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THE FUTURE OF ENERGY REGULATION AND POLICY DEVELOPMENT: A SUMMARY PAPER

By Shantel Beach, Andrew Wilkins and Jennifer Winter

EXECUTIVE SUMMARY

In September 2013, The School of Public Policy at the University of Calgary hosted 19 speakers and 55 delegates in Calgary for a full-day symposium entitled “The Future of Energy Regulation and Policy Development: Conflict, Compromise or Cooperation?” Participants included current and past regulatory officials at the federal and provincial or state levels in both Canada and the United States, academics, lawyers active in regulatory matters, and representatives from industry and non-governmental organizations. Symposium chair Michal Moore (Area Director, Energy and Environmental Policy at The School of Public Policy) challenged participants to imagine what the “next regulatory world” would look like and what we want the regulator of the future to look like, and to consider the future success of energy regulation. The discussion on the role and the future of the energy regulator was wide-ranging and thought-provoking. This paper summarizes the discussion and main themes; policy-related implications and observations arising from the symposium are presented in the conclusion.

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L'AVENIR DE LA RÉGLEMENTATION ET DE L'ÉLABORATION DES POLITIQUES EN MATIÈRE D'ÉNERGIE : RÉSUMÉ

Shantel Beach, Andrew Wilkins et Jennifer Winter

RÉSUMÉ

En septembre 2013, l'École de politiques publiques de l'Université de Calgary a accueilli 19 conférenciers et 55 délégués à Calgary pour un symposium d'une journée intitulé « The Future of Energy Regulation and Policy Development: Conflict, Compromise or Cooperation? » (L'avenir de la réglementation et de l'élaboration des politiques en matière d'énergie : conflit, compromis ou coopération?). On comptait parmi les participants des agents chargés de la réglementation ancienne et en vigueur aux niveaux fédéral et provinciaux ou des États, tant au Canada qu'aux États-Unis, ainsi que des universitaires, des avocats actifs sur les questions de réglementation et des représentants de l'industrie et d'organismes non gouvernementaux. Le président du symposium, Michal Moore (directeur régional en politique énergétique et environnementale à l'École de politique publique) a invité les participants à imaginer le « monde de la réglementation de demain », l'organisme de réglementation idéal et la réussite d'une réglementation en matière d'énergie. La discussion sur le rôle et l'avenir de l'organisme de réglementation du secteur a couvert un champ très large et incité à la réflexion. Dans le présent document, nous résumons cette discussion et les principaux thèmes abordés; en conclusion, nous présentons les observations et les enjeux relatifs aux politiques soulevés lors du symposium.

The first keynote speaker addressed the major “game changers” in regulation that have led to the current state of the regulatory system and foreshadow the future of regulation. The speaker shared seven lessons learned from the game changers: “stay out of the kitchen,” apply the law, avoid planning, deliver real reasons (i.e., for regulatory decisions), watch technology, put the federal government to work, and “measure twice, cut once.”

The second keynote speaker focused on how and why Canada’s regulatory system became “broken” and what is needed to fix the system. In the speaker’s view, the basic principles of regulation should be: regulation is not prohibition and the regulator’s job is to decide not “if” projects proceed, but “how” they proceed; “social contract,” not social licence (to operate), should define relationships between project developers and affected communities; and that “corporate obligation,” not corporate social responsibility, should be the framework used by regulators, project proponents and those affected by the project. “Let’s get back to a time when the trusted arbiters of regulation were regulators,” he urged. He warned that without a system that contributes to certainty around regulatory processes and timelines, Canada could lose its competitive edge in terms of investment, including in energy development.

In the first of four moderated panel sessions, “The Regulator: Independence and the Authority to Act,” there was consensus that political agents — as opposed to independent or arm’s-length regulators — often made decisions based on politics and populism instead of the facts and merits of a proposed project. One speaker cited the regulation of oil sands development as an example of Alberta’s failed regulatory system. However, other participants — referring to the same set of statistics used by the speaker — said the situation indicated the success, not failure, of Alberta’s system. Participants agreed that there is no avenue within current energy regulatory systems, which focus on individual projects, for the public to address concerns about broader policy-based issues such as cumulative environmental impacts, health concerns in the community, or climate change. Several examples, including changes to the National Energy Board and the creation of the Alberta Energy Regulator, were offered to illustrate how government can interfere with regulatory independence or, at minimum, acquire more power to influence regulatory decisions. Some participants felt that the regulator should have no role in policy-making or, if the regulator does have a role, it should be to implement policy, not to make it. There was consensus that the clear definition of the role of the regulator versus that of the government is critical to the overall health of the regulatory environment in any given jurisdiction.

In the second panel session, “Competition for Decision Space between Regulatory Agencies,” there was consensus that energy regulation in Canada is complex, with differing models, constructs and jurisdictions that have varying degrees of overlap. There was no unanimous answer as to whether institutional overlap and the relationship between different levels of regulators and government officials leads to useful dynamic tension or unresolvable negative tension and outcomes among stakeholders. Speakers pointed to the frequent misalignment of regulation and policy. Several collaborative instruments, including mediatory arbitration, were discussed as tools for conflict resolution. There was also discussion about the rationale for creating the Alberta Energy Regulator, a new model that aims to better align regulatory decisions with policy, where the policy directions come from the government minister rather than the regulator. There seemed to be consensus that citizens don’t expect competing or contrary decisions from different levels of government or agencies; rather, the public expects a coherent government response and is taken aback when this isn’t the case. Discussion also ensued about the value of social media in contributing to the dialogue about proposed projects, regulatory decisions, and policy, with some participants viewing social media as generally positive, while others criticized the emotional and unreliable nature of much social-media information.

