

Court of Appeal Opens ERCB's Standing Door a Crack

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

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The issue of standing, or who gets to participate in regulatory proceedings, has been one of long debate in Alberta. It has been most apparent in relation to Energy Resources Conservation Board (ERCB) hearings, given the volume of applications dealt with by the ERCB. A common criticism is that the ERCB has applied its standing test much too narrowly, particularly in light of its public interest mandate. The Court of Appeal recently addressed this issue in *Kelly v. Alberta (Energy Resources Conservation Board)*¹ and provided explicit direction to the ERCB on standing matters.

Background

Standing in ERCB hearings is established under s. 26 of the *Energy Resources Conservation Act*, which requires the ERCB to provide a range of participation rights to a person who may be "directly and adversely affected" by a decision on an application.² Where there are no objections to an application by any potentially directly and adversely affected persons, the ERCB will process the application without a hearing.

The ERCB acts as the doorkeeper for public participation in its hearings. The term "directly and adversely affected" is not defined in legislation, and its meaning is determined by the ERCB on a case-by-case basis. Much reliance is placed on public consultation requirements for industry set out in ERCB *Directive 56*, which vary based on proximity to proposed energy facilities.³ The ERCB has also identified the following factors that it takes into account when determining whether a person is directly and adversely affected:⁴

- Will the proposed project potentially affect safety or economic or property rights?
- Is the person affected in a different or greater way than the general public?
- Is there a clear and direct connection between the proposed project and the rights the person claims will be affected?

The *Kelly* decision

In *Kelly*, three landowners living near two proposed sour gas wells had been held by the ERCB not to be potentially directly and adversely affected and thus ineligible for standing. All three lived outside the emergency planning zone (EPZ), a zone designated around a facility that requires emergency response planning by the operator. An EPZ is significant for standing purposes because it is often used as reference in determining proximity for consultation requirements for sour oil and gas wells and by the ERCB in determining standing.⁵

However, these people based their claim for standing on their location in the protective action zone (PAZ) as modelled by the operator in its licence applications. The PAZ is defined as "an

area downwind of a hazardous release where outdoor pollutant concentrations may result in life threatening or serious and possibly irreversible health effects on the public".⁶ Its use was introduced by the ERCB in mid-2008; the specific size and location of a PAZ depends largely on the speed and direction of wind when a release occurs from a well or other facility.⁷

The landowners asserted that the possibility of exposure to life threatening or serious health effects from well releases, due to their location in the PAZ, meant that they could be directly and adversely affected by the ERCB's decision to issue the well licences. In response, the ERCB held that this information was not sufficient to establish standing, indicating that the landowners had not shown that they would be affected to a greater degree than the general public nor had they provided any further evidence, beyond residence in the PAZ, regarding potential effects on their rights.⁸

Upon review, the Court of Appeal found that the ERCB had erred in its consideration of the landowners' claim for standing, with respect to the test for standing itself and the evidence necessary to establish possible adverse effect on their rights. It overturned the ERCB's decision that the landowners did not have standing and returned the matter to the ERCB for consideration and redetermination, attaching various directions to the ERCB. Of note in the decision are the following matters:

- The Court held that the test for standing before the ERCB does not include a requirement for a person to show a potential effect to a different or greater degree than the general public;⁹
- The landowners' location in the PAZ was adequate evidence to establish standing and the right to be consulted or notified under ERCB directives may also suffice to give persons standing;¹⁰
- The Court found that the drilling and completion of the wells did not render the landowners' appeal moot, citing the continuing adversarial relationship between the parties and a concession made by the operator of ongoing health and safety risk during well operation;¹¹ and
- Unlike many other administrative appeals where the matter has simply been remitted to the board or tribunal for reconsideration, the Court here placed a number of specific directions on its referral of the matter back to the ERCB, related to standing, treatment of evidence and the potential scope of the ERCB's decision on the wells in question.¹²

What does the decision mean?

The immediate significance of *Kelly* is in relation to sour oil and gas wells and facilities. It appeared that much more extensive consultation and broader participation might become the norm to address the rights of people falling within each project's PAZ. The ERCB temporarily suspended issuing licences to sour oil and gas applications to allow it time to develop a response to the Court's ruling in *Kelly*, although it continued accepting and processing these applications.¹³

Ten days later, this suspension was lifted by the ERCB, which indicated its response and future direction. The ERCB indicated that it had made an error in the computer model used to calculate EPZs and PAZs, and had corrected it by adjusting the concentration of hydrogen sulphide used to calculate the PAZ.¹⁴ Interestingly, this change results in PAZs that will not reach beyond the boundaries of an EPZ. Revisions have been made to *Directives 56* and *71* with a view to providing greater clarity on the ERCB's original intent for the PAZ concept and better defining how persons may be directly and adversely affected. Changes have been made

to consultation and notification requirements for sour oil and gas applications, particularly in relation to residents within EPZs and PAZs.¹⁵

It was open to the ERCB to seek to appeal the Court of Appeal's decision to the Supreme Court of Canada. This would have required leave to appeal from the Supreme Court, which is generally limited to matters that are of public importance or raise an important point of law and would be of national applicability. It is questionable whether the issues raised in *Kelly* would be of national significance, particularly given that other Canadian jurisdictions have more open standing tests and also are more willing to apply public interest standing tests.

