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Federal "Smart Regulation": Does the federal regulatory policy have the requisite grey matter?

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The months of November and December 2005 saw the Privy Council Office (PCO) conduct public consultations on the federal draft policy document, *Government Directive on Regulating* (GDR).[1] The GDR represents a revisiting and renewal of federal policy that governs the decision making process for the creation of regulations by all federal departments. The GDR is part of a broader federal policy initiative, going by the moniker of "Smart Regulation", that is already underway.

One concludes from past submissions and participation in the government consultation that many non-governmental organizations in the environmental, health and labour sectors view the GDR and related federal changes to the regulatory policy as lacking "smarts", undermining the public interest in preserving human and environmental health and favouring trade, economics and Canadian business.[2]

The GDR principles and presumptions

The draft GDR contains broad and general statements typical of policy documents. It proclaims that the federal government will ensure its "regulatory activities provide the greatest overall benefit to present and future generations" and that the government is committed to advancing the public interest.[3] In reading the GDR it also becomes apparent that it aims to promote what could be conflicting regulatory principles, such as minimizing discrepancies in trade regulations between nations and ensuring that the environment and human health are protected.[4]

The GDR on a whole appears to focus on regulatory efficiency and promotion of business rather than protecting the public good. Bluntly, the GDR reflects the perspective that regulation is a hindrance to the market economy that should be minimized and, where possible, harmonized with provincial and international standards, regardless of the validity of extra-jurisdictional standards that are set. It is this main presumption that concerned many participants in the consultations, particularly those representing environmental, health and labour interests.[5]

Does Smart Regulation equal deregulation?

When looking at the implications of Smart Regulation policy and its focus on trade, competitiveness and efficiency to drive regulatory policy, one concludes that Smart Regulation may often equate with deregulation.

A provincial perspective given by the British Columbia Deregulation Office on the principles underlying Smart Regulation is as follows: "Smart regulations are much more than just deregulation or results-based regulations. Smart regulations provide needed

public health and safety protection, environmental protection at the same time enhancing economic efficiency."[6]

Federally, the wording of the GDR reflects the sentiment that regulations should be minimized, and that voluntary measures should receive preference. Consider the following excerpts of the GDR:

- "[D]epartments and agencies are responsible for assessing public policy issues and *demonstrating through the best available evidence and knowledge that government intervention is needed,* and that regulation should be considered as part of the mix of government instruments to achieve policy objectives."[7]

- "[D]emonstrate that the regulatory response represents the necessary level and form of government intervention, and that it is proportional to the degree and type of risk to Canadians and Canada's natural environment."[8]

- When developing or changing technical regulations, "particularly regulations affecting trade, departments and agencies are expected to specify, where possible, technical regulatory requirements in terms of their performance rather than their design or descriptive characteristics to ensure that regulations do not restrict trade any more than necessary to fulfill the intended policy objectives; and make use of voluntary consensus-based standards or guides when they adequately fulfill intended policy objectives."[9]

Actions taken to date under the rubric of Smart Regulation further support the view that deregulation is a central tenet of the policy. A case in point is the recent policy change in the Department of Fisheries and Oceans (DFO) habitat protection program.[10] The federal *Smart Regulation: Report on Action and Plans: Fall 2005 Update*[11] *(Report on Actions)* states that the DFO policy change is "Smart" as it:

- Places emphasis on all elements of the compliance continuum, with increased effort on compliance promotion and monitoring for results;

- Assists the regulated community in development of self-audit programs;

- Institutes compliance incentives for public and industry that undertake voluntary remedial actions; and

- Creates increased efficiency in delivery of compliance and enforcement activities through utilizing a risk management framework.[12]

The *Report on Actions* states that the benefits of Smart Regulation accruing to industry are "an improved, predictable and equitable level of compliance and enforcement", while Canadians will benefit from "better protection for fish habitat for present and future generations".[13]

The DFO policy change has resulted in the creation of "Operational Statements" that focus on streamlining regulatory activities related to works that might affect fish habitat.

