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2025 DEVELOPMENTS IN ADMINISTRATIVE LAW RELEVANT TO ENERGY LAW AND REGULATION

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I. 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,[2] 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[3] and a couple of

1. Paul Daly, *2025 Developments in Administrative Law Relevant to Energy Law and Regulation*, ENERGY REGUL. Q. (Mar. 2026), https://energyregulationquarterly.ca/regular-features/2025-developments-in-administrative-law-relevant-to-energy-law-and-regulation#sthash.bFlN3NN8.dpbs. The report has been edited from its original form to conform to the Energy Law Journal's style manual.

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2. *See generally* Canada (Citizenship and Immigr.) v. Vavilov, 2019 SCC 65 (Can.).

3. *See generally* Pepa v. Canada (Citizenship and Immigr.), 2025 SCC 21 (Can.).

statutory interpretation decisions on the correctness standard whose implications are not at all confined to administrative law.[4]

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.[5] 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.[6]

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 section 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 section II, I consider correctness review. The main issue here is the perennial one of the standards of review applicable to *Charter*[7] 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[8], 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

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4. *See generally* Telus Commc'ns Inc. v. Fed'n of Can. Mun's., 2025 SCC 15 (Can.); Lundin Mining Corp. v. Markowich, 2025 SCC 39 (Can.).

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

6. Consider the starkly competing views expressed by two High Court judges in KP v. Sec'y of State for Foreign, Commonwealth and Dev. Affs. & Sec'y of State for the Home Dep't, [2025] EWHC (Admin) 370 [55-57] (Eng. & Wales): BDH v. Lond. Borough of Lambeth, [2025] EWHC (Admin) 2568 [39] as well as the split on the Court of Appeal in SAG v. The Governing Body of Winchmore Sch., [2025] EWCA Civ 1335 [47] (Eng. & Wales).

7. *See generally* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

8. *See generally Telus Commc'ns Inc*., 2025 SCC 15 (Can.).

technological change. I also contrast the approach taken there with that taken in *Lundin*[9], a securities regulation case.

With *Vavilov* out of the way, I turn in section 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 British Columbia (BC) decision involving a cabinet intervention into energy regulation in the context of the challenge posed by the demands of cryptocurrency mining.

II. 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.[10] The year before, I described how *Vavilov* has reached "the parts of the administrative state that previous frameworks did not reach," imposing justification requirements on decision-makers who, previously, had benefitted from reflexive judicial deference.[11]

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

9. *See generally* Lundin Mining Corp., 2025 SCC 39 (Can.).

10. Paul Daly, *2024 Developments in Administrative Law Relevant to Energy Law and Regulation*, ENERGY REGUL. Q. (Apr. 2025), https://energyregulationquarterly.ca/regular-features/2024-developments-in-administrative-law-relevant-to-energy-law-and-regulation#sthash.n2QoXxom.dpbs.

11. Paul Daly, *2023 Developments in Administrative Law Relevant to Energy Law and Regulation*, ENERGY REGUL. Q. (Apr. 2024), https://energyregulationquarterly.ca/regular-features/2023-developments-in-administrative-law-relevant-to-energy-law-and-regulation#sthash.OGgEoAnk.dpbs.

Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing."[12]

The appellant in *Pepa*[13] 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.

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 section 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."[14] 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."[15] 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."[16]

One case involved a predecessor provision.[17] 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."[18] 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."[19] Another case was about a *revoked* visa, not an expired visa, and accordingly the observations about expired visas were not binding precedent (i.e.

12. Immigration and Refugee Protection Act, S.C. 2001, c. 27, § 63(2) (Can.).
13. Pepa v. Canada (Citizenship and Immigr.), 2025 SCC 21, at para. 3 (Can.).
14. *Id*. at para. 66.
15. *Id*. at para. 68.
16. *Id*. at para. 76.
17. *Pepa*, 2025 SCC 21, at paras. 69-72.
18. *Id*. at para. 72.
19. *Id*. at para. 75.

obiter dicta).[20] This was also true of yet another Federal Court case.[21] And, believe it or not, there was also a case interpreting the predecessor provision in a manner favorable to the appellant — but it was "brushed aside" by the IAD, whereas an unfavorable precedent was waved through.[22]

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 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.[23]

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.[24]

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 section 63(2)? The decision-maker never asked itself that question

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20. *Id*. at paras. 77-78.

21. *Pepa*, 2025 SCC 21, at paras. 80-82.

22. *Id*. at para. 83.

23. *Id*. at paras. 84-85.

24. *See also* Paul Daly, *The Scope and Meaning of Reasonableness Review After Vavilov*, 63 ALTA. L. REV. 1, 3-4 (2025).

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."[25] 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."[26] 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 section 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 to support her interpretation of section 63(2):[27] 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.[28] 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

25. *Pepa*, 2025 SCC 21, at para. 194 (Côté and O'Bonsawin, JJ., dissenting).

26. *Id*. at para. 204 (internal citations omitted).

27. *Id*. at paras. 110–12 (majority opinion) (citing IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA, ENF 19: APPEALS BEFORE THE IMMIGRATION APPEAL DIVISION (IAD) OF THE IMMIGRATION AND REFUGEE BOARD (IRB) (Aug. 22, 2024), canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf19-eng.pdf; IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA, ENF 4: PORT OF ENTRY EXAMINATIONS (Feb. 28, 2024), canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf04-eng.pdf).

28. *See also* Paul Daly, *The Relationship Between Hard Law and Soft Law*, ADMIN. LAW MATTERS: BLOG (Aug. 11, 2025), https://www.administrativelawmatters.com/blog/2025/08/11/the-relationship-between-hard-law-and-soft-law/.

