September 1, 2010

The Issues and Challenges with Public Participation in Energy and Natural Resources Development in Alberta

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Public participation is a key feature of energy and natural resources development in Alberta. The provincial government often expresses its desire for participation by Albertans in its policy making and planning processes. At the project approval stage, project proponents regularly conduct public consultation programs and regulatory boards hold public hearings and award costs to interveners.

Yet there are signs that public participation is not all that it seems in the Alberta energy and resources development context. Albertans seem frustrated and dissatisfied with the current level or type of public participation available: see, for example, Dan Woynillowicz & Steve Kennett, "Passage of Bill 46 Perpetuates EUB Shortcomings" (2007). Applications for leave to appeal decisions of energy tribunals on issues of public participation and procedural fairness seem to be on the rise: see, for example, *Prince v. Alberta (Energy Resources Conservation Board)*, 2010 ABCA 214, *Cheyne v. Alberta (Utilities Commission)*, 2009 ABCA 94, and *Kelly v. Alberta (Energy and Utilities Board)*, 2008 ABCA 52.

The Canadian Institute of Resources Law (CIRL) at the University of Calgary is currently engaged in a research project, funded by the Alberta Law Foundation, which is focusing on legal and policy questions in relation to public participation in the Alberta energy and natural resources development context. To obtain input on the issues and challenges facing public participation in this context, CIRL held a Round Table discussion at the University of Calgary on April 16, 2010. There were 20 participants in attendance, all of whom have experience with public participation issues in the energy and natural resources development context. There was representation from landowners, regulators, industry, the regulatory bar, environmental and natural resources organizations, multi-stakeholder consultation groups, policy and energy consultants, and academia.

This post outlines the key themes that emerged from the discussions at this Round Table. No one suggested that public participation in this context is not a valid and worthwhile exercise. Effective and meaningful participation brings with it the prospect of better and richer decision making. It is a legitimate goal to strive for, to work towards, even though we may not all, at first instance, agree on the means for getting there.

For purposes of the Round Table (and CIRL's underlying project), the term "public participation" was used as an all-encompassing label to describe all mechanisms that allow anyone other than government/governmental agencies and project proponents to communicate their views and influence decision making. Although defined broadly, the Round Table did not

deal with the unique issues around the Crown's duty to consult with Aboriginal peoples in regard to energy and natural resources development.

Policy and Planning Stages

There is currently no legislated requirement for public participation in the policy making and planning stages for energy and natural resources development in the province. Any public consultation that occurs does so through *ad hoc* processes at the discretion of the provincial government. That said, there is a history in Alberta of large, province-wide public participation processes designed to assist the government in developing public policies in this context. Recent examples discussed at the Round Table included the work of the Cumulative Environmental Management Association (CEMA), a multi-stakeholder consensus-based partnership tasked with managing cumulative effects in the Athabasca Oil Sands region, and the consultation processes related to the Alberta government's legislated authority to establish regional land-use plans for the province: see the *Alberta Land Stewardship Act*, S.A. 2009, c. 26.8 (*ALSA*).

Participants at the Round Table expressed the view that perhaps more, and certainly more effective, public participation should occur early on in the policy and planning stages for energy and resources development. This would prevent policy issues from arising down the road at the project approval stage which might, it was submitted, be an inappropriate venue or come too late in the decision making process.

Participants highlighted several issues and challenges in regard to current levels of public participation at the policy and planning stages of resources development in Alberta. Many of the processes established by the government have suffered from a lack of commitment both in terms of a failure to provide adequate resources and a failure to ensure that the outputs of the processes are given adequate weight and consideration. Processes often lack specific and detailed guidelines regarding the mandate, terms of reference and the expectations of stakeholder involvement. For public participation to be meaningful, process rules must be detailed and set out plainly at the outset. There must also be a strong sense that participants will in fact have an opportunity to, and will indeed, influence the government's decision-making processes.

With respect to CEMA in particular, although in some ways an idyllic form of multi-stakeholder consultation, participants agreed that the high expectations of this process were never met. Some of the problems identified were: unrealistic objectives, a lack of focus, inadequate resources, deficiencies in the design and implementation of the process (e.g. decision making with limited information and uncertainty, a lack of incentive structure for participants), the underlying pace of development, and lack of a policy and planning context within which to do its work. Moreover, government failed to provide a regulatory backstop in the sense of telling CEMA that if it did not make decisions within a specified time frame, the government would make the decisions instead.

