

## **Electricity Market Participants Not Unfairly Faced With Retroactively Altered Penalties**

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The recent dawn of 2008 was quite likely met with justifiable anxiety by electricity market participants, wary of the monumentally increased penalties that might now be sought by the Market Surveillance Administrator (the MSA) under the new *Alberta Utilities Commission Act* (the AUCA). However, such concerns should be tempered, given that, at the very least, pre-existing investigations of the MSA will not be subject to the extreme penalty provisions of the AUCA.

### **Introduction**

In Alberta, the MSA is to police electricity and natural gas markets, with a mandate to ensure a fair, efficient and openly competitive (FEOC) marketplace. To effect this mandate, the MSA has been given the authority to investigate and request sanctions against market participants for market behaviour that it perceives to be inappropriate.

When the AUCA was proclaimed into force on January 1, 2008, replacing parts of the *Electric Utilities Act* (the EUA), the role of the MSA largely remained the same, but the maximum monetary sanctions increased from C\$100,000 per day to C\$3 million per day. These penalties are in addition to various other sanctions that might be sought, as in the past, including disgorgement of profits and the imposition of terms and conditions on future conduct.

For any pre-existing MSA investigations, especially those investigations delayed or held in abeyance over a protracted period, the question that naturally arises is: "Can the MSA now seek the new, harsher penalties?"

The transitional provisions of the AUCA are entirely silent in relation to ongoing investigations of the MSA. Based on the protections afforded under s. 11 of the Canadian *Charter of Rights and Freedoms* (the Charter) and basic principles of statutory interpretation involving the presumption against the retroactive or retrospective application of statutes, market participants facing pre-existing investigations should expect the lesser maximum penalties to apply.

### **Section 11(i) of the Charter**

Section 11(i) of the Charter provides that:

Any person charged with an offence has the right:

- (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

The protections afforded under this Charter right would allow any market participants that are currently the subject of an ongoing investigation by the MSA, to claim the benefit of the lesser maximum penalty provisions contained in the former version of the EUA. This conclusion is supported by a review of the elements of this Charter-protected right.

**(a) “Any person”**

The extreme administrative penalties and fines for offences under the AUCA might be directed at any person, defined in the EUA as including “an individual, unincorporated entity, partnership, association, corporation, trustee, executor, administrator or legal representative.” Individuals that face personal liability under these draconian measures would, without doubt, be afforded Charter protection.

While not all Charter rights extend to bodies corporate, corporations have been permitted to invoke rights to procedural fairness similar to those afforded by section 11(i) of the Charter, and are therefore entitled to the protection of the lesser maximum penalties previously set out in the EUA.

**(b) “charged with an offence”**

The issue of whether penalty provisions under a provincial regulatory scheme (rather than the *Criminal Code*) would attract Charter protection was decided by the Ontario Courts in *McCutcheon v. Toronto (City)*. In that case, Justice Linden, citing from an earlier decision of the Ontario Court of Appeal, held that an “offence” would include any breach of law involving some penal sanction, whether the breach was contrary to a federal law, a provincial law, or otherwise.

Sanctions and penalties sought on a proceeding commenced under the AUCA would similarly constitute an “offence” for the purposes of s.11(i) of the Charter.

**(c) “if the punishment for the offence”**

Similar to the above issue, this question turns on the fact that the penalties envisioned under the AUCA are of a type or character that would attract Charter protection.

In *R. v. Wigglesworth*, the Supreme Court of Canada held that “a matter could fall within section 11 either because, by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence.” The Court also provided the definition of a “true penal consequence”:

In my opinion, a true penal consequence which would attract the application of s.11 is imprisonment or a fine which by its *magnitude* would appear to be imposed for the purposes of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.

The Supreme Court of Canada reasoned that the recipient of payment of monetary sanctions may also be indicative of the general classification of the penalties. Fines that are to form part of the Consolidated Revenue Fund, for example, would suggest an intent to redress some public wrong.

Administrative penalties under the AUCA can be set at C\$1 million per day, and fines for offences at C\$3 million per day. One would be hard pressed to argue that these amounts would not fall within the “magnitude” envisioned by the Supreme Court of Canada in *Wigglesworth*.

Further support for the conclusion that these monetary sanctions are a true penal consequence is found in the fact that the AUCA stipulates that payments of administrative penalties are to be made to the General Revenue Fund.

**(d) “punishment for the offence has been varied”**

Clearly the penalty provisions of the AUCA constitute a "varied" punishment, from that which existed previously.

**The Presumption Against Retroactive or Retrospective Application**

The common law presumption against retroactive or retrospective application of statutes also prohibits the MSA from seeking the new increased maximum penalties for conduct that occurred before the proclamation into force of the AUCA as of January 1, 2008.

In *Benner v. Canada (Secretary of State)*, the Supreme Court of Canada provided the most consistently applied definition of the terms "retroactive" and "retrospective":

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A **retrospective statute** *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted (...)

Both of these terms can be contrasted with a prospective statute, which would change the future effects of any future, ongoing or continuous situation. Prospective application is, of course, the normal effect of legislation.

As a general rule, there is a strong presumption against the retroactive application of legislation. Such applications are considered to be the most objectionable as they involve reaching into the past and declaring the law to be different from what it was, at an earlier date. The logic behind the strong presumption seems obvious enough – it is a serious violation of the rule of law and is inherently arbitrary for those who could not know the content of the law (as it would only apply after the amendment), when structuring their business or life plans.

Retrospective applications are often seen to be less offensive, as they involve changes for the future only. Leading academics on the issue of statutory interpretation have, however, opined that there should be at least a weak presumption against even retrospective application.

Whether the presumption in the case of the AUCA would be strong or weak is debatable; what is certain, however, is that a presumption would apply. And, having regard to the body of case law on this issue, there is no basis on which the presumption should be rebutted in these circumstances.

**Conclusion**

While the MSA may attempt to recommend the new, harsher penalties of the AUCA in proceedings brought in relation to its pre-existing investigations, a market participant whose impugned actions took place before the coming into force of the AUCA would be entitled to take the benefit of the lighter maximum penalty provisions of the former version of the EUA.

Further, it may well be that even a prospective application of the enormous penalty provisions of the AUCA would be unconstitutional and, thus, disallowed on certain bases including, among other things, the persisting vagueness and ambiguity surrounding the core benchmark of FEOC as an underlying source of liability.

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Blakes would be pleased to answer any questions that you may have about the MSA, the penalty provisions under the AUCA, or the new legislation generally.

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