IS THERE A DOCTRINE OF CANADIAN PUBLIC UTILITY LAW?

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This article addresses whether there is, and should be, a doctrine of Canadian public utility law. Specifically, it argues that there is currently no doctrine because of the lack of meaningful requirement that public utility regulators produce consistent decisions. This arises from both regulators and courts promoting the value of discretionary decision making. The problem with this approach is that discretionary case by case decision making can be criticized from the perspective of fairness, policy development and economic efficiency. The article recommends a legal requirement that public utility regulators be required to either follow previous decisions or provide a reason for not doing so. An unreasoned departure from a previous decision should therefore be considered an error of law. This constraint should provide more well-reasoned, and ultimately better decisions.

Le présent article porte sur la question de savoir s'il existe ou s'il devrait exister une doctrine juridique en matière de services publics au Canada. Plus particulièrement, l'auteur soutient qu'il n'existe actuellement aucune doctrine en la matière en raison du fait qu'il n'y a pas d'exigence obligeant les organismes de réglementation à rendre des décisions uniformes. Cela découle du fait que les organismes de réglementation et les cours prônent tous deux l'exercice du pouvoir décisionnel discrétionnaire. La difficulté relative à cette approche relève du fait que le pouvoir discrétionnaire de trancher les décisions selon les circonstances propres à chaque affaire peut être critiqué du point de vue de l'équité, de l'élaboration des politiques et de l'efficience économique. L'auteur préconise une exigence qui serait prescrite par la loi voulant que les organismes de réglementation des services publics soient liés par les décisions antérieures ou soient obligés de fournir des motifs s'ils rendent une décision contraire. Un écart non motivé par rapport à une décision précédente devrait ainsi être envisagé comme une erreur de droit. Cette contrainte entraînerait des décisions mieux réfléchies et ultimement bien meilleures.

Is there a doctrine of Canadian public utility law? In other words, is there an authoritative set of principles relating to the regulation of public

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utilities that derives from decisions of public utility regulators and courts? With some relatively minor exceptions, relating to some relatively minor areas, I do not think there is. The purpose of this paper is to unpack this question in order to identify what a doctrine of public utility law would consist of and explain why Canada has not developed one. I will also argue that, for conceptual and pragmatic reasons, the lack of a doctrine of public utility law is a weakness in public utility regulation. I will conclude by suggesting how such a doctrine could be developed in a manner that is consistent with Canadian public law.

1. What is a Doctrine of Public Utility Law?

At the outset, it is necessary to define some terms. I propose to use a working definition of "doctrine" as a constraining set of principles that arise from decisions of the regulator and the courts. There are three key components of this definition.

The first is that the principles must provide some form of constraint. It is not necessary that the constraint provided by previous decisions be as unequivocally binding as would be the case under a principle of *stare decisis*, where lower courts are bound by decisions of higher courts. Rather, this aspect of the definition of doctrine could be met by a requirement that a decision accounts for previous decisions. The constraint would be that a utility regulator is bound by previous decisions unless it provides a good reason to depart from the previous decision. The constraint of doctrine is presumptive, not absolute.

The second component is that the constraint arises from *decisions* of regulators. It is clear that regulators are capable of providing constraining principles (in the sense I have defined it) through guidelines and other types of policy instruments. It is also clear that regulators may, where authorized by legislation, produce codes or rules that are not just constraining, but binding. These types of policy instruments perform much the same function as the kind of doctrine defined here, in that they provide a constraint on decision-making on a case-by-case basis. These policy instruments are also a well established part of Canadian public law. The courts have recognized that a public interest value is advanced by providing predictability in the approach of a regulator, and that predictability may be achieved through guidelines or policy statements. In one of the leading cases in this area, the Supreme Court of Canada noted that a policy "could mature as a result of a succession of

applications."[1] It is this type of constraint – a jurisprudential type of constraint – that I am considering in this paper.

The third elemental concept inherent in a doctrine is that the presumptive practice of following previous decisions can create legally enforceable entitlements. In other words, a regulator who provides an unexplained departure from previous decisions would be making a legal error and could be overturned on appeal. Again, this is not to say that a regulator is bound by previous decisions in the sense that it can never depart from them. Rather, for a doctrinal approach to public utility regulation to be meaningful, the doctrine must have some pull on future decisions. Departures from previous decisions must be justified.

