MARKET
SURVEILLANCE
ADMINISTRATOR
ALBERTA CANADA

CANADIAN GAS ASSOCIATION

2020 CGA ENERGY REGULATION COURSE

OTTAWA, MARCH 3, 2020

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ADVOCACY BEFORE ENERGY REGULATORS

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GORDON KAISER,

MARKET SURVEILLANCE ADMINISTRATOR,

ALBERTA

FORMER VICE CHAIR, ONTARIO ENERGY

BOARD

ADVOCACY BEFORE ENERGY REGULATORS

A. ARGUING THE CASE

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ADVOCACY BEFORE ENERGY REGULATORS

A. ARGUING THE CASE

INTRODUCTION

A regulatory hearing is not a trial. Rarely are the rules of evidence used. There are rules of procedure but they are relatively simple.

The law is not the dominant factor. This is not a court. Proceedings can be fact intensive and usually involve expert witnesses. The following are guidelines that will help you argue effectively. However, as in all litigation, preparation is the key.

Regulatory hearings are unique in that you will often appear before the same panel. In these circumstances it is important not to misstate the facts. Counsel must build credibility before the panel. It will serve you well in future cases.

THE OPENING

- Use it – most planes crash on takeoff.
- Do not assume that the panel knows what this case is about.
- Explain to the panel (and to yourself) what the issues are, what you have to prove and how you intend to do it.
- Do not read.
- Get the facts right. Forget the law. It will take care of itself. If some facts go against you, tell the panel. Do not assume they will go away.
- Do not start with procedural crap.
- The opening is a huge opportunity. Do not waste it.

DIRECT EXAMINATION

- Use direct. Do not dump and run. Get your witnesses comfortable.
- Use a panel. But pick a quarterback. And a cleanup batter.

WITNESS CONDUCT

- Answer the question. Do not be evasive.
- Do not argue. Leave that to the lawyers.
- Do not let the lawyers write the evidence
- Know what issues you are responsible for. And stick to them.
- Do not guess.
- Determine upfront if there is any prior evidence that conflicts with the current testimony. If there is both, you and your witness will go down in flames. Make sure you get a copy of all prior testimony.
- Avoid conflicts of interest.

CROSS EXAMINATION

- Use the Technical Conference to get the facts.
- Use a Compendium.
- Do not ambush.
- Keep it short.
- Do not argue.
- Ask for Undertakings. But be clear what you want. And follow-up when you get it.
- Be polite. No one likes a jerk. Particularly panel members who are non-lawyers.
- Remember the Rules of professional conduct

FINAL ARGUMENT

- If oral, provide a written outline.
- Use a Compendium. Include copies of relevant transcript pages and authorities.
- If written, remember this is what is on the panel members desk when they are writing the decision.
- Use a red pen. Often.
- Be fair. Do not misstate.
- Do not go down with the ship. Recognize a stupid argument.

- Remember reputation is everything. This is not a judge that you'll never see again. You will be back before these panel members many times over the next few years.
- Pay attention to onus but make sure it is the law not just convention.
- Remember these proceedings have a strong public interest component.

REPLY

- Keep it short.
- Do not read.
- Use a Compendium.
- Have answers to questions ready. You know the questions by now.
- If the members do not ask you the question, answer it anyway.

B. APPLYING THE LAW

INTRODUCTION

The most basic question counsel face in energy cases is what is the jurisdiction of the Board? As indicated below expert tribunals like energy Boards are granted substantial deference by courts.

The other unique aspect of energy hearings is that there is a body of regulatory law or public utility law that has developed over many years. These are set out below. However the recent decision of Mr. Justice Rothstein in the *Ontario Power Generation*[1] case points out that tribunals are not courts and public utility law is not comparable to the common law. Principles of public utility law are not binding on tribunals. At best they can be seen as a procedural guide. They are important, but you cannot take it to the bank.

The one exception may be the principle established by the Supreme Court of Canada in *Stores Block*.[2] There, the Alberta Commission allocated the gain on the sale of a building in Calgary between the ratepayers and the utility. The utility objected. The Court held that as a matter of property law the customers or ratepayers have no property interest in the assets of utility and therefore no entitlement to a share of the profits on the sale of the building.

That issue has now come full circle. Do the customers have a share of the losses relating to property no longer useful?

Today the largest issue facing utilities is that question - who will pay for stranded costs? The first major decision came in *TransCanada MainLine*[3] before the National Energy Board. There, TransCanada sought to write off (and charge the ratepayers) the stranded asset costs. The stranded asset costs were substantial because shipments on the pipeline had fallen by 50% in six years due to the growth of shale gas in Eastern United States. The pipeline was built 60 years ago to serve Eastern industrials. These customers had local gas next door. They no longer had toe to ship it from Western Canada.

Many utilities across Canada now face stranded costs largely driven by technological change and the rapid development of customer owned generation. The driver is CNP - technology that uses gas to generate electricity locally to supply one customer or a group of customers. This can have a dramatic impact on the usage of traditional local distribution systems.

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[1] *Ontario Energy Board v. Ontario Power Generation*, 2015 SCC 44

[2] *ATCO Gas and Pipelines Ltd. v. Alberta*, [2016] SCR 140

[3] *National Energy Board v. TransCanada Pipelines Limited*, RH-003-2011 (March 2013)

DOES THE BOARD HAVE JURISDICTION?

A tribunal only has the powers stated in its governing statute or those which arise by 'necessary implication' from the wording of the statute, its structure and its purpose.[4] The Ontario Board's jurisdiction to fix 'just and reasonable' rates is found in section 36(2) of the Ontario Energy Board Act, 1998:

> *The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.*

This is standard language in all public utility legislation.

It is generally accepted that an energy regulator's jurisdiction is very broad. In *Union Gas Ltd. v. Township of Dawn*, the Ontario Divisional Court in 1977 stated:

> *this statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements, are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal courts under the Planning Act.*
>
> *These are all matters that are to be considered in light of the general public interest and not local or parochial interests. The words 'in the public interest' which appear, for example, in s. 40(8), s. 41(3) and s. 43(3), which I have quoted, would seem to leave no room for doubt that it is broad public interest that must be served.*[5]

The same Court in 2005 issued two important decisions. The Court stated in the *NRG* case:

> *The Board's mandate to fix just and reasonable rates under section 36(3) of the Ontario Energy Board Act, 1998 is unconditioned by directed criteria and is broad; the Board is expressly allowed to adopt any method it considers appropriate.*[6]

The ruling in the *Enbridge* case decided that the Board in fixing just and reasonable rates can consider matters of 'broad public policy':

> *the expertise of the tribunal in regulatory matters is unquestioned. This is a highly specialized and technical area of expertise. It is also recognized that the legislation involves economic regulation of energy resources, including setting prices for energy which are fair to the distributors and the suppliers, while at the*

[4] *ACTO Gas and Pipelines Ltd. v. Alberta* (Energy and Utilities Board, [2006] 1 S.C.R. 140, [2006] 2.C.J. 400 at para. 38. See also *Bell Canada v. Canada* (Canadian Radio-Television and Telecommunications Commission, [1989] 1 S.C.R. 1722.

[5] (1977), 15 O.R. (2nd) 722, O.J. No.2223 at paras 28 and 29.

[6] *Natural Resource Gas Ltd. v. Ontario Energy Board*,[2005], O.J. No. 1520 (Div. Ct.) at para. 13.

> *same time are a reasonable cost for the consumer to pay. This will frequently engage the balancing of competing interests, as well as consideration of broad public policy.*[7]

TWO CLOSE CALLS

- *Toronto Hydro Electric System v. Ontario Energy Board*, (2008) 93 OR (3d) 380 (Ont. Div. Ct.) rev (2010) OJ No.1504 (Ont. CA)

- Ontario Energy Board Re Rate Affordability Programs, EB-2006-0034 (April 26, 2007)

HOW MUCH DISCLOSURE?

Public utility cases have a large public interest component. Adequate disclosure is important. The following quote is from the Ontario Energy Board decision in *Westcoast Energy.*[*]

A public utility in Ontario with a monopoly franchise is not a garden variety corporation. It has special responsibilities which form part of what the courts have described as the "regulatory compact". One aspect of that regulatory compact is an obligation to disclose material facts on a timely basis. As stated recently by Mr. Justice Lederman in the case of *Toronto Hydro-Electric System Limited v. Ontario Energy Board* [2008] OJ No 3904(QL), para 78.

> "At the heart of a regulator's rate-making authority lies the "regulatory compact" which involves balancing the interests of investors and consumers. In this regard, there is an important distinction between private corporations and publicly regulated corporations. With respect to the latter, in order to achieve the "regulatory compact", it is not unusual to have constraints imposed on utilities that may place some restrictions on the board of directors. That is so because the directors of utility companies have an obligation not only to the company, but to the public at large."

Failure to disclose has at least two unfortunate consequences. First, it can only result in less than optimum Board decisions. Second, it adds to the time and cost of proceedings. Neither of these are in the public interest.

A publicly regulated corporation is under a general duty to disclose all relevant information relating to Board proceedings it is engaged in unless the information is privileged or not under its control. In so doing, a utility should err on the side of inclusion. Furthermore, the utility bears the burden of establishing that there is no reasonable possibility that withholding the information would impair a fair outcome in the proceeding. This onus would not apply where the non-disclosure is justified by the law of privilege but no privilege is claimed here.[8]

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[7] *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2005), 75 O.R. (3rd) 72, [2005] O.J. No.756 at para 24.

*[8] Ontario Energy Board, *Re West Coast Energy*, EB-2008-0304 (Nov.19, 2008)

DOES PUBLIC UTILITY LAW APPLY?

In North America, there is a long history of regulating public utilities. It began with railways, although it can be traced to common law restrictions defining canal operators as common carriers. In 1917, the Supreme Court of the United States first described one of the fundamental obligations of a public utility – the duty to serve – as follows:

> *Corporations which devote their property use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render.*

Certain rights and obligations soon became fundamental. They include the duty to serve, the requirement to set rates that are just and reasonable and a requirement not to discriminate unjustly between customers. In the beginning, the courts set the rules, but this quickly fell under the jurisdiction of independent regulators appointed by the government. They included state regulators in the United States, provincial regulators in Canada and federal regulators in both countries.

The traditional obligations of a public utility flow from a combination of case law and statutory provisions. A public utility must:

- set prices that are just and reasonable;[9]
- not discriminate unjustly between customers;[10]
- not set rates retroactively;[11]
- not refuse to serve a customer;[12]
- offer safe and reliable service;[13]
- offer access to essential facilities;[14] and

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[9] *Northwestern Utilities v. Edmonton* [1929] SCR 186.

[10] *Red Deer v. Western General Electric* (1910) 3Alta L.R. 145; *Bell Telephone v. Harding Communications* [1979] 1 S.C.R. 395; *St. Lawrence Redering v. Cornwell* [1951] O.R. 669; *Epcpr Generation Inc v. Alberta Utilities Board*, 2003 ABCA 374; *Energy Commission* (1978) 87 D.R.L.(3rd) 727; *Brant County Power v. Ontario Energy Board* EB-2009-0065 (10 August 2010); *Apotex Inc. v. Canada* (Attorney General) [1994] 3SCR 1100; Portland General Exchange, Inc. 51 FERC ¶61,108, (1990);*United States v. Ill.Cent. R.R.* 263 U.S. 515,524 (1924).

[11] *Northwestern Utilities Ltd. v. Edmonton* (City), [1979] 1SCR 684; *Bell Canada v. Canada Radio Television and Telecommunications Commission* [1989] SCJ No. 68 at 708; *Brosseau v. Alberta (Securities Commission)* [1989] SCC; *EuroCan Pulp and Paper v. British Columbia Energy Commission* (1978) 87 D.R.L.(3rd) 727; *Brant County Power v. Ontario Energy Board* EB-2009-0065 (10 August 2010); *Apotex Inc. v. Canada* (Attorney General) [1994] 3SCR 1100; *Chastain v. British Columbia Hydro* (1972) 32 DRL (3rd) 443; *Challenge Communications Ltd. v. Bell Canada* [1979] IFC 857; *Associated Gas Distribs. v. FERC*, 898 F2d 809 (D.C. Cir.1990); *San Diego Gas & Elect.Co. v. Sellers of Energy*, 127 FERC ¶ 61,037 (2009)

[12] *Chastain v. British Columbia Hydro* (1972) 32 DRL (3rd) 443; *Challenge Communications Ltd. v. Bell Canada* [1979] IFC 857; *New York ex rel. N.Y.& Queens Gas Co. v. McCall*, 245U.S. 345 (1917) 35n62; *Pennsylvania Water & Power Co. v. Consolidated Gas, Elec.Light & Power Co.of Balt.*, 184 F.2d 552 (4th Cir. 1950).

[13] *Pennsylvania Water & Power Co. v. Consolidated Gas, Elec.Light & Power Co.of Balt.*, 184 F.2d 552 (4th Cir. 1950).

- not contract for rates different than the tariff rate.[15]

A public utility has certain rights. Specifically a public utility is entitled to:

- a fair rate of return;[16]
- recover costs that are prudently incurred;[17]
- a fair rate of return on assets that are used and useful;[18]
- be free from competition in a service area; and
- limited liability for negligence.[19]

WHO PAYS FOR STRANDED ASSETS?

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.[20] That case established two important principles. First, the customer has no ownership interest in the assets 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 is 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[21] followed by the Alberta Utility

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[14] *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.*, OEB, RP 2003-0249 (7 March 2005).

[15] *Keogh v. Chicago & Northwestern Ry. Co.* 260 U.S. 156 (1922); *Square D Co.v. Niagara Frontier Tariff Bureau*, 446 U.S. 409 (1986).

[16] *Federal Power Commission v. Hope Natural Gas* (1944) 320US 59.

[17] *British Columbia Electric Railway v. Public Utilities Commission S.C.R.* [1960] 837 at 848; *Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1SCR 684; *TransCanada Pipelines Ltd. v. National Energy Board* 2004 FCA 149; *Union Gas v. Ontario Energy Board* 43 OR (2nd) 489.

[18] *British Columbia Hydro v. West Coast Transmission* [1981] 2 FC 646; *Alberta Power Ltd. v. Alberta Public Utilities Board* (1990) AJ No. 147 (Alta CA).

[19] *Garrison v. Pacific Nw. Bell*, 608 P.3d 1206 (Or. Ct. App. 1980); *Transmission Access Policy Study Group v. FERC* 225 F3d. 667 (D.C. Cir.2000), affd sub nom, *New York v. FERC* 535 U.S. 1 (2002); *Strauss v. Belle Realty Co.*, 482 N.E.2d 43 (N.Y. 1985); *Gyimah v. Toronto Hydro Electric System Ltd.* 2013 ONSC 2920

[20] *ATCO Gas Ltd. and Pipelines Ltd. v. Alberta (Energy and Utilities Board)* [2006] ISCR 140

[21] National Energy Board, *Re TransCanada Pipelines Limited* RH-003-2011(March 2013)

Commission's UAD decision[22] and the confirmation of that decision in 2015 by the Alberta Court of Appeal decision in *Fortis Alberta*.[23]

The prudence doctrine which was challenged in both Alberta and Ontario[24] 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 that the prudence principles could not be found in the statute.[25] 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.

The Supreme Court's decision in *Ontario Power Generation*[26] 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 appeals of their own decisions. The third issue which is often overlooked was is 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, Alberta Teachers* and *Nor Man Regional Health.*[27]

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

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[22] *Alberta Utilities Commission re Utility Asset Disposition*, Decision 2013 -47 (November 26, 2013)

[23] *FortisAlberta Inc. v. Alberta Utilities Commission*, 2015 ABCA 295

[24] *Power Worker's Union v. Ontario Energy Board,* 2013 ONCA 359,116 OR (3rd) 793; *ATCO Gas Ltd. and ATCO Electric Ltd. v. Alberta Utilities Commission, 2013 ABCA*

[25] *ATCO Gas and Pipelines Ltd. and ATCO Electric Ltd. v. Alberta Utilities Commission,* 2015 SCC 45,*Ontario Energy Board v. Ontario Power Generation Inc.,* 2015 SCC 44

[26] *Ontario Energy Board v. Ontario Power Generation Inc.,* 2015 SCC 44

[27] *Newfoundland and Labrador Nurses Union v. Newfoundland and Labrador Treasury Board,* 2011 SCC 62, [2011]3 SCR 708; *Alberta v. Alberta Teachers Association,* 2011 SCC 61, [2011]3 SCR 654; *Nor-Man Regional Health Authority v. Manitoba Association of Health Care Professionals,* 2011 SCC 59,[2011] 3SCR 616

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.*[28] 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*[29] , the 2004 decision of the Alberta Court of Appeal in *Atco Electric*[30] and the decision the Federal Court of Appeal in the same year in *TransCanada*.[31]

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,[32] not to set rates retroactively,[33] not to refuse to serve a customer[34] or refuse access to essential facilities[35] and not to contract for rates different than the tariff rate[36] are a form of common law. But we forgot, as Justice Rothstein reminded us, that regulators are not courts and common law 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

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[28] *Southwestern Bell Telephone Company v. Public Service Commission,*262US 276 (1923)

[29] *Enbridge Gas Distribution Inc. v. Ontario Energy Board,* 10 OAC 4 (Ont CA) [Enbridge]

[30] *ATCO Electric v. Alberta Energy and Utilities Board,* 2004 ABCA 215 [ATCO Electric]

[31] TransCanada Pipeline Limited v. The National Energy Board (2004) FCA 149 [TransCanada]

[32] *Red Deer v.Western General Electric* (1910) 3 Alta L.R. 145; *Bell Telephone v. Harding Communications* [1979] 1 S.C.R. 395; *St. Lawrence Redering v. Cornwell* [1951] O.R. 669; *Epcor Generation Inc. v. Alberta Utilities Board,* 2003 ABCA 374; *Energy Commission* (1978) 87 D.R.L.(3rd) 727; *Brant County Power v. Ontario Energy Board* EB-2009-0065 (10 August 2010); *Apotex Inc. v. Canada* (Attorney General) [1994] 3SCR 1100; Portland General Exchange, Inc. 51 FERC ¶61,108, (1990); *United States v. Ill.Cent. R.R.* 263 U.S. 515,524 (1924)

[33] *Northwestern Utilities Ltd. v. Edmonton* (City), [1979] 1SCR 684; *Bell Canada v. Canada Radio Television and Telecommunications Commission* [1989] SCJ No. 68 at 708; *Brosseau v.Alberta (Securities Commission)* [1989] SCC; *EuroCan Pulp and Paper v. British Columbia Energy Commission* (1978) 87 D.R.L.(3rd) 727; *Brant County Power v. Ontario Energy Board* EB-2009-0065 (10 August 2010); *Apotex Inc. v. Canada* (Attorney General) [1994] 3SCR 1100; *Chastain v. British Columbia Hydro* (1972) 32 DRL (3rd) 443; *Challenge Communications Ltd. v. Bell Canada* [1979] IFC 857; *Associated Gas Distribs. v. FERC*, 898 F2d 809 (D.C. Cir.1990); *San Diego Gas & Elect.Co. v. Sellers of Energy*, 127 FERC ¶ 61,037 (2009).

[34] *Chastain v. British Columbia Hydro* (1972) 32 DRL (3rd) 443; *Challenge Communications Ltd. v. Bell Canada* [1979] IFC 857; *New York ex rel. N.Y.& Queens Gas Co. v. McCall*, 245 U.S. 345 (1917) 35n62; *Pennsylvania Water & Power Co. v. Consolidated Gas, Elec.Light & Power Co.of Balt.*, 184 F.2d 552 (4th Cir. 1950).

[35] *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.*, OEB, RP 2003-0249 (7 March 2005).

[36] *Keogh v. Chicago & Northwestern Ry. Co.* 260 U.S. 156 (1922); *Square D Co.v. Niagara Frontier Tariff Bureau*, 446 U.S. 409 (1986).

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*[37] 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 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 decision 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.

[37] *ATCO Gas Ltd. and Pipelines Ltd. v. Alberta (Energy and Utilities Board)* [2006] ISCR 140

C. SETTLING THE CASE

INTRODUCTION

One unique feature of regulatory hearings is that many of the applications are settled before the Board hears the case. Over 70% of the Ontario electricity rate applications settle in whole or part. This is important in a province with 77 electricity distributers.

Most Boards, including the Ontario Energy Board, have mandatory settlement procedures. They maintain a panel or roster of mediators or facilitators that the Board appoints to each case. Most Boards have rules with respect to settlement procedures. In the end the settlements must be approved by the Board at which time they become an Order binding on all the participants.

A new development in energy cases is the use of advanced settlements. In that case the utility retains the facilitator and pays the intervenors costs. The utility will then negotiate a settlement agreement before they file an application. Two of those cases (and some of their benefits) are set out below.

Advance settlements are not unique to energy cases. They have been used for years in other regulatory environments such as real estate, the legal profession, agriculture and competition law. Some of those decisions are also set out below. As in the case of energy proceedings the settlement agreement must be approved either by a court or a regulator and sometimes both.

WHAT IS DIFFERENT?

- Who Appoints the Mediator?
- What Rules Apply?
- When do you Negotiate?
  - Before an Application
  - After an Application
  - After an Agreement
- Who has Standing?
- How Much Disclosure?
- Confidentiality Undertakings
- What Remedies are Available
  - Restitution
  - Disgorgement
  - Administrative Penalties

- Costs

- Admissions on Liability
- All or Nothing Settlements
- Pork Barrell Settlements
- Are there Settlement Limits?
- What is the Standard of Review?
- Is the Review Confidential?
- What Happens to Dissenters?
- Is the Settlement Agreement Public?

SETTLEMENT LAW

This is the best summary of the law.

Alberta Utilities Commission, Market Surveillance Administrator v. TransAlta Corporation, Phase 2 Request for consent Order Decision 3110 D03-2015, (October 24, 2015)

ADVANCE SETTLEMENTS: WHAT ARE THEY?

- A settlement before a formal Application is filed.
- The process is confidential and follows the Board's Settlement Rules.
- The Applicant selects and pays the Mediator.
- The Applicant pays the intervenors. Notice is given to all intervenors in prior proceedings.
- The Intervenors and the Applicant agree on the wording of the Application. A panel of company officers answer any questions.
- An Application is made to the Board in the usual fashion. If approved a Board Order follows making the Settlement enforceable.
- Complete settlement in the two cases to date. In both cases the Board approved the Settlement. A third case is underway.

