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Alberta Energy Regulator: Split Jurisdiction Implications for Crown Consultation?

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Legislation Considered:

Responsible Energy Development Act, [SA 2012, c 17](#); *Designation of Constitutional Decision Makers Regulation*, [AR 69/2006](#)

The new single Alberta Energy Regulator under the *Responsible Energy Development Act*, has been proclaimed in force in part (OC 163/2013) on June 4, 2013 to be effective June 17, 2013. Section 21 of that Act, in force on June 17, 2013, states that the Alberta Energy Regulator has *no* jurisdiction to assess the adequacy of Crown consultation:

Crown consultation with aboriginal peoples

21. The Regulator has no jurisdiction with respect to assessing the adequacy of Crown consultation associated with the rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*.

The *Designation of Constitutional Decision Makers Regulation* ([AR 69/2006](#)) (DCMR) has been modified on May 29, 2013 (OC 144/2013) pursuant to the *Regulations Act*, [RSA 2000, c R-14](#) by way of the *Miscellaneous Corrections (Alberta Energy Regulator) Regulation* (AR 89/2013) in section 31 to substitute the “Alberta Energy Regulator” for the Energy Resources Conservation Board. The Schedule to the DCMR references the Alberta Energy Regulator’s authority to decide “all questions of constitutional law.”

These changes will be effective June 17, 2013 *per s* 49 of the *Miscellaneous Corrections (Alberta Energy Regulator) Regulation*. Inasmuch as the Crown’s duty to consult and accommodate is generally considered constitutional right for aboriginal peoples this oversight may be inadvertent or equally telling a deliberate statement of the Government of Alberta that the Crown’s duty to consult and accommodate is *not* a constitutional right of Alberta’s First Nation and Métis peoples as it is merely “associated with the rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*.”

It is axiomatic that legislation overrules regulation. This division of the jurisdiction of the Alberta Energy Regulator between aboriginal constitutional rights (which include treaty rights) and assessing “the adequacy of Crown consultation associated with the rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*” is troubling. As noted by Professor Nigel Banks in his earlier ABlawg post on November 19, 2012 “The Responsible Energy Development Act and the Duty to Consult” ([here](#)) several issues arise most notably the constitutional validity of this provision. Professor Banks noted in November last

year that the suggested changes to Alberta's First Nation's Consultation Policy were tentative and could be expressed in a number of ways including additional legislation.

I would argue that the recent passage of Bill 22, the *Aboriginal Consultation Levy Act* which was tabled in the legislature on May 8, 2013 and passed third reading May 15, 2013 to come into force on proclamation (see Bill 22 [here](#)) provides the basic legislative framework to accomplish the latest draft consultation policy. This Act, which like recent Alberta practice requires extension by regulation, can provide the framework for Alberta's consultation policy by use of additional regulations and administrative measures without requiring additional legislation. Notably this legislation was enacted *before the end of the consultation period on the April 2, 2013 draft of The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013* ([here](#)) as the government set a deadline of May 3, 2013 for public input on this policy and later extended to May 17, 2013.

To a certain extent, the change to Alberta's Policy on Consultation with First Nations, is a moving target. While the deadline for comments has passed, Alberta has yet to formulate a revised draft, final policy or additional legislation in this regard and it would be premature to comment further.

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