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The problem of Locus Standi at the Energy Resources Conservation Board: A Diceyan solution

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Cases Considered:

Kelly v. Alberta (Energy Resources Conservation Board, 2009 ABCA 349

Introduction

A person must have 'standing' to oppose an energy project being considered for approval by the Alberta Energy Resources Conservation Board (ERCB). In January 2009 the ERCB denied standing to Susan Kelly, Linda McGinn, and Lillian Duperron in relation to an application by Grizzly Resources to drill two sour gas wells near their residences. All three applicants reside outside the designated 2.11 km area emergency planning zone (EPZ) surrounding the gas wells and designated by Grizzly pursuant to ERCB Directive 071 – *Emergency Preparedness and Response Requirements for the Petroleum Industry*. Directive 071 defines an EPZ as the area surrounding a sour gas well that due to its proximity requires an emergency response plan from the well licensee. The delineation of an EPZ by and large defines the applicant's consultation requirements set by the ERCB and, as I note below, it also informs the ERCB's interpretation of the standing test in section 26(2) of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E – 10. The distinguishing feature in this case involves the relatively new requirement in Directive 071 for sour gas well licensees to model a protective action zone (PAZ) which anticipates the movement of a sour gas plume upon release from the well. Kelly, McGinn and Duperron reside within the designated PAZ modelled by Grizzly, which covered a larger area than the EPZ. This fact proved significant in the subsequent Alberta Court of Appeal proceedings.

Kelly, McGinn and Duperron appealed their denial of standing by the ERCB to the Alberta Court of Appeal, arguing that the ERCB erred in its interpretation of the section 26(2) test. In *Kelly v. Alberta (Energy Resources Conservation Board)* issued on October 28, 2009, the Court of Appeal agreed with the applicants, holding that the ERCB erred in its interpretation and application of the legislated standing test. The Court accordingly quashed the January 2009 ERCB decision on standing and ordered the Board to hear the appellant's concerns over these sour gas wells. In the aftermath of this judicial decision, the ERCB suspended the issuance of any new sour gas well licenses effective November 3 while the Board considered the implications of the *Kelly* decision. On November 13 the ERCB responded by announcing that the PAZ calculation in the *Kelly* matter was based on incorrect ERCB policy, and further stated that the Board never intended that the geographic size of a PAZ would exceed that of the EPZ for a particular facility.

This subsequent move by the ERCB effectively negates any expansion of the standing test promised by the *Kelly* decision beyond the facts of this particular case. The ERCB's response to the *Kelly* decision will also only aggravate the standing problem that led to this Court of Appeal's ruling in the first place. The Alberta legislature, the ERCB and the Alberta Court of Appeal all share the blame here, and perhaps we need some Diceyan rule of law to resolve the matter.

The Diceyan rule of law

Albert Venn Dicey was a 19th century British constitutional scholar known for his extreme distrust of administrative authority. The Diceyan rule of law called on the judiciary to restrain the power of the executive and its delegates and in no uncertain terms declared legal questions off limits for administrative decision-makers. In a 1999 article, Chief Justice Beverly McLachlin summarized the Diceyan view nicely (see "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999) 12 C.J.A.L.P. 171 at 175):

> The history of courts and administrative tribunals has been thought by many to be one of suspicion and distrust. Until recently, courts strictly adhered to Professor Dicey's model which charged them with the duty of ensuring that neither the executive nor its agents assumed "legislative" powers. Indeed, the argument went, to abandon those powers to the executive or its tribunals would threaten the essential freedom of the liberal individual. Negative liberties, which atomized liberal individuals moved into civil society to protect and which have been jealously guarded since the signing of the *Magna Carta*, would be vulnerable to unreviewable arbitrariness and caprice at the hands of the agents of the executive. Society itself would be defeated if the law was abandoned to the executive. Courts were thought to be uniquely qualified to discern the meaning of democratically-enacted statutes and, in performing this function, both protect the legislature's intentions from being corrupted through the administrative process and protect the individual from the heavy might of the executive state. The Rule of Law demanded no less of the courts.

The Diceyan view governed public law in Canada until the latter part of the 20th century when the Supreme Court of Canada ushered in an era of deference towards administrative decision-making by, in part, starting to respect the intention of a legislator to empower the executive and its delegates with law-making powers. While I fully understand why the Diceyan rule of law is generally untenable in the modern regulatory state, when it comes to Alberta's ERCB and its legal decisions regarding the socio-ecological impacts of energy projects I find myself yearning for the Diceyan rule of law to interpret various sections of the *Energy Resources Conservation Act*.

