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EUB Out of Sync with Public Demands to Protect Natural Environment

By Barbara Janusz

Reminiscent of Marie Antoinette's famous words – "Let them eat cake," the Alberta Energy and Utilities Board (EUB) has turned a blind eye to Albertans' demands to protect the environmentally fragile ecosystem of the Porcupine Hills. On June 8, 2006, the Board delivered Decision 2006-052, denying standing to intervenors opposing an application by Compton Petroleum Inc. to drill a sweet gas well in the southern portion of the eastern slopes.

The EUB is the provincial legislative body that has the exclusive authority or jurisdiction to administer all matters under the *Energy Resources Conservation Act* (*ERCA*). Accordingly, it has the authority to determine, under section 26(2) of the Act, whether Compton Petroleum's application "may directly and adversely affect the rights of a person." Section 26(2) is the test for *locus standi*, Latin for "standing," which is defined in *Black's Law Dictionary* as "[a] right of appearance in a court of justice or before a legislative body, on a given question."

Further to interventions filed by adjoining landowners, coalitions of landowners, AWA, and the Municipal District of Pincher Creek, the Board convened a hearing on April 11, 2006 to determine whether these intervenors were potentially directly or adversely affected by Compton Petroleum's project. Decision 2006-052 denied standing to all intervenors and, in approving Compton's application, essentially deemed unnecessary the holding of a hearing to consider the merits of Compton's application.

The most alarming aspect of this decision is that the EUB has, with impunity, ignored its own mandate under section 3 of the *ERCA* to protect the public interest. Section 3 is entitled "Consideration of Public Interest" and provides that the Board *shall* (my emphasis) have regard to "the social and economic effects of the project and the effects of the project on the environment." The word "shall" in Section 3 (as opposed to "may") obliges the Board to consider the public interest – not just when presiding over a hearing, but also in considering the issue of standing.

Decision 2006-052 acknowledges that "all of the participants expressed concerns about the implementation and application of IL 93-9" (p. 9). Informational Letter 93-9, *Oil and Gas Development, Eastern Slopes (Southern Portion)*, is a guideline issued by the EUB to industry for sustainable energy resource development in the southern portion of the eastern slopes. In formulating IL 93-9, the EUB acknowledges that the region's natural resources (water, fescue prairie grasses, wildlife) warrant protection by exercising a broader regulatory review of industry's proposed projects.

To foster decision-making that is in the public interest, IL 93-9 recommends that industry undertake four initiatives:

- broad public consultation, including documenting identified issues and conflicts;
- formulating development plans that disclose initial and subsequent oil and gas pool delineation and pool-development plans, to discourage a piecemeal or single-well approach;
- conducting environmental assessments as development proceeds; and
- consolidating plans among developers to minimize environmental impacts.

Rather than addressing these concerns, however, the Board, in its decision, pays only lip service to the consultative initiative of IL 93-9 by recommending to the EUB's full Board that it "consider clarifying

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certain aspects of IL 93-9" (p. 9). The decision fails to address in a meaningful way any of the public interest issues that such consultation is intended to reveal and, hopefully, resolve.

By ruling that the drilling of a small number of wells "would benefit Compton's area development plans by more accurately identifying the breadth and scope of the overall development" (p. 7) and that the subject exploratory well does not necessitate the conducting of environmental assessments, the Board is reinforcing its policy of furthering the economic interests of industry at the expense of environmental protection.

Precaution and the Public Interest

Increasingly, around the globe, particularly on the local level, governments are adopting the precautionary principle to address public interest issues when they collide with the profit-maximizing objectives of industry. A doctrine that shifts the onus of proof or duty of care from those who oppose change to those who advocate change, the precautionary principle is epitomized by the adage "better safe than sorry."

We all owe a duty of care to those who we can reasonably foresee might be harmed by our conduct. Duty of care is the basis of the law of negligence, which can be defined as conduct falling below a standard of care. At common law (the statutory and case law derived from Britain), the onus or burden of proof in a civil trial to prove that the defendant acted negligently or breached his or her duty of care is on the plaintiff or injured party.

This legal principle has become so ingrained in Western society's psyche that few of us question the logic or wisdom of not challenging an activity or initiative until harm or injury ensues. Widespread degradation of the environment and the stark realization that our unbridled greed and consumption is no longer sustainable has precipitated a growing shift in attitude away from risk-taking to precautionary decision-making with the objective of protecting the public interest.

Unfortunately, the EUB is resisting the trend to embrace public interest considerations in fulfilling its mandate to regulate the oil and gas industry. While IL 93-9 is a positive step toward adoption of a precautionary principled approach in balancing oil and gas development on the southeastern slopes against competing land interests, this balancing act falls short in meeting the mandated objective of section 3 of the Act to protect the public interest and the environment.

