In the Court of Appeal of Alberta

Citation: Kelly v Alberta (Energy Resources Conservation Board), 2012 ABCA 19

Date: 20120123
Docket: 1003-0333-AC
Registry: Edmonton

Between:

Susan Kelly, Linda McGinn, and Lillian Duperron

Appellants

- and -

Alberta Energy Resources Conservation Board and Grizzly Resources Ltd.

Respondents

- and -

Alberta Surface Rights Group

Intervener

The Court:

The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Myra Bielby
The Honourable Madam Justice Donna Read

Memorandum of Judgment

Appeal from the Decision of the
Alberta Energy Resources Conservation Board
Dated the 22nd day of October, 2010

Memorandum of Judgment

The Court:

[1] The general issue on this appeal is whether the appellants are entitled to costs for their intervention in a hearing that was held before the Board.

Facts

[2] The appellants are the owners of lands in the vicinity of oil wells being drilled and operated by the respondent Grizzly Resources. When they became aware of the application by Grizzly Resources to drill the wells in question, they applied for intervener status under section 26 of the *Energy Resources Conservation Act*, RSA 2000, c. E-10:

> 26(1) Unless it is otherwise expressly provided by this Act to the contrary, any order or direction that the Board is authorized to make may be made on its own motion or initiative, and without the giving of notice, and without holding a hearing.
>
> (2) Notwithstanding subsection (1), if it appears to the Board that its decision on an application may directly and adversely affect the rights of a person, the Board shall give the person . . . notice of the application, . . . and an adequate opportunity of making representations by way of argument to the Board or its examiners.

The Board denied the appellants standing, holding that they were not "directly and adversely affected". That decision was appealed to this Court, which allowed the appeal and directed that the Board conduct a rehearing of the well licence applications, at which rehearing the appellants would have standing: ***Kelly v Alberta (Energy Resources Conservation Board)***, 2009 ABCA 349, 464 AR 315, 14 Alta LR (5th) 261.

[3] The rehearing was subsequently held. By this time the wells had been drilled, so the focus of the rehearing was whether, or subject to what conditions, Grizzly Resources should be allowed to operate them. The Board concluded that the appellants had not demonstrated any risk to themselves from the wells, that the emergency response procedures in place were satisfactory, and that the wells could be operated without any additional conditions: *Re Grizzly Resources Ltd.*, Decision 2010-028.

[4] The appellants subsequently applied for an award of costs to defray the expenses incurred as a result of their intervention. The *Act* allows the Board to grant costs to "local interveners":

> 28(1) In this section, "local intervener" means a person or a group or association of persons who, in the opinion of the Board,
>
> (a) has an interest in, or

> (b) is in actual occupation of or is entitled to occupy
>
> land that is or may be directly and adversely affected by a decision of the Board in or as a result of a proceeding before it, but, unless otherwise authorized by the Board, does not include a person or group or association of persons whose business includes the trading in or transportation or recovery of any energy resource.
>
> (2) On the claim of a local intervener or on the Board's own motion, the Board may, subject to terms and conditions it considers appropriate, make an award of costs to a local intervener.
>
> . . .

The general power to award costs found in the *Act* is supplemented by Part 5 of the Board's *Rules of Practice*, AR 252/2007, which incorporate by reference the Board's Directive 031: *Guidelines for Energy Proceeding Cost Claims*.

[5] The majority of the Board concluded that the appellants were not entitled to costs because they did not qualify as "local interveners": *Re Grizzly Resources Ltd.*, Energy Cost Order 2010-007. The key extracts of the reasons of the majority of the Board are as follows:

> **2 Views of the Board - Authority to Award Costs**
>
> In determining local intervener costs, the Board is guided by its enabling legislation, in particular by Section 28(1) of the *ERCA*, . . .
>
> It is the Board's view that a person claiming local intervener costs must establish the requisite interest in or right to occupy land, and provide reasonable grounds for believing that such land may be directly and adversely affected by the Board's decision on the application in question. . . .
>
> **4.3.1 Views and Decision of the Majority**
>
> . . .
>
> In considering the application of the test under Section 28(1) of the *ERCA* to the Kelly Interveners, the Board arrives at two conclusions. First, the Board finds that the evidence clearly demonstrates that each of the Kelly Interveners has an interest in, occupies, or is entitled to occupy certain land whose location in relation to the Grizzly wells is known. Second, the evidence before the Board in the review hearing provided no indication of possible effect on any of the Kelly Interveners arising from

