In the Court of Appeal of Alberta

Citation: Kelly v. Alberta (Energy Resources Conservation Board), 2009 ABCA 349

Date: 20091028
Docket: 0903-0031-AC
Registry: Edmonton

Between:

Susan Kelly, Linda McGinn and Lillian Duperron

Appellants

- and -

Alberta Energy Resources Conservation Board
and Grizzly Resources Ltd.

Respondents

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Mr. Justice Peter Martin
The Honourable Madam Justice Myra Bielby

Memorandum of Judgment

Appeal from the Decision of the
Alberta Energy Resources Conservation Board
Dated the 16th day of January, 2009

Memorandum of Judgment

The Court:

Facts

[1] This is an appeal from a January 16, 2009 decision of the Energy Resources Conservation Board (ERCB) which denied the Appellants standing to be heard in relation to an application to drill two sour gas wells on the same site made by Grizzly Resources Ltd. (Grizzly). The parties agree that none of the facts are in dispute.

[2] The Appellants each own land and reside near the wells which are the subject of Grizzly's applications. Ms. McGinn lives approximately 2.91 km. from the wells, Ms. Duperron lives approximately 5 km. from the wells, and Ms. Kelly lives approximately 6 km. from the wells.

[3] The wells contain H_2S, a gas which is life threatening at very low concentrations. If gas escapes from one of the wells and ignites, it could convert to $S0_2$ which is also a hazardous substance. Together H_2S and $S0_2$ are sometimes referred to as "sour gas".

[4] The *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 ("ERCA") established the ERCB which is tasked, among other things, with approving or refusing drilling licenses for industry participants such as Grizzly. Section 26(2) of the *ERCA* requires the ERCB to give notice and an opportunity to be heard to a person where it appears its decision on an application "may directly and adversely affect the rights of a person . . .". The ERCB provided notice of the Grizzly applications to the Appellants, but subsequently determined that they did not fall within the s. 26(2) definition of those who had standing to be heard. The gist of this appeal assesses whether the ERCB erred in making that determination.

[5] Certain directives have been issued by the ERCB pursuant to the authority given it in the Oil and Gas Regulation Conservation Regulations, passed pursuant to the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 and the Pipeline Regulation, created pursuant to the *Pipeline Act*, R.S.A. 2000, c. P-15. One of those directives, Directive 71, creates certain zones around a proposed well. They include the emergency planning zone (EPZ), defined as being "A geographical area surrounding a well, pipeline, or facility containing hazardous product that requires specific emergency response planning . . . ".

[6] The ERCB required Grizzly to support its applications for permission to drill by preparing and submitting certain modeling designed to show the likely dispersion of sour gas in the event of an unanticipated escape during the drilling of the wells or their subsequent operation. This modeling was then used to determine the size and location of the EPZ and other zones. It shows that the EPZ for the wells in question amounts to a 2.11 km. area surrounding the well sites.

[7] Directive 71 also creates another geographic area, a Protective Action Zone (PAZ) defined as " An area downwind of a hazardous release where outdoor pollutant concentrations may result in life threatening or serious and possibly irreversible health effects on the public." The PAZ for the wells in question extends to a maximum of 9.25 km. around the well sites; its actual boundaries at any given time are dictated in part by the velocity and direction from which any wind is blowing. The concept of a PAZ is a new one; it was created for the first time in July 2008 pursuant to an amendment to Directive 71. Grizzly's applications are among the first to be considered after the implementation of this change.

[8] Other ERCB directives which affect residents of any EPZ and PAZ include Directive 56 (license requirements) and Directive 60 (notification of flaring within 3 km. of a well). Directive 71 also contains provisions relating to emergency preparedness which bear on the Grizzly wells.

[9] The Appellants all reside outside the boundaries of the EPZ, but within the boundaries of the PAZ of the Grizzly wells. The modeling Grizzly prepared for these wells shows that if there is a sour gas escape with the wind blowing from the southeast, that gas could enter the PAZ and affect the residents in same, including the Appellants.

