ENERGY REGULATION QUARTERLY

VOLUME 14, ISSUE 1 2026

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).

ENERGY REGULATION QUARTERLY

TABLE OF CONTENTS

EDITORIAL

Managing Co-Editors
Karen J. Taylor and Moin A. Yahya

ROLLERCOASTER ABROAD

The geopolitical rollercoaster that characterized 2025 has continued unabated since we wrote our last editorial in September for Issue 4 of Volume 13. At this juncture, it is difficult to suggest that the remainder of 2026 will be anything but more of the same. There were, however, three notable developments that are likely to have consequential implications for Canada internationally and at home, particularly as it relates to energy and trade.

2025 U.S. National Security Strategy

Released on December 5, 2025, the 2025 U.S. National Security Strategy ("NSS") sets out the U.S.' foreign policy principles, priorities, and a focus on global regions. It is a significant departure from traditional U.S. NSS norms and realigns the position of the U.S. in the world order[1] — declaring that the U.S. "must be preeminent in the Western Hemisphere as a condition of its security and prosperity"[2]. As discussed by the Asia Pacific Foundation of Canada[3], "allies — including Canada — are expected to align with Washington's economic statecraft"[4] — alignment "of hemispheric security and co-ordinated economic statecraft take precedence over national discretion, particularly as it relates to China"[5]. Defence and security critiques of the NSS suggest that the planned abandonment of core investments by the U.S. in "security, open trade, democracy, and alliances…the underpinnings of global peace will not make America First; it will make America weak"[6].

Venezuela

Escalating action on Venezuela by the U.S. arguably began in January, 2025, with the signing of an executive order that "paved the way for criminal organizations and drug cartels to be named "foreign terrorist organizations"."[7] Increasingly assertive actions continued throughout 2025. After initiating strikes on small vessels in the Caribbean Sea in September, 2025 (a significant portion of which were associated with Venezuela) in an effort to fight maritime drug trafficking in Latin America[8] and ramping up the pressure on the Maduro regime by seizing oil tankers that operate without U.S. permission and transport oil from Venezuela,

[1] Gisela Grieger, European Union, Parliamentary Research, "The 2025 US National Security Strategy", PE 779.261 (December 2025).

[2] Vina Nadjibulla, "What Trump's New National Security Strategy Means for Canada's China Policy and Indo-Pacific Engagement" (8 December 2025) Asia Pacific Foundation of Canada, online: <asiapacific.ca/publication/what-trumps-new-national-security-strategy-means-for-canada>.

[3] *Ibid*.

[4] *Ibid*.

[5] *Ibid*.

[6] Emily Harding, "The National Security Strategy: The Good, the Not So Great, and the Alarm Bells" (5 December 2025) Center for Strategic International Studies, online: <csis.org/analysis/national-security-strategy-good-not-so-great-and-alarm-bells>.

[7] Ben Finely, Konstantin Toropin & Regina Garcia Cano, "A timeline of U.S. military excalation against Venezuela leading to Maduro's capture" (3 January 2026) PBS News, online: <pbs.org/newshour/world/a-timeline-of-u-s-military-escalation-against-venezuela-leading-to-maduros-capture>.

[8] "United States strikes on alleged drug traffickers during Operation Southern Spear" (last visited 21 February 2026) Wikipedia, online: <en.wikipedia.org/wiki/United_States_strikes_on_alleged_drug_traffickers_during_Operation_Southern_Spear>.

Russia or Iran in contravention of the sanctions imposed by the U.S. and other countries[9], the Trump Administration approved a military strike on Venezuela and on January 3, 2026 captured its president Nicolás Maduro and his wife, Chilia Flores. Despite inditing Maduro and Flores for narco-terrorism[10], President Trump confirmed shortly thereafter that "having a Venezuela that's an oil producer is good for the United States because it keeps the price of oil down"[11] and that "Venezuela will be turning over between 30 and 50 MILLION Barrels of High Quality, Sanctioned Oil, to the United States of America"[12]. A meeting with U.S. and international major oil producers on January 9 confirmed President Trump's overarching interest in Venezuelan oil — both investments to revitalize oil production[13] and monies realized from the sale of confiscated Venezuelan oil[14].

Greenland

President Trump's fixation on Greenland resumed shortly after his re-election, in December 2024 when he stated in a Truth Social post that "the ownership and control of Greenland is an absolute necessity"[15]. Actions and escalations continued through 2025 and into these early weeks of 2026[16]. With the release of the 2025 U.S. National Security Strategy and U.S. actions in Venezuela, it is clear that Greenland, Denmark, and the European Union broadly are taking these unwanted overtures seriously[17], particularly in the face of the imposition of new tariffs on eight European countries — Denmark, Norway, Sweden, France, Germany, the United Kingdom, the Netherlands, and Finland — for opposing American control of Greenland, beginning at 10 per cent on February 1 and increasing to 25 per cent in June. The U.S. risks triggering the collapse of North Atlantic Treaty Organization ("NATO")[18] and the use of the EU's anti-coercion instrument, the so-called "trade bazooka", which could impose a broad array of actions, including blocking U.S. access to EU markets[19].

The Trump administration's Greenland agenda is not without risk in the U.S., as seven in 10 U.S. adults disapprove of Trump using federal funds to try to purchase Greenland[20] and 86 per cent disapprove of using force to obtain the territory[21].

It remains unclear however, whether escalating U.S. interest is purely related to security concerns, or whether it is punishment for President Trump's failure to win the Nobel Peace Prize.[22] One can only hope that as the

---

[9] Christiaan Triebert, Nicholas Nehamas & John Ismay, "U.S. Forces Seize Sixth Oil Tanker Linked to Venezuela" (15 January 2026) *The New York Times*, online: <nytimes.com/2026/01/15/us/politics/oil-tanker-seized-venezuela.html>.

[10] JURIST Staff, "The Charges Against Nicolás Maduro: What the Indictment Alleges", *JURISTnews* (5 January 2026), online (blog): <jurist.org/features/2026/01/05/the-charges-against-nicolas-maduro-what-the-indictment-alleges>.

[11] Kayla Epstein & Osmond Chia, "Trump says Venezuela will be 'turning over' up to 50 million barrels of oil to US" *BBC* (7 January 2026), online: <bbc.com/news/articles/c4grxzxjjd8o>.

[12] *Ibid*.

[13] Natalie Sherman, "Trump seeks $100bn for Venezuela oil, but Exxon boss says country 'uninvestable'" *BBC* (10 January 2026), online <bbc.com/news/articles/c205dx61x76o>.

[14] *Supra* note 11.

[15] Avery Lotz, "Trump's Greenland threats leave allies sweating: How we got here" *AXIOS* (7 January 2026), online: <axios.com/2026/01/07/trump-greenland-denmark-threats-timeline>.

[16] *Ibid*.

[17] "In their words: European governments criticize Trump's tariff threats over Greenland" *The Associated Press* (18 January 2026), online: <apnews.com/article/greenland-denmark-trump-europe-reaction-57db561ff97b038fef951cd9770b5a74>.

[18] Avery Lotz, "Trump defiant as NATO rages over Greenland "blackmail" tariffs" *AXIOS* (19 January 2026), online: <axios.com/2026/01/19/trump-greenland-nato-tariffs-europe-denmark-norway>.

[19] Auzinea Bacon, "Trump has tariffs. Europe has a 'trade bazooka.' This Greenland standoff could get ugly, fast" *CNN* (19 January 2026), online: <cnn.com/2026/01/18/business/europe-greenland-trump-tariffs-trade>.

[20] Anthony Salvanto et al, "CBS News poll finds more Americans say ICE being too tough; Republicans feel protesters have gone too far" *CBS News* (18 January 2026), online: <cbsnews.com/news/ice-trump-greenland-trump-poll>.

[21] *Ibid*.

[22] Aamer Madhani, Geir Moulson & Emma Burrows, "Trump ties his stance on Greenland to not getting Nobel Peace Prize" *The Associated Press* (20 January 2026) online: <apnews.com/article/greenland-denmark-us-trump-starmer-9b01eb577363ee6e913722fe3d40d68e>.

political realities of the upcoming mid-term U.S. elections become more pronounced, rhetoric from the Trump Administration relating to Greenland will ebb.

Canada and the EU Respond

Perhaps in recognition that "hope" is not a strategy, Canada and its European allies are continuing to pursue global partnerships and trading relationships, demonstrating their continued agency in these matters and negotiating around the edicts promulgated in the 2025 U.S. National Security Strategy. On January 17, 2026 the European Union and Mercosur[23] ended 25-years of negotiation by signing a Partnership Agreement ("EMPA") and Interim Trade Agreement creating one of the world's biggest free-trade zones[24] and Prime Minister Carney continues to advance new strategic partnerships with China[25], Qatar[26], and Saudi Arabia[27] to position Canada in the "world as it is, not as we wish it"[28].

At the time of writing this editorial, Prime Minister Carney is in Davos, delivering what is being reported as a "provocative speech"[29]; "amounting to a rallying cry for smaller counties to work together to wrestle economic control of their future"[30]. The Prime Minister's remarks[31] clearly set out the imperative of the moment and Canada's path for the future. An adverse reaction by the Trump Administration at some point in the coming days or weeks does, however, remains a real risk.

BUMPER CARS AT HOME

The question is, of course, whether the Canadian federation is institutionally flexible enough and the players therein are sufficiently motivated to make our experiment in co-operative federalism work for the benefit of all Canadians, sooner rather than later.

There have been positive developments that point to a spirit of greater willingness to cooperate. On November 27, the governments of Canada and Alberta signed a Memorandum of Understanding ("MOU")[32] to work cooperatively, and within their own jurisdictions, striking a new partnership to lower emissions, unlock natural resources, and build a stronger, more sustainable, and more competitive

---

[23] Mercosur is comprised of Argentina, Brazil, Paraguay and Uruguay. Bolivia, Mercosur's newest member was not involved in the negotiations but is able to join the agreement in the coming years.

[24] European Commission, "EU-Mercosur agreement" (last visited 22 January 2026), online: <policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement_en>. Isabel Debre, "Forget tariff wars: The EU and Mercosur build one of the world's biggest free-trade zones" *The Associated Press* (15 January 2026), online: <apnews.com/article/argentina-mercosur-european-union-trade-lula-mile i-trump-china-c61f55cd655fd8695f3edcd6ee5a5b9e>.

[25] Prime Minister of Canada, News Release, "Prime Minister Carney forges new strategic partnership with the People's Republic of China focused on energy, agri-food, and trade" (16 January 2026), online: <pm.gc.ca/en/news/news-releases/2026/01/16/prime-minister-carney-forges-new-strategic-partnership-peoples>.

[26] Prime Minister of Canada, News Release, "Prime Minister Mark Carney of Canada and Amir of Qatar His Highness Sheikh Tamim bin Hamad Al Thani commit to deepening bilateral engagement and economic cooperation" (18 January 2026), online: <pm.gc.ca/en/news/statements/2026/01/18/prime-minister-mark-carney-canada-and-amir-qatar-his-highness-sheikh>.

[27] Natural Resources Canada, News Release "Canada strengthens critical minerals and energy partnership with the Kingdom of Saudi Arabia at the 2026 Future Minerals Forum" (14 January 2026), online: <canada.ca/en/natural-resources-canada/news/2026/01/canada-strengthens-critical-minerals-and-energy-partnership-with-the-kingdom-of-saudi-arabia-at-the-2026-future-minerals-forum.html>.

[28] Amy Hawkins & Leyland Cecco, "Mark Carney in China positions Canada for 'the world as it is, not as we wish it'" *The Guardian* (17 January 2026), online: <theguardian.com/world/2026/jan/17/mark-carney-in-china-positions-canada-for-the-world-as-it-is-not-as-we-wish-it>.

[29] John Paul Tasker, "'The old order is not coming back,' Carney says in provocative speech at Davos" *CBC* (20 January 2026), online: <cbc.ca/news/politics/carney-davos-speech-9.7052725>.

[30] Mike Blanchfield, "Canada's Mark Carney calls on world to adapt to 'rupture' caused by 'great powers'" *Politico* (20 January 2026), online: <politico.com/news/2026/01/20/carney-trump-davos-great-powers-00736740>.

[31] Prime Minister of Canada, News Release, "'Principled and pragmatic: Canada's path' Prime Minister Carney addresses the World Economic Forum Annual Meeting" (20 January 2026), online: <pm.gc.ca/en/news/speeches/2026/01/20/principled-and-pragmatic-canadas-path-prime-minister-carney-addresses>.

[32] Prime Minister of Canada, News Release, "Canada-Alberta Memorandum of Understanding" (27 Novembre 2025), online: <pm.gc.ca/en/news/backgrounders/2025/11/27/canada-alberta-memorandum-understanding>.

economy[33]. In addition, Ontario and Canada have signed a new cooperation "agreement that will significantly streamline environmental approvals for major infrastructure and resource projects through a 'one project, one decision' model"[34]. Ontario has now joined the ranks of British Columbia, Manitoba, Prince Edward Island, and New Brunswick, all of whom have signed similar agreements. Cooperation agreements with Quebec, Newfoundland and Labrador, Nova Scotia, Saskatchewan, Alberta, and Yukon remain in discussion[35].

The effort to build interprovincial energy infrastructure, particularly an oil pipeline to northwestern B.C. continues to face significant challenges, not withstanding the positive narrative surrounding the Canada-Alberta MOU, including:

- Outcome of the settlement negotiations between Trans Mountain Pipeline ULC and its shippers[36]. At issue is the inclusion of more than $9 billion in cost overruns in final interim tolls.[37]
- Lack of a private sector proponent and the likely need for a provincial or federal financial commitment to backstop cost overruns.[38]
- Outcome of a potential Alberta vote on separation in 2026[39] and the outcome of 24 citizen recall petitions faced by UCP Members of the Legislative Assembly, more than half of the 47-member caucus[40].
- Need to build a political consensus on public support for building a new pipeline to the northern coast of British Columbia[41].
- Development of a pathway to address the concerns of coastal First Nations in a manner consistent with the principles of truth and reconciliation.

Domestic challenges aside, there is new pressure to speed up major project approvals following the Trump Administration's actions in Venezuela, as argued by Alberta Premier Danielle Smith in her letter to the

[33] Prime Minister of Canada, News Release, "Canada and Alberta strike new partnership to lower emissions, unlock our natural resources, and build a stronger, more sustainable, and more competitive economy" (27 Novembre 2025), online: <pm.gc.ca/en/news/news-releases/2025/11/27/canada-and-alberta-strike-new-partnership-lower-emissions-unlock-our>.

[34] Office of the Primer of Ontario, News Release, "Ontario and Canada Sign Historic Cooperation Agreement to Eliminate Federal Duplication and Unlock the Ring of Fire" (18 Decembre 2025), online: <news.ontario.ca/en/release/1006884/ontario-and-canada-sign-historic-cooperation-agreement-to-eliminate-federal-duplication-and-unlock-the-ring-of-fire>.

[35] Aya Dufour, "Deregulation or cooperation? 5 provinces now have deals with Ottawa on project assessment" *iPolitics* (3 Decembre 2025), online: <ipolitics.ca/2025/12/03/impact-assessment-draft-agreement-ontario-ring-of-fire-environment-concerns-first-nations/#:~:text=The%20federal%20government's%20efforts%20to,offloading%20responsibilities%20to%20th e%20provinces>.

[36] *Trans Mountain Pipeline ULC* (27 October 2025), RH-002-2023, online: Canada Energy Regulator <docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90465/92835/552980/4301738/4369664/4369668/4606639/C36946-1_TM_Interim_Tolls_-_RH-002-2023_Ruling_No._31_-_Trans_Mountain_Pipeline_ULC%E2%80%99s_request_for_the_proceeding_to_be_placed_in_abeyance_-_A9Q4J4.pdf?nodeid=4603692&vernum=-2>.

[37] Shawn McCarthy, "Trans Mountain Pipeline Tolls Could Leave Feds on the Hook for Billions in Further Costs" *The EnergyMix Solutions Journalism for Now* (2 October 2025), online: <theenergymix.com/trans-mountain-pipeline-tolls-could-leave-feds-on-the-hook-for-billions-in-further-costs>.

[38] Joel Dryden, "Chance of privately developed pipeline almost 'zero' if no government backstop: former Alberta energy minister" *CBC* (9 January 2026), online: <cbc.ca/news/canada/calgary/chance-of-privately-developed-pipeline-almost-zero-if-no-government-backstop-former-alberta-energy-minister-9.7040397>.

[39] Don Braid, "Braid: Alberta will vote on separation in 2026. If it passes, where will Smith stand?" *Calgary Herald* (26 Decembre 2025) online: <calgaryherald.com/opinion/columnists/braid-alberta-will-vote-on-separation-in-2026-if-it-passes-where-will-smith-stand>.

[40] The Canadian Press, "A look at the 26 Alberta politicians facing citizen recall petitions" *CBC* (24 Decembre 2025), online: <cbc.ca/news/canada/edmonton/alta-recall-quicklist-9.7027535>.

[41] Ariel Rabinovitch, "Most Canadians support oil and gas expansion, differ on priorities: Ipsos" *Global News* (18 Decembre 2025), online: <globalnews.ca/news/11583250/oil-gas-pipelines-ipsos-poll-2025>.

Prime Minister posted to social media on January 8, 2026[42]. Premier Smith reiterated the need for a new one million barrel per day oil pipeline to Canada's pacific coast and the expansion of the Trans Mountain pipeline, and insisted that the approval process be shortened ever further to six months from application. Even with the tepid reaction[43] from the major oil producers to President Trump's request for at least US$100 billion in spending for Venezuela and aggressive efforts to bolster production[44], oil and gas analysts at BMO Capital Markets suggest that any material increase in production from Venezuela that makes its way to the United States would likely push Canadian oil sands production out of the Gulf Coast market (Petroleum Administration Defense District 3), requiring additional pipeline capacity to access Asian markets[45].

THIS EDITION

It is tradition that the first issue of ERQ of each year include a review of the developments in administrative law relevant to the energy bar and regulators. This year is no exception, and we are pleased to once again present as a Regular Feature the "2025 Developments in Administrative Law Relevant to Energy Law and Regulation" by Paul Daly, University Research Chair in Administrative Law & Governance, University of Ottawa. This year's edition covers three key areas: (1) extension of the *Vavilov* framework to cover areas of administrative decision-making that were not yet subject to the "culture of justification"; (2) recent cases on the correctness review; and (3) cases relating to aspects of procedural fairness, including bias and adjudicative independence.

The remainder of the articles from our contributing authors in this issue of ERQ have a decidedly electricity grid focus.

The first is an article by David Morton, former Chair and CEO of the British Columbia Utilities Commission and Advisory Board Member of the Canadian Energy Reliability Council, entitled: "Interprovincial Cooperation and Energy Reliability". Morton explores the governance and institutional structures needed in Canada to enable the movement of electric power east - west by looking at the Alberta experience, analyzing the Canadian federal jurisdiction over international and interprovincial power lines, and reflecting on the evolution of the U.S. Federal Energy Regulatory Commission's jurisdiction over interstate transmission, wholesale energy markets, and reliability. Morton concludes that the challenge of interprovincial cooperation is less about electrons than about institutions and trust and that Canada's energy future depends on the development of a rules-based partnership between provinces.

David Brown, Professor of Economics at the University of Alberta and Canada Research Chair in Energy Economics and Policy, outlines several key elements of ongoing electricity market reforms in Alberta, in his article: "Simplified Versus Integrated Market Designs: A Review of Alberta's Evolving Electricity Market". Brown begins by describing Alberta's existing market design, how it developed growing pains over time, and explores approaches used in other jurisdictions to mitigate these challenges. Brown uses the experience and empirical evidence from jurisdictions worldwide to highlight the trade-offs being made in Alberta's final proposed Restructured Energy Market (REM), particularly as it relates to the short-run operation of the electricity market. How the proposed REM interacts with long-run resource adequacy objectives is also discussed, before Brown concludes with the parting thought that time will tell whether the design choices in the proposed REM will lead to additional required market reforms in the future.

Brady Yauch, Director, Markets and Regulatory, and Brendan Callery, Senior Manager Eastern Canada, both of Power Advisory LLC, discuss

[42] The Canadian Press, "Alberta's Smith Calls on Carney to Speed Up Major Project Approvals" (11 January 2026), online: <energynow.ca/2026/01/albertas-smith-calls-on-carney-to-speed-up-major-project-approvals>.

[43] "Our perspective regarding the situation in Venezuela as shared with President Trump" *ExonMobil* (9 January 2026), online: <corporate.exxonmobil.com/news/news-releases/2026/our-perspective-regarding-the-situation-in-venezuela#Darrendeliveredthefollowingremarks>.

[44] Natalie Sherman, "Trump seeks $100bn for Venezuela oil, but Exxon boss says country 'uninvestable'" *BBC* (10 January 2026), online: <bbc.com/news/articles/c205dx61x76o>.

[45] Randy Ollenberger & Phillip Jungwirth, *Trump Card: Venezuela's Oil*,(Bank of Montreal, 2026), online: <research.bmo.com/report/b9d39b04-f712-4aba-b8a6-6a20332f2f5b>.

the arrival of the electricity Market Renewal Program in Ontario on May 1, 2025 in their article: "Breaking Up is Hard to Do: Ontario's Transition to a New Market Design". Yauch and Callery first discuss five of the well-understood and well-known deficiencies of the legacy market in Ontario that dated back to market opening in 2002, before discussing four key overarching design components that are central to the overhaul of the renewed market. Yauch and Callery highlight the expected financial benefits associated with improving the economic efficiency of the IESO-administered market and note that the market design of the Market Renewal Program broadly aligns with the design of markets across North America, particularly in New York, New England and the mid-western to eastern United States. The authors provide a detailed assessment of energy market performance for the more than six months the renewed market has been in operation, before closing with the thought that the impact of Ontario's changing electricity supply/demand balance may lead to amplified price impacts that are independent of the renewed market design.

The article: "Regulatory Questions for Grid Modernization" by Kenneth Costello, former regulator with the Illinois Commerce Commission and researcher at the U.S. National Regulatory Institute, continues the focus on electricity grids, albeit at the distribution level. Costello postulates that robust support for grid modernization from diverse interests should not presume its social desirability and net benefits to utility customers. Utility regulators should perform their due diligence to determine whether grid modernization investments are good for customers and society in general. Costello sets out nine critical questions that regulators should ask when considering grid modernization investments. The article then concludes with a brief overview of three key challenges regulators must overcome when considering grid modernization: information asymmetry, risk allocation, and the consequences for cost allocation and rate design.

The final article in the electricity grid theme, "Beyond Queue Seniority: Customer-Centric Solutions for Interconnection Scarcity" by Travis Kavulla, Head of Policy, Base Power Company, and Kevin Thompson, Regulatory Affairs Manager at NRG Energy, addresses the issue of congestion on the grid given that transmission capacity is become scarce. Whether it is the growth in renewables or the arrival of data centres, the era of abundant transmission capacity is over. The old system of "first-in-time, first-in-right" doesn't seem to be working anymore. The article examines how American and Canadian jurisdictions have been approaching the question and then proposes a market-based approach to solving the allocation of transmission capacity.

We conclude this issue with a book review of Bruce McIvor's latest book "Indigenous Rights in One Minute: What you need to know to talk reconciliation". University of Alberta Faculty of Law Professor Tamara (Baldhead) Pearl reviews the book and provides an excellent context for the reader to situate McIvor's book in modern day aboriginal law. The book review not only provides a useful overview of the book, it also provides Professor Pearl's professional and personal insights on the state of law affecting Indigenous rights in Canada. ■

2025 DEVELOPMENTS IN ADMINISTRATIVE LAW RELEVANT TO ENERGY LAW AND REGULATION

*Paul Daly**

INTRODUCTION

Canadian administrative law is not in a state of flux. As has happened from time to time after the 'big bang' of the *Vavilov* decision,[1] the Supreme Court has had a relatively quiet year in administrative law. It really only made one decision with general implications for the reasonableness standard[2] and a couple of statutory interpretation decisions on the correctness standard whose implications are not at all confined to administrative law.[3]

In a conference organized at the University of Alberta in the summer of 2025, bringing together academics, practitioners and judges, there were relatively few voices (none from practice or the bench) raising concerns about the *Vavilov* framework.[4] Given what went before, this is quite something, and quite something to celebrate. And one can contrast the current Canadian position with ongoing debate in the United Kingdom about the contemporary meaning of the rationality standard.[5]

The Supreme Court did weigh in, in the *Pepa* case, on the relationship between stare decisis and the application of the reasonableness standard. Otherwise, however, to the extent that there have been any other developments in administrative law that are likely to have an impact on the practice of energy lawyers, they have occurred at the lower court level. In particular, appellate decisions in Alberta and the Yukon, as well as the Federal Court of Appeal, have extended the *Vavilov* framework to cover areas of administrative decision-making that, heretofore, have eluded the requirements of the culture of justification (including, most notably, statutory appeals). I will discuss these cases in Part I, as well as a decision from the Manitoba Court of Appeal that opens up an appellate split as to the application of the *Vavilov* framework to arbitration appeals. Most of these cases do not involve energy regulation specifically, but the ongoing debates considered here are very much ones that energy lawyers will need to keep a close eye on.

In Part II, I consider correctness review. The main issue here is the perennial one of the standards

* University Research Chair in Administrative Law & Governance, University of Ottawa.

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

[2] *Pepa v Canada (Citizenship and Immigration),* 2025 SCC 21 [*Pepa*].

[3] *Telus Communications Inc. v Federation of Canadian Municipalities*, 2025 SCC 15; *Lundin Mining Corp. v Markowich*, 2025 SCC 39.

[4] See Paul Daly, Gerard J. Kennedy & Mark Mancini, "Vavilov at 5: Looking Ahead while Looking Back" (2025) 63:1 Alta L Rev.

[5] Consider the starkly competing views expressed by two High Court judges in *K.P. v Secretary of State for Foreign, Commonwealth and Development Affairs* and *Secretary of State for the Home Department* [2025] EWHC 370; *R. (B.D.H.) v London Borough of Lambeth*, [2025] EWHC 2568 as well as the split on the Court of Appeal in *R. (S.A.G.) v The Governing Body of Winchmore School*, [2025] EWCA Civ 1335.

of review applicable to *Charter*[6] violations by administrative decision-makers. Here, both the British Columbia and New Brunswick Courts of Appeal have rendered interesting decisions on cases involving *Charter* rights and values respectively, whilst the Federal Court has also been busy in this area. I also consider whether the borderline between provincial and federal authority, as evidenced by decisions from the Quebec Court of Appeal and the Federal Court of Appeal, represents the last bastion of that forbidden word 'jurisdiction', before turning to the Supreme Court's major statutory interpretation decision in the *Federation of Canadian Municipalities* case[7], dealing with the thorny question — common to many regulatory regimes, including in the energy sector — of how to interpret an outdated legislative provision in light of technological change. I also contrast the approach taken there with that taken in *Lundin*[8], a securities regulation case.

With *Vavilov* out of the way, I turn in Part III to procedural fairness. Here, there have been significant appellate contributions this year on bias and adjudicative independence, from Ontario, British Columbia and Quebec. From Ontario comes an important decision about bias on multi-member tribunals, with significant lessons for any area of regulatory practice. The British Columbia Court of Appeal, meanwhile, offered an interesting analysis of the role of an adjudicative tribunal, identifying circumstances in which a panel had — unfortunately — descended into the arena and become a party to the matter before it, providing some useful 'don'ts' for energy regulators and those appearing before them. Lastly, the Quebec case on adjudicative independence is squarely in the energy law field, as the issue was the relative freedom from government of members of the provincial energy regulator: there are important observations there about the nature of energy regulation, into which can be woven another significant BC decision involving a cabinet intervention into energy regulation in the context of the challenge posed by the demands of cryptocurrency mining.

I. REASONABLENESS REVIEW: *VAVILOV*'S DOMAIN

A theme of my recent 'year-in-review' papers is the expansion of *Vavilov*'s domain. Last year, the Supreme Court extended the *Vavilov* framework to judicial review of regulations.[9] The year before, I described how *Vavilov* has 'reached the parts that other frameworks have not', imposing justification requirements on decision-makers who, previously, had benefitted from reflexive judicial deference.[10]

This year is no different: the Supreme Court explained how *Vavilov* can be applied to ensure compliance with *stare decisis*; lower courts have clarified that *Vavilov* applies to policies and politically-sensitive decisions; and appellate courts have suggested that *Vavilov*'s guidance on reasons is applicable to statutory appeals. Throughout, the touchstone is the *Vavilovian* 'culture of justification', the proposition that legitimacy in public decision-making arises from the provision of reasoned bases for decision, not the mere assertion of power. For lawyers throughout the country, in the energy sector and elsewhere, *Vavilov* is the touchstone for judicial review.

A. Stare decisis

Subsection 63(2) of the *Immigration and Refugee Protection Act* provides: "A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing".[11]

The appellant in *Pepa*[12] held a visa when she entered Canada. But on her entry into Canada, she was referred for an admissibility hearing to determine her entitlement to remain in the country.

---

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

[7] *Telus Communications Inc. v Federation of Canadian Municipalities*, 2025 SCC 15 [*Federation of Canadian Municipalities*].

[8] *Lundin Mining Corp. v Markowich*, 2025 SCC 39 [*Lundin*].

[9] Paul Daly, "2024 Developments in Administrative Law of Interest to Energy Lawyers" (2025) 13:1 Energy Reg Q 15.

[10] Paul Daly, "2023 Developments in Administrative Law of Interest to Energy Lawyers" (2024) 12:1 Energy Reg Q 7.

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

[12] *Pepa, supra* note 2.

By the time the hearing at the Immigration Division rolled around, her visa had expired. She received a negative decision in the form of a removal order.

She sought to appeal to the Immigration Appeal Division ("IAD"). Whereupon the IAD determined that it did not have jurisdiction: she was not a "person who holds a permanent resident visa" on the basis that precedent within the IAD and from the Federal Court and Federal Court of Appeal made clear that a prospective appellant must hold a valid visa at the time of the appeal.

Both the Federal Court and Federal Court of Appeal found that the IAD's interpretation of s. 63(2) was reasonable. A majority of the Supreme Court thought differently, though.

Justice Martin's key proposition was that it is unreasonable for an administrative decision-maker "to rely on clearly inapplicable or distinguishable case law — like cases in different areas of the law or cases addressing different statutory provisions — without justification and explanation of its continued relevance to the matter at hand".[13] That was the error the Division had slipped into, as "the precedents the IAD relied on were not sufficient to resolve the statutory interpretation question before it, nor did the IAD justify or explain their continued currency where they concerned an outdated statutory provision or starkly different facts".[14] Ultimately, "[r]eliance on a clearly distinguishable non-binding case, and the subsequent IAD decisions which followed it, without further analysis themselves, cannot be reasonable without explanation of the reasoning behind such a conclusion".[15]

One case involved a predecessor provision.[16] But as Justice Martin commented, "[t]he IAD used *Hundal* [*Canada (Minister of Citizenship and Immigration) v Hundal*, [1995] 3 FC 32] as binding authority when its jurisprudential force could not simply be assumed but should have been explored, explained, and justified".[17] A series of IAD cases ultimately relied on the *Hundal* case as well. Here, the problem was that "because *Hundal* was used as the basis for the other IAD decisions considered, it means the reasons contain a near total absence of any attention to the text, context, and purpose of the very legislative provision over which Ms. Pepa and the Minister asserted competing interpretations".[18] Another case was about a *revoked* visa, not an expired visa, and accordingly the observations about expired visas were not binding precedent (i.e. *obiter dicta*).[19] This was also true of yet another Federal Court case.[20] And, believe it or not, there was also a case interpreting the predecessor provision in a manner favourable to the appellant — but it was "brushed aside" by the IAD, whereas an unfavourable precedent was waved through.[21]

Ultimately, Justice Martin concluded, the precedent relied upon by the IAD was not dispositive:

> None of the cases cited by the IAD were sufficient pronouncements to resolve the contested interpretation of s. 63(2) without further analysis and some level of engagement with the modern approach to statutory interpretation… While *Vavilov* states that precedent will act as a constraint on what the decision maker can reasonably decide, this only applies to precedent on the issue before it, or precedent on a similar issue. A decision maker needs more than a few citations to cases relying on a different provision, or a clearly distinct factual matrix, to determine the issue. Though failure to conduct a statutory interpretation analysis is not fatal on its own, where the case law

[13] *Ibid* at para 66.
[14] *Ibid* at para 68.
[15] *Ibid* at para 76.
[16] *Ibid* at paras 69–72.
[17] *Ibid* at para 72.
[18] *Ibid* at para 75.
[19] *Ibid* at paras 77–78.
[20] *Ibid* at paras 80–82.
[21] *Ibid* at para 83.

> available to the decision maker is not sufficiently material or binding, the analysis cannot simply stop without ensuring that due consideration has been given, according to the modern principle of interpretation, to the competing interpretations asserted by the parties.[22]

On this view, it is the task of the reviewing court to determine whether a particular constraint is relevant. Here, the relevant constraint was judicial and administrative precedent. Ultimately, the majority concluded that the precedent relied on by the IAD was not relevant to the issue at hand. There was no deference to the decision-maker on the determination of whether the precedent was relevant. The fact that no deference was given on this point might lead one to think that the approach of the majority was not respectful of the autonomy of the IAD. Perhaps Justice Martin had lunched on the forbidden fruit of disguised correctness review? That is never a good dietary choice for a reviewing court but, in this instance, the majority did not succumb to temptation. The key point here is that the *Vavilov* constraints are objective, they either exist or they do not and it is always the role of the reviewing court to make that objective determination. This is not correctness review. It is about setting the parameters for reasonableness review.[23]

The fatal flaw here was the assumption on the part of the IAD that the precedent was relevant. That assumption did not become any more justifiable because it had been made in a series of cases. Fundamentally, the IAD had not explained why the precedent was relevant. It had assumed, without comment, explanation or justification that decisions relating to the predecessor provision and/or visa revocation cases were also relevant to the contemporary provision and visa expiration cases. However, as Justice Martin pointed out, this is not self evident. The relevant question was: are there relevant precedents on the issue of whether an expired visa has the same consequences as a revoked visa for the purposes of s. 63(2)? The decision-maker never asked itself that question, and did not explain or justify why it had not asked that question. Accordingly, there was nothing for the majority to defer to. Again, this is not correctness review — this is a court making an objective determination about whether a constraint is relevant, in circumstances where the decision-maker (the IAD) had not provided any reasons analyzing the constraint. Had it provided reasons on point, the outcome of the case could well have been different.

The dissenting judges had a different view of the relevance of precedent. As Justices Côté and O'Bonsawin remarked in respect of the statutory change, "the distinctions between these two provisions do not affect the reasonableness of the IAD's decision".[24] And they also rejected the expiration/revocation dichotomy of the majority: "[w]hile the facts of that particular case [*Ismail*] deal with revocation, when read as a whole, it is clear the reasons of de Montigny J. are animated by the validity of the visa itself".[25] However, on these points, I do not think they deferred to the reasons of the decision-maker. This was a threshold question about the existence and relevance of a constraint which the court ultimately had to answer for itself.

In my view, there is no interference with the autonomy of the decision-maker in such a circumstance. Under *Vavilov*, deference can only be given on the basis of reasons. If no reasons have been provided, no deference is possible.

Another difficult question raised by this case is what happens next. Having established that the decision was unreasonable because the decision-maker had relied on precedent that, properly read, did not govern the situation at hand, the majority went on to engage in an exegesis of the statutory scheme. They ultimately concluded, having reviewed the text, purpose, and context of the relevant statutory provisions, that there was only one reasonable answer to the interpretation of s. 63(2). I do not intend to provide chapter and verse on this, but I will highlight two interesting aspects. For one thing, Justice Martin relied on soft law produced by a government department

---

[22] *Ibid* at paras 84–85.

[23] See further Paul Daly, "The Scope and Meaning of Reasonableness Review after *Vavilov*" (2025) 63:1 Alta L Rev.

[24] *Pepa*, *supra* note 2 at para 194.

[25] *Ibid* at para 204.

to support her interpretation of s. 63(2):[26] this is the first instance of which I am aware of the Supreme Court relying on soft law to interpret the meaning of a statutory provision in a context not involving the exercise of discretion.[27] For another, she relied heavily on the 'harsh consequences' constraint from *Vavilov*:

> In my view, the IAD did not give sufficient consideration to the relatively significant consequences of the decision for Ms. Pepa. Though the stakes here are not as high as in the penal context, the consequences are nonetheless severe. Further, the IAD's failure to address key factors of statutory interpretation at all in its reasons shows it did not explain why its decision respects Parliament's intention, let alone "best reflects" Parliament's intention. Parliament intended an efficacious appeal process, and the IAD's reading makes this process all but illusory in cases where the visa has expired before the removal order is issued. The reasons ought to have demonstrated that the decision maker considered the consequences of the decision and whether such harsh personal consequences were justified in light of the facts, the law and Parliament's intention. This did not happen here.[28]

I do not have any strong views on whether the outcome of the analysis was good, bad or indifferent. However, I think the majority was ill-advised to engage in this exercise at all. As Justice Rowe explained in his concurring reasons:

> The majority concludes that its interpretation is the only one not tainted by the arbitrariness and absurdity that it ascribes to the interpretation by the IAD and, by implication, to the decisions on which the IAD based its interpretation. This takes reasonableness analysis further than it need go; in so doing, this Court runs an unnecessary risk of creating its own absurdities… If this Court itself interprets the relevant provision, there may well be consequences for the legislative scheme which we cannot contemplate, but that the IAD would more readily appreciate. This very much favours referring the matter back with guidance rather than deciding it on the basis of a single reasonable interpretation.[29]

It was inevitable that the majority would encroach on the autonomy of the decision maker by engaging in the statutory interpretation exercise that the decision-maker would ordinarily have engaged in. Properly directed on the issue of precedent, the IAD could have done its own analysis. Had it done so, it may have arrived at a different conclusion given its knowledge of the statutory scheme. In all events, here the majority was engaging in an exercise that fell within the domain of the decision-maker. Justice Rowe worried that this was "disguised correctness review" but there was really nothing disguised about it at all.[30] To return irreverently to my Garden of Eden metaphor, the majority reasons did not even sport a fig leaf: it was stark-naked correctness review on a point that would have been better left to the IAD. This ties back to the discussion of constraints above: I explained that there was no argument for deference to the IAD in this case, given that it had not provided reasons about the relevance of the precedent it had cited; but as Justice Rowe pointed out, the proper remedy in such a case is to remit the matter to the IAD so that it may provide the missing reasons. Put another way, whereas Justice Martin's analysis of the constraint of precedent did not interfere with the autonomy

---

[26] *Pepa*, *supra* note 2 at paras 110–12, citing Immigration, Refugees and Citizenship Canada, "ENF 19: Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)" (22 August 2024), online (pdf): <canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf19-eng.pdf>, and Immigration, Refugees and Citizenship Canada, "ENF 4: Port of Entry Examinations" (last modified 28 February 2024), online (pdf): <canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf04-eng.pdf>.

[27] See further, Paul Daly, "The Relationship Between Hard Law and Soft Law" (11 August 2025) Administrative Law Matters, online (blog): <administrativelawmatters.com/blog/2025/08/11/the-relationship-between-hard-law-and-soft-law>.

[28] *Pepa*, *supra* note 2 at para 119.

[29] *Ibid* at paras 150, 152.

[30] *Ibid* at para 148.

of the IAD (given the absence of reasons on the relevant point), her remedy very much did.

What lessons does this *Pepa*-talk hold for administrative tribunals and reviewing courts? As far as administrative tribunals are concerned, this should serve as a useful reminder that careful attention to the underlying justification for, and scope of, internal and judicial precedent is extremely important. But I do not think anything here should be taken to undermine the importance of consistency in adjudication. To put it bluntly, it is often better to be consistently wrong than consistently inconsistent. In doing so, however, it is important to return to the source and analyze, even if briefly, the underlying justification and scope of any precedent relied upon, especially where there are indicators — legislative change, harsh consequences or inconsistency with soft law — that the precedent might not be sound.

For reviewing courts, this admonition of Justice Martin should not be overlooked:

> Reviewing courts must exercise caution not to overstep their role when examining the soundness of the precedents that were relied on. The role of a reviewing court in such an instance is to ensure that the duty of justification has been discharged, not to wrestle with the correctness of the past administrative precedents, nor to overturn by proxy a judicial precedent.[31]

As far as refusing to remit a matter is concerned, I am inclined to think that this case was somewhat unusual. But it is becoming harder and harder to ignore the fact that when the Supreme Court finds an administrative interpretation of law to be unreasonable, it also finds that there was only one possible, acceptable interpretation of the provision that should be carved in stone. We are coming quite close to receiving a 'signal' in that regard, if indeed the signal has not already been sent but some of us just refuse to see.[32]

B. Policies and Political Decisions

Last year, in *Auer* the Supreme Court of Canada applied the reasonableness standard to judicial review of regulations, settling a vibrant academic debate and appellate split in favour of the *Vavilov* framework.[33] Two important recent appellate decisions underscore that *Vavilov* is the general framework for judicial review of administrative action: *Universal Ostrich Farms Inc. v Canada (Food Inspection Agency)*[34] and *Rogers v Director of Maintenance Enforcement Program*.[35] In both cases, *Vavilov*'s domain was extended, first to the review of government 'policy', second to the review of government inaction (via, as an added bonus, an analysis that is highly consequential in terms of the availability of mandatory orders as remedies for unlawfulness).

