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The mission of the Energy Regulation Quarterly is to provide a forum for debate and discussion on issues surrounding the regulated energy industries in Canada including decisions of regulatory tribunals, related legislative and policy actions and initiatives and actions by regulated companies and stakeholders. The Quarterly is intended to be balanced in its treatment of the issues. Authors are drawn principally from a roster of individuals with diverse backgrounds who are acknowledged leaders in the field of the regulated energy industries and whose contributions to the Quarterly will express their independent views on the issues.

EDITORIAL POLICY

The Quarterly is published by the Canadian Gas Association to create a better understanding of energy regulatory issues and trends in Canada.

The managing editors will work with CGA in the identification of themes and topics for each issue, they will author editorial opinions, select contributors, and edit contributions to ensure consistency of style and quality.

The Quarterly will maintain a "roster" of contributors who have been invited by the managing editors to lend their names and their contributions to the publication. Individuals on the roster may be invited by the managing editors to author articles on particular topics or they may propose contributions at their own initiative. From time to time other individuals may also be invited to author articles. Some contributors may have been representing or otherwise associated with parties to a case on which they are providing comment. Where that is the case, notification to that effect will be provided by the editors in a footnote to the comment. The managing editors reserve to themselves responsibility for selecting items for publication.

The substantive content of individual articles is the sole responsibility of the contributors.

In the spirit of the intention to provide a forum for debate and discussion the Quarterly invites readers to offer commentary on published articles and invites contributors to offer rebuttals where appropriate. Commentaries and rebuttals will be posted on the Energy Regulation Quarterly website.

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The New Industry Dynamics

Six factors currently drive the energy sector in Canada at the national level: the drop in the price of oil; pipeline delays; the increase in shale gas; the increase in the delivery of crude oil by rail; increased carbon regulation; and the drive to renewable energy.

There have been other changes at the local level, particularly in Ontario and Alberta. The year started off when Ontario legislation came into force on January 1 completing the merger of the Independent Electricity System Operator (IESO) and the Ontario Power Authority (OPA).

In April, Ontario announced its intent to develop a cap and trade system linking with Québec in California through the Western Climate Initiative (WCI). Alberta followed a few months later announcing an economy wide carbon price of $30 per ton beginning at $20 per ton in January 2017 and moving to $30 per ton in January 2018. The carbon price would be applied to end-user emissions similar to the system now in place in Québec and California. Distributors of transportation and heating fuels would be required to acquire emission permits reflecting the emissions their products create when used. Permits could be acquired either through the purchase of credits from other emitters, through the purchase of Alberta-based offsets or through the payment of the carbon levy to the Alberta government.

On November 12, 2015 Ontario announced the completion of the first phase of Hydro One's initial public offering that generated $1.8 billion in gross proceeds dedicated to critical infrastructure and transportation investment. The divestiture was based on recommendations from the Premier's Advisory Council on Government Assets led by Ed Clark formerly Chair of the TD bank. The Hydro One divestiture was quickly followed by the November 19th vote of the Markham Council on the proposed merger of PowerStream, Enersource and Horizon Utilities and the joint acquisition of Hydro One Brampton. This was the final shareholder approval required to complete the megamerger long promoted by the Ontario government. A merger application will be placed before the Ontario Energy Board next month.

On December 13, 2015 the Ontario Minister of Energy announced an updated contract with Bruce Power for the refurbishment of six nuclear units at a cost of $13 billion. In December the government also announced a $234 million commitment to fund natural gas expansion in the province. At the same time the Ontario Energy Board established a generic hearing to determine whether existing ratepayers should subsidize the expansion and who would be eligible for the subsidy.

The year ended with the Auditor General claiming that Ontario customers had paid $37 billion above market price for electricity over the past eight years. At year-end Alberta also made an important announcement- it would phase out its coal-fired power plants by 2030 and replace two thirds of the existing coal-fired capacity with renewable energy.

The Oil and Gas Market Collapse

From an industry perspective, no economic variable is more important than the price of oil. In 2014, we saw the price drop by over 50

per cent. The price decline continued in 2015. The price is now below US$30 per barrel, the lowest level since 2003. It is a long time since we experienced this turn of events. Thirty years ago, the price of crude dropped 67 per cent between November 1985 and March 1986. Between June 2014 and December 2015, crude prices have also fallen by 70 per cent.

It is clear why this happened. American production is skyrocketing from the shale deposits. This led to an oversupply and so the world market prices dropped. Over the past five years, American shale gas production has tripled from about 10 billion cubic feet per day to more than 30 billion cubic feet per day. Tight oil has registered similar gains and now stands at over 3 million barrels per day. This new gas production comes from the Marcellus shale in Pennsylvania, the Utica shale in New York, and the Barnett shale, as well as shale deposits in British Columbia.

In 2013, the total US recoverable gas resource was estimated to be 2,689 trillion cubic feet. In the same year, US demand was 26 trillion cubic feet. That means there is enough natural gas to meet demand for more than 100 years. Cheap gas has changed the industry. It has led to a massive investment in new LNG facilities that have been permitted in the past few years. Cheap gas also means it is cheaper to produce electricity from gas-fired generation, a major factor behind distributed generation, another disruptive technology.

The Saudi share of the world oil market declined, but rather than drop production, the Saudis dropped price. That action was based on their view that the Saudi cost of production is below the shale cost. Shale production costs however continued to drop based on new technology. To add insult to injury, crude is now flowing from Iran with the recent lift of sanctions.

The impact on producers, whether in North America or the rest of the world, is real. Royal Dutch Shell, the largest European group, is cutting its capital spending by over US$15 billion between 2015 and 2017, cancelling or delaying some 40 projects. Conoco Phillips, the largest US exploration and production company, is cutting its capital spending 33 per cent this year. Suncor Energy, the largest Canadian energy company, is cutting its 2015 budget by $1 billion as it delays major oil sands production and the expansion of the White Rose project off Newfoundland and Labrador.

The price of oil has an immediate impact on other products. Natural gas prices are now at a two-year low. Gasoline prices have dropped for 88 straight days, the longest streak of falling prices on record. This is where the regulatory challenge comes in. Later in this editorial we described the regulatory challenge associated with customer owned generation. Customers move to local generation to reduce their energy costs. A significant part of the economy comes from cheap natural gas combined with advanced CHP technology. Hence the move by gas utilities in California to offer both gas and electricity service under a new DERS tariff - not good news for the electric LDC, or the regulator.

Pipeline Delays

The dominant regulatory issue in Canadian energy markets involves pipelines. It is useful to review where these pipeline projects stand at year end. There are five projects that continue to dominate the discussion: TransCanada's Keystone XL pipeline; the Enbridge Northern Gateway line; the Enbridge line 9 Reversal; the Kinder Morgan Transmountain expansion; and, more recently, the TransCanada Energy East project. All five projects have faced serious opposition from First Nations and environmental groups.

All of these pipeline projects were reviewed extensively in last year's annual review. There is little that can be added. There is one exception. The controversy regarding TransCanada Keystone XL line has now ended. It has been declared dead by President Obama.

The President's decision has resulted in a claim for damages of $15 billion under Chapter 11 of the North American Free Trade Agreement (NAFTA) on the ground that the denial of a Presidential Permit for the Keystone XL Pipeline was arbitrary and unjustified, and breached the US administration's NAFTA obligations. TransCanada also filed a lawsuit in the US Federal Court in Houston claiming that the President's decision to deny construction of Keystone XL exceeded his power under the US constitution. This will no doubt keep many high-priced lawyers and arbitrators busy for years.

There are lessons to be drawn from Keystone - lessons which the company is learning again in connection with its Energy East pipeline. That lesson is that pipeline construction is all about dealing with environmental and aboriginal groups. To this we can now add mayors looking for economic benefits. A group of 12 mayors in the Montreal area have now banded together to oppose Energy East and the mayor of Burnaby has become famous in connection with his opposition to the Kinder Morgan Transmountain expansion.

The Energy East debate has the unfortunate potential to drive a wedge between East and West-a controversy not seen since the current Prime Minister's father was in office. Readers that visit the Glenbow museum in Calgary should watch the 15-minute video detailing Alberta's objection to the National Energy Program. This is required viewing for those who forget how divisive national energy policy can be.

Fortunately Energy East has some allies, particularly in New Brunswick. That may make a difference. And the decision of Canadians on October 19, 2015 to grant Justin Trudeau's Liberals a majority government representing 184 of 338 seats in the House of Commons may signal a greater commitment to a national energy policy.

Crude-by-rail Takes Off

The inability to build pipelines in Canada and the United States has led to a rapid increase in moving crude-by-rail. The oil starts in one of two sources: the oil sands in Fort McMurray, Northern Alberta, or the shale deposits in the Bakken formation, North Dakota.

The Canadian dependence on oil trains results from the fact that the US$6 billion Keystone XL pipeline has been blocked since 2008, and the more recent Enbridge Northern Gateway, an US$8 billion dollar investment to move oil sands crude to Kitimat, British Columbia, and then to Asia, is nowhere after six years. The result is a massive growth in crude-by-rail traffic. In Canada, crude-by-rail exports have grown from 20,000 barrels a day in 2012 to 170,000 at the end of 2014 – an 800 per cent increase in two years.

In the process, producers discovered some important features about crude-by-rail economics. Rail transport costs more than pipeline, but rail offers a larger network: there are 57,000 miles of pipeline in North America but there are 140,000 miles of rail, and virtually every refinery in North America has a rail line coming to it. That is not the case with pipelines, and pipelines like long-term commitments – not so crude-by-rail. The greater flexibility by rail allows refiners to take advantage of spot market pricing.

But there is a real downside to crude-by-rail. In 2013 and 2014, there were six crude train accidents. In 2013, there was Lac Mégantic, Quebec in July; Aliceville Alabama in November; and Casselton, North Dakota in December. In 2014, there was Plaster Rock, New Brunswick in January; Lynchburg, Virginia in April; and Wadena Saskatchewan in October.

By far the greatest wake-up call came from Lac-Mégantic on 5 July 2013. On that day, 72 cars carrying North Dakota crude were handed off by the Canadian Pacific Railway in Montréal to a short-line railway called the Montréal, Maine and Atlantic Railway to take the crude to the Irving refinery at Saint John, New Brunswick. Sixty-three of the 72 cars derailed in Lac-Mégantic, 30 miles north of the US border, killing 47 people and causing hundreds of millions of dollars in damage.

The Lac-Mégantic accident also led to class actions in Québec and Illinois. The defendants include: the two companies that produced the oil; the two railroads (the Canadian Pacific Railroad and the Montréal, Maine and Atlantic Railroad); the four companies that manufactured and leased the tank cars; the Irving refinery in Saint John, New Brunswick; and the three companies that owned the crude.

The litigation also involves the Canadian regulator, Transport Canada, and the Government of Canada. Both the regulator and the Government of Canada were accused of negligence. The regulator was accused on the ground that they were aware of the dubious history of the MMA, including its poor safety record which included multiple violations. The company apparently had 129 accidents going back to 2003 and the poorest safety record of any rail- road in North America. The Government of Canada's liability was based on the ground that it had delegated its responsibility to a regulator that was negligent

in the performance of its duties and statutory mandate.

The year 2015 finally saw the end of this saga. Both the American and Canadian governments approved new safety standards on railcars and increased insurance requirements for carriers. Courts in Canada and the United States also approved a class action settlement that saw some $446 million in compensation paid. The settling parties included Irving Oil in New Brunswick, World Fuel Services which sold the crude to Irving, Conoco Phillips, and the makers of the tank cars.

Of the $ 446 million settlement some $ 111 million went to the families of those killed, and $200 million to the Québec government and the town of Lac Mégantic. The rest went to other claims and legal fees. The only party that has not settled is the Canadian Pacific Railroad that now faces additional litigation from the province of Québec on the basis that the company was negligent in handing over the tank cars to Montréal, Main, and Atlantic Railroad which is now bankrupt. Litigation by the CPR still continues in the Federal Court of Appeal.

The Drive to Renewables

The past five years have seen a dramatic increase in the amount of electricity generated from renewable resources, principally wind and solar. Figures just released by the Federal Energy Regulatory Commission indicate that renewables now account 17 per cent of operating generating capacity in the United States but over 65 per cent of new capacity. Goals and mandates for renewable energy continue to grow. The goal is 100 per cent in Hawaii by 2045, 75 per cent in Vermont by 2032, 50 per cent in California by 2030, and 80 per cent in Germany by 2050.

In November the Ontario IESO selected nine new energy storage projects through a RFP for 16.75 MW of capacity. This marked the completion of a procurement of 50 MW of energy story called for in the 2013 LTEP.

Production from both wind and solar is unpredictable and that has placed a reliance on investment in new storage facilities. Historically storage has provided backup for commercial and industrial operations. Today it is crucial to the integration of renewables. In a world of increased renewables, storage is a key reliability asset. Many government agencies are now establishing programs to encourage procurement by both utilities and non-utilities.

The wind and solar investment has been driven by government incentive programmes. In Canada, that was largely the province of Ontario, which established a widespread feed in tariff (FIT) programme under the *Green Energy and Green Economy Act, 2009*.[1] Under the FIT contracts, the government offered a 20-year supply contract at prices substantially above market. To further complicate matters, the Ontario programme had a substantial minimum domestic content requirement. That requirement was successfully challenged by Japan and Europe in WTO cases requiring amendments to the programme.[2]

Another challenge was the action taken by the Government of Ontario to cancel some of these programmes. The province discovered there was excess capacity on the network at night when there was less demand for the energy and wind blows the hardest. As a result, the province ended up paying American customers to take energy off the grid. The 2011 cancellation of all offshore wind projects and the 2009 decision to drop the rates for ground mounted solar from 80 cents to 59 cents per kilowatt hour led to further disputes.[3] At year end there were two NAFTA tribunals hearing claims involving cancelled Ontario renewable projects and one action in the Ontario courts concerning another cancellation.

The biggest renewable story of the year may be the Alberta government announcement on November 22, 2015 to phase out its coal-fired power plants by 2030 and replace two thirds of the coal fired electricity capacity with renewable energy.

The province's Advisory Panel recommended that this be done while retaining Alberta's

1 *Green Energy and Green Economy Act*, 2009, SO 2009, c 12, Sched A.
2 Canada— Measures Relating to the Feed In Tariff Program (Complaint by European Union) (2014), WTO Doc WT/DS 426 (Appellate Body Report).
3 *Trilluim Wind Power Corp v Ontario*, 2013 ONCA 6083; *Capital Solar Power Corp v Ontario Power Generation, 2015 ONSC 2116; Carhoun and Sons v Canada*, 2015 BCCA 163.

competitive electricity market structure. The Panel proposed a clean energy call with the Alberta government providing long-term revenue certainty for new renewable power. This would be an open competitive request for proposals with the government committing to a schedule of annual financing to achieve 350 MW of new capacity by 2018. The government plans to purchase renewable energy credits or REC's from the projects under long-term contracts.

The other challenge in this new policy is how to determine the compensation for the coal-fired plants that will be removed from service prior to their planed end-of-life. The Alberta IESO-plans to establish a Panel of facilitators to determine the amount of stranded assets and the relevant compensation.

The New Regulatory Challenges

As energy regulators look forward to 2016 they can expect four major challenges: the allocation of stranded asset costs between customer and utilities, an increase in market manipulation hearings, and the challenge of regulating customer-owned generation and carbon.

The Allocation of Stranded Asset Costs

The last two years have seen a number of decisions by both regulators and courts that have dramatically changed the regulatory landscape in Canada. They all deal with a very simple question. Who bears the cost of stranded assets? Is it the ratepayer or the shareholder? At the end of the day they all came to the same conclusion: stranded asset costs are for the account the shareholder.

The controversy really began with the Supreme Court of Canada *Stores Block* decision in 2006.[4] That case established two important principles. First, the customer has no ownership interest in the assets of the utility. Second, the regulator has no authority or jurisdiction to grant the ratepayer any part of the proceeds from the sale of an asset.

It follows by extension that the regulator has no authority to penalize the ratepayer if the asset declines in value. Put differently, the costs of stranded assets are for the account of the shareholder not the ratepayer. It took nine years of litigation following *Stores Block* to confirm that point.

Stores Block may be the beginning of the end. The end came between 2013 and 2015. In 2013 the NEB delivered its *TransCanada Pipelines* decision[5] followed by the Alberta Utility Commission's UAD decision[6] and the confirmation of that decision in 2015 by the Alberta Court of Appeal decision in *Fortis Alberta.*[7]

The prudence doctrine which was challenged in both Alberta and Ontario[8] came before the Supreme Court of Canada in 2015. Both cases concerned the long accepted prudence doctrine which held that an examination of prudence could not be based on hindsight and furthermore, there is a presumption of prudence.

The Supreme Court rejected that notion concluding that the prudence principles could not be found in the statute.[9] In short utilities could not rely on those principles to support their argument that they were entitled to be compensated for the cost of stranded assets. Utilities had argued that past investments were prudent decisions and accordingly they were entitled to recover the cost of them throughout their life. The fact that the assets turned out not to be useful could only be determined with hindsight.

That principle the Supreme Court said was simply an urban myth and not binding law. It was simply a convention that regulators had adopted over the years; a convention that regulators could change any time they wished. Which is exactly what regulators did in both Ontario and Alberta.

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4 *ATCO Gas and Pipelines Ltd v Alberta (Energy and Utilities Board),* 2006 SCC 4, [2006] 1 SCR 140 [*Stores Block*].
5 *Re TransCanada Pipelines Limited* (Reasons for Decision) (March 2013), RH-003-2011 *(*National Energy Board).
6 Re *Alberta Utilities Commission Utility Asset Disposition* (Decision) (November 2013), 2013 -417 (Alberta Utilities Commission).
7 *FortisAlberta Inc v Alberta Utilities Commission,* 2015 ABCA 295.
8 *Power Workers Union (Canadian Union of Public Employees, Local 1000) v Ontario (Energy Board),* 2013 ONCA 359, 116 OR (3d) 793); *ATCO Gas and Pipeline Ltd v Alberta (Utilities Commission),* 2013 ABCA 310, 556 AR 376.
9 *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission),* 2015 SCC 45;*Ontario Energy Board v Ontario Power Generation Inc,* 2015 SCC 44.

The Supreme Court's decision in *Ontario Power Generation*[10] involved three important issues. The first was the discretion energy regulators have in setting just and reasonable rates. The second was the right of tribunals to participate in appeals of their own decisions. The third issue which is often overlooked was what is the scope and binding nature (if any) of public utility law.

The majority in Ontario Power Generation reaffirmed the broad discretion of energy regulators to set rates using the tools and methodologies that they consider appropriate the circumstances. In reality this was no great surprise. That movement began with the three decisions of the Supreme Court of Canada in 2011 involving *Labrador Nurses Union,*[11] *Alberta Teachers*[12] and *Nor Man Regional Health.*[13]

The second issue may however have far-reaching and practical implications. The Court rejected the argument of OPG and its unions that the input of tribunals in appeals from their decision should be largely restricted to addressing jurisdictional issues and providing clarifications. The Majority adopted a more flexible approach in determining the scope of tribunals appeals including such factors as whether the appeal would be otherwise unopposed and whether the tribunal's original ruling was adjudicative or regulatory in nature. The Majority concluded that the OEB was not acting improperly defending its own decision given that the decision was regulatory in nature and practically speaking no one else was likely to defend it.

