

**What is sauce for the goose is sauce for the gander (and other, more mixed, metaphors): and a prediction as to the role of power and influence on law-making in the province.**

**by Nigel Bankes**

*ATCO Midstream Ltd. v. Alberta (Energy Resources Conservation Board)*, 2009 ABCA 41

<http://www2.albertacourts.ab.ca/jdb%5C2003-%5Cca%5Ccivil%5C2009%5C2009abca0041.pdf>

The cases are legion in which the Energy Resources Conservation Board, supported by the Court of Appeal, has denied standing to public interest interveners, First Nations (e.g. *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, 2005 ABCA 68) and fellow-travellers on the grounds that they lack an adequate legal interest in the subject matter of the application. What is interesting about this case is that, this time, the ox that is gored is a sacred cow. Two sacred cows in fact; a leading provincial utility and gas processor (ATCO), and a petrochemical interest (NOVA) that the province spawned. At a formal level the result might be celebrated in terms of respect for the neutrality of the law and equality before the law. Respect may be tempered if we think the rule to be a bad rule.

It will be interesting to monitor the reaction of the provincial government and legislature to this decision. Until now I think that the government, the industrial elite of the province (and the Board itself) have been quite content with the narrowness of the standing provision in the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 even though (or because) it has served to disenfranchise those who lack ownership interests that may be affected by a project (be that a well site or an oil sands mine). But what will happen now? Will the industry's lobbying machine gear up to have the legislature amend s. 26(2) of the *Act* to broaden the standing rule? I have certainly argued along these lines in the past (in the context of the Environmental Appeal Board). I think that the standing rules for provincial regulatory bodies and appeal boards are broke and need fixing. This case demonstrates that, but so too have earlier cases like *Sawyer v. Alberta Energy and Utilities Board*, 2007 ABCA 297 (see Shaun Fluker's post [Standing Against Public Participation at the Alberta Energy and Utilities Board](#)). The difference this time is that these guys carry big sticks.

And if the government does rise to the challenge and takes up the pen, it will be even more interesting to see how creative the drafter can be in responding to a drafting instruction framed along the following lines: "open up standing to economic interests; but continue to deny it to those pesky NGOs who want to protect recreational and even ecological values."