In the Court of Appeal of Alberta

Citation: Judd v. Alberta (Energy Resources Conservation Board), 2011 ABCA 159

Date: 20110526
Docket: 1101-0090-AC
Registry: Calgary

2011 ABCA 159 (CanLII)

Between:

Mike Judd

Applicant

\- and -

Alberta Energy Resources Conservation Board and Shell Canada Limited

Respondents

Reasons for Decision of
The Honourable Madam Justice Carole Conrad

Leave to Appeal
Decision 2011 ABERCB 007
dated March 9, 2011

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I. Introduction

[1] In Decision 2011 ABERCB 007 (the Decision), the Alberta Energy Resources Conservation Board (ERCB) allowed Shell Canada Ltd. (Shell)'s application for an exploratory well and a fuel gas compressor, subject to certain conditions, and denied Shell's applications for a gas battery, fuel gas pipeline and production pipeline.

[2] The applicant, Mike Judd, seeks leave to appeal the Decision on the grounds that the ERCB erred in law by:

> (1) failing to exercise its jurisdiction or give effect to the legal status of the *Ursus arctos* (grizzly bear) species as an endangered species under the *Wildlife Act*, RSA 2000, c W-10 in its findings.
>
> (2) failing to provide adequate reasons;
>
> (3) failing to accord the applicant procedural fairness; and
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> (4) failing to satisfy itself that Shell's mineral surface lease meets the current requirements of the Alberta Department of Sustainable Resource Development (SRD).

II. Decision

[3] The application for leave to appeal is denied.

III. Background

[4] In 1995, Shell constructed a 32 kilometre steel pipeline (the Carbondale Pipeline) from wells in the upper Carbondale River area to connector pipelines that supply the Shell Waterton gas plant. Operations in the Carbondale Pipeline resulted in several sources of potentially dangerous emissions and odours in the region.

[5] These leaks, odours and emissions became a source of concern for area residents and community groups, many of whom participated in the hearing for the Decision. The applicant, an area landowner, participated in the hearing as an intervenor.

[6] In February 2010, the ERCB held a pre-hearing meeting at which the applicant was present. The ERCB then issued a decision report which outlined the process for the hearing, including submission filing deadlines for all parties. Roughly two weeks before the deadline for intervenors'

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submissions, the ERCB granted a request for extension extending the deadline for filing of submissions from intervenors to September 7, 2010. Six days before the hearing began, on October 13, 2010, an intervenor, the Castle Crown Wilderness Coalition (CCWC) sought to file additional material. It did not have leave of the ERCB to do so.

[7] The additional material was an addendum to the report of an expert, Dr. B.K. Gilbert, shared by the applicant and the CCWC. The addendum suggested that there was a grizzly bear den on the applicant's property roughly one kilometre from the proposed exploratory well site. It did not, however, suggest that the den would be molested, destroyed or disturbed by the well. The applicant refused to allow Shell onto his property to investigate. The ERCB ruled the addendum inadmissible. In addition, it refused to allow Judd to testify to the existence of the den. It noted that the intervenors could have submitted the addendum sooner, that the late submission was well past the deadline clearly set for submissions from intervenors, and that Shell was not afforded a fair opportunity to respond to and rebut the new report which made admission of the evidence of a den fundamentally unfair.

IV. Test for Leave to Appeal

[8] Pursuant to section 41 of the *Energy Resources Conservation Act*, RSA 2000, c E-10 an applicant may apply to this court for leave to appeal an ERCB decision on questions of law or jurisdiction. This court does not review questions of fact or of mixed fact and law in ERCB decisions: *Talisman Energy Inc v Energy Resources Conservation Board*, 2010 ABCA 258 at para 9, 487 AR 377; *Sawyer v Alberta (Energy and Utilities Board)*, 2007 ABCA 297 at para 14, 422 AR 107.

[9] An applicant seeking leave to appeal a decision of the ERCB must show that a question of law or jurisdiction raises a serious arguable point. Subsumed in this test are four factors:

(1) whether the point on appeal is of significance to the practice;

(2) whether the point raised is of significance to the action itself;

(3) whether the appeal is *prima facie* meritorious, or whether it is frivolous; and

(4) whether the appeal will unduly hinder the progress of the action:

Atco Midstream Ltd v Alberta (Energy Resources Conservation Board), 2008 ABCA 231 at para 20, citing *Atco Electric Limited v Alberta (Energy and Utilities Board)*, 2002 ABCA 45 at paras 11-12, 299 AR 337.

[10] To properly assess these factors this court must also consider what standard of review would be applied if leave were granted: *Nycan Energy Corp v Energy and Utilities Board (Alberta)*, 2001

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ABCA 31 at para 4, 277 AR 391. For questions of law involving the ERCB's knowledge and expertise the standard of review is reasonableness. Questions of law not involving the ERCB's knowledge and expertise and questions of jurisdiction are subject to appellate review for correctness: *Kelly v Alberta (Energy and Utilities Board)*, 2008 ABCA 52 at para 3, 167 CRR (2d) 14.