The third issue is equally interesting. The prudence principle is a time-honored concept of public utility law first established by the US Supreme Court in 1923 by Justice Brandeis in *Southwestern Bell.*[14] Canadian courts and regulators have adopted the principle over the years including most recently the 2006 decision of the Ontario Court of Appeal in *Enbridge*,[15] the 2004 decision of the Alberta Court of Appeal in *Atco Electric*[16] and the decision the Federal Court of Appeal in the same year in *TransCanada.*[17]

Some practitioners have come to believe that the principles of public utility law such as the prudence doctrine, the obligation not to discriminate unjustly between customers,[18] not to set rates retroactively,[19] not to refuse to serve a customer[20] or refuse access to essential facilities[21] and not to contract for rates different than the tariff rate[22] are a form of common law. But we forgot, as Justice Rothstein reminded us, that regulators are not courts and common law

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10 *Ontario (Energy Board) v Ontario Power Generation Inc,* 2015 SCC 44.
11 *Newfoundland and Labrador Nurses Union v Newfoundland and Labrador Treasury Board,* 2011 SCC 62, [2011] 3 SCR 708.
12 *Alberta v Alberta Teachers Association,* 2011 SCC 61, [2011] 3 SCR 654.
13 *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals,* 2011 SCC 59, [2011] 3 SCR 616.
14 *Southwestern Bell Telephone Company v Public Service Commission,*262 US 276 (1923).
15 *Enbridge Gas Distribution Inc v Ontario Energy Board,* [2006] OJ No 1355 (QL), 210 OAC 4 (Ont CA) [*Enbridge*].
16 *ATCO Electric Limited v Alberta Energy and Utilities Board,* 2004 ABCA 215 [*ATCO Electric*].
17 TransCanada Pipelines Limited v National Energy Board, 2004 FCA 149 [*TransCanada*].
18 *Red Deer v Western General Electric,* (1910) 3 Alta LR 145; *Bell Telephone v Harding Communications* [1979] 1 SCR 395; *St. Lawrence Redering v Cornwell,* [1951] OR 669; *Epcor Generation Inc v Alberta (Utilities Board)*, 2003 ABCA 374; *Energy Commission,* (1978) 87 DRL (3d) 727; *Brant County Power v Ontario (Energy Board),* EB-2009-0065 (10 August 2010) [*Brant County Power*]; *Apotex Inc v Canada (Attorney General),* [1994] 3 SCR 1100 [*Apotex*]; *Portland General Exchange Inc*, 51 FERC ¶61,108 (1990); *United States v. Illinois Central Railroad,,* 263 US 515,524 (1924).
19 *Northwestern Utilities Ltd v Edmonton* (City), [1979] 1 SCR 684; *Bell Canada v Canada Radio Television and Telecommunications Commission,* [1989] SCJ No 68 at 708; *Brosseau v Alberta (Securities Commission),* [1989] 1 SCR 301; *EuroCan Pulp and Paper v British Columbia Energy Commission,* (1978) 87 DLR (3d) 727; *Brant County Power*, *supra* note 18; *Apotex, supra* note *18*; *Chastain v British Columbia Hydro,* (1972) 32 DRL (3d) 443 [*Chastain*]; *Challenge Communications Ltd v Bell Canada,* [1979] 1 FC 857 [*Challenge Communications*]; *Associated Gas Distribs v FERC*, 898 F2d 809 (DC Cir 1990); *San Diego Gas & Elect Co v Sellers of Energy*, 127 FERC ¶ 61,037 (2009).
20 *Chastain, supra* note 19; *Challenge Communications, supra* note 19; *New York ex rel NY& Queens Gas Co v McCall*, 245 US 345 (1917) 35 n62; *Pennsylvania Water & Power Co v Consolidated Gas, Elec.Light & Power Co of Balt*, 184 F2d 552 (4th Cir 1950).
21 *CNCP Telecommunications, Interconnection with Bell Canada, Telecom Decision*, CRTC 79-11, 5 CRT 177 at 274 (17 May 1979); *Otter Tail Power Co v US*, 410 US 366 (1973); RE *Canada Cable Television Assoc* (Decision) (7 March 2005), RP 2003-0249 (Ontario Energy Board).
22 *Keogh v Chicago & Northwestern Ry Co,* 260 US 156 (1922); *Square D Co v Niagara Frontier Tariff Bureau*, 446 US 409 (1986).

is a court concept. Regulators live in a different world, period. They are administrative tribunals and any principles binding on them must be found in the statute. There was nothing in the statutes governing the OEB that stated that the regulator cannot use hindsight in determining prudence or that there was a presumption of prudence. As a result, this so-called concept of public utility law was not binding.

Of course that doesn't mean that there are not some binding principles. *Stores Block*[23] is a good example. The issue there was property law. It is also a principle of public utility law that ratepayers have no property interest in the assets of utility. However, the Supreme Court of Canada there held that that principle was binding on regulators because it was a fundamental property law concept.

Justice Rothstein may have left town but the Supreme Court still sits in Ottawa. And an application for leave to appeal is currently before that court in connection with the Alberta Court of Appeal decision in *Fortis Alberta*. The court's decisions in *OPG* and *Atco Pensions* were released one week after *Fortis Alberta*. So the prudence doctrine and the scope of the principles binding on regulators may come back to that court shortly. The decision on the application for leave is expected by the end of June, 2016.

Regulating Market Manipulation

On July 27, 2015 the Alberta Utilities Commission released a major Canadian decision involving market manipulation.[24] The 217 page decision followed a three year investigation and a three-week hearing. The Alberta decision is a major step forward in this branch of energy regulation.

The Commission used a two phase proceeding. Phase One dealt with the substantive allegations. Phase Two dealt with the appropriate administrative penalties.

The Commission found that TransAlta intentionally took certain coal-fired generating units off-line for repairs during periods of high demand. The Alberta Market Surveillance Administrator (MSA) argued that TransAlta could have made those repairs during periods of lower demand but instead the company elected to drive up electricity prices by reducing supply during peak hours. The Commission accepted that position.

The MSA also claimed that two TransAlta traders used non public information to trade in the Alberta electricity market. The Commission found however that that the first trader took all reasonable steps to avoid breaches by obtaining direction from senior TransAlta management and concluded that the trader had established a defense of due diligence. In the case of the second trader the Commission concluded the MSA had failed to demonstrate that the trader had used non public records during the relevant period.

Under the Consent Order[25] TransAlta agreed to pay in excess of $56 million consisting of an administrative penalty of $51.9 million and, $4.3 million in MSA costs. The administrative penalty of $51.9 million consisted of two components. The first was disgorgement of $26.9. The second was an administrative monetary penalty of $25 million.

The decision is a textbook on the principles involved in regulating market manipulation. Like the decision on liability, the decision on the Consent Order explains in detail the jurisdiction of the Commission to accept the Consent Order.

This is a growing part of energy regulation. In recent years Ontario has also moved aggressively to enforce breaches of the Market Rules. A number of settlements have been reached although few are public. As energy markets trend toward more competitive solutions we will see more of these cases. The Alberta decision is a welcome example of timely and first class legal decision-making to be appreciated regardless of which side is viewing it.

Customer-owned Generation: Is Gas the New Electric?

Electricity sales peaked nearly six years ago throughout Canada. Per capita consumption

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23 *Supra,* note 4.
24 *Market Surveillance Administrator v TransAlta Corporation* (Decision) (July 2015), 3110-D0I-2015 (Alberta Utilities Commission).
25 *Market Surveillance Administrator v Transalta Corporation* (Request for Consent Order) (October 2015), 3110-D03-2015 (Alberta Utilities Commission).

has been stagnant for over a decade. In part this is a reaction to higher prices. It is also a reaction to widespread conservation and energy efficiency programs. But increasingly it is a function of new options customers have to generate their own electricity at prices less than grid cost.

Electricity distributors are particularly vulnerable. Distributors exist to distribute electricity from a central generator to the customer's premise. If a customer can generate their own electricity, they do not need a distributor. Or at least not a full time distributor.

A new wave of technology is unfolding that will soon allow many electricity customers to generate their own electricity. The new technology threat is Micro CHP. This technology produces both heat and power. In fact the electricity is a free by product. A 1 kW CHP unit can provide heat and power for the average residential home. Of course the residential household will be the last market segment to convert. Before then will come micro grids for office buildings, universities and hospitals. This will be a competitive market with service supplied by both regulated and unregulated companies. The technology runs on gas, and gas is cheap. Gas may be the new electric. The California Commission recently granted San Diego Gas and Electric (SOCAL) the right to provide CHP service to hospitals, universities, and prisons as a regulated service.[26] While the service involves the supply of both heat and power, the Commission ruled that SOCAL was not distributing electricity because the CHP facility was located on or near the customer premise and the electricity was not being resold.

The reason the customers want to leave the utility is at that there are lower cost alternatives. The most expensive part of electricity service in major markets is not the distribution services that distributors provide. It is the cost of the commodity - the cost of generation. Customers engaged in self-generation are simply trying to buy down the commodity cost.

There are four interesting questions:

- Will customer generation become community generation?
- Who will be the providers of private power systems?
- Will local generators get access to LDC local lines?
- What is the role of the regulator?

Earlier in this editorial we suggested that the major regulatory challenge in 2016 will involve the determination of who bears stranded asset costs, the customer or the utility. Customer-owned generation may present an even greater regulatory challenge. By the end of 2016 most experts would agree that:

- The distinction between gas and electricity will start to disappear as will the distinction between generation and distribution.
- 20 per cent of the electricity in major markets will be generated locally.
- Customers will move to new lower cost local generation with or without the assistance of the local electricity distributor. If they have to string their own wires, they will.
- Local generation will become a highly competitive market. Competitors will include both electricity and gas distributors.
- Co-Gen systems will migrate from customer premise to communities of interest or micro grids. Hospitals and universities will lead the movement.
- Regulators will be forced to recognise the cost savings offered by the new technology and allow both regulated and unregulated companies to participate in the new competitive market.

Regulating Carbon

Canadian energy regulators will, as suggested above, face a serious challenges as they navigate through new rules from the courts on the

26 *Re Application of Southern California Gas Company to Establish a Distributed Energy Reserve Tariff* (Decision) (October 2015), A 14-08-007 (California Public Utilities Commission).

allocation of stranded asset costs, new market manipulation prosecutions, and the regulatory challenges raised by customer-owned generation. There is one further challenge that energy regulators will face in 2016 – the new carbon tax regime that is developing across Canada.

To date Québec and British Columbia have been the leaders but 2015 saw important initiatives in both Ontario and Alberta.

Alberta will be facing an economy wide carbon price of $30 per ton of carbon beginning at $20 per ton in January 2017 and moving to $30 per ton January 2018. The price will be adjusted to keep pace with price increases in other jurisdictions. The carbon price (the word tax is not popular in Alberta) will be revenue neutral with funds generated to be reinvested into clean research and technology.

There will be a special 100 Mt of carbon limit on oil sands emissions compared to the current level of 70 Mt.

The Advisory Panel in Alberta described the Alberta proposal as being similar to programs in Québec and California and indicated that distributors of transportation and heating fuels would be required to acquire emission permits to reflect the emissions their products create when consumed. That will likely create some significant work for the Alberta Energy Regulator.

In Alberta the Advisory Panel recommends separate rules for large industrial facilities which produce over a hundred thousand tons a year. All emissions from those facilities will be priced but the facilities will be allocated credits in proportion to their output.

In Ontario the Minister of Climate Change announced in April 2015 that his government will develop a cap and trade system linking with Québec and California through the WCI. Ontario intends to finalize the regulations for implementation in 2017 and is expected to issue draft regulations in the first quarter of 2016. The Ontario Energy Board is expected to hold a consultation process which will specify in greater detail on the role of Ontario gas companies in this initiative.

As this Year in Review went to press the federal government announced that it hopes to set a minimum carbon price of at least $15 per ton for all provinces. The theory is that this floor price would encourage provinces that don't have any tax to establish their own carbon price in order to collect the revenue.

The national minimum price being proposed is based on the price recently established by the WCI which now includes California and Québec. The minimum price auctioned off last year by the WCI was just above $15 per ton. That price is scheduled to increase to $20 per ton by 2020. The $15 per ton price contributes about 3.5 cents a liter to the price of gasoline.

Ontario is expected to join Québec and California in the WCI next year. British Columbia currently leads Canada with a carbon tax of $30 per ton. Alberta will introduce a $20 per ton carbon price next year. That is expected to increase to $30 a ton by 2018.

Most economists believe the $15 per ton price is not high enough to reduce greenhouse gases by the stated goal-a 30 per cent reduction from 2005 levels by 2030. Some economists claim that the price necessary to achieve the 2030 targets is closer to $280 per ton. The battle continues to unfold but one thing is clear- the direction of the Canadian federal government has changed significantly.

In the end, carbon policy will be about exceptions. There will be no bright lines but Ontario will lead the way.

Under the Province's new plan, 102 large industrial firms will get free permits until 2017. This, as you might guess, is to allow them to "remain competitive."

Fuel wholesalers, however, must purchase allowances for every litre of gasoline and cubic meter of natural gas they sell. The electricity sector, however, will get free allowances. The reason is- Ontario consumers are already paying for high cost wind and solar generation in an effort to reduce carbon. ■

2015 DEVELOPMENTS IN ADMINISTRATIVE LAW RELEVANT TO ENERGY LAW AND REGULATION[1]

*David J. Mullan**

Introduction

2015 was a banner year for the judicial elaboration of principles of Administrative Law in Energy Law and Regulation settings. A number of these developments have been discussed already in the pages of the *Energy Regulation Quarterly.* Nigel Bankes provided a mid-year state of the union report on the multifarious pipeline cases determined by or making their way through the Federal Court.[2] Kemm Yates and Sarah Nykolaishen followed that up with an assessment of the implementation of the 2012 federal procedural reforms to National Energy Board and Joint Review Board hearings on applications for certificates of public convenience and necessity for interprovincial and international pipelines.[3] This came in the wake of the Supreme Court of Canada's denial of an application for leave to appeal the rulings of the National Energy Board rejecting *Charter* challenges to provisions respecting participatory rights in the new procedures,[4] though the article ranges much more widely than that. As well, Alan Ross, Michael Marion and Michael Massicotte discussed[5] *Ernst v Alberta Energy Regulator*, a case involving claims for damages for regulatory negligence and violation of section 2(b) ("freedom of expression") of the *Charter* resulting from the AER's handling of complaints against EnCana respecting the company's alleged damage to the plaintiff's water supply. In 2013, the Alberta Court of Queen's Bench had struck out Ernst's claims against the AER,[6] and this had been affirmed by the Alberta Court of Appeal.[7] However, Ernst applied for and obtained leave to appeal to the Supreme Court of Canada on the *Charter* ground, a claim stemming from the AER's refusal to accept further communications from her.[8] For the most part, I have avoided the temptation to go over the ground covered already in those

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1 Parts of this review article draw on a paper, "The Year in Review – Recent Developments in Administrative Law, 2014-15" that I presented for the Continuing Legal Education Society of British Columbia publication, *Administrative Law Conference 2015* (Vancouver, BC, November 2015).

2 Nigel Bankes, "Pipelines, the National Energy Board and the Federal Court" (2015), 3 *ERQ 59.*

3 C. Kemm Yeates, QC and Sarah Nykolaishen, "National Energy Board Procedural Reform – Round 2 Goes to the Regulator" (2015), 3 *ERQ 37.*

4 *Quarmby v Canada (Attorney General),* [2015] SCCA No 113 (QL), application for leave to appeal dismissed without reasons, September 10, 2015.

5 Allan L. Ross, Michael Marion and Michael Massicotte, "Supreme Court of Canada Will Hear "Charter Damages" Case Against Alberta's Energy Regulator" (2015), 3 ERQ 45 . See also Jennifer Koshan, "Leave to Appeal Granted in *Ernst v Alberta Energy Regulator*" April 30, 2015, online: *ABlawg.ca* <http://ablawg.ca/2015/04/30/leave-to-appeal-granted-in-ernst-v-alberta-energy-regulator/>.

6 *Ernst v EnCana Corporation*, 2013 ABQB 537, 570 AR 317.

7 *Ernst v Alberta (Energy Resources Conservation Board)*, 2014 ABCA 285, 580 AR 341.

8 Leave to appeal granted (30 April 2015) and appeal heard (12 January 2016) and currently under reserve in the Supreme Court of Canada: [2014] SCCA No 497.

articles.[9]

Rather, as last year, I decided to confine my review to three topics involving the intersection between Energy Law and Regulation and the general principles of Administrative Law and judicial review. Those three topics are regulator participation in judicial review applications and statutory appeals challenging their decisions, the standard of review applicable in judicial review applications and statutory appeals involving decisions of energy regulators, and the role of energy regulators in the effectuation of the constitutional right of aboriginal peoples to consultation by the Crown and, where appropriate, accommodation with respect to proposals affecting their rights and as yet unresolved claims.

Energy Regulator Participation in Judicial Review Applications or Statutory Appeals from their Decisions

For nearly forty years, the issue of the extent to which public authorities can participate in judicial review of or statutory appeals from their decisions, and subsequent appeals from first instance court determinations has been a matter of continuing controversy in Canada. Indeed, it is an issue that has particular resonance in the world of energy regulation largely because the foundational Supreme Court of Canada authority involved review of a decision of the then Alberta Public Utilities Board.

In 1979, in *Northwestern Utilities Ltd v Edmonton (City),*[10] Estey J, delivering the judgment of the Supreme Court, not only adopted a largely categorical approach to this question but also restricted the permissible categories of participation to very limited grounds of review. Even though the Board was permitted by statute to be heard on the argument of any appeal, as is the case today with the Alberta Utilities Commission,[11] the statute did not confer party status on the Board in the fullest sense of that term. This led Estey J to impose limitations on the Board's right to be heard on appeals from its decisions. It could participate only to the extent of engaging with jurisdictional issues (in both the preliminary and collateral guises of the 1970's rubric of jurisdiction), and, where necessary, to provide the reviewing court with an explanation of the record on which the judicial review or appeal was being conducted. For these purposes, jurisdictional questions did not include issues of natural justice (once again in terms of the rubric of the day) and certainly not intra-jurisdictional questions of law or the substantive merits of any determination on the facts.

