

In the Court of Appeal of Alberta

Citation: Kelly v. Alberta (Energy and Utilities Board), 2009 ABCA 161

Date: 20090427

Docket: 0703-0244-AC

Registry: Edmonton

Between:

**Russ Kelly, Susan Kelly, Emil Hagman, Elsbeth Hagman,
Daryle Schmidt, Debbie Schmidt, Patricia Kiehlbauch, R.J. Kiehlbauch,
Linda McGinn, Garry Mastre, Louise Mastre, Cory Dusterhoft,
Sandra Dusterhoft, Robert Mulligan, Candace Mulligan, Diane Sullivan,
Don Sullivan, Eileen Belva, Lil Duperron, Robert Domke, Dallas Kissner,
Christine Dodd, Barry Dodd, Sherrice Cunningham, Terry Dingwall
and Laurel Dingwall**

Respondents
(Appellants)

- and -

Alberta Energy and Utilities Board

Applicant
(Respondent)

The Court:

**The Honourable Madam Justice Ellen Picard
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter**

**Memorandum of Judgment
Delivered from the Bench**

Order to Dismiss the Appeal as Moot

**Memorandum of Judgment
Delivered from the Bench**

Watson J.A. (for the Court):

[1] The appellants were, on February 12, 2008, granted leave to appeal against a decision of the Alberta Energy and Utilities Board (now the Energy Resources Conservation Board) dated August 8, 2007 (Decision No. 2007-061) which, after an 11 day hearing, granted conditional approval to the former respondent, West Energy Ltd, for two sour oil wells in an area with what the Board called “a higher than normal density of rural residential homes and farms”: 2008 ABCA 52. The appellants were interveners in the hearing. They assert that they have spent a significant time, effort and cost both for the hearing and the appeal.

[2] As a facet of the conditional approval in Decision No. 2007-061, West Energy Ltd. was required to configure a second access road to the site, called the “original road”, as part of an Emergency Protection Zone for the region and to address concerns of residents in the area. West Energy Ltd. appears to have raised difficulty with this condition, but it was re-affirmed by the Board in Decision No. 2008-040 dated May 20, 2008. West Energy Ltd. subsequently notified the Board that it was withdrawing its applications for the two wells as it was not able to fulfil its commitment and the Board’s condition to construct the second egress road. By Decision No. 2008-082, the Board accepted West’s request and the applications were considered withdrawn.

[3] By order dated December 2, 2008, the Honourable Mr. Justice Côté of this Court permitted West Energy Ltd. to be removed as a party to this appeal, with no liability for costs for steps on the appeal after November 9, 2008, but some possibility of costs for prior to that date. This left the parties on the appeal as being the appellants and the Board.

[4] The Board asserts that its only role on appeal would be to address issues of jurisdiction and not to defend the merits of Decision No. 2007-061. Moreover, the termination of the conditional approvals for the wells means, says the Board, there is nothing in law left to debate about the approvals themselves. Accordingly, the Board contends that there is no remaining adversarial context and no suitable parties to address the two points on which leave to appeal was granted, one of which related to claims under s. 7 of the *Canadian Charter of Rights and Freedoms* which claims were not raised or debated before the Board in the hearing below.

[5] This Court has discretion to adjudicate on appeals which are essentially moot: see *e.g. Telus Communications Inc. v. Telecommunications Workers Union*, (2006) 401 A.R. 137, [2006] A.J. No. 1590 (QL), 2006 ABCA 397 at paras. 2 and 3. Nonetheless, the factors which would ordinarily move the Court to entertain a moot appeal are absent here. The fact that the appellants have invested time and effort unsuccessfully (in the legal sense) to this stage is not a compelling factor. The questions they raise are not elusive of review. Rather, they can be expected to arise again in some form.

[6] The interpretation and application of Directive 056 is well capable of being debated before any new Board on any new motion by West Energy Ltd. on the facts that then exist. That new Board may well have a different view not only of the Directive but of the effect of any deficiency in compliance with the Directive if any. Moreover, the opportunity exists for the appellants to put meat on the bones of a *Charter* argument at any new hearing of the Board, should West Energy Ltd. apply again for approvals. We are told by the parties the Board has changed its standards relevant to environmental and hazard issues.

[7] In light of that circumstance, the present appeal is not only moot for disappearance of its former basis, but it is also arguably moot for prematurity on a future basis. It would not be appropriate for this Court to adjudicate on the questions raised in this appeal in an abstract fashion.

[8] The appeal is dismissed as moot.

Appeal heard on April 16, 2009

Memorandum filed at Edmonton, Alberta
this 27th day of April, 2009

Watson J.A.

Appearances:

J.J. Klimek
for the Respondents

L.M. Berg
for the Applicant