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Some Things Have Changed but Much Remains the Same: the New Canadian Energy Regulator

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Bill Commented On: Bill C-69, An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts

Given the discussions over the last year as to the future of the National Energy Board (see posts here and here) it is hardly surprising that Part 2 of Bill C-69 takes the form of an entirely new Act to be known as the *Canadian Energy Regulator Act* (*CERA*) rather than a set of amendments to the existing *National Energy Board Act*, RSC 1985, c N-7. This no doubt creates the impression that the new Bill represents a wholesale replacement of the NEB rather than mere tinkering. This post examines whether this is indeed the case by examining in some more detail what has changed and what remains the same. My focus is Part 2 of Bill C-69. My colleague Martin Olszynski has already provided a post on Part 1 of the Bill, the proposed new *Impact Assessment Act* (*IIA*) as well as the amendments to the *Fisheries Act*.

CERA (Part 2 of Bill C-69) is divided into nine parts (plus opening sections dealing with definitions and a statement of purpose): Part 1, Canadian Energy Regulator; Part 2, Safety, Security and Protection of Persons, Property and the Environment; Part 3, Pipelines; Part 4 International and Interprovincial Power Lines; Part 5, Offshore Renewable Energy Projects and Offshore Power Lines; Part 6, Lands; Part 7, Exports and Imports; Part 8, Oil and Gas Interests, Production and Conservation; and Part 9, General.

The Opening Provisions

The opening provisions of the *CERA* bill are notable principally because they contain both a preamble and a statement of purpose; both of which are absent in *NEBA*. Neither sings! And remarkably enough, neither makes any reference to the linkages between energy and climate. Indeed, unlike the *IAA* there are no references that I have detected to climate commitments in the *CERA* part of Bill C-69.

It is also perhaps worth noting that the definition of "pipeline" remains the same suggesting that Parliament is content with the broad interpretation of this word (to include a gas processing plant) endorsed by the Supreme Court of Canada in *Westcoast Energy Inc. v Canada (National Energy Board)*, [1998] 1 SCR 322, 1998 CanLII 813.

Part 1, Canadian Energy Regulator (ss 6-92)

This Part introduces the new national energy regulator, the Canadian Energy Regulator (CER) a corporation, albeit an agent of Her Majesty for all purposes. The CER shall be governed by a Board of Directors and shall have a Chief Executive Officer. However, the actual regulatory work of the CER is to be the responsibility of the Commission. The responsibilities of the Commission look much like the responsibilities of the current Board subject to the carve-out for "designated projects" referenced below. The person to be known as the lead commissioner has powers similar to the current chair of the NEB. A minimum of one director and one commissioner must be an Indigenous person (*CERA*, ss 14(2) & 26(2)). In addition, the Commission is instructed (s 56) to consider any adverse effects that its decisions, orders or recommendations may have on the constitutional rights of Indigenous peoples. Further provisions deal with establishing Indigenous advisory committees (s 57) and for maintaining the confidentiality of Indigenous traditional knowledge that has been shared with the CER on a confidential basis.

From a legal perspective it is important to note that the rules with respect to the judicial supervision of the CER remain the same as for the NEB: i.e. an appeal from a decision or order on a point of law or jurisdiction to the Federal Court of Appeal (FCA), with leave. Exempt from this provision (as in the current Act) is any recommendation that the CER (or an *IAA* panel) may make to the Governor in Council with respect to the issuance of a certificate of public convenience and necessity. See *NEBA* s 22 and *CERA* s 72. While the CER is required to provide written reasons for all of its decisions or orders (*CERA*, s 63) there is no direction here to require the FCA to provide reasons, even where it declines to grant leave. For a previous post on this issue see here.

There are new provisions in this part of *CERA* dealing with alternative dispute resolution (with the consent of all the parties to a dispute, s 73) and collaborative processes involving the CER and "Indigenous governing bodies". The details of this collaborative process are to be spelled out in regulations (s 78).

The CER will continue with the NEB's advisory jurisdiction with respect to energy matters. These provisions are currently found in Part II of *NEBA* ss 26-28; they are carried forward with very little change: see ss 80-86 of *CERA*. It is particularly jarring to note that, as with the preamble and statement of purpose in the new Act, there is no reference to climate commitments in the context of this advisory function.

The cost recovery provisions of *NEBA* (s 24.1) continue but with some changes. Particularly notable perhaps is a specific provision (s 87(1)(a)) indicating that cost recovery may extend to "costs related to applications that are denied or withdrawn".