THE RECORD TO DATE

- **Union Gas Limited**
  Custom IRM 2014-2018, EB-2013-0202
  Initial Presentation: April 29, 2013
  IR Response and Negotiation: May 23, June 10, 11, 17, 2013
  Agreement: July 15, 2013 Complete Settlement
  Board Approval: October 7, 2013

- **Hydro One Networks Inc.**
  Custom IRM 2016-2020, EB-2014-0140
  Initial Presentation: June 25, 2014
  IR Response and Negotiation: June 27, 2014, July 11, 17, 23, 29, 30, 2014
  Agreement: August 12, 2014 Complete Settlement
  Board Approval: December 2, 2014

- **PowerStream Inc.**
  Custom IRM 2016-2020, EB-2015-0003
  Initial Presentation: December 15, 2014
  No Settlement

TIME LINES

- **Union Gas Limited**
  6 days of meetings
  Start to finish: 6 weeks (46 days)

- **Hydro One Networks Inc.**
  7 days of meetings
  Start to finish: 6 weeks (48 days)

WHAT'S DIFFERENT?

- The company gets to pick and pay the Mediator. Some are better than others.
- No Lawyers. One company officer does all the negotiating.
- The company answers all IRs. No later than the next morning.
- The Application is agreed to by the parties. It is essentially an Agreed Statement of Facts. This is necessary because the entire process to date has been confidential. In Union a Fairness Opinion was included. The Application usually shows the progress of the negotiation which the Board finds helpful.

ADVANTAGES

- No downside to the utility. It's all confidential. The company gets an early feel for the acceptance of their position. Ontario has a very experienced Intervenor community.

- Utilities get to discover the red flags before they spend millions and months on an Application. Once an Application is filed parties tend to dig in. They become less interested in settlement. This is particularly the case if an Application follows an IR war. These do little to promote settlement. The traditional IR process is now completely out of control. It has become an unsupervised adversarial hearing process with constant objections related to relevance, confidentiality and privilege.

- Utilities (and intervenors) get to set the dates which are agreed to as opposed to being decreed by the Board.

ADVANCE SETTLEMENTS ARE NOT NEW

The Federal Regulator of Telecom has applied Advance Settlements on a number of occasions. The Federal Court of Appeal and the Supreme Court of Canada approved holding that the Commission has not abdicated its rate setting responsibilities by accepting the parties' settlement.

Bell Canada vs. Bell Aliant Regional Communications, 2009 SCC 40

Telus Communications Company vs. CRTC, 2010 FCA 191

THE BOARD RESPONSE

- **Union Gas Limited**
  The Board commends Union and the participating stakeholders, for their efforts in coming to an agreement that the Board considers to be in the public interest. (Decision EB 2013-0202, October 7, 2013)

- **Hydro One Networks Inc.**
  The Board would like to commend Hydro One and the participating stakeholders for their efforts in coming to an agreement that the Board considers to be in the public interest. (Oral Decision EB-2014-0140, December 2, 2014, tr. pg. 29)

OTHER ADVANCE SETTLEMENTS

Advance settlements are common in regulated industries.

REAL ESTATE

Canadian Real Estate Association, a Settlement Agreement with the Attorney General of Canada regarding allegations of price maintenance contrary to the *Competition Act*, Settlement Agreement reached, Consent Order approved by the Federal Court of Canada and all Real Estate Boards. Retained by the Association.

RE/MAX Inc., price maintenance allegation, Settlement Agreement reached, Consent Order approved by the Federal Court of Canada. Retained by the Attorney General of Canada.

AGRICULTURE

Ontario Farm Products Marketing Commission, Mediation of a dispute between Chicken Farmers of Ontario and the Association of Ontario Chicken Processors regarding a formula set the price of chicken in Ontario over a five-year period. Retained by both parties.

ELECTRICITY REGULATION

Independent Electricity System Operator of Ontario, Retained by the IESO to mediate settlement between a market participant and the IESO relating to a breach of the *Market Rules* under the *Ontario Electricity Act.*

Ontario Power Generation, Retained by both parties to provide a Fairness Opinion regarding a Settlement Agreement reached between the IESO and Ontario Power Generation regarding breach of the Market Rules.

GAS DISTRIBUTION

Union Gas Limited, Settlement Agreement with major customers regarding a five-year rate plan. Settlement Agreement reached and approved by the Ontario Energy Board. Retained by the company.

COMPETITION LAW

John Deere Limited, Price maintenance allegation, Settlement Agreement reached, Consent Order approved by the Federal Court of Canada [$1.9 million in restitution approved]. Retained by the Attorney General.

Para Paint, Retained by the Commissioner of Competition to negotiate a settlement regarding allegations of misleading advertising, Settlement Agreement reached, Consent Order approved by the Competition Tribunal.

RL Crane Limited, Retained by the company to negotiate a settlement agreement with the Atty. Gen. of Canada regarding an allegation of bid rigging contrary to the *Competition Act*, Settlement Agreement reached, Consent Order approved by the Nova Scotia Supreme Court.

LEGAL PROFESSION

Waterloo law Association, Settlement Agreement with the Attorney General of Canada relating to an allegation of an agreement to limit competition contrary to the *Competition Act* through the use of County Real Estate Fees Tariffs. Settlement Agreement reached with the Atty. Gen. of Canada and the Law Society of Upper Canada, Settlement Agreement approved by the Supreme Court of Ontario and the Law Society of Upper Canada. Retained by the Association.

ELECTRICITY DISTRIBUTION

Hydro One Networks, Retained by the company to negotiate a settlement agreement with major customer groups regarding a two-year plan for rate increases. Settlement Agreement reached and, approved by the Ontario Energy Board.

REGULATORS AND THE COURTS: A TEN YEAR PERSPECTIVE[1]

*David J. Mullan**

Introduction

This paper has been ten years in the making in the sense that it represents the current evolutionary state of a background document to a presentation that I have been privileged to make at the annual CAMPUT Canada's Energy and Utility Regulators Energy Regulation Course. The nature of that presentation and the title to the paper are the inspiration of Gordon Kaiser at whose suggestion I have been focussing for most of those nine presentations on pitfalls that energy and public utilities regulators may encounter in the course of their regulatory work and their hearing processes in particular. It started out as a list of ten rules that should guide those regulators but that list has now grown to seventeen! However, that should not necessarily be read as an indicator that the potholes along the way have become more numerous and larger. Indeed, for most, if not all regulators, many of the precepts of this paper are now so engrained in their consciousness, work habits, and rules of practice and procedure as to constitute them as no more than a reminder not to become lackadaisical and, perhaps more significantly, as a record of how far the energy and utility regulatory process has advanced in sophistication and attention to best practices. That is not, however, to say that new problems have not emerged or that all areas of controversy and doubt have been resolved satisfactorily. Thus, for example, as this paper will make clear, there are still a number of outstanding issues respecting standing to participate at regulatory hearings and the impact on regulatory hearings of the duty to consult aboriginal peoples. Here, almost of necessity, some of my discussion and recommendations are tentative in the sense that clarification of the law, either internally or from the courts, is still awaited.

Let me start with the current list of precepts:

1. Pay careful attention to identifying the sectors of the public, industry and government to which you should give notice of an impending regulatory hearing.
2. Be aware of the principles and statutory provisions respecting party, intervener, and other forms of status at your hearings.
3. Err on the side of generosity when issues of disclosure arise.
4. Realise the potential, either by reason of your ability to control the proceedings before you or your rules of procedure or practice, for the sorting and refining of issues as well as the simplification of evidence presentation through various

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[1] Some parts of this paper also draw on "Administrative Law and Energy Regulation", a Chapter in Gordon Kaiser & Bob Heggie, eds, Energy Law and Policy (Toronto: Carswell, 2011) at 35.

forms of prehearing procedures.

5. Do not, however, fall into the trap of over-judicializing the proceedings – you are a regulator with a policy mandate, not a criminal court.

6. Without becoming too fast and loose, recognize the flexibility that comes with not generally being bound by the rules of evidence applicable in regular court proceedings.

7. More generally, do not allow the parties to take the conduct of the hearing into their own hands. Impose discipline. Nonetheless, behave at the hearing with decorum, and listen. Behind every testy exchange with counsel and witnesses lies the possibility of a challenge for a reasonable apprehension of bias.

8. Where bias and lack of independence challenges are raised, whether related to your prior involvements and associations, or your behaviour at a hearing, recognize that you are obliged to deal with them. However, conscious of the public interest in participation by experienced adjudicators and the capacity of parties to use bias challenges as a means of "forum shopping", do not disqualify yourself too readily.

9. Energy regulators are generally meant to be independent of the government that appoints them. As a consequence, be careful not to develop cozy relationships with the Minister or departmental staff, and, in particular, resist any encouragement to discuss pending matters with them.

10. Act preemptively when you are aware of prior involvements and associations that could give rise to concerns on the part of one or more of the participants. Reveal the full facts to the parties and ask whether anyone has objections to your participation.

11. Recognize that the standards respecting bias and a lack of independence may vary depending on the role that an Energy Regulator is exercising. In particular, those standards may be stricter in the case of enforcement or compliance proceedings than they are in the instance of broad public interest regulatory permission hearings.

12. As well as dealing with challenges to your participation based on a reasonable apprehension of bias, you may also have a legal obligation to deal with constitutional (including Charter or aboriginal rights) challenges to your jurisdiction and proceedings, and even to the statutory regime under which you function.

13. Do not hesitate to consult with other members of your agency as well as lawyers to the agency and other staff even in relation to matters that you are currently hearing, but recognize the constraints within which such consultations can take place legitimately.

14. Talking of consultation, be vigilant as to the extent to which your proceedings might affect aboriginal peoples' rights, interests and claims and the special procedural obligations that may arise in those situations, particularly when the Crown's constitutional duty to consult is engaged.

15. Pay careful attention to the statutory and common law requirements to provide reasons for your decisions.

16. In particular, take particular care to justify departures from your own previous case law or general principles of regulatory theory.

17. Only resort to the use of grand legal principles where it is absolutely necessary. Where possible, base your decision on a careful examination of the facts, the intricacies of your own statutory regime, and the law developed by your own tribunal or agency precedents. The courts will generally respect your expertise and apply a deferential standard of review if you remain

rooted in those issues.

I will now develop each of these seventeen propositions including references to many of the governing authorities and legislation.

1) Notice

At the outset of any regulatory initiative with the potential to affect a significant number of people, Energy Regulators will have to face up to the question of how to give notice that will satisfy the requirements of either or both of the common law, and their constitutive statutes and procedural rules.

The case law governing this area dates back almost thirty years to *Re Central Ontario Coalition and Ontario Hydro*.[2] There, the Ontario Divisional Court addressed the question of the adequacy of notice provided by a Joint Board (the Ontario Municipal Board and the Environmental Assessment Board) considering a proposal for a significant electricity transmission line project. The Joint Board, in recognition of the number of persons and groups potentially affected by the proposal and also the disparate nature of the impact of the proposal, provided for a combination of personal notice to some individuals and municipalities and notification through newspaper advertisements. While the choice of modalities did not cause any problems in the Divisional Court, nonetheless, the Court ruled that there had been a failure to provide adequate notice in the sense that the newspaper advertisement was not only misleading but also not sufficiently informative as to the siting of the proposed transmission lines.[3]

1657575 Ontario Ltd. v. Hamilton (City)[4] provides more recent reaffirmation of the dual aspects of the requirement to provide notice of pending hearings – make sure that the notice comes to the attention of those whose interests are significantly affected and also that the notice is sufficiently informative to alert those people as to the nature of what is proposed and its potential impact on their rights and interests. However, what is also clear is that, provided the notice is both accurate and sufficiently informative as to participatory rights, various time lines, and where additional information is available, it will pass muster.[5]

Nonetheless, as will be discussed in greater detail below, special obligations with respect to notice may arise when any application has the potential to affect aboriginal rights and interests, including those that are the subject of as yet unresolved claims. Situations such as this will almost invariably require the relevant Energy Regulator to provide "personal" and specific notice to the affected aboriginal peoples.

2) Parties, Intervenors, and Standing

Inextricably linked with the issue of notice is the question of who is entitled to status at any hearing as a party, intervenor, or other form of participant.

In Alberta, there has long been a legislated standard. Section 1 of the *Administrative Procedures and Jurisdiction Act*,[6] a general

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[2] *Central Ontario Coalition and Ontario Hydro* (1984), 46 OR (2d) 715, 10 DLR (4th) 341 (Div. Ct).

[3] For an example of a newspaper advertisement in relation to an application to the Ontario Energy Board that "will have an effect on all electricity consumers in Ontario", see, *inter alia*, "Ontario Energy Board, Notice of Application and Hearing – Hydro One Networks Inc. – Change to Electricity Transmission Revenue and Rates – EB-2010-002", *Kingston Whig-Standard*, Monday, June 14, 2010, at 11.

[4] *1657575 Ontario Ltd. v. Hamilton (City)* (2008), 92 OR (3d) 374 (CA).

[5] Contrast with *Central Ontario Coalition*, *supra* note 2 and *Re Joint Board under the Consolidated Hearings Act and Ontario Hydro* (1985), 51 OR (2d) 65, 19 DLR (4th) 193 (CA).

[6] *Administrative Procedures and Jurisdiction Act*, RSA, 2000, c A-3 (as amended). The *Responsible Energy Development Act*, SA 2012, c R-17.3 (proclaimed partially in force on June 4, 2013, effective June 17, 2013: OC 163/2013)

procedural statute still applicable to the Alberta Utilities Commission as well as the Surface Rights Board and the Natural Resources Conservation Board, defines as a party (and therefore entitled to notice and participatory rights) anyone

> …whose rights will be affected by the exercise of a statutory power or by an act or thing done pursuant to that power.

However, in the context of hearings that have an impact on the public at large, that definition obviously begs the question: What count as "rights"? The constitutive legislation of the province's two principal Energy Regulators attempts to give greater precision to this by requiring hearings or according intervenor status generally for those who are "directly and adversely affected" by proceedings before the Alberta Utilities Commission or the Alberta Energy Regulator.[7] This standard is one that mirrors the traditional test for standing to seek judicial review but, even so, it is not self-applying as the considerable jurisprudence on these provisions makes clear. Indeed, it may well be the most-litigated energy regulation issue in the province.

In *Dene Thá First Nation v. Alberta (Energy and Utilities Board)*,[8] the Alberta Court of Appeal divided the test into two parts:

> First is a legal test, and second is a factual one. The legal test asks whether the claim, right or interest being asserted by the person is one known to law. The second branch asks whether the Board has information, which shows that the application before the Board may directly and adversely affect those interests or rights. The second test is factual.[9]

This bifurcation is significant in that by classifying the second part of the exercise as factual, the Court denied itself the capacity to review the then Board's decision at this stage. The right to seek leave to appeal is confined to questions of law and jurisdiction. As a consequence, a major component of any determination of entitlement to notice and to participate is left to the virtually unreviewable discretion of the particular Energy Regulator. Indeed, this may also be the case where the issue of standing involves the determination of a question of mixed fact and law from which a significant legal issue is not readily extricable.[10]

As far as the "known to law" aspect of the test is concerned, the Court of Appeal has certainly recognized the rights of landowners whose property rights might be affected adversely by the matter before the Regulator.[11] Indeed, in such cases, the requirement may frequently extend to personal notice as opposed to simply notice through an advertisement in a newspaper

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replaced the Energy Resources Conservation Board with the Alberta Energy Regulator. Rule 10 of *Alberta Energy Regulator Rules of Practice*, AR 99/2013, seemed to assume amendment of the designation regulation: *Authorities Designation Regulation*, AR 64/2003, to substitute the new Regulator for the Board but, in fact, the amendment to the Regulation merely removed the Energy Resources Conservation Board and did not include the Alberta Energy Regulator. See AR 64/2003, s 1(e).

[7] See s 9 of the *Alberta Utilities Commission Act*, SA, c A-37.2 and s 32 and 34(3) of the Responsible Energy Development Act, SA 2012, c R-17.3. (See also s 9(2)(a)(i)(A) of the Alberta Energy Regulator Rules of Practice, supra note 6, dealing with interveners in similar terms.)

[8] *Dene Thá First Nation v. Alberta (Energy and Utilities Board)*, 2005 ABCA 68, 363 AR 234.

[9] *Ibid* at para 10.

[10] See *Prince v. Alberta (Energy Resources Conservation Board)*, 2010 ABCA 214, at para11. In the prior paragraph, Watson J.A. affirms Dene Thá First Nation, *supra* note 8, listing various subsequent Alberta Court of Appeal judgments to the same effect. For a very useful discussion of the link between the grounds of appeal and the common law principles governing standard of review, see H. Martin Kay, QC, "What Does Reasonableness Mean?" a paper delivered at the Energy Regulatory Forum, held in Calgary on May 10, 2011.

[11] See e.g. *Lavesta Area Group v. Alberta (Energy and Utilities Board)*, 2007 ABCA 194 at para 37.

or other media.[12] Nonetheless, what precisely counts as a property right for these purposes is itself an open question. Certainly, exposure to expropriation in any form, including the creation of rights of way will qualify. Beyond this though, the previous Energy and Utilities Board recognized in EUB Directive 29 that it had a responsibility of specific notification to landowners on the basis of proximity to any proposed project.

The Alberta Court of Appeal has, however, accepted that there are limits on what constitutes a direct and adverse impact in the sense of an interest known to law. Long-term status as an environmental advocate, even one using the land in question for recreational purposes, is not enough.[13] Indeed, the fact that the regulator has required a proponent to consult with someone is not in itself sufficient to secure standing for the consultee.[14] More generally, the Court has ruled that there is no room for recognition of public interest standing either within the relevant standing provisions or as an overarching discretionary matter.[15] Beyond that, a generalized assertion of a potential downstream economic impact is insufficient.[16]

Also, when it comes to claims such as a potential impact on the health of those living in proximity to the proposed project,[17] the Court has ruled that this is a matter on which those seeking standing have to provide evidence, and that the assessment of that evidence is a question of fact for the regulator not subject to an application for leave to appeal.[18] However, more recently, in the context of another health-based claim to intervenor status before the previous Energy Resources Conservation Board, the Alberta Court of Appeal has signaled that it may be taking a rather more generous view of what constitutes a "direct and adverse effect." In *Kelly v. Alberta (Energy Resources Conservation Board)*,[19] the Court accepted that the issue of whether a "right" was at stake was not the only

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[12] *Ibid*.

[13] *Kostuch v. Alberta (Environmental Appeal Board)* (1996), 182 AR 384, 35 Admin LR (2d) 160 (CA).

[14] *SemCAMS ULC v. Alberta (Energy Resources Conservation Board)*, 2010 ABCA 397.

[15] *Friends of The Athabasca Environmental Assn. v. Alberta (Public Health Advisory and Appeal Board)* (1995), 181 AR 81, 34 Admin LR (2d) 167 (CA). In this regard, the Court specifically (at para 10) rejected the application of *Friends of the Island v. Canada (Minister of Public Works)*, [1993] 2 FC 229 (TD), in which, in **judicial review** proceedings, the Federal Court was prepared to accept that there was room to recognize public interest standing notwithstanding the provision of the *Federal Courts Act*, RSC 1985, c F-7, seemingly restricting an application for judicial review to persons who were "directly affected": s 18.1(1). See also *Alberta Wilderness Assn. v. Alberta (Environmental Appeal Board)*, 2013 ABQB 44, *Kostuch*, *supra* note 13 at paras 18-19, *and Canadian Union of Public Employees, Local 30 v. Alberta (Public Health Advisory and Appeal Board)* (1996), 178 AR 297, 34 Admin LR (3d) 862 (CA) at paras20-25.

[16] *ATCO Midstream Ltd. v. Energy Resources Conservation Board*, 2009 ABCA 41, 446 AR 326 at paras 9-11. See also *Westridge Utilities Inc. v. Alberta (Director of Environment, Southern Region)*, 2012 ABQB 681. Compare *Cardinal River Coals Ltd. v. Alberta (Environmental Appeal Board)* (2004), 10 CELR (3d) 282 (Alta QB), refusing to interfere with the Board's according of status to a person operating wilderness tours in the area affected by an application.

[17] Obviously, this was a matter of concern at a hearing before the previous Energy Resources Conservation Board, in which, according to the *Globe and Mail*, the regulator controversially denied standing to several residents: "Residents warn energy regulator of health risks from refineries", *The Globe and Mail*, June 12, 2010, at A12.

[18] *Graff v. Alberta (Energy and Utilities Board)*, 2008 ABCA 119, at paras 20-27. See also *Sawyer v. Alberta (Energy and Utilities Board)*, 2007 ABCA 297, 422 AR 107. (For an example of where the Court held that the ERCB had erred in the legal test it applied to determining a claim to be directly affected based on health threats, see *Kelly v. Alberta (Energy Resources Conservation Board)*, 2009 ABCA 349, 464 AR 315. See also *Kelly v. Alberta (Energy Resources Conservation Board*, 2010 ABCA 307, the application for leave to appeal the denial of standing described in the previous footnote.) Indeed, this also applies to the extent that the determination of the right to be heard depends on the nature and magnitude of a potential economic impact (*ATCO Midstream Ltd.*, *supra* note 16 at para 10; *SemCAMS ULC*, *supra* note 14), or whether there is a sufficient degree of physical proximity or connection between an asserted aboriginal right and the work proposed (*Dene Thá First Nation*, *supra* note 8 at para 14; *Prince*, *supra* note 10).

[19] *Kelly v. Alberta (Energy Resources Conservation Board)*, 2011 ABCA 325, 515 AR 201.

pure question of law at play for appeal purposes under the relevant provision.[20] It also went on to hold that the test for whether someone was directly and adversely affected was not whether he or she

> …would be affected in a different way or to a different degree that members of the public.[21]

The terms of the test did not establish that as the threshold. Moreover, it was not necessary for those seeking intervenor status to prove that they would necessarily be directly and adversely affected. Rather, the Board's assessment should be one in which it weighed the magnitude of the risk, and not whether the claimant had established that that risk was a certainty. To do otherwise was to not apply the correct legal test.[22] That legal test was based on the following principles:

> The right to intervene in the Act is designed to allow those with legitimate concerns to have input into the licensing of oil and gas wells that will have a recognizable impact on their rights, while screening out those who have only a generic interest in resource developments (but no "right" that is engaged), and true "busybodies".[23]

Indeed, this more generous conception of the role of the intervenors carried over to the issue of costs. The Board determined at the Court-ordered rehearing of the well licence applications that the intervenors had not demonstrated that their safety interests required the imposition of additional conditions on the grant of well operation licences. As a consequence, the Board also denied the intervenors costs on the basis that they were not directly and adversely affected. However, on appeal,[24] the Court of Appeal ruled that the right to costs was not contingent on the intervenors gaining some measure of success at the hearing. On this issue, in remitting the issue of intervenor costs to the Board, the Court summarized its conclusions as follows:

> For clarity, a potential adverse impact on the use and occupation of lands is sufficient to trigger entitlement to costs. Further, while the amount of costs lies within the discretion of the Board, the actual outcome of the hearing, and the absence, with hindsight, of any actual adverse effect does not of itself disentitle an applicant to costs.[25]

While, in Alberta, these issues have been determined in the context of a specific statutory regime, to the extent that that statutory regime reflects generally accepted common law principles governing the entitlement to be heard at regulatory proceedings,[26] there is every reason to believe that these precedents have relevance to other Energy Regulators across the country. It is also important to be mindful of the practical dimensions of this issue. There is a balance to be struck between allowing for meaningful participation particularly on the part of those whose rights and interests are affected immediately and directly by a proposal and also members of the public generally, on the one hand, and the importance of Energy Regulators carrying out their mandate in an efficient and timely manner, on the other. Thus,

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[20] *Ibid* at para 17.

