

In the Court of Appeal of Alberta

Citation: Freehold Petroleum and Natural Gas Owners Association v. Alberta (Energy Resources Conservation Board), 2010 ABCA 125

Date: 20100419

Docket: 0901-0245-AC

Registry: Calgary

Between:

Freehold Petroleum and Natural Gas Owners Association

Applicant
(Appellant on Appeal)

- and -

The Energy Resources Conservation Board

Respondent
(Respondent on Appeal)

- and -

OMERS Energy Inc.

Respondent
(Respondent on Appeal)

**Reasons for Decision of
The Honourable Madam Justice Elizabeth McFadyen**

Application for Leave to Appeal

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Introduction

[1] The Freehold Petroleum and Natural Gas Owners Association (FHOA) seeks leave to appeal a decision of the Energy Resources Conservation Board (Board), denying hearing costs to FHOA on the ground that it did not meet the definition of a “local intervener”.

Background Facts

[2] Following receipt of the application of Montane Resources Ltd. (Montane), the Board conducted a hearing to assess whether the mineral lease held by OMERS Energy Inc. (OMERS) was valid and subsisting entitling OMERS to maintain its well licence over certain oil and gas interests. The issue involved a decision whether its wells were capable of production. Because Montane held a subsequent lease over those same oil and gas interests, its lease would gain priority if OMERS’ well licence was set aside.

[3] Ms. Eva Cymbaluk, the owner of the mineral rights in question and lessor to both OMERS and Montane, is one of more than 4,000 members of FHOA, a federal, nonprofit organization. She gave no indication that she intended to participate in the Board’s hearing, except for a statement authorizing FHOA to represent her interests. FHOA then requested the Board’s permission to fully participate in the hearing. Before the Board received Ms. Cymbaluk’s written authorization, it advised FHOA that it was prepared to allow it to fully participate in the hearing. The Board cautioned FHOA that its decision “does not relate in any way to FHOA’s entitlement, if any, to local intervener costs” as set out by s.28 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 (ERCA). After confirming that Ms. Cymbaluk authorized FHOA to represent her interests, the Board advised that its decision to extend participatory rights to FHOA “is not affected by this additional information.”

[4] FHOA participated in the three-day hearing before the Board. In written reasons issued on May 12, 2009, the Board concluded that OMERS’ lease agreement had lapsed and Omers was not entitled to produce the minerals under its lease. The Board suspended OMERS’ previously-issued well licence.

[5] FHOA filed a claim seeking substantial costs of the hearing. OMERS opposed any award of costs to FHOA. One of the issues was whether FHOA met the definition of a “local intervener” under s.28(1) of the ERCA. That provision reads as follows:

In this section, “local intervener” means a person or a group or association of persons who, in the opinion of the Board,

- (a) has an interest in, or
- (b) is in actual occupation of or is entitled to occupy 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.

[6] On August 11, 2009, the Board denied FHOA's claim for costs. The Board concluded that a party seeking local intervener costs must establish "the requisite interest in land and provide reasonable grounds for believing that such an interest may be directly and adversely affected by the Board's decision on the application in question." FHOA did not have a direct interest in the lands or mineral rights in dispute. The issue before the Board was whether Ms. Cymbaluk, a member of FHOA, had the requisite interest in land and, whether there were reasonable grounds to believe that her interest would be directly and adversely affected by the Board's decision.

[7] Ms. Cymbaluk entered into two mineral lease agreements, the first with OMERS, and a subsequent lease with Montane. Because the Board's decision would essentially determine which of the lease agreements governed, the Board found that while "there may be consequences for [Ms. Cymbaluk] under the OMERS or Montane mineral leases as a result of the Board deciding that the OMERS lease had ended, her interest as the owner of the resource remains unaffected." Accordingly, the Board found no evidence to demonstrate that "Ms. Cymbaluk's rights as an owner of the minerals may be directly affected as a result of the Board's decision." The Board concluded that neither FHOA, nor Ms. Cymbaluk, "was a "local intervener," and that the Board had no authority to award local intervener costs to FDOA.

[8] FHOA seeks leave to appeal the Board's determination on the following two grounds:

Whether the Board erred in law by determining that the impact of the Board's decision on the lessor's entitlement under the petroleum and natural gas lease concerns only Ms. Cymbaluk's rights under contract and not her rights in land?

Whether the Board erred in law in determining that the lessor's rights as a freehold mineral owner remain unaffected by the Board's ruling?

