

## Obtaining leave to appeal an ERCB decision: Where is the justice?

By Shaun Fluker

### Cases Considered:

[\*Bears paw Petroleum Ltd. v. Alberta Energy and Utilities Board\*, 2008 ABCA 405;](#)

[\*Bears paw Petroleum Ltd. v. Alberta Energy and Utilities Board\*, 2009 ABCA 3.](#)

Section 41 of the *Energy Resources Conservation Act*, R.S.A. 2000 c. E-10 provides for an appeal from a decision of the Energy Resources Conservation Board (ERCB) on questions of law or jurisdiction with leave of the Court of Appeal. The test for leave includes a consideration of four factors: (1) whether the point on appeal is of significance to the practice; (2) whether the point raised is of significance to the action itself; (3) whether the appeal is prima facie meritorious; and (4) whether the appeal will unduly hinder the progress of the action. *Bears paw Petroleum Ltd. v. Alberta Energy and Utilities Board* is one of many recent leave to appeal decisions from the Court (See for example [“Landowners, Procedural Fairness and Alberta’s Energy Resources Conservation Board”](#) ). What strikes me about this decision is how it compares to the Court’s decision to deny leave to appeal in *Sawyer v. Alberta Energy and Utilities Board*, 2007 ABCA 297 (see [“Standing against public participation at the Alberta Energy and Utilities Board”](#)).

The facts in this case involve the ERCB detection of hydrogen sulphide (or sour gas) emissions outside the fenced site of a Bears paw Petroleum gas facility. Bears paw sought leave to appeal the ERCB’s decision on four grounds, three of which Madam Justice Constance Hunt denied with oral reasons stating they fail to meet the test of being a serious question of law or jurisdiction (*Bears paw Petroleum Ltd. v. Alberta Energy and Utilities Board*, 2009 ABCA 3).

The issue which ultimately does meet the test for leave concerns whether the sour gas emissions were “off lease” and, accordingly, serve as non-compliance with [ERCB Directive 064 Requirements and Procedures for Facilities](#). While emissions detected outside the boundary of a facility would typically require action on the part of the licensee to eliminate the emissions without controversy, the dispute in this case results from the fact that Bears paw is the owner of surface lands surrounding the facility. Accordingly, Bears paw argues that while its emissions were “off-site” they were not “off-lease”, such that it is not required to take action pursuant to Directive 064. The ERCB on the other hand argues that the purpose of Directive 064 is to ensure

emissions do not escape onto nearby lands and that the ERCB enforcement order issued against Bearspaw has legal validity.

On a quick glance of the applicable sections of Directive 064, it appears that the terms “off lease” and “off site” are used somewhat interchangeably, and in her reasons Madam Justice Hunt notes the terms are not defined in the Directive. On the basis that the meaning of “off lease” is determinative on the legality of the ERCB enforcement order, Madame Justice Hunt grants Bearspaw leave to appeal.

Recall that *Sawyer v. Alberta Energy and Utilities Board* concerned an application by Shell Canada to drill a sour gas well and construct associated pipeline on public land in the Castle region of the eastern slopes of the Rocky Mountains west of Pincher Creek. In deciding who had standing to contest the application, the ERCB interpreted the “directly and adversely affected rights” test for standing in section 26(2) of the *Energy Resources Conservation Act* to include only resident landowners within the prescribed emergency planning zone for the proposed project. Accordingly, Michael Sawyer, a recreational user residing in Calgary whose participation in the licensing hearing was opposed by Shell, was not entitled to full participatory rights. Sawyer sought leave at the Court of Appeal to challenge his denial of standing, and Madam Justice Rowbotham decided there was no question of pure law in the Board’s decision that Sawyer’s recreational interest in the region was not of sufficient connection to the gas well. And she accordingly denied leave to Sawyer.

So while the interpretation of the term “off lease” in ERCB Directive 064 is presumably a question of pure law that prima facie qualifies for leave to appeal, the ERCB’s restrictive interpretation of who has the legal right to participate in a public hearing pursuant to the *Energy Resources Conservation Act* is not. To put the comparison in different terms: the Court of Appeal will review an ERCB decision that serves the goal of eliminating sour gas emissions, but it will not review an ERCB decision that perpetuates the inability of Albertans to voice their opposition to energy development. Where’s the justice?