COURT OF APPEAL FOR ONTARIO

CITATION: National Steel Car Limited v. Independent Electricity System Operator, 2024 ONCA 265
DATE: 20240412
DOCKET: C70728 & C70729

Pepall, Harvison Young and Favreau JJ.A.

DOCKET: C70728

BETWEEN

National Steel Car Limited

Applicant (Appellant)

and

Independent Electricity System Operator, the Attorney General of Ontario, and His Majesty the King in Right of Ontario

Respondents (Respondents)

DOCKET: C70729

BETWEEN

National Steel Car Limited

Applicant (Appellant)

and

Independent Electricity System Operator, Ministry of Attorney General (Ontario), Minister of Energy (Ontario)

Respondents (Respondents)

Jerome R. Morse, David M. Trafford, and Earl A. Cherniak, K.C., for the appellant, National Steel Car Limited

Alan Mark and Melanie Ouanounou, for the respondent, Independent Electricity System Operator

Padraic Ryan and Karlson Leung, for the respondents, the Attorney General of Ontario and His Majesty the King in Right of Ontario

Heard: May 16-17, 2023

On appeal from the judgments of Justice Paul M. Perell of the Superior Court of Justice, dated April 27, 2022, with reasons reported at 2022 ONSC 2567.

Pepall J.A.:

Introduction

[1] This appeal involves a constitutional challenge to electricity costs. In 2009, the Government of Ontario designed a feed-in-tariff renewable electricity procurement program (the "FIT Program") pursuant to the *Green Energy and Green Economy Act, 2009*, S.O. 2009, c. 12 (the "*Green Energy Act*"). Under the FIT Program, suppliers of renewable energy were paid to "feed in" energy into Ontario's electricity grid.

[2] As a result, the cost of electricity increased substantially for the appellant, National Steel Car Limited, a heavy user of electricity. Before the application judge, it took the position that the FIT Program was principally undertaken and intended to create economic stimulus in the wake of the 2008 financial crisis and to redress perceived economic harm suffered by Indigenous communities, rural communities, municipalities, and co-operatives due to the financial crisis. It argued that the

FIT Program was designed to achieve a general economic purpose, not a regulatory purpose, and as such, the costs of the FIT Program, as paid through the Global Adjustment, were not valid regulatory charges. Rather, they were a colourable attempt to tax through regulation contrary to s. 53 of the *Constitution Act, 1867*, which requires taxes to be authorized by the legislature.

[3] The application judge disagreed with the appellant and concluded that the costs of the FIT Program were valid regulatory charges.

[4] Before this court, the appellant advances numerous arguments. It asserts that the application judge erred by finding that to establish colourability, the appellant had to show that the Government of Ontario had "lied". The appellant also submits that the application judge failed to deliver reasons that permit meaningful appellate review. It argues that the application judge failed to analyze or identify the evidence relied upon to determine whether the FIT Program component of the Global Adjustment was an unconstitutional tax and made errors in his treatment of issues relating to hearsay and the onus of proof. In addition, the appellant submits that the application judge erred in finding that the pith and substance of the FIT Program was not the pursuit of stimulus goals and in finding that the goal of economic stimulus was a proper regulatory purpose of the regulation of electricity. Lastly, it also contends that the application judge erred in finding that the appellant's expert witnesses were biased.

[5] I disagree with the appellant's submissions and, for the reasons that follow, would dismiss the appeal.

Background Facts

(i) Statutory Context

[6] By way of background, the Province of Ontario has jurisdiction over the regulation of electricity in the province, including the generation of renewable energy, by virtue of ss. 92(13), 92(15), and 92A(1)(c) of the *Constitution Act*, *1867*. In 1998, the Legislature introduced a competitive electricity market through the enactment of the *Electricity Act*, *1998*, S.O. 1998, c.15, Sched. A, and also enacted the *Ontario Energy Board Act*, *1998*, S.O. 1998, c.15, Sched. B. These two statutes constitute the primary legislative framework for the regulation of electricity in Ontario.

[7] The purposes of the *Electricity Act*, *1998* are extensive. They are described in s. 1 of the Act:

> (a) to ensure the adequacy, safety, sustainability and reliability of electricity supply in Ontario through responsible planning and management of electricity resources, supply and demand;
>
> (a.1) to establish a mechanism for energy planning;
>
> (b) to encourage electricity conservation and the efficient use of electricity in a manner consistent with the policies of the Government of Ontario;
>
> (c) to facilitate load management in a manner consistent with the policies of the Government of Ontario;

(d) to promote the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources, in a manner consistent with the policies of the Government of Ontario;

(e) to provide generators, retailers, market participants and consumers with non-discriminatory access to transmission and distribution systems in Ontario;

(f) to protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service;

(g) to promote economic efficiency and sustainability in the generation, transmission, distribution and sale of electricity;

(g.1) to facilitate the alteration of ownership structures of publicly-owned corporations that transmit, distribute or retail electricity;

(g.2) to facilitate the disposition, in whole or in part, of the Crown's interest in corporations that transmit, distribute or retail electricity, and to make the proceeds of any such disposition available to be appropriated for any Government of Ontario purpose;

(h) to ensure that Ontario Hydro's debt is repaid in a prudent manner and that the burden of debt repayment is fairly distributed;

(i) to facilitate the maintenance of a financially viable electricity industry; and

(j) to protect corridor land so that it remains available for uses that benefit the public, while recognizing the primacy of transmission uses.

[8] For the purposes of this appeal, items (a), (b), (d), (f), (g) and (i) are of note.

[9] The Ontario Power Authority ("OPA") was established in 2004. Its mandate was to ensure a long-term, adequate supply of electricity in Ontario. It was responsible for the procurement of new electricity generation, entering into

contracts with generators[1] of electricity, and planning for Ontario's electricity system. The not-for-profit company, the Independent Electricity System Operator ("IESO"),[2] is responsible for the day-to-day operations of the electrical system and for administering the competitive wholesale electricity market. It also administers the billing and settlement of electricity transactions. In January 2015, the OPA merged with the IESO respondent, with the combined entity continuing as the IESO. The new IESO's mandate was expanded to include the responsibilities formerly held by the OPA. IESO's objectives include:

(a) contracting for the procurement of electricity supply and operating the electrical grid to promote the purposes of the *Electricity Act, 1998*.

(b) engaging in activities to facilitate the diversification of sources of electricity supply by promoting the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources.

(c) regulating Ontario's electricity markets pursuant to Part III of the *Electricity Act, 1998*, which establishes the markets and empowers IESO to make rules regulating them.

[10] The application judge described at para. 115 of his reasons the historical developments that led to the introduction of the FIT Program:

> The wholesale electricity market was originally designed with the objective that, over the long-run, HOEP [the Hourly Ontario Energy Price] would be sufficient to allow electricity producers to recover both their fixed costs and variable costs (costs which increase with the quantity of electricity produced, such as fuel costs, labour costs, *etc*.). However, following the opening of Ontario's

[1] Also sometimes described as suppliers.
[2] Formerly known as the Independent Market Operator.

> competitive wholesale electricity market in May 2002, the prices of electricity rose significantly. This, in turn, caused the government of the day to introduce legislative price controls. This price freeze meant that the market price (HOEP) would not be permitted to rise to cover the cost of private investment in new generation facilities that were needed to meet the province's electricity demands.

[11] In the early 2000s, as pollution and global warming became prominent issues, the Ontario Government introduced legislation and programs to decarbonize the energy sector. Beginning in 2005, the Ontario Government had requested that the OPA prepare a long-term (20 year) electricity plan for the Province. The Government developed an interest in procuring new renewable energy generation, which by its nature does not emit carbon, and which reduces reliance on sources of energy that emit carbon into the atmosphere. Between 2004 and 2006, the Minister of Energy and the OPA engaged in procurements for the generation of electricity from renewable sources (known as Renewable Energy Supply (RES) I, II and III and Renewable Energy Standard Offer Program (RESOP)). As I will discuss, the Global Adjustment (originally described as the Provincial Benefit) was introduced at this time.

[12] On October 8, 2008, the Minister of Energy presented a proposal to Cabinet. The proposal identified three benefits associated with investing in energy conservation and renewable energy:

(a) environmental benefits – cleaner air, much lower greenhouse gas emissions, and shifting reliance from non-renewable resources;

(b) economic benefits – a “green economy” – jobs and economic development opportunities in green manufacturing through skills development and innovation; and

(c) social benefits – regional opportunities, including rural areas and the north, First Nations and Métis partnership opportunities, protection for low-income Ontarians, and community participation including municipalities and Local Distribution Companies.