> 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.[29]

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.[30]

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.[31] 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 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

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29. *Pepa*, 2025 SCC 21, at para. 119 (majority opinion).

30. *Id*. at paras. 150, 152 (Rowe, J., concurring in part and dissenting in part).

31. *Id*. at para. 148.

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.[32]

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.[33]

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 favor of the *Vavilov* framework.[34] 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)*[35] and *Rogers v. Director of Maintenance Enforcement Program*.[36] 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,[37] 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.[38]

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32. *Id*. at para. 68 (majority opinion).

33. Paul Daly, *The Signal and the Noise in Administrative Law*, 68 UNI. OF NEW BRUNSWICK L.J. 68, 71 (2017).

34. Auer v. Auer, 2024 SCC 36, paras. 19-21, 23 (Can.).

35. *See generally* Universal Ostrich Farms Inc. v. Canada (Food Inspection Agency), 2025 FCA 147 (Can. Ont.).

36. Rogers v. Dir. of Maint. Enf't Program, 2025 YKCA 12 (Can.).

37. Health of Animals Act, S.C. 1990, c. 21, § 48 (Can.).

38. *Universal Ostrich Farms Inc*., 2025 FCA 147, at paras. 14, 97.

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 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."[39]

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.'"[40] 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 favorable result for the appellants. To begin with, the overarching legal framework affords "broad discretion . . . to the Minister or ministerial delegates under section 48,"[41] the standard for disturbing factual findings on judicial review is "high"[42] and the bar is again "high" in respect of overturning policy decisions as unreasonable.[43] Given case law to the effect that the Minister may legitimately decide to have a "very low level of risk tolerance"[44] and that the Minister is not required to permit inspectors to make case-by-case determinations about exemptions,[45] as well as the evidence before the Agency when it established the Stamping-Out Policy,[46] 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*."[47]

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

39. Malcolm v. Canada (Fisheries and Oceans), 2014 FCA 130, at para. 32 (Can. Ont.) (citing Maple Lodge Farms v. Gov't of Can., [1982] 2 S.C.R 2).

40. *Universal Ostrich Farms Inc.*, 2025 FCA 147, at para. 50 (internal citation omitted).

41. *Id*. at para. 54.

42. *Id*. at para. 55; *see also id*. at paras 67-71 (stating that the courts are not an "academy of science").

43. *Universal Ostrich Farms Inc.*, 2025 FCA 147, at para. 56.

44. *Id*. at paras. 81, 92-93.

45. *Id*. at para. 80.

46. *Id*. at paras. 91, 94-96.

47. *Id*. at para. 97 (internal citations omitted).

for the exercise of discretion, it will be relatively difficult to demonstrate unreasonableness.[48]

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."[49] 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."[50] 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.[51] It is sufficient for the applicant to demonstrate that administrative inaction is unreasonable, with the court then exercising its discretion to choose an appropriate remedy in the circumstances.[52] There have been hints of this in the jurisprudence of the Federal Court of Appeal in cases such as *LeBon v. Canada (Public Safety and Emergency Preparedness)*[53] and *D'Errico v. Canada (Attorney General)*[54] (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 section 22(1) of the Maintenance Enforcement Act.[55] This allows those who are required to pay child and spousal support to retain a minimum income "prescribed by the Commissioner in Executive Council."[56] 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."[57] He also noted the UK Supreme Court's decision in *RM (AP) v. The Scottish Ministers*[58] and read it as supporting the propositions that "the discretion whether to make such regulations, albeit wide, is not absolute" and that any such

48. *See* discussion *infra* Conifex Timber Inc. v. B.C. (Lieutenant Governor in Council), 2025 BCCA 62 (Can.); *see also* Canadian Coal. for Firearm Rts. v. Canada (Att'y Gen.), 2025 FCA 82, at para. 97 (Can.).

49. Rogers v. Dir. of Maint. Enf't Program, 2025 YKCA 12, at para. 114 (Can.).

50. *Id*. at para. 113.

51. *See* Merck and Co. v. Apotex Inc., 1994 FC 3004, 742 at 766-69 (Can. F.C.), *aff'd* [1994] 3 S.C.R. 1100.

52. PAUL DALY, UNDERSTANDING ADMINISTRATIVE LAW IN THE COMMON LAW WORLD 160 (Oxford Univ. Press 2021).

53. *See generally* Lebon v. Canada (Pub. Safety and Emergency Preparedness), 2013 FCA 55 (Can.).

54. *See generally* D'Errico v Canada (Att'y Gen.), 2014 FCA 95 (Can.).

55. Maintenance Enforcement Act, R.S.Y 2002, c. 145, § 22(1) (Can.).

56. *Id*.

57. *Rogers*, 2025 YKCA 12, at para. 58.

58. *See generally* RM (AP) v. The Scottish Ministers, [2012] UKSC 58 (U.K.).

discretion "cannot be exercised in such a way as to frustrate the intent of the legislature."[59]

Rather, the reasonableness standard must be applied. If *Vavilov* applies to action, it must also apply to inaction:[60]

> [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.[61]

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[62] and its provision for judicial oversight of the collection mechanisms would be rendered meaningless.[63] 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."[64] 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. 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.[65]

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.

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59. *Rogers*, 2025 YKCA 12, at para. 60.

60. *Id*. at para. 69.

61. *Id*. at paras. 69, 73; *see also* Can. Christian Coll. and Sch. of Graduate Theological Stud. V. Post-Secondary Educ. Quality Assessment Bd., 2023 ONCA 544, at paras. 53-54 (Can.); Minister of Just. and Pub. Safety v. Forum des maires de la Péninsule acadienne Inc., 2025 NBCA 99, at paras. 52-56 (Can.).

62. *Rogers*, 2025 YKCA 12, at para. 84.