[10] When the Appellants were notified of Grizzly's applications for permission to drill they each filed objections with the ERCB. The ERCB replied by letter dated November 26, 2008 dismissing each of their objections on the basis that they were not directly and adversely affected by drilling of the wells. It further advised them that they could request a review of that decision pursuant to ss. 39 or 40 of the *ERCA*.

[11] The ERCB granted Grizzly licenses to drill two days later, on November 28, 2008. The wells were then drilled but are not, apparently, yet in operation.

[12] By letter dated December 16, 2008 each of the Appellants asked the ERCB to " review and alter its decisions of November, 2008 denying us standing and [to] direct a hearing . . ." and "to reconsider its decision and to grant us standing with respect to these wells and direct a hearing of whether they are in the public interest."

[13] After some further correspondence that request was denied by letter of January 16, 2009, which contains the decision under appeal. In it the ERCB stated:

> "We are writing to advise you that the Energy Resources Conservation Board (ERCB/Board) has considered your application *under section 40* of the *Energy Resources Conservation Act* (ERCA) for a review and variance of its decision to dismiss your objections . . .

> For the reasons outlined below, the ERCB has decided to deny the Review Application on the basis that you have not demonstrated that your rights may be directly and adversely affected by the ERCB's approval of the Applications.
>
> *. . . while you may reside within a PAZ for the wells, this fact alone is not sufficient to establish that you have rights that may be directly and adversely affected by the ERCB's approval of the Applications* . . .
>
> If an objecting party or review applicant does not own land or reside in a setback area or notification or consultation radius as prescribed in ERCB Directive 56, or the calculated EPZ for the facility, *the onus is on an objecting party or review applicant* to establish that he or she has legal rights that may be directly and adversely affected by a decision by the ERCB to approve an application. The impact must be specific and *the objecting party must establish that he or she may be affected in a different way or to a greater degree than members of the general public . . .*
>
> You have asserted that, because you reside in the PAZ you may die or your health may be adversely affected in the event of an incident at the facility and therefore you should be granted standing in relation to the applications that resulted in the Approvals. However, *beyond residing in the PAZ and the general concerns raised in the Review Application, you have not provided any substantive evidence that your rights may be directly and adversely affected by the Approvals* . . .
>
> In light of our determination that you do not have the requisite standing in respect of the Review Application, it is not necessary to make a decision in respect of your request for a suspension of the ERCB's approvals of the Applications.
>
> For the reasons outlined above, the ERCB hereby denies the Review Application". (emphasis added)

[14] No oral hearing was held at any time in relation to the Appellants' standing. No hearing at all was held in relation to their substantive concerns.

[15] At the conclusion of the drilling process, Grizzly flared the wells which is apparently done for cleansing and other reasons. Ms. McGinn was entitled to receive and did receive notice of the

flaring given the location of her home pursuant to the provisions of Directive 60. The other two Appellants received notification as a courtesy. No poisonous gas escaped during this or any other aspect of the drilling process.

Issues

[16] The Appellants applied for and received leave to appeal to this Court from the January 16, 2009 decision of the ERCB. Leave was granted on various points of law which, restated, include:

a) Did the ERCB misstate the test for standing?

b) Did the ERCB err in assuming that the fact the Appellants resided at locations which would be within a PAZ after a well leak or accident under certain wind and well conditions in the context of the definition of Protective Action Zone in Directive 71, could not be evidence or substantive evidence of possible adverse effect?

c) Did the ERCB fail on January 16, 2009 to consider or correct an error of law made by it on November 25 or 26, 2008 which it should have considered or corrected?

d) Was the ERCB correct in stating that the onus of proof remained on the Appellants throughout and never shifted?

e) Did the ERCB act unreasonably in approaching reconsideration on January 16, 2009 solely under s. 40 of the *ERCA* rather than also conducting that reconsideration under s. 39 of the *ERCA*?

