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The Smoking Gun Revealed: Alberta Environment Denies Environmental Groups Who Oppose Oil Sands Projects the Right to Participate in the Decision-Making Process

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Cases Considered: *Pembina Institute v Alberta (Environment and Sustainable Resource Development)*, 2013 ABQB 567

This decision by Justice Marceau exposes the very disconcerting trend in Alberta of public officials – in particular those with Alberta Environment – opposing the participation of environmental groups in resources and environmental decision-making. Think about this for a minute. Public officials who work on behalf of Albertans and are paid with public funds actively, and in some cases aggressively, oppose participation by organized members of the public seeking input into how public resources are allocated and developed. To be sure, there is something terribly amiss within the corridors of Alberta Environment. The Pembina Institute and the Fort McMurray Environmental Association have served Albertans generally in bringing attention to this by defending their right to participate in the decision-making process concerning a SAGD (Steam Assisted Gravity Drainage) oil sands project along the MacKay River.

This comment proceeds as follows. First, I describe public participation in general terms and provide some examples of where the right to participate in resources decision-making has been codified in law. Second, I say a few words about the right to public participation in resource project decision-making under Alberta legislation. Third, I examine Justice Marceau's decision. And I conclude with my thoughts on the importance of this decision for public participation in resources and environmental decision-making going forward.

The subject of public participation in resources and environmental decision-making has received significant attention from policymakers and scholars during the course of the last fifty years (For an overview see Rebeca Macias, *Public Participation in Energy and Natural Resources Development: A Theory and Criteria for Evaluation* (Calgary: Canadian Institute of Resources Law, 2010) at p 7-13, here). Resources and environmental decisions are administered by public authorities and so determinations of who gets to participate and how they participate is significantly informed by political theories on the relationship between the state and its citizens. Proponents assert that public participation enhances the accountability of state officials to citizens and provides a greater likelihood that the decision is seen as legitimate by those affected. Critics of public participation, on the other hand, argue resources and environmental issues are

complex and are best resolved by experts and technocrats. In the eyes of critics, public involvement in the decision-making process simply introduces unnecessary costs and delay.

The right to public participation in resources and environmental decision-making is codified in domestic and international law. The most relevant piece of international law is the United Nations Economic Commission for Europe *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (the Aarhus Convention, here). The Aarhus Convention provides that signatory countries establish a legal right to public participation in state decision-making concerning specified resource project developments. The right to participate established by the Convention extends to any person with an interest in the decision, and expressly includes environmental organizations. Canada is not a party to the Aarhus Convention.

Public participation in resources and environmental decision-making in Alberta is a highly regulated subject. There are a number of statutes governing participation including the *Responsible Energy Development Act*, SA 2012, c R-17.3, the *Water Act*, RSA 2000 c W-3, and the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12. These statutes represent just a fraction of provincial legislation applicable to resources and environmental decisions generally, but they are most applicable to public participation and energy project approvals. The common feature in these enactments is the narrow scope of persons whom are provided the legal right to participate in project decision-making: Only those persons who can demonstrate they are or, in some cases, may be directly affected by the resource development project in question are entitled to the legal right to participate. But in order to exercise this right a person must first file a statement of concern with the applicable regulatory authority and therein demonstrate to the satisfaction of that authority that the person is or may be directly affected. So the Alberta framework entrusts a large measure of discretion in the hands of government officials to decide who gets to participate in energy project approvals.

Needless to say, in recent years Alberta environmental groups have found it increasingly difficult to convince Alberta Environment to accept their statements of concern as a directly affected person in relation to a resource development project. My own experience with this comes from work in the Faculty's Environmental Law Clinic which I documented last year on ABlawg (see Shaun Fluker, "Access to Justice: University of Calgary Environmental Law Clinic in 2011/2012", here). The result has been that environmental groups are unable to participate in Alberta Environment decisions to approve resource development projects – even in cases where the governing legislation includes fostering public participation as one of its purposes (e.g. section 2(g) of the *Environmental Protection and Enhancement Act*). Alberta Environment also opposes any attempt by these groups to appeal such decisions to the Alberta Environmental Appeals Board. The message from Alberta Environment has been very clear: Environmental groups are not welcome to participate in its decisions concerning resource development projects.

Alberta Environment was not always so averse to participation by these groups. Specifically in relation to oil sands projects, statements of concern filed by the Pembina Institute, the Fort McMurray Environmental Association, and the Toxics Watch Society (collectively under the

umbrella of the Oil Sands Environmental Coalition) were commonly accepted by Alberta Environment until a few years ago. Similarly in relation to water management decisions elsewhere in the province, Alberta Environment used to be open to participation from groups such as the Alberta Wilderness Association.

