Recent Developments in Administrative Law

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Introduction

This power point presentation relies on my annual survey article, “2021 Developments in Administrative Law Relevant to Energy Law and Regulation”, (2022), 10(1) *Energy Regulation Quarterly*, published yesterday, May 4, as updated by reference to some more recent developments.

Dealing with Indigenous Rights, Claims & Interests

AltaLink Management Ltd. v. Alberta (Utilities Commission), 2021 ABCA 342

- Regulatory approval of assets transfer to two partnerships in which participating First Nations had interests, and involving transmission lines crossing First Nations' territories
- Part of a process commenced in 2002 involving upgrading of AltaLink transmission facilities in Southwestern Alberta and securing of approval for portion of transmission lines to cross First Nations territory as a result of AltaLink's assessment of most desirable route

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- As part of regulatory approval of transfer of assets, AUC ruled, on the basis of its “no harm” rule, that annual audit and regulatory costs (estimated at $60,000 annually for each Nation) associated with the operation of that portion of the transmission line owned by the partnerships could not be passed on to consumers in the form of rates
- In so ruling, the AUC panel rejected arguments to the effect that consumers were benefitting from the project in the form of savings resulting (*inter alia*) from the already located and operating portions of the transmission line crossing the two First Nations territories. The AUC held that the no harm rule was prospective only, and that the offsets relied upon were not forward looking, and that the FNs had not established with a sufficient degree of certainty that there were quantifiable future benefits

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- Appeal to Court of Appeal on questions of "law and jurisdiction" with leave of a judge of the Court (Section 29, *AUC Act*)
- From perspective of *Vavilov*, correctness review for pure questions of law. *Quaere* whether any review for jurisdictional issues given dismissal of jurisdiction as a concept, or mixed questions of law and fact where no readily extricable pure questions of law. Full *Housen* regime excluded by legislative confining of appeals to law and jurisdiction?
- Seemingly finessed by majority judgment when focusses on a failure of the AUC panel to take into account all relevant factors and its erroneous interpretation of its public interest jurisdiction under section 17 of the *AUC Act* over approval of the transfer of ownership of transmission lines. Pure questions of law?

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- Issues of scope of appeal and standard of review, meaning of the “no harm” test, and impact of imposition of a broadly based conception of mandatory relevant factors within the AUC’s public interest mandate are discussed in more detail on my *ERQ* survey
- However, one of the subsets of issues raised in that general context is the extent to which Indigenous rights, claims and interests intersect with or are components of the AUC’s public interest mandate
- Watson and Wakeling JJA are comfortable dealing with the appeal on a purely administrative law basis. However, as part of their consideration of whether the AUC failed to take account of relevant factors, is their sense that the AUC neglected any consideration of the historic barriers that Indigenous peoples face to full participation in the wealth and opportunities possessed by others and the contributions that joint projects such as this could make to the promotion of the welfare of Indigenous peoples

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- Though the majority do not develop the implications of this fully, it might well be argued that a failure to factor these considerations into the exercise of a public interest discretionary power is a reviewable legal error.
- Less susceptible to the incorporation of these considerations is the question of the legal scope of a discretion apparently circumscribed by a too narrow conception of the “no harm” rule though even here it might be said that that conception caused the AUC panel to not fully explore the extent to which the project aided the interests of Indigenous peoples
- *Quaere* the regulatory costs involved by such a more expansive canvass on which to exercise a discretion or to assess the fundamental balancing of the interests of consumers in reliable, reasonably priced access to service against the benefits to Indigenous peoples in such projects

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- Feehan JA, while agreeing with Watson and Wakeling JJA, felt obliged to deal with the arguments that constitutional rights were also engaged and, in particular, the honour of the Crown and the principles of reconciliation
- The critical statement is the following at para. 84:

> I conclude that the Commission in exercising its statutory powers and responsibilities, must consider the honour of the Crown and reconciliation whenever the Commission engages with Indigenous collectives or their government entities, and include in its decisions an analysis of the impact of such principles upon the orders made, when raised by the parties and relevant to the public interest.

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- As for the honour of the Crown, seems not to take account of the SCC's position that it does not exist as a general, universally relevant, untethered principle applicable whenever Indigenous peoples interact with government including regulatory agencies
- Rather, it has been located and operational within one of four categories (though admittedly with room for expansion):

> The duty to consult; a fiduciary duty arising out of the Crown's assumption of "discretionary control over a specific Aboriginal interest"; treaty making and implementation; acting in such a way as to accomplish "the intended purpose of treaty and statutory grants to Aboriginal peoples."
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> *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, at para. 73; *Fort McKay First Nation v. Prosper Petroleum Ltd.*, 2020 ABCA 163, at para. 54

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- With the possible but unlikely exception of fiduciary duty, transfer approval and rate setting by the AUC does not as a general matter come within the scope of any of these categories.
- In contrast, it might be argued that the principle of reconciliation arising out of section 35 of the *Constitution Act, 1982*, does place an implicit obligation on regulators in proceedings engaging or implicating Indigenous peoples to consider whether the particular matter provides opportunities for or is consistent with reconciliation objectives – either as a free floating principle or as a further honour of the Crown category.
- In effect, this would constitutionalize (and practically strengthen?) the common law obligations to consider all relevant factors on which the majority partially based their decision.

