A Lost Opportunity for Clarifying Public Participation Issues in Oil and Gas Decision Making
by Nickie Vlavianos

Graff v. Alberta (Energy and Utilities Board), 2008 ABCA 119
http://www2.albertacourts.ab.ca/jdb%5C2003%5Cca%5Ccivil%5C2008%5C2008abca0119.pdf

Keywords: public consultation, EUB Directive 056, standing, directly and adversely affected, evidentiary burden

Those of us following the year-long journey of the Graff family (the "Graffs") through the Court of Appeal were stunned when the final decision was handed down on March 26, 2008. While the grounds upon which leave to appeal had been granted held out promises of clarification on certain key public participation issues in oil and gas development, none of these grounds were ultimately dealt with by the Court. Instead, both appeals (heard together) were dismissed on the basic procedural point that parties requesting standing before the Energy and Utilities Board (the "EUB", now the ERCB) must provide at least some relevant evidence to support their claim of being "directly and adversely" affected.

The journey of the Graffs through the Court of Appeal began in early 2007 when Barbara, Larry and Darrell Graff sought leave to appeal a decision by the EUB in which it had refused to review a prior decision approving the drilling of a sour gas well by Encana Corporation ("Encana") within 2 kilometres of the Graff home. The Graffs' objections centred around concerns that the proximity of the proposed well to their home and workplace would directly affect them and have an adverse effect on their already-compromised medical condition (known as chemical encephalopathy). This condition is akin to asthma and is exacerbated by emissions from the venting, flaring and incineration of natural gas; it also involves excessive sensitivity to chemicals.

In refusing to review its well approval decision, the EUB relied upon the "consultation radius" set out in EUB Directive 056 which is calculated based on the maximum hydrogen sulphide content of the proposed well and the calculated emergency protection zone (EPZ). In this case, Directive 056 required the operator to consult only with residents within the greater of 0.2 km or the calculated EPZ of 0.14 km. According to the Board, because the Graff property was about 2 km from the well site and the calculated EPZ was 0.14 km, the Graffs had failed to demonstrate the potential for direct and adverse impact as required by section 26 of the *Energy Resources Conservation Act* ("the *ERCA*"), R.S.A. 2000, c. E-10. In short, the Board concluded that the Graffs lacked standing to challenge the approval of this well.

Leave to appeal the EUB's decision was granted by Justice Marina Paperny on January 23, 2007 (2007 ABCA 20). Before Madam Justice Paperny, the Graffs argued that Directive 056 sets minimum standards only and does not preclude consultation with parties who may have legitimate concerns simply because they fall outside of the

"consultation radius" it establishes. Justice Paperny was satisfied that the Graffs raised a serious, arguable point "which is of significance both to the practice and to the action itself" and she granted leave to appeal on the grounds that the EUB "erred in law or jurisdiction by granting the licence without affording the applicants a proper opportunity to be heard, by disregarding, misapplying or misinterpreting Directive 56, by improperly fettering its discretion, [and] by failing to properly apply s. 26 of the *ERCA*" (at para. 9).

Subsequently in July 2007, the Graffs filed another leave to appeal application, this time in regard to another EUB decision in which the Board had refused their request for review of a decision approving another Encana well near their land (2007 ABCA 246). In their request to the EUB, the Graffs had stated that the proposed well would have adverse effects on their health and safety. The Board denied their request on the basis that the Graffs had failed to demonstrate that they were directly and adversely affected by the proposed well. In particular, the Board noted that there was no expected production of hydrogen sulphide from this well and that their land was 18.7 kilometers away from this well. According to the Board, to trigger consultation required by Directive 056, there must be a reasonable connection between a party with special needs and the proposed application.

During oral argument before Madam Justice Constance Hunt at the Court of Appeal, counsel for the EUB acknowledged that its decision had been based on misinformation about the distance between the Graffs' land and the proposed well. Rather than 18.7 km, the actual distance was 2.5 km. Especially, but not only, because of this error, Justice Hunt granted leave to appeal the EUB's decision. Leave was granted on the grounds of whether the EUB erred in law or jurisdiction: (a) by concluding that the Graffs were not directly and adversely affected by the proposed well; (b) in the Board's interpretation and application of Directive 056 to the Graffs; or (c) in failing to take into account the cumulative effect on the Graffs of the proposed well along with other wells near their property.

In October 2007, after applying to be added as a party to the appeals, Encana applied to strike out both appeals on the ground that they were moot (2007 ABCA 363). As a result of poor production, Encana was in the process of abandoning both wells. The Graffs defended and argued that, because the parties continued to be in an adversarial relationship, judicial guidance on the proper interpretation and application of EUB Directive 056 was needed. A panel of the Court of Appeal (Justices Carole Conrad, Hunt, and Peter Martin) agreed. In the Court's view, the appeals were not moot and, even if they were, the Court would exercise its discretion to hear the appeals for a number of reasons. First, the Court agreed that the parties continued to be in an adversarial relationship. Second, the Court held that judicial direction on the proper interpretation of the relevant legislation and the duties of the EUB may, "rather than expending judicial resources, actually save resources by preventing re-litigation of similar matters in the future" (at para. 5). And third, given that the proper interpretation of EUB Directive 056 was at the heart of these appeals, the Court held that its law-making function favored hearing the appeals.

Thus the stage was set for some important and much-needed guidance from the Court of Appeal on EUB Directive 056 and the test for standing set out in s. 26 of the *ERCA*. Ultimately, however, none of the legal issues identified by the leave justices were dealt with by the panel (Justices Keith Ritter, Clifton O'Brien and Patricia Rowbotham) hearing the appeals.

Before this panel, it suddenly (and somewhat surprisingly) came to light that there had been no medical evidence placed by the Graffs before the EUB in support of either of the review and variance applications. In short, as the Court held, there was no evidence upon which the Board could have made a decision that the Graffs were potentially directly and adversely affected by the proposed wells. While the record showed that the EUB was willing to consider such evidence, the Graffs had not (perhaps because of concerns about confidentiality) provided any to the Board. Further, although the Graffs had submitted medical evidence as part of their application for leave to appeal, this was not evidence before the EUB. According to the Court, it was not unreasonable for the Board to require parties requesting a review to provide more than a mere assertion of direct and adverse impact.

Although the Court acknowledged that the questions for which leave had been granted were set out as questions of law, it was not persuaded that they should be addressed in these appeals. In its view, had the Graffs placed relevant medical information before the Board and the Board had declined to hear from them, then the issues of Directive 056, the Board's interpretation of s. 26 of the *ERCA* and its duties of procedural fairness may have been raised. But this was not the case here.

On the question of whether the Court should now order the EUB to consider the Graffs' medical evidence, the Court held that there would be little to gain in doing so given that both wells had now been abandoned. It concluded as follows: "[i]n the event that another well operation is commenced within the appellants' vicinity, they will have other opportunities to be heard by the Board and have their medical evidence considered" (at para. 29).

At the end of the day, it is difficult to quarrel with the Court's conclusion that parties claiming to be directly and adversely affected by a well application must provide some factual evidence to substantiate their claim. There is no question that the test in s. 26 of the *ERCA* is to a large extent a factual one. Nonetheless, a number of legal issues arise in respect of s. 26 (and in particular its relationship with EUB Directive 056) as identified by the leave justices in this case. For instance, do the requirements in Directive 056 define who is "directly and adversely affected" for purposes of s. 26? Is it only those parties that have been consulted by a proponent that can challenge an application before the Board? Unfortunately, *Graff v. Alberta* represents a lost opportunity for judicial guidance on issues of public participation in oil and gas development in Alberta.