ENERGY REGULATION QUARTERLY

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MISSION STATEMENT

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

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

EDITORIAL POLICY

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

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

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

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

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

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

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LETTER FROM THE PUBLISHER

Timothy M. Egan, President and CEO, Canadian Gas Association

A changing of the guard is occurring at Energy Regulation Quarterly (*ERQ*). This issue is the last with Rowland Harrison at the editorial helm. Rowland has steered the *ERQ* since its inception in 2013, in partnership with Gordon Kaiser until Gordon's untimely death last year, and since then alone. Over the past 11 years of his service, he has offered insightful analysis, creative thinking, and a rigorous and professional editorial pen. Throughout, Rowland has been a complete pleasure to work with. His editorial guidance has been marked by extraordinary patience: editing a journal like *ERQ* with diverse personalities of the legal scholars it encounters isn't easy. Rowland would demure from comment on this point I am sure, because in addition to all of his other attributes, he is a gentleman of the first order. But I can say from close observation that he helped us through many trials and tribulations. On a personal note, I have only seen him truly light up when describing some of the operatic performances he and his wife Alex delight in. As Rowland steps away from his editorial responsibilities at the *ERQ*, I hope this transition allows them even more time to enjoy many beautiful performances together!

At the same time, this also marks the occasion for the introduction of our two new editors, Karen Taylor and Moin Yahya. We are once again blessed with a depth of talent. Both are former regulators, Karen at the Ontario Energy Board (OEB) and Moin at the Alberta Utilities Commission (AUC). Both have written extensively on regulatory issues and the interplay of law and policy, which is at the heart of economic regulation. They also bring experience in business and academics to the table. We are once again in excellent hands, and I look forward to working with the two of them to build on the already established reputation of this important journal. Welcome, Karen and Moin! ■

EDITORIAL

2024 Year in Review

Managing Editor

Rowland J. Harrison K.C.[*]

EDITORS' NOTE

It has been the practice since the launch of *Energy Regulation Quarterly* in 2013 to focus the Editorial in the first issue of each year on developments in Canadian energy regulation during the preceding calendar year. The incoming Managing Editors of *ERQ* have not participated in preparing the following 2024 Year in Review; as the Managing Editor for this issue, I bear sole responsibility for its content.

It has been a privilege to serve as one of the Managing Editors of *ERQ*. I wish to thank the many supporters who have contributed to the journal over more than a decade.

I wish to acknowledge the support throughout of the Canadian Gas Association as publisher. In particular, the Association's President and CEO, Tim Egan, has been unwavering in his commitment to *ERQ*, while always strictly respecting its editorial independence.

2024 YEAR IN REVIEW

Canadian energy policy and regulation in 2024 were fraught with tension — particularly the tension between the pursuit of "net-zero", on the one hand, and, on the other, the reality of increasing reliance on fossil fuels, specifically oil and gas. While governments and regulators (and, perhaps less obviously, industry) pursue measures directed towards the goal of net-zero, in fact Canadian hydrocarbon production increased during the year and, indeed, is forecast to continue growing significantly for several more years.[1]

Major projects that would further expand production of both oil and gas are in active development. It was reported in November that Enbridge Gas Inc. was considering expanding its Mainline pipeline system by late 2026 and in the first week of 2025 the Alberta Premier announced that the province had signed a letter of intent with Enbridge to "explore Alberta's production and egress capacity."[2] The government, she added, was in discussions with other oil companies "about doubling production." It was reported in mid-December that three oilsands majors planned to increase output in 2025 even in the face of the possibility of tariffs being imposed by the incoming administration of President-elect Donald Trump.[3]

These two paths often appear to be at odds, presenting a form of cognitive dissonance that begs for a resolution and that will likely continue to engage the federal and provincial governments, energy policy-makers and regulators well into the future. Developments throughout 2024 attested to the reality of this dichotomy and illustrated the challenges that it presents.

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* Managing Editor, *Energy Regulation Quarterly*.

[1] Canada Energy Regulator, *Canada's Energy Future 2023: Energy Supply and Demand Projection's to 2050*, 2023, online (pdf): <www.cer-rec.gc.ca/en/data-analysis/canada-energy-future/2023/canada-energy-futures-2023.pdf>.

[2] Government of Alberta, "Taking action to double Alberta's oil production" (6 January 2025), online: <www.alberta.ca/release.cfm?xID=926075BE3672A-E622-1917-DEC78FF814EFCF09>.

[3] Chris Varcoe, "Three oilsands majors plan to boost output next year, despite of Trump", *Calgary Herald* (13 December 2024), online: <epaper.calgaryherald.com/article/281530821613846>.

By the close of the year, however, political developments in both Canada and the United States presaged the two immediate preoccupations of energy policy and regulation as 2025 unfolds. By the time this Issue of *Energy Regulation Quarterly* (*ERQ*) is posted, Canada is likely to be in the midst or on the verge of an election that will likely result in the repeal or replacement of the federal carbon tax. By that time, there may also be at least some clarification of President Donald Trump's proposed tariffs on imports into the United States from Canada of a wide array of goods and commodities, including energy. Canada is by far the biggest supplier of energy imported into the United States, including oil, gas and electricity. The United States Energy Information Administration reported that imports of crude oil into the United States from Canada reached a new record of 4.3 million barrels per day in July 2024.[4] Crude oil is Canada's largest source of export revenue.

FEDERAL-PROVINCIAL TENSIONS

Federal-provincial tension flared into open hostility with the tabling on November 4, 2024 of draft regulations to implement the federal government's proposed "oil and gas greenhouse gas (GHG) pollution cap."[5] The cap, the government said, would put the oil and gas sector "on a pathway to carbon neutrality by 2050, while enabling it to continue to respond to global demand."[6]

The proposed *Oil and Gas Sector Greenhouse Gas Emissions Cap Regulations*[7] and proposed *Regulations Amending the Output-Based Pricing System Regulations*[8] would be promulgated under the *Canadian Environmental Protection Act, 1999*[9]. The cap level for the first compliance period of 2030-2032 would be set at 27 per cent below emissions reported by operators for 2026, which the federal government estimates to be equivalent to 35 per cent below 2019 emissions. Emissions allowances allocated to facilities covered by the system would be tradeable.

The federal government claims that the proposed Regulations would impose "a limit on pollution, not production"[10] and that they have been "carefully designed around what is technically achievable…while enabling continued production growth in response to global demand."[11]

Alberta outright rejected the claim. The province insists that the federal scheme is in reality a cap on production and, as such, is a direct incursion into provincial, constitutionally-protected authority with respect to the management of the province's natural resources. Premier Danielle Smith, fresh off endorsement of her leadership by 91.5 per cent of the membership of the United Conservative Party just two days prior to the release of the draft regulations, accused the federal government of having a "deranged vendetta against Alberta."[12] She was quoted as likening the Prime Minister to the "bad renter who wrecks the furniture"[13] on the way out. The Premier said her government would seek to launch a legal challenge "as soon as possible" and would use the *Sovereignty Within a United Canada Act*[14] to protect the province's interests.

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[4] U.S. Energy Information Administration, "Crude oil imports from Canada reached a record after pipeline expansion" (30 October 2024), online: <www.eia.gov/todayinenergy/detail.php?id=63564>.

[5] Government of Canada, "Environment and Climate Change Canada: Oil and gas greenhouse gas pollution cap – Backgrounder to CGI Regulations" (4 November 2024), online: <www.canada.ca/en/environment-climate-change/news/2024/11/oil-and-gas-greenhouse-gas-pollution-cap--backgrounder-to-cgi-regulations.html>.

[6] *Ibid*.

[7] *Oil and Gas Sector Greenhouse Gas Emissions Cap Regulations*, (2024) C Gaz 1, 158:45.

[8] *Regulations Amending the Output-Based Pricing System Regulations and the Environmental Violations Administrative Monetary Penalties Regulations*, SOR/2023-240, (2023) C Gaz II, 1133.

[9] *Canadian Environmental Protection Act*, SC 1999, c 33.

[10] Environment and Climate Change Canada, "Oil and gas greenhouse gas pollution cap – Backgrounder to CGI Regulations" (4 November 2024), online: <www.canada.ca/en/environment-climate-change/news/2024/11/oil-and-gas-greenhouse-gas-pollution-cap--backgrounder-to-cgi-regulations.html>.

[11] *Ibid*.

[12] Don Braid, "Feds' cap on emissions underscores why Smith needs to drop the gloves" *Calgary Herald* (5 November 2024), online: <epaper.calgaryherald.com/article/281539411468730>.

[13] *Ibid*.

[14] *Sovereignty Within a United Canada Act*, SA 2022, c A-33.8.

Industry weighed in, running full page newspaper ads damning the federal proposal as "short-sighted and punitive."[15]

Alberta's legal challenges of federal initiatives are not, however, confined to its proposed challenge of the federal cap on emissions from the oil and gas sector. In June 2024, extensive amendments to the federal *Impact Assessment Act*[16] (*IAA*) became law. The amendments were aimed principally at addressing the 2023 ruling by the Supreme Court of Canada that large parts of the *IAA* were unconstitutional.[17]

In a letter from the Premier of Alberta to the Prime Minister, dated October 3, 2024, the province rejected the amendments as not addressing "Alberta's concerns with the *IAA* nor do they adequately address the Supreme Court of Canada's ruling."[18] The Premier's letter attached proposed amendments that "would be necessary to address [the province's] ongoing concerns."[19] The letter stated that if the province did not receive a "satisfactory response,"[20] in writing, within four weeks, it intended "to bring a further legal challenge."[21] On November 28, the Premier announced that federal government had not amended the *IAA* as the province had requested and that the province had asked the Alberta Court of Appeal to rule on the constitutionality of the Act.

Rounding out a trifecta of proposed legal challenges, Premier Smith announced on October 29 that the province had filed an application in the Federal Court for judicial review of the federal government's tax exemption from the carbon tax on heating oil, arguing that the exemption "is unconstitutional and inconsistent with the Government of Canada's stated purpose for enacting the *Greenhouse Pollution Pricing Act*."[22]

On December 17, yet another potential Alberta legal challenge of federal initiatives directed to the goal of net-zero emerged in the wake of the release of the finalized *Clean Electricity Regulations.*[23] Most significantly, the previously-proposed federal target of net-zero by 2035 has been postponed to 2050, as had been vigorously promoted by Alberta (and others). On the same day, the Premier, jointly with two of her Ministers, issued a statement stating that they were "gratified to see Ottawa finally admit that the Government of Alberta's plan to achieve a carbon neutral power grid by 2050 is a more responsible, affordable and realistic target."[24] However, the joint statement added that the federal regulations "remain entirely unconstitutional. [They impose] unreasonable and unattainable federally mandated interim targets beginning in 2035 that will still make electricity unaffordable for Canadian families. Alberta will therefore be preparing an immediate court challenge of these electricity regulations that we fully expect to win."[25]

The tension between Alberta and Ottawa over energy appears to have intensified during the year to a level of acrimony that may rival the province's challenge in the early 1980s of the federal National Energy Program — a challenge that, it may be well to remember, was resolved largely in the province's favour.

In the meantime, a welcome sign of cooperation between industry and a federal agency to support a proposed $16 billion carbon capture and storage project came with the announcement of financial backing by the Canada Growth Fund.

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[15] For example Cenovus Energy, "Canada's emissions cap short-sighted and punitive" (last modified November 2024), online: <www.cenovus.com/News-and-Stories/Our-views/Canadas-emissions-cap-short-sighted-and-punitive>.

[16] *Impact Assessment Act*, SC 2019, c 28, s 1.

[17] See *Reference re Impact Assessment Act*, 2023 SCC 23.

[18] Letter from Honourable Premier Danielle Smith to Honourable Prime Minister Justin Trudeau (3 October 2024), online (pdf): <www.alberta.ca/system/files/premier-smith-letter-to-pm-trudeau.pdf>.

[19] *Ibid*.

[20] *Ibid*.

[21] *Ibid*.

[22] Government of Alberta, "Accountability for Ottawa's carbon tax double standard" (29 October 2024), online: <www.alberta.ca/release.cfm?xID=912467C3030B9-C2D6-3DF0-D5CEE22AF06C325D>.

[23] *Clean Electricity Regulations*, SOR/2024-263.

[24] Government of Alberta, "Responding to Ottawa's electricity regulations: Joint Statement" (17 December 2024), online: <www.alberta.ca/release.cfm?xID=925446019306C-D458-F80D-68C351CF59B20CCD>.

[25] *Ibid*.

The Pathways Alliance comprises six producers representing 95 per cent of oil sands production and has pledged to reduce gas emissions from oil sands production to net zero by 2050. The Canada Growth Fund was incorporated in 2022 as a subsidiary of the Canada Development Investment Corporation "to support the growth of Canada's clean economy."[26] The Pathways Alliance is not without controversy, however. Environmental and Indigenous groups requested that the Alberta Energy Regulator (AER) require an environmental impact assessment of the project. In November, the AER determined that an assessment for the project would not be required. Eight First Nations then announced that they would request a review under the federal *Impact Assessment Act*.[27] As the new year arrived, commentators were suggesting that political uncertainty at the federal level was also threatening the Pathways Alliance project as it was unclear whether a new government would be supportive.

TMX BEGINS SERVICE

In the wake of the defeat of several major pipeline projects in recent years by a combination of political, regulatory and market challenges, completion of the expansion of the Trans Mountain Expanded Pipeline System (TMX) and commencement of service on the expanded system in May[28] came as welcome news for Canadian oil producers. TMX has nearly tripled the capacity of Trans Mountain, to approximately 890,000 bpd, thereby easing a shortfall of oil pipeline export capacity in Canada — a shortfall that has resulted in Canadian oil being sold at a substantial discount to West Texas Intermediate. Going forward, this differential is expected to narrow further, resulting in increased income for producers — and increased royalties for government.

Concerns that the commissioning of TMX might negatively affect flows on Enbridge's Mainline system (the largest crude oil pipeline system in North America) were allayed when it was reported in November that the Mainline had been in apportionment (with capacity being rationed) in July and August and was expected to be apportioned again in November. Further, Enbridge reported that it was in discussion with shippers over expanding the Mainline in 2026 and beyond in order to handle growing volumes from Canadian producers.[29] In light of the opposition that Canadian pipeline projects have encountered in recent years, the regulatory review of any such expansion may prove to be controversial.

After the November election of Donald Trump as the incoming President of the United States, the Alberta Minister of Energy was also reported to be hopeful that the Keystone XL project might be resurrected, but it was reported that TC Energy, the project sponsor, would not revive the project.[30]

The completion of TMX certainly came at a cost, however; the final outlay for the project was $34.2 billion, more than quadruple the original estimated cost of $7.4 billion. Late in the year, the Parliamentary Budget Office told the House of Commons that Ottawa was likely to lose money on an eventual sale of the project.

Trans Mountain now faces a regulatory challenge as it seeks approval from the Canada Energy Regulator (CER) of its proposed tolls. The CER hearing on Trans Mountain's application for approval of its tolls (which is

[26] Canada Growth Fund, *2023 Annual Report*, (2023) online (pdf): <d2apye5bf031b.cloudfront.net/documents/cgf-2023-annual-report.pdf>.

[27] *Supra* note 16.

[28] Canada Energy Regulator, News Release, "CER issues final authorization for Trans Mountain Expansion Project to operate" (30 April 2024), online: <www.cer-rec.gc.ca/en/about/news-room/news-releases/2024/cer-issues-final-authorization-for-trans-mountain-expansion-project-to-operate.html>.

[29] The Canadian Press, "Enbridge in talks about Mainline pipeline expansion as Canadian oil output grows", *CTV News* (1 November 2024), online: <www.ctvnews.ca/calgary/article/enbridge-in-talks-about-mainline-pipeline-expansion-as-canadian-oil-output-grows>.

[30] Thomson Reuters, "Calgary-based TC Energy will not revive Keystone XL oil pipeline project", *CBC News* (8 March 2022), online: <www.cbc.ca/news/canada/calgary/canada-s-tc-energy-will-not-revive-keystone-xl-oil-pipeline-project-1.6377165>.

being strongly opposed by some interests) is scheduled for May, 2025.[31]

The potential for future growth in Canada's offshore oil production also reemerged in 2024, with reports that work on developing the proposed Bay du Nord Project (BDN) was proceeding. BDN is a proposed development by Equinor Canada[32] in the Flemish Pass, more than 200 nautical miles offshore from Newfoundland and Labrador. The project was approved, somewhat controversially, by the federal government in 2022.[33] In May 2023, the project developer announced that it was postponing the project for up to three years, due to "changing market conditions and subsequent high cost inflation…"[34] In June 2024, however, Equinor Canada's CEO was quoted as saying he remained optimistic about the project and that the company was "actively working to look at everything we can to improve the project."[35] Exploratory drilling offshore from Newfoundland and Labrador is continuing.[36]

LNG PROJECTS ADVANCE

While further growth in Canadian oil production and firmer prices were foreshadowed by developments during 2024, natural gas producers on the other hand continued to face depressed prices. At the same time, production reached record levels. However, a glimmer of optimism (although not shared by all producers) began to appear towards the end of the year in anticipation of the completion and startup in 2025 of the LNG Canada Project, near Kitimat, B.C. LNG Canada will be Canada's first LNG export project. As with TMX, the project had overcome significant regulatory hurdles and protests along the way, particularly around Coastal GasLink, a TC Energy project promoted as the "first direct path for Canadian natural gas to global LNG markets."[37]

Meanwhile, two other LNG projects on the West Coast continued to advance during the year. Woodfibre LNG, owned by a partnership of Pacific Energy Corporation (Canada) Limited (70 per cent) and Enbridge Inc. (30 per cent) is located on Howe Sound. Construction began in the fall of 2023 and substantial completion is expected by 2027. It is designed to produce 2.1 million tonnes of LNG per year for overseas markets. It claims to be "the world's first net zero LNG export facility."[38]

Woodfibre LNG is also notable for its emphasis on constructing and operating the project "in a manner that is respectful of Indigenous values."[39] The project claims to be "the first industrial project in Canada to recognize a non-treaty Indigenous government, the Squamish Nation, as a full environmental regulator."[40]

Further development of Canada's emerging LNG export industry came during the year with the announcement on June 25, 2024 of a Final

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[31] *Trans Mountain Pipeline* (23 July 2024), ULC RH-002-2023, online: Canada Energy Regulator <docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90465/92835/552980/4301738/4369664/4369668/4477079/C30800-1_Letter_to_RH-002-2023_Participants_-_Process_Letter_No._13_-_Revised_Timetable_of_Events_-_A9C6W3.pdf?nodeid=4477080&vernum=-2>.

[32] With British Petroleum Canada.

[33] See Rowland J. Harrison, "Bay Du Nord Offshore Oil Production Project Clears Threshold Regulatory Hurdle" (2022) 2022 10:2 Energy Regulation Q 22.

[34] Equinor ASA, "The Bay du Nord project" (last visited 26 February 2025), online: <www.equinor.com/where-we-are/canada-bay-du-nord>.

[35] Mike Moore, "One year after shelving Bay du Nord, this Equinor executive is a bit more optimistic", *CBC News* (7 June 2024), online: <www.cbc.ca/news/canada/newfoundland-labrador/bay-du-nord-2024-update-1.7226897>.

[36] Patrick Butler, "Major deepwater drilling underway 500 km off Newfoundland", *CBC News* (6 August 2024), online: <www.cbc.ca/news/canada/newfoundland-labrador/persephone-ultra-deepwater-oil-exploration-1.7286049>.

[37] TransCanada PipeLines Ltd, "The first direct path for Canadian natural gas to global LNG markets" (last visited 26 February 2025), online: <www.coastalgaslink.com>.

[38] Woodfibre LNG, "Sustainably Produced Liquefied Natural Gas" (last visited 26 February 2025), online: <woodfibrelng.ca>.

[39] Woodfibre LNG, "Reconciliation in Action" (last visited 26 February 2025), online: <woodfibrelng.ca/indigenous-reconciliation>.

[40] *Supra* note 38.

Investment Decision to proceed with the Cedar LNG Project.[41] Cedar LNG is a proposed floating facility with a nominal capacity of 3.3 million tonnes per year, located in the traditional territory of the Haisla Nation. The Haisla Nation is the majority owner (with Pembina Pipeline Corporation), making Cedar LNG the world's first Indigenous majority-owned LNG project. It is expected to be one of the lowest emitting LNG facilities in the world, powered by renewable electricity supplied by BC Hydro. Construction is underway, with a projected in-service date in late 2028.

INDIGENOUS EQUITY

The increasing role of Indigenous equity participation in energy development projects and infrastructure ownership was also evident in other ways during the year. In a call for new clean electricity power in April, BC Hydro specified that projects must have a minimum percentage of equity ownership held by First Nations.[42] It noted that the Canada Infrastructure Bank would make loans available as an option for First Nations to help finance as much as 90 per cent of their equity position in any project that was awarded an electricity purchase agreement under the call for power. It was reported that the utility received proposals for three times more energy than it was targeting.[43]

In October, a vision statement issued by the Government of Ontario (discussed further below) noted that the Wataynikaneyap Power Transmission Project, which was expected to reach substantial completion by the end of the year, would be the largest Indigenous-led infrastructure project in Canada. The project is owned by 24 First Nation communities in partnership with Fortis Ontario and Algonquin Power & Utilities Corporation.

ONTARIO'S ENERGY VISION STATEMENT

The challenges posed by anticipated growth in Ontario's power needs were outlined by the provincial government in its vision statement "Ontario's Affordable Energy Future: The Pressing Case for More Power"[44], released on October 22. The statement notes the forecast of the province's Independent Electricity System Operator that electricity demand will increase by 75 per cent, requiring 111TWh more energy by 2050, "the equivalent of four and a half cities of Toronto."[45] In articulating a vision of "an economy powered by affordable, reliable and clean energy", the statement emphasizes the need "to plan for electricity, natural gas and other fuels to ensure that the province's energy needs are anticipated and met in a coordinated way."[46]

Following the tabling of the vision statement, Bill 214 was introduced in the Legislative Assembly "to amend various energy statutes respecting long term energy planning, changes to the Distribution System Code and the Transmission System Code and electric vehicle charging."[47] The amendments include adding a statement of purpose to the *Electricity Act*[48] "to promote electrification and facilitate energy efficiency measures aimed at using electricity to reduce overall emissions in Ontario."[49] The amendments also replace long-term energy plans with "integrated energy resource plans…" The *Affordable Energy Act, 2024*[50] received Royal Assent on December 4, 2024.

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[41] Cedar LNG, "Cedar LNG Announces Positive Final Investment Decision" (25 June 2024), online: <www.cedarlng.com/cedar-lng-announces-positive-final-investment-decision>.

[42] Government of British Columbia, "BC Hydro issues call for new clean electricity to power B.C.'s future" (3 April 2024), online: <news.gov.bc.ca/releases/2024EMLI0018-000470>.

[43] Amanda Stephenson, "Euity ownership 'the next evolution' for reconciliation" *Calgary Herald* (30 September 2024), online: <epaper.calgaryherald.com/article/281805699344928>.

[44] Ministry of Energy and Electrification, *Ontario's affordable Energy Future: The Pressing Case for More Power* (2024) online (pdf): <www.ontario.ca/files/2024-11/energy-ontarios-affordable-energy-future-en-2024-11-07.pdf>.

[45] *Ibid*.

[46] *Ibid* at 19.

[47] Bill 214, *An Act to amend various energy statutes respecting long term energy planning, changes to the Distribution System Code and the Transmission System Code and electric vehicle charging*, (assented to 4 December 2024), SO 2024, c 26.

[48] *Electricity Act*, SO 1998, c 15, Schedule A.

[49] *Affordable Energy Act*, SO 2024, c 26, Schedule 1, s 1(a.2).

[50] *Affordable Energy Act*, SO 2024, c 26.

Ontario's vision statement is also noteworthy for its reference to an emerging additional demand for electricity from the proliferation of data centres — forecast to roughly equal by 2026 adding the demand of the city of Kingston to the grid. It added that the rise of artificial intelligence (AI) and the data centres that power advances in computing could also lead to significant increases in demand on energy grids.

In December, the Alberta government announced a strategy aimed at becoming "North America's destination of choice for Artificial Intelligence (AI) data centre investment."[51] The announcement noted that the AI data centre market size was anticipated to double by 2030 to more than $820 billion. Days later, entrepreneur Kevin O'leary announced that O'leary Ventures had signed a letter of intent to purchase land near Gran Prairie for a proposed AI data centre industrial park.[52] However, commentators noted that the rise of data centres in the burgeoning high-tech sector raised questions about the province's grid.[53]

'GREENWASHING' AND 'GREENHUSHING'

Most federal measures intended to pursue the goal of "net-zero" have been aimed at reducing carbon emissions more or less directly. In 2024, however, with the enactment of Bill C-59[54] amending the *Competition Act,*[55] the government expanded its arsenal for addressing climate change with a measure of a different character: Bill C-59 is aimed at greenwashing, "the process of conveying a false impression or misleading information about how a company's products are environmentally sound."[56]

The amendments prohibit representations for the purpose of promoting the supply or use of a product or any business interest that is not based on "an adequate and proper" test or substantiation, the proof of which lies on the person making the representation. Beginning in June 2025, private parties will be able to seek leave from the Competition Tribunal to commence enforcement proceedings.

On December 23, the Competition Bureau released further draft enforcement guidelines.[57] However, commentators suggested that the guidelines do not entirely resolve the ambiguity in the provisions.

There has been widespread concern expressed that the amendments have introduced considerable risk, particularly arising from industry's claims with respect to its efforts to address climate change. There have also been reports of businesses deleting their websites due to the uncertainty around how the amendments will be interpreted and applied.[58] A new word has entered the lexicon — "greenhushing."

Two Alberta business groups have filed a statement of claim in the Alberta Court of King's Bench claiming that the provisions violate their freedom of speech rights.[59]

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[51] Government of Alberta, Fueling innovation through AI data centre attraction, (4 December 2024), online: <www.alberta.ca/release.cfm?xID=92471C316C21B-DF5D-8ABC-A6386B520590AB55>.

[52] Chris Varcoe, "O'leary proposes AI data park in province" *Calgary Herald* (10 December 2024), online: <epaper.calgaryherald.com/article/281590951148944>.

[53] Chris Varcoe, "Data centres raise questions over province's grid" *Calgary Herald* (6 November 2024), online: <epaper.calgaryherald.com/article/281565181274780>.

[54] Bill C-59, *An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023 and certain provisions of the budget tabled in Parliament on March 28, 2023*, 1st Sess, 44th Parl, 2021, (first reading 30 November 2023).

[55] *Competition Act*, RSC 1985, c C-34.

[56] Adam Hayes, "Greenwashing: Definition, How It Works, Examples, and Statistics" (30 June 2024), online: <www.investopedia.com/terms/g/greenwashing.asp>.

[57] Government of Canada, "Environmental claims and the *Competition Act*" (23 December 2024), online: <competition-bureau.canada.ca/en/how-we-foster-competition/consultations/environmental-claims-and-competition-act>.

[58] See for example Brett Mckay, "Biogas project deletes website after Bill C-59" *Calgary Herald* (10 October 2024), online: <epaper.calgaryherald.com/article/281633900692387>.

[59] Chris Varcoe, "Ottawa faces lawsuit over 'egregious' bill" *Calgary Herald* (6 December 2024), online: <epaper.calgaryherald.com/calgary-herald/20241206/281539411533719/textview>.

CHURCHILL FALLS

Significant energy policy and regulatory developments also transpired in Atlantic Canada during the year.

On December 12, the Premier of Newfoundland and Labrador and the Premier of Quebec announced the signing of a memorandum of understanding covering the purchase by Hydro Quebec of electricity from Churchill Falls, starting in 2025. The agreement will replace the 1969 contract that had been a source of resentment in Newfoundland and Labrador for more than five decades. Under that contract, which would have run until 2041, Hydro Quebec purchased electricity for 0.2 cents per kilowatt-hour, while selling surplus electricity to U.S. distributors at current market rates. Under the new agreement, Hydro Quebec will pay 30 times more for electricity from Churchill Falls. Hydro Quebec also acquires the right to partner with Newfoundland and Labrador Hydro on new hydro installations.

The MOU was approved by the Newfoundland and Labrador Legislature on January 9, 2025.

NOVA SCOTIA DEVELOPMENTS

The widespread changes in the policy, legislative and regulatory framework for energy being wrought by electrification and the pursuit of net-zero in some cases require an overall restructuring of that framework. Such was the case in Nova Scotia with the establishment during the year of a new Energy Board and a new Independent Energy System Operator (IESO), as was reviewed in the December Issue of *ERQ*. At year-end, recruitment of the chair and members of the Board of Directors of the IESO was underway.