Is there an impact beyond sour oil and gas?

While the rights identified in *Kelly* arise from the ERCB's regulatory system for sour oil and gas, the decision may prove persuasive in other energy development situations where parties seek to expand the factors the ERCB should consider in determining standing. The Court of Appeal was very direct in rejecting the ERCB's approach of requiring persons to prove a different or greater effect on themselves than on members of the general public.¹⁶ This puts the future focus directly on the rights claimed by a person who has filed an objection, the validity of those rights, and whether the ERCB's decision on an application may directly and adversely affect those rights.

Taking this in conjunction with the explicit legislative duty imposed on the ERCB to determine whether projects are in the public interest, having regard to economic, social and environmental factors,¹⁷ the Court of Appeal may have opened the standing door wide enough to expand standing considerations beyond those predominantly focused on property ownership in proximity to proposed development. Commentators have discussed the scope of the public interest and the lack of any one "expert" that may assist a regulator by bringing forward the full range of views and values that are relevant to assessing the public interest. Broad participation rights will enable the regulator to hear and consider the wide range of factors relevant to determine the public interest and help avoid capture of the process by any particular interest.¹⁸

Given the public interest aspect of the ERCB's mandate, it may be time for the Alberta Legislature to revisit the standing test for energy development. An appropriate step would be to remove the reference in section 3 of the *Energy Resources Conservation Act* to direct and adverse effect on rights and provide instead that standing be granted to any person or group who has a legitimate interest which ought to be represented in the hearing, or has an established record of legitimate concern for the interest they seek to represent. The standing door needs to open far enough to allow full and proper consideration of environmental and social factors alongside economic matters.

¹ 2009 ABCA 349.

² R.S.A. 2000, c. E-10, s. 26(2).

³ Energy Resources Conservation Board, *Directive 56: Energy Development Applications and Schedules* (Calgary: Energy Resources Conservation Board, 2008), Tables 5.1, 6.1 and 7.1.; online: ERCB <<http://www.ercb.ca/docs/documents/directives/directive056.pdf>>.

⁴ Energy Resources Conservation Board, *ERCB Brochure: Understanding Oil and Gas Development in Alberta* (Calgary: Energy Resources Conservation Board, 2008); online: ERCB <http://www.ercb.ab.ca/docs/documents/directives/directive056_brochure.pdf>.

⁵ *Supra* note 3, Table 7.1.

⁶ Energy Resources Conservation Board, *Directive 71: Emergency Preparedness and Response Requirements for the Petroleum Industry* (Calgary: Energy Resources Conservation Board, 2008) at 69; online: ERCB <<http://www.ercb.ca/docs/documents/directives/directive071.pdf>>.

⁷ *Ibid.*, 12.

⁸ *Supra* note 1, para. 13.

⁹ *Ibid.*, paras. 31-32.

¹⁰ *Ibid.*, paras. 29, 40.

¹¹ *Ibid.*, para. 49-52.

¹² *Ibid.*, para. 54.

¹³ Energy Resources Conservation Board, News Release, NR 2009-28, "ERCB temporarily suspends issuing sour licences pending response to Court of Appeal decision" (3 November 2009), online: ERCB <http://www.ercb.ca/portal/server.pt/gateway/PTARGS_0_0_303_263_0_43/http%3B/ercbContent/publishedcontent/publish/ercb_home/news/news_releases/2009/nr2009_28.aspx>.

¹⁴ Energy Resources Conservation Board, News Release, NR 2009-29, "ERCB announces changes in response to Court of Appeal ruling" (13 November 2009), online: ERCB <http://www.ercb.ca/portal/server.pt/gateway/PTARGS_0_0_303_263_0_43/http%3B/ercbContent/publishedcontent/publish/ercb_home/news/news_releases/2009/nr2009_29.aspx>.

¹⁵ Energy Resources Conservation Board, Bulletin 2009-41, "Processing of Applications for Sour Oil and Gas Development in Light of the Court of Appeal Decision in the Matter of Kelly v. Alberta (Energy Resources Conservation Board) and Grizzly Resources Ltd." (13 November 2009), online: ERCB <http://www.ercb.ca/portal/server.pt/gateway/PTARGS_0_0_303_263_0_43/http%3B/ercbContent/publishedcontent/publish/ercb_home/industry_zone/rules_regulations_requirements/bulletins/bulletin_2009_41.aspx>.

¹⁶ *Supra* note 1, para. 32.

¹⁷ *Supra* note 2, s. 3.

¹⁸ Jodie L. Hierlmeier, " 'The Public Interest': Can it Provide Guidance for the ERCB and NRCB?" (2008) 18 J.E.L.P. 279; Raj Anand & Ian G. Scott, Q.C., "Financing Public Participation in Environmental Decision-Making" (1982) 60 Can. Bar. Rev. 81.

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