



## Introduction

ABlawg is the University of Calgary Faculty of Law's Blog on Developments in Alberta Law. It includes commentary by faculty members, sessional instructors, research associates at the Faculty's affiliated institutes, and students on court and tribunal decisions and legislative and policy developments in Alberta. ABlawg includes commentary in several areas of interest to readers of *Resources*: Aboriginal Law, Carbon Capture and Storage, Climate Change, Energy Law, Environmental Law, Natural Resources Law, Oil and Gas Law, and Water Law. *Resources* articles have sometimes been reprinted

on ABlawg (see e.g. Nickie Vlavianos, [The Issues and Challenges with Public Participation in Energy and Natural Resources Development in Alberta](#) and David Laidlaw and Monique Passelac Ross, [Water Rights and Water Stewardship: What About Aboriginal Peoples?](#)); in this issue of *Resources* we feature three ABlawg posts concerning (1) judicial interpretation of the *Alberta Land Stewardship Act*, (2) regulatory approaches to CCS, and (3) standing at the Energy Resources Conservation Board. The posts included here have been edited for length. For full versions of the posts and to become a subscriber to ABlawg, go to <http://ablawg.ca/>.

## INNOVATIVE BUT CONTROVERSIAL MUNICIPAL BYLAWS SURVIVE CHALLENGES

by Arlene Kwasniak  
(originally published on ABlawg in June 2010)

The case of [Keller v. Municipal District of Bighorn No. 8](#), 2010 ABQB 362, is significant in three regards. First, it raises the thorny issue of standard of review regarding the reasonableness of a municipal bylaw under the *Municipal Government Act*, R.S.A. 2000, c. M-26 (*MGA*). Second, it considers the validity of an innovative municipal land use management tool that is not specifically authorized by the *MGA*, thus shedding light on the breadth of municipal authority in carrying out its land use and development functions. Third, it is the first decision to consider the effect of the *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8 (*ALSA*), and considers who may bring a challenge under the *ALSA* and whether the *ALSA* is retroactive. This article will focus on the third issue (for a discussion of the other two issues, see [ABlawg](#)).

In 1989, the Applicant, Rod Keller, acquired a 406-acre parcel of ranch land in the Bow River Corridor 20 kilometres west of Cochrane, Alberta (the "Keller lands"). Except for a residence, Keller maintained the lands as a nature preserve. In 2006, the Respondent Wild Buffalo Ranching Ltd. ("Wild Buffalo") purchased an adjacent 662-acre parcel of land (the "Carraig Ridge lands"). Wild Buffalo (or its principal) also owned lands north of the Carraig Ridge lands and Keller lands that Justice Sandra Hunt McDonald calls the "Jamison Road lands." Prior to June 2007, under the Municipal District of Bighorn No. 8's Municipal Development Plan ("MDP") all three lands were classified as "small holdings". This land-use zone authorized subdivision into no less than 40-acre lots with a maximum one residence per lot.



Wild Buffalo's plan was to subdivide the Carraig lands into 45 lots, which was not permissible under the 40-acre minimum rules for small holdings. With this hope of carrying out its plan, in February 2007 Wild Buffalo applied to the Municipality for the enactment of three bylaws. These bylaws would put a municipal transfer of development credit ("TDC") program into effect that would enable Wild Buffalo to effect the proposed subdivision.

A typical TDC program involves transferring development potential from one parcel of land to another parcel of land in accordance with municipal plans, policies and bylaws. "Development potential" means the difference between existing land use and potential land use as allowed by and set out in applicable land-use bylaw ("LUB") and municipal plans. The parcel from which development potential is transferred is the "sending parcel." The parcel that receives the development potential is the "receiving parcel." For example if a LUB allows a single residence lot per 40 acres in the sending area, a TDC program might give a landowner who owns 160 undeveloped acres in the area four development credits. Under the program these credits are transferable to the receiving area to enable greater density (more residences, smaller lots) in that area. Appropriate legal instruments secure restrictions on development in the sending parcel, such as conservation easements or restrictive covenants. TDC programs give municipalities a new tool to restrict development where the municipality determines it is inappropriate, and to allow greater density where the municipality determines it is warranted. However, unlike traditional zoning, TDC programs may be designed to enable compensation for a landowner who legally restricts development in a sending area by giving the landowner an opportunity to sell development credits to those who want more density in a receiving area.

