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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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Managing Editors

Rowland Harrison K.C. and Gordon E. Kaiser

Each year since the publication of the first issue in 2013, *Energy Regulation Quarterly* has included an invaluable review of recent "Developments in Administrative Law Relevant to Energy Law and Regulation" by Professor Emeritus David J. Mullan. After a long and distinguished career, Professor Mullan has decided to put down his reviewer's pen.

We are pleased to announce that Professor Paul Daly, Chair in Administrative Law and Governance at the University of Ottawa, has assumed the mantle. Professor Daly's distinguished resume[1] includes numerous publications that have been cited by Canadian courts and administrative tribunals. His award-winning blog *Administrative Law Matters*[2] was the first blog ever cited by the Supreme Court of Canada. His first annual review for *ERQ* is the lead article in this issue.

Developments in energy policy and regulation continue to focus on efforts to adapt to climate change by meeting commitments to reduce greenhouse gas emissions. The impacts of these efforts are felt most immediately by the wide spectrum of stakeholders in the energy production and distribution sectors, which must initially be concerned with regulatory compliance.

Concerns about climate change, however, have expanded beyond immediate impacts to include secondary effects, such as climate-related risks. In "Climate-related Financial Disclosures and Data Challenges: What Does it Mean for Canada's Energy Companies?", Anik Islam *et al.* note that Canada, alongside other G7 and G20 counterparts, has committed to moving towards mandatory disclosures aligned with the recommendations of the Task Force on Climate-related Financial Disclosures (2022) and the International Sustainability Standards Board. As Canada moves towards implementation of these "essential mandates," the authors submit that Canadian energy enterprises will need to understand their own data gaps and challenges. Filling climate data gaps and addressing data-related challenges, however, will require greater collaboration among federal and provincial/territorial governments, regulators, standard-setters, statistical agencies/data providers, businesses and financial institutions.

The most pervasive response to concerns about climate change is of course the "energy transition," away from fossil fuels. The Ontario Energy Board (OEB) and the British Columbia Utilities Commission have recently considered the risk that assets used to serve existing and new customers could become stranded by the transition. In "The Energy Transition, Stranded Assets, and Agile Regulation", Gordon Kaiser (Managing Editor of *ERQ*) compares the two decisions and observes that both faced three central questions:

1. Is the demand for natural gas going to decline in the future as a result of the energy transition?

2. Will there be stranded assets?

3. What steps should regulators take to reduce the stranded assets?

Ian Mondrow's article "Why Bother with an Independent Energy Regulator?" reviews the OEB decision and questions the reaction of the Minister of Energy that he was "extremely disappointed," arguing that the conclusions

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[1] Professor Paul Daly holds the University Research Chair in Administrative Law & Governance at the University of Ottawa. See online: <www.uottawa.ca/faculty-law/common-law/faculty/daly-paul>.

[2] Paul Daly, *Administrative Law Matters*, online: <www.administrativelawmatters.com>.

expressed in the Minister's statement were inconsistent with the facts and the determinations made by the OEB.

The Canadian government's previously-announced policy on mandating a transition to zero emission vehicles (ZEVs) has now been implemented with the promulgation in December of amendments to the *Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations.* Beginning with the new model year 2026, the amendments require manufacturers and imports to meet minimum EV sales targets, increasing by specified percentages each year until 100 per cent of new sales are required to be ZEVs in 2035 and beyond. The scheme for implementation "compliance units" for exceeding the specified requirements in any particular year and for offsetting deficits for failing to meet those requirements are discussed in "Regulating Zero Emission Vehicles in Canada: The Final Federal Regulations are Now in Place", by Timothy Cullen *et al*.

Due to its current heavy dependence on hydrocarbons for electricity generation, Alberta faces particular challenges in reducing greenhouse gas emissions. In "Alberta Needs a Stable Policy Approach to Power", Charles DeLand identifies the analysis, consultations and initiative that are underway to help meet the challenges and urges that "Alberta should not roll out any new electricity system changes until it has received and digested all the incoming reports so it can avoid compromising reliability, affordability, and supply security as the system evolves towards net zero."

This issue of *ERQ* concludes with a review by one of our editors of Andrew Leach's *BETWEEN DOOM & DENIAL: Facing Facts About Climate Change*. Leach is a prominent commentator on Canadian climate change issues who holds a joint appointment at the University of Alberta in the Department of Economics and the Faculty of Law. In *BETWEEN DOOM & DENIAL* he "tackles a series of…half-truths, lies by omission, and too-clever-by-half excuses that we, as Canadians, deploy when talking about climate change." The real value of the work, however, is found in Leach's discussion of the challenges of planning a just transition: "Economic transition will be painful: there will be upheaval, there will be regional pain, and there will be people who never recover." ■

2023 DEVELOPMENTS IN ADMINISTRATIVE LAW RELEVANT TO ENERGY LAW AND REGULATION

*Paul Daly**

First, an apology. Readers of this journal will have enjoyed — as I have — Professor David Mullan's annual reviews over the past decade. They are classics of the genre. All good things come to an end, however, and Professor Mullan is winding down operations. Evidently, my advocacy skills need some work, as I failed to persuade him to — at least — continue to contribute the annual reviews to this journal. For that, I apologize. I am grateful to Professor Mullan, who has been exceptionally supportive of my academic endeavours since I arrived in Canada, for seeing fit to hand me the torch; I will do my very best to repay his trust.

Canadian administrative law is, at present, in a relatively settled state. The years since the seminal Supreme Court of Canada decisions of the late 1970s — *Nicholson*[1] and *New Brunswick Liquor*[2] — have been marked by constant, sometimes avulsive, change. With the decision in *Vavilov* in 2019 the Court sought to place the law of judicial review of administrative action on solid ground.[3] This endeavour has been a success: stability has replaced uncertainty; the transparent framework developed in *Vavilov* has allowed courts and counsel to get more quickly to the merits of disputes and make clear arguments.

Since *Vavilov*, the Court's own interventions in administrative law have been sporadic. Pure administrative law appeals have been thin on the ground and most of the Court's administrative law cases in the post-*Vavilov* era have had an extra dimension that needed clarification. *Bell Canada*[4] and *Canada Post*[5] accompanied *Vavilov* in 2019, there were no administrative law decisions of note in 2020 and just one in 2021 (where the Court was also asked to clear up a question about the role of appellate courts in judicial review cases[6]). Late that year, I remarked that the Court had been "virtually silent" on standard of review since *Vavilov*.[7] 2022 featured two decisions: *Abrametz*[8] was mostly a case about unreasonable delay in administrative proceedings

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[1] *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311.

[2] *C.U.P.E. v N.B. Liquor Corporation,* [1979] 2 SCR 227.

[3] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*].

[4] *Bell Canada v Canada (Attorney General)*, 2019 SCC 66, [2019] 4 SCR 845.

[5] *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 SCR 900.

[6] *Northern Regional Health Authority v Horrocks*, 2021 SCC 42.

[7] Paul Daly, "Life After Vavilov? The Supreme Court of Canada and Administrative Law in 2021", CLEBC Administrative Law Conference (18 November 2021) at 1, online: <www.canlii.org/en/commentary/doc/2021CanLIIDocs13538>.

[8] *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29.

and standard of review was mentioned only briefly; and *Entertainment Software Association*[9] was an interesting case which dealt with an issue left undecided in *Vavilov* and, though the analysis departed in some ways from the spirit of *Vavilov*, it was subtle enough that the ramifications are likely to be limited. Last year, there was another esoteric case dealing with language rights and *Charter* values (*CSFTNO*)[10] with a single pure administrative law decision in *Mason*[11] (though for the most part its significance lies in reaffirming the core principles of *Vavilov*ian reasonableness review).

It seems clear that the *Vavilov* simplification exercise has reduced the number of live issues on which appellate courts part company and where the Court's involvement is therefore required. The trend of the Court only hearing cases which have an extra dimension is likely to continue, with pure administrative law cases probably thin on the ground. Sure enough, three of the four administrative law cases currently on reserve undoubtedly have an extra dimension: *Yatar* deals with limited appeal rights and judicial discretion; *York Teachers* addresses the inter-relationship between judicial review and the *Charter*; and *Société des casinos* deals with the application of freedom of association jurisprudence by an expert labour relations tribunal.[12] The last of the quartet is the *Ontario Mandate Letters* case, and even it touches on matters of high constitutional principle (although, in my view, it can be resolved, as it was in the courts below, on standard application of reasonableness review).[13] Stability, therefore, means fewer pure administrative law cases being decided by the Court.

Several implications follow from this relative stability.

First, and most obviously, it means appellate courts become more influential. They are certainly more influential as far as litigants are concerned, as their word is increasingly sure to be the last word. They are probably also more influential in terms of developing the law: evidently, they must work within the *Vavilov* framework (and so the scope for innovation is limited to that extent) but have significant latitude in working out the requirements of reasonableness review in particular domains and, where the correctness standard applies, setting the legal framework particularly in areas of economic regulation.

Second, and relatedly, caution should be exercised before drawing sweeping conclusions from Supreme Court of Canada decisions. As I observed in a 2017 article in the *University of New Brunswick Law Journal*, it can be difficult to distinguish the "signal" from the "noise" in administrative law. Judicial review cases invariably involve the application of general principles to specific areas of law. But a decision intended to resolve an issue in a specific area of law might have implications for the operation of the general principles.[14] This is always true of an apex court that, by definition, is dealing only with questions of national importance and it is especially true at the moment because the general principles of judicial review were settled by *Vavilov*. In short, it is highly unlikely that the Court when resolving an issue in a specific area intends to change the way the general principles operate. A decision by the Court might well be "noise" as far as the general principles are concerned. It is only when there is a "signal" — a clear statement in one decision or an inference from several decisions — that it can safely be said that the general principles have changed. Hence my caution last year in describing the *Entertainment Software Association* and *Abrametz*

[9] *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30.

[10] *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 [*CSFTNO*].

[11] *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*].

[12] *Yatar v TD Insurance Meloche Monnex*, 2022 ONCA 446, SCC File #40348; *Elementary Teachers Federation of Ontario v York Region District School Board*, 2022 ONCA 476, SCC File #40360; *Association des cadres de la société des casinos du Québec c Société des casinos du Québec*, 2022 QCCA 180, SCC File #40123.

[13] *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*, 2022 ONCA 74, SCC File #40078.

[14] Paul Daly, "The Signal and the Noise in Administrative Law" (2017) 68 *University of New Brunswick Law Journal*, online: <journals.lib.unb.ca/index.php/unblj/article/view/29056/1882524241>.

decisions, with my analysis topped and tailed by caveats about "signal" and "noise".[15]

Third, and perhaps most happily, the range of issues to be discussed in a 'year in review' paper is broader. With standard of review enjoying relative stability and the Court's move to a more 'administrative-law adjacent' docket as far as judicial review is concerned, long-neglected topics might rise to prominence. The last year has provided a veritable cornucopia of fascinating administrative law issues around the country, especially in appellate courts. There have been important decisions on the duty to consult,[16] the duty to keep the commencement of legislation under review,[17] administrative independence,[18] the use of artificial intelligence in public administration,[19] the principle that administrative appeal procedures can 'cure' procedural defects,[20] the content of the record on judicial review,[21] and exhaustion of remedies.[22]

With that background in mind, let me turn to the bill of fare in this paper.

In Part I, I will discuss the Supreme Court of Canada's decision in *Mason v Canada (Citizenship and Immigration)*,[23] which has implications across the broad field of administrative law notwithstanding the fact that the specific issue related to immigration. I will touch briefly on the decision in *CSFTNO*, which is unlikely to have long-term implications in the area of energy law but which nonetheless is worth keeping an eye on. I will round out Part I by highlighting some appellate decisions that underscore the importance of responsive justification by all decision-makers, regardless of their status and perception of the stakes: energy lawyers both writing and challenging decisions should take careful note.

In Part II, I will discuss two recent appellate decisions on the scope of regulatory powers, an important topic that caught judicial attention both federally and in Alberta in the past year. Both decisions restate important first principles and, in the Albertan example, ponder significant questions about the authority of past decisions in the post-*Vavilov* era. In this section I will also address an important recent decision of the Federal Court of Appeal on open justice, which is potentially of broad application, a procedural fairness contribution by the Alberta Court of Appeal that is interesting but unlikely to have systemic ramifications and a Supreme Court decision on extraterritorial regulation.

In Part III, I will turn to an issue that is on the Supreme Court of Canada's agenda, namely the impact of a limited right of appeal on a party's ability to seek judicial review.[24] This issue has garnered enormous attention since *Vavilov*, generating significant heat (though not necessarily light). The Supreme Court may or may not speak authoritatively on this issue in an upcoming decision but in the meantime, with the jurisprudence in appellate and first-instance courts accumulating, it seems to me to be an appropriate point at which to take stock. Given the prevalence of limited rights of appeal in Canadian regulatory law this topic is extremely important for energy lawyers.

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[15] Paul Daly, "Future Directions in Standard of Review in Canadian Administrative Law: Substantive Review and Procedural Fairness" (2023) 36:69 *Canadian Journal of Administrative Law & Practice.*

[16] *Roseau River First Nation v Canada (Attorney General)*, 2023 FCA 163.

[17] *Canada Christian College and School of Graduate Theological Studies v Post-Secondary Education Quality Assessment Board*, 2023 ONCA 544.

[18] *McAnsh v Ontario*, 2023 ONSC 3537.

[19] *Haghshenas v Canada (Citizenship and Immigration)*, 2023 FC 464; *Safarian v Canada (Citizenship and Immigration)*, 2023 FC 775.

[20] *British Columbia (Attorney General) v 992704 Ontario Limited*, 2023 BCCA 346.

[21] *British Columbia (Lieutenant Governor in Council) v Canada Mink Breeders Association*, 2023 BCCA 310.

[22] *Viaguard Accu-Metrics Laboratory v Standards Council of Canada*, 2023 FCA 63.

[23] *Mason*, *supra* note 11.

[24] *Yatar v TD Insurance Meloche Monnex*, 2022 ONCA 446, SCC File #40348. See also *Democracy Watch v Canada (Attorney General)*, 2023 FCA 39; *Georgopoulos v Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2023 ABCA 285; *Canada (Attorney General) v Pier 1 Imports (U.S.), Inc.*, 2023 FCA 209.

I will not address, in this paper, the standard of review applicable to regulations,[25] a matter to be debated at the Supreme Court in April, but Professor Mullan comprehensively discussed this subject in a recent issue of this journal, so I will wait patiently to hear what the Supreme Court has to say. I am also counsel for the appellant in one of those cases and have little to add, beyond my written submissions, to what I have already said on the subject. If you will all have me back next year, I will hopefully be able to offer my thoughts on the Supreme Court's decision(s) on this subject.

I. SELECTING THE STANDARD OF REVIEW AND APPLYING THE REASONABLENESS STANDARD

After a hiatus of nearly four years, the Supreme Court of Canada this year applied the reasonableness standard for the first time since *Vavilov* and the companion case of *Canada Post*. The decision in *Mason* is significant as far as the methodology of reasonableness review is concerned, in respect of (1) the need for an administrative tribunal to grapple with submissions decided from the parties; (2) the extent to which implied reasons can support the reasonableness of a decision; and (3) when a reviewing court can consult a statute. I will start, however, by discussing the majority's choice of standard of review, which may sound the death knell for contextual analysis.

SELECTING THE STANDARD OF REVIEW: THE DEATH OF CONTEXT?

Mason is an immigration law case. In the *Immigration and Refugee Protection Act,* s 74(d)[26] permits the Federal Court, having heard a judicial review application about an immigration or refugee matter, to certify a question of general importance for the Federal Court of Appeal to resolve. For years, this provision was interpreted as requiring correctness review on questions of law. As the Supreme Court explained through a rhetorical question in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, "Is it possible that the legislator would have provided for an exceptional appeal to the Court of Appeal on questions of "general importance", but then required that despite the "general importance" of the question, the court accept decisions of the Board which are wrong in law, even clearly wrong in law, but not patently unreasonable?"[27]

In 2015, the Supreme Court abruptly changed course, applying the reasonableness standard to a question of interpretation in *Kanthasamy v Canada (Citizenship and Immigration)*.[28] I do not propose to rake over the coals of this dispute (which is well described by Côté J in her compelling concurring reasons at paras 128–137) but simply to highlight that the approach to the certified question regime has long been a significant source of contention.[29]

Now, of course, the point of departure is the *Vavilov* framework. With colleagues I appeared for the intervener Canadian Association of Refugee Lawyers before the Court in *Mason*. We argued that under the *Vavilov* framework the correctness standard should apply. We leaned heavily on the apparent return to contextual analysis in *Entertainment Software Association*,[30] making legislative intent and rule of law arguments consistent with the approach in *Entertainment Software Association.* I will not repeat the arguments here as they

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[25] *Auer v Auer*, 2022 ABCA 375, SCC File #40582; *TransAlta Generation Partnership v Alberta (Minister of Municipal Affairs)*, 2022 ABCA 381, SCC File #40570. See also *Sul v The Rural Municipality of St Andrews, Manitoba et al*, 2023 MBCA 25; *British Columbia (Attorney General) v Le*, 2023 BCCA 200.

[26] *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[27] *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, at para 43.

[28] *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909.

[29] Paul Daly, "Can This Be Correct? Kanthasamy v. Canada (Citizenship and Immigration), 2015 SCC 61" (11 December 2015), online: *Administrative Law Matters* <www.administrativelawmatters.com/blog/2015/12/11/can-this-be-correct-kanthasamy-v-canada-citizenship-and-immigration-2015-scc-61>; Paul Daly, "Certified Questions, References and Reasonableness: Canada (Citizenship and Immigration) v. Galindo Camayo, 2022 FCA 50" (8 April 2022), online: *Administrative Law Matters* <www.administrativelawmatters.com/blog/2022/04/08/certified-questions-references-and-reasonableness-canada-citizenship-and-immigration-v-galindo-camayo-2022-fca-50>.

[30] Paul Daly, "The Return of Context? Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association, 2022 SCC 30" (9 September 2022), online: *Administrative Law Matters* <www.administrativelawmatters.com/blog/2022/09/09/the-return-of-context-society-of-composers-authors-and-music-publishers-of-canada-v-entertainment-software-association-2022-scc-30>.

are thoroughly and clearly developed by Côté J in her concurring reasons at paras 146–176. Suffice it to say that having put our fingers through a door that was opened by *Entertainment Software Association*, in *Mason*, the door was slammed shut by Jamal J: "recognizing a new correctness category here would conflict with *Vavilov*'s goal of simplifying and making more predictable the standard of review framework by providing only limited exceptions to reasonableness review."[31]

Although I let out a yelp of pain for my injured fingers and the definitive demise of correctness review on certified questions under the *IRPA*, I am not displeased at the overall outcome. *Vavilov* did simplify and clarify the law; rejecting context on the selection of the standard of review was an important part of the simplification and clarification exercise. Our argument for correctness review in *Mason* was narrowly tailored[32] but a firm rejection of contextual analysis will strongly dissuade lower courts from opening up the correctness categories. Indeed, Jamal J did not give an inch on the scope of the existing categories. Certified questions are not, he held, general questions of law of central importance to the legal system by their nature: here, the issue raised on the certified question was "particular to the interpretation" of a discrete provision,[33] as will typically be the case.

This is commendably clear. I am happy to lose the battle over the *IRPA* if it means simplicity and clarity prevail in the wars that have raged for decades in Canadian administrative law.

Nevertheless, we are now in a situation where in its first two discussions of standard of review subsequent to *Vavilov*, the Supreme Court has taken divergent approaches, leaning heavily on context in *Entertainment Software Association*, but lurching the other way in *Mason*. It is, after all, remarkable that a statute that said nothing at all about judicial review or appeals was held in *Entertainment Software Association* to require correctness review but a statute with elaborate mechanisms relating to judicial review and appeal was held in *Mason* not to evidence any sort of relevant legislative intent.

I have the distinct feeling that had *Mason* been heard and decided before *Entertainment Software Association*, the standard of review outcomes would have been reversed. Yet unexplained divergence from one year to another — of just this sort — was one of the ills that led to *Vavilov*. If the Supreme Court wishes to achieve the simplicity and clarity *Vavilov* promised, it needs to pick an approach and stick with it. I hope (for the Supreme Court's sake) that *Mason*'s rejection of context is definitive.

APPLYING THE REASONABLENESS STANDARD: THE METHODOLOGY OF REASONABLENESS REVIEW

The Decision in *Mason*

The standard being reasonableness, Jamal J then turned to the question of whether the decision at issue was reasonable. The particular issue here related to the inadmissibility provisions of the *IRPA*, which determine who may or may not gain status in Canada. Subparagraph 34(1)(e) makes inadmissible anyone "engaging in acts of violence that would or might endanger the lives or safety of persons in Canada". In concrete terms, a finding of inadmissibility will typically lead to deportation from Canada. M was charged with attempted murder after discharging a firearm and injuring two people at a concert at the Canadian Legion in British Columbia. The charges were stayed, however, and the applicant was thus not convicted. The Minister argued — and the Immigration Appeal Division agreed — that the applicant's conduct came within s 34(1)(e). M argued on judicial review that it was unreasonable to interpret s 34(1)(e) as encompassing "acts of violence" which do not occur in the context of terrorism, war crimes or organized criminality, these being the concerns underpinning the inadmissibility provisions of the *IRPA*. There must be, M argued, a national security nexus to s 34(1)(e). Pre-*Vavilov*, the Federal Court (Grammond J) agreed; post-*Vavilov* the Federal Court of Appeal (Stratas JA; Rennie and Mactavish JJA concurring) found that the tribunal's decision was reasonable.

[31] *Mason*, *supra* note 11 at para 53.

[32] See Côté J's concurring reasons. *Ibid* at para 163.

[33] *Ibid* at para 47.

Jamal J held that the tribunal's decision was unreasonable. The starting point for his analysis was the reasons of the tribunal,[34] understood against the need for those reasons to "reflect the stakes"[35]: potential deportation from Canada. From here, he worked out to identify three flaws in the decision which, cumulatively, led to the conclusion of unreasonableness. Although the tribunal had "applied several recognized techniques of statutory interpretation,"[36] its decision could nonetheless not withstand reasonableness review.

First, the tribunal had failed to grapple with M's argument that s 34(1)(e) requires a security nexus because the availability of discretionary relief (from the responsible minister) was narrower for s 34(1)(e) than the relief available for serious criminality and criminality offences (which may lead to inadmissibility under s 36). The logic of M's argument is that the context of the statute indicates that national security crimes are to be treated more seriously than other crimes, but on the opposing interpretation, less serious crimes (indeed, here, one for which there was not even a conviction) would carry the most serious possible consequences. This was a key argument M advanced — and thus "a significant legal constraint on the interpretation of s 34(1)(e)" — but the tribunal did not address it.[37]

The tribunal had also failed to grapple with a related argument about the impact of a finding under s 34(1)(e) on the pre-removal risk assessment to be conducted by the responsible minister before deporting M or a similarly situated person. Again, M's argument was that the statutory scheme would only make sense if the most serious consequences attached to the most serious inadmissibility ground, namely national security but, once more, the tribunal failed to address "this important contextual argument, which…imposed a significant legal constraint."[38]

Second, the tribunal failed to grapple with M's argument that not requiring a national security nexus would lead to absurd consequences that Parliament could not possibly have intended. The broader definition would capture a wide range of ordinary criminal acts, from domestic altercations to bar brawls and schoolyard fights. Then, those who were suspected of committing the acts would suffer the severe consequence of becoming inadmissible to Canada (even though they had not necessarily been convicted by a court of committing the act in question).[39] This would also do an "end-run" around the *IRPA*'s limitations in respect of youth offences.[40] Again, the tribunal should have considered this point, which was not a "minor aspect" of the interpretive context.[41]

Third, the tribunal had failed to consider Canada's international law obligations. Jamal J's analysis is lengthy, but the key point is as follows:

> The IAD's interpretation allows a foreign national found inadmissible under s. 34(1)(e) to be subject to *refoulement* contrary to Article 33(1) of the *Refugee Convention.* On the IAD's interpretation, a foreign national can be deported to persecution once they are found inadmissible under s. 34(1)(e), without a finding that the person poses a danger to the security of Canada or even if they have not been convicted of a serious offence. Such a person would be entitled to the benefit of Article 33(1) of the *Refugee Convention*, as the exceptions under Article 33(2) would not apply: on the IAD's approach to inadmissibility under s. 34(1)(e), there need not be "reasonable grounds" to regard the foreign national as a "danger to the security" of Canada, or for them to have been "convicted by a final judgment of a particularly serious crime".[42]

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[34] *Mason*, *supra* note 11 at para 83.

