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Standing Against Public Participation at the Alberta Energy and Utilities Board

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Cases Considered:

Sawyer v. Alberta (Energy and Utilities Board), 2007 ABCA 297

In September 2007, the Alberta Court of Appeal denied leave to appeal an AEUB (now the Energy Resources Conservation Board) decision that affirmed its longstanding position that participatory rights to contest the merits of an energy project by, for example, presenting evidence and/or cross-examining the project proponent, are not available to recreational users of public lands or urban environmentalists.

Shell Canada applied to drill a sour gas well and construct associated pipeline on public land in the Castle region of the eastern slopes of the Rocky Mountains west of Pincher Creek. An oral hearing to consider the merits of this proposal was assured by the opposition of local residents that met the AEUB's interpretation of the "directly and adversely affected rights" test for AEUB standing in section 26(2) of the Energy Resources Conservation Act, R.S.A. 2000, c. E-10 (ERCA): namely, resident landowners within the prescribed emergency planning zone for the proposed project.

Opposition to the Shell project, however, was more widespread than simply the locals, leading the AEUB to conduct a June 2007 pre-hearing meeting in Pincher Creek. At this meeting, the AEUB determined who would have standing to participate in the upcoming licensing hearing on the sour gas well. The AEUB decided Michael Sawyer, a recreational user residing in Calgary whose participation in the licensing hearing was opposed by Shell, was not entitled to full participatory rights under the ERCA to contest the merits of the sour gas well (see AEUB Decision No. 2007-053).1 Sawyer sought leave at the Court of Appeal to challenge his denial of standing.

In *Sawyer v. Alberta Energy and Utilities Board*, 2007 ABCA 297, Madam Justice Patricia Rowbotham decided there was no question of pure law in the Board's decision that Sawyer's recreational interest in the region was not of sufficient connection to the gas well. And she accordingly denied leave to Sawyer. In doing so, Rowbotham J.A. endorsed the Board's interpretation that geographic proximity to the project is a consideration in determining standing to contest energy projects on public lands.

Of course, the trouble here is not that the AEUB considered proximity in this case. Rather, the difficulty is that proximity is consistently a determinative factor used to preclude standing to contest energy projects on public lands. In practice, this means most projects are licensed unless

a resident landowner is both within the prescribed emergency planning zone and willing to object. A regulatory dualism has emerged between projects proposed near densely populated areas and those in sparsely populated regions, with the former almost certainly requiring an oral hearing to decide on licensing and the latter being approved by the AEUB within a few days of receiving the written license application in prescribed form.

The Court's denial of leave in Sawyer is unfortunate. Perhaps most noteworthy, it suggests the Court of Appeal still refuses to acknowledge that individual energy projects have broader socioecological impacts, irrespective of their location. The restrictive standing test allows the AEUB to hide from its legal obligation to consider the broader socio-ecological implications of a sour gas well, either on its own or cumulatively with other activity in the region, because the Board rarely hears, let alone considers, evidence on broader socio ecological issues. One is left to question how the AEUB can meet its ERCA section 3 mandate to have regard for the social, economic, and environmental effects of an energy project when it precludes many from providing it with such information.

Restricting standing in front of the AEUB is considered protection from the flood of Albertans that would otherwise congest the regulatory process while adding relatively little to the fact-finding mission. Frankly, the floodgates threat is a myth when it comes to energy projects on public lands.

Only persons with a considered interest in the region, such as Sawyer in the Castle region, are paying enough attention to observe AEUB notices of energy project applications concerning public lands. Moreover, ask the families, recreationalists, farmers, ranchers, and others who have voiced their opposition to an energy project whether they wanted to participate in an AEUB hearing. My guess is they will tell you their participation was a necessary evil – the hearing was their sole opportunity to present their concerns over land-use governance in Alberta so they exercised their standing right.

Relaxing the test for standing might indeed cause a flood of lawyers to speak to the AEUB, but that would be all. Nobody else really wants to be there. Those concerned participate by necessity rather than choice.

Footnotes:

1 The Castle-Crown Wilderness Coalition fared even worse. The AEUB ruled the Coalition did not establish an
interest in the affected lands; notwithstanding its local presence, almost two decades as an advocate for wilderness
preservation in the Castle region, and numerous interactions with the AEUB and Shell over such time.