However, at the very time that Estey J was writing his judgment, the world of Canadian judicial review was changing.[12] Deference, as exemplified by the patent unreasonableness

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9 And, of course, there are other topics that could have been discussed but have been omitted for reasons of space. Thus, for example, the new federal Government's letter to those appointed to boards, agencies and tribunals in the dying days of the previous Government requesting their voluntary resignation (and including one permanent member of the National Energy Board) raises serious issues of independence particularly in the case of appointees to adjudicative tribunals and regulatory agencies. See Bruce Cheadle, "Tory appointees to face grilling before parliamentary committee", *National Post, December 31, 2015 and Shawn McCarthy, "Liberals unlikely to dislodge NEB appointees before 2020", Globe and Mail*, January 2, 2016. Concerns about a lack of independence also surfaced in the Trans Mountain Pipeline hearings. The Pro Information Pro Environment United Peoples Network (PIPE UP) moved for various forms of relief before the hearing panel (including a quashing of the entire proceedings) on the basis of the appointment to the Board of another new pemanent member who prior to his appointment had provided written evidence to the Board on behalf of the proponent. Despite the fact that the panel had struck this evidence from the record, PIPE UP alleged that the appointment of this new member had tainted the process as had the alleged involvement of the non-sitting Chair of the NEB in that appointment. The public interest group also challenged the composition of the panel alleging that a three person panel which included two temporary members lacked sufficient independence. On December 7, 2015, the NEB rejected all of these challenges: Hearing Order OH-001-2014, *Trans Mountain Pipeline ULC (Trans Mountain), Application for the Trans Mountain Expansion Project (Project), Pro Information Pro Environment United People Network (PIPE UP) – Notice of motion filed 13 October 2015*, Ruling 101. For an earlier detailed examination of the ramifications of the appointment of the Board member who had provided evidence in support of the proponent, see Kirk Lambrecht, QC, "The Governor in Council Occasions Change and Delay in the National Energy Board's Review of the Trans Mountain Pipeline Expansion Project: The Curious Case of PC 2015-1137" 15 September 2015, *ABlawg.ca*, online: ABlawg <http://ablawg.ca/2015/09/15/the-governor-in-council-occasions-change-and-delay-in-the-national-energy-boards-review-of-the-trans-mountain-pipeline-expansion-project-the-curious-case-of-pc-2015-1137/>.

10 *Northwestern Utilities Ltd v Edmonton (City)*, [1979] 1 SCR 684.

11 *Alberta Utilities Commission Act*, SA 2007, c A-37.2, s 29(12): "The Commission is entitled to be represented, by counsel or otherwise, on the argument of an appeal." There is a similar provision in the *National Energy Board Act*, RSC 1985, c N-7, the only difference being the substitution of "heard" for "represented." However, this provision does not cover National Energy reports provided for under ss 52 and 53 (pipeline certificate applications) and ss 29 and 30 (environmental assessments of designated projects) of the *Environmental Assessment Act, 2012*, SC 2012, c 19.

12 *CUPE v New Brunswick Liquor,* [1979] 2 SCR 227, was decided just under six months after *Northwestern Utilities.*

standard of review, was becoming a critical part of Canadian judicial review principles. This gave rise to questions as to the role of the decision-maker when its decision was being challenged on the basis of patent unreasonableness. Five years after *Northwestern Utilities, the Court, in Bibeault v McCaffrey,*[13] allowed the Quebec Labour Court participatory rights in contesting a patent unreasonableness challenge to its interpretation of a statutory provision conferring discretion over participatory rights at its hearings. Subsequently, in *CAIMAW, Local 14 v Paccar of Canada Ltd,*[14] La Forest J, in what were technically *obiter dicta,*[15] elaborated on the permissible role of tribunals in the context of the judicial review or statutory appeal of their decisions. They could be heard on what was the appropriate standard and also in justification of their decision as not patently unreasonable, though not to the extent of arguing that it was correct, as well as fulfilling the explanatory role identified in *Northwestern Utilities.*

However, in Alberta especially, Northwestern Utilities continued to cast a long shadow. More specifically, the view seemed to be that, as the Supreme Court had never repudiated it specifically, it still had binding force. The 2008 judgment of the Court of Appeal in *Alberta (Human Rights Commission) v Brewer,*[16] provides a graphic example. There, the Court explained away La Forest J's judgment in *Paccar* as not supported on this point by a majority of the Supreme Court, and then went on to hold that tribunals were not entitled to defend the reasonableness of their decisions on judicial review. Indeed, the Court also questioned whether a tribunal was entitled to even address the legal issue of what was the appropriate standard of review to apply to the various substantive issues posed by the judicial review application.

However, three years later, in *Leon's Furniture Ltd v Alberta (Information and Privacy Commissioner),*[17] it appeared as though that panel[18] of the Court of Appeal had taken a much less categorical approach to the issue of tribunal standing and one that was much more multi-dimensional and fluid. Slatter JA, delivering the judgment of a unanimous Court of Appeal, seemed prepared to downgrade *Northwestern Utilities.* It was no longer to be applied strictly but rather treated as a "source of fundamental considerations."[19] This movement from a categorical approach to a multi-factorial approach paralleled what was occurring in a number of other Courts of Appeal across the country.[20]

Any comfort level produced by this judgment did not last long. In 2013, Slatter JA, again speaking for a unanimous Court of Appeal, in *Atco Gas and Pipelines Ltd v Alberta Utilities Commission,*[21] revisited this question in what was effectively a footnote to a judgment on an appeal from the Commission. Referring to both *Northwestern Utilities* and *Leon's Furniture,* he asserted that the Commission's submissions should have been "limited in tone and **content** [emphasis added]."[22] Without providing detail, he then chastised the Commission for "argu[ing] the merits of the decision under appeal",[23] particularly in a case where the Utilities Consumer Advocate was participating and providing "the necessary adversarial

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13 *Bibeault v McCaffrey*, [1984] 1 SCR 176, at p 191.
14 *CAIMAW v Paccar of Canada Ltd*, [1989] 2 SCR 983, at para 40.
15 La Forest J delivered the judgment of himself and Dickson CJC. The other majority judges did not express any opinion on the issue of tribunal standing. However, in dissent, L'Heureux-Dubé J, expressed agreement with this aspect of the La Forest judgment: at para 64. McIntyre J took no part in the decision meaning that there was not a majority of the panel of six in support of the La Forest position.
16 *Alberta (Human Rights Commission) v Brewer*, 2008 ABCA 160, 432 AR 188 [*Brewer*].
17 *Leon's Furniture Ltd v Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94, 502 AR 110, at paras 16-30 [*Leon's Furniture*].
18 The panel in *Brewer* was Côté, Conrad and Paperny JJA while the panel in *Leon's Furniture* was Conrad, Berger and Slatter JJA.
19 *Leon's Furniture, supra*note 17 at para 28, citing *Children's Lawyer for Ontario v Goodis* (2005), 75 OR (3d) 309 (CA), at para 35 [*Children's Lawyer*].
20 Among the principal authorities in this movement towards a factorial/discretionary approach were Robertson JA in *United Brotherhood of Carpenters and Joiners of America, Local 1386 v Bransen Construction Ltd.*, 2002 NBCA 27, 249 NBR (2d) 93, Goudge JA in *Children's Lawyer*, *supra* note 19, and Stratas JA in *Canada (Attorney General) v Quadrini*, 2010 FCA 246, [2012] 2 FCR 3 [*Quadrini*].
21 *Atco Gas and Pipelines Ltd v Alberta Utilities Commission*, 2013 ABCA 310, 556 AR 736, at paras 12-13 (The panel in this case was Costigan, Martin and Slatter JJA).
22 *Ibid* at para 12.
23 *Ibid.*

context." Indeed, he even went so far[24] as to suggest that the Commission's statutory immunity from the award of costs[25] would not apply where deterrent costs and administrative penalties were appropriate under the Alberta Rules of Court.

When leave to appeal to the Supreme Court was obtained in *ATCO* and the Commission continued as an active participant notwithstanding the presence of the Utilities Consumer Advocate, there was some expectation that the Supreme Court might address the issue of tribunal standing particularly given the admonitions issued by Slatter JA.[26] In contrast, in neither the Ontario Divisional Court nor the Court of Appeal in a parallel case argued before the Supreme Court on the same day, *Power Workers' Union, Canadian Union of Public Employees, Local 1000 v Ontario (Energy Board),*[27] was anything mentioned in the judgments below about the extent of the Board's participation in defence of its own decision. However, when the matter reached the Supreme Court with the Board as appellant, the respondents raised issues as to the extent of the Board's justifications of its original decision. ATCO's factum expressed no such concerns.

Even so, it was surprising that, in *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission),*[28] the Supreme Court had nothing to say about the Commission's participation as respondents to the appeal. Indeed, in one sense, it might have been thought that *ATCO* was the more problematic of the two on the issue of tribunal standing, given the Utility Consumer Advocate's presence as a party to the appeal. In contrast, in none of the three courts in the parallel case was there any other party defending the position of the Ontario Energy Board. Be that as it may, in *Ontario (Energy Board) v Ontario Power Generation Inc,*[29] Rothstein J, delivering the judgment of the majority (with the dissenting judge, Abella J not saying anything about the issue), dealt extensively with the issue of tribunal and agency participation in statutory appeals and applications for judicial review and the extent to which they can defend their decisions.[30]

In confronting *Northwestern Utilities,* Rothstein J reiterated the concerns that animated Estey J's categorical approach to the issue of tribunal participation, concerns that he did not see as in any way rejected by the Courts of Appeal that had moved away from the categorical approach.[31] What was at stake was balancing preservation of a tribunal or agency's adjudicative neutrality (as potentially compromised by aggressive tribunal defence of the merits of the decision under review[32]) against the importance of the reviewing or appellate court having the benefit of the best defence of the outcome reached by that tribunal or agency as well as access to "useful and important information and analysis"[33] not otherwise apparent on the record. However, Rothstein J endorsed[34] the discretionary

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24 *Ibid* at para 13.

25 *Alberta Utilities Commission Act*, SA 2007, c A-37.2, s 29(13): "Neither the Commission nor any member of the Commission is in any case liable for costs by reason or in respect of an appeal or application."

26 However, at the hearing of the case before the Supreme Court, the Utilities Consumer Advocate's counsel preceded the Commission. In its factum, at para. 22, the Commission characterized its submissions as confined "to addressing the standard of review and to showing that the Commission had acted within its core rate-setting function when it considered the Appellant's submissions before it, and had given reasoned, rational rejections to each of the arguments and that its approach was a reasonable approach for the Commission to take."'

27 *Power Workers' Union, Canadian Union of Public Employees, Local 1000 v Ontario (Energy Board)*, 2013 ONCA 359, 116 OR (3d) 793, rev'g 2012 ONSC 729, 109 OR (3d) 576.

28 *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)*, 2015 SCC 45 [*Atco Gas*].

29 *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44 at paras 42-57 [*Ontario Power*].

30 For other commentary on this aspect of the case, see Paul Daly, "A Principled Stand on Tribunal Participation in Judicial Review: *Ontario (Energy Board) v. Ontario Power Generation Inc*, 2015 SCC 44" (25 September 2015), Administrative Law Matters, blog, online: *ALM* <http://www.administrativelawmatters.com/blog/2015/09/25/a-principled-stand-on-tribunal-participation-in-judicial-review-ontario-energy-board-v-ontario-power-generation-inc-2015-scc-44/ >; Shaun Fluker, "The Fundamentals of Tribunal Standing and Bootstrapping in Judicial Review" (13 October 2015), ABlawg.ca, online: *Ablawg* <http://ablawg.ca/2015/10/14/the-fundamentals-of-tribunal-standing-and-bootstrapping-in-judicial-review/> ;and John Mastrangelo, "Shifting from Impartial Decision-Maker to Adversarial Opponent: Tribunal Standing on Judicial Review in *Ontario Energy Board v. Ontario Power Generation"* (1 October 2015), Thecourt.ca, online: *TheCourt.ca* <http://www.thecourt.ca/2015/10/01/shifting-from-impartial-decision-maker-to-adversarial-opponent-tribunal-standing-on-judicial-review-in-ontario-energy-board-v-ontario-power-generation-2/>.

31 *Ontario Power*, *supra* note 29 at paras 41 and 52.

32 Personally, I have always thought that this was a much overrated concern particularly in the instance of regulatory agencies including energy regulators.

33 *Ontario Power*, *supra* note 29 at para 52.

34 *Ibid* at paras 52ff.

approach as adopted in *Leon's Furniture*, and other Courts of Appeal. In this context, he noted that tribunal participation was still subject to the discretionary approach even where, as here, the relevant statutory provision specified the entitlement of the tribunal to be heard on an appeal or judicial review application.[35] He then identified the factors that the first instance court should consider in exercising its discretion. As in the various Court of Appeal judgments, the presence of other parties to the proceedings who could defend the tribunal's decision fully loomed large. He then continued:

> Whether the tribunal adjudicates individual conflicts between two adversarial parties or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of an appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.[36]

Moreover, it was at this point in his judgment that Rothstein J broadened his consideration of the issue beyond the discretion of the first instance court to the role of the Board as an appellant before the Supreme Court of Canada (as opposed to its status as a respondent before the Divisional Court and the Court of Appeal).[37]

In the particular circumstances of this case, the indicators were all in favour of permitting the Board broad participatory rights and "full party status"[38] as an appellant. There was no one else to defend the decision of the Board[39] and the Board was involved in a broad, public interest regulatory role. Accordingly, the Board was entitled to argue the reasonableness of its decision. This should also presumably be read in conjunction with Rothstein J's earlier recognition[40] of the ability of expert, field-sensitive tribunals "to explain how one interpretation of a statutory provision might impact other provisions within the regulatory scheme, or to the factual and legal realities of the specialized field in which they work."

Having determined as a threshold matter that the Board had standing to participate and make submissions, Rothstein J then moved to consider what limitations should be imposed on that participation to guard against inappropriate bootstrapping, or supplementing or sanitizing otherwise deficient decisions. His particular focus was advancing new arguments that had not been part of the original decision. Here, the compromise was to allow tribunals the ability to "offer interpretations of their reasons or conclusions and to make arguments implicit within the original reasons".[41] As well, a tribunal was entitled to "explain its established policies and practices to the reviewing court even if these arguments were not included in the tribunal's original decision."[42] As well, he was prepared to countenance responses to arguments made by a counterparty.[43] However, "entirely new arguments" were off limits.[44] Rothstein J also endorsed previous cautions as to the tone in which tribunals should participate. Aggressive partisanship was not to be countenanced.[45]

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35 *Ibid* at para 58.
36 *Ibid* at para 59. It is worth noting that the movement from a categorical approach to a discretionary approach carries with it a potential disadvantage in some instances. To the extent that the categorical approach was based on the various legal grounds of review, first instance mischaracterization of the list of included categories or of the legal nature of the ground on which review was being sought would be an error of law subject to correctness review on appeal or further appeal. In contrast, appeals from first instance decisions under the discretionary approach will generally be conducted on a deferential reasonableness standard common to the review of all manner of first instance exercise of judicial discretions.
37 In this regard, note should also be taken of *Moore v College of Physicians and Surgeons of British Columbia*, 2014 BCCA 446, application for leave to appeal denied: [2015] SCCA No 26, in which Lowry JA questioned whether the Health Professions Review Board had status to appeal a decision of the British Columbia Supreme Court setting aside one of its decisions in which the College was supporting the physician who was the applicant in the petition for judicial review.
38 *Ontario Power, supra* note 29 at para 62.
39 *Ibid* at para 60.
40 *Ibid* at para 53.
41 *Ibid* at para 69.
42 *Ibid* at para 68.
43 *Ibid.*
44 *Ibid* at para 69.
45 *Ibid* at para 71.

Applying these cautionary principles to the Board's participation on the appeal, Rothstein J found the Board's submissions appropriate save in one respect. The line was crossed when the Board said in its submission it would probably reach the same result if the matter were remitted back for reconsideration under a differently expressed prudent investment test.[46]

In sum, while the concerns about the dangers of tribunal participation that animated *Northwestern Utilities* survive, what is clear is that the Supreme Court has moved away from determining the participatory status of tribunals simply on the basis of categories or grounds of judicial review. While still relevant, the grounds of judicial review are just one factor in determining whether by reference to a range of considerations, tribunals have standing to participate. Probably the most important of these factors is the extent to which there are other parties before the Court defending the tribunal's decision. However, participation by another party or intervenor in support of the tribunal's decision is not automatically a decisive factor. This is underscored when, as already noted, in *ATCO*, Rothstein J, despite the concerns of the Alberta Court of Appeal, made no comment on the Commission's defence of its decision even though the Utilities Consumer Advocate was supporting the Commission before the Supreme Court.[47]

Notwithstanding the liberal attitude taken by Rothstein J and the clarity that he has brought to most of the critical dimensions of this problem, there are still some questions that remain outstanding. 1. What is the role of decision-makers other than tribunals (such as the Governor in Council in approving pipelines), and particularly those who are not required to and do not provide reasons for their decisions? 2. What is the situation with decision-makers which have failed to meet a reasons requirement either entirely or inadequately? How far can they go in relying on *Dunsmuir v New Brunswick* and Bastarache and LeBel JJ's characterization of reasonableness review as involving assessment (quoting David Dyzenhaus) "of the reasons offered **or which could be offered** in support of the decision [emphasis added]"?[48] 3. In practical terms, how, in both factums and oral submissions, should counsel for decision-makers give effect to the admonition that, while they can contend for the reasonableness of a decision, they should not (unless correctness is the accepted standard of review) argue the merits of the decision under review or appeal?

What is clear, however, is that there are some practical ways in which difficulties can be avoided in the sense of the agency or tribunal anticipating likely challenges to its participation or more commonly the scope for its participation. Particularly when an agency or tribunal has to seek intervenor status in order to participate (as generally in the Federal Court and Federal Court of Appeal), as Stratas JA makes clear in *Canada (Attorney General) v Quadrini*,[49] it is important to set out the basis or justification for involvement in concrete terms and by reference to the established criteria or standards. Even where an agency or tribunal is before the court as a party, the same holds to the extent that supporting factums should demonstrate recognition of the

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46 *Ibid* at para 72.

47 It is, however, worthy of note that a week before the Court delivered its judgments in *Ontario Power Generation* and *ATCO*, yet another panel of the Alberta Court of Appeal dealt with a challenge to the extent of the Commission's participation in an appeal in which the Utilities Consumer Advocate was also a participant. This was in *FortisAlberta Inc v Alberta (Utilities Commission)*, 2015 ABCA 295 [*Fortis Alberta*] (application for leave to appeal to the Supreme Court of Canada filed in November 2015: [2015] SCCA No 475 (QL)). In rejecting the challenge, Paperny JA (delivering the judgment of herself, Watson and Rowbotham JJA) stated (at para 105):

> The appellants assert that in this case the Commission has gone beyond [what is permissible] in its factum. I disagree. The Commission's factum sets forth the context in which the decision was made, the issues that the Commission was grappling with in the UAD proceedings, the approach taken in considering those issues, and the conclusions reached. It was in this case necessary and helpful to the court for the Commission to point out those parts of its reasons that discuss the rationale underlying its policy decisions, particularly given their jurisprudential overlay. The appellants submit that certain portions of the Commission's factum appeared argumentative or suggested that it was entering the fray. I would not characterize the submissions in that way; in the circumstances of this appeal and given the breadth and nature of the proceedings, those portions were of assistance to the court.

48 *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 48 [*Dunsmuir*], citing David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M Taggart, ed, *The Province of Administrative Law* (Hart, 1997), 279, 286. For general discussion of the impact on the conduct of reasonableness review of inadequate reasons, see the judgment for the Court of Abella J in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at paras 13-26.

