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THE UNIVERSITY OF BRITISH COLUMBIA  
PETER A. ALLARD SCHOOL OF LAW

FINAL EXAMINATION – December 4, 2018

ADMINISTRATIVE LAW

Section 372.002/509.002  
Professor Jocelyn Stacey

TOTAL MARKS: 80

TIME ALLOWED: 3 HOURS

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NOTES:

1. This is a limited open book examination. You are allowed to bring your course materials and notes, but not textbooks or library books.
2. This examination consists of TWO (2) QUESTIONS. The amount of marks allocated to each part is indicated in the exam. I've provided guidelines for how to allocate your time.
3. Only consider the issues related to administrative law. Rely only on materials for Law 372/509 (Administrative Law) for your analysis.
4. Turn off all mobile devices.
5. If you are handwriting, please write legibly on every second line of your exam booklet and on one side of the page only.
6. Do not write your name at any place on the exam or any printed materials. All materials must be returned at the end of the exam.

THIS EXAMINATION CONSISTS OF 2 QUESTIONS.

YOU MUST ANSWER QUESTIONS 1 AND 2.

QUESTION 1: 45 MARKS [Recommended time = 100 Minutes]

The Province of British Columbia has implemented significant changes to achieve the province's legislated greenhouse gas emissions target. Included in these amendments are enhanced reporting requirements under the *Utilities Commission Act* (UCA or Act) for all energy producers and distributors in the province. The existing BC Utilities Commission (BCUC or Commission) is responsible for overseeing the new reporting requirements. These legislated changes were accompanied by a boost in funding for the BCUC, leading to increased staffing and enhanced training within the Commission.

The UCA now requires all regulated parties to submit to the BCUC an annual climate report that meets certain legislated requirements (s 135). The report must contain an accounting of greenhouse gas (GHG) emissions which, in principle, will demonstrate whether the regulated party is complying with the emission reduction requirements (s 136). The BCUC may take further regulatory action upon receipt of the report. One of the powers available to the BCUC is the power to appoint a Board of Inquiry to inquire into suspected non-compliance and misreporting (s 137). The Board of Inquiry is also subject to the requirements of the UCA. At the end of the inquiry, the Board of Inquiry must make a report to the BCUC documenting its activities and findings and making a recommendation on the appropriate remedy or remedies (s 137). The BCUC then has the power to act based on the recommendations (s 138).

While these legislative changes were welcome news for emerging renewable energy producers and even for BC Hydro, the amendments were opposed by the natural gas industry. Natural gas contains methane, a potent GHG (trapping approximately 86 times more heat than carbon dioxide in a 20-year period). Prior to these legislative changes, the natural gas industry in BC was booming. The amendments to the UCA will curtail this economic boom.

After the amendments came into force, Fortress BC, a major natural gas supplier and a "regulated party" within the meaning of the Act, submitted its annual climate report to the BCUC. The report documented that, contrary to the legislated reduction requirement, Fortress's GHG emissions had increased by 2% in the last year. The report explained that this was likely due to the unusually cold 2017-2018 winter in the lower mainland of BC, which led to increased natural gas consumption for heating.

The BCUC informed Fortress that it was appointing a Board of Inquiry, Betty McKidden, to conduct an inquiry into non-compliance. Fortress objected to the appointment of McKidden as she had served from 2006 to 2016 on the Intergovernmental Panel on Climate Change (IPCC) Task Force on National Greenhouse Gas Inventories. To this role she brought her expertise as

an environmental economist and, while on the Task Force, she was a lead author for several sets of Task Force Guidelines on GHG accounting. Since leaving her position on the Task Force and returning as a full-time professor to the UBC Sauder School of Business, she has been widely quoted in the media urging public officials to take bold action on climate change.

Fortress wrote to McKidden, copying the BCUC, requesting that she recuse herself because her work for the IPCC and comments to the media collectively give rise to a reasonable apprehension of bias. McKidden refused, the Commission did not intervene, and the Inquiry proceeded.

While the Inquiry was ongoing, McKidden continued to give media interviews on current climate-related news in her capacity as an environmental economist. Throughout these interviews she emphasized the need for “urgent climate action,” “use of established carbon budget methods,” and “accountability for greenhouse gas emissions.” In one lengthier interview with the Tyee, McKidden was asked about the effectiveness of new the provincial requirement of climate reports for energy producers in BC. She responded, “They will only be effective if the regulator makes use of all available tools to force big polluters — like the natural gas industry — to lower their greenhouse gas emissions. I have the opportunity as Board of Inquiry in the Fortress matter to set a precedent for what real climate action looks like in this province. I know what I need to do. You can expect that I will use all necessary tools to ensure that Fortress is held accountable for its contribution to climate change.”

