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The Court of Appeal Rebukes the Environmental Appeal Board and the Director for an Erroneously Narrow Interpretation, and Unreasonable Application, of the phrase "Directly Affected" in the *Environmental Protection and Enhancement Act*

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Decision Commented On: *Normtek Radiation Services Ltd v Alberta Environmental Appeal Board*, 2020 ABCA 456 (CanLII), reversing *Normtek Radiation Services Ltd v Alberta (Environmental Appeals Board)*, 2018 ABQB 911 (CanLII), which upheld *Normtek Radiation Services Ltd. v Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, re: Secure Energy Services Inc.* (2 March 2018), Appeal No. 16-024-D (AEAB)

This brief case comment offers a proposition on the cause of a yawning gap between (i) purposes defined in section 2 of the *Environmental Protection and Enhancement Act* (*EPEA*); and (ii) practices of the Environmental Appeal Board (EAB) and the Directors under *EPEA*.

The proposition advanced here is that the phrase "directly affected" in *EPEA* has been, for decades, interpreted and applied by the EAB and Directors under *EPEA* in such a way as to avoid Ministerial oversight of Directors' decisions regarding the environment. In *Normtek*, the Court of Appeal attempted to correct these practices. In the result, the Court remitted the matter of Normtek's standing to appeal to the EAB back to the EAB for reconsideration in accordance with the reasons of the Court.

Facts of the Case

The environmental and economic issues in this case relate to disposal of naturally occurring radioactive material ("NORM"). NORM is described by the Canadian Nuclear Safety Commission ("CNSC") as:

> …material found in the environment that contains radioactive elements of natural origin… It can also be associated with oil and gas production residue (such as mineral scale in pipes, sludge and contaminated equipment)…

Disposal of NORM is provincially regulated. The CNSC website identifies only four places in Canada for disposal of NORM: two are salt caverns in Saskatchewan, one is a landfill in British Columbia, and the fourth is the Pembina landfill near Drayton Valley.
The material facts arise from a decision of a Director under *EPEA* to amend an existing approval given to the operator of the Pembina landfill. The basic situation was succinctly described in the decision of the Court of Queen's Bench:

> Normtek specializes in decontamination and waste management services for naturally occurring radioactive material ("NORM") which is produced in resource development.
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> Secure Energy Services Inc. ("Secure Energy") provides services which include the disposal of oilfield by-products. Secure Energy applied to the Director of Alberta Environment and Parks ("the Director") to allow its Pembina landfill ("the Landfill") to receive and dispose of oil field equipment which contains NORM, without decontamination.
>
> Normtek applied to make submissions to the Director on Secure Energy's application; however, the Director rejected the statement of concern submitted by Normtek on the basis that Normtek was not "directly affected", as set out under the *EPE Act.* The Director eventually approved the amending application and Normtek attempted to appeal the Director's approval to the Board.
>
> The Board held that Normtek was not "directly affected" by the approval and therefore had no standing to appeal the Director's decision. (at paras 2–5)

The essence of the dispute is described in the decision of the Court of Appeal, quoting from a letter from Normtek to the Director:

> The project changes the NORM industry not only in Alberta but all of Canada. Health Canada and the Canadian Nuclear Safety Commission have recognized that the International Atomic Energy Agency and the International Commission on Radiological Protection is comprised of leading experts in the field of radiation. As such, they have adopted these agencies best practices. Normtek and the industry in Alberta have developed based off these sound radiological principles. Low level NORM waste has been approved for landfill disposal and high level waste for geological disposal. Canada has the luxury of geological salt cavern disposal. Changing the industry by allowing high activity disposal levels greater than those already approved in Canada to levels that are also not consistent with international practices affects Normtek, its employees, the industry as a whole and the way international communities look at Canada's NORM management approach. (at para 18)

Purposes of *EPEA*

The purposes of *EPEA* are set out in section 2:

> Purpose of Act
> 2 The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:
>
> > (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;

> (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
>
> (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
>
> (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
>
> (e) the need for Government leadership in areas of environmental research, technology and protection standards;
>
> (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
>
> (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;
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> (h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;
>
> (i) the responsibility of polluters to pay for the costs of their actions;
>
> (j) the important role of comprehensive and responsive action in administering this Act.

