Rebranding the National Energy Board

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We recently commented on changes to Canada's environmental assessment framework proposed in Bill C-69. In the same Bill, the federal government has introduced proposed changes intended to "modernize" Canada's National Energy Board (NEB). Though marketed as "creating a new, world-class federal energy regulator," the proposed changes appear to be largely a rebranding exercise. This bulletin provides an overview of key changes proposed by Bill C-69 and intended to modernize Canada's federal energy regulator.

A new regulator

Bill C-69 would repeal the *National Energy Board Act* and replace it with the *Canadian Energy Regulator Act* (CERA) which, in turn, establishes the Canadian Energy Regulator (Regulator) replacing the NEB as the primary authority responsible for federally regulated oil and gas pipelines and power lines. The Regulator would also become responsible for offshore renewable energy projects and offshore power lines, filling a previous regulatory gap.

The Regulator would have its head office in Calgary and would have a corporate-style executive board of directors responsible for providing strategic advice and direction. The strategic/corporate functions of the Regulator would be separated from the decision making role of the Regulator by giving the decision making responsibility to a Commission of the Regulator, comprised of independent commissioners. Unlike the Alberta Energy Regulator (AER) model which leaves the corporate regulator with significant decision making ability except in narrow circumstances when a matter is referred to "hearing commissioners", the CERA would create clear separation such that virtually all decision making would be done by the independent commissioners.

At least one of the Regulator's directors and one full-time commissioner must be an Indigenous person. As expected from the Discussion Paper, the CERA would eliminate the Calgary residency requirement for directors and commissioners. Federal Cabinet would be able to appoint any Canadian citizen or permanent resident as either a commissioner or director.

Notably, for those who have followed the *Clyde River (Hamlet)* and *Chippewas* cases where the Supreme Court of Canada (SCC) found the NEB is not, strictly speaking, the Crown nor agent of the Crown, (see our previous bulletin) the Regulator (and its Commission) would specifically be made an agent of the Crown. Under CERA, parties should be able to proceed on the basis that the Regulator's decisions constitute Crown action and are the vehicle through which the Crown acts, triggering the Crown's duty to consult, and that the Regulator's process will be relied upon to fulfil the Crown's constitutional obligations. This signals that the federal government does not intend to make major changes to the process for Crown consultation on federally regulated pipeline projects by, for example, establishing a separate body to carry out Aboriginal consultation outside of the Regulator's hearing process, akin to Alberta's Aboriginal Consultation Office.

A similar regulatory framework

Much of the federal pipeline regulatory framework would be preserved under the CERA. Companies would be prohibited from operating federally regulated pipelines without first obtaining a certificate from the Commission, though the Commission could exempt pipelines shorter than 40 km from that and other requirements, similar to applications under section 58 of the *National Energy Board Act*. With limited exceptions, the Commission would be required to hold public hearings with respect to the issuance, suspension or revocation of a certificate. Otherwise, the Commission would have broad discretion to hold a public hearing on any matter if the Commission considered it appropriate to do so. There do not appear to be any changes from the NEB's broad authority to regulate traffic, tolls, and tariffs as it currently exists under Part IV of the *National Energy Board Act*. Companies would continue to be prohibited from charging tolls except as set out in a tariff filed with the Regulator or approved by order of the Commission. As with the *National Energy Board Act*, companies operating oil pipelines would remain common carriers, required to receive and transport all oil offered for transmission by their pipelines.

The CERA maintains the existing requirement for companies to file a plan, profile and book of reference after receiving a certificate from the Commission. The new legislation would use substantially the same process for companies to seek detailed route approval including a requirement for the Commission to hold a hearing if any landowner or other person who anticipates that their lands may be adversely affected by the proposed detailed route files a written statement of opposition with the Commission. Notably, the Commission would be given authority to determine landowner compensation issues. Such issues are currently referred to arbitration before an ad hoc arbitration committee appointed by the Minister of Natural Resources.

Pipeline projects that are not exempt from the requirement to hold a certificate would be reviewed by the Commission unless an impact assessment is required for that pipeline. The Commission would have 450 days to complete its review and issue a report to federal Cabinet – the same statutory time limit currently imposed under section 52 of the *National Energy Board Act*. The responsible minister would have essentially unlimited ability to extend those time limits, a power currently exercisable by federal Cabinet.