Wild Buffalo's proposed Bylaw 06/07 would (1) amend the MDP to enable the Municipality to apply innovative land-use planning and environmental conservation techniques; and (2) add provisions to enable a "transfer of subdivision density" ("TSD") program (the same as a TDC program). Bylaw 07/07 would provide for the creation of an Area Structure Plan for the Carraig Ridge area (to be prepared by Wild Buffalo). Bylaw 08/Z/07 would amend the LUB to (1) add the

necessary definitions relating to the TSD program, and (2) add the new districts for the TSD program. Together these bylaws would permit Wild Buffalo to transfer subdivision potential from the Jamison Road lands to the Carraig Ridge lands. Development restrictions on the Jamison Road lands were to be secured by a registered conservation easement. The conservation easement would prohibit further subdivision. The transfer of density potential to the Carraig Ridge lands would, under the MDP, ASP and LUB, authorize subdivision of these lands into 45 lots.

The *Alberta Land Stewardship Act (ALSA)* was proclaimed in October 2009. *ALSA* was designed to implement the Alberta Land-use Framework (LUF), released in December 2008. The *ALSA* and the LUF together provide the provincial government with unprecedented legislative and policy tools to comprehensively plan and manage public and private lands and interests, including natural resources. The *ALSA* enables Cabinet to make approved regional plans that will bind the Crown, local governments, decision makers, regulated industry, and private individuals. The *ALSA* prevails over all other Alberta statutes and regulations. *ALSA* regional plans prevail over conflicting provisions in any Alberta regulations, and over regulatory instruments, including municipal bylaws, government policies, and codes of practices. In addition to its land management provisions, the *ALSA* authorizes new economic instruments and stewardship tools. These include agricultural easements that enable the permanent or temporary protection of agricultural land from inconsistent uses; TDC programs, and other conservation off-set opportunities.

The *Keller* decision raised two *ALSA* issues. First who may raise a challenge regarding alleged non-compliance with the *ALSA*, and second, is the *ALSA* retroactive so as to invalidate the Municipality's TDC program?

On the first issue, the Applicant argued that the Municipality's TDC program did not comply with the *ALSA* since the Lieutenant Governor in Council did not approve it as required by section 49 of the *ALSA*. The Respondents argued that the Applicant did not have a legal right to bring an application for judicial review on the basis of non-compliance with the *ALSA*. The decision noted that section 13 of the *ALSA*





expressly authorizes the Stewardship Commissioner (appointed in accordance with the *ALSA*) in certain situations to apply to the Court of Queen's Bench if the Commissioner is of the opinion that there is non-compliance with the *ALSA*. The Court agreed with the Municipality that "by excluding references to individuals or persons other than the Stewardship Commissioner, the Legislature intended to exclude anyone other than the Stewardship Commissioner from bringing an application for judicial review on the basis of non-compliance with *ALSA*" (para. 52). The Court read section 13 in connection with subsection 15(3) of the *ALSA* which limits the ability to bring an action concerning compliance with a regional plan to the Stewardship Commissioner, and section 62 which limits individual recourse regarding non-compliance to registering a complaint with the Stewardship Commissioner. The Court found that *ALSA*'s limiting challenges of non-compliance with the Act to the Stewardship Commissioner was sufficient reason alone to conclude that the *ALSA* has "no impact on the disposition of this matter" (para. 53). Nevertheless, the Court found it to be appropriate to consider the issues of retroactivity and vested rights, since the parties addressed them.

The finding of the Court that an individual does not have the right to judicial review regarding an allegation of non-compliance is significant. *ALSA*'s numerous express and implied privative clauses make it no secret that the *ALSA* was designed to preclude all judicial review except as it expressly envisions. The *Keller* case shows that the Act is successful in this regard, so far. One wonders whether section 13 of the *ALSA* would preclude any challenge regarding the vires of a statutory delegate's action that boils down to an allegation of non-compliance with the *ALSA*, or whether, perhaps on more compelling facts than those found in *Keller*, a future court would allow an application for judicial review under the *Alberta Rules of Court*, Alta. Reg. 390/1968, Part 56.1 (Judicial Review in Civil Matters), for example, on the ground that a statutory delegate's action was a nullity since the delegate acted without statutory authorization.

On the second issue, Keller challenged the TDC program on two grounds: (1) it was not a valid TDC scheme as it did not have the Lieutenant Governor in Council's approval as required under section 48 of the *ALSA*, and (2) it was not valid as it was not

established for a conservation purpose as required by section 49 of the *ALSA*.

