Court Affirms Deferring Jurisdiction To Legislatively Established Specialized Tribunals

10 février 2016

Introduction

On February 9, 2016 Madam Justice Kim Nixon of the Alberta Court of Queen's Bench issued a significant administrative law decision in the case of *Independent Power Producers' Society of Alberta ("IPPSA") v. Independent System Operator, operating as Alberta Electric System Operator (the "ISO")*, Alberta Court of Queen's Bench Action 1501-02977, declining to hear a judicial review and instead deferring the matter to an administrative law tribunal, the Alberta Utilities Commission (the "AUC"). Nixon, J. held that the AUC is a specialized expert tribunal established by the legislature to consider and decide issues pertaining to Alberta's electricity regime and that not only should deference be accorded to its decisions, but also the right for it, not the Court, to make those decisions in the first instance.

Background

In January 2015, the ISO issued a notice (the "Notice") to the public announcing modifications to an hourly report it issues, known as the Historical Trading Report (the "HTR"), which contains information about offers made by power producers to sell electricity into Alberta's power pool during the preceding hour. Alberta's statutory market "watchdog", the Market Surveillance Administrator ("MSA") supported the ISO's proposed modifications since it had long been concerned that the HTR could under certain conditions contribute to higher pool prices by revealing sensitive market information.

IPPSA, an association of power producers, commenced a judicial review application (the "Judicial Review") characterizing the Notice as a reviewable "decision" by the ISO. The Judicial Review sought to reverse the Notice and ban the proposed modifications to the HTR on the basis that the legislation (Section 6 of the *Fair Efficient and Open* Competition Regulation, Alta Reg 159/2009 (the "FEOC Regulation")) required the ISO to publish the HTR in its current format and forbade any modifications. Shortly after receiving the Judicial Review application, the ISO announced that it would postpone the modifications pending the outcome of the Judicial Review.

The Judicial Review was then adjourned sine die (leaving the HTR indefinitely intact), after which the MSA brought an application for hearing to the AUC under Section 51 of the *Alberta Utilities Commission Act*, SA 2007, c A-37.2 (the "AUCA") asking the AUC to eliminate or modify the HTR. The AUC commenced its hearing process, which involves notifying interested parties and establishing a process schedule. The IPPSA then revived the Judicial Review and arranged for it to be heard on February 9, 2016, though it was aware that the AUC would schedule a hearing into the HTR.

The IPPSA's view was that Section 6 of the FEOC Regulation could be interpreted by the Court (in IPPSA's favour) without need for background information, context or industry expertise. It also argued that the Judicial Review would render the AUC process moot since there would be a ruling that, in law, the HTR could not be modified.

The AUC scheduled a Hearing for April 11-15, 2016, declining a request by IPPSA to refrain from doing so pending the outcome of the Judicial Review. The MSA applied to the Court to intervene in the Judicial Review and have it dismissed, stayed or set aside.

Decision

The Court found that the MSA had an interest in the matter since the outcome sought by IPPSA would affect the market and that the MSA had important information that should be considered by the Court. Nixon J. therefore granted the MSA intervenor status.

Next, the Court considered whether it should even hear the Judicial Review in light of the fact that the AUC had scheduled a fulsome hearing to consider the issues and was, after all, the body designated by the legislature to regulate the electricity market.

Nixon J. held that Judicial Review was a discretionary remedy, and would not ordinarily be heard if the aggrieved party had adequate alternative remedies. Here, Section 51 of the AUCA and Section 26 of the Electric Utilities Act, SA 2003, c E-5.1 provided a procedure for complaints about ISO conduct to be brought before the Commission. Nixon J. therefore declined to hear the Judicial Review, deferring the matter to the AUC where there would be a full complement of parties, a tribunal and an applicant (the MSA) with expertise and important statutory mandates, and a slate of evidence and background information that the Court lacked in the Judicial Review.

