

PUBLIC PARTICIPATION AT THE ALBERTA ENERGY RESOURCES CONSERVATION BOARD

Article by Shaun Fluker ♦

Introduction

This article examines the law governing public participation in the project licensing process of the Alberta Energy Resources Conservation Board (ERCB or Board).¹ Participation in this ERCB decision-making process may occur by invitation from the Board or by virtue of the legal right to participate held by one or more persons. While the ERCB has the discretion to invite public participation into its decision-making, the Board is reluctant to use this power. The right to participate at the ERCB translates into a legal duty on the ERCB to hear the right holder in its licensing decision process.² The law is currently such that very few persons have the legal right to participate in an ERCB decision-making process. In short, public participation at the ERCB is limited.

The law governing public participation in an ERCB decision-making process is set out in the Board's governing legislation and has been interpreted in several Alberta Court of Appeal decisions. The ERCB applies this law in its own directives and on a case-by-case basis. The research presented in this article is based upon the applicable legislation governing the ERCB, relevant Alberta Court of Appeal decisions, relevant ERCB directives, and a selection of published ERCB decisions.

This article concludes that the legislation governing participation in an ERCB project licensing decision can be interpreted to support more public participation than is currently the practice at the Board. The ERCB applies its governing

legislation as a 'standing' test, and this article suggests the legislation is properly interpreted as codifying procedural fairness obligations on the Board. In addition to providing more individuals with a legal forum to express their concerns with a proposed energy project, the interpretation of the legislation suggested here would also help ensure the legitimacy of energy and environmental decision-making generally in Alberta.

The Problem

An energy project located in Alberta requires the approval of the ERCB pursuant to regulatory power granted to the Board under one of several provincial statutes. In doing so the Board must give consideration to whether the project is in the public interest having regard for its social, economic and environmental effects. The Board's power to approve or deny a project is exercised subsequent to the acquisition by the proponent of a mineral lease and surface access to the project site. Commentators have noted difficulties with this approval sequence concerning energy development on Crown lands, including the fact it places the ERCB in the awkward position of having to assess the public interest of an energy project after the Alberta government has disposed of surface and sub-surface legal interests needed to recover the minerals.³ The Crown mineral disposition process is highly discretionary and completely non-transparent.⁴ Apart from the environmental impact assessment process under



EPEA, from which oil and gas wells are exempt anyways, the legal framework governing energy development in Alberta provides no meaningful opportunity for public participation in energy project decisions outside of the ERCB project licensing process.

The ERCB decides an overwhelming majority of energy project license applications solely on the basis of information provided by the applicant company pursuant to Board requirements. A person who objects to a battery of sour gas wells drilled on lands nearby their home because of health or safety concerns, or a rancher who is concerned that pipelines will fragment the landscape, or a recreational hunter who believes an energy project will displace wildlife, or an environmental group that advocates against the project because it will impair ecological integrity, must first convince the ERCB to hear their concern.

The ERCB has a very narrow view of those persons it will hear in relation to an energy project license application. Essentially only the owner of the land upon which the project will be located or residents within a very close proximity are entitled to contest the merits of a project. Thus only landowners and energy companies really count for the ERCB hearing process. This is particularly troublesome where the project is located on Crown land, since the ERCB considers the disposition of mineral rights by the Crown to imply no objection by the Crown (as the landowner) to the project.⁵

The Board's narrow view on persons it will hear also has implications for public participation in general beyond its impact on specific individuals or groups. Various commentators have identified the substantive and procedural benefits of effective public participation in energy and environmental decision-making, including: (a) a more complete factual record for the decision-maker; (b) an enhanced accountability over public policy decisions; (c) a greater likelihood the outcome is viewed as legitimate by those affected; and (d) citizenship empowerment and social learning.⁶ Access to the decision-making process is one criteria used to measure the effectiveness of public participation.⁷ The ERCB's view that it will only hear landowners or energy companies potentially impairs the effectiveness of public participation in energy and environmental decision-making in Alberta by limiting

the factual record and reducing the likelihood that those adversely affected by energy development believe their concerns are taken into account by public authorities.