49 *Quadrini, supra* note 20 at para 22.

limits on participation and provide justification for any potentially controversial participation in terms of those limits (particularly in dealing with the substantive challenges to its decision). If feasible under the relevant Rules of Court, it may also be advisable where there is another party or intervenor defending the agency or tribunal's decision to delay or to seek leave to delay the filing of a factum until such time as the other parties or intervenors have filed their factums. Indeed, this was the advice provided by the Alberta Court of Appeal in *Atco Gas and Pipelines v Alberta (Utilities Commission)*.[50]

Finally, it is important to reiterate that the principles now established in *Ontario Power Generation* are subject to modification either in primary legislation or Rules of Court. Thus, as just noted, the *Federal Courts Rules*[51] create a regime where decision-makers subject to the judicial review jurisdiction of the Federal Court and Federal Court of Appeal must normally seek intervenor status under Rule 109 in order to participate in judicial review proceedings. Only where the Attorney General is "unable or unwilling" to act as respondent and defend the decision-maker can the decision-maker seek status as a party,[52] and it is only where the decision-maker is actually accorded party status that the decision-maker will have status to appeal any first instance decision reviewing or setting aside its decision. Indeed, this may also apply to the National Energy Board to the extent that section 29(12) of the *National Energy Board Act*, while permitting the Board to be "heard" on an appeal to the Federal Court of Appeal from one of its decisions, does not confer party status on the Board, thereby implicitly precluding it from seeking leave to appeal an adverse decision to the Supreme Court of Canada.[53] This stands in stark contrast with the *Judicial Review Procedure Acts* of both British Columbia and Ontario in which it is provided that decision-makers may participate at their option as parties to judicial review petitions or applications.[54]

Standard of Review: The Rhetoric and the Reality

a. Introduction

Almost eight years after the Supreme Court of Canada in *Dunsmuir*[55] and subsequently *Canada (Citizenship and Immigration) v Khosa*[56] reconfigured the principles respecting the standard of review on judicial review applications and statutory appeals, courts across the country (including the Supreme Court itself) continue to be preoccupied with teasing out the detailed application of those principles. Indeed, as more and more refinements are added to the template for determining whether the standard of review should be that of correctness or reasonableness, and how to actually conduct reasonableness review, questions are inevitably arising as to whether the jurisprudence applying the modified principles has become even more complex than the state of affairs which *Dunsmuir and Khosa* purported to simplify and make more coherent.[57]

b. Reasonableness: the Predominant Standard of Review for Energy Regulators

For the most part, however, energy regulators have benefitted from the *Dunsmuir* principles in the sense that reasonableness has become the

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50 *Supra* note 21 at para 13.

51 *Federal Courts Rules*, SOR/98-106 (as amended).

52 The reference to the Attorney General obviously raises another issue not canvassed in *Ontario Power Generation* or commonly in other case law involving the participatory rights of decision-makers. To what extent is the Attorney General, rather than the actual decision-maker, the appropriate upholder of any decision by a public body? Where this is a role of the Attorney General, what if the Attorney General for whatever reason decides not to defend the decision under attack? Where the Attorney General exercises an entitlement to become a party to an application or petition for judicial review (as, for example, provided for in s 16 of the British Columbia *Judicial Review Procedure Act*), does that preclude participation by the decision-maker save as the nominal respondent? Where the Attorney General assumes the role of defender of the decision under attack, do the same limits and discretionary considerations applicable to the decision-maker itself apply to the Attorney General? These and other related questions are issues that can await another day!

53 There is nothing in the *Rules of the Supreme Court of Canada*, SOR/2002-156, that would suggest otherwise.

54 *Judicial Review Procedure Act*, RSO 1990, c J.1 (as amended), s 9(2); *Judicial Review Procedure Act* SBC 1996, c 241 (as amended), s 15(1). See *Children's Lawyer, supra*note 19 at paras 25-26.

55 *Supra*note 48. Abella J in dissent in *Ontario Power Generation* accepted that reasonableness was the standard but, in her view, the decision was unreasonable.

56 *Canada (Citizenship and Immigration) v Khosa,* 2009 SCC 12, [2009] 1 SCR 339.

57 See eg Paul Daly, "The Signal and the Noise in the Supreme Court of Canada's Administrative Law Jurisprudence" (20 December 2015), *Administrative Law Matters*, blog, online: ALM <http://www.administrativelawmatters.com/blog/2015/12/20/the-signal-and-the-noise-in-the-supreme-court-of-canadas-administrative-law-jurisprudence/>.

almost invariable standard of review for judicial review of and statutory appeals from their decisions. *Ontario Power Generation*[58] provides a typical example. At issue substantively was whether the statutory mandate to set rates that were "just and reasonable" legally committed the Ontario Energy Board to a commonly used and judicially recognized methodology for assessing the costs of the regulated utility – a no hindsight assessment of the prudence of operating expenditures starting with a presumption of prudence. And, if there was no obligation to apply that particular methodology, had the Board exercised its discretion and deployed an appropriate methodology in this instance?

In briefly addressing the issue of standard of review,[59] Rothstein J, delivering the judgment of the majority, noted that the parties all accepted that the standard of review respecting the Board's setting of rates and approving payment amounts under the Act was that of reasonableness. He also went on to emphasise that to the extent that the questions before the Board involved the interpretation of provisions in its home statute, the Board was entitled to a presumption of reasonableness review. Moreover, there was no basis in this context for any assertion that the presumption had been rebutted. Reasonableness was therefore the standard to be applied in the Court's assessment of whether the legislative provision calling for the setting of just and reasonable rates was subject to the implicit gloss and particular methodology asserted by the respondents.

In contrast, in *ATCO,*[60] the standard of review issue was contested. It too involved rate setting methodology and the issue of whether the regulated utility was entitled to recover costs which were reasonable on the basis of a no hindsight prudence assessment by the regulator. The only material difference from the legislative regime in issue in *Ontario Power Generation* was the specific reference to the recovery of "prudent" and "prudently incurred costs" in the relevant Alberta statutes. Despite this, the Commission determined that there was no compulsion to assess the prudence of costs by reference to a specific point in time and, in particular, the time at which the cost was incurred. In the Alberta Court of Appeal,[61] the standard applied to the Commission's determinations on this issue was that of reasonableness. However, in the Supreme Court, ATCO contended by reference to previous case law that the standard to be applied should have been that of correctness on the basis that "true questions of jurisdiction" were at stake, a category which under *Dunsmuir*[62] always attracted correctness review.

Rothstein J, delivering the judgment of the Court, spent little time rejecting this argument and agreeing with the Court of Appeal that the standard of review should be that of reasonableness. In so doing, he again[63] raised the possibility that the category of a true question of jurisdiction might no longer exist but went on to emphasise that, if it did, it was a "rare and exceptional category."[64] Given that ratemaking methodology was in issue, this was a question that was at the very "heart"[65] of the Commission's expertise and deserving of "a high degree of deference."[66] He then also noted that as it involved the Commission interpreting its home statute, the resolution of the matters in issue was entitled to the benefit of a presumption

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58 *Supra* note 29.
59 *Ibid* at para 73.
60 *Supra* note 28.
61 *Supra* note 21 at para 6.
62 *Dunsmuir, supra* note 48 at para 59.
63 He initially raised this in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654, at para 34. Now, see also the judgment of Moldaver J for the majority of the Court in *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895, at para 25.
64 *Atco Gas, supra* note 28 at para 27. (See for an energy case in which the exceptional nature of the category of true jurisdictional question was endorsed: *Shin Han F&P Inc v Canada-Nova Scotia Offshore Petroleum Board*, 2014 NSCA 108, 353 NSR (2d) 335 at paras 52-57 (application for leave to appeal dismissed on July 2, 2015: [2015] SCCA No 51 (QL).
65 *Ibid.*
66 *Ibid.*
67 *Ibid* at para 28 (as specifically recognized in *Alberta Teachers' Association, supra* note 63). What is required to rebut the presumption remains a matter of some uncertainty. Thus, in *Edmonton East (Capilano) Shopping Centres Ltd v Edmonton (City)*, 2015 ABCA 85, 12 Alta. LR (6th) 236, a panel of the Alberta Court of Appeal deployed as one of the factors justifying correctness review of determinations of questions of law by assessment review boards, the fact that an appeal from a board's decision required leave of a judge of the Alberta Court of Queen's Bench. Leave to appeal to the Supreme Court of Canada was granted on September 24, 2015: [2015] SCCA No 161 (QL). Given that leave is required to appeal from the Utilities Commission to the Alberta Court of Appeal, does that generate an argument for possible correctness review of determinations of questions of law by the Commission? That seems unlikely, an

of reasonableness review.[67]

This reaffirmation of the entitlement of energy regulators to the benefit of reasonableness when engaged in core ratemaking functions seemingly puts to rest notions such as correctness review being the standard to apply when fundamental regulatory questions are in play, questions that some have characterized as the common law principles of rate of return regulation or as part of the underlying regulatory compact.[68] What is left dangling, however, is the fate of the three decisions on which counsel for ATCO relied in asserting an entitlement to correctness review: the judgment of the majority of the Supreme Court of Canada in the notorious *Stores Block* decision *(ATCO Gas and Pipelines Ltd v Alberta (Energy and Utilities Board)),*[69] and the judgments of the Alberta Court of Appeal in *Shaw v Alberta Utilities Commission,*[70] and *ATCO Gas and Pipelines Ltd v Alberta Utilities Commission.*[71]

Stores Block involved the issue of whether the regulator could order that consumers were entitled to benefit from the proceeds of the sale of an asset being removed from the rate base. In *Shaw*, the Court of Appeal was confronted with the issue of whether a ministerial declaration that a particular transmission project was of a "critical" nature removed the authority of the Commission to scrutinize the project by reference to its broad overriding public interest mandate.[72] *ATCO* (2009) involved the Court setting aside seemingly on a correctness basis the regulator's determination that a change in the use of assets within the rate base constituted a "disposition" requiring the regulator's approval.

Rothstein J characterized each of these decisions as "not analogous to the matter at hand."[73] Nonetheless, there is reason to believe that they should at the very least be treated with caution in so far as they each espoused correctness as the appropriate standard of review. First, it is abundantly clear that each of them involved the regulators interpreting provisions in their home statute, an exercise now clearly raising a presumption of deferential reasonableness review. Secondly, Rothstein J's musings about the continued existence of a category of "true" jurisdiction calls into question the deployment of that concept in both *Stores Block* and *Shaw.* Thirdly, it is also the case that the task in which the regulator was engaged in both *Stores Block* and *ATCO* (2009) was an incidental part of its ratemaking role. Thus, in terms of Rothstein J's reasons for selecting reasonableness review as the appropriate standard in *ATCO* (2012), none of these three presents a strong case or basis for correctness review.

Perhaps, in terms of *Dunsmuir, Shaw* might still be justified as appropriately applying a correctness standard as it involved a question as to "the jurisdictional lines between two or more competing specialized tribunals,"[74] in this instance the government, on the one hand, and the Commission, on the other. However, that was certainly not the case in *Stores Block*; there the question was one of statutory interpretation at the core of the then Board's regulatory mandate. I would therefore venture to assert that on standard of review, *ATCO* (2012) implicitly overrules *Stores Block*.

Indeed, a week before the Supreme Court of Canada released its judgments in *Ontario Power Generation* and *ATCO*, on September 18, 2015, a panel of the Alberta Court of Appeal in effect came to the same conclusion with respect to the authority of *Stores Block* on standard of review; it had more than likely been overtaken implicitly by subsequent Supreme Court of Canada authority. This was in *FortisAlberta Inc. v Alberta (Utilities Commission),*[75] a case

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assessment that has been give considerable weight by the more recent judgment of the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 42-44, in which the Court rejected a similar argument in respect of the leave to appeal provisions in the *Immigration and Refugee Protection Act*, SC 2001, c 27.

68 See for further elaboration the important article: George Vegh, "Is there a Doctrine of Canadian Public Utility Law?" (2007), 86 Can Bar Rev 319.

69 *ATCO Gas and Pipelines Ltd v Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 SCR 140 [*Stores Block*].

70 *Shaw v Alberta Utilities Commission*, 2012 ABCA 378, 539 AR 315.

71 *ATCO Gas and Pipelines Ltd v Alberta Utilities Commission*, 2009 ABCA 246, 464 AR 275 [*ATCO 2009*].

72 The Court upheld as correct the Commission's determination that the government declaration of criticality precluded the Commission from assessing the project on the basis of its general public interest authority.

73 *Atco Gas, supra* note 28 at para 27.

74 *Dunsmuir, supra* note 48 at para 60.

75 *Supra* note 47.

involving the Commission setting a path for the treatment for rate purposes of utility disposition of stranded assets. In according the Commission's decisions deferential reasonableness review,[76] Paperny JA, delivering the judgment of the panel and echoing[77] an earlier judgment of Fraser CJA,[78] stated:

> Were *Stores Block* to be decided today, it is certainly possible that the majority approach on standard of review might more closely mirror that of the dissent.[79]

That position now finds further support in the judgment of Rothstein J in *ATCO.*

c. But What Does Reasonableness Review Involve in Practice?

It may be comforting for energy regulators and those benefitted by their decisions to know that the standard of review for not only questions of fact and mixed law and fact but also pure law will generally be that of reasonableness. Nonetheless, despite an initial pronouncement of reasonableness as the standard, what follows is in all too many instances "disguised correctness" review. Now is not the place to catalogue all the evidence in support of the pervasiveness of this phenomenon. Paul Daly captures it well when he argues in his blog that many judgments are "characterized by purely *pro forma* references to correctness and reasonableness, an absence of detailed discussion of the general principles of standard of review and lengthy explanations of substantive law designed to guide lower courts."[80]

It is useful to consider both *Ontario Power Generation* and *ATCO* from this perspective. On both, the standard of review analysis is sparse and to the point. This was not surprising in *Ontario Power Generation* as the standard of review was not contested (though this is not necessarily determinative). However, it was contested in *ATCO*, though perhaps the cursory nature of the analysis is explained by the lack of merit of the argument for correctness review. What is, however, worthy of note is that most of the commentary on these cases by energy law experts concentrates on the extent to which they have altered or accepted agency alteration of the substantive law and principles of energy regulation.[81] In this realm, and understandably so, the substantive outcome counts for far more than the fact that that outcome is said by the reviewing court to have been based on a reasonableness assessment which allows for more than one correct answer than on a definitive correctness analysis. A new substantive rule is in effect established and more than likely to be applied or accepted by energy regulators even though theoretically it may not be the only possible and reasonable interpretation of the relevant statute.

In large measure, this has become the reality because of the way in which courts reason to a conclusion on the substantive merits of cases

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76 *Ibid* at paras 87-103.

77 *Ibid* at paras 92-93. Interestingly, Paperny JA took a rather different attitude to the Supreme Court's correctness assessment of the substantive issues in *Stores Block*. In sustaining the Commission's decision in which the Commission had interpreted and applied the substantive legal principles and rules identified on a correctness basis in *Stores Block*, Paperny JA stated (at para 76): "The Commission, and this Court, are bound by *Stores Block* and the subsequent decisions from this Court. Only legislative amendment, reconsideration, or a reversal of *Stores Block* can change that." For comment on this issue in the light of the substantive assessments in both *Ontario Power Generation* and *ATCO* (2012), see Nigel Bankes, "The Regulatory Treatment of Stranded Assets in Alberta" (15 October 2015), *ABlawg.ca*, online: ABlawg < http://ablawg.ca/2015/10/15/the-regulatory-treatment-of-stranded-assets-in-alberta/>. I do not engage in this review with that question. Suffice it to say that on the substantive issues in Stores Block, Professor Bankes suggests that it may now be authority only on the particular issue determined in that case, the entitlement of the regulator to deal with the distribution of surpluses generated by the disposition of assets no longer part of the rate base.

78 *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)*, 2014 ABCA 397, 588 AR 134, at paras. 58-68 and particularly at para 66. The other two members of the panel, Côté and Martin JJA, did not deal with the standard of review issue.

79 *Fortis Alberta, supra* note 47 at para 92.

80 *Supra* note 57. See also Paul Daly, "Uncovering Disguised Correctness Review? Wilson v. British Columbia (Superintendent of Motor Vehicles), 2015 SCC 47 (28 October 2015)", *Administrative Law Matters*, blog, online: ALM <http://www.administrativelawmatters.com/blog/2015/10/28/uncovering-disguised-correctness-review-wilson-v-british-columbia-superintendent-of-motor-vehicles-2015-scc-47/>.

81 See eg Moin Yahya, "ATCO Pensions, Ontario Hydro, Prudency, and Reasonableness: a Case Comment on Ontario (Energy Board) v Ontario Power Generation Inc. & ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)" (2015) 3 ERQ 49 ; Zineida Rita, " *ATCO Gas and Pipelines Ltd. v. Alberta*: Why You Are Paying More on Your Electricity Bill" (18 October 2015), *The Court.ca*, online: The Court <http://www.thecourt.ca/2015/10/18/atco-gas-and-pipelines-ltd-v-alberta-why-you-are-paying-more-on-your-electricity-bill/>; and Nigel Bankes, "Methodological Pluralism: Canadian Utility Law Does Not Prescribe any Particular Prudent Expenditure or Prudent Investment that a Regulator Must Apply" (9 October 2015), *ABlawg.ca*, online: Ablawg <http://ablawg.ca/2015/10/09/6476/>.

where they have just come from acknowledging an obligation of deference to the regulator. This point can be illustrated by reference to *ATCO*, though the same kind of analysis can be deployed with respect to *Ontario Power Generation* and, among others, the Alberta Court of Appeal judgment in *FortisAlberta v Alberta (Utilities Commission)*.[82]

As noted already, the substantive issue in both *ATCO* and *Ontario Power Generation* can be broken into two segments: Did the statute oblige the regulator to apply a particular methodology and no other in deciding whether to allow the regulated utility the amount of cost recovery that it was claiming? If the statute did not require a single unvarying methodology, was the methodology adopted by the regulator acceptable?

If we look to the section in Rothstein J's judgment in *ATCO* on the first order question, what do we find? Rothstein J addresses the first order question in the following way:

> Though the statutes do contain language allowing for the recovery of "prudent" costs, [they] do not explicitly impose an obligation on the Commission to conduct its analysis using a particular methodology any time the word "prudent" is used. Further, reserving the opinion on whether the term "prudently incurred" might require a particular no-hindsight methodology, in this particular case the bare use of the word "prudent" does not, on its own, mandate a particular methodology.[83]

Seemingly, what Rothstein J has done here in relation to the first order question is provide a definitive answer to that question: As a matter of law, the regulator is not obliged to follow one and only one methodology in the assessment of what are "prudent" costsIrrespective of the merits of this particular conclusion, Rothstein J's analysis seems to be a clear example of correctness review. Moreover, it is not rescued from that fate or characterization by the assertion with which the next paragraph commences: "It is thus apparent that the relevant statutes may reasonably be interpreted not to impose the ATCO Utilities' asserted prudence methodology on the Commission."[84] Of course, a statute can be reasonably interpreted that way if that reading has already been assessed as correct. Thereafter, the majority's evaluation of the reasonableness of the methodology chosen under an interpretation that allows for choice and creates discretion fits much more comfortably or satisfactorily into a reasonableness analysis, though even here the discussion of the choice that was made reads at times like a correctness evaluation of the various components or elements that went into that choice. However, in situations where the Court is about to sustain the regulator's exercise of discretion, not too much harm is done to the enterprise of reasonableness review by sustained justification of the reasons for and the basis of the discretionary choice.

Among recent Court of Appeal judgments, however, there are flagrant examples of mere lip service to reasonableness review on all aspects of the decision under scrutiny. Of the energy cases in the period under review, the most palpable of these is *Cape Breton Explorations Ltd v Nova Scotia (Attorney General)*.[85] This involved an appeal from a decision of the Nova Scotia Utility and Review Board approving Nova Scotia Power Inc.'s application to include in its rate base a $93 million dollar investment in a wind project. The approval depended on the interpretation of terms in the Board's constitutive legislation.

