August 21st, 2008

Landowners, Procedural Fairness and Alberta's Energy Resources Conservation Board

By Nickie Vlavianos

Cases Considered:

Domke v. Alberta (Energy Resources Conservation Board), 2008 ABCA 232.

In a break from what seemed to be a growing trend, Mr. Justice Keith Ritter has refused leave to appeal to a group of landowners with respect to an Energy Resources Conservation Board ("ERCB") decision. Perhaps because of the unfortunate result in *Graff v. Alberta (Energy and Utilities Board)*, 2008 ABCA 119 (see my post on this decision), Justice Ritter focused on one component of the test for leave - whether the appeal was prima facie meritorious - and dismissed the application. He looked at the facts and at the evidence and decided there was no merit to any of the proposed grounds of appeal. While it is hard to quarrel with all of Justice Ritter's conclusions, ultimately his decision raises some troubling questions about procedural fairness and the ability of landowners to participate effectively in ERCB proceedings.

In a series of cases over the past year, the Court of Appeal has granted leave to landowners to appeal several ERCB (formerly the EUB) decisions (see *Sincennes v. Alberta (Energy and Utilities Board)*, 2008 ABCA 255; *Kelly v. Alberta (Energy and Utilities Board)*, 2008 ABCA 52; *Lavesta Area Group v. Alberta (Energy and Utilities Board)*, 2007 ABCA 194; *Graff v. Alberta (Energy and Utilities Board)*, 2007 ABCA 246; *Bur v. Alberta (Energy and Utilities Board)*, 2007 ABCA 210; and *Graff v. Alberta (Energy and Utilities Board)*, 2007 ABCA 20). In one way or another, all these applications were driven by landowners' concerns about risks and impacts (to their health, their land, their way of life and the environment) from proposed developments. They were also driven by concerns about procedural fairness and landowners' ability to participate fully and effectively in ERCB decision-making processes. The application in Domke echoed these concerns.

The Facts

In *Domke*, a group of landowners, referred to as the Rocky Rapids Concerned Citizens (the "RRCC"), sought leave to appeal a decision by the ERCB (*Highpine Oil & Gas Ltd.*, EUB Decision 2008-018) which approved the drilling of two level-2 critical sour wells located about 6.5 km northeast of Rocky Rapids near Drayton Valley, Alberta. Before the Board, the RRCC had objected to the wells because of concerns about health and safety, air and water quality, environmental impacts, effects on property value, and the adequacy of emergency response

planning. The RRCC had also raised issues based on s.7 of the *Charter*. Section 7 guarantees 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".

With respect to s.7, the RRCC had argued that the inherent risks involved in the drilling and operation of these wells meant that Board approval would result in a violation of the right to life, liberty and security of landowners living near the wells. This would occur because landowners would be placed in a situation of unacceptable and unnecessary risk. The RRCC had also argued that breaches of the second part of s.7, the principles of fundamental justice (or procedural fairness) had occurred in a number of ways. These breaches resulted in the RRCC not having all the relevant information necessary to adequately understand the risks associated with these wells and to participate fully and effectively in the hearing before the Board. In particular, the RRCC submitted that a lack of procedural fairness had occurred or would occur because: a) the Board had not compelled the applicant ("Highpine") to answer certain information requests by the RRCC; b) the Board had failed to provide the RRCC and the public with a complete list of the H2S (hydrogen sulphide) content of wells drilled in the area; and c) section 12.150 of the *Oil and Gas Conservation Regulations*, A.R. 151/71 (the *OGCR*) had been invoked by the applicant, authorizing it and the Board to keep information about these wells confidential for a period of one year. The RRCC challenged this regulation as unconstitutional.

The ERCB rejected each of these arguments and approved the wells. The RRCC applied to the Court of Appeal for leave to appeal the Board's decision. Before Justice Ritter, the group advanced several grounds of appeal including: a) that the Board proceedings resulted in a breach of procedural fairness due to a reasonable apprehension of bias and the Board's failure to follow its own rules and directives; and b) that the Board erred in law by concluding that there was no s.7 *Charter* violation in this case and by misapplying the test for determining whether s. 12.150 of the OGCR violates s.7 of the *Charter*.

The test for leave to appeal a question of law or jurisdiction to the Court of Appeal from an ERCB decision is whether the submitted ground of appeal raises a "serious arguable point of law". Leave will be granted where: a) the point is of significance to the practice and to the action; b) the point is *prima facie* meritorious; and c) an appeal would not unduly hinder the progress of the action. Sometimes judges place less emphasis on the specific components of the test and simply consider whether a point of law is "serious" and "arguable". Other times, as Justice Ritter did in *Domke*, judges will focus on one component of the test, namely whether the point of law is "*prima facie* meritorious".