A further significant development in Nova Scotia's electricity market was the announcement in September of a further loan guarantee from Ottawa for $500 million to avoid what would otherwise have meant skyrocketing rates for customers of Nova Scotia Power. Due to delays in receiving power from the Muskrat Falls hydroelectric plant in Labrador and the consequent need to purchase power elsewhere, Nova Scotia Power was expected accumulate unrecovered fuel costs that were expected to grow to more than $400 million by the end of the year. Without the federal loan guarantee, the company expected its customers would face an average rate increase of 19.2 per cent. The loan guarantee would reduce that increase to an average of 2.4 per cent for 2025. On November 29, the Nova Scotia Utility and Review Board released its decision approving Nova Scotia Power's application for approval of the agreement.[60]

OFFSHORE RENEWABLES

The continuing evolution of the energy regulatory framework was also reflected during the year with expansion of the authority of Canada's two offshore petroleum boards. Federal Bill C-49, developed in partnership with the Government of Nova Scotia and the Government of Newfoundland and Labrador, amended the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*[61] and the *Canada–Nova Scotia Offshore Petroleum Resources Accord Implementation and Offshore Renewable Energy Management Act*[62] to establish a joint regulatory framework for offshore renewable energy development. The amendments also changed the name of each of the two joint federal-provincial boards from "Offshore Petroleum Board" to "Offshore Energy Regulator."[63] Corresponding changes at the provincial level followed, to maintain the framework of mirror federal-provincial

[60] Nova Scotia Power Inc (23 December 2024), NSUARB 2024-216, online (pdf): Nova Scotia Utility and Review Board <nsuarb.novascotia.ca/sites/default/files/NSUARB%20Board%20Decision%20-%20Nova%20Scotia%20Power%20Incorporated%20%28M11912%29.pdf>.

[61] *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*, SC 1987, c 3.

[62] *Canada–Nova Scotia Offshore Petroleum Resources Accord Implementation and Offshore Renewable Energy Management Act*, SC 1988, c 28.

[63] Bill C-49, *An Act to amend the Canada—Newfoundland and Labrador Atlantic Accord Implementation Act and the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and to make consequential amendments to other Acts*, 1st Sess, 44th Parl, 2024, (assented to 3 October 2024).

legislation that supports implementation of the respective offshore Accords.[64]

LOOKING AHEAD

As noted in introducing this Annual Review, political developments in the closing weeks of 2024 in both Canada and the U.S. introduced two pressing issues that are likely to be the focus of energy policy and regulation in 2025. Canada's carbon tax, if not outright abolished, is likely to be replaced, with attention focusing on any proposed replacement.

Potential U.S. tariffs on imported Canadian energy, and proposed Canadian responses, will dominate Canada-U.S. relations — and, indeed, may strain intergovernmental relations within the nation itself. ■

[64] Natural Resources Canada, News Release, "Government of Canada Passes Legislation to Seize the Enormous Economic Opportunity Offshore Wind Presents for Nova Scotia and Newfoundland and Labrador" (3 October 2024), online: <www.canada.ca/en/natural-resources-canada/news/2024/10/government-of-canada-passes-legislation-to-seize-the-enormous-economic-opportunity-offshore-wind-presents-for-nova-scotia-and-newfoundland-and-labr.html>.

2024 DEVELOPMENTS IN ADMINISTRATIVE LAW RELEVANT TO ENERGY LAW AND REGULATION

Paul Daly[*]

INTRODUCTION

Last year marked the fifth anniversary of the Supreme Court of Canada's landmark decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*.[1] At the five-year mark after the release of the predecessor to *Vavilov*,[2] Professor Mullan wrote an 85-page article about the issues left unresolved — the top 15![3]

No such article could be written today. The issues left unresolved by *Vavilov* are comparatively few. I identified five subsequent to the decision: internal standard of review, arbitration appeals, procedural fairness, *Charter*[4] review and the extent to which reasonableness review is constitutionally entrenched.[5] I later added the standard of review for regulations to the list.[6]

Of these six, the Supreme Court has squarely dealt with procedural fairness[7] and the standard of review for regulations;[8] and has decided cases addressing *Charter* review[9] and the constitutional foundations of judicial review.[10]

There has been no treatment of internal standard of review — though, to be fair, the Supreme Court has never addressed this issue. As far as arbitration appeals are concerned, the minority reasons in *Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District*[11] sought to address them.

Accordingly, at the five-year mark, the question is more how faithful the Supreme Court has been to the *Vavilov* framework than how it needs to clarify or tweak the framework. In the last 12 months, the Court has made a number of significant decisions applying the *Vavilov*

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

[2] *Dunsmuir v New Brunswick*, 2008 SCC 9.

[3] David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action- The Top Fifteen!" (2013), 42:1 Advocates' Q 1.

[4] *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[5] Paul Daly, "Unresolved Issues after Vavilov" (2022) 85:1 *Saskatchewan L Rev* 89.

[6] Paul Daly, *A Culture of Justification: Vavilov and the Future of Canadian Administrative Law* (Vancouver: UBC Press, 2023), at 145–49.

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

[8] *Auer v Auer*, 2024 SCC 36 [*Auer*].

[9] *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 [*CSFTNO*]; *York Region District School Board v Elementary Teachers' Federation of Ontario*, 2024 SCC 22.

[10] *Yatar v TD Insurance Meloche Monnex,* 2024 SCC 8 [*Yatar*].

[11] *Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7.

framework and addressing unresolved issues. Most of the focus of this 'year in review' paper will be on those. Only one of the cases involves energy law directly, a significant decision on stranded assets, but the others all have immediate implications for the sector.

I will begin in Part I with the standard of review of regulations. In Part II, I will address reasonableness review, focusing on the decision in the *Mandate Letters*[12] case and also addressing the most recent entry in the '*Charter* values' ledger. In Part III, I will focus on correctness review, with two *Charter* cases from the labour and employment field forming the core of my analysis. In Part IV, I turn my attention to constitutional issues, specifically the scope of the core constitutional minimum of judicial review post-*Vavilov*. And in Part V, I consider a number of regulatory conduct issues relevant to energy law practitioners that have arisen recently in lower courts (meetings with regulators, counsel in regulatory investigations and the desirability of transparency).

I. STANDARD OF REVIEW OF REGULATIONS

A) Clarifying the Standard

The Supreme Court of Canada handed down its much-anticipated decision on standard of review of regulations in 2024.[13] Regulations in the energy sector are, of course, subject to the framework laid out in *Auer*.

I was co-counsel for the appellant, Roland Auer. After the hearing in April, two things seemed quite clear to me: the Supreme Court would apply the *Vavilov* framework to judicial review of regulations; but was also likely to find that the regulations at issue here (the federal *Child Support Guidelines*[14] made by the Governor in Council) were valid. And so it transpired.

The major issue of administrative law principle was the standard to be applied in cases where an applicant seeks to challenge a regulation. In *Katz Group Canada Inc. v Ontario (Health and LongTerm Care)*[15] the Supreme Court held that judicial intervention would only be appropriate "on the basis of inconsistency with statutory purpose"[16] where regulations were demonstrated to be "irrelevant", "extraneous" or "completely unrelated." This standard was criticized as being "hyperdeferential"[17] and an inappropriate carve-out from the general *Vavilov* framework.[18] But in the Alberta Court of Appeal in *Auer*, the majority held that regulations have a special status recognized by the unique *Katz* standard.[19]

The Supreme Court unanimously, in reasons written by Justice Côté , resolved that dispute in favour of *Vavilov*. The *Vavilov* framework is "comprehensive"[20] and represents a "sea change"[21] in Canadian administrative law, setting out the starting point for any future consideration of issues related to standard of review.[22] Indeed, *Vavilov* specifically folded in cases involving challenges to the lawfulness of regulations.[23] Furthermore, the majority in *Vavilov* contemplated that "robust reasonableness review" would suffice to ensure that administrative decision-makers (including those who make regulations) remain within the boundaries of their authority, even where no formal reasons have been provided for the decision.[24]

However, some aspects of the decision in *Katz* survived the *Vavilovian* sea change. There

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[12] See *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 [*Mandate Letters*].

[13] *Auer*, *supra*, note 8.

[14] *Federal Child Support Guidelines*, SOR/97-175.

[15] *Katz Group Canada Inc. v Ontario (Health and LongTerm Care)*, 2013 SCC 64, [*Katz*].

[16] *Ibid* at para 28.

[17] *Portnov v Canada (Attorney General)*, 2021 FCA 171, at para 19.

[18] *British Columbia (Attorney General) v Le*, 2023 BCCA 200, at para 93.

[19] *Auer*, *supra* note 8, at paras 47–63.

[20] *Ibid* at para 21.

[21] *Ibid* at para 32.

[22] *Ibid* at para 19.

[23] *Ibid* at para 22.

[24] *Ibid* at para 26.

were five aspects to the Supreme Court's prior decision in *Katz*:

> [1] "A successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate";[25]
>
> [2] "Regulations benefit from a presumption of validity… This presumption has two aspects: it places the burden on challengers to demonstrate the invalidity of regulations…and it favours an interpretive approach that reconciles the regulation with its enabling statute so that, where possible, the regulation is construed in a manner which renders it *intra vires*";[26]
>
> [3] "Both the challenged regulation and the enabling statute should be interpreted using a 'broad and purposive approach…consistent with the Court's approach to statutory interpretation generally'";[27]
>
> [4] "This inquiry does not involve assessing the policy merits of the regulations to determine whether they are 'necessary, wise, or effective in practice'".[28] "It is not an inquiry into the underlying 'political, economic, social or partisan considerations'" or an assessment of whether the regulations "will actually succeed at achieving the statutory objectives";[29]
>
> [5] The regulations "must be 'irrelevant', 'extraneous' or 'completely unrelated' to the statutory purpose to be found *ultra vires* on the basis of inconsistency with statutory purpose."[30]

Several of these propositions are entirely unobjectionable, as Justice Stratas observed in *Portnov*.[31] In *Auer*, only the last of them was held to be inconsistent with *Vavilov*, as it created a carve-out based on the status of the decision-maker and nature of decision at issue:

> In my view, all of the above-mentioned principles in *Katz Group*, except for the "irrelevant", "extraneous" or "completely unrelated" threshold, remain good law and continue to inform the review of the *vires* of subordinate legislation. As I will explain, the significant sea change brought about by *Vavilov* in favour of a presumption of reasonableness as a basis for review erodes the rationale for the "irrelevant", "extraneous" or "completely unrelated" threshold, and maintaining this threshold would perpetuate uncertainty in the law. Accordingly, there is sound basis for a narrow departure from *Katz Group*.[32] Otherwise, *Katz Group* continues to "provide valuable guidance on the application of the reasonableness standard."[33] To the extent that the principles in *Katz Group* do not conflict with *Vavilov*, they "are to form part of the application of the reasonableness standard."[34]

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[25] *Katz*, *supra* note 15 at para 24.

[26] *Ibid* at para 25 (emphasis deleted).

[27] *Ibid* at para 26, quoting *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19, at para 8.

[28] *Ibid* at para 27, quoting *Jafari v Canada (Minister of Employment and Immigration)*, 1995 CanLII 3592 (FCA), [1995] 2 FC 595 (CA), at 604.

[29] *Ibid* at para 28, quoting *Thorne's Hardware Ltd. v The Queen*, 1983 CanLII 20 (SCC), [1983] 1 SCR 106, at 112–13.

[30] *Ibid*.

[31] *Supra* note 17 at para 20.

[32] See *Canada (Attorney General) v Power*, 2024 SCC 26, at paras 98, 209; *R. v Kirkpatrick*, 2022 SCC 33, at para 202, per Justices Côté, Brown and Rowe, concurring.

[33] *Supra* note 6 at 148.

[34] *Auer*, *supra* note 8 at para 32; See also *ibid* at 149.

> …
>
> To summarize, unless the legislature has indicated otherwise or if a matter invokes an issue pertaining to the rule of law which would require a review on the basis of correctness, the *vires* of subordinate legislation are to be reviewed on the reasonableness standard regardless of the delegate who enacted it, their proximity to the legislative branch or the process by which the subordinate legislation was enacted. Introducing these distinctions into the standard of review framework would be "contrary to the *Vavilovian* purposes of simplification and clarity."[35]

I would also note that the first principle was not retained in its entirety in *Auer*. The word "requires" used in *Katz* suggested that this was an exclusive basis on which regulations could be challenged. However, in *Auer*, this principle is reframed: inconsistency with statutory objectives or scope is *a* basis on which to attack regulations, as they must be "must be consistent both with specific provisions of the enabling statute and with its overriding purpose or object"[36] but this is not said to be an *exclusive* basis for challenge. Similarly, some of *Vavilov*'s legal constraints — the statutory scheme, common law principles and the rules of statutory interpretation — will be "particularly relevant" in reviewing regulations[37] but clearly, in appropriate cases other constraints might be important and, indeed, the regulations might not follow a coherent chain of reasoning.[38]

As to the second principle, Justice Côté noted the criticism that had been levelled at it but nonetheless saw it as consistent with *Vavilov*. For one thing, *Vavilov* also puts the burden on the applicant to demonstrate substantive unreasonableness.[39] For another, the corollary of the presumption of validity that regulations should be interpreted to conform to the statutory scheme authorizing them does not impose any heavier a burden than *Vavilov*, because "to overcome the presumption of validity, challengers must demonstrate that the subordinate legislation does not fall within a *reasonable* interpretation of the delegate's statutory authority."[40]

Here, I confess to having some sympathy for the contrary view advanced by the Federal Court of Appeal. As Justice Stratas explained in *Innovative Medicines*, "under *Vavilov*, the challenger does not have to overcome a presumption the decision is reasonable."[41] The applicant has a burden and so, in a *de facto* sense, a decision is reasonable until proven otherwise. But there is no *de jure* presumption of validity. The more modest (and I suggest better) way to think about this issue is that, on judicial review, a court must always characterize the decision at issue. *Vavilov* suggests that the characterization should, generally, be in favour of the decision-maker,[42] explaining the need to read administrative decisions "with sensitivity to the institutional setting and in light of the record."[43]

Retaining the *presumption* from *Katz* is a step too far, in my view, if it means that a judge must, as a preliminary matter, undertake an interpretive exercise designed to bring a regulation into conformity with the governing statutory scheme. Giving a regulation a fair *characterization* for the purposes of reasonableness review (just as is done for other administrative decisions) is one thing and would accord with the third *Katz* principle

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[35] Paul Daly, "Resisting which Siren's Call? Auer v Auer, 2022 ABCA 375 and TransAlta Generation Partnership v Alberta (Minister of Municipal Affairs), 2022 ABCA 381"(24 November 2022), online (blog): <www.administrativelawmatters.com/blog/2022/11/24/resisting-which-sirens-call-auer-v-auer-2022-abca-375-and-transalta-generation-partnership-v-alberta-minister-of-municipal-affairs-2022-abca-381>; *Supra* note 6 at 147; *Auer*, *supra* note 8 at para 44.

[36] *Auer*, *supra* note 8 at para 33, citing *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, at para 87.

[37] *Ibid* at para 60.

[38] *Ibid* at para 51; See especially at paras 52–54.

[39] *Ibid* at para 38, citing *Vavilov*, *supra* note 1 at para 100.

[40] *Ibid* at para 39.

[41] *Innovative Medicines Canada v Canada (Attorney General)*, 2022 CanLII 210 (FCA) at para 30.

[42] *Vavilov*, *supra* note 1 at paras 91–94.

[43] *Ibid* at para 96.

on broad and purposive interpretation but requiring preliminary interpretive gymnastics would be quite another. Of course, it is possible that I am making too much of the *de facto/de jure* distinction, especially given Justice Côté's insistence on the primacy of the *Vavilov* framework, her rejection of a special carve-out for regulations, her finding that the "very high degree of deference" required by the fifth *Katz* principle is inconsistent with *Vavilov*ian reasonableness review[44] and her comments on the fourth principle from *Katz*, which I turn to now.

As far as the fourth *Katz* principle is concerned, it is clear that reasonableness review of regulations, no more than reasonableness review of any other type of administrative decision, does not permit a court to second-guess the merits of a determination made by an administrative decision-maker. There is, therefore, no violation of the separation of powers by applying the reasonableness standard to regulations.[45] Although the point was not before the Supreme Court in *Auer*, the various statutes that purport to insulate municipal bylaws from challenges based on "unreasonableness" could be understood as simply emphasizing the point that merits review is *verboten*.[46]

Quoting Professor Mancini, Justice Côté emphasized that the court must be "mindful" that it plays only a reviewing role when assessing the reasonableness of regulations:

> Importantly courts must organize these various sources properly to preserve the focus on the limiting statutory language. Again, the reasonableness review should not focus on the content of the inputs into the process or the policy merits of those inputs. Rather, courts must key these sources to the analysis of whether the subordinate instrument is consistent with the enabling statute's text, context, and purpose. For example, Regulatory Impact Analysis Statements can inform a court as to the link between an enabling statute's purpose and a regulatory aim, much like Hansard evidence. These analyses can help show how the effects of a regulation which, at first blush appear unreasonable, are enabled by the primary legislation.[47]

This is closer to what I have in mind as far as the presumption of validity goes: treat it as *de facto* rather than *de jure* and characterize the administrative action at issue fairly.

With *Katz* put back in the bag, Justice Côté turned to the salient constraints here. Ultimately, the appellant's case foundered on Justice Côté's interpretation of the authority granted by s 26.1 of the *Divorce Act*[48]. The general regulation-making power (s 26.1(1)) granted "extremely broad authority" to the Governor in Council.[49] This general power is limited by s 26.1(2), imposing the "principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation" but this too, Justice Côté held, was "expressed in broad terms."[50] Accordingly, on the various issues identified by the appellant with the substantive reasonableness of the *Guidelines* relating to lines drawn (or not drawn) by the Governor in Council, there was no basis for judicial intervention:

> The GIC was entitled to choose an approach to calculating child support that (1) does not take into account the recipient parent's income; (2) assumes that parents spend the same linear percentage of income on their children regardless of the parents'

[44] *Auer*, *supra* note 8 at para 46.

[45] *Ibid* at paras 55–56.

[46] *GSI Global Shelters Developments Ltd. v Rural Municipality of Last Mountain Valley No. 250*, 2024 CanLII 30 (SKCA) at para 23; *Koebisch v Rocky View (County)*, 2021 CanLII 265 (ABCA) at para 42.

[47] *Auer*, *supra* note 8 at para 57.

[48] *Divorce Act*, RSC 1985, c 3 (2nd Supp).

[49] *Auer*, *supra* note 8 at para 75.

[50] *Ibid* at para 79.

> levels of income and the children's ages; (3) does not take into account government child benefits paid to recipient parents; (4) does not take into account direct spending on the child by the payer parent when that parent exercises less than 40 percent of annual parenting time; and (5) risks double counting certain special or extraordinary expenses. Each of these decisions fell squarely within the scope of the authority delegated to the GIC under the Divorce Act.[51]

With the framework now clarified, it will be interesting to observe how future challenges to the reasonableness of regulations will be framed. The elimination of the special carve-out for regulations is certainly welcome (and, to my eye at least) inevitable in light of *Vavilov*. As ever, though, there are aspects of the Supreme Court's analysis that will require close examination in future cases to determine the extent to which challengers to regulations are likely to prevail.

B) Some Unanswered Questions

Any foray by the Supreme Court into an area of controversy will invariably leave some questions unanswered. That is the case with *Auer* as well. Three jump out at me.

First, as already mentioned, the requirements of the presumption of validity are unclear. There is a plausible case for saying that the 'presumption' does no more than restate the basic administrative law principles that the challenger on judicial review bears the onus of demonstrating unlawfulness and that a regulation — like any decision — should be read fairly with a view to its purpose rather than stingily. Again, as long as the presumption has only a *de facto* quality, rather than a *de jure* quality, it should not create too much difficulty.

Second, the extent to which the consequences of a regulation may be considered by a reviewing court is unclear. The view taken by the Supreme Court was as follows:

> The potential or actual consequences of the subordinate legislation are relevant only insofar as a reviewing court must determine whether the statutory delegate was reasonably authorized to enact subordinate legislation that would have such consequences. Whether those consequences are in themselves necessary, desirable or wise is not the appropriate inquiry.[52]

In its negative sense — what a court *cannot* look at — this passage is clear enough: consequences are not to be taken into account where the applicant seeks to put necessity, desirability or wisdom in issue. In its positive sense — what a court *can properly* look at — this passage is rather less clear. There may be a useful analogy to make with federalism jurisprudence, where the legal effects of a statutory provision are relevant to determining its pith and substance for classification purposes, and it is legitimate to consider "how the law will operate and how it will affect Canadians."[53] But this prompts another question: how does the court get the information necessary to identify the consequences?

Third, however, the content of the record on judicial review of regulations remains unclear. The Supreme Court suggests that regulatory impact assessment documents can be considered as part of the judicial review exercise (albeit the suggestion is that they will help a court to understand why a regulation was adopted and, thus, form part of the case for upholding the regulation). Beyond this, the situation is murky.

To begin with, there is sometimes debate over what constitutes the record when a regulation is reviewed: is the court entitled only to look at the information before the regulation-maker when the regulation was made (which might simply be the text of the regulation itself and any relevant impact assessment documents) or might a wider range of information appropriate based on the grounds of judicial review? The emerging view is that a relatively broad range of information can be considered, as long as it was before the regulation-maker *and* relates to a ground of judicial review pleaded by the

[51] *Ibid* at para 116.

[52] *Ibid* at para 58.

[53] *Reference re Firearms Act (Can.),* 2000 SCC 31 at para 18.

applicant.[54] There is also debate about the extent to which a regulation-maker can be forced to disclose information that was before it, as this might sometimes be protected by privilege,[55] albeit that claims of privilege might backfire by causing a court to draw an adverse inference against the regulation-maker.[56]

Further, there is debate about extrinsic evidence that can be placed in the record. In *Sobeys West Inc. v College of Pharmacists of British Columbia*,[57] 'big box' pharmacies challenged a regulation which, they argued, unjustifiably favoured the interests of the members of the College over those of the public. At first instance, they succeeded, largely on the basis of extrinsic evidence considered by the reviewing court. But the Court of Appeal reversed, holding that the extrinsic evidence did not form part of the record. It was enough, for Justice Newbury, that there was "some evidence — anecdotal though it may have been in whole or in part — to support [the College's] concerns."[58] In *Auer*, the applicant placed extensive expert evidence before the courts to attempt to demonstrate how the *Guidelines* operated in an inequitable manner in a large number of cases. The Supreme Court did not need to take a position on the legitimacy of this exercise as it held that the applicant had not made out his case. But if "consequences" are a legitimate consideration in at least some instances, then presumably expert and other extrinsic evidence will be admissible to demonstrate that a regulation has effects beyond those reasonably authorized by statute.

Given that *Auer* jettisons *Katz* and thereby expands the scope of judicial review of the reasonableness of regulations, it is natural to expect that the record will expand accordingly. Ultimately, future cases will tell us about the potential availability (subject to privilege claims) of information before the regulation-maker, as well as extrinsic evidence. To my mind, however, the trend is towards more extensive, expansive records for the purposes of judicial review of regulations.

C) Discriminatory Regulations

Auer had a companion decision on discriminatory regulations: *TransAlta Generation Partnership v Alberta*,[59] a decision dealing with the treatment for municipal tax purposes of obsolescent assets used by utility companies. It is, therefore, a decision on an important issue for actors in the energy sector: how to treat stranded assets. In this section, I will outline the framework set out in *TransAlta* and illustrate it by reference to a series of recent appellate decisions on discriminatory regulations.

Discrimination in the administrative law sense is different from the notion of discrimination set out in human rights statutes or the jurisprudence on the *Charter*[60] right to equality, and is of much longer standing. In the classic case of *Kruse v Johnson*,[61] Chief Justice Lord Russell of Killowen set out a test of unreasonableness for municipal by-laws. One basis for invalidity, under the broad heading of unreasonableness, was where the by-law in question was "found to be partial and unequal in [its] operation as between different classes."[62]

The leading Canadian case is *Montréal v Arcade Amusements Inc.*,[63] where a municipal by-law preventing those under 18 from entering amusement arcades was held to be unlawful discrimination on the basis of age. Justice

[54] See *Canadian Constitution Foundation v Canada (Attorney General)*, 2022 FC 1233, at paras 62–64; *British Columbia (Lieutenant Governor in Council) v Canada Mink Breeders Association*, 2023 BCCA 310, at paras 66–74 [*Mink Breeders*].

[55] See e.g. *Mink Breeders*, *ibid* at para 76.

[56] *Supra* note 17 at para 51.

[57] *Sobeys West Inc. v College of Pharmacists of British Columbia*, 2016 BCCA 41.

[58] *Auer*, *supra* note 8 at para 70.

[59] *TransAlta Generation Partnership v Alberta*, 2024 SCC 37 [*TransAlta*].

[60] *Charter*, *supra* note 4.

[61] *Kruse v Johnson,* [1898] 2 QB 91.

[62] *Auer*, *supra* note 8 at 99.

[63] *Montréal v Arcade Amusements Inc.,* 1985 CanLII 97 (SCC).

Beetz provided[64] a long list of cases in which discrimination had been held to be unlawful:

> —a distinction between residents and non-residents in the granting of permits: *Jonas v Gilbert* (1881); *Rex v Paulowich*, cited in *Montréal v Arcade Amusements Inc.* by L.-P. Pigeon; *Re Ottawa Electric Railway Co. and Town of Eastview* (1924); *Rex ex rel. St-Jean v Knott*;[65]
>
> —a distinction in respect of closing hours between mariners whose ships were in port and other customers of a dealer: *Regina v. Flory* (1889);[66]
>
> —a distinction between dogs weighing over thirty-five pounds and those weighing less for purposes of muzzling or putting on a chain: *Phaneuf v. Corporation du Village de St-Hugues* (1936), 61 Que. K.B. 83; in this case the unauthorized distinction was aggravated by the intention to affect one person in particular, but the general principles of a distinction unauthorized by law were cited with approval by Chouinard J., speaking for this Court, in *City of Montreal v. Civic Parking Center Ltd.*;[67]
>
> —a distinction between businesses of the same class for the purposes, *inter alia*, of setting closing hours: *Forst v. City of Toronto* (1923); *S.S. Kresge Co. v. City of Windsor* (1957); *City of Calgary v. S.S. Kresge Co.* (1965); *Regina v. Varga* (1979); *Entreprises Anicet Gauthier Inc. v. Ville de Sept-Îles*.[68]

Discrimination in the administrative law sense can be authorized by statute. The problem in *Arcade Amusements* was not the discriminatory by-law *per se* but, rather, the absence of statutory authorization for age-based discrimination. The City of Montreal had argued that the breadth of its powers to enact by-laws supported its regulation of amusement arcades. But Justice Beetz rejected that argument:

> However, as can be seen on the face of these provisions, none of them expressly empowers the City to make distinctions based on age. It may well be that an authorization to make distinctions based on the age of children and adolescents would be useful to the City in exercising its general powers, and especially in exercising its power to adopt policing By-laws; but however useful or convenient such an authorization might be, I am not persuaded that it is so absolutely necessary to the exercise of those powers that it would have to be found in the enabling provisions, by necessary inference or implicit delegation.[69]

Justice McLachlin (as she then was and in dissent but not on this point) explained how discrimination functions as a legal concept in the context of municipal by-laws in *Shell Canada Products Ltd v Vancouver (City)*:

> The rule pertaining to municipal discrimination is essentially concerned with the municipality's power. Municipalities must operate within the powers conferred on them under the statutes which create and empower them. Discrimination itself is not forbidden. What is forbidden is discrimination which is beyond the municipality's powers as defined by its empowering statute. Discrimination in this municipal

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[64] *Ibid* at para 407.

[65] *Jonas v Gilbert*, 1881 CanLII 36 (SCC); *Rex v Paulowich*, cited in *Montréal v Arcade Amusements Inc.* by L.-P. Pigeon; *Re Ottawa Electric Railway Co. and Town of Eastview* (1924), 1924 CanLII 386 (ON SC); *Rex Ex Rel. St. Jean v Knott,* 1944 CanLII 365 (ON SC).

[66] *Regina v Flory* (1889), 17 O.R. 715.

[67] *City of Montreal v Civic Parking Center Ltd.,* 1981 CanLII 214 (SCC), at p 559.

[68] *Forst v City of Toronto* (1923), 54 OLR 256; *S.S. Kresge Co. v City of Windsor, Bartlet, MacDonald & Gow Ltd. et al. v. City of Windsor*, 1957 CanLII 365 (ON CA); *City of Calgary v S.S. Kresge Co.*, 1965 CanLII 508 (AB KB); *Regina v Varga* (1979), 1979 CanLII 1715 (ON CA); *Entreprises Anicet Gauthier Inc. v Ville de Sept-Îles*, [1983] CS 709.

[69] *Supra* note 63 at 414.

> sense is conceptually different from discrimination in the human rights sense; discrimination in the sense of the municipal rule is concerned only with the ambit of delegated power.[70]

In *TransAlta*, the Supreme Court clarified the relationship between the non-discrimination principle and reasonableness review.