[11] In this case, the questions of breach of natural justice and adequate reasons would attract a standard of correctness. The balance of the arguments would be subject to the reasonableness standard.

V. Analysis

A. The effect of the Decision upon grizzly bears

[12] The applicant argues that the ERCB failed to properly exercise its jurisdiction and consider the public interest as required by section 3 of the *ERCA*. He asserts that the ERCB failed to consider the significance of the grizzly bear (*Ursus arctos*)'s status as an endangered species under the *Wildlife Act*, and the impact of its decision on grizzly bear habitat. Specifically, he says the ERCB erred by refusing Judd's testimony as to the existence of a grizzly bear den on his property approximately one kilometre from the well site. Judd submits that it was incumbent upon the ERCB, knowing that the evidence concerned a grizzly bear den, to determine whether a well would breach section 36 of the *Wildlife Act*. In refusing Judd's evidence, he says that the ERCB erred by approving a well without determining whether it would molest, disturb or destroy a grizzly bear den.

[13] The ERCB set specific deadlines for filing of material, and procedures for requesting additional material. Those deadlines were not met with respect to Dr. Gilbert's addendum concerning the existence of a grizzly bear den. Moreover, there was evidence that Shell had consistently been denied access to the Judd property. The ERCB ruled that the expert's addendum and evidence of a den was not admissible. In so doing, the Chairman stated at 1886-87:

> What I wanted to say is our decision is not to allow that information into the record, and I wanted to explain this to everyone here that this is clearly not a technical — all about making it a technical rule – a procedural rule. It's really about fundamental fairness. In the normal course we're pretty flexible in allowing things into the process, and normally we can accommodate and deal with the matter of fairness by allowing the adverse party to be able to rebut.
>
> In this case they cannot rebut. They haven't been allowed information to be able to rebut, so accordingly that we have no alternative but to confirm our October 15th, 2010, ruling in that letter. And our decision is not to allow that information in.

> Dr. Gilbert, we appreciate this puts you in the middle, and we recognize that. However, this has nothing to do with you. It's a matter of what we feel is fundamental fairness.

The fairness issue related directly to Shell's ability to rebut and Judd's adamant refusal to allow Shell access to investigate. Accordingly, consistent with its earlier ruling, the ERCB ruled that Judd's testimony as to existence of the den was inadmissible.

[14] I am not satisfied that the applicant has raised a serious arguable issue of law. The ERCB is entitled to make decisions on the basis of the evidence before it and is entitled to control its own process. It has specific powers to set deadlines. It provided deadlines for filing intervenor submissions, and those deadlines were extended once. At the conclusion of that deadline, there was no evidence of an existing den that would be molested, destroyed or disturbed if a well were allowed. Part of the reason for intervenor deadlines is to provide an adverse party the opportunity to rebut. Here, the ERCB exercised its discretion to exclude new evidence of a specific den after its extended deadline on the basis of fundamental fairness. In my view, that is an exercise of discretion and there is no extricable error of law meeting the test for leave to appeal.

[15] The applicant's argument might be stronger where proper, timely evidence, established the existence of a specific den and expert evidence established that the den would be molested, destroyed or disturbed by a proposed well. But that is not this case. Here, the applicant is really asking us to review the ERCB's exercise of discretion to refuse evidence, filed out of time in circumstances where full investigation and rebuttal was not available.

[16] Moreover, the argument on the leave application was not put in the same manner to the ERCB during the hearing. And, in any event, although the expert opined that a den existed one (1) kilometre from the well site, he did not opine that the den might be molested, disturbed or destroyed by the well. Consequently, even if Judd had been allowed to testify as to the existence of the den, there was no evidential basis supporting the argument concerning breach of the *Wildlife Act.*

[17] Finally, the ERCB did not simply ignore the issue of grizzly bears. The ERCB knew that grizzly bears were designated as a threatened species under the *Wildlife Regulation*: Decision at para 62. It recognized its independent duty to consider the public interest, including the environment. The ERCB was aware of the potential for grizzly bear denning in the area and the possible harm to the grizzly bear habitat. It considered evidence, including the applicant's expert evidence, that likely foraging habitat is extensive. At the end of the day, after balancing all of the factors the ERCB concluded that loss of the grizzly bear habitat due to the exploratory well would not be significant.

[18] Considering all of the factors for granting leave to appeal, the applicant has failed to demonstrate an error of law or jurisdiction under ground one that meets the test for leave to appeal.

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B. The ERCB's reasons

[19] The second proposed ground of appeal challenges the adequacy of the ERCB's reasons. Judd argues that the ERCB failed to provide adequate reasons to justify its decision that the potential adverse impact on an endangered species engendered by the drilling of the exploratory well would be minimal. The adequacy of reasons raises a question of law and is subject to appellate review for correctness.