2. Should Canada Have a Doctrine of Public Utility Law?

In my view, Canadian public utility regulation does not contain any of the elements described above. There is no meaningful requirement that public utility regulators follow previous decisions. To the contrary, the overriding characteristic of public utility regulation in Canada is that regulators maintain their discretion to decide issues on a case by case basis. Before addressing this claim in detail, it is worth considering why taking a doctrinal approach is worthwhile. In doing so, it is important not to overstate the case. A doctrinal approach is not the only or ultimate goal of public utility regulation. There are other social and economic values at stake that should be furthered. There may also be some value in allowing individual panels to maintain the discretion to depart from previous decisions. I do not propose to argue against that approach here, or to make a generalized argument about the content or appropriateness of rules respecting fettering discretion. Conceding that there is a reasonable argument for discretionary case-by-case decision-making, I would argue that this is less compelling in the case of public utility regulators than it may be for other types of regulators, such as adjudicators of rights. In other words, I propose that there is a strong case to be made that public utility regulation would benefit from greater emphasis on consistency and predictability and less emphasis on case by case discretion. This proposition is based on a value-based perspective, a policy perspective and a practical perspective.

From a value-based perspective, the concern about discretionary decision-making is that it can also be characterized as unfair. If a tribunal makes a decision in one case, then, in the absence of a good reason, it should follow this approach in the next case. The argument

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[1] *Capital Cities Communications Inc. v. Canadian Radio-Television and Telecommunications Commission,* [1978] 2 S.C.R. 141 at 171.

for maintaining the discretion to depart from prior decisions without policy reasons to do so leads to randomness and arbitrariness.

From a policy perspective, it is important to consider the role and function of public utility regulators. Public utility regulators have the responsibility of implementing government policy.[2] The reason why the role of policy implementation is given to a utility regulator as opposed to an official within a ministry, is to encourage rational long term decision-making. As Gomez-Ibenez observes, regulation through public utility commissions came about as an alternative to municipal control and state ownership because the commissions "embodied the rationalist, public interest perspective:"

> [Public Utility Commission] PUC commissioners were appointed to fixed terms and were removable only for specific causes, for example, so that they could make decisions that might be unpopular in the short term without fear of political interference. Similarly, by shifting regulation from the municipal to the state level, advocates of PUCs hoped to create regulatory agencies that had enough responsibilities and resources to justify and support an expert staff.[3]

As a result, public utility regulation is adopted as superior to other forms of regulation in order to replace short-term opportunistic behaviour with long-term rational policy-making. This means that policies should have some enduring effect.

From a practical perspective, consistency in decision-making will remove some regulatory risk and therefore encourage sustained infrastructure investment. Given the primary need for infrastructure investment in many parts of Canada, this should be a very important goal.

Despite this, Canadian law and practice have not put a premium on developing a doctrinal approach. Rather, there has been a preference for case-by-case decision-making. This characteristic pervades both the decisions of regulators and the decisions of courts.

3. Regulators

With respect to regulators, they – unsurprisingly - value maintaining discretion, either claiming not to be bound by previous decisions, or

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2 *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781 at para. 24.

3 Jose Gomez-Ibanez, *Regulating Infrastructure* (Cambridge, MA: Harvard University Press, 2003) at 40.

stating the reasons for decisions in such vague and broad terms as to provide no predictability as to their future application.

The preference for maintaining discretion is reflected both implicitly and explicitly. The implicit value is found in the fact that very few decisions actually engage in an analysis of previous decisions. With some exceptions, every case is treated as creating a unique set of facts that calls for a decision without reference to what the regulator had previously decided.