In making that decision, Nixon J. acknowledged that the AUC is a specialized body with a high level of expertise with respect to the electricity market, and cited the Court of Appeal's decision in *Re ATCO Pipelines*, 2014 ABCA 28 to that effect:

As a specialized and expert tribunal charged with the administration of a comprehensive set of legislation regulating all aspects of the energy industry in the Province of Alberta, decisions of the Commission are entitled to a high degree of curial deference. Decisions requiring the interpretation of its governing statutes and regulations, and the application of its experience and expertise, will be measured on a standard of reasonableness: *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta* (Energy & Utilities Board) (1996), 187 A.R. 205 (Alta. C.A.) at para 14.[1]

The Court recognized that, if deference is owed to the AUC with respect to the decision it makes, it should also be accorded deference to make the decision in the first instance, citing Ontario Hydro v Kelly [1998] OJ No 1877 for the following proposition:

It seems to me that, as a matter of logic, if deference is to be paid to the actual decision of a tribunal, then deference should also be paid to the jurisdiction of the tribunal to make that decision. If the factors of specialization, policy making role, and limiting overlapping jurisdiction protect the actual decision of a tribunal, those same factors, if present in a particular fact situation, should also protect the integrity of the jurisdiction of the tribunal to make the decision.[2]

The Court rejected IPPSA's submissions that the interpretation of Section 6 of the FEOC Regulation was "simple" and "straightforward" and required no policy considerations or factual context. Nixon J. held that the FEOC Regulation is part of an overall comprehensive scheme governing the electricity market, and it must be interpreted within that context, quoting the oft-cited principle of statutory interpretation from *Rizzo &* Rizzo Shoes Ltd., Re, [1998] 1 SCR 27: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[3]

Nixon J. ultimately held that the AUC was the appropriate body to consider the issues noting that the AUC is empowered to make determinations of law and fact, the issues in this case required an interpretation of the AUC's home statute, and the interpretation of Section 6 of the FEOC Regulation involved policy considerations that the AUC was well-versed in. On this, she cited *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67 and *Crosby v Rothesay*, 2015 NBQB 133:

…the modern approach to judicial review recognizes that courts 'may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work'…[4]

…there is much wisdom in allowing a specialized tribunal to assess the facts presented to it knowing that it will be applying its expertise not only in respect of the applicable law, but also in the context of the public policy rationale that underlies such regulatory schemes…[5]

Nixon J. awarded the MSA costs of the application even though it was an intervenor on the basis that its intervention was extremely helpful, foreseeable and reasonable in the circumstances.

This case affirms that even though courts may have jurisdiction to hear matters that are also within the ambit of specialized tribunals, they should defer that jurisdiction to the dispute resolution regime established by the legislature.

The MSA's legal team was comprised of John Blair, Q.C. and Laura M. Poppel of BLG.

[1]*Re ATCO Pipelines*, 2014 ABCA 28 at para 26.

[2]*Ontario Hydro v Kelly* [1998] OJ No 1877 (ONCJ) at para 34.

[3]*Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 SCR 27 at para 21.

[4]*British Columbia (Securities Commission) v. McLean*, 2013 SCC 67 at para 31.

[5]*Crosby v Rothesay*, 2015 NBQB 133 at para 23.

Par

Laura Poppel, John Blair

Services

Droit des sociétés et droit commercial, Litiges

BLG | Vos avocats au Canada

Borden Ladner Gervais S.E.N.C.R.L., S.R.L. (BLG) est le plus grand cabinet d'avocats canadien véritablement multiservices. À ce titre, il offre des conseils juridiques pratiques à des clients d'ici et d'ailleurs dans plus de domaines et de secteurs que tout autre cabinet canadien. Comptant plus de 725 avocats, agents de propriété intellectuelle et autres professionnels, BLG répond aux besoins juridiques d'entreprises et d'institutions au pays comme à l'étranger pour ce qui touche les fusions et acquisitions, les marchés financiers, les différends et le financement ou encore l'enregistrement de brevets et de marques de commerce.

blg.com

Bureaux BLG

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000, rue De La Gauchetière Ouest
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749