[21] *Ibid* at para 19.

[22] *Ibid* at paras 22-26.

[23] *Ibid* at para 26.

[24] *Kelly v. Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19, 519 AR 284.

[25] *Ibid* at para 37.

[26] See e.g. *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5, [2006] 1 SCR 227, at paras 38ff., and, in the context of public participation in the decision-making process with respect to the proposal to construct a bridge between New Brunswick and Prince Edward Island and the *Federal Courts Act's, supra* note 15, "directly affected" test

it is not surprising that, where discretion exists with respect to standing, the Courts either by emphasizing the discretionary nature of the exercise, or, as in Alberta, by classifying part of the exercise as a determination of a question of fact, are deferential to the determinations of Energy Regulators.

This concern for the efficient conduct of regulatory hearings obviously motivated the new standing provisions found in the *Canadian Environmental Assessment Act, 2012,* enacted as part of the 2012 federal budget implementation legislation, the *Jobs, Growth and Long-Term Prosperity Act*.[27] The regime is complex and I will not go into all the details in this context. Suffice it to say, however, that the most controversial and potentially limiting aspect of the standing provisions in the new Act are those relating to hearings by the National Energy Board and Environmental Assessment Review Panels on certain designated projects including, for example, pipeline applications. In relation to such projects, "any interested party" is entitled to a participatory opportunity.[28] Critically, section 2(a) defines "interested party" as a person who in the "opinion" of the regulator is

> …directly affected by the carrying out of the designated project or … has relevant information or expertise.

Under the National Energy Board's *Section 55.2 Guidance – Participation in a Facilities Hearing*,[29] that now requires anyone wanting participatory rights at a hearing into such a designated project to complete a ten page application form providing information designed to establish that he or she comes within either of the two categories as defined in section 2(a).

While this new legislative regime was in part a response to the over 4000 registrations for participatory rights in relation to the Northern Gateway pipeline hearings, it does, however, remain to be seen whether the new requirements are as restrictive as many environmental groups have predicted. In this regard, three aspects are worth noting: 1. The according of standing is expressed in subjective terms; it will depend on the discretion of the regulator; 2. The first category, unlike the Alberta legislation, does not require the showing of an adverse effect, just a direct effect; arguably it is more generous; and, 3. And, perhaps most importantly, the second category in section 2(a) introduces a potentially expansive concept of participation in the novel (to both statutory regimes and the common law) form of those who have "relevant information or expertise." Perhaps, ultimately and contrary to what appeared to be the government's intentions, this statutory formula will expand, not contract participatory opportunities in relation to designated projects!

3) Discovery and Disclosure[30]

The common law on disclosure by administrative tribunals and agencies and, in particular, pre-hearing discovery and disclosure is, perhaps surprisingly, sparse. In the instance of regulatory agencies with a broad policy mandate and engaged in economic regulation, the common law was historically remarkably parsimonious as to the extent to which those kinds of tribunals have to provide pre-hearing disclosure of material under their control and, in particular, staff studies and

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for access to judicial review, *Friends of the Island Inc. v. Canada (Minister of Public Works)*, *supra* note 15.

[27] *Jobs, Growth and Long-Term Prosperity Act,* SC 2012, c19, s 52.

[28] Sections 28, 43(1)(c), 83 (inserting section 55.2 in the *National Energy Board Act,* RSC 1985, c N-7)

[29] National Energy board, *Section 55.2 Guidance – Participation in a Facilities Hearing*, online: NEB <http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtcptn/pblchrng/prtcptnthrhrnggdncs55_2-eng.pdf>.

[30] This section owes much to a presentation made by Gordon Kaiser at the 5th Canadian Energy Law Forum, held on Salt Spring Island on May 19, 2011.

other position papers.[31] Indeed, this was true even in the context of regulatory compliance or enforcement proceedings.[32] However, it is almost certainly the case that most major regulatory agencies have finessed issues around pre-hearing disclosure by the development of procedural rules and practices, often with the involvement of stakeholders and generally to the satisfaction of stakeholders.[33] I also assume that access to information requests may often force the issue when there is an initial reluctance to provide full disclosure.

I will therefore not belabour the point, save to point out that the Supreme Court, albeit in a very different context, has more recently taken a strong position on the importance of statutory authorities facilitating effective participation by providing parties with prehearing access to documents in the decision-maker's control which are critical in terms of the ability of the parties to address issues central to the tribunal's task. The case was *May v. Ferndale Institution*,[34] the setting a transfer decision within the penitentiary system, and the documentation in question a scoring chart used in determining an offender's classification and custodial conditions. While the Court rejected[35] the application of the very sweeping disclosure obligations placed on prosecutors in the context of criminal charges as established in *R. v. Stinchcombe*,[36] it sustained the contention that the offender was entitled as a component of procedural fairness to the relevant template. While this is a long way removed from regulatory agencies engaged in broad, polycentric decision-making or economic public interest regulation,[37] the Supreme Court's judgment reveals a generous attitude to disclosure rights.

It might also indicate a Court that would be less hospitable to the arguments that in 1980 prevailed in *Canada (Attorney General) v. Inuit Tapirisat*,[38] where, in the context of attempts to secure access to documents for the purposes of participating in a cabinet appeal, the Court seemed to hold that those involved in broadly-based policy making exercises were acting in a legislative capacity and not bound by the normal strictures of the procedural fairness principles. I suspect it would now be unwise to rely on that judgment save perhaps in the very specific context of cabinet appeals. What is also clear is that the Supreme Court is likely to be far more willing to recognize claims for more extensive disclosure where an Energy Regulator is engaged in enforcement or compliance roles leading to the possibility of sanctions, including monetary penalties and loss of licence.

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[31] See e.g. *Toshiba Corporation v. Anti-Dumping Tribunal* (1984), 8 Admin LR 173 (FCA); *Trans-Quebec & Maritimes Pipeline Inc. v. National Energy Board* (1984), 8 Admin LR 177 (FCA); and *CIBA-Geigy Ltd. v. Canada (Patented Medicine Prices Review Board)*, [1994] 3 FC 425 (CA), aff'g (1994), 77 FTR 197.

[32] See e.g. *CIBA-Geigy Ltd., ibid.*

[33] For a recent example of refusal of leave to appeal a disclosure order, see *Westridge Utilities Inc. v. Alberta (Utilities Commission)*, 2010 ABCA 160, 487 AR 205.

[34] *May v. Ferndale Institution* 2005 SCC 82, [2005] 3 SCR 809. See also *1657575 Ontario Ltd. v. Hamilton (City)*, *supra* note 4 at para 25 (per Rouleau J.A.):

> Disclosure is a basic element of natural justice at common law and, in the administrative context, procedural fairness requires disclosure unless some competing interest prevails.

[35] *Ibid* at para 89 (per LeBel and Fish JJ.).

[36] *R. v. Stinchcombe*, [1991] 3 SCR 326.

[37] Though note in the context of Ontario Energy Board compliance proceedings, *Summitt Energy Management Inc. v. Ontario Energy Board*, 2013 ONSC 318 at paras 96-99, where the Ontario Divisional Court, after classifying the proceedings as not being truly penal in nature, deferred to the Board's assessment that the regulated utility's claim to even more disclosure beyond the already "extensive disclosure package" was not justified. This was a "reasonable decision."

[38] *Canada (Attorney General) v. Inuit Tapirisat*, [1980] 2 SCR 735.

While the issue becomes somewhat more complicated when the setting is the use by a regulatory agency of its power to compel the production of information (either on its own initiative or on the application of a party), and the access rights of the parties to that information (as opposed to information generated by the agency itself), nonetheless, the normal test for an order for the production of such information will be that of relevance.[39] Moreover, once that material has been produced, the general presumption will be that other parties and intervenors will be entitled to demand its production in the name of the principles of procedural fairness and access to potentially relevant information.[40]

Support for these propositions in an energy regulation context can be found in *Re Toronto Hydro-Electric System Ltd.*,[41] where the Ontario Energy Board reviewed the relevant law and, determined that, while Stinchcombe did not apply in the context of a compliance proceeding (not leading to the loss of a licence),[42] nonetheless, the target of the proceedings was entitled to disclosure of all documents in the Board's possession directly relevant to the matter and not just the documents Compliance Counsel intended to rely upon. The Board, however, refused an application by the target corporation for an order for the production of further information in the possession of third parties.[43] The request was wide ranging and lacked specificity. In so ruling, the Board stated:

> There is no question that the Board has jurisdiction to order third parties to produce documents but this is an unusual step to be taken only when the documents identified are clearly relevant and no prejudice or undue burden on the third parties results from the disclosure.[44]

In sum, the fulfillment of broad regulatory mandates will seldom be enhanced by sustained resistance to participant access to relevant documents, save where national security or other legitimate government and public interest reasons for preserving secrecy are in play or there is some other form of evidential privilege or need to protect the confidence of information provided by those subject to regulation (such as preventing competitors from access to critical data[45]). One should also add to the list of exceptions, attempts by parties to the proceedings to secure orders for production that are insufficiently precise or specific, and that, in effect, amount to "a fishing expedition."[46]

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[39] See e.g. *Westridge Utilities Inc. v. Alberta (Utilities Commission)*, *supra* note 33 at para 27, with the Commission's assessment of relevance being reviewed on a reasonableness, not correctness basis.

[40] In the context of enforcement proceedings conducted by the Ontario Securities Commission, the Supreme Court not only applied *Stinchcombe* (*supra* note 36), but, on the basis of a Security Commission judgment as to relevance, was prepared to sustain on a reasonableness basis the Commission's determination that compelled evidence should be provided to the target of the enforcement proceedings: *Deloitte & Touche LLP v. Ontario (Securities Commission)*, 2003 SCC 61, [2003] 2 SCR 713 at para 22. See also *Re Biovail Corp.*, 2008 LNONOSC 536, (2008), 31 OSCB 7161, in which the Commission ruled that its staff had not fulfilled its obligation to make meaningful disclosure by providing the subject of the proceedings with a massive database of documents without identifying in at least broad terms those on which it intended to rely and those it considered to be otherwise relevant.

[41] *Toronto Hydro-Electric System Ltd.*,2009 LNONOEB 46, EB-2009-0308.

[42] *Ibid* at para 24.

[43] *Ibid* at paras 28-34.

[44] *Ibid* at para 29. See also *Inter Pipeline Fund v. Alberta (Energy Resources Conservation Board)*, 2012 ABCA 208, 533 AR 331, in which the Court sustained the Board's rejection of a request for an order for the filing of further information by an applicant on the basis that the objectors already had enough disclosure to make their case, and, in any event, were in a position to lead their own evidence in support of their objection.

[45] See e.g. *McCain Foods Ltd. v. Canada (National Transportation Agency)*, [1993] 1 FC 583 (CA).

[46] *Ibid* at para 31.

4) Prehearing Procedures

Prehearing discovery and disclosure regimes are, of course, but one example of methods for facilitating the expeditious conduct of hearings. By virtue of explicit provisions in their empowering statutes and their Rules of Practice and Procedure, provisions in applicable general procedural statutes such as the *Ontario Statutory Powers Procedure Act*,[47] and their ability to control their own procedures, Energy Regulators possess the ability to engage in various forms of prehearing processes that can contribute to more efficient and more focussed hearings. Pre-filing of evidence and, in particular, experts' reports, conferences aimed at defining, narrowing and refining the facts and legal questions that are in issue, the settlement of agreed statements of facts, even informal attempts at prehearing resolution of some or all of the matters that are in contention, and setting limits on what is to occur at the hearing both in terms of scope and time – these and other devices can, if deployed judiciously, contribute massively to the effective discharge of a regulatory agency's mandate.

5) Over-Judicialization

It may seem somewhat disingenuous to in one breath advocate generosity in terms of disclosure obligations and then in the next to caution against over-judicialization. Nonetheless, there is a difference between providing liberal access to all relevant material prior to and during the course of the hearing and conducting a hearing in a way that recognizes that proceedings of the kind staged by Energy Regulators are not criminal or civil trials and that the issues at stake will often lend themselves to resolution by techniques other than traditional adjudicative-style evidential trials.

Here too, my assumption is that most Energy Regulators have recognized this reality and devised alternative hearing techniques in the context of notice and comment rule-making hearings. Failing that, these design issues are confronted in the course of prehearing planning processes for particular applications.

It may, however, be salutary to suggest that this represents an ongoing challenge particularly when new dimensions emerge such as the procedural entitlements of Aboriginal peoples when their rights and interests are affected by regulatory hearings. Creative, cooperative solutions will always be needed as the regulatory process continues to evolve and, in a very real sense, becomes more complex as different regimes more and more frequently intersect and pressures for intervenor involvement continue to be part of any major regulatory initiative.

6) Evidence

While it is difficult to generalize as to the evidential rules governing administrative tribunals and agencies, in *R. v. Deputy Industrial Injuries Commissioner*,[48] in a passage that has commended itself to the authors of one of Canada's leading administrative law texts,[49] Diplock L.J (as he then was) sets out a list of the principles that apply in most contexts:

i. Administrative tribunals are not bound by the rules of evidence applicable in a court of law;

ii. They are not confined to acting on only the "best" evidence;

iii. However, their decisions must be based

[47] *Statutory Powers Procedure Act*, RSO 1990, c S-22 (as amended). See in particular, s 4.8 (alternative dispute resolution) and section 5.3 (pre-hearing conferences). See also ss 22 and 23 of the *Alberta Energy Regulator Rules of Practice*, AR 99/2013, respecting pre-hearing interactions among expert witnesses and panels of witnesses.

[48] *R. v. Deputy Industrial Injuries Commissioner*, (1964), [1965] 1 QB 456 at 488-90 (CA).

[49] See David P.Jones &Anne S. de Villars, *Principles of Administrative Law*, 4th ed (Toronto: Carswell, 2004), ch 9 at 3(b).

on material that "tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant";

iv. Any evidence relied upon must have some probative value;

v. Provided it does not stray from the admonitions in iii and iv, the weight to be attributed to evidence is a matter for the decision-maker.

In practice, this means that, in comparison to the regular courts, administrative tribunals are entitled more readily to admit hearsay evidence, have a greater capacity for taking official notice of facts, are not so committed to the search for the very best or most exact evidence,[50] can be more flexible in the ways in which evidence is adduced or led, and have greater scope for the use of expert witnesses.

Moreover, while there might be situations, such as professional discipline, where the normal court rules of evidence will have much greater relevance or purchase, the Diplock principles are ones upon which Energy Regulators can almost certainly rely in most of what they do. On judicial review or statutory appeal, the courts generally treat evidential questions as matters for the relevant Energy Regulator. This is clear from the following statement from the judgment of Iacobucci J., delivering the judgment of the Supreme Court of Canada in *Quebec (Attorney General) v. Canada (National Energy Board)*:

> In carrying out its decision-making function, the Board has the discretion to determine what evidence is relevant to its decision. It has not been shown that, in this case, the discretion was improperly exercised so as to result in inadequate disclosure.[51]

Indeed, despite the fact that the Supreme Court of Canada normally takes the position that correctness is the standard for assessment of allegations of procedural unfairness,[52] it is clear that the Courts do not review the exercise of discretion on evidential issues by that standard. Rather, reasonableness will be the touchstone generally in the post-*Dunsmuir* world.[53]

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[50] See e.g. *Husky Oil Operations Ltd. v. Scriber*, 2013 ABQB 74 at paras 69-72.

[51] *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 SCR 159 at para 31. See also *Direct Energy Regulated Services v. Alberta (Energy and Utilities Board)*, 2007 ABCA 140, 404 A.R. 223 at para 12, stating that the relevant Alberta legislation gave the Board "very wide elbow room to decide what types of evidence it will act on." Similarly, see in relation to the Alberta Surface Rights Board: *Husky Oil Operations Ltd. v. Scriber, ibid*.

[52] However, see *Lavallee v. Alberta (Securities Commission)*, 2009 ABQB 17, 467 AR 152 (aff'd 2010 ABCA 48, 474 AR 295) at para 85, citing *Alberta Securities Commission v. Brost*, 2008 ABCA 326, 440 AR 7 and drawing a distinction for these purposes between correctness review in the case of issues of evidence that raise questions of natural justice, and reasonableness review for the review of exercise of discretion with respect to the admission of evidence. It is also noteworthy that, at the Court of Appeal in Lavallee at paras 6-18, the Court held that a statutory direction to "receive that evidence that is relevant to the matter being heard" did not interfere with the Securities Commission's overall discretion to exceptionally refuse to admit relevant evidence. See also *Nova Scotia (Director of Assessment) v. van Driel*, 2010 NSCA 87, 296 NSR (2d) 244 at para 14, a post-*Dunsmuir* judgment, maintaining the position that issues as to onus of proof in regulatory proceedings are to be reviewed on a correctness basis. *Cf Big Loop Cattle Co. v. Alberta (Energy Resources Conservation Board)*, 2010 ABCA 328, 490 AR 246 at para 29, where Rowbotham J.A. stated that the Board's refusal to respond to a request from a party to compel a witness to attend was "entitled to considerable appellate deference."; *Talisman Energy Ltd. v. Energy Resources Conservation Board*, 2010 ABCA 258, 487 AR 377 at para 23 (deference to ruling on refusal of opportunity to respond to new rebuttal evidence); *Judd v. Alberta (Energy Resources Conservation Board)*, 2011 ABCA 159, 513 AR 260 at para 27 (deference to discretionary ruling under explicit statutory provision refusing to allow the filing of evidence out of time under Rules of Practice); *Westridge Utilities Ltd. v. Alberta (Utilities Commission)*, supra note 33 at para 27 (reasonableness standard applied to Commission's disclosure order); and *Deloitte & Touche LLP v. Ontario (Securities Commission)*, *supra* note 40, discussed above, in the section on disclosure and discovery.

[53] See e.g. V*ancouver Pile Driving Ltd. v. British Columbia (Assessor of Area No. 8 – Vancouver Sea to Sky Region)*, 2008 BCSC 810, 47 MPLR (4th) 106 at paras 117-18, in relation to the British Columbia Property Assessment Appeal

Moreover, review for unreasonableness does not mean that "the reviewing court [is] to reweigh the evidence."[54]

This kind of approach is also reinforced statutorily in some jurisdictions either generally or with specific reference to Energy Regulators. For example, under section 9 of the Alberta *Administrative Procedures and Jurisdiction Act,*[55] a statute that applies to most of the province's Energy Regulators (but not the new Energy Regulator), it is provided that evidence need not be given under oath and that decision-makers covered by the Act are not required to adhere to the rules of evidence applicable to criminal and civil proceedings. This is also reinforced by section 18 of the *Alberta Utilities Commission Act*[56] and section 47 of the *Responsible Energy Development Act*.[57] They provide that neither the Alberta Utilities Commission nor the Alberta Energy Regulator is bound by the rules of evidence that apply to judicial proceedings. In fact, the only other direct references to evidence in the *Administrative Procedures and Jurisdiction Act* come in section 4, which mandates the provision of a reasonable opportunity to furnish relevant evidence both at large[58] and in the context of responding to material in the possession of the decision-maker, and section 5 providing the opportunity for cross-examination where it is necessary to answer the case or otherwise deal with the evidence. These provisions aside, the legislature has conferred authority on both the Commission and the Energy Regulator, in sections 76(1)(e) and 61 respectively of their constitutive Acts, power to make rules of practice governing procedure and their hearings.[59] In exercising this power, the Commission in section 1 of its Rules of Practice, has stipulated that

> These rules must be liberally construed in the public interest to ensure the most fair, expeditious and efficient determination of the merits of every proceeding before the Commission.

In Ontario, the Ontario Energy Board is generally subject to the *Statutory Powers Procedure Act,*[60] and section 15 of that Act provides in part:

> (1) Subject to subsections (2) and (3), a etribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document or other thing, relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.
>
> (2) Nothing is admissible in evidence at a hearing,
>
> (a) that would be inadmissible in a court by reason of any privilege under the law of evidence;[61] or

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Board. To the extent that the according of standing to participate in regulatory proceedings is an element of procedural fairness, this can also be seen in judicial review of standing decisions: *Westridge Utilities Inc. v. Alberta (Director of Environment, Southern Region), supra* note 16; *Syndicat des travailleuses et travailleurs de ADF - CSN c. Syndicat des employés de Au Dragon Forgé,* 2013 QCCA 793 at paras 46-47.

[54] *Canada (Citizenship and Immigration) v. Khosa,* 2009 SCC 12, [2009] 1 SCR 339 at para 61 (per Binnie J.).

[55] *Supra* note 6.

[56] *Supra* note 7.

[57] *Supra* note 6.

[58] For an example of a deferential approach to a regulator's exercise of power under this section, see *Talisman Energy Inc., supra* note 52.

[59] An authority shared with the Lieutenant Governor in Council in the case of the Energy Regulator. See sections 60 and 61 of the *Responsible Energy Development Act*.

[60] *Statutory Powers Procedure Act,* RSO 1990, c S-22 (as amended).

[61] It is almost certainly the case that this also applies to Alberta's Energy Regulators notwithstanding the absence of

(b) that is inadmissible by the statute under which the proceeding arises or any other statute.

(3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceeding.