A recent example of this approach in Ontario is found in the issue of how to evaluate the economic value of transmission investments to provide greater system reliability, as opposed to serving a specific new load. In March 2005, the Ontario Energy Board (OEB) approved an application by Hydro One for leave to construct in relation to a project to increase reliability of supply to Toronto; the cost of the project was $44.7 million. The Board addressed the issue as follows:

> The Board agrees with Hydro One that the economic evaluation methodology contained in the Transmission System Code for assessing new load for projects is of limited applicability in this application which is driven primarily by reliability considerations. In any event, based on the analysis submitted, the Board notes that, everything else being equal, the network pool rate will rise from the current level of $2.83 to $2.85 per kW/month on account of this project for the first five years, returning to its current level in the sixth year and declining after that. The Board considers the negative impact in the first five years from the in-service date to be negligible.[4]

Three months later, in July 2005, the Board addressed the same issue with respect to a Hydro One leave to construct application for approval of a reinforcement at the Niagara inter-tie; the cost of that project was $118 million. In that case, like the earlier case, the lack of new load to be served by the project made it difficult to carry out a traditional cost-benefit analysis. The Board this time found that it could not approve the economic rationale for the project. According to the Board, it was "not in a position to make a determination on whether the Project is in the public interest with respect to price because it cannot determine the net costs of the Project."[5]

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[4] *Ontario Energy Board* (11 March 2005), Decision EB-2004-0436 at 13, online: OEB <http://www.oeb.gov.on.ca/documents/decision_hyroonetworks_110305.pdf>.

[5] *Ontario Energy Board* (8 July 2005), Decision EB-2004-0476 at 8, online: OEB <http://www.oeb.gov.on.ca/documents/cases/EB-2004-0476/decision_08 0705 %20.pdf>.

There may have been good substantive reasons to distinguish the two projects. Reading the first decision also indicates that the applicant, Hydro One, provided unclear evidence and rationale. The Board's March decision approving need for the project without a clear cost-benefit analysis, however, was not even referred to in the July decision finding that need could not be demonstrated without a cost-benefit analysis. The Board simply looked at each case on its merits and without reference to the Board's previous practice.

Another example of the apparent disregard for previous decisions is found on the gas side. In September 2002, the OEB considered and approved recovery of costs by Union Gas for contracts with Alliance and Vector pipelines. The Board emphasized that its finding was based on the record before it and would not constrain future panels:

> In the instant case, providing long term firm supply through the Alliance Vector arrangements was, we find, a reasonable measure. Future panels may find that the application of such a policy at a given point in time, under different circumstances, and with a different record, to be inappropriate.[6]

It did not take long for a different panel to come to a different conclusion in a case involving contracts that were virtually the same. In December 2002, the OEB ruled that the costs incurred by Enbridge under its contracts with Alliance and Vector were imprudent.[7] That decision did not even refer to the decision in the Union Gas case on a very similar commercial deal some three months earlier.

My point here is not to criticize the outcome of any particular decision. The point is that the OEB did not demonstrate a concern to acknowledge the need for consistent decision-making. As the panel in the Union Gas decision noted above, the Board maintained its discretion to have different results from different panels based on a different record, which is exactly what it did.

The result is that the decisions of regulators are not aimed at producing a doctrine. They are aimed at maintaining discretion.

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6 *Ontario Energy Board* (20 September 2002), Decision RP-2001-0029 at 24, online: OEB <http://www.oeb.gov.on.ca/documents/cases/RP-2001-0029/decision_200902.pdf>.

7 *Ontario Energy Board* (13 December 2002), Decision RP-2001-0032 at 52, online: OEB <http://www.oeb.gov.on.ca/documents/cases/RP-2001-0032/decision_171202.pdf>.

4. Courts

Canadian courts have not been prepared to require regulators to take previous decisions into account. This is one example of a broader principle in administrative law which takes a very narrow view of the role of reviewing courts in the context of public utility regulation. There are two main components of this for the purposes of this discussion. First, courts provide very limited scope for review of substantive decisions of public utility regulators. Second, courts have expressly not provided a requirement of consistency in decision making as a requirement of administrative law. Each of these issues will be addressed in turn.

a) Scope of Review

The scope of review that courts apply to public utility regulation should be considered within the context of administrative law generally.

David Mullan has described the task of defining administrative law as a "definitional conundrum" - and I cannot be expected to make it easier. Mullan does, however, provide the following concept which can be adopted as a working definition for operational purposes:

> the principles by which the courts ensure that statutory…decision-makers observe the limits on the authority which they exercise; that they do not act invalidly or without authority.[8]

The preoccupation of administrative law is therefore on the boundaries of the authority exercised by executive decision-makers. Those boundaries are set out in legislation.