It is difficult to comprehend how the ERCB complies with its statutory obligation under section 3 of the *Energy Resources Conservation Act*⁸ to consider the public interest in its project decision-making when the Board typically only hears evidence from the applicant company and landowners or residents in close proximity to the project. *ERCA* Section 3 states:

“Where by any other enactment the Board is charged with the conduct of a hearing, inquiry or other investigation in respect of a proposed energy resource project, it shall, in addition to any other matters it may or must consider in conducting the hearing, inquiry or investigation, give consideration to whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment.”

This statutory provision arguably imposes a legal duty on the ERCB to invite public participation into its decision-making process, and at the very least should provide the Board with the legal power to invite public participation into its decision-making process.⁹

The Law on Public Participation at the ERCB

The ERCB is a creature of statute, and is governed by the *Energy Resources Conservation Act* as well as several resource-specific statutes including the *Oil and Gas Conservation Act*.¹⁰ A person may seek to participate in an ERCB licensing process in relation to many types of energy projects, and the discussion in this article focuses on participation in the context of an application for a gas well license made by an energy company. This focus is partly for pragmatic reasons as it limits the legislation and policy that must be canvassed, but the analysis is generally applicable to all energy project licensing decisions by the ERCB. In the context of public participation, an examination of gas well licensing is particularly revealing because gas well projects are exempt from the environmental impact assessment requirement in *EPEA*¹¹ and the



ERCB licensing process thus represents the only legal process available to a person who wishes to speak to the merits of a gas well project. The applicable legislation and policy governing public participation in an ERCB gas well licensing decision includes the *ERCA*, *OGCA*, various regulations, and ERCB Directives 029, 056, and 071.¹²

The *Mines and Minerals Act*¹³ provides the Crown with discretionary power to allocate rights to recover subsurface minerals, subject only to restrictions set out in a land-use plan issued under the *Alberta Land Stewardship Act*.¹⁴ Having secured the necessary mineral rights to drill a natural gas well, a company must submit a written application to the ERCB for a well licence.¹⁵ *OGCA* subsection 18(1) provides the ERCB with the power to either approve or deny the application. Subsection 2.010(1) of the *Oil and Gas Conservation Regulations*¹⁶ requires that an application be in the form prescribed by ERCB Directive 056.

An energy company must also obtain the consent of the surface landowner (and occupant if different from the owner) for access to the targeted well site.¹⁷ Section 76 of the *Disposition and Fees Regulation*¹⁸ enacted under the *Public Lands Act*¹⁹ authorizes the Crown to issue a surface lease on public lands to an energy company enabling access to the project site. Where the company is unable to obtain consent to access a well site on freehold lands, it may apply for a right of entry order from the Alberta Surface Rights Board.²⁰ The right of entry order must conform to the ERCB well licence.²¹

None of the rules pertaining to mineral rights disposition or surface access provide for effective public participation.²² Subsection 2.020(4) of the *Oil and Gas Conservation Regulations* requires the applicant company to notify landowners and residents in accordance with ERCB Directive 056 of its plans to drill a well, and this notification will typically occur after the company has obtained its mineral and surface access rights. ERCB Directive 056 requires an energy company to implement a community participation program before applying for its gas well licence.²³ The ERCB expects an energy company's program to include notification and dialogue with various stakeholders in the surrounding area including local authorities, public interest groups, holders of a Crown

disposition, and any other person who expresses an interest in the project.²⁴ Directive 056 requires the energy company to provide any interested person with prescribed written documents that describe the proposed project and the Board's approval process.²⁵

Directive 056 specifically requires an energy company to conduct face-to-face consultation with the landowner and resident (if different from the owner) of the land upon which the well and access road is located, as well as residents on land within a prescribed radius of the well site.²⁶ For a conventional sweet gas well, this personal consultation radius is 200 metres surrounding the well site.²⁷ For a sour gas well, this personal consultation radius extends to residents within the emergency response zone (EPZ) designated by the applicant pursuant to Directive 071.²⁸ The EPZ is the area surrounding the well site wherein the licensee must prepare an emergency response plan to evacuate residents in the case of a sour gas leak that would expose persons to even a small dose of hydrogen sulphide.²⁹ The applicant company must calculate the radius of the EPZ in accordance with the requirements of Directive 071, and its scope varies depending on parameters set by the ERCB.³⁰

Directive 056 requires the applicant company to disclose any unresolved objections concerning the proposed gas well to the ERCB.³¹ In the case where the application is contested, the ERCB will publish notice of the well licence application and invite those objecting persons to submit their concerns in writing to the ERCB. Directive 029 provides guidance to persons on what to include in this written objection, including why they object to the project.³² The ERCB then decides whether a person objecting to the well has a sufficient interest to trigger a public hearing that considers the license application. The ERCB considers this to be a 'standing' determination.³³

This determination is governed by section 26 of the *ERCA* which reads as follows:

"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.