Regarding both challenges the Court noted that the Municipality's TDC program was established prior to the *ALSA*'s coming into effect. According to the Court the TDC program could be invalid under the *ALSA* only if *ALSA* were retroactive. A retroactive statute changes the legal nature of a past event, in the past. The Court noted that there is a strong presumption against retroactive application of legislation and that the presumption is rebutted only by clear statutory language that legislation is meant to apply retroactively. Since there was no such language the Court concluded that the *ALSA*, or at least the TDC provisions, were not retroactive and that therefore the Municipality's TDC program was not subject to them. On the basis that the legislation was not retroactive, the Court easily dismissed the Applicant's arguments that the Municipality's TDC program needed the approval of the Lieutenant Governor in Council or was not established for an *ALSA* conservation purpose. There were no such requirements in the *MGA* prior to the *ALSA*. As well the Court remarked that in any case, the Municipality's TDC program was aimed at conservation. It was aimed at conservation of the Jamison Road lands, and not the Carraig lands, as desired by the Applicant (para. 29).

Interestingly, the Court did not consider whether the *ALSA* is retrospective, in contrast to retroactive. A retrospective statute does not change the legal nature of an event in the past. Instead, it provides new consequences for a past event. (See for example *Dikranian v. Attorney General of Quebec*, [2005] 3 S.C.R. 530.) On a retrospective interpretation, it could be argued that although the Municipality's TDC program was valid when it was created, it became invalid once the *ALSA* came into effect since, for example, it did not have the approval of the Lieutenant Governor in Council. There is no presumption against retrospective application of a statute. However there is a presumption that Legislature does not intend to interfere with vested rights. The Respondent Wild Buffalo was ready to argue that it possessed vested rights as a result the passage of the bylaws. Mr. MacGregor, the principal of Wild Buffalo, provided an affidavit setting out land purchase expenses exceeding \$11 million and development expenses of about \$2.6 million in reliance on the bylaws. The Court did not





find it necessary to pursue the Respondent's claim of vested right since it already had found that the TDC program was valid under the *MGA* and that *ALSA* did not operate retroactively to invalidate it. In fact, the Court found that nothing under the *ALSA* would limit Wild Buffalo's right to further pursue its development plans by, for example, applying for subdivision, "in the absence of a regional plan purporting to limit" (para. 62) subdivision.

If the Court had entertained the question of whether the legislation was retrospective, in my view, the TDC program likely still would have survived. To invalidate the TDC program on the basis of a retrospective application would at least blur the distinction between retroactive and retrospective application of the *ALSA*, if not reduce a retrospective application to a retroactive one. Such invalidation would not only modify the effects of a prior legal situation, it would nullify that situation. As well, there is the matter of Wild Buffalo's claim of vested rights. As stated by

Pierre-André Côté in *The Interpretation of Legislation in Canada* (3rd ed. (Scarborough, Ont.: Carswell, 2000) at 160-161), there are two criteria for vested rights: "(1) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement." On the facts given in the case (though undisclosed facts also may be relevant) there is a strong likelihood that Wild Buffalo's actions taken and expenditures made in reliance on the bylaws met these criteria and gave rise to vested rights. Since nothing in the *ALSA* appears to expressly or by necessary implication interfere with such rights, the TDC program would survive, at least as it applied to Wild Buffalo and its vested rights. In the special circumstances of the case, the program's application to Wild Buffalo seems to be all that matters, since Wild Buffalo or its principal own all of the land relevant to the TDC program.

## MUTATIS MUTANDIS: THE ERCB SPEAKS (IN LATIN) ON THE SUBJECT OF CARBON CAPTURE AND STORAGE

by Nigel Bankes

(originally published on ABlawg in July 2010)

After a long period of cogitation the chief energy regulator in the province has finally provided a statement of how it proposes to approach the regulation of carbon capture and storage (CCS) projects (see [ERCB Bulletin 2010-22](#), ERCB Processes Related to Carbon Capture and Storage (CCS) Projects, June 29, 2010). The message is simple: apply the current rules, so far as they are applicable to CCS (the basic idea of *mutatis mutandis*). The issue is important: several task forces and many commentators have emphasized that the proponents of CCS projects need regulatory certainty if they are to plan and implement commercial scale CCS operations. Whether this ERCB Bulletin provides sufficient guidance to industry and sufficient comfort to the citizens of the province that CCS projects will be handled safely remains to be seen.

