Using ADR Principles to Manage a Booming Economy:
The Alberta Environmental Appeals Board Model

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I. Introduction

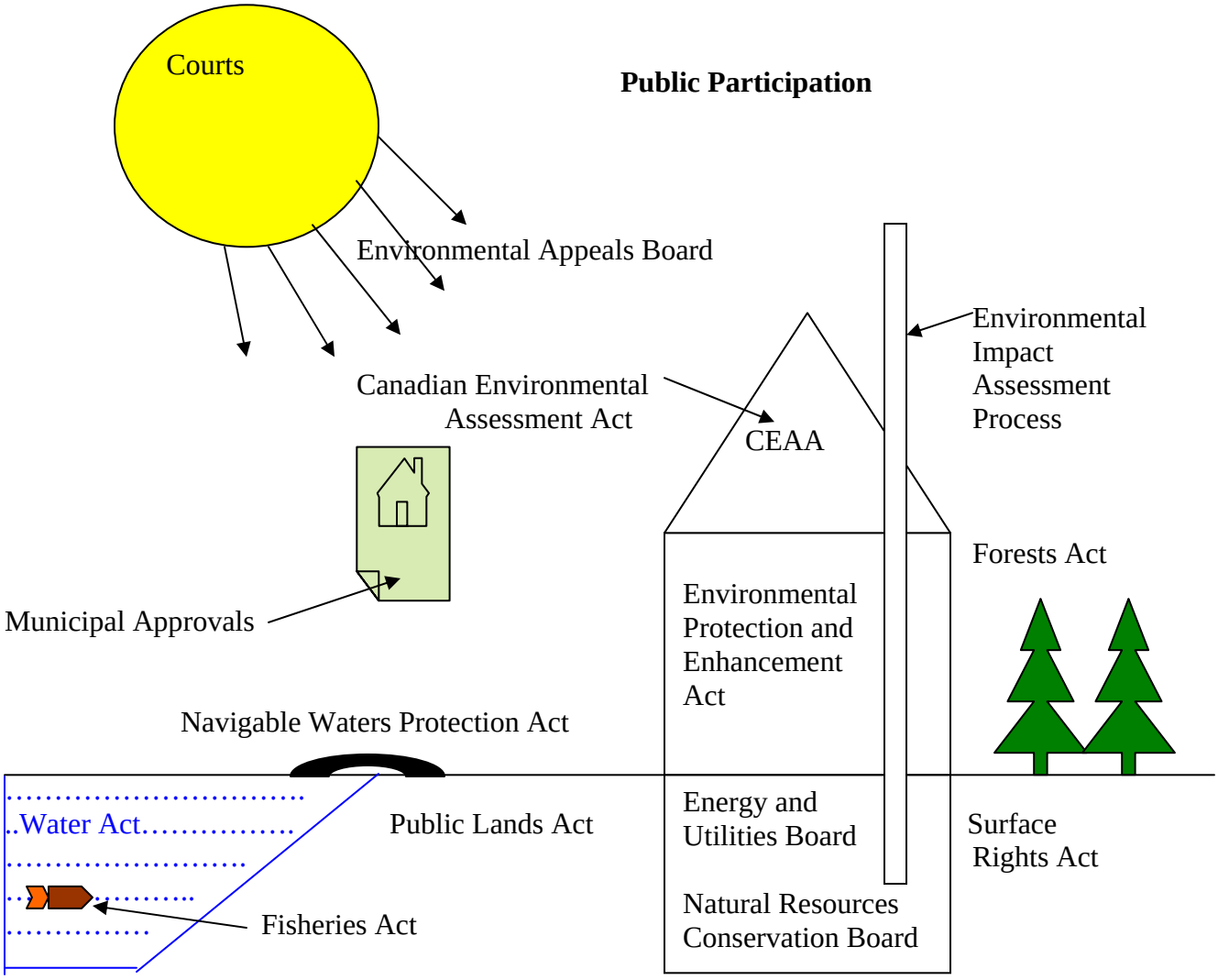
As all of you are no doubt aware, the Alberta economy is booming. One of the key challenges in this booming economy is managing the environmental regulatory process – the process by which environmental approvals, water licences, and other such authorizations are issued to manage the environmental impacts of development. Regulatory agencies are "tripping over themselves" to keep up with the number of developments and the demands of industry and the public. There is a need to look for ways to help the regulatory system cope with these demands. In my view, greater use of interest based dispute resolution can provide some of the help the environmental regulatory system needs. In examining these opportunities, I will provide a brief overview of the environmental regulatory process, look at the part of the process that the Environmental Appeals Board (the "EAB") is involved in and how the EAB uses mediation to manage these challenges, examine other opportunities for the use of interest based dispute resolution techniques, and identify some of the different ways to approach these opportunities.