63. *Id*. at para. 95.

64. *Id*. at para. 89.

65. *Id*. at para. 100.

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 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."[66]

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 Stratas was not persuaded that there were sufficient reasons to depart from that precedent: "if [*Danby Products Limited v. Canada (Border Services Agency)*[67]] is to be reversed, the appellant should seek leave to the Supreme Court."[68] 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.[69] In *Yatar v. TD Insurance Meloche Monnex*,[70] 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 Stratas rightly points out, the fact that you *may* does not necessarily mean that you *should*.[71]

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."[72] Justice Stratas doubted the 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

66. Best Buy Can. Ltd. V. Canada (Border Servs. Agency), 2025 FCA 45, at para. 17 (Can. Ont.).

67. *See generally* Danby Prods. Ltd. v. Canada (Border Servs. Agency), 2021 FCA 82 (Can.).

68. *Best Buy Can. Ltd.*, 2025 FCA 45, at para. 5.

69. Customs Act, R.S.C 1985, c. 1 (2d Supp.), § 68(1) (Can.).

70. *See generally* Yatar v. TD Ins. Meloche Monnex, 2024 SCC 8 (Can.).

71. *Best Buy Can. Ltd.*, 2025 FCA 45, at para. 11.

72. As Justice Costello explained in *Dunne v. Minister for Fisheries* [1984] I.R. 230, 237 (Ir.), "[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."; *see also* Edmonton v. Edmonton East (Capilano) Shopping Centres Ltd., 2016 SCC 47, at para. 78 (Côté and Brown, JJ., dissenting on a different point).

> 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).[73]

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, the list of cases cited by Justice 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*.[74] 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.[75]

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.[76] I am not sure it is either simple or clear to say that, sometimes, facts are law.

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73. *Best Buy Can. Ltd.*, 2025 FCA 45, at para. 11.

74. *See generally* E v. Sec'y of State for the Home Dep't, [2004] QB 1044 (Eng.).

75. *Id*. at para. 66.

76. Canada (Citizenship and Immigr.) v. Vavilov, 2019 SCC 65, at paras. 10-11 (Can.).

As far as sufficiency of reasons is concerned, I think there is great merit to Justice 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*.[77] There may be "some overlap" between this framework and the *Vavilov* framework for judicial review.[78] For 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)*,[79] 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.

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77. R. v. Sheppard, 2002 SCC 26 (Can.).

78. Halton (Reg'l Mun.) v. Canada (Transp. Agency), 2024 FCA 122, at para. 22 (Can.).

79. *See generally* Canadian Nat'l Ry. Co. v. Canada (Transp. Agency), 2025 FCA 184 (Can.).

At issue here was a railroad rate-setting decision under section 127.1 of the *Canada Transportation Act*.[80] The railroad complained that the rate set was not "commercially fair and reasonable to all parties" as required by section 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 Stratas J.A. 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.[81]

Justice 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."[82] Statutory purpose, too, weighed in favor of the relevance of commercial market factors, given an express legislative commitment to competitiveness and economic growth in section 5 of the Act.[83]

Now to the (even more) interesting part. In general, Justice 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. . . 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. . . The same must be said for applying the statutory standards to the evidence in a case like this.[84]

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 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.[85] In particular, Justice Stratas noted, the underlying rationale is not limited to either appeals or judicial reviews:

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80. Canada Transportation Act, S.C. 1995, c. 10, § 127.1 (Can.).

81. *Canadian Nat'l Ry. Co*., 2025 FCA 184, at para. 9.

82. *Id*. at para. 27.

83. *See, e.g*., *id*. at paras. 32, 38

84. *Id*. at para. 44 (citing Canada (Minister of Citizenship and Immigr.) v. Vavilov, 2019 SCC 65, at paras. 115-124 (Can.); then citing Mason v. Canada (Citizenship and Immigr.), 2023 SCC 21 (Can.).

85. *Id*. at paras. 45, 47. *See also* Jennings-Clyde, Inc.v. Canada (Att'y Gen.), 2025 FCA 225 (Can.).

> 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.[86]

Canadian National Railway Company 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 section 18.5 of the *Federal Courts Act*,[87] because a person aggrieved by an Agency decision can petition the Governor in Council to intervene (as is also true under the *Telecommunications Act*[88]). The Federal Court of Appeal recently confirmed that section 18.5 is constitutionally valid, despite the argument that reasonableness review or an equivalent form of judicial oversight is now constitutionally entrenched.[89] Hence, therefore, Justice 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,"[90] absent an extricable legal error or inadequate reasons, an aggrieved party's recourse is to the 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."[91]

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*.[92] 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.[93] 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

86. *Canadian Nat'l Ry. Co*., 2025 FCA 184, at para. 46 (internal citations omitted).
87. Federal Courts Act, R.S.C. 1985, c. F-7, § 18.5 (Can.).
88. Telecommunications Act, S.C. 1993, c. 38 (Can.).
89. Canadian Nat'l Ry. Co. v. Alta. Pac. Forest Indus. Inc., 2025 FCA 160, at para. 26 (Can.).
90. *Canadian Nat'l Ry. Co*., 2025 FCA 184, at para. 40.
91. Nanowski v Winnipeg, 2024 MBCA 81 at para 16 (Can.).
92. *See generally* Northback Holdings Corp. v. Alta. Energy Regul., 2025 ABCA 186 (Can.).
93. Responsible Energy Development Act, S.A. 2012, c. R-17.3, §§ 45, 56 (Can.).

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."[94]

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.[95]

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 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.[96]

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*.[97] 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.[98] Here, the

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94. *Northback Holdings Corp*., 2025 ABCA 186, at para. 225.

95. *Id*. at para. 44.

96. *Id*. at para. 53.