First, when it is alleged that regulations discriminate, the matter will be reviewed on the reasonableness standard. Second, at the risk of stating the obvious, discriminatory treatment must be identified: this is discrimination in the administrative law sense — drawing distinctions between persons or classes — rather than the constitutional law sense. Third, this will involve an application of the principles of statutory interpretation to determine whether (a) the discrimination was expressly authorized or (b) authorized by necessary implication; if not, the regulations will be unlawful. Fourth, the court must go on to determine whether the regulations respect the relevant legal constraints set out in *Vavilov*.

TransAlta owns coal-fired electricity generation facilities in Alberta. Government policy in the province is to phase out coal-fired generation of electricity. Accordingly, in 2016, TransAlta and the provincial government entered into an agreement (an "Off-Coal Agreement") that involved TransAlta ceasing to use those facilities by 2030 in exchange for "transition payments." But then another question arose. TransAlta has to pay municipal taxes on its properties, including the coal-fired electricity generation facilities. These are defined as "linear property" under section 284(1)(k) of the *Municipal Government Act*.[71]

However, these properties are depreciating rapidly as coal-fired plants are being phased out. Is TransAlta therefore entitled to accelerate the depreciation of these facilities? The upshot would be that the assessed value of TransAlta's facilities would be much lower for municipal taxation purposes.

Normally, a property owner can apply to an assessor for relief in these circumstances. But the Minister for Municipal Affairs had issued regulations under the *MGA* that specifically excluded properties subject to an Off-Coal Agreement from being able to claim additional depreciation. Was this lawful? Ultimately, yes, the Supreme Court held, affirming the unanimous view of the lower courts.

i. The Standard of Review

For a unanimous Supreme Court, Justice Côté applied the reasonableness standard, as presaged by Auer,[72] emphasizing that applying the standard to the lawfulness of regulations is "fundamentally an exercise of statutory interpretation to ensure that the delegate has acted within the scope of their lawful authority under the enabling statute."[73]

ii. Identifying Discrimination

Justice Côté held that *TransAlta* had been discriminated against. The Court of Appeal had concluded that there was no discrimination between "similarly situated" persons, as the regulations at issue "apply to all coal-fired electrical power generation facilities in the province that are subject to off-coal agreements or legislation requiring the reduction or cessation of coal-fired emissions."[74] Justice Côté disagreed. The relevant class was owners of linear property: in that class, those who had entered into off-coal agreements were singled out. But for the regulations, TransAlta would have been able to apply to have the additional depreciation considered by a municipal assessor:

> The *Linear Guidelines* discriminate against TransAlta and other parties to offcoal agreements by singling them out as being ineligible to claim additional depreciation on the basis of the offcoal agreements and to have the assessor consider that claim (see ss. 1.003(d) and 2.004(e)). Owners of linear property who are not parties to offcoal agreements are

[70] *Shell Canada Products Ltd v Vancouver (City)*, 1994 CanLII 115 (SCC) at 259.

[71] *Municipal Government Act*, RSA 2000, c M-26 [*MGA*].

[72] *Auer*, *supra* note 8 at paras 14–18.

[73] *Ibid* at para 59; See also *Canadian Natural Resources Limited v. Fishing Lake Metis Settlement*, 2024 CanLII 131 (ABCA), at paras 29-30; See also *Restaurants Canada c Ville de Montréal*, 2021 CanLII 1639 (QCCA) at para 24.

[74] *TransAlta Generation Partnership v Alberta (Minister of Municipal Affairs)*, 2022 ABCA 381, at para 86.

> eligible to make claims for additional depreciation and to have those claims considered by the assessor without exclusion.
>
> …
>
> The fact that the *Linear Guidelines* treat all parties to offcoal agreements in the same way does not mean that they are not discriminatory. The *Linear Guidelines* treat all parties to offcoal agreements in the same *discriminatory* way, as compared with owners of linear property who are not parties to offcoal agreements. As explained, administrative discrimination arises when subordinate legislation expressly distinguishes among the persons to whom its enabling legislation applies (Keyes, at pp. 370–71). The *Linear Guidelines* expressly distinguish between owners of linear property who are parties to offcoal agreements and those who are not parties to such agreements, though both are subject to the *MGA*.[75]

This is a useful reminder that the threshold for a finding of administrative law discrimination is relatively low. Differential treatment within a class will be sufficient.

iii. Authorization to Discriminate

Sometimes there will be express authority to discriminate. Consider *GSI Global Shelters Developments Ltd. v Rural Municipality of Last Mountain Valley No. 250*,[76] where a by-law was upheld against challenge on numerous grounds, including discrimination between holders of developed and undeveloped lots in a resort.

In *GSI*, the central issue was the imposition of a minimum tax, which was controversial because of the particularities of the municipality. The municipality in question features a park, a hamlet, three resort areas and farmland. Most of the permanent residents of the municipality are farmers. There are many ratepayers who are not permanent residents but, rather, use lots in the resort during the summer. GSI owns 78 such lots. But many of the ratepayers have not erected any residence on their lots — rather, they visit in their luxury RVs during the summer months. Historically, ratepayers who had not erected residences on their lots paid much less in municipal tax than those who had: the rateable value of their lot was much lower. When the municipality imposed a minimum tax of $1,200, this had a significant effect on ratepayers with no residence on their lots and, especially on GSI as the owner of multiple lots.

Was the discrimination between developed and undeveloped lots authorized by statute? Justice Caldwell held that it was:

> I also acknowledge GSI's submission that the Bylaw discriminates between properties on the basis of whether they are developed or undeveloped and that this has a disproportionate economic effect on GSI, due to its ownership of many vacant residential lots. However, as noted, *The Municipalities Act* expressly authorises municipalities to impose different levies on different classes of property and to impose different minimum taxes on different classes of properties. The Bylaw does not on its face single out GSI or anyone else, and it does not affect GSI's residential properties any differently than any other residential properties in the RM (other than those expressly excluded from its operation). *The Municipalities Act* permits a municipality to lawfully discriminate or differentiate between properties of the same general class in the way this bylaw does.[77]

This was a case of express authorization, according to Justice Caldwell. Sure enough, section 289(2)(b) provides that "different amounts of minimum tax or different methods of calculating minimum tax for different classes of property…" Therefore, a distinction between

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[75] *TransAlta Generation Partnership v Alberta*, 2024 SCC 37 at paras 46, 48.

[76] *GSI Global Shelters Developments Ltd. v Rural Municipality of Last Mountain Valley No. 250,* 2024 CanLII 30 (SKCA) [*GSI*].

[77] *Ibid* at para 62.

undeveloped and developed lots was perfectly tenable, on the basis that these are different classes of property. It should also be noted that discrimination may legitimately be authorized in a general interpretation statute, as in Ontario,[78] thereby eliminating discrimination as a ground of challenge to regulations.[79]

In *TransAlta*, there was no express provision authorizing discrimination. But Justice Côté held that the Minister was implicitly authorized to discriminate against TransAlta and other parties to off-coal agreements. To begin with, "the Minister has broad authority to make regulations establishing valuation standards for linear property, respecting the assessment of linear property, respecting the processes and procedures for preparing assessments and respecting any matter considered necessary to carry out the intent of the MGA".[80] Furthermore:

> In establishing a valuation standard for linear property, the Minister is authorized to make regulations "respecting designated industrial property, including, without limitation, regulations respecting the specifications and characteristics of designated industrial property"(MGA, s. 322(1)(d.3)). The "specifications and characteristics" that the Minister sets out must be taken into account by the assessor when assessing the value of the property for taxation purposes (s. 292(2)(b)). This grant of authority is articulated in very broad terms — "without limitation" — and specifically empowers the Minister to identify and make regulations respecting the "specifications and characteristics" of industrial property. It is not possible to construe s. 322(1)(d.3) without contemplating the drawing of distinctions between types of properties on the basis of their specifications and characteristics.[81]

Indeed, the *raison d'être* of the statutory scheme is to ensure that valuations are current, fair and equitable. This implies that the Minister must be able to discriminate because, otherwise, there is a risk that assessments will be "inappropriate."[82] Line drawing is inevitable and discrimination thus inherent in the statutory scheme: "where appropriate, the Minister must have authority to pronounce that certain specifications and characteristics are *not* relevant to an assessment, as he did in this case."[83] In most taxing regimes, it would seem, discrimination will inevitably be implicitly authorized, as differentiation is part and parcel of a functioning taxation program.

However, the Alberta Court of Appeal arguably took a different view in *Canadian Natural Resources Limited v Fishing Lake Metis Settlement*,[84] a tax policy (functionally equivalent to a by-law) discriminating between Settlement members and non-members was held to be unlawful, as there was no express authorization, nor was there necessarily implicit authorization. Justice Pentelechuk first explained the nature of the discrimination effected by the taxation policies adopted by the Metis Settlements General Council (not by-laws *per se* but similar instruments of a general nature carrying the force of law):

> The result of these exemptions is that the business property of [Settlement non-member-owned corporations] will be subject to taxation while that held by Settlement member-owned corporations will not. This differs from the Original Policy, where the same property would be taxed regardless of whether or not the corporation was owned by a Settlement member. The General Council notes that the Original Policy already exempted from taxation "Settlement member

[78] *Legislation Act, 2006*, SO 2006, c 21, Schedule F, s 82(2).

[79] *Katz, supra* note 15 at para 48.

[80] *Supra* note 75 at para 52.

[81] *Ibid* at para 53.

[82] *Ibid* at para 54.

[83] *Ibid*.

[84] *Canadian Natural Resources Limited v Fishing Lake Metis Settlement*, 2024 CanLII 131 (ABCA).

> owned property not used to carry on a business". However, this created no unequal treatment as the Original Policy, having only dealt with business property, would have likewise "exempted" from taxation any *non*-Settlement member-owned property *not used to carry on a business*.[85]

She also carefully explained that discrimination for the purposes of taxation need not be expressly authorized by statute. True, in an early Supreme Court case, *Jonas v Gilbert*,[86] Chief Justice Ritchie held that "a power to discriminate must be expressly authorized." But in more recent decisions (including *Arcade Amusements*, as noted above) the Supreme Court confirmed that necessary implication is sufficient.[87] Justice Pentelechuk nonetheless accepted that "the *application* of the test will very much be coloured by the nature of the power at issue."[88]

These words were portentous. Justice Pentelechuk took the view, in light of Supreme Court jurisprudence,[89] that discriminatory tax burdens could only be imposed where the ability to discriminate is necessary to the objectives of the taxation power itself:

> In light of this guidance, it cannot be said that the ability to discriminate between Settlement members and non-Settlement members is absolutely necessary in order for the General Council (or by extension individual Métis Settlements) to exercise powers of taxation; the authority to adopt such policies cannot be implied or inferred from the MSA. Inferring the authority to discriminate is difficult in matters like taxation, and courts will be reluctant to do so. The characterization of the *MSA* as ameliorative is not sufficient to rebut the deeply rooted presumption of equality in matters of taxation.[90]

In the absence of any express authorization to discriminate as between Settlement members and non-members, the taxation policy was unlawful.[91]

Justice Pentelechuk also rejected the proposition (advanced by the first-instance judge) that the discrimination between Settlement members and non-members could be said to form part of an ameliorative programme adopted by an inherently governmental entity charged with supporting the life and culture of the Métis.[92]

It seems to me that the gravamen of Justice of Appeal Pentelechuk's complaint was that the discrimination here was between *persons*, based on attributes not relevant to the operation of the statutory scheme. Some form of differential treatment does seem to be inevitable in the taxation context, as *TransAlta* strongly suggests — but the relevant differences should not relate to a person's attachment to a particular group; it would be strange for income tax or sales tax burdens to differ based on an individual's religious beliefs, political affiliations or sexual orientation.

iv. Other Relevant Legal Constraints

Lastly, Justice Côté assessed the regulations against the relevant legal constraints: "the next question is whether [the Minister] exercised that authority in a manner that is consistent with the scheme and purposes of the MGA".[93]

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[85] *Ibid* at para 15.

[86] *Jonas v Gilbert*, 1881 CanLII 36 (SCC).

[87] *Supra* note 84 at paras 35–40.

[88] *Ibid* at para 45.

[89] *R. v Greenbaum*, 1993 CanLII 166 (SCC) at 695; *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 29.

[90] *Supra* note 84 at para 68.

[91] *Cf Indian Act*, RSC 1985, c I-5, s 87; *Canadian Pacific Ltd v Matsqui Indian Band*, 2000 1 FC 325.

[92] *Supra* note 84 at para 59.

[93] *Supra* note 75 at para 55.

In this case, as in *Auer*[94] the relevant constraints flowed from the statutory scheme. This is not to suggest that, in other cases, other *Vavilovian* constraints might not be relevant. Here, however, the argument made by TransAlta was that failing to account for additional depreciation frustrated the purpose of the *MGA*: the assessed value of the facilities would be inaccurate even though the scheme was designed to ensure precisely that, accuracy. This argument failed because the Off-Coal Agreement offset TransAlta's losses:

> The formula used to calculate the transition payments in the OffCoal Agreement accounts for at least some loss of value arising from the reduced life of TransAlta's coalfired facilities. It does so by prorating the net book value of the facilities by the percentage of life remaining after 2030 (OffCoal Agreement, Sch. A). Even if the payments are characterized as compensation for loss of profits, because the payments promise additional revenues that run with the assets, their effect is to offset the decrease in value caused by the facilities' reduced lifespan. To be current and correct, an assessment of TransAlta's coalfired facilities must consider the fact that the transition payments mitigate at least some depreciation that would otherwise result from the early retirement of the facilities. Therefore, in light of the *MGA*'s purpose of ensuring that assessments are current and correct, it was reasonable for the Minister to interpret his statutory grant of power as authorizing him to deprive TransAlta of the ability to claim additional depreciation under the *Linear Guidelines*.[95]

To deprive TransAlta of the ability to claim additional depreciation is also consistent with the MGA's purpose of ensuring that assessments are fair and equitable. Since the transition payments already account for at least some loss of value resulting from the reduced life of TransAlta's coalfired facilities, there would be a real risk of "double dipping" if TransAlta were able to receive additional depreciation for that same loss of value under the *Linear Guidelines*. That would not be fair or equitable.[96]

Now, one might wonder whether the relevant legal constraints will ever be breached if the discrimination is implicitly authorized. For discrimination to be implicitly authorized, it must be consistent with the statutory scheme and it would be unusual for discrimination to be implicitly authorized (and thus consistent with the statutory scheme) but nonetheless undermine the purposes of the statute. I think it is possible for this to happen, but it is necessary to distinguish between discrimination in a general sense (interpretation) and a specific sense (application). Determining whether discrimination is authorized is a general question of interpretation: can the regulation-maker ever discriminate. Determining whether a particular type of discrimination caused by the application of the authority to discriminate is a specific question: has the regulation-maker reasonably discriminated in this instance? It does seem appropriate to observe, though, that consideration of whether discrimination is implicitly authorized will often overlap with consideration of whether a particular application of the authority to discriminate is justified. Indeed, it might be that the best way to understand Justice of Appeal Pentelchuk's concerns in *Fishing Lake* is that the issue was the *use* of an authority to discriminate — targeting *persons* on the basis of criteria not relevant to the purpose of the statutory scheme — rather than its *existence*.

Two recent Quebec cases are helpful in illuminating the issue further. In *Lauzon-Foresterie (Fiducie) c Municipalité de L'Ange-Gardien*,[97] the discrimination claim arose in respect of a new statutory provision empowering municipalities in Quebec to levy direct taxes.[98] The provision contains restrictions (e.g. no taxes on income) and

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[94] See Paul Daly, "Standard of Review of Regulations: Auer v. Auer, 2024 SCC 36" (8 November 2024), online (blog): <www.administrativelawmatters.com/blog/2024/11/08/6563>.

[95] *Supra* note 75 at para 58.

[96] *Ibid* at paras 58–59.

[97] *Lauzon-Foresterie (Fiducie) c Municipalité de L'Ange-Gardien*, 2024 CanLII 506 (QCCA).

[98] *Municipal Code of Québec,* CQLR c C-27.1, s 1000.1.

conditions (e.g. the subject of the tax and the tax rate must be clearly specified). It also makes clear that the municipality may make "exemptions from the tax."

The municipality used the new power to create a tax on *some* vacant lots, any of 10 acres or more but exempting agricultural and resource-extraction land. This, the appellants claimed, created an arbitrary distinction between some types of lots considered vacant (such as those used for forestry) and agricultural and resource-extraction land (even though this land is often also forest and thus indistinguishable from the appellants' lots). In essence, they argued that the municipality had to apply a uniform approach across all of its territory to the taxation of vacant lots. This generated two distinct grounds of attack on the lawfulness of the regulation: first that the municipality's piecemeal approach was not authorized by the legislation and, second, that the approach was discriminatory.

The first ground failed, as Justice Lavallée found that the power to create "exemptions" could be applied to the whole of the municipality's territory or simply a part,[99] because the legislature had not sought to limit or condition this power in any way.[100]

The second ground also failed. Justice Lavallée recognized that a power to discriminate must be provided expressly or by necessary implication *and* that any such power can only be used in a non-arbitrary way. Here, the power to create "exemptions" implicitly authorized discrimination, on condition that any such discrimination be rationally justifiable.[101] The necessary justification was available.[102] The municipality had engaged in a classic weighing of social and economic factors, seeking to give favourable treatment to the agricultural sector to promote growth and to not penalize a resource-extraction sector already required to pay taxes under a different regime:

> les règlements attaqués prévoient une exonération de la taxe qui a fait l'objet d'une justification rationnelle et raisonnable de la part de l'intimée. La preuve démontre que les exonérations réglementaires reposent sur la volonté que les terrains vacants situés dans les zones d'extraction soient exploités sans que soit imposé un fardeau fiscal supplémentaire aux carrières et sablières, lesquelles sont déjà assujetties à une redevance qui s'ajoute à la taxe foncière. De même, la preuve retenue par le juge permet de conclure que l'intimée s'est souciée de la volonté de revitaliser les terres agricoles vacantes et, à cette fin, de ne pas accroître le fardeau fiscal des agriculteurs.[103]

By contrast, in the *Fishing Lake* case, one might say, the singling out of non-Métis persons was not the result of a weighing of a variety of social and economic factors.

In *Procureur général du Québec c Kanyinda*[104], the issue was the validity of the exclusion from Quebec's subsidized childcare programme of refugee claimants who hold valid work permits. Claimants whose refugee status is recognized are eligible, but those whose claims are being processed are not. The practical — and very real — problem is that final decisions on refugee claims can take several years (3 in K's case), during which time they are not eligible for the subsidized childcare programme.

The *Educational Childcare Act*[105] establishes the programme, which involves the payment of reduced fees by parents for childcare services subsidized under the *Educational Childcare Act*: "The Government may, by regulation, set the amount of the contribution to be paid by a parent for childcare services for which the childcare provider is subsidized."[106] Certain parents may also be exempted from paying the

[99] *Supra* note 97 at para 62.

[100] *Ibid* at para 61.

[101] *Ibid* at para 72.

[102] *Ibid* at para 76.

[103] *Ibid* at para 75.

[104] *Procureur général du Québec c Kanyinda*, 2024 CanLII 144 (QCCA) [*Kanyinda*].

[105] *Educational Childcare Act*, SQ 2005, c 47 [*Educational Childcare Act*].

[106] *Ibid* s 82.

contribution, in whole or in part:[107] there is a dispute resolution mechanism for determining eligibility.[108] The *Educational Childcare Act* in addition provides for a regulation-making power to "determine the terms and conditions for payment of the parental contribution set by the Government."[109]

Justice Dutil held that the ability to set terms and conditions was broad enough to empower the government to exclude asylum seekers by regulation:

> By considering both the object of the ECA and that Act as a whole and its purpose, I am of the view that the government could determine the eligibility conditions prescribed in section 3 of the RCR. The ECA must be considered "in [the] entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the legislature]".[30] By interpreting the ECA according to these teachings, the terms and conditions referred to in section 106(26) "for payment of the basic parental contribution set by the Government" include, in my opinion, the eligibility conditions that must be met to benefit from the reduced contribution and to which the legislature refers in sections 42(2) and 87 of the ECA. This is logical and consistent. Indeed, as the AGQ argues, it is difficult to claim that the government can, in a regulation, establish situations where a parent may be exempted from paying a reduced contribution but cannot determine the eligibility conditions[110]
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> …
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> In this case, the legislature states that there are eligibility requirements for the reduced contribution. Since I have concluded that the government was empowered to determine these eligibility conditions by regulation, it thus had the discretion to make distinctions between certain categories of persons to determine which ones were eligible. This is consistent with the object of the ECA and does not make section 3 of the RCR discriminatory in the administrative law sense. I must nonetheless determine whether the distinction that excludes refugee claimants is consistent with the Charters, which I will do in the next section.[111]

I am not entirely convinced here. The legislation effectively creates a right to subsidized childcare (subject to sufficient places being available). The only relevant terms and conditions relate to how much a parent must pay for the service and whether a parent is exempt from paying. The purpose of the regulation-making power does not seem to be to exclude categories of parent — the whole point of the legislation is to create a general scheme to which all children of working parents have access. In that context, I do not think it necessarily follows that a power to determine terms and conditions includes a power to exclude identified categories of parent.

I am put in mind of the decision of the Court of Appeal of England and Wales in *R. v Secretary of State for Social Security, ex part Joint Council for the Welfare of Refugees*.[112] Now, the regulation there, which deprived certain categories of refugee claimant from social assistance payments, was much more severe in its effects than the regulation at issue in *Kanyinda*. It was also passed under a different statute than the one relating to refugee status. Nonetheless, the broad point seems strikingly similar to me: a general regulation-making power should not lightly be allowed to eliminate a specific right accorded by legislation. In short, *Kanyinda* does not seem to me to be an obvious case of implicit authorization. At the very least, any exclusion

[107] *Ibid* s 84.

[108] *Ibid* s 87.

[109] *Ibid* s 106(26); See also s 42(4).

[110] *Kanyinda, supra* note 104 at para 55.

[111] *Ibid* at para 75.

[112] *R. v Secretary of State for Social Security, ex part Joint Council for the Welfare of Refugees*, 1996 EWCA Civ 1293.

by regulation should be subject to careful scrutiny in circumstances like these.

Ultimately, in *Kanyinda*, the regulation was struck down because it violated the right to equality guaranteed by section 15 of the *Charter of Rights and Freedoms*[113] and the violation was not saved by the proportionality test under section 1.

This analysis does raise another question, however. As noted above, discrimination must be authorized by legislation (expressly or by necessary implication) but must also satisfy the other relevant legal constraints. Even if one accepts that the exclusion of refugee claimants from the subsidized childcare programme was implicitly authorized by the legislation, there remains the question of whether this exclusion is reasonable.

Here, however, the exclusion could not be justified under section 1, as there was no rational connection between the objective of the regulation and the means used to achieve the objective. Quebec argued that the regulation sought to ensure that only parents with a sufficient connection to the province could benefit from subsidized childcare. But, Justice Dutil pointed out, several of those whom the regulation permits to *benefit* from the programme would only be in Quebec temporarily[114]. She also found there was no minimal impairment and that the exclusion failed the balancing test: "The AGQ raises no benefit arising from this exclusion under section 3 of the RCR from the perspective of legislative policy or society as a whole. On the contrary, Ms. Kanyinda has clearly demonstrated the adverse effects suffered by refugee claimants, supported by scientific evidence".[115]

This all being so, however, how could one say that the exclusion was justified in an administrative law sense? To my eye, the absence of a rational connection, minimal impairment and evidence of harm to the public interest militate just as much in favour of a conclusion of administrative law unlawfulness as they do in favour of Justice Dutil's conclusion under section 1. It would have been nice to see more discussion of this point, as the context of the regulation-making power here is very different to the municipal context, where the weighing of competing interests is an inherent part of the regulation-making process and the courts are understandably deferential.

In the end, it worked out better for Ms. Kanyinda that she won under the *Charter*,[116] as Justice Dutil was able to read Ms. Kanyinda's eligibility into the regulations[117]. The Supreme Court will hear the Quebec government's appeal in this case, though there was no cross-appeal by Ms. Kanyinda and so the administrative law issue will likely not be argued at the country's highest court.

If I am right that a reviewing court must ask (1) was there discrimination; (2) was the discrimination authorized expressly or by necessary implication; and (3) was the discrimination otherwise reasonable, then there is a lingering question about *TransAlta* and *Auer*. The lingering question relates to the *application* of the authority to discriminate: at what point does the discrimination become so disproportionate that it is unreasonable?

It seems clear that TransAlta is not in exactly the same position it would have been but for the Off-Coal Agreement, so there appears to be a mismatch between what TransAlta received from the government and what it will ultimately have to pay in municipal taxes. For the Supreme Court, the fact that there was an offset appears to be enough. There was no consideration, however, of the proportionality of the offset. This could well be significant in dealing with stranded assets going forward.

Similarly, in *Auer*, the fact that the regulations drew lines between different persons and classes that result in various unusual, arbitrary or absurd outcomes was not sufficient to render the regulations unlawful, even if in some cases there would be a disproportionate economic impact on some individuals. More could

[113] *Charter*, *supra* note 4.

[114] *Kanyinda, supra* note 104 at para 111.

[115] *Ibid* at para 115.

[116] *Charter*, *supra* note 4.

[117] *Kanyinda, supra* note 104 at paras 117–20.

perhaps have been said in both *TransAlta* and *Auer* on this particular point.

Nonetheless, the Supreme Court's framework for assessing claims of regulatory discrimination under *Vavilov* is neat and tidy, requiring the court to ask three questions: was there discrimination; was it authorized and was the particular discrimination at issue consistent with the relevant legal constraints?

II. REASONABLENESS REVIEW

The Supreme Court of Canada's most notable recent entry in its standard of review catalogue is *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*.[118] This decision follows *Mason v Canada (Citizenship and Immigration)*,[119] in concluding that an administrative decision was unreasonable and, moreover, that there was only one reasonable interpretation of the provision at issue. I was relatively sanguine about the decision in *Mason*; I am less enamoured of the *Mandate Letters* case.

Here, the Commissioner had ordered that mandate letters issued by the Premier of Ontario to his cabinet ministers should be released under the *Freedom of Information and Protection of Privacy Act*.[120] The government of the province had resisted disclosure on the basis of s 12(1) of the *Act*, which creates an exemption "where the disclosure would reveal the substance of deliberations" of the cabinet for a range of documents "including" (but not limited to) agendas, minutes or lists of policy options presented to cabinet. The basic premise of the Commissioner's detailed reasons for decision was that mandate letters, which memorialize decisions that have already been taken, would not reveal the substance of deliberations.

Applying reasonableness review, Justice Karakatsanis concluded that the Commissioner's decision was unreasonable. The key error was that the Commissioner had failed to have adequate regard to the constitutional context: "Because s. 12(1) was designed to preserve the secrecy of Cabinet's deliberative process, the constitutional dimension of Cabinet secrecy was crucial context in interpreting s. 12(1)."[121] This caused a loss of confidence in the outcome.[122]

The Commissioner erred in two ways. First, he gave too narrow a scope to section 12(1). The Commissioner focused only on two rationales for cabinet confidentiality — promoting ministerial candour and preserving collective solidarity — to the exclusion of a third, efficient government. Failing to take this rationale into account caused him to ascribe too narrow a purpose to section 12(1) and to fail to respond to one of the government's submissions:

> First, had the IPC recognized that the fundamental focus of deliberative secrecy is *effective* government, the Commissioner could not have framed the purpose to focus only on "free and frank discussion among Cabinet members"[123]. Rather, as Justice of Appeal Lauwers noted, a contextual interpretation of s. 12(1) instructs that the provision more broadly aims to establish the confidentiality necessary for the executive to function effectively (paras. 187 and 208).
>
> Second, had the IPC framed the purpose of s 12(1) more broadly, he may not have rejected a central argument from Cabinet Office going to the scope of s 12(1). Cabinet Office argued that, along with ensuring ministerial candour and solidarity, Cabinet secrecy also helps to ensure the deliberative process runs efficiently by preserving the confidentiality of deliberations until a final decision has been made and announced (IPC reasons, at paras.

[118] *Mandate Letters, supra* note 12.

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

[120] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31.

[121] *Mandate Letters, supra* note 12 at para 27.

[122] *Ibid* at para 23.

[123] *Ibid* at para 34.

