

In the Court of Appeal of Alberta

Citation: Prince v. Alberta (Energy Resources Conservation Board), 2010 ABCA 214

Date: 20100702

Docket: 0903-0332-AC

Registry: Edmonton

Between:

Freda Prince and Thomas Prince

Applicants

- and -

**Alberta (Energy Resources Conservation Board)
and Talisman Energy Inc.**

Respondents

**Reasons for Decision of
The Honourable Mr. Justice Jack Watson**

Application for Leave to Appeal

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[1] This is an application pursuant to s. 41(1) of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 for leave to appeal a decision of the Energy Resources Conservation Board dated November 25, 2009 which granted the respondent's application for a pipeline license in the Chinook Ridge area.

[2] The applicants live in Grande Prairie, Alberta but are also members of the Sucker Creek Indian Band which has its reserve at the west end of Lesser Slave Lake in Alberta. The applicant, Thomas Prince, is also the owner of a Registered Fur Management license in area 2593 which is Crown land. RFMA's can be issued to, and held by, any persons, including non-aboriginals: s. 1(1)(o) of the *Wildlife Act*, R.S.A. 2000, c. W-10; s. 21(1) of the *Wildlife Regulation*, A.R. 143/97. In application for pipeline license no. 1624805, Talisman proposed a pipeline project affecting lands on the British Columbia border with Alberta, southwest of Grande Prairie, described as LSD 13-09-64-13 W6M to LSD 11-28-65-13 W6M. A portion of the pipeline at its southern end is within the RFMA 2593 but not within the traditional lands of the Band.

[3] On September 18, 2009, the applicants filed a notice of objection with the Board to Talisman's application for pipeline license no. 1624805. They requested a hearing be held with respect to the project. Additional letters or emails to the Board from them dated October 29, 2009, and November 1, 2009 elaborated on the applicants' objection. Counsel agreed before me that the essence of the applicants' position on the facts was adequately summarized in the Board's reasons for decision coupled with the affidavit filed in support of the present motion by Freda Prince.

[4] The core basis for the applicants' objection is that, as trapline holders and as aboriginal individuals exercising traditional cultural practices, the applicants had a legal cognizable claim, right or interest in the lands identified in Talisman's proposal and that the proposed activities would prevent or limit them in their exercise of that claim, right or interest and also in their traditional cultural practices associated with the lands. Merely for brevity hereafter, I choose to refer to this as the applicants' "interest" in the lands. They assert that their interest in access and trapping on the lands had been held by four generations of their family. In addition, the applicants raised various environmental concerns as well as concerns with the consultation process. The applicants also sought compensation for any adverse effect upon their interest in the Crown land.

[5] There is no indication before me that the Sucker Creek Indian Band has sought to intervene or to object to the proposed pipeline. There is no assertion for the purposes of this motion that the proposed pipeline is to be built on or near traditional lands of the Sucker Creek Indian Band. In its decision of November 25, 2009, the Board found that the proposed project was "well removed from the Sucker Creek First Nation's traditional lands". The Board also found that consultation "is to be conducted with First Nation communities as a whole, and that individual First Nation members do not have an independent right to consultation". Generally the Board was satisfied that "Talisman has met the Board's consultation requirements" although the Board was somewhat non-specific on this

point. On the topic of possible impacts on the animals, plants, trees, herbs and other features of the land identified by the applicants, the Board wrote that it had “verified that Talisman has obtained all approvals required by (the Alberta Sustainable Resource Development authority)” of the Alberta Fish and Wildlife Division.

[6] In its November 25, 2009 decision, the Board approved the Talisman application without requiring an oral hearing on the matter. The Board found that while the project location was within the boundaries of Prince’s trapping area, the Board concluded that a registered fur management licence did not confer on its holder an exclusive right to use the land but, rather, only provided a right of access to the holder to a specific area for the sole purpose of trapping. The Board concluded that such a right of access to Crown land did not preclude additional activities taking place in the same area. Moreover, as regards the environmental concerns and potential impact on hunting, the Board found that the proposed pipeline was to be constructed on a route that primarily followed existing “disturbance” along roadways, thereby minimizing the proposed project’s footprint and impact on the landscape. As such, the Board concluded that the proposed pipeline would involve “minimal or no interference” with the applicants’ activities and, in any event, that the applicants’ registered fur management licence did not preclude additional activities from taking place in the same area.

[7] In sum, the Board concluded that the proposed pipeline did not appear to “directly and adversely affect the rights” of the applicants and, therefore, the applicants were not entitled to a hearing pursuant to s. 26(2) of the Act. Concerns about compensation, which were said by the Board to have been raised by the applicants “numerous times” in their materials, were found by the Board to be matters that could be addressed to the Alberta Trappers Compensation Program. The Board observed that a Fish and Wildlife Division officer could assist the applicants in preparing any claim the applicants might have to present to that Program.

[8] The applicants argue that the Board misinterpreted and misapplied the test for standing in s. 26(2) of the *Act* by restricting the section to those who had exclusive rights in the area rather than looking at whether the applicants’ interest was arguably going to be “directly and adversely impacted” by a decision approving the construction and existence of the pipeline. Moreover, they argue that their concerns about their cultural practices, subsistence practices and environmental damage to flora and fauna used in their traditional practices - none of which they say was considered by the Board - clearly demonstrate that they are or would be “directly and adversely impacted” to a sufficient extent to entitle them to the fuller hearing contemplated by the Act. Additionally, they suggest that the Board improperly limited the duty to consult with aboriginal people. The applicants submit that the gatekeeping role of the Board in this regard should permit arguable contentions by applicants, howsoever generally asserted at that initial stage before the Board, to go forward in order that the Board can more fully inquire into them.

