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# Energy Regulatory Forum: A Discussion on Bill C-69 Part 1: Canada Energy Regulator: A rose by any other name – what does it do; how does it work?

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**Editor's Note:** This is the fourth in a series of blog posts that provides summaries of presentations from the ninth annual Energy Regulatory Forum, held in Calgary on May 28, 2018, as summarized by student attendees.

The first presentation at the 2018 Energy Regulatory Forum compared and contrasted Bill C-69 and the incoming Canadian Energy Regulator (CER) regime with the current National Energy Board (NEB) regulatory regime it is intended to replace (for an earlier ABlawg on this topic, see here). What important differences should those in the energy industry be aware of? What are the potential issues with the new regime? Dennis Langen and Shelia Leggett provided a brief tour through the proposed legislation, highlighted some of its key features, and discussed the significance of these regulatory changes.

## Mandate of the CER

The *Canadian Energy Regulator Act* (*CERA*) is one part of the larger Bill C-69 which seeks to overhaul energy regulation and the process of environmental assessment in Canada. The CER is established under the *CERA* and its mandate is largely unchanged from that of the NEB. One significant change is that the CER will not have the mandate to conduct project reviews for new facilities applications for which the NEB previously had complete jurisdiction. The CER will still have jurisdiction over the regulation of interprovincial pipelines and powerlines, including construction, operation, and abandonment; the regulation of pipeline traffic, tolls, and tariffs; the regulation and export of oil, gas, and electricity; and the Declaration of Significant and Commercial Discoveries.

Another change is that the CER will now have control over the construction, operation, and abandonment of offshore renewable energy projects and offshore power lines.

## Structure

The governance structure of the CER appears to be modeled on that of the Alberta Energy Regulator. This model separates the governance, administrative, and adjudicative functions into subgroups. The Chair and CEO roles are separated, a Board of Directors is to provide oversight, strategic direction and advice on operations, and a group of independent commissioners are responsible for project review and decision making.

Leggett paused to comment on some of the issues with this governance model. She offered that to have a Board of Directors advising on operations is unusual and indeed, "advice on operations" is a vague and inaccurate term. Which raises the question: Considering that they will be able to provide advice on operations, what will the expertise and composition of this board be? The NEB was a board with members having specific areas of expertise that was responsible for making regulatory and internal policy decisions on behalf of the organization. It is less clear what the composition of the CER Board of Directors will be.

Further, if the commissioners in charge of project review and decision making are to be independent, then who is setting the policy direction? It will be difficult to integrate the decision-making experience of the commissioners into the policy-making process when it is not their place to set policy. It is unclear how the commission would engage in policy matters, leaving a disconnect between policy-setting and implementation. Essentially, the structure creates a left hand and a right hand without a clear mandate for how they are to interact or collaborate. Casting responsibility across a range of groups may present governance issues in the future.

Another critical responsibility that is not clearly assigned is oversight of condition compliance. Given her experience as a regulator, Leggett commented that having one group setting conditions and another overseeing compliance with those conditions can be problematic.

**Collaborative and Engagement Processes**

Section 76 of the *CERA* allows the CER to enter into an arrangement with any government or Indigenous organization to establish collaborative processes. Section 77 goes further and allows the Minister to enter into arrangements with Indigenous governing bodies in order to carry out the purposes of the *CERA* and may authorize that body to perform the duties and functions under the *CERA*. This delegates authority away from the central body so that the Minister can set up specific groups to fulfil specific aspects of the *CERA* mandate. This begs the question of what the CER's role would be in light of this sort of delegation of authority. There are likely to be risks, opportunities, and consequences of the Minister being able to delegate authority away from CER to Indigenous governance bodies that will reveal themselves as the framework is implemented.

Aside from collaborative processes, the new regulatory regime provides a much greater emphasis on public engagement. The federal government has recognized that there is a growing appetite for public involvement in these processes and the framework seeks to promote more inclusive engagement. To accomplish this, the CER Handbook establishes that CER would use its existing venues to facilitate broader public policy discussions and public engagement outside of the traditional hearing process.

Leggett supports this increased engagement with the public outside of the traditional hearing process. However, she also commented that there is no assigned individual or group whose role it is to set the public policy topics or their scope, and further, there is no framework to implement policy changes based on the input received through this process. This would seemingly negate the advantage to be derived from enhanced public engagement.

**Pipeline Certificates**

The steps toward gaining a pipeline certificate outlined in sections 182-184 are largely unchanged from the NEB framework. Though the general process is similar, there are three specific changes found in section 183 that are significant. The changes are in regard to public participation, additional assessment factors, and review timelines.

Firstly, participation, or standing, has been expanded so that in theory any member of the public may make representations with respect to an application for a pipeline certificate. Section 183(3) provides that this must be in a manner specified by the Commission. So, although anyone can make representations with respect to an application, the Commission determines the level of involvement, which will not necessarily extend to full participatory rights. Instead, representations may be limited to written statements or letters of comment, for example.

