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A single window for the permitting of energy projects in Alberta: who will look out for the chickens?

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Report commented on:

Enhancing Assurance: Developing an integrated energy resources regulator, a discussion document, May 2011

In a discussion paper released on May 9, 2011 under a covering message from Premier Stelmach, the provincial government has announced its intention to create a single window for the permitting of energy projects in the province. The proposal envisages a single new board that will have all of the current responsibilities of the Energy Resources Conservation Board (ERCB) plus the following additional responsibilities (as they pertain to energy projects including conventional oil and gas, oilsands, and coal – and in the future perhaps mining):

1. The responsibilities currently vested in Alberta Environment under the terms of the *Environmental Protection and Enhancement Act*, (*EPEA*) RSA 2000c. E-12, and the *Water Act*, RSA 2000, c.W-3 to conduct EIAs, issue licences and authorizations under the *Water Act* and *EPEA* and to deal with reclamation and remediation on private land.

2. The responsibilities currently vested in Sustainable Resource Development (SRD) to issue public land dispositions including mineral surface leases, and to deal with reclamation and remediation on public land.

Does this make sense?

The substance

The idea of a single window for permitting energy projects is not new and there are undoubtedly some awkward divisions of responsibility that currently exist as between the ERCB, Environment and SRD. Examples might include the division of responsibility as between well abandonment and surface reclamation; the conduct of EIAs for major energy projects; the responsibility for protecting potable groundwater; air emissions from natural gas processing plants; etc. Bringing everything under one roof should produce efficiencies but the policy question is, at what price? Is efficiency the only value that we care about? The title of the report is "enhanced assurance" not "enhanced efficiency" or "competitiveness" (although that is undoubtedly the sub-text). So we should at least ask the following types of questions: Will this proposed change deliver better protection for the environment? Will it do a better job of ensuring that wells are abandoned in a timely way and a better job of ensuring that reclamation is properly funded and actually carried through to completion? Or is it possible that this new Board will be

captured by the industry that it is regulating and see its job as being one of facilitating the permitting of new energy projects?

There may be inefficiencies in the current division of responsibilities between the ERCB and Environment but there may also be important checks and balances inherent in that division.

Timing

Does the timing of this proposed restructuring make sense? I am not convinced that we should be rushing into big changes in the regulation of energy projects. It is not that long ago that we married the ERCB to the utility board/commission (the AEUB) and then divorced them a few years later – what did we learn from that experiment that might be useful here? Here we are proposing to marry independent regulators and line departments. But I suggest caution here principally because I think that it is important that we work through the implementation of the first two regional plans under the *Alberta Land Stewardship Act*, SA 2009, c.A-26.8 before we make further legislative changes (see my earlier blog on the steps we still need to take to implement *ALSA*).

Some challenges and questions

The discussion paper contains a number of "issues to consider" some of which raise important questions, and some of which seem just plain silly -- e.g. the suggestion (at 16) that straightforward applications to use public lands might continue to be dealt with by the line departments with the 20% of difficult decisions being referred to the new Board. But here are some other questions about this brave new world: (1) What will the Crown's duty to consult look like? (2) What will happen to the jurisdiction of the Environmental Appeal Board? (3) What will the right to intervene look like?

The Crown's Duty to Consult

The discussion paper has very little to say about the implications of this proposal for the duty to consult for future permitting decisions; or whether the Crown has fulfilled its duty to consult in the development of this policy. What the paper does say is this (at 19):

> The Government of Alberta will maintain responsibility for assuring that First Nations consultation processes are completed. These will not be transferred to the single regulator. The government is committed to fulfilling its legal obligations to First Nations.

It is not clear to me that this is an accurate statement of either the *current* position or what the *future* position will be given the responsibilities that the Board will exercise.

As to the current position, the situation would seem to be as follows: (1) the Crown has the duty to consult and the Crown has not expressly or impliedly delegated that to the Board (ERCB); but, (2) since the Board has the authority to decide questions of constitutional law the Board has a duty to satisfy itself that the Crown has fulfilled its duty before granting an authorization that has the potential to prejudice an aboriginal or treaty right: *Rio Tinto v Carrier Sekani Tribal Council*, 2010 SCC 43. In other words the ERCB currently has a duty to ensure that the Crown has fulfilled its duty to consult.

One of the reasons why it is possible to conclude that the ERCB does not currently have a duty to consult is that its role is largely a quasi judicial role. The new Board will have additional responsibilities (such as the power to issue surface land and water dispositions) that would be hard to characterize as quasi judicial. While these different roles no longer offer a bright line in assessing whether a tribunal has a duty to consult (see *Carrier Sekani* and my blog on that case), it may be easier to reach the conclusion that the duty to consult has been conferred on a tribunal with respect to administrative or executive functions: see *Chief Apsassin v. B.C. Oil and Gas Commission*, 2004 BCCA 286.

What happens to the jurisdiction of the Environmental Appeal Board?

Under the current rules interested persons may appeal various types of decisions to the Environmental Appeal Board (EAB). These decisions include decisions with respect to water licences and reclamation decisions. In other work I have emphasised the importance of the EAB appeal mechanism insofar as it provides an opportunity for a more purposive approach to the interpretation of environmental statutes: Bankes, "Shining a light on the management of water resources: the role of an environmental appeal board" (2006), 16 Journal of Environmental Law and Practice 131. I think that it would be unfortunate if this opportunity were lost in this re-structuring process. I also think that it would be strange if the EAB appeal mechanism were continued for decisions made by Alberta Environment but discontinued in relation to the same types of decisions made by the new board.

The right to trigger a hearing and the right to intervene

One issue that has bedeviled both the EAB and the ERCB over the past number of years is the question of standing and in particular the question of whether or not there is any room for the concept of public interest standing in relation to these administrative boards: see for example the many blogs of my colleague Shaun Fluker on the topic of standing before the ERCB.

One might have thought that this discussion paper might address this issue.
Unfortunately, while the paper discusses the importance of public engagement at both the policy development level and the decision making levels (e.g. at 19), and while the paper suggests the importance of proving clarity around "the formal test for standing in decision processes (directly and adversely affected)" (at 19), one has the impression that the paper is stuck on the idea of the landowner or other property interest owner as the party with standing and therefore the only party with the ability to transform an application from being routine to non-routine and thereby triggering the opportunity for a hearing. Unless property owners are going to stand up for the protection of ecological values and other "common good" values (a huge assumption) this is an inadequate vision of a decision-making process that is designed to protect the broader public interest.

"Enhancing assurance" as a public consultation document

Finally, what about this document as a public consultation document? The *Enhancing Assurance* document covers some 28 pages but I think that it could have been re-structured as a shorter document that: (1) focused on the key issues, and (2) emphasised the changes that were being proposed. As it stands, the document is very repetitive and includes an unnecessary amount of detail. For example, surely we can take it as a given that Board members must act honestly and in good faith; that the Board will be able to hire technical experts; and that it must give notice of its decisions. Yes, I would expect these issues to be dealt with in the implementing legislation

but they weigh down a document that needs to emphasise the high level policy issues that are at stake in the proposed restructuring. These are all issues dealt with in the current governing legislation for the ERCB: this paper needs to focus on the changes that will result from creating a single window, not on those things that will remain the same.