[35] *Ibid* at para 81.

[36] *Ibid* at para 84.

[37] *Ibid* at para 91.

[38] *Ibid* at para 95.

[39] *Ibid* at para 99.

[40] *Ibid* at para 102.

[41] *Ibid* at para 103.

[42] *Ibid* at para 109.

As the IRPA must always be interpreted with Canada's international obligations in mind, this was a fatal flaw in the tribunal's reasons. It "involved the omission of the principle of *non-refoulement* — "the cornerstone of the international refugee protection regime" — and a critical legal constraint on interpretation of the *IRPA*, one that Parliament has decreed *must* be considered in construing and applying the *IRPA*."[43] This was a "crucial omission" and the decision was therefore unreasonable.[44] All this even though the international law argument had not been made to the tribunal.

Indeed, there was in reality only one reasonable interpretation of s 34(1)(e), namely that a national security nexus is required. The two contextual points the tribunal failed to consider and "especially" the international law point gave "overwhelming support" to the appellant's reading of s 34(1)(e).[45] But this conclusion resulted from what one might term an internal rather than external approach, working out from the reasons rather than beginning with the statutory provisions themselves.[46]

The Decision in *CSFTNO*

In reasons written by Côté J, the decision in *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*[47] is of a piece with *Mason* in this regard (I appeared for the intervener Francophone School Board of the Yukon). This case involved several exercises of ministerial discretion to deny entry into French-language schools. The Minister had adopted a policy that expanded the categories of minority rights holders in s 23 of the *Charter* and made a wider group of children eligible to attend school in French. However, the children at issue in this case did not fall within the scope of the policy. The children were either French-language speakers, otherwise embedded in the French-language community in the Northwest Territories or would contribute to the vitality of the community by attending school in French. In each case, the Commission (the provincial Francophone school board) recommended that they be permitted to attend a French-language school. But the children did not fall within the scope of the policy. Essentially on that basis the Minister refused to permit them to attend a French-language school.

The Supreme Court unanimously held that the Minister's decisions were unreasonable. On the facts, the underlying values of s 23 were engaged even if the right itself was not, as there was a "clear link" between s 23 and the exercises of discretion "because the decisions were likely to have an impact on a minority language educational environment."[48] Preserving and developing the minority-language community (which admission of the children would have contributed to) are s 23 values.[49] There was evidence before the Minister of a clear link between the admission of these Francophone or Francophile students and the values underpinning s 23. However, the Minister failed to justify her decisions given the evidence of this link. (There is much more to say about the distinction between *Charter* rights and *Charter* values and some of the potential difficulties created by the analysis in *CSFTNO* but, happily, these are quite unlikely to bother energy lawyers.)

Implications for the Methodology of Reasonableness Review

There are four broad implications for the methodology of reasonableness review.

First, although it is now almost trite to say this, an administrative decision-maker must grapple in its reasons with the submissions of the parties. Notice that the tribunal decision in *Mason* was handed down long before *Vavilov* was decided. I think tribunals from coast to coast to coast now appreciate that it is necessary to address the arguments made to them in order to render a reasonable decision.

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[43] *Ibid* at para 117.

[44] *Ibid*.

[45] *Ibid* at para 121.

[46] *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, at para 19.

[47] *CSFTNO*, *supra* note 10.

[48] *Ibid* at para 78.

[49] *Ibid* at paras 80–82.

This is the principle of responsive justification that was central to *Vavilov*. The only relevant limits are that the requirement to grapple with a submission only relates to a "key" argument. In this instance, the arguments were "core planks" supporting M's position.[50]

This is a remarkable feature of *Vavilov*. Not only are the tribunal's reasons treated as the starting point — elevating the tribunal to (close to) equal partner status[51] as far as the interpretation of law is concerned — but the tribunal's reasons are shaped by the interaction between the tribunal and the citizen. *Vavilov* requires, one might say, citizen-led law-making.

Second, *CSFTNO* demonstrates that a decision-maker must also grapple with relevant evidence. Here, the Minister's decision was unreasonable because she failed to consider the Commission's support for the applications;[52] she did not consider the "individual characteristics of the various applications in relation to the benefits that could result from a decision to grant them";[53] she attached "too much importance to her duty to make consistent decisions";[54] and "gave disproportionate weight to the cost of the contemplated services in the exercise of her discretion".[55] This meant that her reasons did not demonstrate that she "meaningfully addressed the values of preservation and development of the Francophone community of the Northwest Territories so as to reflect the significant impact that the decisions might have on it".[56] She did not, in short, demonstrate responsiveness to the evidence before her of the contribution that admission of these children would make to the vitality of the minority language community. Where there is evidence in the record that has a bearing on the decision to be made, the decision-maker cannot brush it off but must actively grapple with it (or, alternatively, explain why it is unnecessary to grapple with it).

Third, in working out whether a decision-maker has grappled with key arguments, a reviewing court must exercise significant caution before inferring that an argument has been addressed. In *Mason*, the Federal Court of Appeal had held that the tribunal implicitly turned its mind to the arguments presented. Jamal J firmly disagreed.[57] As these were key arguments — "core planks" — then they had to be met head-on, by explicit reasons.

Working out clear parameters here is difficult. The issue is how much "sensitivity to the institutional setting" and reference to the "history and context of the proceedings" a reviewing court can engage in[58] to deduce that arguments were dealt with. Reference to background context is permissible to plug some holes in a tribunal's reasons, but evidently not all of them. Here is what I wrote (commenting on the Federal Court of Appeal decision) in my book on *Vavilov*:

> For my part, the term "implied" or "implicit" reasons is too strongly associated with the darkest days of the Dunsmuir decade, so I prefer to simply say that administrative decisions should be read fairly, in their whole context. The point is well explained at paras 93–94 of *Vavilov*…without mention of the words "implied" or "implicit"… I would say that the best way to summarize this passage is that a decision is not unreasonable because of a failure to expressly mention a particular point, where it is obvious why the decision maker did not consider it. If a test is needed,

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[50] *Mason*, *supra* note 11 at para 97.

[51] Paul Daly, "Administrative Tribunals in Canada: Constitutional Subordinates or Equal Partners?" (9 September 2023), online: *Social Science Research Network* <papers.ssrn.com/sol3/papers.cfm?abstract_id=4565804>. Forthcoming in Groves, Thomson and Weeks, eds, *Administrative Tribunals in the Common Law World* (Oxford: Hart, 2024).

[52] *CSFTNO*, *supra* note 10 at para 98.

[53] *Ibid* at para 99.

[54] *Ibid* at para 102.

[55] *Ibid*.

[56] *Ibid*.

[57] *Mason*, *supra* note 11 at paras 96, 101.

[58] *Vavilov*, *supra* note 3 at paras 94, 96.

> it should be a test of obviousness (note 49 at 213–214).[59]

Put another way, the court "must be sure" that an argument has been addressed.[60] This chimes with the Supreme Court's analysis in *Mason*. Plainly, Jamal J was not "sure" that the tribunal had addressed the key arguments. It also chimes with the analysis in *CSFTNO*, as it was far from obvious how the Minister had addressed the evidence linking the applications to the values underpinning s 23 of the *Charter*. The lesson for decision-makers is to err on the side of dealing with an argument or evidence; the lesson for reviewing courts is to err on the side of not inferring that an argument or evidence was addressed in the absence of explicit grappling.

Fourth, the treatment of international law creates a tension in Jamal J's reasons in *Mason* and, indeed, recalls a foundational tension in *Vavilov*. The tribunal did not hear arguments about international law. Yet Jamal J held that international law was a significant legal constraint on the tribunal.

On the one hand, Jamal J criticized the Federal Court of Appeal for introducing an additional step into the *Vavilov* analysis. As the court below described it, the judge should undertake "a preliminary analysis of the text, context and purpose of the legislation just to understand the lay of the land before they examine the administrators' reasons."[61] For Jamal J, "*Vavilov* is clear that a reviewing court must start its analysis with the reasons of the administrative decision maker; starting with its own perception of the merits may lead a court to slip into correctness review."[62]

On the other hand, Jamal J sought out relevant provisions in the *IRPA* that made clear that Parliament intended the *IRPA* to be interpreted in conformity with Canada's international obligations, such as s 3(2)(b) which states that one of the *IRPA*'s objectives is "to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement" and s 3(3)(f) which requires the interpretation and application to the *IRPA* to comply "with international human rights instruments to which Canada is signatory". This was surely based on a consideration — far from preliminary — of the text of the *IRPA*, which the tribunal did not consider and which it was not asked to consider. Citizen-led law-making has its limits!

More seriously, I think this issue requires careful unpacking. To begin with, in his typically cogent reasons for the Federal Court of Appeal, Stratas JA was riffing on a theme I developed before *Vavilov* in a piece engaging with Grammond J's thoughtful, sophisticated reasons at first instance in *Mason*.[63] The 'internal' approach I advocated was designed to produce deferential judicial review and is consistent with *Vavilov*; the 'external' approach I described was explicitly rejected in *Vavilov*. The Federal Court of Appeal's preliminary view methodology was therefore not designed to lead to less deferential judicial review. Quite the opposite.

This does not mean that a reviewing court should literally develop a preliminary view before it even reads the tribunal's reasons. Stratas JA's 'internal' approach seeks to ensure that a reviewing court has some basic understanding of the statutory structure. Without such an understanding, a reviewing court may well be at a loss to know which arguments are important and which statutory provisions might plausibly have figured in the tribunal's reasons. Indeed, as a practical matter, a reviewing court will be introduced to the relevant provisions by the parties' written submissions. It has, therefore, to have some idea of how the decision is situated relative to the statutory scheme. Jamal J's reliance on the international law provisions of the *IRPA* is proof positive that a reviewing court cannot conduct reasonableness review in abstraction,

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[59] Paul Daly, *A Culture of Justification: Vavilov and the Future of Administrative Law* (Vancouver: UBC Press, 2023).

[60] *Zeifmans LLP v Canada*, 2022 FCA 160, at para 10, per Stratas JA.

[61] *Supra* note 46 at para 17.

[62] *Mason*, *supra* note 11 at para 79.

[63] Paul Daly, "Unreasonable Interpretations of Law Redux: Mason v. Canada (Citizenship and Immigration), 2019 FC 1251" (23 October 2019), online: *Administrative Law Matters* <www.administrativelawmatters.com/blog/2019/10/23/unreasonable-interpretations-of-law-redux-mason-v-canada-citizenship-and-immigration-2019-fc-1251>.

sealed away hermetically from statutory text, context and purpose.

This recalls a tension within *Vavilov* itself. Many passages in the discussion of reasonableness review reflect a commitment to deference but other passages suggest more intrusive judicial oversight. The discussion of the principles of statutory interpretation is emblematic of this 'on the one hand but on the other hand' approach, with decision-makers permitted to follow an approach that courts would not but also required to consider text, purpose and context. Similarly, although reasonableness is the presumptive standard of review and 'jurisdictional' questions no longer attract correctness review, it was also suggested in *Vavilov* that some legal constraints on administrative decision-makers are binding. A decision-maker cannot "enlarge their powers beyond what the legislature intended"[64] or "arrogate powers to themselves that they were never intended to have."[65] In particular, a commitment to citizen-led lawmaking and reasoned decision-making may run into the venerable principle that jurisdiction cannot be granted by consent of the parties.[66]

Here, Jamal J is plainly sympathetic to the deferential aspects of what was said in *Vavilov* about statutory interpretation. I think he would agree that an administrative decision-maker's approach might "actually enrich and elevate the interpretive exercise."[67] Nonetheless, *Vavilov* also says that an administrative decision-maker "must" consider statutory text, context and purpose, and in *Mason* one of the reasons the tribunal's interpretation could not stand was that it had failed to consider elements of the statutory scheme that Jamal J adjudged important. This tension is present in *Vavilov*. *Mason* does not resolve it.

One thing is clear, however. Under the *IRPA*, consideration of international obligations is going to be mandatory, or close to mandatory, in statutory interpretation going forward. *Vavilov* made clear that international law is sometimes a relevant constraint. *Entertainment Software Association* made clear that international obligations are relevant to the context prong of the statutory interpretation analysis. *Mason* makes clear that international law is a relevant constraint on decision-makers under the *IRPA*. Failure to consider relevant international law obligations in the *IRPA* context will generally lead to unreasonable decisions. Maybe the best way to think about the third aspect of the reasonableness analysis in *Mason* is that Parliament made a uniquely powerful, textually explicit commitment to implementing Canada's international law obligations in the *IRPA*, which is unlikely to have similar force in any other context (save, perhaps, citizenship).

It is difficult to imagine many other situations in which a clear limit on the authority of a decision-maker will have been entirely ignored by the parties and decision-maker but *Mason* suggests that, where this is the case, a court must abide by the limit. *Mason* also suggests that, where this is the case, there is a carve out from the ordinary rule that an argument not made to a decision-maker cannot be raised on judicial review.[68] Something similar has to be said about *CSFTNO*: where evidence is obviously relevant to the task to be performed by the decision-maker, it requires responsive justification regardless of whether a party specifically referenced it. To circle back, however, to a point I made in the introduction, care should be taken about reading too much into two decisions, one of which (*Mason*) would surely have been written differently by the tribunal had it had the benefit of *Vavilov* and the other of which (*CSFNTO*) arose in the highly contentious context of minority language rights and involved the hotly contested concept of *Charter* values.

To close, let me draw a link between the discussion of standard of review and the end of the discussion of reasonableness review. There are tensions in the Supreme Court's post-*Vavilov* case law already. There are tensions within *Vavilov* itself, some of which are evident in *Mason*. Ensuring that the tensions within

[64] *Vavilov*, *supra* note 3 at para 68.

[65] *Ibid* at para 109.

[66] *Greenwood v Buster* (1902), 1 O.W.R. 225 (H.C.J.).

[67] *Vavilov*, *supra* note 3 at para 119.

[68] *Canada (Attorney General) v Ibrahim*, 2023 FCA 204.

the *Vavilov* framework and jurisprudence do not cause serious difficulties will require the Supreme Court to chart a consistent course and stick to it.

RESPONSIVE REASONABLENESS REVIEW

In this section I want to highlight two appellate decisions that underscore *Vavilov*'s message — repeated in *Mason* and *CSFTNO* — about the importance of responsive decision-making. One commentator has observed that the proportion of decisions upheld under *Vavilov* is probably little different from the proportion upheld under its predecessors.[69] Nonetheless, *Vavilov* undoubtedly raised the bar in terms of reasons and, in some areas, its effects have been keenly felt.

Consider, first, an energy law case, *Shell Canada Limited v Alberta (Energy)*.[70] This was a case relating to the calculation of royalties payable to the province from a Shell oil sands project. Alberta Energy audited the project and disallowed some costs claimed by Shell. Shell appealed under the applicable regulations, but the Director of Dispute Resolution found that under the ordinary and grammatical sense of the regulations the costs were properly disallowed. Shell then applied for the appointment of a Dispute Resolution Committee (DRC). The Minister refused to convene a DRC, on the basis that Shell's position on the underlying point of interpretation was wholly without merit, for the following reasons:

> The department's position in this matter is that the interpretation requested by Shell in relation to "solely dedicated" costs is inconsistent with the regulations as written. The regulations remain the legal framework within which such matters must be reviewed.[71]

This was the entirety of the reasoning on the underlying point of interpretation. Unsurprisingly, the Court of Appeal found that it was unreasonable. A simple repetition of the department's position lacking explanation of the analysis undertaken or the test applied, failing to disclose the department's reasoning process and omitting any discussion of context and purpose did not meet the standard of justification set out in *Vavilov*.[72] As Shell's position could not be said to be manifestly unfounded, this was not enough by way of justification. Interestingly, because the Minister had taken so long — 3 years! — to respond to Shell, the reviewing judge had not only ordered the Minister to convene a DRC, but also formulated the question for the DRC. The Court of appeal considered that this was the appropriate course of remedial action in the circumstances.

Traditionally, ministerial discretion has been subject to deferential review by the courts, in part because of the possibility of political accountability through the legislature. But this decision is evidence that there is no *Vavilov* opt-out for ministers; regardless of political accountability, they have to demonstrate responsiveness to the satisfaction of the courts.

Shifting gears slightly, it is also clear that the decision-maker's perception that the stakes are low will not justify shortcomings in responsiveness. The analysis in *Law Society of Newfoundland and Labrador v Buckingham*[73] relates to "screening" decisions about whether it is appropriate to send a regulated professional to a formal disciplinary hearing. When making such decisions, the disciplinary body might well impose lesser sanctions designed to punish behaviour that is not thought to warrant more serious consequences. B's client died while in custody in the provincial correctional system. In media comments, B suggested that correctional officers were responsible for the death. A trade union for public employees complained to the Law Society and, after some back and forth, the matter was referred to the Complaints Authorization Committee. The Committee concluded that B was deserving of sanction (though it did not refer the matter

[69] Andrew Green, "How Important are Ground-Breaking Cases in Administrative Law?" (2023) 73:4 *University of Toronto Law Journal,* at 426.

[70] *Shell Canada Limited v Alberta (Energy)*, 2023 ABCA 230.

[71] *Ibid* at para 4.

[72] *Vavilov*, *supra* note 3 at para 23.

[73] *Law Society of Newfoundland and Labrador v Buckingham*, 2023 NLCA 17.

for a formal hearing) and issued a "Letter of Counsel." The Committee believed that it was not under any duty to give reasons and so, in issuing the Letter, it simply stated that it was doing so based on the information on file:

> The Committee noted that at the time [Mr. Buckingham] gave these two public statements, the evidence to support them did not exist. The record demonstrated that [Mr. Buckingham] provided these statements on November 8, 2019 and that the death was ruled a homicide in December 2019.[74]

O'Brien JA quashed the decision for unreasonableness, noting how *Vavilov* "affirmed the need to develop and strengthen a culture of justification in administrative decision-making".[75] He emphasized that in this instance, the Committee was making a final decision and that in such a context "usually more will be needed to explain the result to the people affected because there will not be any further opportunity for them to be heard."[76] Critically, B's response to the allegations was part of the factual matrix and something the Committee was obliged to respond to.[77] In addition, there would be important consequences for B in the future should he face other disciplinary proceedings or seek a judicial appointment. Given these constraints, the decision was unreasonable for want of justification.[78] Therefore, even a mere screening decision — which resulted in a more favourable outcome for B than a reference to a formal disciplinary hearing — triggers the requirements of *Vavilov* and obliges decision-makers to be responsive.

Vavilov has been successful in refreshing the parts of the administrative state that previous frameworks did not reach — even ministerial discretion on sensitive matters of policy is no exception. Of course, this is an ongoing project so errors and omissions are to be expected (and carceral institutions[79] seem to be a notable exception so far). Nonetheless, the broad outlines are clear: an institutional setting is relevant to assessing the reasonableness of a decision, but context does not provide a decision-maker who has written deficient reasons with a 'get out of jail free' card.

II. SCOPE OF REGULATORY POWERS

On the scope of regulatory powers, a couple of cases — one from the Federal Court of Appeal and one from the Alberta Court of Appeal — have reasserted first principles and (in the Alberta case) offered some thoughts on the interaction between the *Vavilov* framework and previously decided cases. Evidently, regulatory powers of any description are subject to the requirements of responsiveness outlined earlier in this paper. In addition, however, those using regulatory powers must be mindful of the primacy of legislation. The Federal Court of Appeal decision discussed below points to the need to identify positive grants of authority in legislation, whereas its counterpart from Alberta focuses on how legislative sources of authority can be more important than previous court decisions when it comes to determining the scope of regulatory powers.

GROUNDING REGULATORY AUTHORITY IN LEGISLATION

The Federal Court of Appeal decision (in which, as we shall see, I not only had a front row seat but made it into the ring) was a fascinating, complex and controversial case about broadcasting regulation and free speech: *Société Radio-Canada v Canada (Attorney General)*.[80] In a majority decision, the Canadian Radio-television and Telecommunications Commission (CRTC) found that Radio Canada had breached the objectives of the *Broadcasting Act* by permitting the broadcast of the n-word

[74] *Ibid* at para 42.

[75] *Ibid* at para 44.

[76] *Ibid* at para 53.

[77] Ibib at para 55.

[78] *Ibid* at para 86.

[79] Mark Mancini, "The Promise of Habeas Corpus Post-Vavilov: The Principle of Legality" (17 March 2022), online: *Social Science Research Network* <papers.ssrn.com/sol3/papers.cfm?abstract_id=4059757>. Forthcoming in (2022) Canadian Bar Review.

[80] *Société Radio-Canada v Canada (Attorney General)*, 2023 FCA 131.

(in French) repeatedly in the same segment without warning viewers.[81]

The complainant in the matter was a racialized person who was in the studio at the time of the segment. He brought a complaint alleging that Radio Canada had violated paragraph 3(b) of the *Radio Regulations, 1986*,[82] and several objectives of the *Broadcasting Act*.[83] The CRTC majority made no finding that the Regulations had been contravened but concluded that the broadcast violated the objectives of the *Act*, as it "did not provide high-standard programming and did not contribute to the strengthening of the cultural and social fabric and the reflection of the multicultural and multiracial nature of Canada."[84]

The CRTC majority located its jurisdiction in s 5(1) of the *Act*, which provides that the CRTC "shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1)."[85]

The dissenting members of the CRTC took issue with their colleagues' analysis, especially the majority's failure to refer to the *Charter* protection for freedom of expression or the statutory protection to the same effect in s 2(3) of the *Act*.

Radio Canada exercised its statutory right to appeal to the Federal Court of Appeal on a question of law or jurisdiction. Radio Canada's grounds of appeal were (1) that the CRTC does not have jurisdiction to punish a broadcaster by reference solely to the broadcasting policy set out in the *Act*; (2) that the CRTC had not addressed the *Charter* issue; and (3) that the CRTC had failed to consider the complaint under the *Regulations* and the terms of Radio Canada's licence. The Federal Court of Appeal granted leave to appeal.

At that point, the file took an unusual turn. First, the Attorney General of Canada, which is the respondent in CRTC appeals, brought a motion to have the appeal allowed on consent under rule 349 of the *Federal Courts Rules*, SOR/98-106. Second, the CRTC sought leave to intervene to defend its decision, but was refused, on the basis that its intervention would not comply with the principles on tribunal participation in appeal or review proceedings set out in *Ontario (Energy Board) v Ontario Power Generation Inc*.[86]

The Court of Appeal then exercised its inherent authority to manage its proceedings to appoint amicus curiae. I was appointed to ensure that the court had a full view of the legal arguments. I was asked to make any arguments that the CRTC could make in defence of its decision, given immunity from costs, and 20 days from reaching agreement on my fees with the Attorney General of Canada, to provide written submissions (in French, the language of the file). Much of my month of February was devoted to identifying arguments in defence of the CRTC's decision which I thought merited the court's considered attention.

Ultimately, the Court of Appeal found that the CRTC had acted unlawfully, rendering an important decision about the scope of regulatory powers, applicable to any context including energy law. The leading case is *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*.[87] Here, a majority of the Supreme Court held that when making regulations the CRTC could not rely directly on the objectives of the *Act*, as policy statements in legislation do not confer jurisdiction.[88] Subsequently, the Federal Court of Appeal observed that "section 3 and section 5 of the *Act* are not attributive of jurisdiction and are not sufficient in and of themselves to justify the validity of…regulatory provisions."[89] Hence

[81] Broadcasting Decision CRTC 2022-175.

[82] *Radio Regulations, 1986*, SOR/86-982, at para 3(b).

[83] *Broadcasting Act*, SC 1991, c 11.

[84] *Supra* note 81 at para 22.

[85] *Supra* note 83 at para 5(1).

[86] *Ontario (Energy Board) v Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 SCR 147.

[87] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, [2012] 3 SCR 489 [*Cogeco*].