All of this coalesces to produce a situation where Energy Regulators normally have a broad discretion with respect to matters of evidence, a discretion the exercise of which will generally attract deference from reviewing and appellate courts. Nonetheless, there are limits. Thus, there may be more constraints on a tribunal's discretion where the proceedings are of an enforcement or compliance nature leading to possible sanctions such as fines and loss of licences and privileges. Moreover, as Diplock L.J. makes clear, concepts such as relevance[62] and probative value will impose limits on tribunals generally and irrespective of their authority not to adhere to the full panoply of evidential principles and rules applicable in court proceedings. These limits may also come in a constitutional or *quasi*-constitutional form, as exemplified by the rules of evidential privilege,[63] and also by possible limitations imposed in the name of "due process", in sections 1(a) of both the *Alberta and Canadian Bills of Rights*, on statutory or common law rules that Energy Regulators are not bound by the normal rules of evidence.[64] More commonly, however, a reviewing court may review a tribunal's evidential rulings on the basis that they gave rise to a violation of the principles of procedural fairness or such other discrete administrative law wrongs as failing to take account of relevant considerations and taking account of irrelevant considerations.

In an Energy Regulatory context, *Sarg Oils Ltd. v. Alberta (Energy and Utilities Board)*[65] provides a good example. In granting leave to appeal from an order requiring Sarg Oils to abandon wells and other facilities, Hunt J.A. ruled that there was a "serious arguable point"[66] that the Board, by refusing to admit certain evidence, had misconceived the thrust of the applicant's motion and therefore denied procedural fairness.[67] In other words, there was a possibility that the Board's ruling transcended

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any specific reference to it in either their constitutive statutes or the *Administrative Procedures and Jurisdiction Act*, *supra* note 6. This contention is supported by the Supreme Court of Canada's attribution of quasi-constitutional status to various forms of evidential privilege: *Goodis v. Ontario (Minister of Correctional Services)*, 2006 SCC 31, [2006] 2 SCR 32 and *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 SCR 574. For a recent discussion of evidential privileges in the administrative process, see Simon Ruel, "What Privileges Arise in the Administrative Context, and When?" (2013), 26 *Canadian Journal of Administrative Law & Practice* 141.

[62] In this respect, it is worth noting that section 4(a) of the Alberta *Administrative Procedures and Jurisdiction Act* provides that parties to proceedings have the right to adduce "relevant evidence". It is arguably implicit in this that tribunals governed by the Act are not entitled to admit irrelevant evidence or, at the very least, not to give any weight to irrelevant evidence.

[63] *Ibid*.

[64] As held in *Lavallee v. Alberta (Securities Commission)*, *supra* note 52.

[65] *Sarg Oils Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 198. (On the appeal, the Alberta Court of Appeal rejected the claim the Board misconceived the nature of the case that the appellant was advancing: *Sarg Oils Ltd. v. Alberta (Energy and Utilities Board*, 2011 ABCA 56). See also *Lavesta Area Group v. Alberta (Energy and Utilities Board)*, 2007 ABCA 194, and *Bur v. Alberta (Energy and Utilities Board)*, 2007 ABCA 210, both also decisions on applications for leave to appeal.

[66] *Ibid* at para 3. This is the principal component of the test for leave to appeal in Energy matters in Alberta. For recent summaries of the various factors that go into that determination, see *Wood Buffalo (Regional Municipality) v. Alberta (Energy and Utilities Board)*, 2007 ABCA 192, 417 AR 222 at paras 4-5 (*per* Slatter J.A.) and *Atco Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 382 at para 10 (*per* Paperny J.A.).

[67] *Ibid* at para 8. For Supreme Court of Canada decisions to like effect, see T*oronto Newspaper Guild v. Globe Printing Co.*, [1953] 2 SCR 18, and *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 SCR 471.

its discretionary authority with respect to evidence and gave rise to both a misconception of the case and a failure to hear the applicant. Suffice it to say, however, that this is not always a bright line distinction and, as a result, the task of differentiating between a discretionary evidential ruling and other forms of error will be both difficult and frequently controversial.[68]

7) Unruly Counsel, Parties and Intervenors

Being sensitive to the pressures for judicialization and developing procedural techniques that serve as an antidote to those pressures can only take an administrative agency so far. In the movement from the devising of appropriate procedural rules to the actual dynamics of the hearing room, another dimension will frequently emerge: the capacity of lawyers particularly, but also witnesses, parties, and intervenors to consciously or unconsciously take over or change the appropriate complexion of the hearing. Without strong leadership and frequently decisive intervention especially on the part of the person chairing the panel, hearings can start to lose the plot in the sense of becoming bogged down in material of marginal or no relevance. One area in particular where there may need to be particular vigilance is in the qualification of experts and keeping expert testimony within appropriate limits. Panels also need to be conscious of the extent to which delays and distractions are the product of insufficient preparation on the part of counsel or, even worse, no particular concern about delays to the process. Here, as in proceedings before many other tribunals, there are the particular problems of dealing with unrepresented participants or participants represented by inexperienced lawyers. All of these are matters that need to be anticipated and strategies developed for dealing with them appropriately and keeping the hearing on the rails.

Dealing with unruly participants can, of course, test the patience of the most Job-like adjudicator.[69] However, it is equally important to resist the temptation to descend into the pit and take on unruly or unprofessional counsel, parties, intervenors or witnesses on their own terms. While the examples of successful applications for judicial review resulting from the conduct of adjudicators (or counsel to the tribunal, for that matter) at hearings are comparatively few,[70] nonetheless, courtesy coupled with firmness is almost invariably the best approach. While the odd intemperate outburst might find sympathy or understanding from a reviewing court, sustained hostility towards anyone involved in the hearing will probably not. It is also equally important not to allow lack of sympathy with a particular position or line of argument to show itself in the form of open displays of temper and even irritation and impatience. There is also the flip side of adjudicators whose improper conduct manifests itself in inappropriate forms of favouritism and obsequiousness, as opposed to manifest hostility. In sum, adjudicators have to strive to find an appropriate balance between the need to keep the hearing under control and moving forward at an appropriate pace, on the one hand, and behaving in a manner consonant with the best traditions of a dispassionate, alert, even-handed decision-maker, on the other.

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[68] See also *Transcanada Pipelines Ltd. v. Canada (National Energy Board)*, 2004 FCA 149, 319 NR 171, discussed at length by Robertson JA in *Enbridge Gas New Brunswick Ltd. v. New Brunswick Energy and Utilities Board*, 2011 NBCA 36 at paras 16-23.

[69] For cautionary tales in the context of the regular courts, see R. v. Felderhof, [2002] OJ No.4103, aff'd (2003), 68 OR (3d) 481, 235 DLR (4th) 131 (Ont CA), and *Sawridge Band v. Canada*, 2005 FC 607, 265 FTR1; 2006 FC 656, 293 FTR 175; and 2008 FC 322, 319 FTR 217.

[70] See e.g. *Gooliah v. Canada (Minister of Citizenship and Immigration)* (1967), 63 DLR (2d) 224 (Man CA); *Golomb v. Ontario (College of Physicians and Surgeons* (1976), 68 DLR (3d) 25 (Ont Div Ct); *Yusuf v. Canada (Minister of Citizenship and Immigration)* (1991), 7 Admin LR (2d) 86 (FCA); *Brett v. Ontario (Board of Directors of Physiotherapy)* (1993), 104 DLR (4th) 421 (Ont CA) (behaviour of the tribunal's lawyer); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (antagonism revealed in a paper hearing).

8) Bias Challenges – Whose Responsibility?

How tribunals deal with challenges to their proceedings based on a reasonable apprehension of bias, as the Newfoundland Court of Appeal pointed out in *Communications, Energy and Paperworkers Union of Canada, Local 60N v. Abitibi Consolidated Company of Canada*,[71] is a question on which the law has been remarkably uncertain.

In the context of Energy Regulators sitting in panels, there are two questions: Does the panel have jurisdiction to entertain a bias challenge, and, if so and if the challenge is to the participation of one member of the panel (as opposed to all members of the panel), who makes the determination: the panel or the challenged member?

On the first question, the Newfoundland Court of Appeal, in the context of a tripartite arbitral panel, reflected the balance of Canadian authority when it ruled not only that the tribunal has jurisdiction to determine the merits of the challenge but also that in general it should do so.[72] Thereafter, it is for the courts on judicial review to determine, on the basis of the record developed by the tribunal on this issue and supplementary affidavit material, whether any ruling of the tribunal (generally denying the recusal motion) should be set aside.[73]

More problematic for the Court of Appeal was the question of whether the decision should be taken by the panel collectively or by the individual subject to challenge. After considering competing authority and academic commentary, the Court determined that it was for the individual member to make the determination. It justified this in a labour arbitration context by reference to considerations of "efficiency and speedy resolution of employee/employer grievances."[74]

In my view, this is the preferred position for most, if not all tribunal and agency settings. The challenge in such cases is a personal one based on facts pertaining to and within the

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[71] *Communications, Energy and Paperworkers Union of Canada, Local 60N v. Abitibi Consolidated Company of Canada*, 2008 NCLA 4.

[72] This does not gainsay the fact that there may be difficult procedural issues as to how the challenge should be dealt with at the tribunal level. In most instances, however, the objecting party should be able to provide the facts and arguments on which he or she is relying in a statement or written submission to the tribunal. At that point, the challenged member may choose to make a statement of her or his own. Thereafter, after written or oral submissions, the determination can be made.

[73] For an example of an Energy Regulator ultimately taking responsibility for dealing with a challenge based on a reasonable apprehension of bias, see the saga of the Lavesta Area Group and the Alberta Energy and Utilities Board, where the Board's hearing was compromised by the improper conduct of security personnel hired by the Board in the wake of disruptions at a hearing. Ultimately, the Board itself declared that the hearing and related decisions were void on the basis of a reasonable apprehension of bias (Board Decision 2007-075), and this led to the Alberta Court of Appeal allowing appeals on that basis and in reliance on the Board's decision: *Lavesta Area Group v. Alberta (Energy and Utilities Board)*, 2007 ABCA 365. Note, however, *Lavesta Area Group v. Alberta (Energy and Utilities Board)*, 2009 ABCA 155, rejecting an argument that the Board could thereafter not deal with a costs issue arising out of the proceedings on the basis that there was institutional bias. The Court of Appeal held that it was proper for the issue to be dealt with by newly appointed Board members. Subsequently, there was yet another challenge arising out of this matter. At stake here was the meaning of a guideline that had been issued by the now Commission providing assurances that members involved in the earlier impugned decisions would not be assigned to any further panels concerning the relevant subject matter, and also, whether, in any event, the participation of such a member in any subsequent proceedings involving this project would give rise to a reasonable apprehension of bias. The Court of Appeal gave leave to appeal on the basis that these were both issues of law of significance: Lavesta Area Group Inc. v. Alberta (Energy and Utilities Board), 2011 ABCA 108, and, on the determination of that appeal, 2012 ABCA 84, 522 AR 88, the Court held that the impugned member had no connection with the hearing that gave rise to the initial bias allegations, that the connection between the current hearing and those proceedings was tenuous, and that sufficient time had passed to remove any taint. See paras 28-30.

[74] *Supra*, note 71 at para 35.

knowledge of the individual adjudicator, and it is appropriate that that person deal with it at first instance.

Moreover, as demonstrated by *SOS-Save Our St. Clair Inc. v. Toronto (City)*,[75] the other members of the panel may not be without recourse if they feel unable to go along with the individual member's ruling. There, in a case involving a challenge to a member of a three-judge panel of the Ontario Divisional Court, the impugned judge rejected the motion for recusal. While the other two members supported his entitlement to make that ruling on his own, because of their disagreement with him on this issue, they determined for conscientious reasons[76] that they could not continue to serve. The two therefore made an order granting the applicant's motion.

Absent this kind of disagreement among the members of a panel, any challenge to the decision of the individual adjudicator rests with the courts on judicial review. Moreover, there is no obligation on the tribunal to adjourn its proceedings simply because such an application is foreshadowed or even commenced.[77] However, as indicated by the facts of *Committee for Justice and Liberty v. National Energy Board*,[78] where the challenge is serious and comes at the beginning of a lengthy regulatory process, there may be strong practical reasons for not proceeding until the courts have dealt with the challenge.

In the determination of whether there should be recusal of a member of a panel or an entire panel, for that matter, it is, nonetheless, critical to keep in mind that the interests of administrative justice are not at all served by an overly sensitive approach to the task. The mere assertion that there is bias is clearly not enough, and the standard imposed on the party seeking recusal is a demanding one. The reasons for this are obvious. It is in the public interest that designated decision-makers not be disqualified from exercising their statutory roles on weak or dubious grounds. There is a public interest in members fulfilling the task for which they have been appointed. Moreover, too ready capitulation in the face of applications for recusal of a member or an entire panel plays into the hands of parties attempting to "forum shop."

The underlying principles on which these decisions should be taken emerge clearly from the final case involving the Lavesta Area Group and the predecessor of the Alberta Utilities Commission, the Alberta Energy and Utilities Board. Here, the Court of Appeal started off by emphasizing that

> [t]he test for an apprehension of bias is high. The standard is the reasonable observer, not one with a very sensitive or scrupulous conscience…. The grounds must be serious, substantial and based on a real likelihood or probability, not suspicion…. Bald assertions are not sufficient…. In light of its legislative mandate, there is a strong presumption that the Commission and its panels will properly discharge their duties and are not tainted by bias….[79]

The Court then went on to criticize the stance taken by the Chair of that Board:

> It should be noted that the predecessor Chair not only contemplated disqualifying from future panels those who had sat on previous panels on the subject. He actually contemplated not appointing any existing

[75] *SOS-Save Our St. Clair Inc. v. Toronto (City)* (2005), 78 OR (3d) 331 (Div Ct).

[76] *Id*. at para 21.

[77] See e.g. *Ontario College of Art v. Ontario (Human Rights Commission)* (1993), 11 OR (3d) 798 (Div Ct), and *Air Canada v. Lorenz*, [2000] 1 FC 494 (TD).

[78] *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369.

[79] *Lavesta Area Group (2012), supra* note 73 at para 24.

> members of the Board apparently whether they had been involved in any of the prior panels or not. That standard far exceeds any common law standard for a reasonable apprehension of bias.[80]

The implications of these statements for any panel or individual member facing a recusal motion are obvious!

9) Relationships with the Minister and Public Servants

One of the bedrock rules governing the conduct of hearings by tribunals and agencies is that those presiding should not have *ex parte* contact with any of the parties or intervenors outside of the confines of the hearing room. That rule takes on the added dimension of a threat to independence when the contact is with an interested Minister or, indeed, public servant, and especially the Minister responsible for the tribunal or agency. Contacts between a tribunal or agency and the responsible Minister especially in relation to a matter being heard or pending before the tribunal or agency raise the spectre of a lack of both institutional and individual independence as first outlined authoritatively by Le Dain J. for the Supreme Court of Canada in Valente v. R.[81]

This issue surfaced in *Shaw v. Alberta (Utilities Commission).*[82] There, Berger J.A. gave leave to appeal a decision of the Commission on the basis of communications between the responsible Minister and the Chair of and legal counsel to the Commission. These communications gave the appearance that intervention by the Minister may have dictated the Commission's suspension of its consideration of three projects. On the material before the Court, Berger J.A., in granting leave to appeal on a question of law, held that it was arguable that this

> …would cause a reasonable person to apprehend bias on the basis of interference or influence on the part of a member of the Alberta Cabinet, in this case one who recommends the appointment of persons to sit on the Commission and determines their salaries.[83]

On the hearing of the appeal, the Alberta Court of Appeal never reached this argument.[84] Nonetheless, the appropriate strategy is obvious. Absent explicit legislative sanctioning of such interactions between a regulatory agency and the executive branch, avoid communications with the Minister and, indeed, public servants that have the potential to compromise the integrity of a tribunal or agency hearing or, more generally, the independence of the tribunal or agency as a whole or that of individual members.

10) Revealing Circumstances that Could Form Basis for a Challenge

As noted in Proposition 8, from time to time, reviewing and appellate courts issue the admonition that adjudicators have a responsibility not to recuse themselves too readily. Nonetheless, members of tribunals and agencies should recognize the dangers of suppressing information that might give rise to a challenge on the basis of an apprehension of bias or lack of independence, even where they believe that the relevant information probably does not provide a basis for voluntary recusal. While it is appropriate for the person affected

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[80] *Ibid.* at 27.

[81] *Valente v. R.*, [1985] 2 SCR 673.

[82] *Shaw v. Alberta (Utilities Commission)*, 2012 ABCA 100.

[83] *Id*. at para 17.

[84] *Shaw v. Alberta (Utilities Commission)*, 2012 ABCA 378, 513 AR 315. The Court rejected Shaw's argument that, despite legislative conferral on the Minister of authority to determine whether there was a need for a transmission development project, the Commission still had authority as part of its public interest mandate to revisit the issue of need.

to make the initial determination whether he or she should recuse herself or himself, that should be done on the basis of exposure to the contending points of view. There should also be no encouragement given to adjudicators to take comfort in the failure of affected parties to come up with the information on which a possibly credible motion for recusal might be advanced. Often, that information will be within the peculiar knowledge of the adjudicator. However, even in situations where the information might be available on the basis of not too much investigation, it does nothing for the reputation of the member or the tribunal as a whole where the member adopts the attitude that it is the parties' fault if they do not do the digging and come up with the relevant information. Full and frank disclosure is the only sensible course of action.

Here too, the facts of *SOS-Save Our St. Clair Inc. v. Toronto (City)* are instructive. In effect, the failure on the part of the judge to provide full and frank disclosure ultimately compounded the problem and caused embarrassment for the other two judges of the Court.[85]

11) Varying Principles Respecting Unbiased and Independent Decision-making

Over twenty years ago, Cory J., delivering the judgment of the Supreme Court of Canada in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*,[86] confronted the issue of how the principles respecting unbiased decision-making applied in the domain of public utilities regulation. At the macro level, he accepted that the standards for such boards were not those that applied to strictly adjudicative boards where the appropriate evaluation standard was that of traditional judicial neutrality. Prior experience and strongly-held views on policy issues rather than being a basis for disqualification should be something to be valued in an appointee to such an agency. As a consequence, at least at the pre-hearing stage of regulatory proceedings, the normal test of a reasonable apprehension of bias should not be the standard. Rather, the test should be "much more lenient."[87]

> [A] challenging party must establish that there has been pre-judgment of the matter to such an extent that any representations to the contrary would be futile.[88]

Thereafter, once the matter reached the actual hearing stage, members of such regulatory agencies were expected to be somewhat more circumspect and comport themselves in a manner consistent with what was normally expected of those conducting hearings.[89]

There is no reason to believe that this conception of regulatory agencies has changed since Cory J. penned this judgment. What has changed, however, as in the domain of the requirements of procedural fairness with respect to disclosure, discovery, and the application of the normal rules of evidence, is the emergence of a sense that there is a difference between the rules and principles that apply when a regulatory agency is engaged in broad public interest regulation and when that same agency is acting in a compliance or enforcement capacity.

As exemplified by *Rowan v. Ontario Securities Commission*,[90] there will be few occasions

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[85] See *Report to the Canadian Judicial Committee of the Inquiry Committee appointed under section 63(3) of the Judges Act to conduct an investigation into the conduct of Mr. Justice Theodore Matlow, a Justice of the Ontario Superior Court of Justice*, issued May 28, 2008.

[86] *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623.

[87] *Id*. at para 27.

[88] *Ibid*.

[89] *Ibid*.

[90] *Rowan v. Ontario Securities Commission*, 2012 ONCA 208, 110 OR (3d) 492.

on which a regulatory agency's proceedings will be sufficiently penal in nature to engage the protections of section 11(d) of the *Canadian Charter of Rights and Freedoms*[91] and its guarantee of the right to a trial by an independent and impartial tribunal where someone is charged with an offence. Nonetheless, in the context of regulatory enforcement proceedings, the demands placed on adjudicators by the principles of unbiased and independent decision-making are likely to be somewhat more stringent and closely approximating the standards applicable to rights adjudicating bodies.

This will be reflected in the extent to which prior involvement with the respondents in regulatory enforcement proceedings and their counsel as well as any history of advocacy of enforcement policies with respect to the matter before the agency will be disqualifying.[92] However, perhaps more significantly, as the extent (either through legislation, such as the recently enacted Alberta Responsible Energy Development Act, or through agency rules or even practices) to which the enforcement and prosecutorial branches of regulatory agencies are separated from the adjudicative branch becomes more common or even routine, there will not surprisingly be an increased tendency on the part of the courts to treat instances of overlap between those functions as problematic.

The only appropriate conclusion to draw from this is that Energy Regulators on a going forward basis would be well-advised to create appropriate walls between their enforcement and prosecutorial branches, and their adjudicative personnel.

12) Dealing with Constitutional (including Charter) Questions

Not only are tribunals and agencies obliged to deal with challenges to their participation based on an allegation of a reasonable apprehension of bias or lack of independence, but also they are generally required to adjudicate on constitutional questions that arise in the course of proceedings before them. For these purposes, a constitutional question includes issues arising under the *Canadian Charter of Rights and Freedoms* and extends beyond issues of application and interpretation to challenges to the validity of a tribunal or agency's constitutive statute or other relevant legislation. It can also include questions of aboriginal rights and entitlements arising under section 35 of the *Constitution Act, 1982* and based on the honour of the Crown.[93]

The leading authority in this domain is *Nova Scotia (Workers' Compensation Board) v. Martin*.[94] There, the Supreme Court held that the Board and the Appeal Board above it had an obligation to deal with a constitutional challenge to the effect that the statutory rules governing a particular category of claimant were invalid as discriminatory in terms of section 15 of the *Charter*. Despite the fact that tribunals and agencies lack the constitutional competence to make binding declarations of constitutional invalidity, and despite the fact that their rulings on constitutional questions of law receive no deference in subsequent judicial review proceedings,[95] nonetheless, in most

[91] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11.

[92] Though see *Summitt Energy Management Ltd. v. Ontario Energy Board*, *supra* note 37, rejecting a bias challenge in enforcement proceedings to the participation of Independent Legal Counsel whose firm had acted for the respondent`s competitors in unrelated matters: "Given the Board`s need for expertise, it is likely that any ILC retained by a Board will have had prior practice experience in the energy sector" (at para 57).

[93] *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 SCR 585. This will be developed in more detail in this and Section 14.

[94] *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 SCR 504.

[95] At least, where the issue is a pure question of law. Where the setting is the exercise of a discretion implicating

situations, they have no choice but to deal with those questions.

