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# The problem of costs at the Energy Resources Conservation Board: Leave to appeal granted in Kelly #4

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**Cases Considered:**

*Kelly v. Alberta (Energy Resources Conservation Board)*, 2011 ABCA 19

The Court of Appeal has granted leave on a matter that I believe has the potential to produce one of the most significant decisions from the Court in some time concerning energy and environmental law in Alberta. This outcome is largely due to the persistence of Susan Kelly and many other residents, along with their counsel Jennifer Klimek, who have appeared in front of the Court numerous times in recent years seeking leave to appeal decisions by the Energy Resources Conservation Board (ERCB) that issue sour gas well licences near their homes in the Drayton Valley region southwest of Edmonton. Kelly *et al* have been very successful in obtaining the Court's permission to appeal several ERCB decisions, and one result of their efforts is that the law governing the ERCB is changing. (See my previous ABlawg posts The Problem of Locus Standi at the Energy Resources Conservation Board: A Diceyan Solution and The Problem of Locus Standi at the Energy Resources Conservation Board: Leave to appeal granted in Kelly #2.

The primary issue to be dealt with on this appeal concerns the legal authority of the ERCB to make cost awards in favour of persons contesting an energy project. Most who have engaged in the ERCB hearing process will tell you that opposing a project application in front of the Board is an expensive and typically unfruitful way to challenge the unwanted intrusion of the energy industry into your life. Costs will be incurred to hire legal counsel and retain expert witnesses to challenge the applicant's assertions, in addition to the personal time commitment necessary to oppose the application. Access to justice is both complicated and expensive.

The facts here actually came about because of the Court's October 2009 decision in *Kelly v. Alberta (Energy Resources Conservation Board*, 2009 ABCA 349, where Justice Jean Côté ruled Susan Kelly, Linda McGinn and Lillian Duperron were entitled to an ERCB hearing to contest an application by Grizzly Resources to drill two sour gas wells near their residences. (For an overview of that judgement see "The Problem of Locus Standi at the Energy Resources Conservation Board: A Diceyan Solution", above). Grizzly Resources had already drilled the gas wells in January 2009. The ERCB hearing ordered by Justice Côté was nevertheless held in April 2010, wherein the Board after hearing the concerns of Kelly *et al* confirmed that the well licenses issued in 2009 remained valid (ERCB Decision 2010-028, Grizzly Resources Ltd.). The ERCB subsequently denied an application by Kelly, McGinn and Duperron under section 28 of the *Energy Resources Conservation Act*, R.S.A. 2000, c.E-10 for a cost award of $36,000 to cover their legal fees and personal time committed to the hearing. (ERCB Cost Decision 2010-007)

Section 28 of the *Energy Resources Conservation Act* provides the ERCB with authority to award costs to hearing participants. The Board will sometimes provide funds in advance of a hearing under this section to give a participant some financial resources to prepare their case. Otherwise, the ERCB handles cost award applications after the hearing closes. Section 28 reads:

> 28(1) In this section, "local intervener" means a person or a group or association of persons who, in the opinion of the Board,
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> (a) has an interest in, or
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> (b) is in actual occupation of or is entitled to occupy
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> land that is or may be directly and adversely affected by a decision of the Board in or as a result of a proceeding before it, but, unless otherwise authorized by the Board, does not include a person or group or association of persons whose business includes the trading in or transportation or recovery of any energy resource.
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> (2) On the claim of a local intervener or on the Board's own motion, the Board may, subject to terms and conditions it considers appropriate, make an award of costs to a local intervener.
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> (3) Where the Board makes an award of costs under subsection (2), it may determine
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> (a) the amount of costs that shall be paid to a local intervener, and
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> (b) the persons liable to pay the award of costs.

Part 5 of the ERCB *Rules of Practice*, Alta. Reg. 252/2007 and ERCB Directive 31 also include provisions on cost awards in energy matters.

In this case, the ERCB denied the Kelly cost application on the basis that there was no evidence in front of the Board to demonstrate that the Grizzly wells would have a direct and adverse impact on their land. The emphasis of demonstrating an impact on the land itself, rather than an impact on the health or safety of residents themselves, is clearly the focus of the ERCB's interpretation of section 28 of the *Energy Resources Conservation Act*:

> [Directive 031] also makes clear that there are two criteria for eligibility for local intervener funding: 1) the intervener has an interest in land or occupies or has the right to occupy land; and 2) the land in question will or may be directly and adversely affected by the Board's decision on the proposed project that is the subject of the hearing. (ERCB Decision 2010-007 at page 5)

The Board's interpretation of section 28 will be reviewed by the Court in the upcoming appeal proceedings. However, the Court did not end there.

Justice Côté also granted leave specifically on whether the content of an ERCB directive should govern the interpretation of a section in the *Energy Resources Conservation Act* with general application. In other words, what is the legal status of ERCB directives? They obviously guide energy companies in making applications to the Board, but what legal authority do they have to grant or alter rights and obligations of Albertans generally? This question goes to the core of how

the ERCB currently applies several sections of the *Energy Resources Conservation Act*. The issue specific to this case involves the Board's application of its Directive 031 to apply section 28 of the legislation.

This question is also very relevant concerning whether the consultation requirements imposed on energy companies as part of their community involvement program in ERCB Directive 056 – Energy Development Applications should determine which persons have an adequate legal interest to obtain standing under section 26(2) of the *Energy Resources Conservation Act* to oppose an energy project. As Nickie Vlavianos notes in A Lost Opportunity to Clarify Public Participation Issues in Oil and Gas Decision-Making, the Court of Appeal has previously granted leave to appeal on this question only to decide the appeal on different grounds (*Graff v. Alberta (Energy and Utilities Board)*, 2008 ABCA 119).

Justice Côté also granted leave to consider whether the ERCB's legal authority to make cost awards is limited to persons that meet the criteria of a "local intervenor" under section 28(1) of the *Energy Resources Conservation Act*.

This appeal will provide the Court with an opportunity to set out what the Alberta government intended when enacting section 28 of the *Energy Resources Conservation Act*. The approach of the Court in this matter should also inform the powers and obligations of the ERCB under other sections of the Act, such as section 3 and section 26. This approach will be in sharp contrast to the Court's earlier jurisprudence which has generally allowed the ERCB to dictate the meaning of these provisions with its own directives.