[20] Sufficient reasons must explain why a decision maker made its decision. Reasons must be read in context and must provide a basis for the decision, ensure public accountability, and permit meaningful review: *R v REM*, 2008 SCC 51 at paras 17, 25, [2008] 3 SCR 3; see also *Clifford v Ontario Municipal Employees Retirement System*, 2009 ONCA 670 at paras 25-31, 312 DLR (4th) 70; *Moll v College of Alberta Psychologists*, 2011 ABCA 110 at para 33.

[21] A reading of the whole decision demonstrates that the ERCB was alive to the grizzly bear issue and the new status of grizzly bears as an endangered species under the *Wildlife Act*. The reasons demonstrate that the ERCB recognized its obligation to consider whether the project is in the public interest having regard to the social, economic, and environmental effects of the project: see Decision at para 24. The ERCB's reasons dealing specifically with wildlife appear primarily at paragraphs 60-64 of the Decision.

[22] In my view, the ERCB's reasons adequately explain its decision. The reasons demonstrate an awareness of grizzly bear activity in the area. The ERCB's finding that any loss of overall habitat would not be extensive was based on its consideration of the area and the likelihood that foraging habitat was extensive. In addition, the ERCB considered the restricted access being proposed, Dr. Gilbert's statement that grizzly bear denning locations are not limiting, and the fact that Shell's reclamation of older sites at Waterton 6 and Waterton 12 would contribute to maintaining the grizzly bear habitat. The gist of its reasoning is that there is sufficient foraging habitat to mitigate any loss of the habitat affected by this well approval, such that approval was still in the public interest.

[23] The requirement of reasons does not call for a tribunal to discuss every single piece of evidence that was before it and the basis for accepting or rejecting that evidence: *Johnston v Alberta (Energy & Utilities Board)* (1997), 200 AR 321 at para 10. Taken as a whole, the reasons indicate what evidence the ERCB accepted in arriving at its decision. The ERCB reasoned that the effect on the grizzly bear would not be that significant having regard to the extensive foraging habitat, and on the whole of the evidence determined the public interest favoured the well.

[24] There is no arguable ground of appeal with respect to the reasons.

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C. Procedural fairness

[25] The applicant argues that the ERCB failed to afford him procedural fairness by refusing to admit testimony of the grizzly den either through admission of Dr. Gilbert's report or his testimony.

[26] Section 26 of the *ERCA* provides in part:

> 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.
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> (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,
>
> (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
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> (e) an adequate opportunity of making representations by way of argument to the Board or its examiners.

[27] In particular, the applicant asserts that his right to a reasonable opportunity to furnish evidence under section 26(2)(c) was breached when the ERCB rejected the addendum to Dr. Gilbert's report. I disagree. The ERCB refused to admit the evidence of denning because time limits were breached, and it considered late filing, without affording Shell the opportunity to investigate and rebut would be fundamentally unfair. There was evidence to support the conclusion that Shell would never have been provided access. Furthermore, the applicant had a reasonable opportunity to file this evidence in accordance with the procedures established by the ERCB. He failed to adhere

to those procedures. The ERCB has broad powers to control its own processes and control hearings: *ERCA* at sections 16, 30. It also has specific powers to set time limits for the admission of evidence: *Energy Resources Conservation Board Rules of Practice*, Alta Reg 252/2007 at section 6.

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[28] A reasonable opportunity to furnish evidence does not include a right to file late evidence, particularly where reasonable time limits have been imposed and extended. Here the evidence was submitted less than a week before the hearing and the applicant refused to allow Shell onto his property to investigate the alleged grizzly bear den. The ERCB was not obligated to accept this late evidence.

[29] Considering the test for leave and the four factors subsumed in that test, the application must fail. There is no arguable issue of law. Moreover, I am not satisfied that rejection of the evidence of a den would have affected the decision. There was no expert evidence that the well would molest, destroy or disturb such a den if it did exist.

D. The mineral lease

[30] Finally the applicant seeks leave to appeal on the grounds that the mineral surface lease for the subject lands issued by SRD in June 2006 did not meet the current requirements of the SRD. This does not raise a question of law or jurisdiction in respect of the ERCB's decision. The ERCB does not issue mineral leases. The authority to do so is vested in the SRD under the *Public Lands Act*, RSA 2000, c P-40. If the applicant takes issue with the mineral surface lease, he might have recourse to the SRD, however, his objection to the lease does not raise a meritorious ground of appeal from the ERCB decision. Moreover, the ERCB specifically noted that notwithstanding the surface lease, it had the obligation to consider anew the public interest, including the environment: Decision at paras 24-25. It proceeded to do so.

V. Conclusion

[31] The applicant has not established a serious arguable point on a question of law or jurisdiction arising from the Decision. The application for leave to appeal Decision 2011 ABERCB 007 is denied.

Application heard on May 17, 2011

Reasons filed at Calgary, Alberta
this 26th day of May, 2011

Conrad J.A.

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Appearances:

S.C. Fluker
for the Applicant

G.D. Perkins and T.L. Grimoldby
for the Respondent
Alberta Energy Resources Conservation Board

J.N. Craig and L.A. Goldbach
for the Respondent
Shell Canada Limited

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