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Separation of Powers and the Government's Response to the Judgment in *Pembina Institute v Alberta (Environment and Sustainable Resources Development)*, 2013 ABQB 567

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Responses commented on: (1) "Still Alberta's prerogative to say who speaks at oilsands reviews: Alison Redford" as reported by Canadian Press, Calgary Herald, October 4, 2013, and (2) "Environment minister defends officials in oil sands case", as reported by James Wood, Calgary Herald, October 9, 2013

My colleague Shaun Fluker posted a comment on the judgment in *Pembina Institute v Alberta (Environment and Sustainable Resources Development)*, 2013 ABQB 567 last week here. In that case Justice Marceau ruled that a Director within the Department of Environment and Sustainable Resources Development acted unlawfully when he decided that the Pembina Institute and the Fort McMurray Environmental Association were not entitled to file a statement of concern with respect to the MacKay River oil sands project. Justice Marceau ruled that the Director in making his decision took into account irrelevant and improper considerations – namely that the applicants were no longer as cooperative as they had been in their dealings with government in relation to oil sands developments and the environmental impacts of those developments.

Since then, both the Premier (a lawyer) and the Minister responsible for the Department of Environment and Sustainable Resources Development have commented on that judgment. The purpose of this post is to examine those responses through the lens of the doctrine of the separation of powers. My conclusion is that the comments of both the Premier and the Minister reveal fundamental misunderstandings (or the deliberate flouting) of the concept of the separation of powers and the related concept of the rule of law.

What did the Premier say?

The Premier apparently said that "It was the position of the government of Alberta that they [Pembina and the Fort McMurray Environmental Association] weren't directly impacted by the project and *it was certainly within our prerogative as a government to make that determination and it continues to be in our prerogative as a government*." (Emphasis added)

What did Minister McQueen say?

Minister McQueen apparently said that "government officials did not act improperly".

What does the doctrine of the separation powers say?

The doctrine of the separation of powers in a Westminster style democracy deals with the relationship between, and the relative responsibilities of, the three branches of government: the Executive, the Judiciary and the Legislative branches. It is the responsibility of the Legislative branch to make new laws (statutes). It is the responsibility of the Judicial branch to interpret those laws and to determine whether government action is consistent with those laws. And it is the responsibility of the Executive branch to administer the existing laws, to make subordinate legislation (e.g. regulations, but only as authorized by laws passed by the legislature) and to propose new laws for consideration by the legislature. The Executive does not have the power to make new laws beyond the subordinate laws (regulations) referred to above and in a very, very narrow category of exceptional cases as authorized by what is known as the Royal Prerogative. I will not get into the question of what if anything is left in the residual category of the "Royal Prerogative" (the English civil wars of the 17th Century were fought about that and Charles I lost his head over claims that he could make new laws without Parliament); suffice it to say that it is trite law that there is no prerogative power to make a new rule where the matter is already governed by a statute. Since the matter of standing to file a statement of concern is governed by statute (the *Water Act*, RSA 2000, c. W-3 and *Environmental Protection and Enhancement Act*, RSA 2000, c. E-12) there is no role for the prerogative.

Application to the Premier's Comments

The Premier could hardly have chosen a more ill-advised word than the word "prerogative". The government (and here we mean the Executive) has no prerogative power to determine who is directly impacted and who gets to be heard. The Executive's only authority is to apply the current state of the law as laid out in the relevant statutes in this case and as interpreted by the courts. It does not have the prerogative to deny standing because the party that wished to express its concerns is not cooperative. If the Executive does not like that state of the law it is free to propose a change in the law for consideration by the legislature. But until such a change is effected the Executive must administer and apply the current law. That is what the rule of law is all about. The "government" cannot make new laws – only the legislature can do that. As Lord Denning famously said (quoting from Thomas Fuller) "Be you ever so high, the law is above you": *Gouriet v Union of Postal Workers*, [1977] QB 729 and see also *Roncarelli v Duplessis*, [1959] SCR 121 (also referred to by Justice Marceau in *Pembina*).

Application to Minister McQueen's comments

It is the responsibility of the judicial branch to interpret the laws as they stand. Once the judiciary has spoken and has ruled that the behaviour of the Executive branch does not comport with the law it is no longer open to a Minister of the Crown to take a different view and say that "government officials did not act improperly." The Executive can appeal the judicial decision but until the Executive does so and the decision is overturned, Justice Marceau's decision is binding on the Executive and it is the duty of any Minister of the Crown to ensure that the practice within her Department is changed so that it does comport with the law. There is an additional complication in this case since in at least some situations decisions with respect to statements of concern will now be made by the Alberta Energy Regulator, but in non-energy cases the Department will still be making these decisions. In any event, it is simply not open to Minister McQueen to say that government officials did not act improperly when the Justice Marceau has ruled that the Director did act improperly. In making that claim Minister McQueen is ignoring both the concept of the separation of powers and the rule of law. She may be making a different claim such as the "the officials were doing what I told them to do – suppress criticism of our policies" but that is a different story.

For a similar "take" on the government's response expressed in even more trenchant terms see the excellent and edgy blog maintained by alumna Susan Wright here.

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