This development lies in stark contrast to the *National Energy Board Act* RSC 1985, c N-7 which only accepted representations from those who would be directly affected by a project, or those who possess relevant information or expertise. This also lies in contrast to other decisions to be made under *CERA*. Under section 201(4) a person may make representations at a detailed route hearing only if their lands may be adversely affected by the route of a pipeline. Similarly, section 241(3) provides that an abandonment hearing must be held if there is a written statement of opposition to the abandonment or a hearing request, unless the statement or request is frivolous, vexatious, or is not made in good faith.

Secondly, the list of factors that must be considered by the Commission when reviewing a pipeline certificate application has been greatly expanded from those factors that the NEB must consider. There are seven additional factors. Langen commented that five of these factors were already typically considered by the NEB on a discretionary basis, and the remaining two are "new" to the process.

The five factors that were generally considered by the NEB already, but have now been made express are:

- environmental effects;
- safety and security of persons and protection of property and the environment;
- interests and concerns of Indigenous peoples of Canada, including their use of lands and resources for traditional purposes;
- the effects on the rights of Indigenous peoples of Canada recognized and affirmed under the *Constitution Act,* 1982;
- and any relevant "Regional" or "Strategic" Assessments referred to in the *Impact Assessment Act* (Another proposed act under Bill C-69) (*IAA*).

Langen noted that by making these factors express, the discretion of the regulator to consider them or not consider them has been removed.

The two factors that are "newish" and "new" to the application process are:

- health, social, and economic effects, including with respect to the intersection of sex and gender with other identity factors;
- and environmental agreements entered into by the Government of Canada.

Though in the past the NEB considered health, social and economic effects on the whole, the Commission must now assess them from a gender perspective. This may include gender-specific health and social effects, and the equitable flow of economic benefit from the project. The second new factor would presumably require the Commission to consider international covenants such as the Paris Climate Accord.

This expanded list of factors may increase the evidentiary burden for project proponents moving forward. The list provides guidance, but ultimately time will tell what specific evidence or expertise will be required in order to address the enumerated factors and enable the commission to make its decision.

Lastly, though the timeline for submission of the Commission's recommendation report is unchanged from the NEB's 450 days, there is a significant change to the Minister's ability to extend this timeline. As with the *National Energy Board Act*, RSC 1985, c N-7, and under appropriate circumstances, the Lead Commissioner, the Minister, and the Governor-in-Council may all act to extend the review timeline. Under *CERA*, however, the Minister may grant one or more extensions rather than the single three-month extension under the NEB Act. Accordingly, there is no improvement in timeline certainty under the new regulatory regime. It will still be difficult to forecast when there will be certificate approval and significant regulatory risk remains.

Also, if the certificate application relates to a designated project under the *IAA*, then *IAA* timelines apply.

**Certificate Exemptions**

As with the NEB regime, certain pipeline projects may be declared exempt from the certificate requirement. However, the *CERA* adds a new category of exempted projects: pipelines that have already been constructed. This is presumably aimed at existing provincially regulated pipelines that for some reason are moving from provincial to federal jurisdiction.

One substantial change to the certificate exemption process is that the Commission must decide the fate of the exemption application within 300 days from receipt of the completed application, rather than 450 days. Once again, this timeline can be extended, and if the project is found to be a designated project then it is subject to *IAA* timelines, but overall Langen noted that this is the one place in the new regime where material improvements in efficiency are likely accomplished.

## Interactions with *IAA*

*CERA* projects that are also "designated projects" under the *IAA* are subject to a Review Panel impact assessment. The *IAA* process has changed to place a greater emphasis on the environment. The Environment Minister rather than the Minister of Natural Resources will appoint the Review Panel that will conduct the assessment and will also establish the Panel's terms of reference for CER projects. Moreover, if an assessment is necessary, the CER Commission's powers for recommending whether the project should be approved are delegated to the *IAA* Review Panel and the Panel's report is directed to the Environmental Minister. This would all take place under *IAA* timelines.

Under the *IAA* provisions, one issue that is not entirely clear is what will be considered a "designated project". If an application for a certificate exemption is considered a designated project, then those timeline efficiencies mentioned above would be overcome by the *IAA* timeline.

Also, the *IAA* contains no provisions pertaining to standing before the Review Panel. Unlike *CERA* where theoretically any member of the public can make representations before the Commission, it is unknown who may appear before the Review Panel and in what capacity.

## General Duties

The CER will have two significant general duties. Section 63 provides that written reasons must be issued for each decision the CER makes. Other than perhaps increasing the workload of the CER, this is uncontroversial.

The second general duty is found in section 56 which states that whenever a decision, order, or recommendation is made, the Commission must consider any adverse effects that the action may have on the rights of Indigenous peoples. Presumably, the Commission will require evidence regarding the existence of any Indigenous rights, and any evidence of an impact on those rights. At present, many applications, such as those regarding tolls do not include such evidence and so the duty may lead to a lengthier or more complicated process.

