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Seeking Leave to Appeal a Statutory Tribunal Decision: What Principles Apply?

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Case Commented On: *Bokenfohr v Pembina Pipeline Corporation*, 2017 ABCA 40 (CanLII)

Statutory provisions which provide for an appeal from a statutory tribunal to a superior court have not received much critical attention in Canadian administrative law. In 2010 the Alberta Law Reform Institute contemplated a study on statutory appeals to the courts from adjudicative decisions, and in preparation for that study the Institute compiled an inventory of adjudicative tribunals and their statutory appeal mechanisms published in Administrative Adjudicative Decisions: Statutory Review Mechanisms. The Institute decided not to pursue this study, which is unfortunate because there is plenty of uncertainty surrounding the application of these provisions including, for example, how they operate alongside the inherent authority of a superior court to engage in judicial review of administrative decisions. That point does not concern us here, but rather our focus is on the typical legislative requirement that a prospective appellant to obtain leave or judicial permission to proceed with the statutory appeal of a tribunal decision. What principles guide the court in deciding whether to grant leave to appeal? The leave to appeal decision in *Bokenfohr v Pembina Pipeline Corporation*, 2017 ABCA 40 (CanLII) provides a recent illustration for the purpose of exploring this question.

The Applicants in *Bokenfohr* sought leave under section 45(1) of the Responsible Energy Development Act, SA 2012, c R-17.3 to appeal a decision of the Alberta Energy Regulator to approve the construction of pipelines across their land. Section 45(1) provides: "A decision of the Regulator is appealable to the Court of Appeal, with the permission of the Court of Appeal, on a question of jurisdiction or on a question of law." This is a typical leave to appeal provision in Alberta legislation. Section 45 provides some procedural rules for the leave proceedings such as a limitation period on filing the application (one month), who gets notice of the application, what evidence the Court may consider in deciding whether to grant leave, and what powers the Court has on the appeal if leave is granted. However, section 45 is silent on what considerations the Court engages with in deciding whether to grant leave or permission to appeal. The Court of Appeal in *Bokenfohr* strangely employs criteria which on their face have little application to a leave proceeding. We observe this is not an isolated case in the world of statutory appeals from regulatory decisions in energy and utilities in Alberta, and indeed it is quite typical for the Court to cite criteria which it then fails to explicitly apply in deciding whether to grant leave. We return to *Bokenfohr* at the conclusion of this comment.

During the summer of 2016 we used a research grant provided by the Foundation for Legal Research to examine the application of leave to appeal provisions across selected Canadian jurisdictions. Before we get into the substance, a brief note about terminology and our methodology is in order. While some readers and practitioners in administrative law will be familiar with the need to obtain 'leave to appeal' a tribunal decision, we also use the term 'permission to appeal' here because in 2014 the Alberta legislature passed Bill 8: Justice Statutes

Amendment Act, 3rd Session, 28th Legislature (2014-2015), which replaced the term 'leave to appeal' with 'permission to appeal' in all Alberta statutes. Accordingly, we use the phrases interchangeably in this comment. Our methodology for this research project has consisted largely of reviewing permission to appeal decisions by Alberta courts reported on the CanLII database. We started by identifying legislation with statutory appeal provisions that require a prospective appellant to obtain the Court's permission to appeal. We then reviewed permission to appeal decisions reported under each legislative regime. Our review consisted of tracking and recording selected content in each decision such as the justice hearing the application, the test applied by the court to decide whether to grant permission to appeal, and whether permission to appeal was granted. Because the research was done over the summer of 2016, the statistics in this post are for cases reported on CanLII before October 2016.