Test for Leave to Appeal

[9] Section 41 of the ERCA authorizes this court to grant leave to appeal on a question of law or jurisdiction, which requires a determination of whether the appeal gives rise to a serious arguable point. Whether such a ground is raised depends on whether (1) the appeal is *prima facie* meritorious; (2) the point raised is of significance to the action itself; (3) the point is of significance to the practice; and (4) the appeal will unduly hinder the progress of the action itself: *ATCO Midstream Ltd. v. Alberta (Energy Resources Conservation Board)*, 2008 ABCA 231 at para. 20.

Analysis

[10] In my view, the proposed issues do not warrant that leave be granted. The Board's determination on whether a person or group is a "local intervener" is discretionary. It requires a finding that, "in the opinion of the Board," there is an interest in land that is directly and adversely affected. Accordingly, the Board's decision is entitled to deference on appeal: **Wood Buffalo (Regional Municipality) v. Alberta (Energy and Utilities Board)**, 2007 ABCA 192 at para. 6, 417 A.R. 222. Taking into account that standard of review, I do not consider the proposed grounds to be *prima facie* meritorious, nor do I consider it to have significance to the action or the practice in general.

[11] FHOA's primary submission is that the Board's conclusion rests on a determination that only Ms. Cymbaluk's contractual rights were affected, and not her rights or interest in land. That, says FHOA, cannot be correct, and cites **Scurry-Rainbow Oil Ltd. v. Kasha** (1996), 184 A.R. 177, 39 Alta. L.R. (3d) 153 (C.A.), leave to appeal to the S.C.C. refused, [1996] S.C.C.A. No. 391 (QL) for the well-accepted proposition that a lessor's royalty interest is an interest in land. This court held in **Scurry-Rainbow**, at para. 40, that this interest "is properly classified as a species of *profit à prendre*," subject to clear language in the lease agreement to the contrary.

[12] The Board's decision does not contradict the position taken by this court in **Scurry-Rainbow**. Here the Board did not find that Ms. Cymbaluk had no interest in land, but that any such interest was not directly and adversely affected by the Board's ruling. In other words, the Board, did not decide whether Ms. Cymbaluk's interest under her lease was an interest in land or in contract, but was simply assessing whether OMERS' lease was valid for the purpose of maintaining its well licence. Indeed, a Board's decision as to the validity of a mineral owner's lease is generally limited to the issue of whether a well licence itself is valid: **Desoto Resources Limited v. Alberta (Energy & Utilities Board)**, 2008 ABCA 349. Accordingly, any residual impact to Ms. Cymbaluk's rights would therefore be limited to her contractual entitlements under the lease. For instance, the Board's decision impacted whether Ms. Cymbaluk would be entitled to a royalty interest of 15% or 16%.

[13] The Board, in its reasons clarified the issue. It correctly distinguished Ms. Cymbaluk's situation from that considered in a recent Board costs decision, relied on by FHOA, involving questions as to the entitlement to coal bed methane. In the coal bed methane decision, the Board decided whether the petroleum and natural gas rights owner or the coal rights owner had the right to produce coal bed methane. There, the freehold's mineral owners' interests in land were directly and adversely affected by the Board's decision. Here, there is no impact on the mineral owner's rights which remain constant; the only issue being whether the first lease granted by the mineral rights owner was valid and subsisting thus entitling the lessee to apply for and maintain a drilling licence.

[14] FHOA also submits that Ms. Cymbaluk retained her ownership of the mineral rights, and that her ability to protect and preserve her reversionary rights to those mineral rights were in play in this appeal. Ms. Cymbaluk gave no evidence and no issue was raised at the hearing regarding any breach of the default clause under the lease. The entire focus of the evidence and submissions was on the

meaning to be given to the phrase “capable of producing the leased substances,” and whether OMERS met that test in the circumstances. The Board’s decision did not directly or adversely affect Ms. Cymbaluk’s ability to protect and preserve her reversionary rights.

Conclusion

[15] Leave to appeal is denied. At the conclusion of FHOA’s leave application, I requested additional submissions on whether FHOA was able to seek leave to appeal the Board’s decision in its own right. It is not necessary to decide that issue here.

Application heard on February 10, 2010

Reasons filed at Calgary, Alberta
this 19th day of April, 2010

McFadyen J.A.

Appearances:

O.W. MacLaren

W.T. Osvath

for the Applicant

P.M. Johnston, Q.C.

for the Respondent: The Energy Resources Conservation Board

T.M. Bews

for the Respondent: OMERS Energy Inc.