[17] A further issue was raised for the first time in Grizzly's factum:

f) Should the appeal be dismissed as moot?

[18] As a result of the conclusions reached on these points it is not necessary to go on to address the other points of law upon which leave to appeal was granted.

Points of Law

A. Standard of Review

[19] There are two standards of review for questions of law and jurisdiction: correctness and reasonableness. Reasonableness is concerned with whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of the facts and the law; see ***Dunsmuir v. New Brunswick***, 2008 SCC 9, [2008] 1 S.C.R. 190, 2008 CarswellNB 124.

[20] The standard of review for an appeal from the ERCB on a question of law involving the Board's knowledge and expertise is reasonableness; on a question of law not involving the Board's knowledge and expertise is correctness; and, on a question of jurisdiction is correctness; see ***Kelly v. Alberta (Energy and Utilities Board)***, 2008 ABCA 52, 34 C.E.L.R. (3d) 4, 2008 CarswellAlta 160.

[21] The test as to whether a decision is reasonable is whether it is justifiable, transparent and intelligible and falls with the range of possible acceptable outcomes which are defensible in respect of the facts and law; see ***Atco Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)***, 2006 SCC 4, [2006] 1 S.C.R. 140, [2006] S.C.J. No. 4.

Analysis

a) ***Did the Board misstate the test for standing ?***

[22] Yes. In the decision under review the ERCB stated:

> *. . . while you may reside within a PAZ for the wells, this fact alone is not sufficient to establish that you have rights that may be directly and adversely affected by the ERCB's approval of the Applications . . .*

[23] This is not a correct statement of the test for standing to challenge an ERCB decision. In ***Dene Tha' First Nation v. Alberta (Energy and Utilities Board)***, 2005 ABCA 68, 363 A.R. 234, [2005] A.J. No. 158, leave to appeal to the Supreme Court of Canada dismissed [2005] S.C.C.A. No. 176, the Alberta Court of Appeal described the test for standing to appear before the ERCB as follows:

> First is a legal test, and second is a factual one. The legal test asks whether the claim, right or interest being asserted by the person is one known to the law. The second branch asks whether the Board has information which shows that the application before the Board may directly and adversely affect those interests or rights. The second test is factual.

[24] The Appellants argued that the ERCB erred in failing to address the first branch of this test for standing in its January 16, 2009 reasons, and that it further erred in failing to conclude that they had a right or interest known to law arising from the provisions of its own Directives 56, 60 and 71, each of which gave them, as residents in the PAZ, certain legal rights.

[25] In particular Directive 56 gave them the right to be consulted by Grizzly during the application process. The Appellants advised that the failure to effectively consult them is an issue they intend to raise if given the opportunity to argue the substance of their objections before the ERCB at a new hearing ordered as a result of this appeal. While the wells have now been drilled, they hope to convince the ERCB through the consultation process that certain conditions should be placed upon their operation.

[26] Specifically, Directive 56, paragraph 2.2.1 entitled " Who to Include" directed that Grizzly develop a "participant involvement program" including three groups, those who resided within the EPZ, " all parties whose rights may be directly and adversely affected", and people who had special needs or concerns resulting from the drilling applications. For the reasons given below the Appellants are members of the second group and were thus entitled to be included in the participant involvement program.

[27] Directive 60 required Grizzly to provide notice of flaring to residents within 3 km. of a well and to report all unresolved concerns to the ERCB. Ms. McGinn resided within the 3 km. radius of these wells and thus was legally entitled to and did receive notice of the flaring eventually done on the wells.

[28] Directive 71 required Grizzly to develop emergency planning for its sour gas wells which applied to residents of the PAZ among others. The plan it in fact developed for these wells addressed requirements including notification to, shelter in place, and evacuation provisions for PAZ residents including the Appellants.