There was significant discussion at the Round Table about the recent regional advisory committee (RAC) established under *ALSA* to provide advice to Cabinet on the development of the Lower Athabasca Regional Plan. Participants noted that the "advice sheets" (*i.e.* the recommendations, rationales, and dissents) used by the Lower Athabasca RAC and submitted to government are simply advice to Cabinet and therefore do not have to be released to the public. There is no requirement to do so in the legislation; nor is there any requirement that the government consider or follow the advice of the RAC. At the end of the day, participants were of the view that this RAC process was a closed and non-transparent one which did not really

involve the public. “Public” representation on the RACs consists of hand-selected representatives appointed by government.

Stakeholders identified the following challenges with the Lower Athabasca RAC process: (i) a lack of clear instructions about what questions should be answered (and therefore a lack of clarity on what was relevant or not); (ii) a lack of access to necessary information (including a lack of necessary knowledge on the part of participants); and (iii) a lack of a clear understanding about how the ultimate recommendations would be used in developing a regional plan. Without clear guidelines, this RAC found it difficult to draft workable recommendations that would balance the interests of the various stakeholders.

Still, participants at the Round Table noted that, despite the frustrations (and the often significant unpaid time commitments involved), many stakeholders would still participate in such consultation processes. If they are not part of the process (however murky and tenuous), then who will represent their interests? It is hoped that perhaps one day public pressure on government will prevail and these processes will lead to meaningful and enforceable results. There is also merit in simply being at the table if only to observe and listen. Sometimes, though, it was noted that a tipping point can be reached and stakeholders will walk away from such processes. This may or may not lead to necessary changes to get the process back on track.

Generally, participants at the Round Table submitted that Alberta’s approach to public participation at the policy and planning stages for energy and natural resources development is not an example of citizen empowerment. Although they may be consulted, Albertans do not have the power to really affect policy and planning outcomes. Because there is no legal requirement for the government to adopt and implement the recommendations from these *ad hoc* processes, there is no ability for stakeholders to ensure that their views will be heeded to by government.

The challenges noted at the Round Table with respect to the *ad hoc* public consultation processes adopted by the government with respect to policy and planning can be summarized as follows: (i) there is a need for strong government commitment to these processes in terms of funding, setting clear process rules and providing regulatory backstops; (ii) defined rules of procedure must be established and well understood from the outset; (iii) terms of reference must be clear and realistic (and adequate resources must be granted to accomplish these); (iv) the issue of relevance must be carefully considered at the outset (i.e. what is relevant to deliberations and what is not); (v) time lines and incentives must be set forth at the outset; (vi) there must be adequate knowledge and experience available in order to tackle the terms of reference in an informed way (or there must be resources available to provide that information and knowledge as needed); and (vii) participants must know that the outputs from these processes will be carefully considered by government.

Finally, there was discussion at the Round Table about funding for the costs of attendance and participation in these consultation processes. There seemed to be general agreement that Albertans cannot participate effectively in such processes unless they can afford to. They must have the time and ability to become educated about the issues. There was no discussion, however, of how such funding issues should be addressed.

Crown Mineral & Surface Rights Disposition

Although tied to policy and planning (or at least they should be), mineral rights disposition and the granting of access to the surface of public lands in Alberta represent separate stages in the

current resources development process in Alberta. Despite the public nature of the majority of the province's natural resources, it was noted at the Round Table that there are no mechanisms for public participation in the current disposition decision-making processes. Whatever review processes occur are purely internal to government.

Participants noted that the disposition of Crown mineral rights is a critical stage in the resource development process in that it creates legally-enforceable property rights. Once a property right is granted, the holder of that right has an advantage in any decision-making process. The view was expressed that once the government gives someone property rights, it cannot take those away without compensation. It was submitted that the decision about whether or not development of these minerals is in the public interest occurs once they are disposed of.

For grants of rights to access the surface of Crown lands, there was some discussion about the need for energy proponents to obtain consents from other Crown disposition holders (e.g. pursuant to forest management agreements or grazing leases), but it was observed that the Alberta government currently does not engage in broad-based public consultation in making surface disposition decisions.

