In the Court of Appeal of Alberta

Citation: Kelly v. Alberta (Energy Resources Conservation Board), 2010 ABCA 307

Date: 20101015
Docket: 1003-0171-AC
Registry: Edmonton

Between:

Susan Kelly and Lillian Duperron

Applicants

- and -

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

Respondents

Reasons for Decision of
The Honourable Mr. Justice Frans Slatter

Application for Leave to Appeal

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

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[1] The applicants seek leave to appeal a decision of the Energy Resources Conservation Board denying them standing on an application to licence a sour gas well.

[2] The respondent Daylight Energy (formerly known as West Energy) applied to drill a sour gas well. The applicants wrote opposing the well. Daylight Energy asked the Board to disregard their objection on the basis that they had no standing. Under s. 26(2) of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 the applicants are eligible for standing if they will be "directly and adversely affected" by the well.

[3] 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 applicants reside 6.5 km and 5.4 km from the well site, outside this Emergency Planning Zone.

[4] 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 applicants 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 A.R. 315,14 Alta. L.R. (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 applicants no longer fell within the 1.85 km Protective Action Zone for the well.

[5] 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 in case of a release. The applicants fall within that 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, and is considered tolerable. 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". The applicants argued that since under some circumstances detectable levels of sulfur dioxide from the well could reach their properties they are "adversely affected". There appears to be no evidence on this record of the likelihood of a release ever generating a 10 ppm level of contamination at the applicants' residences.

[6] 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 applicants do not reside within the Emergency Planning Zone, they would not be contemplated within the site-specific Emergency Response Plan for this well.

[7] A corporate-level Emergency Response Plan anticipates safety measures that extend beyond the Emergency Planning Zone. The Board's Directive 071, *Emergency Preparedness and Response Requirements for the Petroleum Industry*, has various 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
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> 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. Appendix 6 of Directive 071 mandates evacuation in most situations where readings are over 10 ppm for three minutes on average. The applicants argued this shows they may be adversely affected by the well.

[8] On January 19, 2010 the Board wrote to the applicants dismissing their application for standing, having concluded that the applicants had not demonstrated that they would be adversely affected by the well. The applicants 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 applicants 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.

[9] The Board concluded that there was no evidence that hydrogen sulphide would aggravate the applicants' 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 applicants are not directly and adversely affected. The applicants have now applied for leave to appeal the June 1, 2010 decision.

[10] The applicants propose 14 grounds of appeal. They are repetitive and overlap, and some of them are not truly grounds of appeal, but are merely additional arguments in support of the main issues. A number of them do not disclose a pure issue of law.

[11] A number of the proposed grounds of appeal suggest that the Board failed to properly weigh the evidence, and so underestimated the magnitude of the risk that sulphur dioxide from the well

could reach their properties, or underestimated the levels of sulphur dioxide that could reach their properties. These grounds do not disclose an error of law, even when described as a "failure to properly interpret a policy".

[12] Any issue respecting the Board's interpretation of Directive 56 is moot. Even though the Board concluded that Daylight Energy did not have to consult with the applicants, it went on to note that such consultation had in fact taken place.

[13] The applicants also sought leave to argue breaches of their *Charter* rights. *Charter* rights were not argued before the Board, and it is inappropriate to permit new issues to be raised on appeal for the first time. The applicants argue that it is the order of the Board itself which breached their *Charter* rights, but any breach of *Charter* rights has its source in the Directives, and could have been raised before the Board, preferably at the original hearing, or at least on the review.

[14] The essential legal issue appears to be whether a person who is contemplated by a corporate-level Emergency Response Plan but resides outside the Emergency Planning Zone is entitled as a matter of law to standing. In order to raise a reviewable issue of law, it would likely have to be demonstrated that standing was compulsory in the circumstances (as in ***Kelly #1***), regardless of the magnitude of the risk that hydrogen sulfide levels would ever reach dangerous levels.

[15] Having considered the test for obtaining leave to appeal, I am satisfied that the following two questions of law warrant leave:

(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 applicants' 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?

The application for leave to appeal is granted with respect to these two issues.

Application heard on October 12, 2010

Reasons filed at Edmonton, Alberta
this 15th day of October, 2010

Slatter J.A.

Appearances:

J.J. Klimek
for the Applicants Susan Kelly and Lillian Duperron

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

G.S. Fitch
for the Respondents West Energy Ltd and Daylight Energy Ltd.