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OIL AND GAS FOCUS GROUP ALERT

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KELLY V. ALBERTA (ENERGY RESOURCES CONSERVATION BOARD) – STANDING RE-VISITED

In *Kelly v. Alberta (Energy Resources Conservation Board)*[1] the Alberta Court of Appeal has, once again, considered the scope of the phrase "directly and adversely affected", which is the statutory test under section 26(2) of the *Energy Resources Conservation Act* for determining whether a person will be granted standing to participate in an application before the Energy Resources Conservation Board. In *Kelly*, the Court held that stakeholders residing in the "tertiary" zone surrounding a proposed sour gas well, while not having an absolute right to standing in all cases, do have "a strong *prima facie* case". The Court held that a "perceived risk" of adverse effect may be sufficient, and confirmed its prior ruling that applicants need not demonstrate that the risk of harm is a certainty, or even likely, nor must they prove that the "adverse effect" is greater than that suffered by the general public. As a result, it may now be easier for landowners to gain standing in applications related to oil and gas developments.

THE BACKGROUND

In *Kelly*, the Respondent, Daylight Energy Ltd. (formerly West Energy), applied to the Board for approval to drill a sour gas well. The Appellants resided in the "tertiary" zone, 6.5 km and 5.4 km, respectively, from the proposed well.[2] They wrote to the Board, objecting to the application. The Board denied them standing and dismissed their objection. They then sought a review of the Board's decision. The Board dismissed the Appellants' application for review, holding that they were not directly and adversely affected. The Board held that:

- there was no evidence that hydrogen sulphide would aggravate their existing medical conditions;

[1] *Kelly v. Alberta (Energy Resources Conservation Board),* 2011 ABCA 325 (November 18, 2011) ("*Kelly*").

[2] The Board recognizes three risk zones surrounding sour gas wells: the Protective Action Zone or PAZ (the area where, in the event of a release, pollutant concentrations, including hydrogen sulphide, may result in significant, life-threatening or serious and potentially irreversible health effects); the Emergency Planning Zone or EPZ (the area where, in the event of a release, hydrogen sulphide concentrations may exceed 100 parts per million requiring evacuation of the area or "sheltering in place"); and an unnamed third or "tertiary" zone (an area where, in the event of a release, hydrogen sulphide concentrations exceed more than 10 parts per million on average over a three minute period and evacuation or "sheltering in place" may be required depending on the operator's assessment of local conditions).

- the risk of evacuation was not an adverse effect; rather, the exposure to the gas was the adverse effect – evacuation was merely a method of attempting to remediate that problem, and the provisions relating to evacuation were "precautionary and preparatory only"; and

- that planning in anticipation of an incident did not mean an incident was likely – planning was based on "unmitigated, uncontrolled worst-case scenarios", and being contemplated by an emergency plan "does not, in itself, constitute a potential direct and adverse affect [sic]".

THE DECISION

The Court held that the proper meaning of "directly and adversely affected" was a legal issue. It held that some of the factors considered by the Board, such as the distance of the Appellants' residences from the well and the level of risk, were "clearly legitimate considerations", since "some degree of location or connection between the work proposed and the right asserted is reasonable". The Court decided, however, that the reasoning of the Board could not withstand scrutiny on the reasonableness standard of review, and that it was not "transparent and intelligible, nor was it a method of analysis available on the facts and the law". In allowing the appeal and remitting the matter back to the Board for reconsideration, the Court made the following findings:

- The Board erred in suggesting that the Appellants' medical evidence was not sufficiently focussed to demonstrate that the appellants were adversely affected. The Board's requirement to prove a "heightened sensitivity" was inconsistent with the Court's prior ruling that an applicant need not demonstrate that it was affected to a greater degree than the general public.[3]

- To say that emergency plans are merely precautionary and preparatory did not answer the question whether the appellants would be adversely impacted if the emergency ever did come to pass.

- The suggestion that evacuation is not an adverse effect involves circular reasoning. It is the "lurking risk" of an emergency giving rise to the evacuation plan, and not the evacuation plan itself, that is "adverse".

THE IMPLICATIONS

The Court's findings in *Kelly* may serve to broaden the scope of persons "directly and adversely affected" and, as a result, may lead to:

- more challenges being made to proposed sour gas development by stakeholders who, in the past, may not have been granted standing or even sought standing due to the more restrictive geographic

[3] *Kelly v. Alberta (Energy Resources Conservation Board),* 2009 ABCA 349 (C.A.), at para. 32.

requirement that the Board had previously employed (i.e. having a residence within an EPZ);[4]

- an increase in objections to non-sour oil and gas developments, where there may be risk-related concerns;

- a wider variety of "perceived risks" related to the development being advanced; and

- a shift in how operators approach stakeholder engagement to reflect the potential widening of the class eligible for standing.

It remains to be seen how broadly the Board will interpret section 26(2) of the ERCA, post-*Kelly*. We intend to monitor developments closely.

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[4] For example, see *EUB Decision 2006-116: West Energy Ltd. – Prehearing Meeting, Application for Two Well Licences, Pembina Field.*

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