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November 13, 2012

Bill 2 and its implications for landowner participation in energy project decision-making

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Bill commented on:

[Bill 2, *Responsible Energy Development Act*](), The Legislative Assembly of Alberta, First Session, 28th Legislature

I find it strange to be writing in defence of the current hearing practice at the Energy Resources Conservation Board (ERCB), but that is what I am about to do. I find myself in this odd position because Bill 2 significantly reshapes the governing legislation on energy project hearings, and in doing so the Bill proposes to repeal existing statutory rights held by landowners under sections 26(2) and 28(1) the *Energy Resources Conservation Act*, RSA 2000, c E-10 (*ERCA*). These existing statutory provisions provide a landowner or resident on the land upon which an energy project will be located, or those in very close proximity, with the right to an ERCB hearing to contest the project and the prospect of funding to construct their case. Much has been written on ABlawg concerning these provisions (See various posts by myself and others here at the Faculty under the "Intervener and Standing" category, here. See also a short article I published in volume 111 of Resources (2011) entitled "Public Participation at the Alberta Energy Resources Conservation Board," here. This post describes the changes proposed in Bill 2.

In the latest of a series of decisions on the ERCB hearing process, the Court of Appeal in *Kelly v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19 [*Kelly 2012*] confirmed the importance of the hearing rights set out in sections 26(2) and 28(1) of the *ERCA*. It bears repeating here what the Court has recently stated in order to better grasp what Bill 2 is proposing to retract:

> … In today's Alberta it is accepted that citizens have a right to provide input on public decisions that will affect their rights.
>
> In the process of development, the Board is, in part, involved in balancing the interest of the province as a whole, the resource companies, and the neighbors who are adversely affected: *Re Suncor Energy Inc.*, Energy Cost Order 2007-001 at pp. 10-11. Granting standing and holding hearings is an important part of the process that leads to development of Alberta's resources. The openness, inclusiveness, accessibility, and effectiveness of the hearing process is an end unto itself. Realistically speaking, the cost of intervening in regulatory hearings is a strain on the resources of most ordinary Albertans, and an award of costs may well be a practical necessity if the Board is to discharge its mandate of providing a forum in which people can be heard. In other words, the Board may well be "thwarted" in discharging its mandate if the policy on costs

> is applied too restrictively. It is not unreasonable that the costs of intervention be borne by the resource companies who will reap the rewards of resource development. (*Kelly 2012* at paras 33, 34)

The irony is that just when the Court of Appeal was starting to pry open the ERCB's narrow view of those persons for whom the Board is obligated to conduct a hearing under the *ERCA* (and thus those persons with a right to a hearing), the Alberta government introduces Bill 2 which purports to strip away statutory hearing rights even for those few landowners that meet the restrictive interpretation of the hearing provisions in section 26(2) of the *ERCA* given by the ERCB.

For the benefit of discussion on Bill 2 that follows, I will set out the current wording in sections 26(1) and (2) of the *ERCA* – recall that Bill 2 proposes to repeal the *ERCA* in its entirety:

> Hearings
>
> 26(1) Unless it is otherwise expressly provided by this Act to the contrary, any order or direction that the Board is authorized to make may be made on its own motion or initiative, and without the giving of notice, and without holding a hearing.
>
> (2) Notwithstanding subsection (1), if it appears to the Board that its decision on an application may directly and adversely affect the rights of a person, the Board shall give the person

(a) notice of the application,
(b) a reasonable opportunity of learning the facts bearing on the application and presented to the Board by the applicant and other parties to the application,
(c) a reasonable opportunity to furnish evidence relevant to the application or in contradiction or explanation of the facts or allegations in the application,
(d) if the person will not have a fair opportunity to contradict or explain the facts or allegations in the application without cross-examination of the person presenting the application, an opportunity of cross-examination in the presence of the Board or its examiners, and
(e) an adequate opportunity of making representations by way of argument to the Board or its examiners.

The relevant provisions in Bill 2 are sections 30 to 41. Let me state at the outset that these provisions are incredibly difficult to read and follow. In some cases, the reader is required to have several other statutes in hand to fully grasp the application of Bill 2. In other cases, the drafting is outright confusing. I will do my best to simplify matters here.

Section 30 confirms that energy project applications are to be filed with the Alberta Energy Regulator (the successor to the ERCB – which is dissolved by Bill 2). Section 32 states that a landowner who believes they may be directly and adversely affected by a proposed energy project can file a statement of concern with the Regulator (this process follows that currently in place for other agencies such as the Alberta Environmental Appeals Board). It isn't clear to me what the statement of concern process adds here, since nothing in Bill 2 seems to turn on it except that the failure to file a statement of concern can be used against the landowner subsequent in the process. My experience with the statement of concern process in other fields

suggests this step can also act as a barrier to hearing rights if the Regulator refuses to accept a landowner's statement of concern. Something to watch going forward.

The actual replacement for section 26 of the *ERCA* is section 34 in Bill 2, which reads as follows:

> Hearing on application
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> 34(1) Subject to subsection (2), the Regulator may make a decision on an application with or without conducting a hearing.
>
> (2) The Regulator shall conduct a hearing on an application
> (a) where the Regulator is required to conduct a hearing pursuant to an energy resource enactment,
> (b) when required to do so under the rules, or
> (c) under the circumstances prescribed by the regulations.
>
> (2.1) If the Regulator conducts a hearing on an application, a person who may be directly and adversely affected by the application is entitled to be heard at the hearing.
>
> (3) A hearing on an application must be conducted in accordance with the rules.