Leave or Permission to Appeal provisions in Alberta legislation

The Administrative Adjudicative Decisions: Statutory Review Mechanisms report published by the Alberta Law Reform Institute in 2011 lists all Alberta statutes, at the time of publication, with a provision which provides for an appeal from an adjudicative tribunal to the Court. Within this larger bundle of legislation, we identified 11 statutes that require a prospective appellant to first obtain permission of the Court to appeal the decision of a statutory tribunal. And within this smaller group of 11 statutes, we found reported leave decisions under the following 7 statutes:

- *Metis Settlements Act*, RSA 2000, c M-14: Section 204(1) requires permission to appeal a decision of the Metis Settlement Appeals Tribunal. This Tribunal hears appeals relating to settlement membership, settlement land use, and some decisions of the Settlement Council.
- *Natural Resources Conservation Board Act*, RSA 2000, c N-3: Section 31 requires permission to appeal a decision of the Natural Resources Conservation Board concerning a non-energy resource development project. The Board conducts hearings to consider whether such projects are in the public interest.
- *Agricultural Operation Practices Act*, RSA 2000, c A-7: Section 27 requires permission to appeal a decision of the Natural Resources Conservation Board concerning an intensive livestock project. Under this legislation, the Board may conduct a review on the approval of a livestock project.
- *Police Act*, RSA 2000, c P-17: Section 18 requires permission to appeal a decision of the Law Enforcement Review Board. This Board hears complaints about police conduct and is the forum for an appeal against a disciplinary decision made by the Chief of Police.
- *Municipal Government Act*, RSA 2000, c M-26: Section 688 requires permission to appeal a decision of the Subdivision and Development Appeal Board. Section 470 required permission to appeal a decision of the Assessment Review Board, until section 470 was amended as noted below. Section 506 requires permission to appeal a decision of the Municipal Government Board. Each of these Boards has its own sphere of jurisdiction to hear complaints or appeals concerning some aspect of municipal governance such as development approval, zoning, property assessment, or annexation.
- *Alberta Utilities Commission Act*, SA 2007, c A-37.2: Section 29 requires permission to appeal a decision of the Alberta Utilities Commission. This Commission is responsible for approving and regulating power generation and transmission projects.
- *Responsible Energy Development Act*, SA 2012, c R-17.3: Section 45 requires permission to appeal a decision of the Alberta Energy Regulator. We also included section 41 of the *Energy Resources Conservation Act*, RSA 2000, c E-10 (now repealed) in our research to capture leave applications made to appeal a decision of the Energy Resources

> Conservation Board (the predecessor to the Alberta Energy Regulator). The Regulator is responsible for approving and regulating energy resource development projects.

The 4 statutes with permission to appeal provisions for which we did not find a reported leave decision are (1) section 23 of the *Natural Gas Marketing Act*, RSA 2000, c N-1, which requires permission to appeal a decision of the Alberta Petroleum Marketing Commission; (2) sections 87(12) and 159(1) of the *Irrigation Districts Act*, RSA 2000, c I-11 which require permission to appeal a decision of the Land Compensation Board where the dispute relates to compensation payable in an amount less than $10,000; (3) section 61(3) of the *Livestock Identification and Commerce Act*, SA 2006, c L-16.2 which requires permission to appeal a decision of the Livestock Assurance Funds Tribunal; and (4) section 18 of the *City Transportation Act*, RSA 2000, c C-14 which requires permission to appeal a decision of the Protection Area Appeal Board.

All but one of these 11 statutes direct the statutory appeal of the tribunal decision to the Court of Appeal. The sole exception was section 470 of the *Municipal Government Act* which directed a statutory appeal of an Assessment Review Board decision to the Court of Queen's Bench; however, section 470 was recently amended in January 2017 to remove the availability of statutory appeal from an Assessment Review Board decision (See section 64 of the Bill 21, Modernized Municipal Government Act, 29th Leg, 2nd sess which has now been proclaimed into force).

The Test for Permission to Appeal

Seeking leave to appeal a statutory tribunal decision involves an application before a single justice in chambers at the appropriate Court within a time period prescribed by the governing legislation, for example 30 days from the date of the tribunal decision. The governing legislation also typically prescribes whether a statutory appeal is available on questions of law and/or fact arising from the tribunal decision. Statutory appeal provisions most commonly limit appeals to questions of law and jurisdiction. A notable exception in Alberta is section 38(1) of the *Securities Act*, RSA 2000, c S-4 which provides for a general right of appeal on any question, with a few prescribed exceptions. Section 45(1) of the *Responsible Energy Development Act*, SA 2012, c R-17.3 set out above is a good example of a typical leave to appeal provision which limits a statutory appeal to a question of law or jurisdiction (which is also, of course, a question of law).