At the end of the Inquiry, McKidden submitted her report and recommendations to the BCUC. Her report contained the following findings:

- Fortress’s GHG emissions rose by a total of 4% not 2% as reported in the annual climate report;
- Fortress’s accounting practices fell below industry accounting norms;
- Fortress was correct in reporting that colder winter conditions contributed to an increase in natural gas consumption in the winter of 2017-2018 compared to previous years;
- Fortress had the ability to reduce GHG emissions by at least 3% through public education campaigns and updating facilities to reduce emission leakage.

The recommendations included:

- The appointment of a third-party compliance official for one year to develop a plan with Fortress for meeting its climate reporting obligations and to assist with the implementation of proper accounting protocols;

- BCUC remain seized of the matter for one year to resolve any disputes arising from the third-party compliance process.

The BCUC received the recommendations. It gave written notice to Fortress and to the public through its website and social media accounts that it would accept written submissions on whether to accept and implement the recommendations of the Board of Inquiry. It requested that comments focus on whether the recommendations were just and fair to the regulated party and the consumer, and consistent with BC's legislated climate goals.

Fortress provided an extensive written submission arguing that the recommendations were excessive and unnecessary in light of the changes the utility was already making, it would cause hardship on consumers, and that the Board of Inquiry was inappropriately attempting to "make an example" of Fortress. Hundreds of public comments were submitted expressing a range of views. Some suggested that the BCUC ought to impose even stronger measures than the recommendations to assure the public that the province was serious about climate change.

Prior to making its final determination, the BCUC consulted with McKidden about the possibility of increasing the term of the compliance remedies from one to three years.

The BCUC released its decision with reasons that stated, in part:

"The Commission has reviewed the report and recommendations by the Board of Inquiry. The Commission has decided to accept and implement the Inquiry's recommendation, with one modification. The Commission will appoint a third-party compliance official for a three-year term to ensure that Fortress establishes the necessary governance plans, practices and institutional culture to successfully reduce emissions over the long-term. Accordingly, the Commission will remain seized of this matter for the three-year term to resolve any disputes that arise from the third-party compliance process. Terms of appointment will be released in due course.

In reaching this determination the Commission carefully reviewed the Inquiry report which documented serious issues within the managerial and accounting departments in Fortress. We considered the submissions by Fortress. While we recognize that Fortress is already making important and necessary internal changes, a third-party compliance official can only strengthen and enhance the changes already underway. Moreover, a compliance officer, who reports to the Commission, will give the public confidence that BC's greenhouse gas emissions reduction targets are realizable. We consulted with Ms McKidden prior to making this decision and we all

agree that this amendment to her recommendations is both just and reasonable and consistent with the purpose of the Act.

This is an appropriate instance for the Commission to implement a modified version of the recommendations. As a public interest regulator, the Commission has expertise and experience exercising the powers within its mandate. It will be necessary, from time to time, to modify recommendations of a Board of Inquiry to best fulfill the goals of the Act.”

Fortress has retained your law firm to challenge this decision. Your principal, J. Stacey, has requested that you write a memo analysing the following legal issues:

- A. Whether Fortress must access any any internal statutory mechanisms before seeking judicial intervention and to what court Fortress would apply. [*Maximum 3 sentences*]
- B. The possibility of challenging the decision on the basis of individual bias.
- C. The possibility of challenging the decision for lack of fairness arising from the Commission’s conversations with McKidden prior to issuing its decision.
- D. Whether the Commission’s decision to impose a modified version of the recommendations was substantively proper.

Be sure to consider arguments that could be made by Fortress challenging the decision and the BCUC in defending it. Advise Fortress on the strength of each of these claims. All relevant statutory provisions have been provided in the Appendix.

QUESTION 2: 35 MARKS [Recommended time = 80 Minutes]

Below are three quotes that propose changes that the Supreme Court of Canada (SCC) could make to its approach to substantive review. For this question, you must choose **ONE** quote from the following list. With this quote, address the following three points. Use headings to structure your answer.

- A. What specific challenge or ambiguity in the SCC’s approach to substantive review does this quote respond to? Identify the source of this challenge/ambiguity in the caselaw and explain why it poses a problem for those who are impacted by administrative action.
- B. Briefly explain in your own words what your selected quote requires of judges who are carrying out judicial review. Explain why this approach is consistent with the rule of law.
- C. Assume the role of the judge conducting the judicial review in Question 1. Assume the quote you have selected reflects the current state of the law. Apply it to issue D above.

**QUOTE 1:** The persistency of jurisdictional questions is telling. They have coursed through our jurisprudence for over half a century, playing an integral role in ensuring the rule of law remains more than mere words. Efforts to categorize jurisdiction may have floundered, but this should not be understood either as a problem with the principle or as a rationale for its elimination. Despite definitional challenges of jurisdictional questions, the underlying principle that tribunals must remain squarely within the limits of the mandate that Parliament (and not the tribunal itself) determined, cannot be erased.