97. *See generally* Blockchain Labrador Corp. v. Bd. of Comm'rs of Pub. Utils., 2025 NLCA 35 (Can.).

98. *See also* discussion *infra* Conifex Timber Inc. v. B.C. (Lieutenant Governor in Council), 2025 BCAA 62 (BCCA).

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:

- The Board denied it procedural fairness and natural justice by deciding the Application without conducting an oral hearing.
- 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.
- The Board erred in interpreting OC 2022-266 as exempting NL Hydro from supplying Blockchain with electrical energy on a firm basis.
- The Board erred by finding that twenty MW of power available on the Labrador Interconnected System in winter was properly considered non-firm power, subject to the new non-firm rate.
- 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 twenty MW of power when it became available.

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

Interestingly, the *Board* took the position that all five 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. . . 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 "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.[99]

Justice K.J. O'Brien was not persuaded. Acknowledging the risk of "duplication of judicial effort,"[100] she nonetheless concluded that the Supreme Court in *Yatar* "did not suggest interpreting limited statutory rights of appeals so

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99. *Blockchain Labrador Corp*., 2025 NLCA 35, at paras. 14, 17 (citing Groenwelt v. Burwell, [1738] 91 E.R. 134; R. v. Northumberland Compensation Appeal Tribunal, [1951] EWCA Civ 1, at 6-10; Re Toro. Newspaper Guild, Local 87, Am. Newspaper Guild (C.I.O.), [1953] 2 S.C.R. 18; Globe Printing Co., [1951] SC 145, *aff'd* [1953] 2 S.C.R. 18)

100. *Id*. at para. 18.

broadly as to be unlimited."[101] 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.[102] Accordingly, leave could not be granted on grounds four and five as they related to factual findings which simply fell outside the scope of the appeal clause, properly interpreted.[103]

That means having a limited right of appeal to the Court of Appeal with (if Chief Justice Khullar is right and as Justice 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[104]), 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.

D. 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.*[105] established reasonableness as the presumptive standard, with *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*[106] applying correctness to a question of precedential value, namely the interpretation of standard-form contracts. In *Teal Cedar Products Ltd. v British Columbia*,[107] the

101. *Id*. at para. 22.
102. *Id*. at para. 15.
103. *Blockchain Labrador Corp*., 2025 NLCA 35, at paras 28, 32.
104. Immeubles Port Louis Ltée v. Lafontaine (Village), [1991] 1 SCR 326 (Can.).
105. Sattva Cap. Corp. v. Creston Moly Corp., 2014 SCC 53 (Can.).
106. Ledcor Constr. Ltd. v. Northbridge Indemnity Ins. Co., 2016 SCC 37 (Can.).
107. Teal Cedar Prods. Ltd. v. British Columbia, 2017 SCC 32 (Can.).

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 principle of private ordering;[108] (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.[109]

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.[110] 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*.[111]

Justice 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.
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> 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

108. James Plotkin & Mark Mancini, *Inspired by Vavilov, Made for Arbitration: Why the Appellate Standard of Review Framework Should Apply to Appeals from Arbitral Awards*, 2 CAN. J. COM. ARB. 1 (2021).

109. *See generally* Wastech Servs. Ltd. v. Greater Vancouver Sewerage and Drainage Dist., 2021 SCC 7 (Can.).

110. Northland Utils (NWT) Ltd. v. Hay River, 2021 NWTCA 1 (Can.).

111. Buffalo Point First Nation v. Buffalo Point Cottage Owners Ass'n, 2025 MBCA 72 (Can.).

> arbitrations". . . . As well, "parties engage in arbitration by mutual choice, not by way of a statutory process". . . . 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. . . ." Such factors militate in favour of retaining a reasonableness standard for reviewing commercial arbitration awards.[112]

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 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.[113]

This point was also made by Chief Justice Joyal in *Christie Building Holding Company, Limited v. Shelter Canadian Properties Limited*.[114]

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

Clearly this issue still has legs. Justice 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.[115] *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 section I.C. 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[116]: correctness on extricable

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112. *Id*. at paras. 44-45 (citing Sattva Cap. Corp. v. Creston Moly Corp, 2014 SCC 53, at paras. 74, 104 (Can.)).

113. *Id*. at para. 47.

114. *See generally* Christie Bldg. Holding Co. v. Shelter Canadian Props. Ltd., 2022 MBKB 239 (Can.).

115. *See also id*. at para. 92.

116. *See, e.g*., Earthco Soil Mixtures Inc. v. Pine Valley Entres. Inc., 2024 SCC 20 (Can.).

questions of law but palpable and overriding error on everything else. Correctness on extricable questions of law favors 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.

III. 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 *Charter*. As we know, an administrative decision might engage a *Charter* right,[117] or a *Charter* value.[118] When it does so, the standard of review is reasonableness, based on the controversial decision in *Doré v. Barreau du Québec*,[119] 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*,[120] 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 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

117. Lauzon v. Ontario (Justs. of the Peace Rev. Council), 2023 ONCA 425, at para. 151 (Can.).

118. Comm'n scolaire francophone des Territoires du Nord-Ouest v. Nw. Territories (Educ., Culture and Emp.), 2023 SCC 31 (Can.) (*CSFTNO*).

