
New BCUC Powers to Impose “Administrative Penalties”

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Overview

1. What are administrative penalties?
2. Administrative penalty proceedings at BCUC
– what to expect?

What are Administrative Penalties?

- Fines against companies, and in some cases employees of companies
- Half-way house between:
 1. penal/criminal punishments; and
 2. non-financial administrative orders, eg. licence restrictions
- Rationale: more effective regulation in consequence of greater enforcement options
- First in BC in 1989, now hundreds in Canada.

BCUC's Other Enforcement Powers

- S. 106 – it is an “offence” to refuse to obey an order of BCUC – effectively a criminal charge
- S.38 – BCUC power to establish standards for safe, efficient , just and reasonable service.

BCUC Administrative Penalty Regime

- Two Elements:
 - new Part 8.1 of UCA re Administrative Penalties
 - *Administrative Penalties Regulation*
 - both came into force in November 2012

BCUC Administrative Penalty Regime

- Regulation establishes range of “penalties” for different contraventions
 - up to \$1,000,000 for corporations
 - up to \$100,000 for director, officer or agent for specified contraventions
 - otherwise \$25,000 maximum
- Contravention more than one day: each day may be a separate contravention for purposes of penalty (s. 109.2(2))

BCUC Administrative Penalty Regime

- Part 8.1 establishes the substance of the new regime
 - contravention of UCA or regulations (109.1(1))
 - contravention of “order, standard or rule” or a “reliability standard” of the BCUC (109.1(1))
 - director, officer or agent also contravenes, if authorized, permitted or acquiesced in corporate contravention (109.1(2))

BCUC Administrative Penalty Regime

- due diligence and “officially induced error” defences (s.109.1(4))
- penalty can be imposed only after a hearing (s.109.1(1))

BCUC Administrative Penalty Regime

- Factors to consider in imposing “penalty” (s. 109.2(3)):
 - effect on others
 - benefit
 - past action eg. repeated contraventions, lack of institutional commitment, cost to comply
 - post action eg. cooperation, self-reporting
 - state of mind eg. deliberate, intentional

BCUC Administrative Penalty Regime

- public utility contravenors – may not recover “penalties” in rates (s. 109.5)
- limitation period (of sorts): 2 years from date of notice to chair of BCUC, to notice of contravention and penalty (s.109.8(1))

BCUC Administrative Penalty Proceedings

- Very little in Part 8.1 or Regulation regarding process
- Surprising? (\$1,000,000/day)
- What happens before the hearing?
 - investigation phase (maximum 2 years)

Challenges to Administrative Penalty Regimes

- Constitutional issues
 - division of powers – criminal law is federal responsibility
 - s.11(d) of Charter – presumption of innocence in regard to offences
- Administrative law issues - procedural fairness
 - investigative stage – impartial and thorough investigation
 - hearing stage – who speaks for the “prosecution”

Investigation Stage Issues (1)

- 2005 BCUC investigation into use of open-access transmission service by BC Hydro – no wrongdoing found:
 - investigation stage yielded report of 3rd party consultant that was adverse to BC Hydro
 - on later application to establish new terms and conditions, BCUC sought to retain same consultant
 - consultant was dismissed, on application, on basis of reasonable apprehension of bias

Investigation Stage Issues (2)

- 2012 BCUC investigation into complaints of natural gas marketer, Active Energy:
 - investigation report by 3rd party was challenged and ultimately struck on basis that not impartial, went beyond mandate
 - *ad hoc* establishment of investigation phase staff, with own counsel, and firewall between commissioners and investigation staff

BCUC Implications

- Fundamental question: will *ad hoc* establishment of investigation staff be sufficient?
 - does firewall act only in regard to the matter? does it act only while the matter is on-going?
- At hearing: who, if anyone, will advocate for a finding of contravention:
 - investigation staff problematic (recall obligation to be impartial)

BCUC Implications (con't)

- Assuming more-or-less permanent investigation/prosecutorial roles develop:
 - is “fleshing out the record” role still appropriate? necessary?

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