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- More recently, SCC has had occasion to consider the relevance of the principles of reconciliation in the context of its review of lower court judgments on an application by Beaver Creek Cree Nation for advance costs in support of its action against the Crown for "improperly allowing its lands to be taken up industrial and resource development" in violation of its treaty rights as affirmed in section 35 of the *Constitution Act, 1982*: *Anderson v. Alberta*, 2022 SCC 6.
- The SCC reaffirmed the existing law to the effect that there were three absolute requirements for the "last resort", "rare and exceptional", ultimately discretionary award of advanced costs in public interest litigation.

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- The three requirements were “impecuniosity, a *prima facie* meritorious case, and issues of public importance.” (at para. 24).
- What made this application for advance costs different was the fact that the First Nation probably had financial resources sufficient to fund admittedly very expensive and time consuming litigation. However, it asserted that it nonetheless met the impecuniosity standard by reference to the other demands on its funds.
- The Supreme Court accepted that such a claim if grounded in the evidence and by assessment of the following factors could meet the impecuniosity standard

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"The court must be able to (1) identify the applicant's pressing needs; (2) determine what resources are required to meet those needs; (3) assess the applicant's financial resources; and (4) identify the estimated costs of funding the litigation." (at para. 5)

- Ultimately, the SCC (Karakatsanis and Brown JJ) determined that the Alberta Court of Appeal had taken a too narrow approach to the question of impecuniosity in reversing the case management judge's decision in favour of the First Nation but that the case management judge's reasons for finding that the impecuniosity test had been met were not sufficiently supported by the evidence by reference to the legally relevant criteria. The appeal was therefore allowed and the matter remitted for reconsideration.

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- In its identification of the relevant principles, the SCC incorporated the principles of reconciliation.
- “Where litigation raises novel issues concerning the interpretation of Aboriginal and treaty rights and the infringement of those rights, this may have significant weight in a court’s analysis of the public importance branch of the advance costs test and the exercise of its residual discretion” (para. 26)
- As for impecuniosity, “the pressing needs of a First Nation should be considered from the perspective of **its** government that sets its priorities and is best situated to identify its needs” (para. 27 and see paras. 36 and 44)

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- A possibly gratuitous comment: Despite these appeals to the principles of reconciliation and a statement to the effect that "it must not be prohibitively expensive to establish impecuniosity" (para. 41), the demands placed on those seeking advance costs are onerous as reflected in greater detail as the Court moves to its assessment that the case management judge's award of advanced costs was not evidentially justified.
- While in no sense directly relevant to the application of principles of reconciliation in a setting such as *AltaLink* nor for that matter to the application of legislated (rather than general equitable) authority to award advanced costs, the case does illustrate that in contextually relevant situations, the principle of reconciliation can inform the exercise of discretion with respect not only to the ability of Indigenous peoples to participate in regulatory and judicial proceedings but also potentially to the effective assertion of substantive claims.

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- As an example, think about the interpretation and application of AUC Rule 009, *Rules on Local Intervener Costs*

Good Faith Dealings with the Regulator

- In my 2021 survey article, I discussed one of the grounds on which the AUC's Enforcement Branch had applied to the Commission for the commencement of a proceeding under sections 8 and 63 of the *AUC Act* to determine whether ATCO had acted unlawfully in a rate setting context and should pay an administrative penalty.
- Among the allegations were that ATCO had breached its "fundamental duty of honesty and candour to its regulator – the duty upon which the entire regulatory system relies to function efficiently and effectively."
- The assertion was that ATCO had acted in such a way as to hide from the AUC the fact that it had entered into a sole source contract with a First Nation at a price that was far above fair market value in order to protect the interests of a non-regulated affiliate, thereby transferring responsibility for the excessive costs though the rates borne by its customers.

Good Faith Dealings with the Regulator

- Since the *ERQ* went to press, the matter has progressed to the point at which the application now before the AUC is a *Joint Submission of Alberta Utilities Commission Enforcement Staff and ATCO Electric Ltd. Seeking Approval of a Settlement Agreement in AUC Proceeding NO. 27013.* Under that settlement agreement and Agreed Statement of Facts and Contraventions, ATCO Electric Ltd. has agreed to pay an Administrative Penalty of $31 million.
- With respect to Enforcement Staff's earlier assertion of a failure of "honesty and candour" on the part of ATCO's regulated entity, ATCO has admitted contravention of the *Electric Utilities Act* and its imposition on regulated utilities of a duty as part of its relationship with the AUC to be "honest, true, accurate, and not misleading, either expressly or by omission." (Joint Submission, 5(d)).