The legislated standing test is outdated

Since the ERCB is a creature of statute the legal test for hearing standing is set out in the governing legislation (rather than being established in the common law). Section 26 of the *Energy Resources Conservation Act* states the test:

> **26(1)** Unless it is otherwise expressly provided by this Act to the contrary, any order or direction that the Board is authorized to make may be made on its own motion or initiative, and without the giving of notice, and without holding a hearing.
>
> **(2)** Notwithstanding subsection (1), if it appears to the Board that its decision on an application may directly and adversely affect the rights of a person, the Board shall give the person
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> (a) notice of the application,
>
> (b) a reasonable opportunity of learning the facts bearing on the application and presented to the Board by the applicant and other parties to the application,
>
> (c) a reasonable opportunity to furnish evidence relevant to the application or in contradiction or explanation of the facts or allegations in the application,
>
> (d) if the person will not have a fair opportunity to contradict or explain the facts or allegations in the application without cross-examination of the person presenting the application, an opportunity of cross-examination in the presence of the Board or its examiners, and
>
> (e) an adequate opportunity of making representations by way of argument to the Board or its examiners.

The section 26(2) 'directly and adversely affected' test for standing has been in place since 1969 when it was enacted into the *Oil and Gas Conservation Act*, S.A. 1969, c. 83. Its enactment some 40 years ago constrained what had been complete discretion on the part of the ERCB to decide when to conduct an oral hearing in relation to an energy project application. This significant legislative change was likely passed in response to wider calls in the late 1960s for legislators to impose statutory procedural rules on administrative decision-makers (it was also at this time that Alberta enacted its umbrella procedural requirements for designated administrative decision-makers in what is now the *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3).

Much has changed for the ERCB and its role in energy regulation for Alberta since 1969. Most notably for present purposes, the ERCB is now regularly called upon to address the socio-ecological effects of energy development which, in turn, means more people believe they should have a say on whether a particular energy project is approved and what conditions, if any, should be imposed on an ERCB approval. The 'directly and adversely affected' test fails to reflect this broader ERCB role. To echo a point previously raised by Nigel Bankes on ABlawg, the legislated test for standing at the ERCB is broken and requires a legislative fix.

The ERCB has a very narrow view on standing

The ERCB steadfastly refuses to address the socio-ecological impacts of energy projects. A narrow interpretation of the section 26(2) standing test is one of the tools employed by the ERCB in this regard and must surely be to the satisfaction of industry because it severely limits the number of persons that can legally contest an energy project (See Bankes *supra* and also

Standing Against Public Participation at the Alberta Energy and Utilities Board. The ERCB has a very narrow view of what persons have an adequate legal interest to obtain standing and request a hearing pursuant to section 26(2). ERCB Directive 056 - *Energy Development Applications* directs which persons an applicant must consult with and confirm that those persons will not object to the energy project. These persons generally have a 'direct interest in land' within a geographic radius set by Directive 056 which, in the case of a gas well, appears to be similar to the EPZ. In short, the ERCB view on an adequate legal interest necessary to obtain standing pursuant to section 26(2) appears to be that of a landowner within the designated EPZ. The Court of Appeal's *Kelly* decision expands this to include residing within a PAZ (which up until November 13 was possibly a larger area than the EPZ – but apparently this is no longer the case).

The Alberta Court of Appeal seems reluctant to decide the matter

The issue over whether the consultation requirements of Directive 056 should determine which persons have an adequate legal interest to obtain standing under section 26(2) of the *Energy Resources Conservation Act* remains undecided in Alberta. As Nickie Vlavianos notes in "A Lost Opportunity to Clarify Public Participation Issues in Oil and Gas Decision-Making", the Alberta Court of Appeal has previously granted leave to appeal on this very issue only to decide the appeal on different grounds (*Graff v. Alberta (Energy and Utilities Board)*, 2008 ABCA 119).

While I haven't conducted any empirical research to confirm this, it is my general impression that the Court of Appeal has denied a significant number of leave to appeal on standing applications over recent years concerning the ERCB. In one of the few recent instances where the Court of Appeal did agree to hear a standing issue, the Court interpreted the section 26(2) test in *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, 2005 ABCA 68, stating the test was split into a legal and factual component (at para 10):

> The legal test asks whether the claim right or interest being asserted by the person is one known to the law. The second branch asks whether the Board has information which shows that the application before the Board may directly and adversely affect those interests or rights. The second test is factual.

