COURT OF APPEAL OF YUKON

Citation: *Yee v. Yukon Energy Corporation*, 2026 YKCA 1

Date: 20260119
Docket: 24-YU922

Between:

Nathaniel Yee

Appellant

And

Yukon Energy Corporation and Yukon Utilities Board

Respondents

Before: The Honourable Mr. Justice Abrioux
The Honourable Justice MacPherson
The Honourable Justice Gomery

On appeal from: An order of the Yukon Utilities Board, dated July 12, 2024 (Board Order 2024-05)

The Appellant, in person:	N. Yee
Counsel for the Respondent, Yukon Energy Corporation:	J. Herbert
Counsel for the Respondent, Yukon Utilities Board:	G. Bentivegna
Counsel for the Government of Yukon:	K. Sova
Place and Date of Hearing:	Whitehorse, Yukon November 20, 2025
Place and Date of Judgment:	Whitehorse, Yukon January 19, 2026

Written Reasons by:
The Honourable Justice Gomery

Concurred in by:
The Honourable Mr. Justice Abrioux
The Honourable Justice MacPherson

Summary:

The appellant challenges an order of the Yukon Utilities Board allowing the respondent, Yukon Energy Corporation, to charge customers for the cost of renting diesel electric generators in contravention of licences issued to YEC by Environment Yukon. The appellant argues that the Board cannot authorize YEC to charge for unlawful activities. Held: appeal allowed. The fundamental question is whether inconsistency undermines the integrity of the legal system as a whole. In this case, the Board's decision undermines the objectives of the Environment Act in a manner that threatens the integrity of the legal system and therefore the Board erred in law in approving the charges.

Reasons for Judgment of the Honourable Justice Gomery:

Overview

[1] The question posed in this appeal is whether the Yukon Utilities Board erred in law in permitting a utility, Yukon Energy Corporation ("YEC"), to charge customers for the cost of renting diesel electric generators YEC is not lawfully permitted to operate. Operating the generators would contravene terms of licences issued by Environment Yukon under the *Environment Act,* R.S.Y. 2002, c. 76. YEC leases the generators for emergency use in the event of a breakdown of one of its main hydroelectric generating plants.

[2] The appeal is brought by Mr. Yee as a concerned individual who intervened in the proceeding before the Board and obtained leave to appeal to this Court: 2025 YKCA 3. His fundamental point is one he made before the Board on this occasion and at a previous electrical rate hearing. He submits that the Board cannot authorize YEC to charge for unlawful activities. As he put it in oral argument, the circumstances and need for the generators is irrelevant: unlawful is unlawful, and customers should not be charged for unlawful activities. The Board has not respected a legal limit imposed by the *Environment Act* on YEC's activities.

[3] YEC submits that the Board's decision was one made in the exercise of its broad statutory discretion under the *Public Utilities Act,* R.S.Y. 2002, c. 186 to fix electrical rates in the public interest. It was open to the Board to leave it to

Environment Yukon to enforce the *Environment Act* and address non-compliance with permits issued under that statute. YEC argues that there are multiple perspectives as to what the public interest requires. The Board considers the public interest in one realm, from one perspective, and Environment Yukon considers it from a different perspective. Each regulator has its own role to play, and the Board is not responsible to ensure compliance with the terms of permits issued by Environment Yukon.

[4] Similarly, counsel for the Board submits that there are separate legislative regimes. The Board is governed by a regime established by the *Public Utilities Act,* not the *Environment Act*, and the Board has to respect the statutory intent to have the environmental aspects of YEC's operations governed separately.

[5] Counsel for the Government of the Yukon notes the existence of a range of enforcement mechanisms available to Environment Yukon under the *Environment Act*. She submits that it is for Environment Yukon to choose among them if a permit is violated.

