In the Court of Appeal of Alberta

Citation: Kelly v. Alberta (Energy Resources Conservation Board), 2011 ABCA 325

Date: 20111118
Docket: 1003-0171-AC
Registry: Edmonton

Between:

Susan Kelly and Lillian Duperron

Appellants

- and -

Alberta Energy Resources Conservation Board, West Energy Ltd. and Daylight Energy Ltd.

Respondents

The Court:

The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Madam Justice Myra Bielby

Memorandum of Judgment

Appeal from the Decision by
Alberta Energy Resources Conservation Board
Dated the 1st day of June, 2010

Memorandum of Judgment

The Court:

[1] The appellants were granted leave to appeal a decision of the respondent Board on two issues:

(a) Is a person who resides outside the Emergency Planning Zone, but within the zone where a potential exists for hydrogen sulfide levels of 10 ppm, directly and adversely affected as a matter of law, so as to be entitled to standing?

(b) Did the Board err by holding that there was no evidence on the record to show that the appellants' medical conditions would give them a heightened sensitivity to oil and gas well operations in the vicinity of their properties, and if so is that an error of law?

Facts

[2] The respondent Daylight Energy (formerly known as West Energy) applied to drill a sour gas well. The appellants wrote to the Board opposing the well. Daylight Energy asked the Board to disregard their objection on the basis that they had no standing. The test for standing is set out in s. 26(2) 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
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> (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,
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> (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.

To be eligible for standing the appellants must therefore demonstrate that they will be "directly and adversely affected" by the well.

[3] The Board recognizes and defines three zones around a potential sour gas well which might be impacted by the well: an Emergency Planning Zone, a Protective Action Zone, and a third, lower impact zone.

[4] The Emergency Planning Zone for the well is the area where a combination of thermodynamic, fluid mechanic, atmospheric dispersion, and toxicology modelling predict that concentrations of hydrogen sulphide may reach 100 ppm in case of a release. It is about 2.11 km in size for this well. The Board requires a site-specific Emergency Response Plan for each Emergency Planning Zone. The appellants reside 6.5 km and 5.4 km from the well site, outside this Emergency Planning Zone.

[5] The Board also has regard to a Protective Action Zone for each well. It is the area "where outdoor pollutant concentrations may result in life-threatening or serious and possibly irreversible health effects on the public". At the time that they filed their objection, the appellants would have been in the Protective Action Zone. However, the Board adjusted the computer model that generates the Protective Action Zone as a result of the decision of this Court in ***Kelly v Alberta (Energy Resources Conservation Board)***, 2009 ABCA 349, 464 AR 315,14 Alta LR (5th) 261 ("***Kelly #1***"). The Board stated that it was never the intention that the Protective Action Zone could be larger than the Emergency Planning Zone, the situation that arose in ***Kelly #1***. After the computer model was adjusted, the appellants no longer fell within the 1.85 km Protective Action Zone for the well.

[6] Finally, the Board has regard to a third zone, which is the area where the concentration of hydrogen sulphide might potentially reach more than 10 ppm (over a three minute average) in case of a release. The appellants fall within that tertiary 9.25 km zone. Exposure to that level of hydrogen sulphide is not as problematic as the levels required for the Emergency Planning Zone or the Protective Action Zone. Within this zone, Appendix 6 to the Board's Directive 71, *Emergency Preparedness and Response Requirements for the Petroleum Industry*, states that when the average levels of sour gas exceed 10 ppm: "Local conditions must be assessed and all persons must be advised to evacuate and/or shelter." The Appendix notes that "Licensees should use proper judgment in determining if evacuation is required." The Board noted that "Alberta's worker safety rules provide that people may work safely in an environment of up to 10 ppm H_2S for eight hours".

[7] The appellants argued that since under some circumstances detectable levels of sulfur dioxide from the well could reach their properties, potentially triggering their evacuation under Appendix 6, they are "adversely affected".

[8] As mentioned, the Board requires a site-specific Emergency Response Plan for each Emergency Planning Zone. An operator must also have regard to public safety for areas outside the Emergency Planning Zone, but those considerations are primarily dealt with in a corporate-level Emergency Response Plan. Since the appellants do not reside within the Emergency Planning Zone, they would not necessarily be contemplated within the site-specific Emergency Response Plan for this well.

[9] A corporate-level Emergency Response Plan anticipates safety measures that extend beyond the Emergency Planning Zone. Directive 71 has provisions that contemplate the safety of members of the public outside the Emergency Planning Zone, for example:

> 14.3.5 Notification and Evacuation outside the EPZ
>
> In the unlikely event that public protection measures are required beyond the EPZ, they will be conducted in accordance with the licensee's arrangement with the local authority. . . . Notification mechanisms outlined in the MEP response framework may be used by the local authority to notify residents if public protection measures are required outside the EPZ . . .

