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An Important Development in the Kelly Appeal

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Cases Considered:

Kelly v. Alberta (Energy and Utilities Board), 2008 ABCA 410

Last March I posted a blog about a Court of Appeal decision which granted a group of landowners (Kelly *et al.*) leave to appeal a decision of Alberta's Energy and Utilities Board (now the Energy Resources Conservation Board). See "What does the *Canadian Charter of Rights and Freedoms* have to do with Oil and Gas Development in Alberta?". The grounds for leave in the *Kelly* appeal indicated that the Court of Appeal might have to address novel and difficult questions in relation to the possible application of section 7 of the Charter in the context of oil and gas development in Alberta. A recent development in the case, however, leaves me wondering whether the merits of the appeal will ultimately be heard or not.

The Kelly appeal began with an application for leave to appeal a decision of the Board granting approvals for two proposed sour oil wells to be drilled by West Energy Ltd. (West). The application was brought collectively by 26 close neighbours who worried that they would be adversely affected by the proposed wells. The respondents on the leave application were the Board and West. As noted in my previous blog, the Court granted the application on two grounds, including one based on a possible infringement of section 7 of the *Charter*.

Sometime after the successful leave to appeal, West told the Board that it wanted to withdraw its applications for the well licenses (which had not yet been issued). Why? West said it was unable to comply with a particular condition the Board had attached to the approval of these two wells. West had sought a change in this condition from the Board, but without success. The Board allowed West to withdraw its well applications.

Not surprisingly, West then applied to the Court of Appeal to be removed as a party to the pending appeal. In *Kelly v. Alberta (Energy and Utilities Board)*, 2008 ABCA 410, West argued before Mr. Justice Jean Côté that it had no further legal interest in the matter and that in fact it did not oppose the Court of Appeal allowing the *Kelly* appeal. What it was concerned about was that it did not want to be liable for any costs incurred in the future. West did not, however, seek any costs immunity for steps taken before the removal application.

Kelly *et al.* vigorously opposed West's application to be removed as a party. Although the landowners advanced a number of procedural grounds upon which they said the Court should deny West's request, Justice Côté rejected each ground. Ultimately, in his view, West ought to be removed from the appeal because the "uncontradicted evidence is that [West] no longer has any legal interest in the location in question, and no longer has any well license, not even a conditional one" (at para. 8).

Justice Côté granted West's motion on the condition that West would have no immunity from paying costs, even costs to be ordered in the future, so long as such costs were in respect of steps taken on or before this removal application was heard. In short, the immunity would only be for costs in respect of steps taken after this application. As of the date of West's motion, no appeal book or factum had yet to be filed in the appeal.

In his decision, Justice Côté emphasized that he was not removing West because of any lack of merit in the appeal. No one spoke to the merits of the appeal in this application. Rather, he was removing West because West has "no interest, and no longer opposes the appeal" (at para. 14). He noted that, just as parties are allowed to discontinue their law suits (subject to costs), so are parties entitled to abandon their defences. Justice Côté commented as follows (at para. 12):

> Aside from costs, I cannot imagine what harm could flow to Kelly from the absence of this respondent, West Energy. It seems it would assist Kelly, not hurt that group. The only aspect of which that is not true is costs of future steps in the appeal. And a party with no interest should not be added (or kept) merely to get costs from it.

Justice Côté ordered Kelly *et al.*, on a joint and several basis, to pay West $900 in costs for this motion. However, he stayed the execution of that award for 6 months to allow any further motions about the appeal and its costs to be made. If any costs are awarded to Kelly *et al.* against West, these would be set off against this costs award.

A further motion that must have been in the contemplation of Justice Côté (and the parties) is a motion that will almost certainly be brought by the Board to have the Court of Appeal declare that the *Kelly* appeal is now moot (given the withdrawal of the well applications). Although discretion to hear a moot appeal exists, a court may decline to decide a case which raises merely hypothetical or abstract questions, and where a decision would have no practical effect of resolving some controversy affecting the rights of parties: see *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. It would not be a shock if the Court of Appeal declined to exercise its discretion to hear a moot appeal in this case, but it would be most unfortunate.