Monday, February 14, 2011

The continuing mystery of standing at the Energy Resources Conservation Board

By Shaun Fluker

Cases Considered:

West Energy/Daylight Energy - Section 39 review hearing re: Linda McGinn, 2011 ABERCB 002

A couple weeks ago on ABlawg I suggested that the law governing standing to contest an energy project in front of the Energy Resources Conservation Board (ERCB) is becoming unglued (see The problem of costs at the Energy Resources Conservation Board: Leave to appeal granted in Kelly #4).The first change came out of the Court of Appeal's October 2009 decision in *Kelly v. Alberta (Energy Resources Conservation Board*, 2009 ABCA 349, (and see The Problem of Locus Standi at the Energy Resources Conservation Board: A Diceyan Solution). The Court of Appeal has subsequently granted two leave applications made by Susan Kelly that concern the interpretation of sections 26 and 28 of the *Energy Resources Conservation Act (ERCA)*, R.S.A. 2000, c. E-10. These additional appeals have yet to be heard, but I am certain the Court's ruling in both matters will result in further changes to the law concerning who must be heard at the ERCB. The ERCB's recent standing ruling in West Energy/Daylight Energy Section 39 Review Decision, 2011 ABERCB 002 suggests to me that the Board has lost its way on how to apply section 26(2) of the *ERCA*.

In September 2009 West Energy applied for a license to drill an oil well that would also produce sour gas. West Energy calculated the emergency planning zone (EPZ) as having a 2.11 km radius. Susan Kelly, Lillian Duperron, and Linda McGinn objected to the well. In early 2010 the ERCB decided that Linda McGinn met the test for standing under section 26(2) of the *ERCA*, but that Susan Kelly and Lillian Duperron did not. This ERCB determination on standing followed the Court of Appeal's October 2009 *Kelly* decision, and granted standing to McGinn on the basis that she resided within the 3 km flaring notification radius for the well. Kelly and Duperron did not reside within the flaring notification radius or the EPZ, and were accordingly denied standing by the ERCB. Kelly and Duperron later obtained leave from the Court to appeal this decision, and one of the questions to be determined in that appeal will be whether a person who resides outside the EPZ but within a zone where they are exposed to hydrogen sulphide meets the 'directly and adversely affected' test for standing in section 26(2) (see The Problem of Locus Standi at the Energy Resources Conservation Board: Leave to appeal granted in Kelly #2). That provision states that if it appears to the ERCB that its decision on an application may directly and adversely affect the rights of a person, the Board must provide that person with an opportunity to be heard.

Back to Linda McGinn. In April 2010 West Energy applied under section 39 of the *ERCA* to review the earlier ERCB decision to grant McGinn section 26(2) standing to object to the oil

well. On February 2, 2011 the ERCB issued its decision to reverse its earlier ruling and denied standing to McGinn.

McGinn is entitled to flaring notices by West Energy under Directive 060 – *Upstream Petroleum Industry Flaring*, by virtue of her residence within 3km of the well. The issue for the ERCB in this review hearing was whether this entitlement is evidence that she meets the 'directly and adversely affected' test under section 26(2) of the *ERCA*. The original ERCB panel ruled it was evidence of such, following the Court of Appeal's 2009 *Kelly* decision which stated ERCB Directives 056, 060, and 071 create legal rights which may be affected by an application for the purpose of section 26(2) (2009 ABCA 349 at paras 25-28, 39-41). Specifically on Directive 060 the Court of Appeal stated as follows in *Kelly*:

> Directive 60 required Grizzly to provide notice of flaring to residents within 3 km of a well and to report all unresolved concerns to the ERCB. Ms. McGinn resided within the 3km radius of these wells and thus was legally entitled to and did receive notice of the flaring eventually done on the wells. ...
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> In the decision under appeal, the ERCB failed to address the first aspect of the *Dene Tha* test for standing, whether legal rights were created as a result of the operation of these three directives. Had it, the ERCB would have concluded that such rights were created. (2009 ABCA 349 at paras 27,29)

In this most recent February 2 decision to deny standing to Linda McGinn, the ERCB reasons that flaring notices under Directive 060 are simply a courtesy to residents (at para 22). Relying on the Court of Appeal's decision in *Cheyne v Alberta Utilities Commission*, 2009 ABCA 348, the ERCB holds: "[R]esidence in the flaring notification zone is "no evidence of anything" and is certainly not evidence of any direct and adverse impact that may be suffered as a result of flaring." (at para 23)

This Board ruling has to be incorrect in law. To begin with, ERCB Directives are most definitely evidence of something – at the very least they impose policy obligations on the energy industry and in some cases these obligations have the force of law as regulations enacted pursuant to applicable legislative authority. The reference by the Court in *Cheyne* was to an Alberta Utilities Commission regulation concerning the need to provide notice of a utilities application, and perhaps the Court overstated itself when it asserted that regulation was 'no evidence of anything' (*Cheyne* at para 29).

More importantly here, the ERCB has expressly contradicted the Court of Appeal's 2009 *Kelly* decision by asserting that Directive 060 notices of flaring entitlements are just a courtesy measure and are not evidence of rights that may be directly and adversely affected for the purpose of section 26(2) of the *ERCA*.

I think I understand what the ERCB is trying to assert here. The ERCB seems to be saying that a 'right' under section 26(2) should not include an entitlement to notice or consultation under an ERCB directive. In other words, a person's right to notification under an ERCB directive is not what the legislature intended in section 26(2) as a right that may be directly and adversely affected by a project application. The problem for the ERCB is that a literal reading of the Court's 2009 *Kelly* decision does state that a 'right' for the purpose of section 26(2) includes entitlements to notice under an ERCB directive.

Relying on the *Cheyne* decision to solve this problem does not seem very helpful, and in any case I don't see this as a problem for the ERCB to fix. The Court of Appeal needs to clarify what it intended in the 2009 *Kelly* decision. I read the *Kelly* decision as saying that where a person resides within a notification or consultation radius prescribed by the ERCB in a directive, that fact alone is evidence that the person has rights that may be directly and adversely affected by the application in front of the ERCB. The 'right' which is relevant to a section 26(2) standing determination however should not be the right to be notified or consulted by an energy company pursuant to an ERCB directive. Rather, the notification or consultation entitlement is conclusive evidence that a person's rights (speaking more generally) may be directly and adversely affected. In its 2009 *Kelly* decision, the Court of Appeal did not elaborate on what those rights may consist of. That is the unfinished business here.

In one of the upcoming *Kelly* appeals, the Court will decide whether a person who resides outside the EPZ but within an area where they are exposed to sour gas meets the 'directly and adversely affected' test for standing in section 26(2). This decision should get us moving down the path to identifying what are included as 'rights' of a person for the purposes of section 26(2) in the *ERCA*. And as we head in this direction we might ask where in section 26(2) it states that the 'person' who is asserting the 'right' must be a landowner or occupier of land.