

Bill 2 and its implications for the jurisdiction of the Environmental Appeal Board

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Proposal commented on:

Bill 2, the [Responsible Energy Development Act](#)

This post examines the implications of Bill 2 for the jurisdiction of the Environmental Appeal Board (EAB). The legislation will establish the new Alberta Energy Regulator (the Regulator) and will abolish appeals to the EAB with respect to decisions in relation to energy resource activities. Instead, the Bill proposes a scheme of reviews by the Regulator of its own decisions.

The government of Alberta created the EAB in 1992 through the *Environmental Protection and Enhancement Act*, (EPEA) SA 1992, c E-13.3, now RSA 2000, c E-12, Part 4, ss. 90 – 106. Let me be clear at the outset. I think that this was a good step forward because it allowed an independent body to question the practices of line departments in the way in which they administered their own legislation: see Bankes, “Shining a light on the management of water resources: the role of an environmental appeal board” (2006), 16 *Journal of Environmental Law and Practice* 131 - 185. In particular, it allowed the EAB, on a *de novo* basis, to question whether long standing practices really were consistent with the purposes behind a particular legislative enactment such as the *Water Act*, RSA 2000, c W-3. A case in point is the EAB’s [Capstone decision](#) (*Mountain View Regional Water Services Commission et al. v Director, Central Region, Regional Services, Alberta Environment re: Capstone Energy Ltd.* (24 January 2005), Appeal Nos. 03-116 and 03-118-121-ID2 (AEAB)). The standard of review currently applied by the courts, whether on a statutory appeal or by way of judicial review, makes it very difficult for a court to conduct this type of searching analysis since a statutory decision maker interpreting its own statute is presumptively entitled to deference.

The jurisdiction of the EAB

The jurisdiction of the EAB arises under a number of statutes and includes jurisdiction over some decisions that, as a result of Bill 2, will come under the jurisdiction of the Regulator. For example, under the current rules, a party with standing may appeal to the EAB against the issuance of an approval, preliminary certificate or water licence under the *Water Act* for an oil sands project. A person has standing to appeal if they are: (1) the applicant for the approval etc, or (2) a person who submitted a “statement of concern” in relation to the matter and who is directly affected by the decision. Similar rules apply with respect to decisions made under *EPEA*. For example, a person who has filed a statement of concern may appeal an approval granted under *EPEA* for a gravel operation, a landfill site, or the approvals required for any oil sands operation. Furthermore, a landowner may appeal to the EAB where the landowner believes that the Director has wrongly issued a reclamation certificate in relation to a surface

lease or right of entry order under section 138 of *EPEA*. By the same token, the operator may appeal where it believes that the Director has wrongly refused to issue such a reclamation certificate. In many cases the EAB will seek to resolve appeals through mediation but in some cases matters proceed to a hearing at the end of which the EAB makes a recommendation to the Minister. Both the Minister and Board are protected by a privative clause but there have been a number of judicial review applications dealing with the EAB and/or the Minister: e.g. *Court v Alberta Environmental Appeal Board*, [2003 ABQB 456](#) (CanLII).

The existing scheme is far from perfect. I (and others) have argued that the standing rules to commence an appeal are too narrowly framed and ought to be revised to accommodate the concept of public interest standing which applies in mainstream administrative law: see *Canada (Attorney General) v Downtown Eastside Sex Workers Against Violence Society*, [2012 SCC 45](#) and the blog by Lam and Yurkewich [here](#).

The brave new world of the Alberta Energy Regulator

How will these matters be dealt with under Bill 2? It is not possible to give a definitive answer to this question since so much will depend upon the implementing regulations but I will assume that at least some of the decisions described above which are currently made by persons with the Department of Environment and Sustainable Resource Development will fall within one of the categories listed in section 2(2) of the Bill. That section provides that:

- (2) The mandate of the Regulator is to be carried out through the exercise of its powers, duties and functions under energy resource enactments and, pursuant to this Act and the regulations, underspecified enactments, including, without limitation, the following powers, duties and functions: ...
 - (c) to consider and decide applications and other matters under the *Environmental Protection and Enhancement Act* in respect of energy resource activities;
 - (d) to consider and decide applications and other matters under the *Water Act* in respect of energy resource activities; ...
 - (g) to oversee the abandonment and closure of pipelines, wells, processing plants, mines and other facilities and operations in respect of energy resource activities at the end of their life cycle in accordance with energy resource enactments;
 - (h) to regulate the remediation and reclamation of pipelines, wells, processing plants, mines and other facilities and operations in respect of energy resource activities in accordance with the *Environmental Protection and Enhancement Act*;

This in turn triggers section 24 of the Bill which affords the Regulator the jurisdiction hitherto exercised by the Director (or other designated person) in the line Department. Section 25 provides that the jurisdiction of the Regulator is prima facie exclusive:

Except to the extent that the regulations provide otherwise, an application, decision or other matter under a specified enactment in respect of an energy resource activity must be considered, heard, reviewed or appealed, as the case may be, in accordance with this Act and the regulations and rules instead of in accordance with the specified enactment.

Section 25 also indicates that any review or appeal must occur under this Act, (i.e. Bill 2) rather than under the specified enactment. The combined effect of these provisions is to abolish appeals to the EAB for decisions in relation to energy resource activities that are brought within the ambit of the Bill.

The scheme that the Bill contemplates for considering objections to applications is as follows: (1) a person who may be directly and adversely effected may file a statement of concern (s.32), (2) the Regulator may decide to hold a hearing on the application in response to statement of concern (but equally may elect not to do so) (s.33), (3) the Regulator makes a decision (s.35), (4) a person with standing (Professor Shaun Fluker's blog (to follow) will address the details of the standing test in Bill 2) may apply for a review of the decision (s. 36), (5) the Regulator conducts the review of its own decision "in accordance with the rules" (s.39), (6) the Regulator makes the decision with or without a hearing (s. 40 – 41) (7) the Regulator may review its own decisions (ss. 42 – 44), and (8) an appeal from a decision of the Regulator lies to the Alberta Court of Appeal, with leave, on a question of jurisdiction or law. A broadly drafted privative clause (s.56) precludes other avenues of judicial review.

What then are the most important differences between the current scheme under *EPEA* and the *Water Act* which provides for an appeal to the EAB and the scheme that will prevail under Bill 2 where there are "powers, duties and functions" "in respect of energy resource activities"?

1. The review is internal to the Regulator. There is no opportunity for a view from the outside.
2. It seems unlikely that the review panel will be receptive to creative and purposive interpretations of the legislation that are markedly at variance with those that informed the original decision by the Regulator that is under review. That is, I think, an observation on human nature as much as it is an observation of law. And if a creative interpretation is unlikely to succeed on a review application it is even less likely to succeed if included as part of a judicial review application given the deference that the courts say is owed to the expert body when interpreting its own statute.
3. The current bifurcation of responsibility between the EAB and the line departments creates the possibility for a form of "conversation" (the allusion here is to the idea of a conversation between the courts and the legislature in relation to Charter issues – i.e. not a real time conversation) between the EAB and the Department (and the Minister who must accede to the Board's recommendations). It seems unlikely that the Regulator will have a conversation with itself (i.e. it won't be critically reflecting on what the "other" has decided or observed.)
4. The review will be a review and not a *de novo* appeal, i.e. it will be a review on the record. It seems unlikely that there will be an opportunity to introduce new material except in exceptional circumstances (but here much may depend on the rules that the Regulator develops).
5. Access to the courts following the review is channeled to the Alberta Court of Appeal, with leave, rather than directly to the Court of Queen's Bench on a judicial review application (without leave).
6. The new scheme has done nothing to advance the accountability function of a review/appeal by sanctioning a form of public interest standing to supplement the current rules that confer standing based on direct and adverse effect (a test which favours private interests rather than broader public interests). Professor Fluker will explore this point in more detail in his next blog.

And finally there is the sheer incongruity that will result from the application of Bill 2 to statutory approvals that relate to energy projects while the same air and water approvals for non-energy projects will continue to be subject to the existing regime.