In delivering the judgment of the Nova Scotia Court of Appeal, Farrar JA accepted the agreement of the parties that the standard of review was that of reasonableness.[86] Ultimately, he concluded that the decision was unreasonable on the basis that it did "not fall within the range of possible outcomes," an accepted badge of or test for unreasonableness.[87] However, in the 110

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82 *Fortis Alberta, supra* note 47.
83 *Ibid* at para 46.
84 *Ibid* at para 47. In her dissent in *Ontario Power Generation, supra* note 29, at paras 137-38, Abella J, also applying a reasonableness standard, branded as unreasonable the Board's failure to apply the "well-established set of principles" of prudence review that both it and the Ontario Court of Appeal in *Enbridge Gas Distribution Inc v Ontario Energy Board* (2006), 201 OAC 4 (CA) had previously endorsed.
85 *Cape Breton Explorations Ltd v Nova Scotia (Attorney General)*, 2015 NSCA 35, 357 NSR (2d) 376 [*Cape Breton Explorations*]. For a similar analysis, see William Lahey, *"Cape Breton Explorations Ltd v Nova Scotia (Attorney General)"* (2015), 3 ERQ 65, at pp 68-69.
86 *Cape Breton, supra* note 85 at para 40.
87 *Ibid* at para 150.

paragraphs between the initial identification of the standard of review and this conclusion, there is scarcely a mention of reasonableness and any test for assessing reasonableness. It is straight correctness statutory interpretation characterized by statements such as "the UARB erred in its interpretation of service"[88] in the relevant provision of the Act and "it would be an error for the Board not to take into account" certain provisions of the relevant legislation."[89] This way of proceeding undercuts the whole enterprise of truly deferential reasonableness review.[90] It also, of course, poses problems for those participating in any judicial review or statutory appeal, including the regulator. To what extent should one anticipate the possibility of a judge or panel bent on "disguised correctness" review when drafting a factum, when deciding in the case of the regulator on the permissible scope for participation, and in the making of oral arguments before the reviewing court? If the whole standard of review enterprise is not to fall further into disrepute, the Supreme Court of Canada needs to articulate more fully a template for the conduct of proper or appropriate deferential reasonableness review and to condemn disguised correctness review in all of its various forms.[91]

Duty to Consult Aboriginal Peoples

a. Introduction

Litigation over the duty to consult and, where appropriate, accommodate aboriginal peoples and their rights and claims continues apace. Much of the extensive litigation is, however, now concerned not so much with ascertaining the governing legal principles[92] as with highly fact dependent determinations as to the strength of the aboriginal claim, the extent of the consultation (and accommodation) obligations, and whether any consultation and accommodation that did take place was sufficient to meet the Crown's obligations. Very recent examples include the judgments of Manson J of the Federal Court in *Prophet River First Nation v Canada (Attorney General),*[93] Sewell J of the British Columbia Supreme Court in *Prophet River First Nation v British Columbia (Minister of Environment),*[94] and the British Columbia Court of Appeal in *Ktunaxa Nation v British Columbia (Minister of Forest Lands and Natural Resource Operations),*[95] in all of which the Court held that the Crown had fulfilled its responsibilities.

In this review, I will not canvass the case law involving whether the extent and detail of consultation was of sufficient depth or intensity to satisfy the demands of the Crown's responsibility. Rather, I want to

88 *Ibid* at para 66.
89 *Ibid* at para 119.
90 It is, however, worthy of note that the decision of the Court of Appeal was reversed legislatively. Section 29 of the *Electricity Plan Implementation Act*, SNS 2015, c 31, which received Royal Assent on December 18, 2015, added section 35B to the *Public Utilities Act*, RSNS 1989, c 380 and thereby restored the relevant item to Nova Scotia Power Inc's rate base.
91 Indeed, in the Federal Court of Appeal, Stratas JA, in cases such as *Canada (Minister of Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56, 455 NR 157 *and Canada (Attorney General) v Boogaard*, 2015 FCA 150, has advanced this project in useful and sophisticated ways.
92 2016 had barely commenced when on January 13, Koenigsberg J of the British Columbia Supreme Court delivered a judgment with potentially significant regulatory dimensions, including the scope of the duty to consult. In *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34, at paras 184-213, she held that the British Columbia government had failed to meet its consultation obligations when it ceded by agreement authority to the National Energy Board over the Northern Gateway Pipeline approval process and in failing to respond to requests to terminate that agreement. These actions, which involved forgoing its own authority under the provincial *Environmental Protection Act*, SBC 2002, c 43, even if otherwise permissible, triggered a duty to consult aboriginal peoples. I will leave more detailed comment on this decision and its ramifications for next year's review. See also for a regulator determination that there had been inadequate consultation: *Chief Gale and the Fort Nelson First Nation v Assistant Regional Water Manager & Nexen Inc. et al.,* Decision No. 2012-WAT-013(c), British Columbia Environmental Assessment Board, September 13, 2015, discussed by Nigel Bankes, "Provincial Environmental Appeal Boards: A Forum of Choice for Environmental (and First Nation) Plaintiffs?" (11 September 2015), *ABlawg.ca*, online: Ablawg <http://ablawg.ca/2015/09/11/provincial-environmental-appeal-boards-a-forum-of-choice-for-environmental-and-first-nation-plaintiffs/>; and Erica C. Miller, "BC's Environmental Appeal Board Overturns Nexen Water Licence on Appeal by Fort Nelson First Nation" (2015), 3:4 ERQ 41.
93 *Prophet River First Nation v Canada (Attorney General)*, 2015 FC 1030.
94 *Prophet River First Nation v British Columbia (Minister of Environment)*, 2015 BCSC 1682.
95 *Ktunaxa Nation v British Columbia (Minister of Forests Lands and Natural Resource Operations)*, 2015 BCCA 352, at paras 76-93. This judgment is also noteworthy by reason of the First Nation raising an argument that the Ministerial decision to approve a resort violated its right to freedom of religion under section 2(a) of the *Canadian Charter of Rights and Freedoms.* The Court of Appeal also rejected this argument. It is, however, now the subject of an application for leave to appeal to the Supreme Court of Canada filed on October 2, 2015: [2015] BCCA No 417 (QL).

return to a topic that, despite Supreme Court attention, continues to generate considerable controversy – the roles that administrative tribunals or regulatory agencies play in the duty to consult and, where appropriate, accommodate aboriginal peoples. Under what circumstances, if any are tribunals and agencies through their hearings legitimate participants in the very process of consultation and accommodation? When is it appropriate, perhaps even mandatory in responding to applications potentially affecting aboriginal rights and claims for tribunals and agencies to determine whether the Crown has fulfilled its duty to consult and, where appropriate, accommodate aboriginal peoples? And, what is the impact of a finding by an administrative tribunal or agency that the Crown has not met that obligation?

The leading Supreme Court of Canada judgment respecting these issues remains *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council.*[96] There, it will be recollected that the Supreme Court held that the ability of a tribunal or agency to itself engage in consultation and fulfill the Crown's duty to consult did not, as opposed to the situation of the determination of other questions of law, arise presumptively out of the general authority to determine questions of law; it required express or implicit statutory authorization.[97] Relevant to the determination of whether a tribunal had the authority to itself engage in consultation was an inquiry into whether the tribunal "possess[ed] the remedial powers to do what it is asked to do in connection with the consultation"[98], presumably an inquiry of particular pertinence when the argument is that the power to consult is implicit in the relevant statute. In contrast, where relevant, tribunals and agencies, by virtue of their capacity to determine questions of law, did at least presumptively have the ability to assess whether the Crown had fulfilled its duty to consult and, where appropriate, accommodate aboriginal peoples and their rights and interests. Indeed, it is not going too far to suggest that, as with other constitutional questions, tribunals and agencies not only have the capacity but also the obligation to determine, where relevant to their decision, that question.

b. Tribunal Consultation

In 2015, in *Hamlet of Clyde River v TGS-NOPEC Geophysical Co. ASA (TGS),*[99] the Federal Court of Appeal confronted the issue of whether the National Energy Board ("NEB") had implicit authority to engage in consultation and thereby be the agent for fulfilment of the Crown's constitutional duty. The context was an application for judicial review of an authorization to conduct an offshore seismic study. It was claimed that the NEB had approved the study in the absence of sufficient or adequate consultation with an affected aboriginal community.

As part of the reasons for upholding the approval, Dawson JA, delivering the judgment of the Court, held that the relevant legislation implicitly authorized the NEB to engage in consultation. This arose out of the obligation of the NEB, in this particular variety of approval process, in the assessment of the environmental impacts of the proposal to take account of the use of the affected land and its resources "for traditional purposes by aboriginal peoples" as well as the NEB's discretion to allow public participation in the decision-making process, the legislative history of the processes, and the NEB's commitment as part of its processes to aboriginal consultation. According to Dawson JA, this meant that the NEB "had a mandate to engage in a consultation process such that the Crown may rely on that process to meet, at least in part, its duty to consult."[100] While it is questionable whether a non-legislative commitment on the part of a tribunal to actually engage in consultation can count as an indicator of legislative conferral of the authority to consult, what the judgment does suggest is that implicit authorization may follow quite readily from legislative specification of an obligation to take account of aboriginal rights and claims. It will be interesting to see if that holds up in future considerations of this issue.

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96 *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650.
97 *Ibid* at paras 60-63.
98 *Ibid* at para 60.
99 *Hamlet of Clyde River v TGS-NOPEC Geophysical Company ASA (TGS)*, 2015 FCA 179 [*Hamlet River*], application for leave to appeal to the Supreme Court of Canada filed on October 16, 2015: [2015] SCCA No 430 (QL).
100 *Ibid* at para 65.

In an extensive blog on this case, "The Federal Crown Fulfilled its Consultation Obligations when the National Energy Board Approved a Seismic Program in Baffin Bay",[101] Nigel Bankes argued that significance should also be placed on the fact that this was a final decision; it was not one of the category of NEB decisions that required approval from the Governor in Council, though it must be noted that, as a precondition of approval, the Minister had either to have approved a benefits plan or waived that requirement.

In *Hamlet of Clyde River*, Dawson JA does not confine herself to a consideration of whether the NEB had, in terms of *Carrier Sekani*, explicit or implicit legislative authority to engage in consultation with aboriginal peoples. Irrespective of whether that authority existed, the Supreme Court had also recognized the entitlement of the Crown to rely on procedures created for other purposes as satisfying the duty to consult if those other processes involved a satisfactory level of consultation.[102] In such cases, Dawson JA asserted[103] that the Crown's duty had not been delegated. "Rather, it is a means by which the Crown can be satisfied that Aboriginal concerns have been heard and, where appropriate, accommodated." Given the extent to which regulatory agencies have actually made aboriginal consultation part of their processes both by way of requirements imposed on proponents and directly through their hearings, this may represent a very convenient alternative to having to establish explicit or implicit conferral of authority on those agencies of authority to discharge the Crown's constitutional duty.

However, this approach is not without its potential pitfalls. In both of the Supreme Court judgments on which Dawson JA relied, *Taku River Tlingit First Nation* and *Beckman*, the consultations relied on took place not as part of the processes of an independent regulatory agency but within a departmental setting. Where an independent regulatory agency is implicated (such as the National Energy Board), the deployment of this justification may be problematic particularly where, as in *Hamlet of Clyde River*, the regulatory agency is the final decision-maker. This potential problem is well-illustrated by the following question: What if the Crown is not satisfied with the consultation processes of the independent regulatory agency? What can the Crown do about it? Can it direct the independent regulatory agency to engage in fuller or better consultation without an express statutory authorization to do so? Is it adequate to maintain that the Crown then fulfills its responsibilities by appearing in support of an aboriginal people's application for judicial review of the independent agency's decision?

There are two other dimensions to this overall question that I also want to identify. In the foundation judgment on the duty to consult, *Haida Nation v British Columbia (Project Assessment Director),*[104] McLachlin CJC, delivering the judgment of the Supreme Court, stated that the Crown could delegate some of the procedural aspects of the duty to consult to proponents. This might suggest that even where an independent regulatory agency lacks the necessary authority to itself act as the Crown's delegate in the conduct of consultation, the Crown can nonetheless still rely on that agency's rules and practices with respect to proponent consultation as fulfilling in part the **Crown's** own consultation requirements. Of course, the answer to that question might also hinge on whether in a more general sense the Crown can assess and rely on consultations that form part of the processes of an independent regulatory agency.

Finally, it is also the case that, irrespective of whether a decision-maker has authority to discharge the Crown's duty to consult and, where appropriate, accommodate, that

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101 Nigel Bankes, "The Federal Crown Fulfilled its Consultation Obligations when the National Energy Board Approved a Seismic Program in Baffin Bay" (3 September 2015), *ABlawg.ca*, online: ABlawg<http://ablawg.ca/2015/09/03/the-federal-crown-fulfilled-its-consultation-obligations-when-the-national-energy-board-approved-a-seismic-program-in-baffin-bay/>.

102 *Hamlet River, supra* note 99 at para 44, citing *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 at para 40 and *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103, at para 30. See also the judgment of Barnes J in *Brokenhead Ojibway Nation v Canada (Attorney General)*, 2009 FC 484, 345 FTR 119 at para 25.

103 *Hamlet of Clyde River, supra* note 99 at para 46.

104 *Haida Nation v British Columbia (Project Assessment Director)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida*] at para 53.

105 See *Standing Buffalo Dakota First Nation v Enbridge Pipelines Inc,* 2009 FCA 308, [2010] 4 FCR 500 and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2015 FCA 222 [*Chippewas*], at paras 61-63. (On January 11, 2016, the Toronto Star reported that the First Nation was seeking leave to appeal the latter decision to the Supreme Court of

decision-maker may still be legally responsible for engaging in the equivalent of consultation with aboriginal peoples not only through the common law principles of procedural fairness but also as a consequence of section 35 of the *Constitution Act, 1982.*[105] However, in the 2015 judgment in *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, Ryer JA held that whatever duties to engage with aboriginal peoples arose out of section 35 and other aspects of its mandate, it was not a springboard to asserting that the NEB had the authority to fulfill the Crown's *Haida* consultation duties.[106] This was a different and distinct responsibility. In this respect, does the reference to other aspects of the NEB's mandate call into question Dawson JA's discerning of the conferral of legislative authority to consult in the legislative references to aboriginal interests? Is Ryer JA implicitly asserting that this is too thin a basis for asserting legislative authority to fulfill the Crown's responsibilities?

Now that leave to appeal to the Supreme Court of Canada has been sought in both *Hamlet of Clyde River* and *Chippewas of the Thames First Nation*, perhaps the Supreme Court will seize the opportunity to resolve the differences between Dawson JA and Ryer JA as well as other contested issues discussed below.

c. Tribunal Assessment of Crown Consultation

In *Carrier Sekani*, there is no suggestion in the judgment of McLachlin CJC that the authority of the British Columbia Utilities Commission to consider whether the Crown had engaged in adequate consultation and accommodation depended in any way on the Crown being a party to the proceedings before the Commission. However, the reality was that the Crown in the form of both the Government of British Columbia, the formal applicant for approval of a sale, and BC Hydro, a Crown agent and the purchaser under the sale agreement, were parties to the proceedings both before the Commission and in Court.

This has raised questions as to whether the ability of a regulatory agency to assess whether the Crown has engaged in adequate consultation and, where appropriate, accommodation, depends on the Crown being a party to the regulatory proceedings. The latest consideration of this issue was in *Chippewas of the Thames First Nation.*[107] There, Ryer JA, delivering the judgment of a majority of the Federal Court of Appeal, and affirming his own pre-*Carrier Sekani judgment in Standing Buffalo Dakota First Nation,*[108] held after extensive discussion[109] that, despite its jurisdiction to determine questions of law arising in proceedings before it, the NEB had no authority on an application to which the Crown was not a party to determine whether the Crown had met its constitutional duty to consult.

In a vigorous dissent,[110] Rennie JA held that *Standing Buffalo Dakota First Nation* had been overtaken by *Carrier Sekani*, and that, in any event, could be distinguished in the sense that, as opposed to *Standing Buffalo Dakota First Nation*, in this instance, an application for approval of the reversal of flow in a pipeline, the NEB was the final decision-maker; the approval of the Governor in Council was not required.

As the judgments in *Chippewas of the Thames First Nation* make clear, the issue of agency assessment of the Crown's efforts at consultation when the Crown is not before the agency as a participant raise practical problems respecting procedural and remedial issues. When a tribunal or agency has final decision-making authority in relation to a proposal and that agency is confronted with an assertion that the Crown has not consulted adequately, what happens? Can the tribunal or agency require the Crown to appear and account for itself? Must the agency hold off making a decision until such time as it is convinced either that the Crown has consulted adequately or is prepared to indicate to the tribunal or agency that it is satisfied that the processes of the tribunal or agency have fulfilled the Crown's own obligations to consult? If having found that the Crown has failed to fulfill its *Haida*

Canada: "Ontario First Nation takes Line 9 pipeline fight to Supreme Court". The application for leave to appeal was filed on December 18, 2015: [2015] SCCA No 524 (QL).

106 *Ibid* at paras 61-63.

107 *Ibid.*

108 *Ibid* at paras 50-56.

109 *Ibid* at paras 21-56.

110 On the issue of whether the NEB was empowered to itself engage in consultation in fulfilment of the Crown's *Haida responsibilities, Rennie JA, ibid* at para 120, agreed with the majority.

responsibilities, does a tribunal or agency have authority to order the Crown to remedy that deficiency?

These concerns partially fuelled the judgment of Ryer JA, and, in this context, he cited[111] the judgments of McLachlin CJC in both *Haida*[112] and *Carrier Sekani*[113] to the effect that, at the end of the day, if the tribunal or agency lacked sufficient remedial capacity, the affected aboriginal peoples could always seek "appropriate remedies in the courts." However, given that in *Carrier Sekani* this statement was made in the course of justifying the British Columbia Utilities Commission's authority to determine whether the Crown had fulfilled its *Haida* duties, it is not necessarily a decisive consideration in the determination of whether that authority exists. In this regard, it is worth noting that in dissent, Rennie JA was critical of a solution that would see any impasse as broken only by after the event judicial review. For him,[114] the judgment of the Supreme Court of Canada in *Tsilhqot'in Nation v British Columbia*[115] had placed a gloss on *Haida* and *Carrier Sekani* and their suggestion that judicial review was available if all else failed:

> The suggestion that the only remedy lies in an after-the-event judicial review of a Minister's letter is inconsistent with the Supreme Court in *Tsilhqot'in* at paragraph 78 where the Court reiterated that the duty to consult "must be discharged prior to carrying out the action that could adversely affect the right." According to the jurisprudence, the duty to consult should have been discharged prior to the issuance of a section 58 order. This can be achieved by requiring the Board to ask the questions required by *Carrier Sekani.*

While this does not provide an answer to the various remedial and procedural questions respecting the capacities of the tribunal or agency, it at least counsels early addressing of the issue of consultation and encourages tribunals and agencies to be creative in finding workable solutions to any problems raised in situations where the Crown is not a party to the proceedings.

