TIPS FROM THE TRENCHES

C. Kemm Yates, Q.C.
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PERSPECTIVE

• premises of energy regulation
  – resource development and energy transportation
  – oversight of energy development and operation in the public interest

• view from the trenches
WHAT REGULATORS DO

- regulators are creatures of statute that operate only within their statutory mandates—express or necessary implication
- act in the “public interest”
- public interest is best served by allowing competitive forces to work, except where costs outweigh benefits
  - NEB Decision OH-1-2009 re Keystone XL Pipeline, pp. 32 and 78-80
- determine tolls that are “just and reasonable” and “not unjustly discriminatory”
  - NEB Act ss. 62 and 67
WHAT REGULATORY LAWYERS DO

• represent interested parties that seek or oppose regulatory approvals
• rule of law—application and information
• statutory energy regulatory regime establishes a form of alternative dispute resolution
• regulatory decisions must comply with applicable legislation and legal principles
• regulatory hearings are evidentiary processes conducted in accordance with the rules of natural justice
• prospective, not retrospective
REGULATORY CONTEXT

• increasing attacks on regulation and regulators
  – loss of public confidence in regulatory decision-making
• “modernization” of regulators
• “social licence”
  – antithetical to the rule of law
• standing to participate
TIPS FROM THE TRENCHES

10 TIPS FROM 1 REGULATORY LAWYER’S PERSPECTIVE
10 TIPS

1. Know who you regulate
2. Remember your mandate
3. Remember the rule of law
4. Know what is NOT your mandate
5. Be involved
6. Control the parties
7. Oral or written hearings
8. Value your tribunal counsel
9. Know the value of clear reasons
10. Don’t be afraid of appeals.
TIP #1: KNOW WHO YOU REGULATE

• “...public utility is nothing more than a private corporation subject to certain regulatory constraints”

• …a public utility is first and foremost a private business venture which has as its goal the making of profits”

• “…utility regulations exist to protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service”

TIP #1(2)

- let the market work

- don’t do anything to discourage settlements
  - “…parties to an ongoing Board proceeding have a positive obligation to immediately disclose that they may be aligned in interest on certain issues with other parties to whom they are acting adverse”

  » NEB RH-001-2013 Reasons for Decision, Appendix I: Reasons for Ruling on APPrO Motion
**TIP #2: REMEMBER YOUR MANDATE**

- public interest mandate means regulators are more than adjudicators

- “public interest” is the standard used in decision making both in government authorities and in boards and tribunals

- “the common well-being or the general welfare of the people”

- balance individual rights against the rights of society as a whole

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TIP #2 MANDATE (2)

- NEB has no statutory definition of “public interest”
  NEB GH-1-2006 Emera Brunswick Pipeline, p. 10

- NEB working definition—public interest is “inclusive of all Canadians…and refers to a balance of economic, environmental and social interests that changes as society’s values and preferences evolve over time”

  Energy Regulation in Canada, 50 Years in the Public Interest, Speech by Gaetan Caron, Chair and CEO, National Energy Board, to Alaska RDC Annual Meeting, Anchorage, Alaska, November 19, 2009
TIP #2 MANDATE (3)

- shift 1980s-1990s to reliance on market forces in place of government decision-making in the energy sector—“greatest good for the greatest number”

  *The Regulator’s Role—Promoting the Public Interest, Notes for a Presentation by Mr. Kenneth Vollman, Chairman, National Energy Board, World Forum on Energy Regulation, May 24, 2000, Montreal*

- public interest is best served by allowing competitive forces to work, except where there are costs that outweigh the benefits

  NEB OH-1-2009 Keystone XL, pp. 32 and 78-80
TIP #2 MANDATE (4)

• “public interest” is dynamic and not bound by *stare decisis*
  
  “…under the NEB Act, the factors to be considered and the criteria to be applied in coming to a decision on the public interest or the present and future public convenience and necessity may vary as a result of many things, including the application, the location, the commodity involved, the various segments of the public affected by the decision, societal values at the time, and the purpose of the applicable section of the NEB Act."

  NEB GH-1-2006, Emera Brunswick Pipeline, p. 11
TIP #3: REMEMBER THE RULE OF LAW

- rule of law
  - legislative framework for regulation
    - regulators are creatures of statute
    - enacted by legislators and enforced by the courts
  - decisions are not popularity contests or plebiscites or demonstrations of public opposition or support or phone-in radio shows
    - *ForestEthics Advocacy Association v. NEB* 2014 FCA 245, para 76
    - NEB to BAPE April 1, 2016, citing EH-1-2000 Decision
  - “social licence” is not the rule of law
TIP #3: RULE OF LAW (2)

• rules of natural justice
  – “directly affected”
  – right to be heard
  – no bias
  – procedural fairness
TIP #4: KNOW WHAT IS NOT YOUR MANDATE

• the regulator is not the manager of the utility

• utility management determines expenditures; regulator determines whether the expenditures may be recovered from customers through rates

• regulator is permitted to review management decisions, but not to substitute its decision without grounds to do so: just and reasonable standard
TIP #4: NOT MANDATE (2)

• “when the controlling decisions are made, they are made in the first instance by private management itself. Regulation can do little more than review the major decisions after the fact, permitting here and disallowing there. In these circumstances, they have been unable as a general practice to substitute their judgments for management; and often when they have tried, the courts have denied them the authority to do so, except in cases of obvious and gross mismanagement.”
  – Alfred Kahn, The Economics of Regulation: Principles and Institutions (7th) MIT, 1998, Vol 1, p. 30

TIP #5: BE INVOLVED

- know the issues
- ask questions
- let the parties know what you are thinking
- inform the strategies of the parties to produce the best record
- *rem tene; verba sequentur*
- decision not from space
TIP #6: CONTROL THE PARTIES

• parties to the hearing
  – e.g. National Energy Board Act s. 55.2 “directly affected” or “relevant information or expertise”
    • ForestEthics Advocacy Association v. NEB 2014 FCA 245
• NEB “modernization”
• parties at the hearing

20 political complications
**TIP #7: ORAL OR WRITTEN HEARINGS**

- cross-examination or not
- law is
  - no right to cross-examination
  - right to a fair hearing
- cross-examination when necessary to provide fair hearing
TIP #8: VALUE YOUR TRIBUNAL COUNSEL

• at the hearing:
  – facilitate the process
  – aspect of communication with the parties
  – keep you out of appeal trouble

• on appeal
  – now can be active in defending your decision
    • *Ontario v. Ontario Power Generation* [2015] 3 S.C.R. 147 para. 41 ff per Rothstein, J.
TIP #9: KNOW THE VALUE OF CLEAR REASONS

- insufficient to say “my reasons are that I think so”

- the industry values reasons
  - justifies participation
  - informs future applications
  - encourages settlements
    - cost of capital
TIP #10: DON’T BE AFRAID OF APPEALS

• every judicial decision informs the practice
• better to get judicial view on issues to inform future decisions
• but there are risks:
  • ATCO Gas and Pipelines v. Alberta [2006] 1 S.C.R. 140
  • ATCO v. Alberta [2015] 2015 SCC 45
QUESTIONS?
THANK YOU!

C. Kemm Yates, Q.C.
403-260-9667
kemm.yates@blakes.com