> 30–32; A.R., vol. III, at pp. 90, 101–2, 228 and 232).[124]

As a result, the Commissioner also "did not acknowledge Cabinet Office's submission that determining "when and how" to communicate policy priorities to the public and opposition parties is itself an important part of Cabinet's deliberative process"[125]. In particular, the Commissioner "concluded that "outcomes" of the deliberative process are not encompassed by the opening words of s 12(1), full stop, without acknowledging that an important part of Cabinet confidentiality is government's prerogative to decide how and when to announce policy priorities (see para. 104)".[126]

Second, the Commissioner failed to have regard to constitutional conventions and traditions relating to the nature of cabinet decision-making and the premier's role in the process:

> The Letters on their face contain communications between the Premier and Cabinet ministers about policy priorities, many if not most of which would require decisions from Cabinet, both as to their substance and as to how they should be communicated to the public. Cabinet "formulates and carries out all executive policies," and all major government policy matters are forwarded to Cabinet for decision (Hogg and Wright, at § 9:5; M. Schacter and P. Haid, Cabinet Decision-Making in Canada: Lessons and Practices (1999), at p. 1; see also Brooks, at p. 236). There is no basis in convention or past precedent to separate the Premier's role in this process from the rest of Cabinet. Disclosure of the Premier's initial priorities, when compared against later announcements of government policy and what government actually accomplished, would reveal the substance of what happened during Cabinet's deliberative process. The IPC's characterization of the Letters as "the end point of the Premier's formulation of the policies and goals to be achieved by each Ministry", or "the product of his deliberations" was thus beside the point, and an unreasonable basis upon which to deny protection under s. 12(1) (paras. 132 and 134 (emphasis added; see also para. 79).
>
> Relatedly, to the extent the IPC required evidence linking the Letters to "actual Cabinet deliberations at a specific Cabinet meeting", that approach was unreasonable. Such a requirement is far too narrow and does not account for the realities of the deliberative process, including the Premier's priority-setting and supervisory functions, which are not necessarily performed at a specific Cabinet meeting and may occur throughout the continuum of Cabinet's deliberative process. Accordingly, it would be unreasonable for the Commissioner to establish a heightened test for exemption from disclosure that would require evidence linking the record to "actual Cabinet deliberations at a specific Cabinet meeting"…
>
> [The Commissioner's] focus on actual deliberations at a specific Cabinet meeting underscored his finding that the fact that some policy priorities "may never return to Cabinet at all or…may be altered or amended in significant…ways" was a "deficiency" in Cabinet Office's continuum argument and meant that the Letters could not be exempted in their entirety (para. 121). This determination was unreasonable because it did not account for the fact that disclosure of early policy priorities not acted on, or changed in significant ways before implementation, would be revealing of the substance of Cabinet deliberations — whether the decision to abandon or alter the

[124] *Ibid* at paras 34–35.

[125] *Ibid* at para 37 (emphasis in original).

[126] *Ibid* at para 39.

> priority was the decision of Cabinet, its committees, or the Premier.[127]

These considerations led inexorably to the conclusion that the mandate letters were covered by section 12(1). Justice Karakatsanis refused to remit the matter to the Commissioner.

The methodology of reasonableness review is worthy of comment. Justice Karakatsanis refused to grapple with whether the appropriate standard of review was correctness or reasonableness, on the basis that the decision was unreasonable and thus could not survive under either standard.[128] In substance rather than in form, however, the analysis looks very much like correctness review in the guise of reasonableness review.

The first difficulty here is that Justice Karakatsanis's analysis of the Commissioner's reasons focuses on two aspects of context even though the Commissioner conducted a wide-ranging analysis. As Justice Côté accurately observes:

> The Commissioner relied on, among other things, the stated purposes of the legislation (see paras. 106–8); the principle that "exemptions from the right of access should be limited and specific" (s. 1(a)(ii) of the Act); our Court's decisions in *Babcock* and *Dagg v. Canada (Minister of Finance)* [1997] 2 S.C.R. 403; appellate jurisprudence across the country, notably *O'Connor*; and a significant body of past administrative decisions. All of these factors lend support to his interpretation.[129]

However, Justice Karakatsanis does not acknowledge the Commissioner's reliance on these indicia of reasonableness, nor does she explain why the Commissioner's decision is unreasonable because it fell short in two areas even though it could be defended on other grounds. This was an extensive decision where a loss in confidence in the outcome in one respect could, in theory at least, be offset by the strengths of the reasons in other respects.

Moreover, second, there is significant force to Justice Côté's charge that in order to identify the shortfalls in the Commissioner's decision, Justice Karakatsanis "conducts her own interpretation" of section 12 and "uses her conclusions as a yardstick" against which to measure the Commissioner's interpretation:

> For example, my colleague refers to three rationales for the convention of Cabinet confidentiality: "…candour, solidarity, and efficiency…(para. 30). She finds that the Commissioner considered the first two of these rationales but that he "did not engage with a core purpose of Cabinet secrecy to promote the efficiency of the collective decision making" or with the ultimate goal of effective government (para. 32). However, this third rationale of "efficiency", while an important tenet of Cabinet privilege, has not been articulated by our Court as such. As a result, I do not agree that it was unreasonable for the Commissioner to not address a concept that is fully expressed only in scholarly authority (see Karakatsanis J.'s reasons, at paras. 30 and 36, citing Y. Campagnolo, "The Political Legitimacy of Cabinet Secrecy" (2017), 51 *R.J.T.U.M.* 51, at p. 68, and Y. Campagnolo, *Behind Closed Doors: The Law and Politics of Cabinet Secrecy* (2021), at p. 26).[130]

It is worth repeating how Justice Karakatsanis herself framed the issue: "*had* the IPC framed the purpose of s. 12(1) *more broadly, he may not have rejected a central argument* from Cabinet Office going to the scope of s. 12(1)."[131] This gets things backwards: the submission could only have been a "central argument" if the Commission had agreed that the "purpose" of section 12(1) should have been "framed…more broadly." I have some difficulty appreciating

[127] *Ibid* at paras 53–55.

[128] *Ibid* at para 16.

[129] *Ibid* at para 81.

[130] *Ibid* at para 76.

[131] *Ibid* at para 35 [emphasis added].

how this can be described as "reasons-first" reasonableness review as *Vavilov* requires. There is an important difference between this case and the Supreme Court's recent decision in *Mason*[132], where the tribunal had simply failed to address a central argument for an unarticulated reason, not because of the purpose it ascribed to the provision.

Furthermore, and fundamentally, the choice of standard of review is of critical importance here. On reasonableness review, the Commissioner is in the interpretive driving seat. If deference is to mean anything it all, it must be up to the Commissioner to determine whether the law should be changed to incorporate an additional rationale as background context for section 12(1). As it was, the Commissioner gave multiple reasons in support of his interpretation and, ordinarily, on a deferential standard his refusal to change, extend or expand the law would be respected. On correctness review, by contrast, the courts have the last word (and, indeed, Justice Côté applying correctness review agreed that the law should be updated to incorporate this third rationale). This should have been an example — a pretty good one, I would have thought — of the standard of review making a difference. In my view, reasonableness was the appropriate standard, for reasons I developed[133] and from which Justice Côté's neatly-done argument at paragraphs 55-61 does not dissuade me, and an appropriately deferential approach would have led to the decision being upheld as reasonable.

The discussion of legal and factual constraints is also worthy of comment. Again, there is an important difference from *Mason*: there, the legally binding constraint of international law identified by the Supreme Court at least had the merit of being set out expressly in statute; but here, the conventions and traditions relied upon by the Supreme Court are entirely unwritten. This is different even from *CSFTNO* (discussed below), where the relevant *Charter* values had been expressed repeatedly in binding Supreme Court of Canada jurisprudence on the objectives of section 23 of the *Charter*.

Here, the conventions and traditions have not and arguably cannot be reduced to precise textual statements (and, of course, by their very nature are not binding law at all). Indeed, as political scientist Professor Emmett Macfarlane points out in a critical comment on the decision,[134] these conventions and traditions shift over time, meaning that any administrative decision-maker required to consider them will be aiming at a moving target:

> [T]he problem in this case is that convention is wholly silent on the place or relationship of mandate letters to cabinet deliberations. The Court rests its decision quite heavily on a discussion of convention that is largely irrelevant to the central issue.
>
> In fact, the emergent practice of *releasing mandate letters to the public* (not only at the federal level but in Ontario under former Premier Kathleen Wynne) is precisely what led to this controversy in the first place! Stunningly, the Court pays no heed to this practice — a practice that was unlikely to emerge if those governments felt it would somehow constrain or impair cabinet confidentiality or effective decision-making. In this fundamental sense, recent political practice directly contradicts some of the Court's conclusions about the effects releasing mandate letters might have on cabinet confidentiality.[135]

Professor Macfarlane also notes that the Court gets quite far into the "weeds" of the operation

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[132] See Paul Daly, "Context, Reasonableness Review and Statutory Interpretation: Mason v. Canada (Citizenship and Immigration), 2023 SCC 21" (28 September 2023), online (blog): <www.administrativelawmatters.com/blog/2023/09/28/context-reasonableness-review-and-statutory-interpretation-mason-v-canada-citizenship-and-immigration-2023-scc-21>.

[133] Paul Daly, "Correctness, Conventions, Cabinet Confidence: Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner), 2022 ONCA 74" (24 April 2023), online (blog): <www.administrativelawmatters.com/blog/2023/04/24/correctness-conventions-cabinet-confidence-ontario-attorney-general-v-ontario-information-and-privacy-commissioner-2022-onca-74>.

[134] Emmett Macfarlane, "The influence of conventions in the SCC's decision re: Ford's ministerial mandate letters" (4 February 2024) online (blog): <emmettmacfarlane.substack.com/p/the-influence-of-conventions-in-the>.

[135] *Ibid*.

of government; traditionally, of course, making findings of fact and drawing inferences based on a detailed record is a matter for the administrative decision-maker.

For these reasons, I am somewhat sceptical that the Court arrived at the correct conclusion in this case. Whereas in *Mason* and *CSFTNO* the legal and factual constraints identified by the Court stood on solid ground (and the decisions under review were silent on key aspects of the arguments and evidence), in *Information Commissioner* there is significant force to Justice Côté's charge that the majority engaged in correctness review in substance if not in form. It will be necessary to read the next entries in the standard-of-review catalogue very carefully to see if the Court is sending a signal about the level of intensity of reasonableness review under the *Vavilov* framework.

In that regard, the recent decision of the Quebec Court of Appeal in *Piché c Entreprises Y. Bouchard & Fils inc.*,[136] is very interesting. It suggests that the reasonableness standard set out in *Vavilov*,[137] may indeed have become more robust. Nonetheless, whilst quashing the decision at issue for unreasonableness, the Court of Appeal refrained from imposing a solution even in circumstances where it had been asked to find that there is only one possible, acceptable interpretation.

The underlying issue is very interesting. There are two streams of authority in Quebec's Tribunal administratif du travail (which has jurisdiction over workplace health and safety) about compensating workers who withdrew from the workplace during the COVID-19 pandemic. Both the appellant and the Commission des normes, de l'équité, de la santé et de la sécurité (Commission for Standards, Equity, Health, and Safety) urged the Court of Appeal to resolve two interpretive questions on which the Tribunal is divided.

Here, the applicant was working as a paramedic. His doctors recommended that he temporarily withdraw from the workplace for his own safety as he was taking medication that made him immunodeficient. In the end, he went back to work about nine months after the outbreak. For a three-month period, he received no pay. Under Quebec legislation, an employee who withdraws from work for preventative health reasons can claim an indemnity. But there are several conditions,[138] one of which is that the source of the danger to health must come from a "contaminant." In this case (though not in others!), the Tribunal held that COVID-19 was not a "contaminant" within the meaning of the legislation. The Tribunal also held, based on its analysis of the evidence of his immunodeficiency, that the second condition — danger to the worker — was not met either. The Tribunal did not go on to consider the third condition — alteration of the worker's health.

The Court of Appeal (Justices Moore, Cournoyer and Bachand) held that the decision was unreasonable. Following *Vavilov*, the judges did not apply the correctness standard to resolve the split on the Tribunal but noted that a deficient statutory interpretation analysis by an administrative decision-maker would justify intervention on judicial review for unreasonableness.[139] Indeed, they cited the Supreme Court's decisions in *Mason v Canada (Citizenship and Immigration)*,[140] and *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*,[141] as further support for this proposition:

> Thus, in *Mason*, while the majority of the Supreme Court acknowledged that the decision-maker had applied several recognized techniques of statutory interpretation, it nonetheless found the decision unreasonable on the grounds that the decision-maker had failed to address two points of statutory context, the potentially broad consequences of the decision and the constraints imposed by international law.

[136] *Piché c Entreprises Y. Bouchard & Fils inc.*, 2024 CanLII 1374 (QCCA).

[137] *Vavilov, supra* note 1.

[138] *Supra* note 136 at para 14.

[139] *Ibid* at para 35.

[140] *Mason*, *supra* note 119.

[141] *Mandate Letters*, *supra* note 12.

> Likewise, in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, while the majority of the Supreme Court noted that the decision-maker had paid attention to the text, the general purpose of access to information legislation and two of the purposes of Cabinet secrecy, it nonetheless found the decision unreasonable on the grounds that the decision-maker failed to address a third purpose of Cabinet secrecy, which is the efficiency of the collective decision-making and certain constitutional conventions [translated].[142]

Here, the decision was unreasonable because, in the first place, the Tribunal fixated on an amendment to the statutory scheme made in 2015 and gave it a much broader scope than the legislature intended,[143] without regard for other textual and contextual indicators about the meaning of "contaminant".[144] In addition, the Tribunal failed to have regard to the purpose of the legislature.[145] In the result, the Court of Appeal held — bolstered by *Mason* and *Information Commissioner* — that the statutory interpretation exercise undertaken by the Tribunal in the instant case neglected key elements of text, context and purpose and was, thus, unreasonable.[146]

Interestingly, the Court of Appeal did not conclude, however (unlike the Supreme Court in *Mason* and *Information Commissioner*) that there was only one reasonable interpretation. Rather, it left the matter to the Tribunal, albeit with a stern warning about the desirability of legal certainty[147] and a reminder of the mechanisms available to achieve that certainty:

> In this case, it is clear that there are at least three possible options: 1) COVID-19 is not a contaminant; 2) COVID-19 is a contaminant; and 3) COVID-19 is at times a contaminant, depending of the employer's activities. Regarding the jurisprudential controversy within the Tribunal, in this case it does not suffice to justify having the Court decide in its stead. As noted by the Supreme Court, it should be left to the administrative decision-maker to resolve this point of contention based on its internal mechanisms, whether they be, in regard to the Tribunal, the establishment of a three-member group or participation by the members in the development of guidelines [translated].[148]

It said the same about the jurisprudential split on the third condition — the extent to which the "contaminant" has to affect the health of the worker.[149]

On the question of danger (the second condition), there is an interesting discussion of the role of the Tribunal. Even though the Tribunal sits *de novo* and potentially has access to a wide range of materials, its role in assessing danger is held to be limited. In short, its role is to assess whether there was danger *at the moment the worker withdrew* based on the evidence available at the time. In other words, the Tribunal cannot retrospectively apply evidence that became available after the worker's withdrawal to conclude, with the benefit of hindsight, that there was no danger.[150] The Tribunal may only take a forward-looking view of the matter, with the right to withdraw dissolving only prospectively, from the point the Tribunal has new evidence at its disposal.[151]

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[142] *Supra* note 136 at paras 36–37.

[143] *Ibid* at para 40.

[144] *Ibid* at paras 42–44.

[145] *Ibid* at paras 45–47.

[146] *Ibid* at para 48.

[147] *Ibid* at para 51.

[148] *Ibid* at para 50.

[149] *Ibid* at paras 66–70.

[150] *Ibid* at para 55.

[151] *Ibid* at para 56.

On the evidence here, there was no doubt in the Court of Appeal's eyes that there was ample evidence of danger at the moment the worker withdrew.[152] Either, therefore, the Tribunal disregarded a legal constraint by focusing on danger retrospectively rather than prospectively or disregarded factual constraints by fundamentally misapprehending the evidence: unreasonableness was the inevitable conclusion.[153] Again, the matter was returned to the Tribunal to determine the point at which the worker would have been able to safely reintegrate the workplace.[154]

Overall, this decision indicates that *Vavilov* certainly does furnish the tools for a robust reasonableness review of administrative decisions. The Supreme Court's recent decisions applying *Vavilov* are cited as further support for this proposition. Even if the Court of Appeal did send back the interpretive question about the first issue — "contaminant" — its analysis strongly favoured one of the streams of jurisprudence. Nonetheless, the Court of Appeal here did not go as far as the Supreme Court went in *Mason* and *Information Commissioner*, insisting instead that the matter should be returned to the Tribunal for the identification of a definitive answer albeit with a fairly stern warning that the Tribunal should find a way to resolve its internal jurisprudential conflict in short order.

III. CORRECTNESS REVIEW

In *Société des casinos du Québec inc. v Association des cadres de la Société des casinos du Québec*,[155] the Supreme Court of Canada dealt with a number of important issues that are significant for the law of judicial review of administrative action and for regulation more broadly. Most significantly, the Court gave guidance on the resolution of mixed questions of law and fact arising in the correctness categories established by *Vavilov*. A clear marker has been laid down: on constitutional questions and other issues requiring correctness review, there is no deference to the decision-maker's application of law to fact. This is highly salient in the energy law area, where questions about the borderline between federal and provincial authority arise quite often. Going forward, such questions will be reviewed on a correctness basis, with no deference to the decision-maker.

The case involved a claim for certification by casino managers based in Quebec. Certification would allow them to bargain as a group with their employer. But managers are excluded from the provincial collective bargaining legislation. So, the managers invoked section 2(d) of the *Charter of Rights and Freedoms*[156], which protects freedom of association. Applying the context-sensitive *Charter* test to the facts, the expert tribunal concluded that the exclusion of the managers represented a "substantial interference" with their freedom of association. The remedy was that the legislative exclusion was inoperable as applied to the managers who, accordingly, were entitled to go ahead with their claim for certification. This conclusion was, ultimately, upheld by the Court of Appeal albeit that the effects of the decision were suspended for 12 months to allow for legislative intervention.

However, the Supreme Court allowed the appeal, an outcome on which the seven judges who heard the case were agreed, concluding unanimously that there was no "substantial interference" with associative freedom. In doing so, they addressed: (1) the standard of review for mixed questions of fact and law in the 'constitutional questions' category of correctness review; (2) whether there are distinct tests or standards applicable to *Charter* claims where a positive or negative right is being asserted; and (3) the jurisdiction of administrative tribunals to grant remedies relating to the inoperability of legislation. The third question was addressed only by Justice Côté in her concurring reasons but the others were treated by all seven (Justice Jamal for the majority and Justice Rowe concurring separately).

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[152] *Ibid* at para 57.

[153] *Ibid* at para 64.

[154] *Ibid* at para 65.

[155] *Société des casinos du Québec inc. v Association des cadres de la Société des casinos du Québec*, 2024 SCC 13 [*Société des casinos*].

[156] *Charter*, *supra* note 4 s 2(d).

A) Confirming Correctness on Mixed Questions

The Court of was unanimous on standard of review. Justice Côté addressed the point in detail and the others agreed with her analysis.[157] That analysis is brief and to the point. Here is what she said:

> In this case, determining whether the exclusion from the L.C. regime constitutes substantial interference with the freedom of association of the Association's members is not a simple question of fact. Such an inquiry involves weighing "the constitutional significance" of the findings of fact made on the basis of the members' situation by reference to freedom of association (*Westcoast Energy*, at para. 39). To some extent, this amounts to defining the constitutional standard of "substantial interference".
>
> The definition of this standard requires a determinate and final answer (*Vavilov*, at paras. 53 and 55). In *Westcoast Energy*, cited with approval in *Vavilov*, at para 55, our Court noted that no deference is owed in respect of questions of mixed fact and law that arise in connection with a constitutional question because it is important that constitutional questions be answered correctly (paras. 39–40).
>
> It follows that the Superior Court did not owe deference to the ALT's findings of law and findings of mixed fact and law, but only to the findings of fact made by that tribunal.
>
> A reviewing court must show deference to findings of pure fact that can be isolated from the constitutional analysis (*Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407, at para. 26). Such deference to findings of this kind is based on considerations related to "judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker" (*Vavilov*, at para. 125). The rule of law does not require that there be a determinate and final answer to questions of pure fact, as they will vary from case to case.[158]

The parties agreed[159] that this case fell into the 'constitutional question' category set out in *Vavilov*: the question was the *Charter* compliance of the legislative exclusion of the managers and so, indeed, the correctness standard properly applied, as the answer to this question should be given definitively by the courts. Evidently, however, the parties did not agree on what exactly the correctness standard should apply to.

The question was how much deference, if any, is due to the tribunal in this instance. The standard of review of constitutional questions, such as the consistency of the statutory exclusion with the *Charter*, is correctness. But what about the factual determinations underpinning the tribunal's analysis? And, in any event, can the tribunal's interpretation of the statutory exclusion and the *Charter* be separated from its factual analysis?

The Supreme Court's prior jurisprudence had not been especially clear on this point. On the 'no deference' side of the ledger is *Westcoast Energy Inc. v Canada (National Energy Board)*,[160] a case about whether a pipeline and related facilities constituted a federal undertaking. Justices Iacobucci and Major were skeptical about whether deference would be appropriate on the Board's application of law to the facts before it:

> even questions of mixed law and fact are to be accorded some measure of deference, but this is not so in every case. It would be particularly inappropriate to defer to a tribunal like the Board, the expertise of

[157] *Ibid* at paras 45, 199.

[158] *Société des casinos*, *supra* note 155 at paras 94–97.

[159] *Ibid* at para 93.

[160] *Westcoast Energy Inc. v Canada (National Energy Board)*, 1998 CanLII 813 (SCC), [1998] 1 SCR 322.

> which lies completely outside the realm of legal analysis, on a question of constitutional interpretation. Questions of this type must be answered correctly and are subject to overriding by the courts. It seems reasonable to accept the proposition that courts are in a better position than administrative tribunals to adjudicate constitutional questions. It is interesting to note that this particular panel's professional training was not in law. So, although the question here was one of mixed law and fact, it follows that the Board was not entitled to deference because of the nature of the legal question to be answered.[161]

However, Justices Iacobucci and Majorwent on to observe that the case turned not on the "Board's conclusions as to the different activities carried on by *Westcoast*" but on the "constitutional effect" of the conclusions[162]. In other words, there was no attack on the Board's findings of fact. And when it came to apply the law to those findings, the correctness standard was appropriate. Accordingly, it is difficult to say that Westcoast resolves the deference question one way or another.

In *Northern Regional Health Authority v Horrocks*,[163] albeit addressing the 'overlapping jurisdiction' category of correctness review rather 'constitutional questions', Justice Brown was clear that the decision-maker had to be "correct" on the factually suffused question of characterizing the essential character of the dispute between the parties (as relating to labour relations or human rights adjudication). This led me to comment[164] that "when determining whether or not a decision about competing jurisdictional boundaries was lawful, the decision-maker must be correct ***and*** the reviewing court must satisfy itself, based on the record, that the decision-maker came to the correct conclusion."[165]

The most prominent entry on the 'deference' side of the ledger is *Mouvement laïque québécois v Saguenay (City)*,[166] where Justice Gascon commented at paragraph 46 that deference is appropriate "where the Tribunal acts within its specialized area of expertise, interprets the Quebec Charter and applies that charter's provisions to the facts to determine whether a complainant has been discriminated against".[167] But the emphasis on expertise means that the authority of this statement has been weakened by the downgrading of expertise in *Vavilov*.

Consider also *Consolidated Fastfrate Inc. v Western Canada Council of Teamsters*.[168] Here, the issue was whether a company was subject to provincial or federal regulation. A provincial labour relations board held that the company was an interprovincial undertaking subject to federal labour relations legislation. Justice Rothstein observed that the board's "constitutional analysis rested on its factual findings": "Where it is possible to treat the constitutional analysis separately from the factual findings that underlie it, curial deference is owed to the initial findings of fact".[169] At first glance, this might appear to be a pro-deference proposition, but on closer inspection, it appears that deference is only appropriate where the constitutional question is can be separated from the underlying factual findings: deference on facts in constitutional cases, but only as long as deference does not influence legal determinations as to constitutionality.

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[161] *Ibid* at para 40.

[162] *Ibid* at para 42.

[163] *Northern Regional Health Authority v Horrocks*, 2021 SCC 42, at para 9.

[164] Paul Daly, "Steady as She Goes: Northern Regional Health Authority v. Horrocks, 2021 SCC 42" (22 October 2021), online (blog): <www.administrativelawmatters.com/blog/2021/10/22/steady-as-she-goes-northern-regional-health-authority-v-horrocks-2021-scc-42>.

[165] *Ibid*.

[166] *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16.

[167] See *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11.

[168] *Consolidated Fastfrate Inc. v Western Canada Council of Teamsters*, 2009 SCC 53.

[169] *Ibid* at para 26.

This issue was also discussed in *Toussaint v Canada (Attorney General)*,[170] in the context of appellate review rather than judicial review. Whilst deference is appropriate on "factual findings and exercises of discretion that are heavily suffused with facts,"[171] correctness review is often applied in constitutional cases "probably…because of the centrality of the legal issues in such appeals, and the fact that questions of constitutional law are often extricable from the questions of mixed fact and law that arise."[172]

In *Société des casinos*, the Supreme Court was clear: when applying the correctness standard, a reviewing court must take the findings of fact made by the decision-maker as they are (as long as they are reasonable), but it is for the court to determine for itself the legal effects of those findings of fact. Put another way, the legal characterization of the facts as found by the decision-maker is a matter for the court.

Whatever about my scepticism of the law/fact distinction,[173] this is now definitively the law. And, to be fair, in its post-*Vavilov* case law applying the correctness categories, this has certainly been the Supreme Court's approach. I noted *Northern Regional Health Authority v Horrocks*,[174] above and would now add *Sharp v Autorité des marchés financiers*, (a constitutional question case):[175] there, the decision-maker had made findings of fact about a 'pump and dump' scheme run by out-of-province actors but the application of a context-sensitive legal standard to those facts was done without any deference to the decision-maker's conclusion. In the correctness categories, then, pure findings of fact — the who, what, when, where and why of adjudication — get deference but everything else is ultimately for the court.

Of course, it is always open to a reviewing court to adopt the analysis of the decision-maker (and perhaps this is now the best way to understand the decision in *Law Society of Saskatchewan v Abrametz*[176]) but the judge retains the final word on whether the legal standard has been met based on the facts as found.

B) Tribunals and Remedies

The only member of the Supreme Court to address the remedial jurisdiction of the decision-maker (here, the Quebec Administrative Labour Tribunal) was Justice Côté.

She noted that the managers had decided to bring a claim for certification rather than to seek a declaration of unconstitutionality in superior court and suggested that "[p]roceeding before a superior court is preferable insofar as such a court has the power to make a formal declaration of unconstitutionality and to suspend the declaration in order to give the legislature all the latitude it needs to enact a particular regime that meets the minimum constitutional requirements of s. 2(d)."[177]

In fairness to the managers, they may well have brought the claim in the tribunal to avoid being met in superior court by the counter-argument that they should first have sought a remedy from the tribunal.[178] And there is surely no doubt that the Supreme Court's consideration of the issues was enriched by the tribunal's detailed analysis of the facts.[179]

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[170] *Toussaint v Canada (Attorney General)*, 2011 FCA 213.

[171] *Ibid* at para 54.

[172] *Ibid* at para 55.

[173] See Paul Daly, *Jurisdiction, questions of law and secretion*. In: *A Theory of Deference in Administrative Law: Basis, Application and Scope*. (Cambridge: University Press, 2012) at 220.

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

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

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

[177] *Société des casinos*, *supra* note 155 at para 156.

[178] *Okwuobi v Lester B. Pearson School Board*, 2005 SCC 16 at paras 38–45.

[179] See *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 at paras 42–47; See also *Denton v British Columbia (Workers' Compensation Appeal Tribunal)*, 2017 BCCA 403 at paras 51–52; See also *Campisi v Ontario*, 2017 ONSC 2884 at para 13.

It is true that the tribunal could not suspend any declaration of inoperability,[180] but it did not seek to do so. It was the courts that suspended the effect of the tribunal's decision, on the theory that on the standard of correctness the judges were stepping into the shoes of the tribunal.[181] I remain sceptical: the advantage of the decision could only apply to the particular managers who brought the certification application so the need for broad legislative consideration of the regulatory regime (the usual justification for suspending a declaration of unconstitutionality) is not particularly keenly felt. Justice Côté correctly noted this point, but I do not think it can mean that the tribunal should not have been seized of the matter in the first place.

For my part, I have sympathy for the managers' choice of forum and, given the need for extensive fact-finding, I suspect the fact that they first went to the tribunal ultimately facilitated the Supreme Court's comprehensive analysis of the important freedom of association issues.

In the end then, this is an important decision on standard of review and regulatory design, with interesting points made too about forum choice in cases arising at the intersection of administrative law and constitutional law.

IV. CONSTITUTIONAL FOUNDATIONS OF JUDICIAL REVIEW

This year, the Supreme Court of Canada handed down its much-anticipated decision in *Yatar v TD Insurance Meloche Monnex*.[182] As expected (by me at any rate), the Court reversed the approach below and (correctly, in my view) described the role of discretion in judicial review proceedings. The main takeaway from the case is that judicial review applications can be brought even where there is a limited right of statutory appeal. In the energy field as in many others, questions about the co-existence of appeals and judicial review regularly arise.[183]

In reasons written by Justice Rowe, the Court thereby confirmed that the fact that a right of appeal is limited to questions of law does not prevent an individual from judicially reviewing factual and other issues that would not fall within the scope of the right of appeal. Moreover, although the Court did not grapple with some of the other issues related to limited rights of appeal, such as privative clauses, its overall analysis gives me the impression that, when confronted with these issues, the justices will favour judicial review.

