

**In the Court of Appeal of Alberta**

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

**Date:** 20090210  
**Docket:** 0801-0111-AC  
0801-0112-AC  
**Registry:** Calgary

**Appeal No. 0801-0111-AC**

IN THE MATTER OF the *Energy Resources Conservation Act*,  
R.S.A. 2000, c. E-10

AND IN THE MATTER OF the Energy Resources Conservation Board  
Decision in Application Nos. 1526838 and 1530007,  
dismissing the objection of ATCO Midstream Ltd. dated March 13, 2008  
and issuing Facility Licence Amendment F9527 dated March 20, 2008

**Between:**

**ATCO Midstream Ltd.**

Appellant

- and -

**Energy Resources Conservation Board and  
Keyera Energy Ltd.**

Respondents

And

**Appeal No. 0801-0112-AC**

IN THE MATTER OF the *Energy Resources Conservation Act*,  
R.S.A. 2000, c. E-10

AND IN THE MATTER OF The Energy Resources Conservation Board  
Decision in application Nos. 1526838 and 1530007,  
dismissing the objection of Nova Chemicals Corporation dated March 13, 2008  
and issuing Facility Licence Amendment F9527 dated March 20, 2008

**Between:**

**Nova Chemicals Corporation**

Appellant

- and -

**Energy Resources Conservation Board and  
Keyera Energy Ltd.**

Respondents

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**The Court:**

**The Honourable Madam Justice Ellen Picard  
The Honourable Mr. Justice Peter Costigan  
The Honourable Mr. Justice Jack Watson**

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**Memorandum of Judgment  
Delivered from the Bench**

Appeal from the Decision by the  
Energy Resources Conservation Board  
Dated the 13<sup>th</sup> day of March, 2008

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**Memorandum of Judgment  
Delivered from the Bench**

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**Costigan J.A. (for the Court):**

[1] The appellants, ATCO Midstream Ltd. (“ATCO”) and Nova Chemicals Corporation (“Nova”), appeal two decisions of the respondent Energy Resources Conservation Board (the “Board”) which declined to grant them standing in an application by the respondent Keyera Energy Ltd. (“Keyera”) for an amendment to its licence and declined to adjourn Keyera’s application.

[2] Leave to appeal was granted on three questions of law or jurisdiction:

1. Did the Board deny ATCO and Nova standing and if so, did it apply the proper test to determine standing?
2. Did the Board err in failing to adjourn the application because some of the issues overlapped the issues in the NGL Inquiry?
3. Did the Board fail to consider the public interest before issuing the licence?

[3] We conclude that the Board did not err in law or jurisdiction in declining to grant the appellants’ standing. As the appellants lack standing, the second and third leave questions cannot be addressed in these appeals.

[4] Keyera operates a field plant near Rimbey, Alberta which processes raw natural gas (the “Rimbey Plant”). After gas is processed at the Rimbey Plant, it is injected into a transmission pipeline and becomes part of a commingled stream of processed gas known as the “common stream”.

[5] ATCO is a part owner of two straddle plants which extract ethane from the common stream. Nova purchases ethane which has been extracted at field plants and straddle plants.

[6] Keyera applied to the Board for an amendment to its licence that would allow it to extract ethane from the raw natural gas processed at the Rimbey Plant. The Board sent notices for objection to the appellants which stated, in part: “... should you have a legally recognized interest in this application and want to make a submission, please state in writing your reasons for objecting to the application ...”.

[7] In its objection, ATCO stated:

ATCO ... is directly and adversely affected by approval of the Keyera proposal because it will result in a leaner common stream available to the [straddle plants

ATCO has an ownership interest in], increasing its cost of operations while reducing its potential revenue stream.

[8] Nova's objection stated:

The effect of the Project will ... be to reduce the productivity of [certain ethane extraction] facilities, and increase the unit ethane cost to buyers such as Nova ...

Nova ... submits that it has a legitimate and material economic and commercial interest in the Keyera application, which interest may be directly and adversely affected by the Board's decision.

[9] The Board's responses to ATCO and Nova were substantially similar. The Board noted that, although neither appellant expressly stated what right or rights it was asserting, the appellants were essentially asserting a right to be economically protected from upstream ethane recovery. The Board referenced the standing provision in s. 26(2) of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 and the test for standing stated by this Court in *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, 2005 ABCA 68, 363 A.R. 234 at para. 10 [*Dene*]. The Board concluded that neither appellant was asserting a legally recognized right within the meaning of s. 26(2) and dismissed their objections.

[10] An appeal lies to this Court with leave on questions of jurisdiction or law. Although it cited the correct test for standing, the appellants argue the Board erred in law in finding that their asserted rights are not "known to the law" as required by the first branch of the test. The Board's characterization of the rights asserted by the appellants as economic rights is at best a determination of mixed fact and law. That determination is not reviewable on appeal.

[11] The appellants have not cited, and we are not aware of, any authority for the proposition that the economic interests asserted by the appellants are legally recognized rights under s. 26(2). It follows that the appellants have failed to establish an extricable error of law or jurisdiction in the Board's conclusion that the asserted rights are not legally recognized. Because the Board's decisions that the appellants failed to meet the test for standing set out in *Dene* raise at best a question of mixed fact and law the decisions are not subject to review on appeal.

[12] As we are unable to disturb the Board's finding on standing, the second and third leave questions cannot arise on these appeals.

[13] The appeals are dismissed.

Appeal heard on January 12, 2009

Memorandum filed at Calgary, Alberta  
this 10<sup>th</sup> day of February, 2009

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Costigan J.A.

**Appearances:**

B.G. Nemetz, Q.C./A.M. Sears  
for the Appellant ATCO Midstream Ltd.

J.H. Smellie/H.N. Tanaka  
for the Appellant Nova Chemicals Corporation

M.G. Lacasse  
for the Respondent Energy Resources Conservation Board

G.F. Scott, Q.C./D.E. Crowther  
for the Respondent Keyera Energy Ltd.