[29] In the decision under appeal, the ERCB failed to address the first aspect of the ***Dene Tha'*** test for standing, whether legal rights were created as a result of the operation of these three directives. Had it, the ERCB would have concluded that such rights were created. Further, it erroneously stated that none of the Appellants owned land or resided within the notification radiuses required by Directive 56. Had those errors not occurred, it would have concluded that the Appellants had met the first requirement of standing.

[30] Other errors were made in relation to the second branch of the test as to whether the Board had information which showed that the application before it might "directly and adversely affect those interests or rights". In the decision under appeal, the ERCB stated that to have standing to be heard ". . . the objecting party must establish that he or she may be affected in a different way or to a greater degree than members of the general public".

[31] Section 26(2) of the *ERCA* does not include this limitation in defining those who are entitled to a right to be heard. It states:

> s. 26(2) . . . *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

> (a) notice of the application,
>
> (b) a reasonable opportunity of learning the facts bearing on the application and presented to the Board by the applicant and other parties to the application,
>
> (c) a reasonable opportunity to furnish evidence relevant to the application or in contradiction or explanation of the facts or allegations in the application,
>
> (d) if the person will not have a fair opportunity to contradict or explain the facts or allegations in the application without cross-examination of the person presenting the application, an opportunity of cross-examination in the presence of the Board or its examiners, and
>
> (e) an adequate opportunity of making representations by way of argument to the Board or its examiners. (emphasis added)

[32] Nowhere is the requirement that the Appellants must establish that they may be affected in a different way or to a greater degree than members of the general public. In concluding otherwise in interpreting its own governing statute, the Board made an error in law of a type for which the standard of review is that of correctness. The ERCB's decision was incorrect and cannot stand for that reason.

[33] The Appellants meet both requirements for standing and should have been accorded standing in relation to their application for reconsideration by the ERCB.

b) ***Did the ERCB err in assuming that the fact the Appellants resided at locations which would be within a PAZ after a well leak or accident under certain wind and well conditions in the context of the definition of Protective Action Zone in Directive 71 could not be evidence or substantive evidence of possible adverse effect ?***

[34] Yes. In the decision under review, the ERCB faulted the Appellants for failing to lead evidence of possible adverse effect to establish their standing to object to Grizzly's proposed drilling. It states:

> You have asserted that, because you reside in the PAZ you may die or your health may be adversely affected in the event of an incident at the facility and therefore you should be granted standing in relation to the applications . . . However, beyond residing in the PAZ . . . you

> have not provided any substantive evidence that your rights may be directly and adversely affected . . .

[35] In arriving at this conclusion, the ERCB erred in failing to consider the definition of a PAZ found in its Directive 71, "An area downwind of a hazardous release where outdoor pollutant concentrations may result in life threatening or serious and possibly irreversible health effects on the public." This definition alone indicates that those who live in a PAZ could have their rights directly and adversely affected as a result of a hazardous release. It is difficult to see how any other conclusion could be available. Should the wells leak and the wind be blowing from the southeast, poisonous gas could be blown over and into the Appellants' homes and farms.

[36] The Respondents argued that the Appellants were required to lead substantive evidence on this point rather than rely on Grizzly's evidence that they resided within the PAZ and the logical consequences of same. They cite the decision of this court in ***Graff v. Alberta (Energy and Utilities Board)***, 2008 ABCA 119, [2008] A.J. No. 277 that it is " not unreasonable for the Board to require the parties requesting the review, on the basis that they suffered from an unusual sensitivity to natural gas well, to provide more than a mere assertion of that sensitivity". This authority is readily distinguishable on the basis that it deals with parties whose rights arise from facts independent of the operation of a Directive.

[37] The Respondents alternately argued that because the PAZ is in part defined on the basis of wind conditions at a given time, and the Appellants accordingly each lived in locations which fell within the PAZ only at certain times, they were required to lead additional evidence of possible prejudice because the actual wind conditions during any emergency are unknown in advance. In other words, prejudice cannot arise because it depends on which way the wind is blowing during or after the drilling of a well, a condition which can occur only after the time for hearing into whether it should be drilled is long over. This argument ignores the wording of s. 26(2) of the *ERCA* which gives standing to those who *may* be directly and adversely affected. The fact that events *could* arise which *could* prejudice the Appellants is enough; those events do not have to be occurring at the very moment the application to drill is made or considered by the ERCB.