In the third panel session, “Organization, Adaptation and Flexibility in Regulatory Design,” some speakers had strong doubts about the usefulness of the “social licence to operate” concept in terms of delivering regulatory outcomes that are in the public interest. Innovation was described as one way in which regulators can meet the needs of “consumers” of regulation (i.e., society), while performance-based regulation was cited as one policy option that could best align with and support technological advances. There was consensus that the regulator needs to be very clear in setting guidelines for intervenors in public hearings, and also needs to be very clear about what intervenors should expect from the regulator in the process. There was discussion about the idea of creating a public institution that could serve as a forum for the public to discuss broader, policy-based issues (such as cumulative environmental impacts, health concerns in the community, climate change, etc.) outside of the regulatory system.

In the fourth panel session, “Evolution and the Future of Regulation,” there was consensus that regulators today face new and complex problems at an increasing rate and, without devising new methods and processes, they will become ill equipped to act in the public interest and accomplish their related mandates. During a discussion about the current debate over the need for new pipeline construction in North America, many participants expressed concern that using the regulator as a tool to secure desired political outcomes casts doubt, especially in the minds of the public, on the independence or objectivity of regulators. One participant said that the independence of regulators is a myth, and that the regulator of the future would be more like a government department or agency than like a quasi-independent regulatory body. Another speaker remarked that the “glory days” of regulators are over and, as governments become more involved in the regulatory system, the powers of regulators are being diminished. There was general agreement that this trend would continue into the future.

INTRODUCTION

In September 2013, The School of Public Policy at the University of Calgary hosted 19 speakers and 55 delegates for a full-day symposium in Calgary on “The Future of Energy Regulation and Policy Development: Conflict, Compromise or Cooperation?” Participants included current and past regulatory officials at the federal and provincial or state levels in both Canada and the United States, academics, lawyers active in regulatory matters, and representatives from industry and non-governmental organizations. The symposium included two keynote talks and four moderated panel sessions. The overarching framework set out for the symposium was: “Business and government are often at odds on energy regulation. The private sector cites lengthy review times and onerous mitigation costs, the financial sector sees risk in inconsistent process and regulation and policy makers point to the need to intervene to improve accountability, pointing to their responsibility for protecting people and the environment. What sort of regulatory solutions are available to curb further tension between these groups?”

At the outset, Dr. Michal Moore (Area Director, Energy and Environmental Policy at The School of Public Policy) challenged participants to imagine what the next regulatory world would look like. Emphasizing that the lines have often been blurred between policy-makers and regulators, he said that often we only think about energy when it isn't there, or when there is a failure of the system. Instead, Moore wanted this symposium to focus on the future success of regulation. Because energy regulation is often not a prominent issue in the eyes of the

public, it can be challenging to create and maintain an effective dialogue about important issues. Conference participants were asked to consider these key questions: what is regulation, and what do we want the regulator of the future to look like?

This summary paper seeks to encompass the main ideas discussed at the symposium, to highlight points of general consensus and conflicting views, and to accurately reflect the scope and intent of participants' discourse. Throughout, speakers, panelists, moderators and other participants were encouraged to openly share their candid thoughts and ideas. Chatham House rules applied in all sessions except during keynote talks presented by Gordon Kaiser and Shawn Denstedt. Accordingly, this paper captures the collection of thoughts and ideas discussed throughout the symposium without identifying the views of particular individuals.

GAME CHANGERS

It is often said that in order to see into the future, you must first look at the past. Drawing on his professional experience as an independent arbitrator and former vice-chair of the Ontario Energy Board, Gordon Kaiser began the symposium with a thought-provoking keynote talk entitled "Who Moved the Cheese?" Kaiser, an independent arbitrator at Energy Arbitration LLP, of Calgary and Houston, described what he viewed as the major game changers in regulation that have led to the current state of the regulatory system and that foreshadow the future of regulation. One game changer he cited was "policy-making by road trip," whereby policies from outside jurisdictions are observed and then applied wholesale to other jurisdictions, often with unforeseen and negative consequences. Coined a "bandwagon" mentality, Kaiser pointed to examples in Ontario, such as the province's former Liberal minister of finance Dwight Duncan's trip to Italy and the subsequent rollout of smart meters in the province, as well as former Liberal energy minister George Smitherman's trip to Spain and the subsequent extensive subsidies for solar power in Ontario.

Another game changer in the regulatory system Kaiser described was the technology wave. In his view, immense and rapid advances in technology — leading to changes in energy markets and the repurposing of infrastructure — have hugely impacted energy regulation. Specific technology examples he mentioned were: hydraulic fracturing, wind turbines, smart meters and electric cars. He noted that in the last six years, there have been monumental changes in energy regulation related to load characteristics. From altering the directional flow of pipelines due to changes in demand for natural gas, to adding wind to the electrical grid with huge variability in price, regulators are faced with challenges in meeting energy demand from consumers. Smart meters have also proven to be a game changer in their ability to shift load and demand; however, Kaiser questioned their effectiveness, stating that regulators must ensure capacity is able to meet maximum demand, regardless of efforts to alter peak energy use. Shifting the load is one thing, but peak energy usage occurs for a reason. This has been a major challenge for regulators, with or without new advances in technology. Electric cars were also described as changing load characteristics, another technology game changer directly impacting regulators in today's world.