Universal Ostrich Farms concerned a high-profile dispute about an ostrich farm in British Columbia. After an outbreak of the deadly H5N1 avian flu on the farm, the Canadian Food Inspection Agency ordered the slaughter of the entirety of the flock. The farm fought on all fronts against the cull order. The Agency, acting in the Minister's stead, has broad powers to cull animals under the *Health of Animals Act*,[36] and has adopted a policy — the Stamping-Out Policy, which provides as its name suggests. The Agency essentially has a zero-tolerance policy for avian flu, with some case-by-case exemptions for animals who are epidemiologically distinct from those who were identified as carriers of the virus.[37]

The aspect of the Federal Court of Appeal's decision that is of interest for present purposes is its treatment of the appellants' challenge to the Stamping-Out Policy. The court acknowledged that there has been a lack of clarity in the jurisprudence, with some first-instance judges applying a more deferential standard of review

---

[31] *Ibid* at para 68.

[32] Paul Daly, "The Signal and the Noise in Administrative Law" (2017) 68 *University of New Brunswick Law Journal* 68.

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

[34] *Universal Ostrich Farms Inc. v Canada (Food Inspection Agency)*, 2025 CanLII 147 (FCA).

[35] *Rogers v Director of Maintenance Enforcement Program*, 2025 CanLII 12 (YKCA).

[36] *Health of Animals Act*, SC 1990, c 21.

[37] *Universal Ostrich Farms Inc. v Canada (Food Inspection Agency)*, 2025 CanLII 147 (FCA) at para 14 [*Universal Ostrich Farms*].

when a 'policy' is being challenged, requiring a demonstration that the policy was made in "bad faith, did not conform with the principles of natural justice, or if reliance was placed upon considerations that are irrelevant or extraneous to the legislative purpose".[38]

The court determined that this former standard had to be culled, seeing "no principled reason why the reasonableness review of a discretionary policy decision should not be framed in the manner set out in *Vavilov*, which asks whether a decision "bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision".[39] In that regard, judicial review of policies is now on the same footing as judicial review of regulations — there is no hyper-deference but, rather, the same reasonableness standard as applicable to all forms of administrative action.

Here, however, the application of *Vavilov* did not lead to a favourable result for the appellants. To begin with, the overarching legal framework affords "broad discretion…to the Minister or ministerial delegates under section 48"[40], the standard for disturbing factual findings on judicial review is "high"[41] and the bar is again "high" in respect of overturning policy decisions as unreasonable.[42] Given case law to the effect that the Minister may legitimately decide to have a "very low risk tolerance"[43] and that the Minister is not required to permit inspectors to make case-by-case determinations about exemptions,[44] as well as the evidence before the Agency when it established the Stamping-Out Policy,[45] there was no basis for judicial intervention. As the court put it, more targeted approaches had been considered and ruled out, and the Policy was "supported by the risk to international trade and the scientific realities of how avian flu is transmitted, both of which are acceptable considerations under section 48 of the Act".[46]

This is probably good news for those who wish to challenge policies (and those faced on judicial review by the argument that they are attempting to interfere with government 'policy') notwithstanding the result in this case. As in *Auer*, an artificially high threshold has been lowered, albeit as the decision in *Auer* itself demonstrates, where the statutory scheme gives the policy-maker significant scope for the exercise of discretion, it will be relatively difficult to demonstrate unreasonableness.[47]

Rogers concerned a different matter and its significance is best appreciated by starting with the conclusion of the court that it should declare that the failure of the respondent to enact regulations was unreasonable, with the expectation that the respondent would "promptly remedy the unlawfulness".[48] In substance, this is akin to a mandatory order, but Chief Justice Marchand did not consider it necessary to address the (daunting) criteria for such an order, as it is an order "of last resort".[49] Here, a declaration was sufficient, because the respondent's failure to enact regulations was unreasonable (more on that in a moment).

The effect of this conclusion is to decouple the availability of a mandatory order from the criteria previously treated as pre-requisites for issuing a mandatory order.[50] It is sufficient for

---

[38] *Malcolm v Canada (Fisheries and Oceans)*, 2014 FCA 130 (CanLII), at para 32, citing *Maple Lodge Farms v Government of Canada*, [1982] 2 SCR 2.

[39] *Universal Ostrich Farms*, *supra* note 37 at para 50.

[40] *Ibid* at para 54.

[41] *Ibid* at para 55; See also *ibid* at paras 67–71 on the proposition that the courts are not an "academy of science".

[42] *Ibid* at para 56.

[43] *Ibid* at paras 81, 92–93.

[44] *Ibid* at para 80.

[45] *Ibid* at paras 91, 94–96.

[46] *Ibid* at para 97.

[47] See the discussion of the *Conifex* case below; see also *Canadian Coalition for Firearm Rights v Canada (Attorney General)*, 2025 FCA 82.

[48] *Universal Ostrich Farms*, *supra* note 37 at para 114.

[49] *Ibid* at para 113.

[50] See *Apotex Inc. v Canada (Attorney General)*, [1994] 1 FC 742 at 766–69, aff'd [1994] 3 SCR 1100.

the applicant to demonstrate that administrative inaction is unreasonable, with the court then exercising its discretion to choose an appropriate remedy in the circumstances.[51] There have been hints of this in the jurisprudence of the Federal Court of Appeal in cases such as *Canada (Public Safety and Emergency Preparedness) v LeBon*[52] and *D'Errico v Canada (Attorney General)*[53] (the so-called 'directed verdict' cases) but this is the first example I am aware of from outside the federal court system.

At issue in *Rogers* was s. 22(1) of the Maintenance Enforcement Act.[54] This allows those who are required to pay child and spousal support to retain a minimum income "prescribed by the Commissioner in Executive Council". But the Commissioner has never "prescribed" a minimum income. The applicant, who owes many hundreds of thousands of dollars in unpaid child and spousal support, fears that when he retires, his statutory benefits would in effect be seized.

The respondent raised a variety of objections, including justiciability. Chief Justice Marchand rejected the argument that the failure to make regulations is non-justiciable, on the basis of jurisprudence demonstrating that "the issue is typically justiciable, at the very least to determine the legal effect of the failure to regulate".[55] He also noted the UK Supreme Court's decision in *RM (AP) v The Scottish Ministers*[56] and read it as supporting the propositions that "the discretion whether to make such regulations, albeit wide, is not absolute" and that any such discretion "cannot be exercised in such a way as to frustrate the intent of the legislature".[57]

Rather, the reasonableness standard must be applied. If *Vavilov* applies to action, it must also apply to inaction:[58]

> [A] decision not to carry out a regulatory function called for in legislation must be justified in relation to the enabling statute. Where regulatory inaction undermines (rather than fulfils) the purpose of the legislation and, in the words of *RM*, frustrates (rather than operationalizes) the will of the legislature, the decision is unreasonable. This is so even if the power is itself discretionary.[59]

On the merits, statutory text and purpose suggested that regulations had to be made: the legislature had used the imperative term "shall", its purpose of striking a balance between collecting payment and ensuring that payors have a minimum standard of living would be frustrated by regulatory inaction[60] and its provision for judicial oversight of the collection mechanisms would be rendered meaningless.[61] This was a case "in which the Legislature has used precise and narrow language to delineate that power in detail, signaling a tightly constrained delegation of authority".[62] The bottom line was that the Commissioner's inaction had frustrated the achievement of the intent of the statutory scheme:

> The Act was passed over 20 years ago, and the Commissioner has never prescribed a minimum income. The respondents have not provided any reasonable grounds for the Commissioner's failure to do so.

---

[51] Paul Daly, *Understanding Administrative Law in the Common Law World*, (Oxford: Oxford University Press, 2021) at 160.

[52] *Canada (Public Safety and Emergency Preparedness) v LeBon*, 2013 CanLI 55 (FCA).

[53] *D'Errico v Canada (Attorney General)*, 2014 CanLII 95 (FCA).

[54] *Maintenance Enforcement Act*, RSY 2002, c 145.

[55] *Rogers v Director of Maintenance Enforcement Program*, 2025 CanLII 12 (YKCA) at para 58 [*Rogers*].

[56] *RM (AP) v The Scottish Ministers*, [2012] UKSC 58.

[57] *Rogers*, *supra* note 55 at para 60.

[58] *Ibid* at para 69.

[59] *Ibid* at paras 69, 73; See also *Canada Christian College and School of Graduate Theological Studies v Post-Secondary Education Quality Assessment Board*, 2023 CanLII 544 (ONCA), at paras 53–54; *Minister of Justice and Public Safety v Forum des maires de la Péninsule acadienne Inc.*, 2025 CanLII 99 (NBCA), at paras 52–56.

[60] *Rogers*, *supra* note 55 at para 84.

[61] *Ibid* at para 95.

[62] *Ibid* at para 89.

> Clearly, the Commissioner has made a deliberate choice to not prescribe the minimum income required for the *Act* to function as intended. As such, the Commissioner has thwarted the intention of the Legislature leaving the protections in s. 22 without legal effect. Instead of a clear limit set by regulation by the Commissioner, payors (and recipients) are subject to policy choices made by the Director.[63]

Hence, then, the requirement that the Commissioner promulgate regulations, notwithstanding the political sensitivity of the matter. Once regulatory inaction was held to be unreasonable, it was open to Chief Justice Marchand to choose an appropriate remedy for the unlawfulness created by the Commissioner's failure to act. This is, therefore, a highly significant case both for extending *Vavilov* to government inaction (especially in the realm of regulation making, where the executive has typically benefited from significant deference) and for providing another example of the decoupling of mandatory orders from the highly restrictive criteria that have previously been set out.

C. Adequacy of Reasons on Statutory Appeals

Meanwhile, the debate about the relationship between statutory rights of appeal and applications for judicial review — common in all regulatory sectors, with energy no exception — continues to rumble on, with courts indicating openness to extending the reasoned decision-making requirements of *Vavilov* to statutory appeals on questions of "law" or "jurisdiction".

The first case to consider is *Best Buy Canada Ltd. v Canada (Border Services Agency)*, where Justice of Appeal Stratas for a unanimous Federal Court of Appeal dismissed an appeal and judicial review application that "adopts the submissions made in the appeal, nothing more".[64]

The major issue in the case was whether the Canadian International Trade Tribunal had committed an error of law by following a precedent of the Federal Court of Appeal that, in the applicant's view, was wrongly decided. Justice of Appeal Stratas was not persuaded that there were sufficient reasons to depart from that precedent: "if [*Danby Products Limited v Canada (Border Services Agency)*[65]] is to be reversed, the appellant should seek leave to the Supreme Court".[66] He then went on to make some important observations about the relationship between appeals and applications for judicial review.

Here, the right of appeal to the Federal Court of Appeal from the Tribunal was limited to questions of law.[67] In *Yatar v TD Insurance Meloche Monnex*,[68] the Supreme Court confirmed that a party may make an application for judicial review in respect of matters falling outside the scope of a limited right of appeal. But, as Justice of Appeal Stratas rightly points out, the fact that you *may* does not necessarily mean that you *should*.[69]

That then raises the question of the distinction between an appeal on a question of "law" and an application for judicial review. In Ireland, for example, judges have often wondered whether there is any distinction at all because whether an administrative decision-maker committed any reviewable error is, itself, a question of "law".[70] Justice of Appeal Stratas doubted the

---

[63] *Ibid* at para 100.

[64] *Best Buy Canada Ltd. v Canada (Border Services Agency)*, 2025 CanLII 45 (FCA) 45, at para 17 [*Best Buy*].

[65] *Danby Products Limited v Canada (Border Services Agency)*, 2021 CanLII 82 (FCA).

[66] *Best Buy*, *supra* note 64 at para 5.

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

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

[69] *Best Buy*, *supra* note 64 at para 11.

[70] As Justice Costello explained in *Dunne v Minister for Fisheries* [1984] IR 230 ("[it does not follow] that in every case the Court's jurisdiction on a statutory appeal is the same; in every case the statute in question must be construed. In construing a statute it does not seem to me helpful to apply by analogy the rules of judicial review since, by granting a statutory appeal, the legislature must have intended that the Court would have powers in addition to those already enjoyed at common law" at 237). See also *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, at para 78 per Justices Côté and Brown, dissenting but not on this point.

distinction as well. In his view, "just about anything" that can be raised on judicial review can be characterized as a potential error of law for the purposes of a limited right of appeal:

- Alleged legal errors by the administrative decision-maker, whether they be found in the Constitution, legislative provisions, common law principles or administrative law principles. This includes questions of law that are extricable from (i.e., taint or dominate) questions of mixed fact and law: *Canadian National Railway Company v Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 FCR 573; *Canadian National Railway Company v Canada (Transportation Agency)*, 2016 FCA 266 at para. 22; *Neptune Wellness Solutions v Canada (Border Services Agency)*, 2020 FCA 151 at para. 15.

- Procedural fairness concerns: *Emerson Milling* at paras. 18–19.

- Sufficiency of reasons or inadequate reasons on a key point: *Halton (Regional Municipality) v Canada (Transportation Agency)*, 2024 FCA 122 at paras. 21–33.

- Errors that seem factual but are really legal errors or failures to follow legal principles governing fact-finding. For example, a decision-maker that wrongly takes judicial notice (*R. v Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458), wrongly finds facts without any supporting evidence (*Canada (Border Services Agency) v Danson Décor Inc.*, 2022 FCA 205 at para. 14), wrongly draws a factual inference or finds facts contrary to the law of evidence (*e.g., Pfizer Canada Inc. v Teva Canada Limited*, 2016 FCA 161 and the cases cited therein; *Garvey v Canada (Attorney General)*, 2018 FCA 118 at para. 6), or wrongly finds facts contrary to a statutory provision (*Walls v Canada (Attorney General)*, 2022 FCA 47 at para. 41; *Page v Canada (Attorney General)*, 2023 FCA 169 at para. 79).[71]

I agree entirely with the first two bullet points. On the latter two, there is more to say.

As far as factual errors are concerned, to the list of cases cited by Justice of Appeal Stratas can be added the scholarly analysis of Lord Justice Carnwath (as he then was) in *E v Secretary of State for the Home Department*.[72] For Lord Justice Carnwath, an error of fact can be considered an error of law where four conditions are met:

> First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.[73]

My concern here, however, is that treating errors of fact as errors of law is difficult to square with the key objectives of the *Vavilov* framework: simplicity and clarity.[74] I am not sure it is either simple or clear to say that, sometimes, facts are law.

As far as sufficiency of reasons is concerned, I think there is great merit to Justice of Appeal Stratas's proposed approach. However, there is another step that would have to be taken to achieve conceptual harmony. The sufficiency of reasons for the purposes of a statutory appeal (whether limited to a question of law or not) is assessed under the framework set out in *R. v Sheppard*.[75] There may be "some overlap'" between this framework and the *Vavilov* framework for judicial review.[76] For

[71] *Best Buy*, *supra* note 64 at para 11.

[72] *E v Secretary of State for the Home Department*, [2004] QB 1044.

[73] *Ibid* at para 66.

[74] *Vavilov*, *supra* note 1 at paras 10–11.

[75] *R. v Sheppard*, 2002 SCC 26.

[76] *Halton (Regional Municipality) v Canada (Transportation Agency)*, 2024 CanLII 122 (FCA), at para 22.

now, the two frameworks remain distinct (albeit that the practice of identical appeals on questions of "law" and applications for judicial review gives me some pause in this regard).

That said, using *Vavilov*'s guidance on reasons in administrative appeals makes good sense to me. From an analytical perspective, why should an applicant be confined to the restrictive *Sheppard* standard, which is designed for the relationship between first-instance and appellate courts? And from an institutional design perspective, doesn't granting a right of "appeal" suggest more intrusive judicial oversight, including of reasons?

But I think the Supreme Court would have to make this change. *Vavilov* reasserted a categorical distinction between appeals and judicial review that had long since fallen by the wayside in the *Dunsmuir* era. Pre-*Vavilov*, to almost all intents and purposes, there was no meaningful difference between the grounds that could be considered on appeal or on judicial review. But *Vavilov* sets out two sets of rules, one for appeals and one for judicial reviews.

Now, an alternative course would have been to say "a right of appeal brings correctness *on extricable questions of law*" but that otherwise reasonableness review applies. That road was, however, not taken in *Vavilov*. As I say, I think there are good reasons for the Supreme Court to switch from *Sheppard* to *Vavilov* on appeals from administrative decisions, where the adequacy of reasons is in issue. But until it does so, there is going to be a gap between appeals and judicial reviews.

If the Supreme Court did so, the result would be that only pure questions of fact could conceivably fall outside an appeal clause limited to questions of "law". That would likely drastically reduce the volume of concurrent applications for judicial review and statutory appeals on questions of law, if only because of the difficulty (even on *Vavilov*) of challenging pure findings of fact on judicial review.

In the end, then, there are sound principled and practical reasons for carefully engaging with the analysis in *Best Buy 2025*: this debate will continue to rumble on.

The Federal Court of Appeal soon returned to the issue, this time in the rate-setting context, in *Canadian National Railway Company v Canada (Transportation Agency)*,[77] doubling down on one of its core propositions, namely that inadequately reasoned decisions constitute an error of law for the purposes of a statutory appeal.

At issue here was a railroad rate-setting decision under s. 127.1 of the *Canada Transportation Act*.[78] The railroad complained that the rate set was not "commercially fair and reasonable to all parties" as required by s. 112 of the Act, because the Agency had failed to take commercial market factors into account. In a series of prior decisions, the Agency had set out a rate-setting methodology that did not rely on or refer to market factors. Indeed, as Justice of Appeal Stratas explained, the basis for the Agency's methodology was opaque:

> Of note — and we will return to this at the end of these reasons — the Agency has never conducted and presented, with supporting reasons, a full analysis of the text, context and purpose of the sections in the Canada Transportation Act that bear on the issue in this case. Here, at least judging by the Agency's reasons, it did not do that analysis, nor did it cite to any decision that did that analysis. Instead, over many years, in case after case, it seems that the Agency has applied standards that may or may not have come from the Act — we simply do not know.[79]

Justice of Appeal Stratas analyzed the text, context and purpose of the relevant provisions of the Act and concluded that the Agency's interpretation was wrong. For instance, as to text and context, "the Agency has acted as if "commercially" were read out of section 112" but "[t]his it cannot do".[80] Statutory purpose, too, weighed in favour of the relevance of commercial market factors, given an express

[77] *Canadian National Railway Company v Canada (Transportation Agency)*, 2025 CanLII 184 (FCA) [*CN*].

[78] *Canada Transportation Act*, SC 1995, c 10.

[79] *CN*, *supra* note 77 at para 9.

[80] *Ibid* at para 27.

legislative commitment to competitiveness and economic growth in s. 5 of the Act.[81]

Now to the (even more) interesting part. In general, Justice of Appeal Stratas observed, a failure to conduct a rigorous statutory interpretation analysis means that the decision under appeal is unlawful:

> Cutting corners and conclusory statements, without more, are not how the Agency should roll: see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at paras. 115-124. In *Vavilov*, the Supreme Court instructed administrative decision-makers to show in their reasons that they are alive to the issues of text, context and purpose in the statutory interpretation process. For a major administrative decision-maker like this, one that is dealing with an issue like this, only explicit and rigorous analysis will do: *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21. The same must be said for applying the statutory standards to the evidence in a case like this.[82]

The requirements of reasoned decision-making from *Vavilov* and *Mason* were set out in the context of the application of the reasonableness standard of judicial review, not statutory rights of appeal. Justice of Appeal Stratas acknowledged this but insisted that adequate reasons are required in all cases — whether the decision comes before a court by way of appeal or judicial review, the culture of justification applies and adequate reasons must be given.[83] In particular, Justice of Appeal Stratas noted, the underlying rationale is not limited to either appeals or judicial reviews:

> There are at least three rationales. First, adequate reasons, especially those that analyze text, context and purpose, require careful and rigorous work that often exposes faulty reasoning before the decision is released. Second, in high stakes determinations like this, adequate reasons tell the parties that their key arguments were taken on board and considered, something resting at the core of procedural fairness. Third, adequate reasons further the transparency, legitimacy and accountability of administrative decision-makers to the parties before them, other regulatees, reviewing courts, and the wider public — something needed more than ever in these days of widespread skepticism, cynicism, and mistrust of government.[84]

CN is an especially significant decision in the transportation context. There is no right to seek judicial review of the Agency's decisions, by operation of s. 18.5 of the *Federal Courts Act*,[85] because a person aggrieved by an Agency decision can petition the Governor in Council to intervene (as is also true under the *Telecommunications Act*[86]). The Federal Court of Appeal recently confirmed that s. 18.5 is constitutionally valid, despite the argument that reasonableness review or an equivalent form of judicial oversight is now constitutionally entrenched.[87] Hence, therefore, Justice of Appeal Stratas's observation that the "assessment of weight is entirely for the Agency to decide on the evidence in each case, relying upon its industry appreciation, regulatory experience, and transportation expertise".[88] absent an extricable legal error or inadequate reasons, an aggrieved party's recourse is to the

[81] See e.g. *ibid* at paras 32, 38

[82] *Ibid* at para 44.

[83] *Ibid* at paras 45, 47. See also *Jennings-Clyde (Vivatas, Inc.) v Canada (Attorney General)*, 2025 CanLII 225 (FCA).

[84] *CN*, *supra* note 77 at para 46.

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

[86] *Telecommunications Act*, SC 1993, c 38.

[87] *Canadian National Railway Company v Alberta Pacific Forest Industries Inc.*, 2025 CanLII 160 (FCA).

[88] *CN*, *supra* note 77 at para 40.

Governor in Council on considerations of policy or fact. Policing the reasons requirement in this context fills an important gap, as the Governor in Council's role will not include reviewing a regulator's reasons for compliance with *Vavilov*'s reasonableness standard.

As to the vanishing distinction between judicial review and appeal, benediction from the Supreme Court may yet be required (as I suggested above). Indeed, the Manitoba Court of Appeal has expressly rejected the proposition that "the principles applicable to the review of an administrative decision for reasonableness set the standard for sufficiency of reasons in this case where the appellate standards of review apply".[89]

But there is also a hint of the logic animating the Federal Court of Appeal's approach in the majority reasons in *Northback Holdings Corporation v Alberta Energy Regulator*.[90] This was a case featuring a right of appeal, with leave, on a question of law or jurisdiction to the Alberta Court of Appeal coupled with a privative clause purporting to eliminate judicial review.[91] The applicants sought leave to appeal the Regulator's decisions to decline to approve an open-pit coal mining project. Leave was refused. The applicants then sought judicial review in superior court. The application was struck out. On appeal, Chief Justice Khullar would have permitted the judicial review to proceed, on the basis that the constitutional core minimum of judicial oversight of the administrative process "must include review on questions of fact and mixed fact and law".[92]

But her colleagues in the majority took a different view, essentially that the application for judicial review was misconceived because the right of appeal on a question of "law" or "jurisdiction" was potentially wide enough to encompass grounds of judicial review. As the applicants had not raised the issue of the scope of "law" or "jurisdiction" on the leave application, the first-instance judge was in an impossible position:

> The parties debate whether the term "jurisdiction" is broad enough to encompass questions of fact. As noted, however, they did not raise the question before this Court on the permission application. In the absence of that argument being made and decided in the context of the s 45 process, the chambers justice was left in the realm of hypotheticals. She could not embark on an analysis or make any assumptions as to how this Court would decide the issue if it was raised on a s 45 appeal. As a justice of the Court of King's Bench sitting on a judicial review matter (and not an appeal of the *Permission Decision*), she could not comment on whether the single judge of this Court properly interpreted its jurisdiction under s 45 in light of the constitutional argument, nor did she purport to do so. She simply observed that s 56 barred the appellants' applications for judicial review.[93]

Without necessarily committing themselves definitively to the view that "jurisdiction" must encompass some or all of the grounds that can be raised by way of judicial review, the majority held that the issue would have to be raised and adjudicated in the context of a future application for leave to appeal:

> ***Vavilov*** established that institutional design choices are to be respected. This Court gives meaning to the terms "question of jurisdiction" and "question of law" in the context of a statutory appeal under s 45. If ***Vavilov*** has resulted in a constitutional minimum of review based on an expansive approach to ***Crevier***'s "jurisdiction", it would seem the logical starting point to address this would be in

[89] *Nanowski v Winnipeg (City of)*, 2024 CanLII 81 (MBCA), at para 16.

[90] *Northback Holdings Corporation v Alberta Energy Regulator*, 2025 CanLII 186 (ABCA) [*Northback Holdings*].

[91] *Responsible Energy Development Act*, SA 2012, c R-17.3, ss 45, 56.

[92] *Northback Holdings*, *supra* note 90 at para 225.

[93] *Ibid* at para 44.

> the interpretation of "question of jurisdiction" in s 45 in the context of the statutory appeal regime established by the legislature for review of administrative decisions.[94]

In response, it might be objected that if an appeal on a question of "jurisdiction" encompasses some or all of the grounds of judicial review, it is impossible to give effect to the institutional design choice made by the legislature to create a narrow route to the Court of Appeal on carefully targeted issues.

That was certainly the view of the Newfoundland and Labrador Court of Appeal in *Blockchain Labrador Corporation v Board of Commissioners of Public Utilities*.[95] This decision dealt with an issue that is becoming more and more prevalent — a regulatory decision about power to a cryptocurrency mining operation overlaid with a directive from the provincial cabinet.[96] Here, the provincial cabinet exempted the public utility from providing electricity on a "firm rate" (i.e. guaranteed service) to such an operation. Ultimately, the Board approved an application by the utility to set a non-firm rate for customers on the system serving the Corporation's operation, rejecting the Corporation's argument that it fell within an exemption to the exemption.

The absence of a guarantee of service is a significant problem for cryptocurrency mining and the Corporation sought leave to appeal on a number of grounds:

1. The Board denied it procedural fairness and natural justice by deciding the Application without conducting an oral hearing.

2. The Board erred by failing to consider and apply section 4 of the EPCA, which requires the Board to implement the power policy set out in section 3 of the EPCA.

3. The Board erred in interpreting OC 2022-266 as exempting NL Hydro from supplying Blockchain with electrical energy on a firm basis.

4. The Board erred by finding that 20 MW of power available on the Labrador Interconnected System in winter was properly considered non-firm power, subject to the new non-firm rate.

5. The Board erred by failing to decide if a contract existed between NL Hydro and Blockchain, pursuant to which NL Hydro was required to supply Blockchain with up to 20 MW of power when it became available.

But the right of appeal is confined to questions of "law" or "jurisdiction". Justice of Appeal K.J. O'Brien held that grounds 4 and 5 were not jurisdictional in nature.

Interestingly, the *Board* took the position that all 5 grounds were either questions of law or jurisdiction, in a bid to reduce duplication between appeals and applications for judicial review and speed up the court process:

> Despite the conventional, modern interpretation, the Board submits that historically "jurisdiction" was broadly interpreted and formed the conceptual basis for all judicial oversight of inferior courts, citing *Groenwelt v Burwell* (1738), 91 E.R. 134, 1 Salk 144; *R. v Northumberland Compensation Appeal Tribunal, ex p. Shaw,* [1951] EWCA Civ 1, at 6-10; *Re Toronto Newspaper Guild, Local 87, American Newspaper Guild (C.I.O.); and Globe Printing Company*, [1951] CanLII 145 (ON SC), aff'd 1953 CanLII 10 (SCC), [1953] 2 S.C.R. 18. While the Board acknowledges that these cases have been overtaken by more modern approaches to judicial review, the Board asks this Court to revive the broader, historical approach to "jurisdiction" to essentially mitigate the effects of *Yatar*. In short, the Board invites us to interpret

[94] *Ibid* at para 53.

[95] *Blockchain Labrador Corporation v Board of Commissioners of Public Utilities*, 2025 CanLII 35 (NLCA) [*Blockchain*].

[96] See also the discussion of the decision *Conifex Timber Inc. v British Columbia (Lieutenant Governor in Council)*, 2025 CanLII 62 (BCCA) [*Conifex*] below.

> "questions of jurisdiction" so broadly that it would encompass all potential grounds of judicial review, leaving statutory appeal as the only avenue for review of the Board's orders.[97]

Justice of Appeal K.J. O'Brien was not persuaded. Acknowledging the risk of "duplication of judicial effort"[98], she nonetheless concluded that the Supreme Court in *Yatar* "did not suggest interpreting limited statutory rights of appeals so broadly as to be unlimited".[99] Any change in that regard would have to come from the legislature by expanding the right of appeal to cover all questions, not just questions of law or jurisdiction. It is also notable that the Court of Appeal had, in a series of quite recent decisions, given a narrow interpretation to "jurisdiction" as excluding any issues of mixed fact and law.[100] Accordingly, leave could not be granted on grounds 4 and 5 as they related to factual findings which simply fell outside the scope of the appeal clause, properly interpreted.[101]

That means having a limited right of appeal to the Court of Appeal with (if Chief Justice Khullar is right and as Justice of Appeal K.J. O'Brien recognizes) a judicial review running along a parallel track in the Court of King's Bench. However, if one takes the view that judicial review is always available (as befits a "cornerstone" of our constitutional order[102]), then a right of appeal, even a narrow one, can be seen as an 'addition' to what the common law already guarantees: the same grounds could be raised, but in a proceeding subject to different procedural rules (including, if leave is granted and the appellant is successful on the merits, a right to relief rather than the inherently discretionary remedy available on judicial review). On this view, advanced unsuccessfully by the Board in *Blockchain*, the right of appeal enhances, rather than restricts, judicial oversight of the administrative process. That would be the institutional design choice to respect.

Ultimately, though, the reasons why legislatures granted rights of appeal on questions of "law" or "jurisdiction" are lost in the mists of time, which is a large part of the reason for the current uncertainty. For my part, I very much welcome the addition of *Vavilovian* reasonableness review to the context of statutory appeals: this is territory that the culture of justification ought to occupy, in my view, correcting the anomaly of less intrusive judicial review where the legislature has created a right of appeal that presumably was chosen for ensuring more intrusive judicial review.

A. Arbitration Appeals

One of the unresolved questions still lingering post-*Vavilov* is the standard of review applicable to appeals of arbitration awards. This is a subtly difficult question. Prior to *Vavilov*, the Supreme Court of Canada had held that the judicial review framework applies to arbitration appeals: *Sattva Capital Corp. v Creston Moly Corp*.[103] established reasonableness as the presumptive standard, with *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.*[104] applying correctness to a question of precedential value, namely the interpretation of standard-form contracts. In *Teal Cedar Products Ltd. v British Columbia*[105], the Supreme Court reaffirmed *Sattva* again, a majority holding that the reasonableness standard should generally be applied to questions of law determined by arbitrators.

But it is not obvious (1) that any judicial framework should apply to arbitration appeals, because they are less the exercise of public power than a dispute resolution mechanism chosen by parties pursuant to the

---

[97] *Blockchain*, *supra* note 95 at paras 14, 17.

[98] *Ibid* at para 18.

[99] *Ibid* at para 22.

[100] *Ibid* at para 15.

[101] *Ibid* at paras 28, 32.

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

[103] *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53.

[104] *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.*, 2016 SCC 37.

[105] *Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32.

principle of private ordering;[106] (2) that the *Vavilov* framework is a good fit, because its narrower correctness categories do not map neatly onto the correctness categories that might apply in the arbitration context; or (3) that *Vavilov* itself requires anything other than the application of appellate standards of review to an "appeal".

That said, the question is not mentioned at all in *Vavilov* and one might legitimately therefore observe that until the Supreme Court itself has clarified the state of the law, lower courts are bound to the pre-*Vavilov* position that the same framework applies on arbitration appeals as on judicial review. On the only occasion since *Vavilov* that the question has arisen in one of its own cases, a majority of the Supreme Court avoided answering it.[107]

Now there is a split in the (limited) appellate authority on the question. Previously, the Court of Appeal for the Northwest Territories concluded that the appellate standards of review should apply.[108] More recently, the Manitoba Court of Appeal has weighed in on the side of the judicial review framework in *Buffalo Point First Nation v Buffalo Point Cottage Owners Association Inc*.[109]

Justice of Appeal Monnin's analysis is sharp and to the point.

First, *Vavilov* did not overrule *Sattva* and, therefore, the judicial review framework continues to apply:

> I start from the premise that *Vavilov* did not expressly or impliedly overturn *Sattva* or *Teal Cedar*. *Vavilov* was a decision with respect to a review of an administrative decision. Commercial arbitration awards are not administrative decisions, which are generally recognized as decisions emanating from a government entity. Commercial arbitration awards are the product of contractual agreements between parties who have chosen to reach a resolution of their own making. While there may be merit in considering the rationale of how to review an administrative decision when considering the review of decisions of commercial arbitrators, that was not the issue in *Vavilov*. It was, however, the issue in *Sattva* and *Teal Cedar* and, until a different outcome is stipulated by the Supreme Court, I am of the view that *stare decisis* should guide us in reaching the proper conclusion as to what standard of review currently applies. Accordingly, the surest route to the answer to this question is that *Sattva* and *Teal Cedar* are still good law until directed otherwise.
>
> …
>
> Unless specifically or impliedly overturned, the previous decisions remain and the failure to address it by the Court should not be used as a means of invalidating precedent. Commercial arbitration awards take place "under a tightly defined regime specifically tailored to the objectives of commercial arbitrations" (*Sattva* at para 104). As well, "parties engage in arbitration by mutual choice, not by way of a statutory process" (*ibid*). The parties to an arbitration select the number and identity of the arbitrators. In *Teal Cedar*, this was described as being a "preference for a reasonableness standard…with the key policy objectives of commercial arbitration, namely efficiency and finality" (at para 74). Such factors militate in favour of retaining a reasonableness standard for reviewing commercial arbitration awards.[110]

Second, the fact that under *Vavilov* the appellate standards of review apply where there is a statutory right of "appeal" is not conclusive, because there are significant differences between

[106] James Plotkin & Mark Mancini, "Inspired by Vavilov, Made for Arbitration: Why the Appellate Standard of Review Framework Should Apply to Appeals from Arbitral Awards" (2021) 2:1 Can J of Com Arb 1.

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

[108] *Northland Utilities (NWT) Limited v Hay River (Town of),* 2021 CanLII 1 (NWTCA).

[109] *Buffalo Point First Nation v Buffalo Point Cottage Owners Association Inc.,* 2025 CanLII 72 (MBCA) [*Buffalo Point*].

[110] *Ibid* at paras 44–45.

the administrative law and commercial arbitration contexts:

> The historic development of commercial arbitration through the centuries has been primarily as a result of contractual mechanisms to enable parties to resolve their disputes. This is contraposed with the development of administrative law and the review of governmental decisions, which have followed a different legal and jurisprudential path. When one considers both the jurisprudence and the institutional differences, the argument for less intervention or legalistic approach to the review of commercial arbitration is justified. A different approach to the meaning of the word appeal in *The Arbitration Act*, CCSM c A120, dovetails with the key policy objectives of commercial arbitration; namely, efficiency and finality.[111]

This point was also made by Chief Justice Joyal in *Christie Building Holding Company, Limited v Shelter Canadian Properties Limited*.[112]

On the merits, Justice of Appeal Monnin upheld the award at issue, part of a long-running dispute between the parties.

Clearly this issue still has legs. Justice of Appeal Monnin's point about the difference between arbitration and public administration is well taken and calibrating the appropriate level of deference in the arbitration context can be a difficult endeavour.[113] *Vavilovian* reasonableness review is flexible and so, in principle, can expand or contract in response to the relevant context, being more demanding where the questions are relatively more legal in character but less so when they are fact-heavy. That said, *Vavilov*'s demands of responsiveness will typically require well-reasoned decisions that, in a private setting, might not always suit the parties.

Personally, I am attracted by the call of the *Vavilovian* sirens — "simplicity" — that also lured the Court of Appeal for the Northwest Territories. "Appeal" in a statute providing for court review of arbitration awards means the appellate standards of review are applicable (and responsiveness, therefore, should not come into play, though as noted above in Part IC this is a developing area).

If the appellate standards applied in the arbitration context, this would bring arbitration into line with contractual disputes. When these are litigated in the courts, the appellate standards of review apply[114]: correctness on extricable questions of law but palpable and overriding error on everything else. Correctness on extricable questions of law favours consistency in the law. Palpable and overriding error on questions of fact and mixed law and fact furthers the efficiency and finality objectives of commercial arbitration especially given the modern tendency, exemplified by *Earthco*, of treating most questions of contractual interpretation as applications of law to fact rather than as pure questions of law. And party autonomy can be taken into account: this is only a general framework. Consistent with the primacy of private ordering, the parties remain free to fashion dispute resolution mechanisms that suit their interests.

As I say, this is a subtly difficult question that, ultimately, the Supreme Court will have to resolve at some point. Otherwise, as with any other issue that still has legs, it will run and run.

II. CORRECTNESS REVIEW

In this section, I address some recent cases on correctness review, where issues of scope have arisen both in relation to the perennial issue of *Charter* rights and values and in relation to constitutional limits on administrative decision-makers' authority. I round out the section with an instructive recent application of the correctness standard in regulatory settings.

A. The Scope of Correctness Review

One difficult issue relates to the thorny question of the standard of review of administrative decisions that allegedly infringe upon the

[111] *Ibid* at para 47.

[112] *Christie Building Holding Company, Limited v Shelter Canadian Properties Limited*, 2022 CanLII 239 (MBKB).

[113] See also *ibid* at para 92.

[114] See e.g. *Earthco Soil Mixtures Inc. v Pine Valley Enterprises Inc.*, 2024 SCC 20.

Charter. As we know, an administrative decision might engage a *Charter* right,[115] or a *Charter* value.[116] When it does so, the standard of review is reasonableness, based on the controversial decision in *Doré v Barreau du Québec*,[117] which remains good law.

What, however, is the standard of review applicable to a determination as to whether the *Charter* is engaged? In *York Region District School Board v Elementary Teachers' Federation of Ontario*,[118] the Supreme Court held that issues relating to the scope of *Charter* rights are subject to correctness review. This would seem to indicate that any definitional question about whether a *Charter* right is applicable is to be assessed for correctness.

As to *Charter* values, a number of recent cases have addressed the issue. For instance, in *Vabuolas v British Columbia (Information and Privacy Commissioner)*, Justice of Appeal Horsman commented:

> At the very least, *York Region* seems to suggest that different standards of review may apply to the two stages of the analysis: (1) correctness to the preliminary question identified in *Loyola* as to whether the Charter applies (which would include the scope of the *Charter* protection and the appropriate framework of analysis), and (2) reasonableness to the proportionate balancing that occurs at the second stage.[119]

Justice Southcott agreed in a couple of recent Federal Court cases. In *Robinson v Canada (Attorney General)*[120] and *Mombourquette v Canada (Attorney General)*,[121] he concluded that "the question whether Charter rights or values are engaged is assessed on a correctness standard and, if answered in the affirmative, the necessary balancing of those rights or values with statutory objectives is assessed on the standard of reasonableness".[122] The Federal Court of Appeal came to the same conclusion in *Toth v Canada (Mental Health and Addictions)*.[123] Meanwhile, Justice of Appeal LeBlanc equivocated somewhat on the issue in *Minister of Justice and Public Safety v Forum des maires de la Péninsule acadienne Inc.*,[124] albeit indicating[125] that the threshold question of the engagement of the *Charter* is a matter that the reviewing court has to determine to its satisfaction (i.e., it would seem, correctly) and holding that there was no link between the guarantee of equality of status between the Anglophone and Francophone linguistic communities in New Brunswick and a ministerial decision to close one courthouse that served a Francophone community and reduce the status of another.[126]

I think both Justice of Appeal Horsman and Justice Southcott are right about the implications of recent Supreme Court jurisprudence. Both note, however, that the Supreme Court has not addressed this question

---

[115] *Lauzon v Ontario (Justices of the Peace Review Council)*, 2023 (CanLII) 425 (ONCA), at para 151.

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

[117] *Doré v Barreau du Québec*, 2012 SCC 12.

[118] *York Region District School Board v Elementary Teachers' Federation of Ontario*, 2024 SCC 22.

[119] *Vabuolas v British Columbia (Information and Privacy Commissioner)*, 2025 CanLII 83 (BCCA), at para 96.

[120] *Robinson v Canada (Attorney General)*, 2024 CanLII 2092 (FC).

[121] *Mombourquette v Canada (Attorney General)*, 2024 CanLII 2093 (FC).

[122] *Robinson*, *supra* note 120 at para 69.

[123] *Toth v Canada (Mental Health and Addictions)*, 2025 CanLII 119 (FCA) at para 40.

[124] *Minister of Justice and Public Safety v Forum des maires de la Péninsule acadienne Inc.*, 2025 CanLII 99 (NBCA) [*Forum des maires*].

