

ENERGY LAW & POLICY

Gordon Kaiser and Bob Heggie, Editors, Carswell 2011

Reviewed by Glenn Zacher*

In *Energy Law & Policy*,¹ Gordon Kaiser and Bob Heggie make an important contribution to the literature on law and policy in the continually evolving electricity and gas sectors. Mr. Kaiser and Mr. Heggie, veterans of the Canadian utility regulatory sector, have assembled and edited a topical collection of articles from a cross-section of leading academics, regulators, and experts. Mr. Kaiser, now an arbitrator in international and domestic energy disputes, served as Vice Chair of the Ontario Energy Board (OEB) for six years where he authored a number of notable decisions.² Prior to his appointment to the OEB, Mr. Kaiser acted as counsel on a number of high-profile energy and competition cases. Mr. Heggie is currently Chief Executive Officer of the Alberta Utilities Commission.³ Prior to his appointment in 2008, he served as Executive Manager of the Utilities Branch and as Associate General Counsel of the Alberta Energy and Utilities Board, during which time he led initiatives on gas and electricity restructuring.⁴

Energy Law & Policy is not a text book or a comprehensive overview of policy and regulation in the electricity and gas sectors, but, it is also more than a collection of articles. It is roughly organized around four subject areas – General Canadian Regulatory Principles and Developments, Challenges Arising from Deregulation, Green Energy Developments and Utility Rate Regulation – each of which contains articles on important topics within these subject areas. Further, while *Energy Law & Policy* is focused on the Canadian power sector – in particular, Ontario and Alberta, the only two provinces to have restructured their power markets – it should resonate with a broader audience. The articles in *Energy Law and Policy* touch on themes that are common to the evolution of the power sector across North America and Europe – e.g., intersection of policy and traditional regulation, changing role of utility regulators, implications of green energy development, promoting competition, monitoring and enforcing compliance, etc. In addition, several articles offer useful overviews on the fundamentals of energy regulation in Canada, current trends and developments in the Canadian gas and electricity sectors, and specific areas where the Canadian regulatory landscape is unique. At a time when North American power markets are further integrating – Keystone XL being a notable (and perhaps temporary) exception – and several Canadian jurisdictions are opening

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1. ENERGY LAW & POLICY (Gordon Kaiser & Bob Heggie eds., 2011).

2. *Id.* at vii; see also Decision - Rate Affordability Programs, *Enbridge Gas Distrib. Inc.*, EB-2006-0034 (Ont. Energy Bd. Apr. 26, 2007), *rev'd*, Advocacy Ctr. for Tenants-Ont. v. Ontario Energy Bd. (2008), 293 D.L.R. 4th 684 (Can. Ont. Div. Ct.); *Natural Gas Electricity Interface Review*, EB-2005-0551 (Ont. Energy Bd. Nov. 7, 2006); *Application by Toronto Hydro-Elec. Sys. Ltd.*, EB-2005-0421 (Ont. Energy Bd. Nov. 10, 2006), *rev'd*, Toronto Hydro-Elec. Sys. Ltd. v. Ontario Energy Bd. (2008), 93 O.R. 3d 380 (Can. Ont. Div. Ct.), *aff'd*, Toronto Hydro-Elec. Sys. Ltd. v. Ontario Energy Bd., [2010] O.J. No. 1594 (Can. Ont. C.A.).

3. ENERGY LAW & POLICY, *supra* note 1, at vi.

4. *Id.*

up opportunities for investment (e.g., Ontario's and Nova Scotia's feed-in-tariff programs, and Ontario and Alberta's competitive transmission procurements), these articles will be instructive for U.S. and other foreign readers.

Section I of *Energy Law & Policy* contains two very good general articles on administrative law and utility regulatory developments. In "Administrative Law and Energy Regulation," professor David Mullan, one of Canada's foremost administrative law experts, provides an overview of important constitutional, administrative, and regulatory law principles as they apply to the energy sector.⁵ In "Developments in Public Utility Law," Kaiser and Heggie contribute a lengthy article on developments in Canadian utility regulation.⁶ Together these two articles are excellent primers on important principles governing Canadian utility regulation, including the scope of utility tribunals' jurisdiction, standards of judicial review/appeal, disclosure requirements, solicitor-client privilege, the fair return standard, bypass/asset stranding, and so on. Of particular interest are Kaiser's and Heggie's analysis of several recent cases which have reinforced utility commissions' broad regulatory powers to protect consumers through the establishment of low-income rates and restrictions on utility dividend policies. In addition, Section I includes a paper by Justice David Brown on "Aboriginal Rights in Energy Infrastructure Development."⁷ The law in Canada concerning the federal government's duty to consult and accommodate aboriginal peoples is an evolving and tremendously important area of the law which can have profound and far-reaching impacts on infrastructure development.

