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Still More Questions about Standing before the ERCB

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Cases Considered:

Prince v. Alberta (Energy Resources Conservation Board), 2010 ABCA 214

Leave to appeal applications from standing decisions of the Energy Resources Conservation Board (ERCB) continue to be heard almost, it seems, regularly. Some cases raise questions about the first part of the standing test, whether a "right" has been established that may be affected by a proposed energy project. Others focus on the second part of the test, whether possible direct and adverse effects have been demonstrated. Sometimes the Court of Appeal grants leave; sometimes it does not. *Prince v. Alberta (ERCB)* is another case of leave denied. It is also yet another case that raises important questions about the proper interpretation of the test for standing. Isn't it time for legislative direction?

Introduction

The difficulties in the language of the test for standing to trigger a hearing before the ERCB (or the Alberta Utilities Committee) are obvious. The broadly-worded nature of the provision leaves significant room for debate. The challenges are highlighted in several recent leave to appeal applications: see *Cheyne v. Alberta (Utilities Commission)*, 2009 ABCA 94; *Kelly v. Alberta (Energy and Utilities Board)*, 2008 ABCA 52; *Graff v. Alberta (Energy and Utilities Board)*, 2007 ABCA 246; *Graff v. Alberta (Energy and Utilities Board)*, 2007 ABCA 20; *Sawyer v. Alberta (Energy and Utilities Board)*, 2007 ABCA 297; *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, 2005 ABCA 68 [leave to appeal to the Supreme Court of Canada dismissed [2005] S.C.C.A. No. 176]; and *Whitefish Lake First Nation v. Alberta (Energy and Utilities Board)*, 2004 ABCA 49. We have blogged on some of these cases: see Shaun Fluker, The problem of Locus Standi at the Energy Resources Conservation Board: A Diceyan solution, and Standing Against Public Participation at the Alberta Energy and Utilities Board, and Nickie Vlavianos, Charter and Oil and Gas Issues to Await Another Day: A Disappointing End to the Kelly Appeal?, A Lost Opportunity for Clarifying Public Participation Issues in Oil and Gas Decision Making, and What does the Canadian Charter of Rights and Freedoms have to do with Oil and Gas Development in Alberta?.

The key statutory provision for the ERCB is section 26(2) of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 (*ERCA*). It grants hearing rights "if it appears to the Board that its decision on an application may directly and adversely affect the rights of a person". Courts have said a two-step analysis is involved: (1) a legal determination of whether the right or interest being asserted is one known to the law; and (2) a factual determination of whether there is information or evidence that shows that the application before the Board may directly and adversely affect those interests or rights: see *Dene Tha' First Nation* and *Sawyer*, *supra*.

With respect to the first test of "some legally-recognized interest", the Court of Appeal has said that "[o]bviously a constitutional, a legal, or an equitable interest would suffice": *Dene Tha' First Nation* (at para. 11). The second branch of the test "necessarily requires a weighing of the evidence and a consideration of whether that evidence establishes a sufficient location or connection" between the proposed project and the right asserted: *Dene Tha' First Nation* (at para. 14) and *Sawyer* (at para 16). Both parts of the test have been raised on leave to appeal applications. It is typically the latter part, which is subject to review on a highly deferential standard, that causes applicants the most difficulty both on leave applications and on actual appeals where leave has been granted. The case of *Prince v. Alberta (ERCB)* is no exception.

The Facts

The applicants, Freda and Thomas Prince, lived in Grande Prairie and were members of the Sucker Creek Indian Band (SCIB). Thomas Prince was also the owner of a Registered Fur Management (RFM) licence in RFM Area 2593 (Crown land). As Justice Jack Watson noted, RFM licence's can be issued to, and held by, any persons, including non-aboriginals pursuant to Alberta's *Wildlife Act*, R.S.A. 2000, c. W-10 and its regulations.

The applicants had asked the ERCB to grant them standing to be heard with respect to an application by Talisman Energy Inc. for a pipeline project. The proposed project involved lands on the British Columbia/Alberta border, southwest of Grande Prairie. Part of the pipeline would be within the RFM Area 2593, but not, on the evidence, within the traditional lands of the SCIB.