[125] *Ibid* at para 66.

[126] *Ibid* at para 89.

squarely.[127] As a result, some caution is needed about coming to hard-and-fast conclusions about the state of the law on this question.

There is no doubt, to my mind, that the correctness standard applies to the definition of *Charter* rights. That was the case even under the post-*Dunsmuir* case-law, Doré notwithstanding.[128] The tricky issue is whether the same applies to *Charter* values, especially where an administrative decision-maker has given reasons. Justice Southcott addressed this point in *Robinson* but insisted that the correctness standard should apply even in such circumstances:

> If the decision-maker has conducted such an analysis, then the court has the benefit of that reasoning that may inform its own analysis. However, I do not consider the existence of reasons from the decision-maker on *Charter* engagement to translate into a requirement that the court's review of those reasons must be conducted on the standard of reasonableness.[129]

As I say, I think Justice Southcott is right in his application of Supreme Court jurisprudence. I also think his response to the scenario of an administrative decision-maker providing reasons on the interpretation of the scope of a *Charter* right is sound. Such questions are 'constitutional questions' under *Vavilov* and require uniform answers from the courts. One's freedom of expression right should not change depending on the identity of the administrative decision-maker one appears before.

I am less sure about whether this is right as a matter of first principles as far as *Charter* values are concerned. If *Charter* rights are hard constraints on administrative decision-makers but *Charter* values are simply matters to be taken into account, this suggests that the standard of review as to whether the *Charter* is engaged might be different.[130] In other words, if *Charter* rights and *Charter* values are conceptually distinct, then it cannot be said that the same standard must necessarily apply to the question of whether a *Charter* right or value has been engaged in a particular case. *Charter* values are relatively amorphous and context-sensitive, but this is arguably a feature rather than a bug, as the whole point of resorting to *Charter* values is to facilitate administrative decision-makers' engagement with the Constitution. If that is so, why not give administrative decision-makers some space (via the application of the reasonableness standard) to articulate their understanding of a *Charter* value in their particular domain of specialization and expertise?

Now, in response to powerful critiques of the *CSFTNO* decision[131] I have suggested recently that we should speak in terms of *Charter* purposes rather than *Charter* values.[132] But the argument for deference on the threshold question of whether a *Charter* purpose is engaged still holds. *Charter* purposes are set out in Supreme Court jurisprudence. However, *Vavilov* makes clear that court precedents are not straitjackets are far as administrative decision-makers are concerned, a point underscored by the recent decision in *Pepa*.

As I say, I think both Justice of Appeal Horsman and Justice Southcott are faithful to the Supreme Court jurisprudence. But the Supreme Court has not yet addressed the specific question of the standard of review applicable to a decision on whether a *Charter* value (or purpose) is engaged. And I think there is at least

---

[127] Leave to appeal has been granted in *Vabuolas*. I have been providing some assistance to the appellants. Based on the application for leave, it is not clear that the *Charter* rights/values distinction will be a significant issue, but one point of interest is that Court of Appeal disagreed with the adjudicator about whether the statutory scheme, properly interpreted, interfered with the right to freedom of religion. Can a court second-guess an adjudicator's considered view as to the source of a constitutional violation? This appeal may, therefore, require consideration of how the *Vavilov* framework interacts with the framework set out in *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038 on the identification of the source of a constitutional violation (that is, whether it is attributable to a statute or to an exercise of discretion under a statute).

[128] Paul Daly, "Unresolved Issues after *Vavilov*" (2022) 85:1 Sask L Rev 89, at 107.

[129] *Robinson*, *supra* note 120 at para 63.

[130] Paul Daly, "The *Doré* Duty: Fundamental Rights in Public Administration" (2023) 101:2 Can Bar Rev 297.

[131] See e.g. *Sullivan v Canada (Attorney General)*, 2024 CanLII 7 (FCA).

[132] Paul Daly, "*Charter* Values in Administrative Decision-Making: Defending the *Doré* Duty" (2026) Ottawa L Rev (forthcoming).

an argument that reasonableness might be the appropriate standard of review.

As for Justice of Appeal LeBlanc, the most interesting point in the analysis of the courthouse closure case is the assertion that "Extending the scope of s. 16.1 by way of values that exceed those expressed therein would constitute an inadmissible change to this provision".[133] But this is precisely what the Supreme Court did to s. 23 in *CSFTNO*: imposing a values-based obligation that went over and above the text of s. 23. Perhaps the difference, is that s. 16.1 already embodies a value — equality of status — and to add further values would be to unduly expand the scope of the provision, whereas s. 23 is concerned with more concrete matters. Nonetheless, it does seem in principle that courthouse closures with disproportionate impacts on one linguistic community could violate the values underlying the s. 16.1 guarantee — the Supreme Court will, in any event, soon weigh on in this issue in the appeal from the New Brunswick Court of Appeal in challenge to the nomination of a unilingual, non-French speaking Lieutenant Governor.[134]

B. 'Jurisdiction' By Any Other Name?

The Supreme Court will have another opportunity to weigh in on the correctness categories in the appeal from *Procureur général du Québec c SGS Canada inc.*,[135] a case raising a federalism issue relating to whether SGS is subject to federal or provincial labour laws. This required a detailed contextual examination of factual information by, in the first instance, Quebec's labour relations tribunal. Based on the recent decision in *Société des casinos du Québec inc. v Association des cadres de la Société des casinos du Québec*,[136] no deference should be due to the tribunal's application of federalism principles to the facts, however: only pure findings of fact — who, what, why, where, when and how — are subject to deference, with the legal conclusions that flow from those pure findings of fact subject to correctness review. *Société des casinos* was a *Charter* case and SGS is a federalism case, but the same principles ought to apply in both areas. At the borderline between provincial and federal authority, there can be no room for error. Put another way, this is an area at which bodies must be careful to respect limits on their jurisdiction, that is, to stay within the boundaries of their authority (albeit, of course, that since *Vavilov*, the slippery notion of "jurisdiction" is no longer a correctness category itself and does not furnish a stand-alone test for lawfulness).

In that regard, it is interesting to consider the decision of the Federal Court of Appeal in *Galderma Canada Inc. v Canada (Attorney General)*.[137]

The case involved a judicial review of a decision of the Patented Medicines Prices Review Board purporting to regulate an off-patent acne medicine (that is, a medicine for which the patent has expired and is thus subject to market competition).

At first glance, this looks strange, as Justice of Appeal Stratas pithily explained:

> The Patented Medicine Prices Review Board regulates the pricing of medicines under the market power given by a patent — namely, patented medicines. The Board does not regulate the pricing of unpatented medicines. After all, it's right in the Board's name: the Board is the "Patented Medicine Prices Review Board", not the "Patented and Unpatented Medicine Prices Review Board" or the "All Medicine Prices Review Board".[138]

The Board is a federal board and, as such, the scope of its authority is confined by the Constitution of Canada. Section 91(22) gives Parliament the power to legislate in relation

---

[133] *Forum des maires*, *supra* note 124 at para 89.

[134] *The Right Honourable Prime Minister of Canada et al. v La Société de l'Acadie du Nouveau-Brunswick and The Attorney General for New Brunswick*, 2024 CanLII 70 (NBCA). This appeal was heard in late 2024.

[135] *Procureur général du Québec c SGS Canada inc.*, 2024 CanLII 460 (QCCA).

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

[137] *Galderma Canada Inc. v Canada (Attorney General)*, 2024 CanLII 208 (FCA) [*Galderma*] (the author was co-counsel for the appellant).

[138] *Ibid* at para 4.

to patents. And Parliament has enacted the *Patent Act*.[139] Amongst other things, this statute allows patentees a period of exclusive use of their patent.

However, a long line of cases has established that this power does not extend to price regulation but only to the *abuse* of patents, whether during the period of exclusive use, the patentee seeks to charge abusively high prices.[140] But whether too high a price is being charged for unpatented medicines is a matter for the provinces. Parliament only has the power to regulate patent abuse: "the Board does not have any freestanding consumer protection or general price regulation mandate".[141] Indeed, the Board cannot exercise powers that Parliament cannot delegate to it and so the Board cannot engage in price regulation at large.[142]

Here, the Board's justification for regulating an unpatented medicine was that there was a relationship between the unpatented medicine (sold as Differin) and the patented medicine (sold as Differin XP). The difference between Differin and Differin XP, which are both topical solutions applied to the skin to treat acne, is the concentration of the key ingredient (Adapalene): 0.1 per cent for Differin, 0.3 per cent for Differin XP.

The Differin patent had expired, but the Board's position was that, based on clinical similarities between the two, Differin XP "pertains" to Differin as it "is intended or capable of being used for" Differin, consistent with s. 79(2) of the *Patent Act*. Note that s. 79(2) uses the term "pertains" (which can be read broadly[143]) but also further defines that broad term as "intended or capable of being used for" a medicine.[144]

In a previous round of litigation, the Federal Court of Appeal found that the Board's position was unreasonable but remitted the matter to the Board to consider whether the evidence of clinical similarities met the test set out in s. 79(2).[145]

The Board concluded that it did but Justice of Appeal Stratas roundly rejected the Board's position:

> By making that order, the Board crashed through the constitutional, statutory and jurisprudential guardrails. Or to use the more orthodox, formal, administrative law language in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, the Board exceeded the constraints acting upon it — some pretty clear, longstanding and well-established ones too. Thus, the Board's order must be set aside.

The Board argued, as mentioned, that the clinical similarities between Differin and Differin XP meant that the statutory test was satisfied. On the facts, however, this position was not tenable:

> If the appellant is pricing the patented medicine, Differin XP, excessively due to abuse of its market power under the '237 Patent, the Board can go after Differin XP, not Differin, now unpatented. Nowhere does the Patent Act say that the Board can regulate an unpatented medicine just because a patented medicine might be used in its place or because it shares some unpatented properties of the patented medicine (here, the unpatented ingredient adapalene).[146]

The appellant had argued that the standard of review was correctness, on the basis that the correct interpretation and application

---

[139] *Patent Act*, RSC 1985, c P-4.

[140] *Innovative Medicines Canada v Canada (Attorney General)*, 2022 CanLII 210 (FCA), at para 19. See *Merck Canada inc. v Procureur général du Canada*, 2022 CanLII 240 (QCCA).

[141] *Galderma*, *supra* note 137 at para 7.

[142] *Vavilov*, *supra* note 1 at para 56.

[143] *ICN Pharmaceuticals Inc. v Patented Medicine Prices Review Board* (1996), 1996 CanLII 4089 (FCA).

[144] *Canada (Attorney General) v Galderma Canada Inc.*, 2019 CanLII 196 (FCA).

[145] *Ibid*.

[146] *Galderma*, *supra* note 137 at para 13.

of s. 79(2) is a constitutional question that requires the courts to provide uniform and definitive answers. Justice of Appeal Stratas held that it was not necessary to resolve the debate about standard of review in this case, as the court's analysis demonstrated that it was possible "to characterize the problem as the Board adopting and applying an unacceptable and indefensible (*i.e.*, unreasonable) interpretation of the Patent Act",[147] such that the same result would be reached under either standard.[148]

With characteristically colourful prose, Justice of Appeal Stratas concluded with an admonition to the Board:

> The Board has an important mandate. Given the importance of that mandate, the Board is dedicated and enthusiastic about pursuing it. That's worthy of praise. But the Board must temper its dedication and enthusiasm with a firm and unwavering obedience to legality and the rule of law. Like all administrative decision-makers, the Board must stay within the constraints imposed by the Constitution, its governing statute (the Patent Act, interpreted reasonably in the administrative law sense), and the jurisprudence under each.[149]

This is a very useful, well-written decision that touches concisely and incisively on some key basics of administrative and constitutional law about the limits on the authority (or, dare I say it, "jurisdiction") of administrative decision-makers. Verily, at the borderline between federal and provincial authority, there really can only be one answer, whether one applies the reasonableness or correctness standard.

C. Dynamic Statutory Interpretation

Where the correctness standard applies, it is ultimately the role of the court to offer a definitive interpretation of any issue of law raised by a decision. There is a neat illustration of this in *Telus Communications Inc. v. Federation of Canadian Municipalities* where the Supreme Court grappled with the important issue of dynamic statutory interpretation.[150]

The difficulty was as follows: the *Telecommunications Act* provides that in the event of a disagreement between telecommunications carriers and municipalities, the Canadian Radio-television and Telecommunications Commission can grant the carrier permission to construct a "transmission line" on conditions determined by the Commission. These provisions (especially ss. 43(4) and 43(5)) are controversial because they do away with any requirement of municipal consent. And their interpretation led to this litigation because carriers would like access to install antennae for 5G wireless networks. The question for the Supreme Court was: "does 'transmission line' include antennae for 5G networks?"

To begin with, the question illustrates the linguistic phenomenon of open texture. Evidently, when the relevant provisions of the *Telecommunications Act* were debated and adopted, 5G technology was, at best, a gleam in the eye of a particularly farsighted innovator. But the emergence of new technologies can cause us to call into question our settled understanding of concepts. This is because of open texture, the "limit, inherent in the nature of language, to the guidance which general language can provide".[151] The British philosopher JL Austin gave a vivid example of the phenomenon by introducing the "exploding goldfinch". We all know what a goldfinch is. But if a goldfinch exploded in front of our eyes, we would have revisit our understanding of what a goldfinch is. Similarly, the emergence of 5G antennae as integral parts of a communications network causes us to call into question our settled understanding of "transmission line".

The lesson of open texture for legal interpreters is that text cannot be considered in a vacuum: it

---

[147] *Ibid* at para 16.

[148] *Ibid* at para 17.

[149] *Ibid* at para 19.

[150] *Telus Communications Inc. v Federation of Canadian Municipalities*, 2025 SCC 15 [*FCM*]. The author was counsel for one of the intervenors, the Canadian Telecommunications Association.

[151] Herbert Lionel Adolphus Hart, *The Concept of Law*, 2nd ed (Oxford: Oxford University Press, 1994) at 126, cited in *Pong Marketing and Promotions Inc. v Ontario Media Development Corporation*, 2018 CanLII 555 (ONCA), at para 44.

has to be interpreted having regard to the context in which it is applied.[152] Statutes are no different. Therefore, even provisions which seem prescriptive at first sight may, when considered in their full context, adapt to take account of particular circumstances. The concept of open texture means that statutory "words and concepts do not bear one consistent and coherent meaning but many meanings that vary with the context in which they are relevant".[153] As such, the context in which a provision falls to be applied will influence the interpretation of the provision.

This brings us to the *Federation of Municipalities* case, which was argued on the basis of 'dynamic statutory interpretation', i.e. that law should be interpreted (or perhaps actively updated) to take account of changing circumstances. The Supreme Court saw only a limited role for dynamism, as Justice Moreau explained in her majority reasons.

First, respect for original meaning is paramount: "Statutory interpretation is centered on the intent of the legislature at the time of enactment and courts are bound to give effect to that intent".[154] This led Justice Moreau to look closely at the concepts that were known to Parliament at the time of drafting. For example, "Hansard does not disclose any indication that Parliament intended to expand the access regime to include wireless radiocommunication apparatus like antennas".[155] In my view, a focus on original *meaning* is defensible, but in this passage the Supreme Court came quite close to looking to the original *expected applications* of the drafters. This sort of exercise has, however, long since fallen out of fashion because of the considerable epistemic difficulties it provokes.[156] To be fair to Justice Moreau, she was also contrasting the treatment of antennae across different statutes, which is a rather different exercise than attempting to divine what the people in the room at the time of drafting had in mind about what the statute should apply to.

Second, courts can nonetheless respond to changing circumstances where the statutory language is broad enough to permit them to do so:

> It is uncontroversial that, in the exercise of their legislative authority, enacting legislatures can use broad or open-textured language to cover circumstances that are neither in existence nor in their contemplation… A legislature may in this way intend that a provision be interpreted dynamically, in that the provision should be capable of applying to new sociological or technological circumstances as they arise (Sullivan, at § 6.03). If this original intention is to be preserved, courts must interpret broad or open-textured concepts in a manner sensitive to the evolving context… This principle has been codified in s. 10 of the Interpretation Act, R.S.C. 1985, c. I-21, which provides that the law is "always speaking" and "shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning".[157]

Third, there is no particular role for dynamic statutory interpretation to play. Determining whether a statute (of any vintage) applies to a given set of facts depends on the breadth of the text, when considered in conformity with its purpose and harmoniously with the statutory regime as a whole, not on the existence of any bright line between "dynamic" and "static" statutes:

> The degree to which a provision is capable of applying to new circumstances, including new technology, is an interpretive question like any other that must be answered by reading the text in context and

[152] *Peacock c Adessky*, 2009 CanLII 2259 (QCCA), at para 36.

[153] *Manrique c R.*, 2020 CanLII 1170 (QCCA), at para 19.

[154] *FCM*, *supra* note 150 at para 32.

[155] *Ibid* at para 62.

[156] See the summary in Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge: Cambridge University Press, 2012), at 41.

[157] *FCM*, *supra* note 150 at paras 33–34.

> consistent with the legislature's purpose.[158]

For a variety of reasons, Justice Moreau went on to hold that a "transmission line" does not include 5G antennae. The ordinary textual meaning suggested Parliament intended "to capture wireline infrastructure only".[159] Looking to dictionary definitions, Justice Moreau posited that the word line has physical connotations, especially when "line" is paired with "transmission" and "antennas, even 5G small cell antennas, do not fit naturally within that ordinary meaning because antennas do not transmit intelligence along physical pathways".[160] This was supported by the surrounding text in s. 43, which permits activities like burying things, breaking up roads and altering routes. As anyone who has ever wielded a pickaxe knows, these are physical activities with a capital "P".[161] In addition, the broader context, including legislative history, demonstrated "that antennas or other wireless equipment have never been part of the access regime and that Parliament intentionally distinguished antennas from wireline equipment like wires or cables".[162]

As to statutory purpose, Justice Moreau was not persuaded that either the carriers' interpretation or the municipalities' interpretation would be incompatible with the *Telecommunications Act*. Parliament had attempted to strike a balance between competing interests[163] but neither interpretation advanced that purpose in a compelling way. Put differently, resolving the matter one way rather than the other would invariably favour one of the interest groups Parliament was arbitrating between, which meant that legislative purpose was, for want of a better word, neutral.

In dissent, Justice Côté did take a dynamic approach. She found the text of ss. 43 and 44, read in their immediate context and in harmony with the whole legislative scheme, was broad enough to encompass 5G technology. In terms of purpose, she also noted that Parliament intended "to create a legislative scheme that will not become obsolete with changing technologies".[164]

As I represented a party that was broadly supportive of the telecommunications carriers, it should not come as a surprise to learn that I enjoyed reading the dissent much more than the majority reasons. Justice Côté responds quite effectively to the challenge of open texture, recognizing that a term that seems narrow at first glance — "transmission line" — might have to be understood more broadly given the context in which it now applies.

However, Justice Moreau deserves credit for treating dynamic statutory interpretation explicitly and providing the Canadian legal community with a straightforward framework for applying statutes to changing circumstances. We should not expect these issues to go away though.

D. Interpreting Regulatory Statutes

Towards the end of 2025, the Supreme Court of Canada released another decision on the interpretation of statutes in a regulatory context: *Lundin Mining Corp. v Markowich*.[165] Here, by contrast to the *5G antennae* case, the majority interpreted the term "material change" in Ontario's *Securities Act*[166] broadly, with a view to implementing the purposes of the regulatory regime. There are competing approaches to interpreting statutes in Canada and although the 'text as anchor' approach is currently in the ascendancy, it does not command universal allegiance, as *Lundin* illustrates.[167]

---

[158] *Ibid* at para 36.

[159] *Ibid* at para 42.

[160] *Ibid* at para 45.

[161] *Ibid* at para 50.

[162] *Ibid* at para 57

[163] *Ibid* at para 71.

[164] *Ibid* at para 170.

[165] *Lundin Mining Corp. v Markowich*, 2025 SCC 39.

[166] *Securities Act*, RSO 1990, c S.5 [*Securities Act*].

[167] See further Constitutionally Conforming Interpretation.

The underlying issue in *Lundin* was the point in time at which a mining company should have disclosed pit wall instability and a consequent rockslide at its most important mine. The timing depended on whether the instability and rockslide amounted to "material fact[s]" or "material change[s]". A material fact need only be disclosed periodically. But a material change must be disclosed "forthwith".[168] A material fact is defined in s. 1(1) as "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities". A material change is "a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer". As the Supreme Court has previously noted, there are two components to this definition: a *change* that is *material*.[169]

Here, the company did not disclose the instability and rockslide immediately. M was the lead plaintiff in a class action seeking almost $200m in damages, alleging amongst other things a breach of the statutory duty to make timely disclosure of material changes.

Cutting against the grain of the jurisprudence,[170] the first-instance judge found that immediate disclosure was unnecessary: these were material facts, not a material change. The Court of Appeal reversed: "a change is a change and it should be defined broadly…"[171]

The Supreme Court dismissed the appeal. As Justice Jamal summarized his reasons:

> …the motion judge erred by relying on restrictive definitions of "change", "business", "operations", and "capital", and then erred by applying those definitions to determine whether there was a reasonable possibility that there had been a material change. The Ontario legislature intentionally left these terms undefined to allow the legislation to be applied flexibly and contextually to a wide range of industries and corporate structures. The disclosure standards in the Securities Act should be applied to promote the statutory purpose of preventing and deterring informational asymmetry between issuers and investors, while recognizing that the statutory terms at issue acquire meaning by being applied in concrete factual circumstances. By contrast, adopting rigid definitions would ossify the *Securities Act* and would frustrate the statutory purpose.[172]

The Court also addressed the test for leave under the *Securities Act*, explaining that the required "plausible analysis" is "not a plausible statutory *interpretation*, but rather a plausible *application* of the legislation to the facts".[173] I will not say anything more about this aspect of the decision.

Interestingly, even though the Supreme Court has insisted in a number of recent decisions that the legislative text is the "anchor" of the statutory interpretation analysis,[174] Jamal J began with the four purposes of the *Securities Act* regime — investor protection, well-functioning capital markets, capital formation and market stability — each of which is "promoted by the foundational role of disclosure in securities regulation".[175] In particular, Jamal J agreed with Professor Sarro that the "core policy goal" of securities legislation is "preventing and deterring informational asymmetry between investors and issuers".[176] Hence in the so-called secondary

---

[168] *Securities Act*, *supra* note 166 s. 75(1).

[169] *Theratechnologies Inc. v 121851 Canada Inc.*, 2015 SCC 18, at para 40.

[170] Douglas Sarro, "Material Change Standards in Securities Law" (2024), 59:1 *Can Bus LJ* 11.

[171] *Markowich v Lundin Mining Corporation*, 2023 CanLII 359 (ONCA), at para 82, per Justice Favreau [*Lundin*].

[172] *Ibid* at para 6.

[173] *Ibid* at para 7 [emphasis in original]. On this point the judges were unanimous: see *ibid* at para 262.

[174] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43, at para 24.

[175] *Lundin*, *supra* note 171 at para 33.

[176] *Ibid* at para 36.

market for securities (i.e. resale/trading after an initial public offering of shares) "ongoing disclosure" is essential.[177]

Jamal J then teased out the meaning to be given to "material change" by focusing on the distinction between "material change" and "material fact" given the underlying policy considerations:

> A material fact is "static", because it provides a snapshot of an issuer's affairs at a particular point in time. A material change is "dynamic", because it necessarily compares an issuer's affairs at two points in time… The distinction between a material fact and a material change "is perhaps best understood from the perspective of the evolution of an issuer's disclosure record" (Crawford Report, at p. 142). To illustrate, recall the role of a prospectus as a base disclosure document that must contain full, true, and plain disclosure of all material facts relating to the securities issued or proposed to be issued. Any fact will be a material fact, whether or not it is related to the issuer, if it would reasonably be expected to have a significant effect on the market price or value of the securities being issued. After a preliminary prospectus has been filed, the issuer must update its disclosure whenever there is a material change in its business, operations or capital…[178]

In addition, Justice Jamal noted, a material change must be internal to the issuer.[179] There are two policy reasons for this. For one thing, "the distinction balances the burdens that disclosure places on issuers with the need for investors to be informed on a timely basis of material developments in an issuer's affairs".[180] For another thing, "[r]equiring timely disclosure of a material change…helps level the informational playing field between issuers and investors".[181]

With this purposive scaffolding in place, Justice Jamal proceeded to elucidate the meaning of "material change", weaving it into the overall scheme of the *Securities Act*.

First, it was inappropriate to rely on dictionary definitions in this context.[182] Here, the legislature had "intentionally" left "change" undefined,[183] meaning it should retain "its ordinary meaning"[184] and take its colour from its purpose and context — "to level the informational playing field between issuers and investors" — rather than "from a strict legal formula".[185] Moreover, a rigid definition would compromise the effectiveness of the *Securities Act* in applying to different commercial settings.[186] Lastly, interpretive guidance by securities regulators "collectively help illustrate the meaning of the expression".[187]

Second, the first-instance judge had wrongly "incorporated statements from lower court cases requiring a change to be "important and substantial" into the definition of "change" itself, without grounding the interpretation in

[177] *Ibid* at para 40.

[178] *Ibid* at paras 48–49.

[179] *Ibid* at para 56.

[180] *Ibid* at para 57.

[181] *Ibid* at para 58.

[182] *Ibid* at paras 66–69, a striking contrast with the *5G antennae case*, where dictionary definitions played an important role in the majority's analysis.

[183] *Ibid* at para 70.

[184] *Ibid* at para 71.

[185] *Ibid* at para 72.

[186] *Ibid* at para 73.

[187] *Ibid* at para 74.

the purpose of securities legislation to address informational asymmetries between issuers and investors".[188] In part, the first-instance judge's approach collapsed the distinct questions of *change* and *materiality*,[189] but more generally, Justice Jamal held, a broader disclosure approach "is sound as a matter of policy because it promotes the fundamental purposes of the Securities Act"[190] and consistent with regulatory guidance that "in borderline cases, an issuer should err on the side of disclosure".[191]

Third, the first-instance judge wrongly interpreted the terms "business", "operations" and "capital" restrictively. For these are not "rigid statutory definitions"[192] and were intentionally left undefined by the legislature": "[l]eaving the terms undefined allows courts and regulators to apply the legislation broadly and flexibly as the context and circumstances require".[193] Moreover, it is wrong to look at the three terms individually rather than holistically: "[t]hat standard must be applied based on the purpose of disclosure requirements to level the informational asymmetry between issuers and investors, rather than by parsing each element separately".[194]

This is difficult to reconcile with the 'text as anchor' approach the Supreme Court has promoted in recent cases. 'Text as anchor' posits that legislative intention is revealed by statutory language, with any purposive analysis being limited to purposes that are anchored in the text. On this view, there is a fact of the matter as to the intention the legislature wished to convey and it is the job of the court, as faithful agent of the elected representatives, to give effect to that intention. Recourse to dictionaries, which contain facts about how language is understood, is a natural first step in any interpretive process that places facts of the matter about legislative intent front and centre.

By contrast, Justice Jamal's approach seeks to make sense of "material change" given the purpose of the regulatory scheme, the overall scheme of the legislation and the background context, including regulatory guidance, with a view to establishing a definition that is coherent with all of the relevant materials. This might be called 'coherence as anchor', "a truly purposive and contextual approach…that weaves the fundamental principles" of securities law into the interpretation of the *Securities Act*.[195] Here, there is no supposed fact of the matter about legislative intention but, rather, an appreciation that elected representatives legislate to achieve coherence between statutory text, their policy goals and the fundamental principles of the legal system. As Lord Steyn once put it, "Parliament does not legislate in a vacuum", but for a "liberal democracy founded on the principles and traditions of the common law".[196]

True, in *Lundin*, the word "change" is vague (whereas in the *5G antennae case*, "transmission line" arguably had greater specificity). Does the approach in *Lundin* not simply reflect the need to give meaning to a vague statutory provision? But even vague terms can be subject to the 'text as anchor' approach. In that regard, there is a notable methodological difference between Justice Jamal's approach and that of Justice Côté in dissent, who zeroed in on the language of the statutory definition of "material change", focusing heavily on its textual association with "business", "operations" and "capital" (similar to Justice Moreau's majority reasons in the *5G antennae* case). Invoking 'text as anchor',[197] she concluded that the majority approach "would ignore clear legislative intent, intrude on careful policy balancing, undermine key purposes of the Act's disclosure regime, and potentially override the valuable judicially recognized exclusions [from disclosure]".[198] In particular, "change" had to be interpreted by reference to "the

[188] *Ibid* at para 63.

[189] *Ibid* at para 80.

[190] *Ibid* at para 85.

[191] *Ibid* at para 86.

[192] *Ibid* at para 92.

[193] *Ibid* at para 93.

[194] *Ibid* at para 94.

[195] *Michel v Graydon*, 2020 SCC 24, at para 71 per Justice Martin.

[196] *R v Secretary of State for the Home Department, ex parte Pierson*, [1998] AC 539, at 587.

[197] *Lundin*, *supra* note 171 at paras 212, 221.

[198] *Ibid* at para 211.

constituents of immediate context",[199] namely "business", "operations" and "capital".[200] Put very simply, any vagueness in "change" can be resolved by reference to surrounding statutory context. The difference between the majority and dissent is, therefore, in the methodology used to resolve vagueness, not the existence of vagueness. And, at the risk of flogging a dead horse, in the *5G antennae* case, the term was, in fact, vague due to the open texture of language revealed by technological development.

In my view, there is much to be said for Justice Jamal's approach: seeking coherence is what lawyers are trained to do; and in many cases, especially difficult ones, unduly emphasizing text may stand in the way of interpreting statutes in a way that coheres with the relevant legal materials. *Lundin* gives very useful guidance for those who seek to knit statutory definitions into the existing fabric of the law and stands as a counterpoint to the 'text as anchor' approach. Energy lawyers approaching statutory interpretation on the correctness standard should take note.

III. PROCEDURAL FAIRNESS

So much for *Vavilov*. On now to procedural fairness. There have been significant appellate decisions this year on bias, both the problem of bias on multi-member panels and the borderline between bias and active adjudication, and on adjudicative independence, both in terms of protection of individual members from outside interference and the protection of the integrity of a regulatory scheme.

A. Bias

A question that has garnered relatively little attention in recent years is whether the bias of one member of an adjudicative body taints the entirety of the decision. The Supreme Court of Canada's authorities point in two directions.

On the one hand, in *Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)*,[201] the decision of a multi-member regulatory board was set aside on the basis that one member had made public comments that raised a reasonable apprehension of bias (and, indeed, suggested that he had a closed mind). Justice Cory set aside the entirety of the decision on the basis that it had been voided by the presence of bias: "The damage created by apprehension of bias cannot be remedied".[202] There is a long line of authority in support of this proposition.[203]

On the other hand, in *Wewaykum Indian Band v Canada*,[204] the Supreme Court observed in obiter that it would be inappropriate to set one of its decisions aside by reason of the bias of one of its members (though there, on the facts, no bias had been made out). This was because of the collegial process of decision-making at the Supreme Court, which meant that the courts' "reasons express the individual views of each and every judge who signs them, and the collective effort and opinion of them all":[205]

> Here, the nine judges who sat on these appeals shared the same view as to the disposition of the appeals and the reasons for judgment. Cases where the tainted judge casts the deciding vote in a split decision are inapposite in this respect. In the circumstances of the present case, even if it were found that the involvement of a single judge gave rise to a reasonable apprehension of bias, no reasonable person informed

---

[199] *Ibid* at para 212.

[200] *Ibid* at paras 214–19.

[201] *Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 [*Newfoundland Telephone*].

[202] *Ibid* at 645.

[203] See *R. v Ontario Labour Relations Board; Ex parte Hall* (1963), 39 D.L.R. (2d) 113 (Ont. H.C.), at pp. 117–18, citing *Frome United Breweries Co. v Keepers of the Peace & Justices for County Borough of Bath*, [1926] A.C. 586 (H.L.), at p. 591; *R. v B.C. Labour Relations Board, Ex. p. International Union of Mine, Mill & Smelter Workers* (1964), 45 D.L.R. (2d) 27 (B.C. C.A.), at 29; *Haight-Smith v Kamloops School District No. 34* (1988), 51 D.L.R. (4th) 608 (B.C. C.A.), at 614; *Sparvier v Cowesses Indian Band (T.D.)*, 1993 CanLII 2958 (FC), [1993] 3 F.C. 142, at 166; David Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at 131.

[204] *Wewaykum Indian Band v Canada*, 2003 SCC 45 [*Wewaykum*].

[205] *Ibid* at para 92.

> of the decision-making process of the Court, and viewing it realistically, could conclude that it was likely that the eight other judges were biased, or somehow tainted, by the apprehended bias affecting the ninth judge.[206]

In *Vento Motorcycles, Inc. v Mexico*,[207] Justice of Appeal Huscroft engaged in a considered and comprehensive analysis of the question, coming down on the side of *Newfoundland Telephone*: the bias of one member of a multi-member body is the bias of all and taints any decision made by that body.

Justice of Appeal Huscroft began with the proposition that an unfair decision will generally be set aside regardless of whether the procedural unfairness had an impact on the outcome.[208] He observed that this proposition is "stricter still" so far as bias is concerned,[209] rationalizing as follows:

> This approach reinforces the seriousness of an apparent failure of impartiality. No one whose rights, interests, or privileges are at stake can be required to accept a decision made by an adjudicator whose ability to decide fairly is — for whatever reason — reasonably in doubt. The importance of the rule against bias transcends the interests of the parties to a particular dispute: bias is intolerable in any system that aspires to the rule of law. The finding of a reasonable apprehension of bias requires the disqualification of an adjudicator and the nullification of any decision they have made. Nothing less will do.[210]

There are two distinct points here. One is that solicitude for the interests of the individual whose "rights, interests, or privileges are at stake" requires robust judicial intervention: if an adjudicator is not perceived as being able to decide fairly (as opposed to having made a procedural or substantive error at a hearing), the individual should never be subject to the exercise of the adjudicator's authority. Here, the risk of arbitrariness is too great, even more so than in respect of other types of procedural or substantive error. It is one thing for the adjudicator to potentially get something wrong; it is quite another to be exposed to the exercise of power by someone who may consciously or unconsciously make a decision based on entirely extraneous considerations.

In the *Vento Motorcycles* case, one member of a multi-member arbitration panel was negotiating a lucrative appointment to a national panel of arbitrators during the hearing of the arbitration between Vento Motorcycles and the same government that was making the promises. In those circumstances, we fear bias because the arbitrator might (even with the best of intentions) favour the interests of one of the parties out of a concern for future preferment even though this should never be a relevant consideration. This is the risk of arbitrariness and it is categorically different from the risk that an adjudicator will get something wrong in the course of performing an adjudicative function.

A second point is that this principle is systemic: bias is "intolerable" because the legitimacy of the system of adjudication depends upon decisions being made without the taint of bias. If adjudicators are perceived to be biased, no one will have confidence in the ability of adjudicators to resolve disputes dispassionately. This saps the legitimacy of the system and is entirely inimical to any notion of good administration. Who would have confidence in an arbitral system that permitted adjudicators to negotiate lucrative appointments with parties appearing before them? There is a good reason that Lord Chief Justice Hewart's admonition that justice should not only be done but be seen to be done continues to echo down the ages.

In short, the "stricter still" approach to bias has individual and systemic foundations: it ensures individuals are not subject to arbitrary exercises of authority and upholds public confidence in the system.

---

[206] *Ibid* at para 93.

[207] *Vento Motorcycles, Inc. v Mexico*, 2025 ONCA 82 [*Vento Motorcycles*].

[208] *Ibid* at para 29, citing *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643, at 661.

[209] *Vento Motorcycles*, *ibid* at para 31, citing *Canadian College of Business and Computers Inc. v Ontario (Private Career Colleges)*, 2010 ONCA 856, at para 64.

[210] *Vento Motorcycles*, *ibid* at para 32.

Note that in the High Court of Australia's reformulation of its test of 'materiality', the judges agreed that a reasonable apprehension of bias will always be material, as it is "inherent in the nature of the error" that the resulting decision must be quashed, further underscoring the importance accorded to the no-bias principle.[211]

It is useful to consider the 'materiality' issue further. Materiality has three different senses.[212] First, an error can be material in the sense that it is sufficiently serious to justify judicial intervention. A reasonable apprehension of bias is certainly material in that sense. Second, an error can be material in the sense that there is a causal link between the error and the decision. Justice of Appeal Huscroft (and the High Court of Australia) has explained that a reasonable apprehension of bias will *always* be treated as material in this sense. Third, an error can be material in the sense that a judge, in the exercise of remedial discretion, might decide to decline to grant a remedy, perhaps on the basis that the error complained of was immaterial to the outcome.

This third type of materiality appears to be what the Supreme Court had in mind in the *Wewayakum* case. But the Supreme Court's obiter was based on the unique circumstances of the Supreme Court's decision-making processes and the Supreme Court's own knowledge of those decision-making processes.[213]

Ultimately, whilst this sort of remedial discretion can be invoked in principle, the circumstances in which it is likely to be appropriate to do so are extremely limited. Justice of Appeal Huscroft correctly noted that refusing to grant a remedy for bias is the exception rather than the rule.[214]

The only qualification to make here is that an applicant will 'waive' a claim of bias if they do not raise it at the first available opportunity.[215] This is, again, best understood as materiality in the third sense, as relating to judicial discretion to refuse a remedy, really treating a reasonable apprehension of bias as immaterial on the basis that it could not have been material to the outcome if the applicant was content to let the process unfold in the hope of getting a positive outcome. Even here, however, note that the systemic considerations invoked by Justice of Appeal Huscroft will sometimes lead a court to overlook a waiver: if the systemic implications are serious enough, a court will nonetheless entertain a bias claim that was not raised in a timely manner.[216]

Ultimately, then, the bias of one is the bias of all.

This year's cases also feature *Environmental Appeal Board v District Director, Metro Vancouver*,[217] an example of one of those rare occasions in which an administrative decision-maker has conducted a hearing in such a way as to give rise to a reasonable apprehension of bias, that is that the decision-maker had prejudged the outcome before the conclusion of the hearing.

The Court of Appeal (Justice of Appeal Edelmann) pithily summarized the underlying issue:

> In August 2018, the District Director for Metro Vancouver (the "District Director") issued a detailed permit with a number of restrictions and requirements following an application by GFL to operate a large composting facility in Delta. GFL and several residents of Delta filed appeals with the Board.[218]

Justice of Appeal Edelmann concluded that "the lengthy questioning of the District Director's witnesses went well beyond the role of an adjudicative body, at several points veering into cross-examination appearing to favour the position taken by GFL".[219]

---

[211] *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, [2024] HCA 12, at para 6.

[212] Paul Daly, "A Typology of Materiality" (2019) 26:3 Austl J of Admin L 134.

[213] *Vento Motorcycles*, *supra* note 207 at paras 60–61.

[214] *Ibid* at para 42.

[215] *Ibid* at para 33.

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

[217] *Environmental Appeal Board v District Director, Metro Vancouver*, 2025 BCCA 303 [*Metro Vancouver*].

[218] *Ibid* at para 1.

[219] *Ibid* at para 51.

This was "particularly stark" in the questioning of a senior project engineer for Metro Vancouver.[220] Justice of Appeal Edelmann pulled out a couple of examples from the transcript:

Q	Thank you. And under the table there, I think you've been asked to refer to this before, the first phrase that's in italics there, could you read that, please?
A	This memo documents the verbal recommendation of a draft permit attached presented to the District Director on July 31st, 2018 by Trevor Scoffield, Permitting Specialist, and Kathy Preston, Lead Senior Engineer.
Q	Why did you sign this document?
A	Because I reviewed this document and I agreed with the recommendations.
Q	But you weren't at the July 31st meeting that this documents, were you?
A	No, I wasn't.
Q	So you're confident then, in what was recommended at that meeting, is contained in this document then? Because it says "it documents the recommendation of July 31st" —
A	I —
Q	— that you weren't at.
A	I guess I'm making an assumption that — that what is in — this — they all tie together, to me. This — the permit reflects what's in here, and so I have no reason to believe —
Q	And "here" being?
A	Oh, sorry, in the permit recommendation memo, and— the permit recommendation and the permit are tied together, so I — I have no — I have no reason to believe that this isn't what was discussed at that meeting.
Q	Do you usually sign off on contents of a document that documents a meeting you weren't in attendance at? If someone sent you minutes —
A	Mm-hm.
Q	— from a meeting and you weren't at those — at that meeting, would you say I approve these minutes —
A	Point —
Q	— as accurately reflecting what happened in that meeting?
A	Yeah, point taken.
Q	So is that a "no"?
A	So I — I signed this and I wasn't at that meeting, you are correct.
Q	Okay. So if Dr. Preston said, in her testimony, that she couldn't say why you signed it when you weren't there, what would you say about that?
A	I — I don't know. I — again, I had — I had no reason to believe that the meeting didn't do anything other than recommend — or make the same recommendations that are in here, so that was just— that was my — my belief, I guess.
Q	That was —
A	That was —
Q	— your assumption?
A	— yeah, my assumption.

