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The problem of Locus Standi at the Energy Resources Conservation Board: Leave to appeal granted in Kelly #2

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Cases Considered:

Kelly v. Alberta (Energy Resources Conservation Board), 2010 ABCA 307

On October 15, 2010 the Court of Appeal granted leave to Susan Kelly and Lillian Duperron to appeal the decision of the Energy Resources Conservation Board (ERCB) denying them an opportunity to oppose the drilling of a sour gas well. West Energy proposes to drill the well at a location approximately 6 kilometers from their respective residences. Justice Frans Slatter granted leave to appeal on two questions, one of which concerns the proximity between a residence and the contested well and its application towards whether a person's rights may be directly and adversely affected by the well. Readers not familiar with the law concerning standing to oppose an energy project being considered by the ERCB may wish to consult previous ABlawg posts for background on this matter (For an overview and links to previous postings see Nickie Vlavianos' July 2010 ABlawg post, "Still more questions about standing before the ERCB").

This appeal comes on the heels of the 2009 Court of Appeal decision that ordered the ERCB to hear Susan Kelly, Lillian Duperron, and Linda McGinn in their opposition to the drilling of two sour gas wells by Grizzly Resources (See my previous ABlawg post on *Kelly v. Alberta (Energy Resources Conservation Board)*, 2009 ABCA 349). This earlier 2009 decision turned on the Court's finding that the applicants resided within the ERCB's designated 'protective action zone' which anticipates the movement of a sour gas plume upon release from a well (The protective action zone or 'PAZ' is set out and/or mentioned in ERCB Directive 056, Energy Development Applications and Directive 071, Emergency Preparedness and Response Requirements). The significance of Kelly #1 was the Court's ruling that a person who establishes on the evidence that they have the right to consultation under Directives 056 or 071 (for example because they reside within the PAZ) establishes they have a right that may be directly and adversely affected and thus must be heard by the ERCB under section 26(2) of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10.

The primary issue in standing disputes concerning the ERCB's well licensing is proximity between the person(s) opposing the well and the surface location of the well. In the context of sour gas wells, the ERCB's general position is that only landowners within the emergency planning zone (delineated by the company proposing the well following guidance in ERCB directives) have the right to an in-person hearing to contest the well. Disputes arise because the radius of the emergency planning zone (EPZ) is significantly less than the calculated endpoint of a hydrogen sulphide release. The level of hydrogen sulphide that would escape within the EPZ should a release occur is fatal. Outside the radius of the EPZ, levels of hydrogen sulphide are

perhaps not fatal but still seriously adverse to health and safety such that energy companies must have an emergency response plan. The fact that the ERCB's approach to standing means that Alberta families could be exposed to poisonous hydrogen sulphide in their homes and not even be entitled to speak against the drilling of the sour gas well is truly outrageous and in my view cannot possibly accord with any sense of fairness or justice.

In this case, the calculated EPZ for the drilling of the sour gas well is a radius of 2.11km. Kelly and Duperron both reside outside the EPZ, but within a distance that exposes them to the possibility of a release of hydrogen sulphide in amounts that would require them to be evacuated from their homes. The ERCB denied their written claim that based on this proximity and the potential for exposure, their rights as landowners may be directly and adversely affected by the proposed sour gas well. Incredibly, the ERCB responded to the applicants by suggesting that the possibility of an evacuation would be to their benefit should a release of hydrogen sulphide occur:

> The provisions relating to evacuation and sheltering in place are precautionary and preparatory only. The fact that Directive 071 requires operators to plan for and take preventative measures in the event of an emergency to ensure that safety is not compromised does not, in itself, constitute a potential direct and adverse affect. Planning for an incident and modeling under ERCBH2S are based on unmitigated, uncontrolled worst case scenarios. By contrast, public protection actions such as sheltering indoors or mandatory evacuation (under a declared local state of emergency) are considered during an event and are based on the actual physical conditions present at the time.
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> Further, while evacuation and/or sheltering in place may be a direct effect, it is not an adverse effect. If an incident does not occur, no evacuation is ever required and there is no impact. If an incident does occur, evacuation may be required if the conditions necessary to trigger an evacuation requirement actually exist. *However, evacuation or sheltering in place, if that becomes necessary, has a beneficial impact by removing evacuated or sheltered in place persons from potential risks of exposure to small amounts of H2S.* Based on the foregoing, the Board finds that the prospect of having to be evacuated or sheltered in place does not constitute a potential direct and adverse impact of the Application and does not constitute a ground on which the ERCB's decision to dismiss your objections to the Application should be reviewed.
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> [ERCB letter to Kelly and Duperron dated June 1, 2010, attached as a schedule to the applicant's Notice of Motion for Leave to Appeal, emphasis added]

This appeal will provide the Court with an opportunity to re-evaluate its deference to the ERCB's narrow interpretation of the standing test using its own Directives 056 and 071. The question on appeal concerning whether a person who resides outside the EPZ is entitled to a hearing to oppose a sour gas well will hopefully result in some additional judicial consideration of what the Alberta legislature intended by the phrase "may directly and adversely affect the rights of a person" in section 26(2) of the *Energy Resources Conservation Act*. Section 26(2) is after all the Alberta legislature telling the Board who it must hear, and in my opinion should not be interpreted as giving the Board the sole discretion to decide who it will hear before deciding on a license application (which is more or less how the section has been interpreted by the Board and the Court to date).

While in agreement that leave ought to have been granted here, I do have two concerns with the reasons provided by Justice Slatter. First, he incorrectly states that the standing test in section 26(2) requires that an applicant *will* be directly and adversely affected by a project (para. 2). The correct reading is that the section only requires that an applicant's rights *may* be directly and adversely affected. Second, he dismisses a breach under section 7 of the *Canadian Charter of Rights and Freedoms* as a ground for appeal on the procedural basis that the applicants did not raise the *Charter* at the original hearing or on the review and variance (para 14). What hearing? The whole point of the leave application is the fact that the ERCB is denying Kelly and Duperron a hearing. Standing matters are typically processed by way of written correspondence between the ERCB, the opponent to the project, and the energy company. If there is a 'hearing' in this process, it is only by written correspondence. Moreover, as the applicants here likely argued, the section 7 breach can only occur upon the ERCB decision to deny them a hearing to contest the well. This leave application was the first opportunity for the applicants to raise a *Charter* breach, so I do not see how the applicants could have raised a *Charter* argument beforehand.