[38] Grizzly argued that it engaged in the required consultation with the Appellants and for that reason alone they cannot be considered to have their rights directly and adversely affected by the drilling of the wells. In other words, notwithstanding the wording of s. 26(2) (b)-(e) of the ERCA, once consultation has taken place residents lose their right to furnish the ERCB with their own evidence, to cross-examine the evidence provided by the drilling company and the right to make representations on the issue to the ERCB. There is nothing in the legislation nor other authority to support this interpretation.

[39] The ERCB erred in concluding that the Appellants were required to provide evidence of potential negative consequences to establish that their rights could be adversely affected by the drilling of the wells when it had that evidence before it from other sources. Grizzly's evidence as

to the location of the PAZ in conjunction with the evidence of the location of the Appellants' residences was sufficient. No further evidence was needed. The ERCB made an error of law in the determination of what was required as evidence pursuant to the provisions of its own governing statute and Directive 71, an error for which the standard of review is one of correctness.

c) ***Did the ERCB fail on January 16, 2009 to consider or correct an error of law made by it on November 25 or 26, 2008 which it should have considered or corrected?***

[40] Yes. The fact the Appellants reside within the PAZ was sufficient to compel the conclusion that they might be directly and adversely affected by the drilling of the wells. The ERCB came to the contrary conclusion on November 26, 2008. It failed to correct that error in its January 16, 2009 decision.

[41] In concluding that the Appellants did not have standing to request a reconsideration of its November 26, 2008 decisions, the ERCB failed to go on to correct the error it had made at that time when it concluded that the Appellants were not directly and adversely affected by drilling of the wells. The ERCB put the Appellants in a Catch-22 position by denying them a rehearing in January 2009 into the issue of whether they could be directly and adversely affected by the drilling because they were unable to first show that they could be directly and adversely affected by the drilling.

d) ***Was the ERCB correct in stating that the onus of proof remained on the Appellants throughout and never shifted?***

[42] No. In the decision under appeal, the ERCB erred in stating that ". . . the onus is on an objecting party or review applicant to establish that he or she has legal rights that may be directly and adversely affected by a decision of the ERCB to approve an application".

[43] The correct test for onus is that set out by the Supreme Court of Canada in ***Snell v. Farrell*** [1990] 2 S.C.R. 311, [1990] S.C.J. No. 73 at para. 16:

> 1. that the onus is on the party who asserts a proposition, usually the plaintiff;
>
> 2. that where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it.

[44] While the onus here was originally on the Appellants to establish that they lived within the PAZ, once they had done so they had given enough evidence that they were potentially adversely affected by the drilling. The onus then shifted to Grizzly to prove they were not, partly because it alone could leave evidence about the particulars of these wells, the technology involved in their drilling, and operation and sour gas content and dispersion patterns. The ERCB made an error of law in concluding otherwise, an error for which the standard of review is one of correctness.

e) ***Did the ERCB act unreasonably in approaching reconsideration on January 16, 2009 solely under s. 40 of the ERCA rather than also conducting that reconsideration under s. 39 of the ERCA?***

[45] Yes. In its November 26, 2008 letter dismissing the Appellants' objections to the proposed drilling, the ERCB advised them that they could request a review of that decision under ss. 39 or 40 of the *ERCA*. They did request a review without identifying what sections they wished it to be conducted under. The ERCB went on to conduct that review solely under s. 40 which required the Appellants to establish standing.

[46] Standing would not have arisen as an issue under a review conducted pursuant to s. 39 which simply provides that the ERCB may review, rescind, change, alter or vary an order or direction made by it, or may rehear an application. If the ERCB had reconsidered the matter under that section, it would have gone right to the merits of the Appellants' concerns.