Clearly, however, absent legislative resolution, these issues will not go away and more judicial attention is warranted. Perhaps further guidance and clarity will emerge from the litigation involving the Northern Gateway Pipeline approval process. The applications for judicial review arose out of a joint review panel process in which there was a detailed protocol respecting consultation with affected aboriginal peoples, but where the Crown was before the joint review panel as an intervenor, and the outcome of which required Governor in Council approval. This matter is currently under reserve in the Federal Court of Appeal before a panel consisting of **Dawson**, Stratas and **Ryer** JJA.[116] ■

111 *Ibid* at para 32.
112 *Supra* note 104 at para 51.
113 *Supra* note 96 at para 63.
114 *Chippewas, supra* note 105 at para 125.
115 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257.
116 For another dimension of the issues of consultation that arose out of the Northern Gateway process, see *Coastal First Nations v British Columbia (Environment), supra* note 92. See on this case, on line: National Observer <http://www.nationalobserver.com/2016/01/13/news/breaking-bc-supreme-court-rules-favour-coastal-first-nations-battle-over-enbridge>.

THE SUPREME COURT SAVES DEMAND RESPONSE: NOW WHAT?

*Scott Hempling**

The U.S. Supreme Court has upheld FERC's Order 745.[1] That order requires operators of wholesale energy markets to treat demand side bids comparably to generation bids. Comparable treatment requires that demand side bidders (a) be allowed to compete with generators on the "supply side" of the market, and (b) receive the same compensation generation bidders get—the locational marginal price (LMP). This entitlement to LMP compensation is available only to demand resource bids that will reliably balance supply and demand, and also meet a "cost-effectiveness" test—a test designed to ensure that no wholesale buyer is made worse off by the presence of demand side bids. (Demand response is cost-effective when "reductions in LMP from implementing demand response results in a reduction in the total amount consumers pay for resources that is greater than the money spent acquiring those demand-response resources at LMP").[2]

The Court's opinion has two main holdings. First, demand side bidding is a "practice … affecting" wholesale rates—a phrase is used in the Federal Power Act to define FERC's jurisdiction. Because FERC acted within its wholesale domain, it did not enter the states' FPA-preserved retail domain. Second, the Court held that FERC's justifications for LMP compensation were not "arbitrary and capricious."[3]

With those two questions settled, what can policymakers do next, to ensure that all cost-effective demand response reaches the market and is compensated appropriately?

Market structure and compensation

Market structure: Market structure is about which consumers and aggregators are allowed to sell demand response, the barriers to market entry and exit they face, and to whom they may sell. On this topic the Supreme Court addressed only one facet: FERC may order

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1 FERC v Electric Power Supply Assn, 577 US (2016); see *Demand Response Compensation in Organized Wholesale Energy Markets, Order* No 745, 134 FERC 61,187 (15 March 2011).

2 FERC has defined and explained demand response in its rules and in its orders. Demand response means a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy. 18 CFR 35.28(b)(4) (2010). Demand response resource means a resource capable of providing demand response. 18 CFR 35.28(b)(5). "Demand response, whereby customers reduce electricity consumption from normal usage levels in response to price signals, can generally occur in two ways: (1) customers reduce demand by responding to retail rates that are based on wholesale prices (sometimes called "priceresponsive demand"); and (2) customers provide demand response that acts as a resource in organized wholesale energy markets to balance supply and demand." Order 745 at para 9.

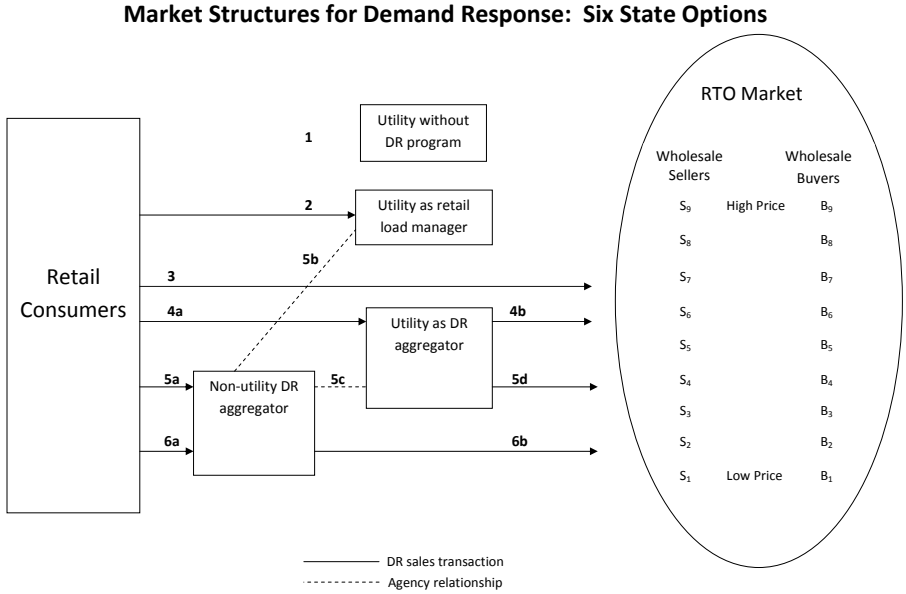
3 *Ibid* at p 14.

market operators to allow demand response providers to sell into organized wholesale markets. This legal clarity now gives states options, in at least three areas. *First,* states can determine whether consumers may sell any demand response to begin with. (A state might have no demand response programs.) *Second,* states determine what types of companies (e.g., utilities or non-utilities), if any, may solicit and aggregate consumers' demand response offers, for resale into the wholesale market. *Third,* states determine whether that demand response, once aggregated, should be used solely to reduce the load of the local utility (sometimes called "retail demand response"), or may instead (or also) be sold into organized wholesale markets (sometimes called "wholesale demand response").

Compensation: Seller compensation addresses the price buyers will pay, and how the resulting revenues are allocated among the market participants (e.g., the consumer, the aggregator and the local utility). Sellers of demand resources, like any sellers, seek the highest price. Order 745 addresses only one option: the compensation sellers of wholesale demand response receive from buyers of wholesale power, in organized wholesale markets. In those markets, the price will depend on how competitive the wholesale market is (and whether, for a market that is not effectively competitive, it is subject to FERC-approved price caps). But this seller of wholesale demand response might prefer to sell retail demand response—foregoing consumption and receiving some compensation, established by the state commission, from the local utility. The price for retail demand response could be higher than for wholesale—if, for example, the state has replaced average pricing with time-of-use rates (which all states should do, so that at any point in time price reflects actual cost). States thus have a key question to answer: May providers of demand response (consumers or their aggregators) sell only to retail utilities (in which case states set the price); or may they sell also (or instead) into wholesale markets (in which case FERC-authorized markets set the price)? Both options are worth pursuing; in fact, the most enlightened states will make both options available, allowing consumers to choose. All the options, for market structure and seller compensation, are displayed in the diagram below.

The market needs clarity, soon. With varying solutions to both market structure and compensation, within and between state and federal fora, there is much room for confusion and litigation. But there is also room for joint solutions. Enlightened regulators will escape

Market Structures for Demand Response: Six State Options



from zero-sum, "federal vs. state" mindsets, instead focusing on which regulatory actors are best positioned to make which decisions. Enlightened legislators will work to update the *Federal Power Act*'s awkward, 80-year-old allocation of state and federal powers to accommodate the best solutions. That way, the economic benefits due consumers will not be delayed—or worse, flared off into fees paid to appellate lawyers.

The state veto

Order 745 limits the options available to demand response sellers. It does so by barring wholesale market operators from accepting demand response bids from states that prohibit their customers from participating—even if those bids are cost-effective. The Court cited this state veto as support for its holding that FERC did not invade the states' retail domain. But the Court made clear (in my reading) that Order 745 would have survived without the provision. FERC therefore is free to remove the state veto. Doing so would allow all demand response to play its consumer-protective role of disciplining wholesale prices.

By viewing the state veto as unnecessary to Order 745's survival, the Court put FERC (properly in my view) in an awkward position. FERC justified its Order 745 by reasoning that absent bids from demand resources, wholesale generation prices will not satisfy the Federal Power Act's standard—that wholesale prices be "just and reasonable." Without demand response, FERC found, wholesale prices will be higher than necessary, enriching generation sellers at the expense of consumers. But with demand response, with consumers foregoing consumption, wholesale prices drop. So paying consumers to forego consumption increases economic efficiency, so long as those payments cost less than the total savings from the lower prices. (That's the essence of FERC's "cost-effectiveness" test.)

Allowing states to block entry by cost-effective demand response has the opposite effect: It leads to unnecessarily (and unlawfully) higher prices. Justice Scalia's dissent made that point precisely: "If inducing retail customers to participate in wholesale demand-response transactions is necessary to render wholesale rates 'just and reasonable,' how can FERC, consistent with its statutory mandate, permit States to thwart such participation?"[4]

So FERC has two options. The first option is to eliminate the state veto option, so that wholesale market operators can (and must) accept demand resources from consumers in all states. Consumers would have a federally-granted right to sell demand response; states would be preempted from interfering. As a result, consumers in non-vetoing states would no longer have to pay for wholesale prices made unlawfully high by the vetoing states. FERC's second option is the "nuclear option": Declare that wholesale market prices in regions with state vetoes are no longer lawful—where the effect of those vetoes is to prevent demand response from lowering those prices to "just and reasonable" levels. Wholesale generators in those regions then would have to sell at prices set or limited by FERC, based in some way on some measure of cost.

What FERC cannot do about the state veto is to say nothing. The FPA does not allow FERC to buy favour with some states by harming other states. And as the Supreme Court once declared, the *Federal Power Act* "makes unlawful all rates which are not just and reasonable, and does not say a little unlawfulness is permitted."[5]

Inadvertent error: The meaning of "interstate commerce"

It is always impressive when a court of general jurisdiction writes clearly and accurately about a technical statute. The Supreme Court's opinion embodied those qualities, with one exception.

The FPA's jurisdictional provision (Section 201(b)(1)) vests FERC with authority over, among other things, "the sale of electric energy at wholesale in interstate commerce." The words "interstate commerce" regularly trip up FPA newcomers; they tripped up the Court here. Presumably referring to those words, the majority opinion, when setting the statutory context, states: "... [T]he Commission may not regulate ... within-state wholesale sales...." The statement is legally wrong. As every FPA

4 *Ibid* at p 9.
5 *Federal Power Comm v Texaco Inc*, 417 US 380 at 399 (1974).

practitioner learns, first week on the job, in FPA-land transactions in every state (except Alaska, Hawaii and Texas) are in "interstate commerce" even if their contractual origin and destination lie within a single state. The reason was given by the Supreme Court itself, in a landmark case involving intra-Florida wholesale sales. Upholding the Federal Power Commission (FERC's predecessor), the Court held that because the nation's transmission network is interconnected across state lines, electrons from multiple states commingle, thus placing all transactions within "interstate commerce."[6] More recently, the Court stated that "electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce."[7]

The Court's error did not affect its reasoning. But it would be destabilizing (in terms of law, policy and commercial contracts) if those seeking to diminish FERC's authority treated this drafting error as a legal holding.

Alfred Kahn

For Professor Kahn, life was a joy. He must be smiling now—from heaven—because (a) the Supreme Court cited his great treatise, *The Economics of Regulation: Principles and Institutions*; and (b) FERC in Order 745 relied on his comments defending LMP against lesser forms of compensation. He died four months after that submission, his 93-year life ending before he could see the fruit of this last contribution.[8] His confidence being as large as his prolificity, he no doubt predicted the outcome. ■

6 See *Florida Power Comm v Florida Power & Light Co*, 404 US 453 (1972).
7 *New York v FERC*, 535 US 1 at 7 (2002). The exceptions are transactions within Hawaii (naturally), Alaska (naturally) and Texas. On the Texas exception, see my *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction* at p 393 n.117 (2013). For a dissident view of "interstate commerce" under the FPA, see Frank Lindh and Thomas Bone, "State Jurisdiction over Distributed Generators" (2013), 34 Energy Law Journal 499.
8 See my appreciation at *Alfred Khan (*1917-2010), ScottHemplingLaw.com <http://www.scotthemplinglaw.com/essays/alfred-kahn>.

MARKET MANIPULATION IN ALBERTA: TRANSALTA PAYS $56 MILLION

*Gordon E. Kaiser**

On July 27, 2015 the Alberta Utilities Commission released the first contested Canadian decision involving energy market manipulation. The 217 page decision[1] followed a three year investigation and a three-week hearing. This is not the first decision on this topic. TransAlta settled an earlier market manipulation case[2] and the Ontario Market Surveillance Panel recently released a extensive Report on gaming of the Market Rules in connection with constrained off payments.[3] But by any measure the Alberta decision is a major step forward in this branch of energy regulation.

The Commission used a two phase proceeding. Phase One dealt with the substantive allegations. Phase Two dealt with the appropriate administrative penalty.

The Allegations

The Alberta Market Surveillance Administrator (MSA) claimed that in November and December 2010 and February 2011 TransAlta intentionally took certain coal-fired generating units off-line for repairs during periods of high demand. The MSA argued that TransAlta could have made those repairs during periods of lower demand but instead the company elected to drive up electricity prices by reducing supply during peak hours.

The MSA also claimed that two TransAlta traders used non public information to trade in the Alberta electricity market.

In addition the MSA claimed that TransAlta did not have an effective compliance policy to prevent anticompetitive conduct.The MSA argued that TransAlta's lack of policy and training regarding the use of non public information breached its obligation to support the fair efficient and openly competitive operation of the market as required by section 6 of the *Electric Utilities Act*.[4]

The Outage Allegations

The Alberta Commission found that TransAlta had in fact timed the outage of its coal-fired generating plants on the basis of market conditions rather than the need to safeguard life, property or the environment as provided for in article 5.2 of the Power Purchase Arrangements. The findings related to four dates- November 19, 2010 for the Sundance 5 plant, November 23, 2010 for the Sundance 2 plant, December 13-16, 2010 at Sundance 2 plant, the Keephills 1 plant and Sundance 6

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1 *Market Surveillance Administrator v TransAlta Corporation* (Decision) (July 2015), 3110-D0I-2015 (Alberta Utilities Commission).

2 Re *Market Surveillance Administrator, Application for Approval of a Settlement Agreement between the Market Surveillance Administrator and TransAlta Energy Marketing Corporation,* (Decision) (3 July 2012), 2012-182 (Alberta Utilities Commission).

3 Ontario Enerergy Board, Market Surveillance Panel, *Report on the Investigation into Possible Gaming related to Congestion Management Credit Payments by Abitibi Consolidated and Bowater Canada Forest Products,* Investigation No 2010-2 (February 2015).

4 *Electric Utilities Act,* SA 2003 c E-5.1, s 6.

plant and February 16, 2011 at the Keephills 2 plant.

The Commission concluded that TransAlta could have done the work during off-peak hours but instead chose to use peak or super peak hours to maximize the price and benefit its own portfolio.

The most important finding in the decision dealt with the interpretation of section 2 of the *Fair, Efficient and Open Competition Regulation*[5]. There were two important issues. First, in demonstrating anticompetitive conduct, is it necessary that the MSA prove that TransAlta intended to limit competition? Second, did the MSA have to prove the extent to which competition had actually been lessened?

The Alberta Utilities Commission relied on the Federal Court of Appeal's decision in *Canada Pipe*[6] and the Alberta court's decision in *Royal LePage*[7] to conclude that direct evidence of subjective intent was not required and that in establishing anticompetitive intent the Commission could rely on the fact that corporate actors intended the consequences of their actions. The Commission also found that section 2 created a per se offense rather than a rule of reason offense in that section 2 does not require assessment of the economic effects resulting from the conduct. In short, the prescribed conduct is anticompetitive in and of itself without assessing the economic effects of that conduct. Once the Commission found that the charging section was a per se offence, the MSA 's chance of success in the case improved substantially.

The Trading Allegations

Contrary to the assertion of the traders, the Commission found that the traders were market participants at all material times and that one of them used non public records to trade contrary to section 4 of the *Fair Efficient and Open Competition Regulation*.

However the Commission also found that the trader took all reasonable steps to avoid breaches of that section by seeking and obtaining direction from senior TransAlta management and concluded that the trader had established a defense of due diligence. With respect to the second trader, the Commission concluded the MSA had failed to demonstrate that the trader had used non public records during the relevant period.

The Compliance Allegations

With respect to the compliance allegations, the Commission concluded the MSA had not proven on a balance of probabilities that TransAlta had breached section 6 of the *Electric Utilities Act* on the basis that the compliance policies and oversight were inefficient, inadequate or deficient.

While the Commission found that the evidence in the case fell short of establishing a contravention of section 6 of the Electric Utilities Act, it noted that robust compliance regimes were important and strongly suggested that TransAlta retain an outside independent expert in the compliance field to review its policies practices and make recommendations for improvement.

The Consent Order

On September 30, 2015 counsel for the MSA filed an application with the Commission seeking approval of a Consent Order under section 54 of the Alberta Act.[8] Counsel argued that the Consent Order would bring Proceeding 3110 to a final and binding conclusion and, if granted, would provide clarity to all market participants.

Counsel further stated that the would provide a in-depth interpretation of the integrated legislative framework governing Alberta's competitive electricity market and that the decision would form the bedrock for future decisions and play a critical role in ensuring that Albertans continue to benefit from a fair, efficient and openly competitive market.

Counsel also noted that the Consent Order would bring the proceeding to a final resolution without further appeals and allow the decision to stand unchallenged to provide immediate and lasting procedural value in administrative decisions.

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5 *Fair, Efficient and Open Competition Regulation*, Alta Reg 159/2009.
6 *Canada (Commissioner of Competition) v Canada Pipe Co,* 2006 FCA 233, [2007] 2 FCR 3.
7 *R v Royal LePage Real Estate Services Ltd,* [1993] ABQB 7148.
8 *Alberta Utilities Commission Act,* SA 2007, c A-37.2, s 54.

Under the Consent Order TransAlta agreed to pay in excess of $56 million. Consisting of an administrative penalty of $ 51.9 million and,$4.3 million in MSA costs.[9] The administrative penalty of $51.9 million consisted of two components. The first was disgorgement of $26.9 million pursuant to section 63(2) of the *Alberta Utilities Commission Act* and Section 7 of Commission Rule 13 .[10] The Second was an administrative monetary penalty of $ 25 million.

The disgorgement under the Alberta Rule 7 Is intended to nullify the value of gains acquired through misconduct. The Commission accepted the MSA expert evidence that 26.9 million was in light of the jurisprudence reasonable and in the public interest.

The Sentencing Factors

The administrative monetary penalty levied by the Commission was at the top of the range under Commission Rules having regard to the various factors in Rule 13 the Commission found the contraventions very serious:

- the contraventions resulted in significant widespread harm to customers and the market by negatively impacting pool prices, the forward market and customer confidence;
- the contraventions involved significant amounts of money and resulted in substantial gains for TransAlta;
- the outage contraventions were premised on manipulation and were part of a broad scheme that was systematic and persistent;
- the bidding strategy was approved by TransAlta senior management;
- this was not TransAlta`s first offence. The company had breached the Fair and Openly Competitive Regulation in November 2010 by impeding Import transactions.[11]

The Procedural Issues

In some respects the main liability issues (a) did TransAlta time the outages for the purpose of maximizing prices and (b) how much was the gain were the easy issues.

From beginning to end the Commission faced a variety of challenges on virtually every possible point of law. All were considered in careful detail. They included the extent of disclosure), the use of circumstantial evidence, the admissibility of expert evidence,[12] the burden of proof), due diligence, the issue of officially induced error, and abuse of process.

