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The fat lady is singing: ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)

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Cases Considered:

ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission), 2009 ABCA 246

The ongoing saga of the Alberta Utilities Commission's treatment of the removal of utility assets from rate base continues.

In 2007 ATCO filed a general rate application with the then Alberta Energy and Utilities Board ("EUB") for approval of rates for the 2008 and 2009 test years. It advised the EUB that it was excluding the "Salt Cavern" assets from its applied-for rate base. Its justification for doing so was that while those assets had historically been included, they were no longer being used for transmission service, and would not be used in the foreseeable future. The Alberta Utilities Commission (AUC) advised ATCO that ATCO could not exclude the assets from the application absent an application by ATCO (and AUC approval) under s. 26 of the *Gas Utilities Act*, R.S.A. 2000, c. G-5. Section 26 requires a gas utility to obtain permission prior to the sale, lease, mortgage, disposal or encumbrance of property. ATCO argued that since it was not selling the property or otherwise disposing of it, but was simply moving it out of rate base, approval under s. 26 should not be required. The AUC took the position that a unilateral withdrawal from rate base was equivalent to a disposition. ATCO appealed that decision to the Court of Appeal.

In the meantime, ATCO and its customers entered into a settlement of the 2008 and 2009 rates with customers which settlement excluded the Salt Cavern assets. That settlement was approved by the AUC.

After summarizing the decision, I will begin by making some critical observations about the Court's treatment of the standard of review. I will then argue that while the Court's interpretation of s. 26 is reasonable, there is no particular basis for preferring it to the interpretation of the AUC. I will then consider some implications of the Court's decision. I will argue that the effect of the Court's interpretation should not be misunderstood with respect to future dealings with the asset by the utility. It does, however, have some significant implications for the Commission's continued struggle with the vexatious problem of removal of assets from rate base. Finally, I will make my regular plea for legislative amendment to clarify the AUC's authority.

The Decision

The Court (Justices Côté, McFadyen and Rowbotham) began by noting the general authority of the AUC with respect to the determination of the utility's rate base. It rejected the idea that there was any "conclusive unilateral power by the utility company to define its rate base" (para. 23)

and reaffirmed that the basic test for the inclusion or exclusion of assets from rate base - that they be used or required to be used in utility service - remained the same. It also concluded that this regulatory power is not confined to “ruling on adding new items to the rate base” (para. 28) but also includes assets to be excluded from rate base. Otherwise, the Court noted, the utility could “shuffle assets in and out of the rate base at will” (para. 29), particularly where it owned more than one corporate entity. The Court acknowledged that the AUC does not “second-guess every management decision” and that, in general, rate hearings do not “spend much, if any time justifying inclusion in the rate base of every item of capital or equipment, nor even every big item” (para. 30). It concluded, however, that it is still the Commission’s authority to determine “what assets (still) are relevant utility investment on which the rates should give the company a return” (para. 31).

The Court then turned to the question of mootness given the settlement, by reason of which - presumably - it could be said that a decision had effectively been made about whether the Salt Cavern assets should be included in rate base. The Court noted the distrust and ongoing conflict between the utility, ratepayers and the AUC on these issues and, in particular, the concern of the utility that it would be abused by the AUC in some way - that if the AUC was not clearly denied a s. 26 power it would “try to evaluate harm to the consumers and impose some penalty or remedy on the appellant company quite outside any adjustment in rates” (para. 7). The Court said that these concerns had a “real foundation” (para. 38) and, on that basis, considered the s. 26 issue.

It held that s. 26 needed to be interpreted “in context and in its grammatical and ordinary sense harmoniously with the scheme and object of the Act” (para. 42). It held that the meaning of the words used in s. 26(2)(d) all connoted “giving up ownership” rather than simply ceasing to become useful (para. 43). Even if the words are interpreted more generally - as including “giving up or relinquishment” - they would not apply to a removal from rate base of this sort (para. 47). The authority of the AUC with respect to whether or not an asset is used or useful is limited to determination of the treatment of that asset in a rate hearing. It is in that context that any utility imprudence can be addressed.

The Court also noted the Supreme Court of Canada decision in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)* 2006 SCC 4, stating that that decision indicates that s. 26 “does not even apply to non-utility assets (or former utility assets), nor to sales in the ordinary course of business” (para. 10).

At this point the Court turned to the question of standard of review. The Court held that this was not a case where the regulator could be said to have expertise with respect to its home statute. It noted that the decisions of utility commissions are publicly reported and also dealt with in textbooks such that the “contents and limits of this tribunal-made law are neither mysterious nor hard to find” (para. 58). It noted that s. 26 type matters were not dealt with in two (American) textbooks on public utilities and that it was therefore not a “question of law on which public utilities commissions have special expertise; still less is it part of their core competence” (para. 59). It noted that interpretation of home statutes do not always get deference on appeal. Finally, the Court suggested that this was a jurisdictional question, because it went to the extent of the AUC’s powers. It noted the existence of a statutory right of appeal and suggested that “the standard of review on appeal is ultimately up to the Legislature and is not constitutional” (para. 64). In the result, and noting the standard of review used by the SCC in its 2006 *ATCO* decision, the Court concluded that the correct standard of review was correctness.