Part 2, Safety, Security and Protection of Persons, Property and the Environment (ss 93-178)

Although this Part looks new, much of the content comes from *NEBA* Part III currently titled Construction, Operation and Abandonment of Pipelines. For example, ss 136-178 are based on

NEBA ss 48.11 – 48.49 and ss 132 - 133. My colleague Martin Olszynski [commented on] these provisions when they were first introduced as Bill C-46, the Pipeline Safety Act.

Part 3, Pipelines (ss 179 – 246)

While this part of *CERA* also adopts many provisions of *NEBA* it also contains two significant changes. First, *CERA* provides enhanced direction to the CER (and review panels) as to the relevant factors that the CER is to take into account in assessing an application for approval for a new pipeline (although the approval is still to be known by the archaic term "certificate of public convenience and necessity" (CPCN) – so much for "modernization" and plain language drafting). Second, *CERA* provides that all new pipeline projects that fall to be classified as "designated projects" under the *IAA* shall be subject to assessment by an *IAA* review panel rather than the CER. However, that review panel will need to apply the same relevant factors as would the CER (at least with respect to the discharge of its responsibilities under *CERA* – the panel will also have responsibilities under the *IAA*).

Enhanced Direction

The current direction to the NEB with respect to new pipelines is encoded in s 52(2) of *NEBA*. There is no express mention of environmental considerations or the rights of Indigenous peoples although both the chapeau to the subsection and the basket reference to the public interest (s 52(2)(e)) have afforded the NEB considerable discretion as to what factors it might take into account (see in particular (although a transmission line case) *Sumas Energy 2 Inc v Canada (National Energy Board)* [2005 FCA 377 (CanLII)]). Section 183(2) of *CERA* offers more detailed guidance:

> (2) The Commission must make its recommendation taking into account — in light of, among other things, any traditional knowledge of the Indigenous peoples of Canada that has been provided to the Commission and scientific information and data — all considerations that appear to it to be relevant and directly related to the pipeline, including
> (a) the environmental effects, including any cumulative environmental effects;
> (b) the safety and security of persons and the protection of property and the environment;
> (c) the health, social and economic effects, including with respect to the intersection of sex and gender with other identity factors;
> (d) the interests and concerns of the Indigenous peoples of Canada, including with respect to their current use of lands and resources for traditional purposes;
> (e) the effects on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*;
> (f) the availability of oil, gas or any other commodity to the pipeline;
> (g) the existence of actual or potential markets;
> (h) the economic feasibility of the pipeline;
> (i) the financial resources, financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which

Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline;

(j) environmental agreements entered into by the Government of Canada;

(k) any relevant assessment referred to in section 92, 93 or 95 of the *Impact Assessment Act*; and

(l) any public interest that the Commission considers may be affected by the issuance of the certificate or the dismissal of the application.

Much of the chapeau is new as are paragraphs (a) to (e) and (j) to (k). The "relevant assessments" referred to in sections 92, 93 and 95 of the *IAA* are regional and strategic environmental assessments. Once again missing from the relevant factors is any reference to climate change commitments (although see below with respect to designated projects). It is perhaps particularly noticeable that the government has missed an opportunity to take a position with respect to upstream and downstream greenhouse gas emissions. In *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 245 (CanLII), the Federal Court of Appeal considered that the NEB was entitled to confine its analysis to the GHG emissions associated with the pipeline itself. By contrast the Energy East Panel (version 2) before it was disbanded indicated that it intended to require TransCanada to file information with respect to upstream and downstream emissions. The federal government itself as part of its "interim measures" commissioned assessments of the upstream emissions associated with pipelines (see here). It is a mystery to me why the legislation does not specifically address this issue. Surely the outcome in any particular case should not depend on the composition of any particular panel of Commissioners.

The Treatment of Pipelines that are "Designated Projects"

Section 185 of *CERA* provides that if an application for a CPCN relates to a "designated project" within the meaning of the *IAA* then the Commission's powers and duties with respect to the consideration of the project and the recommendations to the Minister are to be exercised by the review panel, the report to be submitted is to be submitted to the Minister of the Environment, and the timelines for the report are governed by the *IAA* rather than *CERA*. Section 47 of the *IAA* contemplates that where a review panel is established for such a project then at least one member of the review panel shall be selected from a roster of CER commissioners.

In such a case the review panel will be charged with the preparation of two reports (or at least a two part report, see s 51(3) *IAA)*. One report will fulfill the panel's responsibilities under the *IAA* and a second report will fulfill the panel's responsibilities under *CERA*. The relevant considerations for the *CERA* report have been outlined above. The relevant considerations for a panel report are outlined in s 22(1) of the *IAA*. This is a much longer list and includes reference to cumulative effects as well as "the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change". The decision-making with respect to the *IAA* issues is dealt with in sections 60-65 of the *IAA* (see Martin Olszynski's post) and the ultimate decision statement under that Act "is considered to be a part of the certificate, order, permit, licence or authorization issued, the leave or exemption granted or the direction or approval given under that Act in relation to the designated project."