The final game changer Kaiser mentioned was a phenomenon whereby regulators are being drawn into public policy through meeting proliferous government directives in short periods of time. Kaiser was first to pose an important question that seemed to shape many discussions throughout the symposium: is it the responsibility of regulators to make public policy? Stating that a major fault of national leadership was the absence of national policy-making, Kaiser suggested that independence and policy-making were perhaps contradictory mandates, and he did not believe that the role of regulators was to make public policy.

In sum, Kaiser shared seven lessons learned from the game changers in the regulatory system: “stay out of the kitchen,” apply the law, avoid planning, deliver real reasons for decisions, watch technology, put the federal government to work, and “measure twice, cut once.”

THE REGULATOR: INDEPENDENCE AND THE AUTHORITY TO ACT

The framework set out for the first panel session was: “The role of regulators and regulatory institutions has evolved over the past century, with increasing demands for services and responsibilities for both policymakers and regulators increasing concomitantly. This panel will explore the range of traditional and emerging responsibility for regulators charged with energy infrastructure oversight and approvals.” The panel comprised one representative from an environmental non-governmental organization, as well as a current provincial regulator and a Canadian academic legal expert.

Several critical questions emerged in this session, including: What is regulatory independence? Where did it come from? Is it worthwhile? There were also a number of related questions raised, such as: Can a regulator be truly independent? Is independence a favourable characteristic? Is it likely that regulators will be independent in the future? Throughout the session, speakers posed differing views about whether or not independent bodies are best equipped to handle multi-dimensional regulatory questions, or if others, like those who occupy the executive branch of government, are better equipped. The relationship between the executive branch and regulatory bodies seemed paramount, and the dynamics between these bodies was often described as creating insurmountable challenges in terms of meeting respective mandates. Speakers also explored the trade-offs that exist in terms of modernizing regulatory bodies, either through reinterpretation of pre-existing statutes or direct additions to pre-existing statutes through measures such as directives.

Throughout the session, there was no common answer to the questions raised. On one hand, there were those who believed that there was no such thing as a truly independent regulator, while on the other hand there were those who believed strongly that independence — or at least some level of independence — is an important characteristic of regulatory bodies. There seemed to be a general consensus that the doctrine of independence in regulation emerged historically from the United States, with the first instance of independent regulation being the creation of the Interstate Commerce Commission (ICC), which was established to regulate railroads. Railway companies were politically powerful, and it was recognized that it was necessary to remove politics from regulatory decision-making. Established by statute by the order of U.S. president Grover Cleveland, the ICC was charged with unbiased decision-making. There were seven indicia of independence for the ICC: fixed terms for commissioners, removal limits, multi-member panels, political-party balance, budgetary control, adjudication function and independent channels of communication with government. The degree of independence attained by other regulators is often judged against these criteria.

A theme discussed throughout this session was the efficacy of decision-making by regulators as opposed to elected officials. A fulsome inquiry took place, questioning whether or not important decisions ought to be made by politicians, as they are “closer to the people,” or by unbiased experts. Participants explored the implications of this dilemma, discussing whether elected politicians or unelected regulators were better equipped to make sound decisions related to proposed energy development. There was consensus that political agents often made decisions based on politics instead of evidence from “the record,” and on populism instead of the facts and merits of a proposed project. There was a strong consensus among participants that merit-based decision-making in regulatory bodies, is preferable to political decision-making. Often, lack of independence leads to decision-making that is not sound. To illustrate this, speakers discussed judicial review as an independent check on decision-making bodies. It was noted that there is a higher frequency of decision reversals in court that are related to decisions made by government executive branches as opposed to those made by independent regulatory bodies. Underlying much of this discussion was an emphasis on the relatively negative “us versus them” mentality that exists between elected officials and unelected regulators. This was partly attributed to the decline in independence across regulatory bodies, in the Canada, the United States and elsewhere.

Another facet of the debate over the independence of regulators that was discussed during this session was the derivation of regulatory power. The evolution of a regulator’s mandate and authority often comes through reinterpretation of its statutes. Powers are discovered and rediscovered through re-interpreting statutes; however, there is a trade-off between legal risk and policy gain through this exercise. It was noted that deadlock in political branches does not create static policy; rather it shifts decision-making to independent commissions.