Project Approval Stage

At the stage where an energy proponent seeks approval for a particular project, there are three main avenues for some type of public participation in Alberta. First, there is participation through industry consultation and notification pursuant to required participant involvement programs. Second, there is some opportunity, albeit limited, to comment upon environmental impact assessments conducted pursuant to the province's key environmental legislation, the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (*EPEA*). Third, and most importantly, there is the possibility of triggering and participating in a public hearing to express one's interests and concerns directly to an energy regulator. The key regulators at the project approval stage for energy and natural resources development projects are the Energy Resources Conservation Board (ERCB) for oil and gas projects, the Alberta Utilities Commission (AUC) for electricity generation projects, and the Natural Resources Conservation Board (NRCB) for forestry, mining and water management projects.

1. Consultation by Industry

Participants at the Round Table noted that regulators in Alberta require project proponents to consult with affected stakeholders prior to bringing forth their applications: see, for example, ERCB, *Directive 56: Energy Development Applications and Schedules* (16 June 2008). Some expressed the view that this consultation process is an important avenue for public participation. It was argued that it is the job of industry and affected stakeholders to resolve any concerns without intervention by the regulator. Other participants disagreed and held the view that some project proponents treat public consultation as simply a "box" to be checked off on their application form. Concerns over power and knowledge imbalances between rural landowners and companies were also expressed.

Other issues with consultation by industry from the point of view of "public participation" that were raised included: (i) how "public" is such consultation and how much does it involve Albertans as citizens rather than as immediately affected landowners?; (ii) while good business practice for industry, does such consultation really amount to "public participation in energy and

natural resources development in Alberta"?; and (iii) how relevant are such consultations to the ultimate decisions made by the regulators "in the public interest" (discussed below)?

2. Environmental Impact Assessment (EIA)

There was brief mention of the possibility of public participation through the EIA process pursuant to *EPEA* at the Round Table. *EPEA* and its regulations allow anyone who is "directly affected" by a proposed activity subject to EIA consideration to submit written statements of interest and concern to Alberta Environment (AENV): see *EPEA*, s. 44(6), 73(1) and *Environmental Assessment Regulation*, A.R. 112/93. It was noted, however, that even when an EIA occurs under *EPEA*, there is no deliberative process that results. Written statements of concern are simply filed with AENV, and once AENV deems the EIA to be complete, it forwards the EIA on to the energy/natural resources regulator. There is no evaluation or public deliberation process at the EIA stage. Further, the majority of energy project applications (*i.e.*, oil and gas wells) are exempted from the EIA process under *EPEA*: see *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, A.R. 111/93, Schedule 2(e).

3. Public Hearings

Often when people think of public participation in energy and natural resources development in Alberta, they think of the public hearings that are sometimes held to determine whether or not a project will be approved. These hearings can be important avenues for public input. Other jurisdictions (*e.g.*, British Columbia and Saskatchewan) do not allow for comparable hearing processes in this context.

While important from the point of view of public participation, one view expressed at the Round Table is that success comes when no hearings are held and proponents and affected stakeholders reach solutions on their own, without regulatory board intervention. Some participants argued that the fact that only a very small percentage of applications in Alberta currently go to a hearing demonstrates that the system is working.

Generally, participants at the Round Table noted that effective participation at hearings, when they are held, can be a real challenge. Hearings can be costly, time-consuming and adversarial. It was submitted that quasi-judicial hearings may not be the best way to get public input on a project and that boards should have more flexibility to get public input in different formats, without the quasi-judicial aspects of a hearing.

Participants at the Round Table discussed in detail the issues and challenges with the current regulatory board public hearing process. Although there is overlap, the issues can be considered through two broad categories: the "public interest test" and "the test for standing".

a. The Public Interest Test

In approving projects, the ERCB, AUC and NRCB are mandated to consider whether they are in the "public interest", having regard to their economic, social and environmental effects: see, for example, section 3 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 (*ERCA*). What constitutes the "public interest" and how it is determined generated considerable discussion at the Round Table.

Participants acknowledged that the public interest is not easily defined and that it is a difficult issue for tribunals to address. How can boards balance all the factors in the public interest? How can all the views representing the public interest be expressed before a board? Perhaps owing to these difficulties, participants noted that, in practice, boards have interpreted the public interest test as amounting to nothing more than a cost-benefit analysis where the impacts (social and environmental) of a particular project are weighed against the benefits (social and economic), or *vice versa*. Some participants noted, however, that it is not entirely clear from the legislation that a cost-benefit analysis is what the "public interest" test demands. Government must provide boards and Albertans with more detailed guidance on what the "public interest" test entails.