Standard of Review

The most basic - although not the most important - issue with the Court's identification of the standard of review is its placement. The consideration of the "correct" answer to the question of statutory interpretation, followed by the identification of the appropriate standard of review, creates the impression that the identification of the standard follows the analysis of the substantive issue, rather than the other way around - that is, the Court reviewed the issue and only then decided how deferential it should be in reviewing the issue. This creates a problem. Having determined that the AUC's interpretation of s. 26 was incorrect, could the Court comfortably determine that, nonetheless, the standard of review was reasonableness and thus the decision could stand? Moreover, presumably if one is required to be deferential, one should determine that *before* reviewing the decision in question. Otherwise, in what sense is one being deferential in one's consideration? This may of course simply be a question of drafting, but it is nonetheless unfortunate.

There are other more serious problems. First, the Court states that the standard of review on appeal is legislative, not constitutional. That is a doubtful proposition generally given the inherent jurisdiction of the Courts to maintain the rule of law, as recognized by the Supreme Court in *Crevier v. Attorney General (Quebec)*, [1981] 2 S.C.R. 220. More specifically, however, in its recent decision in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, the Supreme Court considered the statutory appeal provisions of the Federal Court Act and held that general statutory rights of appeal, such as those applicable to the AUC, do not affect the determination of the standard of review. As Binnie J. stated:

> As stated at the outset, a legislature has the power to specify a standard of review, as held in *R. v. Owen*, [2003 SCC 33], if it manifests a clear intention to do so. However, where the legislative language permits, the courts (a) will *not* interpret grounds of review as standards of review, (b) will apply *Dunsmuir* principles to determine the appropriate approach to judicial review in a particular situation, and (c) will presume the existence of a discretion to grant or withhold relief based on the *Dunsmuir* teaching of restraint in judicial intervention in administrative matters (as well as other factors such as an applicant's delay, failure to exhaust adequate alternate remedies, mootness, prematurity, bad faith and so forth) (*Khosa*, para. 51, emphasis in original).

This means, here, that the fact of the statutory right of appeal is entirely irrelevant to the determination of the standard of review. The statutory right sets out grounds, not the standard; the standard is to be determined based on the principles laid out in *Dunsmuir*.

Second, in the majority judgment in *Dunsmuir*, the Court said that "Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (para. 54). The Court in this case largely ignores that directive (although to some extent acknowledging it), and does so for reasons that make little obvious sense. Even if it is true that utility decisions are reported (and, in this case, the decisions have only been publicly reported since the creation of an EUB website in around 1997 - as many articling students who spent hours in the reading room trying to find relevant decisions at the then EUB can attest) that is true of many regulators and administrators. Indeed, there are entire volumes devoted to reporting labour arbitration decisions and yet very few administrative decision-makers are as reliably given deference as are labour arbitrators. I am also mystified as to why the discussion (or lack of discussion) of a provision like this in an American textbook

says anything at all about the issue. I am quite sure that if the Court had looked more broadly at the question of regulatory supervision of utility assets and rate base (which is really what the issue is here) they would have found quite a bit of discussion. Although then, perhaps, they would simply have referred back to the public availability of useful interpretive material. Neither of these grounds seem particularly persuasive, and nor do they fit in any obvious way to the extensive SCC jurisprudence on the question of standard of review.

Third, the Court also does not follow the general standard of review analysis in *Dunsmuir*. It does not look at the myriad of precedent from the Court of Appeal itself with respect to how questions of this type have been treated on a standard of review analysis. It does cite the 2006 SCC decision as saying that the standard of review is correctness; however, that decision in fact sets out two standards of review in relation to s. 26, one for jurisdictional questions and the other for exercise of the powers given to the Commission under that provision. The application of that decision as determinative precedent requires, therefore, that this be a true question of jurisdiction.

Is it? An argument in favour of it being a true question of jurisdiction is that the AUC is deciding whether it has power to review assets in this particular context. However, it is at the same time simply a question of interpreting the language given in the legislation. The AUC clearly has the power to review disposition of assets; the only question is whether this is, properly interpreted, a disposition under the statute. In the 2006 SCC decision, by contrast, there was no express power to allocate proceeds to ratepayers. The existence of such a power was the question to be determined and was, the majority held, a true jurisdictional question.