> the drilling or operation of the wells. The concerns raised by the Kelly Interveners at the hearing related to their health and safety (including the potential for adverse effects) resulting from the approval of Grizzly's applications to the Board.
>
> As discussed in *Decision 2010-028*, the evidence presented demonstrated no connection between those concerns and the drilling or operation of the Grizzly wells. The Board was satisfied that the evidence in the review hearing demonstrated no potential for effect on the Kelly Interveners from the approval of the Grizzly applications. Further, no evidence was presented at the review hearing or in this cost proceeding to demonstrate a potential for the Grizzly wells to directly and adversely affect lands that the Kelly Interveners have an interest in, occupy, or are entitled to occupy. It therefore follows that the second half of the local intervener test is not satisfied, and the Board finds that the Kelly Interveners are not local interveners as defined by Section 28(1) of the *ERCA*.
>
> As the Kelly Interveners are not local interveners under Section 28 of the *ERCA*, the Majority hereby dismisses their application for an award of local intervener costs.

The minority member of the Board agreed that the appellants did not qualify as local interveners, but concluded that an award of costs was appropriate anyway given that the rehearing had been ordered by the Court of Appeal.

[6] The appellants were subsequently granted leave to appeal the Energy Cost Order: ***Kelly v Alberta (Energy Resources Conservation Board)***, 2011 ABCA 19.

Issues on Appeal and Standard of Review

[7] The appellants were granted leave to appeal on three issues:

> 1. Is the Board's power to award costs limited to persons who are "local interveners" as defined by s. 28(1) of the *Energy Resources Conservation Act*?
>
> 2. Does a formal Directive of the Board have the power to interpret a section of that *Act*, and compel the Board and others to follow that interpretation?
>
> 3. What is the proper interpretation of s. 28(1) of that *Act*?
>
> > (a) Must detriment or potential detriment be to the soil or improvements on the land; or can the detriment include interference with occupation, use or enjoyment of the land by people, plants, animals or chattels (including danger to health)?
> >
> > (b) Are the relevant facts for that subsection tested or fixed at the time that the

> proceedings began, or during the proceedings, or only at the time of the costs application after the Board's substantive decision?

The extent to which this Court will engage these issues depends, of course, on the standard of review.

[8] Decisions of the Board which involve the interpretation and application of the *Act*, the *Rules of Practice* or Directive 031 will be reviewed for reasonableness. Such questions of law engage the mandate and expertise of the Board, and its decisions on them are entitled to deference: ***Smith v Alliance Pipeline Ltd.***, 2011 SCC 7 at para. 28, [2011] 1 SCR 160; ***Kelly v Alberta (Energy Resources Conservation Board)***, 2009 ABCA 349 at para. 20, 464 AR 315; ***Kelly v Alberta (Energy Resources Conservation Board)***, 2011 ABCA 325 at para. 13.

[9] True issues of jurisdiction are reviewed for correctness, but they rarely arise: ***Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association***, 2011 SCC 61 at para. 39. In this appeal, the ability of the Board to enact the Directive is likely jurisdictional, but the *vires* of the Directive is not in dispute. The interpretation and application of the Directive by the Board is reviewable for reasonableness.

[10] The appellants argue that whether they are "directly and adversely affected" is a threshold issue upon which the Board must be correct. There was a time when the courts were quick to find threshold issues which were subjected to rigorous judicial review. However, that form of analysis is no longer appropriate. As was noted in ***Dr. Q v College of Physicians and Surgeons of British Columbia***, 2003 SCC 19 at para. 22, [2003] 1 SCR 226:

> To determine standard of review on the pragmatic and functional approach, it is not . . . sufficient merely to identify a categorical or nominate error, such as bad faith, error on collateral or preliminary matters, ulterior or improper purpose, no evidence, or the consideration of an irrelevant factor. . . .

The inappropriateness of attempting to find "threshold errors" has been subsequently confirmed in ***Dunsmuir v New Brunswick***, 2008 SCC 9 at para. 59, [2008] 1 SCR 190. The standard of review should be set by analyzing the decision of the tribunal as a whole, not by dividing it up into separate components.

[11] Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome: ***Canada (Citizenship and Immigration) v Khosa***, 2009 SCC 12 at para. 59, [2009] 1 SCR 339. The existence

of apparently conflicting decisions by the tribunal on a particular subject does not itself warrant judicial intervention, unless the particular decision under review is unreasonable: ***Ellis-Don Ltd. v Ontario (Labour Relations Board)***, 2001 SCC 4 at para. 28, [2001] 1 SCR 221.

The Power to Award Costs

[12] The first issue upon which leave to appeal was granted is whether the Board's power to award costs is limited to persons who are "local interveners" as defined by s. 28(1) of the *Act*.