At root, *Yatar* is a case about accident benefits. There is a right of appeal on questions of law from decisions of the Licence Appeal Tribunal. But Yatar wanted to raise an issue of fact or mixed fact and law. Accordingly, she sought judicial review. Readers will recall that the Court of Appeal (and the Divisional Court) held that given the existence of a limited right of appeal, and the evident desirability of efficient resolution of accident benefits claims, judicial review should only be permitted in rare cases.

This was the central issue on appeal to the Supreme Court of Canada, which resoundingly restated the importance of judicial review. One of the "first principles" of Canadian public law[184] is the "importance" of judicial review.[185] Accordingly, "[w]hile there is discretion to hear the application on the merits and deny relief, this discretion does not extend to decline to consider the application for judicial review."[186] Judicial review is always available:

> When an applicant brings an application for judicial review, a judge must consider the application: that is, at a minimum, the judge must determine whether judicial review is appropriate. If,

[180] *Société des casinos*, *supra* note 155 at para 157.

[181] *Cf supra* note 178 at para 45.

[182] *Yatar, supra* note 10.

[183] See e.g. *Stoney Nakoda Nations v His Majesty the King In Right of Alberta As Represented by the Minister of Aboriginal Relations (Aboriginal Consultation Office)*, 2023 ABKB 700.

[184] *Yatar*, *supra* note 10 at para 45.

[185] *Ibid* at para 46.

[186] *Ibid* at para 49.

> in considering the application, the judge determines that one of the discretionary bases for refusing a remedy is present, they may decline to consider the merits of the judicial review application (*Strickland*, at paras. 1, 38 and 40; *Matsqui*, at para. 31). The judge also has the discretion to refuse to grant a remedy, even if they find that the decision under review is unreasonable (*Khosa*, at para. 135; *Strickland*, at para. 37, quoting *Minister of Energy, Mines and Resources*, at p. 90).[187]

An interesting question here is whether some grounds for the exercise of discretion might preclude consideration of the merits of a judicial review application.[188] Justice Rowe's analysis would suggest not, though there may be some cases where it is plain and obvious that a remedy could not possibly be available.

Beyond this, a limited right of appeal does not, on its own, communicate any legislative intention to restrict access to the courts:

> The Court of Appeal erred by holding that the limited right of appeal reflected an intention to restrict recourse to the courts on other questions arising from the administrative decision, and that judicial review should thus be rare. The legislative decision to provide for a right of appeal on questions of law only denotes an intention to subject LAT decisions on questions of law to correctness review. The idea that the LAT should not be subject to judicial review as to questions of facts and mixed facts and law cannot be inferred from this.[189]

This is very much in keeping with the narrow approach to legislative intent (under the rubric of "institutional design") in *Vavilov*. Where a legislature uses certain magic words, like "appeal", or "patent unreasonableness", courts must give effect to them in the way prescribed by *Vavilov*. But more thoroughgoing contextual analyses of legislative intent are forbidden[190]

Justice Rowe accepted that, where there is an adequate alternative remedy, a judge may exercise discretion to refuse to grant relief in judicial review proceedings. For judicial review to be ousted, however, there must be "an appropriate alternative forum or remedy."[191] Here, there was no such appropriate alternative. The right of appeal was limited to questions of law, making it impossible for Yatar to put in issue the factual questions and mixed questions of fact and law she wished to put in issue. And the possibility of an internal reconsideration was not an alternative either:

> The access to internal reconsideration cannot be an adequate alternative remedy, as the reconsideration decision itself is the subject of the review. Alternatives do exist where internal review processes have not been exhausted or where there is a statutory right to appeal that is not restricted, such that questions of law, fact, and mixed fact and law could be considered on appeal. But, that is not so here.[192]

This is, surely, absolutely right. A final decision is always reviewable regardless of the quality or quantity of internal processes of reconsideration or review (albeit, of course, that when these function well they might weed out unreasonable or procedurally unfair decisions).

To the argument that judicial economy provided a good reason for exercising discretion not to entertain applications for judicial review except in rare cases, Justice Rowe had a firm response:

> Judicial economy is a legitimate concern. However, the countervailing consideration is to ensure that those

[187] *Ibid* at para 54.

[188] See *Budlakoti v Canada (Citizenship and Immigration)*, 2015 FCA 139, at para 28(1).

[189] *Yatar*, *supra* note 10 at para 58.

[190] See also as discussed in *Mason*, *supra* note 119.

[191] *Yatar*, *supra* note 10 at para 61.

[192] *Ibid* at para 63.

> whose interests are being decided by a statutory delegate have a meaningful and adequate means to challenge decisions that they consider to be unreasonable having regard to their substance and justification, or were taken in a way that was procedurally unfair.[193]

The thread running through this analysis and culminating in the passage just quoted is that judicial review is a constitutional fundamental. It is critically important that individuals have the ability to challenge administrative decisions that are alleged to be unreasonable or procedurally unfair.

Now, the Court left for another day the proposition that a privative clause might, in combination with a limited right of appeal, preclude judicial review. But the emphasis on judicial review as a fundamental feature of the Canadian public law landscape suggests that the presence of a privative clause — unconstitutional, let us not forget, per the Court's decision in *Crevier v A.G. (Québec) et al.*[194]— will not change the analysis in any meaningful way. As I demonstrated in last year's paper, privative clauses were no absolute bar to judicial review historically[195] and there is no reason today to deviate from tradition or the first principles asserted in *Crevier*. Moreover, the fact that Justice Rowe poured cold water on the judicial economy rationale for restricting judicial review would strongly suggest that the concerns underlying the enactment of privative clauses should not sway Canadian courts either.

For similar reasons, I would suggest that the Court's analysis bodes ill for other restrictions on judicial review, like section 18.5 of the *Federal Courts Act*.[196] This provision has been invoked in the context of economic regulation of telecommunications and transportation but might now also bar access to judicial review to judges disciplined by the Canadian Judicial Council.[197] The question there will be the extent to which the Federal Court of Appeal's important decision in *Canadian National Railway Company v Scott*, 2018 FCA 148 is consistent with *Vavilov* and *Yatar*.[198]

On the merits, the decision was unreasonable and the matter remitted to the Tribunal:

> However, the LAT adjudicator failed to have regard to the effect of the reinstatement of the IRBs between February and September. The LAT adjudicator did not consider earlier tribunal decisions, some of which had held that when an applicant's benefits are reinstated, the limitation period can only be triggered when they are validly terminated again (see *Veldhuizen v. Coseco Insurance Co.*, 1995 ONICDRG 144 (CanLII); *Rudnicki v. Certas Direct Insurance Co.*, 2001 ONFSCDRS 60 (CanLII)).
>
> It is not in question that Ms. Yatar initiated mediation in September 2012. The mediation took place between June 18, 2013 and January 14, 2014. On January 14, 2014, the mediator released his report. However, s. 281.1(2)(b) of the Insurance Act and s. 51(2) of the *SABS* (as they existed at the time) do not *trigger* a 90-day limitation period from the release of the mediator's report. Rather, they provide for an *extension* of the two-year limitation period from the mediator's report. In other words, it is arguable that there still needed to be a valid denial of the IRBs to start the clock running. I do not purport

[193] *Ibid* at para 65.

[194] *Crevier v A.G. (Québec) et al.*, [1981] 2 SCR 220.

[195] Paul Daly, "Limited Rights of Appeal: Constitutional Traditionalists" (14 March 2024) online (blog): <www.administrativelawmatters.com/blog/2024/03/14/limited-rights-of-appeal-constitutional-traditionalists>.

[196] *Federal Courts Act,* RSC 1985, c F-7.

[197] See Paul Daly, "Judicial Oversight and Open Justice in Administrative Proceedings" (18 May 2023), online (blog): <www.administrativelawmatters.com/blog/2023/05/18/judicial-oversight-and-open-justice-in-administrative-proceedings>.

[198] Note that my client in *Yatar* took the position that section 18.5 does have to be revisited in light of *Vavilov*.

> to decide this question; it is one properly to be decided by the LAT.[199]

Justice Rowe described this as a breach of "legal constraints,"[200] which might prompt one to wonder whether the matter should have been treated as falling within the appeal clause in any event. For my part I do not think anything turns on whether *Vavilov*'s contextual constraints are described as legal or factual (other than to facilitate analysis): the key point here was that the adjudicator's decision lacked justification, intelligibility and transparency on factually suffused questions.

The privative clause issue left unresolved in *Yatar* was the subject of a thoughtful set of reasons in *Democracy Watch v Canada*,[201] Chief Justice de Montigny engaged extensively with my writings on the subject but took a very different view from me. I do not propose to attempt to produce a comprehensive response (or maybe it is a reply or sur-reply at this stage!), as I know from my incoming correspondence that you are all well able to make up your own minds when issues have been fully argued on both sides. Please do read Chief Justice de Montigny's reasons, especially paragraphs 58-78, regardless of the fact that they are *obiter*.[202]

It is worth highlighting a couple of points, however, as these go to the core of the disagreement between those with competing views of the constitutional core minimum of judicial review of administrative action.

Consider, first, the permissible scope of legislative intervention to limit judicial review. Chief Justice de Montigny is of the view that legislation could eliminate reasonableness review in its entirety:

> This is not only consistent with the various *dicta* of the Supreme Court with respect to the role of judicial review (most explicitly in *Crevier* and *Dunsmuir*) and with its insistence on respect for institutional design choices in *Vavilov*. It is also aligned with the underlying rationale for judicial review in a parliamentary democracy, which is that all exercises of delegated authority by the executive branch must find their source in the law and be respectful of the Constitution.[203]

He goes on to ask, "As long as courts have the ability to intervene in cases where an administrative decision-maker steps out of bounds and impermissibly oversteps its lawful authority, how can it be said that the rule of law is threatened by the insertion of a privative clause in a statute?" But this question begs the question. Given the significant changes wrought by *Vavilov*, how can one say that a court can determine when a decision-maker has 'stepped out of bounds' or 'overstepped its lawful authority' without applying the reasonableness standard? Indeed, in *Vavilov*, the majority of the Supreme Court remarked that "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…"[204] To my mind, this passage ties lawful authority to reasonableness review.

Second, there is the issue of respecting legislative intention. Chief Justice de Montigny also sees the downgrading of privative clauses in *Vavilov* as problematic because it fails to give sufficient weight to parliamentary supremacy:

> [P]rivative clauses are downgraded from an important factor in determining the applicable standard of review (as in *Dunsmuir*) to a mere contextual factor in determining the parameters of a reasonable decision. In light of the high degree of deference to which administrative decision makers are entitled when their decisions are subject to the reasonableness standard, it is

[199] *Yatar*, *supra* note 10 at paras 74–75.

[200] *Ibid* at para 76.

[201] *Democracy Watch v Canada (Attorney General)*, 2024 FCA 158.

[202] See *ibid* the concurring judges at para 96.

[203] *Ibid* at para 73.

[204] *Vavilov*, *supra* note 1 at para 67; See also *Vavilov*, *supra* note 1 at para 109.

> not readily apparent what extra protection from judicial scrutiny a privative clause would confer.[205]

As I have suggested previously,[206] the answer is that a privative clause — full or partial — forms part of the 'governing statutory scheme' envisaged by *Vavilov*. As the majority of the Supreme Court noted there, "where the legislature chooses to use broad, open-ended or highly qualitative language — for example, "in the public interest" — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language."[207] A privative clause would be an indication that "greater flexibility" is appropriate, with a partial privative clause carrying less weight and a full privative clause weighing heavily in the balance. This could be particularly significant in a situation where an administrative decision-maker has been tasked with interpreting "precise and narrow language":[208] in such circumstances, a privative clause would instruct the court to give "greater flexibility" in applying the reasonableness standard even though the language being interpreted is precise and narrow.

And now to the facts of the case! Alleging errors of fact and errors of law, the applicant sought judicial review of a report of the Conflict of Interest and Ethics Commissioner concluding that the Prime Minister had not violated conflict of interest legislation by participating in two decisions involving a controversial charitable organization. For Chief of Justice de Montigny, the partial privative clause excluding judicial review for errors of law and errors of fact meant that the application was doomed to failure; but the concurring judges disagreed, given that previous panels of the Federal Court of Appeal had taken a different view on the constitutional core minimum of judicial review.[209]

All three judges agreed, however, that political oversight can be an adequate alternative remedy to judicial review. Chief Justice de Montigny noted that the Ethics Commissioner is "an independent Officer of Parliament, and the position he occupies is firmly within the legislative branch of government."[210] In addition, he found that the statutory scheme suggests that Parliament intended political oversight of the Ethics Commissioner to be a central feature:

> It is very clear from subsections 44(7), 44(8), 45(3) and 45(4) of the COIA, which require the Commissioner to provide his reports to the Prime Minister, that it is for the Prime Minister to decide how to give effect to the Commissioner's determination, and for the House of Commons to hold the government to account. The sanction is meant to be political, not judicial. This conclusion is reinforced by the fact that the report of the Commissioner is to be made available to the public, and that its conclusions are not determinative of the measures to be taken (s. 47 of COIA).[211]

There are "dual supervisory roles,"[212] but the courts' task is limited by the partial privative clause to ensuring the Commissioner respects their jurisdiction, grants procedural fairness to affected parties and does not act fraudulently. Furthermore, for Chief Justice de Montigny, "Courts should be loath to perceive judicial remedies as the only effective recourse in every instance where an aggrieved party raises an alleged illegality."[213] Ultimately, "courts should

[205] *Supra* note 201 at para 66.

[206] See *Koebisch v Rocky View (County)*, 2021 CanLII 265 (ABCA) at para 24.

[207] *Vavilov*, *supra* note 1 at para 110.

[208] *Ibid*.

[209] *Supra* note 201 at para 96.

[210] *Ibid* at para 80.

[211] *Ibid* at para 81.

[212] *Ibid* at para 82.

[213] *Ibid* at para 84, citing *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49.

not be drawn in disputes raising purely legal or factual issues within the jurisdiction of the Ethics Commissioner."[214]

As Chief Justice de Montigny notes, this approach is consistent with that taken in provincial superior courts where judicial review has been sought of decisions of officers of the legislative assembly: *McIver v Alberta (Ethics Commissioner)*; *Democracy Watch v British Columbia (Conflict of Interest Commissioner)*.[215]

For my part, I have always been wary of these decisions. If an officer of a legislative assembly occupies a statutory office, with powers and functions accorded by law and — by definition — subject to limitations set out in its parent statute, to my mind it does not obviously follow that the officer's decisions are non-justiciable.

I appreciate that if someone seeks to raise a political issue before the courts arising from an officer's decision judicial intervention might very well not be appropriate. However, if as here the issue is whether the officer correctly or reasonably interpreted statutory concepts, excluding judicial review seems quite strange as it means that the legislator has the final word on the interpretation of its own statutes. After all, "[j]udicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority."[216] Why would it be any different when an officer of the legislature is administering a statutory scheme?

In that regard, it is notable that the partial privative clause at issue in *Democracy Watch* expressly preserves judicial review on 'jurisdictional' issues: but at what point does an error of law or fact become a potential jurisdictional issue? I would say that the difficulty of drawing this line is, in and of itself, a good reason to take a broad view of the constitutional core minimum of judicial review.

In all events, this is a very interesting decision of which both obiter and ratio will repay careful reading both on the constitutional foundations of judicial review and the adequacy of political oversight as a remedy.

V. REGULATORY ISSUES

In this section, I address a broad range of regulatory issues which have been considered by several appellate courts in the last year: regulator-stakeholder meetings, the presence of counsel during investigations and the desirability of transparency in the regulatory sphere. Each of these decisions from lower courts provides helpful guidance for those charged with advising regulated entities in the energy sector and elsewhere.

A) Meetings with Regulators

Teksavvy Solutions Inc. v Bell Canada,[217] concerned an appeal from a rate-setting decision by the CRTC relating to the rates payable to owners of telecommunications infrastructure. Here, B is an owner and T wishes to access its infrastructure. In T's view, the CRTC set the rates too high. One issue that arose related to bias. T alleged bias on two grounds.

First, the Chair of the CRTC had made public comments about the importance of facilities-based competition. There was, Justice Stratas held, nothing objectionable about this:

> The Chair was doing nothing more than setting out the longstanding and frequently expressed policy position of the CRTC in general terms. As the Chair of a high-profile regulatory body, it was appropriate for him to communicate the policies of the regulator, as had been adopted in CRTC decisions and notices. Such communication can be constructive and in the public interest: *Zündel v. Canada (Attorney General)*, 1999 CanLII 9357 (FC), [1999] 4 F.C. 289, 175 D.L.R. (4th) 512 (T.D.) at paras. 28-30, aff'd (2000), 2000 CanLII 16731 (FCA), 195 D.L.R. (4th) 394, 30 Admin. L.R. (3d) 82 (C.A.) at para. 3. By no means was

[214] *Ibid* at para 88.

[215] *McIver v Alberta (Ethics Commissioner)*, 2018 CanLII 240 (ABQB) at paras 70–77; *Democracy Watch v British Columbia (Conflict of Interest Commissioner)*, 2017 CanLII 123 (BSC) at paras 35–37.

[216] *Supra* note 2 at para 28.

[217] *Teksavvy Solutions Inc. v Bell Canada*, 2024 FCA 121.

> the Chair expressing a preference for the specific positions taken by parties in a specific file before the CRTC, nor was he communicating a permanent, irrevocable policy preference.[218]

Second, during the decision-making process, the Chair had held a meeting with a senior Bell representative. Justice Stratas held that T had not raised this bias objection in a timely manner and was thus precluding from pursuing it.[219] Nonetheless, he appreciated that the meeting was potentially problematic and offered the following observations:

> Meetings between regulators and regulatees outside of the hearing room are a tricky area.
>
> At one end of the spectrum are meetings that are in the public interest, particularly where the regulator has a policy-making mandate and the regulator and the regulatee are in a long term relationship. Regulators need to understand the industry they regulate and the parties in it, their challenges, needs, aspirations, and plans. And regulatees need to understand the motivations of regulators, their view of the public interest and their need to protect it. It is evident from the register maintained under the *Lobbying Act*, most regulatees in sectors such as this engage in these meetings. It is accepted that they are part of doing business. For good measure, the preamble to the *Lobbying Act* has declared lobbying to be a "legitimate activity". And the CRTC's Code of Conduct correctly recognizes that "[f]ormal and informal contacts with parties with an interest in the communications industry are essential to maintaining and enhancing our expertise and knowledge".
>
> At the other end of the spectrum are meetings to discuss live issues coming before the regulator or already before the regulator for hearing and decision. In effect, these meetings are means by which secret submissions can be offered outside of the hearing room, away from the eyes and ears of other parties to the hearing and the public. This subverts fairness and should not happen.
>
> Somewhere in the middle are social gatherings. The CRTC's Code of Conduct permits attendance at social events and other meetings between CRTC members and industry representatives as long as CRTC members do not discuss matters before the CRTC during the events. But this can still invite unwelcome questions that can multiply, with mounting risk.
>
> Looking at this case as an example, why were the two together? What was discussed? Why were just the two of them there without any witnesses? Quite simply, meetings between two people, one a regulator and one a regulatee, without any independent witnesses or other evidence to substantiate why the meeting happened and what was discussed can be a recipe for trouble.
>
> In the evidentiary record before us is a CRTC policy that offers good practical guidance on this issue. It recognizes the benefits of regulator-regulatee meetings. But it also flags the risks and offers some ways the risks can be mitigated. For example, among other things, the policy suggests that a senior Commission staff person be present at such meetings. It also suggests that the purposes of the meeting be confirmed in writing.[220]

This is excellent advice, with the helpful notion of a spectrum between the general and specific particularly useful for regulators seeking to

[218] *Ibid* at para 52.

[219] *Ibid* at paras 57–58.

[220] *Ibid* at paras 65–70.

strike a balance between public engagement and impartiality.

B) Counsel in Regulatory Investigations

In *Neustaedter v Alberta (Labour Relations Board)*,[221] the issue was the ability of a regulated entity to insist on the presence of counsel during a regulatory investigation. Generally speaking, regulatory statutes provide for wide investigative powers in respect of regulated activities (here, occupational health and safety), including the ability to enter on premises and interview staff.

Here, the regulatee objected to interviews with staff being conducted in the absence of counsel. This objection was rejected by the occupational health and safety officer assigned to the matter and by the Board. The Court of Appeal was of the same view:

> [T]he appellants argue, on a proper interpretation, OHS officers did not have authority to compel interviews. The OHS officer came to a different conclusion. He noted section 51(j) of the OHSA expressly gave officers the authority to interview and obtain statements for the purposes of the Act ("For the purposes of this Act, an officer may…interview and obtain statements…"), section 53(2) mandated that witnesses comply with an OHS officer's request for information ("shall, on the request of an officer, provide to the officer any information respecting the injury or incident that the officer requests"), and section 54 required witnesses to cooperate ("No person shall interfere with or in any manner hinder an occupational health and safety officer…who is exercising powers or performing duties or functions under this Act."). He also noted, with reference to *Ebsworth*, that OHS had the authority to determine its own procedure as necessary to carry out its legislated function. He concluded from the foregoing that the *OHSA* gave "an OHS Officer the power to compel a witness to attend an interview for the purpose of requesting information pursuant to section 53(2)". The ALRB characterized the officer's reasoning in this regard as "coherent, rational and justified": *ALRB Decision* at para 54. We agree.[222]

Before the chambers judge, the appellant advanced a variation of this argument by submitting OHS officers have no authority to compel a person to provide information. At paragraph 105 of the *Substantive Decision*, the chambers judge held the appellant's interpretation "would render the OHSA essentially toothless. If a request for information regarding a workplace incident can be ignored with impunity, OHS's mandate to protect worker safety would be rendered nugatory. This cannot have been the Legislature's intention." We agree and extend this reasoning to the argument before us.[223]

The appellant had raised the *Charter* in support of the argument that interviews could not be conducted in the absence of counsel but this was to no avail. The *Charter* simply does not apply with significant force in respect of regulated activities.[224]

C) Reviewability of Guidance

Two recent Canadian cases have dealt with the reviewability of soft law instruments and, in both instances, the courts came out against judicial review.

In *Harold the Mortgage Closer Inc. v Ontario (Financial Services Regulatory Authority, Chief Executive Officer)*,[225] the applicants challenged guidance issued by the Authority. Under the

[221] *Neustaedter v Alberta (Labour Relations Board)*, 2024 CanLII 238 (ABCA).

[222] *Ibid* at para 16.

[223] *Ibid* at paras 16–17.

[224] See e.g Paul Daly, "Regulation and the Constitution: Goodwin v. British Columbia (Superintendent of Motor Vehicles), 2015 SCC 46" (21 October 2015), online (blog): <www.administrativelawmatters.com/blog/2015/10/21/regulation-and-the-constitution-goodwin-v-british-columbia-superintendent-of-motor-vehicles-2015-scc-46>.

[225] *Harold the Mortgage Closer Inc. v Ontario (Financial Services Regulatory Authority, Chief Executive Officer),* 2024 CanLII 4464 (ONSC).

guidance, the Authority publishes details of enforcement action on its website. A licensee subject to enforcement action may resist the action in a de novo hearing before the Financial Services Tribunal. Here, the applicants complained, first, that publication of the notice of enforcement action caused reputational harm and, second, that the Authority should have posted the licensees' response on its website.

Justice Backhouse held that the guidance was not justiciable. The Authority was not exercising a statutory power of decision in adopting the guidance and the guidance did not affect any of the applicants' legal rights and obligations:

> FSRA is not specifically required or empowered by statute to issue the Transparency Guidance or publish the NOP. In this case, the Decisions were to provide a non-binding guidance document on FSRA's administrative processes and to publish (or not publish) documents on FSRA's website. Section 3 of the *FSRA Act* provides FSRA's statutory objects: the goals FSRA strives to achieve. Section 3 does not confer any jurisdiction, authority, or a statutory power of decision upon FSRA. Section 6 provides FSRA's natural person powers, empowers FSRA to administer and enforce legislation, and prohibits FSRA from establishing, acquiring, or dissolving subsidiary corporations. While the Transparency Guidance states that the policy achieves FSRA's statutory objects, neither ss. 3 nor 6 confer any authority or obligation on FSRA to publish NOPs and FSRA does not rely on either section to do so.
>
> …
>
> Although the applicants have an interest in their reputation, the publication of allegations by the regulator does not give rise to a right to judicial review. The Decisions here do not affect the legal rights, interests, property, privileges, or liberty of the applicants. The Transparency Guidance issued by FSRA simply describes when and how FSRA will publish documents related to its enforcement proceedings. Reputational damage in the circumstances of this case does not give rise to a right of judicial review.[226]

Note that I provided some consultancy services to the Authority in respect of this matter.

The Federal Court of Appeal arrived at the same conclusion in *Air Passenger Rights v Canada (Attorney General)*.[227] The issue here related to the publication by the Canadian Transportation Agency of a statement on its website at the outset of the COVID-19 pandemic. There was a wave of flight cancellations and significant concern in the airline industry about the economic consequences of shutting down international travel. In relevant part, the statement read:

> While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).[228]

The applicant here recognized that the statement was not a "decision" but nonetheless argued that judicial review was appropriate because "(a) the Statement is a pre-judgment by the CTA of air passengers' rights to refunds for cancelled flights, and (b) the CTA acted in response to improper third-party influence in formulating and posting the Statement contrary to its *Code of Conduct*, giving rise to reasonable apprehension of bias."[229]

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[226] *Ibid* at paras 70, 75.

[227] *Air Passenger Rights v Canada (Attorney General)*, 2024 CanLII 128 (FCA).

[228] *Ibid* at para 3.

[229] *Ibid* at para 14.

Justice Walker held that judicial review was unavailable. She distinguished the statement from cases addressing the lawfulness of guidelines that, though notionally non-binding, had a mandatory character[230] and held that the statement itself did not *cause* any affect on rights and obligations. First, it was the actions of third parties, such as credit card companies, that affected passengers' rights and obligations:

> At its core, APR's argument that the Statement is justiciable is based on the premise that the actions of third parties (airlines and credit card companies) taken in reliance on the Statement prejudicially affected air passengers' rights and access to refunds for cancelled flights in circumstances where refunds should arguably have been available to them. APR insists that the Statement had the practical effect of facilitating the airlines' retention of passengers' money without providing services.
>
> APR's evidence and arguments are not persuasive. The actions of third parties are not the actions of the CTA, nor is the CTA responsible for the decisions taken by airlines and credit card companies. APR's evidence demonstrates only that third parties used the Statement to justify refund and credit card chargeback refusals. The prejudicial effects asserted by APR flow not from the Statement or the conduct of the CTA but from the interpretation and use of the Statement by third parties. APR asks the Court to consider the Statement from the public's perspective but there is little evidence in the record of that perspective outside of a limited number of email chains in which frustrated air travellers vented their dissatisfaction with the Statement. In any event, the public's possible interpretation of the Statement does not establish prejudicial effect or justiciability.[231]

Second, the statement itself was non-binding:

> Third-parties' mischaracterization of the Statement, whether as a ruling or approval, was not endorsed by the CTA and does not transform the Statement into a mandatory pronouncement. The Statement is written in simple language and conveys a possible way forward in unprecedented circumstances, subject to the adjudication of each case on its own merits. It is drafted using permissive language and addresses one topic. It does not purport to provide a detailed overview of the state of Canadian legislation and jurisprudence regarding the right to refunds, nor does the Statement alter an air passenger's legal entitlement to a refund for certain cancelled flights. Although APR asserts that the Statement misinforms the travelling public about their refund rights, it has pointed to no requirement that the CTA reference the relevant refund legislation, tariff and case law when issuing an interim statement that makes clear reference to travellers' ability to file a complaint despite the guidance in the Statement.[232]

The analysis here is strikingly similar to that of Justice Backhouse in the Ontario case.

However, the applicant had another string to its bow, in the form of an argument that judicial review is always available where procedural fairness is put in issue, especially where a reasonable apprehension of bias is alleged. This too was rejected by Justice Walker:

> This Court does not have plenary jurisdiction to intervene in the conduct of a federal board, commission or tribunal based on allegations of misconduct or perception of bias absent a matter in respect of which a remedy is available. Essentially, APR is asking the Court to censure the CTA regardless of the legal effects of its conduct. This is not the Court's role. At the admitted risk of repetition,

[230] *Ibid* at para 23.

[231] *Ibid* at paras 29–30.

[232] *Ibid* at paras 31–32.

> for a remedy to be available a matter must "affect legal rights, impose legal obligations, or cause prejudicial effects". The Statement does not do so and it is not otherwise amenable to judicial review.[233]

There is something to be said for the applicant's argument on this point. Allegations of bias have sometimes been given special treatment as far as reviewability is concerned.[234] This point merits further consideration. However, if an artful pleader were able to allege a reasonable apprehension of bias in order to circumvent the well-established principles set out by Justice Backhouse and Justice Walker, I am not sure this would be a desirable development in the law of judicial review.