[6] All parties agree that recourse to diesel generation may be necessary for the health and security of Yukon residents in emergency situations in the depths of winter if a hydro-electric generating facility fails. Such situations have arisen in the past and prudence dictates planning for them to arise in the future. The controversy arises from a failure of the permitting regime to recognize this reality. It would be avoided if Environment Yukon were to issue contingent permits to regularize the use of the diesel generators by YEC in emergency situations. It is unclear why Environment Yukon has not done so.

[7] What emerges from this overview of the issue and arguments is that the question at hand involves questions of statutory interpretation and the interplay of the statutory schemes established under the *Environment Act* and the *Public Utilities Act.* A federal statute with an ungainly name, the *Yukon Environmental and Socio-*

economic Assessment Act, S.C. 2003, c. 7 [*YESAA*], is also in play. Is Mr. Yee correct that "unlawful is unlawful"? Are the public interest in setting electrical rates and the public interest in environmental protection truly separate realms? In my view, the answer to both questions is no.

[8] For the reasons that follow, I am of the view that the Board erred in law in approving the rental charges in issue. I would allow the appeal.

Background

[9] YEC is a government-owned electrical utility. The Yukon's electrical grid is isolated from neighbouring grids. All of the electricity within the territory must be generated locally. Most of it is generated by YEC from three large hydro-electric facilities.

[10] YEC supplements hydro-electric generation with thermal generation as necessary. Thermal electric generation is provided by diesel electric generators. The operation of diesel electric generators with a nameplate capacity exceeding 1 megawatt (MW) without a permit is prohibited by s. 2 of the *Air Emission Regulations,* Y.O.I.C. 1998/207 made pursuant to the *Environment Act.* YEC holds permits authorizing the operation of diesel electric generators only up to a maximum stipulated capacity.

[11] YEC sells the electricity it generates at rates approved by the Board pursuant to the provisions of the *Public Utilities Act.* The electrical rates YEC is permitted to charge are reviewed and fixed by the Board following a protracted process that usually includes public hearings. The process begins with a rate application (described as a General Rate Application or GRA) submitted by YEC. In the GRA, YEC forecasts its revenue requirements to supply the electricity it expects will be needed. The Board requests additional information, hears from YEC and intervenors, and ultimately determines the permitted rates.

[12] In November 2020, YEC submitted a GRA seeking approval of rates for 2021 (the "2021 GRA"). The process concluded with a decision rendered on March 16, 2022. Mr. Yee participated as an intervenor in the process leading to this decision.

[13] In the 2021 GRA, YEC included in its forecast of production costs an amount representing the costs of leasing 17 mobile diesel generating units required to satisfy dependable capacity shortfalls "under N-1 conditions". The N-1 reference is to a circumstance where YEC's largest hydro-electric generation facility has gone off-line and there is a need for extra generating capacity that would not otherwise be required. Mr. Yee objected to this element in YEC's costs projections on the ground that it did not have permits required to operate these generators. The Board disagreed and allowed YEC to claim the leasing costs. This decision is not under appeal.

[14] This appeal arises from the Board's decision addressing a GRA submitted by YEC in August 2023 (the "2023/24 GRA"). The decision addresses YEC's reasonable revenue requirements in 2023 and 2024, confirms an interim decision fixing electrical rates from January 2024, and approves new rates effective August 1, 2024. Once again, Mr. Yee participated as an intervenor in the process before the Board.

[15] This time, YEC claimed for the cost of renting 20 mobile diesel generators to satisfy dependable capacity shortfalls under N-1 conditions. Mr. Yee again objected. YEC acknowledged that it was claiming for "unpermitted diesel rental capacity" of 17.95 MW: Board reasons at para. 125. Mr. Yee said the total unpermitted diesel capacity was somewhat larger (21.8 MW) and urged disallowance of costs related to capacity that exceeded permitted limits: reasons at para. 130. The Board approved the rental costs claimed by YEC: reasons at para. 138.

