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The Incredible Shrinking Jurisdiction of the Alberta Utilities Commission

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Cases Considered:

ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board) 2008 ABCA 200

Introduction

In 2006 the Supreme Court of Canada held that the then Alberta Energy and Utilities Board ("Board") (now the Alberta Utilities Commission ("Commission")) had no jurisdiction to allocate proceeds of disposition on the sale of a utility asset, even to ameliorate harm to customers that might arise from that sale. The Court held that while the Board has some jurisdiction to impose conditions on the sale of an asset – to, for example, give "due consideration to any new economic data anticipated as a result of the sale" (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)* 2006 SCC 4 at para. 81 ("*AGPL*")) – that power did not allow the Board to "confiscate" any net gains enjoyed by a utility upon disposition.

As I have discussed elsewhere, an issue created by this decision is that it is unclear how, in light of it, the Commission can properly ensure that a utility is incented not to speculate with its assets (see Alice Woolley, "'Practical Necessity' or 'Highly Sophisticated Opportunism'? Judicial Review and Rate Regulation After *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*" (2006) 44 Alta. L. Rev. 445). In particular, since after the initial decision on inclusion of assets in the rate base there is no ongoing scrutiny of whether the assets continue to be "used or required to be used to provide a service to the public" (the test for being included in the rate base under s. 37 of the *Gas Utilities Act*, R.S.A. 2000, c. G-5), the utility will be incented to attempt to move assets which have developed profitable alternative uses out of rate base, and to realize the gain on those assets, while leaving assets which have decreased value, or fewer alternative economic uses, in rate base, where the utility can continue to earn a rate of return on their net book value. This incentive structure did not exist previously: when the utility did not enjoy all of the profits realized upon disposition the "upside" for the utility in this circumstance was decreased, and ratepayers were protected from risk through their enjoyment of a share of the utility's proceeds.

The significance of the incentive problem has been recognized by the Ontario Energy Board (Decisions EB-2005-0211 and EB 2006-0081 dated January 30, 2007) and has also been

recognized by the Commission, which has convened a generic hearing to determine the principles that should be applied in the event of an asset disposition given *AGPL*. It also largely explains the decision by the Board with respect to ATCO Gas and Pipeline Ltd.'s Carbon gas storage facility, Board Decision 2007-005, which was reversed by the Court of Appeal in this case, *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)* 2008 ABCA 200 (per Justices Elizabeth McFadyen, Constance Hunt, and Frans Slatter).

The Carbon gas storage facility has been in regulated service since 1959, and all of the assets associated with the facility have been included in rate base. This was so even though throughout its history the facility has been used in part to provide regulated service, and in part to provide services in the market. The arrangement was fair to ratepayers insofar as profits from the competitive aspects of the operation of the facility were used as a rate credit – that is, they accrued primarily to the benefit of ratepayers, not the utility.

As recently as 1996 ATCO applied to expand the Carbon facility ("Carbon"), and for the assets related to the expansion to be included in rate base. Nonetheless, by 2001 ATCO was arguing that Carbon was no longer necessary to provide regulated services and should be moved out of rate base. This argument was strengthened in 2003 with shifts in the regulatory regime for the provision of natural gas services which required ATCO to divest itself of its retail operations and, arguably (at least as argued by ATCO) precluding ATCO from operating a gas storage facility.

In being faced with this situation the Board had a significant problem. On the one hand it was obvious that Carbon was not necessary to provide regulated services, and certainly not the distribution services with which ATCO is now exclusively concerned. On the other hand, the historical operation of Carbon, and the inclusion of assets related to the expansion of the asset as recently as 1996 mean that allowing the utility to simply deal with the asset as it sees fit would enhance the incentive problem created by *AGPL*. It would provide authority for the position that a utility can without financial consequence or perhaps even meaningful regulatory control, keep regulatory assets in rate base when there is economic uncertainty with respect to them, and move them out of rate base if that uncertainty is resolved in favour of the utility's economic interests.

To address this problem the Board found that the Carbon asset, even though used only for revenue generation purposes, was nonetheless still "used or required to be used" and must remain in rate base unless and until ATCO successfully brought an application for the asset to be disposed of. The Board, in other words, removed any incentive for the utility to speculate with assets in a deregulating environment by removing the flexibility of the utility to do so.

In reviewing the Court of Appeal's judgment reversing the Board's decision that Carbon was "used or required to be used" this comment will focus on three points:

1. The substantive decision by the Court that the Board's decision that Carbon was "used or required to be used" was unreasonable;

2. The approach by the Court to standard of review in light of the Supreme Court's decision in *Dunsmuir v. New Brunswick* 2008 SCC 9 ("*Dunsmuir*");
3. The Court's indication that interested parties at regulatory proceedings may need to apply to be interveners in appeals of those proceedings.

Used or required to be used

The Court was correct to hold that the Board was unreasonable in concluding that an asset that is used for the purposes of revenue generation is "used or required to be used." As noted by the Court, the Board's decision relies too heavily on the historical use of Carbon as opposed to its current use, its decision in this respect was inconsistent with its earlier ruling that the historical uses of the property were "largely irrelevant" (at para. 24), and its decision "strains" the language of s. 37. It is not reasonable to understand revenue generation as "used or required to be used" for utility service, or as, in itself, a utility service. The Board's interpretation pays insufficient attention to the legal test established by s. 37.