[13] In 2009, the Provincial Government enacted the *Green Energy Act.* The preamble of the Act stated:

> The Government of Ontario is committed to fostering the growth of renewable energy projects, which use cleaner sources of energy, and to removing barriers to and promoting opportunities for renewable energy projects and to promoting a green economy.
>
> The Government of Ontario is committed to ensuring that the Government of Ontario and the broader public sector, including government-funded institutions, conserve energy and use energy efficiently in conducting their affairs.
>
> The Government of Ontario is committed to promoting and expanding energy conservation by all Ontarians and to encouraging all Ontarians to use energy efficiently.

[14] The *Green Energy Act* amended s. 25.35 of the *Electricity Act*, *1998*. The amended section authorized the Minister to direct the development of a feed-in tariff program that was designed to procure energy from renewable energy sources. Section 25.35 stated:

> (1) The Minister may direct the OPA [later the IESO] to develop a feed-in tariff program that is designed to procure energy from renewable energy sources under such circumstances and conditions, in consideration of such factors and within such period as the Minister may require.

> (2) Where the Minister has issued a direction under subsection (1), the Minister may issue, and the OPA [later the IESO] shall follow in preparing its feed-in tariff program, directions that set out the goals to be achieved during the period to be covered by the program, including goals relating to,
>
> > (a) the participation by aboriginal peoples in the development and establishment of renewable energy projects; and
> >
> > (b) the involvement of members of the local community in the development and establishment of renewable energy projects.
>
> (3) Where the Minister has issued a direction under subsection (1), the Minister shall issue, and the OPA [later the IESO] shall follow in preparing its feed-in tariff program, directions that set out the goals relating to domestic content to be achieved during the period to be covered by the program.
>
> (4) In this section,
>
> "feed-in tariff program" means a program for procurement, including a procurement process, providing standard program rules, standard contracts and standard pricing regarding classes of generation facilities differentiated by energy source or fuel type, generator capacity and the manner by which the generation facility is used, deployed, installed or located.

[15] On September 24, 2009, the Minister of Energy issued a Directive to develop and administer the FIT Program. The Directive noted that the FIT Program was designed to procure energy from a wide range of renewable energy sources and was critical to Ontario's success in becoming a leading renewable energy jurisdiction. The Minister's Directive identified the objectives of the program as being: (a) to increase capacity of renewable energy supply to ensure adequate generation and reduce emissions; (b) to introduce a simpler method to procure and develop generating capacity from renewable sources of energy; (c) to enable new

green industries through new investment and job creation; and (d) to provide incentives for investment in renewable energy technologies.

[16] The Minister's Directive also identified the desire to encourage Indigenous communities to participate under the FIT Program through various means including: support programs and "price adders" intended (a) to incentivize Indigenous community or municipal investment and participation and to overcome barriers to entry, and (b) to reflect the fact that Indigenous and community-based projects are generally recognized as having higher cost structures than projects developed by commercial developers. These "adders" increased the rates paid for electricity generated for some FIT Program generators. Specifically, the "adders" supplemented the rates for projects with a minimum percentage of Indigenous ownership, co-operative ownership, or municipality or other public sector ownership.

[17] The IESO launched the FIT Program on October 1, 2009, and across seven years signed over 30,000 individual contracts for various renewable energy projects. These included contracts for the generation of electricity by private entities through renewable electricity generation technology such as wind turbines, solar panels, hydroelectric generation, and biogas. The electricity from these systems is fed into the electricity grid where it is distributed to consumers, thereby providing 'green' renewable energy.

[18] The 2011 Annual Report of the Auditor General provided an assessment of the FIT Program. In it, the Auditor General of Ontario described the FIT Program as being designed to meet three policy objectives: to reduce Ontario's environmental footprint by bringing more renewable energy online; to better protect the health of Ontarians by eliminating harmful emissions from burning coal; and to create green energy jobs and attract scarce investment capital to Ontario in a global recession.

(ii) Pricing

[19] The FIT Program contracts had a standardized price and contract structure. The prices to be paid for the electricity procured through the FIT Program were set out in a price schedule published by the IESO. The generators were paid a fixed fee that varied depending on the type of electricity produced.

[20] Consistent with the September 24, 2009 Directive, the principle governing the price-setting exercise was that generators should be compensated for their costs of construction and provided with a reasonable rate of return on their investment. The FIT Program prices were calculated to provide generators with an 11 percent return on equity as a reasonable commercial rate of return. Thus, under this program, a private supplier of renewable energy was paid a fixed rate over the approximate 20-year term of the contract to "feed in" energy to Ontario's electricity grid.

[21] An electricity generator receives two revenue streams: (i) those it receives from the wholesale market known as the Hourly Ontario Energy Price (the "HOEP")[3] and (ii) a compensatory payment made by IESO reflecting the difference, if any, between HOEP revenues and the generator's entitlement under the contract it has entered with IESO. Consumers pay this latter component to IESO through the Global Adjustment. At paras. 124 and 125 the application judge described the energy charges:

> Electricity charges are determined through a mix of market and government mechanisms including regulations. For consumers, the HOEP is combined with regulatory charges to make up the fee paid for the use of electricity. Consumers pay the HOEP, the Global Adjustment, a debt retirement charge, transmission and delivery fees, and market service charges meant to recover administrative costs.
>
> Originally called the Provincial Benefit, the Global Adjustment was introduced January 1, 2005, and was designed so that the electricity regulator could recover from consumers the difference between the HOEP and the contractual price paid to electricity generators.

[22] As the application judge explained, the Global Adjustment is described in s. 25.33 of the *Electricity Act, 1998.* That section states:

> (1) The IESO shall, through its billing and settlement systems, make adjustments in accordance with the regulations that ensure that, over time, payments by classes of market participants in Ontario that are prescribed by regulation reflect,

3 The HOEP is set through auctions at which generators bid to provide electricity at a given price.

> (a) amounts paid to generators, the Financial Corporation and distributors, whether the amounts are determined under the market rules or under section 78.1, 78.2 or 78.5 of the *Ontario Energy Board Act, 1998*;
>
> (b) amounts paid to entities with whom the IESO has a procurement contract, as determined under the procurement contract; and
>
> (c) such amounts as may be prescribed that are paid or incurred by the IESO in relation to the *Ontario Fair Hydro Plan Act, 2017*.

[23] Accordingly, IESO has to adjust rates to recover the amounts it has contractually agreed to pay generators. Details of the adjustment formula were set out in regulations promulgated under the *Electricity Act, 1998.* The formula contained in the applicable regulation, O. Reg. 429/04, is attached as Schedule A to these reasons. In essence, it represents a cost recovery scheme. Only actual costs incurred by IESO are collected from consumers of electricity.

[24] Part of the Global Adjustment funded electricity procurement contracts under the FIT Program. Other procurement programs included RES I, II and III, RESOP, and Large Renewable Procurement (LRP). The objective of the pricing formula was to fully recover these costs in the electricity bills sent to commercial and residential consumers. The IESO calculated the precise Global Adjustment every month according to the detailed formula set out in O. Reg. 429/04. The

appellant does not take issue with the RES, RESOP, or LRP components of the Global Adjustment.[4]

[25] As the application judge observed, the appellant does not challenge the Global Adjustment as being a tax disguised as a regulatory charge. Rather, it challenges the FIT Program itself.

(iii) Impact on the Appellant

[26] The FIT Program ushered in a very large increase to the Global Adjustment. This change had a significant impact on the appellant.

[27] The appellant manufactures steel rail cars and, as mentioned, is a heavy user of electricity. Its electricity bills substantially increased after the enactment of the *Green Energy Act*. In 2008, the appellant paid $207,260 for electricity but by 2016 it was paying $3,390,645.08 for electricity.

(iv) Repeal of s. 25.35 of the *Electricity Act*, *1998*

[28] A Minister's Direction, dated December 16, 2016, instructed the IESO to cease accepting applications for FIT Program contracts as of December 31, 2016. In 2016, pursuant to the *Energy Statute Law Amendment Act, 2016*, S.O. 2016, c. 10, s. 25.35 of the *Electricity Act, 1998*, which authorized the FIT Program, was repealed. This marked the end of the FIT Program. However, the contracts that

4 Although the appellant's Notices of Application speak of all or some of the Global Adjustment, it is clear that its target is the FIT Program component of the Global Adjustment.

had already been entered into continued until the end of their terms and their associated costs remained in the Global Adjustment.

