or consumed"[5] — should be reconsidered. Rather, he argues, the focus should be on dealing with the risk of climate change, applying a cost/benefit analysis "predicated on carbon pricing set via carbon taxes on emitted GHGs and applied consistently across the world's developed economies."[6] McConaghy makes a convincing case.

First, he takes aim at the United Nations (UN) process directed at reducing the concentration of greenhouse gases (GHGs) in the atmosphere. That process allocates targeted emissions reductions to those developed countries that are major emitters, "while allowing others, such as China and India, to be 'free riders'"; the process should be "reinvented."[7] Along the way, he provides a valuable review of the

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[1] Rowland J. Harrison, K.C., "*BREAKDOWN: The Pipeline Debate and the Threat to Canada's Future*, Dennis McConaghy, Dundurn Toronto, 2019" (2019) 7:4 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/book-reviews/breakdown-the-pipeline-debate-and-the-threat-to-canadas-future-dennis-mcconaghy-dundurn-toronto-2019>.

[2] *Ibid* at 5.

[3] See also Dennis McConaghy, "*DYSFUNCTION: Canada after Keystone XL Dennis McConaghy*, Dundurn Toronto, 2017" (2017) 5:2 Energy Regulation Q, online: *ERQ* <www.energyregulationquarterly.ca/book-reviews/dysfunction-canada-after-keystone-xl-dennis-mcconaghy-dundurn-toronto-2017>.

[4] Dennis McConaghy, *CARBON CHANGE: Canada on the Brink of Decarbonization* (Toronto, Ontario: Dundurn, 2022), at 2.

[5] *Ibid* at 1.

[6] *Ibid* at 3.

[7] *Ibid* at 2.

emergence of the UN approach, from the formation of the UN Intergovernmental Panel on Climate Change (IPCC) in 1988, through the Kyoto Protocol of 1997 and the 2015 Paris Accord to the 2021 Glasgow Conference of the Parties, showing how earlier "targets" morphed into "decarbonization." Further, he identifies the impact that these developments in the UN process have had on proposed energy infrastructure projects in Canada, particularly in the period 2019 to March 2020.[8]

Second, McConaghy argues:

> Decarbonization is simply too costly for the risk that the world actually faces. The world would be better off living with some risk of extreme weather events and less probable high-impact discontinuities in global climate.[9]

He notes that the UN process has never spelled out the net cost of decarbonization[10] and points to the conclusion of a 2022 McKinsey Consulting report that reaching net-zero emissions would require nothing less than "a transformation of the global economy."[11]

McConaghy also draws instructive lessons from comparing policy responses to the challenge of climate change to responses to the Covid-19 pandemic, beginning in 2020. He notes that in both cases "independent, unconstrained actions by individuals, businesses, or states can create risk and collateral damage to others — refusing vaccinations in the case of Covid-19; consuming increasing amounts of hydrocarbons in the case of climate change."[12] However, while Covid-19 "poses an immediate risk to virtually all of humanity,"[13] the world accepts the residual risk that results from the realization that zero Covid-19 is not a reasonable objective.[14] He asks: "Can this reality inform living with a 3°C global temperature increase?"[15] He notes that, despite the "florid language" describing climate change as a "crisis," a "catastrophe," a "code red for humanity" and an "existential threat," the IPCC has never explicitly stated that an increase of 3°C would mean human extinction.[16] After reviewing the precedent struck by certain elements of Canada's response to Covid-19, he worries about the potential for 'climate lockdowns' as a logical complement to the primary objective of decarbonization, without analyzing the costs and benefits.[17]

The climate debate is one of the most extreme manifestations of the destructive polarization infecting much of society, imbued with zealotry, intolerance and denial. Clearly, climate change presents a serious global challenge that must be met with a rational, informed response. *BREAKDOWN: The Pipeline Debate and the Threat to Canada's Future* should make an invaluable contribution to formulating such a response. ■

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[8] McConaghy was the TransCanada executive with lead responsibility for the Keystone XL Project, *supra* note 3.

[9] *Supra* note 4 at 41.

[10] *Ibid* at 130.

[11] *Ibid* at 37.

[12] *Ibid* at 120.

[13] *Ibid* at 131.

[14] *Ibid* at 129.

[15] *Ibid*.

[16] *Ibid* at 130.

[17] *Ibid* at 139.