Closely aligned with the precautionary principle is another theory, known as the public lands doctrine, which is rooted in the concept of the commons. The commons has a dual meaning. It refers to "[t]he class of subjects in Great Britain exclusive of the royal family and the nobility" and is synonymous with "Squares; pleasure grounds and spaces or open places for public use or public recreation owned by towns or cities – in modern usage usually called parks" (*Black's Law Dictionary*).

In American law, Carolyn Raffensperger, executive director of the Science & Environmental Health Network in Ames, Iowa writes in *Ten Tenets: The Law of the Commons of the Natural World,* "[T]he public trust doctrine stands for the principle that a government body holds some resource like tidal waters or shores in trust for the people."

Raffensberger and Peter Montague in "Land Use and Precaution" (*Rachel's Democracy and Health News*, March 2004, #787) caution that the precautionary principle may not go far enough to protect the commons on behalf of the commons. The balancing act that some governments and their administrative bodies engage in to protect the public interest is too often an exercise in risk assessment, not unlike that engaged in by insurance companies. "[R]isk assessments are easily manipulated to get almost any desired answer."

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As trustee for the commons and of the commons, government owes a duty to its citizenry to ensure that the public interest is safeguarded by anticipating or foreseeing harm and making decisions that will avoid unnecessary risks. The public lands doctrine and precautionary principle are about ethics and are analogous to the management concept of social corporate responsibility.

In contrast, most corporations today embrace corporate social obligation, or the shareholder concept, by complying with laws and focusing on maximizing profits for their shareholders. Due to public pressure, however, there is a growing trend toward corporations embracing a stakeholder concept or exercising corporate social responsibility, wherein the interests of all stakeholders, including shareholders, competitors, employees, suppliers, and the community at large, are taken into consideration in conducting business.

Government and public institutions were never mandated to exercise a shareholder concept of governing. Government for and by the people is inimical to engaging in risk assessment. By pandering to corporate interests and failing to protect the public interest, government and its agencies, like the EUB, are breaching their duty of care to the public.

Government is made up of three branches – legislative, executive, and judicial. Parliament and provincial legislatures constitute the legislative branch of government, while the EUB exercises an executive governmental function. As already mentioned, the EUB's jurisdiction is derived from statute law, and it is bound to exercise its authority within the mandated parameters of the *ERCA*, including public interest considerations.

When a regulatory board such as the EUB fails to act within its jurisdiction or authority, the third branch of government, the judiciary, is empowered by our constitution to overrule its decisions and to order the administrative body to reconsider the matter according to its mandate. This process, known as judicial review, applies not only to administrative boards but to all government bodies, including municipal councils, the legislature, and Parliament.

In the Supreme Court of Canada decision of Spraytech v. Town of the Hudson [2001] 2 SCR 241, our highest court has ruled that governments have the right and, indeed, owe a duty to its citizenry to adopt the precautionary principle – to exercise a stakeholder concept of governing. In the Spraytech case, the landscaping and lawn care company challenged the authority of the Town of Hudson to pass a bylaw prohibiting the use of a particular pesticide that had not been banned for use by federal and provincial laws. In upholding the municipal bylaw, the Supreme Court of Canada held that municipalities are empowered under provincial legislation (*Cities and Towns Act*, the equivalent of our *Municipal Government Act*) to enact bylaws for the genuine purpose of furthering goals such as health and public welfare.

Madam Justice L'Heureux-Dube of the Supreme Court began her judgement in Spraytech as follows: "The context of this appeal includes the realization that our common future, that of every Canadian community, depends on a healthy environment." She then quotes the Superior Court Judge who initially upheld the bylaw as valid. "In the words of the Superior Court Judge: 'Twenty years ago, there was very little concern over the effect of chemicals such as pesticides on the population. Today, we are more conscious of what type of an environment we wish to expose our children [to]'…. This Court has recognized that '[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment…. [E]nvironmental protection has emerged as a fundamental value in Canadian society.'"

The law and a nation's constitution is often referred to as a living tree: it must be interpreted and re-interpreted according to the changing values and needs of society. Like a vehicle that has not been serviced for a long time and is in need of a tune-up, so too does Section 3 (the provision mandating

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public interest considerations) of the *ERCA* cry out for judicial review. The Supreme Court of Canada Spraytech decision is a precedent for the EUB applying the precautionary principle in its mandate to protect the public interest when regulating oil and gas development in this province.

Canada has a long tradition of honouring the principle of the Rule of Law. Sometimes called "the supremacy of law," the Rule of Law refers to the application of known principles of law without the intervention of discretion in their application (*Black's Law Dictionary*). Government and its agencies are not at liberty to enact laws or to administer them beyond their mandated authority.

Simply put, no one is above the law, not even the EUB. Albertans have the right and, indeed, the duty on behalf of future generations to ensure that legislative bodies conduct themselves according to their mandated authority. The EUB's concept of the public interest is out of sync with Albertans' current belief that it is better to be safe than sorry. EUB Decision 2006-052 denying standing to the intervenors in Compton Petroleum's application to drill a sweet gas well in the pristine Porcupine Hills is a dangerous precedent that should not be left unchallenged.

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