[88] *Ibid* at paras 22–23.

[89] *TVA Group Inc. v Bell Canada*, 2021 FCA 153, at para 35.

the Attorney General of Canada's conclusion that a decision based on ss 3 and 5 of the *Act* was outside the jurisdiction of the CRTC and thus indefensible.

I submitted that the decision in *Cogeco* (and *TVA*) spoke only to the CRTC's regulation-making function. Here, the CRTC was engaged in its supervisory function, using the procedural powers set out (in very expansive terms) in subsection 18(3) of the *Act*: "The Commission may hold a public hearing, make a report, issue ***any decision*** and give any approval in connection with ***any complaint*** or representation made to the Commission or in connection with any other matter within its jurisdiction under this Act if it is satisfied that it would be in the public interest to do so". The expansive terms of subsection 18(3) should be contrasted, I submitted, with the more restrictive wording — but more forceful potential consequences — of s 12. Moreover, in *Capital Cities Comm. v C.R.T.C.*,[90] a decision that was not cited, still less overruled by the majority in *Cogeco*, the Supreme Court held that s 5 of the *Act* did confer jurisdiction on the CRTC.

The Court of Appeal was unpersuaded:

> *Capital Cities* is more in line with the Attorney General's position that subsection 5(1) is no more attributive of jurisdiction than subsection 3(1) because both are aimed at guiding the CRTC in exercising the discretionary power conferred upon it, one under the guise of a policy and the other under the guise of objects.
>
> [S]ubsection 5(1), by its wording, provides that the objects to be pursued by the CRTC are to develop a regulatory framework and to supervise what is said over the air with the view of implementing the Canadian broadcasting policy. It follows that the argument advanced by the *amicus* according to which the CRTC may rely on this policy as though it was in and of itself a rule of conduct that forms part of the regulatory framework governing what can be said on the air must fail.
>
> Contrary to the Canadian broadcasting policy, which is intended to guide the exercise of the discretionary power conferred upon the CRTC, rules of conduct are put in place in order to delineate what can and cannot be said on the air. It follows that imposing sanctions on the sole basis of this policy, as if it were itself a rule of conduct, goes against the role that Parliament attributed to this policy.[91]

This is a very significant decision on the scope of regulatory powers. To begin with, this case serves as a useful reminder that an 'objectives' clause in a statute, which is typically drawn in expansive terms, does not confer jurisdiction on a regulator to exercise authority over regulated entities. The central proposition, based on a broad reading of the majority decision in *Cogeco*, is that a decision-maker cannot use general powers to impose sanctions when it has more specific powers available to it, even if those general powers are drawn in broad terms. This is an important change as far as the CRTC is concerned, as it has been sanctioning on-air speech on the basis of the objectives of the *Act* for many years.[92] It may prove consequential for regulator and regulated in other fields. Evidently, to exercise jurisdiction over any subject-matter, a decision-maker must be able to point to a specific statutory grant of authority — and a specific grant of authority will likely trump a general grant of authority.

The Court of Appeal also found that the CRTC had erred by failing to analyze the impact on freedom of expression.

The matter was then remanded back to the CRTC for disposition on grounds other than the objectives of the *Act*.[93]

More broadly, the Federal Court of Appeal's appointment of an *amicus curiae* is an interesting development. The law on tribunal

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[90] *Capital Cities Comm. v C.R.T.C.*, [1978] 2 SCR 141.

[91] *Supra* note 80 at paras 51–53.

[92] *Ibid* at para 34.

[93] *Ibid* at 62.

standing is such that it may well occur that a tribunal might not be able to participate to defend its decision on an appeal or in judicial review proceedings, or even that the tribunal cannot fully participate for fear of appearing biased in the future. There is much to commend the Federal Court of Appeal's use of its inherent jurisdiction to appoint a competent person to present points of view a tribunal might not be able to present. The ultimate goal, of course, is to ensure that the court has as full a view as possible of the legal and factual aspects of the matter in order to render an informed decision. The circumstances of this appeal were unusual, as the Attorney General of Canada had expressly declined to defend the decision. But courts should consider the use of *amicus curiae* in other proceedings as well: whenever a tribunal's defence of its decision might cause concern about its impartiality going forward, an *amicus curiae* could usefully make submissions and ensure that the court can make an informed decision. Ultimately, this can only contribute to upholding the rule of law in regulated sectors of the economy.

REGULATORY AUTHORITY, STATUTES AND JUDICIAL PRECEDENT

In the original *ATCO* case in 2006 (known as *Stores Block*),[94] the Supreme Court of Canada addressed the issue of the scope of a regulator's statutory authority, making a distinction between express and implied powers. As I have written, this distinction makes little sense and it would be better simply to focus on legislative intent, discerned by consideration of statutory text, purpose and context.[95] Recently, the Alberta Court of Appeal considered the impact of the original *ATCO* case (*Stores Block*) and shed light on the proper approach to determining the scope of regulatory authority: *ATCO Electric Ltd v Alberta Utilities Commission*.[96]

The issue here was the lawfulness of a decision of the Commission denying ATCO the ability to recover costs incurred as a result of the Fort McMurray wildfire: according to the Commission, it did not have the authority to permit ATCO to include these costs in the rates charged to consumers of electricity; these were "extraordinary" retirements of assets for which consumers ought not to pick up the tab.

The Commission arrived at this view because it took *Stores Block* and subsequent jurisprudence to limit its flexibility in dealing with destroyed assets.[97] Subsequent to *Stores Block*, the Commission extended the logic of that decision to all extraordinary retirements of assets.[98] In an earlier case, the Court of Appeal considered that this decision, which was a general, policy decision that did not consider any specific disposition of assets or request for a rate to be made, was reasonable: *FortisAlberta Inc v Alberta (Utilities Commission)*.[99]

But as the Court of Appeal pointed out, *Stores Block* dealt with the sale of an asset and the power of a regulator to attach conditions to the sale.[100] This is a much more narrowly drawn power than the rate-setting authority at issue here. Indeed, the rate-setting authority refers to concepts such as a "depreciation" and "prudence" without defining them, leaving them to the regulator to work out on a case-by-case basis.[101] In this regard, the Commission had "broad discretion"[102] and nothing in the Supreme Court's 2006 decision dictated the outcome of a rate-setting proceeding.[103]

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[94] *ATCO Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 SCR 140 [*Stores Block*].

[95] Paul Daly, "Against *ATCO*" (24 November 2023), online: *Administrative Law Matters* <www.administrativelawmatters.com/blog/2023/11/24/against-atco-text-purpose-context-not-implied-and-express-powers>. Forthcoming in (2024) *Advocates' Quarterly*.

[96] *ATCO Electric Ltd v Alberta Utilities Commission*, 2023 ABCA 129 [*ATCO Electric*].

[97] *Ibid* at paras 13, 19.

[98] *Ibid* at para 30.

[99] *FortisAlberta Inc v Alberta (Utilities Commission)*, 2015 ABCA 295.

[100] *ATCO Electric, supra* note 96 at para 44.

[101] *Ibid* at para 43.

[102] *Ibid* at para 44.

[103] *Ibid* at para 46. See also *Alta Link Management Ltd v Alberta Utilities Commission*, 2023 ABCA 325 at para 3, commenting that "the statutory framework within which [the Commission] operates is complicated and is *imbedded with legal terms of art requiring a single definition*" [Emphasis added].

Indeed, the *Stores Block* decision was simply not analogous at all to the issue before the Commission, as it addressed the distribution of profits (as between shareholders and customers) from the disposal of a property, whereas here, the property had been destroyed and there was no profit to distribute.[104] Accordingly, the matter was sent back to the Commission for redetermination.[105]

This is a neat example of the importance of considering statutory text, purpose and context in the determination of the scope of regulatory authority. The Commission had drawn an analogy with a past case rather than looking to its statutory authority. This was an error as it caused the Commission to overlook the breadth of the power it had. Indeed, when the Supreme Court of Canada has considered the scope of the authority to set just and reasonable rates, it has taken a much more expansive view of regulatory authority than it did in the original *ATCO* decision.[106] The point, then, is that broad statutory language provides broad regulatory authority, with narrower statutory language providing relatively narrower authority. In all events, regulators should look first and foremost to statutes, with past jurisprudence relevant only to the extent it deals with the same statute that provides the basis for a proposed decision.

This might therefore seem a strange case for the Court of Appeal to also address issues relating to past jurisprudence, but it nonetheless dealt with an important point about the continuing force of its previous decisions. In *Vavilov*, the Supreme Court made some radical changes to Canada's administrative law framework. For instance, on a statutory appeal the standard of correctness henceforth applies on questions of law. Previously, the reasonableness standard would often apply, even on a statutory appeal on a question of law. Plenty of appellate jurisprudence (especially in the field of economic regulation) was based on consideration of the reasonableness of administrative decisions. Given, however, that reasonableness review has become synonymous with the concept of multiple possible interpretations, what is the precedential force today of a previous Court of Appeal decision holding a regulator's interpretation of law to be reasonable given that the standard of review now applicable is correctness?

The Court of Appeal suggested that such decisions should be considered to be presumptively binding:

> ***Vavilov*** should not be read as automatically displacing all the case law decided under the pre-***Vavilov*** standard of review regime. For one thing, even if a decision was reviewed for "reasonableness" and found to be reasonable, that does not mean that the reviewing court did not also agree that the decision was "correct"… Further, decisions like ***FortisAlberta*** were themselves based on binding decisions like ***Stores Block***. If the tribunal decision in ***FortisAlberta*** had failed to follow binding precedent it would not have been reasonable. The importance of stability in the law means that after ***Vavilov*** binding precedents of this Court should presumptively be regarded as continuing to be binding, notwithstanding the change in the standard of review analysis…[107]

As Nigel Bankes has observed,[108] *Vavilov* does not actually speak clearly to this issue. The cited passages in *Vavilov* deal with stare decisis generally and the relevance of the Supreme Court's past precedents for selecting the standard of review and applying the reasonableness standard.

Is the Court of Appeal right? It seems to me that there are two distinct concerns at play here that have to be carefully untangled.

First, in some instances, a court applying the reasonableness standard will have indicated that a decision was not only reasonable but correct, or alternatively that a decision was unreasonable

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[104] *ATCO Electric, supra* note 96 at paras 52–53.

[105] *Ibid* at paras 61–62.

[106] See especially *Bell Canada v Bell Aliant Regional Communications*, 2009 SCC 40.

[107] *ATCO Electric*, *supra* note 96 at para 18.

[108] 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>.

because there was only one acceptable, possible outcome. The Court of Appeal is right, in my view, to say that these decisions should be treated as binding even though they were decided on a reasonableness standard.

Second, however, on other occasions a court will have upheld a decision as reasonable without indicating what the correct decision would have been. The court's conclusion might have been based, in whole or in part, on a previous decision that, in turn, might have been reasonable (but not necessarily correct). I think the underlying concern here is that there may be a chain of reasonable decisions which because they have strayed too far from statutory text, purpose or context might be incompatible with a court's view of the correct interpretation of the statute. Rightly, the Court of Appeal is concerned that liberal application of the correctness standard would throw the authority of many past regulatory decisions into doubt. Notice that the stare decisis analysis in *Vavilov* was directed to the more abstract issue of the selection and application of the standard of review, whereas the Court of Appeal is concerned with the concrete problem of whether past substantive decisions on regulatory powers continue to bind. There is significant potential for upheaval here. Hence the insistence on a presumption of continuing bindingness.

Professor Bankes cogently argues that the judges are "incorrect" to insist on a presumption of continuing bindingness but I am more sanguine. Once the Court of Appeal's concerns have been unpacked, it is easier to understand why the judges thought the presumption is appropriate. Now, it might be that the idea of a presumption is unhelpful, because as Professor Bankes notes, it prompts immediate questions about whether and in what circumstances the presumption could be rebutted. For my part, leaving presumptions out of it, I would re-word the Court of Appeal's advice as follows: where the correctness standard applies, courts have the last word on what a statutory provision means, but in giving the last word, courts should be mindful of settled expectations and practices generated by jurisprudence upholding past decisions as reasonable. Whatever about stating this in terms of a presumption, the Court of Appeal is quite right, in my view, to insist that the change to the correctness standard should not be taken as automatically displacing past jurisprudence applying reasonableness review. Stability in important areas of economic regulation counsels caution.

OPEN JUSTICE

Economic regulators deal with complex matters, often based on large volumes of evidence, some of which is kept confidential for sound commercial reasons. To what extent are they obliged to hold their proceedings in public and permit open access to their records? The relevant question here is the scope of the so-called 'open court' principle, which "guarantee[s] access to the courts in order to gather information".[109] The oxygen of publicity has been said to be fundamental to the "legitimacy" of the administrative state.[110] In an important and interesting decision, the Federal Court of Appeal recently grappled with the scope of the 'open court' principle as it applies to administrative tribunals. Its analysis has potentially broad ramifications for all tribunals, including economic regulators in the energy sectors.

In *Canadian Broadcasting Corporation v Canada (Parole Board)*,[111] the CBC sought judicial review of the Board's refusal to release copies of the audio recordings of parole hearings of three offenders, amongst them Paul Bernardo. Ultimately, the Board's decision was quashed as it reasons "were incoherent, relying on risks that had already materialized affecting opportunities that were unlikely to arise in a foreseeable future".[112] This was standard *Vavilov*ian reasonableness review fare.

Of greater interest is Pelletier JA's approach to the CBC's more ambitious argument: that it had a constitutional right to the recordings because the Board is subject to the 'open court' principle underpinned by s 2(b) of the *Charter*. Notably, the CBC pressed this argument even though the Board's parent statute contains a provision requiring the Board to permit

[109] *Canadian Broadcasting Corp. v New Brunswick (Attorney General)*, [1996] 3 SCR 480, at para 26.

[110] *Southam Inc. v Canada (Minister of Employment and Immigration)*, [1987] 3 FC 329, at para 9.

[111] *Canadian Broadcasting Corporation v Canada (Parole Board)*, 2023 FCA 166 [*Parole Board*].

[112] *Ibid* at para 85.

anyone who applies to attend a hearing as an observer, save in defined circumstances.[113] The significance of the CBC's argument is that, had it been successful, it would also have had access to the audio recordings. And the logic of the argument would go much further: any information in an administrative tribunal's public record (filings, evidence and so on) would have to be made available to the public, subject only to the possibility of a confidentiality order being made in respect of sensitive information consistent with the test set out in *Sierra Club of Canada v Canada (Minister of Finance)* and subsequent cases.[114]

Writing reasons that were at once thoughtful and thought-provoking, Pelletier JA held that the open court principle does not apply to the Board.

Previously, the test for the application of the open court principle to a non-court was whether the body was exercising a quasi-judicial function.[115] However, Pelletier JA held, the concept of a "quasi-judicial" function has "outlived its usefulness" in this context, because it focuses on a tribunal's "processes and formal characteristics rather than its function" whereas the "public interest in court proceedings does not arise from a court's procedural characteristics but from the fact that it decides questions of rights and duties as between citizens and as between citizens and the state".[116] This is a lucid and powerful statement about the rationale for the open court principle and appropriately ties openness to the substance of the issue being decided rather than the formal concept of a quasi-judicial function.

What should replace the concept of a quasi-judicial function? The CBC argued that the open court principle, underpinned by s 2(b), arises from the right of the public to express ideas about public institutions and obtain information about their functioning.[117] For Pelletier JA, this cast the net too wide: "While the public has an interest in knowing about the functioning of all public bodies, the open court principle has to date been limited to those public bodies whose resemblance to courts invites the same degree of public oversight represented by the open court principle".[118]

Instead, Pelletier JA held, the touchstone should be whether the tribunal is adversarial in nature: "the fact that a tribunal presides over adversarial proceedings as an adjudicative body is a reliable indicator that the tribunal is subject to the open court principle".[119] Pelletier JA did not elaborate but presumably the idea here is that where a tribunal is adjudicating between the citizen and the state, or between citizen and citizen, it is performing a court-like role and properly subject to the full glare of publicity. The evident difficulty here is that relying on "resemblance to courts", which looks suspiciously like the concept of a quasi-judicial function under a different label, puts the focus back on form rather than substance. Another difficulty is that the substantive case for the open court principle is quite weak in respect of some adversarial proceedings, where there is little public interest in the details of the matter. Disputes between landlords and tenants would be a good example: undoubtedly adversarial but typically not of importance to the public at large and thus poor candidates for the strongest form of the open court principle.

It may be that the analysis in this case was influenced by the nature of the decision-maker at issue. Here, the Board could not be characterized as adversarial in nature. It performs its functions inquisitorially, performing a risk assessment based on information received from Corrections Canada and submissions from the offender and victims. There is no "representative of the state" on the other side of the table from the offender.[120] Moreover, the offender's counsel (if any) will play only a limited role at the hearing. As

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[113] *Corrections and Conditional Release Act*, SC 1992, c 20, s 140(4).

[114] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522.

[115] See *e.g. supra* note 110 at 336.

[116] *Parole Board, supra* note 111 at para 48.

[117] *Ibid* at para 55.

[118] *Ibid*.

[119] *Ibid* at para 53.

[120] *Ibid* at para 54.

a matter of form, the Board is plainly not court-like. In addition, however, as a matter of substance, the Board is not the most obvious candidate for application of the open court principle, given the sensitive nature of its task and the risk that its work might be distorted by sensationalistic media coverage (by outlets other than the CBC, of course, which, if nothing else, can hardly be accused of sensationalism). Perhaps, then, the tail wagged the dog in the sense that a sensible outcome — no open court principle for the Board — influenced the choice of test.

To drive home the point, it seems to me that the case for the open court principle would be much stronger in respect of a regulatory tribunal tasked with fixing licence conditions or setting rates for an important sector of the economy. Such decisions cut right to the heart of the community's ability to understand vitally important economic issues and express itself about the direction of the polity. Such a tribunal would evidently not qualify as "adversarial" but equally evidently engages the values underpinning s 2(b) of the *Charter*.[121] A test focused on those values — is the tribunal addressing an issue of importance to the community and worthy of public discussion? — would be superior to the concepts of quasi-judicial and adversarial functions, in my view. It would capture the country's regulatory tribunals in energy and other fields, which the 'adversarial function' test does not. Regulatory tribunals are (in my experience) strongly committed to transparency, such that the practical effect of the choice of test does not greatly matter. As far as principle is concerned, however, an open justice test that excludes bodies that form a significant part of the economic and political fabric of Canadian life seems to me to fall short.

PROCEDURAL FAIRNESS

One final appellate decision — a rare defeat for a regulator on an issue of procedural fairness — deserves mention under the broad heading of the scope of regulatory powers: *Alta Link Management Ltd v Alberta Utilities Commission*.[122] At issue here were a series of decisions made by the Commission relating to the recovery, through rates, of expenses incurred in Alberta's transmission and distribution network.

To be more precise, the main question related to the recovery of costs at the interface between transmission and distribution, that is, substations and other facilities that transform high-voltage electricity to low-voltage electricity so as to facilitate delivery to consumers. In Alberta, transmission facility owners and distribution facility owners interact with the Alberta Electric System Operator, a corporation established under the *Electric Utilities Act*[123] to direct the safe, reliable, and economic operation of the interconnected electric system, plan the capability of the transmission system, arrange for the expansion of and enhancement of the transmission system, and provide system access service on the transmission system.

The lead-up to this case involved a dispute between transmission and distribution facilities operators about the Operator's policy. This policy, in place for about 20 years, allowed distribution facilities operators to invest in, and earn a return on, transmission facilities. The upshot of the lengthy, complex proceedings that resulted in the series of decisions was that neither transmission nor distribution facilities operators would be allowed to earn a return on contributions channelled through the Operator. 20 years of settled practice were thereby overturned. The argument that succeeded on appeal was that the Commission breached procedural fairness because the parties were not given adequate notice that the Commission was considering a fundamental change of policy.

Typically, economic regulators benefit from a high degree of deference on procedural matters.[124] Here, however, any deference was tempered by recognition of the significant consequences for market operators: the "capital-intensive" nature of their investments was recognized as important, as was their ability

[121] See the comments of the Alberta Court of Appeal in *Alta Link Management Ltd v Alberta Utilities Commission*, 2023 ABCA 325, at para 48: "its decision making is polycentric, fulfilling a policy-laden role which includes a strong public interest mandate."

[122] *Supra* note 103.

[123] *Electric Utilities Act*, SA 2003, c E-5.1.

[124] See *e.g. Rogers Communications Canada Inc. v Ontario Energy Board*, 2020 ONSC 6549.

to access capital on equity and debt markets,[125] and required heightened procedural protection. The issue here was the adequacy of the notice provided about the change of policy: "the Commission was required to provide clear and transparent notice that an issue to be considered was whether both DFOs and TFOs should be precluded from earning a return on such costs".[126] The Court of Appeal was not satisfied that the notice was adequate.

The Commission's argument was that the notice stated "that it would consider the legal basis of the current…customer contribution policy as it pertains to [transmission and distribution] whether there is a need for a new policy, and the date on which any new policy would commence, [making] clear that the interest of *both* [transmission and distribution facilities operators] in earning a return on customer contributions were implicated in the proceeding."[127] The Court of Appeal was unimpressed. Perhaps the interests of both players were engaged, but the possibility of a radical policy change had not been countenanced:

> That the Commission's Notice Document did not clearly inform the appellants it was considering whether *both* [transmission and distribution facilities operators] should be precluded from earning a return is illustrated by the absence of submissions and evidence on that issue. The ability of [transmission and distribution facilities operators] to earn a return on customer contributions was clearly of great importance to the appellants. Indeed, these proceedings originated because both AltaLink and Fortis sought to include those costs in *their* rate base and earn the attendant return.[128]

This failing had a material impact on the proceedings. The Commission's concern was about price distortion but, as the Court of Appeal pointed out, had that concern been properly communicated to the parties, they could have led expert evidence about the effect of the Operator's policy on price signals.[129]

In the result, the matter was remitted to the Commission (with extensive *obiter* comments about the legal framework, especially the notions of ownership and fair return). This decision is certainly a useful reminder that the courts have the last word on questions of procedural fairness, even if economic regulators generally have a track record of success on judicial review. It is, nonetheless, somewhat surprising that the Commission ran afoul of the duty of fairness on such a fairly technical issue. Evidently, the Court of Appeal felt that it was faced with a stark disparity between what was ultimately decided and what the parties thought would be decided. The fact that the parties' submissions were so far off what turned out to be the mark must have concerned the Court of Appeal. The countervailing concern in procedural fairness cases is that the courts might gum up the works of public administration by requiring too much by way of procedures — that concern did not have much weight here, however, because the Commission's proceedings spanned several years. It must have surprised the Court of Appeal, given the length and iterative nature of the proceedings, that such a gap emerged between what the parties and Commission thought the issue was. In the end, then, the unusual facts of this case mean that it is unlikely to occasion a sea change in the relationship between the courts and regulators on issues of fairness.

EXTRATERRITORIAL REGULATION

A fairly frequent problem in Canadian law is the application of regulatory statutes to individuals or businesses resident or established in another province. Think of a BC engineer advising (badly) on a utilities construction project in Quebec, an Albertan providing inside information to a Manitoban in respect of energy stocks traded in Ontario or an online portal based in Nova Scotia taking orders for the delivery of faulty electrical sockets

[125] *Supra* note 103 at paras 51–55.

[126] *Ibid* at para 57.

[127] *Ibid* at para 60.

[128] *Ibid* at para 63.

[129] *Ibid* at para 64.

in Saskatchewan by a manufacturer from New Brunswick.

Surprisingly enough, the Supreme Court of Canada had not until yesterday authoritatively established the test to apply to determine the circumstances in which a provincial regulator will have the authority to sanction conduct with an out-of-province aspect. Appellate courts had generally relied on *Unifund Assurance Co. v Insurance Corp. of British Columbia*,[130] a decision relating to the scope of provincial insurance benefits scheme. In its decision in *Sharp v Autorité des marchés financiers*,[131] the Supreme Court confirmed that the *Unifund* criteria should be applied.