The Board speaks in many different ways. It speaks through regulations (to the extent that the Board

rather than the Lieutenant Governor in Council has the power to make regulations: *Giant Grosmont Petroleum Ltd. v. Gulf Canada Resources Ltd.*, 2001 ABCA 174); it speaks through Directives (which may not be regulations but which clearly still have some normative effect: *Kelly v. Alberta (Energy Resources Conservation Board)*, 2009 ABCA 349), and it speaks through various information circulars including bulletins and news releases. All of these modes of address are general in the sense that they speak to the public and to relevant industries rather than to particular parties. The Board may also address itself to particular parties through orders and decisions in respect of particular applications. If the application is contested the Board generally issues written reasons which it publishes on its website; if the application is not contested the ultimate orders or approval are either not published or, if published on the website, are withdrawn from the website 30 days after the order has been made.





In this case the Board has chosen to speak by means of a Bulletin. The Bulletin covers just over two pages of text. The Bulletin incorporates and refers to a number of Directives but it makes no reference to the relevant provisions of the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 (principally ss.16 (entitlement to apply for a well licence) and 39 (scheme approvals)).

The overall message in the Bulletin is that the Board already has established procedures and a proven track record in regulating the underground injection of fluids (over many years) and with respect to CO<sub>2</sub> (as part of acid gas disposal (AGD) schemes) “for more than 20 years” and that the Board will apply these procedures to CCS projects. Within that overall message the Board addresses six specific issues: (1) the right to dispose, (2) the application of Directive 56 (which relates to the procedures to be followed for any energy development application), (3) the application of Directive 65 (dealing with acid gas disposal projects and enhanced oil recovery projects) and Directive 51 (Injection and Disposal Wells), (4) the application of a number of regulations and Directives dealing with monitoring, reporting and safety, (5) the application of existing rules with respect to suspension, abandonment and reclamation, and (6) the application of existing rules with respect to liability.

The Bulletin acknowledges in several places that the development of a CCS regulatory approach is a work in progress and that the Board intends to learn by doing and intends to adapt and update its approach as it acquires new knowledge.

The Board has signalled for some time that it will approach the regulation of CCS projects in an incremental way. From that perspective nobody who has been following the issue should be surprised by the minimalist approach of this Bulletin. But I find that I am still amazed at just how spare and cryptic a document this is, especially when one compares it with the rule-making exercises that have been taking place in the United States and in Europe. For the United States, see the Environmental Protection Agency’s (EPA’s) [Proposed Rules](#) on CCS; see also my ABlawg post [How should society deal with the question of long term liability for carbon capture and storage?](#), a comment on the [Report of the Interagency Task Force on Carbon Capture and Storage](#). For Europe, see the EU’s CCS Directive, the background

documents to the Directive, and, most recently, a series of Guidance Documents designed to assist member governments in transposing the Directive into national law, all available on the European Commission’s Climate Action [website](#).

I will comment here on five matters: (1) the tone of the ERCB document, (2) general versus individualized rules, (3) the right to dispose, (4) liability, (5) the Board or Government.

(1) The first few paragraphs set the tone of the document. They convey the message that the Board knows what it is doing and therefore that we should all trust the Board. The Board evidently believes that it is unnecessary to describe the elements of a CCS project; to describe the technologies and challenges associated with the underground disposal of CCS, or the differences between CCS projects and EOR (enhanced oil recovery) and AGD projects. All of this is in stark contrast to the EPA’s approach and to the approach taken in Europe. This is therefore not a very communicative document or a user-friendly document. It provides some guidance to the expert reader and the potential applicant who already knows his or her way around the Directives (and perhaps those are the only people that the Board thinks that it needs to communicate with). But it is not very useful to a member of the general public who wants to understand (or needs to be convinced of the value, importance and safety of) CCS operations and technology.

(2) As noted above the Board speaks in different ways and promulgates both general rules and makes specific decisions in relation to particular applications. There is a trade off between these two approaches. General rules offer guidance to applicants and the public; they are transparent and readily accessible. But individualized decisions offer the opportunity to learn by doing and the opportunity to design terms and conditions that are tailored to particular projects. The downside is that individualized Board orders are not very transparent; they are not very good tools for communicating with the public about the Board’s regulatory approach (especially when, as indicated above, the Board does not routinely publish scheme approvals on its website for more than 30 days). In many cases scheme approvals only make sense when read in light of the application. The Bulletin





indicates in several places that the terms of individual scheme approvals will be a key part of the regulatory approach:

- Additional site-specific or project-specific information may be required to address issues related to the public interest.
- The majority of project-specific operating conditions, monitoring, and reporting requirements will be set out in the scheme approval documents.
- Additional well or scheme abandonment requirements may be specified in ERCB scheme approval documents.
- Additional liability issues may be addressed in energy development approval or scheme approval documents.

