

In the Court of Appeal of Alberta

Citation: Berger v. Alberta (Energy Resources Conservation Board), 2009 ABCA 158

Date: 20090424

Docket: 0903-0023-AC

0903-0024-AC

Registry: Edmonton

0903-0023-AC

Between:

Anita Berger and Darla Hennig

Applicants

- and -

**Alberta Energy Resources Conservation Board and
Highpine Oil & Gas Limited**

Respondents

0903-0024-AC

Between:

**Margaret Crowhurst, Gwen Petrunia, Bob Petrunia, Joseph Petrunia,
Cheryl Lavoie, and Tom Lavoie**

Applicants

-and-

**Alberta Energy Resources Conservation Board and
Highpine Oil & Gas Limited**

Respondents

**Reasons for Decision of
The Honourable Mr. Justice Frans Slatter**

Appeal from the Order of the
Alberta Energy Resources Conservation Board
Order No. 2008-135
Dated the 30th day of December, 2008

**Reasons for Decision of
The Honourable Mr. Justice Frans Slatter**

[1] These two related applications seek leave to appeal decision 2008-135 of the ERCB which authorized the drilling of three sour gas wells near Tomahawk, Alberta.

[2] The case law has identified several factors to be considered:

- (a) Is the proposed issue a question of law or jurisdiction? This is a condition precedent to the granting of leave: *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, s. 41.
- (b) Is the issue of general importance? This factor is sometimes stated to be whether the issue is “of significance to the practice”, but the reference here is to industry or commercial practice, not just court procedures. The point is whether the issue is only of interest to the immediate parties, or whether it has a wider relevance.
- (c) Is the point raised of significance to the action itself? If the issue is merely interlocutory or collateral, or tangential to the action, leave may not be granted, particularly if a determination of the issue will not affect the ultimate outcome of the proceedings.
- (d) Does the appeal have arguable merit? Leave is less likely to be granted when the appeal appears to have little chance of success. This factor is balanced with the importance of the issue. If the issue is of lesser importance, a more compelling argument must be shown than if the issue is of great public importance.
- (e) What standard of review is likely to be applied? This factor is a corollary of whether there is a good arguable case. There is no point in granting leave if the standard of review that the Court of Appeal will apply is highly deferential, such that the Court is unlikely to engage the issue upon which leave is sought. Such issues do not have “arguable merit”.
- (f) Will the appeal unduly hinder the progress of the action? This factor assumes that the action is still ongoing, and has or will be delayed by any appeal.

See *Wood Buffalo (Regional Municipality) v. Alberta (Energy and Utilities Board)*, 2007 ABCA 192, 80 Alta. L.R. (4th) 229, 417 A.R. 222 at para. 5.

[3] The Applicants sought leave to appeal on many issues, some of which were clearly not questions of law. The *Act* provides that leave can only be granted on particular issues of law, and the issues on which leave is sought should be stated with clarity in the Memoranda filed with this Court. The Applicants have identified a number of issues raised by the Board’s decision.

[4] First, they suggest that the Board never considered the “public interest”, as required by the statute. The Applicants argue that the Board considered whether the application complied with the minimum technical requirements of the *Act* and regulations, and then erroneously assumed that such compliance was equivalent to the public interest. The Board’s reasons expressly refer to the “public interest” requirement in one place. While the Board’s reasons appear to contain little direct analysis of the public interest, it is difficult to believe that this central issue escaped its attention. The reasons were undoubtedly drafted to be responsive to the particular issues raised. While compliance with the technical requirements is not equivalent to the public interest, the technical requirements are there to address the public interest, and compliance with those requirements is relevant. Factors bearing on the public interest are discussed in several places. This issue does not warrant leave to appeal.

[5] Second, the Applicants refer to ERCB Directive 071, *Emergency Preparedness and Response Requirements for the Upstream Petroleum Industry*. Section 2.2.2.2 discusses the role of local government in emergency response measures, and states “. . . coordination of roles and responsibilities with the local municipal authorities . . . must take place, be well understood, and agreed to prior to conducting the public involvement program.” The Applicants argue that this provision mandates an agreement between the oil company and the municipal authority before a licence can be granted. The Respondent argues that the provision is not intended to give the local authorities a veto over developments. The Board was aware of the position of the local authority, and took it into account in weighing the public interest. It implicitly proceeded on the basis that, absent agreement, the Board had to adjudicate on any outstanding issues respecting emergency response. Having regard to the standard of review, this argument does not have sufficient substance to warrant leave to appeal.