Appellant's Applications

[29] The appellant challenged the constitutionality of the FIT Program. It submitted that the FIT Program was a colourable attempt to tax through regulation contrary to the *Constitution Act, 1867*. More precisely, it submitted that the FIT Program was designed to provide for a general economic purpose, not a regulatory purpose. The FIT Program, it argued, was intended to create: (a) general economic stimulus; and (b) specific economic assistance to rural municipalities, co-operatives, and Indigenous communities that had been adversely affected by the 2008 economic monetary crisis. The appellant labels this generation of allegedly unlawful tax revenue the "Stimulus Goals" of the FIT Program.

[30] Regulatory charges must be ancillary to the costs of regulation. The appellant submits that, given the FIT Program's Stimulus Goals, the FIT Program's cost was not ancillary to the regulatory scheme. Rather, it was a tax. Being a tax, it was unconstitutional because it was enacted through regulation rather than legislation, contrary to ss. 53 and 54 of the *Constitution Act*, *1867*.

[31] To advance its challenge, the appellant brought two applications for declarations in support of its position. The applications proceeded together as one.

The respondents then brought a motion under r. 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 to strike each application on the ground that they disclosed no reasonable cause of action. The motion judge struck the applications on the basis that it was plain and obvious that the FIT Program component of the Global Adjustment was an *intra vires* regulatory charge and, therefore, the applications could not succeed.

[32] On appeal, this court overturned that decision, primarily on the basis that the applications ought not to have been dismissed in the absence of a full evidentiary record. It also held that the motion judge had failed to address the dominant purpose of the FIT Program and the appellant's position "which was that in funding the FIT program, the Global Adjustment was a colourable attempt 'to disguise a tax as a regulatory charge.' This was the Government's 'ulterior purpose' and its 'concealed purpose'": *National Steel Car Limited v. Independent Electricity System Operator*, 2019 ONCA 929, 451 D.L.R. (4th) 516, at para. 64.

[33] The applications were subsequently heard on their merits with a full evidentiary record and were dismissed by the application judge. The record was very full, consisting of 16,728 pages. The factums and legal authorities briefs filed were 351 pages and 1,355 pages in length, respectively.

Application Judge's Decision

[34] The application judge identified the key issues before him, his conclusions, and how he arrived at those conclusions. In very lengthy reasons, the application judge addressed the appellant's primary argument that the FIT Program component of the Global Adjustment was a colourable tax because its purpose was to achieve economic stimulus, a purpose unrelated to the regulation of electricity. At para. 43, he addressed the pith and substance of a government levy. He wrote:

> The pith and substance of a government levy is its dominant, primary and most important characteristic as distinguished from its incidental features. When determining the pith and substance of a levy, it is important to keep in mind, the context within which the charge is made and the purpose of the charge. If the pith and substance of the levy is the raising of revenue for general government purposes then the levy is a tax, but if the levy is a user charge or a charge for regulatory purposes or necessarily incidental to a regulatory scheme, then the levy is not in pith and substance taxation. [Footnotes omitted.]

[35] Then at para. 49, he stated:

> There is a two-step process to determine if a levy is connected to a regulatory charge. The first step is to identify the existence of a regulatory scheme and if there is a regulatory scheme, the second step is to determine whether there is a relationship between the scheme and the charge.

[36] The appellant does not take issue with the application judge's description of the law in this regard.

[37] At para. 132, the application judge commenced his discussion of the authorization of the FIT Program, including its history and the Government's desire to decarbonize the electricity sector. As he stated at para. 137:

> At the time of the inception of the FIT Programs, the Province of Ontario was phasing out coal and anticipating that some nuclear facilities would be retired without replacement and others would have to be refurbished. It was envisioned that the FIT Programs would be needed as part of the redesigned system to address the immediate and the future capacity needs of Ontario's electricity consumers.

[38] The application judge explained why he rejected the appellant's colourability argument. He did not accept its two major factual premises: (i) that the FIT Program's professed environmental and conservation purposes of procuring renewable sources of electricity were falsehoods, and (ii) the only genuine purpose of the FIT Program was to generate tax revenue for Ontario to achieve economic stimulus and economic assistance to rural municipalities, co-operatives, and Indigenous communities that had been adversely affected by the 2008 financial crisis. The application judge explained:

> [158] I am not persuaded that the Provincial Government made bald-faced lies. The extensive evidentiary record does not show that the Provincial Government was lying, and the record rather reveals a Provincial Government working towards the regulatory purpose of increasing and incentivizing renewable electricity generation in Ontario. The FIT Programs are a genuine part of the electrical system and resulted in tens of thousands of wind turbines and solar panels being installed across Ontario generating electricity.

[39] The application judge noted several other reasons for rejecting the colourability argument. Citing *Re: Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004, at p. 1021, he held that the factual allegations the appellant made against the FIT Program confused constitutional validity with the wisdom of the impugned government policy. He noted that the appellant challenged only part of the Global Adjustment, not its totality, and that the appellant did not challenge the economic stimulus yielded by the other renewable energy procurement programs that formed part of the Global Adjustment[5] – despite them being identical in type to the FIT Program.

[40] The application judge also rejected the appellant's premise that the FIT Program was outside the pith and substance of the *Electricity Act, 1998*, which the appellant characterised as being "to protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service." The application judge found that this characterization of the *Electricity Act, 1998* ignored the other stated purposes of the Act, at least five of which (ss. 1(b), (c), (d), (e), and (g)) arguably supported the FIT Program. He then addressed how incentivization was related to the electricity regime and among the purposes authorized in the *Electricity Act, 1998.* At para. 164, he wrote:

> The incentivization of participation in the ownership of renewable projects by Indigenous communities, and the

5 E.g. the RES and RESOP programs.

> promotion of job creation are related to an electricity regime and are among the purposes authorized by the *Electricity Act, 1998*. As noted by Dr. Yatchew, and acknowledged by Professor McKitrick, it is common for electricity policies to pursue related objectives which may be economic or social in nature. Choices regarding generation technologies will necessarily have economic, environmental, and social impacts and will incur expenditures that are connected to the electricity system. Professor McKitrick acknowledged that electricity planners must consider these objectives.

[41] The application judge further found at para. 166, that the "policy decision to pursue renewable energy rather than fossil fuel technologies when planning for the next generation of electricity supply and that this might stimulate the economy and encourage Indigenous communities and rural communities to participate in the electricity industry" was not extraneous to the electricity system.

[42] The application judge noted that the generators provided renewable energy and were paid for their contribution to the energy grid. The costs of the FIT Program related to the procurement of renewable energy. Even if it could be established that the Stimulus Goals were extraneous to the electricity system (which he found not to be the case), the application judge found that the pith and substance of the FIT Program would still be an *intra vires* regulatory charge. The application judge also found that some of the extraneousness argued by the appellant was trivial in nature. For example, the "adders" represented only 0.4 percent of the Global Adjustment.

[43] The application judge reasoned that Ontario "did not incur expenses that were recouped as a part of the Global Adjustment that were unrelated to the costs of the regulation of energy" and that "any economic stimulus of the FIT Programs [was] reasonably related to the regulatory scheme of the *Electricity Act, 1998*." Thus, the appellant's colourability argument failed.

[44] The appellant conceded that economic stimulus could be pursued as an objective within a regulatory scheme, provided that it was reasonably related to the regulatory scheme. At para. 171, the application judge wrote:

> The evidence in the immediate case showed that the economic stimulus of the FIT Programs was objectively reasonably related to electricity regulation. There is no surplus in the Global Adjustment, which is expressly limited to the costs of the regulatory scheme. Raising revenue for general purposes is not the dominant characteristic of the FIT Programs part of the Global Adjustment and that part of the Global Adjustment is not a different type of charge from the other costs included in the Global Adjustment that have not been impugned as the raising of revenue of general purposes.

[45] In comparing this case with the revenue raising measure described in *Re: Exported Natural Gas Tax*, the application judge wrote at para. 173:

> In contrast, in the immediate case, the FIT Programs did have a regulatory purpose associated with Ontario's electricity scheme. The FIT Programs had the regulatory purposes of: (a) eliminating coal-fired generation of electricity; (b) improving air quality and reducing healthcare costs; (c) planning for an impending supply shortage; (d) increasing renewable energy sources; and (e) encouraging Indigenous communities to participate in Ontario's electrical system.