D) The Desirability of Transparency

Consider, also, the significant decision of the Ontario Divisional Court in *Harold the Mortgage Closer Inc. v Ontario (Financial Services Regulatory Authority, Chief Executive Officer)*.[235]

This was a challenge to guidance ("Transparency Guidance") issued by the Authority pursuant to which details of enforcement action are published on the Authority's website. The applicants claimed that posting details of the enforcement action taken against them was unreasonable and damaged their reputation.

The claim was held to be non-justiciable (as I will explain in a separate post) but Justice Backhouse also helpfully laid out the rationale for the Transparency Guidance and confirmed its reasonableness:

> The Transparency Guidance states that its purpose is to "increase public awareness of misconduct and of the sanctions taken to improve consumer protection and deter future misconduct in the regulated sectors." It sets out under "Rational and principle" that "Greater transparency of Enforcement Action achieves FSRA's statutory objects" which include (relevant here)
>
> - To protect the rights and interests of consumers
> - To regulate and generally supervise the regulated sectors
> - To promote high standards of business conduct in the financial services sectors
> - To contribute to public confidence in the regulated sector
> - To deter deceptive or fraudulent conduct, practices, and activities by the regulated sectors.
>
> The Transparency Guidance also states that "a clear and consistent approach to transparency of Enforcement Action also ensures that non-compliant related entities and individuals are treated evenly and know in advance when and how FSRA will inform the public that it is taking action for non-compliant activity." The Transparency Guidance sets out that FSRA ensures greater awareness of its Enforcement Action by making Enforcement Information publicly available on the enforcement section of the FSRA web site and through news releases. It states that FSRA issues a news release when Enforcement Action is taken and that the combination of a news release and public posting of the Enforcement Information (here, the NOP) on FSRA's web site promotes public awareness and reduces risk to consumers.
>
> …
>
> FSRA's publication decisions are consistent with the practice of many other regulators which also publish their enforcement actions before an adjudication of the merits by a disciplinary tribunal. FSRA indicates in the published NOP that the

[233] *Ibid* at para 44.

[234] See e.g. *Fundy Linen Service Inc. v Workplace Health, Safety and Compensation Commission,* 2009 NBCA 13.

[235] *Harold the Mortgage Closer Inc. v Ontario (Financial Services Regulatory Authority, Chief Executive Officer),* 2024 CanLII 4464 (ONSC) (note that the author have a long-standing solicitor-client relationship with the Authority, including in relation to this matter).

> document contains allegations that may be subject to proof at a hearing.
>
> The issuance of the Transparency Guidance is reasonable — as was the process by which it was developed — and it serves the public interest.[236]

This is a very strong judicial statement in favour of transparency. Ensuring that the public has access to information about how public power is being exercised, and about potential breaches of industry standards, is entirely reasonable and, indeed, salutary. This is standard regulatory practice (or should be) and it is very helpful that the Divisional Court both recognized and endorsed it.

CONCLUSION

This has been a busy year for the Supreme Court of Canada in the administrative law field and adjacent areas. Energy lawyers should certainly take note of recent developments on standard of review of regulations (Part I), reasonableness review (Part II), correctness review (Part III) and the constitutional foundations of judicial review (Part IV), which will bear directly on their practice even if most of the recent cases have not involved energy law per se. And there has also been a good smattering of cases from around Canada relevant to the exercise of regulatory powers (Part V).

To return to where I began, we are at the 5-year mark post-*Vavilov*. Not every possible question has been answered — how could it?! — but it seems fair to say that *Vavilov* is doing much better than its predecessor *Dunsmuir* at this point in its life cycle. ■

[236] *Ibid* at paras 84–87.

THE FUTURE OF INTEGRATED RESOURCE PLANNING: HOW INTEGRATED SHOULD IT BE?[1]

David Morton[*]

INTRODUCTION

This article considers the economic regulators' review of integrated resources planning (IRP) for gas and electric utilities in Canada. The IRP process has typically been conducted by each regulated utility considering only the energy demands of its customers without consideration of other available energy types. However, the move towards net zero greenhouse gas emissions by 2050 is driving new behaviours that include "fuel switching", thereby placing new demands on the IRP planning process.

This article begins by looking at the historical context of public utility growth in Canada, the role of the economic regulator in the IRP process and how IRPs have historically been prepared and reviewed. It considers the role of IRP planning in both "vertically integrated" jurisdictions and in provinces that are "unbundled" thus having a wholesale electricity market. Although public utilities have a key role in the preparation of an IRP, the focus of this article is on the review of the IRP and the role of the economic regulator in that review.

The preparations underway for net-zero are profoundly affecting the IRP review process. Increased electrification and fuel switching from natural gas to electricity are affecting investment decisions in both the natural gas and the electricity sector, presenting challenges in both. A significant portion of fuel switching activity is policy driven which comes with attendant uncertainty.

Fuel switching between electricity and natural gas is largely zero-sum overall with respect to the demand utilities face. However, switch results in a loss of load for the natural gas utility and a proportionate gain in load for the electric utility this results in a coupling of electricity and natural gas demand forecasts and increases the risk of over-forecasting. As a result, this discussion paper concludes that instead of preparing and reviewing gas and electricity plans separately, they should be considered together. Further, potential net-zero impacts on the IRP planning process include the use of electricity as a transportation fuel.

[1] This article is the first in a series of Positive Energy discussion pieces on energy system planning. The need to reform planning processes is a core recommendation of Positive Energy's recent study on how to strengthen public and investor confidence in government decision-making for energy projects (see "Energy Projects and Net Zero by 2050: Can we Build Enough Fast Enough?" by Michael Cleland and Monica Gattinger profiling this research, online: <energyregulationquarterly.ca/articles/energy-projects-and-net-zero-by-2050-can-we-build-enough-fast-enough>).

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The article also considers how in many cases the energy transition is significantly increasing the exposure of regulated utilities to competitive markets is — an emerging regulatory challenge as economic regulators review investment decisions in this competitive marketplace. Economic regulation was never intended to apply to this competitive market situation that public utilities find themselves in and economic regulators may not have the tools to deal with this emerging phenomenon.

The increasing occurrence of fuel switching adds risk to infrastructure investments in all sectors of the energy system. One of these risks is the risk of stranded assets. While many think this risk is confined to the natural gas infrastructure investment, the article also considers the risks to investments in the electricity sector.

In the petroleum fuels sector these risks are largely taken by the investor, or shareholder of the companies that participate in the sector. In the regulated electricity and natural gas sector, a greater proportion of the investment risk is taken by customers. While the IRP process is a key tool to mitigate these risks, imperfect forecasting methodologies and the inherent imperfections of the economic regulatory system that misalign risk and reward may still not satisfactorily mitigate these risks.

The article then questions how to leverage the competition that is emerging in the regulated utility sector to better align investment risk and reward. Other questions about the IRP process, include: Is there a plan for how an electrification scenario unfolds? Is a long-term plan needed? What is the role of market forces in the planning process and what is their impact on the role of the economic regulator?

In the absence of answers to some of these questions, we risk placing at the feet of economic regulators the responsibility to approve increasing amounts of capital (at-risk to ratepayers) in both the electricity and natural gas sectors. It also requires regulators to understand the assumptions implicit in the trajectory towards electricity — the plan that both electricity and natural gas utilities are working towards. We could also potentially turn energy planning for net-zero into a large, comprehensive — and consequently unwieldy — planning exercise.

CANADA'S ENERGY SYSTEM – THE STATUS QUO

The evolution of Canada's energy system has generally been incremental and organic, driven largely by market forces with some significant provincial and federal government policy nudges. Technology improvements brought enough value to consumers to provide the economic impetus for most of those changes. The system evolved into — for the purpose of this analysis — an economically regulated component (delivery of electricity and natural gas) and all the rest.

While the delivery of electricity and of natural gas were considered monopoly activities that arguably justified economic regulation, there was still potential for competition between these energy sources at the margins — specifically as heating fuels — although, at least theoretically, it didn't stop there. One could purchase a natural gas (or diesel, gasoline or other fuel) powered generator for their building, skip the connection to the monopoly electricity supplier and generate one's own electricity. Although many hospitals and other large buildings do have such generation, it is largely for emergency back-up. It turns out generating your own electricity isn't for the faint of heart, especially for the small user, so much that these other fuels never got much traction as a serious electricity competitor, at least where and when grid electricity was available. Where natural gas is available, it has historically often enjoyed a significant price advantage over electricity so became the fuel of choice for heating.

WHAT IS AN IRP?

An IRP is a comprehensive, long-term (typically 20+ years) plan conducted by a utility to ensure it can meet future energy demand reliably and cost-effectively. It evaluates a mix of supply-side resources (e.g., power plants or gas supply) and demand-side strategies (e.g., energy efficiency or demand response) to balance system needs. IRPs consider economic, environmental, and regulatory factors, often involving stakeholder input.

The economic regulator has no role in the development of the IRP but typically reviews it. The regulatory review of a utility's IRP is intended to ensure that a utility's long-term forecasts and its plans for meeting that forecast future energy demand are in the public interest, align with policy goals, and balance reliability, affordability, and environmental sustainability.

The IRP review also contributes to regulatory efficiency as it provides important contextual background for any future application to build facilities that are included in the IRP.

ELECTRICITY IRP IN VERTICALLY INTEGRATED JURISDICTIONS

In British Columbia, Saskatchewan, Manitoba, Quebec, the Atlantic Canada and the Territories, most electricity is supplied by what are termed vertically integrated utilities — the utility owns and operates generation, transmission and distribution and typically operates in a monopoly franchise area and customers receive a single bill for the generation and delivery of their electricity.

Historically the electricity utility's IRP process in these provinces has focussed on generation and transmission infrastructure, with little to no attention paid to distributing the energy to retail customers. Transmission is generally considered those lines operating at 100 KV and higher. Distribution is considered the lower voltage system (less than 100KV) along with local utility infrastructure to step voltage down before entering houses and other buildings.

IRP planning is a two-step process. The regulated utility develops a forecast for the medium to long term demand — typically about 20 years — showing what load they expect to serve and how they will serve it, in particular what new infrastructure they will need to build.

The process is fairly straight forward. First, predict medium to long term energy demand and then figure out how you are going to meet that demand. The first part is largely a macroeconomic forecasting process on the part of the utility. How big is the population of customers going to grow in my service territory and how much are they going to spend on new TVs, toasters and refrigerators. Utilities are typically required to provide more than one scenario to allow for different exogenous events, such as levels of growth or electrification.

Large lumpy loads are obtained through a bottom-up process in discussions with account managers of large commercial and industrial customers. Given the lead-time on the development of the resources to meet these loads, utilities are typically aware of these demands well in advance. Regulators review these forecasts and their underlying assumptions for reasonableness. A very interesting, but to date not particularly controversial exercise.

Next comes the "planning" part. What new infrastructure is required to meet the load forecast? The importance of an accurate forecast can't be overstated. Capital investment is a significant driver of utility rates, and the load forecast drives capital investment decisions. Under-forecasting may leave a utility short of energy or the means to deliver it, potentially necessitating more expensive market purchases. Over-forecasting can result in overbuilding plant and equipment that may not be needed or would only begin to be needed much later in the future.

This long-term plan is filed with their economic regulator for review and approval or acceptance, often after the utility has consulted with its stakeholders.

UNBUNDLED ELECTRICITY MARKETS AND IRP PLANNING

The IRP process differs in jurisdictions that aren't vertically integrated. In Ontario and Alberta, the electricity system is "unbundled" with separate responsibility for generation, transmission and distribution. A key aspect of an unbundled jurisdiction is the presence of a competitive wholesale market.

Multiple distribution companies, which in many cases are owned and operated by a municipality, deliver retail electricity to customers. In both provinces, the high voltage transmission system is operated by separate entity either. A separate entity, owned by or directly accountable to the provincial government, an Independent System Operator (ISO).[2] They are responsible for planning and ensuring the adequacy of the electricity supply over the long term. The ISO is also responsible for real-time balancing of supply and demand, overseeing the wholesale market and ensuring mandatory reliability standards are maintained.

[2] In Ontario it is the Independent Electricity System Operator (IESO) and in Alberta the Alberta Electric System Operator (AESO). In the US, where wholesale markets can cover more than one state the generic term is Regional Transmission Operator (RTO).

Independent owners of generation assets sell their electricity into the wholesale market where it is purchased by local distribution companies and in some cases large industrial users.

In an unbundled system, customers may receive multiple bills (or a single bill with multiple segments), including for the provision of transmission services and distribution services. If they contract directly with a generator, they are billed separately for that also.

Typically, the ISO has responsibility for IRP planning, or its equivalent in those jurisdictions. As with a vertically integrated utility, it must assemble a load forecast and ensure that there will be sufficient generation to meet that demand. In addition to ensuring sufficient generation, the ISO is responsible for transmission planning.

The ISO's plans are often reviewed by an economic regulator. However, typically in unbundled markets investment in generation assets is not at the risk of retail and wholesale customers,[3] and, at least in Alberta's case, are not economically regulated. While this can still leave a role for the economic regulator, allocating the risk of generation investment between the shareholder and the ratepayer is not part of it.[4]

In the next, we will further consider the implications of utility infrastructure built to serve a competitive market and the implications for the review of an IRP.

NATURAL GAS UTILITY IRPS

Companies that deliver natural gas to retail customers are typically not involved in the extraction, processing and transmission of the commodity. They usually obtain the commodity from someone who is involved in those activities and usually pass on its costs to obtain and transport the gas to their own system with little or no markup.

However, like electricity, natural gas supply can also be unbundled. When that is the case, customers can choose which supplier of the commodity of natural gas they will purchase from. They then pay the commodity separately from the delivery costs, which include costs for transmission (high pressure pipelines) and distribution (low pressure and local delivery infrastructure).

In either a bundled or unbundled scenario, the natural gas delivery company is typically responsible for preparing an IRP to provide the regulator with a window on its forecast demand and plans for capital investment in distribution system infrastructure.

The natural gas IRP typically focusses on investments required to the distribution system along with evaluating sources of natural gas supply, including long-term contracts, storage facilities, and transmission pipeline capacity.

THE IMPACT OF NET-ZERO

The impacts of net-zero policy on the energy system are profound. Energy production and consumption is a significant driver of CO_2 emissions, and as a consequence much net-zero policy is directed at the sector. The resultant changing energy landscape impacts the IRP process in a number of significant ways.

With the adoption of net-zero policies, active competition for customers is developing between electricity and natural gas utilities. In B.C. for example, there was a Twitter war between Fortis Gas and BC Hydro about what kind of fuel you should heat your house with: "clean" electricity or "dirty" renewable natural gas.

The British Columbia Utilities Commission (BCUC) recognized in 2020 that IRP planning is no longer business as usual. Instead of looking at gas and electricity as two separate markets, they must be considered together and how the actions of the gas utility affect the electric utility — and vice versa. Fuel switching between electricity and natural gas is largely zero-sum, in that a switch results in a loss of load for the natural gas utility and a proportionate gain in load for the electric utility and vice-versa.

[3] While this is generally true in Alberta, in Ontario, a significant amount of generator contracts with the IESO are "take or pay" which transfers risk from the investor to the customer.

[4] In Alberta, for example, the Alberta Utilities Commission must approve generation facilities and applies a public interest test which may include environmental considerations and whether the project enhances or maintains grid reliability and stability.

However, if utility forecasts only reflect the demand they expect to gain, or keep, at the expense of their competitor this increases the challenges and risks the economic regulator faces when reviewing forecasts. Therefore, the BCUC reacted by asking its major gas and electric utilities to share forecasts along with the underlying assumptions and encouraged them to also take the assumptions of the other utility into account when developing their own forecasts.

Other jurisdictions took similar measures. In the United Kingdom, on October 1, 2024, after a public consultation process the government created the National Energy System Operator (NESO), a new, public corporation responsible for planning Great Britain's electricity and gas networks and operating the electricity system. In so doing it transferred over 2,000 employees from the investor-owned utilities that were formerly responsible for planning the electricity and gas networks and operating the electricity system.

Given the NESO's mandate, it is clear that the "energy" in its title refers to electricity and natural gas. But is it sufficient to plan only the electricity and natural gas systems together? The IRP planning process no longer just involves the two solitudes of electricity and natural gas. Energy for transportation has always been a competitive market and hasn't competed in any material way with electricity. However, electricity is now in the competitive zone, thereby requiring economic regulators of electricity to evaluate the potential of electricity increasingly serving a market that has always largely been served by petroleum.

Much uncertainty remains over what is the best and most cost-effective path to net-zero. For some policymakers, increasingly, the path is becoming synonymous with electricity and consequently, electrification is being pursued. Conventional wisdom suggests that electrification of the natural gas sector and of transportation fuel will result in a drop in, and, depending on the rate of electrification, a collapse of demand in those sectors.

In the natural gas sector in particular, a reduction, or collapse, in demand will result in billions of dollars of stranded assets which will impact the viability of natural gas utilities and their cost of doing business, particularly their cost of capital. To say this will be a headache for regulators is an understatement.

However, what if conventional wisdom isn't quite right. If, on the electricity side, "they build it and no one comes," it is electricity assets that may become stranded. While many may consider this to be an unlikely scenario, there are many factors that could affect the demand for electricity, including supply chain issues, technology breakthroughs in combustion-based fuel processes that reduce their greenhouse gas (GHG) footprint, regulatory delay on permitting electricity projects that make it difficult to sustain the pace of buildout and shifting policy and consumer uptake.

Economic regulators have an important role in overseeing a smooth transition and reviewing utility planning in a holistic way is a good start.

NET-ZERO AND THE DISTRIBUTION SYSTEM

An additional consideration in the utility planning process generally, which primarily affects the electricity sector, is the considerable investment required in the distribution system to meet increasing electrification load. A key example is the electricity infrastructure required to provide Electric Vehicle (EV) charging. While a considerable amount of attention is given to the need for more EV charging facilities, the distribution infrastructure to support that additional load is significant.

Other changes to the distribution system, such as demand response, virtual power plants and rooftop and community solar generation all serve to blur the line between distribution and generation.

These profound changes to the distribution system are resulting in the need for increased public utility investment. How does the economic regulator review these investment plans? As discussed in the previous section, this has not historically been the case. However, there is increasing recognition that is driving a more integrated approach. Incorporating distribution considerations into IRPs is becoming essential to enable economic regulators to better manage the allocation of risk and costs between shareholders and customers.

We will further examine the issue of distribution system planning in a future article.

WHAT IS A REGULATOR TO DO?

This phenomenon of competition shaping markets served by companies that are subject

to economic regulation because they hold a "natural monopoly" arguably requires a complete rethinking of the regulatory framework. However, that requires legislative attention that is simply not forthcoming in most jurisdictions. In the meantime — what's a regulator to do?

In short, it seems that the IRP process is broken. What worked well when electricity and natural gas utilities were siloed and each operated in a separate but relatively stable environment suddenly has a lot of shortcomings in the current environment. How can economic regulators navigate this challenge?

To be successful, regulators need to adopt a different approach to evaluating IRPs, in particular the load forecast. And given the range of uncertainty concerning things like heat pump and EV adoption, implementation of distributed energy resources, the change of industrial processes as they adapt to different fuels, there is a lot to evaluate.

Many don't want an economic regulator to be making determinations on these issues. Not government, not utilities, and in many cases not even the regulators themselves — although there are regulators that see this as an opportunity to "accelerate the transition". Perhaps nowhere is it truer that governments don't want regulators involved in the planning process, than in jurisdictions where government owns electric utilities. And, in those jurisdictions, if regulators are involved, government can be quick to second guess, direct and/or reverse regulators' decisions. In a future article, we will look further at the implications of government ownership and control of the electricity sector.

A number of approaches to IRP planning are possible. Perhaps it could be viewed as a spectrum, with comprehensive planning at one end. At the other end, is allowing market forces to drive investment decisions to serve as a substitute to or perhaps as a way to reduce the complexities of a comprehensive planning process. If so, what are the options in between? In the following sections, we consider this spectrum, and its implications, in a bit more detail, starting at the planning end.

WHERE'S THE PLAN?

Perhaps the first question a regulator should ask when an electric utility comes in with, say, a request to increase capital investments to provide electricity to replace natural gas, is — what's the plan? Demonstrate that natural gas will become, and remain, unviable for the life of these new electric assets; that the pace of the conversion is achievable, that customers will behave in a way we expect them to and that electricity and/or natural gas assets are not going to end up stranded, and if they are, what are the implications for both the utility and its customers.

Similar questions should be asked about investments in electrification of transportation and other sectors. They should also be asked of natural gas utilities that want to make significant investments in their infrastructure or to experiment with lower CO_2 emitting fuels.

To answer these questions in any kind of determinative way requires a broader bigger plan — a plan with a capital P. In the parlance of the previous section, this is the "planful" end of the spectrum. The more far-reaching the impact is on the economy, the more comprehensive the plan needs to be if regulators are going to rely on it in their decision making.

However, detailed plans involving complex and far-reaching markets are notoriously difficult to prepare, and they are inevitably out of date before they're complete. The broader the scope of the planning exercise, the more linkage is required between the plans of different sectors of the economy. Clearly, this is an extremely difficult plan to develop. While examples of planned energy transitions of this magnitude are difficult to find, perhaps one of the better comparators in complex economic planning is Soviet style central planning. That didn't work for the Soviets — do we have reason to believe it will work any better for us?

Currently there is a paucity of any actual plans for how Canada is going to meet its international net-zero commitments. The regulator must instead look to governments' collection of targets, carrots and sticks and evaluate the IRP's underlying assumptions against them.

That said, an important question to ask is: Is a plan even possible? Especially a comprehensive plan that will see large sectors of the economy retooled, converted and transformed. Everybody that uses energy is being asked to consider changing the way they use it, how much they use, when they use it and what kind they use.

As a result, if net-zero emissions are to be achieved through policies of electrification, entire industrial subsectors will need to be replaced — the sector that makes parts for internal combustion engine vehicles for example. These changes involve multi-national corporations, supply chains that span borders and government industrial policy.

Assuming a plan is possible leads to other questions. The energy utility world in Canada is largely balkanized, with each province exercising jurisdiction over its own utilities, so we must ask the following:

- Who will prepare a plan?
- How many plans will there be?
- Who will coordinate multiple plans and how will multiple plans be coordinated? Will there be planning lead?
- In the absence of an overall national plan, what planning assumptions should be used in provincial or municipal plans?
- What is the scope of the plan?
- On what and whose models will the plans be developed?

These are big questions that are not easily answered. However, we will address them in a future article.

COMPETITIVE MARKETS AND CREATIVE DISRUPTION

Creative destruction — the kind that changing fuel mixes and electrification may cause — is neither new nor necessarily undesirable. A very recent example of creative destruction, albeit not in the energy sector, is the rise of the smart phone and its impact on not only land-line based telecom, but also cameras, calculators, watches, computers, etc. — and a wide range of "apps" that have transformed the daily lives of billions of people.

That transition was far reaching and transformed many market sectors, created many new ones and destroyed others. And, importantly for this discussion, it wasn't planned — it occurred largely organically. This example, then, could be said to represent the other end of the spectrum described in the previous section — the market driven path.

Will a market driven transition work better for the energy transition than a planned, policy-driven approach? Perhaps. However, what is different about the energy transition is a lack of a sufficient value proposition to drive it organically — at least at a pace necessary to meet governments' international net-zero and GHG reduction commitments — and therefore a more aggressive policy-driven approach is advocated by many.

However, regulators need more than policy to make some of the decisions needed when reviewing resource plans. Particularly when there is significant uncertainty generated by regulated utilities participating in competitive markets and making what could be considered speculative investments for aggressive electrification.

WEAVING COMPETITIVE FORCES INTO THE PLANNING PROCESS

In the absence of a plan, and given a reluctance of policy makers to let the market decide, is it possible for regulators to encourage the market to shape at least some energy system investment? And if so, do regulators have a role in so shaping? As we have seen, a transition shaped by market forces doesn't need economic oversight and therefore requires a much different IRP planning process. If market forces shape some investment, the burden on the economic regulator is reduced.

Turning again to the BCUC, we see recent examples of an economic regulator that purposefully took steps to forbear from regulating what would otherwise be public utility activities when there was sufficient evidence that competition is present.

Approximately 15 to 20 years ago, British Columbia saw the introduction of novel alternative energy offerings, including Liquified Natural Gas/Compressed Natural Gas (LNG/CNG) for transportation and in-building, campus and district energy scale "clean" thermal systems that utilized sources such as ground source heat pumps, waste data centre heat and sewage heat recovery. The BCUC, acting on complaints that these offerings constituted markets had significant competitive attributes, so in response it conducted a landmark inquiry called the Alternative Energy Services (AES) Inquiry. This was followed by an inquiry into how best to regulate Thermal Energy Systems and a third to consider the regulation of EV charging.

The AES Inquiry found that although the *Utilities Commission Act*[5] required the BCUC to regulate these offerings, in many cases it was actually in the public interest not to because they were offered into a competitive market. The Commission later applied the same principles when it requested the provincial government to exempt EV charging from economic regulation.

The example of the success of thermal energy systems in BC also illustrates the potential benefits of a more holistic approach to energy and utility planning. Thermal system, including Combined Heat and Power systems are a complementary approach to the traditional electricity vs natural gas dichotomy for building heating. Other jurisdictions have recognized this and, for example, in June 2022, New York state enacted a law opening the door to allowing utilities to build and own networks that distribute thermal energy.

Are these examples, along with the example of planning generation in unbundled jurisdictions useful to economic regulators as they oversee the IRP process? Why does competition matter so much?

Economic regulation is, at best, an imperfect tool. Competitive markets almost always provide a better outcome than even the best economic regulators can provide. Competition better aligns reward with risk. When an economic regulator approves an infrastructure investment and the demand is slower than expected, customers end up paying higher rates. Effectively the regulator has derisked the investment for the utility shareholder at the expense of the ratepayer, thus providing an incentive for the utility to overbuild.

In the regulator's defence it is hard to get it exactly right, so this outcome is considered acceptable in a regulated monopoly environment. However, a competitive market ensures that reward follows risk.

This issue will be further explored in a companion article.

THE FUTURE OF IRP PLANNING IN CANADA?

Perhaps at least in part as a response to this additional planning complexity, Ontario and Quebec have taken steps to broaden the scope of the IRP process to ensure energy planning is integrated and considers all forms of energy including electricity, natural gas, hydrogen and other energy resources, as well as energy efficiency, storage and demand management.

In December 2024, Ontario's *Electricity Act*[6] was amended, in particular to enable the Minister to issue an integrated energy plan, and setting out several elements of that integrated energy plan to balance the Government of Ontario's goals and objectives respecting energy for the period specified by the plan.

This change replaced previous wording that required the Minister to issue an "energy plan", which in practice was focused on the electricity system. It also effectively removed the Ontario Energy Board's (OEB) jurisdiction over certain aspects of the review and implementation process, This shift centralizes energy planning authority within the Ministry of Energy, reducing the OEB's direct oversight and formal review functions concerning the development and implementation of integrated energy plans.

Bill 69[7], tabled in the Quebec National Assembly on June 6, 2024, proposes several changes to Quebec's Integrated Resource Planning (IRP) process, including the requirement for the Minister of Economy, Innovation and Energy to develop a 25-year IRP that includes targets for electricity and other energy sources. It also proposes an expanded role for the Régie's to promote meeting energy needs and facilitating the energy transition. The bill also aims to streamline the Régie's decision-making processes to accelerate the approval of new renewable energy projects.

The plan will be based on public consultations and must be submitted to the government for approval by April 1, 2026. The IRP will be updated every six years.

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[5] *Utilities Commission Act*, RSBC 1996, c 473.

[6] *Electricity Act*, SO 1998, c 15, Schedule A.

[7] Bill 69, *An Act to ensure the responsible governance of energy resources and to amend various legislative provisions,* 1st Sess, 43th Leg, Quebec, 2024.

CLOSING THOUGHTS

The IRP process provides economic regulators with the opportunity to ensure that energy utilities' capital projects are in the public interest and fairly apportion costs and risks between customers and the utilities' shareholders. While historically this process has been, for the most part, relatively straight-forward and successful, an increasing number of challenges are arising as we move toward net-zero.

This article has largely looked at this process through the lens of the economic regulators role in apportioning costs and risks, making observations about the increasing role of competition between energy sources and types. These market forces fundamentally change the way that economic regulators should look at IRP planning.

While letting markets decide may be an effective approach, given the realities faced by government policy and the environment in which public utilities operate, it is not a panacea. However, there is similarly no magic bullet available that will provide economic regulators with a firm plan.