[220] *Ibid* at para 52.

Another member of the Board returned to the issue subsequently:

MEMBER:	Okay, thank you. Madam Chair, if you're finished, may I ask one follow–up on this?
THE CHAIRPERSON:	Yes.
MEMBER:	So Ms. Hirvi Mayne, this is a memo you signed off as a P.Eng?
A	Yes.
MEMBER:	And are you concerned that a document to which you affixed your signature was later changed?
A	I — I guess I'm an engineer, not a lawyer, and so —
MEMBER:	So as an engine — that's okay.
A	So as — yeah. So — so I — I don't — I don't think it was changed enough for to — me to be concerned about.
MEMBER:	Okay.
A	I don't think the — the — the general recommendations are still the same, in — in my opinion.
MEMBER:	Okay.
A	So —
THE CHAIRPERSON:	So you're not concerned?
A	I'm — I'm sorry?
THE CHAIRPERSON:	So your answer was you're not concerned?
A	I'm not concerned.
THE CHAIRPERSON:	Thank you.
MEMBER:	And has it been brought to your — have any other documents that were changed after your signature, as a P.Eng, was affixed within your office — in other words, is this a common practice —
A	I —
MEMBER:	— in your office?
A	I'm not aware of that.

The problem was not so much the aggressive questioning per se but the impression it gave that the Board was aligned with the position of GFL before the hearing had concluded:

> As reviewed by the chambers judge, the questioning included extensive interventions in the evidence of witnesses for the District Director that created the impression that the Chair and one of the members were effectively acting as co-counsel for GFL. As the chambers judge noted, the lines of questioning frequently strayed from any attempt to get to the substance of the issues before the Board, focussing instead on peripheral matters. For example, the District Director's witnesses were questioned at length about the process through which the final recommendations for the permit were formulated, and the authorship of various drafts of the recommendations. Yet these issues appeared irrelevant to the real issue before the Board — whether the permit adequately protected the environment — and were not even referred to in GFL's closing submission. Furthermore, the tenor of the questioning was seemingly directed at undermining the

> credibility of the District Director's witnesses, particularly Ms. Mayne.[221]

Why would an experienced panel of Board members engage in hearing conduct that (for the reviewing judge and Court of Appeal) fell short of what is expected? Interestingly, the Board argued that it was not, in fact, operating in an adjudicative capacity but was, rather, exercising inquisitorial functions and, accordingly, was necessarily entitled to greater latitude in its conduct of the hearing. Justice of Appeal Edelmann rejected these arguments. It is useful to begin with his quoting with approval the first-instance judge's conclusion:

> The [Board], in conducting a hearing *de novo*, is not conducting its own investigation… While it does conduct a hearing *de novo*, it is nevertheless exercising a quasi-judicial, or adjudicative, role in determining the adequacy of the permit under appeal.[222]

Justice of Appeal Edelmann also rejected arguments made on appeal about the inquisitorial nature of the Board:

> The Board argues that, unlike trial courts, the ultimate question before it is what is appropriate and advisable for the protection of the environment. It relies on s. 103 of the EMA, which gives the Board the power to "make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances." I am not persuaded these provisions indicate that the Board has an investigatory role. I would note that the structure of these provisions are not unusual for an appellate body, and are similar to those in s. 24(1) of the Court of Appeal Act, S.B.C. 2021, c. 6, granting this Court the power to "make any order that the court appealed from could have made" along with "any additional order that it considers just". I would also note that part of the adjudicative function of trial courts routinely requires the consideration of interests beyond those of the parties before them, such as the best interests of the child in family law or privacy concerns in various aspects of criminal law. Such considerations do not make trial courts into inquisitorial or investigative bodies.
>
> The Board also argues that after a complaint is filed and a hearing is initiated the parties "are no longer fully in control of what happens." While this may be true of certain procedural elements of an appeal, crucial aspects of the process set out by the EMA are party driven. As noted, an appeal is initiated when a person aggrieved by a decision of a director or district director files an appeal under s. 100(1). Under s. 17 of the ATA, once the appellant withdraws all or part of an appeal, the Board must accordingly dismiss all or part of the appeal. I would note that this is consistent with the interpretation set out in s. 15 of the Board's own *Practice and Procedure Manual*, which states that an appellant may withdraw an appeal before or at a hearing. The ability of an appellant to end the process at any time prior to a decision is not indicative of an investigative or inquisitorial function.[223]

Administrative tribunal members are told to engage in 'active adjudication', which often might involve questioning witnesses to ensure that they have a full grasp of all relevant issues. But active adjudication can run up against the principle that the adjudicator must remain above the fray and not be seen to enter the fray on behalf of one party. In the courts' view, active adjudication here crossed the relevant line.

Whether having an inquisitorial or investigatory function permits even more active adjudication than an adjudicative function is an interesting question. For my part, I think the concept

[221] *Ibid* at para 56.

[222] *Ibid* at para 40.

[223] *Ibid* at paras 38–39.

of active adjudication already blurs any clear lines that might exist between the adjudicative, the inquisitorial and the investigatory. And in all contexts, there are some types of questioning — repeated, aggressive, demonstrative of a fixed position — that should be avoided. Where, as here, the parties are represented by counsel, it is wise for decision-makers to take something of a back seat and only intervene where it is necessary to get clarity on a key element. That said, in a multi-day hearing where the adjudicator is struggling for clarity on key points, this may be a counsel of perfection and, indeed, an adjudicator may well rely on counsel to intervene if any line of questioning from the panel is judged to be problematic. In this area, as in so many others of administrative law, all that can be confidently stated is that there is a line that the decision-maker should be careful not to cross.

One last interesting point to note is that the Director made a recusal motion to the Board. In a 36-page decision, the Board determined that it should not recuse itself. At first instance, Justice Baker held that the Board's views on recusal were of no moment (effectively applying the correctness standard to the question of whether there was a reasonable apprehension of bias):

> While a tribunal's decision on bias can be helpful to a reviewing court in some cases, I find that the usefulness of the views of the tribunal on bias arise where the tribunal sets out some substantive facts which are put into issue, such as the facts of a prior or existing relationship with a party, or some financial relationship to a party or an issue. That kind of information in a tribunal's ruling would be useful for a reviewing court to have before it. In the Recusal Decision, the Panel attempted to assess its own conduct in the hearing. I find that the Panel cannot provide an objective assessment of its conduct and, therefore, I am not able to give any weight to the Recusal Decision.[224]

Justice of Appeal Edelmann agreed, on the basis that the standard of review for questions of procedural fairness is correctness even where reasons for decision have been given on the procedural fairness point at issue.[225]

B. Adjudicative Independence

Adjudicative independence is currently a hot-button topic in North America. South of the border, the Trump administration is advancing the 'unitary executive' theory with significant force (and success before the courts). The underlying philosophy is succinctly laid out in the "Ensuring Accountability for all Agencies" executive order:

> The Constitution vests all executive power in the President and charges him with faithfully executing the laws. Since it would be impossible for the President to single-handedly perform all the executive business of the Federal Government, the Constitution also provides for subordinate officers to assist the President in his executive duties. In the exercise of their often-considerable authority, these executive branch officials remain subject to the President's ongoing supervision and control. The President in turn is regularly elected by and accountable to the American people. This is one of the structural safeguards, along with the separation of powers between the executive and legislative branches, regular elections for the Congress, and an independent judiciary whose judges are appointed by the President by and with the advice and consent of the Senate, by which the Framers created a Government accountable to the American people.
>
> However, previous administrations have allowed so-called "independent regulatory agencies" to operate with

[224] *District Director, Metro Vancouver v Environmental Appeal Board*, 2024 BCSC 1064, at paras 199–200.

[225] *Metro Vancouver*, *supra* note 217 at para 80. See similarly, *Abiodun v Canada (Citizenship and Immigration)*, 2021 FC 642.

> minimal Presidential supervision. These regulatory agencies currently exercise substantial executive authority without sufficient accountability to the President, and through him, to the American people. Moreover, these regulatory agencies have been permitted to promulgate significant regulations without review by the President.
>
> These practices undermine such regulatory agencies' accountability to the American people and prevent a unified and coherent execution of Federal law. For the Federal Government to be truly accountable to the American people, officials who wield vast executive power must be supervised and controlled by the people's elected President.
>
> Therefore, in order to improve the administration of the executive branch and to increase regulatory officials' accountability to the American people, it shall be the policy of the executive branch to ensure Presidential supervision and control of the entire executive branch. Moreover, all executive departments and agencies, including so-called independent agencies, shall submit for review all proposed and final significant regulatory actions to the Office of Information and Regulatory Affairs (OIRA) within the Executive Office of the President before publication in the *Federal Register*.[226]

To give effect to this philosophy, President Trump has removed officers from various statutory bodies, such as the National Labour Relations Board. The Supreme Court seems poised to overturn the New Deal-era decision in *Humphrey's Executor v United States*,[227] which held that Congress could legislate restrictions on the President's power to remove the heads of independent agencies. When the continued applicability of *Humphrey's Executor* came before it on the so-called 'emergency' or 'shadow' docket, a majority of the Supreme Court indicated their view that *Humphrey's Executor* is no longer good law: they refused to stay the President's removal of members of the National Labour Relations Board and the Merit Systems Protection Board.[228] The President has also sought to remove a member of the Federal Reserve, albeit in this instance not seeking to challenge the 'for cause' removal requirement imposed by Congress but rather on the basis of alleged unethical behaviour the member engaged in prior to her appointment.[229]

Canada has no comparable 'unitary executive' theory, but government policy and the adjudicative independence of regulatory tribunals has long been a source of contention here too. A recent judicial contribution offers interesting reflections on the relationship between economic regulators and government policy: *Procureur général du Québec c Duquette*.[230] In particular, there are thought-provoking comments about the nature of rate-setting and the required level of adjudicative independence in the energy sector.

Duquette is an unusual case. A complaint was made about D, who is a member of the *Régie de l'énergie* (Quebec's energy board). The complaint was dismissed. D nonetheless sought judicial review, on the basis that being subjected to the disciplinary regime was an interference with her adjudicative independence, in particular because the grounds on which a *régisseur* (commissioner) can be removed are too broad. At first instance, the judge accepted that the grounds of removal were too broad. In the decree appointing D to the board, she was effectively guaranteed tenure unless she committed fraud ("pour raisons de malversation, maladministration, faute lourde ou motif de même gravité"). But the relevant regulation simply states: "Where it is concluded that a public office holder has violated the law, this Regulation or the code of ethics and professional conduct, the competent authority shall impose a penalty".[231]

---

[226] US, The White House, *Executive Order Ensuring Accountability for All Agencies* (14215) (Washington, Administration of Donald J. Trump, 8:45 a.m., 18 February 2025).

[227] *Humphrey's Executor v United States*, (1935) 295 SC 602 (Supreme Court US).

[228] *Trump v Wilcox*, [2025] SCUS 605 (Application for a stay) 24A966.

[229] *Trump v Cook*, [2025] SCUS 25-5326.

[230] *Procureur général du Québec c Duquette*, 2025 QCCA 616 [*Duquette*].

[231] *Règlement sur l'éthique et la déontologie des administrateurs publics*, RLRQ c M-30, r 1, s 40.

However, the Quebec Court of Appeal observed, the first-instance judge had taken too narrow a view of the regulation. That particular provision did not stand alone but, rather, was embedded in a scheme of regulatory provisions and ethical requirements similar to those applicable to judicial officers. Indeed, given that a range of sanctions could be imposed, from a slap on the wrist to removal from office, it was also possible to reconcile the decree with the regulatory regime by holding that *removal from office* would only be an available sanction in the most serious cases.[232]

The first-instance judge had also offered observations on the board's location on the 'spectrum' of agency independence. This is the familiar notion that administrative decision-makers are arrayed along a spectrum running from the relatively political at one end to the relatively legal at the other, with guarantees of procedural fairness (including independence) becoming gradually more demanding as one moves from the political to the legal end.[233] Here, the first-instance judge had concluded that the board is closer to the political end of the spectrum. That being so, the Court of Appeal held, the regulatory regime was perfectly consistent with the requirements of adjudicative independence: serious guarantees against arbitrariness were in place and satisfied the requirements of fairness.[234]

The first-instance judge went on to find that the board was a "tribunal" within the meaning of the Quebec *Charter of Human Rights and Freedoms*, on the basis that it exercises quasi-judicial functions. This is an extremely consequential matter, because designation as a tribunal means that the body in question must respect the quasi-constitutional standards of adjudicative independence guaranteed by s. 23 of the Quebec Charter.[235]

The Court of Appeal was not persuaded, noting that the board is, first and foremost, an economic regulator, designed to ensure that energy is accessible and affordable through balancing the achievement of government policy, the advancement of the public interest, the protection of consumers and the fair treatment of regulated energy companies.

> The pricing of energy transportation and distribution, which is an essential mandate of the Régie under section 31 of the LRÉ, is an integral part of implementing the State's energy objectives. The aim, once again, is to ensure a balance between government energy policies, the needs of the population, sustainable development, and the fair treatment of energy transporters and distributors [translated].[236]

The first-instance judge had identified several quasi-judicial functions on the basis that these required a hearing. The Court of Appeal demurred, on the basis that the fact that a hearing is provided for cannot be determinative of whether a particular function is quasi-judicial: rate-setting, for example, is not a quasi-judicial function just because it is exercised publicly at a hearing:[237]

> In matters of rate-setting, there is in fact no *lis inter partes*, meaning no dispute between opposing parties in which a court applies the law to a specific factual situation. With respect to the setting of transportation or distribution rates for natural gas, under section 48 of the Act Respecting the Régie de l'énergie, the Régie may act on its own initiative. This is not a "dispute" between opposing parties, but rather a "determination" of rates and conditions. Individuals who may be called upon to contribute to the process during a public hearing are "interested persons" or "participants."
>
> In sum, while the Régie's rate-setting authority has some features normally associated with adjudicative

[232] *Duquette*, *supra* 230 at para 18.

[233] *Petit c Gagnon*, 2023 QCCA 680, at paras 12–13.

[234] *Duquette*, *supra* 230 at para 27.

[235] Association des juges administratifs de la *Commission des lésions professionnelles c Québec (Procureur général)*, 2013 QCCA 1690.

[236] *Duquette*, *supra* 230 at para 46.

[237] *Ibid* at para 48.

> functions, such as the structured process that governs public hearings, several factors point instead to an exercise of executive regulatory power. This is particularly evident from the wide range of potential participants and the diversity of interests and considerations the Régie must take into account [translated].[238]

Furthermore, even if the board does exercise some quasi-judicial functions, its role viewed holistically lies quite close to the political end of the adjudicative independence spectrum, given that it is subject to government intervention and having regard to its functions in relation to advising the government on matters of policy.[239]

The Court of Appeal did not come to a firm view on where precisely the board should be located for adjudicative independence purposes, or what guarantees (if any) should attach to its members. These broader comments on the relationship between the board and the government were obiter, designed just to underscore that the first-instance judge had not fully considered all the potential relevant factors. Any definitive decision on these points will have to wait for another day.[240]

Nonetheless, the comments about the nature of rate-setting (the core function of an energy regulator) and the relationship between regulatory agencies and government are notable.

Many economic regulators would describe their public proceedings in rate-setting matters as quasi-judicial. In fact, in Ontario, the concept of a "hearing" is the trigger for the application of the quasi-judicial procedures required by the *Statutory Powers Procedure Act*.[241] However, as the Court of Appeal observes, it is not clear that the classic characteristics of a quasi-judicial process are present in a rate-setting procedure, even if there is a multiplicity of parties presenting evidence, cross-examining witnesses and so on, and even if all the parties would describe the hearing as "quasi-judicial". Indeed, it may be that as a matter of the common law of procedural fairness, not all participants in a typical rate-setting proceeding are entitled to the procedural protections they have: an *applicant* for a rate might be, but it is doubtful that *interveners* in a hearing are so entitled. Now, I do not mean to suggest that energy regulators should change their practices. Their procedures no doubt enhance the legitimacy of their decisions (and, in some cases, Ontario again being the primary example, are required by statute). I am simply suggesting that as a matter of legal principle the procedures currently in use are not necessarily required, given the nature of the proceeding.

As for the relationship between regulatory agencies and government, this is a particularly hot topic at the moment given the general (though often somewhat vague) commitment of most governments to carbon neutrality at some point in the future and the specific tradeoffs that need to be made today in order to move toward a net-zero world. These reasons are a useful reminder that energy regulators play a variety of functions, including generating information to inform government policy. Although they are at arm's length from government as far as adjudication is concerned, there are invariably, and necessarily, frequent contacts between the two. However, the adjudicative independence of energy regulators remains critically important, not least for the legitimacy of their decisions: we do not live in a world where rate-setting decisions can be dictated by government. Ensuring alignment with government policy whilst also ensuring adjudicative independence is a significant contemporary challenge.

Adjudicative independence also came up, albeit in a different context, in *Conifex Timber Inc. v British Columbia (Lieutenant Governor in Council)*.[242] *Conifex* involved an application for judicial review by a company with a cryptocurrency mining project in British Columbia. These projects demand an enormous amount of electricity. The company made an application to the BC Hydro & Power

---

[238] *Ibid* at paras 50–51.

[239] *Ibid* at paras 57–58.

[240] *Ibid* at para 61.

[241] *Statutory Powers Procedure Act*, RSO 1990, c S.22. See *Re Webb and Ontario Housing Corporation* (1978) 93 DLR (3d) 187 (Ont CA).

[242] *Conifex Timber Inc. v British Columbia (Lieutenant Governor in Council)*, 2025 BCCA 62 [*Conifex*].

Authority. But while its application was in the queue, the Lieutenant Governor in Council (the BC cabinet) made an order in council imposing an 18-month moratorium relieving the Authority from any obligation to provide electricity for cryptocurrency mining operations for a period of 18 months. The company sought judicial review of the order in council on three grounds: first, that it violated the rate-setting principle enshrined in the *Utilities Commission Act*[243] that undue discrimination in the provision of services is not permitted; second, that it was inconsistent with the "regulatory compact" that is a fundamental feature of Canadian utilities law;[244] and third, that the order in council could not lawfully impose a moratorium as it circumvented the right to a hearing that the company would otherwise have been entitled to before the provincial Utilities Commission. All three grounds failed.

The order in council was made under s. 3 of the Act, which permits the BC cabinet to "issue a direction to the commission with respect to the exercise of the powers and the performance of the duties of the commission, including, without limitation, a direction requiring the commission to exercise a power or perform a duty, or to refrain from doing either, as specified in the regulation". The only limit on this authority is that the BC cabinet cannot use it to overturn a decision of the Commission, which is an independent regulatory agency.

On the first ground, Justice of Appeal Riley explained that the "key constraints" were "the relevant provisions of the statute, prior Utilities Commission decisions interpreting those provisions, and the common law".[245] As far as the statute was concerned Justice of Appeal Riley reviewed the relevant statutory provisions.[246] The provisions emphasized the bar on undue discrimination. But, as Justice of Appeal Riley pointed out, they also linked undue discrimination to the characteristics of particular types of customer.[247]

The implication is that in utilities regulation, differential treatment of *differently* situated persons will be statutorily authorized. This was borne out by consideration of past decisions of the Utilities Commission. On the one hand, the Commission refused to set a special rate for low-income customers: this would be differentiation on the basis of personal characteristics rather than on electricity consumption characteristics. On the other hand, the Commission had set a special rate for shore-power ratepayers, on the basis of their electricity consumption characteristics. For Justice of Appeal Riley, the past practice of the Commission therefore provided "further support for the view that differentiation in rates or service offered to a class of customers with distinctive consumption characteristics that have cost-of-service or economic implications does not constitute undue discrimination".[248]

As far as the common law is concerned, the key principle is that a utility must "supply its product to all who seek it for a reasonable price and without unreasonable discrimination between those who are similarly situated or who fall into one class of consumers".[249] Again, however, the emphasis is on whether customers are similarly situated or not. As the Supreme Court put it more than a century ago, what is prohibited is discrimination "as between one…establishment and another".[250] Distinctions can legitimately be made "on a cost-of-service or economic basis" or on the "distinct consumption characteristics" of electricity consumers.[251] Ultimately, Justice of Appeal Riley concluded:

> All of the aforementioned legal constraints allow for an interpretation of the UCA in which distinctions

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

[244] *ATCO Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board)*, 2006 SCC 4, at para 63 [*ATCO*].

[245] *Conifex*, *supra* note 242 at para 87.

[246] *Ibid* at para 88.

[247] *Ibid* at para 89.

[248] *Ibid* at para 92.

[249] *Chastain v British Columbia Hydro and Power Authority* (1972), 32 DLR (3d) 443, at 456.

[250] *City of Hamilton v Hamilton Distillery Co.*, (1907), 38 SCR 23, at 50 (holding *ultra vires* differential water rates charged to a distillery).

[251] *Conifex*, *supra* note 242 at para 95.

> in rates and terms of service may be drawn on the basis of electrical consumption characteristics that have cost-of-service or economic implications. It follows that it was reasonably open to the LGIC to interpret s. 3 of the *UCA* to provide authority for the issuance of an OIC requiring a pause on service for a particular class of projects with distinctive electrical consumption characteristics that had cost-of-service or economic implications.[252]

On the second ground, Justice of Appeal Riley rejected the proposition that the "regulatory compact", with its protection against undue discrimination, was the only objective of the *Act*. Indeed, he held that the prohibition against undue discrimination is only one facet of the *Act* and that "it would not be unreasonable to interpret the *UCA*'s overall objective as ensuring that the public's current and future energy needs are met, in a manner that is safe, reliable, just, and consistent with the government's policy objectives concerning energy conservation, production, and consumption".[253] The Supreme Court pithily defined the regulatory compact in *ATCO*: "the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated".[254] For Conifex, the order in council had to be based on an unreasonable interpretation of the purpose of the Act. But Justice of Appeal Riley did not agree that prohibiting undue discrimination was the "exclusive or overarching objective of the statute":[255]

> [W]hile the regulation of the manner in which public utilities provide service to their customers is an important feature of the UCA, the statute can reasonably be interpreted to have broader objectives. The LGIC's use of its regulation-making power under s. 3 of the *UCA* to address matters of energy policy beyond the technocratic competence of the Utilities Commission is not inconsistent with these broader objectives. Returning briefly to the facts, there is a body of evidence reflecting that the LGIC made the decision to order a pause on the delivery of service to new cryptocurrency mining projects to give the government time to consider not only the cost-of-service and economic impacts of these projects, but also to assess the impact of these projects on B.C. Hydro's ability to meet demand, and the broader implications for the government's energy policy. Against this backdrop, and considering the relevant legal constraints discussed above, it was not unreasonable for the LGIC to conclude that the OIC was consistent with the overarching objectives and purposes of the UCA.[256]

On the third ground, Justice of Appeal Riley disagreed with Conifex that the government's interpretation of s. 3 effectively eliminated the statutory guarantee in s. 28(3) of a hearing prior to the Commission relieving the Authority of its obligation to provide service. This was because s. 3(2) expressly contemplates an order in council taking precedence over any other provision of the statute: "Read together, the effect of these provisions is that the LGIC can direct the Utilities Commission to exercise any of its powers under the *Act*, provided that the direction does not negate a prior order or ruling of the Utilities Commission, and the Utilities Commission must then comply with the direction notwithstanding any other provision of the *Act* or regulations".[257] Missing from this analysis is any consideration of whether the power in s. 3(2) — which is a

[252] *Ibid* at para 98.

[253] *Ibid* at para 114.

[254] *ATCO*, *supra* note 244 at para 63.

[255] *Conifex*, *supra* note 242 at para 120.

[256] *Ibid* at paras 122–23.

[257] *Ibid* at para 129.

Henry VIII clause — should be read narrowly and, if so, how. I have not read Conifex's submissions, but it seems to me that one way to formulate the point would be to say that the right to a hearing is a fundamental common law guarantee, recognized here by statute, and that s. 3(2) should not be read so broadly as to negate a basic tenet of procedural fairness. Of course, this may just be a way of repackaging the 'undue discrimination' argument in the garb of procedural fairness. In any event, Justice of Appeal Riley was not impressed, concluding that Conifex's interpretation would lead to absurdity: "Conifex's interpretation would allow the LGIC to issue a regulation under s. 3 directing the Utilities Commission to make a final order relieving B.C. Hydro of its service obligation, but only after a hearing that would serve no purpose, given the Utilities Commission's statutory obligation under s. 3(2) to comply with the LGIC's direction".[258] This decision therefore provides something of a roadmap for cabinets who wish to take a hands-on approach to matters of energy policy ordinarily within the bailiwick of the regulator.

CONCLUSION

I have gone on at such length, and covered such a variety of administrative law matters that an attempt at summing up would be futile. Suffice it to say that Canadian administrative law is in a relatively happy place, where the basics of the judicial review framework are well established, freeing administrative law aficionados up to deal with important matters like the role of appellate courts, the importance of adjudicative independence, dynamic statutory interpretation, the duty to consult and the principles applicable to bias. Some questions remain about the *Vavilov* framework, most notably in the area of statutory appeals, but these are being fully and carefully debated — when the Supreme Court weighs in, it may well have the option of confirming an emerging consensus. Casting my mind back to the mid-point of the *Dunsmuir* decade 10 years ago, I remember only uncertainty, and am grateful for the stability Canadian administrative law now has. ■

[258] *Ibid* at para 131.

INTERPROVINCIAL COOPERATION AND ENERGY RELIABILITY

*David Morton**

INTRODUCTION

Canada's electricity grid is vast, complex, and quietly impressive. From Labrador to Vancouver Island, most Canadians live within reach of reliable power. Yet beneath that apparent unity lies a striking fragmentation: ten provinces, ten regulators, and ten distinct sets of rules. Electricity flows freely north and south into the United States — but rarely east and west across Canada itself.

As Canada increasingly electrifies, while at the same time decarbonizes electricity generation and tightens economic integration, this patchwork raises an urgent question: can Canada build a truly national grid — one that serves all Canadians with affordable, reliable, and clean power? The answer may depend less on erecting copper wires and steel towers than on something harder: building cooperation.

Historically, Canada's power system evolved as a collection of provincial networks, most with more ties to its southern neighbour than to each other. Manitoba sells power to Minnesota; Quebec to New York; British Columbia to Washington. Transmission corridors north-south rather than east-west.

This pattern made sense at first. Geography made east–west links expensive — the Canadian Shield and the Rockies are unforgiving terrain — and the biggest nearby customers were in the U.S. But it has left the country with a structural blind spot: interprovincial trade is the exception, not the norm. Like wine and beer, much less electricity flows across provincial boundaries than across our international border with the United States.

Now, as climate policy drives electrification with intermittent renewable energy increasingly reshaping supply, and an awakened interest in internal trade and concerns about energy security, there's renewed enthusiasm for strengthening east–west connections. The logic is sound. Provinces could share electricity the way they already share pipelines and railways — balancing peaks and valleys in demand and smoothing the intermittency of wind and solar power. But steel and copper alone won't fix the system — Canada also needs regulatory institutions that make those wires work in the public interest.

The trouble is that Canada needs effective governance structures for a national grid. We have no equivalent to the United States' Federal Energy Regulatory Commission ("FERC"), which coordinates interstate markets and enforces open-access rules. Nor do we have a national transmission operator or reliability coordinator. Instead, our electricity system functions as a set of interconnected regional islands — linked physically, separated institutionally.

This fragmentation shows up perhaps most clearly at the seams: the interties connecting provinces. These lines could be Canada's greatest reliability asset, allowing clean energy to flow where it's needed and reducing the need for redundant capacity. Yet too often, they sit underused. Alberta's 2025 intertie restrictions offer a case study in how technical caution, economic issues and policy gaps can converge to limit interprovincial cooperation.

The Alberta episode also underscores a deeper problem: without harmonized rules

* David Morton, *Interprovincial Cooperation and Energy Reliability*, (Canadian Energy Reliability Council, 2025).

or a coordinating authority, no one is truly responsible for optimizing Canada's grid as a whole. Canada's federal energy regulator, the CER, has limited jurisdiction; provincial regulators focus inward; market operators lack mandates beyond their borders. As a result, national reliability depends on a patchwork of bilateral arrangements, good faith, and luck.

The following sections traces how Alberta's experience exposes those fault lines, how the AESO's Restructured Energy Market reform process addressed them, and how lessons from the U.S. FERC could point toward a more coherent national model for Canada.

ALBERTA AND ITS INTERTIES – CANARY IN THE COAL MINE?

In September 2025, an early-autumn heatwave pushed provincial demand to near-record highs. As air conditioners and industrial loads spiked, the Alberta Electric System Operator ("AESO") quietly derated every intertie — the transmission connections to British Columbia, Saskatchewan, and Montana — to zero imports. For several critical days, Alberta could neither draw power from its neighbours nor export any excess.[1]

Under normal conditions, Alberta's interties are a significant reliability asset. The Alberta–B.C. connection, part of the Western Electricity Coordinating Council's ("WECC") Path 1, can carry roughly 1,200 megawatts west to east and 1,000 MW east to west. The 230-kilovolt Montana–Alberta Tie Line ("MATL") adds about 300 MW, while two smaller links to Saskatchewan supply roughly 150 MW combined. Yet during that week, all of them sat idle.

According to a recent Business in Vancouver article, this is not the first time, at least for the

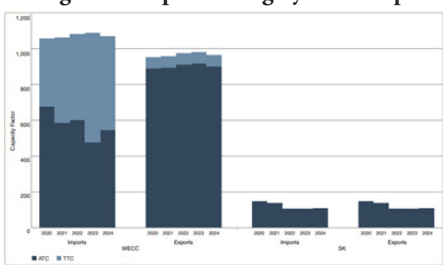
BC-Alberta intertie: the Alberta-bound line has rarely reached its eastward capacity overthe past two decades.

Records show Alberta has consistently limited transmission to between 40 and 60 per cent of what can be delivered, even though B.C. allowed in over 90 per cent of the intertie's rated capacity.[2]

Similar deratings have also long been occurring on the MATL as alleged in an October 2024 letter from the American Clean Power Association and American Council on Renewable Energy to Ambassador Katherine Tai the U.S. Trade Representative to Canada.[3]

This is illustrated in the chart below (ATC = Average Transfer Capability, TTC = Total Transfer Capability).[4]

Average annual path rating by transfer path



[1] For the three interties, AESO data shows:

From September 1 to September 7 – between 400 MW and 600 MW.

From September 8 to September 18 – between 0 MW and 200 MW

From September 19 to September 28 – 0 MW

From September 29 to October 1 – between 400 MW and 600 MW.

[2] Stefan Labbé, *Failed B.C.-Alberta transmission line holds lessons for a national grid*, (last modified 18 July 2025), online: <biv.com/news/resources-agriculture/failed-bc-alberta-transmission-line-holds-lessons-for-a-national-grid-10725383>.

[3] United States Council for International Business, "Comments Regarding Foreign Trade Barriers to U.S. Exports for 2025 Reporting—Canada [Docket Number USTR-2024-0015]" (Washington, D.C.: 2024); American Clean Power Association, Press Release, 220508 "Joint Statement from American Clean Power Association and American Council on Renewable Energy to Ambassador Katherine Tai United States Trade Representative Office of the U.S. Trade Representative" (17 October 2024).

[4] Albert Electric System Operator, *2024 Annual Market Statistics*, (Alberta: 2025) at 29, online (pdf): <aeso.ca/assets/Uploads/market-and-system-reporting/Annual-Market-Stats-2024.pdf>.

The AESO cites reliability as the reason for the deratings — it considers that relying on the intertie for imports exposes the province to risk in the event of a sudden loss of the intertie. It also claims that operational limits on lines in Alberta connecting to some of the interties contribute to the need to derate the interties. Critics accused Alberta of using "reliability" as a pretext for economic protectionism — shielding local generators and driving up domestic prices.

The Alberta Chambers of Commerce estimated that such limitations had cost consumers between $300 million and $500 million over several years. Mark Zacharias of Clean Energy Canada put it more bluntly: "What you're seeing are the symptoms of provincial energy fiefdoms."

This example exposes a deeper issue: no institution in Canada has the authority or incentive to ensure interprovincial lines are used optimally for national reliability. The Canadian Energy Regulator oversees the physical approval of international and, theoretically, interprovincial lines, but it has no operational or tariff-setting powers once a line is built. Provincial regulators such as the Alberta Utilities Commission ("AUC") and the BC Utilities Commission ("BCUC") regulate within their own borders, with little obligation to harmonize with one another.

In this case it left the AESO, a provincial market operator, effectively making national reliability decisions by default. When it derates or restores its intertie capacity, the consequences ripple across the Western grid. Yet those decisions are made under provincial authority, guided by Alberta's Electricity Act — not by a pan-Canadian framework.

UPGRADING THE BC-ALBERTA INTERTIE

In 2018, according to material on the AESO website, the "Alberta — British Columbia Intertie Restoration" kicked off, and in that year, there was a joint public consultation conducted by AESO and AltaLink, Alberta's transmission owner. On the website, AESO stated that:

> Alberta's interconnection with British Columbia is not currently operating to, or near to, its path rating. To restore the intertie, the AESO has determined additional equipment in close proximity to the existing 500 kV transmission line, called transmission line 1201L, is required, along with clearance mitigation work on specific portions of the existing 1201L line and upgrades to the 500/240 kV transformation capacity at the existing Bennett substation, near Langdon.[5]

In a January 2018 Newsletter, also on the project website, the AESO stated that it planned to file a separate application with the AUC, in conjunction with AltaLink's facilities application for this project, by mid-2019.[6] The latest update on the site, a letter dated January 18, 2022, states:

> The AESO continues to evaluate and assess all available options for the restoration of the Alberta-British Columbia Intertie to its path rating. We anticipate these evaluations to take place over the next year, and we will communicate next steps with impacted stakeholders once we have completed this work.[7]

However, it turned out that the proposed work on the BC intertie would have to wait until at least 2026. Attention was shifting from transmission engineering to a revised wholesale market design to, in part, address a mismatch between the approach to managing wholesale market in Aberta as compared to its neighbours.

BC, Montana and Saskatchewan, the three connected jurisdictions have no competitive wholesale market. All three are "vertically integrated" jurisdictions. Individual utilities have

[5] Alberta Electricity System Operator, "Transmission Project: Alberta – British Columbia Intertie Restoration (7006)" (last visited 21 January 2026), online: <aeso.ca/grid/transmission-projects/intertie-restoration>.

[6] Alberta Electricity System Operator, "Alberta – British Columbia Intertie Restoration" (January 2018), online (pdf): <aeso.ca/assets/Uploads/Tx-Newsletter-AB-BC-Intertie-Restoration-Final.pdf>.

[7] Letter from Mike Deising, Director of Communications & Stakeholder Relations (31 January 2022) letter to update stakeholders on the status and timinf the Alberta-British Columbia Intertie Restoration project, online (pdf): <aeso.ca/assets/Uploads/projects/2022-Update-letter-Intertie_FINAL.pdf>.

a franchise territory where they own and operate generation, transmission and distribution facilities. Retail rates are set on a cost-of-service basis; and there is no economic regulation of wholesale rates or a transparent mechanism of price discovery for wholesale rates.

The AESO's *Market Pathways Report* (2022) identified five structural barriers to efficient intertie use: (1) misaligned pricing intervals, (2) lack of congestion management mechanisms, (3) inconsistent treatment of import bids, (4) inadequate ancillary service procurement, and (5) *limited reciprocity between vertically integrated and competitive markets.*[8]

AESO concluded that these challenges could not be fixed through hardware alone — they required a restructured market framework.

THE AESO'S NEW RESTRUCTURED ENERGY MARKET (REM)

On July 18 2024, the Alberta Electric System Operator (AESO) released its *Intertie Participation Options Paper* to gather feedback on how Alberta's transmission connections could operate within the Restructured Energy Market (REM).[9] AESO emphasized that intertie design was central to efficient and fair electricity exchange with neighbouring jurisdictions and outlined objectives of affordability, reliability, 2050 decarbonization, and reasonable implementation.

The paper presented four options:

1. Status Quo – self-scheduled trades remain price-takers;

2. Priced Interties – economic offers and bids;

3. Optimized Scheduling – coordinated dispatch between provinces; and

4. Joining Western Markets – participation in SPP Markets+ or CAISO EDAM.

Over 30 stakeholders participated, including Powerex, SaskPower, Berkshire Hathaway Energy Canada, TransAlta, and Capital Power. Powerex supported transparent, market-based participation but warned against unilateral import curtailments. Berkshire Hathaway argued that unclear access pricing deterred investment, while Alberta generators cautioned that more imports could suppress prices and reduce domestic investment.[10]

AESO's Final Design stopped short of full external market integration (Option 4). Instead, it incorporated intertie participation rules directly into the REM framework — defining eligibility, scheduling, cost allocation, and operational constraints — to balance reliability, affordability, and emissions goals.

A ministerial directive (Dec 10 2024) required AESO to:[11]

- File a plan with the AUC by 2026 to restore and upgrade the AB-BC intertie;

- Maintain high levels of ancillary services for full import capability on both the AB-BC and MATL lines;

- Proceed without competitive procurement; and

- Collaborate with the AUC to implement five-minute settlement intervals by 2032 (system-wide by 2040).[12]

---

[8] Alberta Electric System Operator, *Market Pathways Report* (Calgary: Alberta Electric System Operator, 2022).

[9] Alberta Electric System Operator, *Restructured Energy Market* (2024).

[10] Alberta Electric System Operator, Request for Feedback on REM Intertie Participation Options: July 18 - Aug. 9, 2024 (last visited 21 January 2026), online: <aesoengage.aeso.ca/rem-intertie-participation/surveys/rem-intertie-options-initial-stakeholder-input>.

[11] Letter from the Minister of Afordability and Utilities of Alberta, Nathan Neudrof, to the President and Chief Executif Officer of the Alberta Electirc System Operator (10 Decembre 2024), online (pdf): <ehq-production-canada.s3.ca-central-1.amazonaws.com/38a16e7be66e925f4b09f1d909e64f0a6c40d908/original/1733868706/b1377d0d48bd3f0f4b39963b4d7f993d_Direction_Letter_from_Minister_10Dec2024.pdf>. See also Jessica Kennedy et al., "*Alberta Issues Directive for Power Regime Overhaul*: Fast and Furious Implementation" (18 December 2024), online (blog): <bennettjones.com/Insights/Blogs/Alberta-Issues-Directive-for-Power-Regime-Overhaul-Fast-and-Furious-Implementation/pdf>.

[12] The AESO also sought public comment on 5-minute settlement intervals as part of the REM consultation process.

The REM process illustrates Canada's paradox: energy-market innovation thrives provincially, yet without interprovincial coordination, reforms remain isolated experiments rather than components of a unified continental system.

LIMITED CANADIAN FEDERAL JURISDICTION OVER REGIONAL TRANSMISSION

When Canadians think of electricity, they think provincially: Hydro-Québec, BC Hydro, Manitoba Hydro, Ontario's IESO, Alberta's AESO. Ottawa is rarely part of that picture. The reason lies in the Constitution — and in decades of institutional inertia that have kept electricity regulation largely within provincial borders. Yet, as interdependence grows, the absence of federal coordination is becoming increasingly costly.

Under the *Canadian Energy Regulator Act* (*CER Act*), the Canadian Energy Regulator ("CER") has clear authority over international and interprovincial power lines. Section 261 allows the federal Cabinet to designate a line as interprovincial, while Section 262 requires that designated lines obtain a federal certificate of public convenience and necessity.[16] Section 58.1 empowers the CER to adopt and enforce reliability standards for designated lines and international connections, aligning Canada with the reliability framework of the North American Electric Reliability Corporation ("NERC").

Yet despite this robust statutory language, the federal role in electricity transmission is narrow in practice. Since the *National Energy Board Act* was replaced by the *CER Act* in 2019, no interprovincial power line has ever been designated – and it appears that in its considerably longer history, the CER's predecessor the National Energy Board didn't either. The CER continues to regulate international lines and exports, but its oversight of interprovincial transmission remains largely theoretical.

This governance gap has significant consequences. When any province derates its interties, it affects system reliability across the interconnection. Yet there is no federal mechanism — short of political negotiation — to resolve such disputes. The CER cannot compel provinces to restore capacity or to harmonize tariffs. Nor can it enforce reciprocal treatment for intertie participants.

The irony is that Ottawa has stronger authority over cross-border lines with the United States than over lines connecting two Canadian provinces. This asymmetry reflects a federalism built for a different era — one in which provinces were self-contained systems with limited interdependence. Today, it is a structural weakness.

This institutional gap contrasts sharply with the situation in the United States, where the Federal Energy Regulatory Commission (FERC) operates as a powerful central referee.

Understanding that contrast helps illuminate what Canada lacks — and what a future cooperative model might require.

HOW DOES THIS COMPARE TO FEDERAL JURISDICTION IN THE U.S.?