In some cases evacuation, or "sheltering in place" might be contemplated in a corporate-level Emergency Response Plan, even for persons outside the Emergency Planning Zone. Since Appendix 6 of Directive 71 mandates evacuation in some situations where readings are over 10 ppm for three minutes on average, the appellants argued they may be adversely affected by the well.

[10] On January 19, 2010 the Board wrote to the appellants dismissing their application for standing, having concluded that they had not demonstrated that they would be adversely affected by the well. The appellants applied under s. 39 or 40 for a review of that decision, enclosing more particular evidence about their medical conditions. On June 1, 2010 the Board dismissed the application for a review of the original decision, concluding that the appellants had not raised "a substantial doubt as to the correctness of the Board's [January 19] decision", and finding that there were no circumstances or facts that would lead to the Board varying its decision.

[11] The Board concluded that there was no evidence that hydrogen sulphide would aggravate the appellants' medical conditions. It concluded that the risk of evacuation was not an adverse effect. The exposure to the gas was the adverse effect, and evacuation was merely a method of attempting to remediate that problem. It stated that the provisions relating to evacuation were "precautionary and preparatory only". Planning in anticipation of an incident did not mean an incident was likely. Planning was based on "unmitigated, uncontrolled worst-case scenarios", and being contemplated

by an emergency plan "does not, in itself, constitute a potential direct and adverse affect [sic]". The Board concluded that the appellants are not directly and adversely affected.

[12] The appellants were subsequently granted leave to appeal the decision of the Board on the two issues previously delineated: ***Kelly v Alberta (Energy Resources Conservation Board)***, 2010 ABCA 307.

Standard of Review

[13] Appeals from the Board only extend to questions of law. The legal concept of being "directly and adversely affected" by a proposed oil well arises from the Board's home statute, and engages the Board's technical expertise. The standard of review is therefore reasonableness: ***Kelly #1*** at para. 20. 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, [2009] 1 SCR 339 at para. 59.

Scope of the Issues

[14] The respondent Daylight Energy argues in its factum that the only legal issue in this appeal, and therefore the only issue over which this Court has jurisdiction, is whether the appellants have a "right" recognized by law. All other issues, it alleges, are factual issues which are in the exclusive jurisdiction of the Board.

[15] The respondent relies on the previous decision of this Court in ***Dene Tha' First Nation v Alberta (Energy and Utilities Board)***, 2005 ABCA 68, 45 Alta LR (4th) 213, 363 AR 234. In that decision, the Court stated:

> 10 The Board correctly stated here that that provision in s. 26(2) has two branches. 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.

Dene Tha' was an oral decision of the Court which was primarily focussed on resolving the issues in that appeal. The applicant was a First Nation, which was objecting to proposed wells and access roads on Crown lands; none of them were to be constructed on the reserve. The issue was whether

the applicant's asserted aboriginal and treaty rights were sufficient to establish a "right of a person". The Court confirmed that the definition of a "right" was a question of law.

[16] This approach to the section was followed in ***Kelly #1***. In that case the applicants were able to demonstrate that they resided within the Protective Action Zone for the proposed well. This invoked certain rights under the various Directives of the Board. The Court again discussed whether a "right" was demonstrated that was sufficient to support standing. The Court concluded that such a right did exist because the applicants owned land within the Protective Action Zone, and were thus entitled to apply for standing without demonstrating that they would be impacted to a greater degree than members of the general public.

[17] The decisions in ***Dene Tha'*** and ***Kelly #1*** confirmed that the concept of a "right" is a question of law. They also confirmed that qualifying rights might come from a number of sources, such as aboriginal entitlements, the ownership of land, proximity to the proposed well, inclusion in the Protective Action Zone, and other relevant factors. The respondent Daylight Energy conceded as much in oral argument.

[18] Those cases do not, however, stand for the proposition that the definition of "right" is the only legal issue presented by s. 26(2). The section raises other legal issues, for example the proper meaning of "directly and adversely affected". That legal issue, which was one of the issues in ***Kelly #1***, is also at the forefront of this appeal. The respondent's approach to the issues is therefore too narrow.

"Directly and Adversely Affected"

[19] The legal issue in this appeal is whether the Board adopted a reasonable meaning of the phrase "directly and adversely affected". In ***Kelly #1*** the Board had suggested that an applicant would not be directly and adversely affected unless it could demonstrate that it would be affected in a different way or to a different degree than members of the general public. The Court found that interpretation was not supported by the wording of the statute: ***Kelly #1*** at para. 32.