[46] The application judge reasoned that this was sufficient to dismiss the appellant's applications, but he went on to find that the FIT Program levy, as part of the Global Adjustment, was not a tax but a valid regulatory charge. It was: (a) in relation to the rights and privileges associated with a regulatory scheme; (b) used to finance the regulatory scheme; and (c) used to alter individual behaviour in relation to the regulatory scheme. He determined that the FIT Program part of the Global Adjustment was a regulatory charge to advance the purposes of the *Electricity Act, 1998* and defray the expenses of the Provincial Government's regulatory scheme to supply electricity to its citizens.

[47] There was little dispute that there was a regulatory scheme. The Global Adjustment was tied to and limited to the costs of that regulatory scheme. Applying *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371, the application judge recognized that a levy connected to a regulatory scheme is not a form of taxation. As such, the applications also failed on the appellant's argument that the FIT Program was a tax that should have been enacted by statute and not by regulation.

[48] Having dismissed the applications, he did not consider the appellant's arguments relating to the *Taxpayer Protection Act, 1999*, S.O. 1999, c. 7, Sched. A, or the appellant's arguments on the calculation of an award for an unlawful tax.

[49] The application judge also determined that the appellant's experts had entrenched bias and preconceived conclusions. He concluded that their opinions about the constitutionality of the FIT Program were neither appropriate nor helpful. Given the late timing of the respondents' objection to these experts, and also given that the two experts had testified as participant witnesses on the structure and organization of Ontario's electricity system, he admitted the evidence of the two experts and decided to give it the weight it deserved in light of all the evidence.

Issues

[50] The appellant raises four issues on the appeal.[6] It submits that the application judge erred:

i. in finding that, for the appellant to succeed in its colourability claim, it had to establish that Ontario "lied";

ii. by failing to provide reasons that permit appellate review;

iii. in finding that the Stimulus Goals were a valid regulatory purpose; and,

iv. in finding that the appellant's expert witnesses were biased.

Analysis

(1) The application judge's colourability analysis

[51] The appellant submits that to succeed in its colourability argument, the application judge improperly required it to establish that Ontario had lied about the

6 The order of the issues is drawn from the appellant's factum.

purposes of the FIT Program. The appellant argues that it should not have been required to show that the Government lied. Rather, the required analysis was whether the purpose of the legislation was, in pith and substance, to achieve a purpose other than that suggested by the legislation. In this case, according to the appellant, the alternate and invalid purpose was the pursuit of the Stimulus Goals.

[52] As the late Professor Peter W. Hogg stated in *Constitutional Law of Canada*: "The 'colourability' doctrine is invoked when a statute bears the formal trappings of a matter within jurisdiction, but in reality is addressed to a matter outside jurisdiction": Peter W. Hogg and Wade K. Wright, 5th ed. (Scarborough, ON: Carswell, 2023), at § 15:11. As explained in *Reference re Firearms Act*, 1998 ABCA 305, 164 D.L.R. (4th) 513, aff'd 2000 SCC 31, [2000] 1 S.C.R. 783, an ulterior motive is not a prerequisite to a finding of colourability, but in some cases, Parliament might try to invade an area of provincial jurisdiction by disguising the true nature of its legislation. The court stated at para. 128:

> Certainly, where an ulterior motive is present, it is arguably easier to see how Parliament acted colourably because there is an aspect of deceptiveness to the legislative action. But in other cases, Parliament may not hide its intentions and may forthrightly, but incorrectly, claim a matter falling within provincial powers as its own.

[53] Thus, there are at least two means of establishing colourability: either directly or indirectly through disguise, often in the presence of an ulterior motive.

[54] There is no question that in rejecting the appellant's argument, the application judge used the language of falsehoods and lies. However, this wording reflects the appellant's framing of its own argument. Its factum before the application judge referred to "the clear falsehood of the other stated objectives of the FIT Programs" and almost 10 pages were devoted to a subject entitled: "Ontario's False Claims of the Environmental and Health benefits, the Phase Out of Coal and Addressing an Imminent Supply Gap."

[55] In the appeal from the decision on the motion to strike, Lauwers J.A. at para. 64, described the appellant's position as being that "in funding the FIT Program, the Global Adjustment was a colourable attempt to 'disguise a tax as a regulatory charge.'" He quoted the appellant as saying that this was the Government's "ulterior purpose" and its "concealed purpose." The appellant expressly raised the Government's mal-intended objective, a reality reflected in Lauwers J.A.'s reasons: *National Steel Car Limited*, at paras. 56, 58, 64, and 75.

[56] The appellant raised the issue of falsehood and intent and the application judge responded to it. The appellant made the strategic choice to frame its colourability argument in this way, that is, to challenge the veracity of the stated purposes of the regulation. The application judge's references are reflective of the appellant's own argument.

[57] Furthermore, contrary to the appellant's urging, I am unpersuaded that the application judge's references to lies and falsehoods led him to apply an improper standard of proof to the appellant's case. He legitimately noted that the evidence required to establish a lie must be clear, convincing, and cogent and he specifically stated that "allegations of fraud and lying made in a civil proceeding do not change the standard of proof," and that "there are no varying degrees of probability within the civil standard of proof."

[58] It is important to note, as well, that an application judge's reasons should be read as a whole, not held to "some abstract standard of perfection": *R. v. Palmer*, 2021 ONCA 348, 174 W.C.B. (2d) 84, at para. 83. Read in their broader context, the application judge's comments were not imposing a higher standard, but rather indicating that the appellant had to provide clear evidence to show that the primary purpose of the FIT Program was other than the purposes enumerated in the legislation. Read as a whole, the application judge's reasons disclose that he properly conducted the necessary analysis. His analysis does not betray any higher standard of proof than was required.

(2) The application judge provided reasons that permit appellate review

[59] The appellant submits that the application judge erred by failing to deliver reasons that permit meaningful appellate review. The appellant states that: (1) the application judge failed to address any of the evidentiary disputes between the

parties or otherwise indicate what evidence he rejected and what he relied upon in reaching his conclusions; (2) he failed to address the admissibility of hearsay evidence relating to prices being designed to provide for an 11 percent return on investment for FIT Program generators; and (3) he failed to address the issue of the onus to establish the connection between the cost of the FIT Program and the regulation of electricity.

(i) General Principles

[60] The appellant relies on statements in *Bruno v. Dacosta*, 2020 ONCA 602, 69 C.C.L.T. (4th) 171, at para. 18 in support of its argument. That para. states:

> [I]n order to provide for a meaningful right of appeal, trial judges must identify the key issues; find the facts relevant to the issues; assess credibility and reliability where there is conflict; set out the chain of reasoning; make the decision; and then write the reasons to clearly communicate the decision. Appellate courts rely on trial judges to find the facts and to assess credibility and reliability where there are live witnesses, as in this case. Appellate courts recognize that trial judges attend to these tasks from a privileged vantage point. [Citations omitted.]

[61] As noted in that decision at para. 20, this court is reluctant to order a new trial in civil matters. The court must find a real prospect "that a substantial wrong or miscarriage of justice has occurred." In *Farej v. Fellows*, 2022 ONCA 254, leave to appeal refused, [2022] S.C.C.A. No. 180, Doherty J.A. described sufficiency of reasons as a ground of appeal noting, at paras. 41-42, that reasons for judgment improve the transparency, accountability, and reliability of decision-making but on

review for their sufficiency, the focus is not on their overall quality but on whether they allow the appeal court to engage in a meaningful review of the substantive merits of the decision under appeal. As Doherty J.A. summarized at paras. 45 and 50:

> There is now a deep jurisprudence addressing the sufficiency of reasons as a ground of appeal. The cases repeatedly make two important points. First, the adequacy of reasons must be determined functionally. Do the reasons permit meaningful appellate review? If so, an argument that the reasons are inadequate fails, despite any shortcomings in the reasons. Second, the determination of the adequacy of the reasons is contextual. Context includes the issues raised at trial, the evidence adduced, and the arguments made before the trial judge.
>
> …
>
> Because the adequacy of trial reasons is assessed functionally and depends on the ability of the appellate court to effectively review the correctness of the decision arrived at by the trial court, the appellate court is entitled to look at the record as a whole when determining the trial judge's findings and the reasons for those findings are adequately laid out.