In the public utility context, courts have tended to focus on patrolling the boundaries to ensure that decision-makers do not stray outside them, but have not overly concerned themselves with how the regulators act inside the boundaries. This degree of control is reflected in the deference that the courts apply to public utility decision-makers. When it comes to identifying the scope of jurisdiction by interpreting legislation, the courts will grant very little deference. As Bastarache J. stated in *Atco Gas & Pipelines v. Alberta (Energy & Utilities Board)*, "[T]he expertise of the Board is not engaged when deciding the scope of its powers."[9]

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8 David J. Mullan, *Administrative Law* (Toronto: Irwin, 2001) at 3-4.

9 2006 SCC 4, [2006] 1 S.C.R. 140 at para. 27.

The key constraining legal restriction resulting from this approach to jurisdiction arises from the rules of statutory interpretation. So, for example, the rule that a regulator cannot retroactively set rates is not so much an essential limitation on what can legally be done under the rubric of public utility law; rather it is based on the general presumption against the retroactive application of legislation. This is how the Supreme Court of Canada approached the issue in its seminal decision in the area - *Northwestern Utilities Ltd. v. Edmonton (City)*: "To give the [B]oard retrospective control would require clear language and there is here a complete absence of any intention to so empower the [B]oard."[10] In other words, even something as basic as the rule against retroactive rate-making is not a function of a doctrine of public utility law. It is a function of statutory interpretation.

Once the court determines that an issue is within a board's jurisdiction, a court will be more deferential. Thus, when reviewing an exercise of jurisdiction, a court will tend to uphold a decision where it can be demonstrated that the decision is reasonable; the court does not have to be satisfied that the decision is a correct one. The Ontario Court of Appeal described the reasonableness standard as follows in applying it to an Ontario Energy Board decision:

> The content of a standard of review is essentially the question that a court must ask when reviewing an administrative decision. The standard of reasonableness basically involves asking "after a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?" This is the question that must be asked every time… reasonableness [is] the standard.[11]

The Court even went further and stated that, when the Board is interpreting its own set of rules, there is less room for judicial intervention: "[T]his raises the deference bar even higher."[12] The bar has been raised fairly high already in many areas of public utility regulation.

The first opportunity for the Supreme Court of Canada to develop an approach towards public utility regulation arose in the 1929 decision of *Northwestern Utilities Ltd. v. City of Edmonton*.[13] In that case, the Alberta Board of Public Utility Commissioners reduced the rate of

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[10] [1979] 1 S.C.R. 684 at para. 10.

[11] *Graywood Investments Ltd. v. Toronto-Hydro Electric System Ltd.*, [2006] O.J. No. 2030 at para. 19 [*Graywood*], quoting from *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at para. 47.

[12] *Graywood*, *ibid.* at para. 25.

[13] [1929] S.C.R. 186.

return of a gas distribution company from 10 percent to 9 percent. The Board justified the reduced rate by reference to the "altered conditions of the money market."[14] The Board made this finding without any evidence before it about the money market; the utility appealed. The City of Edmonton also appealed on whether a specific cost should have been included in the rate base. Because appeals were available only on the basis of law or jurisdiction, both parties had to demonstrate how issues of law or jurisdiction were raised by the case. The utility was able to demonstrate a question of law – namely, whether the Board could make such a finding without evidence. The Court held that evidence was not required to make this finding – that the Board's obligation under the legislation was to hold a hearing and provide the opportunity to adduce evidence. The Board therefore met its legal duty by holding a hearing. As for the City's claim that the Board erred in reducing the rate, the Court rejected it summarily: "The items which should be included in the rate base cannot, in my opinion, be considered a question of jurisdiction or of law."[15]

An interesting feature of this case was that it was decided in the same era where American courts were actively engaged in a debate over the appropriate scope for judicial review of public utility legislation and regulation. The contrast between the American and Canadian law on the issue was summarized by a contemporary article in the *Canadian Bar Review.* H.R. Milner described the American law on the topic as follows:

> To require a privately owned public utility to render its service or dispose of its commodity at unjust rates would in effect amount to expropriation without just compensation. Consequently, the Courts hold that the Commissions cannot fix unjust rates for this in law amounts to the taking of private property for public use without compensation or without due process of law. The moment that a Commission so values the property of a utility or so fixes the rate of return of the rates themselves that it is no longer possible to earn a fair return on the just value of the property a constitutional question is raised and the matter can be removed into the Federal Courts.[16]

By contrast, under Canadian law following the *City of Edmonton* case, "acting within its jurisdiction, the powers of the Alberta Commission are to all intents and purposes absolute."[17] As a result,

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[14] *Ibid.* at 192.

