

Susan Kelly, Linda McGinn, and Lillian Duperron (appellants) v. Alberta Energy Resources Conservation Board and Grizzly Resources Ltd. (respondents) and Alberta Surface Rights Group (intervenor)
(1003-0333-AC; 2012 ABCA 19)

Indexed As: Kelly et al. v. Energy Resources Conservation Board (Alta.) et al.

Alberta Court of Appeal
Slatter and Bielby, J.J.A., and Read, J.(ad hoc)
January 23, 2012.

Summary:

Grizzly Resources Ltd. (Grizzly). made an applications to the Energy Resources Conservation Board to drill two sour gas wells on the same site. The appellants, who resided near the site, filed objections. The Board dismissed their objections. The appellants requested that the Board, inter alia, review and reconsider its decisions. The Board denied the request. The appellants obtained leave to appeal the Board's decision.

The Alberta Court of Appeal, in a decision reported at 464 A.R. 315; 467 W.A.C. 315, vacated the Board's decision and remitted the matter for consideration and redetermination in accordance with the court's directions, including that the appellants were to be accorded standing to be heard on the merits.

The rehearing was held. By this time, the wells had been drilled, so the focus of the rehearing was whether, or subject to what conditions, Grizzly should be allowed to operate them. The Board concluded that the appellants had not demonstrated any risk to themselves from the wells, that the emergency response procedures in place were satisfactory, and that the wells could be operated without any additional conditions. The appellants subsequently applied under s. 28(2) of the Energy Resources Conservation Act for an award of costs to defray the expenses incurred as a result of their intervention. The majority of the Board concluded that the appellants were not entitled to costs because they did not qualify as "local interveners" as required by s. 28. The appellants sought leave to appeal the cost order.

The Alberta Court of Appeal, per Côté, J.A., in a decision reported at [2011] A.R. Uned. 12, granted leave to appeal.

The Alberta Court of Appeal allowed the appeal and remitted the application for costs back to the Board for reconsideration, in a manner consistent with these reasons. The court found that a potential adverse impact on the use and occupation of lands was sufficient to trigger entitlement to costs. Further, while the amount of costs to be awarded was within the discretion of the Board, the actual outcome of the hearing, and the absence, with hindsight, of any actual adverse effect did not of itself disentitle an applicant to costs.

Mines and Minerals - Topic 6035

Operation of mines, quarries and wells - Licences and permits - Appeals or judicial review - Standing - Costs - [See first **Mines and Minerals - Topic 7084**].

Mines and Minerals - Topic 7084

Regulation - Boards and commissions - Costs - The appellants were granted standing to be heard in relation to an application made by Grizzly Resources Ltd. to drill two sour gas wells on the same site - The appellants lived near the well site - The Energy Resources Conservation Board concluded that the appellants had not demonstrated any risk to themselves from the wells, that the emergency response procedures in place were satisfactory, and that the wells could be operated without any additional conditions - The appellants applied under s. 28(2) of the Energy Resources Conservation Act for an award of costs to defray the expenses incurred as a result of their intervention - The majority of the Board concluded that the appellants were not entitled to costs because they did not qualify as "local interveners" as defined by s. 28(1) - A person claiming local intervener costs had to establish the requisite interest in or right to occupy land, and provide reasonable grounds for believing that such land could be directly and adversely affected by the Board's decision on the application - The Alberta Court of Appeal allowed the appeal and remitted the application for costs back to the Board for reconsideration, in a manner consistent with the court's reasons - It was not reasonable to require physical damage to the lands to establish eligibility for costs - A potential adverse impact on the use and occupation of lands was sufficient to trigger entitlement to costs - Nor was it reasonable to make an award of costs overly dependent on the outcome of the hearing - The actual outcome of the hearing, and the absence, with hindsight, of any actual adverse effect did not of itself disentitle an applicant to costs - See paragraphs 22 to 37.