I expect that there will be significant public interest in the first few large scale CCS projects in Alberta. The Board might usefully commit to making the terms of scheme approvals broadly and easily available to members of the public.

(3) One of the most significant property law issues in the context of CCS is the ownership of pore space for disposal purposes. From the operator's perspective the question may be framed in terms of whose permission is required before injecting CO<sub>2</sub> into a saline aquifer or a depleted reservoir. Are the pore space storage rights owned by the owner of the surface (by and large the US position) or by the owner of the mineral rights (the so-called English rule) — and if the latter, which mineral owner?

One might be forgiven for thinking that these ownership issues are not issues for the Board and that they are issues for the legislature and for the common law courts but the snag for the Board is that ownership issues are increasingly coming before the Board, not least in the context of the still unresolved issues of coal bed methane where the vehicle for raising the issue is section 16 of the *Oil and Gas Conservation Act* and the entitlement to produce (or inject): (see for example Decision 2007-024: Bears paw Petroleum Ltd., Devon Canada Corporation, and Fairborne Energy Ltd., Part 2 of Proceeding No. 1457147 – Review of Certain Well Licences and Compulsory Pooling and Special Well Spacing (Holding) Orders in the Clive, Ewing Lake, Stettler, and Wimborne Fields, March 28, 2007).

The issue is complex and has many dimensions. Perhaps the most significant from the perspective of the ERCB is the geographical scope of the necessary consents. Even if we assume that the relevant owner is the mineral rights owner and we have the easy case in which the mines and minerals estate has not been split, we still need to know which owners we need consents from. In the context of a producing well the concept of a spacing unit and the rule of capture provides us with the answer but spacing units make no sense in the context of an injection well. So in the case of an injection well should the consents be confined to the bottom hole location of the injection well(s), the anticipated injection plume, or the pressure front?

The Board's guidance on these matters is very short:

The right to dispose of CO<sub>2</sub> into an underground geological formation must be obtained from the mineral rights owner prior to submitting a well licence application in accordance with *Directive 056* and prior to submitting a CO<sub>2</sub> disposal scheme application in accordance with *Directive 065*.

In Alberta, the mineral rights owner is either the Alberta Crown (Alberta Energy) or Freehold (private ownership). A letter to the applicant from the mineral rights owner or lessee (as described in *Directive 065*, Section 4.2.2: Equity and Safety) authorizing the CCS operations is generally acceptable to demonstrate the right to dispose of CO<sub>2</sub>.

Several observations are in order. First, the Bulletin is based on the assumption that the right to use an underground formation for disposal purposes is held by the owner of the mineral rights. While I think that this assumption is probably correct in Alberta there may be some doubts about the matter in the absence of appropriate clarifying declaratory legislation. Second, even if the disposal rights are held by the "mineral owner" there may still be a question about which is the relevant mineral owner where the mineral estate is severed into different component elements. Third, the Bulletin does not expressly address the geographical scale of the necessary consents. Directive 65 requires applicants for acid gas disposal schemes to notify all mineral owners within a 1.6



km radius but it does not suggest that consents are required from all such parties. Fourth, the suggestion that “a letter of consent” suffices for these purposes is certainly consistent with present practice but we might reasonably ask whether it is adequate on a go-forward basis. A letter of consent is nothing more than a licence and by its nature therefore (in the absence of a supporting contract) revocable at will.

(4) There is a significant debate in the literature about the long term liability for CCS operations. Many argue that while the operator of an injection project should assume all liabilities during the active period of injections and for a period thereafter, at some point liability, it is said, should be transferred to the government (with or without the mediation of an industry sponsored fund).

The current rules for conventional oil and gas operations are as follows: (1) the licensee assumes all liabilities for the well for so long as it remains the licensee, (2) the licensee's liability survives abandonment; (3) a licensee may have to post security for abandonment costs where its deemed liabilities exceed its deemed assets, (4) where a licensee lacks the economic capacity to carry out abandonment or re-abandonment operations the Board may require working interest owners (WIO) in the well to carry out those operations; (5) where the licensee cannot act or where WIO's carry out the abandonment, the cost of those operations (or the share of costs attributable to those who cannot act) becomes the responsibility of the industry fund (the orphan fund); (6) the liability of the Fund is limited to abandonment and reclamation matters, it does not include tortious liability or liability for other environmental harms. In sum, in conventional operations there is no transfer of liability to government and the liability of the Fund is only engaged as a default matter and in relation to a limited spectrum of liability issues.