On a practical level this policy change means fewer environmental assessments, less enforcement, and greater efficiency (by way of less direct regulation by DFO) and therefore the benefits claimed for industry appear substantiated.[14] The claim that Canadians will benefit from "better protection for fish habitat" is far less certain. Indeed, in the short term, the Smart Regulation policy has seen vast reductions in the number of fisheries enforcement officers in the prairie provinces and no legal mechanism to ensure compliance with the terms of the Operational Statements. Further, there is no indication that the Operational Statements have attracted sufficient scientific scrutiny or field testing nor how compliance with the statements will be monitored or achieved. In this regard the industry benefit is far more certain and provable while the benefit to Canadians is elusive and uncertain at best. The policy shift to favour the regulated (as opposed to Canadians) is thereby illuminated.[15]

Conclusions regarding Smart Regulation and GDR as effective regulatory policy
The Environmental Law Centre concludes that the draft GDR, in focusing on efficiency, trade harmonization and economic advantage, will be ineffective in promoting laws and policy for the protection of a clean, diverse and healthy environment. The issues that the GDR needs to address include:

1. Recognizing the purpose and supremacy of enabling legislation;

2. Recognizing the nature of uncertainties when considering impacts of regulation;

3. Recognizing the breadth of international obligations; and

4. Recognizing the value of prohibitions and the force of law, as reflective of the public interest.

1. Recognizing the purpose and supremacy of enabling legislation

The GDR has the potential to result in the undemocratic centralization of decision-making in the PCO. On a practical level the PCO policies and guidelines (and its regulatory challenge function[16]) may begin to govern decisions regarding whether regulation is needed rather than responsible departments properly deciding to regulate in pursuit of the express terms of their enabling statute. The decisions to regulate, made either by the responsible Minister or Cabinet, must be governed by the purpose and goals of the legislation, not the contents of the GDR. Laws, not policies, should govern the creation of regulations.

By way of example, the duties of the Government of Canada set out in section 2 of *Canadian Environmental Protection Act, 1999*[17] (CEPA 1999) make it abundantly clear that the measures taken by government should promote the protection of human health and the environment. The sole mention of economic considerations in that section arises at s. 2(1.1) where it indicates that the government shall consider the "positive economic impacts arising from the measure, including those cost-savings arising from health, environmental and technological advances and innovation, among others".

The GDR proposes to challenge this legislative mandate and decision-making process by requiring that the responsible department demonstrate "that no unnecessary regulatory burden will be imposed on Canadians and business"[18] and that due consideration be given to international trade agreements.[19]

While a multitude of considerations must go into the making of regulations one must ask the question, "when does the policy direction of the GDR undermine the legislative mandate of CEPA 1999?". Currently, transparency at the policy level is insufficient to allow the Canadian public to assess whether the regulatory decisions are being made in support of the democratically created statute objectives or governed by overbearing arguments arising from the GDR. In this regard the PCO must be extremely cautious in exercising its regulatory challenge role to avoid undermining legislative intent.

The public interest is reflected in the purpose and duties created by enabling statutes and these statutes must govern decisions regarding regulation.

2. Recognizing the nature of uncertainties when considering impacts of regulation

The GDR fails to recognize the disparate nature of uncertainties when dealing with environment and health impacts, as opposed to arguments regarding economic impacts. Economic impacts are inherently more certain when considered in a cost-benefit analysis and risk management framework. The costs and benefits are often readily ascertainable, quantifiable, and therefore provable. On the other hand the GDR requires proof of the need for regulations to protect the environment or health. Cost-benefit analysis and risk management considerations of environmental and health impacts carry greater uncertainty. The impacts are typically long term with difficult issues of proof of causation of harm, particularly in relation to cumulative and synergistic effects. Further, environmental and health impacts are usually considered externalities that will not be attributed sufficient monetary or economic considerations.