First ground of appeal

The first ground of appeal submitted by the RRCC was that a combination of factors had led to a reasonable apprehension of bias and a breach of procedural fairness on the part of the ERCB. These factors included the fact that two ERCB panel members were also ERCB employees and that each had had some previous involvement with Highpine, either through the pre-hearing process or through past applications. According to Justice Ritter, the fact that ERCB employees are also panel members does not, by itself, raise a reasonable apprehension of bias. Employees

like the two panel members in question bring expertise to the panel, which, as Justice Ritter pointed out, is crucial to its proper functioning. Unless there is something to suggest an inappropriate relationship between the adjudicator and a party, other than past contact on a professional basis, a reasonable apprehension of bias cannot be shown. Because there was no such evidence here, Justice Ritter was correct in refusing to grant leave on this proposed ground of appeal.

The second submitted ground of appeal was that the Board had failed to follow its own rules and directives regarding information requests and disclosure of hydrogen sulphide (H2S). The RRCC argued that these failures constituted breaches of procedural fairness sufficient to warrant leave. The Board had compelled Highpine to provide some, but not all, of the information requested by the RRCC with respect to Highpine's well applications. In the Board's view, some of the information was irrelevant and some of the information would be made available at the hearing. According to Justice Ritter, the Board's approach met the scheme set out in its Rules of Practice and did not evidence a breach of any duty owed to the RRCC.

As for H2S information in particular, the RRCC submitted that the Board and Highpine had failed to adequately disclose information relating to H2S content of other wells drilled by Highpine in the area and had refused to produce documentation submitted by Highpine to the Board in accordance with Directive 056. The RRCC pointed to regulations that require oil and gas operators to file relevant H2S statistics for all wells with the ERCB. The group argued that this lack of information deprived them of their right to know the case to be met and of their ability to respond effectively. In particular, they did not call an expert or adduce any evidence regarding gas volumes at the hearing because, in their view, they did not have enough evidence upon which an expert could provide an analysis of potential gas volumes with respect to the two wells in issue.

Justice Ritter looked to the case law and concluded that the extent of disclosure required to meet procedural fairness requirements is context specific. Not every case will require full disclosure. Several factors determine the level of disclosure that is adequate, including the consequences to the parties in question. In this case, although "it would clearly be preferable to have the information for all neighbouring wells in hand" (at para. 19) and "it is troubling that the EUB has not taken steps to fully enforce H2S volume filings" (at para. 21), Justice Ritter agreed with the Board that there was sufficient information to enable an expert to provide an appropriate analysis of gas volumes on the basis of information related to the wells at issue.

According to Justice Ritter, the weakness in the RRCC's position was that it chose not to call an expert or to adduce any evidence regarding gas volumes. Had the group done so, and had that expert stated that he or she was unable to determine potential volumes because of a lack of sufficient data, that might have influenced the Board to require more data. On the facts here, there was nothing to suggest that an expert could not perform the necessary calculations based on the available data. Moreover, the ERCB had erred on the side of caution by basing its assessment on a gas volume substantially higher than the level indicated by the available data.

There is something troubling about Justice Ritter's assessment of the way things played out here in front of the ERCB. First, he admits that it would have been better for the group to have had pertinent information before the hearing and that the Board failed to strictly enforce its requirements with respect to the filing of H2S information. Second, although he is convinced that the RRCC had enough information to adequately prepare their case, a review of the Board decision makes this less clear. The Board's decision is very confusing as to what information was or was not available to the RRCC prior to the hearing. On the one hand, the Board concluded that it believed the group received "sufficient information and materials before and during the hearing to know the case they had to meet" (EUB Decision 2008-018, at p. 27). On the other hand, the evidence was that Highpine had not provided its H2S release rate and geologic information until the "eve of the hearing" (*Id.*, p. 25). Was the "eve of the hearing" or "during the hearing" sufficient time for the RRCC to engage experts and prepare for the hearing (even for the purpose of engaging them to testify that there was insufficient data)?

Moreover, with respect to information relating to other wells in the area, the ERCB noted that its Information Services could not provide the RRCC with some of the requested information because it "did not have the information" (at p. 25). Nonetheless, the Board added, the RRCC "could have obtained this information at any time" since "consultants exist who make it their work to mine information available from the EUB" (at p. 25). Clearly, these are some significant and questionable burdens being placed on landowners.