Alberta’s oil sands were discussed in some detail to show the perceived failures, at least in some quarters, of the province’s energy regulatory system. The unmitigated development of the oil sands was characterized by one speaker as a failure of regulation, given that the vast majority of proposed projects do not have much in the way of public participation opportunities (e.g., public hearings), and that proposed oil sands developments are rarely, if ever, turned down for environmental reasons. The efficacy of rules related to duty to consult was discussed at length, with some speakers advocating that the role of the regulator should not be to routinely approve projects, and others arguing that it is the very job of the regulator to be the shepherd for projects, so long as they meet pre-determined criteria. In suggesting the failure of Alberta’s energy regulatory system, one speaker noted that out of 35,382 energy applications in the province in 2012, only seven applications led to regulatory hearings. Furthermore, out of 410 in situ oil sands applications, there was only one hearing. There should be a “regulatory system, not an approval system,” the speaker said. While the speaker raising these statistics viewed them to be harmful in terms of securing objective outcomes that reflect the public interest, other speakers viewed these figures as representing an accomplishment of the regulator. Along similar lines, the notion of “phantom mitigation” — the regulator’s acceptance of proposed or unproven mitigation, or mitigation based on expected future regulation or policy that never materializes — was discussed at length. There was little consensus about this issue.

Participants also discussed at length the apparent disjoint between policy recommendations made by regulatory bodies to governments, and policy action based on those recommendations. A number of Canadian case studies were used to describe situations where non-binding policy recommendations are made, with the assumption that they will be implemented. More broadly,

there appear to be significant policy gaps between issues identified by regulators and government action. There was no consensus about the appropriate way in which to make policy recommendations binding, but there seemed to be agreement that some mechanism ought to exist. There was some discussion about the ability of a regulator to deny a project; however, views were divided, with some participants advocating that the role of the regulator should be as an approver of projects, so long as certain criteria were met.

The next topic discussed in this session was the degree to which regulators do and ought to engage with the public. The often-visceral reactions from citizens in response to new projects that were once managed municipally (the authority to site power-generation facilities in Ontario, for example) continue to be an ongoing problem for regulators, whose authority stems most often from higher levels of government (i.e., federal or provincial). Many intervenors in regulatory proceedings seem to have no other public avenue through which to express their concerns. Given the often-narrow legislated mandates of regulators, regulatory bodies can be ill equipped to handle broader questions from the public about environmental degradation, cumulative impacts, or issues such as climate change, yet regulatory bodies often receive the brunt of public concerns. A question emerged about whether or not a co-operative relationship between the government and regulators to jointly serve the public was beneficial or detrimental. It was said that confusing isolation with independence is a common misunderstanding of the relationships that ought to exist between government decision-makers and regulators.

A case study was used to demonstrate one way in which a government can interfere with regulatory independence. In 2012, significant changes were made to the legislation governing the National Energy Board (NEB). Prior to 2012, for all practical purposes, pipeline certificate approvals were final; however, after 2012, the *National Energy Board Act* was changed, effectively turning the NEB from the final arbiter into to the maker of recommendations to the federal cabinet. The legislative changes also imposed time limits (a maximum of 15 months) for the NEB to make recommendations. Cabinet can now accept or reject recommendations, or send them back to the NEB for reconsideration. According to one speaker, it is this back-and-forth scenario that presents a problem, in creating the potential for a serious co-opting of the NEB to make recommendations that the government wants the NEB to make. There was some discussion about the implications of the structural changes made to Alberta's energy regulator, with concern raised about the new structure of the Alberta Energy Regulator (previously the Energy Resources Conservation Board). Some were of the view that the regulator's ability to implement policy was altered, with more power being concentrated in the discretion of the provincial energy minister as opposed to the regulator. In fact, the legislation that created the Alberta Energy Regulator (AER) explicitly says that the minister can direct the AER on policy matters.

This phenomenon was discussed more broadly, with some participants noting that governments seem more willing now than ever to rein in the independence of energy regulators in order to ensure outcomes that are aligned with economic development or other policy goals. In the context of this discussion, the various functions of a regulator were discussed — primarily approval and oversight. While there was debate about how the role of the government should be different than that of the regulator, there was consensus that there should be clarity between these respective roles. Lack of clarity, transparency and regular communications have led to frustration on both sides, particularly surrounding the question of which body makes final decisions. If it is not the regulator, then what is the role of the regulator?

While participants in this session did not agree on what precisely defines regulatory independence, there was consensus that regulators ought to have a different function in policy-making than those who make decisions at the executive branch of government. Some participants felt that regulators should have no role in policy-making or, if regulators do have a role, it should be to implement policy, not make it. Participants agreed that the clear definition of those respective roles is critical to the overall health of the regulatory environment in any given jurisdiction. Certainty surrounding decision-making capacity also emerged as a critical component of the regulatory framework; while there was no consensus about whether or not a regulator can be “truly” independent, independence was viewed as a favourable characteristic by most session participants.

COMPETITION FOR DECISION SPACE BETWEEN REGULATORY AGENCIES

The framework for the second panel session was: “The roles and responsibilities of regulatory institutions often overlap with those of land use or other special use agencies. The line of demarcation either in terms of authority or in intent may be unclear, especially when jurisdictional goals overlap or compete. This panel will discuss the interplay in this area with a particular focus on local and sub-regional land use authorities.” The panel comprised an academic policy expert, as well as a regulatory lawyer and former U.S. state energy regulator, and a provincial energy regulator.

Throughout this session, there was consensus that energy regulation in Canada is complex. Differing models, constructs and jurisdictions exist simultaneously with varying degrees of overlap. The deeper question posed was whether or not institutional overlap leads to useful dynamic tension or irresolvable negative tension and outcomes among stakeholders. While there was no unanimous answer to this question, a number of collaborative instruments were discussed, including the role of mediation or arbitration for conflict resolution.