The clearest indicator of an almost irrebuttable presumption of competence over constitutional questions is a provision in the tribunal or agency's empowering legislation giving it authority to deal with any question of law arising in proceedings that come before it. However, even absent that form of legislative signposting, the position after Martin is that this is a responsibility that devolves on almost all adjudicative tribunals, and there is no reason to believe that Energy Regulators are an exception

In 2010, in *R. v. Conway*,[96] the Supreme Court of Canada reinforced the competence of administrative tribunals and agencies in the constitutional realm by applying these same principles to the determination of whether a tribunal or agency is a "court of competent jurisdiction" for the purposes of awarding remedies under section 24(1) of the Charter. Absent legislative abrogation, if a tribunal or agency has the authority to consider constitutional questions, there is a strong presumption that it also has the capacity to award constitutional remedies by reference to section 24(1). However, this does not represent the recognition of an at large or unfettered conferral of remedial jurisdiction. The tribunal or agency will still be confined to those remedies that are part of its armoury under its constitutive statute. Thus, if a tribunal or agency does not have the capacity to award damages or costs under its empowering legislation, it does not acquire that capacity by reference to its status as a tribunal or agency with the power to award remedies by reference to section 24(1).

Martin did not, however, garner universal approval, and, in two provinces, Alberta and British Columbia, its holding has been modified. Under the Alberta *Administrative Procedures and Jurisdiction Act*,[97] only those tribunals designated by regulation under section 16 have the capacity to deal with constitutional questions[98] (other than the exclusion of evidence under section 24(2) of the *Charter*[99]). In fact, under the *Designation of Constitutional Decision Makers Regulation*, each of the Alberta Energy and Utilities Board, the Alberta Utilities Commission, and the Energy Resources Conservation Board were all given jurisdiction to deal with all constitutional questions, and this has now been extended to the Alberta Energy Regulator.[100] However, it is also the case that, as opposed to the situation under *Martin*, section 13 of the *Administrative Procedures and Jurisdiction Act* confers a discretion on an agency designated under

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constitutional guarantees and values, the Supreme Court of Canada has now recognized that deferential, reasonableness review may be appropriate in any review of the exercise of that discretion provided the decision-maker has identified the correct legal principles: see *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395.

[96] *R. v. Conway*, 2010 SCC 22, [2010] 1 SCR 765.

[97] *Supra* note 6.

[98] Section 10(b) defines "question of constitutional law" broadly to include not only challenges by reference to the Canadian Constitution and the *Alberta Bill of Rights* to the "applicability and validity" of federal and Alberta legislation but also "a determination of any right under" the Canadian Constitution and the *Alberta Bill of Rights*.

[99] *Supra* note 91s 12(1).

[100] Alta Reg. 69/2006, Schedule 1 [as amended by AR 89/2013, s 31]. In fact, as of January 1, 2007, the Alberta Energy and Utilities Board became two separate entities, the Alberta Utilities Commission and the Alberta Energy Resources Conservation Board. The Regulation has now been amended further to substitute the new Alberta Energy Regulator for the Energy Resources Conservation Board: see *Miscellaneous Corrections (Alberta Energy Regulator) Regulation*, AR 89/2013, section 31 (May 29, 2013, made effective on June 17, 2013 by section 49). However, it should be noted that section 21 of the *Responsible Energy Development Act* provides:

The Regulator has no jurisdiction with respect to assessing the adequacy of Crown consultation associated with rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act*.

Presumably, the intention of this provision is to make it clear that the new Energy Regulator has not only no authority

section 16 to refer any constitutional question to the Court of Queen's Bench.

In British Columbia, under the *Administrative Tribunals Act*,[101] for the purposes of determining constitutional questions, tribunals subject to that Act are placed in one of three categories: those with jurisdiction to decide all constitutional questions (section 43), those with no jurisdiction to decide constitutional questions (section 44), and those with jurisdiction to decide Charter questions (section 45). Both the Mediation and Arbitration Board, under the *Petroleum and Natural Gas Act*,[102] and the Utilities Commission under the *Utilities Commission Act*,[103] are designated as subject to section 44 and therefore have no jurisdiction to deal with constitutional questions. However, as opposed to the situation under the Alberta *Administrative Procedures and Jurisdiction Act*, the term "constitutional question" is defined more narrowly. By virtue of section 1, it is confined to

> …any question that requires notice under section 8 of the Constitutional Question Act.

Section 8[104] specifies that notice must be given where

> (a) the constitutional validity or constitutional applicability of any law is challenged, or
>
> (b) an application has been made for a constitutional remedy.

As opposed to the equivalent Alberta legislation, it does not extend to the "determination of any right."

In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*.[105] McLachlin C.J., delivering the judgment of a unanimous Supreme Court, held that this did not preclude the Utilities Commission from determining whether the Crown had fulfilled its constitutional obligation to consult aboriginal peoples in relation to an as yet undetermined claim that was potentially affected by a matter that had come before the Commission.

> The application to the Commission… for a rescoping order to address consultation issues does not fall within this definition. It is not a challenge to the constitutional validity or applicability of a law, nor a claim for a constitutional remedy under s. 24 of the *Charter* or s. 52 of the *Constitution Act*, 1982. In broad terms, consultation under s. 35 of the Constitution Act, 1982 is a constitutional question… However, the [relevant] provisions of [both Acts] do not indicate a clear intention on the part of the legislature to exclude from the Commission's jurisdiction the duty to consider whether the Crown has discharged its duty to consult with holders of relevant Aboriginal interests. It follows that, … the Commission has the constitutional jurisdiction to consider the adequacy of Crown consultation in relation to matters properly before it.[106]

In all other jurisdictions, *Martin* applies to Energy Regulators. As a consequence, there

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to independently conduct aboriginal consultation but also no authority to assess the Crown's efforts at consultation. It also contradicts and presumably partially overrides Schedule 1's conferral of jurisdiction on the Alberta Energy Regulator to determine all questions of constitutional law arising before it.

[101] *Administrative Tribunals Act*, SBC 2004, c 45, ss 43-45.

[102] *Petroleum and Natural Gas Act*, as amended by the *Administrative Tribunals Act*, RSBC 1996, c 361, s 13(6).

[103] *Utilities Commission Act*, as amended by the *Administrative Tribunals Act*, RSBC 1996, c-473, s 2(4).

[104] *Constitutional Question Act*, RSBC 1996, c68.

[105] *Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650.

[106] *Id*. at para 72.

is no choice but to deal with constitutional questions and, where appropriate, refuse to apply unconstitutional statutes. In this capacity, the boards in question (and indeed the designated Alberta regulators[107]) should be cognizant of the extent of the relevant provincial statutory obligations to serve notice of any constitutional question on the provincial Attorney General and the Attorney General of Canada.

It is also important to keep in mind one of the principal reasons behind the rule that tribunals and agencies have authority to deal with constitutional questions: to build an evidential record on the basis of which generally non-deferential, correctness judicial review will be facilitated. That suggests the wisdom of tribunals and agencies having special provisions in their procedural rules for conduct of hearings in which constitutional questions are raised. Absent that, individual members and panels should pay particular attention at the prehearing stage of any case in which constitutional questions will be in issue to the crafting of appropriate ways within the existing general procedural rules of the tribunal or agency for handling the resolution of the constitutional issues.

13) Consulting with Non-Panel Members

In 1993, the Supreme Court of Canada rejected the notion that inconsistency provided an independent or free-standing basis for judicial review of a tribunal or agency's decisions.[108] The Court of Appeal for Ontario has subsequently reaffirmed that principle[109]

However, this does not mean that the Supreme Court does not recognize the importance of consistent decision-making within administrative tribunals and agencies. Indeed, in her concurring judgment in *Dunsmuir v. New Brunswick,*[110] Deschamps J. stated, in a judicial review context, that "[c]onsistency of the law is of prime societal importance." Thus, while there is no formal system of precedent in the tribunal system[111] and while inconsistency does not give rise to a stand-alone basis for judicial review, the Supreme Court has given encouragement to tribunals and agencies in the devices and processes that they have developed to encourage consistent decision-making among their various members and panels.[112]

In fact, Domtar had been preceded in 1990 by *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging*

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[107] *Administrative Procedures and Jurisdiction Act, supra* note 6 s 12.

[108] *Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756.

[109] See particularly, *National Steel Car Ltd. v. United Steelworkers of America, Local* 7135, [2006] OJ No.4868, 218 OAC 207 (CA), at para 31 (per MacPherson J.A.).

[110] *Dunsmuir v. New Brunswick,* 2008 SCC 9, [2008] 1 SCR190.

[111] For an argument that there can be no mature system of Public Utility law in Canada until there is a much greater recognition of the weight of precedents and at least limited judicial review for inconsistency, see George Vegh, "Is There a Doctrine of Canadian Public Utility Law?" (2007), 86 *Canadian Bar Review* 319.

[112] See the judgment of Feldman J.A. in *Investment Dealers Association of Canada v. Taub,* 2009 ONCA 628, 98 OR (3d) 169, at paras 61-67, speculating that for a future tribunal not to apply, in another case, an outcome that a reviewing court has previously found reasonable though not necessarily correct, creates a rule of law problem, and, in particular, the principle that the law should apply equally to all affected citizens. In so doing, she referred to similar musings by Juriansz J.A. in *Novaquest Finishing Inc. v. Abdoulrab,* 2009 ONCA 491, 95 OR (3d) 641, at para 48. However, that possible development has subsequently been squelched by the judgment of Fish J. for the Supreme Court of Canada in an Energy Regulation setting: *Smith v. Alliance Pipeline,* 2011 SCC 7, [2011] 1 SCR160. There, though without reference to the Ontario cases, at paras. 38-39, in response to an argument that the existence of inconsistent tribunal authority on an issue of law was a species of unreasonableness, he stated (at para 39):

Indeed, the standard of reasonableness, even prior to *Dunsmuir*, has always been "based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute" such that "courts ought not to interfere where the tribunal's decision is rationally supported" (*Dunsmuir*, at para 41).

Ltd.,[113] and in 1992 by *Tremblay v. Québec (Commission des affaires sociales)*.[114] In each of these, the Supreme Court endorsed the practice of full membership meetings of administrative tribunals to discuss particular matters in which decisions were pending before particular members or panels of the tribunal. The Court saw these practices as potentially contributing to a greater level of consistency in the decision-making of tribunals and agencies and as of particular value in the case of high volume jurisdiction tribunals. More recently, in 2001, in *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*,[115] the Court reaffirmed, even strengthened its recognition of the legitimacy of such practices. It also seems clear that consultations of this kind can take place not simply at the level of whole board or tribunal meetings but also among smaller groups of members, and between presiding members and staff including lawyers.

Nonetheless, the Court has always been conscious of the extent to which such practices can compromise the principles of procedural fairness. In particular, they can constitute a danger to the independence of those actually charged with deciding the particular matter (or, in terms of the old parlance, the principle that the person who hears the case must decide the case). Indeed, it was a failure of this kind in the form of inappropriate intervention by a non-sitting Chair that was part of the downfall of the process before the Court in *Tremblay*. As well, depending on the nature of the discussions that take place, they can constitute a violation of the principles of procedural fairness relating to notice and the participants' right to confront the proofs and arguments relevant to the determination of the particular matter.

To meet these concerns, the Supreme Court placed constraints on the conduct of these various forms of consultation. Therefore, while tribunals should be developing these consistency-encouraging practices, it is important that members and Chairs in their executive capacity particularly should be aware of the various constraints.

In terms of the decision-making independence of individual members and panels of tribunals, the Court has made it clear that, while bringing influence to bear is quite acceptable, compulsion is not. Best practices therefore mean that participation in these forms of consultation should be at the option of the presiding member or members, and the discussions should be informal and not involve compulsory attendance on the part of other members, minute taking, or voting. More generally, the Chair or counsel to the tribunal or agency should not exercise a dominant role. More problematic is the advisability of the discussions taking place against the backdrop of a draft decision. In any event, the process adopted should be calculated to allow the presiding member or members to arrive at their own final determination of the matter following the consultation. Finally, though it is not mentioned by the Supreme Court in any of the trilogy, in the context of enforcement and compliance proceedings, where there is a statutory or even a self-imposed separation of the decision-making arm of the Energy Regulator from the enforcement or prosecutorial functions of that Regulator, the discussions of a particular case should not involve those engaged in enforcement or prosecution.[116]

As for the preservation of the opportunity of the participants to participate effectively in the hearing, the Court has insisted that, if the

[113] *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282.

[114] *Tremblay v. Québec (Commission des affaires sociales)*, [1992] 1 SCR 952.

[115] *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 SCR 221.

[116] In other words, recognize the principles laid down in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 SCR. 919, in the quasi-constitutional setting of the *Quebec Charter of Human Rights and Freedoms*. Even

consultations raise any new arguments of law and policy that will be relevant to the final determination, the member or panel is obliged to put those matters to the parties before relying on them in the final decision. The Court has also made it clear that discussions of this kind should never become a vehicle for the introduction of new facts or evidence. Indeed, in *Consolidated-Bathurst*, the Court went so far as to say that there should be no discussion of the facts. That seems excessive and now has to be read in light of *Ellis-Don*, where the majority appeared to hold that, at the very least, the consultations could involve discussion of what factual configurations could come within the parameters of a legal test or standard developed by the Labour Relations Board.

In short, consultation practices of this kind can be invaluable but there are natural justice or procedural fairness limits to their legitimacy, limits that tribunals and agencies should respect not only to avoid judicial review for procedural unfairness[117] but, more generally, out of consideration for the integrity of the hearing process.

14) Duty to Consult with Aboriginal Peoples [118]

Among the most significant developments in Canadian Administrative Law particularly for Energy Regulators over the past decade has been the evolution of the duty to consult Aboriginal peoples as part of regulatory processes. The Supreme Court has made it clear that this duty to consult applies not only where a regulatory decision may have an impact on a recognized or existing Aboriginal peoples' right, be it under treaty or otherwise, but also even where the right in question is inchoate in the sense of asserted but not yet recognized.[119]

The extent to which this duty to consult might affect Energy Regulators became clear in late 2006, when, in *Dene Tha' First Nation v. Canada (Minister of Environment)*,[120] Phelan J. of the Federal Court held that it applied to the Ministers involved in the creation of the regulatory and environmental review processes related to the proposed Mackenzie Gas Pipeline. Various regulatory bodies (including the National Energy Board) were involved in the setting up of a Joint Review Panel charged with an environmental assessment of the project. It was at the point of the setting up of that Panel that Phelan J. found that the Ministers had failed in their duty to consult. While the case was ultimately settled, the Federal Court of Appeal held that Phelan J. had made no errors in principle in reaching the conclusion that he did and that the judgment was an application of existing Supreme Court of Canada precedent in this field.[121]

While the obligation in this case formally rested with the relevant Ministers who were responsible for the design of the process,

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where constitutional or quasi-constitutional rights and freedoms are not engaged, the common law principles governing bias and lack of independence would almost certainly be marshalled against the participation of those involved in a particular case in an enforcement or prosecutorial capacity, especially in regimes where, in other respects, there is a separation within the Energy Regulator's operations of such functions.

[117] In reality, as *Ellis-Don* makes clear, the Court seems prepared to give tribunals and agencies a broad "presumption of innocence" in cases involving allegations that the *Consolidated-Bathurst* limits have been exceeded. This comes principally in the form of immunity from testimonial compulsion as to what actually took at the relevant consultation.

[118] This section of the paper owes much to discussions over a number of years with Keith Bergner and more recent discussions at the second Energy Regulatory Forum and the 5th Annual Canadian Energy Forum with Chris Sanderson and Patrick Keys among others. However, I should enter the qualification that I am not at all sure that we have reached common ground on the current state of the law!

[119] The leading authorities are *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550; and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388.

[120] *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, 303 FTR 106.

[121] *Canada (Ministry of Environment) v. Imperial Oil Resources Ventures Ltd.*, 2008 FCA 20, 378 NR 251.

the implications for Energy Regulators seemed obvious. Nonetheless, there remained controversy among regulators and the courts as to whether the duty to consult that is impressed on the Crown extended to independent, *quasi*-judicial bodies. For those who argued that independent quasi-judicial regulators were not impressed with the obligation to consult Aboriginal peoples, the governing authority was asserted to be *Quebec (Attorney General) v. Canada (National Energy Board)*,[122] where Iacobucci J., for the Court, rejected an argument to the effect that the Board owed a higher duty of procedural fairness to the affected First Nation than would normally be required by the common law. To the extent that this argument was based on the fiduciary duty owed by the Crown to Aboriginal peoples, the duty was not one that was impressed on independent, *quasi*-judicial agencies. To do so would impinge on their independence.

Nonetheless, given that the duty to consult and accommodate rests on a broader overarching concept of the honour of the Crown (of which the Crown's specific fiduciary obligations are just one component), there was some reason to believe that this aspect of the *National Energy Board* case could no longer be relied upon. What emerged was a body of jurisprudence that at the very least placed the obligation on Energy Regulators to assess whether the duty to consult and accommodate has been met by the Crown in relation to applications before them that have a potential impact on Aboriginal rights, interests, or yet to be established claims.[123]

In 2009, these two aspects of Energy Regulators' responsibility in relation to consulting and accommodating Aboriginal peoples' rights, interests, and claims coalesced in another judgment involving the National Energy Board. In *Brokenhead Ojibway Nation v. Canada (Attorney General)*,[124] Barnes J. of the Federal Court held that the National Energy Board was an appropriate location for assessing the adequacy of proponents' consultation with Aboriginal peoples and itself conducting consultation in the form of its hearings. This was in the context of applications involving the use and taking up of land for the purpose of pipeline projects subject to regulatory approval. In the particular circumstances of the matters before the Board and the Federal Court, this satisfied the honour of the Crown in the sense that there was no further obligation on the Governor in Council, in determining whether to approve the relevant projects, to do more. The critical paragraph in Barnes J.'s judgment states:

> In determining whether and to what extent the Crown has a duty to consult with Aboriginal peoples about projects or transactions that may affect their interests, the Crown may fairly consider the opportunities for Aboriginal consultation that are available within the existing processes for regulatory and environmental review…. Those review processes may be sufficient to address Aboriginal concerns, subject always to the Crown's overriding duty to consider their adequacy in any particular situation. This is not a delegation of the Crown's duty to consult but only one means by which the Crown may be satisfied that Aboriginal concerns have been heard and, where appropriate, accommodated,[125]

Subsequently, however, the Federal Court of Appeal, in the context of the same regulatory proceedings, this time on applications for judicial review of the National Energy Board's own decisions on these applications (as opposed

[122] *Supra* note 51 at 183.

[123] See Carrier Sekani, supra note 105, and *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68, 89 BCLR (4th) 273.

[124] *Brokenhead Ojibway Nation v. Canada (Attorney General)*, 2009 FC 484, 345 FTR 119.

[125] *Ibid. at para 25.*

to the Governor in Council's approval of those decisions) seemingly took a rather different view of the whole issue. This was in *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*[126] There, the affected Aboriginal peoples argued that it was incumbent on the Board to assess whether the Crown itself had consulted and accommodated sufficiently with respect to their outstanding claims. After noting that the Aboriginal peoples were not claiming that it was any part of the Board's obligation to itself engage in consultation, the Court not only agreed with the concession[127] but also rejected the Aboriginal peoples' arguments. Regulators were not implicated in the consultation and accommodation process.[128] Interestingly, Ryer J.A. (delivering the judgment of the Court) did go on to recognize (once again citing the Iacobucci judgment) that section 35 of the *Constitution Act, 1982* created a separate source of obligation to Aboriginal peoples. Recollect its provisions:

> 35. (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "Aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

However, in this instance, the proponent's consulting as directed by the Board and the Board's according of participatory rights to affected aboriginal peoples had satisfied the procedural aspects of that obligation.[129]

All of this led to considerable confusion. Did the duty to consult and, where appropriate, accommodate ever fall on Energy Regulators? What about an obligation to assess whether there has otherwise been adequate consultation and, where appropriate, accommodation? And, to the extent to which there is a separate obligation arising out of section 35, when is it triggered, what are its components, and to what extent does it vary from the duty to consult arising out of the honour of the Crown and any separate or coordinate responsibility to assess whether there has otherwise been adequate consultation?

A number of these matters came to a head in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*.[130] This was an appeal from one of two decisions[131] in which the British Columbia Court of Appeal held that the Commission had failed in the context of regulatory proceedings to assess whether there had been adequate consultation and accommodation by one of the parties to those proceedings, an agent of the Crown.

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[126] *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 FCR 500.

[127] *Ibid*. at para 34, relying on the 1994 National Energy Board judgment.

[128] *Ibid*. at paras 25-33.

[129] *Ibid*. at paras 36, 38 and 40. In light of this, the substantive issue in dispute in *Sweetgrass First Nation v. Canada (National Energy Board)*, 2010 FC 535, 365 FTR 254 is fascinating. The First Nation was attempting to prevent the Board from holding a hearing until the Crown had consulted the First Nation with respect to the aboriginal rights affected by the proceedings, to which the Crown's response was that it was entitled to rely on the processes of the Board to fulfill the consultation obligations. The Federal Court never reached the merits of that issue, concluding that the Federal Court did not have jurisdiction over such issues.

[130] *Supra* note 106.

[131] The other was *Kwikwetlem First Nation v. British Columbia (Utilities Commission), supra* note 123.

In delivering the judgment of the Supreme Court of Canada, McLachlin C.J. held that, while the legislature could impose a duty to consult on a regulatory agency or tribunal,[132] it would have to do so explicitly or by necessary implication, and that, unlike the duty to consider constitutional questions, could not simply arise out of the statutory conferral of an ability to deal with questions of law pertinent to the proceedings before it. As there was no such express or necessarily implicit conferral of power in this case, the Commission did not have any mandate or responsibility to itself engage in consultation with the affected Aboriginal peoples.[133] However, she then held that the Commission did have authority to consider whether or not the proceedings engaged the rights, interests, or undetermined claims of Aboriginal peoples, and, if so, whether the Crown had engaged in adequate consultation, and, where appropriate, accommodation. This arose out of the Commission's power to decide questions of law in the exercise of its authority, and also the requirement that the Commission take into account "any other factor that the Commission considers relevant in the public interest."[134] Whether either of these in isolation would have been sufficient to trigger this power (indeed, obligation) is uncertain.

It is also important to read this judgment in conjunction with the Court's subsequent decision in *Beckman v. Little Salmon/Carmacks First Nation*.[135] Among the issues raised in that case was the adequacy of consultation efforts engaged in by decision-makers acting under a departmental umbrella. Implicit in this evaluation is an acceptance that these bodies and officials constituted the Crown for these purposes and that they had not only the power (and responsibility) to engage in consultation (as well as the assessment of the consultation efforts of others) but also the ability to meet at least in part the Crown's overall duty to consult and accommodate. In other words, the holding in Carrier Sekani requiring an explicit or necessarily implicit conferral of power to engage in consultation is probably restricted to independent agencies and tribunals.