[15] *Ibid.* at 196.

[16] H.R. Milner, "Public Utility Rate Control in Alberta" (1930) 11 Can. Bar Rev. 101 at 109.

[17] *Ibid.* at 101.

according to Milner, "investors in public utilities in Alberta are dependent for their security entirely on the good faith, honesty of purpose, integrity and sound judgment of the personnel of the Board."[18]

I will return to the comparison with American law shortly. For now, it should suffice to say that Canadian law has not changed much since the *City of Edmonton* case. Courts have tended to view issues of facilities approval[19] and rate setting[20] as within the discretion of regulators and effectively not subject to review on appeal on substantive grounds. Canadian courts have, on occasion, stated that the exercises of these powers cannot be "arbitrary or capricious,"[21] but have rarely used those grounds to overturn a decision on substantive grounds.[22] Once an issue is characterized as falling within, for example, rate setting, the regulator is effectively exercising a largely discretionary jurisdiction. This is true both substantively and procedurally.

The Supreme Court of Canada linked the deference on substantive and procedural matters fairly clearly in *Newfoundland Telephone Co. v. Newfoundland (Public Utilities Board)*. According to the Court:

> When determining whether any rate or charge is "unreasonable" or "unjustly discriminatory" the [B]oard will assess the charges and the rates in economic terms. In those circumstances, the [B]oard will not be dealing with legal questions but rather policy issues. The decision-making process of this [B]oard will come closer to the legislative end of the spectrum of administrative boards than to the adjudicative end.[23]

As a result, applying rules of administrative law, the courts have been highly deferential to substantive decisions of public utility tribunals. In areas within a tribunal's jurisdiction, the courts have

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18 *Ibid*. at 111.

19 *Atco Ltd.* v. *Calgary Power Ltd.*, [1982] 2 S.C.R. 557 at 576; *Union Gas Co. v. Syndham Gas and Petroleum Co.*, [1957] S.C.R. 185 at 190.

20 *Natural Resource Gas Limited v. Ontario (Energy Board)* (2006), 214 O.A.C. 236 at paras. 24 and 25 (Ont. C.A.); *Trans Mountain Pipeline Co. v. Canada (National Energy Board)*, [1979] 2 F.C. 118 (Fed. C.A.).

21 *Re Union Gas and Ontario Energy Board* (1983), 43 O.R. (2d) 489 at 503 (Ont. S.C.J.).

22 The closest to an example of a mandatory common law requirement that a just and reasonable rate include fair compensation, is the concurring decision of Locke J. in *British Columbia Electric Railway Co. v. British Columbia Public Utilities Commission*, [1960] S.C.R. 837 at 846.

23 [1992] 1 S.C.R. 623 at para. 32.

expressly applied a standard of reasonableness. The language describing this standard – which views tribunal decisions within core areas of expertise as discretionary – suggests that there is virtually no possibility of legal error in some areas. As the Ontario Court of Appeal stated, in some circumstances the bar is raised even higher. Even applying a standard of reasonableness, it may be arguable that an unexplained departure from previous decisions is unreasonable. In order to assess this possibility, it is first necessary to address the judicial treatment of the requirement of consistency in decision-making.

b) Consistency in Decision-Making

The issue of consistency in decision-making was the subject matter of a well-articulated academic debate in the early 1980s. In an influential article, David Mullan argued that inconsistency in decision making should be grounds for review. Professor Mullan's argument was based on the premise that consistency is an inherent part of fairness. According to Professor Mullan, there is "clearly room for condemning unexplained or inexplicable inconsistencies in the administration of statutory discretions:"