Participants at the Round Table also wondered whether "public interest" determinations have already been made before applications get to the boards. For instance, in the case of oil and gas project applications, the government has already disposed of the minerals (and in the case of Crown lands, has granted surface access). Do these disposition decisions not already indicate that developing these minerals is in the public interest according to the government?

Once before the regulator, participants suggested that there seems to be a presumption that all proposed projects are in the public interest as long as they meet the boards' technical requirements. This comes to light most clearly when one considers routine applications (*i.e.* ones that do not go to a hearing but meet all technical requirements). Routine applications are approved without public review; this must mean that they meet the public interest test because that is the standard the boards must apply in their review. Participants questioned who represents the public interest for those applications. Perhaps the public interest is reflected in the technical requirements, the standards of the day? Even for those applications that do go to a hearing, participants noted that regulators seem to take the view that as long as the project complies with the standards of the day and there is a plan to mitigate harm to acceptable levels, the project will be deemed to be in the public interest.

Ultimately, the Round Table revealed two opposing views on what the "public interest" test demands of regulators. On the one hand, it was argued that the "public interest" test at this stage in the development process requires boards to determine whether the particular project, as designed, meets with current requirements and mitigates impacts to acceptable levels. If so, the project is in the public interest as far as the project approval stage is concerned. On the other hand, the view was expressed that the "public interest" test, as set out in the relevant legislation, requires consideration of broad questions of policy which include questions around the nature, type, pace, intensity, etc. of development. On this view, even if a project adheres to the technical rules, boards can reject applications on broad policy grounds.

The different views on what the public interest test demands lead to different views on what is relevant argument and evidence before the boards. It also leads to distinct views on who should be entitled to participate at public hearings, as discussed below. On the question of relevance, participants at the Round Table focused on the fundamental question of whether broad policy issues properly belong at the regulatory hearing stage. Some participants took the view that regulatory boards are ill-equipped to handle broad policy questions and they are, in any event, not the appropriate decision making body in this regard. Policy is the domain of government, not an independent quasi-judicial tribunal. Board members are appointed because they have technical expertise with respect to the particular projects reviewed, not because they are policy makers.

Participants at the Round Table noted that Albertans are in fact increasingly trying to use board hearings as a forum to debate policy. This is so despite the fact that the regulators take the position that they do not have jurisdiction over broad questions of policy. Issues raised by interveners may not relate to specific details of the project, but they might relate, for instance, to questions about whether coal bed methane should be pursued in the province or questions about impacts on lands not directly involved in the project. Ultimately, it was noted that the process can lead to frustration and disillusionment on the part of hearing participants since, although they may be allowed to 'vent' at the hearing, the policy issues that they raised will typically not appear in the regulator's decision report.

Not all participants at the Round Table agreed with the view that policy debate is inappropriate at board hearings. For one thing, given the lack of other opportunities elsewhere in the development process, often the hearing is the only vehicle available for those affected by development to voice their concerns about the policy issues. Secondly, the legislative provisions setting out the public interest test can be read broadly as requiring a consideration of a wide range of policy issues. Further, representation of broad public interests at regulatory hearings can aid in the boards' understanding of the broader issues and can help to contextualize the impacts of the particular project under review. Lastly, it was observed that Albertans do not generally care about or understand the divisions of labour and mandates between the government and regulatory boards; what they really want is to have their say as efficiently as possible. Sometimes a regulatory hearing best serves this purpose.

b. The Test for Standing

The ability to trigger a regulatory hearing in Alberta depends on meeting the test for "standing" set out in the relevant legislation. Although there are differences, participants at the Round Table agreed that they are all versions of the "directly affected" test: see, for example, section 26(2) of the *ERCA*.

Participants noted that regulators are increasingly interpreting the standing provisions strictly rather than liberally. The ERCB, for instance, focuses on safety or economic or property rights and requires a close connection in terms of proximity to the proposed project. The Board also looks to see if the person seeking standing is affected differently than the general public. Participants at the Round Table queried whether the recent decision of *Kelly v. Alberta Energy Resources Conservation Board*, 2009 ABCA 349 eliminates this need to be "differently" affected.