If the Canadian Energy Regulator's authority over interprovincial electricity is at the modest of a spectrum, the U.S. Federal Energy Regulatory Commission ("FERC") stands at the opposite end, FERC is the keystone of a unified federal framework for electricity transmission, wholesale markets, and reliability. Its evolution shows how a federal system can balance state autonomy with national coordination — something Canada has yet to achieve.

FERC's authority over the electricity transmission system in the US[13] comes from the *Federal Power Act* ("*FPA*") of 1935, which extended federal jurisdiction to "the transmission of electric energy in interstate commerce" and to "the sale of such energy at wholesale in interstate commerce."The rationale was simple: electricity flows do not respect state borders, and uncoordinated regulation risked creating balkanized systems. The U.S. Constitution's Interstate Commerce Clause gave Congress the power to regulate such trade,

[13] The "interconnected grid" regulated by the FERC, includes all lines operating at 100 kV or greater and is referred to as the Bulk Electric System or BES.

allowing the federal government to impose consistent rules across states.

As a result, if wholesale electricity sales, even within a single state, can affect interstate flows and markets they fall under federal jurisdiction. Therefore, if a wholesale transaction occurs entirely within one state (both buyer and seller located in the same state), FERC can and does regulate it if:

- The electricity flows on an interconnected grid that crosses state lines (which most U.S. grids do), or
- The transaction effects interstate wholesale prices or reliability.

Today, FERC's jurisdiction encompasses the transmission and wholesale sale of electricity in interstate commerce, along with natural gas pipelines and hydropower licensing. Its mission is to ensure that rates are "just and reasonable," that markets operate without undue discrimination, and that reliability standards are maintained.

This authority is not absolute—states still control retail electricity rates, resource planning, and siting of generation—but it is extensive enough to unify the backbone of the U.S. grid. Any transaction or facility that affects interstate flows falls within FERC's purview.

Orders 888 and 889: Opening the grid

Modern U.S. electricity markets may well have been born in 1996, when FERC issued Orders 888 and 889. Order 888 required vertically integrated utilities to provide open, non-discriminatory access to their transmission systems — a notion now embedded in Open Access Transmission Tariffs ("OATT"). Order 889 complemented this by creating the Open Access Same-Time Information System ("OASIS") — a public database showing available transmission capacity in real time. For the first time, generators and traders could see and reserve capacity on a transparent, standardized platform. The combination of these orders laid the groundwork for competitive wholesale markets across much of the U.S.

Order 2000 and the rise of RTOs

In 2000, FERC issued Order 2000, encouraging utilities to form Regional Transmission Organizations ("RTOs"). These entities coordinate regional dispatch, transmission planning, and congestion management, effectively serving as neutral grid operators over multi-state territories. Today, RTOs along with similar single-state ISOs manage more than two-thirds of the U.S. electricity load.

The largest — the PJM Interconnection — spans 13 states and the District of Columbia, coordinating a market of over 1,000 participants. Others include the Midcontinent Independent System Operator ("MISCO"), the Southwest Power Pool ("SPP"), the California Independent System Operator ("CAISO"), the New York ISO ("NYISO") and the ISO New England ("ISO-NE"). These organizations operate energy, capacity, and ancillary service markets under FERC-approved tariffs, ensuring transparent and consistent pricing across vast regions.

Orders 1000 and 2222: Planning for a changing grid

As the grid evolves, so does FERC's regulatory toolkit. Order 1000 (2011) required regional and interregional transmission planning and cost allocation. It forced utilities and RTOs to coordinate investment in new lines that provide regional benefits, ensuring that costs are shared equitably.

More recently, Order 2222 (2020) opened wholesale markets to distributed energy resources ("DERs") such as batteries, rooftop solar, and aggregated demand response. This order recognized that reliability and efficiency increasingly depend on the integration of small, flexible assets — a shift Canada is only beginning to grapple with.

FERC, electricity reliability and NERC

FERC delegates reliability oversight in the U.S. to NERC, which operates under FERC's authority. Section 215 of the *Federal Power Act*, added in 2005, make NERC's standards mandatory and enforceable.

Reliability standards include standards for physical and cyber-security, vegetation management, maintaining generation and load balance, emergency preparedness and operations, facilities ratings, reserve margin requirements, providing accurate data and models for planning and operations, transmission operations, transmission planning and connecting inverter-based resources to the grid.

NERC develops reliability standards through a stakeholder process; FERC approves them and enforces compliance through fines and corrective actions.

This arrangement—federal oversight with delegated technical implementation—ensures both accountability and flexibility. It also binds Canada to the same reliability framework, since Canadian utilities that trade with U.S. markets must comply with NERC standards.

THE RECIPROCITY PRINCIPLE

When FERC issued Order 888 in 1996, requiring open access to transmission networks, it also extended a condition of reciprocity to foreign utilities. To sell into U.S. wholesale markets, non-U.S. entities had to provide "comparable open access" at home. That meant Canadian utilities wishing to export electricity to the U.S. had to offer similar non-discriminatory access to their own transmission systems.

The result was subtle but profound. Without passing new legislation, Canada's provinces effectively adopted FERC's open-access framework through self-interest. Most large Canadian utilities — BC Hydro, Manitoba Hydro, Hydro-Québec, and IESO — developed Open Access Transmission Tariffs ("OATTs") that mirrored FERC's pro forma tariff, sometimes almost word-for-word.

In practice, this meant that a generator in Washington or Minnesota could access transmission on comparable terms to a generator in Alberta or Ontario. It also ensured that Canadian exports complied with FERC's transparency requirements. Reciprocity, in short, became the mechanism through which U.S. federalism shaped Canadian electricity policy — without any formal treaty or constitutional amendment.

Reliability alignment

The Canadian Energy Regulator ("CER") formally recognizes NERC and its regional entities — WECC, MRO, and NPCC (Northeast Power Coordinating Council) — as the basis for Canadian reliability compliance. Provinces with direct connections to the US portion of the grid adopt and enforce most or all NERC reliability standards and, in most cases, they are enforced by the province's utility regulator.

This arrangement ensures that Canada and the U.S. operate under a single continental reliability framework. It also provides a degree of technical consistency that makes cross-border power trade seamless. However, the system relies entirely on voluntary adoption and self-enforcement. If a province chose not to apply NERC standards, no federal Canadian body could compel it to do so.

A voluntary web, not a national grid

Canada's participation in NERC and adoption of FERC-style tariffs may give the illusion of continental integration. In reality, the system depends on voluntary compliance and bilateral goodwill. This structure works when provincial interests happen to align, but it lacks mechanisms for resolving disputes or balancing costs and benefits. When Alberta derates its interties, or when provinces disagree over wheeling charges, there is no referee to call a foul. The handshake holds only as long as both parties choose to clasp hands. As we saw in the Alberta example, Montana's right to access Alberta intertie doesn't trump Alberta's reliability concerns and the operational decisions to derate the capacity of the intertie.

As Canada pursues increased electrification, this voluntary patchwork looks increasingly fragile. The federal government has begun to acknowledge this through programs like the Smart Renewables and Electrification Pathways Program ("SREPs") and the Pan-Canadian Grid Council, but without clear regulatory authority, coordination remains aspirational.[14]

The next step, many analysts argue, is to evolve from a handshake to a framework — a cooperative model that preserves provincial autonomy while establishing enforceable rules for reliability and open access. The U.S. experience suggests that such a model is achievable within a federal system. Whether Canada can muster the political will to build it remains an open question.

[14] Natural Resources Canada, *Smart Renewables and Electrification Pathways Program (SREPs): Program Overview* (Ottawa: Natural Resources Canada, 2023).

RELIABILITY THROUGH DIVERSITY – WHY WE NEED A CANADIAN GRID

Although the ability to buy and sell electricity from and to a neighbouring province directly benefits both of those provinces, Interprovincial interties can benefit more than just the two provinces they connect. Broader east-west (and west-east) diversity can be a driver to electricity trade across the entire country. For example, the evening peak load in Manitoba occurs about two hours before the evening peak in BC. This can enable BC to supplement Manitoba's generation to help meet demand and vice versa. Connecting provincial electricity grids east-west in Canada allows provinces to leverage this load diversity thereby reducing the need for new generation capacity in each province as population and load grows.

East-west transmission also provides for geographical diversity for intermittent renewables — if the wind isn't blowing in New Brunswick, it may be blowing somewhere in Ontario or vice versa. It also enables provinces with dispatchable generation (such as hydroelectricity), to "firm up" intermittent generation sources in other provinces by providing electricity when those intermittent sources can't produce electricity.

Economists have long shown that regional diversity reduces the total amount of capacity needed to maintain reliability. A 2022 study by the Canadian Climate Institute estimated that better interprovincial connectivity could cut total generation investment needs by up to $1.7 billion per year by 2050.[15] In other words, sharing reserves and balancing variability can save money while improving resilience.

A national reliability framework would also diversify risk. Extreme weather—floods in B.C., droughts on the Prairies, ice storms in Ontario—rarely respects borders. If one province experiences an outage or generation shortfall, access to neighbouring systems can prevent cascading failures. In a fully cooperative grid, no province would need to overbuild "just in case."

Equity in access and price

Reliability and equity are two sides of the same coin. Provinces rich in dispatchable hydro capacity, such as B.C., Manitoba, and Québec, possess valuable flexibility that can firm intermittent renewables elsewhere. Provinces without such resources, such as Alberta and Saskatchewan, face higher costs to ensure adequacy. Coordinated trade could equalize those advantages — allowing hydro provinces to earn revenue from flexibility while fossil-reliant provinces access clean power at competitive prices.

Without coordination, however, disparities deepen. Electricity prices in Canada vary by a factor of three — from less than $0.08 per kWh in Manitoba to more than $0.25 in parts of Atlantic Canada. Some of that reflects resource endowment, but many stem from policy fragmentation. When provinces invest in redundant capacity rather than shared infrastructure, consumers pay for isolation.

Why equity matters

Increased electrification will amplify these challenges. Decarbonizing electricity is a national goal, but the cost and feasibility vary by province. Hydro-rich regions will decarbonize electricity relatively easily; fossil fuel-dependent ones will struggle unless they have access to less emissive energy. A fair transition therefore requires interprovincial cooperation—not charity, but reciprocity.

Equity also matters politically. Public support for national climate policy depends on visible fairness. If one province bears higher costs because it lacks local resources, resentment grows. A shared grid distributes both opportunity and responsibility. That is the essence of cooperative federalism: not uniformity, but mutual aid.

Reliability as a national asset

Electric reliability is often seen as a provincial metric — measured in SAIDI (System Average Interruption Duration Index) and SAIFI (System Average Interruption Frequency Index) scores. But at scale, it is a national asset.

[15] Canadian Climate Institute, *Connected and Ready: How Interprovincial Transmission Can Help Canada Achieve Net Zero* (Ottawa: Canadian Climate Institute, 2022).

Reliable electricity underpins every modern industry, from manufacturing and mining to digital services. When reliability falters in one region, it affects supply chains, prices, and public confidence nationwide. And as we appear prepared to extend our dependence on electricity to the transportation sector, electricity reliability's effect on us all will have an even greater impact.

In this sense, reliability is to the electricity sector what interprovincial highways are to transportation: a shared foundation for economic life. Yet while Canada has a national highway system funded by both orders of government, it has no equivalent for transmission. The infrastructure exists, but the governance does not.

CONCLUSION: BUILDING TRUST ALONGSIDE WIRES

The story of Canada's electricity grid is, at its heart, a story about trust. Wires can carry power, but only institutions can carry confidence. The physical infrastructure of interties and substations is impressive, but without a framework of shared governance, it remains underused — a half-built national project.

Learning from FERC – without copying it

Canada need not replicate FERC, but it can learn from its approach. FERC's authority rests not on centralization but on clarity: states know what they control (generation and retail), and the federal government knows what it controls (interstate transmission and wholesale markets). That clarity creates predictability, which attracts investment and enables planning.

Canada's current ambiguity—Ottawa has theoretical jurisdiction over interprovincial lines but exercises none—creates the worst of both worlds: overlapping accountability with no enforcement. A clearly defined cooperative model, backed by federal recognition of interprovincial lines, would bring order to this uncertainty.

From policy to politics

The barriers to such reform are not technical; they are political. Provinces fear losing control, and the federal government fears provoking them. But history shows that shared jurisdiction need not mean zero-sum control. Confederation itself was built on the idea that common infrastructure could coexist with local autonomy. The Intercolonial Railway[16] of the 19th century was a federal project serving provincial economies. The Trans-Canada Highway and national pipelines followed the same logic. Electricity transmission should be no different.

The political calculus may also be changing. Extreme weather, supply-chain disruptions, and the rising cost of reliability have made energy security a mainstream public concern. Voters care less about jurisdictional pride than about keeping the lights on. As electricity becomes the backbone of the net-zero economy, its governance will inevitably become more national in character.

A model of cooperative federalism

FERC's structure demonstrates that federal coordination need not undermine regional autonomy. States retain control over generation choices and retail markets, while FERC provides a transparent, rules-based framework for interstate reliability and commerce. The result is a system that encourages investment, facilitates renewables, and manages congestion across borders.

For Canada, this contrast is instructive. The U.S. model shows that even in a federal country with strong state rights, national reliability and open access can be achieved through legislation, delegation, and clear accountability. It offers not a blueprint for replication, but a useful example.

What Canada needs is not a top-down federal takeover but a federated reliability compact — a binding framework built on cooperation, transparency, and reciprocity. Provinces would retain operational control but commit to shared standards and dispute

[16] As a historic Canadian railway that operated from 1872 to 1918, when it became part of Canadian National Railways. As the railway was also completely owned and controlled by the Government of Canada, the Intercolonial was also one of Canada's first Crown corporations.

resolution mechanisms overseen by the CER or a similar organization.

This could begin modestly: joint planning for a handful of key interties and coordinated reserve-sharing agreements. Over time, it could evolve into a country-wide partnership, reflecting Canadian values of equity and regional balance.

The payoff would be enormous. A more interconnected grid would reduce costs, enhance reliability, and help to support electrification policy — all without sacrificing provincial autonomy. It would also allow Canada to present a coherent face to the United States in cross-border market integration, strengthening both sovereignty and competitiveness.

Building trust alongside wires

Ultimately, the challenge of interprovincial cooperation is less about electrons than about institutions. Trust, once built, can help move power fast, reliably and efficiently. But trust requires rules — clear, fair, and enforceable. Canada's energy future will depend on whether it can move from handshake diplomacy to a rules-based partnership among provinces and between provinces and Ottawa.

The lesson from Alberta's REM, from FERC's evolution, and from the CER's dormant authority is the same: cooperation is not an act of charity; it is an act of prudence. As the grid becomes the central nervous system of our economy, Canada must decide whether that system will be a collection of provincial reflexes or a coordinated national response.

Some wires already exist and the rest can be built. The question now is whether we have the will to connect them. ■

SIMPLIFIED VERSUS INTEGRATED MARKET DESIGNS: A REVIEW OF ALBERTA'S EVOLVING ELECTRICITY MARKET

*David P. Brown**

1. INTRODUCTION

Like many jurisdictions worldwide, Alberta's electricity system is undergoing considerable changes as its generation resource mix evolves. Between 2015 and 2024, the province saw a rapid decline in coal generation from meeting 50 per cent of total output to just 2 per cent, while renewable generation in the form of wind and solar has more than tripled as a share of output supplying 17 per cent of the market. The remainder of the market is served largely by natural gas generation, making up 78 per cent of generation in 2024.[1] With these changes comes new pressures on Alberta's electricity market design which has remained relatively unchanged in its core elements since its inception in 2001.

This article outlines several key elements of ongoing market reforms in Alberta, referred to as Alberta's Restructured Energy Market ("REM"). The REM was initiated in early 2024, with the Alberta Electric System Operator ("AESO"), the organization in charge of planning and operating Alberta's electricity system, submitting a report on market reform recommendations.[2] After stakeholder engagement, the final REM proposal was released in August 2025, providing a clearer picture of the future direction of Alberta's market design.[3] Throughout this process, the REM reforms were paired down in key ways from the original recommendations. The proposed REM adopts a number of important market reforms, but it maintains several unique features of Alberta's relatively simplistic market design. While it could be argued that Alberta's market has functioned well in the past and the simplicity is a feature not a bug, the changing technology mix and anticipated demand growth place distinct pressures on the prevailing market framework.

* David Brown is a Professor of Economics at the University of Alberta where he holds a Canada Research Chair in Energy Economics and Policy. He is a Faculty Affiliate at Stanford University's Program on Energy and Sustainable Development. David has served as the president of the Canadian Association for Energy Economists since 2020. His expertise lies at the intersection of energy economics, industrial organization, and regulatory policy.

David Brown is engaged as a subcontractor for FTI Consulting on the ongoing AESO's ISO Tariff Redesign project. The views and opinions expressed in this piece are solely his own and do not necessarily reflect those of FTI Consulting or its clients. David was not privy to any confidential or non-public information concerning the matters addressed in the article and has exclusively relied on publicly available information.

[1] Alberta Utilities Commission, "Annual Electricity Data", online: <auc.ab.ca/annual-electricity-data>.

[2] Alberta Electric System Operator, "Alberta's Restructured Energy Market: AESO Recommendation to the Minister of Affordability and Utilities" (31 January 2024) online (pdf): <aesoengage.aeso.ca/37884/widgets/156642/documents/125532>.

[3] Alberta Electric System Operator, "Restructured Energy Market: Final Design" (August 2025), online (pdf): <aeso.ca/assets/REM/Restructured-Energy-Market-Final-Design.pdf>.

The growing pains facing Alberta's electricity market are not unique. Many jurisdictions worldwide have adopted sophisticated market elements to deal with both the short-run and long-run challenges arising from the broader energy transition to increased renewable generation. This article draws from the considerable experience and empirical evidence from jurisdictions worldwide to highlight several key trade-offs being made in Alberta's latest REM design proposal.

2. ALBERTA'S MARKET DESIGN AND GROWING CHALLENGES

Alberta's electricity sector relies on market-based mechanisms having restructured its electricity market in 2001 from a setting with vertically integrated regional monopolies. While this is only one of two jurisdictions in Canada with a restructured market, the other being Ontario, there are numerous regions worldwide with restructured electricity markets with a diverse array of institutional settings and design elements.

At a high-level, Alberta's current wholesale energy market has a single hourly market where generators submit bids to supply electricity. The AESO takes these bids, stacks them from least-to-highest costs until there is sufficient supply to meet demand. The highest accepted bid sets the market-clearing (uniform) hourly price that applies across the entire province. These bids are limited to be between $0/MWh and $999.99/MWh, with a price-cap of $1,000/MWh that can arise during scarcity conditions.

Alberta's market design is what is often referred to as an "energy-only" market. In this setting, generators in Alberta rely solely on revenues from wholesale energy (and ancillary service) markets to recoup their large fixed cost of investing in generation capacity.[4] As part of this market design, Alberta has taken a unique viewpoint on permitting firms to exercise unilateral market power in the form economic withholding. That is, beyond the price floor and cap, firms are generally not restricted in the bids they submit in the wholesale energy market, permitting bids in excess of short-run marginal cost. The idea behind this being that to the extent that there is short-run market power, this will be disciplined by the entry of new generation capacity in the long-run.[5]

Electricity is delivered on a transmission network with physical constraints and is governed by laws of physics that determine how power flows through the network. Despite this, the physical nature of the network is not directly accounted for in the wholesale market clearing that sets an Alberta-wide uniform price. Historically, transmission congestion has been minimal in Alberta due in large part to a government policy referred to as the "no congestion" policy that effectively requires infrastructure build-out to ensure there is no congestion in the long-run.[6]

Figure 1 illustrates how Alberta's generation mix has evolved since market restructuring in 2002 to 2024. The market has transitioned from a coal dominated market to being largely supplied by natural gas. While remaining a relatively small portion of the annual market share, wind and solar supplied 17 per cent of total output in 2024, representing a large increase over the last decade. This aggregate number masks important hourly dynamics that arise due to high wind and solar output resulting in an increasing frequency of supply surplus events, as well as higher fluctuations in net demand to be met by non-renewable generation.[7]

---

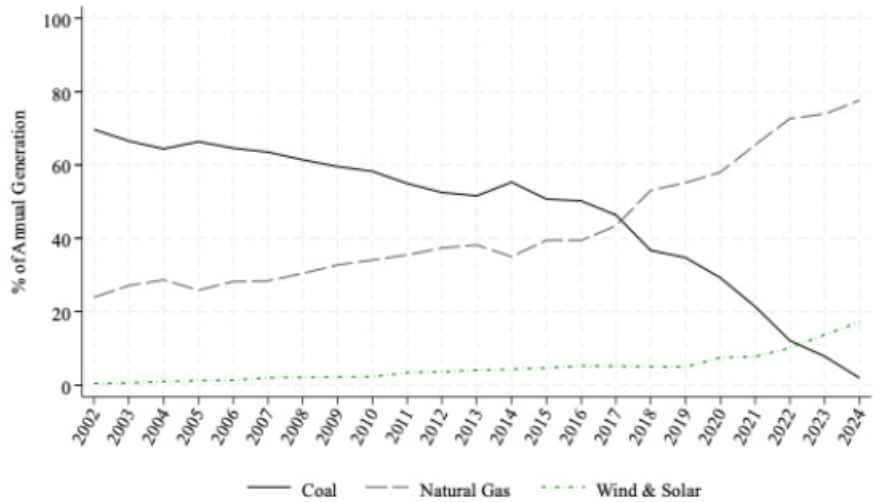
[4] Ancillary service markets are supplemental markets that ensure supply and demand are balanced at all moments in time. While these markets are essential and are part of key reforms under the REM, they are out of the scope of the current article.

[5] For a more detailed discussion on this point and broader market design elements, see Derek E. H. Olmstead & Matt J. Ayres, "Notes from a Small Market: The Energy-Only Market in Alberta" (2014) 27:4 Electricity J 102; See also David P. Brown et al., "Electricity Market Design with Increasing Renewable Generation: Lessons from Alberta" (2025) Electricity J 107484 [*Lessons from Alberta*].

[6] For a detailed discussion of the history of transmission policy in Alberta, see Government of Alberta, "Transmission Policy Review: Delivering the electricity of Tomorrow" (23 October 2023), online (pdf): Ministry of Affordability and Utilities <ablawg.ca/wp-content/uploads/2023/11/Transmission-Policy-Green-Paper-2023.pdf>.

[7] In 2024, the market-clearing price was $0.00/MWh due in part by high renewable output for 532 hours beating the previous record set in 2023 of 83 hours. See Alberta Market Surveillance Administrator, "Quarterly Report for Q4 2024" (February 2025) at 13, online (pdf): MSA <albertamsa.ca/assets/Documents/Quarterly-Report-for-Q4-2024.pdf>.

Figure 1: Annual Generation (% of Total) by Generation Technology[8]



The evolution of the market has introduced several pressing issues on the short-run operation of the system. First, while there is currently sufficient natural gas capacity in the province to meet demand, these units have to be turned on and ready to generate. A subset of gas generators incur large start up costs in addition to the variable cost of supplying output and can take up several hours to a full day to turn on. For these units, referred to as long-lead time ("LLT") assets, it is generally not profitable to run all the time, leading their operators to have to make the economic decision of whether to start up the units in a setting with considerable uncertainty. This self-commitment mechanism has led to rising concerns over short-run reliability due to LLT units being offline in tight market conditions, an issue flagged by Alberta's Market Surveillance Administrator ("MSA").[9]

Second, the growth in geographically concentrated renewables has put increasing pressure on transmission infrastructure leading to increasing congestion.[10] Alberta's wholesale energy market applies a single real-time price that ignores the presence of congestion. Congestion is dealt with via a secondary re-dispatch process that adjusts the supply of units to solve the transmission constraints and compensates them out-of-market. These re-dispatch mechanisms have been heavily criticized in the literature because of firms' abilities to exercise market power and distort wholesale market outcomes.[11]

Alberta's system planner (the AESO) is required to ensure the transmission system is subject to "no congestion" in the long-run. Without policy changes, this would require further build out of the transmission system to alleviate constraints. Transmission costs are passed down to consumers and have risen rapidly in the past decade. This has led to considerable debate over the need to adjust the prevailing transmission planning policy in the province.[12]

---

[8] Figure recreated from Figure 1 in *Lessons from Alberta, supra* note 5.

[9] See Alberta Market Surveillance Administrator, "Quarterly Report for Q2 2024" (August 2023) at 34, online (pdf): MSA <albertamsa.ca/assets/Documents/Quarterly-Report-for-Q2-2023.pdf>.

[10] For a detailed discussion, see Alberta Market Surveillance Administrator, "Quarterly Report for Q1 2024" (May 2024) at 34, online (pdf): MSA <albertamsa.ca/assets/Documents/Quarterly-Report-for-Q2-2023.pdf>.

[11] For a detailed analysis of this issue, see Christoph Graf et al., "Simplified Electricity Market Models with Significant Intermittent Renewable Capacity: Evidence from Italy" (2020) National Bureau of Economic Research, Working Paper No 27262, online (pdf): <nber.org/system/files/working_papers/w27262/w27262.pdf>.

[12] *Supra* note 6.

Finally, as noted above, Alberta is unique in its explicit stance on unilateral market power execution via economic withholding and its connection to long-run resource adequacy. Starting in 2021, there was a rise in market concentration and documented increase in unilateral market power execution.[13] Recent evidence from the MSA has indicated that economic withholding has declined as more generation capacity has entered the market.[14] However, the recent rise in wholesale energy costs has led to a renewed debate over whether additional regulations are needed to limit market power execution. This persistent debate relates to the broader long-run resource adequacy conversation that evaluates whether wholesale and ancillary service markets provide sufficient short-run revenues to cover the large capital cost associated with generation investment.

Before discussing the proposed REM and interim reforms that have been put in place over the past two years, the next section summarizes one key approach taken in other jurisdictions to address the challenges facing Alberta.

3. INTEGRATED ELECTRICITY MARKET DESIGNS

Restructured markets in other jurisdictions have adopted sophisticated market designs to address the key challenges highlighted above. This section will focus on so-called *integrated* market designs that are broadly deployed in the United States. This market framework has evolved to consider the physical characteristics of transmission infrastructure and unit constraints through a sequence of markets.

Like Alberta, these jurisdictions started with simplified market designs that focused primarily on balancing aggregate market supply and demand with a single market-wide price, solving system constraints via secondary processes (such as Alberta's re-dispatch mechanism) to ensure feasibility. However, over 20 years ago, these markets moved away from this market design to address several of the challenges that are currently creating frictions in Alberta's electricity system. While these markets have a vast array of technical and regulatory details that vary by jurisdiction, this article will highlight two core common elements of integrated markets: (i) multi-market settlement with a financial day-ahead market ("DAM") and physical real-time market (RTM) and (ii) locational marginal pricing (i.e., nodal pricing).[15]

Starting a day in advance of real-time delivery, there is a financial DAM where firms submit bids that represent their willingness to supply electricity at different points (i.e., nodes) on the grid.[16] This bidding process also permits generators to submit "complex bids" that include their costs of starting up. The system operator (the equivalent of the AESO), takes these bids and chooses units to minimize the as-bid costs to meet location-specific demand, while accounting for physical constraints of the transmission network and unit-specific capabilities. This results in a schedule where if there were no changes between the day-ahead and real-time, this schedule could physically deliver energy at the right locations to balance supply and demand.

However, in reality, market conditions change after the DAM (e.g., due to changes in renewable output, market demand, gas unit availability, etc.). To manage such deviations, the system operator runs a real-time market ("RTM") where generators can submit bids that represent adjustments from their DAM schedule. The RTM is also cleared to account for physical characteristics of the grid and unit capabilities and constraints with a process called Security Constrained Economic Dispatch ("SCED"). Unlike the DAM, clearing the RTM comes with a physical commitment with dispatch instructions that if they are not followed, the firms are subject to costly penalties.

---

[13] David P. Brown et al., "Evaluating the Impact of Divestitures on Competition: Evidence from Alberta's Wholesale Electricity Market" (2023) 89 Int'l J of Industrial Organization.

[14] See Alberta Market Surveillance Administrator, "Wholesale Market Report: Q1 2025" (May 2025) at 24, online (pdf): MSA <albertamsa.ca/assets/Documents/Wholesale-Market-Report-Q1-2025.pdf>.

[15] For a comprehensive comparison of simplified versus integrated market designs, see Christoph Graf, "Simplified Short-Term Electricity Market Designs: Evidence from Europe" (2025) Electricity J.

[16] These markets also permit location-based demand-side bidding. However, for brevity, we abstract away from the demand-side in this article.

The DAM results in a schedule that represents a financial commitment to supply a certain level of output at a particular location on the network. Despite the fact that the DAM does not come with a physical commitment, there is an inherent financial incentive to follow the DAM schedule. If a firm underdelivers from its DAM schedule, they must buy back this quantity in the RTM. This exposes the firm to financial risk that can be considerable if RTM conditions are tight (resulting in a potentially very high RTM price). Because of these strong financial incentives, and the fact that the DAM schedule is feasible by construction, most DAM bids go on to physical delivery.[17]

By considering the physical constraints of the system, the DAM and RTM market-clearing processes result in location-specific prices for each node on the network. These prices reflect the as-bid cost of serving an additional MWh of energy at a specific location on the network. This design is referred to as nodal pricing or locational marginal pricing (LMP). When there is no transmission congestion, the cost of serving demand at any given node is the same across all nodes. It simply reflects the cost of serving an additional MWh of supply from the market-level supply curve. However, when there is congestion, prices can diverge across nodes on the network, capturing the cost of addressing congestion. In these designs, generators often face the local nodal price, while end-users face a regional (zonal) weighted average price. It is important to emphasize that this market design addresses congestion within the wholesale bidding and market dispatch process. As a result, it does not require a secondary mechanism that addresses congestion via re-dispatch processes that have been shown to create market distortions and inefficiencies, as noted above.

In addition, the presence of the DAM is expected to facilitate more efficient pre-scheduling and unit commitment of long-lead time ("LLT") units. Units that clear the DAM secure prices in advance, and in the case of LLT units in Alberta, they do not face the same challenge of turning on the unit and hoping they will end up being able to cover their start up costs in the RTM.[18] Facilitating financial hedging opportunities in the DAM in advance of the more volatile RTM is a broader benefit of multi-settlement market designs outside of just LLT units.

There is a growing literature documenting the benefits of integrated multi-settlement market designs with LMPs. A series of studies demonstrate that a transition from a simplified to integrated market design results in sizable economic improvements in short-run operational efficiencies.[19] Recent studies document evidence of increasing challenges in the presence of simplified market designs with increasing renewable generation, suggesting that the benefits of integrated market designs may be increasing.[20]

We would be remiss if we did not note the challenges of integrated market designs. First and foremost, they are complex, involve a multitude of regulations and rules, and require costly upgrades to software used to clear wholesale electricity markets. The literature has documented additional, more technical challenges that we will just briefly acknowledge, including slower responses to changing market conditions and reduced and difficulty of financial hedging when facing differential pricing at individual nodes on the network.[21] However, taken as a whole, the literature suggests that integrated market designs lead to more efficient short-run market outcomes and help alleviate the challenges of integrating often geographically concentrated renewable generation.

---

[17] Udi Helman et al., *Competitive Electricity Markets*, Chapter 5: The Design of US Wholesale Energy and Ancillary Service Auction Markets: Theory and Practice (2007) 180.

[18] In addition to securing a price in advance, LLT units that submit complex bids and clear the DAM secure a "revenue sufficiency guarantee" where if they do not earn enough revenue to cover their start up costs from operating, they are provided additional payments (called uplifts) to break even.

[19] See Frank A. Wolak, "Measuring the Benefits of Greater Spatial Granularity in Short-Term Pricing in Wholesale Electricity Markets" (2011) Am Econ Rev; See also Jay Zarnikau et al., "Did the introduction of a nodal market structure impact wholesale electricity prices in the Texas (ERCOT) Market?" (2014) J of Regulatory Econ; See also Ryan C. Triolo & Frank A. Wolak, "Quantifying the Benefits of a Nodal Market Design in the Texas Electricity Market" (2022) 112:1 Energy Econ.

[20] For example, see *supra* note 11.

[21] Ahlqvist Victor et al, "A Survey Comparing Centralized and Decentralized Electricity Markets" (2022) Energy Strategy Rev.

4. ALBERTA'S INTERIM REFORMS AND PROPOSED REM DESIGN

Now that we have an understanding of how Alberta's market has evolved, the challenges it faces, and approaches used in other jurisdictions to mitigate these issues, we turn our attention to the ongoing and proposed market reforms in Alberta.

In March 2024, the Alberta government instituted the Supply Cushion Regulation to address concerns that LLT units were raising short-run reliability concerns by not turning on under tight supply conditions.[22] The approach outlined in the regulation was a non-market mechanism that turned on LLT units via an administrative approach that was triggered when market conditions were forecasted to be sufficiently tight. This was pitched as an interim measure to address reliability concerns until a broader market reform process was carried out.[23]

In January 2024, the AESO published initial recommendations on broader market reforms.[24] The recommended reforms were echoed in a direction letter from the Government of Alberta's Minister of Affordability and Utilities in July 2024.[25] The initially proposed high-level reforms were a fairly holistic market redesign with a proposal to adopt many of the features of a multi-settlement integrated market outlined above. Key components that were explicitly stated were: (i) the development of a multi-settlement market with a DAM followed by a RTM, (ii) a market-clearing approach that uses bids in the RTM to minimize the cost of meeting demand, while accounting for the physical realities of the grid and unit constraints (referred to above as SCED), and (iii) a policy decision to move away from the current "no congestion" policy. These reforms represented a large departure from the existing simplified market design.

The initial reform proposal was followed by a year-long stakeholder process. In August 2025, the AESO released their final proposal for the REM.[26] The final REM proposal formalized a transition to LMP with SCED-based optimization of as-bid costs in the RTM that is a core element of integrated market designs. This market design will be increasingly important as Alberta is anticipated to continue to have transmission congestion in the long-run due to the transition away from the "no congestion" policy. The move to market-based congestion management via the adoption of LMP will avoid the pitfalls and inefficiencies of secondary re-dispatch mechanisms outlined above.

However, one critical change from the initial proposal is that Alberta will not transition to a multi-settlement market design, i.e., there will be no financially binding day-ahead energy market.[27] Rather, the proposed REM sticks with a process similar to the interim approach outlined in the Supply Cushion Regulation. This process, now called the Reliability Unit Commitment ("RUC"), continues with the administrative approach of directing LLT units online when market conditions are forecasted to be sufficiently tight, with cost recovery guarantees.

The decision to not move forward with a day-ahead energy market reduces the complexity of the market design, an important trade-off to acknowledge. However, it differs from the trajectory taken in nearly every other

---

[22] See *Supply Cushion Regulation*, Alta Reg 42/2024.

[23] For a detailed discussion of the interim market reforms running up to the REM proposal, see Alberta Market Surveillance Administrator, "Advice to support more effective competition in the electricity market: Interim action and an Enhanced Energy Market for Alberta" (December 2023), online (pdf): MSA <albertamsa.ca/assets/Documents/MSA-Advice-to-Minister.pdf>.

[24] Alberta Electric System Operator, "Alberta's Restructured Energy Market: *AESO Recommendations to the Minister of Affordability and Utilities*" (January 2025), online (pdf): <aesoengage.aeso.ca/37884/widgets/156642/documents/125518>.

[25] See the letter from the Minister of Affordability and Utilities of Alberta, Nathan Neudrof, to the President and Chief Executive Officer of the Alberta Electric System Operator, Mike Law (3 July 2024), online (pdf): <aeso.ca/assets/direction-letters/Direction-Ltr-from-Minister_REM_Tariff_Tx-Policy_03July2024.pdf>.

[26] Alberta Electric System Operator. Restructured Energy Market Final Design. August 2025. Alberta Electric System Operator, "Alberta's Restructured Energy Market: Final Design" (August 2025), online (pdf): <aeso.ca/assets/REM/Restructured-Energy-Market-Final-Design.pdf>.

[27] *Ibid* at 6, the AESO makes reference to a Day-Ahead Reliability Market. This is the same as a financially binding day-ahead energy market. While similar language, this reflects day-ahead ancillary service markets that are critical to maintaining short-run reliability.

restructured electricity market worldwide to manage the increasing challenges of integrating renewable generation. For example, the development of a multi-settlement DAM-RTM with LMPs has recently been finished in Ontario as part of its Market Renewal. The implementation of a financially binding DAM was noted as a key improvement in Ontario's market design.[28]

The latest proposal for the REM moves Alberta towards a market design that is closer to that which has been employed for over 20 years in Singapore and New Zealand.[29] These market designs have single-settlement systems with RTMs and LMPs. Recent work in the context of New Zealand has highlighted the reliability challenges of this market design with increasing renewable generation.[30] This market design is an improvement on Alberta's historical simplified market design, but it does not achieve several of the key benefits that come with DAMs, including a market-based mechanism to facilitate efficient "turn on" decisions of LLTs and an avenue for generators and the demand-side to hedge price risk in advance of the typically more volatile RTM.

To summarize, the proposed REM design includes several important market reforms, including the transition to LMP, more sophisticated optimization in the RTM to account for physical realities of the grid and generation technologies, and additional improvements to ancillary service markets that are beyond the scope of this article. However, the decision to not adopt a DAM comes with the trade-off of attempting to reduce the complexity of the market design with the well-documented benefits of multi-settlement DAM-RTM designs.

5. LONG-RUN RESOURCE ADEQUACY

Much of the discussion in this article has focused on the short-run operation of the market. However, a long-standing tension in Alberta, and any restructured market design more broadly, is designing a market that promotes sufficient generation capacity investment to ensure there is sufficient supply to meet demand at (nearly) all points in time. This is often referred to as promoting long-run resource adequacy. It is important to briefly highlight how the proposed REM interacts with these long-run objectives.[31]

In nearly every jurisdiction with restructured energy markets, there are limits on wholesale price-levels. In Alberta, the wholesale price cap is set at $1,000/MWh. The presence of these wholesale price caps has led to a long-standing debate over whether or not there will be sufficient generation capacity investment in restructured markets.[32]

As discussed in Section 2, Alberta's market framework takes the unique stance that unilateral market power is an element of the market design. The market design permits a trade-off of short-run inefficiencies due to market power with long-run investment signals, i.e., in the long-run, entry is expected to discipline the market. There have been periods of considerable market power execution in Alberta when market conditions are tight, followed by capacity investment and reduced wholesale energy prices in Alberta.[33] Despite the challenges associated with this

[28] Independent Electric System Operator, "Day-Ahead Market High-Level Design: Executive Summary" (August 2019).

[29] For a detailed analysis of Singapore and New Zealand, see Frank A. Wolak, "An Assessment of the Performance of the New Zealand Wholesale Electricity Market" (2009) Stanford University Research Working Paper No 94305-6072, online (pdf): <fawolak.org/pdf/new_zealand_report_redacted.pdf>; See also Frank A. Wolak, "The Benefits of Purely Financial Participants for Wholesale and Retail Market Performance: Lessons for Long-Term Resource Adequacy Mechanism Design" (2019) 35:2 Oxford Rev of Econ Pol'y 260, online (pdf): <fawolak.org/pdf/oxford_economic_policy_pub_wolak.pdf>.

[30] Shaun McRae, "Rethinking Wholesale Market Design for New Zealand's Clean Energy Transition" (2025) Electricity J, online (pdf): <sdmcrae.com/files/rethinking-market-design.pdf>.

[31] For a more detailed discussion on the issue of resource adequacy and Alberta's market design, see *Lessons from Alberta, supra* note 5.

[32] Frank A. Wolak, "Long-Term Resource Adequacy in Wholesale Electricity Markets with Significant Intermittent Renewables" (2022) 3:1 Envt and Energy Pol'y and the Econ 155, online (pdf): <journals.uchicago.edu/doi/epdf/10.1086/717221>.

[33] *Supra* note 13.

"boom-and-bust" cycle, Alberta's market design has been successful in promoting sufficient capacity investment.

In 2024, after several years of elevated wholesale prices and high-levels of documented market power, the Government of Alberta adopted the Market Power Mitigation Regulation as an interim approach until broader reforms under the REM are put in place.[34] The regulation serves as a "safety valve" that evaluates if firms have earned excessive market power revenues beyond the levels that are deemed necessary to promote long-run capacity investment signals. Once generators are determined to have earned sufficient revenues, limits are placed on bids of gas generators owned by the large generators.