The Court of Appeal made the following observations:

> One of the goals of the *Environmental Protection and Enhancement Act*, when it was introduced by then Environment Minister Ralph Klein, was to achieve better environmental decision-making. The Environmental Appeals Board process was set up to help achieve that. By granting standing to those directly affected by Directors' decisions, the Minister receives the benefit of additional scrutiny which, in the case of directly affected industry participants, provides the Minister with a practical understanding of the effects of conditions of approvals, which industry participants are in a unique position to provide. The integration of environmental protection and economic impacts is one of the purposes of the *Environmental Protection and Enhancement Act* (ss 2(b) and 2(c)) and hearing appeals by those impacted economically helps the Minister achieve that purpose.
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> In our view, the decisions of the Board and the reviewing judge that the economic effects of an approval are not enough to ground standing unless the economic effects can be linked back to the environment were unreasonable. The reviewing judge pointed out at paragraph 59 of her decision that the Act does not say that in order to be directly affected, a natural resource or the environment must be directly affected. We agree. Yet the reviewing judge also found that the Board's requirement that the potential for economic harm had to be connected to the environment was reasonable. We disagree; but in any

> event, Normtek did present evidence which linked the economic impact on it back to the environment. That evidence was not dealt with by the Board. (at paras 127–28)

The Legislative Scheme in *EPEA*

EPEA is supposed to be Alberta's keystone legislation supporting and promoting the protection, enhancement, and wise use of the environment (see, e.g., the Alberta Energy Regulator's description of *EPEA*). When enacting *EPEA*, the Legislature saw fit to create the EAB as an advisory body intended to strengthen Ministerial oversight of Directors' decisions by making independent advisory recommendations which inform Ministerial oversight. The Minister has power to approve, vary or rescind any Director's decision which comes before the Minister. The basic *EPEA* process operable in this case was as follows.

Any person directly affected by a proposed activity that is the subject of a decision of the Director may submit a written statement of concern to the Director setting out the person's concerns with respect to the proposed activity. *Vavilov* suggests that the Director should issue reasons for whatever decision is taken. In this instance, the Court of Appeal found that the Director "did not address any of the grounds upon which Normtek argued that it was directly affected."

Appeals to the Environmental Appeal Board are addressed in s. 91 of *EPEA*. In this case, Normtek filed a notice of appeal of the Director's decision approving the acceptance of NORM at Secure Energy's Pembina Landfill. The relief sought by Normtek was described by the Court of Appeal, as follows:

> We would ask the Board to recommend to the Minister to vary the acting [director's] approval for radium 226 to 5 Bq/g which is consistent with the BC Licensed Hazardous waste facility until such time as the request for amendment can be reviewed by the AER [Alberta Energy Regulator] giving consideration to the concerns addressed in the appeal or ask the Minister to reverse the acting [director's] approval until such time as formal policies have been implemented on radioactive waste in Alberta. (at para 29)

The Court of Appeal characterized this as what Normtek considered to be "regulatory harmonization (i.e. a level playing field), not that Secure Energy's application be denied outright."

Before the EAB, the Director opposed Normtek's appeal even though the Approval Holder, Secure Energy, had the capacity to respond to Normtek's appeal to the EAB, and did respond to Normtek's appeal. The Court of Appeal described this in paragraphs 42 to 47 of its decision. To summarize, the Court of Appeal found the Director's position to be unresponsive to the regulatory concerns raised by Normtek, and especially so in relation to "Normtek's argument that the acceptance limits in the approval did not comply with acceptance limits prescribed in the federal *Guidelines for the Management of Naturally Occurring Radioactive Materials* or the International Atomic Energy Association Regulations which were referenced in the approval."