This, of course, does not resolve all questions respecting consultations and Energy Regulators. In fact, the Supreme Court seemed to pass up for the moment at least the opportunity to fill the remaining gaps when, shortly after Beckman was released, it denied leave to appeal in the *Standing Buffalo Dakota First Nation* case, a matter that had obviously been held in abeyance pending the disposition of the two other appeals.[136] However, it is possible to construct a plausible and reasonably comprehensive version of the relationship between regulatory tribunals and agencies and Aboriginal consultation rights on the basis of the two recent Supreme Court decisions, and the surviving parts of both *Brokenhead Ojibway Nation and Standing Buffalo Dakota First Nation*:

i. As opposed to public servants and bodies operating under the umbrella of a government department or agency, regulatory tribunals and agencies do not have the authority to engage in the consultation of Aboriginal peoples except where that power is conferred expressly or arises by necessary implication out of primary legislation. At present, there do not appear to be any such examples among Energy Regulators.

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[132] Implicitly, this seems to undercut the Iacobucci position in *Quebec (Attorney General) v. Canada (National Energy Board), supra* note 51, that any such power is incompatible with the independence of *quasi*-judicial regulatory agencies and tribunals.

[133] *Supra*, note 105 at paras 56, 60, and 74 particularly.

[134] *Id*. at paras 68-70 particularly.

[135] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103.

[136] *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, [2009] SCCA No. 499 (QL).

ii. In contrast, it appears as though they will have the power, indeed the duty to inquire in relation to matters before them whether the Crown has a duty to consult, and, if so, whether that duty to consult has been fulfilled.[137]

iii. However, it may well be that this power and duty is subject to explicit legislative exclusion as provided for in section 21 of the Alberta *Responsible Energy Development Act*, respecting the authority of the newly-minted Alberta Energy Regulator.[138]

iv. Despite 1, in the fulfillment of the Crown's duty to consult, the Crown can rely on the extent to which the procedures adopted by Energy Regulators (including the consultation requirements imposed on proponents) have sufficiently engaged Aboriginal peoples as to constitute at least a component of the meeting of that responsibility.

v. Irrespective of the Crown's duty to consult and, where appropriate, accommodate, the common law principles of procedural fairness and, more importantly, the rights recognized in section 35 of the *Constitution Act, 1982* impose on Energy Regulators special procedural responsibilities in relation to Aboriginal peoples when proceedings before those regulators affect the rights, interests, and as yet undetermined claims of Aboriginal peoples.[139] These responsibilities may in part be fulfilled by assigning responsibility for consultation to proponents.

More recently, in *Behn v. Moulton Contracting Ltd.*,[140] the Supreme Court affirmed another principle that is critical in not only the conduct of consultation by those regulatory agencies with authority to consult but also regulatory agency assessment of consultations by the Crown:

> The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature … But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights … .

Without such an authorization, regulators only have to concern themselves with identifying the affected Aboriginal people or peoples for the purposes of giving notice and engaging in consultation, and for assessing the consultative

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[137] However, in two decisions, the ECRB determined that it did not have this authority, referencing the terms of its empowering statute and distinguishing *Carrier Sekani*, *supra* note 105, on the basis that it involved a Crown agency as proponent, and not the evaluation of whether the Crown had fulfilled its duty to consult in the context of an application by a private sector proponent: ECRB, Reasons for July 17, 2012 Decision on Notice of Question of Constitutional Law, *Osum Oil Sands Corp., Taiga Project,* August 24, 2012 (application for leave to appeal denied on the basis that the issue was not ripe for determination: *Cold Lake First Nations v. Alberta (Energy Resources Conservation Board)*, 2012 ABCA 304), Joint Review Panel decision, Jackpine Mine Expansion Project, October 26, 2012 (application for leave to appeal denied on basis that it would serve no useful purpose: *Métis Nation of Alberta Region 1 v. Joint Review Panel*, 2012 ABCA 352, 539 AR 146). Moreover, as seen already, *supra* note 99, section 21 of the *Responsible Energy Development Act, 2012* specifically withdraws this capacity from the ECRB's successor, the Alberta Energy Regulator. As for the two ECRB decisions, Nigel Bankes has criticized them as misconceiving badly the Supreme Court's position in *Carrier Sekani*: see "Who decides if the Crown has met its duty to consult and accommodate?", ABlawg.ca, September 6, 2012.

[138] See also *Métis Nation of Alberta Region 1 v. Joint Review Panel, ibid.*, application for leave to appeal dismissed: [2013] SCCA No. 33 (April 11, 2013), upholding an agreement between the federal Crown and the Alberta Energy Resources Conservation Board to the effect that the Joint Review Panel would have no jurisdiction over the sufficiency of the Crown's consultations with Aboriginal peoples.

[139] Note, however, *Prince v. Alberta (Energy Resources Conservation Board)*, *supra* note 10, refusing leave to appeal a Board decision that a matter did not have a direct and adverse effect on aboriginal interests.

[140] *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, at para 30

efforts of others. While that process of identification may itself be a complicated exercise where there are overlapping or contested (as between or among Aboriginal peoples) rights and claims, it at least narrows the field of those who can call the regulator to account.

Given all of this and, in particular, the obligations to assess the consultation efforts of others and the likely separate section 35 responsibilities of Energy Regulator, the most obvious way to avoid pitfalls in this area is for Energy Regulators to take proactive steps and put in place detailed policies on *consultation* with Aboriginal peoples.[141] It is also important not only to engage Aboriginal peoples in the development of those policies but also to recognize that the duty of consultation may not necessarily be met by simply ensuring that affected Aboriginal peoples have an equal opportunity to participate at any hearings in precisely the same way as all other parties and intervenors. The case law[142] recognizes that the honour of the Crown may very well involve individualized and specially tailored forms of consultation with affected Aboriginal peoples.

Absent the development of policies on consultation, it may fall on particular panels of Energy Regulators to be both alert to the possibility of the potential regulatory impact of proposals on Aboriginal peoples and attuned to the ways in which its own duties can be fulfilled. The potential for front-end failures to generate protracted judicial review proceedings and frustrate regulatory initiatives is enormous.[143]

15) Reasons

Canadian common law did not recognize the existence of a duty on the part of administrative tribunals and agencies to provide reasons for their decisions until comparatively recently. This came in 1999 in *Baker v. Canada (Minister of Citizenship and Immigration)*,[144] and, even then, the Court did not conceive of it as a universal requirement of administrative decision-making. However, before that, there were statutory obligations to provide reasons contained in the general administrative procedure statutes of at least two provinces: Alberta[145] and Ontario.[146] In each, those general procedural statutes applied to Energy Regulators. There is therefore a reasonably long history of Energy Regulators coping with the demands of a statutory obligation to give reasons. Indeed, as far as I am aware, with possibly one exception discussed in the next section, Energy Regulators have managed to avoid judicial review based on a failure to meet that obligation, whether imposed by the common law or by statute.[147]

However, that is no reason for complacency. At the end of the day, what matters most is not whether there is a document constituting the reasons of the agency or tribunal. Rather, it is the quality of the reasons that is critical. A lack of quality can give rise to a challenge

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[141] See the judgment of McLachlin C.J. in *Haida Nation, supra* note 119.

[142] And, in particular, *Mikisew Cree First Nation, supra* note 119.

[143] For recent examples of the complicated disputes that can arise as to whether there has been adequate consultation, see *Nlaka'pamux Nation Tribal Council v. British Columbia (Project Assessment Director, Environmental Assessment Office)*, 2009 BCSC 1275, and *West Moberly First Nations v. British Columbia (Ministry of Energy, Mines and Petroleum Resources)*, 2010 BCSC 359, 6 BCLR (5th) 94, aff'd 2011 BCCA 247, 18 BCLR (5th) 234.

[144] *Supra* note 70.

[145] *Administrative Procedures and Jurisdiction Act*, RSA 2000, cA-3, s 7(1) and mandatory for tribunals subject to that Act when making a decision affects "the right of a party".

[146] *Statutory Powers Procedure Act*, RSO 1990, c S-22, s 17(1), and required when requested by a party of a decision-maker subject to that Act.

[147] For examples of unsuccessful challenges, see *Judd v. Alberta (Energy Resources Conservation Board), supra* note 52, and *Regional Electricity Transmission for Albertans Assn. v. Alberta (Infrastructure and Transportation)*, 2013 ABQB 162.

to the substantive outcome of a hearing. The Supreme Court of Canada has made this clear recently in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*.[148] There, Abella J., delivering the judgment of the Court, settled a matter that had previously been unsettled: whether inadequate, as opposed to no reasons gave rise to a free-standing basis for judicial review founded on procedural unfairness. She held that it did not. Nonetheless, a decision not supported by adequate reasons in the sense of reasons that met the standards of "justification, transparency and intelligibility" specified in *Dunsmuir v. New Brunswick*[149] could expose the decision to review on the basis that the decision was unreasonable.

However, the courts have been conscious of the realities facing administrative agencies and tribunals. Thus, in *Judd v. Alberta (Energy Resources Conservation Board)*,[150] Conrad J.A. conceded:

> The requirement of reasons does not call for a tribunal to discuss every single piece of evidence that was before it and the basis for accepting or rejecting that evidence: *Johnston v. Alberta (Energy & Utilities Board)* (1997), 200 A.R. 321 at para 10. Taken as a whole, the reasons indicate what evidence the ECRB accepted in arriving at its decision.

Abella J. expressed similar sentiments in *Newfoundland and Labrador Nurses' Union*,[151] and also endorsing[152] an earlier statement by Evans J.A. of the Federal Court of Appeal that "perfection is not the standard."[153] Even more importantly, she also accepted that, on judicial review, the reasons should not be read in isolation from the evidence, the parties' submissions, and the process, all of which might provide justifications for a conclusion that appeared possibly unreasonable simply on the face of the reasons.[154] Indeed, this material as well as the reviewing courts' own evaluation of the outcome in light of the relevant statutory provisions and purposes might serve as a surrogate for fuller and more adequate reasons in sustaining the reasonableness of a decision under attack.[155]

Nonetheless, agencies and tribunals should not be overly sanguine on the basis of the Court's apparent willingness to fill in the gaps and discern justifications that are not readily, if at all apparent on a perusal of the reasons provided. Good public administration, including fairness to the parties in the sense of letting them know why the outcome was reached, provides an independent imperative for taking seriously the obligation to provide adequate reasons. Stratas J.A., of the Federal Court of Appeal, expressed it well in *Vancouver International Airport Authority v. Public Service Alliance of Canada* when he stated that the reasons

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[148] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708.

[149] *Supra* note 110 at para 47.

[150] *Supra* note 52 at para 23.

[151] *Supra* note 148 at para 16.

[152] *Ibid*. at para 18.

[153] In *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 FCR 221, at para 163.

[154] *Supra* note 128 at para 18, quoting the respondents' factum. See also the judgment of Rothstein J. in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654, at paras 52-56, as to review in situations where reasons are not required and none were given.

[155] In an Energy Regulation context, see *Responsible Electricity Transmission for Albertans Assn. v. Alberta (Infrastructure and Transportation), supra* note 146, absolving the Minister from the obligation to give reasons in permitting the commencement of a project, but going on to hold (at paras 32-42) that, even if reasons were required, they could be inferred from the record of the proceedings that was in evidence before the Court.

> …must provide an assurance to the parties that their submissions have been considered, enable the reviewing court to conduct a meaningful review, and be transparent so that regulatees can receive guidance.[156]

Moreover, even with the Abella qualifications on the need for comprehensible and comprehensive reasons, a reviewing and appellate court doing its own reconstruction exercise might actually not discern a reasonable basis for the decision where adequate reasons would have made that clear. Alternatively, where the discerning of whether the decision is reasonable is not possible even within the broader "evidential" context that Abella J. suggests, the end result will be a remission to the agency or tribunal to provide fuller and better reasons. Neither of these outcomes is in the interests of administrative justice and regulatory efficiency.

As a consequence, the following test developed by Iacobucci J. on behalf of a unanimous Supreme Court of Canada in *Law Society of New Brunswick v. Ryan*[157] for whether a decision passes muster under the unreasonableness standard of review continues to serve as general guidance to tribunals in evaluating whether their reasons suffice:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.[158]

This focus on the existence of a line of analysis in the context of the evidence on the record conveys an obvious message to administrative agencies and tribunals: Make sure your reasons flow logically and find a reference point in the material adduced at the hearing.

More specifically, the litmus test for a tribunal or agency concerned with the production of reasons that not only are technically bullet-proof but also respond to the policy imperatives behind the obligation to give adequate reasons is whether (1) the reasons are comprehensible, (2) address in sufficient detail all of the major issues raised in the course of a hearing, and (3) provide a basis on which (a) the parties can determine whether to exercise any right of appeal or apply for judicial review, and (b) the reviewing court can assess the correctness or reasonableness of the conclusions reached.

16) Departures from Precedents and General Regulatory Principles

In the context of the discussion of internal consultations,[159] I have already identified that Canadian judicial review law does not recognize inconsistency as a free-standing ground of judicial review. However, there is some evidence of a tendency on the part of the courts to regard the obligation to provide reasons as more onerous in situations where an agency is departing from its own precedents or general regulatory principles sometimes developed in tandem by a regulator and the courts on either judicial review or statutory appeal.

One of the clearest examples of this is to be found in the dissenting judgment of Rothstein and Moldaver JJ. in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*[160] There, they stated:

> Thus, while arbitrators are free to depart from relevant arbitral consensus and

[156] *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158, [2011] 4 FCR 425, at para 14.

[157] *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 SCR 247.

[158] *Ibid*. at para 61.

[159] *Supra* notes 108-12 and accompanying text.

[160] *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*, 2013 SCC 34

> march to a different tune, it is incumbent on them to explain their basis for doing so. As this Court has stressed, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process" (*Dunsmuir*, [*supra*, note 109, at] para. 47). Because judges are not mind readers, without some explanation, whether implicit or explicit, for a board's departure from the arbitral consensus, it is difficult to see how a "reviewing [could] understand why the [board] made its decision" *(Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* [*supra*, note 147] at para. 16). Reasonableness review includes the ability of courts to question for consistency, where, in cases like this one, there is no apparent basis for implying a rationale for inconsistency.[161]

While this is a dissenting judgment, it is important to note that the majority and the minority in the Supreme Court disagreed as to whether the arbitral jurisprudence was consistent with the decision of the arbitration panel in this case, with the majority in part basing its holding that the decision under review was reasonable on its view that the arbitrator applied "a remarkably consistent arbitral jurisprudence."[162]

In an energy regulatory context, this sense of a heightened obligation with respect to reasons in cases of divergence from precedent or general regulatory theory emerges most clearly in *Power Workers' Union (Canadian Union of Public Employees, Local 1000) v. Ontario (Energy Board),*[163] a judgment delivered on June 4, 2013, just ten days before that of the Supreme Court in Irving Pulp & Paper Ltd. This case involved an appeal from a decision of the Ontario Energy Board on a general rate application by Ontario Power Generation in which the Board had reduced significantly Ontario Power Generation's projection of its revenue requirements to cover its nuclear compensation or wages costs. In so doing, the Board treated the compensation items as forecast costs subject to review, under the OEB's precedents and general regulatory theory, by reference to a range of considerations, and not as committed costs, presumptively, once again under the Board's precedents and general regulatory theory, not reducible without a prudence review. Notwithstanding the fact that the compensation costs in question had already been set in place by way of collective agreement, the Board refused to treat them as committed costs, possibly on the basis of a position that, for these purposes, committed costs were confined to capital costs, as opposed to operating costs. On appeal to the Divisional Court, this conclusion (and the reduction in revenue requirements) was sustained by a majority of the Court on the basis that it was reasonable.[164] In reversing that decision and setting aside the Board's holding on this issue as unreasonable, the Court of Appeal stated:

> We say this for two reasons. First, the Board's approach to these committed costs is contrary to the approach required by its own jurisprudence and accepted [[165]] by this court. Second, it is unreasonable to require the OPG to manage costs that, by law, it

(McLachlin C.J. concurring).

[161] *Ibid*. at para 79.

[162] *Ibid*. at para 16 (per Abella J., (LeBel, Fish, Cromwell, Karakatsanis, and Wagner JJ. concurring).

[163] *Power Workers' Union (Canadian Union of Public Employees, Local 1000) v. Ontario (Energy Board),* 2013 ONCA 359.

[164] *Ontario Power Generation Inc. v. Ontario (Energy Board),* 2012 ONSC 729, 109 OR (3e) 576 (Div Ct) (per Hoy J. (as she then was) (Swinton J, concurring and Aitken J dissenting)).

[165] *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)* (2006), 210 OAC 4 (CA), leave to appeal to the SCC

cannot manage.[166]

While I would not necessarily go so far as to suggest that this is judicial review for inconsistency through the back door, what it clearly endorses is the sense that regulators have an obligation to grapple explicitly with their precedents and those of the courts before setting out in a new direction. If they fail to do so, reviewing and appellate courts are not going to be all that willing to listen to after-the-decision arguments in support of the departure from previous jurisprudence.

17) Avoiding Grand Statements of Principle

Ever since *Dunsmuir v. New Brunswick*,[167] the Supreme Court of Canada has, at the level of theory, been moving more and more in the direction of the predominance of the deferential reasonableness standard of review as the presumptive or default standard. Correctness review is becoming more and more exceptional. In a paper delivered at the Fifth Annual Energy Law Forum at La Malbaie on May 17, 2012, "Recent Developments in Administrative Law Relevant to Energy Law and Regulation", I detailed this evolution by reference to nine Supreme Court of Canada judgments starting in October 2011. The summary of my conclusions was as follows:

> *Dunsmuir* identified four situations where correctness review would be the norm. In all four instances, subsequent Supreme Court of Canada cases have made it clear that reviewing courts should be alert not to interpret their scope expansively[168]. This has contributed to a significant expansion of the situations in which deferential unreasonableness review is the requisite standard. Other refinements of *Dunsmuir* have contributed: the downplaying of expertise as a factor in the standard of review analysis, a willingness to revisit past jurisprudence on the standard of review where there are concerns about whether those precedents determined the standard of review satisfactorily, and acceptance that review should not necessarily become more expansive when a statutory or prerogative decision-maker does not give reasons for its decision especially in situations where there is no common law or statutory obligation to provide reasons. Indeed, even where such an obligation exists, the Court is prepared to look beyond the reasons for justifications for the outcome of the exercise of a statutory or prerogative power. Inadequacy of reasons is not a free-standing ground of judicial review. Most significantly, however, the Supreme Court has sent a very clear message to the lower courts, starting with *Smith v. Alliance Pipeline Ltd.*,[169] and reaffirmed with emphasis by Rothstein J. in *Alberta (Information and Privacy Commissioner)*:
>
> > [T] he interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.[170]

Moreover, in what follows, Rothstein J.

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refused, [2006] SCCA 208 (QL), and sustaining the notion that committed costs included operating costs.

[166] *Supra* note 164 at para 37.

[167] *Supra* note 129.

[168] One of those instances was correctness review in the instance of jurisdictional error. In this regard, it is interesting that Energy Regulation law provides two of the most prominent and very few examples after *Dunsmuir* in which a Court of Appeal has classified an issue before a Tribunal as jurisdictional in nature and therefore subject to correctness review. See *Shaw v. Alberta (Utilities Commission)*, *supra* note 84, and *Newfoundland and Labrador Hydro v. Newfoundland and Labrador (Board of Commissioners of Public Utilities)*, 2012 NLCA 38, 323 Nfld. & PEIR 127.

[169] *Supra* note 112.

[170] *Supra* note 154 at para 34.

makes it clear that this is a presumption that is not easily rebutted.

However, I then went on to argue that, at the level of the actual assessment of whether a decision is unreasonable, the Supreme Court of Canada has on a number of occasions engaged in what one of my correspondents describes as "disguised correctness review." Indeed, a now retired member of the Supreme Court of Canada said as much in one of his final judgments, his concurrence in the result in *Alberta (Information and Privacy Commissioner*.[171] Binnie J.'s primary exhibit was the judgment of LeBel and Cromwell JJ. in *Canada (Canadian Human Rights Tribunal) v. Canada (Attorney General)*.[172]

I make this point here to draw attention to the fact that the promise of deference is not always as comforting to tribunals andagencies as it might be. Particularly on questions of law but even sometimes on questions of fact,[173] courts, while purporting to apply a deferential standard, will reach deeply into the merits of the decision under review.

What lessons are there in this for administrative tribunals and agencies?

First, recognize that, if you trespass into the domain of the Constitution, the common law, the *Civil Code*, and statutes with which you are not regularly in contact, the likelihood of correctness, or disguised correctness review inevitably increases.

Secondly, while there may be occasions where such incursions are unavoidable, always consider whether it is possible without violating your responsibilities to confine your decision to your home statute and, where feasible, with reference principally to the facts on which the decision is based.[174] Carried to extremes, of course, constantly delivering decisions that are based entirely or largely on facts will get in the way of the development of a coherent body of tribunal precedent. Nonetheless, the reality is that it is the particular facts that carry most cases, so avoid the temptations to make grand pronouncements on general law and indeed regulatory law and policy where factually-based findings will do.

Thirdly, and this is related to the whole issue of how to craft reasons, I believe it is important to take time to explain where there might be room for inappropriate classification of the nature of the question you are confronting; to make it clear that what could appear to be a question of common, civil or general law is in reality a highly context-sensitive issue with the relevant statutory terms taking their meaning from that context and not from common, civil, or general law.[175] ■

[171] *Ibid.* at para 85.

[172] *Canada (Canadian Human Rights Tribunal) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471.

[173] See, for example, the judgment of Abella J. in *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 345, and the reaction that produced from Rothstein J. at paras 57-60.

[174] For an excellent post-*Dunsmuir* example of the difficulty of securing judicial review on a reasonableness standard of a decision that focuses on the relevant facts, see *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, 237 OAC 71.

[175] The decision of the United States Supreme Court in *National Labor Relations Board v. Hearst Publications Inc.*, 322 US 111 (1944) remains a wonderful example of this kind of approach.

EXPERT EVIDENCE FOR ENERGY LAWYERS AND REGULATORS

*Philip Tunley**

Introduction

Recent court decisions dealing with the admissibility and assessment of expert evidence are already confronting energy regulators with new challenges, as shown by the decision of the Alberta Utilities Commission in Canada's first electricity market manipulation case.[1]

Much of the work done by and in front of energy tribunals involves experts. Expert evidence can affect the assessment of a wide variety of issues involved in energy regulation, including accounting and financial matters, monopoly and market economics, environmental impacts of energy products and infrastructure, and a myriad of technological and scientific issues affecting the energy industry. Such evidence can be critical both in the adjudication of disputes between stakeholders, and in the forward-looking development of energy policy. At its best, it has the potential to be compelling, or even decisive, on many issues. There may also be a measure of expertise involved in the presentation of many of the adjudicative facts that arise in energy proceedings, including implicit or explicit "opinions" of technical witnesses, whether or not they are formally identified as "experts". The preparation, presentation and assessment of expert evidence are therefore critical topics for both practitioners and tribunal members.

