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Narrowing the prospect of obtaining leave to appeal an ERCB decision: The troublesome aspect of judicial deference

By Shaun Fluker

Cases Considered:

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

The Court of Appeal routinely decides applications for leave to appeal an Energy Resources Conservation Board (ERCB) decision on questions of law or jurisdiction pursuant to section 41 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 (*ERCA*). In *Berger v. Alberta (Energy Resources Conservation Board)*, Mr. Justice Frans Slatter denies a request from several applicants for leave to appeal a December 2008 ERCB approval issued to Highpine Oil and Gas to drill 3 sour gas wells in Parkland County west of Edmonton (ERCB decision 2008-135).

Early in his decision, Justice Slatter sets out factors to consider in a leave application, most of which have been cited in previous ABlawg entries on this topic (see my post "Obtaining leave to appeal and ERCB decision: Where is the justice?", and Nickie Vlavianos's post "Landowners, procedural fairness, and Alberta's Energy Resources Conservation Board"). Noteworthy to me in the list of factors set out by Slatter J. here is the inclusion of what standard of review the Court of Appeal will apply to the ERCB decision on appeal. The result is that if the Court of Appeal will be "highly" deferential to the ERCB decision on appeal, then leave to appeal should not be granted pursuant to section 41 (at para. 2):

> 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".

As precedent, Justice Slatter relies on his earlier leave decision in Wood Buffalo (Municipal Region) v. Alberta (Energy and Utilities Board), 2007 ABCA 192, where he states (at para. 5):

> 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”. Where the standard of review is itself likely to be a contentious issue if leave is granted, this factor becomes less decisive. In this case it is likely that the Court would apply a deferential standard of review.

Note that this earlier rendition is less absolute in denying leave based on the standard of review, presumably because this statement was made prior to the Supreme Court’s decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, which purports to alleviate the contentious issues in applying a standard of review (see my post on *Dunsmuir*). This may or may not be the case, and I leave that discussion for another day. My focus here is on the use of judicial deference to decide leave applications.

No point in granting leave if the Court will be deferential, because the Court is unlikely to engage in the issue? Perhaps this is effectively the result, but arguably the inclusion of the standard of review as a factor in the test for leave is an interpretation that *ERCA* section 41 cannot bear. The relevant portion of section 41 reads: “[O]n a question of jurisdiction or on a question of law, an appeal lies from the Board to the Court of Appeal.” By including standard of review as a consideration in whether to grant leave, Slatter J. has read into section 41 the italicized text that follows: [O]n a question of jurisdiction or on a question of law *which the Court of Appeal believes it should answer,* an appeal lies from the Board to the Court of Appeal. This reading has the potential to severely limit the ability of an applicant to meet the test for leave to appeal an ERCB decision.

I make this claim on the basis of what “highly deferential” means in the context of judicial review. When a reviewing court decides to defer to an administrative decision-maker (such as the ERCB) on a particular question of law, that court is stating its view that the impugned administrative decision-maker is better suited to have the final say on that question. This will typically be the case where an administrative board is interpreting its governing legislation or the question of law is otherwise specific to the regulatory regime it administers — for example, where the ERCB interprets its rules and governing legislation concerning the application requirements for a well license, a subject matter comfortably within the home territory of the ERCB. Generally in the case of energy, utilities, telecommunications, financial services, and similarly complex and elaborate regulatory frameworks, the standard of review jurisprudence is such that in the majority of cases the administrative decision-maker will have final say on a question of law. In other words, only in rare instances will the Court of Appeal conclude that it, rather than the ERCB, should answer the question of law. And thus in result, we have a narrowing of the prospect for obtaining leave to appeal an ERCB decision.

In this case the applicants sought leave to appeal on more than a dozen grounds, including arguments that the ERCB erred in relation to interpreting its own directives and governing legislation, including the following for which Slatter J. denied leave because the standard of review would be deferential:

- ERCB Directive 071 Emergency Preparedness and Response Requirements for the Upstream Petroleum Industry requires an agreement between a municipality and the energy company on emergency response before a license can be issued;
- Highpine Oil and Gas failed to consult in accordance with ERCB Directive 056 Energy Development Applications and Schedules; and,
- Highpine was allowed to file technical evidence just before the ERCB hearing, and the applicants were given insufficient time to retain experts for rebuttal purposes.

It isn't even clear to me how the last of these grounds attracts judicial deference, given that it is an allegation of breach in procedural fairness - a basis for judicial review in which no deference is typically owed by the court. And even if this is only an arguable point, it surely isn't a sufficient basis upon which to deny leave to appeal given the language in section 41.

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