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What is the Test for Leave to Appeal from the Decision of a Regulatory Tribunal in Alberta?

Written by: Nigel Bankes

Case commented on: *Judd v Alberta Energy Resources Conservation Board*, 2014 ABCA 41

The provincial legislature has chosen to "channel" judicial supervision of the decisions of Alberta's energy regulators to the Alberta Court of Appeal. The legislature achieves this channeling through two linked provisions in the relevant legislation. The first is a strong privative clause which purports (I say purports because such a measure can never be completely successful for constitutional reasons: *Crevier v Attorney General of Quebec*, [1981] 2 SCR 220, *Dunsmuir v New Brunswick*, 2008 SCC 9) to exclude ordinary judicial review applications. Then, having purported to close the door, the legislature cracks it open again with a provision that allows an aggrieved party to appeal the regulator's decision on a point of law or jurisdiction, but only with leave. The leave application is heard by a single judge who is charged with assessing whether the matter should be heard by three of his or her colleagues on the merits of those alleged points of law or jurisdiction. The relevant provisions of the *Energy Resources Conservation Act*, RSA 2000, c E-10 in force at the time read as follows:

> 41(1) Subject to subsection (2), on a question of jurisdiction or on a question of law, an appeal lies from the Board to the Court of Appeal.
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> (2) An application for leave to appeal must be filed and served within 30 days from the day that the order or direction sought to be appealed from was made, or within a further period of time granted by the judge where, in the opinion of the judge, the circumstances warrant it.
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> (3.2) On leave to appeal being granted by a judge of the Court of Appeal, the appeal shall proceed in accordance with the practice and procedure of the Court of Appeal.
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> 42 Subject to section 41, no proceedings of or before the Board may be restrained by injunction, prohibition or other process or proceedings in any court nor are they removable by certiorari or otherwise into any court.

The legislation affords no guidance to the single judge as to how to exercise his or her discretion. But several things seem obvious. The first is that the decision ought not to depend upon how that particular judge "feels" about the application or what sort of morning he or she might have been

having. This is, after all, notwithstanding the realists and the crits, a scheme that should at least adhere to the forms of the rule of law and the idea that no discretionary power is unconstrained and free of its context. Second, except in the most obvious cases, the single judge ought not to be deciding the ultimate question, the point of law or jurisdiction, that the putative appellant seeks to advance. If that were the case the legislature would not have created a two step system. And third, given this relative void in legislative guidance it should be open to the Court of Appeal to develop its own guidance as to how it might exercise this discretion. No doubt this will be an iterative process but it did seem for a while as if the Court was progressing towards giving the regulatory bar and interested parties this sort of guidance. In particular, Justice Slatter in *Berger v Alberta (Energy Resources Conservation Board)*, 2009 ABCA 158 seemed to have enunciated a test that was finding support in subsequent decisions.

In that case Justice Slatter suggested (at para 2) as follows.

> (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.
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> (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.
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> (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.
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> (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.
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> (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".
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> (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.

The first paragraph repeats the language of the statute and is a true condition precedent to proceeding to the next stage. The subsequent paragraphs all seek to provide additional guidance on whether leave should be granted assuming that the applicant has met the requirements of the first paragraph. For similar but less extensive statements of relevant considerations see: *ATCO Midstream Ltd v Energy Resources Conservation Board*, 2008 ABCA 231 (CanLII), 2008 ABCA 231, 171 ACWS (3d) 454 at para 20 and *Atco Electric Ltd v Alberta (Energy and Utilities Board)*, 2002 ABCA 45 (CanLII), 2002 ABCA 45, 299 AR 337 at para 17.

Now one might cavil with Justice Slatter's list of criteria. There is clearly some overlap and interaction between the different elements of the test; and the test may be difficult to apply in different contexts. And there may be additional criteria to be added. But it is a start and more than a start. And, as noted above, the decision seemed to be attracting some support: *Métis Nation of Alberta Region 1 v Joint Review Panel*, 2012 ABCA 352 (per Berger JA), *Prince v Alberta (Energy Resources Conservation Board)*, 2010 ABCA 214 at para. 9 (per Watson JA).

But this sort of test and the quest for at least a modicum of certainty will only work if it is refined and applied in subsequent cases. I am not sure that this is still happening; the individual members of the Court no longer seem to be applying this test in any rigorous manner. I commented on this here in Justice Slatter's own recent decision in *Fort McKay First Nation v Alberta Energy Regulator*, 2013 ABCA 355 (and more recently *Andre v Evergreen Gas Co-op Ltd.* 2014 ABCA 29, also per Slatter JA).

But I see an even more egregious departure from any effort to apply this test (or alternatively refine it) in Justice O'Ferrall's lengthy decision denying leave in *Judd*. In this case it looks to me as if Justice O'Ferrall has effectively decided the very issues that Mr. Judd and his counsel sought to put before the Court (i.e. a panel of three). That is not the gatekeeper role of the single judge on a leave to appeal application unless the issues are so clear and obvious that a single judge should decide them. Justice O'Ferrall arrives at this result without so much as referring to *Berger* or any other leave case for the test to be applied.

For a completely different take on the *Judd* leave application see Jordan Hulecki, Regulatory Process Protects Landowners' Rights: Alberta Court of Appeal, here.