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ALBERTA COURT OF APPEAL

Judd v Alberta Energy Regulator, 2024 ABCA 154

Appeal – Production of Records

Application

Michael Judd (“Appellant”) appealed a decision by the Alberta Energy Regulator (“AER”) that denied his pre-hearing motion in a regulatory appeal of a pipeline licence issued to Pieridae Alberta Production Ltd. (“Pieridae”). The motion sought disclosure of information obtained by the AER under two of its directives: *Directive 067: Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals (“Directive 067”)* and *Directive 088: Licensee Life-Cycle Management (“Directive 088”)*.

Decision

The Alberta Court of Appeal (“ABCA”) allowed the appeal and referred the matter back to the AER for further consideration and redetermination. The ABCA determined that the AER erred by confining itself to information it had received under AER *Directive 056: Energy Development Applications and Schedules (“Directive 056”)* and that the Appellant was entitled to the production of records that were relevant and material to the issues set out in the scoping decision for the hearing regardless of the process by which the AER received them.

Pertinent Issues

The AER granted, pursuant to *Directive 056*, Pieridae’s application for a licence to construct and operate a 0.64 km pipeline to transport sour natural gas with a hydrogen sulfide (H₂S) concentration of 32% from an existing wellsite to an existing pipeline tie-in point. The AER issued Pipeline Licence No. 62559 (“Licence”) to Pieridae.

The AER granted the Appellant’s request for a regulatory appeal of the decision to issue the Licence. The AER panel of hearing commissioners assigned to the regulatory appeal (“Panel”) determined that the regulatory appeal would address the following four issues:

1. The determination of the Emergency Planning Zone for the pipeline, including the methodology used and the applications of AER Modelling requirements;
2. Emergency preparedness and proposed public protection measures;
3. The construction and operation of the pipeline, including the design and monitoring of the pipeline and the pipeline Integrity Management Program; and

4. The potential effects of the pipeline on the environment.

The Panel rejected the consideration of the following additional issues proposed by the Appellant:

1. Liability – legal uncertainty on the allocation of liability in the case of an H₂S release event, as well as abandonment, reclamation and other clean-up costs;
2. *Directive 067* Information – disclosure of information received by the AER under *Directives 067* and *088* in relation to the application for the Pipeline, and the AER’s evaluation of that information;
3. Pieridae’s Financial Capability – Pieridae’s financial capacity to safely and responsibly manage the proposed Pipeline and the associated infrastructure or to address the current and future abandonment and reclamation liabilities associated with the Foothills Assets and their other assets; and
4. Shell – Pieridae Sale Agreement – consent from Shell to construct and operate the pipeline.

The Appellant brought a motion seeking an order for further disclosure and access to all information collected, received, assessed, compiled or produced by the AER under *Directive 067* and *Directive 088* about the application, the Licence and the holistic licensee assessment of Pieridae and its eligibility to acquire and hold a licence for energy development in Alberta.

The Panel denied the Appellant’s motion on the basis that the requested information was not relevant and material to the regulatory appeal, holding that the determination of licence eligibility under *Directive 067* and the holistic licensee assessment under *Directive 088* were separate regulatory processes from deciding an application for a new pipeline licence (“Motion Decision”).

The ABCA granted permission to appeal the Motion Decision on the following question of law:

[W]hen the panel considered whether the information requested by Mr. Judd was relevant and material to the issues in the regulatory appeal did they err in law by effectively confining themselves to the information obtained by the AER under *Directive 056*?

Applying a standard of correctness, the ABCA determined that the Panel misinterpreted the legislative scheme when it treated the separation of its regulatory processes as determinative of what was relevant and material to the regulatory appeal. The Panel’s emphasis on the separation of the application process under *Directive 056* from the licence eligibility and holistic licensee assessments under *Directive 067* and *Directive 088*, respectively, misdirected its analysis, causing the Panel to wrongly conclude that the information sought by the Appellant was not relevant and material to the issues in question.

The ABCA stated that, contrary to the legislative scheme, the Panel treated the information obtained under each of these directives as categories, with information obtained under one being irrelevant to proceedings under another. According to the ABCA, the purpose and wording of *Directive 067* and *Directive 088* show that information gathered by the AER under these directives can be relevant and material in the context of other AER proceedings, including regulatory appeals of decisions to issue new licences.

The ABCA noted that the AER was entitled to limit the parameters of the appeal and that not every appeal must be holistic. When considering whether information is relevant and material to the regulatory appeal, the Panel is entitled to consider the issues that have been included and those that were expressly excluded. For the purposes of record production, the issues that were specifically excluded were as important as those included.

The ABCA allowed the appeal, holding that the Panel erred by confining itself to information it had received under *Directive 056*. The ABCA concluded that the Appellant was entitled to the production of records relevant and material to the issues set out in the scoping decision regardless of the process by which the AER received them. The ABCA referred the matter back to the AER for further consideration and redetermination.