This disparate nature of uncertainty must be recognized if the regulatory policy is to be effective in protecting the environment and human health. This can be done through pursuing a precautionary approach, allowing regulations to be brought forth on the basis of avoiding harm through erring on the side of caution rather than requiring absolute proof of a harm and an evaluation of whether the regulation is truly necessary (as mandated by the GDR).[20]

3. Recognizing the breadth of national and international obligations

The GDR cites the need to comply with international obligations and cites specifically North American Free Trade Agreement (NAFTA) and World Trade Organization (WTO) obligations.[21] The *Convention on Biological Diversity*, *Migratory Birds Convention Act, 1994*, *Ramsar Convention, 1971* and *Convention on the International Trade of Endangered Species* receive no mention. Yet one must ask which international obligations should be front and centre when the Minister of Environment is considering regulation under the *Species at Risk Act*.[22] Whether these international environmental obligations should be superceded by conventions on trade should be part of a broader political dialogue that questions outdated trade principles that may harm human health and the environment domestically. This argument is only strengthened when one

considers the current shortcomings and undermining of both NAFTA and the WTO on the world stage.

Similarly, cooperation and collaboration with provincial governments should be pursued only to the extent that the federal legislative intent is not undermined. Abdicating enforcement and regulatory powers to the provinces on issues such as species at risk may undermine federal legislative objectives. The regulatory decisions made by Canada must reflect *bona fide* consideration of the enabling statute and the democratic intent housed therein.

4. Recognizing the value of prohibitions and the force of law, as reflecting the public interest

The GDR fails to recognize the value of regulatory prohibitions and the importance of legally enforceable standards in a just and fair society. Legally enforceable standards provide Canadians the transparency and accountability required to ensure that our government is living up to its democratically and statutorily pronounced goals and objectives. Furthermore, legally enforceable regulations can act as economic drivers, providing impetus for research and development and the use of less polluting (and less highly regulated) alternatives.

Indeed, the regulatory policy itself would benefit from being legally entrenched, as it would allow for a fair and open debate of its contents and increase the transparency and accountability of federal regulatory decisions.

Conclusion

Maintaining a wide variety of tools for compliance is essential to effective and reliable protection of the environment and human health. The federal draft GDR and Smart Regulation policy aims to minimize the cost of regulation while maintaining social and environmental protection. However, the GDR may undermine regulatory decisions by giving excessive weight to economic cost and benefit analysis and promoting a culture that minimizes regulations within federal jurisdiction. Cooperation, voluntary measures, and harmonization constitute several tools in the regulatory toolbox but they should not be relied on too heavily, as this can lead to regulation by the lowest common denominator. For this reason, the ELC recommends a thorough revisiting of the GDR and Smart Regulation Policy, as it fails to adequately protect the public interest in a clean, healthy environment and protection of human health and safety.

The ELC is a co-signatory to comments provided to the Privy Council Office on the GDR prepared for the Canadian Environment Network by the Canadian Environmental Law Association. The document entitled *Protection and Precaution: Canadian Priorities for Federal Regulatory Policy* is available online at <http://www.regulation.gc.ca/docs/smartregint/subbusngofall2005/CanEnvironNet_e.pdf>.

[1] Government of Canada, *Draft Government Directive on Regulating*, (Ottawa: Privy Council Office, October 2005), online: Regulation.GC.CA <http://www.regulation.gc.ca/default.asp?Language=E&Page=smartregint&doc=GDR2_e.htm>

[2] The perspective of labour, health and environmental groups was evident in the workshop submissions in Calgary, on November 25, 2005, and is reflected in the following online documents: For a health perspective see <http://www.healthcoalition.ca/march29.pdf> and the submission of Tim Lambert of the Calgary Health

Region <http://www.regulation.gc.ca/docs/smartregint/subbusngo/tlambert_E.pdf >, for an environmental perspective see the Canadian Environmental Law Association website at <http://www.cela.ca/coreprograms/detail.shtml?x=2017> and for a labour perspective see <http://www.regulation.gc.ca/docs/smartregint/subbusngo/Canlabourcongress_E.pdf.>

[3] *Supra* note 1at p. 2.