In the AESO's final proposed REM design, this "safety value" interim approach will be a core part of the market design, with some adjustments to the details. In addition, the wholesale price cap will be increased to $3,000/MWh, closer to levels observed in other jurisdictions as a mechanism to better signal scarcity on the system to promote investment. Finally, there will be an offer cap (representing a ceiling on firms' bids) of $1,500/MWh initially, followed by an increase to $2,000/MWh in 2032. Market-clearing prices (but not bids) can rise above the offer cap to the wholesale price cap through an administrative scarcity pricing mechanism that is triggered when the market dips into ancillary service markets because of limited supply in the wholesale market. Such administrative scarcity pricing approaches have been broadly deployed in US markets to enhance price signals during scarcity events.[35]

However, this scarcity-pricing plus market power approach differs from approaches taken in the majority of other jurisdictions. In particular, while the proposed REM now places more regulations on bidding to restrict what is deemed as excess market power, it is still considerably less restrictive than bid mitigation approaches in other jurisdictions.[36]

To alleviate concerns of resource adequacy, other jurisdictions (with more stringent regulations of market power) have adopted capacity payment mechanisms. These are separate markets that typically take place years in advance of the actual delivery of electricity and aim to fill the gap between the cost of capacity investment and the expected revenues from energy markets. However, there is a growing literature documenting the considerable issues with capacity mechanisms, including their high degree of complexity, costs of operating, heavy regulatory requirements, and poor fit with the growth of renewables.[37] Alberta considered adopting a capacity market in 2016. However, in 2019, the move to a capacity market was terminated.[38]

Alternatives to capacity markets that rely on longer-term financial forward contracting have gained some traction in ongoing policy debates.[39] Without getting too deep into the details, this approach essentially aims to facilitate longer-term risk-hedging opportunities that currently do not exist, with the idea of reducing hesitancy in undertaking large capital-intensive investments in generation capacity in a highly uncertain environment. However, the use of these more frontier mechanisms were not proposed in the REM.

The interim reforms and final REM proposal is taking a fairly status-quo approach to resource adequacy, with additional market design elements to strengthen energy market price signals and new regulatory tools to limit

---

[34] *Market Power Mitigation Regulation*, Alta Reg 43/2024.

[35] For a detailed discussion of this market design referred to as the Operating Reserve Demand Curve (ORDC) in the Texas context, see William W. Hogan and Susan L. Pope "Priorities for the Evolution of an Energy-Only Market Design in ERCOT" (May 2017) FTI Consulting, online (pdf): <hepg.hks.harvard.edu/sites/g/files/omnuum10586/files/hepg/files/hogan_pope_ercot_050917.pdf>.

[36] Christoph Graf et al., "Market Power Mitigation Mechanisms for Wholesale Electricity Markets: Status Quo and Challenges" (2021) Stanford University, Working Paper, online (pdf): <web.stanford.edu/group/fwolak/cgi-bin/sites/default/files/MPM_Review_GPQW.pdf>.

[37] For a more detailed discussion of capacity mechanisms, see Pär Holmberg & Tangerås Thomas, "A Survey of Capacity Mechanisms: Lessons for the Swedish Electricity Market" (2023) 44:6 Energy J 275; See also *Lessons from Alberta, supra* note 5.

[38] Legislative Assembly of Alberta, Bill 18. Electricity Statues (Capacity Market Termination) Amendment Act, 2019. Bill 18, *Electricity Statutes (Capacity Market Termination)*, 1st Sess, 30th Leg, Alberta, 2019.

[39] *Supra* note 32.

excessive market power execution. While Alberta's market design has been successful in promoting resource adequacy under this design, there are questions of whether this approach will continue to be successful with the rising uncertainty and variability of energy prices that comes with the growth of renewable generation.

6. CONCLUSIONS

Facing a considerable transition in the generation resource mix, Alberta has undertaken market reforms to address growing challenges and cost pressures. The proposed reforms make several important changes to the prevailing market design, adopting key features that exist in other more sophisticated markets. However, the proposed REM remains anchored in several key market design elements that are particular to Alberta. While this helps maintain the simplicity of Alberta's electricity market design, the more sophisticated, but complex, elements such as the use of multi-settlement DAM-RTMs come with their distinct advantages. Time will tell whether these decisions will lead to additional required market reforms in the future. ■

BREAKING UP IS HARD TO DO: ONTARIO'S TRANSITION TO A NEW MARKET DESIGN

*Brady Yauch and Brendan Callery**

1. MARKET RENEWAL ARRIVES IN ONTARIO

On May 1st, 2025, Ontario's Independent Electricity System Operator ("IESO") officially launched its renewed market, known as the Market Renewal Program (("MRP") or the "renewed market"). The renewed market represented the most significant redesign of the IESO-administered market ("IAM") in Ontario since it was first introduced in 2002. While the renewed market resulted in hundreds or thousands of different changes to settlement systems, Market Rules and Market Manuals, there are a few overarching design components that were central to the overhaul of the renewed market.

a. ***Locational Marginal Prices ("LMPs")*** – The move to locational based pricing across the IAM eliminated what was known as the two-schedule market that played a significant role in the legacy market. By introducing a single schedule market and the resulting LMPs, prices now fully reflect transmission congestion and losses and more accurately reflect the true cost of consumption at different locations on the grid.

b. ***Financially Binding Day-Ahead Market ("DAM")*** – The DAM provides financially binding schedules for Market Participants ("MPs") across the IAM and replaces the non-financially binding day-ahead commitment process that was in place in the legacy market. Most supply is now procured in the DAM.

c. ***Enhanced Real-Time Unit Commitment ("ERUC")*** – The IESO updated and refined its commitment programs for what are known as Non-Quick Start ("NQS") generators, which are predominantly gas-fired generators. NQS resources typically require the dispatch algorithm to consider a number of operational and physical constraints. Under the ERUC changes, the financial and physical constraints of different NQS resources are intended to be more optimized and efficiently committed than occurred with the commitment programs in the legacy market.

* Brady Yauch is the Director of Markets and Regulatory at Power Advisory. While at Power Advisory he has provided extensive advice to a range of clients regarding wholesale market prices and wholesale market design across Canada and the United States. Prior to Power Advisory he worked at the Market Assessment Unit (MAU) supporting the Market Surveillance Panel. He has a Masters in Economics from York University and Masters in Cultural Politics from the University of Edinburgh.

Brendan Callery is the Senior Manager of Eastern Canada at Power Advisory LLC. Since the launch of Market Renewal in Ontario, Brendan has been analyzing market outcomes with Brady Yauch and the Power Advisory team, contributing to the Power Advisory market update newsletters, presenting the material in public webinars and advising clients. Prior to joining Power Advisory in 2022, Brendan worked at the IESO and Ontario Power Authority for 9 years, including 3 years supporting the OEB's Market Surveillance Panel in the Market Assessment Unit of the Market Assessment and Compliance Division (MACD). He has a Bachelor of Applied Science in Civil Engineering from Queen's University.

d. ***Market Power Mitigation ("MPM")*** – The mitigation framework for all resources was moved from an ex post ("after the event") clawback of out-of-market payments to an ex ante ("before the event") screening of various financial and physical parameters.

The following sections provide a high-level overview of known flaws of the legacy market that prompted MRP before discussing outcomes in the renewed market over the first six months of operation. The discussion on the legacy market and its flaws will remain high-level, as most of these flaws have been discussed (and cited in footnotes) at length in multiple settings throughout the last two decades.

2. A BITTERSWEET SYMPHONY: THE LEGACY MARKET DISAPPEARS AND REMOVES PRICE SUPPRESSION MECHANISMS

The legacy market in Ontario had a number of well-understood and well-known deficiencies. In some cases, these deficiencies were intended to be addressed within a few years of the market being launched in 2002. For a variety of reasons, these deficiencies became embedded in the overall market design and were some of the most recognizable "features" of the Ontario wholesale market compared to a number of other wholesale markets across North America.

The IESO and the Market Surveillance Panel ("MSP") highlighted many of the flaws of the legacy market throughout its more than 20 years in operation. The most comprehensive report on the flaws of the wholesale market was the MSP's 2016 report "Congestion Payments in Ontario's Wholesale Electricity Market: An Argument for Market Reform". The IESO also provided a detailed review for a number of the deficiencies in the wholesale market as part of the evidentiary record in a Market Rule appeal by a group of NQS generators.[1]

The IESO also presented its "Energy Stream Business Case" for the Market Renewal Program, that included $975 million in savings over ten years, with $97.5 million in annual savings coming from the combination of the elimination of constrained off CMSC ($45 million/year) and market efficiencies ($52.5 million/year).[2] The market efficiencies benefits were summarized by the IESO as "more efficient use of interties (particularly exports), better unit commitment and enhanced competition will result in better asset utilization and reduced natural gas burn, avoiding fuel cost".[3]

The most notable flaws and deficiencies of the legacy market are discussed below.

i. Legacy Market Prices Did Not Reflect Physical Limitations of the Grid (The Two-Schedule System)

The Two-Schedule System in the legacy market required two different algorithms to dispatch units and set wholesale prices. In the "dispatch" algorithm, the physical constraints of different units and the transmission grid were considered in order to physically dispatch the units and create a "dispatch schedule". The "market" algorithm then created a "market schedule" that ignored the physical constraints of both Market Participants and the transmission grid to create a Market Clearing Price ("MCP") that was uniform across the province and used for settlements. The market schedule was "fictional" in the sense that it did not account for how all the units were physically dispatched in the "dispatch" schedule and, as such, was not based on the actual cost and dispatch of the grid.

Divergences between the two schedules required out-of-market payments known as Congestion Management Settlement Credits ("CMSCs"),

[1] See Ontario Energy Board, *Congestion Payments in Ontario's Wholesale Electricity Market: An Argument for Market Reform*, Market Surveillance Panel (Ontario Energy Board, 2016), online (pdf): <oeb.ca/oeb/_Documents/MSP/MSP_CMSC_Report_201612.pdf>; See also Ontario Energy Board, *Congestion Payments in Ontario's Wholesale Electricity Market: An Argument for Market Reform*, Market Surveillance Panel (Ontario Energy Board, 2016), online (pdf): <oeb.ca/oeb/_Documents/MSP/MSP_CMSC_Report_201612.pdf>; See also *IESO Market Rule Description Evidence in Response to Procedural Order No. 2* (2024), EB-2024-0331, online (pdf): Independent Electricity System Operator <rds.oeb.ca/CMWebDrawer/Record/875538/File/document> [*IESO Market Rule Description Evidence*].

[2] See Independent Electricity System Operator, *Market Renewal Program: Energy Stream Business Case*, BC-165 (Ontario: Independent Electricity System Operator, 2019), online (pdf): <ieso.ca/-/media/Files/IESO/Document-Library/market-renewal/MRP-Energy-Stream-Business-Case-2019.pdf>.

[3] *Ibid*.

which resulted in both a number of "gaming" issues and overall economic inefficiencies, as detailed by the MSP throughout the last two decades.[4] It also blunted the reality that the cost of electricity consumption differed in various parts of the grid due to well-known transmission constraints — leading to both inefficient dispatch and consumption.

ii. Legacy Market Had Inefficient Commitment Programs for Gas ("NQS") Generators

When the wholesale market launched in 2002, there were no commitment programs for NQS generators as they were expected to fully rely on spot energy prices for dispatch and operational revenues. Over time, the IESO developed both real-time and day-ahead commitment programs. The real-time program — known as the Real-Time Generator Cost Guarantee ("RT-GCG") — committed NQS generators in the pre-dispatch timeframe based on their incremental energy costs only and did not consider other start-up-related costs. The RT-GCG program also did not account for commitment over multiple hours — even though most NQS generators must physically remain online for numerous consecutive hours — and that resulted in commitments that were "inefficient and disadvantageous to lower cost NQS resources."[5]

Under the legacy market, many NQS generators could self-commit themselves under an RT-GCG program that did not incorporate system-wide conditions when committing long-lead time resources. Instead, NQS generators could self-commit their units when they were "economic" — i.e. their marginal cost offer for supply was less than the market price — for half of their minimum operational run-time.

The MSP provided recommendations to the IESO to address the inefficiencies of guarantee programs repeatedly, with it receiving nearly as much attention as CMSCs over the last 20 years.

iii. Legacy Market Lacked a Financially Binding Day-Ahead Market

Similar to the commitment programs for NQS Generators, there was no DAM included in the IAM when it was launched in 2002. The IESO ultimately implemented what became known as the Day-Ahead Commitment Process ("DACP") in 2006. Nonetheless, the DACP was not financially binding for Market Participants — although NQS Generators could receive a cost guarantee in the DACP — and, as such, did not result in full or efficient participation by many resources.

The IESO concluded that the "failure" of resources to "fully" or "efficiently" participate in the day-ahead commitment process in the legacy market diminished "IESO's ability to schedule and commit the lowest-cost set of resources to meet the next day's demand."[6]

iv. Legacy Market Assumed Fictitious Ramp Rates for Generators

In the legacy market, the market algorithm — which determined hourly and 5-minute market prices — included an assumption that the "ramping" capability of generators was 3-times faster than their actual physical capability (i.e. it assumed they were 3-times "faster" than their real-world performance). This assumption was explicitly included in the market algorithm to suppress price volatility that resulted from the rapid ramping up and down of units. The IESO itself noted that the three-times ramp rate resulted in "price stability" and made it "more likely that slower, less expensive resources will set the price."[7]

v. Legacy Market Included Low-Priced Emergency (Control Action) Operating Reserve

In the supply stack for Operating Reserve ("OR"), the IESO included an offer to reduce system-wide voltage by 3 per cent and 5 per cent

[4] See the 2016 report and multiple MSP reports among multiple other examples. Inefficient CMSC payments were discussed at length in nearly every MSP report: Ontario Energy Board, *Monitoring Report on the IESO-Administered Electricity Markets*, Market Surveillance Panel (Ontario Energy Board, 2014), online (pdf): <oeb.ca/oeb/_Documents/MSP/MSP_Report_Nov2012-Apr2013_20140106.pdf>; See also Ontario Energy Board, Monitoring Report on the IESO-Administered Electricity Markets, Market Surveillance Panel (Ontario Energy Board, 2011), online (pdf): <oeb.ca/oeb/_Documents/MSP/MSP_Report_20110310.pdf>.

[5] See *IESO Market Rule Description Evidence*, *supra* note 1, IESO's filing as part of the Market Rule appeal by a group of NQS generators.

[6] *Ibid*.

[7] *Ibid*.

(or other emergency actions), which would theoretically provide hundreds of megawatts of additional OR by reducing demand. This was known as "Control Action Operating Reserve" or CAOR. The primary concern was not the action itself — which is present in other wholesale markets — but rather the price at which it was offered. The IESO added CAOR into the OR stack at a price as low as $30/MW, which meant that in many hours it either suppressed wholesale prices or would create uncertainty in the actual amount of OR available. The IESO included standing supply offers for OR representing voltage reductions of 400 MW for 30-minute OR at $30/MW, and 400 MW for 10-minute OR at $30.10/MW.[8] Another 400 MW was included to represent disregarding the 30-minute OR requirement, with 200 MW priced at $75/MW and 200 MW priced at $100/MW.[9] This amount of fictional OR is significant, considering the IESO would typically schedule between 1,400 MW to 1,600 MW of OR in every hour. This suppressed overall prices both in the OR and energy markets due to co-optimization.

vi. Legacy Market Did Not Properly Value Energy Flowing Across Interties

According to the IESO's MRP Business Case, under the legacy market, "the price of imports and exports is based on an unconstrained price that at times overvalues or undervalues the energy flowing across the intertie".[10] The IESO highlighted that, under the legacy market, if the locational marginal price near the intertie was different than the Market Clearing Price (MCP) because of congestion, then the "intertie price calculated will not be accurate and may result in higher costs".[11] Market Renewal would "correct the pricing at the interties by factoring in the locational marginal price at the intertie in addition to the (Internal Congestion Price)".[12] Based on analysis conducted between 2015 and 2018, the IESO's analysis concluded that net exports to MISO and the New York Independent System Operator were 9 per cent and 13 per cent inefficient, respectively.[13] This would amount to $4.60/MWh of costs incurred for MISO net exports and $3.10/MWh for NYISO net exports.[14] The IESO projected that the "inefficiency costs of net exports avoided with improved pricing at the interties" would lead to $28.5 million in savings per year with MRP.[15]

3. THE JUSTIFICATION OF MRP: A FRIEND WITH BENEFITS

Improving the economic efficiency of the IAM is expected to deliver financial benefits to Ontario ratepayers, according to the IESO. The benefits will amount to more than $1 billion in savings over the first ten years of operation (or around $100 million annually, which is less than 1% of the total value of Ontario's electricity supply costs).[16] These benefits come primarily from the following areas:

a. More efficient scheduling and commitment of resources in the real-time market will provide $500 million in savings over the first ten years;

b. The elimination of "unnecessary" CMSC payments will provide $450 million in savings; and

c. The IESO also highlighted that the new market design will reduce the opportunity for "gaming" that resulted in more than $360 million in "clawbacks" in previous years but did not provide a forecasted value of these benefits.

The IESO has also highlighted the benefit of both the "operational certainty" due to the introduction of a financially binding DAM

[8] See Independent Electricity System Operator, Market Manual 7: System Operations, Part 7.2, online (pdf): <ieso.ca/-/media/files/ieso/document-library/market-rules-and-manuals-library/market-manuals/system-operations/so-neartermassessreport.pdf>.

[9] *Ibid*.

[10] See *supra* note 2.

[11] *Ibid*.

[12] *Ibid*.

[13] *Ibid*.

[14] *Ibid*.

[15] *Ibid*.

[16] These values and quotes from the IESO's 2019 Benefits Case for MRP. See Independent Electricity System Operator, *Market Renewal Program: Energy Stream Business Case*, BC-165 (Ontario: Independent Electricity System Operator, 2019), online: <ieso.ca/-/media/Files/IESO/Document-Library/market-renewal/MRP-Energy-Stream-Business-Case-2019.pdf>.

and the value of locational pricing that "could positively impact future investment decisions."

Overall, market design of MRP broadly aligns with the design of markets across North America, particularly in New York, New England and the mid-western to eastern United States. Many of these markets have been in operation for decades and have incorporated nearly all of the designs included in MRP (apart from the 27-hour Look Ahead Period).

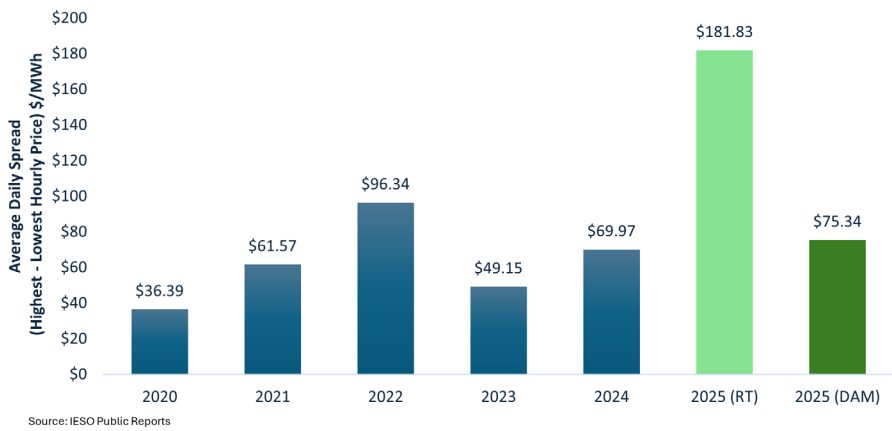
4. REALITY BITES: THE FIRST SIX MONTHS

At the time of writing, the renewed market has been in operation for more than 6 months and there are a number of key observations from a market pricing and dispatch perspective. Importantly, the renewed market has operated through a peak demand season — which typically occurs in the summer months, although extremely cold winters can also test the Ontario grid — and, as such, provides outcomes of the renewed market when the grid is operating on a tight supply/demand balance.

Nonetheless, as with all commentary on highly volatile electricity markets — particularly ones that are just six months old — pricing and dispatch outcomes are expected to evolve over time. As the supply/demand balance evolves — including nuclear refurbishments, new Battery Energy Storage Systems (BESS) and increased system demand — market outcomes will similarly evolve as Market Participants respond to the new market conditions.

The rollercoaster ride of real-time price volatility

Prices in the real-time market have been significantly more volatile than in the legacy market. The figure below provides the average daily spread between the highest and lowest price hours in the May-to-October timeframe from 2020 to 2025. The average daily spread between the highest and lowest hour real-time price in 2025 was $182/MWh in the first six months of the renewed market — or nearly double the daily spread observed in 2022, the year with the highest spread from 2020 to 2024.[17] It should be noted that 2022 experienced significant volatility in electricity prices due to broader volatility in the commodity markets impacted by the Russian invasion of Ukraine. The daily spread between the highest and lowest price hours in the DAM are higher than four out of the five past years of prices, with 2022 as the exception.



Real-time price volatility under the renewed market is less "impactful" for most load customers, as a majority of generation is purchased in the day-ahead market — with

[17] Note that all data in the following graphs comes from publicly available IESO data, which can be found here: Independent Electricity System Operator, "Report: Public" (last visited 30 January 2026), online: <reports-public.ieso.ca/public>.

the real-time market largely acting as more of a balancing service for divergences between day-ahead forecasts and real-time conditions on the grid. Any load that is purchased in real-time — by large customers, for example, or by the IESO to address forecast error — is exposed to this volatility. Nonetheless, there are a few underlying factors for the increase in real-time price volatility:

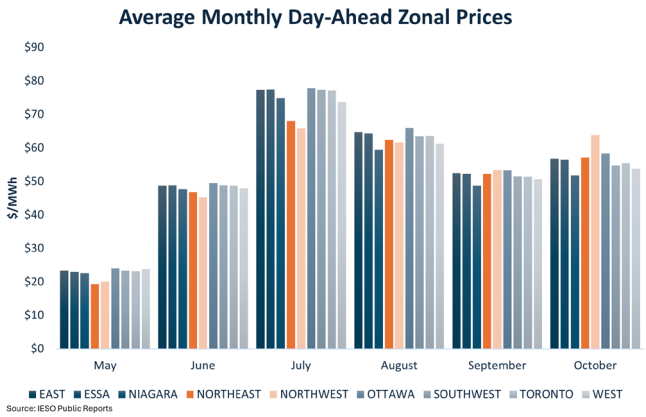
1. ***End of the three-times ramp rate*** – With the fictitious three-times ramp rate assumption removed in the renewed market, the pricing volatility that was previously suppressed is now a feature of real-time pricing outcomes.

2. ***Updated commitment programs*** – In the legacy market, due to the RT-GCG and DA-PCG commitment programs, multiple units were frequently committed to their minimum physical capability, rather than committing fewer units to their full output capabilities. The "oversupply" for such commitment could put downward pressure on prices and suppress real-time volatility, as there was an abundance of ramping capabilities being committed in many hours. This is discussed in more detail in a later section (see "*Commitment Issues*").

Location, location, location: Price divergence across the IAM

One of the key elements of the renewed market was the introduction of locational prices, or LMPs. LMPs are intended to provide a more accurate price signal, which would, among other features, improve the economic efficiency of the wholesale market by providing a more accurate signal for dispatch, consumption and long-term investment.

Based on historical shadow prices — which were in many ways a proxy for LMPs in the renewed market — the northern zones in the IAM in many hours and months of the year faced structural transmission constraints that limited the amount of supply that could be delivered to the major load centres in southern Ontario. In a market with locational prices, the transmission constraints that limit the amount of low marginal cost supply that could be delivered from northern to southern Ontario would be expected to be reflected in locational prices. The "value" of supply in many hours in northern Ontario would be expected to be less than in most other zones, as there were physical constraints that would limit how much could be delivered. With all loads and suppliers settled on the market price — which did not incorporate the financial impact of transmission losses or congestion — the value of supply or consuming electricity at different points on the grid was not considered.



As hoped for (and as expected), the renewed market has highlighted the locational value of supply based on the physical constraints of the grid. Over the first six months, the average price in the Northwest and Northeast zones was less than nearly all of the other zones in the

IAM.[18] In the summer months, the discount was particularly extreme, due to high demand in the southern zones — where most of the load is based — and physical constraints that limited the delivery of supply from the Northeast and Northwest and required dispatch of higher marginal cost resources in the south.

Anything but reserved: OR prices shoot higher

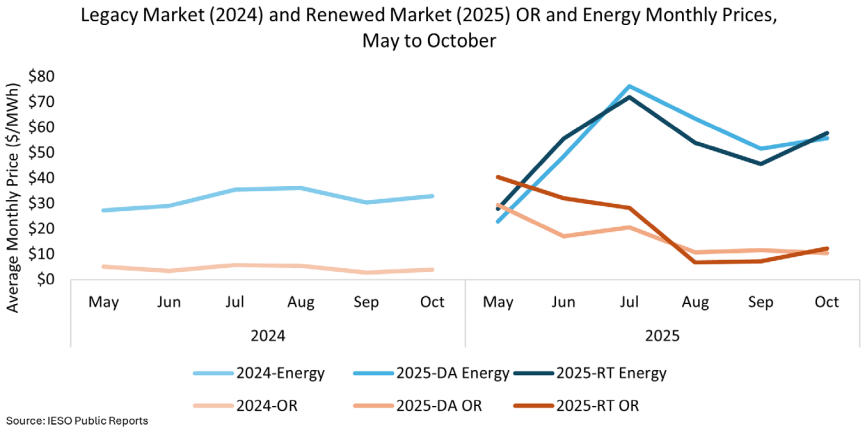
One consistent feature across both the legacy and renewed market is the co-optimization between energy and OR prices. Co-optimization determines the lowest overall cost of providing energy and OR. During times when there is sufficient OR supply, co-optimization has little-to-no impact on the energy price. However, at times when OR supply is facing a shortage, the OR price can put upward pressure on the energy price.

Under MRP, the IESO replaced its policy of including CAOR in the OR supply stack at a price between $30/MW and $100/MW with what is known as an Operating Reserve Demand Curve (ORDC). The ORDC penalty prices are applied when the OR market is tight and includes much higher price laminations compared with CAOR — from $250/MW up to $600/MW (or up to $1,900/MW as a cumulative price) depending on the amount and class of OR that is below the requirement. This new ORDC has meant that there is a new price sensitivity in the market related to the availability of OR that was not present in the legacy market.

In May 2025 when MRP was launched, there happened to be systemic conditions that led to a tight OR supply. Namely, high water levels in various water systems across the province limited the ability of hydroelectric generators to provide OR. This was coupled with fewer fast-ramping dispatchable gas resources online due to shoulder season demand levels and enhanced gas generation unit commitment. This led to a limited availability of OR supply that then triggered higher OR prices and impacted the energy price through co-optimization. In May, 47 per cent of the hours in the DA timeframe had higher or equivalent OR prices compared to the energy price, and 62 per cent of hours in real-time had higher or equivalent OR prices. By June, the OR price more frequently dropped below the energy price, returning to historical patterns more reflective of OR prices acting as an opportunity cost to the energy market. Nonetheless, overall OR prices in the DAM and in RT remain elevated compared to the legacy market.

The monthly average energy and OR prices (10-minute spinning) for the May to October period is shown below for both the legacy market in 2024 and the renewed market in 2025.

[18] The Niagara zone is the one zone in southern Ontario that has experienced structurally lower prices than the load-weighted average Ontario Zonal Price ("OZP").



Commitment issues: Enhanced commitment in the renewed market

Another key component of the renewed market was the re-design of a number of commitment programs for NQS generators, as well as updates to the dispatch algorithms to include a number of new financial and operational constraints. These updates were intended to more efficiently commit NQS generators and lower overall system costs.

As noted previously, NQS generators are treated differently by the calculation engines and settlement functions than many other resource types, as they have unique financial and operational attributes. Notably, they incur a certain amount of costs to start and maintain operations, as well as physical restrictions on the minimum output and number of hours that they must remain online once they have started.

Under the legacy market, the IESO had designed specific commitment programs for NQS generators to provide a financial guarantee once they are committed and dispatched to address these unique characteristics. But the design of these programs — and their integration into the dispatch algorithm — in the pre-dispatch (i.e. hours prior to real-time) and real-time timeframe did not, according to the IESO, "achieve the most economic commitment of NQS resources."[19]

1. First, the commitment programs did not incorporate the total costs of an NQS unit, including its incremental energy costs, start-up costs and what is known as speed-no-load costs. Instead, the units were committed based on their incremental energy offers only — which should broadly reflect their incremental energy costs — and not their total costs. As a result, the IESO could potentially commit resources that appear to be the most economic resource based only on incremental energy offers but may have higher total costs than other units when all of the other costs are considered.

2. Second, the pre-dispatch process accounted for each hour separately and did not consider the minimum run time that each unit must remain online once it was committed. This meant that a unit with low incremental energy costs and a very long minimum run-time could be committed instead of a unit with higher incremental energy costs and a much shorter minimum run time. The result is that a higher cost unit could be committed over a competing unit with lower total costs.

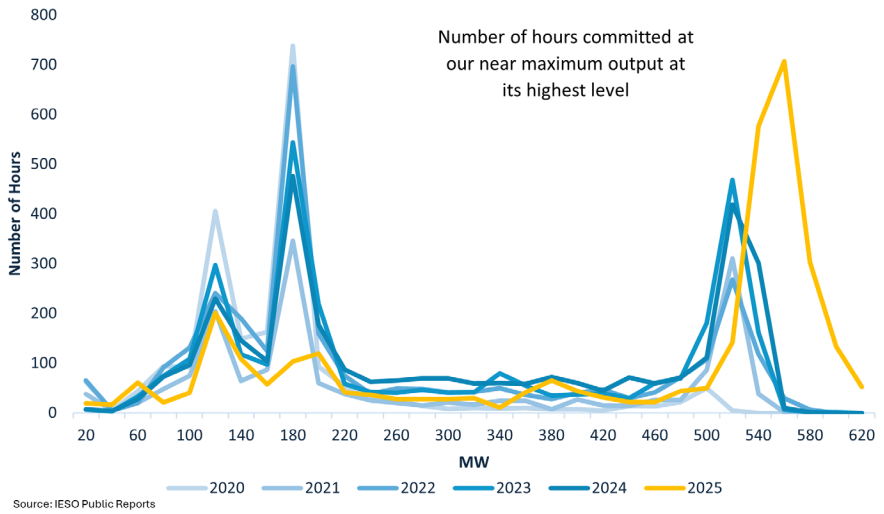
The combination of the deficiencies described above could result in economically inefficient commitment of NQS resources, including having multiple high-cost NQS generators committed at the same time running at their minimum loading points — the lowest level of output they can physically operate at — instead of a fewer number of units operating beyond their minimum loading point.

[19] See IESO's NQS evidence, *IESO Market Rule Description Evidence*, *supra* note 1.

The IESO has stated in multiple forums that the renewed market was intended to address these deficiencies by incorporating what are known as three-part offers — which include all of the unit's costs — and optimization over multiple hours in both the day-ahead and pre-dispatch algorithms. In short, the updated commitment programs included in MRP were intended to "improve the efficiency" of commitment.

One way to test whether the efficiency of commitment has been improved in the renewed market is to compare the number of hours in the renewed versus legacy market when an NQS generator operated at its minimum operating point compared to a higher output. By committing units on a more holistic basis — incorporating all of their costs and physical commitments — we would expect that once a unit is committed it would operate at a higher capacity factor, as opposed to operating at its minimum allowed output without considering commitment of other units. Overall, the number of hours when a unit is operating at its minimum loading point should decline in the renewed market (all else being equal).

The following graph highlights the number of hours when the combustion turbines at a large, combined cycle gas turbine facility operated at different output levels in the first six months of the renewed market compared to the same months in previous years. As can be seen, the number of hours where the unit operated at or near its minimum level decreased materially under the renewed market, while the hours where it operated at or near its maximum output level increased. While this analysis is simplified, it highlights that the stated intention of updating the commitment processes — to ensure that units were more efficiently committed — appears to have occurred. Committing a unit more efficiently — by dispatching more supply rather than incurring start-up costs for multiple units, for example — could result in lower overall costs for ratepayers, one of the intended outcomes of the renewed market.



5. DOCTOR, DOCTOR: POTENTIAL EARLY ISSUES WITH MRP IMPLEMENTATION

While the overall implementation of the renewed market has been smooth from a grid-wide perspective (i.e. it did not require a roll-back or other extreme intervention), it has resulted in both unintended (or unexpected) outcomes and the need to update certain Market Rules and specific components of the calculation engines. As of January 2026, the Market Surveillance Panel ("MSP") that is tasked with monitoring and investigating design flaws in the IESO wholesale market has not provided any commentary on the first six months of the renewed market.

Notably, the IESO has repeatedly highlighted what it has called a "defect" that resulted in rapid changes in its demand calculation by hundreds of megawatts and required a "workaround" and administrative pricing.

The IESO first highlighted concerns around demand fluctuations in an August presentation to stakeholders but stated that given the "unpredictable nature" of many of the variables used to calculate demand, there can be "significant changes in demand from one interval to the next attributed to one or many different variables." The IESO did note that "tool or software defects or failures can occasionally result in erroneous spikes in demand."[20]

The IESO in its 6-month review of the renewed market to stakeholders in November stated that there was a "defect causing demand fluctuations."[21] The IESO concluded that the calculation engine was overstating demand by including Hourly Demand Response ("HDR") resources when they were placed on standby. The IESO introduced a "work around" to mitigate the defect. In total, there were 38 intervals where the "workaround" did not mitigate the impact of the defect and prices needed to be administered by the IESO.

The IESO has also highlighted a number of "specific and limited" instances where "inappropriate" out-of-market payments were made to Market Participants. To address these payments, the IESO has proposed a number of changes to the Market Rules.

Another issue that has not yet been highlighted by the IESO is the increased dispatch interventions that have occurred since the launch of Market Renewal. According to the IESO, the Dispatch Deviation Report is "an after-the-fact summary of the number of occurrences where the IESO has taken an action that deviates from the results of the dispatch algorithm and does not impact dispatching or market settlements".[22] The report is important, as it is meant to highlight the number of interventions by the IESO. The actions taken by the IESO are either a one-time dispatch or a blocked dispatch to resources for system reliability purposes, with blocked dispatches occurring far more frequently than one-time dispatches.

When comparing the interventions by the IESO since the launch of Market Renewal with the monthly interventions under the legacy market, the number of interventions under the renewed market is notably higher. For example, in July 2025, there were 14,929 blocked and one-time dispatches for the month, averaging 1.7 IESO interventions to the dispatch algorithm every 5 minutes (noting 5-minute intervals can experience multiple interventions). Compared to July 2024, July 2025 has recorded more than

---

[20] See the IESO's August presentation to stakeholders: Independent Electricity System Operator, "Update on Renewed Market Performance and Operations" (21 August 2025), online (pdf): <ieso.ca/-/media/Files/IESO/Document-Library/engage/renewed-market/rmo-20250821-presentation-renewed-market-update.pdf>.

[21] See the IESO's November presentation: Independent Electricity System Operator, "Updtae on Renewed Market Performance and Operations" (26 November 2025), online (pdf): <ieso.ca/-/media/Files/IESO/Document-Library/engage/renewed-market/rmo-20251126-presentation-renewed-market-update.pdf>.

[22] See the Independent Electricity System Operator, "News and Updates: Change to Dispatch Deviation Report" Updtae on Renewed Market Performance and Operations" (10 February 2022), online: <ieso.ca/en/Sector-Participants/IESO-News/2022/02/Change-to-Dispatch-Deviation-Report>.

The Dispatch Deviation Report can be found on the IESO's Public Reports page: Independent Electricity System Operator, "Dispatch Deviation" (last visited 30 January 2026), online: <reports-public.ieso.ca/public/DispDeviation>.

triple the number of blocked and/or one-time dispatches.[23]

6. CLOSING TIME: CONCLUDING REMARKS ABOUT THE FIRST SIX MONTHS OF THE RENEWED MARKET

The IESO has successfully crossed over into the renewed market. Whereas prices in the legacy market were suppressed due to the number of design features, a transparent price that incorporates congestion and other factors is now in place due to the design features introduced as part of MRP. Overall, prices have been higher in the renewed market compared to historical averages.

High prices are not necessarily a bad outcome if they more accurately reflect the cost of supply and consumption. High market prices can also be the result of higher gas (and carbon) prices, or increased demand — both of which have occurred in the first six months of MRP. However, when these effects are removed, prices experienced in the renewed market remain higher than in the legacy market. In the long-run, more accurate pricing should improve the overall efficiency of the market and, subsequently, reduce the long-term costs to ratepayers. But there are many different policy decisions that can be made that may blunt this signal over time.

Ontario is facing a much tighter supply/demand balance over the next decade — certainly one that is in stark contrast to the prevalence of Surplus Baseload Generation (SBG) that Ontario experienced over the last decade. The impact of the design features of MRP are just one component of future electricity prices and dispatch. Nonetheless, a number of the "band-aids" that blunted the price signal in the legacy market have been removed at the same time that the grid is becoming increasingly "tight", and prices are expected to move higher while remaining volatile. Data available since the launch of MRP has already provided some insights into pricing in the renewed market, but significant uncertainty remains regarding the impact of Ontario's changing supply/demand balance, including a significant resurgence in Ontario's nuclear fleet and the rapid rise in data centre demand, among other factors. The upcoming years of tight supply conditions may lead to amplified price impacts that are independent of the renewed market design. ■

[23] See the July 2025 Dispatch Deviation Report (14,929 blocked and one-time dispatches from the IESO): Independent Electricity System Operator, "Dispatch Deviation Report – July 2025" (last visited 30 January 2026), online: <reports-public.ieso.ca/public/DispDeviation/PUB_DispDeviation_202507.html>.

See also the July 2024 Dispatch Deviation Report (4,366 blocked and one-time dispatches from the IESO): Independent Electricity System Operator, "Dispatch Deviation Report – July 2024" (last visited 30 January 2026), online: <reports-public.ieso.ca/public/DispDeviation/PUB_DispDeviation_202407.html>.

REGULATORY QUESTIONS FOR GRID MODERNIZATION

*Kenneth W. Costello**

INTRODUCTION

The robust support for grid modernization ("GM") from diverse interests should not presume its social desirability and net benefits to utility customers. This Article focuses on electricity distribution, which falls under state regulation in the United States. At odds with the prevailing view, it raises the question of whether utilities should spend more on GM and whether it should be done as quickly as possible.

Regulators should perform their due diligence to determine whether GM investments — which for some utilities amount to billions of dollars — are good for utility customers and society as a whole. Not to be overlooked, regulators should ask whether utilities have an incentive to overspend on GM. In the end, the burden ultimately falls on utility regulators to assure that customers receive the promised benefits to a magnitude that at least offset the costs they pay for GM investments. This exercise requires sound technical investigation as well as good judgment. After all, the benefits are often highly uncertain and sometimes immeasurable, while estimated costs may be unreliable because of unexpected overruns.[1]

Utility customers should avoid having to bear the burden of undue risk, which arguably is happening with recent capital-cost recovery mechanisms; namely, upfront regulatory commitment and riders/trackers. The moral hazard created by such mechanisms reduces both utility and regulatory accountability and can be a major factor for utility overspending on GM.

THE POLITICAL ECONOMY OF GRID MODERNIZATION

Grid modernization refers to the transformation of the traditional electrical grid into a smarter, more efficient, reliable, and resilient system. It encompasses a variety of technologies[2] that advance various objectives: the integration of renewable energy, improvement in grid

* Kenneth W. Costello worked for a state utility commission for almost ten years (the Illinois Commerce Commission), 28 years at the National Regulatory Research Institute, which was the research, educational and technical arm of all the state utility commissions around the US, and over 6 years as an independent consultant. During his tenure, Mr. Costello conducted research and written on a wide array of topics, including some of those discussed in this article.

[1] As noted in a study by Lawrence Berkley National Laboratory (Tim Woolf et al., *Benefit-Cost Analysis for Utility-Facing Grid Modernization Investments: Trends, Challenges, and Consideration*, (2021) Report for the U.S. Department of Energy's Modern Distribution Grid, online (pdf): <eta-publications.lbl.gov/sites/default/files/gmlc_bca_final_report_20210202.pdf>

"For jurisdictional utilities, grid modernization plans pose some new and complex challenges for state public utility commissions in determining whether projects will provide net benefits to customers. Plans typically include multiple grid modernization components that have interactive effects and are difficult to analyze or justify separately. Many benefits are hard to quantify or monetize, making it difficult to compare all benefits and costs. Part of the rationale for some grid modernization investments is to meet state energy goals, which can be difficult to quantify and account for in [cost-benefit analysis]. Equity issues arise when investments may benefit some types of customers more than others" at i).

[2] These technologies can be both in current use and new ones. New technologies fall within the subgroup "innovation." Other categories of innovation are the creation of better products, more efficient and effective operating processes, and any ideas that enhance a utility's performance.

reliability and resilience, enhancement of cybersecurity, and empowerment of consumers.[3] It involves major upgrades of the transmission and distribution grid that accommodate new technological developments (e.g., renewable energy, storage) and systems, changing market dynamics and shifting consumer preferences. GM reflects both an evolutionary and a revolutionary progression, contingent on the technology and process under consideration.

Most electric industry observers support GM at both the transmission and distribution level.[4] Advocates of GM comes from diverse quarters: electric utilities, clean air and climate advocates, technology vendors, consultants, labor unions, and state[5] and federal politicians and bureaucrats.[6] Wall Street also favors GM when utilities are able to earn at or above their cost of capital on the potentially large expansion in their rate base from GM investments — delivering coveted earnings per share and dividend growth, in addition to the need to issue additional debt and potentially equity.[7] (Evidence has shown that most electric utilities earn above their cost of capital.[8]) These advocates generally argue that utilities should be spending more and sooner on GM.[9]

As a casual observation, proponents of GM in the governmental domain have dominated both skeptics and opponents.[10] Since GM has the potential to advance a wide array of regulatory and public policy objectives, such as stimulating renewable energy, improving reliability and resilience, reducing operating costs and effectuating more efficient pricing, it places utility regulators in an unenviable position to reject proposed GM investments.