(3) When by subsection (2) a person is entitled to make representations to the Board or its examiners, the Board or its examiners are not by subsection (2) required to afford an opportunity to the person

- (a) to make oral representations, or
- (b) to be represented by counsel, if the Board or its examiners afford the person an opportunity to make representations adequately in writing, unless the statutory provision authorizing the Board's decision requires that a hearing be held."

Public participation in a proposed gas well project is thus limited to consultations with the project proponent until the process reaches the well license application stage at the ERCB. Upon receipt of an application that discloses an objection to the project, the ERCB will determine whether one or more of the persons objecting to the project has a right that may be directly and adversely affected by the gas well. Where the Board is of the opinion that a person is affected as such, that person has standing to trigger a public hearing.

The ERCB has a very narrow view of those persons capable of meeting the 'directly and adversely affected' test for standing to trigger a hearing under subsection 26(2). ERCB Directive 056 expressly describes these persons as those located within the project face-to-face consultation radius.³⁴ These persons consist of the landowner and resident (if different from the owner) of the land upon which the project is located, as well as residents located on land within a prescribed radius of the energy project. Directive 056 encourages an energy company to include stakeholders beyond these persons in its community participation program, but the ERCB position has consistently been that only landowners or residents within the project consultation radius have 'standing' to trigger a hearing on an energy project application.³⁵

The ERCB's narrow view on who has the legal right to participate in its energy project licensing decision process, together with its reluctance to otherwise invite participation, make it difficult to assert that the Board engages in the practice of public participation at all in the licensing process. Members of the public who seek to participate in an ERCB licensing decision, either as an individual or as part of an organized group, are routinely dismissed by the Board on the basis that they do not own land in sufficient proximity to the proposed energy project.

The ERCB's application of *ERCA* subsection 26(2) has been considered by the Alberta Court of Appeal in several instances. The leading interpretation of subsection 26(2) was provided by the Court in its 2005 *Dene Tha' First Nation v Alberta (Energy & Utilities Board)* decision.³⁶ The applicant energy company proposed to drill wells on Crown lands that were located outside the Dene Tha' First Nation reserve. The Dene Tha' sought to oppose the wells at the ERCB, and the Board denied them standing. In the appeal decision, the Court endorsed the following interpretation of the subsection 26(2) test provided by the ERCB:

"The Board correctly stated here that that provision in s. 26(2) has two branches. First is a legal test, and second is a factual one. The legal test asks whether the claim right or interest being asserted by the person is one known to the law. The second branch asks whether the Board has information which shows that the application before the Board



may directly and adversely affect those interests or rights. The second test is factual.”³⁷

The Court stated it is reasonable for the ERCB to require the person to submit evidence to demonstrate some degree of proximity between the proposed project and the right asserted in its factual determination under subsection 26(2).³⁸ The degree of proximity necessary to meet the subsection 26(2) test is a question of fact for the ERCB to determine.³⁹

In subsequent decisions the Court of Appeal has provided further guidance on what is included as a legal right under *ERCA* subsection 26(2). An economic interest on its own is not a legal right under subsection 26(2).⁴⁰ An entitlement to notice or consultation under ERCB directives 056, 060 or 071 is a legal right under subsection 26(2).⁴¹ The ERCB may consider the degree of proximity between the proposed energy project and the affected legal right in its assessment of whether the legal right in question may be directly and adversely affected, however subsection 26(2) does not require that a person demonstrate they may be affected in a manner different from the public generally.⁴²

An Alternate Reading of *ERCA* Subsection 26(2)

The ERCB applies subsection 26(2) as a test for standing which a claimant must satisfy in order to trigger a public hearing on a licensing decision. The claimant must demonstrate to the ERCB that its license decision may directly and adversely affect his/her rights. The ERCB relies to a great extent, if not exclusively, on the consultation radius prescribed in its Directive 056 to determine who satisfies this threshold. While the ERCB has the legal power to convene a public hearing on any project application or allow any person to participate in a hearing convened at the request of someone else who meets the test for standing, the ERCB has demonstrated a reluctance to do so. Public participation is thus extremely limited at the ERCB, to the point that it is debatable whether the Board engages in public participation at all.