119. Doré v. Barreau du Québec, 2012 SCC 12 (Can.).

120. York Region Dist. Sch. Bd. V. Elementary Tchrs' Fed. of Ont., 2024 SCC 22 (Can.).

> analysis), and (2) reasonableness to the proportionate balancing that occurs at the second stage.[121]

Justice Southcott agreed in a couple of recent Federal Court cases. In *Robinson v. Canada (Attorney General)*[122] and *Mombourquette v. Canada (Attorney General)*,[123] 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."[124] The Federal Court of Appeal came to the same conclusion in *Toth v. Canada (Mental Health and Addictions)*.[125] Meanwhile, Justice LeBlanc equivocated somewhat on the issue in *Minister of Justice and Public Safety v. Forum des maires de la Péninsule acadienne Inc.*,[126] albeit indicating[127] 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.[128]

I think both Justice 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 squarely.[129] 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.[130] 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:

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121. Vabuolas v. British Columbia (Info. and Priv. Comm'r), 2025 BCCA 83, at para. 96 (Can.).

122. *See generally* Robinson v. Canada (Att'y Gen.), 2024 FC 2092 (Can.).

123. *See generally* Mombourquette v. Canada (Att'y Gen.), 2024 FC 2093 (Can.).

124. *Robinson*, 2024 FC 2092, at para. 69.

125. Toth v. Canada (Mental Health and Addictions), 2025 FCA 119, at para. 40 (Can.).

126. Minister of Just. and Pub. Safety v. Forum des maires de la Péninsule acadienne Inc., 2025 NBCA 99 (Can.).

127. *Id*. at para. 66.

128. *Id*. at para. 89.

129. 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 Commc'ns Inc. v. Davidson*, [1989] 1 S.C.R. 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).

130. Paul Daly, *Unresolved Issues after Vavilov*, 85 SASK. L. REV. 89, 107 (2022).

> 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.[131]

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.[132] 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,[133] I have suggested recently that we should speak in terms of *Charter* purposes rather than *Charter* values.[134] 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 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 an argument that reasonableness might be the appropriate standard of review.

As for Justice LeBlanc, the most interesting point in the analysis of the courthouse closure case is the assertion that "[e]xtending the scope of s. 16.1 by way of values that exceed those expressed therein would constitute an

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131. Robinson v. Canada (Att'y Gen.), 2024 FC 2092, at para. 63 (Can.).

132. *See generally* Paul Daly, *The Doré Duty: Fundamental Rights in Public Administration*, 101 CAN. BAR REV. 297 (2023).

133. *See, e.g.*, Sullivan v. Canada (Att'y Gen.), 2024 FCA 7 (Can.).

134. Paul Daly, Charter Values in Administrative Decision-Making: Defending the Doré Duty, OTT. L. REV. (forthcoming 2026).

inadmissible change to this provision."[135] But this is precisely what the Supreme Court did to section 23 in *CSFTNO*: imposing a values-based obligation that went over and above the text of section 23. Perhaps the difference, is that section 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 section 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 section 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.[136]

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 v. SGS Canada Inc.*,[137] 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 labor 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*,[138] 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)*.[139]

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).

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135. Minister of Just. and Pub. Safety v. Forum des maires de la Péninsule acadienne Inc., 2025 NBCA 99, at para. 89 (Can.).

136. *See generally* Prime Minister of Can. v. La Société de l'Acadie du Nouveau-Brunswick, 2024 NBCA 70 (Can.). This appeal was heard in late 2024.

137. Procureur général du Québec v.SGS Can. inc., 2024 QCCA 460 (Can.).

138. Société des casinos du Québec inc. v. Ass'n des cadres de la Société des casinos du Québec, 2024 SCC 13 (Can.).

139. Galderma Can. Inc. v. Canada (Att'y Gen.), 2024 FCA 208 (Can.) (the author was co-counsel for the appellant).

At first glance, this looks strange, as Justice 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".[140]

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 to patents. And Parliament has enacted the *Patent Act*.[141] 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.[142] 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."[143] Indeed, the Board cannot exercise powers that Parliament cannot delegate to it and so the Board cannot engage in price regulation at large.[144]

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% for Differin, 0.3% 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 section 79(2) of the *Patent Act*. Note that section 79(2) uses the term "pertains" (which can be read broadly[145]) but also further defines that broad term as "intended or capable of being used for" a medicine.[146]

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 section 79(2).[147]

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

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140. *Id*. at para. 4.

141. *See generally* Patent Act, R.S.C. 1985, c. P-4.

142. Innovative Meds. Can. V. Canada (Att'y Gen.), 2022 FCA 210, at para. 19 (Can.). *See generally* Merck Can. inc. v. Procureur général du Can., 2022 QCCA 240 (Can.).

143. *Galderma Can. Inc*., 2024 FCA 208, at para. 7 (internal citations omitted).

144. Canada (Citizenship and Immigr.) v. Vavilov, 2019 SCC 65, at para. 56 (Can.).

145. ICN Pharms. Inc. v. Patented Med. Prices Rev. Bd., 1996 FCA 4089 (Can.).

146. Canada (Att'y Gen.) v Galderma Can. Inc., 2019 FCA 196, at para. 12 (Can.).

147. *Id*. at para. 22.

> 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.[148]

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).[149]

The appellant had argued that the standard of review was correctness, on the basis that the correct interpretation and application of section 79(2) is a constitutional question that requires the courts to provide uniform and definitive answers. Stratas J.A. 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,*"[150] such that the same result would be reached under either standard.[151]

With characteristically colorful prose, Justice 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.[152]

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

148. *Galderma Can. Inc*., 2024 FCA 208, at para. 10.

149. *Id*. at para. 13.

150. *Id*. at para. 16.

151. *Id*. at para. 17.

152. *Galderma Can. Inc*., 2024 FCA 208, at para. 19.

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.[153]

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 sections 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."[154] 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 has to be interpreted having regard to the context in which it is applied.[155] 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."[156] 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.

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153. Telus Commc'ns Inc. v. Fed. of Can. Muns., 2025 SCC 15 (Can.). The author was counsel for one of the intervenors, the Canadian Telecommunications Association.