The Board's decision on the standing application is not available on-line, but Justice Watson summarized the applicants' objection to the proposed pipeline as follows. They submitted that, as trapline holders and as aboriginal individuals exercising traditional cultural practices, they had a legally-recognized right or interest in the lands identified in Talisman's proposal and that the proposed activities would prevent or limit them in their exercise of that right or interest and also in their traditional cultural practices associated with the lands. Justice Watson referred to "this" as the applicants' "interest" in the lands (at para. 4). He further noted that the applicants asserted that their interest in trapping on the lands had been held by members of their family for four generations. They also raised various environmental concerns as well as concerns about the consultation process, including inadequate consultation on the part of the Crown. Lastly, they sought compensation for any adverse effect upon their interest in the Crown land.

Justice Watson noted that the SCIB had not attempted to intervene or object to Talisman's pipeline. Further, there was no submission made or evidence led that the proposed pipeline was to be built on or near traditional lands of the SCIB. The Board also found that consultation "is to be conducted with First Nation communities as a whole, and that individual First Nation members do not have an independent right to consultation" (at para. 5). Generally the Board was satisfied that Talisman had met its consultation obligations and that possible environmental impacts on the lands had been addressed.

The ERCB approved Talisman's application without requiring a hearing. In short, it denied standing to Freda and Thomas Prince. This is so despite the fact the Board concluded that the project would be located within the boundaries of Thomas Prince's trapping area. It did so for a couple of reasons. First, the Board commented that a RFM licence does not confer on its holder an "exclusive right to use the land" but, rather, only provides "a right of access to the holder to a specific area for the sole purpose of trapping" (at para. 6). Such a right of access to Crown land

did not preclude additional activities taking place in the same area. Second, with respect to the environmental concerns and potential impacts on hunting, the Board concluded that the proposed pipeline was to be constructed on a route that primarily followed existing "disturbance" along roadways, thereby minimizing the proposed project's footprint and impacts on the landscape. Consequently, the Board held that the proposed pipeline would involve "minimal or no interference" with the applicants' activities and, in any event, "that the applicants' [RFM] licence did not preclude additional activities from taking place in the same area" (at para. 6).

The ERCB therefore concluded that Talisman's proposed pipeline would not directly and adversely affect the rights of the applicants and, therefore, they were not entitled to a hearing under s. 26(2). Concerns about compensation, said the Board, were matters to be addressed to the Alberta Trappers Compensation Program (a program established since the 1980s to compensate trappers for losses related to industrial activity and other causes: see here). The Board told the applicants that an Alberta Sustainable Resource Development Fish and Wildlife Division officer could assist them in preparing their claim for that program.

Court of Appeal Decision

Before Justice Watson, the applicants argued that the ERCB had misinterpreted and misapplied the test for standing. First, they argued that the Board incorrectly read section 26(2) of the *ERCA* to include only parties who have exclusive rights in an area of land (like an RFM Area). Because of this, the Board failed to consider whether the applicants' interest was potentially directly and adversely affected by the proposed pipeline. Second, they argued the Board failed to consider their concerns about "their cultural practices, subsistence practices and environmental damage to flora and fauna used in their traditional practices" (at para. 8) which clearly demonstrated that they are, or would be, directly and adversely affected to a sufficient extent, entitling them to a hearing as contemplated by the Act.

As noted by Justice Watson, the test for leave to appeal an ERCB decision on a question of law or jurisdiction (per s. 41 of the *ERCA*) requires an applicant to demonstrate that the question of law or jurisdiction raises a serious, arguable point. While several factors are part of this test, Justice Watson highlighted the requirements that the proposed appeal be arguable and of significance. Included in this is a consideration of the applicable standard of review if leave were granted. For pure questions of law, the standard is correctness; for those of mixed fact and law, the standard is reasonableness.

With respect to the first branch of the standing test, the legal question of whether a right or interest known to law has been asserted, Justice Watson held that the ERCB found that the RFM licence in the affected area conferred such a right or interest. I agree. A statutorily-granted licence must give someone rights recognized in law. Justice Watson rejected the applicants' argument that the ERCB had dismissed their claim entirely on the basis that their right of access to the RFM Area was not an exclusive right. Nor was the Board oblivious to the aboriginal status of the applicants or to their generalized assertions about environmental harm. According to Justice Watson, the Board accurately outlined what the applicants' interest was. Further, he held there was no basis to find that any further consultation with the Band or the applicants was required in order to identify the interest claimed or its scope; nor would further consultation have changed the facts of the situation before the Board.