II. Overview of the Regulatory Process

The environmental regulatory scheme in Alberta is a flexible and adaptive system of interlocking pieces; a puzzle so to speak. It involves a number of different regulatory agencies with different mandates. Different portions of the regulatory scheme take effect depending on the nature of the project. Generally, the larger the project the more parts of the scheme are triggered. To proceed with your project, you need to obtain

authorizations from all portions of the regulatory process that apply to your project. The challenge is to navigate your way through this process as efficiently as possible.

Conceptual Diagram - The Environmental Regulatory Process in Alberta



Opportunities using interest based dispute resolution techniques, in many different forms – both formal and informal – exist throughout this regulatory scheme. However, many of these opportunities are overlooked. Missing these opportunities can lead to protracted and potentially more expensive regulatory processes. Taking advantage of these

opportunities can streamline the regulatory process, saving time and money, and build constructive relationships with stakeholders that can be a benefit in the long run.

III. Alberta Environment and Environmental Appeals Board

Under the Alberta Environment and the EAB part of the regulatory process, the proponent of a project submits an application for the project to Alberta Environment seeking an approval or licence to construct, operate, and often reclaim the project. Based on the information provided, the Director will decide whether to issue the approval or licence and under what conditions. As part of the process, Alberta Environment will issue a notice of the application and seek input, a statement of concern, from those who could be affected by the project. Once the approval has been issued, those who filed a statement of concern and still have concerns with the project can file a notice of appeal to the EAB. If the person filing the appeal is found to be directly affected, the EAB will hear the appeal. It is only certain decisions made by Alberta Environment under the *Environmental Protection and Enhancement Act* and the *Water Act* that can be appealed.

The EAB has been in existence since 1993, and very early on, it recognized the need for a process other than a formal hearing to allow appellants, industry, and Alberta Environment to discuss issues concerning the environment. As a result, the EAB developed a mediation program and the first mediation was held in 1994. Since that time, the EAB has held 171 mediations with respect to 706 appeals (this includes 8 that are still outstanding or ongoing), and its success rate is over 85%.

In conducting our mediations, it is often clear that participants are in the appeal process because they have tried to talk with the other participants, but feel they have not been heard. Often by the time it reaches the EAB, the participants are frustrated, polarized, and highly positional. While mediation is effective at resolving disputes of these types, this type of situation clearly indicates that there are opportunities for the use of interest based dispute resolution techniques earlier on in the process to avoid reaching this stage.

IV. ADR within the Regulatory Process

Although the EAB's process is successful, can and should mediation principles be brought into the process before an appeal is filed? Is it reasonable to consider alternative dispute resolution as a means of dealing with the effects of a booming economy?

ADR allows participants to learn more about the project and we often hear, "I wish someone would have explained this to me before," and mediation is often the first time participants feel they are being listened to and their questions are being answered. ADR principles extend beyond delving for common interests. There is a developed communication process which includes active listening to hear the concerns and to be able to address the concerns expressed.

In Alberta Environment it is the Director who makes the decision to issue the approval or licence, and his decision is based on the information provided to them by the proponent of a project. Often part of the application process requires the proponent to explain what it has done to notify the public about the proposed project. I believe mediation should start not only at the required consultation phase, but even before that, when the proponent is planning the project. It is almost impossible now to find a place in the Province that is not inhabited or used by someone. In all likelihood, someone who will have an interest in that land in some form or another that could be affected by the proposed project.

ADR techniques can and should be used by proponents of projects to actively listen to the concerns of those they speak with about the project. It will make them feel like they have been heard, and the proponent can learn more about the area, the people, and how the project may affect the area specifically. This could lead to a better project, taking into consideration the concerns heard in the consultation process. It will probably simplify the approval process as well, as Alberta Environment will be able to see the efforts made to accommodate the concerns of residents.