[4] *Ibid.,* pp. 6 and 9 respectively.

[5] *Supra* note 2.

[6] As stated in the description of a Smart Regulation Conference in March 2005, online: Regulatory Reform Office <http://www.deregulation.gov.bc.ca/conference_outline.htm>

[7] *Supra* note 1 at p. 4 [emphasis added].

[8] *Ibid.,* p. 5.

[9] *Ibid.,* p. 6.

[10] For more information, see Jason Unger, "DFO Sets New Policy Course for Fisheries Act Enforcement: Habitat Protection through Operational Position Statements and Diminished Enforcement Staff", *Environmental Law Centre News Brief*, 20:4 (2005) 4, online: Environmental Law Centre <http://www.elc.ab.ca/ims/client/upload/DFOSetsNewPolicyCourseforFisheriesAct.pdf.>

[11] Government of Canada, (Ottawa: Library and Archives Canada Cataloguing in Publications, 2005)

[12] *Ibid* at p. 62.

[13] *Ibid*.

[14] *Supra* note 11.

[15] The policy drivers are also evident in the description of Smart Regulation provided by Natural Resources Canada, where it stated that the policy will foster "an improved investment climate, fewer costly delays for substantial resource development projects, competitiveness of industry and a healthy economy and trade balance, and better integration of government policy objectives (economic, environmental and social) for improved stewardship and productivity." Online: Natural Resources Canada, <http://www.nrcan-rncan.gc.ca/sd-dd/sr-ri/sr-ri_e.html>.

[16] The Privy Council Office undertakes a regulatory challenge function that involves reviewing, assessing and challenging the nature and necessity of proposed regulations. The goal of the challenge function is to ensure that the regulations are legally and substantively sound, are in compliance with international obligations and reflect the policy directive, such as that proposed by the draft GDR.

[17] S.C. 1999, c. 33.

[18] *Supra* note 1 at p. 9.

[19] *Ibid*. at p. 6.

[20] *Supra* note 6.

[21] *Ibid*. at p. 6.

[22] S.C. 2002, c. 29.

Comments on this article may be sent to the editor at elc@elc.ab.ca.

NRCB Revises to Respond to AOPA Concerns

By Cindy Chiasson
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Alberta's Natural Resources Conservation Board (NRCB) carries out a split regulatory mandate. Since its inception in 1991, the NRCB has dealt with reviews of non-energy natural resource projects, determining whether such projects are in the public interest, having regard to environmental, economic and social factors.[1] In 2002, its mandate was expanded to make it responsible for the regulation and review of intensive livestock operations under the *Agricultural Operation Practices Act* (AOPA)[2], which has considerably increased its workload.

Last year, the NRCB underwent an independent governance review, the results of which have sparked various changes aimed predominantly at its regulatory role under AOPA. Some of these changes offer greater transparency and clarity for livestock operation regulation within Alberta, but their success will depend in large part on the NRCB's commitment to their practical implementation.

Background

The 2005 governance review of the NRCB arose from a previous government initiative seeking to improve the accountability of provincial agencies, boards and commissions. Since taking on the regulatory responsibility for livestock operations, the NRCB has been subject to ongoing criticism from the agricultural sector.[3] This has occurred against the backdrop of a provincial strategy seeking significant growth in the agricultural sector by 2010[4], the effects of the BSE crisis on Alberta's livestock industry, and increasing pressures on land and resources due to rapid economic growth within Alberta. Additionally, when given the responsibility for regulation of livestock operations, the NRCB was assigned topic areas and duties very different from its previous business.

The growth pressures on the agricultural sector placed a considerable demand on the NRCB's staff and resources: [5]

> [S]ince its assumption of responsibility for AOPA, the NRCB has received or conducted:
> - more than 500 applications
> - more than 3000 public complaints concerning confined feeding operations
> - inspections of more than 800 operations
> - 41 public hearings or mediations related to approval or enforcement decisions at the request of directly affected parties.