Defining who is "directly affected" in any given instance is the biggest challenge facing the regulators in applying the test for standing. For instance, does "directly affected" in the legislation include taking impacts caused by cumulative effects into account? Generally, it was noted that there is pressure on regulators to avoid hearings and therefore to narrow standing. Project proponents want to avoid the costs and time-consuming nature of hearings. There are also budget constraints facing the boards themselves. Moreover, a narrow approach to standing is justified by an interpretation of the public interest test as requiring only a consideration of the specific details of the project under review (as discussed above). Only those stakeholders (typically landowners) that will be directly affected by the design or type of project should be heard so as to make required adjustments to the nature of the project proposed.

Participants noted, however, that if, as discussed, the public interest test requires a broader consideration of interests and concerns (including broad energy policy issues), then there is

currently a disconnect between the narrow approach to standing (*i.e.* one focused on economic and property rights) and the public interest test. How can a few landowners contribute to an understanding of what constitutes the "public interest" in this broad sense? The narrow approach to standing focuses only on the details of the specific project being proposed and not on the criteria by which the application is to be judged (*i.e.* the broad public interest). It was submitted that if boards do not hear from a broad range of people and interests, their decisions will not reflect the public interest at large. To ensure the public interest is heard, it was suggested that perhaps something other than the current standing tests are required. Perhaps there is a need for regulators to allow "public interest standing" as courts have done? And perhaps the financial burden of more hearings should be imposed on all sectors to allow for broader consultation?

Of particular concern to participants at the Round Table was the fact that the narrow approach to standing is very problematic in cases of projects on public lands. Unless there is someone with an economic interest (*e.g.* a surface disposition holder), there is usually no one who can meet the directly affected standing test with respect to public lands. The ERCB has, for example, denied standing to recreational users of public lands (see e.g. *Sawyer v. Alberta (Energy and Utilities Board)*, 2007 ABCA 297). Participants thus wondered who speaks to the public interest for applications on public lands. Compounding the problem is the current lack of land-use plans. How is the public interest being determined with respect to development on public lands?

Participants were also concerned about the current lack of clarity with respect to the standing rules in practice. The practice of the ERCB in particular was discussed. Although it takes a very restrictive view and only allows a hearing to be triggered at first instance by someone with a closely affected property or economic interest, the ERCB will sometimes allow others to participate (as "discretionary participants") to some extent once a hearing has been called by someone with proper standing. For example, the ERCB might allow (unsworn) parties to have air time (to "vent") at the microphone during a hearing. This raises questions as to whether those parties need to be cross-examined and as to the weight and value that should/will be given to their submissions. Generally, clarity is needed on the exact rules of the game to ensure fairness and transparency at these hearings.

Lastly, participants at the Round Table discussed the issue of costs. Funding plays a significant role in one's ability to participate effectively at regulatory hearings. Although each board is governed by its own legislation, it was noted that the applicable tests for eligibility for costs are generally narrower than those for standing. Participants observed that even where a broad view of standing is adopted, a significant deterrent to effective participation remains because of the possible inability to recover at least some costs.

Conclusion

The primary issues and challenges identified at CIRL's Round Table can be summarized as follows:

1. There is a need for more effective public participation at the policy and planning stages for energy and natural resources development in Alberta. This includes decision making in regard to the setting of energy policy and the establishment of regional land-use plans for the province. Early public participation would help remove policy discussions from the possibly ill-suited project approval stage. To be effective, these processes must be supported by strong government commitment in terms of the provision of resources and the implementation of

2. outputs. Specific and detailed guidelines must also be provided with respect to the mandate, terms of reference, expectations, and rules of the process.

3. There is a need for public participation at the Crown mineral and surface rights disposition stages. In most cases, the sale of mineral rights leads to the development of those rights. Disposition decisions by government with respect to Crown resources are critical decisions that determine the course of energy and natural resources development in the province. They represent important public interest decisions that should be made through consultation with Albertans.

4. There is a need to address several aspects of existing participation processes at the project approval stage. Does stakeholder consultation by industry really amount to public participation in energy and natural resources development decision making? How relevant are such consultations to the ultimate decisions made by regulators "in the public interest"? With respect to the public interest test, how is the public interest considered in the case of routine applications that do not go to hearing? For those that do go to a hearing, does the public interest test require a project-specific analysis of technical issues or a broader analysis of policy issues? What is the appropriate test for standing in light of the public interest test? How does a narrow approach to standing support a public interest determination where public lands are involved?

By addressing these issues and challenges, public participation in energy and natural resources development in Alberta will be strengthened, and government decision making enhanced.

This post is an edited version of a longer article published by the Canadian Institute of Resources Law in Resources, available here.