[13] The Board did not expressly deal with this issue, and it is not clear that it was directly raised by the appellants. The decision of the majority of the Board perhaps assumes that there is no jurisdiction outside s. 28(1), because it assumes that ineligibility under that section resolves the issue. The decision of the minority member of the Board perhaps assumes the opposite, because he felt that an award of costs was appropriate even though the appellants did not qualify as local interveners.

[14] Given the express provisions of s. 28(1) of the *Act*, it would be somewhat unusual to find that there is a further, implied ability to award costs. If there is a general ability to award costs, that would appear to undermine the statutory requirement that costs be awarded to those who own land that is "directly and adversely affected by a decision". A general power to award costs would make that precondition in s. 28(1) redundant. In any event, even if there is such a general power to award costs, there is no further reference made to it in the *Rules of Practice* or Directive 031. Even if there is an ability to award costs outside s. 28(1), the failure to do so would be reviewed for reasonableness: ***Smith v Alliance Pipeline*** at paras. 29-32. Given the provisions of s. 28, the *Rules of Practice* and Directive 031, any implicit decision by the Board not to award such costs to the appellants discloses no reviewable error.

The Effect of Directive 031

[15] The second question on which leave was granted is:

> Does a formal Directive of the Board have the power to interpret a section of that *Act*, and compel the Board and others to follow that interpretation?

The *Act* grants the Board a discretion to award costs in some specified situations. Directive 031 gives some indication of how the Board will exercise that discretion.

[16] There is no doubt that the Board has the authority to enact Directive 031. Section 28(2) allows the Board to award costs "subject to terms and conditions it considers appropriate". Section 28(7) allows the Board to "make regulations respecting . . . the awarding of costs", and s. 49 grants a general power to enact rules of procedure. Part 5 of the Board's *Rules of Practice* incorporates Directive 031 by reference.

[17] Where a statute grants a discretion, coupled with an ability to pass regulations respecting the exercise of that discretion, the tribunal is able to mold the exercise of the discretion in any reasonable way that is not inconsistent with the statute. Whether or not this is described as "interpreting" the statute does not change the essential ability of the tribunal to enact the policy.

[18] A tribunal must, of course, avoid "fettering" any statutory discretion it is granted in ways not authorized by the statute. But where the statute specifically gives the authority to make regulations concerning the exercise of the discretion, the scope of any fettering argument will be limited. There is no objection to a tribunal putting in place policies that promote consistency in its decisions. As stated in ***Canada (Attorney General) v Mavi***, 2011 SCC 30 at para. 66, [2011] 2 SCR 504:

> . . . Policies are necessary to guide the action of the multitude of civil servants who operate government programs. The Minister is entitled to set policy within legal limits. It cannot be said that the Ontario policy here so "fetters" the discretion as to be invalid.

Policies such as Directive 031 play an important role in administrative decision making: ***Skyline Roofing Ltd. v Alberta (Workers' Compensation Board)***, 2001 ABQB 624 at para. 75, 95 Alta LR (3d) 126, 292 AR 86.

[19] Whether an instrument like Directive 031 is "binding" on the Board depends on the context. The statute that authorizes the policy may say whether such a policy is binding: see for example s. 13.2(6)(b) of the *Workers' Compensation Act*, RSA 2000, c. W-15. Alternatively, the policy itself may specify its effect. In this case neither the *Act* nor the Directive explicitly deal with the issue. Some aspects of the Directive are clearly open-ended, for example the sections discussing what expenses are considered "reasonable". Other parts are more emphatic. For example, Directive 031 says that "Only those persons determined to be 'local interveners' . . ." will be eligible for costs. Describing the Directive as "guidelines" for cost claims suggests some flexibility.

[20] In the absence of any definitive statement of the binding effect of the policy, whether it will generally, or always, or never be treated as binding is up to the Board. The interpretation and application of the policy to particular cases is quintessentially within the purview of the Board, and so long as its decisions are reasonable, the application of the Directive is up to it: ***Smith v Alliance Pipeline*** at paras. 29-32.

[21] The second question can be answered by saying that Directive 031 is validly enacted, and that the Board's reasonable application of the Directive in a particular case is not subject to appellate review.

<u>The Eligibility for a Costs Award</u>

[22] The third issue on which leave to appeal was granted concerns the scope of the provisions that set out the eligibility of local interveners for a costs award:

> (a) Must detriment or potential detriment be to the soil or improvements on the land; or can the detriment include interference with occupation, use or enjoyment of the land by people, plants, animals or chattels (including danger to health)?
>
> (b) Are the relevant facts for that subsection tested or fixed at the time that the proceedings began, or during the proceedings, or only at the time of the costs application after the Board's substantive decision?