In most instances the decision to grant leave to appeal resides wholly within the discretion of the chambers justice hearing the application, and the legislation is silent on the test or criteria to be met by an applicant in order to obtain permission to appeal. The *Municipal Government Act* is an exception to this norm, where the legislation prescribes the criteria for the Court to consider in deciding whether to grant leave to appeal a decision made by one of the three municipal tribunals created in the Act. These criteria more or less codify the factors developed by Alberta courts and described in more detail below.

Our review of leave decisions across jurisdictions and regulatory regimes suggests the conventional test for obtaining permission to appeal a statutory tribunal decision involves an applicant convincing the Court on two grounds: (1) there is a question of law with some degree of significance or importance arising from the tribunal decision; and (2) the applicant has a reasonable chance of success in an appeal on that legal question. However, there is some variation in how Alberta courts have assessed these considerations of significance and merit. For

example, the test for leave to appeal a decision of the Metis Settlement Appeals Tribunal under the *Metis Settlements Act* requires an applicant to demonstrate the question of law raises issues of importance to the Metis people, the Tribunal or the public generally. See *Paddle Prairie Métis Settlement v. Métis Settlements Appeal Tribunal*, 2011 ABCA 96 (CanLII) at para 9, for a recent application of the test for leave under this regime. In contrast, the leave to appeal test under other legislation such as the *Municipal Government Act* seems to assess significance more subjectively in relation to the parties or the matter in question.

Similarly, there is variance and even disagreement on how meritorious an issue must be to obtain permission to appeal a tribunal decision. Some courts have applied a low threshold on the applicant, requiring them to simply demonstrate there is an arguable case or that the issue(s) raised are not frivolous. For example, in leave applications concerning a decision of the Subdivision and Development Appeal Board under the *Municipal Government Act* the Court has stated a 'reasonable chance of success' only requires the applicant to establish the appeal will not to be frivolous. See recently *Osman Auction Inc. v Edmonton (City)*, 2015 ABCA 135 (CanLII) at para 34 or *Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)*, 2016 ABCA 129 (CanLII) at para 9.

Some courts have insisted the applicant demonstrate they have a reasonable prospect of success in the appeal or are likely to succeed on the balance of probabilities. And many, but not all courts, will consider the standard of review applicable to the tribunal decision in assessing the applicant's prospect for success on appeal. So the parties in a leave application often make submissions on whether the standard will be correctness (higher chance of success on appeal) or reasonableness (lower chance of success on appeal).

On the higher end of the threshold for leave, sometimes the leave decision gives the impression that the applicant had to essentially argue the merits of their case in the leave application. The *Bokenfohr* decision perhaps offers an illustration of this, as we discuss below. Some empirical evidence might also be seen in the relatively high success rate on appeals heard where leave was granted. We noted that there were 10 reported appeals concerning decisions of the Assessment Review Board, and 9 of those 10 decisions resulted in the appeal being granted in whole or in part. Similarly, of the 17 reported appeals from the Law Enforcement Review Board, we found 13 instances where the appeal was granted in whole or in part. And in relation to appeals from decisions of the Subdivision and Development Appeal Board, we observed 22 of the 28 reported decisions resulted in the appeal being granted in whole or in part. Conversely, we observed 30 reported decisions concerning statutory appeals from the Alberta Utilities Commission or Alberta Energy Regulator (and its predecessor the Energy Resources Conservation Board) and of these 30 decisions only 5 resulted in the appeal being granted.

A recent disagreement on the merit point surfaced at the Court of Appeal in relation to decisions made by the Law Enforcement Review Board. In the 2014 *Boychuk v Edmonton (Police Service)*, 2014 ABCA 163 (CanLII) decision, Justice Wakeling took the position that a reasonable prospect of success means the likelihood the appeal will be allowed is at least as great as the likelihood it will be dismissed (at para 54-55). Justice Berger disagreed with this finding in *Quaidoo v Edmonton (Police Service)*, 2015 ABCA 87 (CanLII) (at para 5):

> I respectfully disagree. The legislative framework is bereft of any indication that the legislature made a conscious choice to so constrain appellate review. The suggestion that the reasonable prospect of success test would be reduced to a 50/50 proposition is, on its face, problematic given my colleague's asserted acceptance of the inevitable consequence

> that meritorious appeals would not go forward and unjust outcomes would stand uncorrected.

