CAMPUT Conference 2015

Tuesday's Day in Review

This morning, I am going to recap the sessions from yesterday, except for Regulating Oil and Gas Companies: energy tribunals or government departments – Is there a difference in approach? I am not doing that one, because I have no intelligence; or should I say, I have no reconnaissance.

Yesterday's sessions were largely about 3 themes:
-who is not being heard, that should be heard?
-who is being heard, that should not be heard?
-and, why are you guys listening to this anyway?

I am going to start my review of the day around these three themes with the observation that, as regulators, what we hear and how we hear it matters. And to make this point, and tie together the 3 themes from yesterday, I'm going to start my review of yesterday's session in the middle, with The Regulatory Process – Is it Broken. This is because I think it is instructive to tether the issues raised in the other sessions I attended to the discussion on the regulatory process and how we might modify that process, whether it is genuinely broken or not.

I was reminded in this session that it is incumbent on us as regulators to "test the case" before us. We are not passive adjudicators. We can and we should actively participate in the assessment of the evidence before us. This session presented a dichotomy of views on whether the "court like" regulatory process in Canada is the "worst form of regulatory process, except for all those others that have been tried."
In the view of **Kemm Yates**, the traditional litigation approach strikes the best balance between efficiency and the necessary procedural fairness safeguards. In his view, it is all about fairness and a reliance on relevant facts. Kemm gave some examples of regulatory proceedings that sought to limit standing in order to focus the scope of proceedings to relevant issues. He urged us, as regulators, to be more judicious in our proceedings, saying that now is the time to do so, because the trend is towards deference by the courts.

As regulators, we need to ask ourselves, what do we need out of the procedural process. I sum it up like this. We need a complete and fairly developed record where all who are legitimately impacted by our decisions have a voice – but also where the perspectives and positions of all parties are adequately challenged and debated.

So, does the court-like approach provide for that? Is there another way to get there? **Rosemarie LeClair** suggested that there are other approaches that can get us there, and argued that the court like approach limits the ability of regulators to get a full airing of relevant views. She shared some approaches that the Ontario Energy Board has adopted to seek a full airing of relevant views; including: present the application days, the development of issues lists, hot tubbing, consumer engagement vehicles, and customer consultations.

The question for Mr. Yates, and some of us in this room, is whether such alternative approaches provide sufficient opportunity to "test the case"; to allow those with a contrary view to challenge the positions of all parties.

Justice Carole Conrad gave us lots of advice about how to make our processes more effective, including: setting time limits, streamlining representations, defining the scope of interventions, enforcing relevancy standards, mediation, and again, hot tubbing. She challenged us to find ways to make room for all parties to be heard, and she told us to move forward without fear of being appealed.

Certainly, we should not be afraid to try new procedures, and if some of these tools allow us to get a better airing of the positions of all parties, perhaps we should engage them. The challenge is to do it in a way that is fair to all parties. If the trend is towards deference by the courts, we must remember that, with deference, comes responsibility. The challenge in these new approaches to regulatory procedures is to avoid introducing bias into the process, and to avoid introducing evidence or perspectives that parties do not have an adequate opportunity to consider and challenge.

First Nations Issues

Earlier in the morning, **Kim Baird** argued that the regulatory rule book was developed without first nations input – and it doesn't really work. In her view, what is needed is reconciliation and relationship building and she argued that the current process does not facilitate this outcome. She encouraged us to negotiate a new rule book.

So how do we adequately integrate first nations consultations, as Ms. Baird has encouraged us to do, into the regulatory process? **Mary Pat Campbell offered** some advice and cautioned us that building relationships is a long process. She argued that the process would be facilitated by "demystifying the regulatory process." B**rian Crowley** challenged us to question whether it is enough to satisfy ourselves that the duty to consult has been met. How do we judge that mitigation efforts are adequate? He also reminded us that there is not only one aboriginal people; there are a whole host of nations, each with unique interests. But he was hopeful, saying that deals are being struck all the time. However, I was reminded of the statement of Andre Plourde on Monday that just because a deal has been agreed upon by two parties, does not mean the deal was established in a free market.

So, what about our court like approach? Can it result in a satisfactory outcome for our first nations? Perhaps we should consider first nations as a level of government that must be heard, as Ms. Baird suggests.

Environmental Issues Impacting Energy Regulators

Yesterday we also heard about Environmental issues impacting energy regulators. **Dan McFadyen** reviewed the history of environmental regulation in Alberta. He suggested that, although environmental concerns have had many different names, and are now largely subsumed under the moniker climate change, "the ethical principles are foundational."

Bob Hanf from Nova Scotia Power reviewed some of the challenges in Nova Scotia and warned us that public sentiment changes over time but we are making decisions that effect generations in the future. This makes it difficult to balance competing interests.

James Gardner from Kentucky, which he described as a coal state in a GHG sensitive world, argued that it is difficult, as a costs and rates regulator, to deal with environmental issues. He suggested that it is problematic to balance competing public interest issues; for example employment impacts against meeting GHG emissions standards. He used the example of Germany, where the auto industry is being impacted by increasing energy costs, to satisfy environmental targets.

David Manning talked about his experience with the XL pipeline and the political debate (which colors what we hear) that extends beyond the XL pipeline to brand the oil sands as the dirtiest oil on the planet. He proposed that Canada's environmental investments are largely ignored in the debate.

Regulation of Government owned utilities – Why and How

The last session of the day that I attended explored the challenges of regulating government owned utilities. **Bob Watson** argued that regulation of government owned utilities provides a much needed independent view. He proposed that crown corporations should not be a mechanism to tax or promote specific agendas, but this requires the regulator to be truly independent from the government owner. He found, though, that total independence is hard to maintain, as "grey matter" often creeps into the regulatory process.

Regis Gosselin explained crown corporations and his mandate as a regulator of crown enterprises. He argued that regulation of crown corporations is a substitute for competition, by providing an independent view that safeguards against monopoly power.

Guy Bridgeman from EPCOR provided a perspective from the regulated government-owned utility. He noted that there is a role for regulation, because rates must reflect the full cost of service. We run the risk of chilling investment if rates are not equivalent to what would be expected in a private entity.

Once again, I am looking forward to today's sessions. I hope you will find them interesting and thought provoking.

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