In general terms this question can, again, be answered by saying that reasonable decisions of the Board on issues respecting costs are not subject to appellate review.

The Nature of the Required Detriment

[23] The first sub-issue concerns the interpretation of s. 28, which ties eligibility for costs to "land that is or may be directly and adversely affected by a decision of the Board". There are some costs decisions where the Board appears to have accepted that physical damage to the land itself is not needed; detriment to the user of the land, or detriment to persons or animals on the land, is sufficient. Directive 031 in places refers to how "the use of the land" may be affected. However, latterly there have been some decisions of the Board that appear to read s. 28 as being confined to physical damage to the land itself.

[24] The position of the panel that rendered the decision presently under appeal is not entirely clear. The majority of the Board discusses "possible effects on any of the Kelly interveners", including effects on their health and safety. This suggests that the majority felt that an adverse effect on the use of the lands, or the occupants of the lands, was sufficient. But the reasons also "further" note that there was no evidence of activity that would "directly and adversely affect lands". It is unclear if the majority of the panel felt that the latter aspect was sufficient in and of itself to disentitle the appellants to costs. The way the majority dealt with the claim of the Losey and Kerpan interveners suggests that they did think it was sufficient.

[25] The majority of the Board noted that the test for standing in s. 26 is different from the test for costs eligibility in s. 28. It is true that the class of "interveners" entitled to standing is undoubtedly wider than the class of "local interveners" entitled to costs. It is not, however, reasonable to completely divorce the two sections. Functionally, they are related, because those who are entitled to participate in hearings include those who will eventually apply for a costs award. It cannot be a coincidence that both of the sections use the critical phrase "directly and adversely affected".

[26] It is unreasonable to limit s. 28 to physical damage to the land. Realistically speaking, the

person most likely to suffer physical damage to the land is the owner of the surface rights where the development is taking place. The surface rights owner will be entitled to compensation for that physical damage by virtue of the instrument granting a right of entry. In any event, at the time that the hearing is conducted it is probably unusual for any actual off-site physical damage to be anticipated. The general purpose of the regulatory process is to ensure that resource development takes place in ways that will prevent or reduce the risk of physical damage to anything, including land. If s. 28 is limited to damage to the land itself, it must contemplate that extremely limited circumstance where a resource development company proposes some sort of activity which is known to be likely to cause damage to neighbouring lands, and those local interveners whose lands are likely to be damaged are intervening at the hearing. It is unreasonable to think that s. 28 was intended to have such a narrow focus; in context "land" must include the value and use of the land.

[27] Further, s. 28 provides that a local intervener need only be in occupancy of land; there is no requirement that the local intervener own an interest in land. As a result, a local intervener could be a tenant on a month-to-month lease. That type of local intervener would have little interest in physical damage to the land arising from the development, but might have a considerable interest in the impact of the development on the use of the land. Limiting the eligibility for costs awards to situations where the physical land is damaged is inconsistent with the inclusion of a wider class of potential claimants who would not have any legal interest in the land itself.

The Time for Determining Entitlement

[28] The second sub-issue concerns the factors that should be considered in determining eligibility under s. 28, and particularly the point in time at which eligibility should be determined. Should the Board test whether the intervener is "directly and adversely affected" at the time of the intervention, or only after the result of the hearing is known?

[29] In this case the majority of the Board emphasized the results of the substantive rehearing. The majority noted that the evidence on the rehearing "provided no indication of possible effect" on any of the interveners. The determination of whether the appellants were adversely affected, and therefore eligible for a costs award, was therefore heavily results-oriented; success at the hearing was a key, and possibly a decisive, issue.

[30] In making an award of costs the Board is entitled to have regard to the issues at play in the hearing, and whether the intervention was responsive to those issues, and helpful. Persistent intervention in opposition to any form of resource development need not be rewarded with costs. But those considerations go more to the reasonableness of the costs incurred, rather than to entitlement to costs. For example, in this case the wells had been drilled by the time of the rehearing, making many potential issues moot. The focus on the rehearing was more on the circumstances under which continuing production from the wells should be permitted. Expenses incurred in responding to moot issues might well not be considered reasonable. However, as the minority member of the panel noted, in this case the mootness factor was considerably ameliorated by the fact

that the Court of Appeal knew the wells had already been drilled when it ordered a rehearing. Another relevant circumstance is that as a result of the decision of the Court of Appeal on standing, the Board adjusted the computer model that generates the Protective Action Zone around a well: see ***Kelly v Alberta (Energy Resources Conservation Board)***, 2011 ABCA 325 at para. 5.

