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Access to Justice: University of Calgary Environmental Law Clinic in 2011/2012 – "What's legal is not always what is just" – Rick Collier

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Case and Decision considered:

Kelly v Alberta (Energy Resources Conservation Board), 2012 ABCA 19,

Hohloch v Director, Southern Region, Environmental Management, Alberta Environment and Water, re: Eastern Irrigation District (29 March 2012), (AEAB), Appeal No 10-043-ID2

As the Fall 2012 term approaches we here at the law school have started to prepare for the return of students and the resumption of lectures. In my case, this includes getting ready for another year of supervising our environmental law clinic. Before the new term arrives for the clinic, however, I want to look back on some highlights from 2011/2012. The clinic allows one to step out of the law school and into the field of environmental disputes in Alberta. If there was a common theme to all of our files last year, it was access to justice. I've chosen to end this recap with a tribute to Rick Collier who stood up for wilderness in an act of civil disobedience to protest the lack of public input into resource and environmental decision-making in Alberta.

In January 2011 the Alberta Court of Appeal granted leave to Susan Kelly, Linda McGinn and Lillian Duperron to appeal a costs decision by the Alberta Energy Resources Conservation Board (ERCB). I commented at the time that this matter carried some significance for energy and environmental law in Alberta – see my ABlawg post "The problem of costs at the Energy Resources Conservation Board: Leave to appeal granted in Kelly #4", here. The essence of the appeal rested on the interpretation of section 28 of the Alberta *Energy Resources Conservation Act* (RSA 2000, c E-10) which provides the ERCB with authority to award costs to hearing participants. The ERCB had denied a cost award to Kelly *et al* on the basis that section 28 only provides the Board with authority to grant costs to a hearing participant where there is evidence to demonstrate an energy project may have a direct and adverse impact on that person's land. The peculiar result of this ERCB ruling was the Board's view that a hearing participant who could only demonstrate potential impacts to their health or safety or use of their own land would not qualify for a costs award.

The Alberta Surface Rights Group is an organization that advocates on behalf of landowners in Alberta. The Group works with landowners and other interested parties on matters such as surface leases, pipelines, power lines, and land reclamation. The Group also monitors public law and policy concerning landowner rights vis-à-vis energy development in rural Alberta. The ERCB costs ruling was of significant concern to the Group because the Board's interpretation of section 28 would effectively preclude the ability of landowners to exercise their right to participate in Board hearings to oppose energy projects on or near their land. By restricting the eligibility of a landowner for a costs award, the Board was effectively precluding the ability of

people to exercise their participation rights to oppose energy projects because such participation is very expensive. The ERCB encourages landowners to retain experts to give evidence on the negative effects of an energy project. Experts cost money. Without the prospect of a costs award, participating in an ERCB hearing exceeds the financial resources of many Albertans.

The Group had a definitive interest in the outcome of the Kelly appeal, and was very interested in trying to convince the Court to overturn the restrictive ERCB costs ruling. The Group also felt it could make a positive contribution in terms of legal arguments for the Court to consider. Thus, the Group retained the Environmental Law Clinic in the Fall 2011 to seek intervener status to make arguments at the Kelly appeal. In late October several members of the Group's executive met with myself and the JD students enrolled in the Clinic to prepare the intervener application materials. Following that meeting, the clinic students and I drafted pleadings and the supporting affidavit for filing at the Court of Appeal. The Clinic appeared as counsel for the Group in front of Mr. Justice Brian O'Ferrall in early December to argue for intervener status. Justice O'Ferrall granted leave to the Group to file a written argument in the Kelly appeal, and so clinic students and myself then assisted the Group in preparing its intervener factum and filed it with the Court in advance of the Kelly appeal hearing.

The Court of Appeal issued its decision in *Kelly v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19 on January 23, 2012. The Court unanimously ruled that the ERCB's interpretation of section 28 was unreasonable, and accordingly ordered the ERCB to reconsider its costs decision. The Court interpreted section 28 of the *Energy Resources Conservation Act* (Alberta) as stating the eligibility for a costs award in an ERCB hearing includes those hearing participants who demonstrate a potential adverse impact on their use or occupancy of land, and not just those who can demonstrate adverse impacts to the land itself.

