September 6, 2012

The letter decisions of the Energy Resources Conservation Board

By Nigel Bankes

Decision commented on:
Reasons for July 17, 2012 Decision on Notice of Question of Constitutional Law, Osum Oil Sands Corp., Taiga Project, August 24, 2012.

In a letter decision of August 24, 2012 the Energy Resources Conservation Board (ERCB or Board) decided that it lacks the jurisdiction to determine whether or not the Crown in right of Alberta had discharged its duty to consult and accommodate the Cold Lake First Nation (CLFN) with respect to the impacts of a proposed SAGD bitumen project (the Taiga project).

I have commented on the substantive aspects of this decision in a companion post, "Who decides if the Crown has met its duty to consult and accommodate?" This post examines the Board's practice with respect to the publication of "letter decisions." The post argues that the Board needs to be much more proactive in making important decisions available to the public and to the regulatory bar. The current practice of publishing (or not publishing) letter decisions is neither coherent nor transparent.

A casual visitor to the Board's new website at http://www.ercb.ca/ who follows the link on the home page to "decisions" might be forgiven for thinking that the Board is not very busy these days. After all, at the time of writing, there are only nine decisions posted for the entire calendar year. And of those decisions listed as "Decision Reports," a growing and depressing number are hardly worth reading (at least from the perspective of somebody interested in the development of the Board's jurisprudence) since they simply record that the applicant has withdrawn its application (e.g. 2012 AERCB 006, Sinopec Energy) or that the Board no longer needs to hold a hearing and issue a reasoned decision since all person who have standing to object (and that, as various posts on Ablawg under the topic heading "intervenors and standing" note is a pretty narrow class) have withdrawn their objections to the application (see e.g. 2012 AERCB 010, Northwest Upgrading Inc, objection withdrawn by BA Energy). Such decisions are extremely terse and provide no indication of the nature of the objection, or the reasons why the objection has been withdrawn.

A more astute casual visitor would understand that, from the Board's perspective, this paucity of reasoned decisions is all to the good; it shows that the Board's ADR system is working and that the Board is not overwhelmed by contentious applications. After all, the Board deals with thousands of applications each year for all manner of statutory approvals. And there is clearly some truth to this. Not all of these applications could possibly go to public hearing and require reasoned decisions.

But even our astute observer would likely not be able to discern that the Board has another category of decisions which apparently neither need nor deserve to be posted or published as "Decision Reports" - even though they may be every bit as significant (and indeed much more so) than the purely formal and trivial published decisions closing a file such as AERCB Decisions 2012 - 006 and 20112 - 012, referred to above). These decisions are the Board's letter decisions and one of them is the subject matter of the companion "Who decides?" post. That decision is 9 pages in length and contains, as the blog makes clear, extensive discussion of both statutes and case law. It clearly purports to decide important matters of law and policy. But the Board does not publish such decisions either as part of its decision reports or on its website.

So how do you find out about these decisions? Well, the applicant and any person who continues to object to the application will be sent a copy of the decision, but after that my only answer is that it is a question of who you know (there may be better answers and I would be interested to learn from readers who have found other ways to obtain these decisions – perhaps some of you use the Board's recondite IAR Query system). In my own case I usually only find out about these decisions when the Board itself in a subsequent "Decision Report" or the Court of Appeal on an application for leave refers to an earlier "letter decision." And then my own "research methodology" consists of looking at the list of counsel to figure out who might be persuaded to send me a pdf. But what if you do not know that the decision has been issued? And why would you if you do not know when to ask, whom to ask, or what to ask for? Well, in that case, you have to trust to serendipity and hope that somebody will send you the decision - as happened in this case.

The point of this lengthy sidebar to the main entry on the substantive issues raised by the Board's decision is to suggest that the Board's current policy practice of deciding what to publish and what not to publish -- and the unpublished decisions are certainly not confidential -- is not appropriate. The Board should either put up all of its "decisions" on the internet (see the fabulously rich website of the Ontario Energy Board and the equally useful and functional websites of the British Columbia Utilities Commission and the Alberta Utilities Commission) or it should have a reasoned and rational basis for deciding which decisions are significant enough to merit publication on the Board's "decisions" site. The present criterion seems to be the "hold-out criterion" and nothing more: i.e. did a party with intervenor status maintain its objection either to the bitter end or until after the Board had scheduled a hearing. The "hold out criterion" on its own tells the reader very little (if anything) about the legal or practice significance of the decision – and it produces many published decisions that are of no interest whatsoever either to the public or the regulatory bar.

But by any measure this decision is clearly significant since it purports to decide important questions of statutory interpretation and constitutional law that are of interest to proponents, First Nations and members of the regulatory bar.

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