More recently in *IJ v Alberta (Law Enforcement Review Board)*, 2016 ABCA 234 (CanLII) Justice Wakeling seems to avoid the matter by simply remarking the prospect of success must be high enough to justify granting permission to appeal (at para 5).

Given the significant gatekeeping function performed by the leave requirement, the variance in the test to be met by an applicant seems problematic. Moreover, there is surprisingly little judicial or scholarly discussion on the rationale, purpose or theory underlying the test for obtaining permission to appeal. We found only one decision that explores the purpose of the leave process in much depth. In *Boychuk v Edmonton (Police Service)*, Justice Wakeling described the test for permission to appeal as intended to control limited judicial resources and to ensure an appeal only proceeds "when the institutional apparatus an appellate court represents will provide a significant benefit to the community." (at para 31) Justice Wakeling suggested the most influential factor in granting leave to appeal should be an assessment of the significance or importance of the legal question at issue, and we should accept the prospect that legal errors will be made by statutory tribunals which will not be corrected by a superior Court (at para 55). This latter point is certainly a contested one.

The most significant doctrinal anomaly in the Alberta leave decisions is the reference by the Court of Appeal to the leave criteria set out by *Power Consolidated (China) Pulp Inc. v British Columbia Resources Investment Corp.* [1988] BCWLD 2679, [1988] BCJ No 1403. The *Power Consolidated* criteria for determining whether leave should be granted are:

- whether the point on appeal is of significance to the practice
- whether the point raised is of significance to the action itself
- whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous
- whether the appeal will unduly hinder the progress of the action.

These criteria were developed in an application for leave to appeal an interlocutory finding on the admissibility of evidence in civil proceedings, and were first introduced into Alberta for the test for leave to appeal a statutory tribunal decision in *Atco Electric Ltd. v Alberta (Energy and Utilities Board)*, 2002 ABCA 45 (CanLII) (at para 12). These *Power Consolidated* criteria have since been applied regularly in relation to decisions made by the Alberta Utilities Commission and the Alberta Energy Regulator (and its predecessor Energy Resources Conservation Board). And recently the *Power Consolidated* factors were cited in a leave decision concerning a decision of the Métis Settlement Appeals Tribunal in a recent decision (*Kikino Metis Settlement v Husky Oil Operations Limited*, 2016 ABCA 228 (CanLII) at para 10).

The application of the *Power Consolidated* criteria in this context is awkward to say the least. Two of the 4 *Power Consolidated* factors make no sense whatsoever in relation to a statutory leave application. Whether the point on appeal is significant to the practice? Assuming this is a reference to the practice of law, it is hard to see how this factor relates to a statutory appeal. Whether the appeal will unduly hinder the progress of the action? Well there is no action if the applicant fails to get leave to appeal; in other words, there is nothing to hinder. The other 2 *Power Consolidated* factors at least speak to considerations of significance and merit, but do so in an odd way. For example, when seeking permission to appeal a tribunal decision there is no action for something to be of significance towards. So how did these *Power Consolidated* factors find their way into Alberta leave to appeal decisions? This remains a mystery. But the

unfortunate doctrinal result is that many Alberta justices hearing a leave application cite the test but do not apply it to the application before them.

Our final general observation is that the overall success rate when seeking permission to appeal at the Court of Appeal hovers around 50%. The more specific statistics are as follows:

- Of the 13 applications for permission to appeal from the Métis Settlement Appeals Tribunal, 9 have been granted permission to appeal
- Of the 8 applications for permission to appeal from the Natural Resources Conservation Board, only 1 has been granted permission to appeal
- Of the 41 applications for permission to appeal from the Law Enforcement Review Board, 20 have been granted permission to appeal
- Of the 106 applications for permission to appeal from the Subdivision and Development Appeals Board, 50 have been granted permission to appeal
- Of the 89 applications for permission to appeal from the various tribunals in the energy and utilities sector, 45 have been granted permission to appeal.

