

What does the Canadian Charter of Rights and Freedoms have to do with Oil and Gas Development in Alberta?

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Cases Considered:

[*Kelly v. Alberta \(Energy and Utilities Board\)*, 2008 ABCA 52](#)

This is not the first time that section 7 of the Canadian Charter of Rights and Freedoms (the Charter) has been raised on an application for leave to appeal a decision of Alberta's Energy and Utilities Board (EUB). It is, however, the first time that a justice of the Court of Appeal has put the issue squarely before the court. Can the granting of a licence by the EUB (now the ERCB) for a particular oil and gas well violate rights protected by section 7 of the Charter? Is it possible that the environmental risks and hazards of a particular oil and gas operation may be such as to trigger the protection of section 7 of the Charter? Mr. Justice J.A. Berger has said that this is arguable. In doing so, he has placed some difficult issues, with potentially far-reaching consequences, before the Court.

This case began with two applications by West Energy Ltd. (West) to drill two sour oil wells. The EUB approved the applications on a number of conditions (EUB Decision 2007-061). Interveners in the Board's proceeding applied to the Court of Appeal for leave to appeal the Board's decision. To obtain leave to appeal, applicants must show that the issues they advance raise serious, arguable points that have a reasonable prospect of success.

Before Mr. Justice Berger, the Applicants successfully raised two grounds of appeal. First, they argued that the EUB acted without jurisdiction and erred in law by misconstruing and failing to apply Directive 056. As Justice Berger noted, Directive 056 is both a procedural manual on filing a well or facility licence application and a regulatory document that sets out the requirements for the licence application process. In particular, Directive 056 sets out the requirements for public consultation that a company must undertake when applying for an oil and gas well or facility licence.

In approving these wells, the EUB noted that West had admitted to a number of weaknesses in its public consultation program. Still, the Board concluded, West's consultation was adequate and effective for some residents; it addressed the minimum requirements of Directive 056. Before Mr. Justice Berger, the Applicants submitted that this was not good enough. They said the requirements set out in Directive 056 should have been complied with. In response, West pointed

to legislation that allows the EUB to proceed on deficient applications. According to Justice Berger, whether or not the relevant provisions of Directive 056 are mandatory raises a serious, arguable question of law. Leave to appeal was granted on this ground.

Especially as regards its public consultation provisions (and the distinction between “requirements” and “expectations”), Directive 056 is not a straightforward document. At least two other appeals are currently before the Court of Appeal on Directive 056 issues. Any further guidance from the Court that will result from this appeal will certainly assist in clarifying the role of this important Directive for industry, landowners and other affected parties.

The Applicants’ second ground of appeal raised section 7 of the Charter. Section 7 grants everyone the “right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. As stated by Justice Berger, the thrust of the Applicants’ argument was that, in approving these wells, the EUB acted without jurisdiction and erred in law by requiring residents to voluntarily relocate or to continue to live in their homes exposed to an unacceptable risk during the drilling and completion of the proposed wells. West’s evidence before the Board was that at least 8 families lived in an area of above-average risk.

Justice Berger noted that the EUB reached a number of critical conclusions about the level of risk involved in this case. The Board found that: (i) drilling the wells presented an inherent hazard for the residents in the area; (ii) West had an obligation to inform those living in the area of the risk of its operation; and (iii) relocating residents was the best option to reduce the risk to them. Nonetheless, the Board imposed no condition that the residents who live in the areas of unacceptable risk must leave before drilling could proceed; nor did the Board address the issue of compensation for those who chose to leave.

In these circumstances, Justice Berger concluded that it is at least arguable that the Applicants should be entitled to advance an argument on appeal that section 7 may be invoked and that an infringement of section 7 has been made out if the Applicants can establish three things. These are: (i) that there has been a real or imminent breach of the life, liberty or security of the person; (ii) that there are relevant principles of fundamental justice that apply; and (iii) that the deprivation of the life, liberty or security of the person was not in accordance with identified relevant principles of fundamental justice.

In granting leave to appeal on this ground, Justice Berger acknowledged that the Applicants had not raised section 7 before the Board, nor had proper notice of an intention to raise a constitutional question been given. In his view, this was of no consequence. As he said, it is, in part, the Board’s findings of fact that give rise to the section 7 argument in this case.

Justice Berger’s approach on this point must be correct. Where the Charter issue is known at the time of the EUB application — so, for example, if the constitutionality of a legislative or regulatory provision is to be raised — proper notice must be given and the argument can at first instance be made before the EUB. But where, as here, the Charter argument arises because of the

Board's exercise of its statutory authority, the argument will not be known until after the Board has rendered its decision. It is the way the EUB exercised its discretion that raises the spectre of a Charter violation in this case. And until the contrary appears to occur, litigants are entitled to presume that statutory delegates like the EUB will exercise their powers in a way that does not violate the Charter.

The Court of Appeal will undoubtedly have to wrestle with a number of difficult issues on this appeal. For one thing, it remains to be seen whether the Court will accept that it is the EUB's approval of these wells, and not the subsequent operations by West, that amounts to an imminent infringement of life, liberty and security of the person. The law is clear that the Charter applies only to government actors (including statutory delegates) and not to private actors (including corporations).

The court will also have to consider the "principles of fundamental justice" in section 7. These principles typically afford procedural protections (such as rights to reasonable notice, to a fair hearing, and to reasons for a decision) before a deprivation of life, liberty or security of the person will be justified. Whether such procedural guarantees were met in this case depends, at least in part, on what the Court of Appeal finds with respect to the adequacy of notice and consultation. Still, the "principles of fundamental justice" also allow courts to review government actions on more substantive grounds, including arbitrariness, vagueness and overbreadth. Further, there is case law that suggests that there may be circumstances where the deprivation of life, liberty and security of person would so "shock the conscience" of Canadians that no amount of due process can justify them. Such cases have included situations where a party would face the death penalty if extradited from Canada.

Justice Berger has placed some novel and important issues before the Court of Appeal. It will be interesting to see how the Court resolves them.