

## *COST MATTERS*

Earlier this year, in *Michigan v. EPA*, the Supreme Court of the United States, in reviewing EPA's power to regulate, considered whether the phrase "appropriate and necessary" which was a precondition to EPA's exercise of the power to regulate, necessarily must include a consideration of cost, including cost of compliance with the proposed regulation, absent an express legislative direction to the contrary.

The majority found that cost, and indeed cost/benefit, must be considered. The analysis leading to that finding was accepted by both the majority and the minority. The Justices parted ways on the issue of when cost must be considered.

Here is what the Court said:

There are undoubtedly settings in which the phrase "appropriate and necessary" does not encompass cost. But this is not one of them. Section 7412(n)(1)(A) directs EPA to determine whether "*regulation* is appropriate and necessary." (Emphasis added.) Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions. It also reflects the reality that "too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 233 (2009) (BREYER, J., concurring in part and dissenting in part).

The minority decision concurred with that analysis and said:

... Cost is almost always a relevant—and usually, a highly important—factor in regulation. Unless Congress provides otherwise, an agency acts unreasonably in establishing "a standard-setting process that ignore[s] economic considerations." *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 670 (1980) (Powell, J., concurring in part and concurring in judgment). At a minimum, that is because such a process would "threaten[] to impose massive costs far in excess of any benefit." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 234 (2009) (BREYER, J., concurring in part and dissenting in part). And accounting for costs is particularly important "in an age of limited resources available to deal with grave environmental problems, where too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems."

What was said by the court in *Michigan v. EPA* can be seen as harmonious with the principles of sustainability which recognize that, given finite resources, a process of balancing must occur. As we ready to enter 2016, it will be of interest to see how Canadian legislatures, courts and administrative tribunals address what has now been said by the Supreme Court of the United States.