Good Faith Dealings with the Regulator

- Paras. 32-34 of the Joint Submission reiterates much of what was asserted in the earlier application by Enforcement Staff: the centrality of honesty and candour in the effective functioning of the regulatory system. The regulator must be entitled to assume that the information by utilities is “full, fair and accurate.”
- The Submission goes on to accept that the utility’s responsibilities are heightened not just because only it has “full knowledge of its own activities and operations” but also when the Commission has recently responded to recommendations for the reduction of regulatory burden.

Good Faith Dealings with the Regulator

- This acknowledgment formed a preamble to the admission by ATCO Electric that it “took steps to omit relevant information in filings with the AUC in its Deferral Account proceeding” (para. 35).
- Thereafter, in the *Agreed Statement of Facts and Contraventions*, ATCO Electric acknowledged the lack of necessary transparency and the impact that this had had on the Commission and the public (especially the interveners) in the Deferral Account proceedings. It rested on ATCO Electric, as the only entity with access to all the relevant information to ensure that the information available was “true, accurate, complete and not misleading.” (paras 143-147)

Good Faith Dealings with the Regulator

- It now remains to be seen how the Commission responds to these admissions and the recommended sanctions and undertakings. In any event, these aspects of the Joint Submission and Agreed Statement of Facts and Contraventions amount to a powerful reminder to regulated entities of their responsibilities in responding to regulatory demands.

Good Faith Dealings with the Regulator

- Two further points
- In the Joint Submission, it is asserted that, in considering whether to approve a consent order, the AUC should take instruction from “the principles developed by courts with respect to joint submissions on sentencing in the criminal law context.” (para. 36). This submission is made with reference to the practice in other regulatory settings.
- However, presumably in order to avoid allegations of overreaching and the imposition of truly criminal sanctions, the Joint Submission goes on (at para. 46) to recognize that regulatory sanctions are not intended to be punitive, but rather through both general and specific deterrence to be “protective and preventative.”

Vavilov and Review Standards for Administrative Penalties and Costs

- At this point, no direct relevance to *ATCO* but questions have been raised as to whether, at least where there is a statutory right of appeal from a statutory decision to a court, unless there is a specific provision to the contrary, the standard of review is that generally deployed by the courts in civil litigation – *Housen* – correctness for pure questions of law, and palpable and overriding error for questions of fact and mixed questions of law and fact from which there is no readily extricable pure question of law.
- In *Dhalla v. College and Physicians and Surgeons of Manitoba*, 2022 MBCA 7, the Court of Appeal, in a professional disciplinary setting, held that the *Vavilov* mandate on statutory appeals applied to only **administrative** decisions; not discretionary decisions made in a **civil** context

Vavilov and Review Standards for Administrative Penalties and Costs

- For these purposes, a **civil** context includes at least rulings on penalties and costs in professional disciplinary matters
- In that species of appellate setting, reasonableness continues to be the standard, and, for those purposes, reasonableness means: absent a misdirection in law or on the facts, there will not be intervention unless the "the decision on penalty is so wrong as to amount to an injustice" (para. 71)
- In so doing, the Court of Appeal rejected arguments that, as a matter of law, that test should be seen as the functional equivalent of palpable and overriding error. It also rejected the application of the criminal law sentencing test requiring either an "error in principle" or a "demonstrably unfit" sentence.

Vavilov and Review Standards for Administrative Penalties and Costs

- This conclusion was based on the Court's sense that *Vavilov* had not overturned prior Manitoba Court of Appeal authority and the application in this setting of the reasonableness standard, as well as its assertion of clear indicators in *Vavilov* that its ruling on statutory appeals applied to only administrative, not discretionary decision-making.
- While it is true that, in formulating the application of *Housen* principles (at para. 37), *Vavilov* refers twice to an "administrative decision", I cannot detect that that term is being used in contra-distinction to "discretionary decision."

Vavilov and Review Standards for Administrative Penalties and Costs

- Nonetheless, it is also clear that the pre- and post-*Vavilov* authority is all over the place on this issue. See Cameron JA's extensive coverage of the case law at paras. 47-68.
- There also are questions as to whether for these purposes, professional discipline cases are *sui generis*, or whether the Manitoba Court of Appeal's ruling should be seen as binding on other administrative penalty situations such as those exemplified by *ATCO.*
- The judgment of a five-judge panel of the Manitoba Court of Appeal and, ultimately, the SCC is awaited!

Vavilov and Review Standards for Administrative Penalties and Costs

- Given that standard of review simplicity was one of the objectives of *Vavilov*, it is instructive to see the stark, unqualified terms in which the SCC applied the *Vavilov* analysis and the *Housen* standards in *Ward v. Commission des droits de la personne et des droits de la jeunesse*, 2021 SCC 43, involving a tribunal ruling on a discrimination complaint and the imposition of penalty.