ONTARIO ENERGY BOARD

# Who best to decide? Deference to regulators in Canada and Australia

Presentation to ACCC/AER Regulatory Conference

Michael Millar, Senior Legal Counsel, OEB

# Overview

- Ontario and the Ontario Energy Board
- Appellate review of tribunal decisions and the principle of “deference”
- Case studies: Ontario Power Generation appeal and Ausgrid appeal
- Implications for Ontario and Australia

# Ontario's Energy Sector – Statistics

| | |
|---|---|
| **Area:** | 1,076,395 $km^2$ |
| **Population:** | ~13.5 million |
| **GDP:** | $763.2 billion (38% of Canada GDP) |
| **Electricity Customers:** | ~ 5 million |
| **Total Demand (2016):** | 137 TWh |
| **Peak Demand: (2016)** | 23,213 MW on September 7, 2016 |

- Consumes ~32% of Canada's electricity
- Produces ~27% of Canada's electricity

# The Ontario Energy Board

- OEB is a quasi-judicial regulatory body that regulates Ontario's electricity and natural gas sectors
- ~10 Board members, ~160 staff
- Sets rates for 70 electricity distributors (networks), 3 natural gas distributors, and one large generation company (OPG)
- Issues over 100 decisions every year

# The hearing process

- In order to issue a decision, the OEB must first hold a public hearing
- Interested stakeholders can participate
- Hearing can be written or oral, but must allow parties to ask questions about the evidence, file their own evidence if they choose, and make final submissions
- Proceeding ends with a final decision by the OEB, usually in writing

# Review/appeals of regulator's decisions

- Both Canada and Australia have a review/appeal process for tribunal decisions
- What is the purpose of a review? What potential problems/errors does it seek to resolve?
- Historic tension between the role of the original decision maker (tribunal) and a reviewing court
- Who is best placed to make the ultimate decision?

# The Canadian experience

- Appeals go straight to the courts – there is no intermediary review body like the ACT
- The first step in any appeal of a Canadian regulators decision is to determine what level of "deference" the Court will pay to the tribunal
- Determining the appropriate level of deference has a long and confused history, but has been largely settled since *Dunsmuir* (2008)

# Dunsmuir and Deference

- There are now 2 standards of deference a court may apply: reasonableness or correctness
- Correctness (no deference): used for issues of law outside tribunal expertise – court will give no deference and overturn decision unless it is correct (i.e. matches exactly what the court would have decided)
- Reasonableness (deference): where a tribunal is considering its home statute or dealing with matters within its expertise, courts will defer to the decision of tribunal unless there is a serious error. This applies even to legal issues provided they are related to the tribunal's home stature.

# Dunsmuir

- “In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”
- a policy of deference “recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime”
- “In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.”

# Evolution of deference since Dunsmuir

- The courts have moved steadily towards applying reasonableness as the default standard.
- If the tribunal made the decision under its home statute or within area of expertise, reasonableness is the standard
- Alberta Teachers, Newfoundland Nurses: The decision is striking, because it asserts (1) that the requirement of justification, transparency, and intelligibility is not a universal feature of reasonableness review, and (2) that a reviewing court can repair or fill in gaps which might otherwise raise concerns from a rule of law perspective

# What does deference mean?

- The level of deference that is applied is not simply an academic exercise – it has a significant impact on chances of successful appeal
- Since 2008 reasonableness has usually been the standard, and that has reduced both the number of successful appeals, and the number of appeals actually filed

# Case study: Ontario Power Generation

- OPG is Ontario's largest electricity generation company - ~14,000 MW of nuclear and hydro
- ~10,000 employees
- Owned by provincial government
- Annual revenue requirement ~$4B
- Rate regulated by the OEB since 2008 – biggest hearings the Board does

# Ontario Power Generation

- In hearing covering 2011-2012, OEB disallowed $145M in costs for excessive employee compensation
- OEB used benchmarking (and other tools) to determine that OPG paid its employees significantly above market
- Decision was appealed by OPG and its labour unions – eventually reached the Supreme Court of Canada

# OPG at the Supreme Court

- Reasonableness (deference) was found to be the standard
- The court essentially deferred to the expertise of the OEB and upheld its decision
- Once reasonableness (deference) was found to be the standard, the appellants had little chance of success
- Court reviewed OEB decision, found that nothing was “unreasonable”, and upheld the OEB’s decision

# OPG decision vs. AER decision

- It is clear that both the ACT and the Australian Federal Court took a different approach to the review
- Legislation gives broad review mandate to the court
- 3 very thorough decisions by 3 different bodies

# Observations/Implications

- The level of deference can be the key issue on the review/appeal of a regulator's decision
- Courts have essentially said that for factual matters and matters within regulators' expertise they will generally defer
- Given that many energy regulatory decisions are exercises in judgment within regulators' expertise, successful appeals are difficult
- This has arguably made regulators more powerful, and their decisions more important

# Observations/Implications

- More certainty that regulators' decisions are final, efficiency (12/20 AER decisions reviewed, 20/1000s of OEB decisions)
- Appeals are infrequent given poor chance of success – the main battle is held before the regulator, not the courts
- Deference does not mean a decision is unreviewable - Appeals can of course still succeed – it is just less likely

# Observations/Implications

- Policy of deference is not without controversy
- Concern that courts are assuming expertise the regulator may not have
- Regulators can make mistakes, and a proper appeals process should be able to correct this
- Policy should aim to have decision made by the body best able to do so in the public interest, in the most efficient manner possible

# Questions?