[62] In considering this issue, it is important to be reminded of the principles established by the Supreme Court in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. There, Iacobucci J. wrote, at para. 39, that "the failure to discuss a relevant factor in depth, or even at all, is not itself a sufficient basis for an appellate court to reconsider the evidence." In the same paragraph, Iacobucci J. quoted from Bastarache J. in *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014,

at para. 15, in turn paraphrasing *Van Mol (Guardian ad litem of) v. Ashmore*, 1999 BCCA 6, 168 D.L.R. (4th) 637, leave to appeal refused, [1999] S.C.C.A. No. 117, at para. 13, saying that "an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence." Moreover, an appellate court may presume that the application judge has reviewed all of the record: *Housen*, at paras. 46, 72.

(ii) Criticism of Application Judge's Reasons

[63] The appellant states that the application judge found that the FIT Program had regulatory purposes associated with Ontario's electricity scheme and that those purposes were:

(a) eliminating coal-fired generation of electricity;

(b) improving air quality and reducing healthcare costs;

(c) planning for an impending supply shortage;

(d) increasing renewable energy sources; and

(e) encouraging Indigenous communities to participate in Ontario's electrical system.

[64] The appellant maintains that there was no support for items (a)–(d) and therefore (e), which the appellant describes as economic stimulus, was the only explanation for the FIT Program.

[65] Moreover, the appellant argues that the reasons do not provide a review of the relevant evidence on these various issues, including:

1) the elimination of coal;

2) the OPA's 2008 testimony that there was no regulatory need to procure such a vast amount of renewable electricity in such a short time frame;

3) the statements and evidence of the Minister of Energy, George Smitherman, and Assistant Deputy Ministers of Energy, Susan Lo and Richard Jennings;

4) admissions obtained on cross-examination on the purported environmental benefits of the FIT Program;

5) evidence that the electricity generated by the FIT Program was largely unable to meet supply gap concerns or replace coal-fired generation;

6) FIPPA documents and other sources revealing that Ontario ignored the OPA's advice on the FIT Program's design;

7) the post-design implementation of the FIT Program, in particular, an August 2011 Ministerial Directive, establishing the continued pursuit of the Stimulus Goals;

8) evidence from the Auditor General and other sources concerning the lack of business case evaluations and the FIT Program's prices being in excess of comparable programs; and

9) Ontario's 2021 admission that the FIT Program provided for electricity that Ontarians "did not need" at "prices it could not afford."

[66] The application judge's reasons did not have to address every issue raised. He clearly understood the key issues. First, he found that the FIT Program component of the Global Adjustment was not a tax but a valid regulatory charge, and second, he found that it was related to the regulation of electricity even though

it might also provide economic stimulus. These findings were clear, supported by the record, and, read in light of the broader record, permit appellate review.

[67] Moreover, the application judge explained his conclusions. He undertook the necessary pith and substance analysis and gave numerous other reasons for rejecting the appellant's claim, for his findings on the purposes of the FIT Program, and his finding that the economic stimulus was incidental to the valid regulatory objectives of the FIT Program. Numerous pieces of evidence supported his conclusion.

[68] To start, the application judge had before him and described the October 2008 Cabinet proposal relating to the FIT Program. That proposal identified benefits associated with investing in conservation and renewable energy. These were environmental (that is cleaner air and lower emissions), economic, and social in nature. Additionally, the statements of purpose in relevant legislation and the Directives that addressed regulatory purpose were considered by the application judge and supported his findings on the purposes of the FIT Program. As mentioned, s. 1 of the *Electricity Act, 1998* provides that one of its purposes is promoting the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources. The preamble to the *Green Energy Act* stated that the Government was committed to fostering the growth of renewable projects, promoting opportunities for renewable energy projects, and promoting a green economy. Section 25.35 to the

Electricity Act, 1998 provided that the Minister may direct the development of a feed-in tariff program "designed to procure energy from renewable energy sources under such circumstances and conditions, in consideration of such factors and within such period as the Minister may require." Section 25.35(2) expressly provided that the FIT Program had objectives to promote "the participation by aboriginal peoples in the development and establishment of renewable energy projects" and "the involvement of members of the local community in the development and establishment of renewable energy projects."

[69] Similarly, as noted previously, the Minister's September 24, 2009 Directive to the OPA to develop and administer the FIT Program noted that the FIT Program "is critical to Ontario's success in becoming a leading renewable energy jurisdiction" and identified the express objectives of the FIT Program as being to:

(a) increase capacity of renewable energy supply to ensure adequate generation and reduce emissions;

(b) introduce a simpler method to procure and develop generating capacity from renewable sources of energy;

(c) enable new green industries through new investment and job creation; and,

(d) provide incentives for investment in renewable energy technologies.

[70] The FIT Directive states that prices should seek to cover the expected costs of a project "plus a reasonable return on investment" and that the program should "provide an opportunity for Ontario manufacturers to participate in the economic

benefits that will flow from the program." It also expressly identified the desire to "encourage aboriginal and community projects under the FIT program" and, to this end, reward projects with Indigenous and community participation through various means, including through support programs and "price adders".

[71] The enabling legislation and the FIT Directive support the regulatory purposes identified by the application judge and are helpful starting points when reviewing the evidence of government intent. The appellant had the difficult task of showing that these express objectives were simply cover for the true purpose of economic stimulus (and only stimulus). It was unable to do so.

[72] Moreover, the contemporaneous documents point to a purpose anchored on renewable energy. There was no concealed purpose and no improper purpose. The appellant challenges the specific objectives identified by the application judge in the context of his comparison of the case with *Re: Exported Natural Gas Tax* and argues that he failed to analyze or identify the evidence relied upon to determine whether the FIT Program's component of the Global Assessment was an unconstitutional tax. Hence, it submits that the application judge's reasons were inadequate. I disagree. As I will explain, read in the context of the record, his reasons allow for appellate review. I will address each of the appellant's specific complaints.

(a) Coal-Fired Generation

[73] First, the appellant argues that the trial judge improperly found that one of the purposes of the FIT Program was to eliminate coal-fired generation of electricity. It states that this is because coal-fired generation was already going to be eliminated by committed gas-fired generation procurement processes before the implementation of the FIT Program. The appellant relies on a confidential Cabinet document entitled *Coal Policy Moving Forward*, presented by the Ministry of Energy in April 2008, which indicated that, prior to the design and implementation of the FIT Program, Ontario had procured sufficient gas-fired and renewable generation capacity to replace the coal-fired generation that was scheduled to be retired in 2014. In addition, Richard Jennings, the former Associate Deputy Minister of Energy, confirmed in cross-examination that the capacity required to replace coal-fired generation was obtained before the implementation of the FIT Program. Thomas Adams, an expert called by the appellant, suggested that given the inherent limitations of wind and solar generation, renewable generation was unable to address any supply gap arising from the phase-out of coal.

[74] However, the respondents explained, as reflected in Mr. Jennings' cross-examination, that there is a difference between capacity and energy. Capacity is the maximum output an electricity generator can physically produce. Even if the overall system capacity to replace coal was technically in place by 2008, this

referred to maximum capacity and not to actual energy production levels. Many generators do not run at their full capacity at all times. It could not be assumed that these other resources would be running all the time to entirely replace all the coal-fired generation. In any event, the FIT Program was developed as part of the long-term plan to phase out coal by addressing the resulting energy supply needs through multiple energy sources. As Chuck Farmer, the Senior Director of Power Systems Planning with the IESO testified, the FIT Program was never intended to replace coal on its own; rather, this was to occur through a combination of nuclear energy, natural gas, conservation targets, and renewable energy generation.

[75] The record discloses that the finding that replacing coal-fired power generation was one of the purposes of the FIT Program was open to the application judge. As Dr. Yatchew, a Professor of Economics at University of Toronto, explained, the FIT Program was part of a long-term and multifaceted energy plan that necessarily evolved over time.

(b) Air Quality and Healthcare Costs

[76] Second, the application judge found that one of the purposes of the FIT Program was to improve air quality and reduce healthcare costs, however the appellant argues that there was never any study done on whether the FIT Program would result in such benefits. Mr. Adams suggested that the purported environmental benefits of the program were belied by the intermittent nature of

wind and solar generation, which requires standby natural gas generation. Mr. Jennings acknowledged that there were no specific studies making the case that wind and solar procurement under the FIT Program would result in much lower greenhouse gas emissions.

[77] However, there was ample evidence in the record for the application judge to find that the FIT Program was intended to improve environmental outcomes, including air quality and population health. The FIT Directive stated that a goal was to "[i]ncrease capacity of renewable energy supply to ensure adequate generation and reduce emissions," and the December 2008 presentation to Cabinet depicted three categories of benefits sought through investing in conservation and renewable energy. One of the three, environmental benefits, included cleaner air, much lower greenhouse gas emissions, and shifting reliance from non-renewable resources.