Bokenfohr v Pembina Pipeline Corporation

Permission to appeal is denied in *Bokenfohr*. Justice Slatter finds the applicants do not establish a question of law emanating from the impugned Alberta Energy Regulator decision (at para 33). The analysis by Justice Slatter in *Bokenfohr v Pembina Pipeline Corporation* provides a good, recent illustration of doctrinal difficulties inherent in the *Power Consolidated* factors. In *Bokenfohr*, Justice Slatter cites a modified version of the *Power Consolidated* factors (at para 2):

> The applicants now seek permission to appeal the approvals under s. 45(1) of the *Responsible Energy Development Act*, SA 2012, c. R-17.3, which permits further appeals to this Court on questions of law or jurisdiction if permission is granted. On an application for permission to appeal, the Court considers a number of issues:
>
> (a) Is the issue of general importance?
>
> (b) Is the point raised of significance to the decision itself?
>
> (c) Does the appeal have arguable merit?
>
> (d) What standard of review is likely to be applied?
>
> (e) Will the appeal unduly hinder the progress of the proceedings?
>
> The test is set out in cases like *Berger v Alberta (Energy Resources Conservation Board)*, 2009 ABCA 158 (CanLII) at para. 2, and *Wood Buffalo (Regional Municipality) v Alberta (Energy and Utilities Board)*, 2007 ABCA 192 (CanLII) at para. 5, 80 Alta LR (4th) 229, 417 AR 222.

The applicants in *Bokenfohr* sought leave to appeal a decision of the Alberta Energy Regulator to approve the construction by Pembina Pipeline Corporation of two pipelines running from Fox Creek to Namao. The applicants are landowners along the proposed right-of-way who collectively own approximately one-third of the land traversed by the pipelines. They participated collectively in the hearing process, and while they did not oppose the pipelines

outright, they had a number of site-specific concerns, such as width of the right-of-way, depth of cover, weed control, construction monitoring, and precise routing.

The Alberta Energy Regulator approved the pipelines after a hearing: *Pembina Pipeline Corporation: Applications for Two Pipelines Fox Creek to Namao Pipeline Expansion Project*, 2016 ABAER 004. The primary issue for the applicants was that the Regulator accepted Pembina's proposal to address many of their concerns with undertakings or promises (referred to as 'commitments') submitted during the oral argument phase of the hearing, and the Regulator chose not to include Pembina's commitments as enforceable conditions on approval. The Regulator stated it expects Pembina to live up to its stated commitments, which Pembina and affected landowners were free to continue negotiations on. The applicants asserted there is an arguable question whether the Regulator committed an error in law by purporting to rely on unenforceable promises to address concerns with the proposed pipeline project. The applicants argued there were both substantive and procedural problems with how the Regulator dealt with this.

Justice Slatter finds no substantive question of law arises from how the Regulator incorporates Pembina's commitments into its decision to approve the construction of the pipelines (at paras 18 and 27). Procedurally, the applicants argued the Regulator should have granted an adjournment in the hearing to provide them with an opportunity to respond to the list of commitments tendered by Pembina. Justice Slatter rules no viable question of law arises from this procedural point (at para 32).

What is noteworthy for the purposes of this comment is the absence of any explicit application of the test for leave criteria cited by Justice Slatter at the outset of his decision. Although the overall flavour of Justice Slatter's reasoning suggests he was not convinced there was arguable merit in the applicant's appeal (cited as paragraph (c) in his criteria). This decision should probably be read in this way, as one could quite comfortably argue the Regulator's reliance on unenforceable commitments to address concerns with a proposed energy project, and the way in which the Regulator handled the matter during the hearing, raises one or more legal issues. The *Bokenfohr* decision also gives the impression the applicants were faced with a high threshold for obtaining leave to appeal, although Justice Slatter provides very little reasoning to substantiate how the applicants failed to meet the test for significance and merit.

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