The Board proposes that these rules will govern CCS operations in much the same way as they will govern conventional oil and gas operations. CCS operations will be covered by the Fund and potential liabilities will be pooled with conventional operations. This will also mean that in some circumstances the operator/well licensee will be required to post security for anticipated abandonment costs where the costs of abandonment and reclamation operations exceed deemed assets. This is a far cry from a transfer of liability.

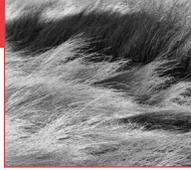
(5) While the ERCB is the province's key energy regulator it is not the only actor within the government. Furthermore, while it is an independent regulator, the province may choose to alter the regulatory rules within which the Board operates although it must do so by means of an amendment to the Board's constituent statutes. Other important regulatory players in the province include the Department of Energy (as the owner of pore space and a party concerned about the potential resource sterilization implications of CCS projects) and the Department of the Environment (with responsibilities for water and surface reclamation).

The Department of Energy is currently drafting legislation which will be tabled in the Fall 2010 sitting which will provide some further guidance on these matters and perhaps suggest some different policy directions. I am sure that there have been some efforts to coordinate a response to CCS projects as between Alberta Energy and the ERCB but the timing of the ERCB's release creates the risk that these two main actors will speak with different and potentially contradictory messages. Until we see that legislation, industry might well conclude that the rules for CCS projects are still very uncertain.

This division of responsibilities between the Department of Energy and the ERCB also begs the question of which entity should be taking a leadership role in communicating with the public and educating them about carbon capture and storage technology. At the moment there is a void: neither has assumed this responsibility. The [Pembina Institute](#) has provided valuable information and fora to discuss CCS, but government also has a role to play and at the moment the Government of Alberta is lagging behind other governments such as those in the United States, Europe and Australia. And it is a laggard despite having committed [significant funding](#) to CCS projects in the province.

*For a post on Alberta's new CCS Bill, see Nigel Bankes, [Alberta makes significant progress in establishing a legal and regulatory regime to accommodate carbon capture and storage \(CCS\) projects](#) (November 2010). Nigel Bankes' work on CCS issues is supported by a grant from ISEEE.*





## THE PROBLEM OF LOCUS STANDI AT THE ENERGY RESOURCES CONSERVATION BOARD: A DICEYAN SOLUTION

by Shaun Fluker

(originally published on ABlawg in November 2009)

A person must have 'standing' to oppose an energy project being considered for approval by the Alberta Energy Resources Conservation Board (ERCB). In January 2009 the ERCB denied standing to Susan Kelly, Linda McGinn, and Lillian Duperron in relation to an application by Grizzly Resources to drill two sour gas wells near their residences (see [Kelly v. Alberta \(Energy Resources Conservation Board\)](#), 2009 ABCA 349). All three applicants reside outside the designated 2.11 km area emergency planning zone (EPZ) surrounding the gas wells and designated by Grizzly pursuant to ERCB Directive 071: [Emergency Preparedness and Response Requirements for the Petroleum Industry](#). Directive 071 defines an EPZ as the area surrounding a sour gas well that due to its proximity requires an emergency response plan from the well licensee. The delineation of an EPZ by and large defines the applicant's consultation requirements set by the ERCB and, as I note below, it also informs the ERCB's interpretation of the standing test in subsection 26(2) of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 (*ERCA*). The distinguishing feature in this case involves the relatively new requirement in Directive 071 for sour gas well licensees to model a protective action zone (PAZ) which anticipates the movement of a sour gas plume upon release from the well. Kelly, McGinn and Duperron reside within the designated PAZ modelled by Grizzly, which covered a larger area than the EPZ. This fact proved significant in the subsequent Alberta Court of Appeal proceedings.

Kelly, McGinn and Duperron appealed their denial of standing by the ERCB to the Alberta Court of Appeal, arguing that the ERCB erred in its interpretation of the subsection 26(2) test. In *Kelly v. Alberta (Energy Resources Conservation Board)* issued on October 28, 2009, the Court of Appeal agreed with the applicants, holding that the ERCB erred in its interpretation and application of the legislated standing test. The Court accordingly quashed the January 2009 ERCB decision on standing and ordered the Board to hear the appellant's concerns

over these sour gas wells. In the aftermath of this judicial decision, the ERCB suspended the issuance of any new sour gas well licenses effective November 3 while the Board considered the implications of the *Kelly* decision. On November 13, 2009 the ERCB responded by announcing that the PAZ calculation in the *Kelly* matter was based on incorrect ERCB policy, and further stated that the Board never intended that the geographic size of a PAZ would exceed that of the EPZ for a particular facility (see [ERCB Announces Changes in Response to Court of Appeal Ruling](#)).