An alternative is, where possible, to let markets decide and utilities respond. This could lead to slower organic growth — unless a "killer app" comes out of unforeseen technological advances and another "iPhone revolution" catapults us to our net-zero future. ■

CHASING THE WIND: THE VALUE OF WIND GENERATION IN A LOW-EMISSION NUCLEAR AND HYDRO-DOMINANT GRID – THE CASE OF ONTARIO[1]

Edgardo Sepulveda[*]

INTRODUCTION

This paper provides a cost-benefit assessment of wind generation in Ontario, Canada for the 2020–2023 period and on a forward-looking basis for the 2027–2030 period. Our work is based on well-established economics literature examining the interaction of wind in various grids and its corresponding cost-benefit.[2] This literature suggests that the social and climate cost-benefit of wind generation will be grid-specific, with the lower the price of wind on the grid and the more that wind displaces higher-emitting generation, the higher wind's social and climate benefit. And vice versa. We find a large negative net cost of wind for the 2020–2023 period, reflecting Ontario's relatively high wind prices and low wind emissions offset.

The second chapter provides a summary of Ontario's wind roll out policy and how it resulted in its relatively high average price of $151/MWh in the 2020–2023 period.

[1] This is a condensed version of a longer report of the same title prepared by the author for the Macdonald-Laurier Institute (MLI) and released in September 2024: Edgardo Sepulveda, *Chasing the Wind: The value of wind generation in a low-emission nuclear and hydro-dominant grid – the case of Ontario* (A Macdonald-Laurier Institute Publication, 2024), online (pdf): <macdonaldlaurier.ca/wp-content/uploads/2024/09/20240724_Wind-power-Sepulveda_PAPER-v13-FINAL.pdf>.

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[2] This includes work on the Texas electricity grid by Joseph Cullen, "Measuring the Environmental Benefits of Wind- Generated Electricity" (2013) 5:4 Am Econ J: Econ Pol'y, 107-33, online: <doi.org/10.1257/pol.5.4.107>; and Kevin Novan, "Valuing the Wind: Renewable Energy Policies and Air Pollution Avoided" (2015) 7:3 Am Econ J: Econ Pol'y, 291-326, online: <doi.org/10.1257/pol.20130268>; and more recent work analyzing the Ontario grid by Pejman Bahramian, Glenn P. Jenkins & Frank Milne, "The displacement impacts of wind power electricity generation: Costly lessons from Ontario" (2021) Energy Pol'y 151, online: <doi.org/10.1016/j.enpol.2021.112211> [*Bahramian*]; and several regions of the United States by Harrison Fell & Jeremiah X. Johnson, "Regional disparities in emissions reduction and net trade from renewables" (2021) 4 Nature Sustainability, 358–65, online: <doi.org/10.1038/s41893-020-00652-9> [*Harrison Fell*].

We then review Ontario's seasonal wind profile and how this is likely to interact with the existing generation mix and emissions intensity. The third chapter presents the results of the regression analysis of the interaction of wind generation with other generation technologies. We apply the regression results to a cost-benefit analysis of wind generation and find that the costs far exceeded the benefits for the 2020–2023 period. We also undertake a forward-looking cost-benefit analysis for the 2027–2030 period and calculate a cost-benefit "break-even" wind price of $46/MWh. The fourth chapter includes the policy discussion, and the fifth chapter is the conclusion.

WIND IN ONTARIO'S ELECTRICITY SECTOR

Ontario's installed wind capacity of 5.5 GW[3] has largely evolved within an electricity sector that is unique in North America: a restructured, single-buyer with a system-wide contracts-for-difference ("CfD") mechanism, majority out-of-market revenues, and high subsidization.[4]

In preparation for market opening in May 2002, Ontario Hydro was split into several entities. In 2005, the new government established the single-buyer model for generation in Ontario by creating the Ontario Power Authority ("OPA") responsible for contracting existing and new generation that was not otherwise economically regulated by the Ontario Energy Board ("OEB"). Indeed, virtually all wind resources in Ontario have been centrally procured by the government. To tie the administrative OPA element to the competitive Independent Electricity System Operator ("IESO") element, the government introduced a sector-wide CfD mechanism in 2005. Generating entities would receive market revenues based on the hourly Ontario energy price ("HOEP"), on top of which they would receive out-of-market CfD payments equal to the difference between their individual "strike price" (set by regulation or contracts) and the HOEP. Those CfD-type payments are funded via the Global Adjustment ("GA") mechanism, which has generally been fully recovered via rates.

Ontario's first commercial wind farm went into service in 2002, but it was not until the government implemented the Renewable Energy Supply ("RES") in 2004 that wind took off in Ontario. Additional rounds occurred in 2005 ("RES II") and 2007 ("RES III") and the related Renewable Energy Standard Offer Program ("RESOP") in 2006. To speed up the rollout of wind and solar, government enacted the *Green Energy and Green Economy Act*[5] ("*GEA*") in 2009, which would later be renamed the *Green Energy Act*[6] before being repealed in 2018. Modelled on German legislation, its key provisions included the rollout of the standard offer feed-in-tariff (FIT) approach to procurement so that wind projects were developed, owned and operated in the form of independent power producers ("IPPs"). Wind contracts generally had "escalation clauses" that increased the rate by one-fifth the rate of inflation. The average contracted wind price for the 2014–2019 period was $143/MWh and increased to $151/MWh for the 2020–2023 period.

The climate benefits of wind will generally depend on its particular profile, including capacity factors over the year, and how that interacts with the existing generation mix and its emissions intensity. On the one extreme, in a relatively high emission grid dominated by coal or oil, for instance, wind will tend to have a relatively higher climate benefit if it can displace coal or oil on a MWh-to-MWh basis. At the other extreme, in a relatively low emission grid dominated by nuclear or hydro with no coal, as is the case of Ontario, we would expect wind to have a relatively lower climate benefit.

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[3] Independent Electricity System Operator, "Ontario's Electricity Grid: Supply Mix and Generation" (last visited 22 January 2025), online: <www.ieso.ca/Learn/Ontario-Electricity-Grid/Supply-Mix-and-Generation>.

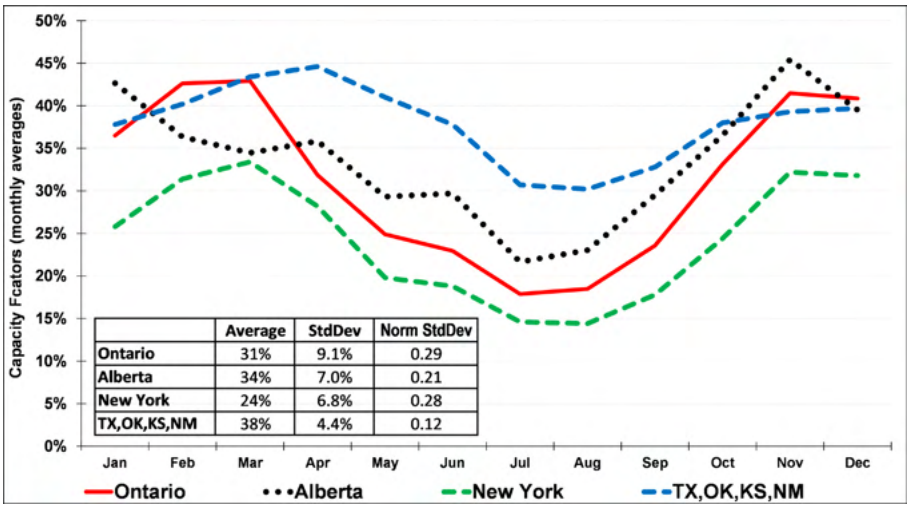
[4] For an overview of early reforms see Michael Trebilcock & Roy Hrab, "Electricity Restructuring in Ontario" (2005) 6:1 Energy J, online: <journals.sagepub.com/doi/abs/10.5547/ISSN0195-6574-EJ-Vol26-No1-6> for an update, including on the GA and increasing prices, see Edgardo Sepulveda, "Power to the people: Privatization and electioneering have made electricity prices unbearable in Ontario" (1 May 2018), online: <www.policyalternatives.ca/news-research/power-to-the-people>; and for subsidization see Edgardo Sepulveda, "Ontario election: The $6.9 billion budget item that (almost) no one is talking about" (19 May 2022), online: <www.tvo.org/article/ontario-election-the-69-billion-budget-item-that-almost-no-one-is-talking-about>.

[5] *Green Energy Act*, SO 2009, c 12, s A.

[6] *Ibid*.

To compare Ontario's average wind profile for the 2020–2023 period, Figure 1 presents average monthly capacity factors from New York state[7] (NYISO 2024, and previous), Alberta[8] and the "Lower Plains" states as defined by the U.S. Energy Information Administration ("EIA") to include Texas, Oklahoma, Kansas, and New Mexico[9] for selected periods[10]. Except for Alberta, the other profiles in Figure 1 show some form of an "M" shape, with peaks around March and November and a pronounced trough in July-August. Ontario's monthly capacity factors are always higher than that of New York, indicating that Ontario has a superior wind profile. However, Ontario's average capacity factor of 31 per cent is lower than that of Alberta (34 per cent) and of the Lower Plains (38 per cent). Ontario generally compares favourably to these other regions during the peaks; it is Ontario's more pronounced and prolonged summer trough that brings down its average annual capacity factor.

Figure 1: Average wind capacity factors for 2020–2023[11], by month



[7] New York Independent System Operator, "NYCA Renewables 2023" (last visited 22 January 2025), online: <www.nyiso.com/documents/20142/29609937/2023-NYCA-Renewables-Presentation.pdf/b4b189e8-e213-baf1-9f81-ac425342a2ea>.

[8] Alberta Electricity System Operator, *Annual Market Statistics Report*, (Market Analytics, 2024), online: <www.public.tableau.com/app/profile/market.analytics/viz/AnnualStatistics_16161854228350/Introduction>.

[9] See United States Energy Information Administration, "U.S. wind generation falls into regional patterns by season" (30 November 2022), online: <www.eia.gov/todayinenergy/detail.php?id=54819>.

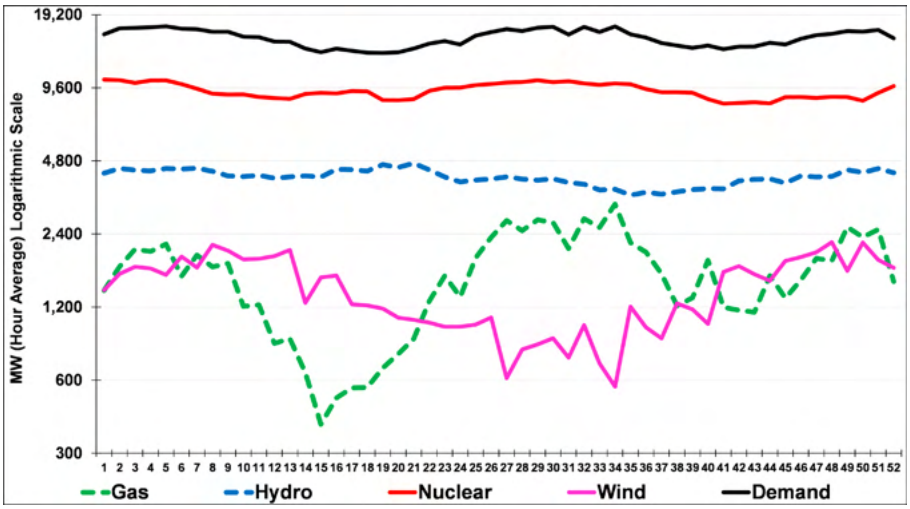
[10] Data for Ontario, NYISO and AESO are monthly averages for the 2020–2023 period; for the Lower Plains the data is monthly from 2016 to mid-2022.

[11] Data for the Lower Plains (TX,OK,KS,NM) is from 2016 to mid-2022.

One of the innovations of this report is that the regression and cost-benefit analysis considers this seasonal variation. Indeed, for the rest of the report we use weekly data, week 1 to 52 of the year, to more accurately capture this seasonality. We construct a custom database for the four most recently available years, 2020–2023, based on publicly available data.[12] We use this database in this chapter to graphically present the results and in Chapter 3 as the basis for the regression and cost-benefit analyses. This hourly[13] data is only available for transmission-connected generation, which covers 92 per cent of all generation, with distribution-connected capacity making up the remaining 8 per cent, with the ratio for wind being 89 per cent/11 per cent respectively.[14]

Figure 2 shows the average hourly demand and generation for the years 2020–2023, by week of the year. Table 1 presents averages, standard deviations and correlations. Ontario demand has two troughs (weeks 15 to 20 and weeks 39 to 43) and two peaks (weeks 27 to 34 in the summer and a winter peak from week 49 at the beginning of the winter in one year to week 7 near the end of winter the following year). The summer peak is associated with higher space cooling and the winter peak with higher space heating and industrial use.

Figure 2: Average Ontario demand and generation for 2020–2023, by week



[12] See Independent Electricity System Operator, "Public Reports Data Portal" (last visited 22 January 2025), online: <www.reports.ieso.ca/public>.

[13] For our database we use the hour as the basic unit of analysis and group all hours in seven-day periods from January 1 of every year, from week 1 to week 52. Fifty-two 7-day weeks total 364 days, so we need to add an eighth day to one of the weeks to have the necessary 365 days. Each of the weeks from week 1 to week 51 have seven days thus a total of 672 hours (24 hours x 7 days x 4 years). Week 52 will get an extra day thus having 768 hours (24 hours x 8 days x 4 years). For analytical purposes we exclude the 24 hourly data points for February 29 of 2020, a leap year.

[14] *Supra* note 3.

Table 1 shows that demand averaged 15,422 MW and had a normalized standard deviation of 0.08. Wind averaged 1,425 MW with a normalized standard deviation of 0.32, with gas being even higher at 0.42. Nuclear[15] is positively correlated with Ontario demand (correlation co-efficient r = 0.649).[16] Gas generation is very strongly correlated with Ontario demand, with r = 0.862, reflecting its "peaking" function. In contrast, wind generation is uncorrelated with Ontario demand, with r = 0.047. Table 1 shows that wind is negatively correlated with gas generation, with r = -0.266, indicating that wind did not efficiently displace gas in Ontario.

REGRESSION AND COST-BENEFIT ANALYSIS

This chapter presents the regression analysis to assess how wind generation interacted in Ontario's nuclear and hydro-dominant grid for the four years from 2020–2023. We apply these regression results to a historical cost-benefit analysis of wind generation for the 2020–2023 period and a forward-looking cost-benefit analysis for the 2027–2030 period.

Our objective is calculating regression coefficients that quantify whether and by how much wind generation is statistically associated with decreases or increases of other types of generation. In our case, we focus on the three largest generation technologies in Ontario, nuclear, hydro and gas. We also model whether and by how much wind generation increases/decreases net exports (NX) from/to other provinces and the US. Our work differs from previous research by specifically considering the seasonal variation of wind by calculating separate week of year regressions over the 2020–2023 period. As described in the previous chapter, we pool hourly data by week of the year and carry out 208 regressions, one for each week of the year (52 weeks) for four variables (gas, hydro, nuclear, and NX).

Figure 3 presents the results of the wind interaction coefficients for the 208 regressions. Statistically significant coefficients are presented by their coefficient results; insignificant results are presented as zero. Overall, the regression results were strong, with relatively high adjusted R2 and other significance parameters. These coefficient results indicate that on average 1.00 MWh of wind generation was statistically associated with the following: a decrease (displacement) of -0.56 MWh of gas, a decrease (displacement) of -0.23 MWh of hydro, an increase (contribution) of 0.17 MWh to NX and had a minimal impact (-0.01 MWh) on nuclear. These results indicate that in Ontario's low-emissions nuclear and hydro-dominant grid, only about 56 per cent of wind output goes to displacing gas generation.

Table 1: Descriptive Statistics for Ontario generation and demand for 2020-2023, by week

	Gas	Hydro	Nuclear	Wind	Demand
Average (MW)	1,661	4,115	9,324	1,425	15,422
StdDev (MW)	683	302	641	460	1,209
Normalized StdDev	0.41	0.07	0.07	0.32	0.08
Correlation with Demand	0.862	0.032	0.649	0.047	1.000
Correlation with Gas	1.000	-0.267	0.539	-0.266	0.862

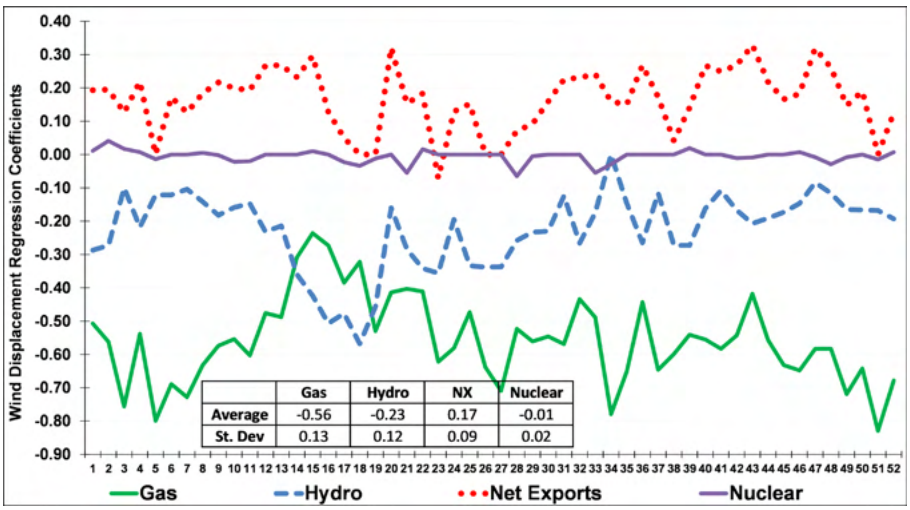
[15] This type of nuclear seasonal "load following" is made possible by planning maintenance outages for Ontario's fleet of 18 nuclear reactors in a coordinated manner consistent with Ontario demand.

[16] The correlation coefficient r measures the strength of the relationship between two variables, going from -1.00 (perfect negative correlation means two variables move in opposite direction), to 1.00 (perfect positive correlation means that two variables move in the same direction all the time), with 0.00 meaning uncorrelated.

Figure 3 highlights the importance of seasonal variation around these annual averages. During the winter peak of Ontario demand in week 5, for example, it shows that each 1.00 MWh of wind displaced -0.80 MWh of gas. On the other hand, in week 15 1.00 MWh of wind on average displaced just -0.24 MWh of gas. The climate benefits associated with wind displacing gas, therefore, depend on the week of the year.

Figure 4 shows how much gas wind is displacing. To be clear, the displaced gas did not occur — it is an estimate of the gas that would have occurred had wind not existed. It is the gas avoided. During week 5, for instance, wind displaced about 1,302 MW of gas generation per hour. In contrast, during week 15, wind displaced an average of only 375 MW of gas per hour.

Figure 3: Wind regression coefficients for 2020-2023, by week



	Gas	Hydro	NX	Nuclear
Average	-0.56	-0.23	0.17	-0.01
St. Dev	0.13	0.12	0.09	0.02

Figure 4: Average gas generation and displacement for 2020–2023, by week

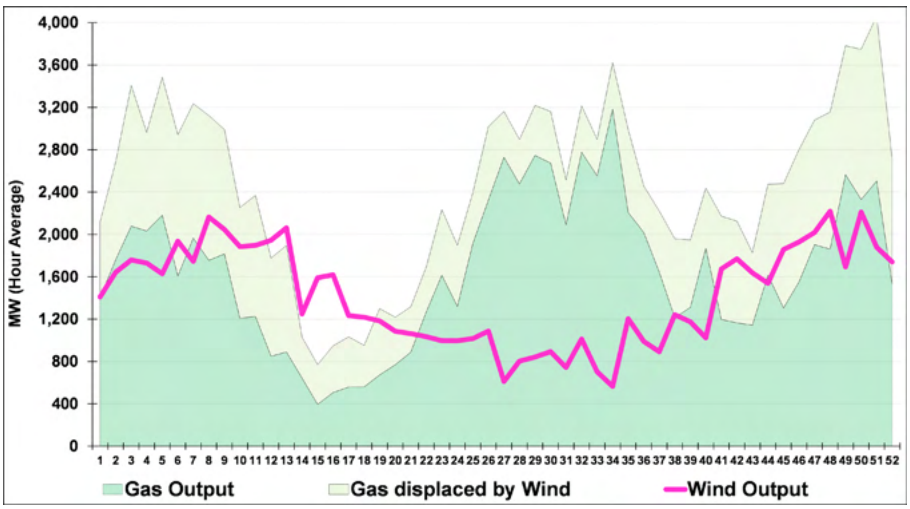


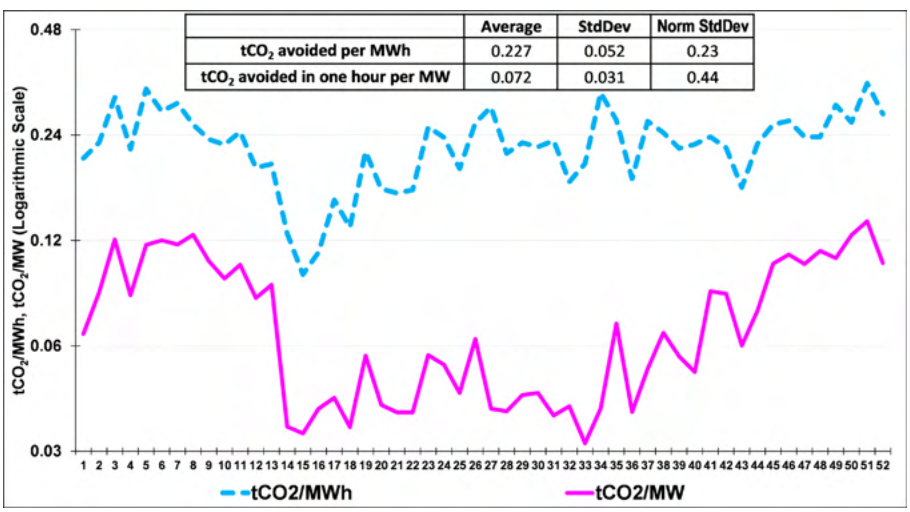
Figure 5 shows these climate benefits directly, by showing how much CO_2 is avoided by wind. It shows that on average 1.00 MWh (generation) of wind displaces 0.227 tCO_2 (the wind emissions offset), and that 1.00 MW (capacity) of wind displaces 0.072 tCO_2 per hour (the wind capacity emissions offset). This confirms that the capacity and output avoided CO_2 ratio (0.072/0.227) is the same as average wind capacity factor (31 per cent). From a capacity perspective, Figure 5 shows that the capacity value of wind with respect to climate are lowest in weeks 14 to 34, during which 1.00 MW displaces only 0.043 tCO_2 per hour.

This section expands this analysis to assess the cost- benefit of a more comprehensive perspective, including estimating the financial impacts of how wind interacts with the other modelled generation resources and NX, as well as placing a monetary value on the avoided CO_2 emissions in the form of the Social Cost of Carbon ("SCC"). From an Ontario perspective, there are two elements on the cost side, and four elements to the benefit side of the cost-benefit analysis, which we discuss below.

On the cost side the two elements are the expenses associated with wind output and with wind curtailment. Average annual wind output expenses are equal to average output over the 2020–2023 period (12.5 TWh) times the average wind price over the same period ($151/MWh).

Ontario has been a net exporter of electricity since the late-2000s, mostly driven by a condition that IESO refers to as "surplus baseload generation" ("SBG"), which occurs when electricity production from nuclear, hydro, wind, and solar is greater than Ontario demand.[17] For grid stability purposes IESO must balance surplus and deficit power situations. IESO's first "escape valve" in surplus situations is to increase exports; the second is to reduce Ontario generation, including wind generation. Such wind reductions are referred to as "curtailment." As in other jurisdictions, wind IPPs are compensated for curtailment. IESO calculates the estimated capability for every wind turbine in Ontario based on a series of parameters, including available installed capacity, and actual wind speed at the location, based on sensors. The difference between actual and IESO forecast wind generation is referred to as "curtailed wind." Average annual expenses associated with wind curtailment is equal to average wind curtailment over the 2020-2023 period (1.3 TWh) times the average wind price over the same period ($151/MWh).

Figure 5: Average tCO_2 reductions due to wind for 2020–2023, by week



[17] Ontario Power Generation, *OPG Reports 2023 Financial Results*, (Toronto: Ontario Power Generation Inc., 2024), online (pdf): <www.opg.com/documents/2023-financial-results-pdf>.

Figure 6: Average Ontario wind output and curtailment for 2020–2023, by week

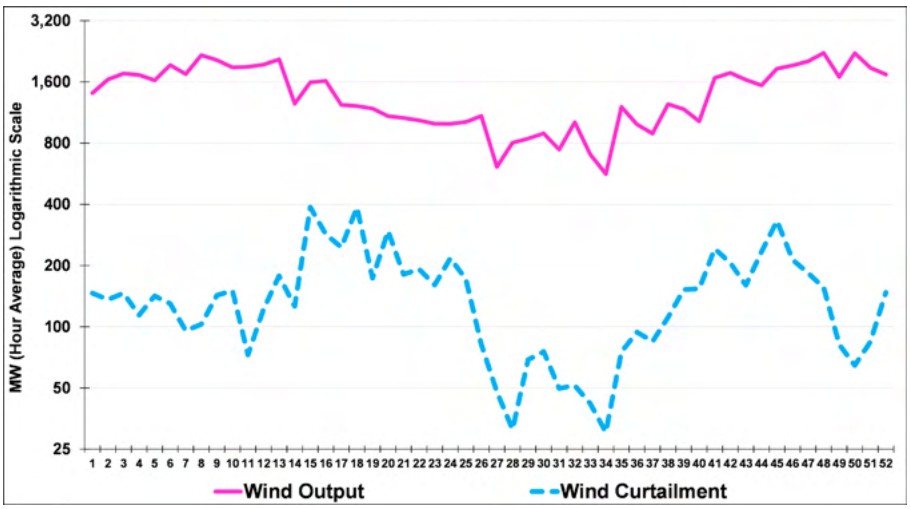


Figure 6 shows average hourly wind generation and curtailment for the 2020-2023 period. Curtailed wind is highest during the hydro peak freshet in weeks 16 to 21 and lowest during the Ontario summer demand peak in weeks 27 to 34.

There are four elements on the benefits side: the financial savings from decreased hydro and gas generation, the increased revenues from increased NX, and the financial benefits from avoided CO_2. We do not include any financial impact of nuclear given wind's minimal impact on this form of generation.

Our regression-based estimates indicate that wind decreases hydro generation by an average of 2.7 TWh/year over the 2020–2023 period. We calculate the effective price of that reduction by associating wind-related decreased hydro generation with forgone hydro production due to SBG conditions. OPG, which has 84 per cent of Ontario's hydro resources, reported forgone production of 2.2 TWh/year over the 2020–2023 period[18] so that for the sector as whole that would be 2.6 TWh/year, very close to the regression-based estimates. OPG was compensated for its forgone hydro generation at $30/MWh based on series of OEB-approved deferral accounts. During this period OPG's regulated hydro rate was $43/MWh, so the difference between that and the compensated price ($30/MWh) equals the per MWh savings from wind-decreased hydro ($13/MWh).

As discussed above, gas generation in Ontario is used as peaking and to back up wind and solar and not as "baseload," and is not generally subject to SBG-related reductions. The way gas has been contracted reflects its profile in Ontario. Indeed, about 70 per cent of gas generation is contracted under deemed revenue monthly payments designed to promote the availability of gas capacity when it is needed[19]. Under this specific contractual arrangement, the financial savings from displaced gas generation is equal to the value of the natural gas and other approved variable costs. The gas generation savings therefore are based on the

[18] *Ibid.*

[19] In summary, for each different gas plant IESO establishes a fixed dollar amount to pay for fixed capital and operational costs, as if there was no gas generation. From that amount IESO subtracts the net revenues that specific generator should have earned ("deemed revenues") in the market, after paying for the natural gas and other approved variable costs. Deemed hours of generation are those during which the HOEP exceeded the specific operator's approved net variable costs. To ensure stand-by capacity, this system "tops up" net energy revenues with a form of capacity payment to "make whole" the generators.

average 2020–2023 Dawn Hub natural gas price ($4.50/MMBtu) multiplied by the gas saved (54.1 million MMBtu/year). This is equivalent to $34.5/MWh for 7.0 TWh, to which we add $5/MWh as a proxy for the other variable costs.

We calculate revenues from NX by multiplying the average regression — based additional NX for the 2020–2023 period (2.2 TWh) by the average NX price of $37/MWh. For the financial valuation of avoided CO_2 we use a SCC of $50/t$CO_2$[20] and multiply it by the avoided emissions (2.9 MtCO_2) associated with the displaced gas.

The summary results of the 2020–2023 cost-benefit analysis are presented in Figure 7, which includes the two cost and four benefit elements as well as the overall cost-benefit. To facilitate comparisons with other scenarios, we calculate the cost-benefit result on a MWh basis, at -$124/MWh. This means that the costs of wind generation in Ontario during the 2020-2023 period far exceeded the corresponding climate and other benefits. This result is driven by the relatively high contracted wind price over the period ($151/MWh) and by our finding that while wind displaced some gas generation, it also displaced lower priced zero-emission hydro and contributed to lower priced NX.