> Given the prevalence of this principle of consistency of treatment in the development of most legal systems as well as within the various substrata of legal systems, there is a strong case for branding as reviewable those cases where statutory authorities inexplicably fail to act consistently. To do so without reason or without thinking would seem to be the height of arbitrary behaviour.[24]

The counter-argument was put forward by H. Wade MacLauchlan.[25] Professor MacLauchlan acknowledged the value of consistency in decision making. In his view, however, the issue was whether the courts or the tribunal should determine whether decisions are consistent: "It is a matter of applying rules, or principles, to facts. The essence of the matter is not to determine in some scientific fashion whether a decision is consistent with a claimed precedent but to determine *who should decide*."[26]

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[24] David J. Mullan, "Natural Justice and Fairness – Substantive as well as Procedural Standards for the Review of Administrative Decision Making?" (1982) 27 McGill L.J. 250 at 285-86.

[25] H. Wade MacLauchlan, "Some Problems with Judicial Review of Administrative Inconsistency" (1984), 8 Dalhousie L.J. 435.

[26] *Ibid.* at 441 (emphasis in the original).

This debate was put to rest by the Supreme Court of Canada's decision in *Domtar Inc. v. Quebec*[27] where the Court determined that jurisprudential conflict does not constitute an independent basis for judicial review. As a result, a tribunal does not commit a legal error if it fails to follow a previous decision. The Court clearly sided with Professor MacLauchlan that the issue is really about whether the courts should intervene in these matters. L'Heureux-Dubé J. put it as follows for the Court:

> In my opinion, questions as to the advisability of resolving a jurisprudential conflict avoid the main issue, namely, who is in the best position to rule on the impugned decision. Substituting one's opinion for that of an administrative tribunal in order to develop one's own interpretation of a legislative provision eliminates its decision making autonomy and special expertise.[28]

According to this approach, one should thus look to the tribunal itself to address inconsistency. The Court noted that there are "internal mechanisms developed by administrative tribunals to ensure the consistency of their own decisions."[29] It also observed that the jurisprudential process of adjudicative decision-making will lead to the development of doctrine:

> Ordinarily, precedent is developed by the actual decision makers over a series of decisions. The tribunal hearing a new question may thus render a number of contradictory judgments before a consensus naturally emerges.[30]

As a legal matter, then, the Supreme Court is not prepared to impose a requirement of consistency. *Domtar* has not, however, fully exhausted this issue. Interestingly, the Supreme Court's refusal to impose this requirement in *Domtar* is based not on the premise that consistency is not a value that should be pursued by tribunals, but that the tribunal is in a better position to develop its jurisprudence than is a court.

In fact, given the emphasis in *Domtar* on the intention of the legislator, it is arguable that the Court sees a positive duty on a tribunal to develop consistent decisions. If so, what happens if it does not? What if the tribunal does not even engage in the jurisprudential exercise of considering past decisions and develop a reasoned approach? Is it failing to meet its statutory duty? If so, what is the

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27 [1993] 2 S.C.R. 756.

28 *Ibid.* at 796-97.

29 *Ibid.* at 798.

30 *Ibid.* at 799, quoting from *Tremblay v. Quebec*, [1992] 1 S.C.R. 952 at 974.

remedy? One remedy, proposed by MacLauchlan (and quoted approvingly in *Domtar*), is that the government intervene:

> The proper response to administrative action which is ostensibly inconsistent but which falls short of traditional grounds of review is not judicial oversight, but the exertion of pressure in the political dynamic, of which the administrative decision-maker forms a vital element.[31]

There are several problems with this approach. Most importantly, it is not clear why the government – and not the tribunal itself – should be in the position of maintaining consistency. If, as the Court in *Domtar* suggests, the real question is "who should decide" whether decisions are consistent, it seems that the government is the least qualified to make that determination.