Here, regulatory proceedings were brought in Quebec against British Columbia residents who were accused of engaging in a 'pump and dump' scheme that manipulated stock prices in *La belle province* and caused financial harm to Quebec investors. The majority of the Supreme Court (Wagner CJ and Jamal J) applied *Unifund* and concluded that the proceedings were within the authority of the Quebec regulator (Autorité des marchés financiers – AMF) to prosecute before the province's securities tribunal (Financial Markets Administrative Tribunal – FMAT). Much of their analysis concerns the (in) applicability of the provincial civil code to administrative tribunals. But having found that the relevant provisions of the code did not grant the regulator the necessary authority, the majority concluded that the provincial securities statutes did provide sufficient authority, as long as there was a sufficient connection between the targets of the proceedings.

The power to adjudicate regulatory breaches flows from provincial legislation:

> in this case the FMAT's adjudicatory jurisdiction flows from the province's prescriptive legislative jurisdiction… Section 93 of the *Act respecting the Autorité des marchés financiers* stipulates that the FMAT shall exercise jurisdiction under the *Securities Act*. Since the Quebec legislature has decided that the FMAT shall adjudicate alleged breaches of the *Securities Act* and the appellants' alleged conduct has a real and substantial connection with Quebec, the FMAT necessarily has jurisdiction over the appellants in respect of their alleged contraventions. The special legislation, properly interpreted, thus provides for the FMAT's adjudicatory jurisdiction.[132]

In simple terms, if someone does something that contravenes a provincial regulatory statute, they are potentially liable to enforcement by the provincial regulator.

The next question is whether there is a sufficient connection between the province and the target of enforcement action. Sufficient connection depends on the application of the factors set out by Binnie J in para 56 of *Unifund*:

1. The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it;

2. What constitutes a "sufficient" connection depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it;

3. The applicability of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of order and fairness that underlie our federal arrangements;

4. The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation.[133]

Wagner CJ and Jamal J confirmed that the *Unifund* factors are to be applied to determine when provincial regulatory

[130] *Unifund Assurance Co. v Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 SCR 63.

[131] *Sharp v Autorité des marchés financiers*, 2023 SCC 29 [*Sharp*].

[132] *Ibid* at para 136.

[133] *Supra* note 130 at para 56 [emphasis in original].

legislation can be applied with extra-provincial effect.[134] This is not a question of the validity of the provincial legislation (which will typically fall under the capacious provincial power to legislate in respect of property and civil rights in the province) but rather of its applicability: its scope, not its lawfulness. These factors therefore determine whether enforcement action can be taken in the province against out-of-province actors (or where there is some other extra-provincial aspect).

The *Unifund* factors are seen as a principle of statutory interpretation,[135] essentially a device for finding that a particular type of transaction or action which would be regulated if done in the province by a provincial resident, is in fact outside the authority of the provincial regulator. Here, as the majority's analysis explains, the factors did not weigh against provincial regulation.

The analysis in *Sharp* itself is quite useful. Quebec was used as the "face" of the pump-and-dump scheme.[136] As such, it was fair to apply the Quebec regime to their activities: "Because the appellants made Quebec the face of their securities manipulation operation, their entrance into Quebec's market was not accidental or irrelevant, but rather was an integral part of the scheme".[137] This conclusion was not undermined by the possibility of proceedings in other provinces, because jurisdictional overlaps in securities regulation are a necessary feature of Canadian law.[138] (In practice, these overlaps are addressed by provincial legislation[139] or soft-law cooperation.[140])

Note also the Court's explicit approval of the need for a flexible and purposive approach when determining the territorial scope of regulatory legislation: "Because contemporary securities manipulation and fraud are often transnational and extend across provincial and national borders, courts and tribunals must take a flexible and purposive approach when applying the principles of order and fairness in the securities context. In our view, it is consistent with the principles of order and fairness for the FMAT to have jurisdiction over the appellants".[141] This is of a piece with the Supreme Court's relatively hands-off approach to the *Charter* compliance of regulatory legislation designed to protect the public (albeit, of course, that the characterization of such legislation is controversial, as it often has anti-competitive effects that favour market incumbents).

The standard of review featured too, of course. The parties did not dispute that the applicability of regulatory legislation to out-of-province actors had to be determined on a correctness standard. Even though the analysis is context-sensitive and fact-heavy, the Supreme Court confirmed that this is a constitutional question requiring correctness review to ensure uniform answers.[142]

In addition, the question of the relevance of the civil code to regulatory jurisdiction was said to be of central importance to the legal system and also requiring correctness review. This one was also, it is fair to say, as pure a question of law as can be imagined.

Indeed, the issues here transcended the securities sphere and was relevant to any provincial regulatory scheme and, accordingly, judicially imposed consistency was required to ensure uniformity. These are paradigm examples of the narrow correctness categories set out in *Vavilov*, as they relate to situations where deviation from the norm by even one regulator would undermine the coherence of the legal system.

All in all, I think this is a useful decision. The *Unifund* criteria are helpful in addressing

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[134] *Sharp, supra* note 131 at para 102.

[135] *Ibid* at paras 113–114.

[136] *Ibid* at para 129.

[137] *Ibid* at para 133.

[138] *Ibid* at para 134.

[139] See *e.g. McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895.

[140] See *e.g.* the Canadian Securities Administrators and, especially, its Standing Committee on Enforcement.

[141] *Sharp, supra* note 131 at para 135.

[142] See also *Northern Regional Health Authority v Horrocks*, 2021 SCC 42.

difficult questions relating to out-of-province actors, as lower courts have found in previous years, and they provide a framework for regulators to cooperate on enforcement matters.

III. LIMITED RIGHTS OF APPEAL

In *Vavilov*, the Supreme Court of Canada referred on two occasions to the effect of a limited right of appeal. At paragraph 45, the majority viewed it as self-evident that a right of appeal limited to questions of law, or limited to questions of law or jurisdiction does not preclude judicial review. This is of a piece with the view expressed by four dissenting judges in the pre-*Vavilov* case of *Edmonton East* that the legislature "must have known that judicial review is available for any question not covered by a limited right of appeal".[143] Later, at paragraph 52, the majority repeated the point but added that a limited right of appeal does not "on its own" preclude judicial review. Looming over these paragraphs is the Supreme Court's 1980s decision in *Crevier*, which invalidated a privative clause that would have, if given effect, prevented the courts from correcting 'jurisdictional' errors. However, jurisdiction is "not so much in vogue today"[144] and, indeed, does little or no work any more in the common law of judicial review.[145] We now find ourselves in a position where the leading authority — *Crevier* — speaks in terms of 'jurisdiction', a concept that is largely defunct and it is necessary to figure out what to do.

Since 2019, a great deal of ink has been spilled by lower courts and commentators on the meaning to be given to these statements in paragraphs 45 and 52 of *Vavilov*. These courts and commentators can be grouped into three camps: legislative intentionalists, discretion advocates and constitutional traditionalists. As Stratas JA observed in a characteristically colourful analysis, it can be said to be an "open question" which of these camps is right.[146]

I will describe these camps in turn but I should warn the reader in advance that I am a constitutional traditionalist. In my view, the principle from *Crevier* is that the superior courts must be able to keep administrative decision-makers within the proper boundaries of their authority by applying the common law principles of judicial review.[147] Indeed, I was one of the first to stake out that particular ground. Everything I have read since has, however, only strengthened my conviction that constitutional traditionalism is consistent with *Vavilov* and with the fundamentals of Canada's public law tradition. By contrast, the position of the legislative intentionalists is — with respect — impossible to reconcile with first principles of Canadian public law. As for the discretion advocates, their emphasis on judicial discretion would require developments in the law of judicial review of administrative action that are as novel as they are problematic and must be rejected. Discretion can be useful in some circumstances but it cannot provide a complete answer to the questions posed by those paragraphs of *Vavilov*.

LEGISLATIVE INTENTIONALISM

The legislative intentionalists take a narrow view of *Crevier* and a broad view of institutional design. In their view, judicial respect for legislative intent demands that partial restrictions on judicial review (such as appeals limited to questions of law or jurisdiction) be given effect, as long as the decision-maker at issue is not completely immunized from court oversight.

Near JA's minority reasons in *Canada (Attorney General) v Best Buy Canada Ltd.*,[148] are illustrative. The issue was whether Canada could challenge a fact-sensitive tariff classification decision by the Canadian International Trade Tribunal: there is a right of appeal on questions of law only to the Federal Court of Appeal[149]

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[143] *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, at para 78 [*Edmonton East*], citing *Habtenkiel v Canada (Citizenship and Immigration)*, 2014 FCA 180, [2015] 3 F.C.R. 327, at para 35.

[144] *Democracy Watch v Canada (Attorney General)*, 2022 FCA 208, at para 39.

[145] *Vavilov*, *supra* note 3 at paras 65–68.

[146] *Democracy Watch v Canada (Attorney General)*, 2022 FCA 208, at para 45.

[147] *Immeubles Port Louis Ltée v Lafontaine (Village)*, [1991] 1 SCR 326, at 360.

[148] *Canada (Attorney General) v Best Buy Canada Ltd.*, 2021 FCA 161.

[149] *Customs Act*, RSC 1985, c 1 (2nd Supp), s 68(1).

and the Tribunal's decisions are otherwise protected by a privative clause.[150]

Near JA thought the effect of these provisions was to preclude judicial review. He leaned heavily on the Supreme Court's reliance on "institutional design" in *Vavilov*. If legislative intent is to be taken seriously, he reasoned, Parliament's considered choice to restrict appellate oversight should be respected: "If Parliament's institutional design choices are to be respected, factual issues and issues of mixed fact and law for which no legal question can be extracted must *not* be subject to review by this Court."[151] Near JA did not see any constitutional problems arising as a result of limiting appeals from the Tribunal to extricable questions of law, as *Crevier* only restricts "Parliament's ability to completely insulate the CITT from *any* Superior Court review."[152]

Summing up his view of legislative intent and the scope of the *Crevier* principle, Near JA asked rhetorically, "What purpose would the specific provisions of the Customs Act, and many other federal statutes that restrict review, serve if recourse to the Courts could always be had on all issues…?"[153] Subsequently, Stratas JA suggested that *partial* restrictions on judicial review (such as those created by a limited right of appeal) that "further a valid and substantial legislative purpose" might be constitutional.[154]

More recently, Slatter JA reasoned along similar lines in *Georgopoulos v Alberta (Appeals Commission for Alberta Workers' Compensation)*.[155] The Commission had granted G less compensation than he had claimed. G appealed on a question of law or jurisdiction and also sought judicial review of the Commission's decision. At first instance, the superior court dismissed the appeal as no legal error or breach of procedural fairness had been made out and also dismissed the application for judicial review on the reasonableness standard. For the majority of the Court of Appeal, Feehan JA was content to dismiss the appeal on the basis that G had failed to identify any error in the superior court's analysis.

However, Slatter JA went further in concurring reasons. Noting that the legislation contains a strong privative clause along with the circumscribed appeal on questions of law or jurisdiction,[156] he concluded that G could not apply for judicial review at all, as this would be "inconsistent" with the intention of the legislature to give the Commission "the final say on questions of fact and mixed fact and law, including assessment of the expert medical evidence".[157] Slatter JA reached this position having reflected on the "very wide mandate that the Legislature has to define the nature and availability of judicial review"[158] and the "general rule" that "a statutory right of appeal from the decision of an administrative tribunal is intended to exhaust the remedies available to the applicant."[159]

With respect, I do not think the legislative intentionalist position is defensible.

First, it is true that the *holding* in *Crevier* was narrow but the *principle* dictating the outcome was significantly broader. Laskin CJ held that a statute insulating an administrative decision-maker from judicial review of jurisdictional matters "must be struck down as unconstitutional by reason of having the effect of constituting the tribunal a s. 96 court."[160] However, he based this holding on a broader principle: "[i]t cannot be left to a provincial statutory tribunal, in the face of s. 96, *to determine the limits of its own jurisdiction*

[150] *Ibid*, s 67(3).

[151] *Supra* note 148 at para 46.

[152] *Ibid* at para 59. See also *Canada (Citizenship and Immigration) v Canadian Council for Refugees,* 2021 FCA 72, [2021] 3 FCR 294, at para 102; *Democracy Watch v Canada (Attorney General)*, 2022 FCA 208, at paras 42–44.

[153] *Supra* note 148 at para 60.

[154] *Democracy Watch v Canada (Attorney General)*, 2022 FCA 208, at para 45.

[155] *Georgopoulos v Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2023 ABCA 285.

[156] *Ibid* at para 22.

[157] *Ibid* at para 24.

[158] *Ibid* at para 16.

[159] *Ibid* at para 13.

[160] *Crevier v A.G. (Québec) et al.*, 1981 SCC, [1981] 2 SCR 220, at 234.

without appeal or review."[161] So, yes, a statute purporting to provide complete immunization from judicial review is unconstitutional but only because it allows an administrative decision-maker a free hand in determining the boundaries of its powers. These boundaries can be dependent on findings of fact[162] or factually suffused determinations.[163] Indeed, in *Vavilov*, the Supreme Court put legal *and* factual constraints on an even footing: in order to be reasonable, a decision must be justified in respect of *both* the law and the facts. The 2023 decision in *CSFTNO*, which turned on failure to adequately grapple with relevant evidence, is a stark reminder of this.

Second, as a historical matter, judicial review has always been available — long before *Crevier* — to ensure that administrative decision-makers remain within the boundaries of their authority.[164] Clauses that might restrict access to the courts have been narrowly construed for eons.[165]

When the history is fully appreciated, the legislative intentionalist approach is difficult to support. As to the wide mandate of the legislature, the lynchpin of Slatter JA's constitutional analysis in *Georgopoulos* was his proposition that, historically, there was no judicial review of factual errors: "At common law, *certiorari* was limited to review of jurisdictional errors and errors of law on the face of the record; factual errors were not in play."[166]

With respect, I do not think this is correct. *Certiorari* has long been available to correct errors on questions of jurisdictional fact.[167] The availability of *certiorari* on issues of jurisdictional fact was part and parcel of keeping administrative decision-makers within the boundaries of their lawful authority, a core function of the superior court.[168]

As to the general rule of exhaustion of remedies, this rule has only ever applied to remedies that are adequate and effective.[169] An appeal that is limited to questions of law cannot, evidently, be an adequate and effective remedy for alleged factual errors.[170] Indeed, there is abundant jurisprudence, albeit now long forgotten, that the existence of a right of appeal does not prevent judicial review: *certiorari* was available, to correct jurisdictional error, even if there was a right of appeal.[171] Furthermore, even *exercising* the right of appeal did not prevent an applicant from seeking *certiorari* in respect of a defect going to jurisdiction.[172]

Now, of course, "jurisdictional" questions have been excised from the common law of

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[161] *Ibid* at 238 [emphasis added].

[162] See *e.g. Blanchard v Control Data Canada Ltd.*, 1984 SCC, [1984] 2 SCR 476. See generally Paul Daly, "Facticity: Judicial Review of Factual Error in Comparative Perspective" in Peter Cane et al eds., *Oxford Handbook of Comparative Administrative Law* (OUP, 2021), 901, at 905–907.

[163] See *e.g. Northern Regional Health Authority v Horrocks*, 2021 SCC 42, at paras 7–9.

[164] See *e.g. Boston v Lelievre*, 1864 CarswellQue 4, at para 15.

[165] See *e.g. R. v York Justices,* 1835, 1 NBR 108; *Ex Parte McNeil*, 1857, 8 NBR 493.

[166] *Supra* note 155 at para 17.

[167] *Bunbury v Fuller*, 1853, 9 Ex. 109; *R. v Licence Commissioners of Point Grey*, 1913, 14 DLR 721; *R. v Nat Bell Liquors Limited*, 1922, 65 DLR 1; see also *Green v Alberta Teachers' Association*, 2016 ABCA 237.

[168] The difficulty with the position advanced by Mark Mancini in a recent paper, "Foxes, Henhouses and the Constitutional Guarantee of Judicial Review" (2024) *Canadian Bar Review* (forthcoming) is that he conflates 'lawful authority' with 'questions of law'. With respect, there is no basis for this conflation, not least because at various points in history it was accepted that some 'errors of law' would be beyond judicial review if they were made 'within jurisdiction'. It would be decidedly odd, therefore, as a historical matter, for there to be a constitutional guarantee of judicial review on questions of law. Unsurprisingly, there is no authority for any such conflation. Mr Mancini cites *Attorney General (Que.) v Farrah*, 1978, 195 SCC, [1978] 2 SCR 638, but with respect, the principle of this case is that a legislature cannot use a privative clause and other devices to transfer part of the supervisory jurisdiction of the courts to a statutory body (which was the effect of the legislative scheme). It does not stand for the proposition that the constitutional core minimum of judicial review contains only 'questions of law'. If anything, it stands for the proposition that 'questions of law' are *at least* part of the constitutional core minimum.

[169] *Fooks v Alberta Association of Architects*, 1982, 139 DLR (3d) 445.

[170] *Legal Profession Act (Re)*, 1967, 64 DLR (2d) 140, at 146 (Alta SC App Div).

[171] *Harris v The Law Society of Alberta*, [1936] SCR 88, at 92, 102–103; see also *Dierks v Altermatt*, [1918] 1 WWR 719, at 724 (Alta SC App Div).

[172] *Hespeler v Shaw* (1858), 16 U.C.Q.B. 104, at para 6.

judicial review since *Vavilov*. Nonetheless, the notion that has underpinned judicial review for centuries now — that the superior courts must ensure that administrative decision-makers remain within the boundaries set by legislation and the common law — remains an integral part of the Canadian public law tradition. *Vavilov* makes clear that the courts have a "constitutional duty" to ensure that administrative decision-makers respect the boundaries of their authority.[173]

Third, the position advanced by Near and Slatter JJA relies heavily on a contextual analysis of legislative intent. But as the Supreme Court reaffirmed in *Mason* (righting the ship after a deviation in *Entertainment Software Association*), contextual analysis is now *verboten* in selecting the standard of review. "Institutional design" as deployed in *Vavilov* is a thin concept, which focuses on the application of appellate standards of review where an "appeal" has been provided for: the concept goes no further than this. It is difficult to see, therefore, why it should be used to preclude access to judicial review.

DISCRETION

Those in the discretion camp do not take sides as between legislative intentionalists and constitutional traditionalists. Rather, they would use the remedial discretion of the superior courts to refuse to grant a remedy for factual error in most cases. In that way, respect can be paid to legislative intent by restricting access to judicial review remedies but without making judicial review unavailable, as such. There is no doubt that remedial discretion has long been a feature of the law of judicial review of administrative action but those in the discretion camp advocate a new departure, in order to stake out a position between the legislative intentionalists and constitutional traditionalists.

The leading case for those in the discretion camp is the decision of the Ontario Court of Appeal in *Yatar*. This decision is currently on reserve at the Supreme Court of Canada. (I appeared for the intervener Canadian Telecommunications Association.)

In *Yatar v TD Insurance Meloche Monnex*,[174] the Divisional Court refused to entertain a concurrent appeal and application for judicial review of a decision of the Licence Appeal Tribunal refusing an application for statutory accident benefits. For Kristjanson J, the appeal could not be entertained, as it raised questions of mixed fact and law falling outside the scope of the appeal on questions of law only. And the judicial review application should not be entertained: judicial review is discretionary and, where there is a right of appeal, should be entertained only in exceptional circumstances. She gave four reasons justifying the refusal to entertain the judicial review application.

First, the legislature had plainly intended to limit oversight of factual matters in the statutory accident benefits field, implementing a suite of reforms "designed to provide a streamlined response, prioritizing access to justice in a quicker and more efficient manner".[175] Second, there is an internal reconsideration power, exercisable on a basis "akin" to the correctness standard.[176] Third, the nature of the alleged errors — on questions of fact or mixed questions of law and fact involving the assessment of evidence — was such that any judicial review would be conducted on a "high standard of deference".[177] Fourth, concurrent appeals and judicial reviews create "systemic difficulties".[178] Accordingly, judicial review would only be available in "exceptional circumstances" which were not present here.[179]

The Ontario Court of Appeal affirmed for slightly different reasons: *Yatar v TD Insurance Meloche Monnex*.[180] Nordheimer JA held that judicial review of a reconsideration decision

[173] *Vavilov*, *supra* note 3 at para 68.

[174] *Yatar v TD Insurance Meloche Monnex*, 2021 ONSC 2507.

[175] *Ibid* at para 41.

[176] *Ibid* at para 43.

[177] *Ibid* at para 44.

[178] *Ibid* at para 45.

[179] *Ibid* at para 46.

[180] *Yatar v TD Insurance Meloche Monnex*, 2022 ONCA 446.

would only be available in "rare" cases, as the courts could exercise their residual discretion not to hear the application for judicial review.[181] This was because the legislature intended there to be swift and efficient resolution of benefits disputes.[182]

In my view and with respect (and with the caveat that my client in the *Yatar* appeal sought to doubt Nordheimer JA's analysis), this decision should not be followed. Consider the legislative intent point first. It must be pointed out that the power of reconsideration in this case was not contained in the relevant parent statute. Rather, it is contained in the Tribunal's own rules. There is a general provision in the *Statutory Powers Procedure Act*, permitting tribunals to make rules relating to internal review of decisions.[183] But this general provision can hardly indicate a specific legislative intent in respect of the benefits disputes regime. In this instance at least, the legislative intent argument rests on shaky foundations.

Beyond this, as long as we have had judicial review, it has been the case that courts can judicially review any final administrative decision, whether or not there was an elaborate internal process leading up to that decision. To give courts a discretion not to hear judicial review applications because of their perception of the quality and quantity of internal reconsiderations would allow judicial discretion to trump constitutional principle. The quality and quantity of internal reconsiderations might have a bearing on how much deference is due to the decision-maker, but it should not have a bearing on whether the individual challenging a decision is entitled to their day in court. There are principled grounds for refusing a remedy — prematurity, mootness, lack of standing, failure to exhaust alternative remedies — but the one mentioned in *Yatar* is not one of them. Notwithstanding the creative approach of Kristjanson J and Nordheimer JA (and again with the caveat that my client in the *Yatar* appeal has an interest), I am unconvinced.

Discretion featured in a slightly different way in *Canada (Attorney General) v Pier 1 Imports (U.S.), Inc.*[184] Here, Boivin JA suggested, having reviewed the current controversy, that "as a matter of practice, and in the vast majority of cases, the statutory appeal will be sufficient to address the issue at hand, and the judicial review, although available, will be rendered superfluous."[185] For Boivin JA, an appeal *may* be an adequate and effective remedy (and, indeed, may *often* be so) but one cannot be categorical about this. In my view, discretion relating to remedies can be pushed no further than this in resolving the jurisprudential dispute about the effect of limited rights of appeal. In particular, if an appeal is confined to questions of law, but an applicant for judicial review seeks to impugn a finding of fact, it is difficult to see how the appeal can be an adequate and effective remedy.

CONSTITUTIONAL TRADITIONALISM

Constitutional traditionalists take a broad view of *Crevier* and a narrow view of legislative intent. For members of this camp, judicial review for substantive reasonableness and procedural fairness must always be available, on issues of law and issues of fact alike. The only situation in which judicial review can be precluded is where the legislature has provided for appellate-style or equivalent review in an independent body. Constitutional traditionalists might also be apt to think that a statutory right of appeal, because it is drafted against the well-accepted backdrop that judicial review is always available, must be interpreted to give a prospective appellant something more than that available by way of judicial review.

As will be clear from my critique above of legislative intentionalism, I believe that history firmly supports the constitutional traditionalist position. Judicial review has changed in many ways over the centuries, with the prerogative writs latterly displaced by a law of general principles of administrative action. But there are some fundamentals. Judicial review is distinct from an appeal on the merits. Clauses interfering with the ability to seek judicial review are narrowly construed. And the function of the superior courts, as constitutionalized by *Crevier*, is to

[181] *Ibid* at para 47.

[182] *Ibid* at para 38.

[183] *Statutory Powers Procedure Act*, RSO 1990, c S.22, s 21.2(1).

[184] *Canada (Attorney General) v Pier 1 Imports (U.S.), Inc.*, 2023 FCA 209.