Conclusion

The decision is a textbook on the principles involved in regulating energy market manipulation. While there has been extensive jurisprudence in US investigations under FERC jurisdiction, this is the first Canadian decision to rule on the wide ranging legal issues that will guide regulators throughout the country.

Of interest was the fact that the Consent Order contained an acknowledgment by TransAlta that the MSA had carried of its mandate in a fair and reasonable manner. The record was littered with allegations of abuse of process. Another interesting point about the Consent Order proceeding was that the consumer groups were not granted standing - the Commission having ruled that it did not have legislative authority to award restitution.[13]

Like the decision on liability, the decision on the Consent Order explains in detail the jurisdiction of the Commission to accept the Consent Order. Taking guidance from the principles developed by the courts throughout Canada,[14] the Commission ruled that the Commission's obligations to decide whether or not the

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9 *Market Surveillance Administrator Allegations against TransAlta Corporation et al* (Request for Consent Order) (29 October 2015), Decision 3110 – DO3- 2015, (Alberta Utilities Commission).

10 Alberta Utilities Commission Rule 013, *Criteria Relating to the Imposition of Administrative Penalties.*

11 Re *Market Surveillance Administrator, Application for Approval of a Settlement Agreement between the Market Surveillance Administrator and TransAlta Energy Marketing Corporation,* Decision 2012-182 (Alberta Utilities Commission).

12 Following the main hearing the Commission asked for submissions on decision of the Supreme Court of Canada in *White Burgess Langille Inman v Abbott and Haliburton,* 2015 SCC 23 [*White Burgess*].

13 Limited standing had been granted in the first TransAlta decision, *supra* note 2.

14 *R v Bullock*, 2013 ABCA 44 at para 18; *Rault v Law Society of Saskatchewan*, 2009 SKCA 8; *R v DeSousa,* 2012 ONCA 154, 109 OR (3d) 792.

proposed settlement is reasonable is that it must fall within a range of acceptable outcomes given the facts and the applicable law, not whether it is the result that the Commission might have chosen.

This was a hotly contested case with expert counsel on both sides and a range of expert witnesses. For those that follow these cases, what stands out to any observer is the detail that the Commission exercised in carefully examining each aspect of the evidence and each legal argument. It's a rare example of detailed reasons that we rarely see in regulatory decisions today. It provides an important handbook for regulators and lawyers practicing this field.

This is a growing part of energy regulation. In the United States regulatory lawyers like to say that in the old days their main work was the regulation of rates, but today they focus on regulating competition. Between 2007 and 2014, FERC assessed civil penalties of $ 602 million and ordered disgorgement of $300 million under market manipulation cases. The levels increased in 2015.

In recent years Ontario has also moved aggressively to enforce breaches of the Market Rules. A number of settlements have been reached although few are public. As dynamic energy markets move toward more competitive solutions, we will see more of these cases. The Alberta decision is a welcome example of timely and first class legal decision-making to be appreciated regardless of which side is viewing it. ■

ALBERTA UTILITY ASSET DISPOSITION (UAD) – COURT OF APPEAL UPHOLDS COMMISSION & UTILITIES SEEK LEAVE FROM THE SUPREME COURT

*James H. Smellie**

1. Introduction

The last quarter of 2015 was a busy one in respect of judicial activity of interest to Alberta utilities: a decision by the Alberta Court of Appeal (ABCA); two decisions by the Supreme Court of Canada; and two applications for leave to the Court from that ABCA decision.

A short while ago, Gordon Kaiser observed that the Court's 2006 *Stores Block*[1] decision was the 'beginning of the end' of the debate about who bears the cost risk of stranded utility assets, and that the 'end' of the controversy was marked in 2015 with the unanimous affirmation by the ABCA in *FortisAlberta*[2] of the Alberta Utilities Commission (AUC or Commission) *Utility Asset Disposition* (UAD) decision.[3]

My first task is to comment on the *FortisAlberta* appeal decision. But in light of the Court's decisions in *OPG*[4] and *ATCO Pension*[5] (which concerned Alberta utilities legislation) - released a mere week after *FortisAlberta* – and which have upended the prudence doctrine, at least as it relates to utility operating costs, and the fact that *FortisAlberta* is now the subject of two leave applications at the Court, a brief, high-level comment on the latter developments is also appropriate. Perhaps it is the case that we are not quite at the 'end.'

2. Stores Block

As is well known, in *Stores Block*, the Court narrowly found that all gains and losses arising from the disposition of an Alberta gas utility asset, outside the normal course of business, were for the account of the utility and its shareholders, on the principal ground that utility ratepayers enjoy no property right in the assets used to provide them with service.

Subsequent ABCA decisions (*Carbon*[6], *Harvest Hills*[7], *Salt Caverns I* and *II*[8]), building on *Stores Block*, established that only gas assets operationally deployed in providing service can be included in the utility rate base and that if not used or required to be used to provide service, such assets

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1 *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 SCR 140 [*Stores Block*].
2 *FortisAlberta Inc v Alberta (Utilities Commission)* 2015 ABCA 295 [*FortisAlberta or ABCA UAD Decision*].
3 AUC - *Re: Utility Asset Disposition*, Decision 2013-47 (26 November, 2013) [*UAD Decision*].
4 *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44 [*OPG*].
5 *ATCO Gas & Pipelines Ltd v Alberta (Utilities Commission)*, 2015 SCC 45 [*ATCO Pension*].
6 *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2008 ABCA 200, 433 AR 183 [*Carbon*].
7 *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2009 ABCA 171, 454 AR 17 [*Harvest Hill*].
8 *ATCO Gas & Pipelines Ltd v Alberta (Utilities Commission)*, 2009 ABCA 246, 464 AR 275 [*Salt Caverns I*]; A*TCO Gas & Pipelines Ltd v Alberta (Utilities Commission,* 2014 ABCA 28, 566 AR 323 [*Salt Caverns II*].

must be removed from rate base, in the normal course. By its own admission, the ABCA in these decisions has elected to broadly apply the *Stores Block* principles.

3. UAD Decisions

a. AUC

A stranded utility asset in Alberta is one that is no longer used or required to be used in utility service, prior to the end of its anticipated service life, and therefore, prior to the recovery by the utility of its capital investment in that asset. If the circumstance is an 'ordinary retirement' – due to a cause reasonably anticipated in setting depreciation provisions – then ratepayers will continue to be responsible for the undepreciated capital cost of the now stranded asset. But in the circumstance of an 'extraordinary' retirement – due to a cause that was not reasonably anticipated, such as a fire or flood – the utility and its shareholders will absorb the undepreciated capital cost.

In addressing the question of who, as a matter of policy under the umbrella of its broad rate-making authority, is to bear the risk of stranded assets, the AUC relied on *Stores Block* and the subsequent ABCA decisions.[9] Under the umbrella of its broad rate-making authority, the AUC concluded that stranded assets can longer be used to provide service, and so must be removed from rate base, with any gain or loss to the account of the utility.

b. ABCA

The Alberta utilities obtained leave to appeal the UAD Decision, on the question of whether the AUC had wrongly imposed on them a new "prudent cost recovery risk" such as to deprive them of the opportunity to recover their prudently incurred costs of stranded assets. They challenged what they said was an unwarranted extension of *Stores Block*, albeit on somewhat different grounds. The gas utilities argued *Stores Block* ought to be limited to its facts, and asset dispositions outside the normal course, and should not apply to other assets, and certainly not stranded assets. Otherwise, they said, their entitlement to recover all of their prudently incurred costs would be undermined.

The electric utilities, while supporting that argument, also argued that since the deregulation of their industry in Alberta, they were subject to an entirely different legislative scheme and regulatory construct, where the 'used or required to be used' principle was simply not applicable, having been replaced by a guarantee of the recovery of their prudently incurred capital investment costs.

That scheme, they noted specifically, excluded the concept of rate base and used or required to be used. All of this, the transmission utilities argued, made sense in light of the fact that the Alberta AESO could direct them to invest in facilities: how could they be at risk of not recovering their capital investments when they could not control those investments?

The ABCA upheld the UAD Decision and found no basis for appellate intervention.

First, given that the appeals raised issues of the interpretation and application of Alberta's utility legislative regimes and the AUC's rate-making authority, the ABCA had little difficulty concluding that its review would proceed on a deferential standard of reasonableness. This was a key determination: the issue for the Court was not whether the utilities' interpretation was a reasonable one, but whether the AUC's interpretation was unreasonable.

Second, the Court rejected the utilities' contention that in participating in their appeal, the AUC had overstepped the accepted boundaries for a regulator's participation in an appeal of its decision, concluding that the AUC's participation had been necessary and helpful.

The Court provided a detailed context for its decision, in a thorough review of the historical treatment of stranded assets in general, the *Stores* Block saga and its own subsequent decisions which extended the *Stores Block* principles to the AUC's rate-making function, as opposed to simply the disposition of utility assets outside the normal course of business. In the Court's view, it was bound by those decisions, absent a reversal or reconsideration of *Stores Block,* or a legislative amendment.

The Court considered that the UAD Decision was a 'generic policy decision' by the AUC, a broad statement of how the AUC would deal with the issue of stranded assets in the future. It concluded that Alberta ratepayers should not have to pay for service they don't receive, and while the utilities were entitled to a reasonable opportunity to

9 See James Smellie, "Alberta Utilities Asset Disposition Decision" (Summer 2014), 2 ERQ 196.

recover prudent capital investment, the legislation did not make this a guarantee. A reasonable opportunity is just that, which in the Court's view, was reflected in the Commission's applicable depreciation methodology and procedures. As a matter of policy, it was not unreasonable for the AUC, in the exercise of its broad authority, to assign the risk of stranded assets to the utility.

As to the electric utilities, the ABCA acknowledged that while the recovery of prudent investment model was a permissible interpretation of their legislative scheme, it was not the only one, and concluded that it was not unreasonable for the AUC to have interpreted that scheme as providing a similar reasonable opportunity to recover prudent investment capital.

Importantly, the ABCA noted that the AUC's policy did not amount to a fetter of its discretion, given its authority to adjust for utility depreciation expense in respect of stranded assets in the circumstance of an extraordinary retirement, and so to "retain the flexibility to fulfill its mandate on a case by case basis."[10]

The fundamental conclusions of the Court were taken in light of its view of the Alberta legislation, the law in *Stores Block* and its own subsequent decisions, and the Commission's interpretation of them. The issue of stranded asset risk, in the view of the ABCA, is informed by public interest considerations, quite consistent with the role and mandate of the AUC. As such, it concluded that the UAD Decision was not unreasonable, but legitimate and well within the Commission's legislative authority as a choice from a range of options.

4. The Supreme Court's Review of the Prudence Doctrine

Whilst the ABCA was penning its *FortisAlberta* decision, Rothstein J was busy writing the Court's unanimous decision in *ATCO Pension,* and the majority decision in *OPG*. In each of these cases that were heard together, the Court grappled with the prudence doctrine[11], in the context of the regulatory disallowance of certain operating costs that the utilities sought to recover in rates.

In essence, the doctrine, or test, holds that in determining whether a utility's costs are prudent, they are presumed to be so, and the determination should be made without the benefit of hindsight.

a. ATCO Pension

ATCO Pension concerned the same legislative schemes that were in issue in the ABCA's UAD Decision, and the Commission's decision to disallow certain pension costs claimed to be recovered in rates by the ATCO gas and electric utilities.

The Court first affirmed that the standard of review of an AUC decision to set rates under the Alberta utilities legislation is reasonableness.

The Court acknowledged that while the legislation recognized the principle of allowing utilities to recover their operating and capital costs in rates, provided they are prudent or reasonable, it rejected the argument of the utilities that the Commission had failed to properly address the prudence of the pension costs in issue.

It did so based on the way in which the current Alberta legislation uses the word 'prudent,' which neither implied any presumption nor required a no-hindsight approach, or any particular methodology. Indeed, given the statutory burden of proof on the utilities to demonstrate that their proposed rates are just and reasonable, they must also show that their costs are prudent or reasonable.

The Court was careful to reserve its opinion on whether a situation covered by the term "prudently incurred" might dictate the use of a particular no-hindsight methodology, as would a situation (such as that which prevailed to some extent in *OPG*, see below*)* where the costs in question were 'committed' or as spent. Equally, the Court noted that "there are undoubtedly situations in which a failure to apply a no-hindsight methodology may result in unjust outcomes for utilities and thus violate the statutory requirement that rates must strike a just and reasonable balance between consumer and utility interests…"[12]

But in this case, on this statutory language and dealing with forecast operating costs, the Court concluded that the AUC was free to consider a variety of tools to determine whether costs are prudent, provided that the ultimate rates it sets

10 *FortisAlberta, supra* note 2 at paras 143,168.
11 See Gordon Kaiser, "The Prudence Doctrine Goes to the Supreme Court of Canada" (Summer 2014) 2 ERQ 205.
12 *ATCO Pension, supra* note 5 at paras 46- 65.

are just and reasonable, and the AUC's conclusion – reached without benefit of the prudence test and in all of the circumstances – was not unreasonable.

Finally, in rejecting the contention that the AUC had been overly preoccupied with reducing rates, the Court affirmed that regulators can't disallow prudent costs solely because they might lead to higher rates, and noted its conclusion in *OPG* that "the regulatory body ensures that consumers only pay for what is reasonably necessary."

b. OPG

In *OPG*, the Ontario Energy Board (OEB) appealed a decision of the Ontario Court of Appeal which had set aside the OEB's disallowance of certain labour compensation costs (which the Court classified as partly committed under collective agreements, and partly forecast).

First, the Court confirmed that the OEB had properly participated in the appeal, and that it had not sought to amend or vary or supplement – bootstrap – its original reasons for decision.

Under the relevant Ontario legislation, the Court found that while the prudent investment test is a valid tool that could be used in determining just and reasonable utility rates, the OEB was not bound to apply a particular prudence test in this case. As the utility was bound to establish that its rates were just and reasonable, neither did the legislation establish any presumption of prudence in its favour.

Rothstein J noted that the prudent investment test is not a mandatory feature of just and reasonable rates in the US, or Ontario, and contrasted the present situation with a scenario in which express statutory protection for the recovery of prudent investment costs is provided, thus making a no-hindsight prudent investment test a required feature of just and reasonable rates. When the test is not required by the particular scheme, but only that rates are just and reasonable, not using the test does not make the resulting decision on rates unreasonable.

Of note was the Court's observation that the concept of just and reasonable rates captures the essential balance at the heart of regulation: the encouragement of robust investment in utility infrastructure and protecting consumer interests requires that utilities be allowed to earn their cost of capital over the long run.

Rothstein J specifically noted that depending on the circumstances, a prudence review could be important in ensuring that utilities are able to secure the requisite level of investment capital, and are not discouraged or 'chilled' from making the optimum level of investment in their facilities. However, given that operating costs were involved here, there was not, in the majority's view, any danger of a chilling effect about incurring such costs in the future.

In her dissent, Abella J noted that the OEB had said it would evaluate the committed portion of the costs using a prudence review, but then ignored that method, including any presumption of prudence. Such regulatory uncertainty and moving targets would leave OPG unable to determine what to spend and invest, and as such, the OEB decision was unreasonable.

5. FortisAlberta - Leave Applications[13]

After the release of the *OPG/ATCO Pension* decisions, two leave applications were filed with the Court just prior to the end of 2015 in respect of *FortisAlberta*: the first by three electric utilities[14], and the second by a combination of four gas and electric utilities.[15] Each of the Commission and the Utility Consumer Advocate (UCA) have opposed the applications. As in all leave applications to the Court, the test is whether there is an issue of sufficient public, legal or national importance to warrant the Court's intervention. It is not surprising that the parties disagree on whether this is the case; it is perhaps somewhat surprising that all of the parties rely on the *ATCO Pension* and *OPG* decisions.

a. Applicants' Positions

In the AltaLink Application, the electric utilities argue that the Alberta *Electric Utilities Act* (EUA) embodies and enshrines the prudent cost recovery standard, consistent with the provincial policy to encourage and protect capital investment in infrastructure. Each of the AUC and ABCA erred in applying *Stores Block* and subsequent

13 Section 5 is based on a review of the briefs filed by the parties in SCC Docket Nos. 36728 and 36730 between November 2015 and January 2016.
14 AltaLink, ENMAX Power and EPCOR Distribution and Transmission [*AltaLink Application*].
15 AltaGas Utilities, ATCO Gas & Pipelines, ATCO Electric and FortisAlberta [*AltaGas Application*].

ABCA decisions to modify and override this clear legislative intent.

The ABCA UAD Decision also conflicts with *ATCO Pension* and *OPG,* and the right of the utilities to recover their prudently incurred costs, given the Alberta legislative regime. In other words, the Alberta legislative regime is one that includes what Rothstein J described as "express statutory protection"[16] for the recovery of prudent investment costs.

The AltaGas Application makes many of the same points, and so far as *ATCO* Pension is concerned, argues that while there may be flexibility in the Alberta legislation concerning the manner in which the AUC determines just and reasonable electric utility rates, once a determination has been made that the costs in issue are prudent, a reasonable opportunity to recover those costs must be provided, given the clear legislative direction.

The problem with the UAD Decision and the ABCA's affirmation of it, is that it establishes an "outright denial" of any opportunity for the recovery of any of the undepreciated costs of prudently acquired assets, if they are the subject of an extraordinary retirement, or at least dilutes that opportunity to the point of being unreasonable. In other words, the UAD Decision embeds the notion that the utility will always bear the risk of loss on those investments.

In each of the applications, an argument is also made that the Court's guidance on the scope of reasonableness review is required. Acknowledging that the interpretation of the AUC's home statute can be accorded deference, the argument is that the AUC's interpretation of case law – *Stores* Block and its 'progeny' in the ABCA – and policy choices to override clear legislative intent concerning express statutory protections of cost recovery should not.

b. Respondents' Positions

The AUC and UCA say that there is no question of sufficient public or national importance to warrant the granting of leave. There is evidence which supports the symmetry of risk established in *Stores Block;* the issues are Alberta-specific, as evidenced by the way in which other jurisdictions have already distinguished *Stores Block* and can be expected to deal similarly with the UAD Decision, in accordance with their own legislative schemes; varied treatment of stranded utility assets across the country is not a matter of national importance; and the Court has refused leave on key ABCA decisions extending the *Stores Block* principles.

i. AUC

The Commission says the question for the Court is: in setting rates for Alberta utilities, what is the appropriate treatment of the unrecovered portion of stranded assets that cease to be used prior to the end of their anticipated service life, for extraordinary reasons? And in response, the Commission says that the UAD Decision reasonably reflects the proper guidance that has been provided by *Stores Block* and the ABCA decisions, in the context of the Commission's main function of setting rates.

Relying on *ATCO Pension*, and the ABCA UAD Decision, the AUC says it is clear that the preeminent principle under Alberta utility legislation is not the guaranteed recovery of prudent costs – which is in fact only a reasonable opportunity - but just and reasonable rates. The Alberta legislation doesn't prescribe any specific method to determine just and reasonable rates, and provided that is the outcome, the AUC has a broad discretion to determine whether utility costs are prudent and variety of tools to do so.

