

Ethics at the Energy and Utilities Board: Appearance or Reality?

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Canadian governmental agencies on the whole operate more ethically than their counterparts in most countries of the world. If the constitutional motto of the USA is “life, liberty and the pursuit of happiness”, the corresponding phrase in our constitution is “peace, order and good government”. These words may not be as inspiring as the American, but they do seem to capture something essential about the Canadian approach to government. We have enjoyed a pretty much unbroken peace at home; we do seem to like order; and we have tended to put considerable value on good government.

Our relative success building good government is reflected in international rankings. For example, in Transparency International’s 2008 Corruption Perceptions Index, Canada is tied with Australia in 9th position, behind only Denmark, New Zealand, Sweden, Singapore, Finland, Switzerland, Iceland and the Netherlands.

In the natural resource development sector, which is very important to our economy, you see just how different Canada is from much of the rest of the world in corruption terms. Through most of the world, the government processes which oversee the development of natural resources are rife with corruption. There is no doubt that Canada shines as a “clean” counter-example in this context.¹

The difference in prevalence of corruption between Canada and other major natural resource-reliant economies, such as Russia, is staggering. It is so great as to sometimes thwart attempts of oil and gas regulators from Canada and other countries to take each other seriously or even to talk to each other. For several years I helped bring Russian and Canadian energy regulators together in the hopes that the Canadians might be able to be of technical assistance to Russian efforts to reform their system of oil and

¹ I like to think this is not damning with faint praise.

gas regulation. In hindsight, I can see just how doomed to failure these efforts were, but at the time there was considerable support for them, and there were high hopes that Russia could make genuine strides towards better governance.

On one occasion when my colleagues and I organized a seminar in a northern region of Russia on the issuance of licenses, by government of course, to explore for and produce oil and gas. One of the Canadians involved was in charge of the rights issuance process for the province of Alberta, from which most oil and gas in Canada is produced. Much time was devoted to a painstaking explanation of how the system in Alberta worked, including a description of the auctions, through which the government awards licenses to the highest bidder.

Following that session, at a small dinner, one of the government officials on the Russian side, after asking some further technical questions, bluntly put the following question to the Alberta director of licensing, “And how much money do you make from this process, I mean, not your salary, but under the table?” My colleague answered: “Absolutely nothing, and even if I wanted to, given the way the system is set up, there is no way that I could”. The Russians present were blown away: it was incomprehensible to them that this could be true and yet, at the same time – because they had a lot of background information on Canadian governmental approaches to oil and gas regulation – I am fairly certain, they believed him.

Although I am going to express some worries about the integrity of some of our governmental processes, it remains the case that out-and-out corruption in the sense of money or other goodies or favours changing hands is – again comparatively speaking – not our problem. Something else is, though, and that something else could eventually erode our public sector values to the point where actual corruption (and the public alienation that allows corruption to flourish) gains a significant toe-hold.

So my “thesis” is that, although the current Canadian picture looks in many ways very good, there is reason to doubt that Canadian governmental agencies’ operational reality is as ethical as the appearance of their operations would suggest. It is further that this growing discrepancy between appearance and reality threatens to undermine the integrity of our government processes, possibly, someday, to the point – as I just noted above – where actual corruption becomes a significant problem.

From here, I am going to proceed in the following way. First, I am going to relate two stories about one of our premier governmental oil and gas agencies – it is now called, once again, the Energy Resources Conservation Board – which I think make a strong point about deterioration of that agency’s integrity.² Second, I am going to ask whether all I am pointing to is a Canadian instantiation of Thomas Friedman’s first law of petro-politics. Third, I am going to suggest that what is happening in Canada is probably not an illustration of this law: the rot, although not deep in most places, is more widespread than the First Law of Petro-politics would suggest.

Here is our first story about the Energy Resources Conservation Board. This government agency still has a hugely important jurisdiction over oil and gas development in Alberta, but when the episode I am about to relate took place, it had the legal jurisdiction to issue approvals for *virtually all* energy production, processing and transportation facilities in the province. It is important to note that the Board had long had an outstanding reputation in the global oil and gas industry as a textbook example of responsible, efficient and – to most minds anyway – ethically upstanding regulator.

The most serious accusation that had been made against the ERCB, prior to 2007, was that its decision-makers – appointed by government, but operating at arm’s length from it – were biased in favour of development. This criticism was routinely made and no doubt had considerable merit, as the government viewed oil and gas development as for the most part an unequivocal good, and thus the only important questions to be answered by the ERCB were technical ones of, for example, reservoir engineering or safe drilling procedures. Given this, it only made sense to people in government and many other Albertans that the decision-makers appointed to the ERCB would be petroleum engineers and other technical experts, who given their previous careers in either government or industry would of course be favourably disposed to development of the resources.