[185] *Ibid* at para 52.

keep administrative decision-makers within the boundaries of legality. These days, as the Supreme Court put it in *Vavilov*, the courts must apply the reasonableness standard "to ensure that administrative bodies have acted within the scope of their lawful authority."[186] Similarly, when monitoring compliance with procedural fairness, the courts may imply additional protections into statutory schemes to ensure lawful decision-making.[187]

The leading member of the constitutional traditionalists is Gleason JA, who wrote the majority reasons for the Federal Court of Appeal in *Best Buy*. For her, at least some factual errors must be reviewable regardless of Parliament's institutional design choices. Based on a magisterial review of the development of the "standard of review analysis" in Canadian law, culminating in *Vavilov*, she identified three fundamental propositions. First, the Supreme Court determined in *Vavilov* that "as a matter of principle, the availability of limited appellate review does not foreclose the availability of judicial review".[188] Second, there is no indication in *Vavilov* that privative clauses such as s 67(3) of the *Customs Act* bar access to judicial review or curial oversight of any types of errors:

> A complete bar on the availably of judicial review for any type of issue would offend the rule of law as the Supreme Court noted in *Dunsmuir*, a holding that was specifically endorsed in *Vavilov* at para. 24. Further, the Court in *Dunsmuir* and *Vavilov* did not overturn the previous decades-old case law determining that what were previously characterized as patently unreasonable factual errors, formerly called jurisdictional, remain reviewable, albeit now under the reasonableness standard.[189]

Third, *Vavilov* expressly contemplates that "factual issues may give rise to unreasonable decisions".[190] As a result, a privative clause cannot be read "as barring access to judicial review for all factual issues".[191] Institutional design considerations are "part of the relevant statutory framework — an important contextual factor in determining the parameters of a reasonable decision according to *Vavilov* and the case law of this Court."[192]

Gleason JA also cited with approval the following piece of academic commentary:

> First, in the same paragraph [of *Vavilov*] that eliminated jurisdictional error as a category of correctness review one finds the following assertion: "A proper application of the reasonableness standard will enable courts to fulfill their *constitutional duty* to ensure that administrative bodies have acted within the scope of their lawful authority." The language of constitutional duty is the language of *Crevier* and *Dunsmuir*. It suggests that reasonableness review *cannot*, in fact, be ousted, for its elimination may prevent courts from doing their constitutional duty.
>
> Second, although the point is not expressed in constitutional terms, the majority was very clear that it was directing administrative decision-makers to henceforth "adopt a culture of justification and demonstrate that their exercise of delegated public power can be 'justified to citizens in terms of rationality and fairness.'" If reasonableness review has been eliminated, administrative decision-makers need never demonstrate that their exercise of

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[186] *Vavilov*, *supra* note 3 at para 67.

[187] *Innisfil Township v Vespra Township*, 1981, 59 SCC, [1981] 2 SCR 145, at 169, citing *Cooper v Wandsworth Board of Works*, 1863, 14 C.B. (N.S.) 180.

[188] *Supra* note 148 at para 111.

[189] *Ibid* at para 112. See also at paras 82–87, discussing how "seriously erroneous factual determinations [can] onstitute[e] patently unreasonable error", and at para 116.

[190] *Ibid* at para 113.

[191] *Ibid* at para 116.

[192] *Ibid* at para 117. See also *Koebisch v Rocky View (County)*, 2021 ABCA 265, at para 24.

> public power can be justified in terms of rationality and fairness. This would knock the legs from under a central pillar of the architecture of *Vavilov*.
>
> The result, I submit, is that *Vavilov* establishes a core constitutional minimum of reasonableness review.[193]

This position has also been adopted in Manitoba.[194]

This still leaves the question of when exactly judicial review can be precluded. Recall that in paragraph 52 of *Vavilov* the proposition is that a limited right of appeal cannot "on its own" prevent a superior court from performing its reviewing function. What does this mean?

The answer I give (and presented to the Supreme Court in *Yatar*) is that this is permissible where the reasonableness (and, for that matter, procedural fairness) of all aspects of a decision can be assessed by an independent body in appellate-style review: "Where the judicial review jurisdiction of the courts *has been* successfully ousted by statute, one finds more than a simple clause with privative language: the legislature has provided a particular channel for oversight of the legality, rationality and procedural fairness of administrative action."[195] One early Supreme Court of Canada case provides a nice example. In *Kelly v Sulivan*,[196] a landowner sought judicial review (via a writ of *certiorari*) of a decision of the Commissioner's Court, an administrative tribunal established under the *Prince Edward Island Land Purchase Act, 1875*, the effect of which was to acquire all her township lands in PEI. The Court held that a writ of *certiorari* was not available, but only because the statute precluding access to *certiorari* also provided that an application could be made to the superior court, within 30 days, to correct any error, informality or omission in the award.[197] This covered the same ground as *certiorari* and was, accordingly, capable of ousting the superior court's jurisdiction. But only because it covered the same ground as *certiorari*.[198]

This may also occur where there is a limited right of appeal to the courts (perhaps on questions of law) *and* provision for appellate-style review of remaining aspects of the decision. Quite what appellate-style review means, and in particular whether an appeal to the federal or provincial cabinet meets the standard, has been debated before the courts previously[199] and may become relevant again in the near future.

Whether the Supreme Court will tell us in *Yatar* which of these camps it right remains to be seen. The statute at issue there specifically provides that the right to seek judicial review is not precluded.[200] The legal significance of this fact is unclear, however. Whether the

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[193] Paul Daly, "Unresolved Issues after Vavilov IV: The Constitutional Foundations of Judicial Review" (17 November 2020), online: *Administrative Law Matters* <www.administrativelawmatters.com/blog/2020/11/17/unresolved-issues-after-vavilov-iv-the-constitutional-foundations-of-judicial-review>.

[194] *Smith v The Appeal Commission*, 2023 MBCA 23, at paras 43–44.

[195] Paul Daly, "Understanding Administrative Law in the Common Law World" (Oxford University Press, Oxford, 2021), at 188 [emphasis in original].

[196] *Kelly v Sulivan*, 1877 1 SCR 3 [*Kelly*].

[197] Though even here there was at least a suggestion that *certiorari* remained available to correct jurisdictional errors: "The view I take is that the mode pointed out by the Statute is the one which should have been pursued by the proprietor in this matter if there were any *error, informality* or *omissions* in the award made, and that the Court had no other authority to enquire into the proceedings of the Commissioners further than *to see if the subject matter was properly before them, and, perhaps, to see if they had been guilty of any fraud in their proceedings*", *ibid* at 37 [emphasis added]. Underlined emphasis is mine and captures the old idea that a decision-maker must have 'jurisdiction to enter on the inquiry'.

[198] See similarly, *Federal Courts Act*, RSC 1985, c F-7, s 18.5. *Kelly* is cited by Mark Mancini in "Foxes, Henhouses and the Constitutional Guarantee of Judicial Review" (2024) *Canadian Bar Review* (forthcoming) as an example of the permissibility of legislation precluding judicial review. However, the scope of *Kelly* is plainly quite limited: the comments about excluding judicial review were made in a context where — in fact — judicial oversight was not excluded at all on the Supreme Court's interpretation of the statutory scheme. *Kelly* does not stand for the bald proposition that judicial review can be precluded by statute.

[199] See *e.g. Canadian National Railway Company v Scott*, 2018 FCA 148.

[200] *Insurance Act*, RSO 1990, c I.8, s 280(3).

statute said so or not, judicial review would be available as a matter of common law.[201] Then, the question becomes whether a limited right of appeal can function as a limitation on the scope of judicial review, either by discretion (as the courts below held in *Yatar*) or in some other way. Personally, I find it difficult to see a distinction of principle between preclusion of judicial review arising from discretion and preclusion of judicial review arising from statute: in both instances, it is necessary to clarify the extent to which judicial review is constitutionally entrenched (especially on questions of fact) in order to explain why it cannot be precluded. Unless the Supreme Court puts itself in the discretion camp, its disposition of *Yatar* will be telling.

IV. CONCLUSION

I have covered a miscellany of issues in this 'year in review' paper. It is something of a relief to be able to comment on a relatively settled landscape. The first few years post-*Vavilov* are proving much more stable and satisfactory than those that preceded the seminal 2019 decision. The Supreme Court is facing a multiplicity of issues in the coming months that will put the *Vavilov* framework to the test, but as long as simplicity and clarity remain as the touchstones, there is reason to be optimistic about the medium-term future of Canadian administrative law. Long may stability continue! ■

[201] *Edmonton East*, *supra* note 143 at para 78.

CLIMATE-RELATED FINANCIAL DISCLOSURES AND DATA CHALLENGES: WHAT DOES IT MEAN FOR CANADA'S ENERGY COMPANIES?

*Anik Islam, Colleen Kaiser and Geoff McCarney**

1. INTRODUCTION

As Canada moves towards achieving net-zero emissions by 2050 in a concerted effort to mitigate the worst consequences of climate change, a profound transformation is underway within the energy sector. This transition encompasses a wide spectrum of stakeholders, ranging from vertically integrated oil and gas conglomerates to independent power producers and utilities. They are confronted with an imperative task: to proactively address their expanding array of climate-related risks and change their business practices to align with economic opportunities associated with climate change and the net-zero transition.

Sound management of climate change-related risks and opportunities requires shared understanding and transparency on climate-related information, which must be facilitated by high-quality, reliable and comparable climate-related financial disclosures. With several jurisdictions moving ahead, Canada is poised to adopt mandatory disclosure of climate-related financial information for businesses. Canadian energy enterprises, characterized by their substantial size, stringent regulatory environment, and strong industry-regulatory engagement, will need to be prepared as Canada moves toward the implementation of these essential mandates.

As a starting point, energy companies need to understand their own data gaps and challenges. Better data would not only help these companies to complete their own climate disclosures but also disclosing along uniform standards will help improve data access and comparability of climate-related risks across Canada.

What are Climate-Related Financial Disclosures?

Climate-related financial disclosures are information that helps businesses and stakeholders analyze, quantify and integrate climate-related risks and opportunities into their decision-making and operating processes.[1] This includes information on processes to manage climate-related risks and opportunities, current and future GHG emissions, net-zero/GHG emissions reduction targets, planned future investments in cleaner and more energy-efficient

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[1] "2022 Status Report" (October 2022), online (pdf): *Task Force on Climate-related Financial Disclosures* <assets.bbhub.io/company/sites/60/2022/10/2022-TCFD-Status-Report.pdf>.

technologies, the ability to adapt to different climate change-related scenarios and more. In turn, these disclosures allow financial institutions such as banks, insurance companies, long-term institutional investors and others to analyze and factor in climate risks and opportunities and make better lending, insurance underwriting and investing decisions.

Most companies disclose climate-related information based on voluntary frameworks and guidance such as the recommendations from the Taskforce on Climate-related Financial Disclosures (TCFD). The four overarching elements of the TCFD recommendations include:[2]

1. **governance** – describing the roles of the board and management in dealing with related opportunities and risks;

2. **strategy** – examining the actual and potential impact on the organization's businesses, strategy and financial planning;

3. **risk management** – disclosing the processes used to identify, assess, and manage associated risks; and

4. **metrics and targets** – identifying the measures used to assess and manage climate-related risks and opportunities.

1.1 INTERNATIONAL PROGRESS ON CLIMATE-RELATED FINANCIAL DISCLOSURES

The adoption of voluntary frameworks has gained traction over the years. As per the TCFD Progress Report 2023, the percentage of companies disclosing TCFD-aligned information globally increased from 18 per cent in fiscal year 2020 to 58 per cent for fiscal year 2022.[3] In Canada, among the companies which are part of the S&P/TSX Composite Index, 64 per cent adopted the TCFD recommendations for their climate disclosures, representing an increase of 113 per cent since the TCFD was implemented in 2019.[4] However, voluntary disclosures lead to multiple and sometimes different reporting of information by the same firm, which in turn makes individual assessments and sector wide comparisons cumbersome. The lack of standardized reporting has also raised concerns about the reliability, usefulness, and comparability of such information.

To standardize reporting of sustainability and climate-related information, at the UN Climate Change Conference (COP26) in November 2021, the International Financial Reporting Standards Foundation (IFRS) announced the creation of the International Sustainability Standards Board (ISSB). The ISSB's remit is to issue standards that deliver a comprehensive global baseline of sustainability-related financial disclosures building off the recommendations from the TCFD and other frameworks.[5] In June 2023, the ISSB finalized its inaugural standards.[6] IFRS S1 provides a set of disclosure requirements designed to enable companies to communicate their sustainability-related risks and opportunities they face over the short, medium, and long term. IFRS S2 focuses on the topic of climate and establishes how companies should disclose climate-related information.

While the sustainability standards are global, it is up to countries to implement mandatory climate-related financial disclosures in line with these standards. Countries such as the United Kingdom, China, New Zealand, Switzerland and others are moving forward on implementing mandatory disclosure requirements in line with the TCFD recommendations and now the ISSB standards.[7] Mandatory disclosures will drive standardization for markets, reduce

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[2] Sean Cleary, "Why companies are getting on board with climate related disclosures" (2021), online: *Institute for Sustainable Finance* <smith.queensu.ca/centres/isf/resources/primer-series/financial-disclosures.php>.

[3] "2023 Status Report" (October 2023), online (pdf): *Task Force on Climate-related Financial Disclosures* <fsb.org/wp-content/uploads/P121023-2.pdf>.

[4] Millani, "Millani's 7th Annual ESG Disclosure Study: A Canadian Perspective" (October 2023), online (pdf): <66e92bb4-13f5-462a-98c4-69b0f2ad5f7d.usrfiles.com/ugd/66e92b_184f379cd39d4cbfa22c1e237478ae75.pdf>.

[5] "Climate-related Disclosure" (June 2023), online: *International Financial Reporting Standards* <ifrs.org/projects/completed-projects/2023/climate-related-disclosures>.

[6] "ISSB issues inaugural global sustainability disclosure standards" (26 June 2023), online: *International Financial Reporting Standards* <ifrs.org/news-and-events/news/2023/06/issb-issues-ifrs-s1-ifrs-s2>.

[7] Jonathan Arnold, "More than Mandatory: Why Canada needs to go beyond global disclosure rules to secure its long-term economic success" (28 October 2021), online: *Canadian Climate Institute* <climateinstitute.ca/more-than-mandatory>.

fragmentation and simplify the disclosure landscape for all stakeholders.[8]

Some jurisdictions are proceeding more quickly than others. The European Union has adopted the European Sustainability Reporting Standards, subject to their Corporate Sustainability Reporting Directive, which will require all large companies and all listed companies (except listed micro-enterprises) to disclose information on risks and opportunities arising from social and environmental issues, and on the impact of their activities on people and the environment.[9] The US Securities and Exchange Commission proposed rules requiring publicly listed companies to disclose climate-related information ranging from GHG emissions to expected climate risks to transition plans.[10] However, the implementation of disclosure rules has been delayed to later in 2024 (April estimated).[11] Pre-empting the federal rules, the state of California has put forward a law that will require certain public and private US companies doing business in the state to provide both quantitative and qualitative disclosures of GHG emissions and climate-related risks.[12]

Climate-Related Financial Disclosures in Canada

The Government of Canada, alongside other G7 and G20 counterparts, has committed to moving towards mandatory disclosures aligned with the TCFD recommendations and now the ISSB standards.[13] In Budget 2021, the Government of Canada announced that federal crown corporations will demonstrate climate leadership by adopting TCFD/ISSB recommendations as an element of their corporate reporting.[14] The Office of the Superintendent for Financial Institutions (OSFI) has developed a principles-based climate risk management and disclosure requirement guideline for federally regulated financial institutions.[15] The Canadian Securities Administrators (CSA) — the umbrella group for provincial and territorial securities regulators — has developed draft climate disclosure requirements for publicly listed Canadian companies.[16] However, following the launch of the ISSB, the CSA is waiting to conduct further consultations to ensure it adopts disclosure standards consistent with ISSB standards.[17] The Federal Government's Fall Economic Statement 2023 also announced that the federal government will develop options for making climate disclosures mandatory for private companies in order to close the regulatory coverage gap for climate disclosures across the Canadian economy.[18]

These developments suggest that mandatory climate-related financial disclosures are coming soon in Canada. Canadian energy companies need to take the necessary steps on climate disclosures to not only understand climate-related risks and opportunities within their operations but also access the

[8] Jennifer Fairfax et al.,"International Sustainability Standards Board releases draft sustainability and climate change disclosure proposals for public comment" (24 May 2022), online: *Osler* <osler.com/en/resources/governance/2022/international-sustainability-standards-board-releases-draft-sustainability-and-climate-change-disclo>.

[9] European Union, "The Commission adopts the European Sustainability Reporting Standards" (31 July 2023), online: *European Commission* <finance.ec.europa.eu/news/commission-adopts-european-sustainability-reporting-standards-2023-07-31_en>.

[10] U.S. Securities and Exchange Commission, "Enhancement and Standardization of Climate-Related Disclosures" (2022), online: <sec.gov/files/33-11042-fact-sheet.pdf>.

[11] Maia Gez, Scott Levi, and Danielle Herrick, "Fall 2023 Reg Flex Agenda: Climate Rules Pushed to April 2024" (8 December 2023), online: *Lexology* <www.lexology.com/library/detail.aspx?g=9864456e-d723-4243-b1e4-13e7a14754b2>.

[12] Deloitte, "California adopts legislation requiring climate disclosures" (11 October 2023), online: *IAS Plus* <iasplus.com/en/news/2023/10/california-climate-bills>.

[13] "G7 Finance Ministers and Central Bank Governors' Statement on Climate Issues" (12 October 2022), online: *Government of Canada* <canada.ca/en/department-finance/news/2022/10/g7-finance-ministers-and-central-bank-governorsstatement-on-climate-issues.html>.

[14] "Budget 2021: A Recovery Plan for Jobs, Growth, and Resilience" (last modified 19 April 2021), online: *Government of Canada* <budget.canada.ca/2021/home-accueil-en.html>.

[15] Office of the Superintendent of Financial Institutions Canada "B-15 Guideline: Climate Risk Management" (March 2023), online (pdf): *OSFI* <osfi-bsif.gc.ca/Eng/Docs/b15-dft.pdf>.

[16] "Canadian Securities Administrators statement on proposed climate-related disclosure requirements" (5 July 2023), online: *Canadian Securities Administrators* <securities-administrators.ca/news/canadian-securities-administrators-statement-on-proposed-climate-related-disclosure-requirements>.

[17] *Ibid*.

[18] "2023 Fall Economic Statement" online (pdf): *Government of Canada* <budget.canada.ca/fes-eea/2023/report-rapport/FES-EEA-2023-en.pdf>.

much-needed capital and other financial services to undertake their own business transition to net-zero emissions by 2050 and be globally competitive.

2. CLIMATE DISCLOSURES NEED ADEQUATE CLIMATE DATA

Implementation Canada's newly announced climate-related financial disclosure mandate will require energy companies to produce robust, high-quality, reliable climate data to ensure that climate disclosures provide decision-useful information. However, data gaps and challenges remain a critical barrier to progress on disclosures and Canada's broader climate objectives.

To start, energy companies will need to understand where they might have data gaps and challenges and address them quickly to enable them to develop and complete their own climate disclosures. Moreover, by disclosing against uniform standards, energy firms (utilities in particular) have the potential to foster data uniformity on GHG emissions and climate-related transition risks for stakeholders in the Canadian economic landscape.

To understand data requirements, research undertaken by the Smart Prosperity Institute[19] compares disclosure standards, frameworks and guidelines relevant to Canada. Amongst others, the relevant frameworks and regulatory instruments for energy companies include the TCFD's *Final Recommendations from the Task Force on Climate-Related Financial Disclosures*[20], ISSB's *IFRS S2 Climate-related Disclosures*[21] and CSA's proposed *National Instrument 51-107 Disclosure of Climate-related Matters*[22] for companies publicly listed in Canada.

The comparison of the relevant disclosure standards and regulations shows that businesses preparing disclosures require a mix of qualitative and quantitative data, information, methodologies, and forward-looking analysis based on the following broad pillars — *governance, strategy, risk management, metrics & targets* and *transition planning and engagement strategies*. Qualitative disclosures for governance, strategy, risk management and transition planning are specific to organizations preparing disclosures. On the other hand, quantitative disclosures rely on the development of commonly accepted metrics and targets and their underlying methodologies and assumptions.

The completion of quantitative disclosures is often the first step in the disclosure process. They feed into and supplement qualitative requirements and help decision-makers identify and analyze drivers, exposure, and financial impacts of climate-related risks and opportunities. For these reasons, businesses need to prioritize quantitative climate data to support disclosures.

Stakeholder consultations and desk research show consensus around the five types of quantitative climate-related financial disclosures that need to be prioritized:[23]

- **GHG Emissions** – information, numbers, and methodologies for measurement and reporting of emissions across the value chains (Scope 1, 2 and 3, including financed emissions and insurance-associated emissions).
- **Net Zero/GHG Emissions Reduction Targets** – information and numbers needed to set net-zero/ GHG emissions reduction targets (e.g., interim emissions reduction targets).
- **Physical Risk** – information, numbers, and analysis to understand business

[19] Anik Islam, Colleeen Kaiser, and Marena Winstanley, "Climate Data Requirements, Gaps, and Challenges to Support Climate-Related Financial Disclosures" (August 2023), online (pdf): *Smart Prosperity Institute* <institute.smartprosperity.ca/sites/default/files/Climate%20Data%20Requirements%20Gaps%20and%20Challenges%20to%20Support%20Climate-Related%20Financial%20Disclosures.pdf>.

[20] "Recommendations of the Task Force on Climate-related Financial Disclosures" (June 2017), online: *Task Force on Climate-related Financial Disclosures* <fsb-tcfd.org/recommendations>.

[21] "IFRS S2 Climate-related Disclosures" (June 2023), online: *International Sustainability Standards Board* <ifrs.org/content/dam/ifrs/publications/pdf-standards-issb/english/2023/issued/part-a/issb-2023-a-ifrs-s2-climate-related-disclosures.pdf?bypass=on>.

[22] Canadian Securities Administrators, "Consultation Climate-related Disclosure Update and CSA Notice and Request for Comment Proposed National Instrument 51-107 Disclosure of Climate-related Matters" (18 October 2021), at 74, online (pdf):<osc.ca/sites/default/files/2021-10/csa_20211018_51-107_disclosure-update.pdf>.

[23] *Supra* note 19.

activities or asset's exposure and vulnerability to physical risks.

- **Transition Risk** – information, numbers, and analysis to understand business activities or assets exposure and vulnerability to the transition to a net-zero economy, resulting from policy, legal, market, reputation technological changes, or social adaptation.

- **Scenario Analysis** – methodologies, forward-looking analysis and results needed to assess physical and transition risks and opportunities.

For the five priority types of disclosures, the data requirements are assessed from the disclosure expectations in the TCFD recommendations/ ISSB standards. The data needs for the five priority areas are listed below. It should be noted that some data, such as GHG emissions data, underpins multiple areas of climate-related financial disclosures. To assess and disclose transition risks, preparing entities first needs GHG emissions data to feed into the analysis and disclosure of net-zero/emissions reduction targets. Similarly, scenario analysis feeds into and relies on transition and physical risk data.