[78] In my view, no contemporaneous studies of the FIT Program's environmental impacts were necessary. Their absence does not lead to the inference that the Government did not believe there were environmental and attendant healthcare benefits or that Ontario was only concerned with economic stimulus goals. Moreover, although there was no contemporaneous study regarding the environmental benefits of the specific FIT Program, the Ontario Government had commissioned a 2005 study identifying the harmful environmental impacts of coal generation in the Province. In addition, Dr. Yatchew

testified that there were plenty of studies addressing the long-term benefit of similar programs; Ontario was not an outlier in moving to clean energy. As noted by him in his report filed on the applications, an analysis prepared for the U.S. Department of Energy in 2010 concluded that FITs were the most widely used policy in the world for accelerating renewable energy deployment. The move to renewable energy was well underway in numerous jurisdictions and, as Mr. Jennings testified, the Ontario Government took other countries' experiences into account. Quite apart from this evidence, the basic laws of chemistry support the proposition relied upon by the application judge. Replacing all or some of coal generation with renewable generation would lead to reductions in carbon dioxide emissions.

[79] In sum, no specific contemporaneous study of the FIT Program's environmental impacts was necessary to find that there was an intended regulatory purpose. Among other things, it was not necessary for the Government to show that its policy goals would follow from its chosen measures with scientific certainty or legal probability. Even if the effectiveness of those measures was somehow misconceived – which is a policy matter – this alone would not undermine the evidence demonstrating that environmental benefits were one of the primary goals of the FIT Program from the outset.

(c) Planning

[80] Third, the application judge stated that another purpose of the FIT Program was to plan for an impending supply shortage, however the appellant argues that this cannot be. The appellant relies on the September 8, 2008 testimony and presentation given on the Integrated Power System Plan ("IPSP") by OPA representatives before the Ontario Energy Board. IPSP was a plan developed by the OPA to achieve government policy goals on the adequacy and reliability of electricity supply. As part of the IPSP, the representatives testified that there was no imminent supply need, that little to no renewable electricity generation was warranted to meet Ontario's electricity supply needs by 2025, and that the procurement of renewable electricity in the amount and time frame secured through the FIT Program was not needed. Mr. Jennings acknowledged that the IPSP was the OPA’s design, but the Ontario Government overruled the OPA and put in more renewables.

[81] The application judge was entitled to find on the evidence that the FIT Program formed part of Ontario's plan to address a future energy supply shortage caused by the retirement of coal-fired and some nuclear generation. The September 8, 2008 presentation by OPA representatives was based on the Minister's 2006 Supply Mix Directive, which prioritized cost-effectiveness and under which the OPA recommended only a modest amount of wind procurement and no solar procurement by 2025. However, there was a shift in Government

policy and on September 17, 2008, the Minister issued a new directive to the OPA to revisit the IPSP with a view to establishing new targets incorporating increased renewable energy sources. Mr. Jennings stated in his affidavit that this directive "marked one of the first formal policy shifts towards increasing the supply of renewable energy generation in Ontario."

[82] Comparing the plans and projections developed under two different mandates is of limited assistance in determining whether a subsequent regulatory objective was valid. It was open to the Ontario Government to change its policy goals to prioritize renewable energy as part of its medium and long-term energy planning. Furthermore, this regulatory objective must be evaluated as of the time the FIT Program was implemented and not with hindsight. To the extent that initial forecasts did not match final outcomes, such variation is to be expected where system planning must be undertaken many years in advance. Nor is it realistic to suggest, as the appellant does, that additional renewable generation capacity could simply be developed and brought online only if, and when, it eventually became needed. Dr. Yatchew's evidence, which the application judge considered, addressed this issue fully. The appellant ignores the complex, prospective planning required to manage Ontario's energy supply and meet the other statutory objectives of the *Electricity Act, 1998* including adequacy, safety, reliability, and sustainability.

(d) Fostering Renewable Energy

[83] Fourth, the appellant also contends that the application judge ignored its argument that the FIT Program, as structured, was unnecessary to procure renewable energy because the prices it offered were too high. The appellant argues that Ontario knew by 2009 that the FIT Program contracts were unnecessary to foster the renewable energy market because it had already implemented two successful renewable energy generation programs, RES and RESOP, which provided far lower rates to generators than did the FIT Program. The appellant infers that higher prices were therefore not required to incentivize investment in renewable energy projects and, as such, the additional amounts paid to FIT generators amounted to pure economic stimulus.

[84] With respect, the appellant views the FIT Program too narrowly and in light of its own preferred regulatory goal of maximizing cost effectiveness, rather than the Government's stated rationales, which are apparent both on the face of the enabling legislation and the record. Notably, the FIT Directive states that the prices offered to generators under the FIT contracts should seek to cover the expected costs of a project "plus a reasonable return on investment" and should particularly encourage Indigenous and community participation through various means, including "price adders" – small additions to the price for electricity generated by projects with a minimum percentage of Indigenous community, co-operative, or municipality or other public sector ownership.

[85] Dr. Yatchew noted that the RESOP initiative had significant administrative overhead that eroded the value of the program. In determining a "reasonable return," Mr. Farmer testified that the previous RES and RESOP initiatives had not been as successful at attracting local and Indigenous participation. Therefore, further incentives were needed to address barriers to entry and the higher cost structures of these ownership models. In other words, the Government identified an objective that was not met in its earlier renewable energy programs and made changes to try and better achieve it, as it was entitled to do. This does not in any way detract from the broader regulatory objective of increasing renewable generation; it simply acknowledges the other statutory and incidental objectives, including environmental, social, and economic benefits, that the Government sought to achieve. Nor does it transform these increased rates – which, in the case of the adders, the application judge found constituted only 0.4 percent of the Global Adjustment – into pure economic stimulus.

[86] There can be no doubt that, as the trial judge found, the FIT Program was intended to increase renewable energy generation in Ontario.

(e) Indigenous and Community Participation

[87] Lastly, the FIT Directive was stated to have the purpose of encouraging Indigenous and community participation in Ontario's electrical system. The

appellant does not challenge this objective or the application judge's finding in this regard.

[88] The application judge found that the FIT Program was related to the regulation of electricity even though it might also provide economic stimulus to certain groups. In this regard, as he noted, the Global Adjustment only recovers actual costs and does not go into general revenues. He also noted that s. 25.35(2) of the *Electricity Act, 1998* identified permissible goals that included participation of Indigenous and local communities in the development of renewable energy projects, that the purposes of the *Electricity Act, 1998* supported the adoption of the FIT Program, and that both Dr. Yatchew and the appellant's own expert Professor McKitrick acknowledged that it is common for electricity policies to pursue related objectives which may be economic or social in nature. I would note that Professor McKitrick actually acknowledged that it is expected for the government to consider the potential impact of generation investment decisions on the environment, the economy, and employment in the province.

[89] In conclusion, the application judge's reasons allow for appellate review. There was no need for the application judge to conduct an issue-by-issue discussion of the appellant's criticisms of the FIT Program. There is no requirement for a court to canvass and adjudicate every issue that a party advances during the proceeding. That the appellant's arguments were not accepted does not mean that the reasons were inadequate. Fundamentally, the appellant disagrees with the

policy rationale that supported the FIT Program. That, of course, is different from whether the FIT Program was a colourable attempt to tax through regulation and designed to provide economic stimulus.

[90] Although the application judge did not address every evidentiary contest, his reasons make it clear, indeed obvious, why he decided as he did and they allow for effective appellate review. I would reject the appellant's ground of appeal based on the sufficiency of the application judge's reasons.

(iii) Hearsay

[91] The appellant also submits that the application judge failed to address the allegation of, and impermissibly relied on, hearsay evidence from IESO's affiant, Mr. Farmer, that FIT prices were set so as to enable generators to recover their costs plus an 11 percent rate of return. In addition, Mr. Jennings stated that the IESO "sought to achieve an 11 per cent return on equity as a reasonable commercial rate of return on investment." The appellant submits that the rate of return was a central issue because it informed whether there was a nexus between the impugned charge and the cost of regulation.

[92] I disagree. The figure and the broader understanding that FIT prices were set to enable generators to recover their costs plus an 11 percent rate of return was not controversial and hence, pursuant to r. 39.01(5) of the *Rules of Civil Procedure*, quite proper. No evidence to the contrary was advanced by the

appellant.[7] In fact, the 11 percent rate of return was supported by the evidence in the FIPPA documents contained in the appellant's own record and relied on by the appellant's expert. The application judge implicitly rejected the appellant's hearsay argument by reliance on the 11 percent figure.