[31] In normal civil litigation costs generally go to the "winner". Civil litigation occurs in a fully adversarial context, and costs awards are designed to encourage settlement, and reasonableness and efficiency in litigation, and to partly compensate the winning party for the expenses of the action. While there are certainly some adversarial aspects to the hearings before the Board, the Board processes are not primarily directed towards identifying "winners and losers"; as the Board notes in its factum, its hearings are directed at the public interest. In ascertaining and protecting the public interest, there are, in one sense, no winners or losers. It follows that it is unreasonable to award costs in Board proceedings solely or primarily on some measure of perceived "success" of the intervention. Since one of the primary purposes of public hearings is to allow public input into development, all interventions are "successful" when they bring forward a legitimate point of view, whether or not the ultimate decision fully embraces that point of view. The process of the hearing is an end of itself.

[32] The wording of ss. 26 and 28 supports the view that "success" of the intervention is not an overriding issue. Both of the sections anticipate development that "may" cause an adverse effect. At the end of the substantive hearing it will be known whether the Board found any adverse effect. If a costs award is to be primarily based on the "success" of the intervention, there would be no need to consider if the hearing "may" disclose such an effect. The use of the word "may" is inconsistent with the idea that hindsight should be a primary factor in awarding costs. Further, an intervener should not have to predict correctly at the time of intervention what the ultimate outcome of the hearing will be. As this hearing demonstrated, all the evidence, and its full impact, are never completely known until the hearing is over. It is sufficient if, at the beginning of the process, it is reasonable to believe that the evidence "may" disclose an adverse effect: *Re Glacier Power Ltd.*, Energy Cost Order 2003-09 at p. 3.

[33] The respondent Board argues in its factum that its mandate is to "ensure the orderly and efficient development of the province's resources". It argues that its functions are not "thwarted simply because every party who appears before the Board may not be entitled to reimbursement" of costs of participation. Orderly and efficient resource development is undoubtedly the objective of the *Act* in a global sense, but the purpose of the standing and hearing sections of the *Act* is to allow people to be heard. The development of Alberta's natural resources enriches the province as a whole, and provides significant economic benefits to the companies that develop those resources. Resource development can, however, have a disproportionate negative effect on those in the immediate vicinity of the development. The requirement for public hearings is to allow those "directly and adversely affected" a forum within which they can put forward their interests, and air their concerns. In today's Alberta it is accepted that citizens have a right to provide input on public decisions that will affect their rights.

[34] In the process of development, the Board is, in part, involved in balancing the interests of the province as a whole, the resource companies, and the neighbours who are adversely affected: *Re Suncor Energy Inc.*, Energy Cost Order 2007-001 at pp. 10-11. Granting standing and holding hearings is an important part of the process that leads to development of Alberta's resources. The openness, inclusiveness, accessibility, and effectiveness of the hearing process is an end unto itself. Realistically speaking, the cost of intervening in regulatory hearings is a strain on the resources of most ordinary Albertans, and an award of costs may well be a practical necessity if the Board is to discharge its mandate of providing a forum in which people can be heard. In other words, the Board may well be "thwarted" in discharging its mandate if the policy on costs is applied too restrictively. It is not unreasonable that the costs of intervention be borne by the resource companies who will reap the rewards of resource development.

[35] The third question can be answered by stating that any reasonable decision of the Board respecting costs is not subject to appellate review. However, it is not reasonable to require physical damage to the lands to establish eligibility for costs, nor is it reasonable to make an award of costs overly dependent on the outcome of the hearing.

Conclusion

[36] In conclusion, costs decisions of the Board will only be disturbed on appeal if they contain an unreasonable decision on a point of law. There is a certain lack of transparency in the reasons of the majority of the Board, because it is not clear how much weight was placed on the need for physical damage to the property, nor how important the Board felt was the outcome of the hearing.

[37] In the circumstances, the appropriate remedy is to allow the appeal and remit the application for costs back to the Board for reconsideration, in a manner consistent with these reasons. For clarity, a potential adverse impact on the use and occupation of lands is sufficient to trigger entitlement to costs. Further, while the amount of costs to be awarded lies within the discretion of the Board, the actual outcome of the hearing, and the absence, with hindsight, of any actual adverse effect does not of itself disentitle an applicant to costs.

Appeal heard on January 12, 2012

Memorandum filed at Edmonton, Alberta
this 23rd day of January, 2012

Slatter J.A.

Bielby J.A.

Read J.

Appearances:

K.E. Buss as Agent for J.J. Klimek
for the Appellants

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

L.M. Sali, Q.C.
for the Respondent Grizzly Resources

S.C. Fluker (no oral argument)
for the Intervener