The government does have a supervisory role over public utility tribunals, but it is not to maintain consistency. It is to maintain fidelity to government policy. This supervisory role is carried out through governmental directions to tribunals and through Cabinet appeals. Both directions and Cabinet appeals are inherently political exercises. As the Law Reform Commission of Canada observed with respect to Cabinet appeals:

> Although appeals to courts are grounded on accepted standards and restricted to matters of record or, occasionally, clearly enunciated new material, Cabinet "appeals" are quite different. They are really policy appeals replete with lobbying external to any formal written representations made, and allow for reversal on grounds of "evidence" unrelated to the considerations an agency may have regarded as relevant.[32]

Whatever the merits of Cabinet appeals as a way of ensuring compliance with government policy, they do not provide a good mechanism to ensure compliance with a regulatory tribunal's previous decisions.

I believe that there is a better approach to the supervision of agencies that is consistent with the goal of consistency and with leaving the development of doctrine to the tribunal. The approach I propose is the one adopted in the United States public utility context, which is for the courts to defer to the policy decisions of regulators, but also to require the regulators to follow previous decisions unless they

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31 *Ibid.* at 798.

32 Law Reform Commission of Canada, Working Paper 25, *Administrative Law: Independent Administrative Agencies* (Ottawa: Law Reform Commission of Canada, 1980) at 87.

provide a rationale not to do so. In other words, regulators develop doctrine and can choose to follow it or change it. Unexplained and unreasoned departures, however, are unreasonable and constitute an error in law. The issue would therefore go back to the tribunal which can ultimately make the decision to follow a previous decision or depart from it. The result is that the tribunal – and not the court – would be the final author of the doctrine.

I do not believe that this approach is inconsistent with *Domtar* or Canadian administrative law more generally. In the next part of this paper, I will address how this doctrine was developed and how it is used in the United States. I will also argue that it could and should apply in the Canadian context as well.

5. The Development of Public Utility Doctrine in the United States

The development of public utility law in the United States followed a path of political and legal challenges to address the appropriate role of the state in regulating businesses and the role of the courts in overseeing legislatures. It is an interesting story told well by a number of writers.[33] My point here is to recount only the high points of the story to illustrate the context in which the modern doctrine of public utility law emerged.

The key decisions that led to the development of modern public utility law date from the late 1870s to the 1930s. The issue that dominated that period was the extent to which legislatures could identify types of businesses as "public utilities" and therefore subject to regulation of services and particularly rates. If this characterization was not legitimate, then the regulation of services and rates would amount to an unauthorized taking under the Fourteenth Amendment to the American Constitution.

In the nineteenth and early twentieth centuries, the United States Supreme Court provided a categorical analysis of particular industries to justify their inclusion or exclusion in the categories of "public utilities." The decisions were largely a debate over whether the business at issue was "affected with a public interest" and therefore subject to regulation. Over time, the debate began to change. A series of minority opinions in the 1920s focussed less on how to characterize

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[33] An excellent account is in Charles Phillips Jr., *The Regulation of Public Utilities: Theory and Practice* (Arlington: Public Utilities Reports Inc., 1993) at 83-121.

a specific business and more on whether the exercise of regulatory authority was appropriate. Specifically, a minority of the Court, consistently led by Justices Brandeis and Holmes, questioned whether it was appropriate for the Court to shelter any types of businesses from state regulation. In their view, the Fourteenth Amendment prohibited expropriation without compensation; the issue therefore was whether a business was entitled to compensation under the Fourteenth Amendment, not whether the business had the inherent features of a public utility.[34] This minority position became the majority view in the 1934 decision of *Nebbia v. New York*, where a majority of the Court upheld state legislation establishing a Milk Control Board and regulating the prices and trade practices of milk producers and distributors. The legislation was challenged on the grounds that the milk business had none of the characteristics of a public utility - that is, that it was not "affected with a public interest." A five-four majority of the Court held that such a characterization was not determinative. Rather, the issue was whether the restrictions were consistent with the requirements of the Fourteenth Amendment:

> If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary or discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*.[35]

As a result, following *Nebbia*, the test for the appropriate scope of public utility regulation is whether the legislation (and the regulatory power being exercised under it) has a reasonable relation to a proper purpose and is neither arbitrary nor discriminatory. If the legislation passes this test, it complies with the Fourteenth Amendment and is within the authority of a state legislature. This remains the approach today.

In the context of the principle of consistency, the courts acknowledge that utility regulators should develop and apply case law. This includes the entitlement to change policies and depart from previous decisions. The American courts are also aware of the need to

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[34] Justice Brandeis put it as follows in *Tyson & Brother v. Banton*, 273 U.S. 502 (1934) at 446:

> [T]he notion that a business is clothed with a public interest and has been devoted to public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it.

