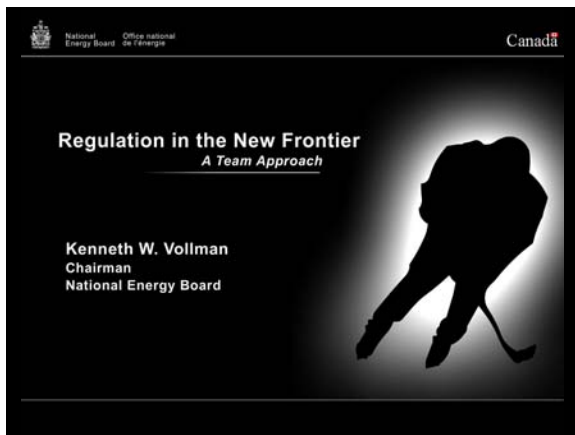


Regulation in the New Frontier “A Team Approach”

Introductory remarks by
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Chairman, National Energy Board
to an Armchair Discussion at the 2007 CAMPUT Conference
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The question our panel has been asked to address is: “What is the role of Regulators in the New Frontier?”

I think most regulators in this room would agree with my answer:

It's to protect the safety of citizens, their property and the environment, and to create the conditions for an innovative and competitive economy.

I also expect most regulators in this room believe they are doing an excellent job at this – and I personally believe you are.

Why then the mounting criticism of regulation, including criticism that regulation in Canada does not benchmark well against a number of other countries?

What I'm going to suggest to you is that we need to increasingly think of regulation as a “system”, rather than what any individual agency is doing. When a project proponent expresses concern about regulation, those concerns usually include all of the reviews and permissions a project must successfully survive before construction might begin. In Canada these challenges often include unresolved broad public policy issues such as unsettled land claims, or

longstanding social and economic issues, as well as challenges associated with navigating the intricacies of federal/provincial relations and departments. My remarks today will take a broad look at the system and the message I want to impart is that we need to take a team approach to streamlining the system.



A company that's bringing forward an application for a major pipeline in Canada faces a number of big challenges in the New Frontiers. In the time available to me, I'll mention what I believe to be the three largest challenges, suggest what I think should be done to address the challenges and then throw it open for discussion.

The three largest challenges are:

- Uncertainty around Aboriginal Consultation
- Uncertainty around Environmental Processes
- Improving the Regulatory Process

Given that Canada is a hockey nation and we're right in the middle of playoffs, I thought it appropriate to use a hockey analogy to help make my points.



The obligation of the Crown to consult and accommodate arises from the principle of the honour of the Crown as outlined by the Supreme Court in the *Haida Nation* decision. The goal for both parties in the consultation process is the reconciliation of the interests of the Crown and Aboriginals.

Proponents or players that start the game in the absence of adequate Crown consultation with Aboriginals, run the risk of being sent to the penalty box either right away or later on in the game. In addition, the nature of the penalty may be such that it cripples the team – perhaps even ending the game altogether.

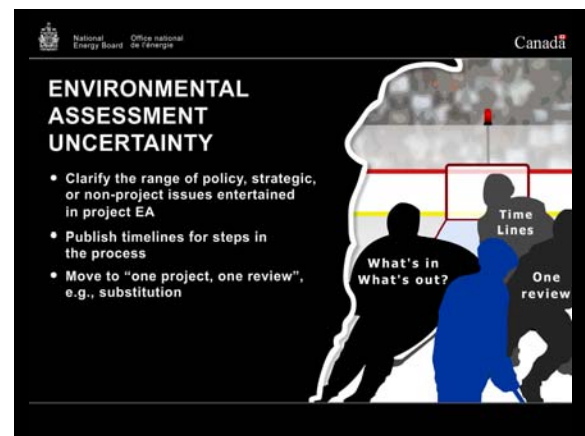
Obviously industry players want to stay out of the penalty box so what can be done?

It's my view that two steps are critical:

- Consultation protocols need to be developed as a basis for a common understanding by proponents, aboriginals, government and regulators as to how consultation will be conducted for a project. In other words, lay out the rules for the game and the tools for playing it.
- The federal government needs to identify a lead department or agency to deal with Aboriginal concerns with major projects.

With respect to the first suggestion, there are a number of draft protocols out there that are being worked on and out of this work should emerge a shared understanding of what is required for effective consultation. While not yet clear, there is also some work progressing on establishing consistency with respect to accommodation, but that work is not as advanced as the emerging guidance on consultation protocols.