Priority Disclosures	Data Needs
GHG emissions (Scope 1, 2 and 3)	**Activity Data (Scope 1 and 2)** – activities that generate emissions from assets owned/controlled by the company (Scope 1) and purchased energy (Scope 2)
	Emissions Factor or Global Warming Potential (Scope 1 and 2) – values used to convert source activity into GHG emissions/ equivalent tonnes of carbon dioxide emissions
	Activity Data (Scope 3) – activities that generate emissions but originate outside the direct control of the company/asset include both upstream and downstream value chains
	Emissions Factor or Global Warming Potential (Scope 3) – values used to convert source activity into GHG emissions/equivalent tonnes of carbon dioxide emissions
	GHG Methodology and Assumptions – used to calculate emissions, mainly from the GHG Protocol
Financed and insurance-associated emissions	**Company/Investment/Asset Emissions** – emissions either directly reported by company or investee (verified or unverified) or estimated from physical or economic activities (based on relevant and credible emissions factors and/or global warming potential)
	PCAF Standard Methodology and Assumptions – including attribution factor and data quality scores
Net-zero/GHG emissions reduction	**GHG Emissions** – inventory of company-wide Scope 1, 2 and relevant Scope 3 GHG emissions to set net-zero or GHG emissions reductions target
	Sectoral Pathways – provide the link between the science of the remaining carbon budget that can be emitted and the detailed steps that a specific sector/company can take to reduce GHG emissions to a particular level in a specified timeframe
	Transition Plans – information on impacts, strategies, investments to support GHG emissions reduction or net-zero transition (e.g., spending on energy savings initiatives, adopting renewable energy sources, use of carbon credits or offsets

Physical risks	**Physical Hazards Data** – data and analytics on the types and impact of past (historical) and projected (forward-looking) extreme weather events (floods, storms, wildfires, etc.) and gradual changes in climate (projected sea-level rise, hazardous air-borne pollutants, etc.)
	Asset Specific Data – information on assets (e.g., value of asset, size, year of construction, construction material, etc.) and location of physical assets (e.g., firms' facilities) and value and supply chains (location of firms' suppliers and customers) at the most granular level possible
	Adaptive Capacity – information and analytics on the degree of sensitivity to extreme weather events (e.g., data on how they coped with extreme weather events in the past)
	Vulnerability Assessment – data and analytics to translate physical hazards into damage/loss for exposed assets
Transition risks	**GHG Emissions** – data and information on Scopes 1, 2 and 3 emissions
	Net Zero/Emissions Reduction Targets and Sectoral Pathways – data and information on emissions reduction or net-zero targets (absolute and intensity-based) and sectoral pathways to show how emissions will be reduced over time
	Transition Metrics – data and information which convert official-sector policies, shifts in consumer preferences and technology development into standardized metrics to measure transition risks
	Transition Preparedness – data and analytics on the degree of preparedness to transition to net-zero economy (e.g., firm's transition plans, exposures to carbon pricing, etc.)
Scenario analysis	**Scenario Analysis Models and Types** – data and information on the model used and different types of scenarios used to make assessments
	Scenario Analysis Inputs and Assumptions – information about processes, assumptions, time horizons, outputs, and potential management responses to different scenarios

3. DATA GAPS AND CHALLENGES

The gaps and challenges for each of the five priority types of disclosures are summarized below:

GHG Emissions: Large entities, such as energy companies, seemingly have access to relevant activity data, emission factors and relevant guidance and methodologies to measure and disclose GHG emissions from their activities (Scope 1) and energy consumption (Scope 2). However, they are likely to face difficulty in accessing relevant and sufficiently granular data to measure and disclose emissions across their upstream and downstream value chains (Scope 3). Reasons range from preparing companies being unable to obtain information from value chain entities, value chain entities not being able to measure their activity consistently and accurately, complex corporate structures creating challenges in data collection, lack of supplier-specific emissions factors to calculate GHG emissions and value chain entities having different reporting timeframes resulting in significant reporting lags.[24]

To fill the data gaps, preparers are likely to utilize a combination of supplier-specific activity data, where available, and broad sectoral-level physical or economic activity data with secondary emissions factors (industry

[24] Emma Cox, and Casey Herman, "Tackling the Scope 3 challenge" (28 October 2022), online: *PWC* <pwc.com/gx/en/issues/climate/scope-three-challenge.html>.

averages) and/or information from third-party data providers.[25] This quantification may involve subjective decision-making, disclosures and potential recalculation in subsequent years, thus leading to less reliable and comparable data. Similarly, recent research highlights complexities in applying methodologies and assumptions to measure and disclose Scope 3 emissions across upstream and downstream value chains negatively affect disclosures.[26] Energy companies need to be aware of these data collection, analytical and quantification challenges to support their disclosures, especially concerning Scope 3, which is expected to be the majority of the corporation's total GHG emissions.

Net-Zero/GHG Emissions Reduction Targets: GHG emissions reductions/net-zero targets are often disclosed by companies preparing disclosures. Preparing entities rely on estimations to fill data gaps related to GHG emissions measurement, which presents reliability and comparability challenges. To credibly set net-zero/GHG emissions reduction targets, preparing companies need to understand their sectoral pathway to achieve net-zero emissions.[27] However, there are different approaches and trade-offs in analyzing sectoral pathways that create challenges in analyzing actions and outcomes at the entity level. In addition, lack of clarity regarding the application of existing frameworks and guidance on net-zero transition planning adversely impacts their development and, ultimately, disclosures.[28] For energy companies, target setting is likely to be hindered for all three GHG emission scope levels, particularly Scope 3 emissions targets, due to the challenges described above.

Physical Risk: Physical risks such as climate-related heatwaves and floods can be significant and highly unpredictable. Energy companies need robust forward-looking data to account for and disclose these risks. Data on different types of physical hazards are available mostly from "off-the-shelf" datasets. These datasets may be expensive to procure and may not capture Canada-specific sub-national/regional physical risks at the spatial and temporal granularity required. These challenges create the need for granular, regularly updated, Canada-specific sub-national/regional physical hazard datasets.[29] In addition to physical hazards, energy companies preparing disclosures need to analyze and disclose relevant information related to the exposure (likelihood of the severity of a hazard in a given place) and vulnerability (likelihood that assets will be damaged/destroyed/affected when exposed to a hazard) of operations and assets.[30] There is limited availability of asset characteristics and location data to map location-specific exposures. Adaptive capacity data is not readily or uniformly available across sectors and is difficult to measure for preparers.[31] There are no industry-specific physical risk metrics and targets, within an industry sector/sub-sector, against which a company can be benchmarked.[32] There are also modelling challenges in assessing vulnerability from physical hazards, which makes it difficult to

[25] *Supra* note 19.

[26] *Ibid*.

[27] Glasgow Financial Alliance for Net Zero, "Draft Recommendations for the Development of the Net-Zero Data Public Utility" (2022), online (pdf): <assets.bbhub.io/company/sites/63/2022/09/Development-of-the-Net-Zero-Data-Public-Utility-September-2022.pdf>.

[28] "Metrics Targets and Transition Plans Consultations" (October 2021), online (pdf): *Task Force on Climate-related Financial Disclosures* <assets.bbhub.io/company/sites/60/2021/10/October_2021_Metrics_Targets_and_Transition_Plans_Consultation_Summary_of_Responses.pdf>.

[29] Sean Cleary, and Simon Martin, "Partial Disclosure: Assessing the state of physical and transition climate risk disclosure in Canada" (October 2022), online (pdf): <smith.queensu.ca/centres/isf/pdfs/ISF-partial-disclosure-paper.pdf>.

[30] Financial Stability Board, "The Availability of Data with Which to Monitor and Assess Climate-Related Risks to Financial Stability" (7 July 2021), online (pdf): <fsb.org/wp-content/uploads/P070721-3.pdf>.

[31] Network for Greening the Financial System, "Progress report on bridging data gaps" (May 2021), online (pdf): <ngfs.net/sites/default/files/medias/documents/progress_report_on_bridging_data_gaps.pdf>.

[32] Katherine Bakos, and Blair Feltmate, "Transitioning From Rhetoric to Action: Integrating Physical Climate Change and Extreme Weather Risk Into Institutional Investing" (July 2023), online (pdf): *Intact Centre on Climate Adaption* <intactcentreclimateadaptation.ca/wp-content/uploads/2023/07/UoW_ICCA_2023_07_Integrating_Physical_Climate_Change_Risk_Into_Investing.pdf>.

translate physical risks into economic impacts and disclose this information.

Transition Risk: Other things being equal, firms with higher emissions or less stringent emissions reduction or net-zero targets are expected to face higher transition risks.[33] The main barriers to effective analysis and disclosures of quantitative transition risk are an incomplete measurement of Scope 1 and 2 emissions, limited availability of Scope 3 emissions, target setting for only narrow scopes of entities' emissions and trade-offs in using different sectoral pathway approaches. There is a shortage of standardized metrics to appropriately assess transition risks, while data on transition preparedness are not always possible to disclose.[34] In their absence, energy companies have to rely on third-party data providers who may fill the data and analytics gaps using their own models and assumptions, leading to incomparable and unreliable information for users of disclosures such as financial institutions.

Scenario Analysis: Models such as those developed by the Intergovernmental Panel on Climate Change (IPCC), the International Energy Agency (IEA), and NGFS, along with other guidance materials, are available to support preparers in undertaking and disclosing climate-related risks and opportunities under different scenarios. However, business-relevant data and tools that provide input to companies for conducting scenario analysis are less available. To fill these gaps, different organizations including energy companies have to employ subjective judgement or look towards expertise from external third-party data providers which may cause reliability and comparability challenges and negatively affect disclosures.

4. SUMMARY DISCUSSION AND FUTURE RESEARCH

Canada is moving forward on implementing mandatory climate-related financial disclosures across the economy. Good quality, comparable and reliable climate data is needed to move forward on climate disclosures. However, this report finds that different entities are likely to face different gaps and challenges across the five priority types of disclosures. Data availability varies across the five priority disclosure types and in cases where data is available, it may not be complete, comparable, and/or reliable. Energy companies are likely to have data to measure Scope 1 and 2 GHG emissions either directly with entities or through proxy estimations. They can also set absolute and/or intensity-based net-zero or GHG emissions reduction targets and interim targets. However, they are likely to face challenges in estimating and disclosing the full extent of their Scope 3 GHG emissions, translating existing sectoral transition pathways at the global level to set emissions targets at the entity level, developing transition-oriented metrics to provide forward-looking outlooks on climate-related transition risks and gathering business-relevant data inputs and tools to conduct scenario analysis.

To continually fill climate data gaps and address data-related challenges, greater coordination is needed amongst stakeholders such as federal provincial/territorial governments, regulators, standard-setters, statistical agencies/data providers, businesses, and financial institutions. Canadian energy companies — with robust industry-regulatory coordination — can lead from the front in coordinating with other stakeholders to support data availability and close the gap on reliability and comparability challenges. Some areas where regulators, including energy and securities regulatory bodies, and other stakeholders can coordinate are as follows:

- Regulators can work with other stakeholders such as governments and standard setters to continually update existing guidance on the use of granular emissions factors, activity data and/or proxies to calculate GHG emissions (particularly Scope 3 emissions) and restatement of emissions data. Additionally, these stakeholders can suggest uniform actionable steps across the sector if information is unavailable, and/or if new information and calculation methodologies become available.

- Regulators, governments, and statistical agencies/data providers can align to

[33] *Supra* note 19.

[34] *Supra* note 30.

provide guidance and analytics support to energy companies on Canada-specific scenarios and pathways for sectors (e.g., oil & gas, utilities) to help translate sectoral transition pathways to entity-level emissions reduction pathways and facilitate net-zero/GHG emissions reduction target setting. These stakeholders can also collaborate to develop granular, easily accessible, regularly updated, Canada-specific sub-national/regional physical hazard datasets.

- Regulators, governments, financial institutions, and businesses can coordinate to develop standardized physical risk adaptive capacity and transition preparedness metrics to measure and track progress on both physical and transition risks for the energy sector.

As energy companies close their own data gaps and challenges, they can provide a path forward on data solutions for other sectors of the economy facing climate data-related gaps. For example, as per the recommendations of Canada's Sustainable Finance Action Council (SFAC), Scope 1 and 2 GHG emissions quantification would be easier and more accurate if businesses had access to the emissions data associated with their energy and fuel consumption directly from their respective utilities/energy companies (as part of their utility bills).[35] This process can result in marked improvements in the reliability and comparability of GHG emissions data across different entities and support other areas such as net-zero target setting and transition risk assessment. However, further analysis is needed to ensure that this works in practice, including practical challenges and associated costs that utilities/energy companies and regulators may face in making the data available.

At a higher level, it is also important to recognize that data requirements and disclosure standards, together with taxonomies, depend on and reinforce each other.[36] Data, disclosure standards and taxonomies collectively form the interconnected building blocks of the climate information architecture.[37] This architecture helps promote transparency, quantify climate-related risks and opportunities, and provide investors with clear and consistent information and signals to make financing decisions. However, future research needs to understand the challenges and opportunities that Canada's energy sector will face in aligning with Canadian and global climate data, disclosure and taxonomy requirements and practices. This will help build a sustainable energy system that is truly aligned with Canada's environmental and economic goals. ■

[35] Sustainable Finance Action Council, "SFAC recommendations to the Government of Canada on advancing climate-related disclosures in Canada" (2 February 2023), online (pdf): <canada.ca/content/dam/fin/programs-programmes/fsp-psf/SFAC-Disclosure-EN.pdf>.

[36] Anik Islam, Colleen Kaiser, and Geoff McCarney, "Guiding Sustainable Finance Toward a Net-zero Future" (5 September 2023), online: *Smart Prosperity Institute* <institute.smartprosperity.ca/ClimateInformationArchitecture>.

[37] Caio Ferreira, David L Rozumek, Ranjit Singh, and Felix Suntheim, "Strengthening the Climate Information Architecture" (8 September 2021), online: *International Monetary Fund* <imf.org/en/Publications/staff-climate-notes/Issues/2021/09/01/Strengthening-the-Climate-Information-Architecture-462887>.

THE ENERGY TRANSITION, STRANDED ASSETS, AND AGILE REGULATION

*Gordon Kaiser**

INTRODUCTION

Climate change policies around the world have had a significant impact on energy regulation. This article considers the first three Canadian cases that have struggled with the impact of the energy transition on stranded assets. It also deals with the impact of the energy transition on energy regulation practice and procedure.

Thia article also seeks to explore what we now call agile regulation, a new form of regulation that requires real time innovation and flexibility to meet the demands of the energy transition. The cases we consider come from three different regulators in three different provinces — Ontario, British Columbia and Nova Scotia

The three cases involve a fundamental principle in public utility law that provides that utilities can only recover the cost of capital assets that are "used and useful." Used and useful has a long history in both Canadian[1] and American[2] law. The Supreme Court of Canada decision in *ATCO*[3] makes it clear that assets that are no longer required to meet public utility service needs cannot be included in regulated assets and considered part of the rate base.

The energy transition runs into the "used and useful" rule every day. There are a number of reasons. First, the energy transition involves major capital expenditures in new technology some of which will not work.[4] If the technology doesn't work it will not be used and useful. Second, the new technology may render useless existing technology or reduce its useful life.

THE DECISIONS

Ontario

On December 21, 2023 the Ontario Energy Board (OEB) issued a 145 page decision in a rate application by Enbridge Gas Inc. (Enbridge) following an 18 day hearing.[5] There was no shortage of participation in this hearing. The Board considered the submissions of 20 intervenors and 385 letters of comment. In a press release the same day the Board pointed out that this is the first OEB proceeding to consider a natural gas rates application in the context of the energy transition.

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[1] See *Re London Hydro Inc.* (20 March 2009), EB-2008-0235; *Re PowerStream Inc.* (27 July 2009), EB-2008-0244; *Re Toronto Hydro Electric System* (2 April 2013).

[2] See James Hoecker, "Used and Useful, Autopsy of a Ratemaking Policy" (1987) 8:303 Energy Law Journal, online (pdf): <www.eba-net.org/wp-content/uploads/2023/02/25_8EnergyLJ3031987.pdf>.

[3] *ATCO Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board)*, 2006 SCC 4.

[4] *Nova Scotia Power Incorporated (Re),* 2022 NSUARB 2; Gordon Kaiser, "Canadian Energy Regulators and New Technology: The Transition to a Low Carbon Economy" (July 2021) 9:2 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/articles/canadian-energy-regulators-and-new-technology-the-transition-to-a-low-carbon-economy>.

[5] OEB EB-2022-0200, December 21, 2023, *Decision and Order,* Enbridge Gas Inc.

The first section of the Enbridge decision set out the Board's major findings related to the energy transition:

1. The energy transition poses a risk that assets used to serve existing and new Enbridge customers will become stranded because of the energy transition. Enbridge has not provided an adequate assessment of this risk to demonstrate that its capital spending plan is prudent. The stranded asset risk affects all aspects of Enbridge's system and its proposals for capital spending on system expansion and system renewal.

2. The OEB has reduced the overall proposed capital budget for 2024 by $250 million. Enbridge is expected to utilize its project prioritization process to accommodate this envelope reduction. The OEB did not accept the current Asset Management Plan as a basis to support the proposed capital investments.

3. For the proposed system expansion capital spending plan, the OEB has determined that for small volume customer connections, the revenue horizon that Enbridge uses to determine the economic feasibility of new connections is to be reduced from 40 years to zero, thus reducing stranded asset risk for these new connections to zero, effective January 1, 2025.[6]

Enbridge Gas Inc. is the largest natural gas distribution utility in Canada, serving over 3.5 million customers. The company is the product of a merger in 2018 of Enbridge Gas Distribution Inc. and Union Gas Limited. This application is the first cost of service application since the two companies were joined together.

Essentially the application was a rate case. But the issue that dominated the application and the decision was issue three above. That was the decision by the OEB to reduce the revenue horizon for small volume customer connections from 40 years to zero. It costs Enbridge just over $4,000 to connect a gas customer. Reducing the number to zero meant that the new customers had to pay the full cost of the connection upfront. This, the OEB concluded, avoided any possibility of stranded assets.

The OEB concluded that the gas utility had completely ignored the impact of the energy transition and assumed it was "business as usual":

> The OEB concludes that Enbridge Gas' proposal is not responsive to the energy transition and increases the risk of stranded or underutilized assets, a risk that must be mitigated. In particular, Enbridge Gas has not met the onus to demonstrate that its proposed capital spending plan reflected in its Asset Management Plan is prudent and that it has accounted appropriately for the risk arising from the energy transition.
>
> Two important themes emerged during this proceeding.
>
> - climate change policy is driving an energy transition that gives rise to a stranded asset risk, and
>
> - the usual way of doing business is not sustainable.
>
> …
>
> As OEB staff put it,
>
> > Enbridge Gas expects to continue to add new customers and expand its rate base in what appears to be "business as usual."
>
> …
>
> In the face of the energy transition, Enbridge Gas bears the onus to demonstrate that its proposed capital spending plan reflected in its Asset Management Plan is prudent having accounted appropriately for the risk arising from the energy transition.
>
> The record is clear that Enbridge Gas has failed to do so. Enbridge Gas has taken the position that there is no stranded asset risk for the purpose

[6] *Ibid* at 2.

> of setting rates for 2024. This is not logical.[7]

There was a great deal of controversy as to whether the number should be zero or a larger number. The number estimates became a guessing game. Enbridge was prepared to move from 40 to 30 years on an interim basis if the final number could be determined in a separate hearing. Board Staff and one Board member agreed on 20 years while others agreed on 15 years. Two intervenors and two Board members remained at zero. They turned out to be the winners. As Enbridge pointed out numerous times, the numbers were largely argument as opposed to evidence.

Estimating the degree of stranded assets involves a new and difficult forecast. Board Staff, Enbridge, and four intervenors suggested that the stranded asset calculation be deferred to a separate hearing. That was rejected by the Board which ruled:

> Enbridge Gas has not demonstrated that the 40-year revenue horizon is appropriate in light of the energy transition underway. Enbridge Gas acknowledges this in its reply argument. It proposes a 30-year revenue horizon on an interim basis pending a separate proceeding to determine what the revenue horizon should be. The OEB is of the view that the record before it is more than sufficient to determine this issue and there is no benefit to deferring the issue to a subsequent proceeding.
>
> …
>
> The OEB finds that zero is the optimal revenue horizon because this fully addresses the risk of stranded assets resulting from the energy transition for new connection projects.[8]

Enbridge responded to the decision with two appeals. The first was an application to the courts indicating that the decision should be set aside because there were no reasons or evidence supporting the findings. This was supported by the Minister of Energy who stated the next day that he would use all of his authority to pause and reverse the Ontario Energy Board's decision.

The second was a Motion for Review that asked the Board to establish a new panel that would review the decision of the first panel. The grounds were essentially those set out in the application to the Court of Appeal — there was no evidence or reasons. There was however one wildcard.

In the Notice of Motion Enbridge stated:

> "The Decision effectively makes a new policy that is directly at odds with Government of Ontario policy. In this way key aspects of the decision are fundamentally flawed. It is appropriately the role of the provincial government to make the overarching policy and for the OEB to implement it. As an economic regulator it is the OEBs role to serve and promote provincial energy policy. Where the OEB creates new policy that conflicts with the government of Ontario policy that is an error of law contrary to the OEBs statutory objectives in respect of natural gas and an overstepping of jurisdiction that must be corrected."[9]

At page 5 of its Reply Argument Enbridge states:

> "Energy transition policies are appropriately the domain of the government and not the OEB and speculating on a future state in advance of government direction is at best unproductive and at worst results in not meeting the reliability, affordability and energy access needs of Ontario."[10]

[7] *Ibid* at 19–21.

[8] *Ibid* at 39.

[9] OEB EB-2022-0200/EB-2024-0078, January 29, 2024, *Enbridge Gas Motion for Review and Variance*, at para 14.

[10] OEB EB-2022-0200, October 11, 2023, *Reply Argument*, at para 11.

The Notice of Appeal that Enbridge filed with the Divisional Court comes close to this principle when it states that:

> …the OEB erred in law and jurisdiction by:
>
> > Acting contrary to the statutory objectives for gas as set out in the *OEB Act* and in accordance with the policies of Government of Ontario."[11]

If upheld, a claim that failing to act in accordance with the policies of the government constitutes an error in law and jurisdiction by an energy regulator could significantly change Canadian energy regulation.

As indicated, the OEB dismissed outright the Enbridge application to spread the cost over 40 years. More importantly the Board ignored a request by Enbridge, the Board Staff, one of the Board members and a number of interveners to hold a separate hearing to make proper determination of what the number should be. Those parties all argued that the evidence was insufficient, and a number of relevant parties affected by the ruling were not present and had not been given notice.

There was no concern about any possible delay caused by the second hearing. Both Enbridge and Board staff agreed that there would be no stranded assets in year one. It looked like 30 or 20 years would work on an interim basis. However, the OEB disagreed and stated:

> "The OEB is of the view that the record before it is more than sufficient to determine this issue and there is no benefit to deferring the issue to a subsequent proceeding."[12]

The Enbridge decision has faced its fair share of criticism. This includes a response from the Ontario Minister of Energy who proposed new legislation that would give the government authority to reverse the decision. It also includes the right for the government to order generic hearings on certain aspects of a proceeding where the government believes that the evidence is insufficient.

There is however one feature of the decision that the OEB deserves credit for. This is one aspect of agile regulation called "regulatory guidance." In the Enbridge decision this is set out in section 10 of the Order as follows:

> 10. For its next rebasing application, Enbridge Gas shall:
>
> > a. File an Asset Management Plan that provides clear linkages between capital spending and energy transition risk. The Asset Management Plan should address scenarios associated with the risk of under-utilized or stranded assets and identify mitigating measures.
> >
> > b. File a report examining options to ensure its depreciation policy addresses the risk of stranded asset costs appropriately. These options must encompass all reasonable alternative approaches, including the Units of Production approach.
> >
> > c. Track and study the ten accounts proposed by InterGroup with respect to net salvage and file a report on the results.
> >
> > d. File a proposal to reduce any remaining capitalized indirect overheads to zero.
> >
> > e. File an independent third-party expert study that assesses its overhead capitalization methodology.

[11] OEB EB-2022-0200, January 22, 2024, *Notice of Appeal*, at 5.

[12] *Supra* note 5 at 39.

> f. Perform a risk assessment and develop a plan to reduce the stranded asset risk in the context of system renewal.[13]

This is an important element of practice and procedure in agile energy regulation. It was also used by the Nova Scotia regulator in *Annapolis Tidal Generation* which is reviewed later in this article.

British Columbia

The Enbridge decision is not the only Canadian decision to deal with rate regulation and the energy transition. The very next day, December 22, 2023, the British Columbia Utilities Commission (BCUC) released a decision that faced the same issue. The BC decision[14] involved an application by Fortis BC Energy Inc. (FortisBC) to expand a natural gas pipeline in the Okanagan region of British Columbia.

In the British Columbia case the utility, FortisBC, applied to the BCUC to expand a natural gas pipeline in the Okanagan at a cost of $327 million. FortisBC stated that the pipeline expansion was needed to meet it forecast increase in demand for natural gas in the Okanagan region due to population growth.