[6] Third, the Applicants argue that the Respondent failed to continuously consult with interested parties right up to the time of the hearing, citing s. 2.5 (53) and (54) of ERCB Directive 056, *Energy Development Applications and Schedules*. All of the present Applicants were consulted, and there is no evidence that any potential intervener moved into the area after the consultation ceased, and might have been missed. The Board was aware of this issue, but ruled that at some point there must be closure in public consultation. Having regard to the standard of review, and the absence of any prejudice to these Applicants, this argument does not have sufficient substance to warrant leave to appeal.

[7] There are previous decisions granting leave to appeal issues arising from the interpretation of ERCB Directive 056, but that does not mean that every application engaging ERCB Directive 056 warrants leave to appeal. Each issue must be examined individually. For example, in *Graff v. Alberta (Energy and Utilities Board)*, 2007 ABCA 20 it was argued that ERCB Directive 056 unlawfully fettered the Board’s discretion. The alleged error in *Graff* was in applying ERCB Directive 056; here the alleged error is in the non-application of ERCB Directive 056. The issues are different in character, and the standard of review is possibly different.

[8] Fourth, the Applicants argue that the Respondent did not submit a Participant Involvement Summary Form (Appendix 4) with its application as required by s. 7.11.2.2 (91) of ERCB Directive 056. The Applicants argue that Directive 056 makes this a mandatory part of any application. The

Applicants point to other alleged examples of non-compliance with other provisions of Directive 056 that make mandatory the inclusion of various types of information in the application.

[9] The *Oil and Gas Conservation Regulations*, Alta. Reg. 151/71, provide for the method of applying for a licence:

2.010(1) An application for a licence shall

- (a) be made on the form prescribed for that purpose by, and obtainable from, the Board, and
- (b) include the documentation required by Directive 056, “Energy Development Application Guide and Schedules”, published by the Board.

These *Regulations* (which incorporate by reference Directive 056) are authorized by the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6:

10(1) The Board may make regulations

- (a) prescribing the information that is to be included in or is to accompany any application under this Act or the regulations;

...

(4) If a regulation under subsection (1)(a) has prescribed the information to be included in or to accompany an application pursuant to a given provision of the Act or the regulations, the Board is not precluded from considering or acting on an application pursuant to that provision that does not contain that information or from requiring additional information.

Even if the requirement for a Participant Involvement Summary Form is “mandatory”, the mere absence of that Form does not preclude the Board from processing the application. The *Regulations* and Directive 056 are subordinate legislation, and cannot be interpreted as removing the discretion given to the Board under s. 10(4) of the *Act*. Given the wide powers held by the Board under s. 10(4), and given the standard of review that would apply, the argument respecting missing information does not have sufficient substance to warrant leave to appeal.

[10] Fifth, the applicants argue that there were deficiencies in the Notice of Hearing issued by the Board, and that it did not comply with s. 23 of the *Energy Resources Conservation Board Rules of Practice Regulation*, Alta. Reg. 252/2007. Specifically, the Applicants claim the Notice did not set deadlines for filing evidence as required by s. 23(2)(h). Section 6 of the *Rules of Practice* empowers the Board to vary time limits set by the *Rules*, s. 7 includes a wide power to “dispense with, vary or supplement” the *Rules*, and s. 8 provides that no proceeding is invalid by reason of a defect or other irregularity in form. Given the wide procedural discretion held by the Board, and the absence of any prejudice to these Applicants, this argument does not have sufficient substance to warrant leave to appeal.

[11] Sixth, one set of Applicants argue that the Respondent was allowed to file highly technical expert reports just before the hearing. While the Board adjourned the hearing for one week, these Applicants argue that they were not given sufficient time to retain experts to rebut these reports. A breach of the rules of natural justice would be an error of law. On July 15, 2008 the Board ordered the Respondent to file the expert reports in question by August 1. The reports were actually filed late, between August 15 and 21, at which time the hearing was scheduled to commence on September 16. The Board subsequently granted an adjournment of the hearing to September 23, and extended the time to file rebuttal reports. The Board was aware that the other interveners had filed expert reports on the topics in question. In the end, the issue is whether the Board erred in exercising its discretion to deny an adjournment longer than one week. The granting of adjournments and the scheduling of hearings are highly discretionary, the standard of review is very deferential, and this issue does not warrant granting leave to appeal.