The Board's decision

Statutory framework

[16] Interpretation of the *Public Utilities Act* and equivalent legislation elsewhere in Canada takes into account the utility's statutory obligations to provide service: *ATCO Gas and Pipelines Ltd. v. Alberta,* 2006 SCC 4 at para. 63. These are stated broadly in s. 106—to "supply the utility…to all persons with the area covered by the privilege except in those cases where the company may lawfully refuse to supply the utility"—and also in s. 26, to "maintain its property and equipment in such a condition as to provide safe, adequate, and proper service". In what is termed "the regulatory compact", the utility is afforded the exclusive right to sell its services for a fair return in exchange for assuming "a duty to adequately and reliably serve all customers in their determined territories" and being constrained as to the rates they may charge: *ATCO* at para. 63.

[17] YEC holds what the *Act* describes as a franchise to operate a public utility. The Board determines that a franchise is "necessary and proper for the public convenience and properly conserves the public interests": s. 21(2)(a).

[18] The Board's express authority to set rates for public utilities derives from s. 27 of the *Public Utilities Act*. Subsections (d) and (e) offer broad scope to the Board to impose "just and reasonable" standards and practices on a utility, and to require the utility to expand or supplement the services offered. Section 27 states:

> **27 Board orders**
>
> The board may make orders
>
> (a) *setting rates of a public utility*;
>
> (b) prohibiting or limiting any proposed rate change;
>
> (c) setting proper and adequate rates and methods of depreciation, amortization, or depletion in respect of the property of any public utility;
>
> (d) *setting just and reasonable standards, classifications, regulations, practices, measurements, or services to be observed, provided, or followed by a public utility*;

> (e) determining the areas to which a public utility shall provide service, and *requiring the public utility to establish, construct, maintain, and operate any reasonable expansion of its existing services*; and
>
> (f) determining the conditions that may be imposed by a public utility to establish, construct, maintain, or operate an expansion of its existing services.
>
> [Emphasis added.]

[19] In setting rates, the Board exercises a broad discretion to set rates that provide to the utility "a fair return on the rate base": s. 32; *Rate Policy Directive (1995),* Y.O.I.C. 1995/090, s. 2. As described by Dickson J.A., speaking for the court in *Yukon Energy Corporation v. Yukon (Utilities Board),* 2017 YKCA 15 at para. 7, "the regulator sets rates designed to be fair to both customers and the utility based on forecast demand and the reasonable cost of supplying the service".

[20] Section 29 lists matters that the Board may consider in setting rates. These include, in sub-s. (a), "the revenues and costs of the public utility in the financial year in which the proceedings for setting the rates and charges began or in any period immediately following …"

[21] The idea that rates must be fair to both consumer and supplier traces back to *Northwestern Utilities Ltd. v. City of Edmonton,* [1929] S.C.R. 186 at 192–193, 1929 CanLII 39. In *Ontario (Energy Board) v. Ontario Power Generation Inc.,* 2015 SCC 44 at para. 16, Rothstein J. spoke for the majority and explained that this means that the utility must, over the long run, be given the opportunity to recover, through the rates it is permitted to charge, its operating and capital costs. While cost recovery is the overall objective, Rothstein J. added, at para. 17:

> This of course does not mean that the Board must accept every cost that is submitted by the utility …

The Board's reasons

[22] The decision under appeal was made against the backdrop of the 2022 decision approving the 2021 GRA. In 2022, the Board stressed the following in

rejecting Mr. Yee's objection to YEC's claim to recover costs for unpermitted activities: (1) what it viewed as the limited nature of its own mandate "to set YEC's just and reasonable rates", (2) YEC's statutory obligation to provide reliable service, (3) a special dispensation for emergency operations under s. 49 of *YESAA*, which it (mistakenly) viewed as the statute under which emissions permits were granted; and (4) the need for safe and reliable electrical service in Yukon even under N-1 emergency conditions.

[23] In the 2024 decision under appeal, the Board stated that YEC's business case regarding the rented diesel generators contained certain shortcomings (at para. 135). YEC had not achieved forecast timelines for clean energy projects previously proposed to make the rental of diesel generators unnecessary. It commented that:

> In future, the Board expects YEC to provide stronger evidence regarding the timelines for such projects.
>
> (Reasons, para. 136).