The BCUC turned down the application stating:

> The basis for FEI's justification for constructing the OCU Project is that the growth of population and development in the Okanagan region is robust, and the growth curve will continue unabated. The three peak demand forecasts all support this although with significant variability between them. Of particular concern to the Panel is FEI's admission that none of its forecasts have considered the potential for a flattening or even a reversal of the curve due to commitments in the CleanBC Roadmap and the impacts of changes to the BC Energy Step Code, other planning guidelines or zoning bylaws. Despite such potential risks, FEI has maintained a 'business as usual' approach to its forecasting with the expectation there will be a continued increase in peak demand over the next 20 years.
>
> …
>
> If the OCU Project were a minor expenditure the Panel might be inclined to move forward with a favorable Decision at this time. But at last estimate, the total Project cost estimate is $327.4 million with a delivery rate impact of 2.37 percent. This is a very significant expenditure and, for it to be approved, there needs to be greater certainty that the proposed scope of the project is fully required.[15]

The BCUC also asked FortisBC to consider a matter not addressed in the application. That was a short-term solution that could meet additional demand in the early years. The Commission directed the utility to file a new plan by the end of July 2024 to address this issue.

Nova Scotia

Energy regulators today live in a new world. Worldwide energy regulators face a $131 trillion investment in new technologies designed to reduce the amount of carbon in the production, distribution and use of electricity.[16] Picking winners and losers in new technology is not easy. It is always a challenge.

Approving a technology pilot is just the first problem. The second problem is what do the regulators do when the technology fails. The first decision addressing this problem surfaced

[13] *Ibid* at 140–141.

[14] BCUC Order G-361-23, FortisBC Energy Inc.

[15] BCUC Order G-361-23, December 22, 2023, *Decision and Order*, at 24.

[16] International Renewable Energy Agency, "World Energy Transition Outlook" (2021) at 28, online (pdf): *IREA* <www.irena.org/-/media/Files/IRENA/Agency/Publication/2021/Jun/IRENA_World_Energy_Transitions_Outlook_2021.pdf?rev=71105a4b8682418297cd220c007da1b9 >.

in Nova Scotia recently.[17] There the energy regulator faced an application by Nova Scotia Power to write off significant costs related to a new technology pilot that after many years not to be commercially viable.

The project in question is known as the Annapolis Tidal Generation Station. At the time of its commissioning in the mid-1980s the Station was intended to be a short-term research initiative to test the viability of tidal barrage technology in the Bay of Fundy.[18] In recent years the utility that was operating the project, Nova Scotia Power, experienced significant operational and maintenance costs with the Generating Station. Capital costs were increasing significantly while at the same time the amount of power generated was declining.

The application by Nova Scotia Power asked the Nova Scotia Utility and Review Board (NSUARB) to approve the amortization of the undepreciated value and the remaining construction work in progress over a ten-year period. Nova Scotia Power did not apply for decommissioning at the same time.

The Board's decision and the reasoning shows how complicated these cases can become. Nova Scotia Power asked the Board to find that the project was no longer used and useful. It turns out that is not a simple question to answer.

There is no question that at the time of the application the generating station was not being used. The question was whether the technology could be useful in the future. The NSUARB pointed to the arguments of the intervenor groups at paragraph 32.

> The closing submissions of the Small Business Advocate, the Industrial Group, the Consumer Advocate, and the Town of Annapolis Royal all expressed concerns relating to NS Power's assertion that the retirement of the Generating Station is the lowest cost option to customers. All four stakeholders noted that they do not agree that NS Power has put forth a sufficiently comprehensive analysis to convince them that there is no viable future use of the assets in question for public utility purposes.[19]

The analysis by the NSUARB is best set out in the following paragraphs:

> In this case, given the significant amount of the undepreciated cost remaining in rate base, NS Power proposed a 10-year amortization period. No party challenged the proposed length of the amortization period. It was supported by both Mr. Reed and Grant Thornton. The Board agrees that, if decommissioning is established as the least cost option, a 10-year amortization period appears to create a reasonable balance between negative impacts to current ratepayers and intergenerational equity considerations.
>
> The substantive issue in dispute in this case is whether NS Power has shown that decommissioning of the Generating Station is the least cost option for ratepayers. The Board recognizes that in preparing its case NS Power took several steps in this application which are appropriate. The use of external consultants to supplement in-house expertise follows Board guidance. The Board acknowledges these consultants support the approach set out in the application. As well, the use of probabilistic modelling was appropriate in this case, given the number of uncertainties which could impact cost estimates. That said, the Board has determined it does not have enough information to find that decommissioning is, in fact, the least cost option. The Board therefore finds NS Power has not met the burden of proof to obtain the

[17] *Nova Scotia Power Incorporated (Re),* 2022 NSUARB 2.

[18] For a detailed background on the project, see William Lahey, "Regulation and Development of a New Energy Industry: Tidal Energy in Nova Scotia" (September 2015) 3:3 Energy Regulation Q, online: *ERQ* <energyregulationquarterly.ca/articles/regulation-and-development-of-a-new-energy-industry-tidal-energy-in-nova-scotia>.

[19] *Supra* note 17 at para 32.

accounting treatment relief sought in this matter.

The Board is in general agreement with the Intervenors, based on the evidence filed by Midgard and MS Consulting, that there are too many cost variables which have not been sufficiently addressed, or have been addressed in an inconsistent manner across the various options. The Board acknowledges there is contention between NS Power and MS Consulting as to the actual impact of certain inputs on the modelling results, including certain inputs used by MS Consulting. The Board also recognizes that Midgard's ultimate recommendation was that the LEM option be kept alive. This could theoretically be done by approving the current application and revisiting the issue, if necessary, when a decommissioning application is filed.

That said, given the magnitude and scope of the unaddressed issues, the Board concludes approval of the accounting treatment at this point is premature. The evidence indicates there are varying levels of class estimates for the different options. In particular, the spread in NPVRR values between the LEM option and the decommissioning option are not that wide. In certain scenarios, the LEM option might actually be more cost-effective, although with greater risk.

It is therefore important that, as far as it is possible, there be an apples-to apples comparison between the LEM option and the decommissioning option. The Board is concerned that if the accounting treatment is approved now, there may be a tendency to focus on having the decommissioning option approved. This may create less incentive to continue robustly assessing the LEM option.[20]

In the end the NSUARB concluded that it did not have sufficient information to make a decision. The complexity of the issues that face regulators in this type of case is evident in the Commission's direction to Nova Scotia Power regarding the additional information that is required to properly address the issue:

> While it will not direct NS Power to undertake any specific studies, it would seem to the Board that the following information would be of assistance in determining the least cost option in this matter:
>
> 1. A more fulsome assessment of LEM costs;
>
> 2. A more fulsome assessment of the new technology option, including: a. A more thorough assessment of options and costs to change station capacity under the new technology option; and b. Solicitation of pricing from multiple manufacturers for the new technology option;
>
> 3. A more fulsome assessment of sedimentation issues and costs associated with the decommissioning option;
>
> 4. Completion of environmental studies needed to assess environmental risks and costs associated with each alternative;
>
> 5. A more fulsome assessment of station asset disposal options;
>
> 6. A detailed explanation of why capital cost estimates for the decommissioning option have decreased so dramatically from the estimates included in NS

[20] *Ibid* at paras 89–93.

> Power's 2018 Hydro Asset Study;
>
> 7. Engagement with DFO personnel on if NS Power can satisfactorily present alternative studies or data on fish migratory periods and fish mortality for the site, short of returning the Generating Station into operation, including potentially modifying its operation to reduce or mitigate the potential impacts on fish so as to avoid the requirement for a DFO Authorization;
>
> 8. Engagement with DFO personnel on whether it would consider any compliance plan with an accompanying request for authorization. If DFO will entertain such a request, NS Power could estimate the cost of preparing and implementing a compliance plan in its Decision Analysis;
>
> 9. Engagement with DFO personnel and the Province on any *Fisheries Act* or environmental compliance issues under the Decommissioning option with respect to restoring the area to its original condition (i.e., with no water flow through the causeway at the location of the Generating Station and any resulting decommissioning compliance costs related to the sluice gates, causeway, and fish passages). The results of these discussions could be incorporated into the Decommissioning option in the Decision Analysis; and
>
> 10. With respect to the above initiatives, engagement with Indigenous communities respecting the various options (including LEM, New Technology and Decommissioning), to better inform the potential costs to be incorporated into the Decision Analysis.[21]

The Board concluded that until it received this information in a new application it was unable to make a decision stating:

> The Board has determined that it has insufficient evidence at this time to find that decommissioning of the Generating Station is the least cost option for ratepayers. It therefore is not able to find that the asset is not used and not useful in accordance with Accounting Policy 6350. Therefore, the Board will not approve the application at this time. The Board believes the best way of proceeding is to reconsider the application for accounting treatment approval along with a decommissioning application. That said, NS Power is at liberty to reopen the matter if it is in a position to address the Board's concerns.[22]

The introduction of new technology creates two problems for energy regulators. The first is defining the terms and conditions on which regulators accept and approve investment in new technology. The second as outlined in this Nova Scotia case is the terms and conditions on which regulators remove the technology from rate base when it turns out not to be useful.

AGILE REGULATION

Recently three economists from the University of Ottawa released a study on energy regulation during the energy transition, prepared for the

[21] *Ibid* at para 99.

[22] *Ibid* at para 118.

Canadian government. It started with the following premise:

> Achieving the government of Canada's ambitious emissions reduction strategy will require an unprecedented scale and pace of innovation. Against this backdrop shifting to a more agile regulatory system has never been more pressing… Shifting towards a more agile regulatory system has two dimensions. It involves changing the policy instruments and the regulatory institutions. [23]

The authors then added: "Regulatory excellence means using the best available evidence and being transparent and inclusive."[24]

More recently the Ontario Minister of Energy sent to a new Letter of Direction to the Acting Chair of the Ontario Energy Board stating:

> "as electrification and energy transition progresses the OEB should continually explore how to maximize its flexibility to facilitate innovation within the existing regulatory framework The OEB should continue to collaborate with the IESO, Ministry officials and sector stakeholders in this regard. Innovation in both gas electric sectors is critical to meeting our goals of meeting future energy demand in reducing emissions."[25]

The three decisions reviewed in this article were the first decisions in Canada where energy regulators faced the full force of the energy transition head on in terms of its impact on stranded assets. This is an important issue today. It will become more important tomorrow.

Regulatory practice and procedure in this area will require some refinement. Energy regulators will have to become more flexible and innovative, something the Ontario Minister of Energy has endorsed. The Ottawa economists suggested that agile regulation is regulation that is not only transparent but seeks the best possible evidence.

The decisions reviewed in this article indicate that energy regulation involving the energy transition and stranded assets require consideration of six factors: better evidence, different solutions, new regulatory guidance, cost allocation, risk adjustment, and policy alignment.

BETTER EVIDENCE

An interesting question is why did the OEB not ask for better evidence in the Enbridge case? A number of parties in that proceeding including Board Staff asked the OEB to defer the matter to a generic hearing in order to obtain better evidence. This is not a new procedure in energy regulation. Recently when Nova Scotia Power asked the Nova Scotia Utility and Review Board (NSUARB) to approve the amortization of the undepreciated value of the *Annapolis Tidal Generation Station*,[26] the NSUARB indicated it could not make its decision until additional information that properly addressed certain issues was provided.

The OEB treated the Enbridge case as a garden-variety rate case. In those cases, if the applicant does not meet its burden of proof the application is dismissed. The treatment of stranded assets in the energy transition requires a different approach.

The Canadian energy regulators will have to revise their practices and procedures to meet the new challenge. The starting point is the procedure used by the NSUARB in *Annapolis Tidal Generation*. Where the stranded asset evidence is not satisfactory, regulators must take steps to get better evidence. The regulator should also provide better guidance and be specific about the information required as the NSUARB did in *Annapolis Tidal Generation*.

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[23] Colleen Kaiser, Geoff McCarney, and Stewart Elgie, "Agile Regulation for Clean Energy Innovation" (July 2021), at 1, online (pdf): *Smart Prosperity Institute* <institute.smartprosperity.ca/sites/default/files/WP_Agile_regulation.pdf>.

[24] *Ibid* at 4.

[25] Letter of Direction from the Minister of Energy to the Acting Chair of the Ontario Energy Board, (29 November 2023), at 3, online (pdf): <www.oeb.ca/sites/default/files/letter-of-direction-from-the-Minister-of-Energy-20231129.pdf>.

[26] *Supra* note 17.

Different Solutions

The British Columbia decision in FortisBC is a good example of another feature in the world of agile regulation. Rather than simply dismissing the application the BCUC decided that while it could not approve the $327 million pipeline it was important to address a short-term problem. The BCUC was concerned that based on the evidence there could be a lack of capacity in the short term if not in the long-term and that should be addressed. The BCUC then ordered the utility to prepare a different application dealing with the problems by the end of July 2024. This is another example of the importance of agile regulation.

New Regulatory Guidance

Another new area of practice and procedure in energy regulation that assists the parties in difficult cases like those involved in the energy transition and stranded assets is "new guidance." The leading examples in the three decisions considered in this article are the Enbridge decision by the OEB, the Annapolis Tidal Generation decision by the NSUARB.

Section 10 of the Order in Enbridge Gas, set out above, lists six different calculations and submissions that the Board required Enbridge to undertake in its next rebasing application.

The NSUARB in *Annapolis Tidal Generation* listed in detail the information it would be looking for in a revised application with respect to that project. The Board had ruled that it did not have enough information to make proper decisions in the first application. The Board put that application on the shelf and asked the applicant to make a revised application. In difficult cases this is a more productive approach than simply dismissing the original application.

Cost Allocation

An important element of stranded assets cases is an understanding by all parties as to who bears the cost. And in what proportion. To quote the leading American energy regulation scholar, Scott Hempling, wide discretion is granted to regulators. In a well-known article Hempling states:

> Stranded cost situations always combine two key facts: prudent investments, and post-investment circumstances not anticipated at the time of the investment. Those factual developments can be reductions in demand, increase in input costs, obsolescence, and changes in regulatory policy. The question is always: When prudent actions produce uneconomic outcomes, who bears the unrecovered costs: shareholders or customers? Readers hoping for clear "dos" and "don'ts" will be disappointed; those hoping for broad regulatory discretion will be pleased. The consistent principle is this: Regulators have a range of options, from full recovery plus profit, to no recovery and no profit, and all points in between.[27]

The Canadian decisions with respect to who bears the cost of stranded assets also vary widely. The Enbridge decision by the OEB is just one example. There Enbridge claimed that all of the costs relating to stranded assets should be borne by the customers. A number of parties disputed that but the Board for some reason made no decision on that issue. However, the decision in the case that the customer should pay all of the connection costs upfront suggests that the Board believed that the customers were on the hook for all the stranded assets.

It may be that if regulators make a clear statement on how stranded costs will be allocated between the utility and the customer applicants may make a more careful estimate of the extent to which the project will produce stranded costs. We should remember that in these three early cases two of them rested on a conclusion by the regulator that there had been no serious attempt to estimate the stranded cost potential of the project.

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

Risk Adjustment

Another important instrument regulators face in stranded asset cases is the risk adjustment factor. This was a live issue in the Enbridge case where the capital structure for the purpose of ratemaking was a ratio of 64 per cent debt to 36 per cent equity. Enbridge proposed an increase in the equity thickness from 36 to 42 per cent. Board Staff and four interveners recommended an increase to 38 per cent while eight interveners recommended that it remain at 36 per cent. In the end the OEB approved an increase in the Enbridge equity thickness from 36 to 38 per cent.

This is an important adjustment factor available to regulators although it is generally restricted to rate cases. It does however require a very reliable estimate regarding the degree to which the applicant faces stranded asset risk.

Policy Alignment

Stranded asset cases have been around for a long time. However stranded assets caused by the energy transition raise unique problems. That is regulatory decisions that run counter to government policy.

The energy transition by definition is a product of government policy and in many cases serious government investment. This factor proved to be the main feature of the Enbridge case which led the Ontario government to introduce new legislation that would allow the government to overrule certain aspects of the OEB decision. Those that believe strongly in the importance of an independent energy regulator found this to be a troubling development.

A better approach would be to give relevant government agencies adequate notice of any aspect of a proposed hearing that raised the possibility of conflict with government policy. There is no reason why government agencies cannot intervene in regulatory hearings.

The Enbridge case raised a serious legal question. That is, the argument that to the extent an energy regulator issues the decision that conflicts with government policy that regulator is acting beyond its lawful jurisdiction. In the world of energy transition and stranded assets this will be an ongoing problem. It will be difficult to resolve it by issuing policy directives from the government to the regulators. More dynamic real-time solutions are required.

Agile regulation requires greater transparency. This means notice to all relevant parties including the Minister of Energy. The government is by definition involved in every energy transition case.

This article and these three cases are just the start of what could easily become a very significant reform of Canadian energy regulation. We will keep you posted. ■

WHY BOTHER WITH AN INDEPENDENT ENERGY REGULATOR?

*Ian A. Mondrow**

BECAUSE FACTS MATTER.

The energy sector is complex. The energy transition is making it even more complex. Energy policy makers will have to make some choices in the coming years, and implementing the outcomes arising as a result of those choices will not always be easy.

An independent, and expert energy regulator is critical to thoughtfully executing on the details of overall energy policy within the regulator's areas of responsibility. The transparent, inclusive, fact-based processes that Ontario's independent energy regulator — the Ontario Energy Board (OEB) — engages in to do its work result in robust outcomes and public acceptability of those outcomes.

So, for the Minister responsible for an increasingly complex portfolio that really matters, like energy, an independent regulator guiding the sector through complex, and sometimes turbulent, changes would be of critical value. It would be of value both for the quality of the detailed regulatory determinations which it makes to execute government policy choices, and for facilitating public confidence in, and acceptability of, those determinations and their outcomes. Taking care to avoid unnecessarily undermining the work of that regulator would be important.

Curious, then, that just hours after the recent issuance by the OEB of an important distribution rate decision with respect to Enbridge Gas Inc. (EGI), Ontario's Minister of Energy issued a statement publicly criticizing the decision and announcing his intention to overrule it. It appears that the Minister may have been incompletely and/or inaccurately briefed. The precedent that this approach sets is less than ideal.

WHAT IS HAPPENING WITH ENBRIDGE?

At 6 p.m. on December 21st, 2023 the OEB publicly issued a comprehensive decision on an application by EGI for approval of Ontario gas distribution rates commencing January 1, 2024. The decision is the result of a thorough public hearing process which involved more than a year of review, thousands of pages of company and expert evidence, a comprehensive oral hearing and a thorough process for submissions by EGI, OEB Staff, and a number of informed, indeed expert, customer and public interest intervenor representatives. The comprehensive, well-written and fully reasoned decision is 147 pages long (including a three page partial dissent).

Early the following day after the release of the OEB decision, Ontario's Minister of Energy released a statement expressing that he was "*extremely disappointed*" with the OEB's decision regarding a new gas connection revenue horizon. The Minister asserted that the OEB's determination on this point "*would mean costs that are normally paid over 40 years would be owed in full up front, could lead to tens of thousands of dollars added to the cost of building new homes [and]…would slow or halt the construction of new homes, including affordable housing.*"

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If those facts were true, then the Minister could well have a legitimate and immediate housing policy concern. The facts as determined in the OEB's decision do not, however, support a "*tens of thousands of dollars*" increase in home costs, and it does not appear that the decision will in fact "*slow or halt the construction of new homes.*" The conclusions expressed in the Minister's statement are inconsistent with the facts relied on, and determinations made, by the OEB's three-member expert panel of Commissioners as a result of the comprehensive hearing process undertaken.

WHAT IS A "REVENUE HORIZON" AND WHY DOES IT MATTER?

The OEB determined, as one of many determinations made in the case, that in evaluating new residential and small commercial gas customer connections after January 1, 2025, EGI should use a "revenue horizon" of zero. The Minister's statement *is* correct in saying that this OEB determination means that costs for new natural gas connections that have historically been paid over 40 years in gas delivery rates would, starting in 2025, be payable in full up front.

The current rules for evaluating the economics of new customer connections include calculating the revenue to be earned from the newly connected residential and small commercial customers over a 40 year period. These revenues are then set off against the cost of the new connection to determine whether the new connection is "economic" on its own: i.e., will be paid for, over time, by the new customers connecting to the system. If not, then, in order to protect the interests of existing customers, a "contribution in aid of construction" (CIAC) from the new connecting customer is required up front to preclude undue cross-subsidy of new connections by existing customers.

Like many things energy, the energy transition prompts questions about the continued appropriateness of this historical approach. Considering both the near term and the longer term implications of the energy transition, including Ontario's plans for a "*clean energy future*" characterized by increasing electrification, the OEB determined that:

- it is no longer appropriate to assume that the assets required for new gas customer connection will continue to be "used and useful" 40 years into the future;
- future gas customers now face a risk of underutilized gas delivery assets and potential associated stranded asset costs;
- the current practice of providing no-cost (to home builders) new gas connections shifts the risk of stranding of these new gas connection assets to homebuyers and future customers and is no longer appropriate; and
- customers are better protected by encouraging new home builders and their customers to weigh the cost of new gas connections and associated gas heating equipment against the alternative of using already-required electrical connections in conjunction with available high efficiency electric heat pumps, and then making the most economic decision in servicing the new home.

To support proper and informed consideration by builders and new home buyers of today's energy choices and associated costs, the OEB determined that new gas connection costs should be paid by new home builders (under a zero "revenue horizon" model), rather than deferred for payment through ongoing gas delivery rates by gas customers decades into the future. In making this determination, the OEB considered the evidence before it that:

- The average historical cost to connect a home to gas service is $4,412 (weighted average of new construction and existing homes)[1], and that it would take approximately 31 years, on average, to recover these costs from future home owners.[2]

[1] OEB EB-2022-0200 December 21, 2023 *Decision and Order,* at 25.

[2] Recent escalation in new gas connection costs indicates that for new Ontario gas customers added between 2021 and 2023, the cost of adding those customers is higher than the revenues that will be received in rates over the then applicable 40-year revenue horizon. *Ibid*.

- The effect of a new-home builder choosing to include gas service and paying the associated gas connection cost up front would be to increase the cost of the house by ~$4,400 on average, and less in new developments, while at the same time reducing the operating cost of the house through lower gas rates — ***largely a wash for homebuyers***.[3]

- The other choice for new home builders is to decide against gas servicing and avoid the up-front connection cost, thus lowering the cost of housing and lowering the operating energy cost of the house — ***a win for homebuyers and an outcome for developers that keeps them competitive on price in the housing market***.[4]

- Electrifying heating in a single-family Toronto home would result in energy savings over the useful life of the heating equipment of ~$16,750. ***The expert analysis considered by the OEB Hearing Panel indicates that new home buyers would save 37% on their first year energy bills, and 46% over the 18 year average useful life of new heating equipment, all prior to application of available federal and Ontario energy efficiency rebates.*** [5]

- Requiring new connection costs to be paid up front would reduce EGI capital costs, costs which could become stranded in the future, in the range of a ***billion dollars*** over the EGI proposed 5-year rate plan period, and would significantly reduce gas delivery rates as a result.[6]

In making its revenue horizon determination, the OEB specifically noted:

> *In laying out its energy strategy, Ontario has identified a need for reliable electricity especially as households increase their consumption to heat and cool their homes and power their vehicles.*[7] [Citation in original to *Powering Ontario's Growth,* page 39]
>
> …
>
> *The primary consideration throughout this proceeding has been the risk of stranded assets resulting from the energy transition. The OEB's finding of a zero revenue horizon fully addresses that risk for new connection projects. When a developer is faced with the full cost of including gas service in a development, that developer will be fully incented to choose the most cost effective, energy efficient choice in a manner that not only achieves efficiency in the cost of housing in a competitive market and lowers the operating cost of that housing, but also maximizes the contribution to the government's decarbonization policy goals. It also eliminates the split incentive problem [under which the developer makes the energy choice while the future home owner pays the cost of that choice].*[8]

In fact, the OEB also directed EGI to develop a rate credit for buyers of new homes with gas connections, so that they don't pay the connection cost twice: once through the purchase price of the home, and once again through gas delivery rates that include historical costs for connecting new customers. As noted in an analysis by two Associate Professors at the

[3] *Ibid* at 37 [emphasis added].

[4] *Ibid* [emphasis added].