The first theme discussed was the relationship between different levels of regulators and elected government officials. To describe this relationship, four concepts formed the foundation of one speaker’s analysis: “the devil made me do it;” the “85 per cent solution” problem; the misalignment of regulation and policy; and projects that turn into “clashes of civilization.”

The first concept describes the relationship between regulators and elected government officials. Characterizing government officials as being predominantly concerned with vote acquisition, this speaker used examples to show that regulatory bodies are often willing to make tough decisions and deliver important results for the public at large, without worrying about direct accountability to a voting public. In a sense, regulators are freer to make more difficult decisions and are better equipped to take the brunt of public opposition than are elected government officials. This makes regulators a vitally important and necessary body in terms of carving out decision space. Using the example of water runoff from Los Angeles, the speaker discussed how elected government officials had no motivation to take action to mitigate an environmental harm, but regulators were able to act. In the end, a favourable outcome was secured because of regulatory oversight. An important determinant of the success in this case study was the regulator’s independence, allowing for the public to view the regulator’s decision to act as fact-based, as opposed to politically based.

The next concept discussed by this speaker was the “85 per cent solution” problem. Because decision space can often be narrowed due to pre-existing circumstances or decisions made in the past, regulators are often faced with the conundrum of regulating in “small” decision spaces. They are often charged with monitoring development behaviour in spaces that are not large enough to make a significant contribution to the targeted result. Basically, the problem is that regulators often are charged with regulating merely the 15 per cent of an area that is left after 85 per cent has already been developed. The mitigation that is recoverable from the 15 per cent is not enough to realistically accomplish environmental mandates. The example used to demonstrate this concept was the case study of the Los Angeles basin coastal sage scrub, a habitat for rare species. Currently, only a small portion of this land is not developed and is strictly regulated and protected; however, the large majority of the habitat is already developed and is not regulated or protected. Competition for decision space — and literally for space in which decisions will be effective — under these circumstances then becomes constrained.

The final two concepts discussed were the misalignment of regulation and policy, and projects that turn into “clashes of civilizations.” The misalignment of regulation and policy relates to the inability of pre-existing governance structures to meet the needs of modern-day demographic pressures. Current realities often come under governance structures and political arrangements that are ill suited to meet the needs of decision-makers looking to solve present-day problems. It was the speaker’s view that realignment of regulation and policy often does not happen in the absence of crises. This dilemma creates problems for regulators in terms of effectively utilizing decision space in an emotionally charged, competitive environment. The “clash of civilizations” reference was used to describe the diminished decision-making space that results from ideologically driven policy debates. Some projects that appear before regulatory bodies can become irresolvable in many ways, such as when facts are perceived as being secondary to or less important than symbols, emotion and values. Using the example of the proposed Keystone XL pipeline, the speaker described the evolution of the project as a clash of civilizations between advocates and opponents, an incredible challenge for any decision-making body to overcome.

The next major theme discussed in this session was accountability through competition for decision space. Various rationales were explored regarding the design of overlapping regulatory decision space and its effect. One example discussed at length was the federalist governance structure emerging out of the United States, and more specifically in its application in California. One speaker spoke directly to this, noting that the three branches of government (the executive, the legislative and the judicial) provide “horizontal” limits, while “vertical” limits are achieved through the federalist system. This discussion emerged within the understanding of the historical context of the nature of regulatory bodies and their interactions in decision-making space. A consensus emerged about the importance of developing checks and balances on the power of decision-makers to curtail abuses of power. There was also consensus that delays can occur in the regulatory process when a regulator is seeking to redefine or broaden its pre-existing jurisdiction or powers.

The next topic in this session focused specifically on the new Alberta Energy Regulator. According to one speaker, three major changes were made in redesigning the regulatory framework: a new governance structure; expansion of the regulator’s mandate; and a newly established relationship with government. While energy regulation in Alberta dates back to the 1930s, Alberta’s energy regulator has undergone a number of changes over the years, resulting

in the current “single-window” system where integration is first priority. While the results of the changes made to Alberta’s regulatory framework are not yet clear, one speaker viewed the recipe for success to be clear policy directions, alignment between policy objectives and regulatory outcomes, alignment of priorities and communication, and collaboration.

An important point that emerged from this session was the contrast between how citizens view government bodies and agencies, and how those respective bodies view themselves. There seemed to be a consensus that citizens don’t necessarily distinguish between levels of government, and they don’t expect competing or contrary responses or decisions from different agencies. In most cases they expect a coherent government response, and are taken aback when this isn’t the case. There was agreement that the public deserves greater efficiency, often more than what competition for regulatory space among government agencies can provide. There was also some discussion about the role of social media in terms of its effect on regulators. Broadly speaking, speakers in this session viewed social media as positive, in terms of its ability to “light a fire” and push for good public policy. However, there was also agreement that social media can heighten emotional intensity, present factually incorrect information, which is widely and rapidly disseminated, and create problems for regulators in later phases of projects — a challenge that can be difficult to overcome. One speaker remarked that “the Internet is the biggest challenger of the truth that we’ve ever encountered.”