154. Pong Mktg. and Promotions Inc. v. Ont. Media Dev. Corp., 2018 ONCA 555, at para. 44 (Can.) (citing Herbert Lionel Adolphus Hart, The Concept of Law 126 (2d ed. Oxford Univ. Press 1994)).

155. Peacock v. Adessky, 2009 QCCA 2259, at para. 36 (Can.).

156. Manrique v. R., 2020 QCCA 1170, at para. 19 (Can.).

First, respect for original meaning is paramount: "[s]tatutory interpretation is centered on the intent of the legislature at the time of enactment and courts are bound to give effect to that intent."[157] 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."[158] 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.[159] 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. . . . 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".[160]

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 consistent with the legislature's purpose.[161]

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."[162] Looking to dictionary definitions, Justice Moreau posited that the word line has physical

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157. *Telus Commc'ns Inc*., 2025 SCC 15, at para. 32.

158. *Id*. at para 62.

159. *See* PAUL DALY, A THEORY OF DEFERENCE IN ADMINISTRATIVE LAW: BASIS, APPLICATION AND SCOPE 41 (Cambridge Univ. Press 2012).

160. *Telus Commc'ns Inc*., 2025 SCC 15, at paras. 33-34 (internal citations omitted).

161. *Id*. at para. 36.

162. *Id*. at para. 42.

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."[163] This was supported by the surrounding text in section 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."[164] 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."[165]

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[166] but neither interpretation advanced that purpose in a compelling way. Put differently, resolving the matter one way rather than the other would invariably favor 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 sections 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."[167]

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*.[168] Here, by contrast to the *5G antennae* case, the majority interpreted the term "material change" in Ontario's *Securities Act*[169] broadly, with

163. *Id*. at para. 45.

164. *Telus Commc'ns Inc*., 2025 SCC 15, at para. 50.

165. *Id*. at para. 57

166. *Id*. at para. 71.

167. *Id*. at para. 170 (Côté J., dissenting).

168. *See generally* Lundin Mining Corp. v Markowich, 2025 SCC 39 (Can.).

169. Securities Act, R.S.O. 1990, c. S.5, § 1 (Can.).

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.[170]

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."[171] A material fact is defined in section 1(1) as "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities."[172] 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."[173] As the Supreme Court has previously noted, there are two components to this definition: a *change* that is *material*.[174]

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,[175] 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…"[176]

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.[177]

The Court also addressed the test for leave under the *Securities Act*, explaining that the required "plausible analysis" is "not a plausible statutory

170. See further Constitutionally Conforming Interpretation.

171. Securities Act, R.S.O. 1990, c. S.5, § 75(1) (Can.).

172. *Id*. § 1(1).

173. *Id*.

174. Theratechnologies Inc. v. 121851 Can. Inc., 2015 SCC 18, at para. 40 (Can.).

175. Douglas Sarro, *Material Change Standards in Securities Law*, 59 CAN. BUS. L.J. 11 (2024).

176. Markowich v. Lundin Mining Corp., 2023 ONCA 359, at para. 82 (Can.).

177. Lundin Mining Corp. v. Markowich, 2025 SCC 39, at para. 6 (Can.).

interpretation, but rather a plausible *application* of the legislation to the facts."[178] 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,[179] 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."[180] 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."[181] Hence in the so-called secondary market for securities (i.e. resale/trading after an initial public offering of shares) "ongoing disclosure" is essential.[182]

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. . . ." 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 . . . [183]

In addition, Justice Jamal noted, a material change must be internal to the issuer.[184] 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."[185] For another thing, "[r]equiring timely disclosure of a material change . . . helps level the informational playing field between issuers and investors."[186]

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*.

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178. *Id*. at para. 7 (emphasis in original). On this point the judges were unanimous. *See id*. at para. 262.

179. Quebec (Comm'n 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 (Can.).

180. *Lundin Mining Corp*., 2025 SCC 39, at para. 33.

181. *Id*. at para. 36.

182. *Id*. at para. 40.

183. *Id*. at paras. 48-49 (internal citations omitted).

184. *Lundin Mining Corp*., 2025 SCC 39, at para. 56.

185. *Id*. at para. 57.

186. *Id*. at para. 58.

First, it was inappropriate to rely on dictionary definitions in this context.[187] Here, the legislature had "intentionally" left "change" undefined,[188] meaning it should retain "its ordinary meaning"[189] and take its color from its purpose and context – "to level the informational playing field between issuers and investors" – rather than "from a strict legal formula."[190] Moreover, a rigid definition would compromise the effectiveness of the *Securities Act* in applying to different commercial settings.[191] Lastly, interpretive guidance by securities regulators "collectively help illustrate the meaning of the expression."[192]

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 the purpose of securities legislation to address informational asymmetries between issuers and investors."[193] In part, the first-instance judge's approach collapsed the distinct questions of *change* and *materiality*,[194] 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*"[195] and consistent with regulatory guidance that "in borderline cases, an issuer should err on the side of disclosure."[196]

Third, the first instance judge wrongly interpreted the terms "business," "operations," and "capital" restrictively. For these are not "rigid statutory definitions"[197] 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."[198] 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."[199]

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

187. *Id*. at paras. 66-69 (a striking contrast with the *5G antennae case*, where dictionary definitions played an important role in the majority's analysis).

188. *Lundin Mining Corp*., 2025 SCC 39, at para. 70.

189. *Id*. at para. 71.

190. *Id*. at para. 72.

191. *Id*. at para. 73.

192. *Lundin Mining Corp*., 2025 SCC 39, at para. 74.

193. *Id*. at para. 63.

194. *Id*. at para. 80.

195. *Id*. at para. 85.

196. *Lundin Mining Corp*., 2025 SCC 39, at para. 86.

