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The Federal Response to the Report of the Expert Panel on the Modernization of the National Energy Board

By: Nigel Bankes

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Professor Mascher has provided an overview of this Discussion Paper. This post highlights how the Discussion Paper responds to the Report of the Expert Panel on the Modernization of the National Energy Board. This is not a straightforward task for two reasons. First, while the Discussion Paper contains one page that is devoted to "modern energy regulation" (at 20) there are references throughout the document that are perhaps also relevant to the National Energy Board (NEB) as well as the other regulatory processes that are under review. Second, and more importantly (and as has already been highlighted by Professor Mascher), the Discussion Paper is not directly responsive to the Report of the Expert Panel. While there are a few quotations from the Expert Panel Report (and from the other review processes) scattered through the Discussion Paper there is no systematic tabulation of Expert Panel recommendations against the responses of the Government of Canada with perhaps (no doubt wishful thinking on my part) some supporting reasoning. Instead, all that we have is a set of high level proposals.

Given this challenge I have elected to organize this post around a number of key themes. These themes are as follows: alignment between energy and climate policy; an independent energy information authority; governance; project decision making; and relationships with Indigenous peoples. In each case I have tried to indicate how the Discussion Paper has responded to the Report of the Expert Panel. I have commented previously on many of the recommendations of the Panel.

In addition I comment on one specific proposal relating to the regulation of offshore wind projects.

Alignment Between Energy and Climate Policy

The Discussion Paper does not directly respond to the call for a better alignment between energy policy and the role of a national energy regulator. However, the section on "addressing cumulative effects" may seem to give a nod in this direction insofar as the Paper contemplates the use of national environmental frameworks, strategic environmental assessments (SEAs) and regional assessments as a way of addressing cumulative impacts. For example, the paper suggests (at 9) that "a strategic assessment of the Pan-Canadian Framework [for Clean Growth and Climate Change] would provide guidance on how to determine how life-cycle greenhouse gas emissions associated with individual projects are assessed". What is missing however is any articulation of a clear link between Canada's international greenhouse gas reduction obligations

and the role of an energy regulator. I think that the greater use of SEAs is to be applauded but it is not clear to me that the suite of measures referenced under the heading of cumulative impacts will lead to better alignment between energy policy and the role of a national energy regulator. In other words, I think that issues of energy and climate alignment and government policy and regulator alignment are different from the issues associated with landscape level cumulative impacts. There are some links, but concerns for landscape level cumulative effects must of necessity deal with a range of ecological and economic issues that go far beyond climate change issues.

An Independent Energy Information Authority

On the specific issue of an energy information agency the Government does seem to be receptive to the Expert Panel's recommendation to create such an agency insofar as the Discussion Paper suggests that the Government is considering (at 20) "a separate model to deliver timely and credible energy information to Canadians."

Governance

The Government is perhaps less impressed by the Expert Panel's proposal for a new national energy regulator such as the Canadian Energy Transmission Commission (CETC). Thus the Discussion Paper refers to amending the *National Energy Board Act*, RSC 1985 c. N-7 (*NEBA*) rather than creating a new agency. However, the Paper (at 20) does seem to favour many of the organizational and governance changes recommended by the Expert Panel including: separating the roles of Chief Executive Officer and Chairperson of the Board; creating a corporate-style executive board to lead and provide strategic direction to the NEB organization; creating separate Hearing Commissioners to review projects and provide regulatory authorizations; enhancing the diversity of the Board and Hearing Commissioners; increasing Indigenous representation among the Board and Hearing Commissioners and requiring expertise in Indigenous knowledge; and eliminating the residency requirement for Board and Hearing Commissioners. All of these were recommended by the Panel Report. The Paper does not however endorse the suggestion of geographically splitting the Board and moving the executive Board to Ottawa.

Project Decision-Making

The Discussion Paper does not endorse the concept of a two-step project decision-making process that the Expert Panel had recommended nor the distinction that the Panel proposed between national interest and public interest. The Paper does reference (at 18) the need for "a new early planning phase led by proponents with clear direction from government" but this is perhaps better thought of as early engagement rather than a first step in a two-step project review process. The Paper favours (at 13) joint assessments for major energy transmission, nuclear and offshore oil and gas projects as well as (at 18) final political approval for major projects—although it also contemplates (at 20) that the NEB will have the authority to make final decisions on "certain functions such as import/export licenses, and variances or transfers to certificates and licenses" (presumably on the basis that these do not raise significant policy issues).

Relationships with Indigenous Peoples

The Discussion Paper deals with relationships with Indigenous peoples under all/most of the seven crosscutting areas of change that serve as headings for the Paper. Thus, Indigenous

knowledge is referenced under the heading of cumulative impacts and dealt with extensively (at 12) in the section entitled "Science, Evidence and Indigenous Knowledge", while the section on early engagement and planning (at 10) refers to "[d]irect engagement between Crown representatives and Indigenous peoples to discuss and understand potential project impacts to facilitate early planning and issue identification". This seems to be directly responsive to the recommendations of the NEB Expert Panel Report. The Discussion Paper anticipates (at 13, 18) that the relevant legislation will "explicitly require assessment of impacts on Indigenous peoples" and with respect to consultation will establish (at 13) "a single government agency responsible for impact assessment and for coordinating consultations with Indigenous peoples for federally designated projects". This proposition is re-framed a few pages later (at 15) in subtly different terms as a statement to the effect that the Government is considering creating a "single government agency with increased capacity to coordinate consultation and accommodation for federally designated projects." While neither passage explains what is meant by the term "federally designated project" the proposal is similar to that advocated by the NEB Expert Panel Report as is the goal (at 15) of "[c]larifying roles for consultation and accommodation in regulatory processes to ensure the honour of the Crown is respected". In the context of the duty to consult one would have thought that a federally designated project should be any project where the federal Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right or title and contemplates federal conduct that might adversely affect that right or title: *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII) at para 35. The decision of the BC Supreme Court in *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34 (CanLII) suggests that neither level of government will be able to pass off its consultation obligations to another level of government by, in this case "designating" a project as federal. A project is federal for this purpose if federal statutory powers are engaged.