[93] Lastly, a charge that is limited by the regulatory scheme to the recoupment of actual costs, as it is here, amounts to a regulatory charge and not a tax: *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929, at para. 85; *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] 1 S.C.R. 131, at paras. 38-40, and 45. In all the circumstances, the application judge was not required to embark on any further inquiry.

[94] I would not give effect to this ground of appeal.

(iv) Onus

[95] The appellant also submits that the application judge's reasons are insufficient because they fail to address the burden on the respondents to establish a connection between the cost of the FIT Program and the regulation of electricity. It states that the only mention of this argument in the application judge's reasons is made in passing at para. 24: "In the case at bar, the Respondents succeed on their strong arguments that the FIT Programs are not colourable and are proven

7 IESO submits that it offered to undertake to produce the costing model but the appellant declined that offer.

to be a regulatory charge. I need not decide this case on the weak argument that one side or the other failed to meet the evidentiary onus of proof."

[96] This finding, the appellant argues, is an error of law. The issue of onus is inextricably bound to the determination of whether the FIT Program constitutes a regulatory charge. Whether there is a nexus or connection between the cost of the charge and the cost of the regulation – and who had the onus to establish it – is a vital component of the analysis.

[97] In support, the appellant cites *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, where in finding that a by-law was an unconstitutional tax, not a valid regulatory charge, the court held that the party whose potential tax is being challenged has the onus to demonstrate the "nexus" between the cost of the charge and the regulation.

[98] The respondents respond by arguing that it did not matter which party had the onus and, in any event, the onus in a constitutional challenge is on the party seeking the declaration of invalidity because an "impugned measure is presumed to be *intra vires* the province": *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467, at para. 81. It is the claimant's burden to displace this presumption. The respondents argue that this is simply a reflection of the general rule that the party who asserts, must prove: *Manitoba (A.G.) v. Metropolitan Stores*, [1987] 1 S.C.R. 110, at para. 25. It applies equally in civil and

constitutional cases. Proving (or disproving) the elements of a regulatory charge is part and parcel of the burden placed on the appellant.

[99] On the facts of this case, I agree with the respondents and the application judge that it did not matter who bore the onus of proof. Put differently, if the onus was on the respondents, they succeeded; if the onus was on the appellant, it failed. The evidence was overwhelming. The application judge's reasons clearly indicate that he did not find addressing the onus question necessary because the respondents' arguments carried the day, regardless of who had to prove the case. The respondents had succeeded on their "strong argument" of demonstrating that the impugned charge was not colourable and was a valid regulatory charge. Given the strength of the respondents' argument, the application judge stated at para. 24: "I need not decide this case on the weak argument that one side or the other failed to meet the evidentiary onus of proof." On the facts of this case, I see no error in his conclusion.

[100] For these reasons, I would reject the appellant's grounds of appeal relating to sufficiency of reasons, hearsay, and onus.

(3) The Stimulus Goals

[101] The appellant's third argument raises two related issues, parts of which have already been touched upon. First, the appellant submits that the application judge erred in finding that the pith and substance of the FIT Program was other than the

pursuit of the Stimulus Goals. Second, the appellant argues that the application judge erred in finding that goals of economic stimulus were valid regulatory objectives for the FIT Program on the basis that energy procurement is a "vital component of any economy and any business." The appellant submits that the application judge erred in finding that goals of "general or specific economic development" were not extraneous to Ontario's electricity system. The appellant argues that if these goals are not "extraneous to Ontario's electricity system to achieve general or specific economic development", then governments are free to pursue general economic policies through any conceivable regulatory regime. The appellant states that it is not arguing that economic considerations are impermissible when making regulatory policy; rather, a charge that is imposed within a regulatory regime for the paramount or principal purpose of achieving an economic stimulus is contrary to the constitutional protections of s. 53 of the *Constitution Act, 1867*.

(i) General Principles

[102] In addressing these issues, a good starting point is Gonthier J.'s statement in *Westbank*, at para. 30:

> Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary

> or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee.

[103] Rothstein J. provided further guidance on this issue in *620 Connacht*, at para. 24:

> [A] government levy would be in pith and substance a tax if it was 'unconnected to any form of a regulatory scheme'. This fifth consideration provides that even if the levy has all the other indicia of a tax, it will be a regulatory charge if it is connected to a regulatory scheme. [Citations omitted.]

[104] To determine the characterization of the government charge, it is necessary to determine its "pith and substance." The pith and substance of the government levy is its primary and most important characteristic as distinguished from its incidental features: *620 Connaught Ltd*, at paras. 16-17; *Westbank* at para. 30. A determination of the pith and substance of a levy must include the context within which the charge is made and the purpose of the charge: *Ontario Home Builders'*, at para. 43.

[105] Rothstein J. went on to describe the two-step test to determine whether a governmental levy is connected to a regulatory scheme at paras. 25-27 of *620 Connaught*. The first step is to identify the existence of a relevant regulatory scheme. The second step is to determine whether there is a relationship between the levy or charge and the scheme in the sense that the revenues are tied to the costs of the regulatory scheme or the levies or charges themselves have a

regulatory purpose, such as the regulation of behaviour or the conferral of benefits: *620 Connaught*, at paras. 25-28; *Westbank*, at para. 44.

(ii) The pith and substance of the FIT Program was not the pursuit of the Stimulus Goals

[106] Regardless of the application judge's finding, the appellant persists in its submission that the primary purpose of the FIT Program was to pursue the Stimulus Goals alone or predominantly.

[107] The appellant argues that the pursuit of the Stimulus Goals was established by (1) the statements of Ontario Ministers involved in the design and administration of the FIT Program, (2) the design of the FIT Program, including the decision to disregard the advice of experts as to the excessive price for unnecessary energy to ensure the greatest possible economic stimulus, and (3) the failure to establish the stated objectives of the FIT Program.

[108] The appellant relies on statements of former Minister Smitherman and Assistant Deputy Minister Lo from a North American Free Trade Agreement hearing. The former are excerpts from statements given after Mr. Smitherman departed from provincial politics and was appearing on behalf of an off-shore wind power developer in NAFTA litigation brought against the federal and provincial governments. The excerpts are taken not from any NAFTA transcript but from the 2017 affidavit of Mr. Adams, whose impartiality was impugned by the application

judge. Apart from the evidence of the former Minister Smitherman being hearsay in nature, he does not identify the FIT Program as the topic he is addressing.

[109] The appellant also points to the following statement by Assistant Deputy Minister Lo: “the confluence of the need for a new approach to energy generation and the need for an economic stimulus that would generate jobs led to the development of [the *Green Energy Act*].” This statement also emanates from Mr. Adams’ 2017 affidavit and not from any NAFTA transcript. It too is hearsay in nature. In any event, I fail to see how this statement assists the appellant. It does not show that the predominant purpose of the FIT Program was to provide economic stimulus and, furthermore, stimulus as an ancillary or even integral objective does not undermine the application judge’s conclusions.

[110] The appellant also attempts to ascribe certain conclusions to Mr. Jennings. However, his evidence must be read in context. For instance, in response to a question on cross-examination that the FIT Program was the Minister’s attempt to stimulate the economy, Mr. Jennings stated: “Well, certainly the program was intended – in addition to providing more supply and renewable supply, the focus was they wanted to increase renewable supply.” He did not recoil from acknowledging that stimulus was part of the *Green Energy Act*, but this does not equate to it being the primary purpose of the FIT Program.

[111] The appellant also argues that advice received concerning energy projects and the design of the FIT Program shows that the true purpose of the FIT Program was economic stimulus. I disagree.

[112] First, as I have already discussed at para. 80 and following, it was open to the application judge to find that the Government was not bound by advice received and that choosing to undertake a policy that had some detractors did not render its regulatory purpose overtaken by any stimulus effect.

[113] Second, the evidence relied upon by the appellant is largely based on inferences drawn from Mr. Adams' review of documents obtained under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31. Mr. Adams did not create nor did he have first-hand knowledge of these documents.

[114] Third, the appellant submits that the purpose of the FIT Program was economic stimulus because FIT contracts were awarded to communities in Northern Ontario where transmission restrictions meant that the electricity could not always be used. In other words, the appellant argues that such FIT contracts could only have been justified as pure stimulus. However, the FIT Program incorporated checks for transmission availability as a matter of course and, if applicable, distribution availability, before any contract award. Moreover, even if there was insufficient transmission capacity at a particular point in time, this does

not itself demonstrate that the FIT Program was primarily intended to achieve the Stimulus Goals.