Mines and Minerals - Topic 7084

Regulation - Boards and commissions - Costs - Section 28(2) of the Energy Resources Conservation Act provided that, on the claim of a local intervener or on the Energy Resources Conservation Board's own motion, the Board could, subject to terms and conditions it considered appropriate, make an award of costs to a local intervener - The general power to award costs found in the Act was supplemented by Part 5 of the Board's Rules of Practice, which incorporated by reference the Board's Directive 031 (Guidelines for Energy Proceeding Cost Claims) - The Alberta Court of Appeal held that Directive 031 was validly enacted - The Board's reasonable application of the Directive in a particular case was not subject to appellate review - Policies such as Directive 031 played an important role in administrative decision making - In the absence of any definitive statement of the binding effect of the policy, whether it would generally, or always, or never be treated as binding was up to the Board - The interpretation and application of the policy to particular cases was quintessentially within the purview of the Board, and so long as its decisions were reasonable, the application of the Directive was up to it - See paragraphs 15 to 21.

Cases Noticed:

Alliance Pipeline Ltd. v. Smith, [2011] 1 S.C.R. 160; 412 N.R. 66; 2011 SCC 7, refd to. [para. 8].

Kelly et al. v. Energy Resources Conservation Board (Alta.) et al. (2009), 464 A.R. 315; 467 W.A.C. 315; 2009 ABCA 349, refd to. [para. 8].

Kelly et al. v. Energy Resources Conservation Board (Alta.) (2011), 515 A.R. 201; 532 W.A.C. 201; 2011 ABCA 325, refd to. [paa. 8].

Alberta Teachers' Association v. Information and Privacy Commissioner (Alta.) et al. [2011] A.R. TBE d. DE.167; 424 N.R. 70; 2011 SCC 61, refd to. [para. 9].
Dr. Q., Re, [2003] 1 S.C.R. 226; 302 N.R. 34; 179 B.C.A.C. 170; 295 W.A.C. 170; 2003 SCC 19, refd to. [para. 10].
New Brunswick (Board of Management) v. Dunsmuir, [2008] 1 S.C.R. 190; 372 N.R. 1; 329 N.B.R.(2d) 1; 844 A.P.R. 1; 2008 SCC 9, refd to. [para. 10].
Khosa v. Canada (Minister of Citizenship and Immigration), [2009] 1 S.C.R. 339; 385 N.R. 206; 2009 SCC 12, refd to. [para. 11].
Ellis-Don Ltd. v. Labour Relations Board (Ont.) et al., [2001] 1 S.C.R. 221; 265 N.R. 2; 140 O.A.C. 201; 2001 SCC 4, refd to. [para. 11].
Mavi et al. v. Canada (Attorney General) et al., [2011] 2 S.C.R. 504; 417 N.R. 126; 279 O.A.C. 63; 2011 SCC 30, refd to. [para. 18].
Skyline Roofing Ltd. v. Workers' Compensation Board (Alta.) et al. (2001), 292 A.R. 86; 95 Alta. L.R.(3d) 126; 2001 ABQB 624, refd to. [para. 18].

Statutes Noticed:

Energy Resources Conservation Act, R.S.A. 2000, c. E-10, sect. 28(1), sect. 28(2) [para. 4].
Energy Resources Conservation Act Regulations (Alta.), Energy Resources Conservation Board Rules of Practice, Reg. 252/2007, Directive 031 [para. 4].
Energy Resources Conservation Board Rules of Practice - see Energy Resources Conservation Act Regulations (Alta.).

Counsel:

K.E. Buss as agent for J.J. Klimek, for the appellants;
M.G. Lacasse, for the respondent, Alberta Energy Resources Conservation Board;
L.M. Sali, Q.C., for the respondent, Grizzly Resources;
S.C. Fluker (no oral argument), for the intervener.

This appeal was heard on January 12, 2012, before Slatter and Bielby, JJ.A., and Read, J. (ad hoc), of the Alberta Court of Appeal. The following decision was delivered by the court on January 23, 2012.

Appeal allowed.

Editor: Rodney A. Jordan

Mines and Minerals - Topic 6035

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