The list of designated projects is not yet available but the federal government has issued a consultation paper on the process that it intends to use to revise the current project list under CEAA. The current list, *Regulations Designating Physical Activities*, SOR/2012-147 includes new pipelines with a length of 40km or more.

One of the challenges associated with sending all significant new pipeline projects to an *IAA* panel is that it will make it difficult or impossible to deal in an integrated way with tolling issues at the same time as considering the infrastructure project. This has been an important consideration for the NEB (and parties) in recent years in dealing with a series of applications from NOVA Gas Transmission to extend its pipeline system more deeply into British Columbia: specifically the Chinchaga and Komie North application, North Montney and, most recently, Towerbirch (and see post here). It will be interesting to see how these issues (which are in part pipe-on-pipe competition issues) will be dealt with in the future.

What's the Same in the New Part 3?

If those are the big changes in Part 3 there are also other provisions where there is little if any change. Thus, the provisions on the operation of a pipeline continue (see *NEBA*, s 29 and *CERA* ss 179-181) as do the provisions dealing with detailed routing and location (*NEBA* ss 31-45) and *CERA* sections 198-213). Similarly, the tolling provisions of *NEBA* currently found in Part IV of *NEBA* (ss 58.5-72) are continued in *CERA* as ss 225-240 (not quite verbatim but the minor changes that have been made seem insignificant). The provisions dealing with abandonment have been expanded and now refer to the creation of an orphan pipelines account (*CERA*, ss 241-246).

What is perhaps most noticeable is that *CERA* retains the provisions dealing with the ultimate decision-making authority with respect to pipeline projects. It will be recalled that the Harper government changed this rule. The prior rule was that if the NEB rejected a project the Governor in Council (GiC) had no authority to change that conclusion. The current Act provides (*NEBA*, ss 52-54) that the NEB's role is only to make recommendations (except for small projects where the NEB may be the final decision-maker, as in *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*., 2017 SCC 41 (CanLII)) with respect to issuance or denial of the certificate (although the Board must always propose suitable terms and conditions to be include in CPCN even if it recommends rejection). These rules are now encoded in CERA, ss 182-188. As with the current rules, the GiC's decision is subject to judicial review, with leave, on a question of law or jurisdiction (see *NEBA*, s 55 and *CERA* s 188).

Part 4, Interprovincial and International Power Lines (ss 247-295)

The rules pertaining to interprovincial and international power lines remain largely the same (see *NEBA* Part III.1, ss 58.1-58.4) subject to some reorganization. As a result, and as a practical matter, interprovincial power lines are not subject to any federal energy regulation. Regulation of an interprovincial powerline requires designation of a particular facility by Order in Council under both *NEBA* (ss 58.24(c) and 58.4) and the proposed *CERA* (s 261). No facility has ever been so designated. Interprovincial transmission lines might be subject to assessment under the

IAA. *Fulton et al. v Energy Resources Conservation Board et al*., [1981] 1 SCR 153, 1981 CanLII 169 (SCC) therefore continues to be a useful authority.

International powerlines continue to be subject to the bizarre and rule-intensive scheme of a federal permit plus provincial regulation *or* a federal certificate of public convenience and necessity. The choice between the two options turns initially on the election of the applicant (*CERA*, s 259). *Sincennes v Alberta (Energy and Utilities Board)*, 2009 ABCA 167 (CanLII) therefore also continues to be a good and useful authority. If an application is considered as a certificate application, and the project is a designated project, then it is the *IAA* panel rather than the CER that will consider the application (*CERA*, s 263). Once again, the new statute offers some additional guidance to the CER with respect to relevant factors (see s 262) but it is not quite the same as the relevant pipeline provision (s 183).

Part 5: Offshore Renewable Energy Projects and Offshore Power Lines (ss 296-312)

Part 5 is completely new. The NEB had no jurisdiction over offshore renewable projects. This represented a governance lacuna since the provinces can have no jurisdiction with respect to such projects outside the boundaries of the province (recognizing that some marine areas are within a province, see, for example, *Reference re: Ownership of the Bed of the Strait of Georgia and Related Areas*, [1984] 1 SCR 388, 1984 CanLII 138 (SCC)). While I am surprised that the federal government has proceeded unilaterally in this matter without, for example, negotiating accords with the relevant provinces, it is important to have a rule system in place since it is an essential precondition to developing offshore renewable energy resources.