A literal reading of *ERCA* section 26 raises the question of whether its current application by the ERCB and interpretation by the Court of Appeal as a

standing test is correct in law. ‘Standing’ concerns the determination by a decision-maker such as the ERCB as to whether the claimant has a sufficient interest recognized in law to commence proceedings.

In the common law, the rule of standing essentially precludes public participation in legal decision-making.⁴³ Legislated standing provisions typically restrict public participation in an analogous manner to the common law by restricting the right to initiate proceedings to a person who may be ‘directly affected’ by the decision in question. For example, a person who is directly affected by a decision of Alberta Environment to amend a water license issued under the *Water Act*⁴⁴ may file a statement of concern with Alberta Environment under section 109 of the *Water Act* and subsequently appeal the amendment decision to the Alberta Environmental Appeals Board (EAB) pursuant to subsection 115(1)(c) of the *Water Act*.⁴⁵ In concurrent 1996 decisions, the Alberta Court of Appeal interpreted ‘directly affected’ in a legislative context to mean a claimant seeking standing must demonstrate a personal impact or harm that is distinguishable from that of the public in general.⁴⁶

The suggestion that *ERCA* subsection 26(2) does not set out a standing rule begins with the observation that the section is preceded with the header entitled ‘hearings’. A person objecting to an energy project is not seeking to commence proceedings at the ERCB, but rather seeks to intervene in an application process already commenced by an energy company. Section 26 reads more like a codification of the common law procedural fairness doctrine.

The common law procedural fairness rule 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. In a series of decisions between 1979 and 1999 the Supreme Court of Canada ruled that where an administrative decision made under statutory authority may affect the rights, interests or privileges of an individual, the statutory decision-maker has a legal obligation to notify that individual of the case against them and provide them with an opportunity to meet that case.⁴⁷ Only clear statutory language will remove the application of this common law duty of fairness.⁴⁸

Section 26(1) provides the ERCB with discretionary





power to decide whether or not to hold a hearing in making a decision. Subsection 26(2) takes away some of this discretion by requiring the ERCB to conduct a hearing into the merits of the proposed energy project where it forms the opinion that its license decision may directly and adversely affect the rights of a person. In cases where the ERCB is of this opinion, subsection 26(2) obligates the ERCB to provide that person with the procedural entitlements set out in clauses (a) to (e). These entitlements are really just a codification of the common law procedural fairness rule: the right to know the case against you and having an opportunity to meet that case. In other words, in subsection (2) the legislature is instructing the Board on who it must hear as an exception to the general discretion provided to the ERCB in subsection (1).⁴⁹

The distinction between standing and procedural fairness is somewhat fundamental to the implications of *ERCA* subsection 26(2) on public participation at the ERCB. Read as a standing test, the section provides the ERCB with the power to determine who does or does not have the legal right to object to an energy project. Public participation in an energy project decision is, at best, the exception to the norm because the standing doctrine is generally about limiting access to decision-making rather than inviting participation.

Read as a procedural obligation, subsection 26(2) codifies a legal duty on the ERCB to hear persons whose rights may be directly and adversely affected by an energy project. Procedural fairness does not necessarily invite public participation in legal process, but it does recognize an entitlement to participation based upon a wider set of criteria. Under this interpretation, the Board's current application of subsection 26(2) would translate into the view that it owes a duty of procedural fairness only to landowners or residents within the project consultation radius. This is a much narrower application of the doctrine as compared with that in the common law where the ERCB owes a duty of procedural fairness to any person whose rights, interests or privileges may be adversely affected by its decisions. Moreover, there is no express language in subsection 26(2) to support the ERCB's interpretation that 'rights' in that section mean exclusively ownership of land or residence thereon.

Conclusion

From the perspective of enhancing public participation in an energy project's licensing process there are important reasons for rejecting the view that *ERCA* section 26 sets out a standing test for access into the ERCB decision-making process. First, 'standing' is not consistent with a literal reading of the statute and arguably not consistent with a purposive reading either. Second, 'standing' places the onus on a person objecting to an energy project to demonstrate the right to participate when the section literally speaks of an obligation on the ERCB to afford participation. Third, 'standing' provides some justification for limiting the legal right to participate only to landowners or residents in close proximity to an energy project.

