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Bill 2 *Responsible Energy Development Act*: Setting the stage for the next 50 years of effective and efficient energy resource regulation and development in Alberta

By Shaun Fluker

Bill commented on:

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

In the afternoon of Wednesday October 24, 2012 the Alberta government introduced Bill 2 - the proposed *Responsible Energy Development Act* (Alberta) – and the bill passed first reading. In the words of the Minister of Finance, speaking in place of the Minister of Energy:

> Through Bill 2 Alberta is setting the stage for the next 50 years of effective and efficient energy resource regulation and development. The proposed legislation will create a single regulator for oil, gas, oil sands, and coal. The new regulator will be efficient and effective for landowners, efficient and effective for industry, and committed to Alberta's stringent environmental standards. (Hansard, Oct 24)

Bill 2 has ambitious plans to say the least. It creates a new regulatory agency imaginatively named the Alberta Energy Regulator to regulate energy development in the province. If enacted into law, the Bill will dissolve the Energy Resources Conservation Board (ERCB) and repeal its governing statute the *Energy Resources Conservation Act*, RSA 2000 c E-10 (*ERCA*). The Bill also proposes to amend many other statutes that regulate energy development in order to shift regulatory authority on energy matters away from existing agencies to the new Alberta Energy Regulator. There is already significant attention being paid to this Bill (See e.g., a comment posted by Cindy Chiasson of the Environmental Law Centre, online here; a bulletin issued by Blakes LLP, online here; recent comments by leaders of Alberta's opposition parties; and recent and forthcoming posts by my colleagues on ABlawg). My comment here will focus primarily on the independence of the proposed agency. In a subsequent post, I will look at how Bill 2 affects statutory hearing rights provided to landowners or others members of the public seeking to oppose energy projects.

Before I get into the substance of independence, let me make two general observations from a drafting perspective. What logic contributed to beginning the title of this Bill with the word 'responsible'? The word appears sparingly in the substance of the proposed legislation. And who will think to look under the letter 'r' when searching the table of statutes for energy legislation or the rules that govern the Alberta Energy Regulator? Why not simply the *Energy Development Act*? Adding the word 'responsible' to the title does nothing as an adjective here, except perhaps mislead.

My second general observation is how the Bill continues with a recent trend by the Alberta government to delegate much of the detail to subordinate legislation. This is very troublesome. Key powers in the proposed legislation will never be debated in the House because they will be enacted by regulation. These include: empowering the Regulator to act in the place of a Minister under specified statutes including the *Mines and Minerals Act*, RSA 2000, c M-17, *Public Lands Act*, RSA 2000 c P-30, *Environmental Enhancement and Protection Act*, RSA 2000, c E-12, and the *Water Act*, RSA 2000 c W-3 (section 26(c)); enacting rules to govern hearings in front of the Regulator (Part 2 generally); setting the time limitation for filing an appeal to the Court from a decision of the Regulator (section 45(2)); and, powers to grant cost awards (section 61(r)). In some cases this delegation is to Cabinet, but in many others it is a delegation to the Regulator itself. The extent of delegation in Bill 2 seems excessive and in many ways unnecessary. Surely much of these details are known and could have been inserted into the Bill. Leaving them to subordinate legislation gives the impression the Alberta government has something to hide, and would thus rather implement these powers via the much less transparent regulation or rule-making processes.

No one should confuse the Alberta Energy Regulator with a truly independent administrative agency. The Bill simply gives the Minister too much control over the functions of the agency for it to qualify as independent in the eyes of the informed bystander. One example of high Ministerial control over the agency is provided in section 16 which requires the agency to disclose any information - even that provided in confidence to the agency – to the Minister upon request. Where the Bill is perhaps most controversial in terms of its lack of independence is in the appointment of 'hearing commissioners' – and their power to decide contested energy project applications, review project decisions, and otherwise adjudicate legal rights under Part 2 of the proposed Bill. The Bill provides Cabinet with the power to appoint a roster of these hearing commissioners and set their remuneration.

One of the defining characteristics of quasi-judicial administrative process in Canada is independence from the executive. Tribunal independence is essential to the legitimacy of quasi-judicial administrative process. Beginning with *R v Valente*, [1985] 2 SCR 673, the Supreme Court of Canada has applied the three pillars of judicial independence to administrative agencies: (1) security of tenure; (2) financial security; (3) administrative control over the judicial function. Generally at common law, an administrative agency that adjudicates legal rights must be perceived as free from political influence. Paradigm independence for statutory powers is governing legislation that fixes appointment terms and sets remuneration for tribunal members, rather than leaving it to the Minister or Cabinet to decide these fundamental matters.

So it is with this background in mind, that I raise concerns with the perceived independence of the hearing commissioners employed by the proposed Alberta Energy Regulator to conduct hearings and project reviews under Part 2. The Bill states these persons will be appointed by Cabinet for an undefined term (section 11). The tenure of these hearing commissioners is thus at the pleasure of Cabinet. The absence of a fixed term for a statutory official who will decide legal rights, fails the test for independence on security of tenure in the common law. Compare this to how the *ERCA* currently governs the tenure of ERCB members who administer project hearings. Section 5 of the *ERCA* states that such ERCB members are appointed to a fixed 5 year term, and they are only removable during such term on the address to the legislative assembly.

However to make matters worse, section 67 of the Bill states the Minister can direct hearing commissioners to exercise their powers in accordance with government policy, and the section then obligates the commissioners to adhere to the Minister's direction. As well, section 15 of the

Bill gives Cabinet the power to direct what factors hearing commissioners must consider in rendering a decision. The Bill removes the much maligned 'public interest' test from energy project decision-making (Currently, section 3 of the *ERCA* requires the ERCB to make project decisions in the public interest, having regard to the economic, social and environmental effects of the decision). So persons who conduct hearings on energy project applications or who review energy project decisions that directly and adversely affect rights of a person may be obligated to implement the will of Cabinet or the Minister should either of them choose to direct the Regulator on what factors to consider or otherwise how to decide a particular hearing. And there is nothing in the proposed legislation to require this be in the public interest. It is conceivable on the face of this proposed legislation for the Minister to favour one person's legal rights over another, and direct hearing commissioners to adhere to these politics in deciding an energy project application or a project review. The well-informed person, viewing the matter realistically and practically, can only conclude there is no independent hearing process at the proposed Alberta Energy Regulator.

The legal basis to support such a framework comes from the Supreme Court of Canada's 2001 *Ocean Port v British Columbia*, 2001 SCC 52, decision which ruled the legislature determines the relationship between the executive and administrative agencies. In other words, the legislature has the power to deliberately set a close relationship between the executive and its delegates in an enactment (such as it has done here). The Alberta Court of Appeal has endorsed *Ocean Port* (see e.g. *Searles v Alberta*, 2011 ABCA 144). And a close relationship between the legislature and its delegates is by no means unheard of where the delegate is created to implement government policy. But *Ocean Port* is not a complete shield, and Bill 2 likely relies too heavily on this one case. There are times when the need for real tribunal independence is paramount. Administrative tribunals who exercise adjudicative functions in subjects concerning security of the person or deeply entrenched private law rights are expected to have a high degree of independence. Some have suggested tribunal independence in these cases is an unwritten constitutional right. Should this Bill go ahead as it is currently drafted, we can expect a constitutional challenge to the independence of hearing commissioners on an energy project decision in the near future.

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