Section II includes articles addressing some of the challenges associated with the restructuring of gas and electricity markets in Canada. There is a particularly fascinating article by Bill Rupert, a former OEB Board member, on the deregulation of the Ontario natural gas storage market in 2006.⁸ This novel proceeding addressed the question of how an economic regulator decides whether "it is no longer necessary to regulate the price of a commodity."⁹ Mr. Rupert methodically walks the reader through the history of the gas storage market, the changing market dynamics that precipitated the proceeding, the interests and positions of the parties involved, and, ultimately, how the Board made its decision to forbear in regulating a large portion of the storage market. Mr. Rupert also offers some interesting closing thoughts on how, in the wake of the Board's decision, the gas storage market has evolved. Alek Dadson, Dan Allegretti, and Ian Mondrow, in an article entitled "Competition in U.S. and Canadian Electricity Markets," briefly review and contrast the story of competitive electricity markets in the U.S. and Canada respectively.¹⁰ One

5. David Mullan, *Administrative Law and Energy Regulation*, in ENERGY LAW & POLICY, *supra* note 1, at 35.

6. Gordon Kaiser & Bob Heggie, *Developments in Public Utility Law*, in ENERGY LAW & POLICY, *supra* note 1, at 93.

7. Hon. David M. Brown, *Aboriginal Rights and Energy Infrastructure Development*, in ENERGY LAW & POLICY, *supra* note 1, at 249.

8. Bill Rupert, *Deregulation: The Ontario Natural Gas Shortage Case*, in ENERGY LAW & POLICY, *supra* note 1, at 291.

9. *Id.*

10. Alek Dadson, Daniel Allegretti & Ian Mondrow, *Competition in U.S. and Canadian Electricity Markets*, in ENERGY LAW & POLICY, *supra* note 1, at 307.

minor complaint with the *Electricity Law & Policy* is with the brevity of this section. This is a rich area, and it would have been interesting to further examine the successes and failures of other aspects of deregulation in Alberta and Ontario.

In Section III, Kaiser and Heggie include papers on the transformation of the electricity sector introduced by green energy policies. Ontario has been at the forefront of green energy development in North America, and the articles included in this section should be of broad interest. Peter Fraser, Managing Director of Regulatory Policy at the OEB, looks at the profound implications that green energy policies have on the job of economic regulators.¹¹ In a further article, Mr. Fraser and Roy Hrab address the challenges arising from Ontario's attempt to wean itself off coal.¹² In 2003, coal units accounted for 7,500 MW (25%) of the province's installed generation capacity; as of today, all but 2,000 MW have been shut down, with the balance due to be retired by 2014.¹³ Michael Trebilcock and James Wilson also contribute an interesting analysis on the perils of picking technology winners as part of renewable energy policies.¹⁴

Finally, Section IV includes articles on developments in the area of rate regulation – e.g., the cost of equity capital and a fair rate of return, the fair return standard, and developments in rate design for electricity distributors. These articles, while of narrower interest, reflect current debates before Canadian regulators on how to fairly treat the respective interests of investors and consumers. In the book's final article, Scott Hempling poses the question: "Effective Regulation: Do Today's Regulators Have What It Takes?"¹⁵ Mr. Hempling's article – a condensed version of the arguments advanced in his recent book, *Preside or Lead? The Attributes and Actions of Effective Regulators*¹⁶ – addresses the expanding role of regulators and how, in this context, regulators need to act in order to effectively discharge their public interest mandate.

In summary, *Energy Law & Policy* highlights many of the key themes and topics that policymakers and regulators are grappling with across the North American electricity and gas sectors. At the same time, for U.S. and European observers, the book will offer an insightful glimpse into how some of these themes are playing out in Canada.

11. Peter Fraser, *Implications of the "Green Economy" for Electricity Network Regulation*, in ENERGY LAW & POLICY, *supra* note 1, at 379.

12. Roy Hrab & Peter Fraser, *Climate Change and the Coal Challenge: The Case of Ontario*, in ENERGY LAW & POLICY, *supra* note 1, at 445.

13. *Id.* at 446.

14. Michael J. Trebilcock & James S.F. Wilson, *The Perils of Picking Technological Winners in Renewable Energy Policy*, in ENERGY LAW & POLICY, at 343.

15. Scott Hempling, *Effective Regulation: Do Today's Regulators Have What It Takes?*, in ENERGY LAW & POLICY, *supra* note 1, at 541.

16. This book was reviewed in Volume 32 of the *Energy Law Journal*. William A. Mogel, *Preside or Lead? The Attributes and Actions of Effective Regulators*, 32 ENERGY L.J. 627 (2011) (book review).