We then move on to estimating the forward-looking cost-benefit analysis for the 2027–2030 period. We chose this period because it is relatively soon from an energy system perspective, and hence the regression parameters that we calculated for the 2020–2023 period are likely to remain reasonably valid. Our analysis serves for two scenarios. One is for the legacy wind projects whose 20-year contracts would expire in and around this period. As it has for other resources whose contracts have expired, there could be a mutual interest between IESO and wind IPPs to re-contract, depending on operational state of the resources. Our study provides an assessment of the price at which such a re-contracting could be cost-beneficial. Our work also serves to provide insight into the cost-benefit of new wind projects.[21]

For the 2027–2030 scenario we maintain most of the same parameters that we used for the 2020–2023 analysis other than update the natural gas price based on the average 2027–2030 forecast of $6.35/MMBtu.[22] As a base, we use a (rounded) reference wind price of $80/MWh, based on applying Ontario's wind capacity factor of 31 per cent to a recent levelized cost of energy (LCOE) study for wind.[23] Given the recent trajectory of wind LCOEs and uncertainty over its future evolution, we use the same nominal amount of $80/MWh for the 2027–2030 period.

Figure 8 presents the results for the 2027–2030 period, with a cost- benefit result of -$38/MWh. This result is based on a 10 per cent increase in wind generation relative to the baseline amount, but the size-normalized result of -$38/MWh equally applies to both re-contracted legacy and new wind projects. These results suggest that even at the lower reference price of $80/MWh relative to the $151/MWh that held during the 2020–2023 period, the costs associated with wind generation still exceed the corresponding climate and other benefits.

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[20] See *Bahramian, supra* note 2. Based on Government of Canada, "Carbon pricing: regulatory framework for the output-based pricing system" (last modified 31 January 2018), online: <www.canada.ca/en/services/environment/weather/climatechange/climate-action/pricing-carbon-pollution/output-based-pricing-system.html>.

[21] Conceptually, the biggest difference between the cost-benefit analysis of legacy or new projects would be the inclusion in the latter of the system and other costs of adding new wind. This would include new transmission resources to enable the expansion of wind, possibly new back-up or storage facilities and related ancillary services. While this type of detailed modelling is outside the scope of this study, it is important to keep in mind that these incremental costs are likely to be significant. For example, IESO estimates that the average cost of new transmission to 2050 for wind projects is in the range of $25/MWh. See Independent Electricity System Operator, *Pathways to Decarbonization* (Independent Electricity System Operator, 2022), online (pdf): <www.ieso.ca/-/media/Files/IESO/Document-Library/gas-phase-out/Pathways-to-Decarbonization.pdf>.

[22] Independent Electricity System Operator,. *2024 Annual Planning Outlook: Resource Costs and Trends* (Independent Electricity System Operator, 2024), online (pdf): <www.ieso.ca/-/media/Files/IESO/Document-Library/planning-forecasts/apo/Mar2024/Resource-Costs-and-Trends.pdf>.

[23] National Renewable Energy Laboratory, "2022 Cost of Wind Energy Review" (last visited 22 January 2025), online (pdf): <www.nrel.gov/docs/fy24osti/88335.pdf>.

Figure 7: Average cost-benefit of wind generation for 2020–2023, by week

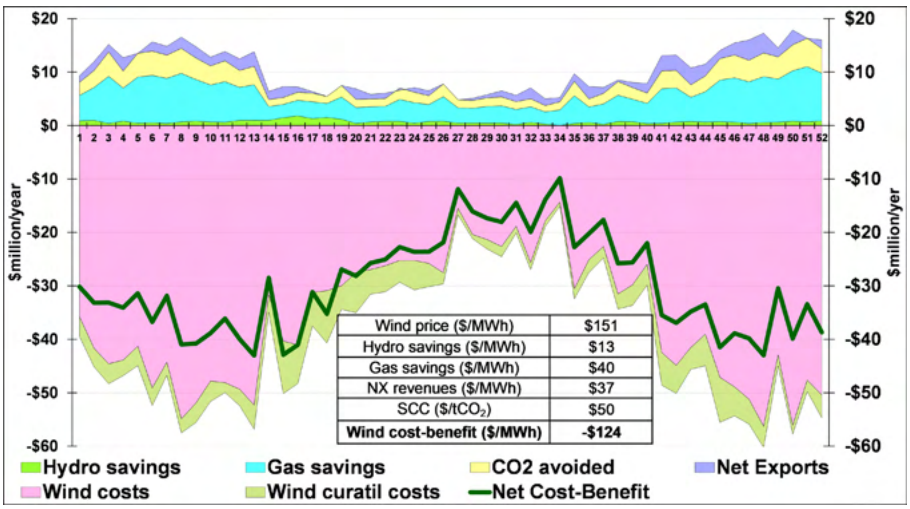
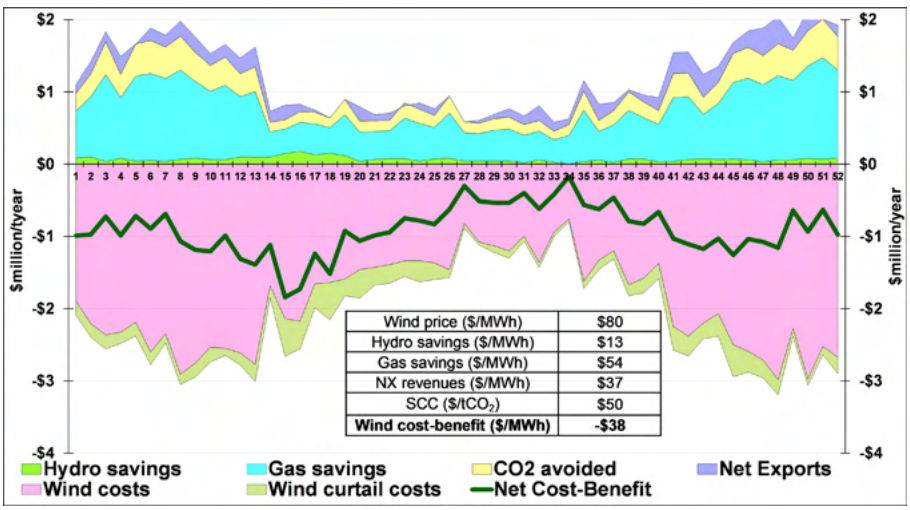


Figure 8: Average cost-benefit of wind generation for 2027–2030, by week



There are an infinite number of possible variations of the baseline and reference amounts to test the sensitivity of the reference 2027–2030 results. For example, we can calculate the "break even" wind price at $46/MWh that would be required to set the 2027–2030 cost-benefit = $0/MWh. The break-even price of $46/MWh is well below both the actual average 2020–2023 price of $151/MWh and the LCOE-based reference price for 2027–2030 of $80/MWh. We can calculate that with an SCC of $0 would result in a break-even wind price of $36 while an SCC=$150/tCO$_2$[24] results in a wind price of $67/MWh.

[24] Government of Canada, "Update to the Pan-Canadian Approach to Carbon Pollution Pricing 2023–2030" (last modified 5 August 2021), online: <www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/carbon-pollution-pricing-federal-benchmark-information/federal-benchmark-2023-2030.html>.

Our regression results are comparable to those of an earlier Ontario study,[25] suggesting that the results are robust relative to level of data aggregation and to time period. Ontario's wind emission offset is relatively low, at only 43 per cent of Texas (0.227 vs. 0.53 tCO_2/MWh)[26], for instance. This reflects that in Ontario 1.00 MWh of wind displaces only 0.56 MWh of gas, a relatively lower-emitting technology, compared to other regions where wind tends to displace relatively more coal and/or gas. Likewise, because of Ontario's relatively modest wind capacity factor, its wind capacity emissions offset is relatively lower than Texas, at just 37 per cent (0.072 vs. 0.196 tCO_2/MW per hour)[27].

POLICY DISCUSSION

Our analysis can inform policy options with respect to legacy and new wind projects.

For legacy wind projects whose contracts expire before 2030 the choice faced by owners will be either to decommission or to continue operations either "as is" or under partial/full repowering. Financially, the wind IPPs would recognize that re-contracting at or near $151/MWh is unlikely to be politically or economically feasible and that continuing operations could be done under a new contract with IESO or uncontracted, either a pure HOEP-only market merchant or with a third-party Power Purchase Agreement ("PPA"). From an IESO perspective, our analysis is clear that the societal break-even contract price is about $46/MWh. Assuming that the initial wind project financing in Ontario was for 20 years or less, at contract termination the incremental costs of long-term operation with no or modest partial repowering could well be at or below $46/MWh. In comparison, the relative attractiveness of the HOEP-only alternative would depend on long-term forecasts of the HOEP. The HOEP averaged $30 during 2020–2023 period, with an annual peak of $47 in 2022 during the energy crisis.

One approach would be for IESO to design and offer a wind re-contracting standard offer of $46/MWh for a maximum of a ten-year CfD-type mechanism. Wind IPPs would then be able to determine their decommissioning/continuation business decision based on this standard offer and their specific situation. Some wind operations would shut down, some will recontract with IESO, and some may continue operations either under a third party PPA or be pure merchant. By way of reference, for the Eastern US the average PPA in 2021–2022 was about $65/MWh[28].

On a stand-alone basis, not considering incremental transmission and other system costs, a similar cost-benefit perspective applies for new wind projects. From an IESO perspective, the same societal break-even contract price of about $46/MWh applies. However, the new build-based reference price results in a large gap between the social price ($46/MWh) and the private cost ($80/MWh). There are a number of options in this regard.

One option is to continue to move forward under the current private wind IPP contractual approach and for the IESO to design a competitive auction process with a maximum "reserve price" of $46/MWh. The reserve price is a critical because if it is set too high it could lead to a low value for money result for the public, but if set too low, wind IPPs may decide not to participate because it does not meet their target weighted average cost of capital ("WACC"). Another possibility is to discard the contractual approach in favour of financing and compensating wind projects based on cost-of-service economic regulation. There is no particular reason that wind should be treated any differently than the majority of generation resources in Ontario or Canada as a whole. The argument that the contractual approach is always superior to economic regulation simply does not hold for wind in Ontario over the last 20 years. Indeed, economic regulation could do a better job of aligning public costs with public benefits.

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[25] See *Bahramian*, *supra* note 2.

[26] *Harrison Fell*, *supra* note 2.

[27] *Ibid.*

[28] U.S. Department of Energy, *Land-Based Wind Market Report: 2023 Edition*, (Lawrence Berkeley National Laboratory: Wind Energy Technologies Office of the U.S. Department of Energy's Office of Energy Efficiency and Renewable Energy, 2023) online(pdf): <www.energy.gov/sites/default/files/2023-08/land-based-wind-market-report-2023-edition.pdf>.

A third option would be to leverage the larger economies of scale and lower cost of public financing and have new wind projects publicly-owned and operated. This is already the case of about half of the wind capacity in PEI[29] and is the thrust of the just-announced strategy in Quebec that aims to roll out 10 GW of new publicly-owned wind by 2035 that Hydro-Quebec claims could result in savings of as much as 20 per cent from centralized purchasing and other economies of scale.[30] The wind assets would enter OPG's regulated "rate base" and be subject to the lower cost of financing associated with provincially backed Crown corporations, compared to private financing.

CONCLUSION

Our research shows that costs of wind far exceeded its societal and climate benefits for the 2020–2023 period, with average net cost of -$124/MWh. Such a negative result is a combination of Ontario's relatively low wind emissions offset (0.227 tCO_2/MWh) and high wind prices ($151/MWh). We also undertook a forward-looking cost-benefit analysis for the 2027–2030 period and calculate an average net cost of wind of -$38/MWh based on a reference price of $80/MWh. The cost-benefit "break-even" wind price for the 2027–2030 period is $46/MWh.

Structurally, wind's value is relatively low in Ontario's current low-emission nuclear and hydro-dominant grid. Ontario's average wind capacity factor is relatively low. While wind technology could improve this performance in an absolute sense, it will not change the comparative disadvantage. Further, wind in Ontario is negatively correlated with gas generation, making it relatively inefficient at displacing it. Regardless of the price of wind, these structural shortcomings would remain in the short- and medium-term.

The challenge from a policy perspective is to implement programs that are sustainable over time and that align public costs with public benefits. The overall experience of wind generation in Ontario over the last twenty years has been that costs have far exceeded the benefits. Our hope is that this and other research contributions will provide the type of forward-looking guidance to ensure that any future wind development in Ontario is in the public interest. ■

[29] Prince Edward Island Energy Corporation, "What We Do" (last visited 22 January 2025), online (pdf): <www.peiec.ca>.

[30] Hydro-Québec *Charting the Course toward Collective Success: Wind Power Development Strategy*, (Québec: Hydro-Québec, 2024), online (pdf): <www.hydroquebec.com/data/a-propos/pdf/wind-power-development-strategy.pdf>.

INVESTOR PERSPECTIVES ON NATURAL GAS UTILITIES — A CANADIAN AND UNITED STATES REVIEW

Sam Brothwell[*]

In May of 2024, the Canadian Gas Association (CGA) and the American Gas Association (AGA) engaged MCR Performance Solutions, a management consulting firm dedicated to serving utilities, to update and expand a 2022 study, Investor Expectations on North American Natural Gas Utilities.[1] The updated report,[2] was released on November 7, 2024 and concludes that investors view natural gas utilities as attractive investments for maintaining stability in their portfolios while supplying a reliable and predictable Return on Equity (ROE).

HOW THE RESEARCH WAS DONE

Working with a Steering Committee of AGA and CGA member companies, MCR updated the 2022 foundational research, rolled the data forward, and targeted a wider group of equity and debt capital market participants to inform the investor perspective discussions. The expanded group of participants included sell-side analysts, buy-side portfolio managers, investment bankers, and credit rating agencies as well as some AGA and CGA member company financial executives. To promote candor, confidentiality and non-attribution were strictly maintained.

KEY FINDINGS:

In MCR's view, the gas utility industry's underlying commercial foundation remains solid. But regional policy challenges coupled with rapidly growing energy demand (and the urgent imperatives of affordability, security, resilience, and reliability) suggest there is potential in considering new commercial avenues — avenues that can both sustain a mature industry and align business strategies with important public policy and social objectives.

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* Sam is Vice President of Strategic and Financial Advisory with MCR Performance Solutions, a management consulting firm serving North American electricity and natural gas utilities. Sam's background includes a decade in utility industry corporate planning and investor relations, fifteen years on Wall Street as a senior equity and credit financial analyst and nearly a decade as a utility and pipeline investor. His background includes electricity, natural gas, and renewable energy. Sam has worked extensively with federal and state policy makers as well as non-government organizations involved in the energy and utility sectors, and he has spoken at numerous industry conferences and investment forums.

[1] Guidehouse, *Investor Expectations on North American Natural Gas Utilities*, (Ottawa: Canadian Gas Association, 2022), online (pdf): <www.cga.ca/wp-content/uploads/2022/07/Study-Investors_View_Natural_Gas_Utilities_as_Desirable_Investments.pdf>.

[2] MCR Performance Solutions, *Investor Perspectives on Natural Gas Utilities: A Canadian and United Stated Review,* (Ottawa: American Gas Association, 2024), online (pdf): <www.aga.org/wp-content/uploads/2024/11/AGA-CGA_Investor_Report_FINAL_11-5-24.pdf>.

Specifically, the report arrives at the following primary conclusions:

1. While rising interest rates and bond yields have mitigated the risk of lower regulatory allowed ROE, the latter have begun an upward inflection after many years of gradual decline. As of June 2024, average allowed ROEs stand at 9.83 per cent for U.S. gas utilities and 9.28 per cent for Canadian utilities.

2. Markets hold a consensus view that natural gas and related infrastructure will play a vital role in energy supply, security, and resilience for decades to come.

3. Investors allocate capital based on perceived risk and reward and "vote with their feet." To attract investment, utility regulatory returns need to exceed alternative investment opportunities—referred to as the opportunity cost of capital.

4. So-called "gas bans" and environmental, social, and governance (ESG) considerations that dampened investor interest in gas utilities five years ago have been reshaped by geopolitical and other events that have put energy security, access, and affordability at center stage.

5. Rising energy demand, including for electricity, presents an opportunity for gas utilities to play a key role in keeping North American energy secure, reliable, resilient, and affordable.

CANADIAN VERSUS U.S. RETURNS ON EQUITY CAPITAL

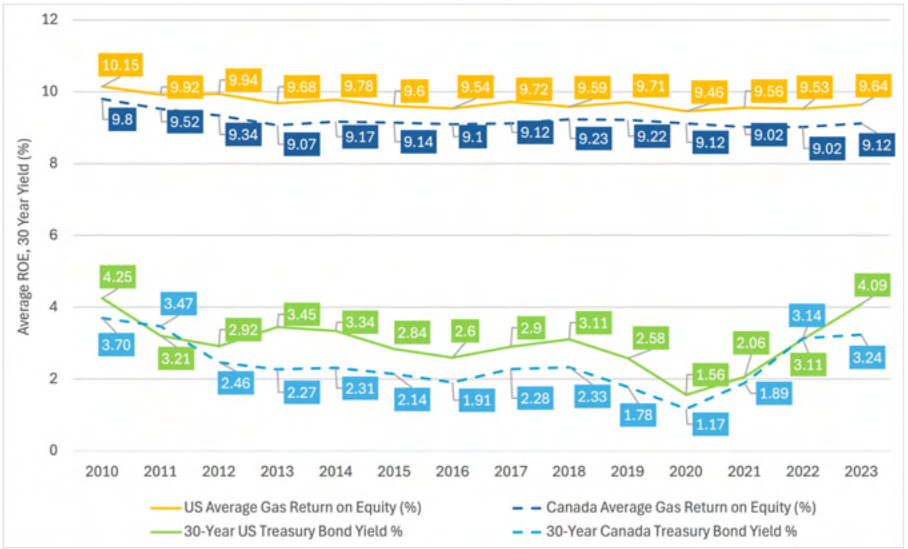
The research examined average allowed equity returns for Canadian gas utilities and concluded that they tend to lag those of their U.S. counterparts by 40 to 60 basis points, while equity as a percentage of total capitalization tends to average around 30 per cent versus 40 per cent to 50 per cent in the United States. Notably, a 2023 cost of capital decision[3] by the British Columbia Utilities Commission set gas utility ROE at 9.65 per cent with a capital structure equity component of 41 per cent. That proceeding specifically recognized increased business risks faced by gas utilities, including energy transition issues. Chart 1 below provides a historical perspective of average Canadian and U.S. gas utility ROE compared with government bond yields.

While the more modest returns on a smaller equity base arguably make Canadian utility investments less compelling on the surface, it was noted during the course of investor discussions that Canadian utility regulation typically uses forward-looking data, volume decoupling, and often greater flexibility for adjustment between regular rate cases. It was also noted that Canadian utilities rarely under-earn allowed ROEs and are somewhat more likely to over-earn.

Allowed ROE and capital structure drive investor capital allocation decisions. Over the past decade, several Canadian utilities have expanded southward into the U.S. market through merger activity, with Enbridge's recently completed acquisition of three U.S. natural gas utilities the most recent example. That acquisition follows cross-border deals by AltaGas, Algonquin Power and Utilities, Emera, and Fortis. Conversely, no U.S. utilities have ventured northward. The relatively higher allowed equity returns and greater allocation to equity in the regulatory capital structure are often cited as key considerations by acquiring Canadian utility companies.

[3] Generic Cost of Capital Stage 1 (5 December 2023), BCUC G-236-23, online: BCUC <www.ordersdecisions.bcuc.com/bcuc/decisions/en/item/521862/index.do#:~:text=For%20FBC%2C%20a%20deemed%20equity,allowed%20ROE%20of%209.65%20percent.&text=The%20Panel%20determines%20that%20the,%2C%20effective%20January%201%2C%202023>.

Chart 1: Canadian and U.S. Gas Utility ROE and Bond Yield History[4]



IMPORTANCE OF CAPITAL COST TO UTILITY CUSTOMERS

While the regulatory process is often viewed as a balancing act between the competing interests of customers and shareholders, utilities are infrastructure companies characterized by high levels of capital investment. As such, they need ready access to capital to finance not only the building, but also the maintenance of their systems. Like other costs of running the utility enterprise, financing is reflected in rates, meaning that customers benefit when utilities have ready access to capital on the most favourable economic terms.

THE ONGOING ROLE FOR NATURAL GAS

All of the study participants saw an ongoing role for natural gas over a period of decades. As one discussant noted, "No sophisticated person thinks gas is going away." Analysts and investors pointed to the ongoing dependence on natural gas of states with even the most aggressive decarbonization policies. The ongoing use of carbon-intensive fuel oil in the Northeastern U.S. was also mentioned as being rather paradoxical, especially in states where natural gas supplies aren't constrained. The ongoing use of natural gas in power generation was cited as well, although discussants didn't see that as having much of an impact on gas LDCs. Investors expressed a clear preference to invest in states with more gas-friendly policies.

The challenges associated with phasing out natural gas were frequently raised. Investors, as well as a few combination utility company executives, observed that electrifying gas heating in cold climates could require a threefold increase in electrical capacity, an unrealistic scenario that most believe could exert massive upward pressure on customer rates, even if it were technically achievable. One combination utility executive noted that in order to address numerous investor inquiries about the strategic positioning of its gas LDC operations, the company added disclosure to an investor presentation quantifying the significant economic burden that full electrification would impose on its customer base.

The variable, non-dispatchable nature of wind and solar was also discussed. While battery deployment continues to grow, so does the

[4] S&P Global, *Analyst Estimates.*

demand for power. In several conversations, it was noted that battery storage is costly and inefficient compared to natural gas as a proxy for longer-term seasonal storage, as solar output declines in winter months.

CONCLUSION

A successful energy transition that sustains reliability and affordability for consumers will require continued investment in the systems that transport and deliver electricity and natural gas. Attracting investor capital on favourable economic terms depends on offering a compelling risk / reward profile relative to other investment alternatives. By speaking directly with investors, analysts, and other capital market participants, this study captures valuable insights into factors shaping the capital allocation process. ■

COMMENTS RE: "ACCELERATING ELECTRIFICATION BY LOWERING ITS OPERATING COSTS THROUGH TECHNOLOGY-SPECIFIC MARGINAL COST PRICING", BY DR. AHMAD FARUQUI

*Carl R. Danner and Philip Quadrini**

EDITORS INTRODUCTION

The last issue of *Energy Regulation Quarterly* (*ERQ*) included an article by Ahmad Faruqui on "Accelerating Electrification by Lowering its Operating Costs Through Technology-Specific Marginal Cost Pricing"[1]. Two Comments on that article follow.

As a forum for discussion and debate on issues affecting regulated energy industries, *ERQ* welcomes reader comments.

Carl R. Danner

I appreciated this article from Dr. Faruqui, and can see the appeal of price discrimination to benefit incremental loads for purposes that policy makers favour. To the extent feasible, it would preserve the position of other customers and loads as he mentioned. This has been a point raised in other instances of preferred prices for incremental demands, such as the low gas rates sometimes offered years back to industrial customers who had the ability to switch to oil fuels.

At the same time, this proposal raises some practical and philosophical questions, such as the following:

1. For a customer who adopts the new technology, how much electricity should be offered at the preferential rate? Is

[1] Ahmed Faruqui, "Accelerating Electrification by Lowering its Operating Costs Through Technology-Specific Marginal Cost Pricing" (2024) 12:4 Energy Regulation Q 14, online (pdf): <energyregulationquarterly.ca/wp-content/uploads/2024/12/ERQ_Volume-12_Numero-4-2024.pdf>.

* Carl R. Danner is an economist and Managing Director with Berkeley Research Group. He has addressed energy issues both inside government and as a consultant to a wide range of clients.

Philip Quadrini designed PG&E's residential electric rates for a quarter century, from 1994 to 2018. This included testifying before the California Public Utilities Commission as an Expert Regulatory Analyst on electric rate matters involving the residential and small commercial classes. He designed California's first electric vehicle rate in 1995 and its first battery storage rate in 2018.

there a way to track actual incremental usage? How much error is likely if simple measures are attempted (like pre and post bill comparisons)? What about a simple block discount entitlement (e.g. heat pump = a set number of kilowatt-hours at the marginal cost rate)?

2. What about arbitrage possibilities, such as by drawing household electricity usage from the car battery? Or charging up the car to replenish the neighbour's home batteries before charging it up again? Would such a large price incentive spur increasingly innovative responses? My favourite creative example was a discovery by California Public Utilities Commission staff of a fake mockup oil tank and pipes at an industrial facility seeking to pay a lower gas rate meant for those with fuel-switching capability. If we called usage for non-intended purposes "leakage", how much might be anticipated under this rate proposal?

3. What makes electricity demands for EVs and heat pumps so worthy compared to other demands that are now being suppressed due to California's high electricity prices? Why are the preferences of government officials so important and those of members of the public (for themselves) to be overlooked?

4. With regard to the fixed charge recently imposed on electricity bills from large California utilities (to reduce, somewhat, the high usage rates), would a more apt nationwide comparison involve the percentage of the bill rather than an average dollar amount? On the same dollar to dollar basis, what is the ratio of per-kWh rates for CA versus those across the nation? Given CA's supersized bills, might larger fixed charges just come along as an unfortunate part of the package?

5. For heat pump adoption including realistic installation costs and for full lifecycle electric vehicles, what is the per ton carbon abatement cost? How do those change if one includes reasonable estimates for consumer welfare losses due to forced or pressured adoption? (While this is beyond the scope of Dr. Faruqui's analysis, these are important questions and perhaps someone has addressed them.)

6. The expense of electric vehicles and heat pump adoption might suggest that wealthier people would disproportionately benefit from this policy. Is that accurate, and if so, acceptable?

7. Might Dr. Faruqui's proposal be extended to operators of vehicle charging stations as well? Could they be offered more sophisticated wholesale prices, e.g. a clearance rate during times of excess solar output?

I hope these questions will be of interest to readers of Dr. Faruqui's analysis.

Philip Quadrini

Dr. Faruqui's article[2] explains how electric rate design can be a barrier to the adoption of green end-use technologies and why these technologies should be priced at the utility marginal cost.

In my San Francisco Chronicle op-ed[3], I proposed charging for incremental green usage at the lower Tier 1 (baseline) rate. Richard McCann, of M-Cubed, pointed out to me afterward that the utility marginal cost is much more cost-based and lower. I could not disagree.

First, I would like to propose a simpler rate design than what Dr. Faruqui proposes: instead of using changes in a customer's load shape to apply the marginal cost rate, apply it to pre-determined usage levels for each particular green technology, provided the customer is on an accurately designed Time of Use (TOU) rate.

For example, electric vehicle customers would be charged the marginal cost rate for their first 300 kWh of monthly usage (or receive a commensurate discount), regardless of their

[2] *Supra* note 1.

[3] Philip Quadrini, "I used to design PG&E rates. How to fix California's high fees" (15 July 2024), online: <www.sfchronicle.com/opinion/openforum/article/pge-fixed-fees-california-19563400.php>.

actual EV charging. Pacific Gas and Electric Compagny ("PG&E") already uses this method for customers with medically necessary equipment: 500 kWh/month at the lower Tier 1 (baseline) rate. This rate design change could be implemented relatively quickly and is easy for customers to understand.

Second, there is no need to charge the marginal cost rate for heat pumps during the months of May through October since the heat pump replaces the pre-existing air conditioner. Hence, there is no net increase in usage during these months.

Finally, Dr. Faruqui proposes adding capacity cost to the rate design "if electrification in certain zones bumps into distribution capacity constraints."[4] This may already be an issue with electric vehicles. Unless the EV owner is on a TOU rate, the owner will most likely plug in their EV when they return from work in the early evening when distribution demand is highest. Most EV customers are not on a TOU rate; neither are the vast majority of legacy solar customers. This can and will lead to capacity additions and rate increases.

The best way to avoid this is to first, require all customers to be on a TOU rate, and second, set the peak period at 6PM-9PM, with a shoulder peak one hour before and one or two hours after. (This is more accurate than PG&E's current 4PM-9PM peak period.) However, it may be necessary to have a modestly different peak period in coastal areas where the load shape is different.

Heat pumps represent a potential costly impact to the grid in areas without air conditioning. Areas *with* air conditioning, representing more than 60 per cent of PG&E customers, can easily handle increased winter loads from heat pumps because their circuits and local distribution systems were designed for much high summer loads. But communities without air conditioning, suc h as Berkeley, have little excess capacity in the winter to absorb new load from heat pumps. Unlike an EV, which is used year-round, using a heat pump for space heating is largely limited to just five months of the year. Therefore, it may not be cost-effective to encourage adding heat pumps on some circuits. Finally, anyone who adds a heat pump to a house with no air conditioning – as in Berkeley – will most likely use it as an air conditioner during summer heatwaves and cause spikes in summer loads. This could also increase costs.

To summarize, marginal cost pricing is the right solution for incremental green electricity, but only if the peak period is designed to avoid or minimize costly load increases. This requires each utility to identify, for each circuit and local distribution area, the times of the day and months when green electrification increases distribution costs, then devise the least-cost solution(s) to mitigate it. However, since utilities increase their profits by adding capacity to the grid, this is going to require legislative and regulatory oversight. ■

[4] *Supra* note 1 at 17.