The Court also held the degree of geographic proximity between a person and the contested facility was a proper question of fact for the ERCB to consider in its standing deliberation (at para 14).

The *Kelly* appeal provided another rare opportunity for the Court of Appeal to review the test for standing at the ERCB. In this case, the ERCB decided against standing for Kelly, McGinn and Duperron on the following grounds (*Kelly* (ABCA) at para 13, emphasis added by the Court of Appeal):

> *. . . while you may reside within a PAZ for the wells, this fact alone is not sufficient to establish that you have rights that may be directly and adversely affected by the ERCB's approval of the Applications.*

> If an objecting party or review applicant does not own land or reside in a setback area or notification or consultation radius as prescribed in ERCB Directive 56, or the calculated EPZ for the facility, *the onus is on an objecting party or review applicant* to establish that he or she has legal rights that may be directly and adversely affected by a decision by the ERCB to approve an application. The impact must be specific and *the objecting party must establish that he or she may be affected in a different way or to a greater degree than members of the general public . . .*
>
> You have asserted that, because you reside in the PAZ you may die or your health may be adversely affected in the event of an incident at the facility and therefore you should be granted standing in relation to the applications that resulted in the Approvals. However, *beyond residing in the PAZ and the general concerns raised in the Review Application, you have not provided any substantive evidence that your rights may be directly and adversely affected by the Approvals.*

The Court makes two significant findings on standing in *Kelly*:

1. The Court held that a person who establishes on the evidence that they have the right to consultation under ERCB Directives 056 and 071 has an adequate legal interest that satisfies the first branch of section 26(2) and that such evidence is sufficient to satisfy the factual branch of whether those rights may be directly and adversely affected (see paras. 24 to 29 and 34 to 44).

2. The Court held that nothing in section 26(2) supports the ERCB's interpretation that 'directly and adversely affected' means in a different way or to a greater degree than the public generally (see paras. 30 to 32).

While the *Kelly* decision does expand the test for standing in front of the ERCB, only the second finding above seems very compelling to me in relation to advancing the law because it is only in this second finding where the Court actually tells us something new about the legal test for standing in section 26(2). And in particular it is *the Court's* interpretation of section 26(2), rather than the ERCB's interpretation with the Court's endorsement.

In its first finding, the Court remains true in its deference to ERCB directives and its endorsement of the ERCB using those directives to interpret the standing test in section 26(2) – with the only exception from the norm here being that the ERCB seemingly failed to follow its own directives in denying standing to Kelly et. al. I find this judicial deference very curious given that the ERCB does not have rulemaking authority in relation to establishing legal rights for standing. While these directives may have the force of law in respect of guiding applicants in calculating an EPZ and/or a PAZ, in my view directives 056 and 071 are simply policy guidance when it comes to who is directly and adversely affected by energy projects. The Court of Appeal's endorsement of the ERCB's use of these directives to interpret section 26(2) incorrectly provides these directives with the force of law on determining standing.

The folly in the Court's ways here is aptly illustrated by the ERCB's November 13 announcement that Directive 071 incorrectly designates the geographic size of a PAZ as exceeding that of an EPZ. With the swift stroke of a policy pen, the ERCB has seemingly reverted the law on standing back to that of residing within a designated EPZ.

A Diceyan solution

Under a Diceyan rule of law we would not have a standing problem at the ERCB. The Diceyan Court would interpret the section 26(2) test to be a question of law (or at most a question of mixed law and fact) and beyond the competence of the ERCB to determine. That Court would have no reservation in telling us exactly what section 26(2) requires of persons who wish to oppose an energy project in Alberta, with little regard for the views of the ERCB since, after all, section 26(2) is the democratically-elected legislature telling the ERCB who it will hear - not the ERCB deciding for itself who it will hear. And if there was a drafting problem with section 26(2) the Court would direct the legislature to fix it with a close eye towards ensuring that energy projects do not adversely affect one's right to life, liberty and security of the person except in accordance with the common law principles of fundamental justice administered by the Court alone.

"In a society governed by the rule of law", the Diceyan Court would say, "the Alberta legislature cannot possibly enact a standing test that provides the ERCB with the discretion to decide who it will hear and limit the ability of individual Albertans to contest energy projects by simply amending one of its own policies. If such were the case the legitimacy of the government itself, let alone the ERCB and the Court, would falter in the eyes of the citizenry."

And indeed there is a crisis of legitimacy forming in Alberta when it comes to the ERCB and the executive and judicial bodies charged with overseeing the ERCB.

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