To address this, the applicant may need to undertake consultation with Indigenous groups on their own initiative, or the commission could engage with Indigenous groups using one of the engagement processes referred to previously under sections 57 and 74. Ultimately, it is uncertain as to how CER will fulfil this duty and the evidentiary requirements will reveal themselves as the framework unfolds.

## Other Considerations

Langen highlighted some other areas of the legislation that might be of interest to those involved in the energy industry. Sections 243 to 246 establish that the CER can designate a pipeline as an orphan pipeline and can use funds in an orphan pipelines account to abandon those pipelines. The way the legislation reads, an orphaned pipeline is a certificated pipeline. Pipelines

less than 40 km in length are exempt from the certificate requirements and given the number of these pipelines owned by smaller entities, these exempted pipelines are the ones most susceptible to being orphaned, yet the CER may not be able to use the orphan pipelines account in respect of these pipelines. This is a weak point in the legislation.

Additionally, Section 317 provides that a company seeking to construct a pipeline must not take possession, use, or occupy lands in a reserve without the consent of the Band Council, rather than the Governor-in-Council. Langen identified this as a very positive development that respects the authority of the group that is actually in charge of the lands.

Lastly, sections 190 to 192 are intriguing from a commercial perspective. These sections provide that where there is a transfer or variance to a certificate, the Minister may direct the Commission to make a recommendation with conditions to the Governor-in-Council. There is seemingly no limit to the conditions the Minister may impose and this introduces uncertainty into the process. This may delay or draw out the process of certificate transfer.

## What Does it all Mean?

In closing, Langen and Leggett compared the features of the *CERA* to the federal government's stated objectives in introducing the new regime. These purposes are listed in the CER Handbook.

- **Modern and effective governance**: The *CERA* is perhaps modern, but its effectiveness is unknown at this time. It would appear that there are considerable details to be revealed as the framework is implemented, so it is difficult to say whether it will be truly effective at this time.
- **Enhanced certainty and timelier decisions:** The lack of detail in the legislation means there is a lack of certainty, and Leggett stated that this makes it difficult to predict timelier decisions at this point. She also expressed concern with the split between the CER and *IAA* because splitting responsibilities has the risk of splitting accountability, with both sides able to point to the other in the event of something going wrong. She does not see this structure as being in the national interest of Canadians as it is a source of instability in the process.
- **More inclusive public engagement:** As discussed, section 183(3) provides no hurdle requirements for participant status and the CER may only limit *how* a member of the public is to participate in application hearings. Leggett compared this to her time spent on the Northern Gateway Joint Review Panel, where there were also limited criteria as to registering as an intervenor. Though public engagement is important, the process must be meaningful and efficient to allow the panel to gain the information they require to make a timely and informed decision. It should not be a sounding board or a process for process sake. Hearing from a large volume of people is not necessarily the most effective way to consult with the public and instead there should be some participant guidelines.
So, while there will be more public engagement under *CERA*, it is difficult to say how effective that engagement will be. Similarly, holding public consultation processes outside the traditional application hearing is positive but, as stated previously, there is

uncertainty with respect to how the results of those consultations will be used to adapt policy.
- **Greater Indigenous participation**: There will be greater Indigenous participation under *CERA* which is a significant step forward for energy governance in Canada; however it is unknown how this will impact application timelines.
- **Strengthened safety and environmental protection**: Leggett is particularly skeptical of *CERA* in this regard. She fails to see how the CER has vastly improved on the decades of work the NEB has done in these areas. The implementation of the framework may reveal improvements, but a significant strengthening of safety and environmental protection is not apparent at this time.

Overall, Leggett concluded that the test of this framework will be whether the changes enhance the process so that the decision-making power of the federal and regulatory bodies is restored. The regulatory regime must improve federal and regulatory oversight and create a framework for new energy infrastructure, construction, and operation in order to build a positive investment climate. Given the uncertainty and lack of detail present in the framework, it will still be very difficult to determine when a 'yes is a yes'. The federal government will have to be nimble in order to course-correct as required.

Leggett also wonders if there can be a role for increased standards in regulatory frameworks. She referred to the successful application of CSA Z662, which provides technical guidance on the safe design, construction, and maintenance of pipeline systems, and how such a model could be recreated and expanded to introduce certainty into the environmental, economic, and social aspects of the regulatory decision-making process. This would help us to understand where lines are drawn, what the process is, and allow us to get to key areas of conversation.

Langen concluded that there needs to be more substance in the *CERA* framework with respect to improving review timelines, emphasizing the need for accountability. Accountability standards would introduce some stability to the process and limit the discretion that the CER has to extend review timelines.

Langen sees the regulation of energy as an evolving art and science that must allow the regulator to be nimble while staying true to requirements for decisions to be science and evidence based. Ultimately, an energy regulator is not a policy instrument and is instead an adjudicator that must meet its role of making tough decisions. It cannot be afraid of dealing with difficult matters and making challenging decisions in the public interest.

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