This subsequent move by the ERCB effectively negates any expansion of the standing test promised by the *Kelly* decision beyond the facts of this particular case. The ERCB's response to the *Kelly* decision will also only aggravate the standing problem that led to this Court of Appeal's ruling in the first place. The Alberta legislature, the ERCB and the Alberta Court of Appeal all share the blame here, and perhaps we need some Diceyan rule of law to resolve the matter.

Albert Venn Dicey was a 19th century British constitutional scholar known for his extreme distrust of administrative authority. The Diceyan rule of law called on the judiciary to restrain the power of the executive and its delegates and in no uncertain terms declared legal questions off limits for administrative decision-makers. In a 1999 article, Chief Justice Beverly McLachlin summarized the Diceyan view nicely (see "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999) 12 C.J.A.L.P. 171 at 175):

The history of courts and administrative tribunals has been thought by many to be one of suspicion and distrust. Until recently, courts strictly adhered to Professor Dicey's model which charged them with the duty of ensuring that neither the executive nor its agents assumed "legislative" powers. Indeed, the argument went, to abandon those powers to the executive or its tribunals would threaten the essential freedom



of the liberal individual. Negative liberties, which atomized liberal individuals moved into civil society to protect and which have been jealously guarded since the signing of the *Magna Carta*, would be vulnerable to unreviewable arbitrariness and caprice at the hands of the agents of the executive. Society itself would be defeated if the law was abandoned to the executive. Courts were thought to be uniquely qualified to discern the meaning of democratically-enacted statutes and, in performing this function, both protect the legislature's intentions from being corrupted through the administrative process and protect the individual from the heavy might of the executive state. The Rule of Law demanded no less of the courts.

The Diceyan view governed public law in Canada until the latter part of the 20th century when the Supreme Court of Canada ushered in an era of deference towards administrative decision-making by, in part, starting to respect the intention of a legislator to empower the executive and its delegates with law-making powers. While I fully understand why the Diceyan rule of law is generally untenable in the modern regulatory state, when it comes to Alberta's ERCB and its legal decisions regarding the socio-ecological impacts of energy projects I find myself yearning for the Diceyan rule of law to interpret various sections of the *ERCA*.

Since the ERCB is a creature of statute, the legal test for hearing standing is set out in the governing legislation (rather than being established in the common law). Subsection 26(2) of the *ERCA* states that a person must be "directly and adversely affected" to have standing. The subsection 26(2) test has been in place since 1969 when it was enacted into the *Oil and Gas Conservation Act*, S.A. 1969, c. 83. Its enactment some 40 years ago constrained what had been complete discretion on the part of the ERCB to decide when to conduct an oral hearing in relation to an energy project application. This significant legislative change was likely passed in response to wider calls in the late 1960s for legislators to impose statutory procedural rules on administrative decision-makers.

Much has changed for the ERCB and its role in energy regulation for Alberta since 1969. Most notably for

present purposes, the ERCB is now regularly called upon to address the socio-ecological effects of energy development which, in turn, means more people believe they should have a say on whether a particular energy project is approved and what conditions, if any, should be imposed on an ERCB approval. The "directly and adversely affected" test fails to reflect this broader ERCB role, and the ERCB steadfastly refuses to address the socio-ecological impacts of energy projects. A narrow interpretation of the subsection 26(2) standing test is one of the tools employed by the ERCB in this regard and must surely be to the satisfaction of industry because it severely limits the number of persons that can legally contest an energy project. ERCB Directive 056: [Energy Development Applications](#) directs which persons an applicant must consult with and confirm that those persons will not object to the energy project. These persons generally have a "direct interest in land" within a geographic radius set by Directive 056 which, in the case of a gas well, appears to be similar to the EPZ. In short, the ERCB view on an adequate legal interest necessary to obtain standing pursuant to subsection 26(2) appears to be that of a landowner within the designated EPZ. The Court of Appeal's *Kelly* decision expands this to include those residing within a PAZ (which up until November 13, 2009 was possibly a larger area than the EPZ — but apparently this is no longer the case).

The issue over whether the consultation requirements of Directive 056 should determine which persons have an adequate legal interest to obtain standing under subsection 26(2) of the *Energy Resources Conservation Act* remains undecided in Alberta. As Nickie Vlavianos notes in "[A Lost Opportunity to Clarify Public Participation Issues in Oil and Gas Decision-Making](#)", the Court of Appeal has previously granted leave to appeal on this very issue only to decide the appeal on different grounds (*Graff v. Alberta (Energy and Utilities Board)*, 2008 ABCA 119).