This review of recent cases provides both an essential primer on the law, and some insights into the underlying principles and purposes of this kind of evidence that are relevant to energy lawyers and regulators.

As a starting point, it is useful to examine the law relating to expert evidence, as developed largely in the context of dispute resolution by our courts. Recent court decisions continue to reflect a fundamental tension between, on one hand, the value and importance of expert opinion evidence in an increasingly complex world, and on the other, caution respecting the dangers of misuse and over-reliance on this kind of evidence. In part, this tension reflects an institutional feature of our courts, which are deliberately non-specialist in character. However, it also reflects broader concerns, for example, about the use of experts as professional "hired guns", the potential role of counsel in shaping this kind of evidence to support an adversarial position rather than an accurate or optimal result, and the danger of adjudicators abdicating their role to the experts on highly specialized issues. These concerns can all apply with equal force to regulatory tribunals and proceedings. This review therefore suggests how counsel and tribunal members can both benefit from the application the legal rules and practices developed in our court system, and at the same time avoid the pitfalls identified in court decisions.

The paper also considers how expert evidence can assist the policy-making role of "expert" tribunals, such as energy regulators. It considers some special concerns that can arise when members of such tribunals apply their own expertise to shape the evidence in proceedings over which they preside. The purposes of the rules of evidence align closely with the goals of fairness to parties, and of optimal decision-making in the public interest that underlie administrative proceedings. These goals are

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[1] *Re Market Surveillance Administrator Allegations Against TransAlta Corporation et al*, Decision 3110-D01-2015, AUC (July 27 2015) [*TransAlta*].

best served when the principles and dangers underlying the law of expert evidence are understood and applied. They should inform counsel's decisions about what expert evidence to call, as well as the procedures to be followed when calling such evidence at a hearing, and the assessment of the evidence by decision-makers. In all these respects, the recent case law has useful and important lessons for energy lawyers and regulators.

The Limited Admissibility of Opinion Evidence: Fact *versus* Opinion

The general rule of our law is that witnesses may not give opinion evidence, but are limited to testimony about facts within their personal knowledge.[2]

Although the line between fact and opinion is not always clear, in general "opinions" represent an inference or conclusion drawn by the witness from underlying facts. This distinction highlights two specific reasons for the general rule against allowing opinion evidence:

- first, it is usually the role of the court, not the witnesses, to draw inferences or conclusions from the facts; and
- second, there is a concern to avoid collateral inquiries into the myriad factors affecting the basis for the witness's opinion, and its validity.

The first rationale is based on the integrity of the courts' decision-making process, and is particularly important where the inference or conclusion to be drawn involves a legal component: e.g. whether or not someone was negligent. The second highlights the unreliability of this kind of evidence, generally. In most circumstances, it is neither relevant nor helpful to the court, and may even be distracting, to hear the witnesses' opinions about the matters in issue.

The general rule against opinion evidence is, however, subject to recognized exceptions. One involves lay witnesses who do not use special knowledge, and applies in circumstances where the distinction between fact and opinion is virtually impossible to maintain: for example, testimony as to whether someone is drunk, or how fast a vehicle is travelling. The other important exception involves expert opinion evidence. In this context, an "expert" is someone with special knowledge or expertise, who can provide the trier of fact with a "ready-made inference" based on facts they observe or are asked to assume, which the court itself would be unable to draw unassisted.[3]

These background principles highlight why expert evidence, although common, is exceptional in nature, and should properly be subject to special requirements, and assessed with caution.

Some of the most important considerations in the presentation and assessment of expert opinion evidence, which recur throughout the discussion below, can be summarized as follows:

- Relevance: are the opinions offered relevant to an issue raised before the tribunal?
- Qualifications: does the witness have special knowledge, based on qualifications or experience, to provide a proper basis for the opinions offered?
- Necessity: are the opinions necessary to the tribunal's decision-making process, or do they usurp the proper role or functions of the tribunal?
- Foundation: does the testimony differentiate appropriately between opinions and the underlying facts on which they are based, and are the necessary facts established to support the opinions offered?

Conditions for the Admission of Expert Opinion Evidence

The first three of these considerations were identified by the Supreme Court of Canada in *R v Mohan*[4] as pre-conditions that must now be met before expert evidence is admitted in the courts. In total five such conditions have

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[2] For a good discussion of this rule, and the principles underlying it, see Alan W Bryant, Sidney Lederman & Michelle K Fuerest, *Sopinka, Lederman and Bryant: The Law of Evidence in Canada*, 4th ed [*Sopinka*] (Markham: LexisNexis, 2014) at ch 12, Introduction. There are several other excellent evidence texts, which often provide slightly different insights and analysis. It is worth consulting more than one whenever an important issue arises.

[3] *Ibid* at 769

[4] *R v Mohan*, [1994] 2 SCR 9, 114 DLR (4th) 419 [*Mohan*] at pp 20-25.

now been suggested. They are reviewed in turn below, together with the procedures used by many courts to ensure that the admissibility requirements are met at the outset of a trial.

(a) Relevance and the Requirement for an Expert Report

The requirement of relevance is basic and necessary for any evidence to be admitted, but its application in cases of expert evidence has several dimensions. First the opinion that is offered must arise from or relate to the facts that are relevant to the dispute: an opinion of facts other than those before the court is not relevant, and is of no assistance to the court. However, this does not mean that the expert is limited to facts disclosed or put in issue by the parties: it is quite common for further investigations or tests to be undertaken by or at the request of an expert witness, and for additional facts to be put forward. These are also subject to the relevancy requirement. Finally, the opinion itself must be one that is relevant to an issue which the court has to decide: for example, the value of property in issue, or the negligence of a party.

Even this relatively simple analysis illustrates how expert evidence tends to complicate a dispute, by adding to the facts that need to be decided, as well as the evidence to be considered on certain issues. To address this, most courts and tribunals have rules of practice requiring the preparation of an expert report setting out (among other things) the facts that the expert has considered, and the opinions she or he is offering to the trier of fact. Typically, these rules require parties to exchange reports a certain time in advance of the hearing, and limit the testimony of the experts at the hearing to the matters set out.[5] One of the functions of such requirements is to allow parties to raise any objections regarding relevance of the proposed testimony before it is called.

The criterion of relevance also has a legal component, which engages counsel for the parties directly. A vital part of counsel's role is to advise on the issues that require expert evidence and the selection of appropriate experts to address them, and to instruct the experts appropriately. It is common practice for counsel, in discussion with the expert, to prepare a retainer letter that sets out any facts provided or to be assumed, and the specific issues on which an opinion is sought. Again, a key purpose is to ensure that the expert report will meet the relevance criterion by responding to issues defined by counsel involved in the proceeding.

(b) Qualifications and "Tendering" the Expert

Court rules and practices also typically address the requirement for a qualified expert.

Selection of an appropriate expert must be based on their qualifications to provide the opinions requested, but counsel also consider their other qualities as a witness. Discussion of the draft retainer letter with the selected expert ensures that the issues defined by counsel are fully within her or his qualifications. In some cases, this may identify a need to sub-divide the issues between differently qualified experts, and to request two or more separate reports that together meet the needs of the particular case.

The rules of practice requiring expert reports typically require that these also include confirmation of the witness's qualifications to provide the opinion requested. Qualifications may consist of formal training, certifications, research, publications or other experience. Reports typically attach a current CV, and may include other material addressing the witness's qualification to address the specific issues raised in a given case.

In addition, most courts have adopted a screening process, referred to as "tendering" the expert, which counsel is required to go through at the beginning of their expert witness's testimony. This process typically involves leading the expert through their relevant qualifications, and then asking the court to recognize the witness as an expert in a defined area covering the issues in their report. Opposing counsel is then given an opportunity to cross examine the expert on their qualifications in the defined area, followed by any re-examination. The court may then require argument, if there is still any challenge to the witness giving evidence. Ultimately, the court rules both on whether the witness is qualified to give expert opinion evidence, and if so in what area or areas.

In many cases, this process may be abridged in whole or in part by opposing counsel

[5] See for example, rule 53.03(1) of the Ontario *Rules of Civil Procedure*, RRO. 1990, Reg 194 as am; rule 52,2(1) of the *Federal Court Rules*, SOR/98-106 as am. is to the same effect but requires an Affidavit; and see s. 657.3(1) of the *Criminal Code*, RSC 1985, c C-46 as am.

conceding the issue of qualification. Such counsel may nevertheless elect to cross-examine on qualifications at the outset, either as a matter going to weight rather than admissibility, or simply to restrict the scope of the witness's expertise. In some cases, the relative scope of the witnesses' expertise and the areas in which they are recognized by the court to be qualified to give expert opinions may be the real battleground, as counsel seek to exploit any areas where their own expert is qualified while the opposing expert is not.

Some tribunals abridge or dispense with this tendering process altogether, as a matter of routine. If it will serve no real purpose in terms of the quality of the expert testimony, this may be appropriate. If so, experienced counsel usually agree to dispense with the process. This is common, for example, where the witness has testified previously and has been recognized as having the relevant expertise by the decision-maker. In other cases, however, it can serve an important "gate-keeping" function, as well as ensuring fairness to all parties. There may therefore be a strong case for following it through, particularly where the expert evidence is contested, and the outcome of the case is likely to depend on how that evidence is assessed.

(c) Necessity and Opinions on the "Very Issue" before the Court

It is trite to say that an expert must not usurp the function of the trier of fact, by giving evidence on "the very issue" that the trier is to decide. However, in practice this can be a very difficult line to draw. Two common examples serve to illustrate the problem:

- An accountant asked to give evidence about certain property whose value is in issue may testify about the accuracy of financial data about the property (expert findings), calculations she or he performed on that data and their results (expert conclusions), the fairness of the presentation of information in financial statements related to the property (expert opinion) – and they may offer an opinion as to the value of the property, which may in some cases be the ultimate issue the court is to decide.
- A medical doctor may be asked to give evidence about symptoms observed in a patient or the results of tests performed (findings), the factors likely contributing to the patient's condition (conclusions), their diagnosis (opinion) – and they may offer an opinion as to the current standard of care recognized in their profession for treatment of the condition, or the causation of the condition, which again approach the ultimate issue to be decided.

The requirement of "necessity" in court decisions about the admissibility of expert evidence is one of the ways this line is drawn on a case-by-case basis: the question asked is whether the trier of fact (judge or jury) could or could not draw the inference required without expert assistance? If the answer is "no", because special knowledge or judgment is required to draw the inference reliably, then expert evidence is admissible to assist. In that case, the integrity of the decision-making process can still be protected in a number of ways, for example:

- the court normally has at least two competing opinions to select from,
- the court is still required to test the opinions given, based on foundation in the facts, in expert literature or research, in common sense or logic, and even based upon the credibility of the witnesses;
- in many areas, experts deliberately express opinions in a form that respects the ultimate decision-making authority of the court; for example, a valuation opinion is often in terms of a range of "reasonable" values rather than a single result.

These and other factors – including the fact that accountants regularly advise buyers or sellers, and physicians regularly treat ill patients in the real world – also help ensure the reliability of the ultimate decision made by the court based on this kind of evidence.

Another dimension of the analysis of whether this line is crossed arises where the inference to which the testimony relates has a legal component: for example, a finding of negligence. Expert evidence about what standards of care are currently practiced in a given profession may be proper. Evidence that shows those prevailing standards do not require certain treatments, or do not mitigate certain risks, may also be proper. However, going on to provide opinions on what the standard ought to be, in a prescriptive sense, usually crosses the line and trenches upon the functions of the court.

At the other end of the spectrum, opinion evidence is not necessary if the court is able to draw the inference itself, without assistance, in

which case the evidence should not be allowed.

(d) Other Exclusionary Rules Continue to Apply

In *Mohan*, the Court added a fourth condition: that the proposed testimony must not fall afoul of any other exclusionary rule of evidence, separate and apart from the opinion rule.[6] In other words, even if evidence is given by an appropriately qualified expert, is relevant, and meets the necessity criterion, it is not admissible if other exclusionary rules apply.

It is not the purpose of this paper to explore these issues in detail, since available evidence texts generally provide a thorough review. However, both counsel and the tribunal should ensure that other applicable exclusionary rules are not overlooked when expert evidence is developed and presented, including in particular the special problems that can arise with the hearsay rule.[7]

(e) Impartiality, Independence and Bias

Very recently, in *White Burgess Langille Inman v Abbott and Haliburton Company Limited*,[8] the Supreme Court suggested a fifth condition to the admissibility of expert evidence, in stating that:

> "… at a certain point, expert evidence should be ruled inadmissible due to the expert's lack of impartiality and/or independence."

This statement builds on a long line of authorities articulating the "expert's duty" to provide independent, impartial, and unbiased evidence to the courts, which first developed at common law. Based on a review of the case law, the often-cited U.K. case of *National Justice Compania Naviera v Prudential*[9] set out a number of principles that comprise the elements of this expert's duty. These may be summarized as follows:

- the evidence should be the independent product of the expert, uninfluenced by the exigencies of the litigation;
- that evidence should be objective, unbiased, and within the witness' expertise;
- the expert should state the facts or assumptions on which the evidence is based, and not omit to consider relevant facts;
- all qualifications on the opinion should be stated expressly;
- all documents relied on must be produced to the parties; and
- the expert should never assume the role of an advocate.

The duty of the expert to remain impartial and independent has also been codified in the rules of several courts. Recently, in Ontario, the articulation of this duty has been significantly strengthened following a recent civil justice review[10] and subsequent public inquiry[11] which identified renewed concerns about the potential for misuse and overreliance on expert opinion evidence. Rule 4.1.01(1) now provides that it is the duty of every expert engaged by or on behalf of a party to provide opinion evidence that is (a) "fair, objective and non-partisan", and (b) "related only to matters that are within the expert's area of expertise". In addition, the expert has a duty to "provide such additional assistance as the court may reasonably require to determine a matter in issue." Subrule (2) provides that this duty "prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged". In addition, the expert is required to sign and include in his or her report a written "Acknowledgement" of this duty.[12] The Ontario Energy Board has now adopted similar principles in Rule 13A of its own Rules of Practice and Procedure.

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6 *Mohan, supra* note 4 at pp 25, 37-39. The Court in that case upheld the exclusion of evidence sought to be called by the defence from a psychiatrist as to disposition to commit the crime charged.
7 See *Sopinka, supra* note 2 at paras 12.169-12.215.
8 *White Burgess Langille Inman v Abbott and Haliburton*, 2015 SCC 23, 383 DLR (4th) 429 [*White Burgess*].
9 *National Justice Compania Naviera SA v Prudentential Assurance Co,* [1993] FSR 563, [1993] Loyd's Rep 68.
10 The *Report of the Civil Justice Reform Project* headed by Coulter Osborne, 2007, made recommendations resulting in these revisions to the *Rules of Civil Procedure* in Ontario. See The Honourable Coulter A Osborne, *Civil Justice Reform Project: Summary of Findings and Recommendations* at ch 9, online: Ministry of the Attorney General of Ontario <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/cjrp-report_en.pdf>.
11 The 2008 report by Commissioner Stephen Goudge in the *Inquiry into Pediatric Forensic Pathology in Ontario* arose out of concerns about the evidence given by pathologist Dr. Charles Smith.
12 *Rules of Civil Procedure,* RRO 1990, Reg. 194, Rule 4.1 and Form 53.

However, despite these developments and the Supreme Court's decision in *White Burgess*, it remains to be seen whether it will be possible (as with the other four conditions) to enforce this principle pre-emptively, before the evidence is heard. The Court notes that the threshold for pre-emptive exclusion is "not particularly onerous" and that this "should only occur in very clear cases."[13]

The Court has so far provided little guidance on what "certain point" must be reached before considerations of independence, impartiality and bias should result in a finding of inadmissibility, rather than going to weight. In terms of a test, the Court cited another recent decision of its own, in *Mouvement laïque québécois v Saguenay (City)*,[14] which seems to make this determination depend very much on the facts: "whether the expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case." While the Court then cited a number of cases in which evidence was ruled inadmissible because the expert was a party litigant, or a lawyer for a party, or had some interest in the litigation, or in one case simply had an inappropriate retainer agreement, *White Burgess* does not clarify whether these were categorical rulings or turned on their particular facts. In the absence of further guidance, it is difficult to anticipate how it could be determined whether the test proposed is met or not, without first hearing the evidence.

The recent decision of the AUC in *TransAlta* is an important acknowledgment and application of these principles by an energy regulator. The Commission accepts and applies the *White Burgess* framework in considering challenges to the admissibility of expert evidence called by both parties. Although no challenge to admissibility had been made by either side in written submissions on the pre-qualification of experts, and questions were not asked of the witnesses in testimony related to the tests subsequently adopted in *White Burgess*, the Commission was able to apply the Supreme Court's analysis retrospectively, and to conclude that all of the experts who testified met the threshold for admissibility.[15]

This case law suggests that if it can be shown that any of these five conditions are not met by proposed expert evidence, then a preliminary objection can be taken to prevent the evidence being heard by a court at all. Interestingly, objections based upon a failure to differentiate fact from opinion, or the sufficiency of the facts to support an opinion, are not currently identified as pre-conditions for admissibility in the same way. As a practical matter, however, many issues related to relevance, necessity and bias may also become apparent only as the substantive evidence is led, and a pre-emptive objection may not always be possible. At that stage, the question as to whether these objections are taken into account in ruling the admissibility of the evidence, or as going to the weight to be given to the opinions and whether they should be accepted at the conclusion of the hearing, may well depend upon the specific facts of the case.

Litigation Experts *versus* Participating or Third Party Experts

In another very recent decision, the Ontario Court of Appeal has held that the these requirements, and particularly the expert's duty respecting independence, impartiality, and bias and requirement to sign an Acknowledgment of that duty, only apply to "litigation experts" who are retained and called by the parties specifically to provide opinions on matters arising in the litigation. In *Westerhof v Gee Estate*,[16] in the context of medical evidence relating to a personal injury dispute, the Court of Appeal usefully distinguishes two other types of experts who are not subject to these requirements.

Under this analysis, "participating experts" are ones who form expert opinions or make expert findings based upon their participation in the underlying events: e.g. a treating physician who renders emergency service at a hospital. There has never been any doubt that such witnesses may give evidence about their actions and observations, including evidence about the expert judgments (opinions) they applied: for example, in terms of the treatments they provided. Similarly, "third party experts" are identified as experts retained by someone other than the litigant parties to form an opinion based on the underlying facts, such as a medical

[13] *White Burgess*, *supra* note 8, at para 49.
[14] *Mouvement la*ïque québécois v Saguenay (City*)*, 2015 SCC 16 at para 106.
[15] *TransAlta*, *supra* note 1 at paras 85, 100, 105-106.
[16] *Westerhof v Gee Estate*, 2015 ONCA 206, at paras 6-8, 65-86.

practitioner retained to provide opinions for insurance purposes unrelated to the litigation.

What is important about the Court's reasoning in *Westerhof* is that it is expressly ***not*** based upon drawing a simplistic distinction between fact evidence and opinion evidence, as earlier authorities arguably were.[17] Rather, it expressly accepts that the evidence to be given will be expert opinion evidence, and that it will be given without complying with the rules applicable to litigation experts.[18] Moreover, the rationale for admissibility of this evidence is based upon the presence of other factors that provide assurance as to the reliability of these expert witnesses (specifically that they form and typically record their findings, opinions and conclusions in a professional context prior to, or at least separate from, the particular litigation), as well as the artificiality and impracticality of trying to force compliance with the litigation expert regime.[19] This is important because it may avoid the need to limit their evidence based on untenable distinctions between fact evidence and opinions. Inevitably, in cross-examination or even during examination in chief, counsel may wish to confront these "experts" with the opinions or analysis of litigation experts, to either reinforce or challenge whatever judgments they made at the time they formed their opinion. There is no principled basis to restrict this kind of expert exchange.

The approach taken in the *Westerhof* case should be welcomed by energy lawyers and regulators, to whom the concept of participating and non-party experts should be very familiar. For example, legislation in the energy field sometime allows regulators in an adjudicative proceeding to receive reports from other specialist agencies, such as an electricity system operator, without specifying the evidentiary nature or status of such reports.[20] Under the *Westerhof* analysis, such reports can now be recognized as simply as a form of non-party expert report. When an issue is joined on some aspect of such a report before the regulator, responding litigation expert reports could be filed. Procedures could be invoked to require the attendance of an expert representative of the agency for cross-examination on their report. Ultimately, the tribunal would have the benefit of a full expert evidentiary record to decide the issue in the public interest. Similarly, regulated parties often commission consulting reports when developing a facility, system or policy, long before any issue arises about it in proceedings before a regulator. When such issue does arise, these consulting reports are typically filed. They can now be presented, challenged, and evaluated for what they are: that is a form of participating expert report.

The next question is whether the expert accounting, financial, or technical staff of a regulated party – who invariably testify in energy proceedings – can now also be recognized as participating experts. The fact is that the financial and other documents they prepare, and the witness statements prepared for them by counsel, regularly reflect both implicit and explicit expert opinion evidence. Should they be denied such status, and their evidence restricted, simply because they are not independent of one of the litigant parties?