[9] The statutory requirement for leave to this Court involves a qualified right of appeal. Section 41 of the *Act* allows an appeal to the Court of Appeal only on a question of law or jurisdiction. The test for leave to appeal requires the applicant to show that the question of law or jurisdiction raises

a serious, arguable point. Subsumed in this test are several factors, but the crucial points for present purposes are whether the proposed appeal is arguable and of significance: see *e.g. Atco Midstream Ltd. v. Alberta (Energy Resources Conservation Board)*, 2008 ABCA 231 at para. 20 citing *Atco Electric Ltd. v. Alberta (Energy and Utilities Board)*, 2002 ABCA 45 at para. 17; *Berger v. Alberta (Energy Resources Conservation Board)*, 2009 ABCA 158 at para. 2. In determining the prospects of success of an appeal, a relevant consideration is also the standard of review which would be applied if leave were granted: *Nycan Energy Corp. v. Energy and Utilities Board (Alberta)*, 2001 ABCA 31, 227 A.R. 391 at para. 4; *Atco Electric Ltd.*, 2002 ABCA 45 at para. 14.

[10] Section 26(2) of the *Act* requires the Board to give certain procedural rights to a person if “it appears to the Board that its decision on an application may directly and adversely affect the rights of a person”. As the Board noted in its reasons, this Court has stated that s. 26(2) has two branches; (1) a legal test of whether the claim, right or interest being asserted is one known to the law; and (2) a factual test whether the “Board has information which shows that the application before the Board may directly and adversely affect those interests or rights”: *Dene Tha’ First Nation v. Alberta (Energy & Utilities Board)*, 2005 ABCA 68 at para. 10; *Sawyer v. Alberta (Energy and Utilities Board)*, 2007 ABCA 297 at paras 8-10; *Atco Midstream*, 2008 ABCA 231 at para. 14. The second branch of the test “necessarily requires a weighing of the evidence and a consideration of whether that evidence establishes a sufficient location or connection” between the proposed project and the right asserted: *Dene Tha’ First Nation* at para. 14; *Sawyer* at para 16.

[11] In my view, the proposed appeal rests on issues of mixed fact and law in ways that a significant legal point is not extricable to justify proceeding further. The Board did not read the legal test for standing under s. 26(2) of the *Act* in a manner which prejudiced the applicants.

[12] On the legal aspect of whether the interest being asserted is one known to the law, the Board appears to have found that the applicants’ Registered Fur Management license in the affected area arguably conferred a legal right or interest sufficient to satisfy the first branch of the test. However, and appropriately, the Board recognized the extent and limitations of the claimed interest. The applicants assert that the Board rejected their claim entirely because the Board found their right of access was “not an exclusive right”. The Board’s reasons do not suggest the Board dismissed the applicants’ interest as being unknown to the law. Nor do the reasons indicate that the Board found that the nature of their interest was so trivial or commonplace that it should not be regarded as an interest within the meaning of the *Act*, even if legally cognizable. Nor is it arguable that the Board was oblivious to the aboriginal status of the applicants or to their generalized assertions about environmental harm.

[13] The Board correctly focused on, and described, what it understood to be the actual interest being asserted. It is not arguable that it did so incorrectly. There is no basis to find that any further consultation with the Band or the applicants was required in order to identify the interest claimed or its scope. Nor is there a basis to find that further consultation would change the actuality of the situation before the Board. Accordingly, I need not comment on whether the Board is engaged in a purely legal enterprise when (a) it describes a given claim, right or interest proposed to it or (b)

it determines whether, on the evidence it has, a claim, right or interest is of a character intended to be considered under s. 26(2) of the *Act*. A question whether this type of Board reasoning would be a matter for correctness review or reasonableness review can be resolved where it necessarily arises in some future case. The Board accurately outlined what the applicants' interest was.

[14] The main bone of contention, in my view, is the Board's consideration of the second - and factual - branch of the test. On the material before it, the Board found that there was minimal or no evidence to conclude that the applicants' interest was susceptible of direct and adverse effect by its decision to permit the pipeline. At least two factors well support this conclusion.

[15] First, as presented to the Board, the nature of the legally cognizable interest of the applicants was limited, even when seen through a lens of sensitivity to aboriginal rights and values. The potential for any adverse effect on that identified interest by a subsurface pipeline was facially minimal and largely speculative. Second, to the extent that an adverse effect on that interest might be quantifiable and provable, a compensation scheme appropriate to trapline operation existed separately through a dedicated program. It follows that any potential for a significant direct adverse effect by the pipeline on the interest of the applicants was reasonably accounted for under the circumstances. The Board was entitled to make fact findings, on the materials provided to it in performing their gatekeeping function, that a decision to approve the pipeline would not have a direct and adverse effect on the interest of the applicants as presented by them.

[16] In essence, the applicants challenge the reasonableness of what the Board made of the evidence before it on a fair appreciation of the extent of the applicants' asserted interest. The applicants had to put their best foot forward in presenting to the Board. Giving the maximum effect to the applicants' definition of their interest, the applicants have not demonstrated a reasonable prospect of success in argument that the Board erred in denying them a hearing under s. 26(2) of the *Act* in order to further their arguments about that interest.

[17] Leave to appeal is, accordingly, denied.

Application heard on June 29, 2010

Reasons filed at Edmonton, Alberta
this 2nd day of July, 2010

Watson J.A.

Appearances:

J.F. Villebrun
for the Applicants

K.W. Stilwell
for the Respondent, Alberta (Energy Resources Conservation Board)

T.M. Bews
for the Respondent, Talisman Energy Inc.