Concerning the reasonableness standard of review, the AUC argues that varying the standard depending upon what the tribunal is interpreting – home statutes, case law or policy – would be at odds with *Dunsmuir* and is not warranted.

ii. UCA

The UCA echoes the AUC arguments made on the basis of *ATCO Pension* and the ABCA UAD Decision. As to the claim that under the UAD Decision, utilities will be denied outright any opportunity to recover stranded asset costs, the UCA refers to the AUC's depreciation methodology, noting that the onus is on the utilities to justify their depreciation costs, and in the rare case that some element of those costs are disallowed, that is entirely consistent with the statutory requirement of a reasonable opportunity to recover costs.

The UCA rejects the argument that the reasonableness standard of review needs to be revisited, as the principles which guide its

16 *OPG, supra* note 4 at para 96.

application are well-settled and not uncertain.

c. Applicants' Replies

The electric utilities reply by suggesting that the UAD and ABCA decisions actually conflict with *OPG* and *ATCO Pension*, which distinguish operating and capital costs, and emphasize the importance of the opportunity to recover the latter. However, even though capital investment has already been found to be prudent, the effect of the UAD Decision is to deny recovery due to unforeseeable events.

They then focus on *Stores Block* and its progeny, noting that those decisions had nothing to do with ratemaking or electric utilities, and yet have been used to override clear legislative intent under the EUA in the UAD Decision, which itself had nothing to do with ratemaking, but was written to comply with a particular interpretation of *Stores Block*.

In reply to the AUC, AltaGas *et al* say that if the *Stores Block* principles were so fundamental as to have informed the UAD Decision, then their application can't be limited to Alberta, especially since denying recovery of committed capital in utility assets raises obvious concerns across the country. With respect to *OPG* and *ATCO Pension*, AltaGas says that this case is not about the right methodology or test to evaluate prudence, but whether cost recovery in relation to assets already found to be prudent can be reasonably denied on the basis of case law that overrides clear legislative direction.

In reply to the UCA, AltaGas *et al* say that the case is not about "absolute guarantees" of recovery, but whether it is reasonable for the *Stores Block* principles to completely deny an opportunity to recover prudent costs, and whether that result is consistent with the conclusions in *OPG* and *ATCO Pension* that such an opportunity must be provided. On the depreciation point, AltaGas *et al* argue that this simply demonstrates the need for the Court to intervene: how can a mechanism used to ensure the recovery of prudent costs even beyond an ordinary retirement event be used as the basis for denying the recovery of similar costs in the event of an extraordinary retirement?

With all briefs now completed, a decision by the Court on these important applications may be expected sometime this spring.

6. What Next?

There are many difficult questions in and about Alberta these days, whether they concern the economy generally, the essentially anemic price of oil, job losses, or the seemingly ever-higher hurdles that impact the ability to deliver Alberta resources to markets, whether they be to the south, to the west, or to the east. The uncertainties are many, and palpable.

The ABCA's UAD Decision and *ATCO Pension* appear to have eliminated some of the uncertainty and moved us closer to the end of the debate about who should bear the cost risk of stranded Alberta utility assets.

In respect of forecast Alberta utility operating costs, there would appear to be little doubt that the current legislation does not require the use of a specific methodology – the prudent investment test – to determine whether such costs may be included in just and reasonable rates. Whether that is the case for committed operating costs seems to be an open question.

And as disclosed by the *OPG* and *ATCO Pension* decisions and the briefs in the *FortisAlberta* leave applications, as it relates to committed capital investment costs which have already been found to be prudent, particularly where they are no longer available for utility service due to extraordinary events, there are clearly divergent views.

Will the Supreme Court see the need to assist in getting the asset disposition debate all the way across the finish line? If so, we will have some ways to go yet to get to the 'end.'

If not – if *Stores* Block lives on, as interpreted by the ABCA - its UAD Decision will join the list of others in respect of which leave has been refused by the Supreme Court in this area, and the debate may well then be at an end - at least for the time being. If so, that may take us well back in time, to the vicinity of *FPC v Hope Natural Gas Co.* and the US Supreme Court's conclusion that rates set by the FPC under a certain legislative scheme did not have to be based on a single specific method or formula, because the important and operative question to be answered is whether the total effect of the rate order, the result reached, was reasonable.[17]

17 *FPC v Hope Natural Gas Co*, (1944) 320 US 575. Sometimes called the "end-result" doctrine.

And in that case, will there be a call for changes to Alberta's utility legislation, as the ABCA alluded to in its UAD Decision? Will there be changes to the AUC's depreciation methodology in light of that 'end', and at whose behest? Will there be occasion for the utilities to test the AUC assertion that it has the authority under its rate-making power to amend its depreciation methodology to fit the circumstance of a case in which it is claimed that the essential balance between robust utility investment and customer interests has been upset, unless the utility can recover the costs of a stranded asset? ■

POLE ATTACHMENT CHARGES – ONTARIO ENERGY BOARD INITIATES A COMPREHENSIVE REVIEW

David Stevens[1]

The Ontario Energy Board ("OEB") has commenced a process to determine the approach to be used to set wireline pole attachment fees across Ontario.[2] In a November 2015 letter, the OEB initiated a "comprehensive policy review" of miscellaneous rates and charges.[3] The OEB indicated that the first component of the review will address wireline pole attachment fees. This review follows a number of rate proceedings where pole attachment fees have been an issue (including the recent Toronto Hydro[4], Hydro One[5] and Hydro Ottawa[6] rate applications).

The CCTA case

The rates to be charged to Canadian "Carriers" (as defined by the *Telecommunications Act*[7]) for pole attachments were previously approved by the OEB in a generic proceeding in 2005 (the "CCTA" case).[8] That case was an application by the Canadian Cable Television Association ("CCTA") for an order requiring Ontario electricity distributors to provide uniform terms of access for attaching cable television transmission lines to power poles. The case arose because Carriers were unable to reach agreement with distributors about the charges (rates) for such attachments.

Over the objections of electricity distributors, the OEB decided that regulatory intervention was appropriate to remove uncertainty over the terms under which pole attachments would be permitted. The OEB decided that all licensed electricity distributors shall provide access to their power poles to all Canadian Carriers (including cable companies). The OEB also decided that the same "pole attachment rate" should apply for all distributors, and to all Carriers.

There was significant debate about the method to be used to calculate the appropriate "pole attachment rate." The OEB decided that the rate should take account of the "incremental or direct" costs of attachment, as well as a portion of the fixed or common costs of each power pole. The fixed costs are to be allocated on the assumption that there is an average of 2.5 communications attachments per pole, as well as one power attachment. Taking all of this into account, the OEB ordered that the "pole attachment rate" would be $22.35 per pole per

1 David Stevens is a partner at Aird & Berlis LLP, and is an editor and contributor for EnergyInsider.ca.
2 EB-2015-0304, Review of Miscellaneous Rates and Charges.
3 EB-2015-0304, OEB Letter dated November 5, 2015.
4 EB-2014-0116, Toronto Hydro-Electric System Limited Application for electricity distribution rates for the period from May 1, 2015 to December 31, 2019.
5 EB-2013-0416/EB-2014-0247, Hydro One Networks Inc. Application for electricity distribution rates for 2015 to 2019. The portion of the Decision in that proceeding related to wireline attachment fees is the subject of a review and variance motion from Rogers Communications and other Carriers, under docket EB-2015-0141.
6 EB-2015-0004, Hydro Ottawa Limited Application for electricity distribution rates for the period from January 1, 2016 to December 31, 2020.
7 *Telecommunications Act, SC 1999, c 38, s 1(1).*
8 RP-2003-0249, Application pursuant to section 74 of the *Ontario Energy Board Act, 1998* by the Canadian Cable Television Association for an Order or Orders to amend the licenses of electricity distributors.
9 RP-2003-0249, Decision and Order dated March 7, 2005.

year.[9] This was to be included as a condition to each electricity distributor's licence.

The CANDAS case and the subsequent decision to allow competitive rates for wireless attachments

In the 2011 "CANDAS" proceeding[10], the OEB was asked by the Canadian Distributed Antenna Systems Coalition ("CANDAS") to confirm that the CCTA decision applied equally to "wireless" attachments, as it did to "wireline" attachments. The distinction is that "wireless" equipment includes components of distributed antenna systems (not just cable lines). At that time, some distributors had taken the position that pole access did not need to be granted for "wireless" attachments. In its decision on a preliminary motion in the CANDAS proceeding, the OEB confirmed that the findings in the CCTA decision, including the pole attachment rate and the associated requirement on distributors to provide access apply to both wireline and wireless attachments.[11]

Subsequently, Toronto Hydro brought an application to the OEB requesting that the OEB forbear from regulating the terms, conditions and rates for wireless attachments.[12] This would allow Toronto Hydro to charge competitive rates. A Settlement Agreement was reached and approved by the OEB, under which Toronto Hydro was permitted to provide access for wireless attachments to its poles on commercial terms normally found in a competitive market.[13] Toronto Hydro agreed that it would credit net revenue from wireless attachments against its revenue requirement.

The OEB then convened a separate process to amend electricity distributors' licences to allow market-based rates to be charged for attachment of wireless telecommunications devices to utility poles.[14] In a recent decision, the OEB has amended the electricity distribution licences for each distributor to allow them to charge market rates for wireless pole attachments.[15]

Recent applications to increase pole attachment charges

In their recent rate filings, Toronto Hydro and Hydro One have sought increases to the wireline pole attachment charge that had been set in the 2005 CCTA decision. In the Toronto Hydro case, the increase was to a level around four times the existing charge (it was subsequently revised to around three times the existing charge). This was met by objections from a wide range of cable companies. Among other things, the cable companies argued in both the Toronto Hydro and Hydro One cases that the OEB does not have jurisdiction to set the charges for pole attachments pursuant to the rate setting provisions of the *OEB Act* (section 78). The cable companies argued that this is not an electricity rates issue, and that any increases to the charges must be achieved through licence amendments (under section 74 of the *OEB Act*). Given that the Toronto Hydro and Hydro One rate applications were made pursuant to section 78 of the *OEB Act*, the cable companies argued that the OEB has no jurisdiction to approve the requests to increase their pole attachment charges. The OEB decided in the Toronto Hydro case that it does have jurisdiction under section 78 because pole attachment rates are incidental to the distribution of electricity as the poles are an essential facility properly considered while setting rates.[16]

The recent rate applications have not determined the question of whether the methodology for determining wireline pole attachment fees, and the amounts of the fees, should be updated from the level that was set in the 2005 CCTA decision. Generally speaking, distributors support raising the rates (as seen in the Toronto Hydro, Hydro One and Hydro Ottawa rate applications) and Carriers object

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10 EB-2011-0120, Application by Canadian Distributed Antenna Systems Coalition for certain orders under the *Ontario Energy Board Act, 1998*.

11 EB-2011-0120, Decision on Preliminary Issue and Order, September 13, 2012.

12 EB-2013-0234, Application by Toronto Hydro-Electric System Limited for an order pursuant to section 29 of the *Ontario Energy Board Act, 1998*, Decision and Order dated June 14, 2013.

13 EB-2013-0234, Settlement Proposal dated May 15, 2014.

14 EB-2014-0365, Wireless Attachment Consultation, OEB Letter dated July 30, 2015.

15 EB-2016-0115, Amending Rate-Regulated Electricity Distributor Licences to Authorize Market Rates for Wireless Pole Attachments, Decision and Order dated January 28, 2016.

16 EB-2014-0116, Decision and Procedural Order No. 10, April 29, 2015.

to the magnitude of the increases being sought.

The OEB's "comprehensive policy review"

As noted, in a November 2015 letter, the OEB initiated a "comprehensive policy review" of miscellaneous rates and charges.[17] In its letter, the OEB has asked interested parties to apply to be part of a Pole Attachments Working Group ("PAWG"). Around 15 parties applied to be part of the PAWG. In a letter dated February 9, 2016, the OEB appointed representatives of nine organizations to participate in the PAWG.[18] According to the OEB's letters, the PAWG will provide advice on technical aspects and related details for pole attachment charges. The meetings of the PAWG will begin in March 2016, and an expert consultant appointed by the OEB will assist. During or after this process, the OEB will consider the methodology to be used to determine pole attachment charges, including the appropriate treatment of revenues that the Carriers may receive from third parties for allowing additional cables to be attached to existing cables (referred to as "overlashing"). It is not clear how long the OEB's "comprehensive policy review" will take.

It will not be surprising if the planned comprehensive review of pole attachment charges in Ontario leads regulators in other jurisdictions to review the same items. ■

17 EB-2015-0304, OEB Letter dated November 5, 2015.
18 EB-2015-0304, OEB Letter dated February 9, 2016.

BOOK REVIEW – *THE GUIDE TO ENERGY ARBITRATIONS*[1]

*Glenn Zacher**

In his Preface to *The Guide to Energy Arbitrations*, William Rowley QC notes that "if a single industry can lay claim to parental responsibility for the present universality of international arbitration as the go-to choice for the resolution of commercial and investor state dispute, it must be the energy business. It is the poster boy of arbitral globalization." As Rowley and others of the book's contributors observe, the drivers of commercial arbitration operate in spades in the energy sector. Energy projects are international in scope; they are complex, long-term, capital-intensive projects; and, they bring together many parties of different nationalities and cultures from varied legal systems. These factors, as Rowley aptly remarks, make "the energy sector a natural incubator for disputes". Likewise they create powerful incentives to bypass the uncertainty and distrust engendered by foreign court systems and ensure the appointment of neutral adjudicators who possess the requisite expertise to competently and efficiently resolve disputes. At the same time, as Andrew Clarke, General Counsel of ExxonMobil International, cautions in the book's Foreword:

> "While … international arbitration has become the primary mechanism by which disputes are resolved in the oil and gas industry ... [u]nfortunately, the dispute resolution process itself is becoming increasingly complex and uncertain, adding a further layer of difficulty to the parties finding solutions to their disputes. The time and cost associated with international arbitration now compares unfavorably with litigation (which was never a good benchmark in the first place)."

It is against this backdrop that Rowley and fellow editors Gordon Kaiser and Doak Bishop have gathered "the thinking and recent experiences of some of the leading counsel in the sector." The *Guide to Energy Arbitrations* is not a textbook. The articles presume a basic knowledge of the energy sector and arbitration and the book is not comprehensive. For instance, there are no sections devoted to the enforcement of arbitral awards. That said, the book spans a lot of ground and the articles should for the most part be accessible to any in-house counsel, external counsel or student possessing a basic knowledge of the field. Bishop et al provide a very good and useful Overview that considers: (i) the various agreements and phases which constitute an international energy project (and can give rise to disputes), (ii) the evolving role of host states in energy projects, and (iii) the instruments (conventions, treaties and agreements) that have been developed to address disputes. This Overview provides a good starting point particularly for those readers who are not as familiar with the area. Many of the other chapters also mix practical guidance on how to approach issues with academic insights on emerging trends and how some of the key controversies and tensions in the international arbitration field are revealing themselves and playing out in the context of energy arbitration.

Part I of the book addresses "investor-state

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[1] J William Rowley, Doak Bishop & Gordon Kaiser, (ed), *The Guide to Energy Arbitrations*, (London: Law Business Research Ltd, 2015).

disputes" which many observers perceive as lying at the heart of international arbitration. This Part, which constitutes approximately half of the book, includes a very good introductory chapter by Mark Friedman et al examining the subjects of expropriation and nationalization which have historically featured in many high-profile cases. As Friedman interestingly notes, while expropriation and nationalization may hark back to the 1970s, "[i]n times of rising prices, energy resources represent easy opportunities to capitalize on the upward trend for investors and governments alike." Friedman provides a good primer on the types and forms of expropriation, the remedies available and practical considerations for protecting against expropriation.

The remaining chapters in Part I take a deeper dive into specific types of investor-state disputes, focusing on the key issues at play and the relevant jurisprudence. Steve Jagusch et al provide a good summary of the broad range of disputes and the jurisprudence. Of particular interest to energy companies and their general counsel, Jagusch distinguishes the types of state regulatory actions that have not typically sustained successful arbitration claims and therefore represent risks which may be challenging to protect against. Jagusch also highlights the inherent tension between state sovereignty and freedom of contract that underlines many investor-state disputes.

Similar themes are explored by Constantine Partasides et al and Nigel Blackaby et al in ensuing chapters. Partasides addresses stabilization clauses as a fundamentally important means of protecting against political volatility and government intervention through changes in tax policy. He analyzes the types of stabilization claims, their historical treatment by arbitral tribunals and how arbitral treatment of such clauses may be evolving. Blackaby likewise examines the management of long-term contractual risk through stabilization clauses in the utility context. He further traces the changes to the utility sector that have driven privatization and foreign investment, the unique and sensitive public interests that utility investments implicate, and the consequent (and pronounced) political and regulatory risks faced by utility investors. As Blackaby observes, the unique public interest dimension that attaches to utilities has made arbitration, including arbitrations conducted pursuant to investment treaties, controversial and unpredictable.

Parts II, III and IV address disputes involving Construction of Major Capital Projects, Joint Ventures and Gas Supply and LNG Arbitrations. These parts include a chapter by Doug Jones on why energy construction disputes particularly favour arbitration over state court proceedings and a more in-depth piece by Fred Bennett on Tort Claims for Massive Cost Overruns. Bennett explains the complex procedural and substantive law issues that arise when cost overruns on a project escalate to such a massive proportion that they exceed the scope of contractual provisions for adjudicating overrun claims. Given the amounts at stake and the susceptibility of megaprojects to cost overruns, this is an instructive article for companies and their counsel. These Parts also include an interesting review by Mark Levy on gas price adjustment mechanisms in long-term gas supply agreement. Noting the recent increase in gas price review arbitrations (triggered by price volatility arising from changes in global supply conditions, competition from new sources of energy and other factors), Levy queries whether (and how) the unpredictability and risk that they have introduced will lead to industry-wide changes in how such arbitrations are conducted.

The final two parts of the book address Disputes Involving Regulated Utilities and Procedural Issues. The chapter by Gordon Kaiser on Regulated Utilities appears at first glance out of place in a book focused on arbitrating disputes arising from major international oil and gas and power projects. However, as Kaiser notes, for every large investor-state case "there are 10 significant commercial arbitrations in the downstream energy sector" in which "the center of gravity is not London, Stockholm or Paris, it is Houston or Calgary." He further observes that what distinguishes these arbitrations from investor-state arbitrations is that they are between companies and that the companies are rate regulated. Kaiser, who served for a long time as Vice-Chair of the Ontario Energy Board and now principally arbitrates energy disputes, reviews the factors driving disputes between regulated utilities - the drop in the price of oil, the moratorium on pipeline construction, increases in shale gas, increases in the delivery of oil by rail, the growth

of distributed generation and increases in renewable energy use. Kaiser then provides an insightful and thought-provoking analysis of how courts in the US and Canada are drawing jurisdictional lines between the authority of regulators and arbitrators over utility disputes. This section also contains a very good analysis by David Haigh et al on Multiple Contracts and Multiparty Arbitrations. Haigh offers practical guidance on drafting arbitration clauses to accommodate multi-contract and party arbitrations and as well on the considerations and procedural options available when agreements are more narrowly drafted.

The Guide to Energy Arbitration is a very useful contribution to the literature in the area. While as noted, it is not a comprehensive text, it nevertheless assembles the views and insights of leading counsel and arbitrators on many of the key issues and trends in the energy arbitration world. It should be a valuable guide to energy companies and their internal and external counsel, in addition to being of interest to commercial and litigation lawyers generally. ■