But something changed a while back, and now an environmental group can expect Alberta Environment to oppose its participation at every turn as a matter of course. It seems wrong for a decision-maker exercising public authority to be so set in its ways, but proving attitudinal bias is always difficult. The onus of proof is high and the evidence is elusive. Simply because the Alberta government invests millions, probably billions, of our dollars telling the world we have resources for the taking does not prove Alberta Environment is biased against environmental groups who oppose resource development. Alberta Environment rejects participation by environmental groups on the ground that these groups fail to demonstrate how they are or may be directly affected by a project. The 'directly affected' test is codified in governing legislation, and reasons provided by Alberta Environment for denying participatory rights are always the same: the group is not a legal person capable of being directly affected; the group fails to demonstrate a majority of its individual members are directly affected; the group fails to demonstrate how the project will adversely affect land it owns or its use of land in close proximity; the group fails to demonstrate how its concerns are unique from that of the public generally. Notably, none of these reasons are set out in the legislation. They have evolved from years of administrative and judicial consideration into what it means for a person to be 'directly affected' by a resource project.

But now the smoking gun has been revealed. In an August 2009 internal briefing note, Alberta Environment staff gave us the truth behind their decision to begin opposing participation by the Oil Sands Environmental Coalition in oil sands project decisions. The Pembina Institute attached the full text of the briefing note to its media release announcing Marceau J.'s decision. The briefing note states the members of the Oil Sands Environmental Coalition are "no longer simple to work with" and "less inclined to work cooperatively" – making insinuating remarks on the use of legal process by these groups to oppose project approvals. In relation to Pembina specifically, the briefing note mentions Pembina publications critical of oil sands development. In the words of Alberta Environment, it was time to stop giving these groups "the benefit of the doubt" when it comes to assessing whether they are truly directly affected by an oil sands project.

Justice Marceau sets out the entire briefing note in his judgment at para 22. After setting out the briefing note, Justice Marceau makes several key findings (at para 23): (1) the briefing note was not disclosed prior to this hearing; (2) subsequent to this briefing note, the statements of concern filed by Oil Sands Environmental Coalition on 4 successive projects were rejected by Alberta Environment; (3) the reasons for these rejections make no mention of the concerns described in the briefing note, and the reasons that are provided "are so close to being identical they seem to have been cast from the same template"; (4) by rejecting statements of concern Alberta Environment precludes any participation by these groups including their ability to appeal the decision (this raises significant rule of law issues which I previously noted on ABlawg in "Access to Justice: University of Calgary Environmental Law Clinic in 2011/2012", here).

The application before Justice Marceau from Pembina and the Fort McMurray Environmental Association is for judicial review of a decision by Alberta Environment to reject their statements of concern filed under sections 73 of the *Environmental Protection and Enhancement Act* and section 109 of the *Water Act* in relation to a SAGD project proposed by Southern Pacific Resource Corp. The applicants sought to have the Court quash the Alberta Environment decision and declare that they have met the directly affected test for filing a statement of concern under the legislation. Justice Marceau quashes the Alberta Environment decision on his finding that Alberta Environment failed to adhere to principles of natural justice. Justice Marceau doesn't grant the applicants the declaration sought on the issue of whether they were directly affected, but he does suggest in *obiter* that the test ought to be applied with more 'flexibility' (at para 45) which presumably helps the applicants' case going forward.

Marceau J.'s ruling that Alberta Environment breached principles of natural justice is based on his finding that Alberta Environment rejected the statements of concern on the basis of reasons set out in the briefing note. He finds legal authority for his ruling in two landmark Supreme Court of Canada decisions: (1) the majority decision written by Madam Justice L'Heureux-Dubé in *Baker v Canada*, [1999] 2 SCR 817 concerning procedural fairness and bias of public officials; and (2) the opinion of Justice Rand in *Roncarelli v Duplessis*, [1959] SCR 121 concerning the improper exercise of discretionary power by government officials. In relying on an undisclosed briefing note to deny participatory rights, Marceau J. rules Alberta Environment failed to give the applicants an opportunity to respond to the actual case against them (at para 34). He also rules that the briefing note expresses an aversion to public participation that contradicts the purpose of the governing legislation, and sets out irrelevant and improper considerations on the part of Alberta Environment (at paras 33 and 35). The Pembina Institute and Fort McMurray Environmental Association were improperly targeted for their negative views on oil sands development (at para 37). Marceau J. stops short of calling this an abuse of power, but the tone of his judgment clearly sends this message.

This decision is a strong statement of the link between principles of natural justice and participation in resources and environmental decision-making. The decision sits alongside the recent 2012 decision by the Alberta Court of Appeal in *Kelly v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19, concerning participatory rights in energy project decision-making. No doubt there is more work to be done. Access to justice can be expensive. The right to participate is empty for someone without the requisite financial means. And the 'directly affected' test continues to govern determinations by the Alberta Energy Regulator and Alberta Environment in terms of who gets to participate in resource project decision-making. But this thread of legality recently sown into the jurisprudence by Alberta courts is nevertheless important. It provides Albertans with a basis upon which to stand against government officials who seem fixated on removing public participation from the landscape.