[47] In comparison, s. 40 requires proof the Appellants were "affected" by the earlier order or direction. That led the ERCB into a consideration of whether the Appellants may have been directly and adversely affected by its decision, in which it made the errors described above and which resulted in its failure to consider the merits of the Appellants' concerns.

[48] The ERCB acted unreasonably in failing to conduct its reconsideration under each of ss. 39 and 40.

f) ***Should the appeal be dismissed as moot?***

[49] No. Grizzly argued that this appeal is academic as the wells are drilled and completed without significant incident. However, it does concede that there is a potential ongoing health and safety risk to the Appellants if there is a release of poisonous gas during the future operation of the wells.

[50] The fact that Grizzly chose to take upon itself the risk of drilling wells which it may not be permitted to operate or operate unconditionally does not render this matter moot. The Appellants noted that if after a rehearing the ERCB permits Grizzly to operate the wells, it may impose conditions on their operation which are designed to address their safety concerns. Those concerns included what would happen to children or the infirm if alone at home when an order to remain in the home is issued due to an escape of sour gas. These and similar risks could be addressed through the imposition of conditions, a matter which would be addressed at a rehearing even if the ERCB ultimately decided that the wells should be permitted to operate.

[51] In any event, Grizzly's concession of an ongoing health and safety risk to the Appellants alone refutes the suggestion of mootness because it means a concrete dispute remains between the parties. Therefore the first requirement to establish mootness has not been made out, i.e. if the issues

have not become academic through the disappearance of a concrete dispute between the parties; see ***Borowski v. Canada (Attorney-General)*** [1989] 1 S.C.R. 342, [1989] 3 W.W.R. 97. It is not therefore necessary to go on to consider the further requirements for an effective mootness argument as set out therein.

[52] In any event, even if the issue were moot, a discretion exists to hear the appeal as determined by this Court in ***Graff v. Alberta (Energy and Utilities Board)***, 2007 ABCA 363 in which it rejected the argument that an appeal was moot because the wells in question had been abandoned due to poor production. It held that the appeals were not moot and, alternatively that discretion should be exercised to hear the appeal since the parties continued to have an adversarial relationship, and the appeal presented an opportunity to determine the proper interpretation of certain Directives; see also ***Atco Gas***, *supra*. The same situation may exist here.

Remedy

[53] The *ERCA* s. 41(6) provides that on the hearing of an appeal the Court of Appeal shall proceed to confirm, vary or vacate the order appealed from. If the order is vacated, the matter shall be referred back to the ERCB for further consideration and redetermination. Section 41(10) provides that in that case the ERCB shall vary its order in accordance with the judgment of the Court of Appeal.

[54] The January 16, 2009 decision of the ERCB is therefore vacated and the matter remitted to it for consideration and redetermination in accordance with the following directions:

a) Each of the Appellants is to be accorded standing to be heard on the merits;

b) The ERCB must accept that as a result of the location of the Appellants' residences in areas which will become located within the PAZ in certain circumstances, they have rights which may be directly and adversely affected as a result of the ERCB giving Grizzly the licenses to drill;

c) The Appellants are not required to lead evidence to show that they are affected in a different way or to a greater degree that members of the general public as a result of the drilling of these wells;

d) The onus of proof shall be determined in accordance with the test in ***Snell v. Farrell***, *supra;*

e) The rehearing shall be conducted under the provisions of each of ss. 39 and 40 of the *ERCA*; and,

f) The fact that the wells have now been drilled shall not be treated as a limit on ultimately concluding that Grizzly should not be permitted to operate them, or if in operation at the time of the rehearing, that it cannot be required to shut them down or that the right to operate cannot be made subject to appropriate conditions to be devised by the ERCB based on the evidence heard during the rehearing.

Appeal heard on September 4, 2009

Memorandum filed at Edmonton, Alberta
this 28th day of October, 2009

Côté J.A.

Martin J.A.

Bielby J.

Appearances:

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 Ltd.