The Court of Appeal described the advisory role of the EAB within this regime succinctly:

> The Environmental Appeal Board is not a regulator like some of the Province's energy boards. The Environmental Appeal Board is essentially an independent commission of inquiry reporting to the Minister. Vis-à-vis what are known as specified activity approvals, the Environmental Appeal Board has one function and one function only and that is to hear appeals by parties directly affected by Directors' decisions (s 90(2)). The Board reports to the Minister what it hears and makes non-binding recommendations (s 99(1)). Under the *Environmental Protection and Enhancement Act* the Minister, assisted by his Directors, is the regulator. The Board was established to provide the Minister with independent and expert advice with respect to such regulation by reporting to the Minister a summary of the representations which were made to it and any recommendations it might have as a result of those representations (s 99(1)). (at para 126)

In this legislative scheme, the practices of the EAB can effectively avoid Ministerial oversight, and can also frustrate meaningful judicial review of oversight executive action. If the EAB finds that an appellant before it is not directly affected by a Director's decision, then the Minister will not become engaged in oversight of a Director's decision. So, EAB practice (as encouraged by the Director) can preclude Ministerial oversight of Director's decisions. And, if the EAB decision is divorced from any consideration of the grounds of appeal, then judicial review of the EAB decision is also frustrated.

Further, in a Catch-22 reality, the EAB practice can block opportunity for judicial oversight of Director's decisions because of the 6-month time limit in the *Alberta Rules of Court* for commencing judicial review. Judicial review from a Director's decision may be premature where an internal appeal from that Director's decision to the EAB is outstanding. Should the EAB decide an appellant lacks standing, then commencement of judicial review from the merits of the Director's decision is time barred if six months have passed since the Director's decision was issued and a precautionary judicial review has not already been commenced.

In this case, the Director's decision was issued in 2016. The EAB dismissed Normtek's appeal on October 13, 2016, holding without reasons that Normtek was not "directly affected" by the Amending Approval. The EAB reasons for this decision were issued on March 5, 2018, some 16 months after the decision.

Administrative Practice of the EAB and the Director

The EAB had blinded itself to expeditious process in two ways.

First, the position of the EAB – supported by the Director – was that standing to appeal to the EAB, in all cases, had to be determined without regard to the merits of the appeal.
Second, the position of the EAB – again supported by the Director – was that standing was to be determined by a narrow reading of the phrase "directly affected." On this point, the Court of Appeal found it necessary to make this observation at paragraph 97 of its decision:

> … the logical conclusion of the position taken by the … Director in Normtek's case, which appears to have been adopted by the Board, is that someone can be physically affected by an approved activity to the point of death, but still lack standing to appeal if

> that person's use of a natural resource is not being directly affected. We too exaggerate to make the point.

The genesis of the problem was described by the Court of Appeal as follows:

> The Board's interpretation of "directly affected" as requiring an appellant to establish that the Director's decision will harm a natural resource which the appellant uses in the vicinity of the approved activity may have had its genesis in the Board's 1998 decision in *Bildson* (cited earlier at para 80) because the Board's analysis in *Bildson* was relied upon by Justice McIntyre for the "test" he employed for determining whether the appellant was directly affected by the Director's decision in *Court v Alberta Environmental Appeal Board*, 2003 ABQB 456. Justice McIntyre's "test" in *Court* was, in turn, relied upon by the Board in the case before us for determining whether the appellant was "directly affected". (at para 90)

What the Court of Appeal Found

The significance of the Court of Appeal decision is twofold.

First, the Court of Appeal was critical of the narrow interpretation of a "directly affected" person.

Second, the Court of Appeal was also critical of the practice, in all cases, of separating the standing to appeal issue from the merits of the appeal.

Key to the Court of Appeal decision is understanding that standing to appeal to the EAB cannot, in all cases, be divorced from the merits of an appeal:

> If the ground for objecting to an approval or a Director's decision is that the approval or Director's decision adversely affects the appellant, then the merit of the objection is directly tied to whether or not the appellant is in fact adversely affected. Often that is the only issue which the Board has to determine. The directly affected issue and the substantive issues are often effectively the same. In such cases, the issue of whether the appellant is directly and adversely affected is really not finally determined until after the hearing of the appeal is completed and the Board has made its decision and reported to the Minister (ss 98 and 99). (at para 136)

The Court of Appeal was alive to the impact this had on judicial review. The Court stated:

> The appellant's submissions with respect to the merits of the Director's decision were all about the impacts of that decision on the appellant's business and the regulation of the appellant's industry. To summarily dismiss these impacts as speculative or too remote without dealing with them, at least in a preliminary way, makes assessing the reasonableness of the Board's decision to dismiss the appellant's appeal without a hearing impossible. In this case, the Board's actions precluded judicial review. The

> Board's reasons were not transparent enough to enable proper judicial review. (at para 137)

Observations

It is difficult to see how failure to hear appeals because of an erroneous and unreasonable approach to standing by the EAB fulfils the integration objectives of *EPEA* as described by the Court of Appeal:

> One of the goals of the *Environmental Protection and Enhancement Act*, when it was introduced by then Environment Minister Ralph Klein, was to achieve better environmental decision-making. The Environmental Appeals Board process was set up to help achieve that. By granting standing to those directly affected by Directors' decisions, the Minister receives the benefit of additional scrutiny which, in the case of directly affected industry participants, provides the Minister with a practical understanding of the effects of conditions of approvals, which industry participants are in a unique position to provide. The integration of environmental protection and economic impacts is one of the purposes of the Environmental Protection and Enhancement Act (ss 2(b) and 2(c)) and hearing appeals by those impacted economically helps the Minister achieve that purpose. (at para 127, emphasis added)

The EAB is advisory. It is supposed to provide independent and expert advice to the Minister by means of a summary of the representations which were made to it, and through recommendations it might have as a result of those representations.

If, at the urging of the Director, the EAB creates procedural barriers to standing which avoid any comment on the merits, this frustrates both Ministerial and judicial oversight. This does not contribute to better decision-making. It does offer an effective barrier to Ministerial oversight of Directors' decision, and meaningful judicial review of executive action.

At all material times, the Director opposed Normtek. The Director rejected Normtek's Statement of Concern, a decision which gave rise to a judicial review discussed at paragraphs 19 and 20 of the Court of Appeal decision but not otherwise addressed in this comment. In addition, the Director argued that Normtek lacked standing to appeal to the EAB. The EAB accepted the Director's submissions, and therefore refused to consider a stay of the Director's decision pending appeal. The EAB decision on standing was the subject of the Court of Appeal decision. Before the Court of Appeal, the Director opposed Normtek's appeal.

Few litigants have the resources to engage with the Director in lengthy litigation over preliminary issues. Preliminary objections divorced from the merits of an appeal to the EAB are a procedural quagmire, and a real challenge to expeditious advisory proceedings akin to Franz Kafka's *Castle* or Charles Dickens' *Bleak House*. This seems difficult to reconcile with the purposes of *EPEA,* including integrating environmental protection and economic decisions in the earliest stages of planning, providing government leadership on protection standards, recognizing shared responsibility to ensure protection enhancement and wise use of the environment, or

making opportunities available through *EPEA* for citizens to provide advice on decisions affecting the environment.

The Court of Appeal attempted to give guidance to the EAB and the Director about the relationship between rulings on standing and the merits of an appeal to the EAB:

> Normally, the issue of standing is a preliminary matter to be determined at the outset. But that does not mean that a tribunal can ignore the merits of an appellant's appeal when those merits go to the issue of whether the appellant is directly affected. The Board treated these two issues as separate and distinct, never the twain to meet. Two silos, so to speak. That too was unreasonable. We would echo Justice McIntyre's comment in *Court*: "a review of the case law generated by the Board discloses that it would be unusual for an issue of standing not to be inextricably linked, more or less, to the substantive issues of an appeal" (para 68).
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> The Board misinterpreted the law. The law is not, as the Board stated in paragraph 133, that the determination of whether an appellant is directly affected must be determined before hearing any of the substantive issues as if to say the determination of whether an appellant is directly affected must be determined without reference to the substantive issues. The law is simply that standing is a preliminary matter to be dealt with, if it can be, at the outset of the proceeding. Sometimes it cannot be.
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> Determination of a preliminary *issue* just means that the issue has to be decided first, before the merits can be decided. It does not necessarily mean that a separate hearing and decision occur before any of the merits are heard. Rather, in the appropriate case, the Board may hear all the evidence, and as a matter of logical sequence, address the preliminary issue first. Again, how the Board chooses to proceed will depend on the context of the case before it, but it should not place artificial, formalistic, constraints on its ability to address the issues before it in a reasonable manner. (at paras 132–34)