Perhaps of most interest here is the statement (at 15) that the Government will aim at early engagement and participation "based on recognition of Indigenous rights and interests from the outset, seeking to achieve free, prior and informed consent [FPIC] through processes based on mutual respect and dialogue". The language adopted here apparently owes something to the relevant articles of the *UN Declaration on the Rights of Indigenous Peoples* although it is a softer version of FPIC than the formulations (see especially Article 19 and 32(2)) found in that text. Much like the Expert Report however the Discussion Paper seems to duck some of the hard issues such as the scope for the application of the doctrine of justifiable infringement in the context of linear projects and the role of the NEB in assessing (or not) whether the Crown has discharged its obligation to consult and accommodate. Finally, the Discussion Paper does not specifically address the Expert Panel's proposal to create an Indigenous Major Project Office but it implicitly replaces that with the suggestion that the Government is considering (at 20) "[s]trengthening the approach for Indigenous peoples to build capacity for participation in processes and help coordinate Crown consultations".

The Regulation of Offshore Renewable Energy Projects

Perhaps the most specific measure that the Government indicates that it is considering adopting is (at 20) to add provisions to *NEBA* "to provide authority to regulate renewable energy projects and associated power lines in offshore areas that are under federal jurisdiction". This was not a recommendation of the Expert Panel although the Panel did think (Recommendation 1.6.1) that the authority of the CETC with respect to transmission lines should be reviewed and strengthened but on the premise that generation would be under the authority of the provinces.

There is little discussion of the offshore other than a passing reference to the Bay of Fundy (Panel Report at 42). I think that there are two questions here. First, do we need a regulatory framework for offshore renewables projects and if the answer to that is in the affirmative, then, second, who should provide that regulatory framework?

There is significant interest and available technological capacity to develop renewable energy projects using offshore sites, notably for wind generation projects. Europe, for example, is investing heavily in such projects. But nobody will make the necessary massive investments in generation and transmission in the absence of an appropriate regulatory framework. Hence there is no doubt (the first question) that we need such a regulatory framework – and sooner rather than later.

For the most part, the provinces all end at the low water mark (the important exceptions include inland waters such as the Salish Sea and the Bay of Fundy). Thus as a matter of formal constitutional law the provinces are not in a position to provide that framework since the power of the provinces to make laws under ss 92 and 92A of the *Constitution Act, 1867* is confined to the power to make laws "in each province". Thus, federal intervention is necessary. But as a matter of practice the history of offshore oil and gas regulation in Canada confirms that the littoral provinces have been able to persuade the federal government to afford those provinces an important role in offshore oil and gas development. This has been achieved through political accords (e.g. the Atlantic Accord), mirror legislation based on a federal model (e.g. *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*, SC 1987, c 3) and through the creation of joint management boards (e.g. the Canada-Newfoundland Offshore Petroleum Board).

The issue therefore for present purposes is whether the federal government wishes to adopt a unilateral model (simply amend *NEBA* as proposed) or a cooperative federalism model such as that adopted for offshore oil and gas. I think that the unilateral ship sailed a long time ago and I doubt that the current federal government wants to pick a fight with all of the littoral provinces including Quebec. Consequently the oil and gas model has much to commend it. The parties could negotiate renewable energy protocols to the existing accords and build a common legislative model to deal with both generation and transmission. The model might create new joint boards or the expertise and scope of practice of the existing boards could be expanded.

Reflections on Process

I conclude by reflecting on process and most importantly that part of process that requires respectful engagement in order to build (restore) public trust. The Discussion Paper contains numerous references to a commitment to respectful and meaningful participation. The trouble is that the Discussion Paper itself belies that commitment. Why? Because it fails to provide reasons for why the Government seemingly chooses to follow the advice it received (or even articulate that advice) or why it chooses not to follow such advice (or again what that advice was). In sum, the Discussion Paper is big on self-congratulation in terms of respectful public process and engagement but falls short on delivery. As such it shows a lack of respect for those who take the time to participate and especially those who make the huge commitment to serve on these expert engagements as panel members working under very demanding time frames.

But let me also caveat the negative tone of the last paragraph since, as my colleague Martin Olszynski counsels, perfection is surely the enemy of the good. My qualification is simply that I

would far rather have these less than perfect efforts towards informed public debate about project review than experience the *fait accompli* of an omnibus budget bill tabled in the House of Commons without any prior informed consultation or public debate. My plea however is that we must be just as careful in designing procedures for informed public participation in the context of the legislative reform process as we claim to be for project assessment and review. If the government is to continue to use this system of expert panels to assist in the design of legislative reform then that requires thinking about the endgame before the terms of reference are finalized and panel members appointed.

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