Alberta Court of Appeal Grants Leave to Appeal Decision for Work Camp Permit Near Sour Gas Facilities

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Summary

In *Canadian Natural Resources Limited v Municipal District of Greenview No 16 Subdivision and Development Appeal Board*1, the Alberta Court of Appeal granted Canadian Natural Resources Limited ("CNRL") and Shell Canada Limited (Shell) leave to appeal the decision of the Municipal District of Greenview No. 16 Subdivision and Development Appeal Board (the "Board") to renew a development permit issued to Devco Developments Corp (Devco) and Horizon North Camps & Catering (Horizon) for a work camp located near CNRL and Shell's sour gas facilities. Significantly, in this decision the Court of Appeal demonstrated willingness to intervene where safety-related consequences resulted from a municipal development authority's decision, and appears to acknowledge the primacy of provincial approvals over municipal development decisions under s. 619 of the *Municipal Government Act* (MGA).

Background

In October 2017, the Municipal Planning Commission for the Municipal District of Greenview No. 16 (the Commission) issued Development Permit D17-304 (the First DP) to Devco and Horizon for a work camp located 140 and 250 meters from CNRL and Shell's sour gas facilities, respectively. In June 2018, the Alberta Energy Regulator ("AER") confirmed to CNRL that the work camp in question did not conform to the AER's setbacks for sour gas facilities. In September 2018, Devco and Horizon sought to have the First DP renewed. In November 2018, the Commission renewed and issued Development Permit D18-259 (the Second DP). CNRL and Shell appealed the Second DP to the Board arguing that the camp's proximity to sour gas facilities and pipelines raised concerns about the safety of its occupants. The Board found,*inter alia*, that the issuance of the development permit was not an appealable decision under s. 685(3) of the MGA. The Board further noted that if it had had jurisdiction to decide the appeal, it would have exercised its authority under s. 687(3) of the MGA to depart from and vary the setback distances prescribed by the AER. CNRL and Shell sought permission to appeal the Board's decision before the Alberta Court of Appeal.

Issues

CNRL and Shell argued that the Board had erred in law or jurisdiction in three different ways: (1) in finding that the issuance of the Second DP was not an appealable decision under s. 685(3) of the MGA; (2) by abusing its discretion under s. 687(3) of the MGA; and (3) by failing to consider s. 619 of the MGA.

Decision

Pursuant to s. 688 of the MGA, leave to appeal a decision of the Board may be granted if the appeal involves a question of law of "sufficient importance" to merit a further appeal and has a "reasonable chance of success."

The Court of Appeal concluded that the three grounds of appeal offered "sufficient importance" to merit a further appeal in light of the central role of the energy sector in Alberta and the lethal nature of a sour gas leak. The Court then considered whether each ground of appeal had a "reasonable chance of success."

First, the court found that the argument that the Board had erred in law or jurisdiction in finding that the issuance of the Second DP was not an appealable decision under s. 685(3) of the MGA had a reasonable chance of success. This section provides that "no appeal lies in respect of the issuance of a development permit for a permitted use unless the provisions of the land use bylaw were relaxed, varied or misinterpreted …." The court held that it was arguable that s. 685(3) of the MGA did not apply because the two sections of the By law had been relaxed.

Second, the court found that the argument that the Board had erred in law or jurisdiction by abusing its discretion under s. 687(3) of the MGA also had a reasonable chance of success. The court noted that failing to take into account relevant considerations and taking into account irrelevant considerations may amount to abuse of discretion. The court held that the Board did not consider the evidence that there would not be time to initiate an alert or to activate an Emergency Response Plan ("ERP") within the setback area in the event of a sour gas release, and this was arguably a relevant consideration. Further, the court held that the Board considered the fact that no incident had occurred in the past year, and this was arguably an irrelevant consideration.

Third, the court found that the argument that the Board had erred in law or jurisdiction by failing to consider s. 619(1) of the MGA had a reasonable chance of success as well. This section provides that "[a] licence, permit, approval or other authorization granted by the … AER … prevails, in accordance with this section, over any statutory plan, land use bylaw, subdivision decision or development decision by a subdivision authority, development authority, subdivision and development appeal board, or the Municipal Government Board or any other authorization under this Part". The court held that the interpretation of this section was a new issue which could be raised on appeal for a number of reasons, including its implications beyond the particular parties to this dispute, and no apparent prejudice to the parties in determining the issue. Consequently, leave to appeal was granted.

Implications

Two important conclusions flow from this decision which should be considered by facility owners/operators and landowners who apply for or challenge the issuance of a development permit near oil and gas facilities. First, safety-related consequence resulting from a municipal development authority's decisions are of sufficient importance to merit Court of Appeal intervention. While the applicant has an approved emergency response plan, that alone appears insufficient, especially in relation to sour gas. The fact that a sour gas leak could potentially reach the work camp well before an alert could be initiated or an ERP could be activated was a critical factor in the Court of Appeal's decision to grant leave. Second, the primacy of provincial approvals over municipal development decisions under s. 619 appears to have been acknowledged by the Court of Appeal. There is a paucity of judicial decisions on s. 619 of the MGA. This decision contributes to the jurisprudence on the provincial-municipal friction on energy related development decisions.

We will continue to monitor these issues and provide updates.

1*Canadian Natural Resources Limited v Municipal District of Greenview No 16 Subdivision and Development Appeal Board*, 2019 ABCA 143.

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