With respect to the second point, the strategy at the National Energy Board has been to ensure that Aboriginal concerns are brought before us so that they can be factored into the decision on the application. Whether the Crown needs to consult separately for NEB applications or whether the Board's process is sufficient to address Aboriginal concerns has not been legally established. In some instances the NEB process may be an effective means for Aboriginal concerns to be addressed; in others, particularly for large projects, there may be a need for a separate Crown consultation process to address broader Aboriginal concerns. The quasi-judicial process, with its limitations such as an inability to hold discussions one-on-one with an affected party, is not "consultation" in the sense understood by most Aboriginal people but its importance in ensuring the mitigation of impacts on Aboriginals cannot be overlooked. Hence, my second suggestion that we need to agree who has the lead and then we can all play our parts with no one going into the penalty box.



Once back in the game, our player has to deal with the environmental processes of the system. These can come at the proponent from different angles and with different intensity - and every time the EA process can be different. This might be like having different referees on the ice – all with different rule books and our players earnestly trying once again to stay out of the penalty box.

What can help our player better deal with the necessary environmental processes? Here are my suggestions:

- Clarify the range of policy, permitting, or non-project issues examined in project EA.
- Publish timelines for steps in the process.
- Move to "one project, one review", e.g., substitution.

Public hearings on a project often attract discussion of broad public policy issues. This is understandable if public hearings on projects are the only opportunity people have to discuss such matters. However, such debates can be time consuming and frustrating for all parties if the solutions are not within the mandate of the regulator. Clarifying what's in and what's out should be part of the front end of the EA process.

My second suggestion is to establish clear timelines for steps in the EA process and to find means for holding parties accountable for adhering to an agreed upon schedule.

Finally, the current system allows for multiple reviews of a single project. We need to move to a "one project, one review system." One means of doing that is using the substitution provision in CEAA, as we did for the Emera application to allow the NEB environmental assessment process to substitute for a separate environmental assessment by a CEAA review panel. Our Board is committed to working with CEAA to evaluate that pilot and to implement whatever changes are required to our process for substitution to become the standard way of doing hearings which would otherwise involve a CEAA review panel.

The examination of environmental issues currently takes more time in public hearings than all other issues combined. This is an indication of the importance the public attaches to environmental matters and it is likely that the interest in environmental matters will only grow. It therefore seems to me doubly important that we address the process inefficiencies if we are to do an effective job in addressing environmental concerns within the broader regulatory system overall.

Once our players have addressed the aboriginal consultation and environmental system issues, then the final challenge is the regulatory process itself.

Given the occupations of this audience, I expect my suggestions here are hardly novel. But I think it's important to list them and talk about them because I believe they will be the basis for how the game will be played in the new millennium.

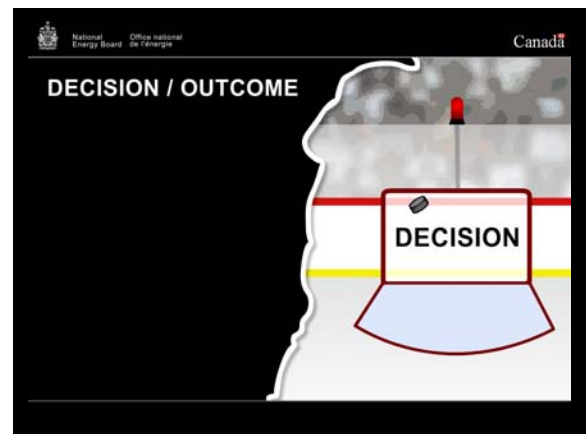
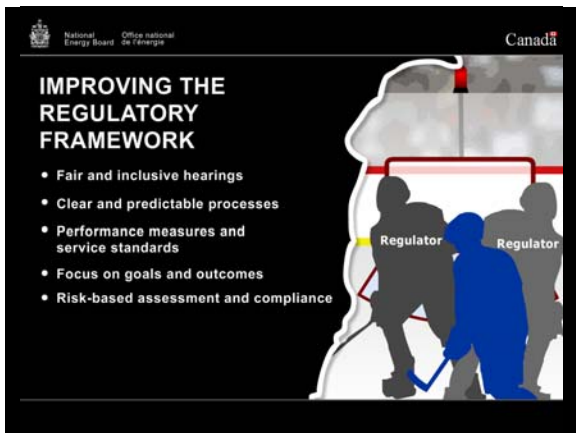
In my view, regulators need to ensure that their game plan includes the following five strategies:

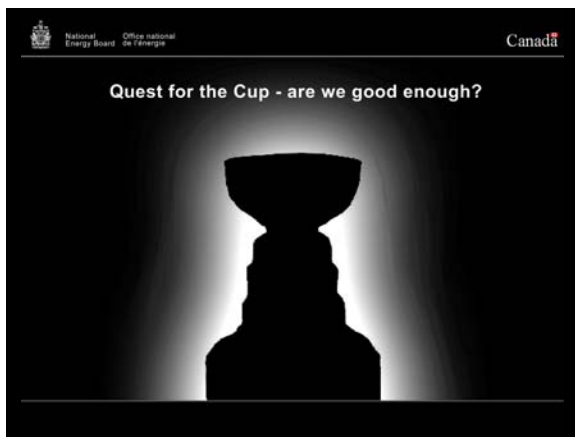
- Fair and inclusive hearings
- Clear and predictable processes
- Performance measures and service standards
- Focus on goals and outcomes
- Risk-based assessment and compliance

"Of course", you might be saying. "That sounds sensible." But like any team system, it works only if the players really buy-in. How can you tell if your players have bought in? Well, if you hear any of the statements below, you should be concerned.

SUGGESTED STRATEGY	INDICATION PLAYERS HAVE NOT BOUGHT-IN
Fair and inclusive hearings	"We advertised the hearing; if they don't show up it's nobody's fault but theirs!"
Clear and predictable processes	"The companies should know what they need to file."
Performance measures & service standards	"It will take as long as it takes to do a good job"
Focus on goals and outcomes	"The company will cut corners if you don't tell them exactly how to do it."
Risk-based assessment and compliance	"I don't understand this, so let's ask the applicant to file more information."

With all of these elements of the system corrected, our project proponents should be able to efficiently attain what they are after, a Decision.





So this is what is needed to win a game, but are we good enough to go for the Cup?

I've been playing, coaching and managing for many years, and in a few weeks will enjoy observing you as an armchair coach. From that perspective, my answer to the question is: "not yet, but we're on the right building program."

Quite frankly, I think the reason many of the system problems still exist has been the tendency in the past for the owners to ask the players to fix things. That would not work on a hockey team and it should be no surprise it hasn't worked well in regulation. Governments ("owners") need to be involved in correcting the system and there is growing evidence they are taking this role seriously.

Improving the regulatory system is a priority of the Council of Energy Ministers and was featured prominently in the recent federal Budget. My sense is that Ministers would like to see the improvements made without legislation, but are prepared to legislate solutions where necessary.

A good example would be the move to performance based regulation which includes setting of clear service standards. The government's commitment to service standards was clearly stated in the Budget. I know that a number of Boards, including ours, have embraced the concept of published service standards. Others have not done so yet. I know that one of the concerns of boards is that working to service standards could affect quality. That should not occur if the service standards are set properly.

Let me use another analogy here. You take your car to the garage to have the water pump replaced. The garage calls you at the end of the day to say they will need to keep your car overnight. Is that to improve quality? Given that it should take four hours or less

to change a water pump, what they are really saying is that your car sat on the lot most of the day and nobody worked on it.

Returning to the Budget, the government is also creating a Major Projects Management Office to improve coordination of reviews, and is investing \$60 million over two years to address capacity issues. I am also observing movement on the aboriginal consultation front and a willingness among agencies to achieve a "one project-one review" solution.

Whether the various players will buy in remains to be seen. My bet is that gains will be limited and that governments will need to be even more "hands on", including making legislated changes.

The beauty of the game of hockey, which has formed the basis of my analogy, is that at any time, the players can look up at the score board and see where they are at in the game – the penalties, the score, the teams on the ice, and they play to a well defined set of rules and expectations. That is the degree of clarity and expectations that we have a responsibility to bring to our game – this all important game that unfolds on behalf of all Canadians and will have great importance in determining our overall well-being as a people and as a nation. We have a collective responsibility to approach this game in a systematic way and, without ever seeking to pre-determine any given outcome, improve its overall performance. That's how I'd like to see the game unfold.

I've chosen to focus my remarks today on what needs to be done to improve the overall regulatory system. Beyond that, we must all prepare to deal with the substantive issues of the new millennium – and these will vary from agency to agency. A large challenge for the NEB is the difficult engineering issues we will have in front of us, whether it's cold weather engineering, pipelining in permafrost, or converting pipes from one type of service to another. Perhaps an issue that is common to all of us is what some folks are calling the "new environmentalism." One aspect of that is a growing public interest in debating whether we are making the right energy choices. Another example would be the growing public resistance to any type of new infrastructure that could affect enjoyment of their lands. Just as the game of hockey is changing, our game is changing too.