Having found the first branch of the standing test to have been met, the key issue in this case was, according to Justice Watson, the Board's consideration of the second, factual, branch of the

standing test. He concluded that the Board was justified, based on the materials before it, to find that there was "minimal or no evidence" to conclude that the applicants' interest was susceptible to direct and adverse effect by its decision to permit the pipeline. At least two factors supported this conclusion in his view. First,

> ... as presented to the Board, the nature of the legally cognizable interest of the applicants was limited, even when seen through a lens of sensitivity to aboriginal rights and values. The potential for any adverse effect on that identified interest by a subsurface pipeline was facially minimal and largely speculative. (at para. 15)

Second, Justice Watson stated that to the extent an adverse effect on the interest under the RFM licence might be quantifiable and provable, a compensation scheme appropriate to trapline operation existed separately through a dedicated program available to trappers in the province. It follows, according to Justice Watson, "that any potential for a significant direct adverse effect by the pipeline on the interest of the applicants was reasonably accounted for under the circumstances." (at para. 15).

Ultimately, Justice Watson held that the Board's conclusion on whether a decision to approve the pipeline may have a direct and adverse effect on the interest of the applicants was reasonable. Leave was denied.

Commentary

Several questions and comments came to mind as I read Justice Watson's decision in this case. Two relate to his analysis of the first branch of the test for standing and two relate to the second branch of the test.

With respect to the first branch, I found it interesting that the legally-recognized interest in this case, the RFM licence, was described as the "applicants' interest" throughout the decision (see for *e.g.* at para. 14) even though there was no evidence that Freda Prince held such a licence. We are told only that Thomas Prince, one of the applicants, was an owner of an RFM licence so it is not clear why the interest was referred to as being that of the "applicants". So what was the nature, if any, of Freda Prince's interest in bringing the standing application to the Board? My guess is that this is part of the reason why the applicants made submissions in regard to "cultural practices", "subsistence practices" and "traditional practices". Were they trying to assert an aboriginal right of some kind (for *e.g.*, a trapping right)? It is unclear. In any event, because aboriginal rights typically involve rights to carry out specified activities on particular tracts of land, the fact that traditional lands were not involved here would have been a significant barrier to making out such a right in the circumstances.

Also in relation to the first part of the standing test, the references to the claimed interest being "limited" or having its "limitations" (at paras. 15 and 12) are odd. So what if the "interest" or "right" being asserted is limited in some way? Does section 26(2) say that the "right" must be an absolute one? Do absolute rights or interests even exist? Presumably this point about the interest being limited was intended to reference the ERCB's point that an RFM licence does not give a holder exclusive use of an area. But it is hard to see how this is relevant in any way to the test set out in section 26(2) of the Act. A limited right or interest is a right or interest nonetheless and should be given full effect under the legislative provision.

The case ultimately turned on the second branch of the test, the factual determination of whether there might be direct and adverse impacts. My concern here is that Justice Watson and the ERCB may have set the bar too high in terms of what was required by way of proof and type of impact. Although the Board said there would be "minimal or no interference", it appears that "minimal" was equated with "none". Are not "minimal" impacts still impacts? Section 26(2) does not say that only evidence of major or significant impacts counts. Until it does, it is difficult to read this in. Interesting that Justice Watson suggests that "any potential for a significant direct adverse effect by the pipeline on the interest of the applicants" was all that mattered (at para. 15, emphasis added).

One is reminded of Justice N. Wittman's conclusion about the second branch of the standing test in *Whitefish Lake First Nation*, *supra*, where he emphasized that, given the language of s. 26(2), only a *prima facie* case of a possible infringement of a legal right need be made out (at para. 22). In *Cheyne*, *supra*, Justice C. Conrad held that whether a higher threshold test has been applied in this context is a legal question that merits the granting of leave. Ultimately, without specifics about what the "minimal" impacts were in this case, it is hard to know whether the correct standard was applied or not.

Lastly, the conclusion that there was no potential for direct and adverse effect within the meaning of section 26(2) because a compensation program is available to trappers is completely unsatisfactory. Isn't that like telling a landowner there is no prospect his or her rights will be directly and adversely affected by an oil and gas facility because they might be able to recover some type of damages through suing in tort? Besides, who knows how much would be recoverable under this program and whether this trapper would even qualify? Even if recovery were possible, this talk of compensation makes it sound like the only relevant impacts to be considered are ones that can be quantified in monetary terms. Does section 26(2) say that? And how all of this supports the Board's mandate to make decisions "in the public interest" is even murkier.

At the end of the day, *Prince* is yet another case on standing which raises more questions than gives answers. More questions means more reasons that point to a need for legislative clarity on the standing test. Until then, cases will continue to make their way to the Court of Appeal.