[24] The Board accepted that the use of unpermitted diesel generators continued to be necessary "in the short term". It stated:

> 137. Mr. Yee has provided substantial comment on permitted capacity and whether ratepayers should pay for costs related to unpermitted capacity. Mr. Yee also commented on YEC's elasticity when determining the capacity rating of several of its thermal units. *These submissions do not provide evidence the Board is able to use to determine the revenue requirement for YEC to provide safe and reliable electric service at rates that are in the public interest. It is incumbent upon YEC to ensure it has all required regulatory approvals, processes, and assets in place to provide that safe and reliable service.* Regarding the capacity issues raised, YEC is directed, in its future applications, to provide a strong industry based and accepted approach on what the manufacturers accept as criteria and evidence for uprating thermal generation units. This can be based on documented industry standards.
>
> 138. *In this proceeding, YEC has proven that a capacity shortfall exists on the YIS unless additional capacity is added. The Board accepts that in the short term, the only solution is rental diesel units*. Therefore, the Board approves the rental costs for diesel units that YEC has applied for in this application.
>
> [Emphasis added.]

Issue

[25] An appeal to this Court lies from a decision of the Board with leave "on a question of law or excess of jurisdiction": *Public Utilities Act*, s. 69(1). Mr. Yee applied for and obtained leave to appeal. The order granting leave states:

> IT IS ORDERED that the application for leave to appeal is granted on the issue of whether the [Board] has erred in law and exceeded its jurisdiction by allowing Yukon Energy Corporation to claim and receive payments from customers based on forecasts that factor in the cost of rental of diesel units for diesel capacity that exceeds the limits Environment Yukon has permitted it to generate.

[26] This Court has no jurisdiction to intervene on the basis of an error of fact or an error in the exercise of discretion falling short of an error of law or jurisdiction. Only an error of law or jurisdiction will do.

Analysis

Analytical framework

[27] There are many different laws and legislative schemes constituting the modern regulatory state. Does unlawfulness or illegality of conduct under one statute bear on an assessment of what may be lawfully approved under another? How must we approach this question?

[28] Guidance is offered by the modern cases grappling with the defence of illegality to common law claims for monetary relief. These cases deal with a similar problem, namely: in what circumstances should a plaintiff be denied relief to which it would otherwise be entitled because of illegality of conduct or of purpose in the underlying transaction? Two judgments of Hunter J.A., speaking for the British Columbia Court of Appeal, are instructive.

[29] In *Kim v. Choi,* 2020 BCCA 98, the plaintiff's claim was for unjust enrichment. The plaintiff sought the recovery of expenses paid to the defendant in connection with a scheme to deceive immigration authorities. The defendant argued that the illegality of the scheme was a bar to recovery. This defence failed. At paras. 33–74,

Hunter J.A. undertook a comprehensive review of the authorities. He identified the problem raised by the defence of illegality as one arising from a concern for consistency in the law and the integrity of the legal system. The defence should succeed where allowing the plaintiff's claim would stultify (or defeat) the legal policy behind the illegality: at paras. 48–49. Summing up, he stated:

> [63] I conclude that, having in mind the evolution of the modern approach to the *ex turpi causa* defence explained in *Still* and *Lindsay*, as well as the principled approach to the defence set out in *Hall*, there is no general rule that a claim for unjust enrichment will fail if it is based on an illegal contract. A claim for restitution based on unjust enrichment that derives from an illegal contract will only be barred by illegality *when the restitution will defeat or frustrate the policy underlying the illegality, thereby leading to inconsistency in the law and undermining the integrity of the legal system*.
>
> [64] Because the usual remedial order for unjust enrichment is a restoration of the *status quo ante*, it will be seldom that such an order will be seen as introducing inconsistency in the law. Nevertheless, it will be necessary in each case where an illegality defence is raised to *consider the legal policy at issue, the conduct of the claimant and the proportionality of the result in light of the illegality in order to determine whether restitution in a given case will frustrate the policy underlying the illegality*.
>
> [Emphasis added.]