[5] Exhibit M9, Evidence of Chris Neme, *Energy Futures Group,* at 23.

[6] *Supra* note 1 at 48. Data produced indicated that moving to a 10 year revenue horizon would decrease capital expenditures by $853 million over 5 years. Decreasing the revenue horizon to 0 would result in significantly greater reduction in capital spending.

[7] *Ibid* at 37.

[8] *Ibid* at 41.

Ivey Business School at Western University[9], new home-buyers generally pay for their homes over time through mortgage financing, and the OEB directed rate credit would offset, on a monthly basis, any incremental financing costs for the new home owner of their builder's choice to provide that home with natural gas service.

WHAT ABOUT THE MINISTER'S CONCERNS?

On the facts, it appears that the Minister's expressed concern that the OEB's new revenue horizon policy "*could lead to tens of thousands of dollars added to the cost of building new homes [and]…would slow or halt the construction of new homes, including affordable housing*" is questionable.

In fact, the analysis by the Ivey Business School associate professors concluded that:

> *…the Government's decision to override the OEB should have virtually no effect on affordable housing in the province. Based on our admittedly rough estimates, their policy might reduce the annual cost of buying a home by $92.74 or it could possibly increase it $32.90. Hardly seems worth damaging regulatory independence for.*[10]

If the OEB has its facts right (remember the comprehensive hearing process that resulted in this thoroughly evidenced and carefully reasoned regulatory decision based on numerous submissions made by sophisticated, well-advised and well-informed parties having a variety of interests), the only party really prejudiced by the OEB's revenue horizon determination would appear to be EGI. As a regulated utility, EGI earns its profit on the basis of the equity invested in its asset base. Historically EGI finances the capital cost of new gas connections and recovers those costs from gas customers over 40 years. During that period, the unrecovered new connection costs are added to EGI's asset base, on which it earns a return on investment. That's about one billion dollars of asset base and associated return on investment over five years of new customer connections. The new OEB policy would mean that, starting in 2025, EGI's rate of asset and earnings (i.e. business) growth would drop off significantly. If one were to assume that the risk of the future stranding of such investment rests with gas customers rather than EGI's shareholder, one can certainly understand why this impact on business growth would be a significant concern for EGI.

WHAT IF THE FACTS ARE WRONG, OR INCOMPLETE?

What if the OEB is mistaken?

Perhaps EGI has additional concerns that it has shared with the Minister or his staff? Perhaps, though not raised during the hearing process, those concerns involve impacts on customers not accounted for in the OEB's determinations? Perhaps new home builders have raised concerns? Is it possible that the OEB made a mistake, or left something important out of its analysis?

If the OEB is mistaken, there are two well-established, highly credible and independent review processes mechanisms for addressing such concerns. In fact, EGI is actively pursuing both of those mechanisms.

- By Notice of Appeal dated January 22nd, 2024, EGI has appealed the OEB's decision on, *inter alia*, the revenue horizon to the Ontario Divisional Court.

- By Notice of Motion dated January 29th, 2024, EGI has asked the OEB to appoint a fresh panel of Commissioners to review, *inter alia*, the revenue horizon decision.

Though the OEB's decision on revenue horizon for new customer connections does not apply until 2025, in both appeals EGI has requested a suspension of that decision, if necessary, while those appeals are properly determined.

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[9] Adam Fremeth and Brandon Shaufele, "When Housing Policy meets the Energy Regulator: Understanding the Minister of Energy's Decision to Effectively Overrule the Ontario Energy Board" (January 2024), online (pdf): *Ivey Energy Policy Management Centre* <www.ivey.uwo.ca/media/atnhvecf/iveyenergycentre_blog_housingenergy_jan2024.pdf>.

[10] *Ibid* at 6.

In the normal course, a Court will now defer to the OEB's review of the matter, reserving the Court's own process for whatever justifiable EGI concerns remain once that regulatory review process has concluded. Such deference to the expertise of the regulatory tribunal is instructive.

There is no need at this point for the Minister to override the considered and well-reasoned determination of the independent and internationally very well-respected Ontario energy regulator. If, after all now engaged reviews have concluded, the OEB's revenue horizon regulatory policy determination remains and, in the Minister's view, there remains a sound public policy problem with implementing that determination, the Minister can, and perhaps should, intervene.

Does the end of the era of steady gas distribution business growth present a public policy problem? Perhaps it does. Does an increase of ~1% in the up front cost of a new home, even if offset by reduced gas delivery rates going forward, present a challenge to the Ontario government's housing affordability policy? In such events, government intervention might be appropriate. Such intervention can and should proceed by way of legislation, transparently tabled, debated and enacted in the legislature. There is a longstanding and well-regarded process for that too.

WHAT MIGHT THE MINISTER DO NOW?

The energy sector is complex. Public policy objectives like decarbonizing our economy and promoting clean energy growth may sound simple, but getting from here to there will not be. The costs — new and stranded — are potentially huge. There will be winners and losers. Navigating this transition will not be easy and probably won't be cheap.

Fortunately, we have a well-established, properly resourced, transparent, expert, and independent energy regulator in Ontario with the wherewithal and commitment to guide us through that transition, in the public interest, and with the public and stakeholder respect necessary to legitimize its determinations.

At the same time, broader public policy trade-offs are not always dependent on facts. It is the job of elected officials to consider and direct these broader public policy trade-offs. The regulator's job is to implement the broader public policy directions that have been determined and set by publicly elected representatives. Though they should ideally be informed by fact, sometimes political trade-offs and judgements are required. Reasonable people may, of course, disagree on such trade-offs. Our government and its appointed Ministers are elected to make those decisions in a manner that they determine the general public wants. There is an open and generally balanced legislative process through which they do that.

In December, 2023 the Minister stated that the government would introduce legislation to reverse the OEB's revenue horizon decision.

There is also an alternative process that bears consideration, one that can be directed by the Minister and can also maintain the transparency, consistency, public accountability, thoughtful and reasoned consideration of detailed facts and their implications, and the balancing of interests which characterizes the OEB's work in the often complex field of detailed regulatory policy.

On January 19th the Electrification and Energy Transition Panel appointed by the government released its report entitled *Ontario's Clean Energy Opportunity*. Among the many recommendations in that report is one for the OEB to review cost recovery policies for natural gas and electricity connection, precisely the issue considered by the OEB in the Enbridge case and of concern to Minister Smith.

The Minister could request, or require[11], that the OEB undertake such broader review, and could provide any overall public policy context or objectives that the Minister considers necessary or appropriate for the OEB to expressly consider as part of that review. This course would address concerns raised while maintaining and reinforcing the transparency, consistency, public accountability, and thoughtful and reasoned balancing of interests that characterizes the ongoing and important work of the OEB. That, after all, is the reason for an independent energy regulator. ■

[11] *Ontario Energy Board Act*, 1998, SO 1998, c 15 Sched B at s 35.

REGULATING ZERO EMISSION VEHICLES IN CANADA: THE FINAL FEDERAL REGULATIONS ARE NOW IN PLACE

*Timothy Cullen, Martin Thiboutot and Adelaide Egan**

On December 20, 2023, Canada published final regulations amending the Passenger Automobile and Light Truck Greenhouse Gas Emissions Standards that will require 100 per cent of new passenger cars and light trucks (light-duty vehicles, "LDVs") sold from 2035 to be zero emission vehicles (the "Amendments").[1]

A zero emission vehicle ("ZEV") is defined as an "automobile that is an electric vehicle, a plug-in hybrid electric vehicle or a fuel cell vehicle."[2] The purpose of the Amendments is to phase out all non-ZEV LDVs.[3] To achieve these objectives the Amendments impose yearly minimum percentage of fleets of ZEV vehicles offered for sale ("sales target") for manufacturers and importers, a credit system to help manufacturers and importers meet interim targets, and reporting requirements to track progress towards the 100 per cent mandate.

THE NEW PLAN

The Amendments require manufacturers and importers to meet minimum ZEV sales targets for LDVs from the 2026 model year and after. The targets increase from 20 per cent to 100 per cent of ZEV sales by 2035 and after, as set out below:

Model Year	Minimum ZEV Requirement (%)
2026	20
2027	23
2028	34
2029	43
2030	60
2031	74
2032	83
2033	94
2034	97
2035 and after	100

As of 2026, manufacturers and importers exceeding the ZEV requirement threshold for a given model year will receive "compliance units" for that year.[4] Likewise, manufacturers and importers will incur a "deficit" if they fall short of the ZEV target for that model year.[5]

* Timothy Cullen is a partner with McMillan LLP in Ottawa, Martin Thiboutot is a counsel with the firm in Montreal, and Adelaide Egan is an associate with the firm in Ottawa.

[1] Regulations Amending the Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations, SOR/2023-275.

[2] *Ibid*, s 1 (s 1(1) of the amended regulation).

[3] *Ibid*, s 2 (s 2 of the amended regulation).

[4] *Ibid*, s 13 (s 30.14(1) of the amended regulation).

[5] *Ibid*, s 13 (s 30.14(2) of the amended regulation).

Deficits must be offset with (1) early compliance units, (2) regular compliance units from previous years or (3) charging station units.[6]

> (1) Early compliance units can be obtained if there are already ZEVs in a company's 2024 and 2025 model year fleets. Early compliance units can be banked for future use but cannot be transferred to another company. Early compliance units are only valid until the 2027 model year.
>
> (2) Regular compliance units are obtained by overcompliance with the minimum ZEV sale targets starting in 2026. Regular compliance units can be banked or transferred to another company. Regular compliance units are valid until 2035.
>
> (3) Charging station unit credits are obtained by contributions to the fast-charging infrastructure in Canada and are discussed in more detail below.

Manufacturers and importers must submit an "end of model year report" containing information regarding their fleet, a breakdown of how many vehicles are electric or plug-in hybrid vehicles, a summary of compliance units and any offsets, and other information required for enforcement of the Regulations.[7] The Amendments allow companies to include allowances in their calculations for any "innovative technologies" that result in measurable CO_2 emission reductions.[8] Canada pulls the definition of "innovative technology" from the US federal legislation on the same issue. The reports are due by no later than May 1st of the calendar year following the model year.

NEW CHARGING INFRASTRUCTURE CREDITS

A frequent criticism of Canada's plan to reach the 100 per cent ZEV mandate is the lack of charging infrastructure in Canada. As part of the Amendments, manufacturers and importers can earn compliance credits for contributions to fast-charging infrastructure in Canada.[9] Manufacturers and importers must submit an application with the details of the charging station project and then they will be allocated credits based on a formula accounting for the amount of their investment in the charging stations (as a general rule, one (1) credit per $20,000 invested), the number of investors, and the rated power capacity of the charging stations.[10] Any investment in charging infrastructure after January 1, 2024 until December 31, 2027 is eligible for charging infrastructure credits.[11] Charging infrastructure credits can be banked for future use or transferred to another company, but are only valid until the end of the 2030 model year.

ALIGNING STANDARDS WITH THE UNITED STATES

The Amendments go beyond the 100 per cent ZEV mandate. They also aim to reduce the regulatory burden for companies operating in both Canada and the United States, by ensuring the administrative requirements for greenhouse gas vehicle emission standards up to model year 2026 are aligned between the two jurisdictions.[12]

CONCLUSION

This federal mandate enhances the provincial regimes encouraging consumer adoption and growth in the sale of ZEVs, notably in British Columbia and Québec. It is aligned with the federal government's Emissions Reduction Plan published in March 2022, and signals a gradual shift from a carrot to a stick approach. Notably, while the Government of Canada has invested over $2 billion in ZEVs purchase incentives since 2019, these incentives are set to expire on March 31, 2025. ■

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[6] *Ibid*, s 13 (s 30.15(3) of the amended regulation).

[7] *Ibid*, s 14 (s 33(4) of the amended regulation).

[8] *Ibid*, s 9 (s 18.3(1) of the amended regulation).

[9] *Ibid*, s 13 (s 30.17 of the amended regulation).

[10] *Ibid*, s 13 (s 30.21 of the amended regulation).

[11] *Ibid*, s 13 (s 30.21 of the amended regulation).

[12] *Ibid* s 6 (s 17 of the amended regulation).

ALBERTA NEEDS A STABLE POLICY APPROACH TO POWER

*Charles DeLand**

EDITOR'S INTRODUCTION

Today the cost of climate change damage and the energy transition investment necessary to reduce carbon dominates the decisions of most Canadian energy regulators. In Alberta, there is an additional problem that faces regulators. The provincial economy is dominated by the production of oil and gas which in this environment faces considerable opposition. This makes life even more difficult for the Alberta government and the Alberta regulator.

This is a unique article. One of Canada's leading energy economist sets out some sage advice for both the regulator and the government as they face this challenge.

BACKGROUND

It's all electricity all the time in Canada these days as we come to grips with the green transition and its electric vehicles, its electric heat pumps and its electric everything. And it's up to provincial governments, their agencies, and regulators to plan and deliver our expanded electricity future, affordably and reliably.

All provinces face this challenge, with two big things now in front of them. First, they must respond to the federal government's proposed Clean Electricity Regulations (CER),[1] designed to require electricity systems to transition to "net-zero" by 2035. Second, and related, they need to refine their grids to integrate increasing volumes of inherently intermittent renewable power, especially wind and solar, while delivering reliability virtually 100 per cent of the time.

THE ALBERTA SITUATION

Alberta faces an extra tough task. Its good intermittent solar and wind resources are not supported by the nuclear generation enjoyed by Ontario or the hydropower resources in Quebec, British Columbia and Manitoba. Instead, Alberta relies on its vast quantities of coal and natural gas. Reliable and affordable sources of baseload power, they emit more GHGs than hydropower or nuclear. The province also relies on the private sector to fund its fossil-fuel generation fleet. Decisions on the type, size, location, and timing of new projects are driven entirely by the economic returns private investors anticipate from the wholesale market. Financial risks created by the CER will doubtless deter investors in new natural gas baseload generation projects.

Alberta's government has noticed its electricity issues, but its response so far appears haphazard and its decisions abrupt. A more measured approach would help. In August 2023, the government paused approvals for new renewable generation projects, ostensibly to address concerns about their reliability and land use, but with potential investment-damaging

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[1] "Clean Electricity Regulations" (19 August 2023) 157:33 *Canada Gazette*, online: *Government of Canada* <www.gazette.gc.ca/rp-pr/p1/2023/2023-08-19/html/reg1-eng.html>.

effects.[2] And, in late November 2023, the Premier tabled a motion in the Legislature to apply the *Alberta Sovereignty within a United Canada Act*,[3] which purports to give it the power to reject federal laws or regulations that hurt the province. The motion has not yet been debated. If adopted, it would also launch consideration of the "feasibility and effectiveness" of establishing a Crown corporation to be used as a defence from Ottawa's limits on new natural gas generation projects.

Instead of quick responses to each issue as it arises, Alberta should proceed by gathering thoughtful and measured analysis from expert sources, and integrating it to assess choices. If not, it risks imposing high power costs on Albertans. One silver lining is that much analysis is already underway in a variety of separate, yet related, consultations.[4] In mid-2023, the Alberta Energy System Operator (AESO) launched the Market Pathways[5] initiative to explore changes to the market framework to support the energy transition. In October, the government launched a transmission policy review[6] just as the Alberta Utilities Commission opened a separate two-pronged inquiry[7] into electricity generation. On top of these, the AESO and the Market Surveillance Administrator have been asked for advice on further necessary reforms.

These initiatives should draw out expert opinion from these agencies. If they don't have the required expertise, it should be sought elsewhere, and the agency should expand its capacity to provide that expertise itself. The government should then publish the results from all these inquiries and any policy changes should be clearly and publicly linked to their results.

In the meantime, the government should say and do as little as possible. Even the suggestion of introducing a government-backed Crown corporation into a private market may have already cast a chill on investment.

As an aside, Premier Danielle Smith mentioned the Alberta Treasury Branch, a Crown-owned bank, as an example of a Crown-owned entity in a competitive environment, which was worrisome; there remain few compelling reasons the government should remain involved in a well-developed financial services market, and the same holds true for the electricity market.[8]

GOING FORWARD

Electricity ought to be boring. It needs to be there when and where people and businesses need it, at a cost that is as low as possible. Power systems and electricity markets are complicated and dynamic, and any changes must be thoughtful and well-designed to minimize the risk of disruption and unintended consequences. Politicians need to listen carefully to advice from technical and regulatory agencies, and outside experts, to understand the full range of outcomes of various courses of policy action.

Alberta should not roll out any new electricity system changes until it has received and digested all the incoming reports so it can avoid compromising reliability, affordability, and supply security as the system evolves towards net zero. ■

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[2] G. Kent Fellows to Nathan Neudorf, Alberta Minister of Affordability and Utilities "Renewables Moratorium Risks Harming Alberta's Investment Climate" (21 August 2023), online: *C.D Howe Institute* <www.cdhowe.org/intelligence-memos/g-kent-fellows-renewables-moratorium-risks-harming-albertas-investment-climate>.

[3] *Alberta Sovereignty within a United Canada Act*, SA 2022, c A-33.8

[4] Jessica Kennedy, Larissa Lees, Nathan Green and Siobain Quinton, "Change on the Horizon for Alberta's Electricity Regulatory Regime in 2024" (23 November 2023), online: *Bennet Jones* <www.bennettjones.com/Blogs-Section/Change-on-the-Horizon-for-Albertas-Electricity-Regulatory-Regime-in-2024>.

[5] "Market Pathways" (last modified 30 January 2024), online: *AESO* <www.aesoengage.aeso.ca/market-pathways>.

[6] Government of Alberta, "Transmission Policy Review: Delivering the Electricity of Tomorrow" (23 October 2023), online (pdf): *ABlawg* <ablawg.ca/wp-content/uploads/2023/11/Transmission-Policy-Green-Paper-2023.pdf>.

[7] "AUC inquiry into the ongoing economic, orderly and efficient development of electricity generation in Alberta" (23 October 2023), online (pdf): *AUC* < efiling-webapi.auc.ab.ca/Document/Get/795151>.

[8] Glen Hodgson to Travis Toews, Alberta Minister of Finance and President of the Treasury Board, "Time to Review ATB Financial: Is It Still Needed as a Crown Corporation?" (13 January 2022), online: *C.D. Howe Institute* <www.cdhowe.org/intelligence-memos/glen-hodgson-time-review-atb-financial-it-still-needed-crown-corporation>.

BETWEEN DOOM & DENIAL: FACING FACTS ABOUT CLIMATE CHANGE, ANDREW LEACH, SOUTHERLAND HOUSE, TORONTO, 2023

Rowland J. Harrison, K.C.

The climate change debate is frequently clouded by extreme claims, sometimes imbued with zealotry, intolerance and denial. Extreme positions, on both sides, can exceed the bounds of intelligent discussion of facts, confusing the real issues and impeding the challenge of identifying paths forward. Further, some claims that may have a superficial element of reasonableness or intuitive appeal that simply do not withstand closer scrutiny.

Andrew Leach's *BETWEEN DOOM & DENIAL: Facing Facts About Climate Change* is a valuable contribution to keeping the climate change debate focused, particularly in a Canadian context. The work does not propose any particular path forward, as the primary title of *BETWEEN DOOM & DENIAL* might imply. Rather, its value is found in the sub-title: *Facing Facts About Climate Change*. In Leach's own words, the book "tackles a series of…half-truths, lies by omission, and too-clever-by-half excuses that we, as Canadians, deploy when talking about climate change."[1]

Leach's qualifications and experience are eminently up to the task. With a Ph.D. in Economics and a B.Sc. in Environmental Sciences, he holds a joint appointment at the University of Alberta in the Department of Economics and in the Faculty of Law. In 2015, he was chair of Alberta's Climate Leadership Panel, the recommendations of which formed the basis for the Climate Leadership Plan implemented in Alberta.

In the first chapters of *BETWEEN DOOM & DENIAL*, Leach addresses several widespread assertions about the implications of climate change for Canada that he demonstrates do not stand up to scrutiny. While he does not use the word "myths", he makes a convincing case that that's just what they are.

In Chapter 2, Leach addresses the view expressed by some that climate change will not be that bad and that society can adapt. He points out, however, that there are three choices for dealing with climate change – mitigation, adaptation and suffering – and adopts the obvious point made by the director of the White House Office of Science and Technology Policy in the Obama administration that "the more mitigation we do, the less adaptation will be required, and the less suffering there will be."[2] Furthermore, while adaptation strategies may help in some cases (for example,

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[1] Andrew Leah, "*BETWEEN DOOM & DENIAL"*, at 1.

[2] *Ibid* at 8.

potentially with the substitution of food crops), the worst of some adverse effects will only be avoided by mitigation.

In the following four chapters, Leach turns to questionable claims that are specific to Canada's circumstances, the first being that, as a cold country, Canada may benefit from climate change, with new opportunities in agriculture and in oil, gas and mineral development in the Arctic, as well as "greater personal comfort of living in a more hospitable climate."[3] Labelling the cold country trope as "insidious", he points out that, while the cold may offer some protection from the worst effects of rising temperatures, climate change will also bring melting permafrost, rising sea levels, increased heat waves, and more fire weather.

Leach next addresses resistance to climate mitigation measures based on the fact that Canada accounts for less than 2 per cent of the world's emissions. Leach's rejection of the argument rests on both Canada's "substantial, historical contribution to climate change" and the fact that, with per capita emissions about three times the global average, "Canada is making the climate change problem worse."[4]

In the chapter devoted to discussing the future of the Canadian oil and gas industry in the context of action on climate change, Leach concludes that what will matter much more than how much oil and gas are used is how much the world is willing to pay for fossil fuels: "So long as the world continues to be willing to pay enough for oil and gas, Canadian production is potentially more resilient than you might think to domestic and global action on climate change."[5] He finds the argument of a fellow economist at the University of Calgary to be convincing: "There is a reasonable argument that, if there is a last barrel of oil produced in North America, it will come from [the oil sands] unless government policy decides to actively forgo that economic opportunity."[6]

On the role of renewables, especially solar energy, Leach observes that the challenge is not so much that the sun doesn't shine at night as it is winter (as evidenced by Alberta's recent brush with threatened blackouts). Solar panels will generate half as much energy in the depths of winter, when Canadian electricity demand is at its greatest, as they do over the summer months. Extensive new transmission infrastructure will be needed, yet transmission "may be the most important and least discussed component of a low-carbon electricity system."[7]

Leach's dissection of these "half-truths and clever excuses" is itself an important contribution to informing the climate change debate. The real value of *BETWEEN DOOM & DENIAL*, however, is to be found in its penultimate chapter addressing the challenges of planning a "just transition". The focus is on the unprecedented uniqueness of those challenges:

> Economic transition will be painful: there will be upheaval, there will be regional pain, and there will be people who never recover.
>
> ***
>
> Promises of a just transition are going to run into two hard realities. First, the fossil fuel energy industry, and in particular the oil and gas sector, is far larger and more diverse than other industries to which Canadian governments have attempted to provide traditional support. Second, a policy-forced transition away from oil and gas is different from other economic transitions we have weathered in Canada because of the high wages earned by oil and gas workers, the significant government incomes that oil and gas extraction provides, and the very real potential

[3] *Ibid* at 14, quoting former federal Finance and Natural Resources Minister Joe Oliver.

[4] *Ibid* at 27.

[5] *Ibid* at 55.

[6] *Ibid* at 47, quoting G. Kent Fellows, "Last Barrel Standing? Confronting the Myth of 'High-Cost' Canadian Oil Sands Production", (20 December 2022) Commentary 635, online (pdf): *C..D Howe Institute* <www.cdhowe.org/sites/default/files/2022-12/Commentary_635.pdf>.

[7] *Ibid* at 65.

> for market signals to counteract government transition planning.[8]

Various Canadian and international experiences are frequently embraced as "precedents" that can guide Canada's approach to meeting the challenge, including the Atlantic cod moratorium, the phase-out in Alberta and Ontario of reliance on coal for power generation and the phasing out of Denmark's oil and gas sector. While these experiences might offer some guidance, Leach's message is that their real value is in helping to identify the uniqueness of the challenge of a "just transition" in the Canadian context.

BETWEEN DOOM & DENIAL is a valuable, and refreshing, contribution to the process of meeting that challenge. ■

[8] *Ibid* at 72.