The Court made strong statements about the role and accessibility of administrative process towards ensuring the legitimacy of resource development in the province:

> … In today's Alberta it is accepted that citizens have a right to provide input on public decisions that will affect their rights.
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> In the process of development, the Board is, in part, involved in balancing the interest of the province as a whole, the resource companies, and the neighbors who are adversely affected: *Re Suncor Energy Inc.*, Energy Cost Order 2007-001 at pp. 10-11. Granting standing and holding hearings is an important part of the process that leads to development of Alberta's resources. The openness, inclusiveness, accessibility, and effectiveness of the hearing process is an end unto itself. Realistically speaking, the cost of intervening in regulatory hearings is a strain on the resources of most ordinary Albertans, and an award of costs may well be a practical necessity if the Board is to discharge its mandate of providing a forum in which people can be heard. In other words, the Board may well be "thwarted" in discharging its mandate if the policy on costs is applied too restrictively. It is not unreasonable that the costs of intervention be borne by the resource companies who will reap the rewards of resource development. [at paras 33, 34]

This was a positive result for the Alberta Surface Rights Group and collectively for landowners in Alberta. This also proved to be a rich learning experience for JD students at the Clinic,

providing them with an opportunity to engage with a client, draft various legal materials, and appear at the Court of Appeal.

Over the past decade, Alberta Environment has amended water licenses held by irrigation districts (IDs) to allow these IDs to allocate water for commercial purposes other than irrigation. Some question the authority of Alberta Environment to approve these amendments under the Alberta *Water Act* (RSA 2000, c W-3). The general argument here is that such change-of-purpose license amendments should be handled as a transfer of license allocation under the *Water Act*. And this argument is grounded on several points, including that by using the license amendment route rather than a transfer the conservation holdback provision of the *Water Act* is avoided and the amendment approach involves significantly less opportunity for public oversight over water management. This latter point has borne out further as public interest groups have been consistently thwarted by Alberta Environment and the Alberta Environmental Appeals Board in their attempt to have a say into the amendment process. The relevance of this matter is intensified in those water basins that have been closed to new license applications, such as the Bow, Oldman, and South Saskatchewan, in order to conserve water.

Back in 2003, the Southern Alberta Group for Environment (SAGE) made the first attempt to open the license amendment process to public scrutiny. The southern tributaries of the Oldman River had recently been closed to new allocations, and the St Mary River ID applied for an amendment to its 1991 license to expand its allowable uses. Alberta Environment granted the amendment, and subsequently denied standing to SAGE to oppose it. SAGE appealed this standing decision to the Alberta Environmental Appeals Board under provisions of the *Water Act*. The EAB also denied SAGE standing, and the legal fight on this amendment was over. (For further discussion see Nigel Bankes and Arlene Kwasniak "The St. Mary's Irrigation District Licence Amendment Decision: Irrigation Districts as a Law unto Themselves," (2005) 16 J Envtl L & Prac 1 at 1-18.)

The first application for a license amendment in the Bow River Basin was submitted by the Eastern Irrigation District in 2007. Over 50 statements of concern were filed in opposition to the amendment under the *Water Act*, and Alberta Environment subsequently deferred its deliberations on the application to allow for a review of policy on water license amendments. This EID application also provided impetus for the formation of an Alberta public interest group dedicated to advocacy on watershed protection in Alberta. Water Matters formed in the fall of 2007.

