

Public Participation in Energy Regulatory Processes – Legal Principles

Positive Energy Project Workshop

How to Decide: Engagement, Information and Capacity:

What Works?

University of Ottawa, October 4-5, 2017

Introduction

- Range – “I suspect that there will be an appetite for the full range of regulatory decision-making processes if you’re able to address them. ... project decision-making, regulatory development, monitoring/compliance/enforcement [almost the entirety of the ‘project cycle’].”

Monica Gattinger email to David Mullan, September 28, 2017

- Participatory rights not only in context of specific project approval but also policy development through primary and subordinate legislation, rule-making, directives, internal policy formulation both substantive and procedural
- Law – Common law developed by the courts, legislation (primary and subordinate), rule-making within decision-making agencies, policy statements and directives

II. Participatory Rights in Regulatory Processes at Common Law

- Historically Canadian courts disinclined to recognize public participatory rights on common law basis where not provided for by statute
- SCC denied claim to notice and participatory opportunities to land owners affected by Ministerial decision to create right of way over land by way of expropriation to enable construction of power line; not applicable to public interest decision-making of this species. Not a *quasi*-judicial process!

Calgary Power Ltd. v. Copithorne, [1959] SCR 24

- No longer “good law” – participatory entitlements recognized where decision affects “rights, privileges or interests” provided decision at stake “administrative and specific” as opposed to “legislative and general”

Cardinal v. Director of Kent Institution, [1985] 2 SCR 643, at para. 14; *Wells v. Newfoundland*, [1999] 3 SCR 199, at para. 61

II. Participatory Rights in Regulatory Processes at Common Law (cont.)

- But still no movement in direction of common law entitlement to procedural fairness with respect to legislative functions – primary and subordinate legislation (or rule and policy making generally)

Authorson v. Canada (Attorney General), 2003 SCC 39, [2003] 2 SCR 40 (primary legislation); *Canadian Association of Regulated Importers v. Canada (Attorney General)*, [1994] 2 FCR 247 (rule-making).

- However, in regulatory domain, Cabinet appeal and approval processes no longer viewed as “legislative” and will be subject to at least limited common law procedural protections **for those entitled to participate**

Canadian National Railway Co. v. Canada (Attorney General), 2014 SCC 40, [2014] 2 SCR 135, at para. 38, in effect rev’g on this point *Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 SCR 735; *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 FCR 418 (in context of duty to consult indigenous peoples)

II. Participatory Rights in Regulatory Processes at Common Law (cont.)

- Focus of common law rules of procedural fairness remains those whose “rights, privileges and interests” are specifically impacted by a process or decision. Not animated in any real sense by values of public participation or appeals to the need for consideration of broader public interest (as opposed to highly individualised interests)
- While SCC has clearly recognized principles of public interest standing to seek judicial review and launch a statutory appeal as well as intervention in those proceedings, public interest standing is not an animating principle in the determination of common law hearing rights

Finlay v. Canada (Minister of Finance), [1986] 2 SCR 607 (applying principles of public interest standing in constitutional cases to an administrative law challenge)

II. Participatory Rights in Regulatory Processes at Common Law (cont.)

- Evolution has not been through courts imposing public participation opportunities on regulatory agencies through common law principles but rather by way of legislative provision in statutes, regulations and agency developed procedural rules
- Courts' role has been that of interpreting the scope of provisions dealing with both participatory rights at regulatory proceedings

III. Rights in Regulatory Processes – Statutory and Agency Rules

Even in regulatory agency rules, participation rights have historically tended to be expressed in terms derived from the common law of procedural fairness or pre-public interest standing law and frequently by reference to standard conceptions of standard court-like processes rather than broader conceptions of public interest engagement

Alberta

Alberta Utilities Commission Act, section 9(2) (participation), 22(1) (intervenor costs); *Responsible Energy Development Act*, sections 32, 34(3), 36-38 (“directly and adversely affected”)