This question is one that arose before the AUC in its *TransAlta* decision. In that case, one of the Market Surveillance Administrator's expert witnesses was one of its own employees, who had acted as the lead investigator, and prepared the notice of allegations that framed the prosecution before the Commission. TransAlta argued that these circumstances gave the witness a "vested interest in the outcome of this proceeding", which should result in his evidence being inadmissible. In rejecting that argument, the Commission relied in part upon the statement by the Supreme Court in *White Burgess* that in most cases "a mere employment relationship with the party calling the evidence will be insufficient" to disqualify the witness altogether. The Commission did not note that the Supreme Court also quoted with approval from longstanding authority to the effect that "there is a natural bias to do something serviceable for those who employ you and adequately remunerate you".[21]

The Commission did, however, accept that in these circumstances "the expert and the party

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17 See especially *ibid* at paras 66-70.
18 *Ibid* at para 14.
19 *Ibid* at paras 82-83, 85-86.
20 See for example, the Ontario Energy Board's Decision and Order in EB-2011-0140, *East-West Tie Line – Phase II* (August 7, 2013), at p 4 ff, in which the Board requested technical reports from the Ontario Power Authority and Independent Electricity Operator relating to the technical feasibility and requirements and the need for an electricitytransmission project.
21 *TransAlta*, *supra* note 1 at paras 86-88, 121; and see *White Burgess*, *supra* note 8 at paras 11, 49.

are effectively one and the same", and that "ordinarily that could be cause for considerable concern leading to the evidence in question being accorded little or no weight". In finding that the result should not follow in the *TransAlta* case, the Commission recognized a number of important mitigating factors, specifically:

- the assumptions and calculations made by the expert were transparent;
- the Commission had available a critique of the expert's testimony from TransAlta's own experts, and was not reliant upon the challenged expert alone;
- the Commission also relied upon its own expertise, which "does allow it to make an informed judgment" about the challenged evidence;
- the witness was "well qualified" because of his "experience and knowledge of the Alberta electricity market"; and
- the Commission accepted both the MSA's argument that it had a statutory mandate as, itself, an expert body, which should not be unduly prevented from developing and employing its own in-house expertise, and the witness's testimony that he understood that mandate.[22]

The Commission also went on to refer to other "corporate witnesses" whose evidence included some element of specialized technical and opinion evidence, and reaffirmed its 3-step process for weighing these "expert" components of their evidence, by considering:

- the nature of their specialized and technical evidence;
- whether the witness has demonstrated the necessary skill, knowledge and experience to provide an opinion; and
- whether or to what degree the evidence was influenced by the witness's position as an employee.[23]

Consistent with *White Burgess*, the *TransAlta* analysis confirms that, as a practical matter, it may be better simply to recognize, challenge and weigh the evidence of specialized or technical corporate witnesses for what it really is, and that is expert opinion evidence. Nevertheless, when an issue in the proceeding is truly going to turn on a battle of expert evidence, the regulated party will likely not rely solely on its in-house experts, but rather will be well advised to retain litigation experts to make its case.

The Role of Counsel in Drafting Expert Reports

Another recent decision of the Ontario Court of Appeal in *Moore v Getahun*[24] revisits the longstanding debate about counsel's role in the preparation and review of expert reports, and appears to resolve it convincingly. The trial judge, following one line of prior decisions, had expressed strong concern about counsel's involvement in the process of drafting expert reports, and required disclosure of all drafts. Her decision caused a renewed debate among lawyers, particularly at the Advocates Society, who prepared "Principles Governing Communications with Testifying Experts", and intervened in the appeal. The Court of Appeal, adopting the Advocates Society's "Principles" gave lengthy reasons allowing the appeal. The Court refused to interfere with "the well-established practice of counsel meeting with expert witnesses to review draft reports" on the basis that "expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive". It also held that production of draft reports is not required and should not be ordered "[a]bsent a factual foundation to support a reasonable suspicion that counsel improperly influenced the expert."[25]

This decision provides a strong reaffirmation of the legitimacy of counsel's involvement, based upon the importance of ensuring that expert evidence is relevant to the matters in issue, and that it is of assistance to the court.

Implications for Energy Regulation

How then should energy lawyers and tribunal members respond to these developments in the case law coming from our courts?

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[22] *TransAlta*, *supra* note 1 at paras 97, 109-111, 122-128.
[23] *Ibid* at para 132, applying the tests developed in its Decision 2011-236, *Heartland Transmission Project*, (November 1, 2011) at para 93.
[24] *Moore v Getahun*, 2015 ONCA 55.
[25] *Ibid* at paras 62-65, 78.

In terms of the tightening rules respecting admissibility of expert opinion evidence, one response may be to ignore them, and carry on as usual. Many energy regulators can rely on provisions like subsection 15(1) of Ontario's *Statutory Powers Procedures Act*[26], which provide that they may admit as evidence any relevant testimony "whether or not admissible in a court." The fundamental difference between expert regulators and non-expert courts in terms of the expert evidence they hear may be invoked to justify departures from the approach represented by these decisions.

Indeed, the AUC in *TransAlta* makes a strong case that its own expertise mitigates the specific risk of deferring inappropriately to expert witnesses to a point where it is "not a significant factor".[27] Nevertheless, as noted, that Commission carefully applies the Supreme Court's analysis in reaching its assessment of particular expert evidence issues before it. This approach is to be commended, for a number of reasons.

First, as has been shown, the main principles and concerns underlying these decisions – complexity of proceedings, the use of experts as professional "hired guns," the potential to shape expert evidence to support adversarial positions, the risk of usurping the proper role of adjudicators – can all apply with equal force in a regulatory context. The decision whether to exclude the evidence on threshold grounds of admissibility, or to admit the evidence but not accept or act upon it, is ultimately not as important as the reasoned analysis of the evidence and the basis for finding it unreliable. These decisions all contribute to that analysis, and to our understanding of what can make expert opinion evidence either unreliable or compelling.

Second, the purposes of the rules of evidence align closely with the goals that that underlie all administrative proceedings. The rules of evidence generally are based on two considerations: fairness and ascertaining the truth through accurate fact-finding. Many regulators would recognize the same principles as fundamental to their goal of optimal decision-making in the public interest. The principles at play in these decisions relate to both the fairness of the process and the accuracy of the findings related to the admission of expert opinion evidence.

Most importantly, specialized tribunals like those in the energy field are simply more reliant on expert evidence to function effectively. It is necessary for them to receive and assess expert evidence more often and for more purposes, than it is for the courts. It is normal, and a matter of routine. Such tribunals must therefore be prepared to process such evidence more efficiently, and sometimes perhaps more flexibly, than the courts, but that is not a reason to do it any less carefully and deliberately.

Some examples will illustrate both the special opportunities and risks that regulators face in their use of expert evidence.

One important opportunity concerns the proactive development and presentation of expert evidence by regulators in policy development proceedings. For example, the Ontario Energy Board has occasionally hired its own expert to lead a process of stakeholder consultations towards the development of a new policy. This technique was used in hearings to develop new options for demand-side management programs for natural gas utilities, and appears to have been particularly effective because of the absence of sharply adversarial interests between stakeholders. Although judicial review of the process was sought, unsuccessfully, by one intervenor, the grounds for review did not challenge evidentiary process followed in the development of the new policy, but rather the substantive policy options that emerged and the legal status and use of the policy in subsequent Board decision-making.[28] In another case, however, the same Board adopted a similar informal consultation process and led expert evidence on the much more contentious issue of rate of return on investment. Although some individual stakeholders led competing evidence to challenge the Board's expert, the ultimate result was a decision and order substantially following the recommendations of the Board's own expert. Although open to subsequent challenge in particular rate hearings, this result left many intervenors unhappy at the appearance of pre-determination, and vowing

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[26] *Statutory powers Procedures Act, RSO 1990, c s22, s 15(1).*
[27] *TransAlta, supra* note 1 at para 110.
[28] EB-2011-0021, *Generic Proceeding on Demand Side Management Activities for Natural Gas Utilities*, Report dated August 25, 2006;see *Pollution Probe v Ontario Energy Board*, 2012 ONSC 3206 (Div Court, May 30, 2012).

to raise the issue again at the next opportunity.[29] These examples highlight both the value of this approach to policy development, but also the importance of fairness considerations in the use and assessment by regulators of their own experts.

Another opportunity, *albeit* with attendant risks, is the engagement in examination of experts by tribunal members who share the same expertise. Properly undertaken, this practice takes advantage of the tribunal's expertise, and can serve the interests of efficiently getting to the heart of the issues troubling the tribunal, while giving notice to the experts, counsel and parties involved of the matters that need to be addressed. The risks are fairly obvious, however, and include the possibility of unfairness if major concerns are being raised only towards the end of a hearing after the evidence is substantially committed, and in extreme cases perhaps even giving an appearance of bias. These risks may be increased if tribunal members at the same time engage in practices (fortunately less common today than in the past), such as performing their own searches of prior reports or testimony of the expert to use in examination, or taking the experts beyond their own reports and testimony to explore other issues reflecting the member's own interests. What is clear from the court decisions reviewed above is that courts are well versed in the issues for fairness related to expert opinion evidence, including the assessment of concerns about bias in this context.

There are, however, many techniques that tribunals can employ to minimize the resulting risks of judicial review. The first is, simply, to raise any issues of concern as soon as expert reports are delivered and filed, so that counsel and the experts can be prepared to address them up front before the hearing begins. Secondly, if tribunal staff have status at the hearing, then cross-examination of the experts (especially questions involving review of material prepared in advance) can appropriately be left to them, as can the preparation of responding expert reports, where appropriate, to address issues of sufficient interest to the tribunal. Just as important, however, tribunals should be prepared to adopt and use the full range of pre-hearing procedures respecting disclosure and resolution of issues, including those developed by the courts specifically to deal with expert opinion evidence.

In terms of such procedural solutions, some tribunals have developed their own approaches that build upon those of the courts. For example, Rule 13A.04(a) of the Ontario Energy Board's *Rules of Practice and Procedure* allows the Board to require two or more opposing litigation experts to confer in advance of the hearing "for the purposes of, among others, narrowing the issues, identifying the points on which their views differ and are in agreement, and preparing a joint written statement to be admissible as evidence at the hearing". Rule 13A.04(b) also allows the Board to require such experts to appear and be questioned together, on a single witness panel. This kind of innovation is designed not only to increase efficiency and reduce the complexity of proceedings, but also to improve the quality and reliability of the evidence heard and the opportunity for tribunal members to evaluate the competing positions.

These and other procedures, including the involvement of tribunal staff in preparing a case for hearing, can all help to avoid the situation of a tribunal being left with an absence of necessary expert evidence on an issue raised before it.[30] No matter how expansive a view one takes of the importance of tribunal expertise or the scope of their ability to take administrative notice of facts, the individual expertise of tribunal members is no substitute for real evidence given by appropriate expert witnesses, tested under cross examination. While tribunal expertise can certainly assist members in understanding and evaluating the expert evidence before them, it cannot by itself provide fair and accurate decision-making in the public interest.

Conclusions

The proper preparation, presentation and evaluation of expert evidence is critical to effective energy regulation. Whether we act as counsel presenting and cross-examining witnesses on matters involving special expertise, or as tribunal members evaluating their testimony, the issues involved are complex and serious, and arise in one form or another on an almost daily basis. These issues are both more

[29] EB-2006-0087, *Generic Proceeding to Amend the Licenses of Electricity Distributors*, Decision and Order (November 20 2006).

[30] An example where this arose can be found in Decision 2005-028 of the Alberta Energy and Utilities Board (now the Alberta Utilities Commission), in *Westridge Utilities Inc. General Rate Application*, 19 April 2005.

prevalent and more important because of the increasing technological and financial complexity of our world, particularly in the field of energy regulation. Recent court decisions in this area are useful to energy lawyers and regulators in a number of ways. They remind us that this kind of evidence is admissible only as an exception to the general rules, and highlight the reasons for the exercise of caution in receiving and relying upon it at all. They reveal principles and procedures developed by the courts over time to govern its admissibility, and ensure its reliability, which are generally still relevant and applicable in energy regulation today. They provide a foundation for energy regulators to build upon, by adapting and adding to the courts experience in ways that can better serve the interests of stakeholders and the public interests involved. This is not to say the decisions should be applied slavishly, either by regulators or on judicial review. Rather it is the principles underlying the admissibility of this kind of evidence that should inform counsel's preparation and probing of the witnesses, in order to strengthen the presentation of competing expert positions. Those same principles should also inform the evaluation performed by energy tribunals, to improve the quality of the ultimate decision-making in this area."

THE JOY OF DECISION WRITING

Mr. Justice David M. Brown[1]

Introduction: The Joy

Justification, transparency and intelligibility in the decision-making process, coupled with acceptable outcomes which are defensible in respect of the facts and the law, are the hallmarks of sound regulatory tribunal decisions according to the seminal decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*.[2] It follows that when tribunal members come to write their decisions they must ensure that their reasons justify the result reached and disclose a transparent, intelligible line of reasoning which supports and explains the result.

In the inaugural edition of the *Energy Regulation Quarterly* Professor David Mullan gave the following wise advice to tribunal members:

> Where possible, base your decision on a careful examination of the facts, the intricacies of your own statutory regime, and the law developed by your own tribunal or agency precedents. The courts will generally respect your expertise and apply a deferential standard of review if you remain rooted in those issues.[3]

How does a tribunal member apply that advice in day-to-day practice? This short article seeks to offer tribunal members some practical direction about writing decisions, the part of the judicial job I most enjoy. I find decision-writing to be a joy, and through this article I hope to share some of my enthusiasm for that process. Of course, in the words of the old ABC Wide World of Sports intro, the thrill of completing a set of reasons can, in some cases, be followed by the agony of reversal by a reviewing court. Such is the life of front-line tribunals and courts which make the initial decisions. It is safe to say, however, that the harder a tribunal strives to meet the goals of justification, transparency and intelligibility, the less the chance its decisions will be reversed on review.

The Decision's Audience

Reasons are meant to tell the parties what the tribunal has done and why it did so. Reasons should offer assurance to the parties that their positions were understood and considered by the tribunal in arriving at its decision. As put by the Ontario Divisional Court in one case, "reasons are required; not merely conclusions".[4]

One of my former colleagues, Mr. Justice Dennis Lane, gave the following advice to tribunal members about identifying the audience for their reasons:

> There are many audiences for your, and our reasons: the courts, the parties, the public, the press, the legal academics, and so on. The audience many decision-makers think of first is the Court of Appeal or the [Judicial Review] court. But I will tell you: it is a mistake to write for the reviewing court. To do so gets in the way of writing for the most important reader of all: the party who is about to learn that the case has been lost. If you can explain to that person in clear language why the case was lost, you will have no worries that a reviewing court will not understand what you did and why you did it. In general terms, write for the educated layperson; that is usually the description of the parties, so

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1 Superior Court of Justice Ontario. An earlier version of these remarks was given at the CAMPUT Energy Regulation Course at Queen's University in July, 2014.
2 *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.
3 David J Mullan, "Regulators and The Courts: A Ten Year Perspective" (2013) 1, *Energy Regulation Quarterly*, 13 at 14.
4 *Clifford v Ontario (Attorney General)* (2008), 90 OR (3d) 742, (Div Ct).

that is the same advice as writing for the losing party.[5]

Preparing to Write Your Reasons: Before and During The Hearing

The preparation for writing a decision starts before the hearing begins. The tribunal member must master the written record filed in advance of the hearing. Doing so enables the tribunal member to understand the issues in dispute and to ask questions at the hearing which clarify the issues and the evidence upon which the reasons must be based.

While most tribunals enjoy the availability of real-time transcripts of a day's proceeding, a tribunal member needs to make some notes during each hearing day. A member should record:

i. his views about the credibility and reliability of the evidence given by each witness;

ii. the plausibility of the various arguments advanced before the tribunal and his evolving views about those arguments as they are heard; and,

iii. those matters he wishes to raise with subsequent witnesses during the hearing.

At the end of each hearing day a member should take the time to prepare a short summary of his thinking about the issues based upon the evidence heard that day, in light of all the evidence heard up until that point of time. The last portion of the member's daily notes should contain a kind of diary of the member's evolving thoughts about the issues at play in the case and the possible outcomes on each issue. At the end of a typical trial day I usually spend up to 1.5 hours going over my notes, breaking them down into discrete issues for easy subsequent reference and putting down comments about witness credibility and my thinking on the issues.

Starting to Write the Actual Decision

Of course, the focus of a member's efforts each day should be on ensuring that he understands the evidence given and the arguments heard, and so prepare for the next day's evidence. But, at some point of time, a member has to start sketching out an outline of the decision, an outline which identifies the issues to be decided and the member's preliminary thoughts on each issue.

Ideally, the process of sketching an outline should begin before the tribunal starts to hear evidence. The pre-filed evidence enables the identification of the issues in dispute, as well as the parties' general positions on each issue. The originating document for the hearing, such as a notice of application, will specify the relief sought allowing the tribunal to know, in advance of the oral hearing, what it will be asked to do at the end of the hearing.

Preparing a preliminary outline of the structure of the reasons before the hearing begins serves several useful functions:

i. it identifies for the tribunal the issues truly in dispute, the relief sought and the initial positions of the parties on each issue;

ii. it can serve as a roadmap for understanding the evidence which is led during the hearing, particularly if the evidence is adduced in a somewhat scattered fashion on the issues;

iii. it enables the tribunal to be alive to shifts in the parties' positions and the relief requested as the hearing unfolds;

iv. by identifying the issues in dispute, the outline assists the tribunal in assessing objections made to evidence on the basis of lack of relevance to the issues at play in the hearing; and,

v. it provides an overview of the entire matter which proves useful in reflecting upon the decisions which the tribunal will be called upon to make.

Understanding and organizing the issues before the hearing commences is the single most useful device to inform the tribunal's decision-making thought process as the hearing unfolds.

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[5] Mr. Justice Dennis Lane, *How to get Judicially Reviewed in an Infinite Number of Easy Lessons: A Report from the Trenches*, The Canadian Institute, June 11, 2007.

Some tribunals will have access to staff to assist them during the hearing. The temptation always exists to draw upon the staff to review the pre-filed evidence and to assist in creating an outline of the reasons. Yet tribunal members must be alive to two issues. First, the law requires that only those who hear the parties' representations can participate in the decision-making process. Accordingly, the job of resolving contested evidence is that of the tribunal, not of staff. Second, as a practical matter, the more a tribunal cedes review and organizational work to staff, the less the opportunity for tribunal members to review and to inform themselves about the evidence, the positions of the parties and the dynamic of evolving evidence during the hearing. High quality decision-making results from members who personally are well-versed in the evidence and the arguments. The more a tribunal delegates the review of the evidence and argument, the more the tribunal risks lowering the quality of its ultimate decision. While the temptation to delegate can be great where the volume of evidence filed is large, at the end of the day it is the tribunal members who are paid to make the informed, reasonable decision, not staff. There is no substitute for the extensive involvement of tribunal members in the review and the organization of the evidence and arguments.

The Key Factors When Writing Decisions

If justification, transparency and intelligibility are the end-goals for any decision, how do you get there? By employing in your reasons clarity, proximity, context, the "courage of selection", and by answering the key question: Why?

Clarity: Reasons must clearly identify the issues for decision and identify the tribunal's reasoning in reaching the decision on each issue. Ask yourself: will the average educated person be able to understand the decision?

Proximity: Avoid first reciting all of the facts and then proceeding to conduct an issue- by-issue analysis. Place the treatment of the facts relevant to an issue in proximity to your application of the law or policy to that issue and to the decision made on that issue.

Context: Place the issues for determination in their larger context. For example, is the issue a "one-off", fact-specific one, or does it raise considerations which go beyond the immediate interests of the parties and engage larger policy considerations?

Courage of selection: Decide only what needs to be decided and only place relevant facts in the decision. The Supreme Court of Canada has provided guidance on this point in recent years:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion. In other words, if the reasons allowed the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*.[6]

> This court has strongly emphasized that administrative tribunals do not have to consider and comment upon every issue raised by the parties in their reasons. For reviewing courts, the issue remains whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v. Driver Iron Inc.*[7]

Why? Make the "Why?" of the decision crystal clear. Explaining why you reached the decision is the most important aspect of understanding the train of thought which led you to that decision. Do not opt to obfuscate or try to avoid dealing with the difficult issues head-on. Reviewing courts have the uncanny ability to sniff-out tribunals' attempts to avoid dealing directly with key issues. Reduced deference usually results from such avoidance efforts.

As well, a tribunal should always be alive to

[6] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board,)* [2011] 3 SCR 708 at paras 16-17.

[7] *Construction Labour Relations v. Driver Iron Inc*, [2012] 3 SCR 405 at para 3.

the power of the language which it uses in its reasons. Be temperate in the language you use.

Some Concluding Observations

Let me conclude by offering five additional pieces of practical advice about the decision-writing process.

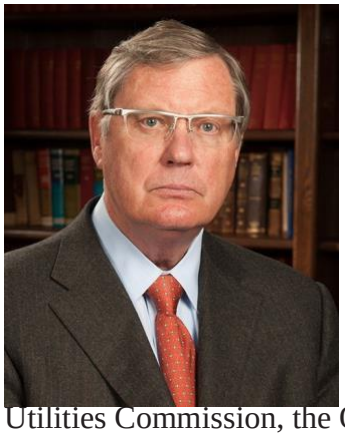
First, at some point in the decision-writing process the tribunal member inevitably comes up against writer's block. Creating and then following an organized, logical outline structure for your reasons is the best way to overcome writer's block. If you take the time at the start to create a good structure, the decision often writes itself - simply take the time to work methodically and patiently through the evidence on each issue and then decide the issue. If you are in doubt about your preliminary decision on a particular issue, keep going through the rest of your reasons and circle back to that issue at a later time. Often, once you have made your preliminary determinations on all issues, it is easier to go back and revisit your decision on a particular one.

Second, more often than not it is the facts of the case that drive the result. Consequently, make your findings of fact before you turn to applying the law to the facts. Of course, as with any general rule, there is always an exception. If a case raises a novel issue of law or policy, take the time to understand the law or policy before turning to the evidence. It is easier to make specific findings of fact once you understand the legal or policy context in which those findings must be made because the legal principle or policy informs the process of ascertaining whether or not evidence is relevant.

Third, although setting out the positions of each party on each issue often is a good way to structure the legal analysis on an issue, one must remember that it is the governing legal principles, not the positions of the parties, which ultimately must inform your decision-making.

Fourth, having completed a first full draft of a judgment, review and revise it several times to ensure that it addresses all the issues and provides a coherent, logical analysis of each issue which fully rests on the facts and evidence. This stage of the decision-writing process often requires going back to review the parties' written submissions and checking material facts. Several drafts of the reasons result. As part of this process, I find it helpful to read the draft reasons aloud several times. In addition to identifying typographical errors, the process of reading a decision out loud enables you to listen to your own thought process. If a portion of your reasons sound confusing, they most likely are confusing. Go back and rewrite them until they sound clear and persuasive.

Finally, on all but the most urgent of cases, employ the "overnight rule". Having completed a draft of the judgment, sit on it overnight and thoroughly review it the following morning. Often the passage of 24 hours offers the decision-maker time to clarify his thought process and improve the decision's language■



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Mr. Kaiser has negotiated over 50 settlement agreements in the energy and telecommunications sector. He has successfully mediated disputes on multiyear rate plans between a number of large public utilities and their major customers. He has also mediated long term contracts for the pricing of agricultural products. He has advised both the Alberta's Utility Commission and the Ontario IESO on settlements under the Market Rules. Mr. Kaiser acted for the Attorney General Canada in negotiating settlements under the criminal and civil provisions under the *Competition Act*. He acted for the Commissioner of Competition in the *Petroleum Products Inquiry* and well as in telecommunication proceedings before five provincial regulators.

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