Having said that, however, it is also the case that the Court ducks the broader incentive issue with which the Board was grappling. It emphasizes significantly the regulatory changes of 2003, but does not note that, in fact, ATCO first sought to move the Carbon asset out of rate base in 2001, prior to the regulatory change taking place, and that ATCO was still expanding Carbon within rate base in 1996, after the shift in the regulatory approach in Alberta, at least on the electricity side, had begun.

In addition, the Court places emphasis on an assertion of customer consent to the inclusion of all Carbon assets in rate-base, saying that all "concerned were content with that arrangement" (at para. 28). With respect, in a situation like a utility rate application, where almost all of the relevant information is held by the utility, and customers are for the most part limited to raising those issues on which they can present meaningful evidence or ask questions based on what the utility has provided, it is an error to see Board decisions leading to a particular result as evidencing much in the way of customer contentment.

Neither of these points substantially undermines the legal persuasiveness of the Court's decision. However, between them the Alberta Court of Appeal and the Supreme Court of Canada have left the Alberta Utilities Commission with a real problem – how to properly incent the utility not to speculate with its assets – and an increasingly limited range of options as to how to address it.

Dunsmuir

As set out in previous comments on this blog, the Supreme Court has in *Dunsmuir* attempted to re-articulate the correct approach to identification of the standard of review for regulatory decisions. While it is not clear, in the end, how much difference the *Dunsmuir* decision will make, it is notable that here the Court of Appeal relied on *Dunsmuir* and did not go through the stages of the pragmatic and functional analysis. Instead, it identified different precedents related

to utility matters and the Board, decided into which category of precedents this decision would fit, and applied the standard of review from those precedents (i.e., reasonableness).

In so doing the Court correctly rejected the Board's highly doubtful attempt to use precedent to categorize its decision on inclusion of Carbon in rate base as a question of fact. It also rejected ATCO's argument that the question before the Board was jurisdictional – i.e., going to the authority of the Board to deal with an asset that no longer provides utility service. The Court rejected ATCO's argument on the basis that these "questions raise, at most, issues about the proper interpretation of the definitional provisions of the *Gas Utilities Act*, and are not properly categorized as jurisdictional in nature" (at para. 17). The Court also said that jurisdiction "relates only to the ability of the Board to embark on the inquiry," so that even if a decision might relate to a "threshold" issue it is not necessarily "jurisdictional" (at para. 16).

While this characterization by the Court makes some sense, and is consistent with some Supreme Court jurisprudence, it is a relatively narrow identification of what constitutes a jurisdictional question, and may be inconsistent with *AGPL*. In that case Justice Bastarache held that the disposition of assets was a jurisdictional question because it went to the extent of the Board's powers: "It is an inquiry into whether a proper construction of the enabling statutes gives the Board jurisdiction to allocate the profits realized from the sale of an asset" (*AGPL* at para. 30). Given that characterization by Justice Bastarache, it is easy to see why ATCO thought the question raised here was also jurisdictional: it similarly goes to the extent of the Board's power over assets, and to an interpretation of the extent of the power given by the legislation to the Board regarding the utility's assets.

This problem of characterization may suggest a problem with the Supreme Court's shift in *Dunsmuir* (and in earlier cases) to putting a disproportionate amount of emphasis on the nature of the question. The nature of the question posed by a decision may be evocative, but it is also apparently elusive. Here the Board viewed the question as one of fact, ATCO viewed the question as one of jurisdiction and the Court viewed the question as one of law. And even in *AGPL* itself the majority and the dissent split on the nature of question fundamentally raised by the appeal. It is troubling to have so much turn on a concept that can be so difficult to apply.

Interested Parties

In the course of its decision the Court noted that neither the City of Calgary nor the Utilities Consumer Advocate had applied to be interveners, but "purported to participate in these appeals as 'interested parties.'" The Court said that absent any objection from the actual parties it "ha[d] considered their submissions" (para. 14). This statement may be an indication that the Court is of the view that parties who participate in regulatory proceedings as "interested parties" need to take additional steps to have status to participate in an appeal. It is to be hoped that this does not occur. While the Court needs to maintain the integrity of its process, hearings before the Alberta Utilities Commission and the Energy Resources and Conservation Board are not properly characterized simply as decisions by the regulator directed at an applicant such as ATCO. They affect the rights and interests of a broad variety of parties who are properly given standing to

present and challenge evidence, and to make arguments. Those same parties are directly affected by the matters raised by an appeal, and should not have to re-establish their interest to participate in the appeal.

This is especially significant because it has traditionally been understood that a regulator should be somewhat limited in defending its own decision-making process, that there is an impropriety in a quasi-judicial body making a decision and then arguing on appeal that it was correct to have done so. This means that it is for other parties – such as the City of Calgary and the Utilities Consumer Advocate – to defend the Board's decision fully. They cannot do so if they are limited in their ability to appear, or perhaps even if they have to go through the time and expense of establishing themselves as interveners.