For pipelines that are "designated projects" which require an impact assessment under the *Impact Assessment Act*, a review panel established by the Minister of Environment and Climate Change Canada would carry out the impact assessment and prepare a report to federal Cabinet to satisfy the requirements of both the CERA and the Impact *Assessment Act*. The review panel, which would include at least one commissioner appointed under the CERA, would have 600 days from the day the review panel is established to prepare its report to federal Cabinet, compared with 450 days under the current framework. Again, federal Cabinet would have essentially unlimited ability to extend that statutory time limit.

The CERA sets out a number of express criteria the Commission or a review panel must consider when making recommendations to federal Cabinet. Some additions to the list of criteria currently identified in the include:

- the health, social and economic effects, including with respect to the intersection of sex and gender with other identity factors;
- interests and concerns of Indigenous peoples with respect to their current use of lands and resources for traditional purposes;
- the effects of the pipeline on the constitutionally protected rights of Indigenous peoples; and
- environmental agreements entered into by Canada.

Though the list of codified criteria the Commission or review panel must consider has expanded, all or substantially all

of the "new" criteria are currently considered by the NEB as part of its public interest mandate. We note that the list of factors which the Commission must consider does not expressly reference upstream or downstream greenhouse gas emissions or impacts on Canada's climate change obligations. However, as we discussed in our previous bulletin, impacts on climate change obligations would be addressed under the proposed for those federally regulated pipelines that require an impact assessment

If the Commission or review panel recommended issuing a certificate for a project, federal Cabinet would be able to (i) accept that recommendation and order that the certificate be issued, (ii) reject that recommendation and order that the application be dismissed, or (iii) refer the matter back to the Commission for reconsideration. However, if the Commission or review panel recommended that a given project was *not* in the public interest, federal Cabinet would *not* have the ability to override that decision and could, at most, refer the matter back to the Commission for reconsideration. A "yes" from the Commission or review panel would therefore mean "yes, subject to federal Cabinet approval", while a "no" would mean "NO." Federal Cabinet's decision on a recommendation from the Commission or a review panel would need to be made within 90 days of receiving a report. Again, the responsible minister or federal Cabinet would have discretion to extend that time limit indefinitely.

Standing provisions

As expected from the Discussion Paper, the CERA eliminates the "standing" provisions contained in the *National Energy Board Act* which were implemented following the "mob the mic" tactics employed by some groups in pre-2012 joint review panel proceedings. The new legislation expressly provides that any member of the public has the right to make representations in a manner specified by the Commission with respect to an application for a certificate. The Commission would be required to accept and consider that input when preparing its report to federal Cabinet. Although the Commission or review panel would not be able to apply a standing test to exclude public commenters, it would likely have the ability to restrict the scope of their participatory rights if it considered such restrictions appropriate in the circumstances. The new legislation can arguably be interpreted such that the Commission retains its ability to grant different participatory rights to directly affected parties (e.g. landowners, indigenous groups, or affected industry members) and members of the general public who are not located near the proposed pipeline and are not affected to the same extent.

Conclusions

Objectives of the NEB modernization review process included restoring investor confidence and regaining public trust in Canada's federal energy regulator. The proposed legislation would replace the NEB with a new regulator with substantially the same powers under a similar recommendation and decision-making framework. It would codify many of the criteria currently considered by the NEB when considering a certificate application for a federally regulated pipeline. The new legislation would maintain notional time limits for certificate applications and, critically, would preserve the ability to extend those time limits on a case-by-case basis.

What the federal government has proposed, at least so far as federally regulated pipelines are concerned, appears to be largely a rebranding exercise. It is not clear how such a rebranding would, without more, improve investor confidence in Canada's regulatory process or regain public trust, to the extent either was lacking.

Information available through a federal government website indicates that the government "would seek input from Canadians on regulations and policy changes" required to accompany the new legislation. The government has not yet released any timelines for proposed consultation on those regulations.

Your Key Contacts

Bernie (Bernard) J. Roth
Partner, Calgary
D +1 403 268 6888
bernard.roth@dentons.com

Dan Collins
Senior Associate, Calgary
D +1 403 268 6837
dan.collins@dentons.com

Laura K. Estep
Partner, Calgary
D +1 403 268 6308
laura.estep@dentons.com