This aspect of the *Normtek* case is most easily understood with an appreciation of the merits of the appeal to the EAB as described by the Court of Appeal:

> The appellant, Normtek Radiation Services Ltd. (Normtek), is in the business of decontaminating (removing) naturally occurring radioactive material (typically radioactive scales, sludges and films) which become unnaturally accumulated or concentrated in oilfield waste or on oilfield equipment (principally production pipe) as a consequence of oil and gas extraction and production operations. Normtek then disposes of the radioactive material either in an approved landfill (like that which the Director approved) or in a secure subterranean geological formation, depending on the level of the material's radioactivity.
>
> Normtek responded to Secure Energy's application for approval by submitting to the Director what the Environmental Protection and Enhancement Act refers to as a statement of concern indicating its concerns with the proposal to landfill radioactive waste material with a radioactivity concentration of higher than 5-10 Bq/g rather than

dispose of it in a subterranean geological formation. Secure's proposal was to landfill NORM up to 70 Bq/g. A Bq or Becquerel is a measure of radioactivity. A Bequerel is one nuclear transformation or disintegration per second. Normtek argued that generally-accepted industry standards and national and international guidelines suggest that Secure was proposing to landfill radioactive wastes that ought properly to be disposed of in a secure subterranean geological formation.

Normtek contended that the landfilling of naturally occurring radioactive material which becomes concentrated in oil field waste is only appropriate for low radioactivity level material (5-10 Bq/g). Higher radioactivity level NORM, such as that proposed to be landfilled at Secure Energy's Pembina Landfill (up to 70 Bq/g), Normtek submitted, is typically sent for geological disposal in salt caverns in Saskatchewan. Normtek's statement of concern also pointed to the lack of a provincial regulatory regime for NORM and the lack of clarity surrounding the respective responsibilities of the Alberta Energy Regulator and Alberta Environment with regard to NORM disposal. Normtek urged the Director not to approve the acceptance of high level radioactive waste at Secure's facility until appropriate waste classification criteria for NORM disposal had been developed. Apparently, there had been a previous failed attempt by the Alberta Energy Regulator to reach an industry/regulator consensus on landfill acceptance limits for oilfield NORM. Significantly, Normtek made it clear that it did not object to the landfilling of low-level radioactive materials.

On July 14, 2016, the Director issued an approval amending Secure Energy's landfill approval to permit it to receive and dispose of NORM waste that did not exceed certain prescribed maximum concentration limits (70 Bq/g) as proposed by Secure Energy. The approval also required Secure Energy to operate the landfill in accordance with the "Canadian Guidelines for the Management of Naturally Occurring Radioactive Materials". The Guidelines were developed by the Federal-Provincial-Territorial Radiation Protection Committee (the FPTRPC). Among other things, the Guidelines set maximum concentration acceptance limits for NORM dispersed in soils and other media.

…

Provincially, "radiation" is defined as a "substance" in section 1(mmm) of the Environmental Protection and Enhancement Act. Under the Act, no person is permitted to release a substance into the environment in an amount, concentration or level that is in excess of that expressly prescribed by an approval, a code of practice or the regulations (s 108(1) of the Act).

The Canadian Guidelines for the Management of NORM referenced in the approval were developed to help the provinces regulate NORM in order to address radiation exposure risks and to harmonize practices between provinces and minimize jurisdictional gaps. They purport to set out a code of best practices.

The Director's approval expressly requires the approval holder to operate its landfill in accordance with these Guidelines. Yet the Director's approval also expressly prescribes

> certain radioactivity limits for materials accepted by the landfill which appear to be expressed in a multiple of the concentration limits (10 times the concentration limits) for exempt material set out in certain International Atomic Energy Association Regulations. Normtek's position was that the federal Guidelines and the so-called International Atomic Energy Association Regulations were violated by the very terms of the approval which purported to incorporate them. (at paras 12–25)

In plain language, Normtek had argued that the Directors' approval was unreasonable, or illegal, because it authorized the disposal of certain radioactive materials in the Pembina Landfill which were more radioactive than allowed for in *Guidelines* incorporated by the approval.