These allegations of bias were sincerely made, and as I have said I think had merit, but they never got anywhere because the notion of bias in our administrative law is not broad enough to encompass this kind of predisposition. Bias in Canadian

² The Energy Resources Conservation Board (ERCB) used to be known as the Energy and Utilities Board (EUB). In the paper I write of the ERCB. I have left “EUB” in the title of the paper as that was the format used in the abstract submitted to conference organizers.

administrative law goes to preconceived ideas about the particular project or applicant, not to the whole industry which the administrative agency has regulatory control over.

Indeed administrative bodies, such as the ERCB, probably couldn't function at all were it to be otherwise. Of course, not functioning at all was often the goal of those making the complaints, but that is another story.

My point is that back then the story about the ERCB looked pretty good and probably largely was.³ There were regulatory oversights⁴ but what the ERCB had been clearly mandated by law to do, it did and usually pretty well. Board members travelled the world giving lectures and seminars on Alberta's oil and gas regulatory system. In their particular pond they were pretty big – and pretty highly respected – fish.

To critical observers the foundation for this reputation had been eroding for quite some time. But by 2007 two problems with the ERCB's ethically pure image had come to light; it became clear that the agency was resting on its laurels and not keeping careful watch on what was actually happening. First, it was revealed that security staff together with Board members – that is, the government appointed people with authority to make the high-level decisions – had approved an undercover (plain-clothes) spying operation against a citizen's group whose only "offence" had been to strenuously resist the construction of a transmission line across their lands. The agency had gone so far as to authorize one of the undercover security personnel to participate in a conference call – posing as one of the protesters – held for the purpose of planning the group's next moves.

The violation of Canadian ethical standards, not to mention privacy and possibly other laws, was egregious. Specific breaches of privacy law (which there were) aside, ERCB leadership had created (wittingly or not) an institutional "culture" which condoned spying on Albertans.

How did such unethical leadership take hold at the Board? Other people would no doubt offer different views, but I think the answer is that the ERCB fundamentally lost its way. It was supposed to be one thing – which it had long been – but had become

³ There were always problems with the legislation, but the politicians were responsible for correcting those, not the ERCB.

⁴ For example, for many years the legislation did not address crucial issues such as who is to pay for the proper decommissioning of oil and gas facilities, such as wells or pipelines, when the company responsible goes bankrupt or merely disappears.

another, probably without most people associated with it knowing the transformation had taken place.

Even though the phrase is enshrined in every law which governs its operations – the Board as an organization, and its leadership in particular, had forgotten they were to work “in the public interest”. In forgetting that their primary obligation is to act “in the public interest” of all Albertans, the Board had come to view those who oppose energy developments, such as new electricity transmission lines – not as concerned citizens exercising their democratic rights of free expression and association but – as *the enemy*, against which at least some people thought it justified to use illegal measures.

Second, these breaches of ethics and law were exacerbated, in a sense, by the fact that the agency in question, the ERCB, had on staff its very own Ethics Advisor.⁵ This was very unusual in Canadian regulatory practice. Most agencies employ no such person and either have to figure things out for themselves (together perhaps with legal or other advisors) or seek advice from a government level ethics officer, if there is such a person, or the ombudsman. So the spying occurred on the watch of an ethics advisor who seems to have played no role in the matter at all – not before, during or after the scandal.

So, what was going on here? What was the ethics advisor for then? I am still researching the exact scope of the role, but it was not confined – as I had originally thought – to examining conflicts of interest issues concerning Board members and staff. It extended at least to reviewing allegations of unfairness by companies applying for approvals from the Board. So he (and it was a he) seems to have operated as something of a front-line administrative law referee. But whatever his mandate, it is clear that he was not consulted when a matter having serious ethical implications – how to deal with fierce opponents to a proposed facility – arose.

Whatever he was, he was not in fact an Ethics Advisor to the Board. Although the Board no doubt needs one, it is probably better – in the sense that appearance now better corresponds to reality – that the position was abolished – as it was in 2007.⁶

⁵ Bob Clark was Ethics Advisor to the EUB, predecessor to the ERCB, from 2002 – 2007. His job included reviewing accusations of administrative unfairness against companies applying for approvals from the Board.

⁶ When the Energy and Utilities Board – the former ERCB – split into two entities in 2007, no one replaced the retiring Ethics Advisor. The position does not exist at either of the two spin-off agencies.

The second story concerning the ERCB is different in kind but also suggests that appearances are increasingly one thing and reality another. This one too suggests that key participants have been spending too much time reading their own press clippings and not tending to the shop. This story concerns the revelation that about 500 ducks became contaminated, and as a result died, when they landed on one of northern Alberta's oil sands tailing ponds, one operated by a company called "Synchrude" (for synthetic crude oil).