197. *Id*. at para. 92.

198. *Id*. at para. 93.

199. *Id*. at para. 94.

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 center.

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*.[200] 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."[201]

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,"[202] 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]."[203] In particular, "change" had to be interpreted by reference to "the constituents of immediate context,"[204] namely "business," "operations," and "capital."[205] 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

200. Michel v. Graydon, 2020 SCC 24, at para. 71 (Can.).

201. Ragina v. Sec'y of State for the Home Dep't, *ex parte* Pierson, [1998] A.C. 539, 587 (H.L.).

202. *Lundin Mining Corp*., 2025 SCC 39, at paras. 212, 221.

203. *Id*. at para. 211.

204. *Id*. at para. 212.

205. *Id*. at paras. 214-19.

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.

IV. 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)*,[206] 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: "[t]he damage created by apprehension of bias cannot be remedied."[207] There is a long line of authority in support of this proposition.[208]

On the other hand, in *Wewaykum Indian Band v. Canada*,[209] 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:"[210]

> 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 of the decision-making process of the Court, and viewing it

206. Newfoundland Tel. Co. v. Newfoundland (Bd. of Comm'rs of Pub. Utils.), [1992] 1 S.C.R. 623 (Can.),

207. *Id*. at 645.

208. See R. v. Ont. Labour Rels. Bd., *ex parte* Hall (1963), 39 D.L.R. (2d) 113, 117-18 (Can. Ont. H.C.) (citing Frome United Breweries Co. v. Keepers of the Peace & Justs. for Cnty. Borough of Bath, [1926] A.C. 586, 591 (H.L.); R. v. B.C. Labour Rels. Bd., *ex. parte* Int'l Union of Mine, Mill & Smelter Workers (1964), 45 D.L.R. (2d) 27, 29 (B.C. C.A.); Haight-Smith v. Kamloops Sch. Dist. No. 34 (1988), 51 D.L.R. (4th) 608, 614 (B.C. C.A.); Sparvier v. Cowesses Indian Band (TD), [1993] 3 F.C. 142, 166; DAVID MULLAN, ADMINISTRATIVE LAW 131 (Toro.: Irwin L. 2001)).

209. *See generally* Wewaykum Indian Band v. Canada, 2003 SCC 45 (Can.).

210. *Id*. at para. 92.

> 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.[211]

In *Vento Motorcycles, Inc. v. Mexico*,[212] Justice 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 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.[213] He observed that this proposition is "stricter still" so far as bias is concerned,[214] 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.[215]

There are two distinct points here. One is that solicitude for the interests of the individual whose "rights, interests, or privileges are at stake"[216] 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) favor 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

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211. *Id*. at para. 93.

212. *See generally* Vento Motorcycles, Inc. v. Mexico, 2025 ONCA 82 (Can.).

213. *Id*. at para. 29 (citing Cardinal v. Dir. of Kent Inst., [1985] 2 S.C.R. 643, 661 (Can.)).

214. *Id*. at para. 31 (citing Can. Coll. of Bus. and Computs. Inc. v. Ontario (Priv. Career Colls.), 2010 ONCA 856, at para 64 (Can.)).

215. *Id*. at para. 32.

216. *Vento Motorcycles, Inc*., 2025 ONCA 82, at para. 32.

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.

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.[217]

It is useful to consider the "materiality" issue further. Materiality has three different senses.[218] 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 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.[219]

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. Huscroft J.A. correctly noted that refusing to grant a remedy for bias is the exception rather than the rule.[220]

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.[221] 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.

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217. LPDT v. Minister for Immigr., Citizenship, Migrant Servs. and Multicultural Affs., [2024] HCA 12, at para 6 (Austl.).

218. Paul Daly, *A Typology of Materiality*, 26 AUSTL. J. ADMIN. L. 134 (2019).

219. *Vento Motorcycles, Inc.*, 2025 ONCA 82, at paras. 60-61.

220. *Id*. at para. 42.

221. *Id*. at para. 33.

Even here, however, note that the systemic considerations invoked by Justice 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.[222]

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*,[223] 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 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.[224]

Justice 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."[225]

This was "particularly stark" in the questioning of a senior project engineer for Metro Vancouver.[226] Justice Edelmann pulled out a couple of examples from the transcript:[227]

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.

222. *See generally* Fundy Linen Serv. Inc. v. Workplace Health, Safety and Comp. Comm'n, 2009 NBCA 13 (Can.).

223. *See generally* Env't Appeal Bd. v. Dist. Dir., Metro Vancouver, 2025 BCCA 303 (Can.).

224. *Id*. at para. 1.

225. *Id*. at para. 51.

226. *Id*. at para. 52.

227. *Env't Appeal Bd*., 2025 BCCA 303, at para. 53.

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.

Another member of the Board returned to the issue subsequently:[228]

228. *Id*. at para. 55.

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.[229]

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 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.[230]

Justice 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

229. *Id*. at para. 56.

230. *Id*. at para. 40.

> end the process at any time prior to a decision is not indicative of an investigative or inquisitorial function.[231]

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 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 thirty-six-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.[232]

Justice 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.[233]

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"

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231. *Env't Appeal Bd*., 2025 BCCA 303, at paras. 38-39.

232. Dist. Dir., Metro Vancouver v. Env't Appeal Bd., 2024 BCSC 1064, at paras. 199-200 (Can.).

233. *Env't Appeal Bd*., 2025 BCCA 303, at para. 80. *See also* Abiodun v. Canada (Citizenship and Immigr.), 2021 FC 642 (Can.).