---

[3] Grid modernization encompasses the often-used term "smart grid" but much more. A smart grid centers on digital technologies that include real-time monitoring, automation, data analytics and two-way communications between a utility and its customers. Grid modernization is a broader concept that covers transmission and distribution physical upgrades. A smart grid may include smart meters, artificial intelligence, Interest of Things, demand response systems, while grid modernization may include storm hardening and replacing or elevating the performance of aging infrastructure. Taking smart meters as an example, they can provide two-way communications capabilities and other functionalities that facilitate the ability of customers to better manage their electricity usage. They can also, although still at a low level but a growing one in the U.S., allow for time-varying pricing. Time-varying pricing can bolster certain new technologies (e.g., energy storage), both inside and outside the home. The slow acceptance of time-varying pricing, so far, may reflect more than anything the preference of customers and regulators for the "stability" feature of average-cost pricing.

[4] One prominent U.S. climate advocacy group, RMI, contends that too much effort has been directed at local, low-voltage projects relative to high-voltage transmission projects. It recommends collaborative actions that the state, local, regional, and federal authorities can take to mitigate what RMI calls a "regulatory gap." Claire Wayner, "Mind the Regulatory Gap: How To Enhance Local Transmission Oversight" presentation to PJM PIEOUG, (10 December 2024), online (pdf): <pjm.com/-/media/DotCom/committees-groups/user-groups/pieoug/2024/20241210/20141210-mind-the-regulatory-gap-how-to-enhance-local-transmission-oversight.pdf>.

[5] Robert Zullo, "21 states join Biden administration in bid to modernize nation's aging grid" *Washington State Standard* (30 May 2024), online: <washingtonstatestandard.com/2024/05/30/21-states-join-biden-administration-in-bid-to-modernize-nations-aging-grid>.

[6] The federal government, under the Biden Administration, has subsidized GM and encouraged its development. The *Infrastructure Investment and Jobs Act* appropriated more than $65 billion for upgrading the electric grid. The U.S. Department of Energy established the Grid Modernization Initiative to assist in "creating the modern grid of the future." State organizations like the National Conference of State Legislatures and the National Governors Association also support more spending and aggressive activity on GM. See Glen Andersen, Megan Cleveland & Daniel Shea, "Modernizing the Electric Grid: State Role and Policy Options" (22 September 2021), online: <ncsl.org/energy/modernizing-the-electric-grid>; See also National Governors Association, "Advanced Grid Technologies: Governor Leadership To Spur Innovation and Adoption" (January 2025), online (pdf): <nga.org/wp-content/uploads/2025/01/2025_Advanced_Grid_Technologies.pdf>.

[7] Steve Kihm, Janice Beecher and Ronald Lehr, *Regulatory Incentives and Disincentives for Utility Investments in Grid Modernization*, Report No. 8 (Lawrence Berkley National Laboratory, 2017), online (pdf): <eta-publications.lbl.gov/sites/default/files/feur_8_utility_incentives_for_grid_mod_rev_062617.pdf>.

[8] Karl Dunkle Werner and Stephen Jarvis, "Rate of Return Regulation Revisited" (2025) Energy Institute at Hass, Working Paper, online (pdf): <haas.berkeley.edu/wp-content/uploads/WP329.pdf>.

[9] According to the American Society for Civil Engineers, current grid "investment trends" will lead to funding gaps of $42 billion for transmission and $94 billion for distribution by 2025. See Glen Andersen, Megan Cleveland & Daniel Shea, *Modernizing the Electric Grid: State Role and Policy Options*, (National Conference of State Legislatures, 2019) online (pdf): <gridwise.org/wp-content/uploads/2020/01/NCSL_-Modernizing-the-Electri-Grid_112519_34226.pdf> [*Modernizing the Electric Grid*].

[10] When searching the internet, and various articles, reports and other sources to identify the proponents, opponents and skeptics of GM, I discovered that the proponents dominate the other two categories by a far margin. I am confident that the reader will come to the same conclusion.

From a public-choice perspective, strong pressure from various interests with political clout can sway utility regulators and energy policymakers to support their positions, even when harmful to the public interest.[11] As discussed later, utility regulators and consumer advocates in particular should be aware of this possibility, which also arises in others aspects of utility regulation and energy policy.

POTENTIALLY LARGE BENEFITS FROM GM

Sixty percent of the U.S. distribution grid — which carries electricity energy to homes and businesses at the local level — have gone past their 50-year life expectancy. The Brattle Group estimates that $1.5 trillion to $2 trillion will be spent by 2030 to modernize the grid just to maintain sufficient reliability,[12] which constitutes a huge amount that elevates the importance of utility regulators conducting careful cost-benefit reviews.

GM investments encompass myriad technologies that digitize a utility's grid. This allows utility operators to improve their ability to monitor grid conditions, examine those conditions with software, and take appropriate action in near real-time (e.g., restore power after an outage). GM has the potential to improve the reliability of the electrical grid, better integrate alternative energy, and enable pricing that reflects the marginal cost of generation. For example, smart grid technology helps operators to better handle fluctuating supply from renewable energy sources.[13] Design of the present grid occurred when power plants in central locations exclusively controlled a one-way flow of electricity to customers.[14] A modern grid has the ability to accommodate greater consumer control and two-way flows of power.

Climate advocates are a strong proponent of GM, as they consider GM necessary to satisfy the "net zero emissions" standard.[15] Some utilities share this view. As expressed by one advocate, the Union of Concerned Scientists:

> Grid modernization can deliver greater quantities of zero-to low-carbon electricity reliably and securely, including handling variable renewables like wind and solar power. It can support the electric vehicle revolution and increase grid resilience to withstand climate impacts. It can spread economic opportunity in rural and urban communities through electricity and transportation infrastructure investment and upgrades. And, it can improve system efficiencies and reduce costs by reducing the need for expensive and dirty power plants that only run a few hours per year.[16]

This view is also consistent with past experience — achieving public-policy goals at an affordable or reasonable cost to society often requires technological and other innovative breakthroughs. Similarly, making the transition to a clean-energy future at an affordable or politically acceptable cost will demand new technologies, such as those rooted in GM.[17]

New technologies also have enormous potential for improving the performance of public utilities. New technologies can help enhance the quality of utility services, achieve clean-energy goals at a lower cost, reduce the cost of existing services, and advance other

---

[11] *See* James D. Gwartney et al., *Microeconomics: Private and Public Choice*,15th ed (Stamford, CT: Cengage Learning, 2015).

[12] See *Modernizing the Electric Grid, supra* note 9.

[13] Assessing the economics of renewable energy requires adding the costs for new transmission lines and network reconfiguration to accommodate renewable-energy generation.

[14] AltEnergyMag, "From One-Way to Two-Way: The Future of Electricity with Smart Grids" (26 June 2024), online: <altenergymag.com/news/2024/06/26/from-one-way-to-two-way-the-future-of-electricity-with-smart-grids/42377>.

[15] See Andreas Schierenbeck, "The cost of inaction: Grid Flexibility for a resilient, equitable digital energy future" (20 January 2025), online: <weforum.org/stories/2025/01/grid-flexibility-for-resilient-equitable-digital-energy-future>.

[16] Peter O'Connor, "The Equation: What is Grid Modernization – and What's the Role of Electric Vehicles?" (12 September 2017), online (blog): <blog.ucsusa.org/peter-oconnor/grid-modernization-and-smart-charging>.

[17] More broadly, one of this year's winners of the Nobel Prize in Economics, Joel Mokyr, stresses the importance of new technologies and other innovations to modern economic growth.

regulatory objectives more effectively and economically.[18] New technologies also play a vital role for advancing long-term policy objectives, like safety, reliability, resilience,[19] cheaper energy, and energy efficiency.

Who then can disagree that GM is the wave of the future, in which policy makers and regulators should give their unequivocal support for GM investments that ostensibly coincide with the public interest?

THE VALID QUESTION: ARE GM INVESTMENTS IN THE PUBLIC INTEREST?

The strong support for grid modernization (GM) from a wide array of interests, and its potential large benefits, do not guarantee its desirability to utility customers and society. Trying to reconcile the divergence between individual interests and the public interest is an inescapable obligation that commonly besets utility regulators.

Utility regulators should probe whether (1) the total benefits from GM to utility customers exceed the costs[20] and (2) low-income and other households will overpay, given common ratemaking structures, since higher-income households will mostly benefit from purchases of electric vehicles and rooftop solar systems that GM tries to accommodate.[21]

Economically, initial investments in GM should have the highest net benefits, with succeeding

[18] For the electric industry, a confluence of new technologies has erupted in recent years. The most important ones include solar, wind, battery storage, electric vehicles, fuel cells, small modular nuclear reactors, digital control of the grid, smart technologies, demand-side innovations, and information and communications technologies. Some of these technologies will require a longer time before they become commercialized. Other new technologies that show promise today may never attain commercial success. Initial flaws and high costs of new technologies require an extended period of experimentation, learning and technology development as part of the "innovation" process. Widespread adoption of a technology often follows this extended period during which the technology is iteratively tested, refined and adapted to market conditions. During the initial years, new technologies appear attractive but often too expensive for the mass market. When first entering the market, new technologies are typically "crude, imperfect, and expensive." They initially assume a market "niche" from their performance and unique features, rather than by their cost competitiveness.

Firms typically invest in new technologies at different times. The diffusion of a new technology is often slow and highly unpredictable, even after its initial commercial application. Established firms with older capital assets and firms with newly purchased assets face different economic conditions when deciding to scrap old capital assets and purchase new assets that embody state-of-the-art technology. Not all firms should invest in "best practice" technologies at the same time. What is a "best practice" for one firm may not be "best practice" for another firm. Regulators should therefore not expect all utilities immediately to deploy the newest or the same technologies.

[19] Measuring the resilience of an electric power system is especially problematic, but critical for decision-making (Henry H. Willis and Kathleen Loa, *Measuring the Resilience of Energy Distribution Systems* (Santa Monica, California: RAND Corporation, 2015).). According to the National Academies of Sciences, Engineering, and Medicine (National Academies of Sciences, Engineering, and Medicine, *Enhancing the Resilience of the Nation's Electricity System* (Washington: The National Academies Press, 2017). "Developing metrics for resilience is extremely challenging because that involves assessing how well we are prepared for, and could deal with, very rare events, some of which have never happened".

[20] Few students of utility regulation would dispute the contention that long-term utility customer welfare is one of the least represented interests in the regulatory arena. Utilities focus on their financial interests, consumer advocates tend to take a short-term view, and other stakeholders have their own agenda (e.g., the advancement of clean energy and certain technologies). A gap in adequate representation for the long-term interests of customers becomes evident. Regulators' main duty, which commonly stated in statutes and court rulings is to advance the public interest, should be to fill that void, notwithstanding the intense pressure regulators face to appease individual stakeholders with substantial political and economic influence.

[21] Under cost-of-service regulation, customers who benefit more from a particular investment should pay a higher share of the costs for the investment. GM would benefit all customers, although grossly unevenly in some instances, when it improves reliability, resilience, operations efficiency and have other positive system-wide effects. Utility regulators generally approve rolled-in pricing when a new investment benefits all customers, or when demand by all customers creates the need for a new investment. (Under rolled-in pricing, the utility would add the costs of GM investments to existing costs with prices to all customers based on this sum; analysts often refer to rolled-in prices as average or embedded cost prices).

One example justifying rolled-in-pricing is a gas utility investing in new storage capability to accommodate the growing demand of its customers. Because the investment would benefit all customers, it would be appropriate to roll-in the costs into the rates of all customers. They would then be responsible for paying the costs for this investment that the utility made to benefit them. When the utility expands its system dedicated to serving a subgroup of customers, on the other hand, rolled-in pricing becomes less defensible from both an "equity and economic efficiency perspective.

investments having lower or even negative net benefits. To say differently, this sequence of actions would result in the ratio of benefits to dollars spent decreasing at higher levels of GM investments. The implication is that spending lesser amounts on GM could be cost-beneficial, limiting the size of socially optimal GM spending and potentially extending the horizon over which this optimal GM spending occurs. This condition especially holds when substitutes for GM investments can achieve the same objectives at lower cost.[22]

Although the economics literature has devoted relatively little attention to regulated firms' incentive to adopt new technologies,[23] the standard narrative is that regulation causes utilities to be cautious about innovating and taking risks.

Utilities are often accepting of new technologies, particularly when mandated and are included in rate base and remain in rate base, considered "used and useful" even if all of the promised benefits do not materialize. Otherwise, utilities would have the propensity to underinvest in new technologies, for example when they have high risk relative to their expected return, produce public benefits[24] or threaten their monopoly status. If a utility has a choice of two technologies, for example, one existing and the other new, where the regulator allows the same allowed rate of return, it will tend to favor the existing technology since inherently it has lower risk.[25] But there may exist explanations for why this may not hold under certain conditions.[26]

One example is GM investments where recent regulatory practices can provoke excessive spending on GM. Several U.S. regulators have

---

[22] Paul J. Alvarez et al., "Alternative ratemaking in the U.S.: A prerequisite for grid modernization or an unwarranted shift of risk to customers?" (2022) 35:9 Electricity J 107200, online: <doi.org/10.1016/j.tej.2022.107200>.

[23] Studies that examine how regulatory incentives affect new technologies include Stuart Burness et al., "Capital Contracting and the Regulated Firm" (1980) 70:30 Am Econ Rev342-54; Mohammad Harunuzzaman et al., "Regulatory Practices and Innovative Generation Technologies: Problems and New Rate-Making Approaches" (1994) National Regulatory Research Institute at 94–105; and Paul Joskow, "Productivity Growth and Technical Change in the Generation of Electricity" (1987) 8:1 Energy J at 17–38.

[24] Public benefits are external to a utility and defined by economists as positive externalities. Examples include clean air and national security, which society values but individual utilities in terms of their profitability do not. Investments in new technologies like GM that have the potential to reduce greenhouse gas emissions and lower the risk of harmful climate change can benefit society at large. Absent carbon pricing or similar policies (e.g., carbon trading), no direct financial compensation associated with those benefits exists, which drives a wedge between the private return that a utility realizes from adopting a new technology and the overall social return.

[25] The reality is that new technologies create more risk than conventional technologies. New technologies can fail economically in a number of ways: low operating performance, high cost overruns in construction, and (for optional demand-side technologies) low penetration or customer acceptance. Assets based on new technologies may have shorter economic lives than those assumed under a regulator-approved depreciation schedule. Overall, new technologies carry higher risk, and unforeseen problems commonly occur.

[26] Throughout its history, utility regulation has gone through periods where it has given utilities either inadequate or excessive incentives to innovate. The second condition occurred when utilities shouldered little risk from adopting a new technology relative to the benefits they realize.

As an example of the second condition, during this period (1960-1975) regulators rarely conducted prudence reviews and disallowed cost recovery, while extended regulatory lag allowed utilities to retain the benefits of a new technology over several years. These regulatory practices were one reason why many utilities found nuclear power attractive (See for example, H. Stuart Burness, W. David Montgomery & James P. Quirk, "Capital Contracting and the Regulated Firm" Am Econ Rev): The potential for earning high rates of return from increased sales and the low risks during this period from rare retrospective reviews and cost disallowances. Regulatory lag meant that utilities were able to keep any cost savings or other benefits for a number of years until the next rate case, which occurred infrequently during that period when utilities' average cost was falling. Instructive for the present time, a price cap or another multiyear rate mechanism could help achieve a similar outcome, heightening the incentive of utilities to innovate. In its purest form, a price-cap regulatory system regulates a utility's prices but not its profits. Price caps generally allow utilities to earn higher profits. Compared to traditional rate-of-return regulation, a price-cap scheme also imposes higher risk on the utility. The focus shifts from "inputs" to "output," which tends to improve the utility's interest in using innovation to serve customers and society. See Ken Costello, "New Technologies: Challenges for State Utility Regulators and What They Should Ask" (2012) 12:1 National Regulatory Research Inst.

committed to GM projects that shift risk to utility customers.[27] While no state utility regulators have guaranteed full cost recovery of a utility's GM investments, some regulators have allowed a utilities to recoup their costs outside traditional rate cases and preapprove costs not yet incurred. Some analysts have claimed that these actions have weakened regulatory oversight of utilities to control the costs of GM projects, with the increased possibility of customers absorbing imprudent costs from mismanagement.[28]

WHAT UTILITY REGULATORS SHOULD ASK

Utility regulators face a formidable challenge in ensuring that utility investments in GM advance the public interest.[29] While state statutes encourage GM, they do not require regulators to approve utility GM plans.[30] In the state of New Mexico, the Grid Modernization Statute authorizes the state's Public Regulation Commission ("PRC") to approve distribution GM projects.[31] In evaluating utility-proposed projects, the PRC must consider the reasonableness of the project (presumably related to customer net benefits) and whether a project would advance certain objectives, like a reduction in greenhouse gases, facilitation of grid access for renewable and other forms of clean energy, and improved reliability and resilience. Other states have comparable statutes to encourage electric utilities to upgrade their distribution systems.[32]

Utility regulators must address myriad questions. Neglecting to answer the questions below increases the chances that GM investments will fail tests of reasonableness that underscore net benefits and societal welfare.[33] Although admittedly difficult to answer, regulators cannot ignore them if they hope to prevent excessive spending on GM, which could (1) involve large sums of money ultimately borne by utility customers and (2) be better spent on other, more economical actions. Failing to answer these questions can also create "equity" problems that jeopardize the public interest. Answers to many of the questions require a combination of judgment and objective information.

---

[27] Utilities often see upfront commitment by regulators to a new capital project as a way to minimize risk. Without that kind of commitment, utilities sometimes rightly feel vulnerable to regulatory "hold-up" or "opportunism." (Economists label this condition "asset specificity." It includes investments that have an alternative value much lower than their value in its original use.) The regulator, for example, might disallow a utility to recover certain costs because of an outcome that fell short of expectations even though the utility was not at fault. In other words, the utility made a good decision that turned out bad. The tough question for regulators then becomes, how should the cost of the bad outcome be shared between the utility customers and shareholders, or even utility management?

[28] In some states like Indiana and Kentucky utilities file multi-year modernization plans, which once approved, allow utilities to recover their expenditures unless clearly imprudent. Regulators are more constrained in disallowing imprudent costs than when utilities have to show that the costs they incurred were prudent. *Supra* notes 7 and 22.

[29] The public interest is an ill-defined term devoid of any definite metric. Generically, it refers to the "common well-being" or "general welfare." One idea is for regulators to identify the multiple objectives that coincide with the public interest, assigning weights to those objectives and resolving the trade-offs among them. Of course, trade-offs must recognize the prevailing statutory, constitutional and other checks.

[30] Since 2021 over 28 states have introduced legislation relating to grid modernization. See National Conference of State Legislatures, "Strengthening the Grid Against Extreme Weather" (4 January 4 2025), online: <ncsl.org/energy/strengthening-the-grid-against-extreme-weather>. In some of the states, legislation requires either the regulator or utilities to evaluate the costs and benefits of GM. In most U.S. states, legislation limits the authority of utility regulators by statute, which typically provides general guidelines from which regulators form their regulations. Regulators have exercised their authority to require studies on the feasibility and economics of grid modernization. (NC Clean Energy, Technology Center, "The 50 States of Grid Modernization: Utilities Pursue Tools for Demand Management and Grid Flexibility in Q1 2025" (24 Avril 2025), online: <nccleantech.ncsu.edu/2025/04/24/the-50-states-of-grid-modernization-utilities-pursue-tools-for-demand-management-and-grid-flexibility-in-q1-2025>.

[31] Gridworks, *Investing in a Modern Electric Grid for New Mexico*, Report prepared for the New Mexico Public Regulation Commission, (September 2022) , online (pdf): <gridworks.org/wp-content/uploads/2022/11/GW_New-Mexico-Modern-Grid-Report_.pdf>.

[32] Glen Anderson et al., *Modernizing the Electric Grid: State Role and Policy Options*, Report prepared by the National Conference of State Legislatures, (22 September 2021), online: <ncsl.org/energy/modernizing-the-electric-grid>.

[33] GM investments have often fallen short of achieving the benefits utilities projected in their proposed plans. See Sanem Sergici, "Reviewing Grid Modernization Investments: Summary of Recent Methods and Projects" (4 December 2018) The Brattle Group before the National Electrical Manufacturers Association; Herman K. Trabish, "Duke, SCE, Other Grid Modernization Proposals Faced Big Cost Questions, More Regulatory Scrutiny in 2021" (4 January 2021) *Utility Dive*; and *The 50 States of Grid Modernization: Q3 2022 Quarterly Report,* (North Carolina Clean Energy Technology Center, 2022).

The most critical questions are:

1. How much weight should regulators give in their decisions to those benefits that are difficult to quantify and highly uncertain?

2. What is the best method of cost recovery for balancing utility and customer interests (e.g., riders[34] and surcharges versus base-rate treatment)? Should regulators commit to GM investments upfront when it limits their ability to disallow costs when found imprudent?[35]

3. What is the optimal timing or roll-out of GM investments?[36]

4. How can a regulator implement appropriate rate structures to reduce or substantially eliminate a utility's inherent incentive to overinvest (e.g., the Averch-Johnson effect[37] or "gold plating")?

5. Do the benefits of GM accrue to the same customers who pay the costs? If not, what adjustments should the regulator make to cost allocation and rate design structures to maintain fairness and meet established criteria of a sound rate structure?[38]

6. How do the benefits depend upon utility actions in deployment — should utilities be held accountable ex post for achieving the benefits contained in their GM plans?

7. Should taxpayers pay for a portion of GM costs in situations where benefits extend beyond those of utility customers and are society-wide (e.g., environmental, grid resilience)?

---

[34] Cost riders account for those costs lying outside base rates by creating a separate cost category, or include specified new costs or true-ups from cost levels that differ from test-year costs. A rider can either provide short-term rate relief for a utility or adjust rates between rate cases based on movements in those costs specified in a rider. Attrition is the fundamental reason for interim rate relief. Attrition refers to the tendency for a utility's rate of return to decline since the last rate case. Attrition exists when revenue growth falls below revenue requirement increases, eroding the utility's rate of return over time in the absence of a rate change. See Ken Costello, "How Should Regulators View Cost Trackers?" NRRI 09-13, September 2009.

[35] Utilities often see upfront commitment by regulators to a new capital project as a way to minimize risk. Without that kind of commitment, utilities sometimes rightly feel vulnerable to regulatory "hold-up" or "opportunism." (Analysts label this condition "asset specificity." It includes investments that have an alternative value much lower than their value in its original use.) The regulator, for example, might disallow a utility to recover certain costs because of an outcome that fell short of expectations even though the utility was not at fault. In other words, the utility made a good decision that turned out bad. The tough question for regulators then becomes, how should the cost of the bad outcome be shared between the utility customers and shareholders, or even utility management?

[36] Uncertainty about future returns creates what analysts call an option value to deferring or postponing investment in the technology. A firm may rationally wait because it wants to acquire new information before making a decision that involves large amounts of money. Real options theory says that when the future is uncertain, it pays to have available a broad range of options and to maintain the flexibility to exercise those options. Applying real options theory to smart meters, a preferred policy might involve a pilot program rather than installation of smart meters in all homes over a designated period of time. An excellent discussion of real options theory is contained in Avinash K. Dixit and Robert S. Pindyck, *Investment Under Uncertainty* (Princeton, NJ: Princeton University Press, 1994); and Robert S. Pindyck, "Irreversible Investment, Capacity Choice, and the Value of the Firm" (1988) 78:5 Am Econ Rev 969.

[37] On example is utilities upgrading their grid by building-out rather than adopting grid enhancing technologies (GETs) that would be more costly to customers but more profitable to utilities. Building-out is more capital intensive. GETs also have the advantages of being faster to deploy. GETs include dynamic line ratings, advanced power flow control, and topology optimization software. See Climate XChange, "Enabling ATTs and GETs" (last modified 21 July 2025), online: <climatepolicydashboard.org/policies/electricity/transmission-atts-gets>.

[38] Since businesses and industrial firms would be the primary beneficiaries of improved resilience (which, to recall, is one benefit of GM), they should proportionately bear the associated GM investment costs. Traditional cost allocation methods may need modification to recognize this reality.

8. Are there other, more cost-effective ways to achieve the same benefits from GM that are less costly?[39] and

9. To what extent, if any, has government subsidies stimulate uneconomical GM Investments?[40]

CONCLUSION

Several challenges with GM await regulators seeking to maximize the public good while protecting the interests of the utility and its shareholders. A prime one is regulators being sufficiently informed about new technologies embedded in GM to avoid — or at least seek to balance out — the information asymmetry[41] that inevitably exists between the regulator and the utility.[42] Reliance solely on information from utilities and other GM advocates fails to safeguard the public interest.

Another task for regulators is to allocate the risk of GM investment costs between the utility and its customers. They must also seek to align utility rewards with utility risks.[43] An added burden for utility regulators is how to allocate risk between customer classes. When an investment chiefly benefits only a portion of a utility's customers, regulators should consider the potential responsibility and benefits for each group of customers. Should all customers bear the risk of an investment that benefits only one class of customers? Should all residential customers pay the same costs, even though some users benefit much more than others? Regulators may have to cogitate whether commonly-used cost allocation and rate design structures are appropriate for GM investments.[44]

Finally, regulators should not outright reject a GM proposal just because it increases electricity rates or be prejudiced against a proposal in spite of the evidence; or accept a proposal just because it will support clean energy and is politically popular, while ignoring the effect on utility customers and other options to achieve similar objectives. One cannot ignore the fact that either of these scenarios can happen and probably already has in some jurisdictions. ■

---

[39] In a cost-effectiveness calculation, two or more actions assume to have the same or similar benefits with the lowest-cost option being the preferred choice. Unless the benefits of each action are quantifiable, a decision as to which action or actions are preferable becomes an exercise in judgment, which can become adulterated with the decision-maker's biasness and other undue favoritism toward a particular choice. History has shown that utilities, utility regulators, the state and federal governments and others favor those actions based on a host of factors other than cost. One can then surmise that the investments and other actions taken to improve resilience bear little resemblance to being purely cost-effective. Even though some utility regulators pronounce their adherence to cost-effective actions, in reality their declaration is more rhetorical than real.

[40] The rationale for government subsidies rests with evidence of the social desirability of GM to penetrate the marketplace more intensively and rapidly than occurring under private-market incentives. This rationale is ostensibly the core argument for governmental intervention. Its sentiment presumes that the benefits of GM override any costs that would arise. Subsidies, especially when poorly structured, can be (a) unfair to funding parties (e.g., taxpayers), (b) economically inefficient, and (c) unfair to competing energy sources. Overall, subsidies typically fail a cost-benefit test from an aggregate economic-welfare perspective. See the problems with subsidies in Elizabeth Van Heuvelen, "Subsidy Wars" *F&D Magazine*, International Monetary Fund, (June 2023), online: <imf.org/en/Publications/fandd/issues/2023/06/B2B-subsidy-wars-elizabeth-van-heuvelen>.

[41] The basic problem is that regulators know less than utilities about the availability, cost, risk, and benefit of new technologies. (This "information asymmetry" arises in many areas of regulation). It causes regulators to be uncertain about the commercial and social value of new technologies. Inadequate information might also make it difficult for regulators even to know when they have sufficient information to make a decision as to whether a new technology is in the public interest. Proactive regulators require parties to provide them with objective and adequate information. Especially if a utility regulator is asked to pre-approve a new technology or the associated utility's expenditures, it should have a thorough understanding of the likely risks and benefits before allowing the utility to pass those risks on to customers.

[42] See Paul L. Joskow & Richard Schmalensee, "Incentive Regulation for Electric Utilities" (1986) 4:1 Yale J on Regulation 1, online: <openyls.law.yale.edu/entities/publication/af9483dd-5fc9-4cfc-8ea8-9806666858af>.

[43] Economic theory says that all firms will innovate if they receive adequate compensation given the risks they face. This theory applies equally to utilities, although regulated utilities have different kinds of risks and compensation and hence different incentives. Regulatory policies can discourage or stimulate utility investments in innovations, thereby affecting the amount that utilities spend on innovation, the speed at which they innovate, and the nature of the investments (*supra* note 26). The regulatory tools that affect innovation are ratemaking, mandates, and performance objectives. By placing bounds on utility profits and risk, regulation can affect innovative activity. Regulated utilities face more severe profit constraints than their unregulated counterparts, which generally diminishes their willingness to innovate. On the other hand, utilities generally face less risk than unregulated companies.

[44] See *supra* note 21.

BEYOND QUEUE SENIORITY: CUSTOMER-CENTRIC SOLUTIONS FOR INTERCONNECTION SCARCITY

*Travis Kavulla and Kevin Thompson**

First-in-time, first-in-right Large Generator Interconnection ("LGI") rules that have for the first part of this century governed the priority of access to most North American grids are no longer viable. Scarce transmission, surging artificial intelligence ("AI") driven load, and deep queues of merchant renewables have broken the logic of these rules. Queue seniority no longer correlates with customer or system value, and it hardly could have because the relative costlessness of queuing was never an efficient instrument to allocate a scarce resource. This paper proposes a hybrid approach to generator interconnection depending on the characteristics of the underlying marketplace: prioritize projects with real customer commitments and competitive procurement, or use open-season and pricing mechanisms to allocate scarce capacity efficiently.

For roughly two decades after Federal Energy Regulatory Commission ("FERC") Orders 888 and 2003 standardized open access and interconnection, grids operated with ample headroom. Grid operators in Canada such the Alberta Electric System Operator ("AESO") followed suit and LGI policies granting priority rights based on queue position worked well thanks to an environment of abundant transmission capacity. Grid utilization improved, incumbent market power was limited through enhanced competition, and in turn lower wholesale costs resulted.

Today, that premise has inverted. Interconnection queues for generation, and now large loads driven by AI data centers, have swelled while transmission capacity is scarce. Yet interconnection decisions still hinge on queue timing rather than economic value or system need. Antiquated first-in-time, first-in right LGI policies assume transmission is a public good that any commercially viable generator may use without reducing its availability to others. This assumption is flawed. Just as in water and wireless spectrum, a ration approach to resource allocation requires a market-based approach to define rights to scarce transmission capacity.

Allocating transmission capacity arbitrarily based on queue position no longer works. Interconnection backlogs across North America total hundreds of gigawatts, incapable of clearing efficiently. The challenge is further compounded by a parallel queue on the demand

* Travis Kavulla (B.A., Harvard; M.Phil, University of Cambridge) is head of policy at Base Power Company and the former chairman of the Montana Public Service Commission and past president of the National Association of Regulatory Utility Commissioners. He is a lecturer at the University of Chicago's Harris School of Public Policy.

Kevin Thompson (B.A., Mount Royal) is regulatory affairs manager at NRG Energy.

This article is based on an earlier piece published in the Energy Bar Association's Energy Bried. See Eric Blank & Travis Kavulla, "The End of the Grid's Gold Rush Era: Toward Customer-Oriented Approaches to Generator Interconnection" (23 August 2025), online: <eba-net.org/the-end-of-the-grids-gold-rush-era-toward-customer-oriented-approaches-to-generator-interconnection>.

side. Sadly, but predictably, the inefficient LGI process has been photocopied in its application to massive data centers seeking to connect to the grid. Scarce transmission has ended the "Gold Rush" era for generation, but this new one is underway. Neither can be managed effectively under a first-in-time, first-in-right policy, leaving regulators and system operators to grapple with both interconnection reform and reliability concerns.

In 2023, both FERC and the AESO introduced cluster processes and added financial screens to weed out speculative or queue-sitting projects. However, these reforms did not fundamentally abandon the core first-in-time, first-in-right policy. These measures seek to improve study mechanics, but not necessarily allocation logic.[1]

Meanwhile, these LGI policies raise broader questions. Queue-based priority also distorts competition and transmission planning. Utilities and load-serving entities ("LSE") cannot select the highest value projects, instead hamstrung by senior queue holders who have captured scarce transmission capacity which is neither fair nor efficient.

In sum, prevailing interconnection policy is upside down under scarcity conditions. Access to the grid should prioritize customer and system value, not create rent for early queue filers. Reforms must pair competitive procurement with willingness to pay signals for scarce capacity for merchant projects. Stopgap measures like PJM Interconnection's ("PJM's") and the Midcontinent Independent System Operator's ("MISO's") jump-the-line measures that bypass senior LGI rights highlight the urgency of replacing Gold Rush era LGI queue rules with durable, value-based approaches.

I. FIRST-IN-TIME, FIRST-IN-RIGHT RULES WORKED WHEN TRANSMISSION WAS ABUNDANT

When FERC introduced LGI policies over 20 years ago,[2] United States markets had ample transmission headroom.[3] Alberta's zero congestion transmission standard similarly drove an overbuild of transmission, enabling easy interconnection of new generation.[4] Annual LGI requests were modest.[5] With embedded transmission costs already covered by load and marginal interconnection costs near zero, first-in-time, first-in-right rules made sense. They maximized abundant capacity, promoted open access and competition, and curbed utility selfdealing.

Early LGI reforms such as FERC Order 2003 sought to accelerate entry and mitigate discriminatory practices but were rooted in a view of untapped abundance rather than treating transmission interconnection as a scarce resource. FERC framed this reform as a complement to open access and generator competition in Order 888 and

[1] So, for example, the first cluster to be studied would be a group of generators at the front of the interconnection queue. See generally Federal Energy Regulatory Commission, Improvements to Generator Interconnection Procedures and Agreements, 184 F.E.R.C. ¶ 61,054, (2023).As described below, the Midcontinent Independent System Operator (MISO) and PJM Interconnection, L.L.C. (PJM) each have noted that, even under the reformed "first ready, first served" LGI procedures, clearing their respective interconnection queues will take many years. Restudies will be necessary due to projects that drop out after having been found not to be "ready," and projects that clear the process may not come online (if at all) until the later part of the next decade. See Federal Energy Regulatory Commission, Standardization of Federator Interconnection Agreements and Procedures, 104 F.E.R.C. ¶ 61,103, (24 July 2003), online (pdf): <ferc.gov/sites/default/files/2020-04/E-1_71.pdf> [*Order No. 2003*].

[2] *Ibid*.

[3] See e.g., Joseph Rand, "Queued Up: Status and Drivers of Generator Interconnection Backlogs", Lawrence Berkeley National Laboratory, Transmission and Interconnection Summit (June 2023) at 5, online (pdf): <energy.gov/sites/default/files/2023-07/Rand_Queued%20Up_2022_Tx%26Ix_Summit_061223.pdf>. (showing active interconnection queues in 2010 as being relatively small compared to installed capacity comprised of mostly wind and thus concentrated).

[4] Alberta's last significant transmission projects were two parallel high voltage direct current (HVDC) lines directed by Bill 50. At that time, numerous academics and industry professionals warned of inefficient overbuild. See e.g., Jeffrey Church, et. al., "Transmission Policy in Alberta and Bill 50", University of Calgary School of Public Policy Research Paper, (2 November 2009), at 4, 8, 15, online (pdf): <journalhosting.ucalgary.ca/index.php/sppp/article/view/42325/30212>.

[5] See e.g., Joseph Rand, "Queued Up: Status and Drivers of Generator Interconnection Backlogs", Berkeley Lab (June 2023) at 4, online (pdf): <energy.gov/sites/default/files/2023-07/Rand_Queued%20Up_2022_Tx%26Ix_Summit_061223.pdf> (showing annual megawatt capacity and number of requests in national interconnection queues back to 2000).

regional transmission organization ("RTO") development under Order 2000.[6] These policies largely succeeded. Open access and queue priority to a newly liberalized grid made third-party generation highly financeable, spurring hundreds of billions of dollars in new generation investment. Innovative hedging products and virtual power purchase agreements[7] helped further reduce project finance risk and accelerated development.

Because commercially viable generators received priority interconnection rights at minimal cost, they sought the most efficient connection points on an under-utilized grid.[8] With ample transmission headroom, customers could competitively procure supply from either new or existing generation projects, while reliability and other goals were achieved.

II. FIRST-IN-TIME, FIRST-IN-RIGHT CONCERNS UNDER CONDITIONS OF SCARCITY

Over the past five years or so, transmission and interconnection headroom for new generators (and new large loads) has been exhausted.[9] Scarcity drivers have been well documented in FERC proceedings, including load growth, decarbonization goals, permitting and planning challenges for new transmission, and greatly improved renewable energy cost and performance.[10] As a result, LGI requests now exceed the coincident peak demand of many balancing authorities by several multiples, eliminating nearly all generator headroom.[11] Connection requests for data centres compound the strain, approaching or exceeding peak demand in jurisdictions such as the Electric Reliability Council of Texas ("ERCOT") and Alberta. Under these conditions, granting priority LGI rights solely on queue timing raises significant concerns.

A. The Dysfunctional Nature of First-in-Time, First-in-Right LGI Approaches

Until recently, priority interconnection rights in RTOs went to generators that filed first and demonstrated "commercial viability." Today, most wind, solar, and storage projects are sponsored by experienced, well-capitalized developers, making commercial viability a weak differentiator.[12] Queue timing is now the only meaningful distinction among hundreds of similar projects.[13] Even when capacity exists, oversized cluster studies prevent efficient use of limited headroom.

FERC and Canadian ISOs have tried to address this. Order 2023 and its successors introduced a "first-ready, first-served" model, but in practice it retains a queue-based priority. Clusters are studied and resolved sequentially, and withdrawals trigger restudies that delay entire cycles. MISO estimated that the current cluster cycle takes 3–4 years, with projects

[6] RTOs are assumed to include PJM, MISO, Southwest Power Pool (SPP), CAISO, New York Independent System Operator, Inc. (NYISO), and ISO New England Inc. (ISO-NE).

[7] See Initial Comments of the Colorado Public Utilities Commission (12 October 2022), RM-22-14-000 [hereinafter Initial Comments of the Colorado PUC].

[8] FERC standards evolved requiring generators to show that they were "commercially viable." These standards seemed like a reasonable minimum floor to help avoid spending transmission utility or system operator resources evaluating speculative, poorly designed, or under-capitalized projects that may have been prevalent in the earlier days of RTO operation.

[9] See e.g., Notice of Proposed Rulemaking, Improvements to Generator Interconnection Procs. & Agreements, 179 F.E.R.C. ¶ 61,194, (2022) at 20 (noting that "available transmission capacity appears to have been exhausted in many regions").

[10] Unlike wind energy projects that are often restricted to unique geographic locations, utility-scale solar and storage development can occur across a far wider range of sites and regions and are now responsible for most of the backlog in interconnection queues. See Rand, *supra* note 5, at 5 (showing that solar and storage projects account for most queue filings).

[11] See Rand, *supra* note 5, at 12 showing capacity of queues in each ISO/TRO. See also the Alberta Electric System Operator, "Long Term Adequacy Metrics" (last visited 3 February 2026), online: <aeso.ca/market/market-and-system-reporting/long-term-adequacy-metrics>.

[12] See *supra* note 9, at 2–3.

[13] *Ibid* at 6–7.

from its 2025 cluster potentially waiting until 2036 to come online.[14] In Alberta, AESO's first cluster drew 22 GW — more than double average demand — with 16 GW advancing, underscoring the scale of oversubscription.[15]

These reforms improve study mechanics but do not solve the core problem. Interconnection queues across regions exceed peak demand many times over and most projects will never be built. It is time to invert the paradigm and ask which projects deliver genuine customer benefit or represent the highest value use of scarce interconnection capacity.

B. With Scarcity, First-in-Time LGI Approaches Crowd Out Needed Investment and Raise Costs

When transmission and interconnection are constrained, rationing of headroom is inevitable. Today, that rationing occurs by granting priority LGI rights based on the timing of the cluster studies or an application within a cluster study.[16] This leaves critical decisions of allocating scarce grid capacity to the arbitrary filings dates, where the legacy squatter rights have inhered years before a competitive solicitation for resources commences, effectively dictating the outcome of a process better determined by resource cost and operational characteristics. This undermines Order 2003's goal of "bringing much-needed generation to market to meet the growing needs of electricity customers" without undue delay.[17]

Recognizing this misalignment, RTOs such as PJM, MISO, and the Southwest Power Pool ("SPP") sought FERC approval to prioritize resources needed for reliability. In PJM, 1,059 projects were eligible to seek interconnection, of which 60 per cent were intermittent resources. It proposed the Reliability Resource Initiative ("RRI") to allow a subset of generators needed to meet PJM's capacity needs to achieve a faster interconnection.[18] Utilizing an administrative scoring mechanism that considers market impact and commercial operation date rather than queue position,[19] 94 applications totaling 26 gigawatts were reduced to 51 projects representing 9,300 megawatts of new capacity.[20]

MISO's Expedited Resource Addition Study ("ERAS")[21] requires projects to demonstrate they will meet an identified reliability need, supported by an attestation from a regulated utility that it will self-build or contract through a power purchase arrangement ("PPA") or similar arrangement.[22] It was initially rejected by FERC,[23] but later approved as ERAS 2.0 with caps on qualifying projects and carved out Illinois and Michigan, which have retail competition.[24]

SPP's similar proposal, also called ERAS, though for Expedited Resource Adequacy

---

[14] *Midcontinent Independent System Operator, Inc., Revisions to the Open Access Transmission, Energy and Operating Reserve Tariff: Expedited Resource Addition Study Filing*, (17 March 2025), Washington, DC, ER25-1674-000 at 21 (for 3-4 year timeline for current study cycle); *Midcontinent Independent System Operator, Inc., Motion to Intervene and Request for Rehearing and Stay of Public Interest Organizations*, USDE 202-25-9 at 30 (for online date of 2025 cluster).