These statistics cover a time period of approximately 2½ years.

Many of the recommendations from the governance review focus on internal NRCB structure and process. An overarching theme is the need to clarify the separation of the approval and review roles under AOPA. The report also emphasizes a need for improved stakeholder communications and relationships.[6]

Implementation

As part of its response to the governance review, the NRCB is creating greater opportunities for multi-stakeholder consultation and involvement in relation to AOPA.[7] This includes the establishment of two different advisory groups and the creation of "accountability sessions". The Policy Advisory Group will focus on regulatory matters under AOPA, including proposed regulatory and legislative changes. This group, made up of multi-stakeholder representatives, an NRCB Board member, and representatives of relevant government departments, will meet on a semi-annual basis and report to the Deputy Ministers of Sustainable Resource Development and Agriculture, Food and Rural Development.[8] The Technical Advisory Group will deal with the development of technical guidelines related to AOPA for topic areas such as risk assessment, monitoring and construction standards. Its membership will be technical experts from industry, the NRCB and Agriculture, Food and Rural Development, with potential input from stakeholders on specific issues "as appropriate".[9]

In addition, the NRCB plans to hold regular "Accountability Sessions" involving the Ministers of Sustainable Resource Development and Agriculture, Food and Rural Development, stakeholders and NRCB senior management. These sessions would act as a high level review of the "overall performance of AOPA delivery".[10]

There are also plans to make changes to the regulations under AOPA, although the nature of the changes has not been revealed.[11] It is likely that some amendments may be geared at more clearly defining the roles of the NRCB's Chair and its chief officer, in response to key recommendations of the governance review. However, it is less clear whether any of these changes would deal with the advisory groups mentioned above, or any other substantive changes to AOPA's regulatory system or technical requirements. The NRCB, Sustainable Resource Development and Agriculture, Food and Rural Development have all indicated that there are no plans at this time to make changes to AOPA.

The NRCB intends to develop and publish a written statement of regulatory policy and philosophy, likely with stakeholder input through the upcoming Policy Advisory Group.[12] It is currently preparing a compliance and enforcement policy to set out its approach to AOPA enforcement.

Commentary

While these measures appear to be positive steps towards enhanced stakeholder involvement, their true effectiveness is still to be determined. For example, the appointment process for the advisory groups and the accountability sessions has not been set out. A process allowing stakeholder interests (including industry, municipalities and non-governmental organizations) to appoint their own representatives would be preferable to support the integrity of the consultation process. The Technical Advisory Group membership may be too narrowly focused, with a bias favoring industry expansion. There are likely various parties who do not fall within the stated membership criteria but could bring technical expertise and broader perspectives to the table, which would add greater rigour to the development of technical guidelines under AOPA. Additionally, accountability sessions should include, as a standing item, a report back from the NRCB on concerns and issues raised at previous sessions.

With respect to the development of regulatory policies, the NRCB must take care to ensure that these policies are not implemented in a way that will fetter its discretion as a review board and the discretion of its staff in dealing with authorizations and enforcement matters. It should also ensure that it seeks and obtains broad stakeholder input as part of the development of these policies, beyond the proposed Policy Advisory Group, and commit to a regular review and report on the policies' effectiveness.

[1] *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3, s. 2.
[2] R.S.A. 2000, c. A-7.
[3] George B. Cuff & Associates Ltd., *Natural Resources Conservation Board Governance Review Report* (Edmonton: Alberta Sustainable Resource Development, 2005), pp. 9-12 (*Cuff Report*).
[4] *Alberta's Agriculture Growth Strategy* (Edmonton: Alberta Agriculture, Food and Rural Development, 2004). The Strategy seeks to achieve income levels of $20 billion in the value added agriculture industry and $10 billion in the primary agriculture industry by 2010. Reported receipts for those sectors for 2003 are $8.8 billion for value added agriculture and $7 billion for primary agriculture.
[5] *Cuff Report, supra* note 3, p. 12.
[6] *Ibid.,* pp. 7-9.
[7] *Effective Delivery of the Agricultural Operation Practices Act* (Edmonton: Natural Resources Conservation Board, 2005), p. 4.
[8] Alberta Sustainable Resource Development has statutory responsibility for the NRCB as a whole, while Alberta Agriculture, Food and Rural Development is the department responsible for AOPA.
[9] *Supra* note 7.
[10] *Ibid.*
[11] *Ibid.*, p. 5.
[12] *Ibid.*