**QUOTE 2:** Interpretations of home statutes are subject to a presumption of reasonableness, which can only be rebutted by clear legislative direction such as the *BC Administrative Tribunals Act*. The categories of correctness should be eliminated. Constitutional questions and questions regarding competing jurisdictional lines between one or more tribunals are, in reality, simply applications of the principle that the tribunal's legal interpretations are entitled to deference only when they concern its own home statute. Only the courts can claim the Constitution of Canada as their "home statute". And when it comes to jurisdictional lines, the issue is whose "home" it is – an issue only the courts can resolve. The other two categories have proven unhelpful. No satisfactory definition of questions of "true" jurisdiction has materialized in the case law. While this Court has left the "door open to the possibility" of such a question arising, it is now time to shut the door permanently, and to thereby simplify the analysis. "Questions of central importance to the legal system" have likewise evaded easy definition. The Court has occasionally found this category applicable, but has more commonly held that it is not engaged. The real issue is not whether a question is of "central importance" to the legal system, but whether it is a question of the interpretation of a "home" or "closely related" statute.

**QUOTE 3:** Unless the administrator gives clear reasons justifying its selected statutory interpretation, there is no reason to defer on questions of law. In such cases, the court is at liberty to engage in its own statutory interpretation. It is difficult to conceive of what other approach the court could take, and this better reflects what this Court has actually done. In many cases, meaningful access to justice, including ensuring equality before the law, necessitates access to a court to resolve, fully, finally and fairly, legal disputes between Canadians and the administrators that control various aspects of their lives. Judicial statutory interpretation is the only available recourse where administrative decision-makers attempt to amend statutes implicitly rather than through proper reasoned justification.

## Appendix: Statutory Provisions

### ***Utilities Commission Act***

2.1 The following provisions of the *Administrative Tribunals Act*\* apply to the commission [...]:  
[...]

(e) section 44 [tribunal without jurisdiction over constitutional questions];

#### **Part 6 - Commission Jurisdiction**

72.1(1) If the commission has reason to believe that a regulated party is not operating in compliance with the Act, the commission may appoint a third-party compliance officer on such terms it deems just and fair to the regulated party and the consumers.

(2) The terms of appointment for the third-party compliance officer must be set out in writing by the commission and made public.

(3) The commission retains jurisdiction over the third-party compliance officer for the duration of the appointment.

#### **Part 7 - Decisions and Appeals**

99 The commission, on application or on its own motion, may reconsider a decision, an order, a rule or a regulation of the commission and may confirm, vary or rescind the decision, order, rule or regulation.

100 (1) An appeal lies from any decision or order of the commission to the Court of Appeal, with leave of a justice of that court.

(2) The commission and the Attorney General may be heard on an appeal.

#### **Part 10 - Climate Reporting Requirements**

134 The purposes of this part [*Part 10*] are to:

- (a) facilitate the collection of accurate information about greenhouse gas emissions in British Columbia;
- (b) achieve British Columbia's greenhouse gas reduction targets set out in the *Greenhouse Gas Reduction Targets Act*;

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\* This is the only provision of the ATA that pertains to jurisdiction or standard of review that is incorporated into the UCA.

(c) require public utilities to take concrete actions to reduce their greenhouse gas emissions in accordance with Schedule A.

135 (1) A regulated party must file with the commission annually, by September 1, a climate report for the period of January 1 - December 31 of the previous calendar year.

(2) A climate report must contain the following:

(a) a detailed accounting of greenhouse gas emissions, as defined in the *Carbon Tax Act*, for the relevant period and for:

- (i) all facilities owned by the regulated party; and
- (ii) all facilities managed by the regulated party or within the care and control of the regulated party;

and, where relevant:

(iii) the consumption of all products distributed by the regulated party to consumers.

136 A regulated party must reduce greenhouse gas emissions in accordance with Schedule A. \*

137 (1) The commission may, in response to a climate report, a complaint or on its own initiative, appoint a Board of Inquiry to inquire into matters of compliance with Part 10 of this Act.

(2) A Board of Inquiry must be comprised of at least one and no more than three independent experts.

(3) A Board of Inquiry must comply with the terms of reference set out by the Board and must complete the inquiry within the time determined by the Board.

(4) At the end of the Inquiry, the Board of Inquiry must submit to the commission a report on its findings and recommendations to the commission on how to respond to the findings.

(5) The report of the Board of Inquiry will be made public, unless the regulated party applies to the commission for an exemption under the *Utility Privacy and Privilege Regulations*.

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\* The details of Schedule A are not relevant to the issues presented by this hypothetical.



(6) The Board of Inquiry may make any recommendations that it determines are just and fair to the regulated party and to the consumers and that further the purposes of Part 10 of this Act.

138 Upon receipt of a report from a Board of Inquiry the commission must:

- (a) accept and implement the recommendations of the Board of Inquiry within a reasonable time; or
- (b) refer the matter back to the Board of Inquiry for further inquiry; or
- (c) reject the recommendations of the Board of Inquiry and provide public reasons for rejecting the recommendations.

### ***Administrative Tribunals Act***

44 (1) The tribunal does not have jurisdiction over constitutional questions.

(2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.