Once the application has been received by Alberta Environment, it is important to continue listening to the public. Again, ADR techniques can be incorporated into the daily practices of Alberta Environment to address the concerns of the public and industry. In dealing with industry onsite or in discussions, ADR techniques could prove to be very effective in getting the information needed and to understanding the issues raised. With this increased awareness and understanding of the issues, Alberta Environment can develop better approvals with conditions that mitigate the concerns of the public and industry. If these concerns are addressed early, there is less likelihood that an appeal will be filed, reducing the amount of time Alberta Environment, proponents, and members of the public would spend preparing for and appearing at an appeal hearing.

V. Conceptual Approaches to ADR within the Regulatory Process

Development and Evolution

In order to take advantage of the opportunities for using interest based techniques within the regulatory process, it is important to understand the development and evolution of the various decision-making models within the regulatory scheme. These decision-making models have changed over time to reflect the changes in society and an increasing desire of the public to be involved in the decision-making process.

Historically, the main decision-making model that has been used is the "authoritative model". Under the authoritative model, the decision-maker makes the decision without any formalized public input. Examples of legislation that use this model are the *Public Lands Act* and the *Forests Act.* (It should be noted that under both pieces of legislation, steps have been taken in recent years to introduce requirements for public input.)
Most modern, most environmental legislation incorporates some form of a formal public input mechanism. Under this approach, the decision-maker still makes the decision, but

is required to take into account public input. Examples of legislation that uses this model are the *Environmental Protection and Enhancement Act* and the *Water Act*. Under both of these acts, the proponent (in most cases) is required to publish an advertisement inviting members of the public who are directly affected to submit a statement of concern to the decision-maker. The decision-maker is then required to take relevant statements of concern into account in making their decision.

The decision-making model that is currently emerging is where the public takes an active part in the decision-making. This is known as the negotiated decision-making model. Under this model, the regulator (the traditional decision-maker), the project proponent, and the affected members of the public, negotiate the regulatory decision.

Opportunities for Dispute Resolution

Another aspect that needs to be considered to take the best advantage of opportunities for dispute resolution is to understand where these opportunities occur. In general, opportunities for dispute resolution occur at three points in the regulatory scheme: the proactive phase; the regulated phase; and the reactive phase.

The proactive phase occurs before the formal regulatory process is engaged. This is the phase of the regulatory process where dispute resolution is most underused and where there is the most to gain. By undertaking effective dispute resolution at this stage in the process, project proponents have the opportunity bring stakeholders onside and to clearly identify and limit opposition to the project. The key benefit of undertaking dispute resolution at this point in the regulatory process is that there are none of the limitations that exist in the other phases of the regulatory scheme and the proponent is in complete control of the process.

The regulated phase of the regulatory process occurs where the actual regulatory decision is being made. Examples of opportunities for dispute resolution in the regulated phase include the statement of concern process under the *Environmental Protection and Enhancement Act* and the *Water Act* and the public hearing process under the *Energy and Utility Board Act* and the *Natural Resources Conservation Board Act*. While dispute resolution can still effectively take place at this point in the process, the proponent is no longer in complete control of the consultation and it is frequently not as effective as in the

proactive phase. The proponent is frequently under time pressures to obtain its authorization documents, and opposition to the project may have already solidified. The reactive phase of the regulatory process occurs where the regulatory decision has been made and is under appeal or being challenged in court. Again, while dispute resolution can take place at this point in the process, as is evidenced by the EAB's extensive mediation program, the proponent of the project is generally on the defensive and the project, while approved, now faces the potential of being delayed.

Purpose of Dispute Resolution

When undertaking dispute resolution, it is important to understand the goal of the consultation. In broad terms, this type of dispute resolution falls into two categories. The first category is transactional. Transactional dispute resolution addresses a specific project at a specific time. It is aimed at moving that particular project through the regulatory process as smoothly and as quickly as possible, by building short term transitory relationships with stakeholders.

The second category of dispute resolution is relational. Relational dispute resolution is geared towards building long term lasting relationships between the proponent of a project and its stakeholders. While such relationships take longer to build, and may comparatively delay the initial construction of the project, this approach is more farsighted and is aimed at making all regulatory processes, the initial regulatory process and all subsequent renewals, more efficient.

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