Section 34 retains an obligation on the Regulator to conduct an application hearing in prescribed circumstances. We don't know for sure the extent of this obligation because most of these circumstances will be prescribed in subordinate rulemaking. This is an example of what I referred to earlier by having to know what several other statutes say to fully grasp section 34(2). Energy resources enactments such as the *Oil and Gas Conservation Act*, RSA 2000, c O-6 provide hearing rights that protect interests of energy companies, not landowners. So we do know for sure that there is no statutory right to a hearing in Bill 2 for a landowner to contest the merits of a proposed energy project *before* the Regulator decides on the application.

Nor is there a statutory right to a hearing *after* the Regulator decides on the application. A landowner who is directly and adversely affected by an energy project approval may apply to the Regulator under section 38(1) for a hearing to appeal the project approval. Sections 39 and 40 give the Regulator the power to conduct this appeal hearing and control its parameters, but the statute does not obligate the Regulator to do so. And this is where the failure to file a statement of concern can bite the landowner: Section 39(4) expressly provides the Regulator with power to dismiss an appeal where the applicant landowner fails to file a statement of concern. Section 40(1) states clearly that the decision to hold a statutory appeal hearing is a decision for the Regulator to make in its discretion.

In summary, we can observe the following key points in Bill 2 concerning landowner rights to contest an energy project:

(1) Bill 2 contains no statutory obligation on the Regulator to conduct a hearing either before or after it makes a decision on whether to approve a proposed energy project. Bill 2 repeals the statutory hearing rights provided to a landowner in section 26(2) of the *ERCA* to contest an energy project application, and does not replace them.

(2) Bill 2 retains the 'directly and adversely affected' test that is currently set out in the *ERCA*, but applies it only *after* the initial decision is made on the energy project. In Bill 2, only a landowner who *is* directly and adversely affected by an energy project decision can seek an internal appeal with the Regulator. The onus is seemingly on the landowner to demonstrate they are directly and adversely affected, and this evidence must be conclusive rather than simply a possibility.

(3) IF (that is a big "IF") the Regulator in its discretion decides to conduct a hearing to consider or reconsider an energy project approval, then a landowner who may be directly and adversely affected is entitled to participate in that hearing.

(4) The ability of that landowner to participate in the hearing will likely depend entirely on their savings account. Bill 2 contains no statutory power (never mind obligation) for the Regulator to make cost awards in favour of a landowner who participates in regulatory process to oppose an energy project. Bill 2 repeals the local intervenor costs provision (section 28) in the *ERCA*, and does not replace it. Instead, Bill 2 provides the Regulator with rulemaking authority on cost awards in section 61(r). Don't hold your breath waiting for these rules to be enacted – the *Kelly 2012* decision of the Court of Appeal is a direct result of ERCB reluctance to use its statutory powers on cost awards in the *ERCA*.

Speaking of the Court's *Kelly 2012* decision, I hope it is apparent by now that Bill 2 is either unaware or completely dismissive of what Alberta's highest court has said about landowner hearing rights and the important role hearings play in legitimizing resource development in this province.

The silver lining of Bill 2 – should it be enacted into law – for landowners may be that it opens the door for the common law to apply to energy project applications. The *audi alteram partem* rule in the common law holds that a person has a right to know the case against them and be provided with an opportunity to meet that case *before* a public authority makes a decision that may affect their interests. This right translates as a duty of procedural fairness owed by the public authority to hear that person before it makes a decision. The Regulator owes this duty to affected landowners when it considers an energy project application, notwithstanding the mess of Bill 2.

I am surprised there is no reference in Bill 2 to the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3. This legislation goes back to 1965 when the Alberta government struck an expert committee to survey the exercise of administrative powers by statutory authorities and, among other items, consider the need for codified hearing procedures (The Report of the Special Committee on Boards and Tribunals (Carlton Clement, Chair). The committee observed that at the time other jurisdictions, including England and the United States, were increasingly concerned with statutory tribunals exercising powers that affected individual rights and interests without adhering to procedural fairness. The committee advised the Alberta government to consider enacting a statutory code of procedural obligations owed by tribunals exercising statutory powers that will affect individual rights or interests (Clement Report at 55-64). The Alberta government accepted the recommendation and subsequently enacted the *Administrative Procedures Act* in 1966. These provisions remain in force in Part 1 of the *Administrative Procedures and Jurisdiction Act*. This legislation requires designated tribunals, including the ERCB, to provide persons who will be affected by its decisions with notice of the application and an opportunity to meet the case against them before the decision is made. Bill 2 dissolves

the ERCB, and thus removes the application of this legislation to energy project decision-making. Yet Bill 2 seems to do so incidentally, since the *Administrative Procedures and Jurisdiction Act* is not mentioned at all. If this implication was truly overlooked by the drafters, this is a significant oversight. Easily remedied, of course, by adding the Regulator to the list of agencies subject to Part 1 of the *Administrative Procedures and Jurisdiction Act.* But then these provisions would conflict with section 34 of Bill 2.

Bill 2 is nothing short of a colossal gaffe by the Alberta government in attempting to retract legal rights for landowners. If this is truly the objective here, than the job is not finished because these landowner rights also exist in the common law, the *Alberta Bill of Rights*, RSA 2000, c A-14, and the *Charter* in some cases. The more likely objective in Bill 2 is to move the *application* hearing rights for landowners currently in the *ERCA* to *appeal* hearing rights – in order to make energy project decision-making more "efficient." In other words, landowners may be entitled to appeal an energy project decision after it is made but not contest it before it is made. But the right to contest a decision that may affect one's interests before the decision is made by a public authority is a legal right firmly rooted in the common law and constitutional enactments. Thus Bill 2 incorrectly, in my view, treats landowner hearing rights as political rights that can be manipulated for political gain. The retraction of statutory hearing rights for landowners in Alberta is also a substantial gift to political opponents of the governing Tories. And it will be the sort of gift that keeps on giving when the Regulator commences operations.

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