PUBLIC INTEREST AND PUBLIC TRUST

Over the lunch hour, Shawn Denstedt, a partner at Osler, Hoskin and Harcourt LLP, gave a thought-provoking keynote talk entitled “Back to the Future: The Role of Regulation in Society.” He began his remarks by saying that Canada’s regulatory system is broken. Not only is Canada’s regulatory system opaque, obtuse and cloudy to outsiders, even insiders find it complex. Raising the question, “How did we get here?” Denstedt focused on what he called the basics of regulation, led by common sense and simplicity. In his view, the basic principles of regulation are: regulation is not prohibition; “social contract,” not social licence (to operate); and “corporate obligation,” not corporate social responsibility. There is a lot at stake depending on how we look at regulation today and in the future, he said.

The first principle of regulation Denstedt discussed was that regulation is not prohibition. He emphasized that developing energy resources is legal in Canada, and developers shouldn’t have to go on bended knee in order to do what they are legally entitled to do, providing they meet certain benchmarks and performance standards. All regulation should be viewed through this lens, he said; therefore, approval should be the “default” or presumed outcome, rather than denial. Included in the bundle of rights that developers have is not only the right to develop, but also the right to transport their products to market. Underlying much of Denstedt’s comments was the assumption that the goals of regulation today are being distracted from or derailed by interventions from international non-governmental organizations, including environmental groups. It was his strong view that the job of regulators is not “if” energy projects should proceed, but “how.”

The second principle of regulation described by Denstedt was that social contract ought to define relationships between developers and communities as opposed to social licence (to operate). He was highly critical of what he viewed as the illusion of consent through social

licence, and stated that the concept had evolved into a mechanism by which local communities have the perceived inherent right to veto projects, even though this perception is not rooted in law, and the right of veto in fact rests with either the regulator or the executive branch of government. According to Denstedt, the illusion of local communities giving consent for a project through a social-licence concept harms the regulatory process. It gives rise to ambiguous and ambivalent expectations, and leads to situations whereby local communities are often disappointed with the results of regulatory decisions and/or those of projects. His view is that the term “social contract” better describes the natural relationship between local communities and developers, and lends more certainty rooted in the law. It ought to be the role of regulators to arbitrate disputes if and when they occur, he said.

The third principle of regulation Denstedt discussed was that corporate (social) responsibility shouldn't be relevant to the regulatory world, but corporate obligations should. His view was that corporate social responsibility can act as a veil behind which corporate actors can hide their behaviour. According to Denstedt, a strong corporate social responsibility program does not have the same weight as meeting regulatory obligations, and with the rise of corporate social responsibility, the weight of the regulatory obligations (which are more important) becomes somewhat diminished. What regulators ought to require of firms is continuous improvement, rigorous enforcement and public accountability, not public relations, he said. What ought to matter more is what the public thinks about a company's record, not what special-interest groups do. Denstedt also said that companies need to have self-evaluation privileges, such as critical internal audits, and that self-evaluation needs to be done without fear of liability.

A theme underlying much of Denstedt's keynote talk was trust. Who does the public trust, and why does the public trust them? His view was that what matters most to members of the public is that they can trust that whoever is making decisions about energy projects is doing a fair job. Reminiscing about what he characterized as a reality that has come and gone, he proposed: “Let's get back to a time when the trusted arbiters of regulation were regulators.” The first step towards this goal is that we accept regulatory decisions, he said, and avoid the onslaught of public relations that can ensue from extending intervenor status in regulatory hearings to participants that are not directly affected by the proposed project. He argued that intervenor status should be given only to those directly affected by a proposed project.

Another pivotal theme discussed throughout Denstedt's remarks was risk and uncertainty. Under the current situation in Canada, whereby lack of pipeline infrastructure has had severe negative consequences in the ability to transport petroleum products to market, he emphasized that there is a lot at stake. Without a system that contributes to certainty around regulatory processes and timelines, he stated that “we will fail” as a society. Not only has regulatory uncertainty hurt local investors, Denstedt also noted that Canada has come to be known internationally as an uncertain place in which to invest. As investors look for jurisdictions in which to invest, such as Australia, Qatar and Indonesia, Canada's so-called “competitive edge” could vanish, he said.

To conclude, Denstedt stated that energy regulation should be used as a “shield, not a sword,” and that moving forward, regulators should be given the authority, direction and independence to enforce their rules without question. By protecting the “true” public interest, regulators alone can restore public trust in the regulatory system.

ORGANIZATION, ADAPTATION AND FLEXIBILITY IN REGULATORY DESIGN

The framework set out for the third panel session was: “Regulatory institutions are by nature relatively orthodox and stable over time, especially when issues regarding public interest and public utilities such as power facilities are concerned. Changes in public interest issues, stakeholder groups and landowner rights, as well as safety or indemnification, have emerged as new topics that may challenge the role of the regulator, as well as the policy makers who empower the institutions and provide long-term policy objectives and guidance. This panel will examine the changes occurring in this important area and explore the range of responses in terms of adjusting the regulatory process or participation in it.” The panel comprised two regulatory lawyers and a representative from a provincial government utilities consumer-advocate’s office.

Much of the discussion in this session centred on a core function of regulation: acting in the public interest. Key questions discussed were how do regulators treat public interest, and what mechanisms have evolved in regulatory design so that regulators can act in the public interest. One concept discussed at some length was social licence to operate. Harkening back to a common theme of the conference, speakers had strong doubts about the usefulness of the concept of a social licence to operate in terms of delivering regulatory results in the public interest. Because social licence to operate can mean different things in different applications, it was generally viewed as an intangible concept based on shifting beliefs, perceptions and opinions.