[12] Seventh, the Applicants argue that they should have been allowed to cross examine ERCB staff on a standard gas dispersion computer model (known as ERCBH2S) routinely used to assess the risks from sour gas wells. Over 700 pages of background material relating to the model were available. The weight to be placed on evidence of this sort, the inherent reliability of the model, and the need for cross examination on it do not raise pure questions of law.

[13] Eighth, in its reasons the Board directed that the Respondent had to ensure that a particular road was passable during drilling, but the Applicants argue that the Board failed to include that condition in its formal order. The Board has a wide power to vary its orders, and if something has been overlooked the proper remedy is to apply to the Board for an amendment.

[14] Ninth, the Board directed that the Respondent consult further with one particular family about evacuation procedures in the event of an emergency. That Applicant argues that this amounted to an unlawful delegation by the Board of its duties, and that the Board was required to adjudicate on this issue. The Board, however, has a wide jurisdiction to direct further consultation, and to adjourn adjudication on particular issues or sub-issues. The Board retains its full authority to adjudicate on this issue if the Respondent and the family are unable to resolve the issue. Leave is not warranted.

[15] Tenth, the Applicants argue that the panel erred in deciding to grant the licences without having before it the full results of the public consultation that is required by the regulations and directives. Directive 056 requires an extensive public consultation by an applicant for a licence, and requires that the results of that consultation be reported to the Board. The Respondent intended to comply with those requirements, but the version of its report that was given to the panel had been redacted. In addition to personal information about those consulted, the substance of all of the comments made by neighbours was effectively deleted. As a result, the panel was only aware of the position of those neighbours who chose to attend the hearing itself. Counsel for the Board indicated that the requirements of Directive 056 have been modified and qualified as a result of input received from the privacy authorities. But the decision in question, Information and Privacy Commissioner Investigation Report F2007-IR-002, concludes at para. 47 that public disclosure of the substance of the objections to an application for a licence is legitimate.

[16] The Directives contemplate a “public” hearing after “public” consultation. The issue of the extent to which the Board’s Directives and hearings can as a matter of law be modified or influenced by the privacy authorities or privacy considerations raises an important issue of law. But the point is not of sufficient significance to this particular hearing to warrant leave to appeal. Although the panel was aware of the redactions, it did not discuss this point in its reasons, so the views of the panel are not known. The issue is better dealt with on a record where the views of the Board are apparent. In addition to these Applicants, who presented an organized response to the applications, the panel heard from a number of concerned residents who attended the hearing. It is unlikely that any particular objection was not aired at the hearing, or that the panel failed to understand that the community opposed the licences, and so any error of law here would not realistically have affected the result.

[17] Finally, the Applicants seek leave to appeal on the following grounds:

- (a) The Board’s assessment of the evidence, particularly the expert evidence, is unreasonable.
- (b) The Board’s assessment of the public interest is unreasonable.
- (c) The Board’s decision does not adequately protect the health and safety of the Applicants.
- (d) The Board’s ultimate decision is unreasonable, given the evidence.

These proposed grounds do not raise issues of law, and leave is denied with respect to them. The Applicants suggest that the Board “lost jurisdiction” as a result of these factors. The paradigm of attempting in this way to recast all errors as jurisdictional errors has now been definitively rejected: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 at para. 59.

[18] In conclusion, the applications for leave to appeal are dismissed.

Application heard on April 21, 2009

Reasons filed at Edmonton, Alberta
this 24th day of April, 2009

Slatter J.A.

Appearances:

I.K. Wilson

for the Applicants Anita Berger and Darla Hennig

L.M. Berg

for the Respondent Alberta Energy Resources Conservation Board

J.J. Klimek

for the Applicants Margaret Crowhurst, Gwen Petrunia, Bob Petrunia, Joseph Petrunia, Cheryl Lavoie, and Tom Lavoie

G.S. Fitch and D.J. Farmer

for the Respondent Highpine Oil & Gas Limited