[15] See Alberta Electric System Operator, "Cluster Assessment Process, Cluster 1 Progress Update" (31 July 2024), online (pdf): <aesoengage.aeso.ca/31713/widgets/131604/documents/135512>.

[16] For example, recent conversations with SPP staff suggest that over 7,000 megawatts of new LGIAs have been executed with priority rights going to projects in the earliest cluster studies.

[17] See *supra* note 7.

[18] *PJM Interconnection L.L.C.,* (13 December 2024), ER25-712-000, online (pdf): <pjm.com/-/media/DotCom/documents/ferc/filings/2025/20250328-er25-712-000.pdf>.

[19] *Ibid* at 30–33.

[20] PJM Interconnection, L.L.C., "PJM Chooses 51 Generation Resource Projects To Address Near-Term Electricity Demand Growth" (2 May 2025), online: <insidelines.pjm.com/pjm-chooses-51-generation-resource-projects-to-address-near-term-electricity-demand-growth>.

[21] *Supra* note 14.

[22] *Ibid* at 17–18.

[23] See *Midcontinent Independent System Operator, Inc., Order Rejecting Tarif Revisions* (16 Mai 2025), FERC 61,131, online: Federal Energy Regulatory Commission <sierraclub.org/sites/default/files/2025-05/ferc-reject-eras-20250516-3074.pdf>.

[24] *Supra* note 14. *PJM Interconnection L.L.C.,* (13 December 2024), ER25-712-000, online (pdf): <pjm.com/-/media/DotCom/documents/ferc/filings/2025/20250328-er25-712-000.pdf>.

Study, was also accepted.[25] The SPP proposal is intended to expedite utility-designated generation projects for LGI.[26] These programs underscore that queue-based allocation cannot meet reliability needs and require ongoing exceptions—a symptom of structural failure.

C. Under Conditions of Scarcity, First-in-Time LGI Approaches Distort Transmission Investment

Current LGI approaches distort both new generator and transmission investment decisions. Queue-based cost allocation once worked when few projects connected to a robust grid. Today, with thousands of queued projects, this *ad hoc* model cannot produce an optimal transmission system.

Alberta is moving away from this paradigm. Its shift from a zero-congestion standard to optimal transmission planning ("OTP") requires new transmission projects proceed only when the system benefit exceeds costs.[27] Paired with new transmission reinforcement payments ("TRP") — upfront, non-refundable charges that replace the current refundable deposits — the policy sends sharper locational signals. Developers are incentivized to site where capacity exists or fund reinforcements, reducing congestion risk and speculative filings. Other regions are exploring similar approaches, but most still rely on queue seniority, which transfers transmission value to early filers and encourages "LGI lottery" behavior. As well, incumbents can exploit this to block efficient entrants, raising costs for customers.[28]

When regional transmission planning then occurs to accommodate the growth protended by such a backlogged, but speculative, queue, the effect is predictable: Transmission is planned for and funded by customers which may fail to deliver intended benefits if priority access goes to projects with a senior queue position, but which are misaligned to customer needs or value.

III. REFORMS FOR AN OPEN ACCESS LGI APPROACH BASED ON CUSTOMER AND SYSTEM BENEFIT

Open access should remain central to interconnection policy, but scarcity demands regulators and ISOs move beyond first-in-time, first-in-right approaches. These legacy approaches assumed transmission was a limitless public good, but this premise no longer holds. Once effective in accelerating grid development, these Gold Rush rules now impede the ability to meet customer demand, reliability, and other policy objectives. This paper recommends reforms that allocate scarce interconnection capacity to projects delivering the greatest customer and system value.

Any approach must recognize that customers, or the Load-Serving Entities ("LSEs") that supply them energy, ultimately bear transmission costs in most ratemaking arrangements.[29] Scarce interconnection capacity should therefore prioritize projects backed by customer commitments or ensure the greatest system benefits. Broken first-in-time LGI procedures fail to do this. However, a shift is already underway in several places.

---

[25] See Federal Energy Regulatory Commission, Order Accepting Tariff Revisions, Subject to Condition, 192 F.E.R.C. ¶ 61,062, (21 July 2025), online (pdf): <spp.org/documents/74369/20250721_order%20accepting%20tariff%20revisions%20subject%20to%20condition%20-%20expediated%20resource%20adequacy%20study_er25-2296-000.pdf>.

[26] Derek Wingfield, SPP Board Approves Expedited Generation Interconnection Process to Help Meet Regional Resource Adequacy, Southwest Power Pool (6 May 6 2025), online (pdf): <spp.org/news-list/spp-board-approves-expedited-generation-interconnection-process-to-help-meet-regional-resource-adequacy>.

[27] For further details, see Ruppa Louissaint, "Alberta's grid in transition: An overview of the restructured energy market" (2025) 13:4 Energy Regulation Q.

[28] Given the potential impact of new transmission on altering dispatch and reducing RTO wholesale market prices, several incumbent generators have aggressively opposed new transmission investments, particularly in vertically disaggregated RTOs. See Alissa J. Schafer & Dave Anderson, "NextEra Spent $20 Million to "Ban" Clean Energy Transmission Project in Maine" (3 November 2021), Energy & Policy Institute, online: <energyandpolicy.org/nextera-spent-20-million-to-ban-clean-energy-transmission-project-in-maine>. (describing a situation where incumbent generators spent over $20M to fund efforts to kill a cost-effective new transmission line that, as proposed, would have created large customer benefit by lowering wholesale market prices); Clark Mindock, "Key Leases for Hydropower Transmission Line Upheld by Maine Top Court" (29 Novembre 2022), Reuters, online: <reuters.com/legal/litigation/key-leases-hydropower-transmission-line-upheld-by-maine-top-court-2022-11-30>.

[29] With the notable exclusion of those transmission interconnections or planning processes that establish nonrefundable allocations or payments for transmission service, such as those described for AESO in this paper.

Competitive processes should replace queue seniority as the basis for transmission allocation. In bilateral markets and state-regulated utilities, this may mean state-supervised solicitations overseen by independent evaluators. In restructured markets with retail competition, nominations by LSEs could achieve similar outcomes. Open seasons or auctions could also be employed. In all cases, safeguards must be in place to prevent transmission owners favouring affiliated generation, consistent with FERC Orders 888 and 2003.

Pricing should also reflect reality. Access to new transmission must reflect incremental or market-based costs, not historical embedded rates under an open access transmission tariff. When interconnection triggers major network upgrades, cost allocation to interconnecting resources or their offtakers should account for those impacts. Aligning price signals with actual costs discourages speculation and ensures transmission expansion delivers value to customers and the system.

Much of these recommended open access LGI approaches, where all generators can compete for priority interconnection independent of when they filed in the LGI queue, can be implemented in bilateral and state-regulated markets, but naturally require different approaches in fully restructured markets.

1. State regulated approach for vertically integrated utilities

In bilateral and state-regulated markets, transmission expansion can be comprehensively planned for the benefit of native load customers, funded through socialized cost recovery, rather than by assigning upgrade costs to individual generators. Coupled with transparent, competitive all-source procurements, priority interconnection can be awarded to winning bids that best meet reliability, resource adequacy, and cost objectives rather than queue seniority.

Tying scarce LGI rights to the outcomes of state-supervised competitive solicitations makes commercial viability a competitive result, not a timestamp. As a result, the allocation decision lies within a regulated process focused on public-interest outcomes. This design also addresses familiar concerns about objectivity and transparency in "jump-the-line" exceptions to ordinary LGI rules. Competitive solicitations overseen by independent evaluators, with robust record development and regulatory review in litigated proceedings, provide regulators with process visibility. FERC could establish a yardstick for the acceptability of these state processes before sanctioning them to ensure that the purposes of open access are meaningfully fulfilled, if not through an approach that mistakenly relies upon first-in-time, first-in-right interconnection regulation within the federal domain.

Awarding scarce interconnection priority through competitive procurements, rather than individual queue position, determines what capacity is added, when and where it is needed, and under what commercial terms. This constrains self-build bias by forcing head-to-head competition between utility-owned and third-party proposals under defined cost and risk limits and returns transmission value to customers lower utility offtake pricing. This contrasts many RTO structures that privatize value via senior queue rights. Colorado's all-source procurements exemplify this model: scarce LGI priority follows winning bids, enabling scale transmission planning and delivery.[30]

2. The CAISO approach

Compared to vertically integrated states, the California Independent System Operator ("CAISO") operates within a far more diverse retail landscape of 100 LSEs, including investor-owned utilities, community choice aggregators, and competitive retailers ranging in size from less than 1 megawatt to over 13,000 megawatts.[31] Its interconnection queue is highly oversubscribed, demonstrated by its Cluster 15 study that included 541 new projects representing 354,000 megawatts. This far exceeds CAISO's all-time peak demand,

[30] Details of this model are explained in greater detail in Eric Blank & Travis Kavulla, "The End of the Grid's Cold Rush Era: Toward Customer-Oriented Approaches to Generator Interconnection", (2025) 6:1 Energy Bar Association, online (pdf): <eba-net.org/wp-content/uploads/2025/08/EBA-Brief-2025-Vol-1.pdf>.

[31] California Open Data Portal, "Electric Load Serving Entities (IOE & POU)" (last visited 10 February 2026), online: <data.ca.gov/dataset/electric-load-serving-entities-iou-pou>; See also State of California, "Registered Electric Service Providers" (last visited 10 February 2026), online: <apps.cpuc.ca.gov/apex/f?p=511:1:0::NO>.

underscoring the speculative nature of the interconnection queue.[32]

To address this, CAISO replaced first-in-line priority with a weighted scoring system to allocate priority LGI rights.[33] LSEs receive "commercial interest points" that they may allocate to resources in the queue to grant it higher-priority status.[34] LSEs naturally use their points on projects they intend to or have already contracted with, giving priority to resources backed by real customer commitments. This mechanism has already influenced power purchase agreements, with buyers securing better terms in exchange for points that reduce interconnection uncertainty.

Limits on utility generation ownership reduce self-dealing,[35] and centrally planned, customer-funded transmission makes LSE points a reasonable proxy for customer benefit.[36] California's retail restructuring, albeit incomplete, ensures that competitive tension between buyers of generation is present, avoiding the perverse incentives that a regulator would otherwise have to guard against in the vertically integrated utility markets that are closed to retail competition. Early use of points under the CAISO reform was modest given a rushed rollout, but the market's reform squarely reorients interconnection priority to customer-backed projects and away from speculative queue filings, allowing all generators to compete on system and customer value — a more genuine form of open access.

3. Fully Restructured Markets

In fully vertically disaggregated RTO and ISO markets, where generation ownership is diversified and retail competition is widespread, the interconnection problem broadly mirrors that of other jurisdictional structures. First-in-time, first-in-right procedures still backlog LGI queues with many projects lacking credible commercialization paths, while impeding lower-queued projects that could better meet resource adequacy, reliability, and customer value needs. The remedy is necessarily more complex than in vertically integrated markets, where the buyer of generation is clear, or California which has fewer LSEs and more policy-driven contracting. In markets such as PJM, ISO-New England, New York Independent System Operator Inc ("NYISO"), ERCOT (Texas), and Alberta, customers are less obviously linked which complicates any customer-centric prioritization in the queue.

Customer shopping activity in these jurisdictions is not universal. Most industrial customers with the option have chosen a third-party LSE,[37] and in some cases, they know exactly what they are buying, such as when Microsoft purchases a long-term PPA tied to the restart of Constellation's Three Mile Island.[38] More commonly, supply arrangements are shorter term and lack any clear link to specific generation resources.

Residential participation varies widely. Depending on the market, only 5 per cent to as much as 85 per cent of households take service from a third-party LSE.[39] Even these

[32] CAISO reached a peak demand of 51,479 MW in 2022. See State of California, "Registered Electric Service Providers" (last visited 10 February 2026), online: <apps.cpuc.ca.gov/apex/f?p=511:1:0::NO>.

[33] FERC approved this reform in 2024.

[34] CAISO divided the overall project scoring into three main categories: 30% for commercial interest points, 35% for project viability, and 35% system need, the latter two being determined by the CAISO.

[35] *Electric Utility Industry Restructuring Act*, AB 1890, 1996 Cal Stat ch 854.*See, e.g., California Public Utilities Commission, Executive Summary,* online: <ia.cpuc.ca.gov/environment/info/esa/divestpge-two/eir/chapters/s-summary.htm>.

[36] See, e.g., California Independent System Operator, "The California ISO's Transmission Planning Process – A Brief Overview" (7 April 2025), online (pdf): < caiso.com/Documents/Transmission-Planning-Process-Overview.pdf>.

[37] U.S. Energy Information Administration, "Annual Electric Power Industry Report", *Form EIA-861* (2023), online: <eia.gov/electricity/data/eia861> [*US EIA Form-861*].

[38] Constellation, "Constellation to Launch Crane Clean Energy Center, Restoring Jobs and Carbon-Free Power to The Grid" (20 September 2024), online (pdf): <constellationenergy.com/newsroom/2024/Constellation-to-Launch-Crane-Clean-Energy-Center-Restoring-Jobs-and-Carbon-Free-Power-to-The-Grid.html>.

[39] See *US EIA Form-861, supra* note 37; See also Market Surveillance Administrator, "Retail Statistics" (5 January 2026), online (excel): <view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.albertamsa.ca%2Fassets%2FDocuments%2FMSA-Retail-Statistics.xlsx&wdOrigin=BROWSELINK>; See also Electric Reliability Council of Texas, "ERCOT Grid Insights" (November 2025) at 3, online: <ercot.com/about/news/grid-insights>.

customers do not receive energy from a utility's dedicated set of resources. Many LSEs do not own generation at all; instead, they purchase power from the wholesale market through financial trades rather than unit-contingent contracts. These trades typically settle as contracts-for-differences against day-ahead and real-time spot auctions run by the RTO or ISO.[40] Counterparties may be generation owners or financial intermediaries, making the source of generation, and its link to individual customers, unclear. For non-shopping customers, utilities, state agencies, or regulated retailers aggregate demand and bid it into the wholesale market, where wholesale suppliers compete to serve that load.

This fragmented commercial landscape raises a key question: What would a customer-centric approach to interconnection look like in markets where customers rarely know the resource serving them? One option is to extend the logic of CAISO's reform, which awards priority based on commercial interest rather than queue timing. If an LSE or large customer has contracted for a resource, that arrangement could justify higher priority in the queue. This approach ensures that resources with real customer commitments, and therefore a clear path to commercialization, move ahead of purely speculative projects. This method is often looked at as a solution to AI-driven load queues, with data centre projects encouraged to "bring your own generation."

For resources developed on a merchant basis, a different remedy is needed. One promising approach is a network open season, a time-limited process where the grid operator solicits binding requests for interconnection or transmission capacity, aggregates demand and allocates rights and costs transparently, often through auctions or pro-rata subscriptions. This model, long used in natural gas pipelines and adapted for merchant HVDC projects,[41] replaces timing-based seniority with demonstrated willingness to pay or contractual commitment, filtering speculation and aligning expansion with actual system needs. Rights obtained through an open season could even be traded in a secondary market, creating liquidity and ensuring capacity flows to the highest value uses.

Alberta's AESO offers a useful case study in partial reform. Its cluster assessment process batches generation and storage projects into defined intake windows and studies them together, improving efficiency and imposing financial discipline through application fees, security requirements, and generator-related contribution obligations.[42] These measures reduce speculative filings and allow coordinated network analysis. However, clustering alone does not solve the core problems related to allocation and speculation. Priority still generally depends on timing within the cluster, and with over 16,000 megawatts of projects in cluster one, many projects will not, nor have the intention, to move forward. These issues result in high cancellation risks, which limits the effectiveness of the studies,[43] a concern previously described in this paper within MISO.[44]

The cluster process introduces structured stages, beginning with a System Access Service Request ("SASR") and moving through preliminary and detailed assessments, each requiring deliverables such as study scopes, cost estimates, and evidence of Generator Unit Owner Contribution ("GUOC") payment. Financial security and stage-gate decisions help filter speculative projects, though payments are often minimal enough that well-funded developers can simply treat these as a cost of doing business especially when

[40] In general, retailers make hedging decisions based on their expected load and may over-hedge to account for weather risk, a kind of 'reserve margin' practice in the competitive retail community that is intended to prevent severe financial consequences in the event of a blow-up in the wholesale market price. See, e.g., *Comments of NRG Energy, Inc.,* Pennsylvania Public Utility Commission, Docket No. M-2024-3051988 (9 January 2025).

[41] See G Rob Gramlich & Zach Zimmerman, *Use of Network Open Seasons in the Electric Industry* (9 August 2024), Grid Strategies LLC prepared for NRG Energy, online (pdf): <nrg.com/assets/documents/energy-policy/grid-strategies-electric-network-open-seasons080924.pdf>.

[42] See Alberta Electric System Operator, "Cluster Assessment" (last visited 10 February 2026), online: <aeso.ca/grid/connecting-to-the-grid/cluster-assessment>; See also Alberta Electric System Operator, "Cluster Assessment Process Implementation" (last visited 10 February 2026), online: <aesoengage.aeso.ca/connection-process-streamlining>.

[43] For Cluster 3, AESO explicitly extended the submission and stage-gate timelines "to accommodate restudies as a high number of project cancellations are expected".

[44] See *Order No. 2003, supra* note 1, and MISO's restudy concerns described in Section 2.

entering queues in multiple jurisdictions. The coordinated studies allow AESO to identify least-cost connection alternatives and shared upgrades more effectively than serial reviews, though these limitations are highlighted in the cancellations discussed above.

These processes help enhance transparency and predictability for developers through published intake windows and milestone schedules, but issues persist. Given the oversubscription and cancellation issues, it is clear that clustering alone cannot cure speculative queue dynamics plaguing RTOs and ISOs across North America. Cost signals can also be blunt, attempting to filter speculative projects (though costs may only be high enough to truly filter out smaller developers) but does not necessarily lead to prioritizing resources with the highest reliability, locational, or speed-to-market value unless it can then be paired with a value-based selection rule.

A hybrid approach, retaining clustering for study efficiency but assigning priority through customer-anchored scoring or open-season bidding, would better align interconnection with reliability, resource adequacy, and customer value. Upcoming reforms in Alberta may get it closer to achieving these goals. In July 2024, the Minister of Affordability and Utilities directed the AESO to move to an OTP approach.[45] Combined with TRP, this new planning standard moves Alberta closer to achieving the above hybrid approach. This approach is designed to send sharper location-based price signals and align developer incentives with system value, while enabling AESO to better manage congestion and allocate costs according to cost-causation principles.[46]

Clearer location signals for developers will be provided by existing transmission interconnection capacity, TRP costs, and real-time locational marginal prices in the wholesale market. Developers will no longer be able to rely on the AESO planning costly transmission upgrades to relieve congestion. Taken together, clustering, OTP, and TRP build toward a coordinated, value-driven interconnection and transmission regime. Clustering ensures efficiency and transparency in study sequencing. OTP rationalizes expansion decisions around system-wide benefits. TRP introduces stronger locational and technical cost signals upfront.[47]

CONCLUSION

Scarcity has upended the logic of first-in-time, first-in-right interconnection policy. Open access must evolve to prioritize projects that deliver measurable customer and system value through transparent, competitive processes and market-based signals.

Early reforms in Colorado and California demonstrate that queue seniority can be replaced with mechanisms grounded in real commitments that preserve competition and curb speculation. For fully restructured markets, the challenge is greater but solvable. Alberta's shift to Optimal Transmission Planning and Transmission Reinforcement Payments, paired with clustering, signals a move toward value-based interconnection.

Done right, these reforms will not only replace the Gold Rush mentality but strengthen the foundations of open access, enabling grids to meet rising demand and policy goals without sacrificing fairness or efficiency. Flexibility and creativity are no longer optional, they are prerequisites for a reliable, customer-focused grid in an era of scarcity. ■

---

[45] See the letter from the Minister of Affordability and Utilities and Vice Chair of Treasury Board of https://aesoengage.aeso.ca/trp-and-supply-sas/news_feed/background-information Alberta, the Honorable Nathan Neudorf, to the President and Chief Executive Officer of the Alberta Electric System Operator, Mike Law (3 July 2024), online (pdf): <ehq-production-canada.s3.ca-central-1.amazonaws.com/5ccdffa7dc3623ae39ba332646af9fbf23df6237/original/1730998577/36be17e72e012e4b8f1fe6a4300ea44e_Minster%27s_Letter_-_July__2024.pdf?X-Amz[1]Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIA4KKNQAKIII4DU7AG%2F20260211%2Fca-central-1%2Fs3%2Faws4_request&X-Amz-Date=20260211T014450Z&X-Amz-Expires=300&X-Amz-SignedHeaders=host&X-Amz-Signature=b657e0fa4282cde0aa6ed5ea6eb955384880c7b4b238e1b588aa7ffb0ef15116>.

[46] Alberta Electric System Operator, "Background Information", (last visited 10 February 2026) online: <aesoengage.aeso.ca/trp-and-supply-sas/news_feed/background-information>.

[47] *Transmission Regulation*, Alta Reg 86/2007, s 29.1(4) specifies that TRP payments are based on available transmission capacity, technical characteristics of the generator, and the cost of reinforcing the system.

"INDIGENOUS RIGHTS IN ONE MINUTE: WHAT YOU NEED TO KNOW TO TALK RECONCILIATION", BRUCE MCIVOR[1]

*Tamara (Baldhead) Pearl**

Bruce McIvor's book, *Indigenous Rights in One Minute: What you need to know to talk reconciliation*, is the most recent release from First Peoples Law, published in 2025. The book aims to offer readers without legal training a more accessible understanding of the complex body of Indigenous rights cases and legislation, otherwise known as Aboriginal law. Often confused with Indigenous law, which is distinct and rooted in Indigenous peoples' cultures, customs and ways of life, Aboriginal law involves Canadian legislation and case law that are concerned with Indigenous peoples' rights as protected under the common law, statute, and Section 35 of the *Constitution Act of 1982*[2].

Through the creation of this accessible guide to understanding Indigenous rights, the outcome assumption may be for the public to participate more in reconciliation efforts that are aligned with the Truth and Reconciliation Commission's Calls to Action ("TRC" or "CTA"). The inspiration behind this book is to create more interest in advocacy or to inspire further research into Indigenous peoples' issues for readers outside of the legal profession.

At the beginning of the book, McIvor offers a useful road map as to the book's contents. The bigger picture is focused on the Indigenous-Crown relationship and why it is a useful tool in this endeavour. He splits the book into two main sections. These two main sections are further portioned into subsections. In each subsection, there are subject descriptions that range from important questions, such as "Why do Indigenous people have special rights?"; "What is reconciliation?" and describes legislation and cases in the same way, such as "Why is the *Horseman* decision important?" and so on. Each description's answer is rarely longer than two pages and can vary from a half page to a little more than two pages, with the majority of each description averaging about a page and a half only in length. This internal structure of the book is quite clever in its design

[1] Bruce McIvor, *Indigenous Rights in One Minute: What You Need to Know to Talk*, First Peoples Law (Nightwood Editions, 2025).

* Tamara (Baldhead) Pearl is a nēhiyaw iskwew (Plains-Cree woman) from One Arrow First Nation in Treaty 6 territory and the traditional homeland of the Métis. She is an Assistant Professor at the Faculty of Law, University of Alberta and a PhD in Law candidate at the University of Ottawa. Her research focuses on "anti-dominance" training which challenges the dominance dynamics of the settler colonial framework imposed upon Indigenous Peoples. Professor Pearl aims to contribute to training legal practitioners using anti-dominance to respectfully engage with Indigenous legal traditions and communities while using Treaty relationships as a guide. Her goal is to help train law students and other legal professionals, to not only better our communities but to bridge them by using the nēhiyawak or Plains Cree concept: māmawī wīcihitowin ("working together, helping one another"). Professor Pearl is a Research Fellow for the Wahkohtowin Law and Governance Lodge and serves as a board member for the Canadian Research Institute for the Advancement of Women (CRIAW-ICREF).

[2] *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

and people may be more inclined to read it cover to cover.

Section 1 is titled, "The most important questions about Indigenous rights" and begins with the subsection titled "Basics". This includes a range of explanations from the assertion of Crown sovereignty, what the Doctrine of Discovery is, including "Who is an Indian?". McIvor then delves into definitions surrounding "Rights", such as what is Aboriginal title, including a brief description of comprehensive claims. I am surprised that there is so little included about modern treaties with the exception of one or two cases for the rest of the book, although he does identify, such as a brief mention of the *Nunavut Land Claim Agreement*[3], in other places. This first section of definitions then goes on to describe treaties, and includes more useful descriptions, such as for the *Natural Resource Transfer Agreements*[4], including some discussion of the "cede, release and surrender" clause mentioned in the Numbered Treaties.

This is then followed by the subsection "Obligations" which is obviously on the side of the Crown, but this part also addresses a lot of fear-mongering and misinformation surrounding Indigenous rights, such as useful questions like "Why don't Indigenous people have a veto?", "Why is the Duty to Consult inadequate?", or my personal favourite, "How does the Crown avoid responsibility for breaching a fiduciary duty?".

He then ends Section 1 with a portion titled "Reconciliation", which ranges from describing two main inquiries, the TRC and the *Royal Commission on Aboriginal Peoples*[5]. He also describes a bit about the *United Nations Declaration on the Rights of Indigenous Peoples*[6] ("UNDRIP") but does not mention the more recent federal legislation on implementing UNDRIP, or Bill C-15[7], or the provincial legislation, such as British Columbia's *Declaration Act*[8] ("*BC DRIPA*"), and Bill 85, the Northwest Territories' UNDRIP *Implementation Act*[9]. Another omission is Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*[10] which recognizes Indigenous jurisdiction over child welfare matters, but he does describe the *C-92 Reference* in the following Section 2 in the subsection "Aboriginal Rights", with the specific focus on self-government.

McIvor in Section 1 does generally touch on Indigenous grassroots advocacy, such as "What is "Land Back"?" but I feel this area could have been more robust, including highlighting some very public examples that a lay person would have heard about, such as the "Idle No More" movement or maybe some examples of "land defenders". To illustrate, my students pick up reasonably quickly who gets to consult on behalf of the Crown, including that although third parties do not, there are procedural aspects that can be delegated as brought up in McIvor's "Obligations" section. But for important nuance, I am asked early on in my classes, why there is so much tension within some Indigenous communities as to who gets to consult on behalf of Indigenous people. They see in the news a number of issues including how some land defenders reject the *Indian Act*[11] imposed elected chief and band council system, and it would be an interesting follow up in a future sequel or edition to discuss in more detail how the *Indian Act*[12] targeted the hereditary chief system, along with other poorly

---

[3] Government of Nunavut, "Nunavut Land Claims Agreement" (entered into force 9 July 1993), online (pdf): <gov.nu.ca/sites/default/files/policies-legislations/2022-01/Nunavut_Land_Claims_Agreement.pdf>.

[4] *The Saskatchewan Natural Resources Transfer Agreement*, SS 19993, c S-31.1.

[5] *Royal Commission on Aboriginal Peoples*, RCAP 99-24E, (1991).

[6] [United Nations] *Declaration on the Rights of Indigenous Peoples (UNDRIP)*, GA Res 61/295, UN Doc A/RES/47/1 (2007).

[7] Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 43rd Parl, 2019 (assented to 21 June 2021).

[8] *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

[9] Bill 85, *United Nations Declaration on the Rights of Indigenous Peoples Implementation Act*, 2nd Sess 19th Leg, Northwest Territories, 2023 (assented to 6 October 2023).

[10] *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24.

[11] *Indian Act*, RSC 1985, c I-5.

[12] *Ibid*.

understood assimilation policies that are 'hot button topics' in the wider public discussion.

McIvor clarifies in the book's preface that he does not cover any details of the *Indian Act*[13], such as elections, registrations, etc. This could also be why there is no specific section on important *Charter*[14] cases as the two often intersect because of the individual human rights or substantive equality aspect to *Charter*[15] cases that are complex, but again he may address this area of Indigenous rights in another publication. In fairness, the *Indian Act*[16] is still peppered throughout the book in various contexts and definitions, including what it means to have "status" as a First Nation. I suspect that part of the complexities for not including too much about the *Indian Act*[17] or the *Charter*[18] case law, is the controversial historic sex discrimination that is ongoing today. This is not a criticism of McIvor's decision to not include this, as Indigenous rights understood within the Indigenous-Crown relationship was the main focus in this book. He does touch on the issue of how some Indigenous women have lost their status under the *Indian Act*[19] in the subsection "Rights" under the description "Who is entitled to benefit from Aboriginal and Treaty rights?" But I am always curious in any discussion around reconciliation, including the jurisprudence that involves the Indigenous-Crown relationship, where are the women? I would have also preferred if there was some coverage of the pre-treaty period outside of the *Royal Proclamation of 1763*[20].

About halfway through the book, we then enter Section 2 which deals with McIvor's pick of the top 50 Aboriginal law decisions and why they are important. It is portioned into the subsections of "Aboriginal Title", "Aboriginal Rights", "Treaty Rights", "Fiduciary Duty", "Duty to Consult and Accommodate", "Métis Rights", and then ends with "Miscellaneous and Emerging Issues". Each of the cases has helpful issues as it relates to the section that the case is in. To illustrate, under the subsection "Duty to Consult", one of the cases he uses is described with the title, "Why is the *Rio Tinto* decision important?" which underneath is followed by, "*Duty to Consult – Administrative Tribunals – Trigger for Consultation*"; or under the subsection "Miscellaneous and Emerging Issues" a case is titled as, "Why is the *Dickson* decision important?" followed with "*Modern Treaties – Charter of Rights*". Although *Dickson* was one of the few modern treaties and *Charter* issues mentioned, a future sequel or edition would benefit from a section on Inuit Rights, as that would include an important historical part of reconciliation, including the Arctic Relocation, which is a not very well known part of Canadian history that involved the forced relocation of Inuit families to protect Canada's Cold War interests in the 1950s[21].

At the end of the book there is a helpful glossary for understanding some of the legal jargon, and his section, "When you have more than one minute" is brilliant. McIvor's style is quite readable. The book's tone can be at times pejorative, but I am sure the reader will understand that this is a consequence of the fact that McIvor cares deeply about the continuing impacts of settler colonialism that are so entrenched in this area of law.

For decades, Aboriginal law was considered a niche subject in law schools and within the legal profession. In 2015, the TRC released its Final Report into the historical abuse of the residential school system. Among the 94 Calls for Action, CTA #27 and CTA #28, were directed to the legal profession and law schools

---

[13] *Ibid.*

[14] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (UK), 1982, c 11 [*Charter*].

[15] *Ibid.*

[16] *Supra* note 11.

[17] *Ibid.*

[18] *Charter*, *supra* note 14.

[19] *Supra* note 11.

[20] George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1 [*Royal Proclamation, 1763*].

[21] Government of Canada, "The High Arctic Relocation: A Report on the 1953-55 Relocation and Summary of Supporting Information (three volumes) (July 1994)", (last modified 26 January 2026) online: <recherche-collection-search.bac-lac.gc.ca/eng/home/record?app=rcap&IdNumber=469&ecopy=rcap-458>.

to develop cultural competence and anti-racism training that "includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*[22], Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations". From the TRC's spotlight combined with pressing political issues, most notably rapid Canadian resource development in response to threats from the current administration of the United States of America, as reflected in Bill C-5 *One Canadian Economy: An Act to enact the Free Trade and Labour Mobility in Canada Act and the Building Canada Act*[23], Indigenous rights in the Aboriginal law context are once again front and center in current public discussions.

McIvor's book attempts to distill and summarize about 40 years of Aboriginal law jurisprudence — largely case law on Aboriginal rights defined through Section 35 — into roughly 200 pages, is impressive and ambitious. Arranged into these legal themes makes sense, as the book extracts clear-cut takeaways from some of the most important cases, while also addressing larger questions about relevant legislation, and the main areas of advocacy for the most pressing Indigenous concerns. Mixed in with this are McIvor's own opinions, as he declares early in the book's preface, that are derived from his expertise from clearly many years of practice.

When I was asked to do a book review of McIvor's *Indigenous Rights in One Minute*[24], I was interested to see what I would have to say about such a claim, not just as a law professor that teaches mandatory courses in this area in response to the TRC's CTA #28, but also as a *nēhiyaw iskwew* or Plains Cree woman. First Peoples Law is widely respected, and I have been following Bruce McIvor's work and 'hot takes' on his blog for some time.

I was happy that the book is well structured, and I certainly echo the sentiment from the testimonials on the back of the book, contributed by very well-known advocates in this field. At the end of reading it, my only sticking point is in the book's title, as I am not sure I am in agreement that it can deliver on that claim of Indigenous rights in one minute, or if it should have made the claim it could be in one minute, although I understand it is figuratively catchy and not meant necessarily to be taken in a literal sense. As it stands, it may very well be "Indigenous rights in one minute for legal professionals and law students". But for the layperson I am unsure.

But even the portion of the title, "*What you need to know to talk reconciliation*" highlights what could be further included. There could have been more discussion around Indigenous rights that included some milestones in the 10 years from when the TRC had released their Final Report. For example, some developments made to address the 21 CTA's that were geared to Canada's Justice System, or the *National Inquiry into Missing and Murdered Indigenous Women and Girls* in answer to CTA #41. Or even some discussion on the research units that are community led in revitalizing Indigenous laws in response to the CTA #50, such as the Indigenous Legal Research Unit at the University of Victoria, or the Wahkohtowin Law and Governance Lodge at the University of Alberta.

I am hopeful my review of McIvor's book is of relevance for potential readers, not only as a law professor but also because I understand the perspective of a lay person, as I am "first generation" in my family with a legal education. Despite its obvious relevance to my lived experiences, I am an Indigenous woman who grew up knowing nothing about Indigenous rights. Outside of a very limited understanding of individual human rights, I had no understanding of collective rights for my reserve and why my community was the way it was, as my only experience of being Indigenous was racism and poverty. When I did begin to truly grasp what Indigenous rights were, it was not from my very interesting undergraduate Native Studies classes, although that was in the late 1990s. But a paradigm shift occurred for me when I went to law school and became educated on the meaning — but also the legal culture — of settler colonial dominance and the power that goes into sustaining the settler colonial status quo. My main (but hopefully

[22] *Supra* note 6.

[23] Bill C-5, *An Act to enact the Free Trade and Labour Mobility in Canada Act and the Building Canada Act,* 1st Sess, 45th Parl, 2025 (first reading June 6, 2025).

[24] *Supra* note 1.

constructive) critique is that there is a wide spectrum of receptivity towards the subject matter of Aboriginal law among my students, and it mostly leans on resistance. I suspect the same for the lay person who may read McIvor's project.

At the risk of being a little digressive from my review of McIvor's book, I do feel it is necessary to add a further illustration of what I mean by a paradigm shift for interested readers. Before being accepted into law school I attended the *Program of Legal Studies for Native Peoples* ("PLSNP") at the Native Law Centre (now Indigenous Law Centre) at the University of Saskatchewan's College of Law. It was one of only two pre-law programs in Canada geared to supporting incoming Indigenous law students at the time. As an aside, this one had been in existence since 1975, and in May of 2026 the Indigenous Law Centre will be hosting a 50th anniversary for all its alumni[25]. This pre-law program was specifically geared to incoming Indigenous students from across the country, many recommended, some required, to enrol in this program by the Canadian law schools that the Indigenous students had applied.

The program was responsible for setting up Indigenous students with a supportive Indigenous cohort to extend well beyond their law school days, and to equip them with explicit core legal skills needed to do well in the legal profession. Alumni of the PLSNP developed core legal skills but also community building skills in its design to assist them in law school and beyond. This was in response to another hurdle that many Indigenous people who entered the legal profession had (and still have) to overcome, and that is the "mentoring gap"[26]. Mentorship in law involves a long-term investment, and it is difficult to make any substantive changes within law, as law is purposely slow, gatekept, unwieldy, and very resistant to change. It is necessary to build and nurture a sense of community among Indigenous law students and legal practitioners, especially with the historical and present trauma that is triggered for Indigenous people in learning about Indigenous rights, especially Aboriginal law jurisprudence.

For those law students of mine that do not lean on the side of resistance, and are open to broader concepts, such as "multi-juridicalism" or legal pluralism, it is not such a steep hill for them to climb. Professor Joshua Nichols in a video featured on the Center for International Governance Innovation's website[27], describes that there is a way forward beyond the paternal treatment of Indigenous Peoples through Aboriginal law. He reflects that it may be time to address the unjust norms that have resulted from not including Indigenous Peoples as founding partners in Canada's constitutional order, along with the French and English. In Canada, we already have a bi-juridical system (common law and civil law), but a term like "multi-juridical" poses a lot of questions around Indigenous Peoples becoming proper founding peoples along with the French and English, and maybe the public is ready for these conversations? From what McIvor has described in his book, it is very apparent that the Crown holds most of the cards. For many Indigenous people in Canada, and forgive me for quoting Bob Dylan, "you can't win with a losing hand".

Reconciliation requires a commitment to systemic change, not only in our legal education, but within public conversations as well. The risk of being hyper focused on one area, although a very important area of Indigenous rights, without factoring in the need for a paradigm shift for the lay person, may have the unintended effect of oversimplifying

---

[25] Donella Hoffman, "Advancing access to legal education for Indigenous peoples for 50 years" *University of Saskatchewan: USASK News*, (8 January 2026), online: <news.usask.ca/articles/community/2026/advancing-access-to-legal-education-for-indigenous-peoples-for-50-years.php>; see also Indigenous Law Centre, "History" *University of Saskatchewan*, (last visited 27 January 2026), online: indigenouslaw.usask.ca/about/history.php; see also Heather Persson, "Roger Carter encouraged First Nations lawyers across Canada" *Saskatoon Star Phoenix*, (23 March 2017), online: thestarphoenix.com/news/saskatchewan/roger-carter-encourages-first-nations-lawyers; see also Dalhousie University, "Indigenous Blacks and Mi'kmaq Initiative" *Schulich School of Law*, (last visited 27 January 2026), online: <dal.ca/faculty/law/indigenous-blacks-mi-kmaq-initiative.html>.

[26] Brown-Nagin, Tomiko, "Race and Higher Education Commentary Series: The Mentoring Gap" (2016) 129:303 *Harv L Rev*, online: <harvardlawreview.org/wp-content/uploads/2016/05/vol129_Brown-Nagin.pdf>("mentoring gap[s]" occurs when "[s]egregation in the real world begets social silos on campus" at 304).

[27] Joshua Nichols, "Indigenous Peoples Are Not Seen as Equals in Confederation; It's Time to Fix That" *Center for International Governance Innovation*, (13 June 2019), online: <cigionline.org/multimedia/indigenous-peoples-are-not-seen-equals-confederation-its-time-fix>.

what are complex dynamics of dominance that are not easy to disrupt.

But returning to the book review, the positives more than outweigh any potential negatives of this book. As already mentioned, it would be welcome to see a series of books that tackle other complex areas of Indigenous rights that continue to affect Indigenous people. For example, including further publications around the subject matter included in the book's section, "Indigenous Rights: When you have more than a minute". Or even tackling the TRC's 21 CTA's for the justice system, such as perhaps "*Gladue* Principles in one minute", that could assist as a pocket mentor to the BC First Nations Justice Council's transformative initiative, *The Gladue Principles: a guide to the jurisprudence* authored by Professor Benjamin Ralston[28], which would complement an already robust synthesis of *Gladue* cases.

Although I am not convinced of the promise of one minute in understanding Indigenous rights for those who are not trained in law and do not have the benefit of a legal paradigm shift, the book overall, does act as an excellent "pocket mentor", or even a "pocket translator" of what the main issues and holdings are in the Aboriginal law cases that are featured. This book is also a great beginning for those who want a strong start, could be used for employee training, or even as a review for those in legal practice or education in understanding how Indigenous people are still very much impacted by the effects of settler colonialism today. I highly recommend it. ■

[28] Benjamin Ralston, *The Gladue Principles: a guide to the jurisprudence*, BC First Nations Justice Counsel (Saskatchewan: Indigenous Law Centre, University of Saskatchewan, 2021), online (pdf): <indigenouslaw.usask.ca/documents/publications/the-gladue-principles_ralston.pdf>.