Canada

National Energy Board Act, section 55.2 (“directly affected”)

III. Rights in Regulatory Processes – Statutory and Agency Rules (cont.)

- However!
- My sense has always been that section 55.2 of the *NEB Act*, in its alternative basis for participatory rights (“any person who, in the Board’s opinion, has relevant information and expertise”) might have the potential for an expansionary impact on public participation rather than the contraction almost certainly intended by the Government of the day and anticipated by most critics.
- See also the AUC deployment of “with relevant information which may be of assistance to the Commission” with respect to participation in electricity market manipulation settlement hearing

Market Surveillance Administrator, Application for Approval of a Settlement Agreement between the Market Surveillance Administrator and TransAlta Energy Marketing Corp., July 12, 2012, Decision 2012-182, at para. 9.

III. Rights in Regulatory Processes – Statutory and Agency Rules (cont.)

- Nevertheless, these determinations are discretionary on the part of the regulator and subject to considerable deference on review by the courts.

ForestEthics Advocacy Association v. National Energy Board, 2014 FCA 245, [2015] 4 FCR 75

- What is also critical is that public interest standing to participate rules and determinations have tended to focus on the actual hearing process on an application for permission; they have not embraced a more holistic approach to participatory rights (“engagement”) involving the whole project cycle from planning for an application through the approval process to the end of any approved project’s working life

III. Rights in Regulatory Processes – Statutory and Agency Rules (cont.)

- NEB recognition of need for engagement to extend beyond actual hearings (oral or written)

Peter Watson’s address to CAMPUT Annual Conference (“Modernizing Hearings – Facilitating Public Engagement in Decision Making”), Vancouver, May 9, 2017; Public Information Sessions “sometimes before an application is even filed”: *National Energy Board Hearing Process Handbook*.

- Recommendations for ongoing process “throughout lifecycle of regulated infrastructure”

Forward Together: Enabling Canada’s Clean, Safe and Secure Energy Future, Report of the Expert Panel on the Modernization of the National Energy Board (May 15, 2017, at 4.3.1 (pp. 73-74))

IV. Lessons to be learned by regulators and courts from the duty to consult indigenous peoples

- Are there lessons to be learned from case law involving duty to consult indigenous peoples, especially since recent judgments implicating NEB in both fulfilling at least in part the Crown's obligation and assessing adequacy of consultation to that point?

Clyde River (Hamlet) v. Petroleum Geo-Services Inc., 2017 SCC 40; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41

- Duty to consult may be engaged early in the process – “strategic planning” for a pending application; procedural design to be followed in dealing with a matter

Dene Tha' First Nation v. Canada (Minister of Environment), 2006 FC 1354, at paras. 100 and 106-10 (aff'd 2008 FCA 20); *Mikisew Cree First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)*, 2016 FCA 311, at para. 63.

IV. Lessons to be learned by regulators and courts from the duty to consult indigenous peoples (cont.)

- May be triggered in rule-making and subordinate legislation development

Tsuu T'ina Nation v. Alberta (Minister of Environment), 2010 ABCA 137

- Question of whether might even extend to primary legislation currently before SCC

Mikisew Cree, supra, leave to appeal granted June 19, 2017, [2017] SCCA No. 5 (QL)

- Duty to consult is an ongoing responsibility; does not end with decision on project or conclusion of treaty conferring rights on the Crown

Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53, [2010] 3 SCR 103.

IV. Lessons to be learned by regulators and courts from the duty to consult indigenous peoples (cont.)

- More generally, the body of duty to consult law where the courts have been confronted with the responsibility of providing the detail of the constitutional imperative to consult contains valuable insights into not only a judicial but also a practical sense of what engagement and consultation involve

See *e.g. Hamlet of Clyde River and Gitxaala Nation v. Canada*, with more to be anticipated from the Trans Mountain judicial review proceedings that started this Monday.

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