[115] Fourth, as of January 1, 2022, the Ontario Government transferred a portion of the contracted costs of renewable generation that were previously recovered through the Global Adjustment to the taxbase saying that: "these high-cost contracts were entered into by the previous government for energy that Ontario does not need at a price that employers cannot afford." The appellant makes much of this statement. However, this does not mean that the FIT Program component of the Global Adjustment was a tax. IESO's comment on this statement in its factum is apt:

> It is political commentary by one government about the wisdom of an earlier government's policy choices and made with hindsight. It is difficult to accept the proposition that the procured FIT capacity is "not needed" when a shortfall in capacity is expected beginning in the mid-2020s even with all the renewables still in service.

[116] In addition, much of the evidence provided by the appellant's experts is unreliable. As noted by the application judge, there were concerns about the experts' impartiality. Again, much of the evidence pressed by the appellant really turns on whether the FIT Program was a wise Government policy decision, not whether it was constitutional.

[117] Finally, as noted in the discussion on the alleged insufficiency of the application judge's reasons, the purposes of the FIT Program put forward in the relevant legislation, regulations, and Directive and accepted by the application judge were amply supported by the record. In sum, there is simply no meaningful evidence to support the appellant's proposition that the primary purpose of the FIT Program was to achieve the Stimulus Goals.

(iii) The FIT Program component of the Global Adjustment is a valid regulatory charge

[118] Here, there is a clear regulatory scheme in place; this is not controversial. The more pertinent question concerns the second step in the analysis: was there a relationship between the levy or charge and the scheme. Here, "it is the *primary purpose* of the law that is determinative": *620 Connaught*, at para. 17.

[119] The record revealed a Provincial Government working towards the regulatory purpose of increasing and incentivizing renewable electricity generation in Ontario. The application judge clearly found that the costs of the FIT Program related to the procurement of renewable energy. The electricity suppliers who were recruited to incur the expense of building renewable energy generations were paid for their investment in, and contribution to, Ontario's electricity grid. Unlike the situation of the Federal Government's tax in *Re: Exported Natural Gas Tax*, the FIT Program was not in pith and substance a revenue-raising mechanism.

[120] The application judge found that any economic stimulus from the FIT Program was objectively reasonably related to electricity regulation. There was no surplus in the Global Adjustment and raising revenue for general purposes was not the dominant characteristic of the FIT Program part of the Global Adjustment. The Global Adjustment was a price adjustment that adjusts the amounts to be paid by consumers in light of the amounts to be paid to generators. The adjustment could be favourable or unfavourable for consumers. Significantly, the Global Adjustment limits recovery to actual costs. It provides for payment of the actual costs that IESO has incurred to generate electricity. The funds do not go into general revenues but are used to meet the contractual procurement obligations agreed to with the generators. The levy was used to finance the regulatory scheme.

[121] The appellant submits that it was an error of law to hold that the Stimulus Goals or goals of specific or general economic development constituted a proper regulatory purpose for the regulation of electricity. However, it should be noted that economic, social, and environmental factors are legitimate considerations when making electricity generation investment decisions. The incentivization of participation in the ownership of renewable projects by Indigenous communities, and the promotion of job creation are related to an electricity regime and are among the purposes authorized by the *Electricity Act, 1998*. Choices regarding generation technologies will necessarily have economic, environmental, and social

impacts. The central and significant role electricity has in the economic and social fabric of Ontario belies the appellant's notion that the pith and substance of *intra vires* legislation regulating electricity must be about procuring cheap or the cheapest source of energy. Indeed, as mentioned, Professor McKitrick, who was called by the appellant, acknowledged that a government would be expected to take economic, environmental, and social considerations into account when making electricity generation investment decisions.

[122] In conclusion, I would reject the appellant's third ground of appeal.

(4) The application judge did not err in finding the appellant's expert witnesses to be biased

[123] The appellant's fourth argument is that the application judge erred in finding that the appellant's experts were biased. The appellant led the expert evidence of Thomas Adams, an energy and environmental research advisor and media commentator focused on energy consumer concerns, and of Ross McKitrick, Professor of Economics at the University of Guelph. The application judge admitted the evidence of the two experts and decided to give it the weight it deserved in light of all the evidence.

[124] The application judge described the applicable law and found that Mr. Adams (a long-standing advocate of affordable electricity and the interests of electricity consumers) and Professor McKitrick (who, on philosophical, ideological,

and religious grounds, opposes renewable energy development as a “job killer”, an impediment to economic development, and a dangerous expansion of government control over private life), lacked impartiality. Specifically, he found that they failed at the fourth of the *Mohan* criteria in the threshold stage, which requires, as codified by rule 4.1.01 of the *Rules*, the witness to be independent, objective, and impartial: *White Burgess Langille Inman v. Abbott and Haliburton Co*, 2015 SCC 23, [2015] 2 S.C.R. 182, at para. 10. The application judge summed up his conclusion at para. 101 of his reasons:

> Mr. Adams and Professor McKitrick are entitled to their own opinions about the Provincial Government’s electricity policies and about the merits and demerits of the FIT Programs that are the subject matter of National Steel Car’s applications. However, the court is entitled to receive opinion evidence that is fair, objective and non-partisan from witnesses who have acquired special or peculiar knowledge through experience or study in respect of the opinion evidence. In the immediate case, National Steel Car’s experts have entrenched bias and preconceived conclusions and are not unbiased. Their opinions about the constitutionality of the FIT Programs are neither appropriate nor helpful.

[125] Based on the record, the application judge’s finding was open to him and is owed deference. Moreover, he admitted their evidence. I see no basis on which to interfere.

Disposition

[126] For these reasons, I would dismiss the appeal. As agreed, the appellant is to pay the respondents collectively $100,000 in costs on a partial indemnity scale, inclusive of disbursements and applicable tax.

Released: April 12, 2024 “S.E.P.”

“S.E. Pepall J.A.”
“I agree. A. Harvison Young J.A.”
“I agree. L. Favreau J.A.”

Schedule A

Electricity Act, 1998

ONTARIO REGULATION 429/04

ADJUSTMENTS UNDER SECTION 25.33 OF THE ACT

(1) Global adjustment

1.1 (1) For the purposes of this Regulation, the global adjustment for a month is the amount calculated by the IESO using the formula,

$$(A – B) + (C – D) + (E – F) + G + H$$

in which,

"A" is the total amount payable by the IESO under section 78.1 of the *Ontario Energy Board Act, 1998* to generators who are prescribed under that Act for the purposes of that section with respect to output for the previous month from units at generation facilities that are prescribed under that Act for the purposes of that section,

"B" is the total amount that, but for section 78.1 of the *Ontario Energy Board Act, 1998,* would be payable by the IESO under the market rules to generators referred to in "A" on behalf of those generators with respect to the output referred to in "A",

"C" is the amount payable by the IESO to the Financial Corporation under section 78.2 of the *Ontario Energy Board Act, 1998* for the previous month, less amounts payable by licensed distributors with respect to output for the previous month from generation facilities that are prescribed under that Act for the purposes of that section,

"D" is the amount that, but for section 78.2 of the *Ontario Energy Board Act, 1998,* would be payable by the IESO under the market rules for the previous month with respect to output generated at, and ancillary services provided at, generation facilities that are prescribed under that Act for the purpose of that section and for which the Financial Corporation is the metered market participant,

“E” is the amount payable by the IESO to generators and other persons or entities with respect to output generated by units at generation facilities and ancillary services in respect of which the IESO has entered into procurement contracts under Part II.2 of the *Electricity Act, 1998* for the previous month, less amounts payable by licensed distributors to the IESO for the previous month in respect of procurement contracts referred to in that Part,

“F” is the amount that would be payable to the IESO under the market rules for the previous month with respect to output generated by units at generation facilities and ancillary services in respect of which the IESO has entered into procurement contracts under Part II.2 of the *Electricity Act, 1998* and that are generated or provided at generation facilities for which the IESO is the metered market participant,

“G” is the amount paid or payable by the IESO to persons or entities with whom the IESO has entered into a procurement contract under Part II.2 of the *Electricity Act, 1998* for the previous month, and

“H” is the sum of all amounts approved by the Board under section 78.5 of the *Ontario Energy Board Act, 1998* that are payable by the IESO to distributors for the month.