[35] 291 U.S. 502 (1934) at 536-37.

grant some deference to a tribunal's review of previous decisions.[36] An *unexplained* departure from a previous decision, however, will be found to be arbitrary and thus a reviewable error. The U.S. Court of Appeal put it as follows in *Entergy Services Inc. v. FERC*:

> The Commission may change its practices, but it must do so with "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." Departures from precedent must not violate the Administrative Procedure Act's prohibition on arbitrary and capricious decision making.[37]

A similar approach has been used in the United Kingdom. In *HTV Ltd. v. Price Commission*, Lord Denning M.R. stated:

> It is, in my opinion, the duty of the Price Commission to act with fairness and consistency in their dealings with manufacturers and traders. Allowing that it primarily is for them to interpret and apply the code, nevertheless if they regularly interpret the words of the code in a particular sense – and regularly apply the code in a particular way – they should continue to interpret it and apply it in the same way thereafter unless there is good cause for departing from it.[38]

As a result, in the United States the courts ensure that regulators develop reasoned decisions and follow those reasons in subsequent decisions unless they expressly depart from them, and there is support for a similar approach in the United Kingdon. It is true that the initial focus of American public utility law came from the perspective of the Fourteenth Amendment and many of the specific doctrines which developed in that context are not applicable in Canada. Nonetheless, the values of fairness, policy and economic practicality outlined above are integral to the Canadian legal fabric as well. There is no compelling reason why Canadian tribunals cannot meet these standards.

6. A Canadian Approach to Public Utility Doctrine

In my view, having *no* standard for consistency in decision making is fatal to the development of a doctrine of public utility law. If courts are not going to require tribunals to constrain their discretion and require consistent decision making, it is hard to see why tribunals would make this sacrifice.

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[36] See for example, *National Association of Regulatory Utility Commissioners v. FERC*, 2007 WL 79054 (C.A.D.C), where the Court notes at para. 7 that "we defer to an agency's reasonable application of its own precedents."

[37] 391 F.3d 1240 at 1251 (C.A.D.C. 2004), citations omitted.

[38] [1976] 2 ICR 170 at 185 (C.A.)

As indicated at the outset, I think that Canadian public utility regulation is the weaker from both a principled and practical perspective for not taking a doctrinal approach. A doctrinal approach could be instituted through a legal requirement that tribunals cannot make unexplained departures from previous decisions. This approach does not offend the premise of *Domtar* that tribunals, not courts, should be developing the doctrine. To the contrary, it provides the impetus for tribunals to do just that.

A possible objection to applying a rule against unexplained departures from previous decisions is that it does not go far enough. In other words, if fairness, good policy and economic practicality dictate a need for consistency in decision making, it is difficult to explain why *any* departures from previous decisions should be tolerated. Why not impose a requirement of consistency on all public utility tribunals?

A purely formal response to this question is that a binding requirement of consistency is inconsistent with *Domtar*. Less formally, I think that this objection both overestimates the value of a mandatory consistency requirement and underestimates the value of a requirement that departures from previous decisions be justified by reasons.

It overstates the value of a binding consistency requirement because consistency, though an important value, is not the only value of public utility regulation. The demands on public utility regulation can change quite dramatically, sometime in a relatively short time frame. For example, in the 1990s, energy regulation was largely aimed at facilitating competition. More recently, the focus has moved to environmental concerns. Public utility regulation operates in a dynamic environment and policies have to be able to change. The point of this article is that policy development should be explicit and deliberate.

It would also be a mistake to believe that only a mandatory requirement to follow previous decisions can have a meaningful impact on producing consistent decisions. If nothing else, a requirement to consider past decisions will impose an intellectual discipline on decision makers to think through the decisions that they are producing, as well as previous decisions. Furthermore, the fact is that, in the United States, where this “softer” requirement is in place, there has developed a principled and logical debate over issues of public utility regulation that is simply not present in Canada. Canadian public utility doctrine – and, in my opinion, Canadian public utility regulation – would improve by adopting this approach.