[30] In *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.,* 2020 BCCA 130, the plaintiff's claim was in contract. The defence, which succeeded at trial, was that the contract was entered into for a fraudulent purpose, as part of a scheme to deceive third parties. The plaintiff's appeal failed. At paras. 43–71, Hunter J.A. addressed the authorities and held that the defence of illegality may arise in a contract case in two ways. First, the contract itself may be illegal if performance would violate a statutory or common law prohibition: at para. 47. Second, it may be unenforceable if it was entered into for an illegal purpose: at para. 48. In this second case, the court must consider the impact of enforcement on the integrity of the judicial process. Hunter J.A. elaborated on this possibility at para. 69, stating:

> The question remains whether enforcement of an agreement that is tainted in some way with illegality will undermine the integrity of the legal system. This may occur when the remedy sought by the plaintiff would allow the plaintiff to profit from wrongful conduct, or would introduce inconsistency in the law, or would frustrate the policy underlying the illegality, or would in some other way

> driven by the facts of the particular case undermine the integrity of the judicial process.

[31] As in *Kim* and *Youyi,* the problem raised on this appeal is one of legal consistency. In determining the reasonable rates YEC will be permitted to charge in the public interest, it is inconsistent to compensate YEC for rental expenses incurred for equipment that it cannot lawfully operate. Approving the charges amounts to winking at the unlawful purpose. The fundamental question is whether this inconsistency undermines the integrity of the legal system as a whole. To answer this question, it is necessary to examine the legal policy established by environmental legislation, the extent of the apparent unlawfulness, and whether compensating YEC frustrates or defeats the policy.

[32] This analysis explains why I do not accept Mr. Yee's argument that "unlawful is unlawful". In a world filled with laws and regulations, some will inevitably work at cross-purposes resulting in some degree of inconsistency. The Board is not obliged to reflexively reject charges for expenses tainted with regulatory non-compliance, no matter the circumstances. However, this does not mean that the appeal must be dismissed. It means that what the law requires, in cases such as this, is a nuanced analysis.

Relevant environmental legislation

[33] Consideration of the scheme and provisions of the *Environment Act* leads me to conclude that it reflects and implements a significant and wide-ranging public policy. The statute asserts the importance of environmental protection and the necessity of integrating environmental considerations effectively into all public decision making. Environmental protection is a right secured by a private right of action and through regulation.

[34] One of the regulatory tools provided by the statute for the protection of the environment from polluting diesel emissions is a permitting regime established in

Part 6. Permits may be issued on terms. Contravention of a term may have significant punitive consequences.

[35] The *Environment Act* begins with a preamble that includes the following:

> Recognizing that the way of life of the people of the Yukon is founded on an economic, cultural, aesthetic and spiritual relationship with the environment and that this relationship is dependent on respect for and protection of the resources of the Yukon;
>
> …
>
> Recognizing that a healthful environment indispensable to human life and health;
>
> Recognizing that every individual in the Yukon has the right to a healthful environment;
>
> …
>
> Recognizing that the Government of the Yukon is the trustee of the public trust and is therefore responsible for the protection of the collective interest of the people of the Yukon in the quality of the natural environment;
>
> Recognizing that all persons should be responsible for the environmental consequences of their actions;
>
> *Recognizing that comprehensive, integrated, and open decision-making processes are essential to the efficient and fair discharge of the environmental responsibilities of the Government of the Yukon*; …
>
> [Emphasis added.]

[36] Section 4 of the *Environment Act* provides that it binds the government of the Yukon. The Board is a creature of government. Its members are appointed by the responsible Minister and it is responsible to the Minister for the administration of the statute: *Public Utilities Act, s.* 2. It has access to public servants to carry out its functions: *Public Utilities Act, s.* 16.