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Ask Staff Counsel

Trespass and Directional Drilling

By Jodie Hierlmeier
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Environmental Law Centre

Dear Staff Counsel,

I am a landowner concerned about oil and gas development on my property. Instead of drilling the well on my property, the company is planning to directional drill from my neighbour's property. As a "surface owner" what do I actually own? Is the company trespassing on my property if they directional drill over my property line?

Ina Landowner

Dear Ina,

Most Albertans do not own the minerals underneath the surface of the land. When homesteaders came to Alberta most received title to the land surface only, while the provincial Crown retained title to the minerals. Mineral rights owned by the Crown are managed by Alberta's Department of Energy. "Minerals" are defined under the *Mines and Minerals Act* as including petroleum, oil, natural gas and coal belonging to the Crown. Minerals do not include sand, gravel, clay or marl. Under the *Mines and Minerals Act,* the sand, gravel, clay and marl belong to the surface owner of the land.

You wanted to know whether directional drilling for the minerals (which are owned by the Crown) into the sand, gravel, clay and marl (owned by the surface owner) could be considered trespass to surface owners' land. Unfortunately, there is no clear answer to this question in Canadian law.

An action in trespass is an action for the direct interference with land in the possession of another person. Part of the challenge with an action in trespass is determining the physical dimensions of land ownership. There once was an old legal principle which said whoever owns the soil, owns all the way up to the heavens and down to the depths of the earth. Canadian courts have resisted applying this principle verbatim and have generally attached qualifications to, or modified it, in some fashion. The principle has also been modified by legislation.

In terms of court decisions, there is very little Canadian case law on the extent of ownership rights to the "depths of the earth" and subsurface trespass. However, there is some case law on the extent of ownership rights "up to the heavens" and trespass into airspace. The case law on airspace trespass may be helpful or analogous to subsurface trespass.

In terms of airspace, courts have held that the owner of the surface holds an entitlement to the airspace up to a reasonable height above the ground; a height of space which can be used or occupied by the surface owner.[1] If the airspace is intruded upon by a permanent low level intrusion such as a power line, the landowner may sue in trespass. If the airspace is intruded upon by a transient, high level disturbance such as an airplane, the landowner may not sue in trespass.[2]

It is possible for courts to apply similar reasoning for subsurface rights in that a landowner is entitled to the subsurface down to a reasonable level which can be used or occupied by the landowner. This is just speculation at this point because Canadian courts have not ruled on this specific issue. However, one potential obstacle with bringing a trespass claim for directional drilling may be that the drilling does not usually occur within the space of the landowner's reasonable use.

Another potential obstacle in bringing a trespass claim is the defence of legal authorization, which is one defence to an action in trespass. If legislation authorizes entry, an action for trespass will not succeed. The question is whether the Crown's ownership of and access to the minerals constitutes effective legal authorization to counter an action in trespass to the gravel, sand, clay, and marl. There is no clear answer in Canadian case law on this point.

[1] *Didow v. Alberta Power Ltd.* (1988) 88 A.R. 250 (Alberta Court of Appeal).
[2] A landowner could try to sue in nuisance for transient, high level disturbances, but an action in nuisance presents its own obstacles. Nuisance can be brought by a landowner or occupier where someone has unreasonably interfered with that person's use and enjoyment of their property. It is the "unreasonableness" of the interference that is key for an action in nuisance to succeed. Nuisance also requires that the landowner demonstrate proof of damages.

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