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Charter and Oil and Gas Issues to Await Another Day: A Disappointing End to the Kelly Appeal?

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Cases Considered:

Kelly v. Alberta (Energy and Utilities Board), 2009 ABCA 161

In an earlier post, I suggested that a recent development in the *Kelly* appeal would likely lead the Court of Appeal to declare the appeal moot (see "An Important Development in the *Kelly* Appeal"). I also suggested that, although this would not be a surprising decision, it would amount to a disappointing end for an appeal which held out promises of elucidating important legal issues. The Court of Appeal has indeed dismissed the *Kelly* appeal as moot. Although this result is certainly disappointing from a legal point of view, it is perhaps less so from a societal and public participation point of view.

The *Kelly* appeal began with an application to the Court of Appeal for leave to appeal a decision of the Alberta Energy and Utilities Board (now the Energy Resources Conservation Board) which had approved two proposed sour oil wells to be drilled by West Energy Ltd. (West). The leave application was brought collectively by 26 landowners who were concerned about adverse impacts from the proposed wells. Mr. Justice Berger granted the leave application on two grounds, including one based on a possible infringement of section 7 of the *Canadian Charter of Rights and Freedoms (*see my post "What does the *Canadian Charter of Rights and Freedoms* have to do with Oil and Gas Development in Alberta?").

Section 7 of the *Charter* grants Canadians 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". The essence of the landowners' argument before Justice Berger was that the Board had erred in approving these wells because the decision required residents to either voluntarily relocate without compensation or to continue to live in their homes exposed to an unacceptable risk during the drilling and completion of the proposed wells. There was evidence before the Board that at least 8 families lived in an area of above-average risk.

In its decision, the Board had reached a number of critical conclusions about the level of risk involved in this case. For example, the Board found that drilling these wells presented an inherent hazard for the residents in the area and that relocating residents was the best option to

reduce the risk to them. Still, the Board approved the well applications without imposing any condition requiring the relocation of residents prior to the commencement of drilling; nor did the Board address the issue of compensation for those who chose to leave.

In these circumstances, Justice Berger concluded that it was at least arguable that section 7 of the *Charter* may apply and that an infringement of section 7 made out. The landowners would have to establish three things: (a) that there was a real or imminent breach of the life, liberty or security of the person; (b) that there were relevant principles of fundamental justice that applied; and (c) that the deprivation of the life, liberty or security of the person was not in accordance with the principles of fundamental justice. In the result, Justice Berger placed the question of whether the *Charter* could apply in the context of actual or potential impacts from oil and gas development squarely before the Court of Appeal.

Can the granting of a licence by the Board 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*? Clearly these are important questions with potentially far-reaching consequences. Is it any wonder that West withdrew its well applications, thereby setting the stage for this appeal to be dismissed as moot?

After leave to appeal was granted, West told the Board that it wanted to withdraw its applications for the well licenses (which had not yet been issued). West said it was unable to comply with a particular access road condition the Board had attached to its approval. The Board allowed West to withdraw its applications. West then applied to the Court of Appeal to be removed as a party to the pending *Kelly* appeal on the ground that it had no further legal interest in the matter. Mr. Justice Côté granted West's application, and granted West immunity from costs for any steps taken after the date of West's application. See "An Important Development in the *Kelly* Appeal", *supra*).

Not surprisingly, the Board then brought an application to the Court of Appeal for an order dismissing this appeal as moot. The doctrine of mootness provides that a court will usually decline to hear a matter which raises a hypothetical or abstract question without a live controversy underpinning it (see *Telus Communications Inc. v. Telecommunications Workers Union,* 2006 ABCA 397 at para. 2). The Board argued that the termination of the conditional approvals for the two wells meant there was nothing left in law to debate about the approvals themselves. There was no existing adversarial context and no suitable parties to address the points upon which leave had been granted.

In *Kelly v. Alberta (Energy and Utilities Board)*, 2009 ABCA 161 (Kelly #2), a panel of the Court of Appeal granted the Board's application. The Court began by acknowledging that it does have discretion to hear a moot appeal if the circumstances so warrant. To exercise this discretion, the Court will consider whether there is a sufficient adversarial context, whether there is an issue of importance with broader application and whether hearing the appeal would be consistent with

the court's proper lawmaking function (see *Telus Communications, supra* and *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342).

In *Kelly #2*, the Court concluded that the factors which would typically lead a court to entertain a moot appeal were absent here. The Court stated that the fact that the landowners had invested significant "time and effort unsuccessfully (in the legal sense) to this stage [was] not a compelling factor" (at para. 5). Most importantly, the Court concluded that the questions raised in this appeal were "not elusive of review" (at para. 5). Rather, they can be expected to arise again in some form. According to the Court, "…the opportunity exists for the appellants to put meat on the bones of a *Charter* argument at any new hearing of the Board, should West Energy Ltd. apply again for approvals"(at para. 6). The Court further noted that: "[w]e are told by the parties the Board has changed its standards relevant to environmental and hazard issues" (at para. 6). Because of the disappearance of its adversarial basis and because it raised premature abstract questions, the Court held that it would be inappropriate for it to hear this appeal.

The questions raised by this appeal about the possibility of the *Charter* applying in the context of ERCB approvals are undoubtedly important and interesting ones from a legal point of view. Hence the disappointment for those of us who would have liked to see the questions answered, even in abstract form. But what about the 26 landowners involved? Of course they would have preferred not having to start this appeal at all and expending the time, effort and money (and hopefully costs will not be awarded against them for the appeal's dismissal on this ground). And of course it would have felt more like justice had been done if the Court of Appeal had handed them a favourable decision. Still, something happened here. The well applications were withdrawn and these two sour oil wells are no longer going ahead, at least not as originally planned. This is ultimately what the landowners in *Kelly* were seeking. Their involvement and participation had an effect. Looked at through the lens of public participation, the result in the *Kelly* appeal is less disappointing.