The issue in this case seems more akin to that dealt with by the Court of Appeal in its recent decision in *Macdonald v. Mineral Springs Hospital*, 2008 ABCA 273. In that case the issue under appeal was a decision by the Hospital Privileges Appeal Board that it had no jurisdiction to hear an appeal from an Operating Room Committee decision that it would not increase a physician’s operating room time. This looks at first glance like a jurisdictional question - after all, the Board is deciding whether it has jurisdiction to do something. However, as the Court in that case rightly pointed out, that is not sufficient to make something a jurisdictional question in the relevant sense. A jurisdictional question would be, can the Hospital Privileges Appeal Board even ask this question? Are they even entitled to decide whether they have the power to hear the appeal of the Operating Room Committee on this issue? That type of question was not raised. The HPAB does have that power, and the only question is as to the answer - can it hear the appeal or not? That question is a straightforward matter of statutory interpretation, and is reviewed on a reasonableness standard. Similarly, here, the question is simply one as to the meaning of the various words used in s. 26, which are part of the AUC’s home statute. While this may arguably be a jurisdictional question, it seems, consistent with *Mineral Springs*, better characterized as a question of statutory interpretation with respect to which the AUC should have been given deference.

Interpreting s. 26

There is nothing wrong with the Court’s interpretation of s. 26. Indeed, it seems well justified based on the principles of statutory interpretation set out and applied by the Court. It is less obvious to me, however, that the interpretation of the Court is wholly preferable to that of the AUC, or that the AUC’s is unjustifiable. In essence, the AUC is arguing that relative to the utility’s conduct of its operations, an asset is “otherwise dispose[d]” of when it is moved out of utility service. This is similar, I would suggest, to the approach taken by the SCC and by the then

Public Utilities Board (PUB, the precursor to the EUB) with respect to the related section of the legislation requiring AUC approval of various transactions (related to shares and debt) of the "owner of a public utility" (*ATCO v. Calgary Power*, [1982] 2 S.C.R. 557). The PUB and SCC took the position that an owner of a public utility included companies some way up the corporate chain from the actual utility (which are the pipelines and what not that are used to serve customers). As Wilson J. pointed out in dissent, this interpretation was inconsistent with the ordinary uses of these terms in other statutes. Nonetheless, in safeguarding the PUB's mandate of the "widest proportions" (at 576) the majority gave a "broad interpretation" (at 575) to the language of the statute. Such an approach seems equally justifiable in this case. It is not the only result - and it is worth noting that in 1982 the SCC was split 4-3 on the case - but it seems a reasonable enough interpretation of the language of the statute.

Moreover, the decision in this case is not without broader implications for regulatory rate-making. It is almost certain that the AUC understands those implications - for efficiency, fairness and transparency in decision-making - better than the Court does.

Implications of the Court's decision

There are a few things that should be emphasized following the Court's decision. First, it is clear that whether or not the AUC has the power to review the removal of an asset from rate base under s. 26, it retains its power to consider the prudence of the utility's conduct, and the extent of the utility's rate base, in an ordinary rate hearing. It chose not to exercise that jurisdiction in this case due to the settlement reached by the utility and the ratepayers, but that jurisdiction remains. This is part of an overall trend in the disposition of utility assets jurisprudence, beginning with the 2006 SCC decision, to push all asset related issues into the rate proceedings. As I have addressed elsewhere, the AUC will need to consider all of these implications in terms of determination of rate base, calculation of rate of return, calculation of depreciation etc.

Second, that the owner of a public utility does not have to apply for s. 26 review when it removes an asset from rate base does not eliminate the need for such an application in the event the owner of a public utility ultimately disposes of an asset. There is nothing in s. 26 to limit its application to those assets owned by an owner of a public utility and included in rate base. The effect of this, of course, is likely to be inconsequential. Once an asset has been removed from rate base, and any rate implications dealt with, it is not clear on what basis the AUC can exercise its power to order the owner of the public utility not to sell the asset. Nonetheless such approval is required. It is noted that the Court does suggest that s. 26 does not apply to non-utility assets. However, there is no language in the actual section to narrow its meaning in that way. Further, any other interpretation would denude s. 26 of meaning; the utility could simply move the asset out of rate base prior to disposing of it, thereby eliminating any effective regulatory review of that transaction. If that result is contemplated then why have s. 26 at all?

Legislative amendment

As noted, the effect of this decision is to push all meaningful consideration of how to deal with a utility's assets into rate base. While that may be functional, it is not obviously desirable, as I have discussed elsewhere (see my post [A Rock and a Hard Place]). It potentially requires the AUC to do the very thing that, in this case, the Court noted was impracticable, requiring that the utility justify "inclusion in the rate base of every item of capital or equipment" (para. 30). A legislative clarification of s. 26, spelling out precisely the nature of the AUC's power in respect of utility assets, is important and desirable.

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