The interpretive question under subsection 26(2) ought to be one of procedural fairness rather than standing: To whom does the ERCB owe a legal duty to hear? The Alberta legislature has chosen to impose this duty where the ERCB forms the opinion that its decision may directly and adversely affect the rights of a person. The extent of this duty rests on the meaning of 'directly and adversely affect the rights of a person'. As a creature of statute and a delegate of the legislature, the ERCB should not have the power to determine the extent of this duty. In other words, the ERCB should not have the last word on which persons it must hear in an energy project application.

- ◆ Shaun Fluker is an Assistant Professor with the Faculty of Law at the University of Calgary. Mr. Fluker gratefully acknowledges the research assistance provided by Christine Caskey (2011 JD). Financial support for the research was provided by the Alberta Law Foundation. The author also wishes to thank Monique Passelac-Ross for helpful feedback on an earlier draft.



Notes

1. In limiting my review to the project licensing process, I have excluded the environmental impact assessment process that may apply to some energy projects under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (EPEA). In the case of an oil or gas well project, this exclusion is moot because such projects are exempted by section 2 of the *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, Alta. Reg. 111/93 from having to undergo an environmental impact assessment.
2. The 'right' in this sense is a Hohfeldian claim right. See Wesley Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 Yale L.J. 710.
3. See Steven A. Kennett & Monique M. Ross, *In Search of Public Land Law*, Occasional Paper #5 (Calgary: Canadian Institute of Resources Law, 1998) at 32-37. See also Steven A. Kennett & Michael M. Wenig, "Alberta's Oil and Gas Boom Fuels Land-Use Conflicts – But Should the EUB be Taking the Heat?" (Summer 2005) 91 Resources 1 at 5. Surface access and mineral rights for energy projects on freehold lands may be disposed by a private owner, but the sequence issue remains the same.
4. Kennett & Ross, *ibid.* at 16. Kennett & Wenig, *ibid.* at 5. Likewise a freehold disposition of mineral rights would be non-transparent.
5. ERCB Directive 056: *Energy Development Applications and Schedules* at ss. 5.10.2.4, 6.10.2.4, 7.11.2.3, online: ERCB, <<http://www.ercb.ca/docs/documents/directives/directive056.pdf>>.
6. Rebeca Macias, *Public Participation in Energy and Natural Resources Development: A Theory and Criteria for Evaluation*, Occasional Paper #34 (Calgary: Canadian Institute of Resources Law, 2010) at 7-13.
7. *Ibid.* at 28.
8. R.S.A. 2000, c. E-10 (ERCA).
9. The extent of legal obligations imposed on the ERCB by section 3 has yet to receive judicial consideration. See Shaun Fluker, "The jurisdiction of Alberta's Energy and Utilities Board to consider broad socio-ecological concerns associated with energy projects" (2005) 42 Alta. L. Rev. 1085. For a detailed examination of the public interest concept as applied to the ERCB see Jodie Hierlmeier, "The Public Interest': Can it provide guidance for the ERCB and NRCB?" (2008) 18 J. Envtl. L. & Prac. 279.
10. R.S.A. 2000, c. O-6 (OGCA). Other legislation includes the *Coal Conservation Act*, R.S.A. 2000, c. C-17 and the *Oil Sands Conservation Act*, R.S.A. 2000, c. O-7.
11. *Supra* note 1.
12. ERCB Directive 029: *Energy and Utility Development Applications and the Hearing Process*, online: ERCB, <<http://www.ercb.ca/docs/documents/directives/Directive029.pdf>>; ERCB Directive 056, *supra* note 5; ERCB Directive 071: *Emergency Preparedness and Response Requirements for the Petroleum Industry*, online: ERCB, <<http://www.ercb.ca/docs/documents/directives/Directive071.pdf>>.
13. R.S.A. 2000, c. M-17, ss. 9 and 16. See also the *Petroleum and Natural Gas Tenure Regulation*, Alta. Reg. 263/97.
14. *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8. Subsection 15(1)(a) binds the Crown to the content of a regional land-use plan. As of writing, there are no land use plans issued under the legislation.
15. OGCA, *supra* note 10, ss. 11(1) & 15(1).
16. Alta. Reg. 151/1971.
17. *Surface Rights Act*, R.S.A. 2000, c. S-24, s. 12(1).
18. Alta. Reg. 54/2000.
19. R.S.A. 2000, c. P-40.
20. *Supra* note 17, s. 15(1)
21. *Ibid.*, s. 15(6).
22. See Nickie Vlavianos, "Public Participation and the Disposition of Oil and Gas Rights in Alberta" (2007) 17 J. Envtl. L. & Prac. 205.
23. ERCB Directive 056, *supra* note 12, s. 2.2.1. An overview of the public participation process is set out in Appendix 12 attached to ERCB Directive 056.
24. *Ibid.*, s. 2.2.
25. *Ibid.*, s. 2.2.2.
26. *Ibid.*, s. 2.3.1.
27. *Ibid.*
28. *Ibid.*
29. ERCB Directive 071, *supra* note 12, ss. 3.1 to 3.4.
30. *Ibid.*
31. ERCB Directive 056, *supra* note 12, s. 3.8.2.
32. ERCB Directive 029 *supra* note 12, s. 4.3.
33. *Ibid.*, s. 6.
34. ERCB Directive 056, *supra* note 12, s. 2.3.1.
35. See e.g., EUB Decision 2003-030: *Memorandum of Decision, Prehearing Meeting, Applications for a Licence to Drill a Sour Gas Well, Compulsory Pooling, and Special Well Spacing Orders, Polaris Resources Ltd.*, Livingstone Field; ERCB Decision 2006-052: *Decision on Requests for Consideration of Standing Respecting a Well Licence Application by Compton Petroleum Corporation Eastern Slopes Area*; ERCB Decision 2007-053: *Shell Canada Limited Application for a Well and Associated Pipeline Licences Waterton Field — Prehearing Meeting*; ERCB Decision 2010-021: *Shell Canada Limited Prehearing Meeting Applications for Well Licences and Associated Pipeline and Facility Licences Waterton Field*; ERCB Decision 2011 ABERCB 002: *West Energy Ltd./Daylight Energy Ltd. Review Application 1647499 A Section 39 Review of Linda McGinn's Status under Section 26 of the ERCA re Hearing of Application 1623169*.
36. 2005 ABCA 68 [Dene Tha']
37. *Ibid.* at para. 10.