[20] In the present appeal the Board gave a number of reasons for concluding that the appellants were not directly and adversely affected:

> (a) The medical evidence provided by the appellants demonstrated that they had certain medical conditions (asthma) but "does not go further to inform the Board as to whether your medical conditions evidence that you have heightened sensitivity to this or any other well or oil and gas operation in the vicinity of your property and whether you may be directly and adversely affected by the proposed well."
>
> (b) The Board noted that the appellants reside "a considerable distance from the proposed well".

(c) While Directive 71 did require that the operator have a plan for evacuating people like the appellants, the Board concluded that "the provisions relating to evacuation and sheltering in place are precautionary and preparatory only." The planning was based on "unmitigated, uncontrolled worst-case scenarios". The Board noted that the risk of an incident was small.

(d) The Board concluded that "while evacuation and/or sheltering in place may be a direct effect, it is not an adverse effect." If an event occurred, the Board noted that evacuation would be a desirable thing, and not "adverse".

[21] Some of the factors considered by the Board, such as the distance of the appellants' residences from the well and the level of risk, are clearly legitimate considerations. As was noted in ***Dene Tha'*** at para. 14, "some degree of location or connection between the work proposed and the right asserted is reasonable. What degree is a question of fact for the Board." Further, possible deficiencies or shortcomings identified by the appellants in the evacuation plans are merely that. They do not demonstrate that the appellants are adversely affected. Unless the appellants are indeed adversely affected, the deficiencies in the plan are largely academic.

[22] There are, however, some difficulties with the analysis of the Board. The first is the suggestion that the medical evidence was not sufficiently focussed to demonstrate that the appellants were adversely affected. In ***Kelly #1*** at para. 32 the Court held that an applicant did not have to demonstrate that it was affected to a greater degree than the general public, and the need to prove a "heightened sensitivity" is inconsistent with that ruling. The very reason why the Board is concerned about sour gas is because it is harmful to the health of those in contact with it. It is somewhat surprising that the Board would then require proof of a specific connection between asthma and exposure to sour gas.

[23] Secondly, the suggestion that the evacuation plans are merely "precautionary and preparatory" is unconvincing. The entire Directive 71, including the requirement for Emergency Planning Zones and Emergency Response Plans, is "precautionary and preparatory". Presumably if the Board felt that some sort of dangerous incident was a near certainty, it would not allow the well to be developed. Emergency plans always plan for the worst, while hoping for the best. To say that emergency plans are precautionary and preparatory does not answer the question whether the appellants would be adversely impacted if the emergency ever did come to pass, and if so what the level of risk would be. It cannot be suggested that no one is adversely affected unless they can demonstrate with certainty that they will be exposed to sour gas: ***Kelly #1*** at para. 37.

[24] Thirdly, the suggestion that evacuation is not an adverse effect involves circular reasoning. Evacuation is obviously desirable in the case of an emergency. But the very fact that a plan is required which contemplates evacuation in some circumstances must demonstrate that there is some lurking risk. It is the lurking risk which is "adverse", not the evacuation plan itself.

[25] The reasoning of the Board therefore does not withstand scrutiny on the reasonableness standard. It is not transparent and intelligible, nor is it a method of analysis available on the facts and the law.

[26] The respondent Daylight is correct when it states that adverse effect is a matter of degree. At some point the Board must decide whether the magnitude of the risk is such that the applicant has become "directly and adversely affected". But the applicant need not demonstrate that the perceived risk is a certainty, or even likely. Nor need the applicant prove an adverse effect greater than that suffered by the general public, nor that any adverse effect would be life-threatening. Those in the tertiary evacuation area may not have an absolute right to standing in all cases, but they have a strong *prima facie* case for standing. The right to intervene in the *Act* is designed to allow those with legitimate concerns to have input into the licensing of oil and gas wells that will have a recognizable impact on their rights, while screening out those who have only a generic interest in resource development (but no "right" that is engaged), and true "busybodies". As observed in ***Dene Tha'*** at para. 14, that balancing is the responsibility of the Board, provided that it is done on a proper legal foundation.

Conclusion

[27] The answer to the first question on which leave to appeal was granted is that a person who resides within the tertiary zone around an oil well is eligible for standing before the Board. Whether any particular applicant who resides in the tertiary zone would be granted standing depends on a finding by the Board that they are directly and adversely affected. The decision of the Board to deny these appellants standing was not made in the context of a reasonable meaning of "directly and adversely affected". It is not necessary to answer the second question.

[28] The appeal is allowed, and the matter remitted to the Board for reconsideration.

Appeal heard on October 5, 2011

Memorandum filed at Edmonton, Alberta
this 18th day of November, 2011

Slatter J.A.

Authorized to sign for: McDonald J.A.

Bielby J.A.

Appearances:

J.J. Klimek
for the Appellants

R.J. Mueller
for the Respondent Alberta Energy Resources Conservation Board

G.S. Fitch
for the Respondent Daylight Energy Ltd.