Generally speaking, social licence to operate was rejected as a means by which regulators could make decisions to act in the public interest. There was a consensus that regulatory decisions ought to be made based on tangible outcomes, facts and quantitative analysis. Social-licence issues were criticized as often leading to more polarized regulatory proceedings that question the reputation and credibility of the regulator as well as procedural fairness. In order to act in the public interest, regulators need to maintain public confidence in the fairness of their decisions. A question about whether or not social licence should be written into legislation was raised, however there was no consensus as to whether or not this would be beneficial.

The second topic discussed was the role of consumers in the regulatory process and regulatory design. Innovation was described as being one way in which regulators can meet the needs of consumers of regulation (society). As technologies change, regulators have to be able to meet changing demands. The way that regulators capture those changes can have a large impact on stakeholders. Performance-based regulation was one policy option discussed that could best align with and support technological advances.

In addition to finding new ways to innovate, speakers in this session also discussed other activities that regulators engage in that are related to the public interest. One question asked was: What happens when emerging public policy issues appear in a regulatory process? Because regulatory hearings are often held in a public forum, emerging issues can often surface in these hearings, whether or not they are relevant to the specific project at hand. Increasingly often these issues are about broad environmental concerns. A question emerged about what regulators should do in the face of celebrity environmental activists like Neil Young and Robert Redford, who seem to inspire others to oppose projects at the regulatory phase of development.

While there was no consensus on the most appropriate response, there was overwhelming agreement that regulators should be very clear in the guidelines for intervenors in public hearings. If a party needs to be heard, wants to be heard or has to be heard, the regulator must ensure that all parties are fully aware of what is expected of them in the regulatory process. Likewise, the regulator also needs to be clear of what the intervenors should expect of the regulator in the process.

Throughout this session, it became clear that speakers were somewhat frustrated that a number of complex public policy questions or issues emerge in public regulatory hearings. One speaker pointed to what he saw as emerging issues facing regulators, such as: First Nations issues (including consultation, cumulative impacts, long-standing traditional uses of the land, economic impacts and benefits); environmental issues (development of the oil sands versus clean energy sources); increasing activity and influence by public-interest advocacy groups; concerns of low-income customers (faced with rising energy costs); community health concerns; and the cost of deregulation (e.g., new electrical-transmission infrastructure in Alberta). There was empathy for members of the public who would like have a forum to express their concerns and know that the concerns were taken seriously; however, it becomes very burdensome on the regulator to address these broader issues. One suggestion that was explored in some depth was the creation of a public institution that would serve as a forum, outside of regulatory hearings, for the public to discuss important policy questions related to energy development. The costs of delays were described as a real cost of the absence of this type of institution. Of course, individuals can vote for politicians that they believe will represent their concerns on policy issues that matter, but participants in this session came to agree that citizens need more avenues to have their voices heard, beyond just general elections. In the absence of an institution that is suited to host various stakeholders and can use their input in a constructive way, regulators likely will continue to deal with the public and its broad issues and concerns.

EVOLUTION AND THE FUTURE OF REGULATION

The framework set out for the fourth and final session of the symposium was: “Regulators and regulatory institutions have a dynamic responsibility, representing the public interest while ensuring that necessary or critical infrastructure needs are met. This panel will have the task of spinning the crystal ball, and describing the energy regulatory institution of the future.” The panel comprised a former provincial regulator, as well as a current provincial regulator, and a regulatory lawyer.

In this session, the first picture painted by one speaker was what he saw as today’s regulator: timid, risk averse and toothless, stripped of much of its former independence and authority, and left in limbo to determine its own fate amidst changing circumstances. Not all speakers agreed that the current state of regulation matches this description. However, there was general consensus that regulators today face new and complex problems at an increasing rate and, without devising new methods and processes, regulators will become ill equipped to protect the public interest and accomplish their related mandates. Considerable discussion ensued about where regulators have come from and where they are headed.

One topic featuring prominently in this session was that of pipelines. In North America recently, controversies surrounding proposed new pipeline projects have fallen largely on the shoulders of energy regulators. Although many levels of government describe large pipeline projects as nation-building infrastructure, decisions regarding pipelines are often shirked by elected officials and left instead to regulatory bodies. A consensus emerged that political decisions ought to be made at the political level and left out of the regulatory level of decision-making. Perhaps an even greater consensus emerged that political outcomes should not be administered through regulators, if possible. Using the regulator as a tool to secure political outcomes casts doubt on the independence of regulators, especially in the mind of the public. If this is so, it raises a question about whether using the regulator as a tool to implement government policy would also cast doubt in the public's mind about the regulator's independence and objectivity. It could be argued that in many cases, the implementation of policy is meant to produce a desired political outcome.