Notes (Continued)

38. *Ibid.* at para. 14.
39. *Ibid.*
40. *ATCO Midstream v. Energy Resources Conservation Board*, 2009 ABCA 41.
41. *Kelly v. Alberta (Energy Resources Conservation Board)*, 2009 ABCA 349.
42. *Ibid.* at paras. 30-32.
43. Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: Ontario Ministry of the Attorney General, 1989).
44. R.S.A. 2000, c. W-3.
45. The Environmental Appeals Board is established pursuant to subsection 90(1) of the *Environmental Protection and Enhancement Act*. The 'directly affected' test for standing at the EAB is also referenced in subsection 91(1)(a) of the *Environmental Protection and Enhancement Act*. For a more detailed commentary on the application of this test by the EAB see Nigel Bankes, "Shining a Light on the Management of Water Resources: The Role of an Environmental Appeal Board" (2006) 16 J. Envtl. L. & Prac. 131 at 162-171.
46. *Canadian Union of Public Employees, Local 30 v. WMI Waste Management of Canada* (1996), 35 Admin. L.R. (2d) 172, 178 A.R. 297; *Friends of the Athabasca Environmental Association v. Alberta (Public Health Advisory and Appeal Board)* (1996), 34 Admin. L.R. (2d) 167, 181 A.R. 81.
47. *Nicholson v. Haldimand-Norfolk Police Commissioners*, [1979] 1 S.C.R. 311; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817. This obligation does not attach to a policy or legislative decision that affects rights or interests generally (*Reference Re Canada Assistance Plan*, [1991] 2 S.C.R. 525). The paradigm example of a legislative decision is the enactment of legislation.
48. *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105 at 1113.
49. Subsection 26(3) clarifies that oral hearings and counsel representation are not required by subsection (2).

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MFH 3353, University of Calgary, 2500 University Drive N.W., Calgary, AB T2N 1N4
Telephone: 403.220.3200 Facsimile: 403.282.6182 E-mail: cirl@ucalgary.ca
Website: www.cirl.ca



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