The Director took care to avoid responding to this aspect of Normtek's appeal:

> The Director did not respond, either in its submission to the Board or in its factum in this appeal, to Normtek's argument that the acceptance limits in the approval did not comply with acceptance limits prescribed in the federal Guidelines for the Management of Naturally Occuring Radioactive Materials or the International Atomic Energy Association Regulations which were referenced in the approval. Nor did the Director respond to Normtek's argument that the acceptance limits in the approval represented a departure from generally accepted best practices. (at para 46)

Assuming without deciding that there was merit to the Normtek appeal, the Court of Appeal stated that the interests advanced by Normtek were exactly those which should foster standing:

> The economic interest which Normek [sic] argued was directly affected was based on its interest in ensuring that naturally occurring radioactive materials are managed in accordance with generally accepted regulatory standards to which it said it was required to adhere. Properly understood, Normtek's concern was as much regulatory concern as it was an economic or commercial concern. Normtek argued that the Director's decision directly affected its interest, as an industry participant, in a regulatory regime which governed its industry in the interests of protecting the environment. It is hard to think of a better basis for standing before the Environmental Appeals Board than a concern about a regulatory decision which is alleged to adversely impact a party economically and which also may have implications for environmental protection, particularly when the regulatory decision permits an activity which involves the disposal of a substance of concern under the Environmental Protection and Enhancement Act (i.e. radiation). The foregoing, of course, assumes that there is merit to Normtek's substantive submissions which the Board, at the urging of the Director and approval-holder, ignored. (at para 118)

Throughout the proceedings, the Director had opposed Normtek's position on standing. The Court of Appeal made the following comments on the role of the Director in appeals to the EAB:

> As an aside, one of the reasons the Director has typically been accorded "party" status on appeals of Director's decisions is that in order to assess the merits of an appeal of a Director's decision, the Environmental Appeal Board needs to understand the approval and the reasons therefor. But here the Director, who had already ruled that Normtek was

> not directly affected by Secure Energy's landfill approval application, took a position on Normtek's directly affected status. Whether that was appropriate, we leave for another day, although we note that it also troubled the reviewing judge. If the Director participates in a Board proceeding to determine a would-be appellant's standing, its contribution might appropriately be in the form of a response to the merits of the appellant's appeal, not in the form of an adoption of the position of the approval-holder with respect to the appellant's standing. Here the Director failed to assist the Board by not addressing the merits of Normtek's claims. Had the Director done so, it might have become apparent whether Normtek was directly affected or not. (at para 47)

It remains to be seen if the Director will embrace this role, or whether the Director will continue to advance procedural barriers which effectively avoid Ministerial oversight of Directors' decisions.

The Court of Appeal noted that Normtek raised many issues which are a direct challenge to the lawfulness and reasonableness of the Director's initial decision to allow certain radioactive oilfield waste to be placed into the Pembina landfill:

1. whether the Minister and Director contravened *EPEA* by not developing formal policies, procedures, and regulations concerning radioactive material or whether best practices were followed;

2. whether the Approval Holder misled or downplayed the long-term hazards of high activity radioactive waste;

3. the acceptable limits for waste to be accepted at the Landfill;

4. who the Director should have consulted to determine the potential impacts of his decision; and

5. the classification of the waste as low-level waste. (quoted at para 130)

The extent of radioactive oilfield waste in the Pembina landfill near Drayton Valley is at issue in Normtek's future EAB proceedings.

It will be interesting to see how the EAB and the Directors perform their statutory functions in this setting, and beyond. A paradigm shift in posture is required.

This post may be cited as: Kirk Lambrecht Q.C., "The Court of Appeal Rebukes the Environmental Appeal Board and the Director for an Erroneously Narrow Interpretation, and Unreasonable Application, of the phrase "Directly Affected" in the *Environmental Protection and Enhancement Act*" (January 11, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/01/Blog_KL_Normtek.pdf