Part 6: Lands (ss 313-342)

Most of the provision in Part 6 of *CERA* are continued from Part V of *NEBA* (ss 73-115). These provisions include the power to enter on Crown lands (at issue in TMX's ongoing dispute with Burnaby – see post here) as well as the provisions for the compulsory acquisition of land through a rather idiosyncratic process of ad hoc arbitration committees (see post by Matt Ducharme here and most recently *Emera Brunswick Pipeline Company Ltd. v Sierra Supplies Ltd*., 2018 FC 17 (CanLII)). While some of these provisions are carried forward verbatim (e.g. the old s 73 at issue in the TMX/Burnaby matter is now s 313) there have been some significant changes. Two in particular stand out.

First, s 317 contemplates that a company cannot construct a pipeline on an Indian reserve or enter on to reserve lands for survey purposes etc without the consent of the relevant band council. This will replace the current s 78 of *NEBA* which contemplates that reserve lands may be used with the consent of the Governor in Council. The new section also overrides the power of expropriation found in s 35 of the *Indian Act*, RSC 1985, c I-5. This seems to me to be a significant development. While as a matter of practice the Governor in Council has been extremely reluctant to exercise this power during the past decade or longer, it was presumably available as a reserve power in exigent circumstances. This change may not affect a project like TMX (although even TMX has faced challenges to its existing rights of way from at least one First Nation, see post here) it may present a considerable obstacle to a new greenfield pipeline. Some may welcome this change as consistent with the principle of free, prior and informed

consent. Certainly it offers reserves very strong protection. Indeed the protection offered would seem to be stronger than that afforded to a constitutionally protected aboriginal title which (as per *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 (CanLII)) is at least arguably subject to justifiable infringement in appropriate circumstances.

Second, *CERA* will do away with the ad hoc arbitration procedure for assessing compensation for a right of way. Henceforward, compensation issues will be determined by the Commission by order (*CERA*, s 327). I think that this is a welcome change.

Part 7: Exports and Imports (ss 343-380)

These provisions, currently found in Part VI of NEBA, are carried over into Part 7 of *CERA*. While the current regime (when read in conjunction with the *National Energy Board Act Part VI (Oil and Gas) Regulations*, SOR/96-244, requires approval of the Governor in Council for export licences for oil and gas, the proposed new rules will delegate this authority to the Minister. There are additional provisions on the transfer of licences. Division 2 dealing with electricity (in each statute) is essentially unchanged. Similarly, the old Part VII of *NEBA* dealing with Interprovincial Oil and Gas Trade is now included as Division 3 of Part 7 of *CERA,* again largely unchanged. Division 4 of Part 7 of *CERA* reproduces, essentially verbatim, the contents of Division 3 of Part VI of *NEBA* dealing with the implementation of Canada's free trade agreements with respect to energy goods.

Part 8: Oil and Gas Interests, Production and Conservation (ss 381-388)

The NEB has historically had two types of upstream oil and gas functions with respect to federal oil and gas rights in the territories. The geographical scope of these responsibilities has declined with the devolution of oil and gas rights to Yukon and the Northwest Territories. The first set of responsibilities are those with respect to making declarations of significant and commercial discoveries under the *Canada Petroleum Resources Act*, RSC 1985, 2d supp, c 36. These provisions are currently found in Part II.1 of *NEBA* (s 28.1). They appear in Part 6 of *CERA* (s 382) without change. The second set of responsibilities relate to well authorizations and oil and gas conservation. Most of these provisions are found in the *Canada Oil and Gas Operations Act*, RSC 1985, c O-7 and accordingly *CERA* contains consequential amendments to that Act.

Part 9: General (ss 389-392)

This Part of the new Act is largely given over to regulation-making powers, either by the Regulator (with the approval of the GiC) or by the GiC alone. Section 392 contemplates a review of the Act after ten years.

A Final Note: *CERA* and Reconciliation

NEBA makes no specific reference to the Aboriginal or Indigenous peoples of Canada although the current Board routinely deals with projects that affect traditional territories. The Supreme Court of Canada has recently confirmed that the Government of Canada may use the NEB to fulfil its duty to consult at least where the NEB has final decision-making power: see *Chippewas*

of the Thames, *Clyde River (Hamlet) v Petroleum Geo-Services Inc*., 2017 SCC 40 (CanLII) and post here.

Bill C-69 changes this picture dramatically. The new *CERA* contains many references to the rights of Indigenous peoples of Canada from the Preamble through to the operative provisions for the statute. It is not possible to catalogue all of those provisions here (but see references in the discussion of Part 1 of *CERA*, above): they merit a separate post.

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