It is my general impression that the Court of Appeal has denied a significant number of leave to appeal on standing applications over recent years concerning the ERCB. In one of the few recent instances where the Court of Appeal did agree to hear a standing issue, the Court interpreted the subsection 26(2) test in *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, 2005 ABCA 68, stating the test was split into a legal





and factual component (at para 10): “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.” The Court also held the degree of geographic proximity between a person and the contested facility was a proper question of fact for the ERCB to consider in its standing deliberation (at para 14).

The *Kelly* appeal provided another rare opportunity for the Court of Appeal to review the test for standing at the ERCB. In this case, the ERCB decided against standing for Kelly, McGinn and Duperron on the following grounds (*Kelly* (ABCA) at para.13): residing within a PAZ is not sufficient to establish the directly and adversely affected test; the onus is on the objecting party to establish this test, including evidence of specific impact and evidence that the objecting party “may be affected in a different way or to a greater degree than members of the general public”; and this onus was not met.

The Court makes two significant findings on standing in *Kelly*. First, the Court held that a person who establishes on the evidence that they have the right to consultation under ERCB Directives 056 and 071 has an adequate legal interest that satisfies the first branch of subsection 26(2) and that such evidence is sufficient to satisfy the factual branch of whether those rights may be directly and adversely affected (see paras. 24 to 29 and 34 to 44). Second, the Court held that nothing in subsection 26(2) supports the ERCB’s interpretation that ‘directly and adversely affected’ means in a different way or to a greater degree than the public generally (see paras. 30 to 32).

While the *Kelly* decision does expand the test for standing in front of the ERCB, only the second finding above seems very compelling in relation to advancing the law because it is only in this second finding where the Court actually tells us something new about the legal test for standing in subsection 26(2). And in particular it is *the Court’s* interpretation of subsection 26(2), rather than the ERCB’s interpretation with the Court’s endorsement.

In its first finding, the Court remains true in its deference to ERCB directives and its endorsement of the ERCB using those directives to interpret the

standing test in subsection 26(2) — with the only exception from the norm here being that the ERCB seemingly failed to follow its own directives in denying standing to Kelly *et al.* I find this judicial deference very curious given that the ERCB does not have rulemaking authority in relation to establishing legal rights for standing. While these directives may have the force of law in respect of guiding applicants in calculating an EPZ and/or a PAZ, in my view Directives 056 and 071 are simply policy guidance when it comes to who is directly and adversely affected by energy projects. The Court of Appeal’s endorsement of the ERCB’s use of these directives to interpret subsection 26(2) incorrectly provides these directives with the force of law on determining standing.

The folly in the Court’s ways here is aptly illustrated by the ERCB’s November 13, 2009 announcement that Directive 071 incorrectly designates the geographic size of a PAZ as exceeding that of an EPZ. With the swift stroke of a policy pen, the ERCB has seemingly reverted the law on standing back to that of residing within a designated EPZ.

Under a Diceyan rule of law we would not have a standing problem at the ERCB. The Diceyan Court would interpret the subsection 26(2) test to be a question of law (or at most a question of mixed law and fact) and beyond the competence of the ERCB to determine. That Court would have no reservation in telling us exactly what subsection 26(2) requires of persons who wish to oppose an energy project in Alberta, with little regard for the views of the ERCB since, after all, subsection 26(2) is the democratically-elected legislature telling the ERCB who it will hear — not the ERCB deciding for itself who it will hear. And if there was a drafting problem with subsection 26(2) the Court would direct the legislature to fix it with a close eye towards ensuring that energy projects do not adversely affect one’s right to life, liberty and security of the person except in accordance with the common law principles of fundamental justice administered by the Court alone.

“In a society governed by the rule of law”, the Diceyan Court would say, “the Alberta legislature cannot possibly enact a standing test that provides the ERCB with the discretion to decide who it will hear and limit the ability of individual Albertans to contest energy projects by simply amending one of its own policies. If such were the case the legitimacy of the government



itself, let alone the ERCB and the Court, would falter in the eyes of the citizenry.”

And indeed there is a crisis of legitimacy forming in Alberta when it comes to the ERCB and the executive and judicial bodies charged with overseeing the ERCB.

For a follow-up post on Kelly, see Shaun Fluker, [\*The problem of Locus Standi at the Energy Resources Conservation Board: Leave to appeal granted in Kelly #2\*](#) (October 2010).

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