Some participants cast doubt on the very notion of independence in regulation, questioning whether or not independence even has a role to play in the future of energy regulation. One speaker viewed independence as merely a myth, and said that there ought to be no misunderstanding that regulators are implementing policy every day and will continue to do so. It was this speaker's view that, especially under pressures to expedite project approvals, the regulator of the future would become more like a government department or agency, rather than what we have understood to be the independent or quasi-independent commissions of the past. One speaker referred to the notion of independence as being the principle of keeping regulatory decisions at arm's length from government, and that in the future we will see further erosion of this concept. The future regulator will not be engaged in the adjudication of disparate interests, but will act as an administrative department instead. Based on recent regulatory decisions, the regulator won't even have the "duty to be fair" in making its decision, and the concept of procedural fairness (including cross-examination) will not be an essential part of the process, he said. Another speaker raised the question of whether society wants a regulatory system based on 300 years of parliamentary democracy, or a system that looks and functions like a corporate structure; these approaches are very different, he noted. Another speaker began his remarks with a statement that could summarize much of the discussions within this session: the "glory days" of regulators are drawing to a close. As governments become more involved, the powers of regulators are being diminished. There were no speakers who believed that this trend would reverse in the future.

CONCLUSION

This symposium hosted by The School of Public Policy presented multiple and differing views and perspectives about the current and future state of energy regulation and policy development. In his closing comments, symposium chair Dr. Michal Moore noted that for a regulatory system to be credible and effective there has to be consistency in the tenure of regulatory officials (e.g., with fixed terms for appointments and removal limits). Moore also stated there is need for an independent energy information agency in Canada.

Several overarching policy-related themes, with implications for the future of energy regulation and policy development, emerged. These included:

1. **The independence (and perceived independence) of the regulator.** If this independence has in fact waned and government is increasingly taking the reins in decision-making, what are the implications for the regulator, the project proponent and citizens, in terms of public trust or confidence in the regulator's decisions? How are citizens to trust that the regulator is in fact acting in the "public interest" rather than in the government's interest (e.g., in implementing policy and ensuring political outcomes that the government desires)? If regulatory decisions are ultimately made by the executive branch of government, would the project proponent gain more advantage by spending more time and resources on lobbying cabinet ministers than on preparing for and participating in often lengthy regulatory hearings? Moreover, will regulatory decisions — or indeed the entire regulatory system — be consistent if the ultimate decision is made by politicians who are appointed to cabinet for varying and uncertain lengths of time (an average of two years in Alberta, for example) and by the political party in power at the time, versus regulatory officials who — at least historically — serve set tenures and act within specific mandates? A related question is: If the role of the regulator is diminished, will the regulator of the future have adequate technical capacity to make decisions and/or recommendations on complex proposed projects?
2. **Government's desire to align regulatory decisions with policy.** If the Alberta government's desire, as one speaker put it, is to better align policy objectives and regulatory outcomes (a main rationale offered for creating the Alberta Energy Regulator), then how exactly will this be done? What is the process and what are the specific mechanisms? One speaker mentioned that the establishment of a provincial "Policy Management Office," as part of the new "one-window" regulatory approach, is crucial to the process, and will hopefully enable government to accelerate its decisions around policy-making. When will this happen? What is the "yardstick" for measuring the effectiveness of this new office? How will the government communicate the function and effectiveness of this new office to stakeholders?
3. **Definitions and tests of "public interest" and "intervenor standing."** There was little consensus around either of these terms, except that participants agreed that the definition and tests of both terms are inadequate, unclear and/or confusing, and that both terms mean different things to different people. One participant wittily remarked that recognizing the public interest is like recognizing pornography: "You'll know it when you see it." Can policy be developed — ideally with public consultation — to provide clearer and fairer (meaning more equitable for all participants in the regulatory process) definitions and tests of both these terms?
4. **Clarity and transparency about who makes the ultimate decision.** If the independence of regulators has in fact waned, and if government truly desires regulatory decisions that implement government policy and achieve certain political outcomes, then, in the interests of transparency, why not have policy (and communications associated with that policy) that makes it clear that government (e.g., federal or provincial cabinet) makes the ultimate decision and that the regulator essentially functions as a body that listens to all participants (or at least to those directly affected by a proposed project, as one speaker urged), weighs the facts and merits of the project, and makes recommendations to government? This is in fact now the case with the National Energy Board, as one speaker pointed out. If this is the

trend, is there a need for new policy or communications to make the regulator's "new" role clear and transparent to the public? Also, given the regulator's increasingly confined role, what are the appropriate measures to put in place to ensure the regulator has some degree of objectivity (if not actual independence) in weighing the facts and merits of a proposed project? Or, should there be new policy — as one speaker suggested — to put an end to the notion of an independent or objective regulator and simply assign this regulatory function to a government department or agency?

5. **The relationship among regulators, governments, citizens and the courts.** Although this relationship did not receive much discussion during the symposium, several interesting questions were posed. What are the implications for the trend toward more politically influenced and government-directed regulatory decisions in terms of potential court challenges of those decisions? Will stakeholders increasingly turn to the courts for remedies to regulatory decisions if they no longer trust in the regulator's independence or objectivity? Is there a role for policy to ensure that citizens have access to legal remedies — or other options, such as binding arbitration and/or mandatory compensation — for decisions made by government-directed regulators that these citizens don't believe are in the public interest (or at least in their own interest)? There was considerable discussion during the symposium about the idea of creating some sort of public institution that could serve as a forum for the public to discuss and seek potential solutions to broader, policy-related issues (such as First Nations issues, cumulative environmental impacts, health concerns in the community, climate change, etc.) outside of the regulatory system. Is there a role for policy in encouraging the creation of such an institution?



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