Although supporters of the oil sands try to suggest differently, this incident speaks to something far more significant in the long run than the death of some ducks, of which it is true there are very, very many in northern Canada. That is the apparent violation of the conditions attached to licenses under which Synchrude's operations are conducted, licenses issued by the ERCB. Synchrude was supposed to put measures in place to prevent exactly what happened, but it did not, and the ducks died.

More important than investigations after the fact (which have taken place and the company is, as of early 2009, being prosecuted, but only after an environmental group first launched a private prosecution) is prevention, so that harm can be avoided. This is where the appearance versus reality distinction becomes alarming. We had long been told that development of the oil sands is environmentally acceptable because stringent conditions are imposed on that process. But even if those conditions are both strict and appropriate to oil sands mining operations⁷, they are meaningless if not complied with. We had been told there was no need of more field inspection officers because companies – especially, purportedly "good" companies, such as Synchrude – voluntarily adhere to the conditions on their licenses. This is called "self-regulation". And whether in the financial and banking sectors or the oil and gas industry, we have now more reason than ever to doubt the wisdom of this approach.

It reminds me of the old Soviet and then later Russian joke: we pretend to work and they pretend to pay us (Soviet); we pretend to vote and they pretend to govern (post-Soviet Russian). The Alberta version is, companies pretend to comply and the ERCB pretends to regulate.

⁷ There is good reason to think they are not.

But perhaps this is nothing more than the “First Law of Petro-politics” at work? In an article for the American journal *Foreign Policy*⁸ in 2006 Thomas Friedman wrote:

The price of oil and the pace of freedom always move in opposite directions in oil-rich petro- states. According to the First Law of Petropolitics, the higher the average global crude oil price rises, the more free speech, free press, free and fair elections, an independent judiciary, the rule of law, and independent political parties are eroded.

Friedman notes that he “would be the first to acknowledge that this is not a scientific lab experiment, because the rise and fall of economic and political freedom in a society can never be perfectly quantifiable or interchangeable”, but he still thinks “there is value in trying to demonstrate this very real correlation ... even with its imperfections”.

My examples are from Alberta, not a country, but still a political jurisdiction with a great deal of autonomy from the Canadian central government and an economy which is dominated by oil and gas activity. More than one writer thinks the first law of petropolitics applies to Alberta. For example, according to Andrew Nikiforuk in his book Tarsands, Dirty Oil and the Future of a Continent:

The democratic gap between the rulers and the ruled [in Alberta] grows wider every day. Polls show that Albertans overwhelmingly favour real reductions in carbon emissions, yet their government champions a laughable program to reduce emissions by 14 percent by 2050. Most people want a slowdown in the tar sands, but the government will hear nothing of it. Rural Albertans ask for tough groundwater protection but get more oil and gas drilling in their backyards instead.⁹

While everything Nikiforuk says is true, I think the problem I am concerned with is more deep-seated. Although the First Law is at work in Canada, especially vis a vis development of the oil sands, the problem I point to – of the growing gap between appearances and reality – has its roots elsewhere. For example, the federal freedom of information legislation is broken and has been broken for a long time. Critics argue that recent federal governments get away with being secretive more easily because the flawed

⁸ Thomas Friedman “The First Law of Petropolitics”, *Foreign Policy*, May/June 2006.

⁹ (Vancouver: Greystone Books, 2008), p. 162.

legislation is in place, than were it not on the law books at all. Appearance is one thing – we have a freedom of information statute. But reality is another – having it is worse than not having it. Information might well flow more easily were there no legislation in this area at all. This failure of governance, and many others like it, cannot be chalked up to our oil and gas resources.

For another example, take our judicial system, often touted as one of the best in the world. The courts are still solid, if you can get before them. But the delay in getting there is serious in many if not most parts of the country. And that difficulty is spawning others. Until 2004 when political pressure forced repeal of the measure, the laws of the province of Ontario (think Toronto) gave legal force to family law arbitrations carried out by religious courts. In a pluralist democracy committed to the rule of law, this was unthinkable, but nevertheless had been in operation for about 13 years before being called to a stop.

In too many places, what was once what it appeared to be, no longer is. I think the essential problem is complacency. The prevailing view is that we've got it figured out. All that remains is fine tuning and someday, when the spirit moves us – perhaps when we stop shopping – we'll get on with that fine tuning. It is possible that the financial downturn will jolt us out of our complacency, although even if it does, there won't be as much money as there was a while ago to address the growing list of governance problems.

The lesson to be taken away from these examples, I think, is that there is no place for complacency when it comes to the ethical operation of government, that “the price of freedom” to quote Thomas Jefferson really is “eternal vigilance”. The moment we neglect signs of rot because, after all, we have things so much better than so many other places (which is true), we start down the road to one of them.

For Canadians specifically, the warning is we must always be concerned that our ethical realities match our ethical appearances, which we are rather exceptionally good at constructing.