Second ground of appeal

The next ground of appeal advanced by the RRCC was that the Board had erred in its conclusion that there was no violation of s.7 of the *Charter* in this case. Before the Board, the group had argued that, because of the inherent health and safety risks associated with drilling these sour wells, the approval of these wells would violate its members' rights to life, liberty and security of the person protected under s.7. According to Justice Ritter, the Board's analysis on this point was "unassailable" (at para. 27). In his view, the Board had articulated the correct test for a s.7 analysis and it had applied this test correctly to the facts. Although he acknowledged that future risk of infringement can constitute the basis for a breach of s. 7, he noted that in this case the ERCB had considered the potential risk to be minimal. Moreover, the Board had also considered that the required emergency planning zone would further minimize risk and that those who lived close to the wells had the option of temporarily re-locating during drilling. Justice Ritter noted that what the RRCC disagreed with was the Board's assessment of risk, but that assessment is fact laden involving the Board's expertise and would be entitled to substantial deference on any appeal.

Justice Ritter is correct when he says that the assessment of risk in this case would be something to which the Court of Appeal, on appeal, would grant substantial deference. The Board is a specialized tribunal and is in the best position to hear the evidence and assess the level of risk involved. That said, there is something discomforting about the discussion with respect to voluntary relocation in this case, both by Justice Ritter and by the Board. Justice Ritter says that this option is something the ERCB took into account in deciding that the risk was minimal. To say that the risk is minimal because people can simply move out of their homes if they want to is

strange. Of course there is no risk if there is no one around. But how easy is it for people to simply relocate, even temporarily? Also troublesome is the lack of any discussion about compensation for this "voluntary" relocation.

Last ground of appeal

Finally, the RRCC argued that leave should be granted on the issue of whether s.12.150 of the *OGCR* breaches their members' s.7 *Charter* rights. Section 12.150 allows well information required by the Board to be given confidential status for a period of one year. The purpose of the provision is to give operators, that have risked capital, a period of time during which they enjoy an advantage over competitors. Highpine had applied for confidential status for its proposed wells. Before Justice Ritter, the RRCC argued that, because they would not have the right to access Highpine's records for one year, they would not know if they were facing potential risks that were higher than the anticipated rates of sour gas. They submitted that this constituted a future risk type of s.7 *Charter* breach and the principles of fundamental justice demanded disclosure of this information.

Justice Ritter disagreed. He noted that the RRCC did not adduce evidence to show any likelihood that gas volumes would be greater than projected volumes. To his mind, in the absence of such evidence, a prospective breach is not established. But, he said, the evidentiary burden is not an impossible one for landowners to meet. Coupled with expert evidence, it might be possible for landowners to show that all wells in a given area, or drilled in a particular formation, resulted in gas volumes well beyond those projected in the initial licensing process. Still, where, as here, the evidentiary basis for a point is totally lacking and is entirely speculative, leave should not be granted on that point.

Justice Ritter's analysis on this point is confusing. On the one hand, he says that landowners may be able to meet the evidentiary burden required to establish a s.7 *Charter* breach if they have the right evidence. But on the other hand, he has just condoned the fact that it looks like necessary information was either not provided to the landowners or was not available in this particular case. One wonders how landowners could meet the evidentiary burden Justice Ritter refers to if they are not given the information or they receive it too late to make meaningful use of it.

Moving forward

Despite the result, all is not gloomy for landowners after *Domke*. First, it is significant that neither the Board nor Justice Ritter cast any doubt on the applicability of s.7 of the *Charter* in the context of oil and gas operations. Previously, the question of whether s.7 might apply in the context of health and environmental risks associated with oil and gas development was an open one. Now we know that it does apply and we know that with the right evidence it might provide a remedy in appropriate cases.

Second, both the Board and Justice Ritter conceded the importance to landowners of information about oil and gas operations in the vicinity of the particular wells at issue. There was general agreement that some information about the hazards and risks in the area as a whole is critical for landowners to properly assess the possible risks and impacts associated with the particular wells

being applied for. Moving away from just looking at the particular wells at issue is a move towards considering cumulative effects. The RRCC was not concerned about two sour gas wells; they were concerned about two *new* sour gas wells in conjunction with all the other facilities in the neighbourhood.

It is particularly noteworthy that the Board ended its decision in this case by recognizing the "potential impact on the public of multiple developments", and by announcing that future applications will be held to new requirements. These will require the provision of more information to landowners living near sour gas developments about future development plans, as well as current land use and existing infrastructure. Hopefully the Board will consider these new requirements to be binding and will enforce them strictly.

Lurking in the background of *Domke* (and the other leave to appeal applications cited at the outset) is the nagging question of whether, at the end of the day, the law is ultimately the right tool (and the courts the right venue) for resolving the conflicts between landowners, the oil and gas industry and the ERCB. At the core of these cases lies a fundamental distrust by these landowners in the Board's willingness and ability to take their concerns very seriously. On the heels of last year's "spy scandal" and privacy breaches by the Board, we see landowners still worried about the Board's allegiances. Until the government squarely addresses this issue, landowners will continue to seek assistance from the courts. All eyes are now on the pending appeal in *Kelly v. Alberta (Energy and Utilities Board)*, *supra* (see my post on *Kelly*).