[37] Section 5 of the *Environment Act* states its objectives and sets out principles applying to the realization of the objectives. The objectives include, in s. 5(1)(d):

> (d) to ensure comprehensive and integrated consideration of environmental and socioeconomic effects in public policy making in the Yukon;

[38] The principles set out in s. 5(2) are worth stating in their entirety:

> (2) The following principles apply to the realization of the objectives of this Act
>
> (a) economic development and the health of the natural environment are inter-dependent;
>
> (b) *environmental considerations must be integrated effectively into all public decision making*;
>
> (c) the Government of the Yukon must ensure that public policy reflects its responsibility for the protection of the global ecosystem;
>
> (d) the Government of the Yukon is responsible for the wise management of the environment on behalf of present and future generations; and
>
> (e) *all persons should be responsible for the consequences to the environment of their actions*.
>
> [Emphasis added.]

[39] Section 6 affords to the people of the Yukon the right to a healthful natural environment.

[40] Section 8 creates a private right of action where a person has impaired or is likely to impair the natural environment, or the government has failed to meet its responsibilities as trustee of the public trust to protect the natural environment from actual or likely impairment. Defences include that the activity in question was performed under a permit and the absence of a feasible and prudent alternative to the activity: s. 9(a), (c). Potential remedies include injunctive relief (s. 12(1)(a)) and cancellation of a permit (s 12(2)(d)).

[41] Part 6 deals with permits. Section 83 provides that, where an activity requires a permit, no person shall undertake the activity without the permit. Section 89 requires that, where a permit has been issued, terms and conditions imposed in the permit are binding. Contravention of a term or condition of a permit is an offence punishable on a first conviction by a fine not exceeding $300,000: s. 172(g). Fines may cumulate with each day's non-compliance constituting a separate offence: s. 178.

[42] As already noted, the permits held by YEC are issued under the *Air Emission Regulations*. Section 2 of the *Regulations* provides that no person shall undertake

an activity listed in Schedule 1 except as authorized by a permit issued under the regulations. Item 8 in the schedule lists electrical generating facilities with nameplate capacity equal to or greater than 1 MW.

[43] The other relevant environmental legislation is the *YESAA*. It establishes a process for the assessment of "projects", in order that their environmental and socio-economic effects may be considered: s. 5(2)(b). "Projects" are subject to assessment according to ss. 47–49. Section 47 provides for the listing of categories of assessable projects by regulation if the activity in question is undertaken with government authorization. Section 49 limits the requirement for an assessment in the case of an emergency. It states:

> 49 (1) Notwithstanding sections 47 and 48, no assessment is required of an activity that is undertaken in response to a national emergency for which special temporary measures are being taken under the *Emergencies Act*, or in response to an emergency when it is in the interest of public welfare, health or safety or of protecting property or the environment that the activity be undertaken immediately.

[44] By the *Assessable Activities, Exceptions and Executive Committee Projects Regulations*, SOR/2005-379, s. 2 and Schedule 1, Part 4, Item 2, the operation of a fossil fuel-fired electrical generating station is subject to assessment.

[45] The effect of the *YESAA* is that, in the ordinary course, the operation of the YEC's diesel generators requires assessment in compliance with the requirements of the statute except in the case of an emergency as defined in s. 49(1). The *YESAA* limits the government's ability to issue a permit without first undertaking an assessment. Avoiding that limit does not do away with the permitting requirement.

Assessment

[46] As noted, the respondents maintain that the statutory schemes established under the *Environment Act* and the *Public Utilities Act* constitute separate realms. The hypothesis that compliance with environmental permitting requirements was not for the Board to assess was important to its rejection of Mr. Yee's argument in 2022

and 2024. In the 2022 decision, the Board stated that "the Board's statutory mandate is to set YEC's just and reasonable rates, and the Board's analysis and findings are necessarily limited to its mandate": at para 107. In the 2024 decision now under appeal, it stated (at para. 137, quoted above and repeated here for ease of reference):

> [Mr. Yee's] submissions do not provide evidence the Board is able to use to determine the revenue requirement for YEC to provide safe and reliable electric service at rates that are in the public interest. It is incumbent upon YEC to ensure it has all required regulatory approvals, processes, and assets in place to provide that safe and reliable service.