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 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*.[234]

To give effect to this philosophy, President Trump has removed officers from various statutory bodies, such as the National Labor Relations Board. The Supreme Court seems poised to overturn the New Deal-era decision in *Humphrey's Executor v. United States*,[235] 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 Labor Relations Board and the Merit Systems Protection Board.[236] 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

234. Exec. Order No. 14215, 90 Fed. Reg. 10,447 (Feb. 18, 2025).

235. Humphrey's Executor v. United States, 295 U.S. 602, 631-32 (1935).

236. Trump v. Wilcox, 145 S. Ct. 1415, 1415 (2025).

the basis of alleged unethical behavior the member engaged in prior to her appointment.[237]

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 v. Duquette*.[238] 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 gravit . . ."). But the relevant regulation simply states: "[w]here 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."[239]

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.[240]

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.[241] 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

237. Trump v. Cook, 804 F. Supp. 3d 14, 19-20 (2025).

238. *See generally* Procureur général du Québec [Att'y Gen. of Que.] v. Duquette, 2025 QCCA 616 (Can.).

239. Règlement sur l' éthique et la déontologie des administrateurs publics [Regulation Respecting the Ethics and Professional Conduct of Public Office Holders], CQLR c. M-30, r. 1, § 40 (Can.).

240. *Duquette*, 2025 QCCA 616, at para. 18.

241. Petit v. Gagnon, 2023 QCCA 680, at paras. 12-13 (Can.).

guarantees against arbitrariness were in place and satisfied the requirements of fairness.[242]

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 section 23 of the Quebec Charter.[243]

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].[244]

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:[245]

> 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 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].[246] 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

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242. *Duquette*, 2025 QCCA 616, at para. 27.

243. Association des juges administratifs de la Commission des lésions professionnelles [Ass'n of Admin. Judges of the Comm'n on Occupational Inis.] v. Québec (Procureur général) [Att'y Gen.], 2013 QCCA 1690, at para 73 (Can.).

244. *Duquette*, 2025 QCCA 616, at para. 46.

245. *Id*. at para. 48.

246. *Id*. at paras. 50-51.

intervention and having regard to its functions in relation to advising the government on matters of policy.[247]

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 potentially relevant factors. Any definitive decision on these points will have to wait for another day.[248]

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*.[249] 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.

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247. *Id*. at paras. 57-58.

248. *Duquette*, 2025 QCCA 616, at para. 61.

249. Statutory Powers Procedure Act, R.S.O. 1990, c. S.22. *See generally Re* Webb and Ont. Hous. Corp. [1978] 93 D.L.R. 3d 187 (Can. Ont. C.A.).

Adjudicative independence also came up, albeit in a different context, in *Conifex Timber Inc. v. British Columbia (Lieutenant Governor in Council)*.[250] *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 Authority. But while its application was in the queue, the Lieutenant Governor in Council (the BC cabinet) made an order in council imposing an eighteen-month moratorium relieving the Authority from any obligation to provide electricity for cryptocurrency mining operations for a period of eighteen 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*[251] 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;[252] 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 section 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 Riley explained that the "key constraints" were "the relevant provisions of the statute, prior Utilities Commission decisions interpreting those provisions, and the common law."[253] As far as the statute was concerned Justice Riley reviewed the relevant statutory provisions.[254] The provisions emphasized the bar on undue discrimination. But, as Justice Riley pointed out, they also linked undue discrimination to the characteristics of particular types of customers.[255]

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

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250. *See generally* Conifex Timber Inc. v. British Columbia (Lieutenant Governor in Council), 2025 BCCA 62 (Can.),

251. Utilities Commission Act, R.S.B.C. 1996, c. 473.

252. ATCO Gas and Pipelines Ltd. v. Alta. Energy and Utils. Bd., 2006 SCC 4, at para. 63 (Can.).

253. *Conifex Timber Inc*., 2025 BCCA 62, at para. 87.

254. *Id*. at para. 88.

255. *Id*. at para. 89.

characteristics. For Justice 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."[256]

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."[257] 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."[258] Distinctions *can* legitimately be made "on a cost-of-service or economic basis" or on the "distinct consumption characteristics" of electricity consumers.[259] Ultimately, Riley J.A. concluded:

> All of the aforementioned legal constraints allow for an interpretation of the *UCA* in which distinctions 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.[260]

On the second ground, Justice Riley J.A. 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."[261] 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.[262]

For *Conifex*, the order in council had to be based on an unreasonable interpretation of the purpose of the Act. But Riley Justice did not agree that

256. *Id*. at para. 92.

257. Chastain v. British Columbia Hydro and Power Auth. 32 D.L.R. 3d 443, 456 (Can. 1907).

258. City of Hamilton v. Hamilton Distillery Co., 38 S.C.R. 23,50 (Can. 1907) (holding *ultra vires* differential water rates charged to a distillery).

259. *Conifex Timber Inc*., 2025 BCCA 62, at para. 95.

260. *Id*. at para. 98.

261. *Id*. at para. 114.

262. ATCO Gas and Pipelines Ltd. v. Alta. Energy and Utils. Bd., 2006 SCC 4, at para. 63 (Can.).

prohibiting undue discrimination was the "exclusive or overarching objective of the statute."[263]

> [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*.[264]

On the third ground, Justice Riley disagreed with Conifex that the government's interpretation of section 3 effectively eliminated the statutory guarantee in section 28(3) of a hearing prior to the Commission relieving the Authority of its obligation to provide service. This was because section 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.[265]

Missing from this analysis is any consideration of whether the power in section 3(2) — which is a 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 section 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 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.[266]

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263. *Conifex Timber Inc*., 2025 BCCA 62, at para. 120.

264. *Id*. at paras. 122-23.

265. *Id*. at para. 129.

266. *Id*. at para. 131.

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.

V. 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 ten years ago, I remember only uncertainty, and am grateful for the stability Canadian administrative law now has.