The EID resubmitted its application for a change-of-purpose amendment in January 2010. Water Matters was among those persons who filed a statement of concern in opposition. Alberta Environment granted the EID change-of-purpose amendment in November 2010 (License Amendment No. 00071066-00-01) under the *Water Act*. Several public interest groups and individuals subsequently applied to the EAB for a reconsideration of this license amendment approval. The applicants included Water Matters, the Alberta Wilderness Association, Trout Unlimited, Cheryl Bradley, Lorne Fitch, and Walter Hohloch. Alberta Environment and the EID argued that none of these applicants had standing to challenge the EID license amendment. In August 2011 the EAB ruled that only Walter Hohloch – a rancher who lives in the eastern irrigation district – had demonstrated he may be 'directly affected' by the license amendment and thus had standing under the *Water Act* to challenge the EID change-of-purpose license amendment at the EAB. The Hohloch hearing is now scheduled to be heard on September 18, 2012 in Calgary, and one matter for consideration by the EAB at this hearing is whether the change-of-purpose license amendment is in accordance with the *Water Act*.

Water Matters retained the Environmental Law Clinic early in 2012 to seek intervener status to participate in the Hohloch – EID appeal in front of the EAB. Although Water Matters had been denied standing by the EAB to participate in the Hohloch - EID hearing as a party, the organization maintains it has a contribution to make on the issues. This file provided a JD student at the Clinic with the opportunity to research the process for obtaining intervener status in front of the EAB and work with the executive from Water Matters to prepare the written submission to the EAB under the Alberta *Environmental Protection and Enhancement Act* (RSA 2000, c E-12). The essence of the intervener request by Water Matters was its tangible interest and policy expertise as an organization dedicated to watershed protection in Alberta that was formed, in part, to contribute to public dialogue on the very issue to be heard in the upcoming Hohloch-EID appeal – the legality of change-of-purpose license amendments under the *Water Act*. Moreover, Water Matters noted that the *Water Act* calls for a public role in water management decisions.

Alberta Environment opposed any participation by Water Matters at the upcoming EID – Hohloch hearing in front of the EAB. The government's position rested, in part, on the argument that a public role in water management decision was satisfied by the filing of statements of concern and the acceptance by the EAB of one individual member of the public as 'directly affected.' Interestingly, the EAB used this fact against Water Matters in denying its intervener request by emphasizing the upcoming Hohloch-EID hearing is about how the license amendment affects Hohloch himself – suggesting this hearing does not really have a public element and thus a public interest group like Water Matters would have little to add in this regard. We found this reasoning somewhat curious given the EAB itself has indicated it will consider whether the change-of-purpose license amendments are in accordance with the *Water Act* at the Hohloch – EID hearing.

While there hasn't been much success in the EID license amendment process for public oversight, the matter has yet to be fully closed. In May 2011 Alberta Environment also granted a change-of-purpose license amendment to both the Western Irrigation District and Bow River Irrigation District to expand allowable uses. As with the EID license amendment process, Alberta Environment and the EAB denied any standing for public interest groups to participate in those amendment decisions and challenge the legality of the process under the *Water Act*. The Alberta Wilderness Association, Trout Unlimited Canada, and Water Matters have retained Ecojustice to represent them in a judicial review application challenging the restrictive interpretation of standing provided by the EAB under the *Water Act*. See online here.

Over the past few years in the course of my research projects and clinical work I've seen first-hand many barriers that government officials and project proponents have erected that impede public participation in resource decision-making. Access to justice and public participation in environmental and resource decision-making has become a real and pressing issue here.

Early this past winter I was reminded at how widely this concern is shared by Albertans when a climbing friend of mine – Rick Collier – stood up to Alberta Sustainable Resource Development in an act of civil disobedience by using his body to block Spray Lakes Sawmills from commencing its most recent logging in the Castle Wilderness. Rick and several others were subsequently arrested by the RCMP. There is a telling picture of Rick being carried away by police officials in an article written by Nigel Douglas of the Alberta Wilderness Association wherein he interviewed Rick about this event (See online here.) When it comes to resource decision-making in Alberta these days, I think Rick Collier said it best: "What's legal is not always what is just." Sadly, Rick was recently killed in a climbing incident. Rick's passing

touches a nerve inside me, not only because I climb but also because he reminded me what makes the Clinic work so rewarding – helping people stand up for what they truly believe in.