[47] Having regard to the statutory provisions reviewed above, the "separate realms" theory is untenable. The statutory discretion conferred on the Board under the *Public Utilities Act* is open-ended and grounded in fairness, reasonableness, and the public interest. The *Environment Act* is intended to ensure, as stated in s. 5(1)(d), "comprehensive and integrated consideration of environmental and socioeconomic effects in public policy making in the Yukon". Environmental considerations are to be "integrated effectively into <u>all</u> public decision making": s. 5(2)(b), emphasis is added. In the fulfillment of its statutory mandate, the Board is not exempt. It is an instrument of government, and the government is bound. Indeed, government regulation is central to the project of environment protection envisaged in the *Act*. The public interest with which the Board is concerned includes the project of environmental protection.

[48] Returning to the question of law posed in this appeal: did the Board err in law in permitting YEC to charge customers for the cost of renting diesel electric generators YEC is not lawfully permitted to operate? The case is one of an unlawful intended purpose. Answering the question requires consideration of the legal policy underlying the unlawfulness and the extent of the unlawfulness. The ultimate question is whether the Board's decision frustrates the policy underlying the illegality and thereby threatens the integrity of the legal system.

[49] As set out at length above, the legal policy of environmental protection is significant and wide-ranging. It carries great weight. The policy is implemented in part by permitting requirements with a view to constraining and regulating emissions from diesel electrical generators.

[50] Favouring the view that the Board has erred in law, YEC has pursued a practice of renting unpermitted diesel generators through two rate applications since 2021, in the face of Mr. Yee's pressing and cogent objection. This is not a case of accidental or inadvertent illegality, but of a deliberate practice undertaken and persisted in over four years. As against these points, the need for the generators is undisputed, situational, and well motivated.

[51] Taking everything together, in my view the Board's decision undermines the objectives and principles stated in the *Environment Act* in a manner that threatens the integrity of the legal system. The *Environment Act* mandates a 'whole of government' approach to environment regulation in general, and emissions regulation specifically. The Board's approval of the rental charges in issues reflects a siloed approach. These approaches cannot be reconciled.

[52] It makes no difference that, to date, Environment Yukon has chosen not to address the issue through regulatory action to enforce the permits. The question is not whether YEC should be charged with offences under the *Environment Act*. It is whether it makes sense, in the statutory context I have described, to charge consumers for activities that, according to the permits issued by Environment Yukon, should not be taking place. In my view, it does not.

[53] I conclude that the Board erred in law in approving the charges in issue.

[54] To be clear, the only issue before us concerns the 2023/24 GRA approved by the Board. The record on appeal does not disclose whether the 2024 rates were carried forward into 2025 and 2026, or whether current rates have been made the subject of a fresh GRA. At the hearing, we were told that circumstances have

changed in that permits have now been issued in respect of two of the three communities in which YEC sought compensation for unpermitted capacity. We were not provided details. These are matters to be addressed by the Board.

[55] With this decision, we are not deciding that unpermitted generators should not be operated in N-1 emergency conditions. As noted, no one before us suggested as much. The appropriate operational response to emergency conditions is not a matter in issue in this appeal. It will be for the Board to reconsider the 2023/24 GRA in light of our legal conclusion on this appeal and to order whatever rate modifications and consequential relief are appropriate in the exercise of its public interest mandate.

Disposition and costs

[56] For these reasons, I would allow the appeal and remit Board Order 2024-05 to the Board for reconsideration in accordance with these reasons. Mr. Yee is entitled to his costs.

"The Honourable Justice Gomery"

I AGREE:

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Justice MacPherson"