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Public Interest Standing and a Statutory Right of Appeal

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Cases Considered:

Pembina Institute for Appropriate Development v Alberta (Utilities Commission), 2011 ABCA 302

The Pembina Institute for Appropriate Development ("Pembina") recently sought leave of the Alberta Court of Appeal to appeal the June 30, 2011 interim decision of the Alberta Utilities Commission ("AUC") to approve the construction of a coal-fired power generation facility by Maxim Power Corp. ("Maxim") in Alberta. In *Pembina Institute for Appropriate Development v Alberta (Utilities Commission)*, 2011 ABCA 302, Madam Justice Patricia Rowbotham denies the Pembina application for leave to appeal. However in her reasons for decision, Justice Rowbotham adds to the Alberta jurisprudence on public interest standing. I will first describe the parameters of the leave application before discussing the standing matter.

Pembina advanced three grounds upon which it would challenge the interim decision of the AUC if granted leave by the Court. First, the AUC erred in law by making a final determination that the power generation facility is in the public interest before completing its review of Maxim's application. The AUC's interim approval concludes the facility is in the public interest, but also states the AUC will give further consideration to conditions that will attach to its final approval. Pembina thus argued the AUC could not have fully considered the implications of the facility before issuing its interim approval if the AUC was still considering possible conditions to impose on the approval.

Pembina also argued the AUC erred in law by issuing its interim approval in response to a written request by Maxim to expedite the approval process so as to avoid pending federal regulations on emissions. Maxim applied for regulatory approval back in early 2009. In June 2010 the federal government announced pending regulations to reduce greenhouse gas emissions from coal-fired power generation facilities. These new federal regulations will apply to a facility which commences operation after July 1, 2015. The AUC record includes a letter written in early June 2011 addressed to the AUC from counsel for Maxim asking the AUC to expedite its approval process and approve the new facility before June 30, 2011 so as to ensure Maxim can have its facility operating before the new federal regulations come into force. Section 17 of the *Alberta Utilities Commission Act*, SA 2007, c A-37.2 requires that the AUC give consideration to whether its decision is in the public interest. Pembina argued the AUC erred by concluding the public interest is met by expediting an approval process so as to avoid the application of pending federal emissions reduction laws.

Pembina also argued the AUC erred in law by failing to give adequate reasons in its interim approval to explain how this decision is in the public interest.

Justice Rowbotham denies Pembina leave to appeal on each of these grounds. Her decision is based primarily on the fact that the AUC issued a final decision in August 2011 approving the power generation facility with reasons. Justice Rowbotham concludes the final approval renders moot any errors arising from the interim approval (at paras 21-24).

The contribution of this decision to the jurisprudence lies in how Justice Rowbotham applies the doctrine of public interest standing. The AUC did not hold a public hearing to consider the Maxim application. The AUC determined that all parties who sought to oppose the application, including Pembina, failed to meet the 'directly and adversely affected' test set out in section 9(2) of the *Alberta Utilities Commission Act*. The novel point of law decided by Justice Rowbotham here is her ruling that Pembina has public interest standing to seek leave to appeal the AUC interim decision under the statutory appeal process set in the *Alberta Utilities Commission Act* notwithstanding that Pembina was not a party in the underlying AUC proceedings. Justice Rowbotham also specifically rejects the argument from the AUC and Maxim that Pembina's application for leave is a collateral attack on the AUC's section 9(2) determination that Pembina is not affected by this decision (at para 13).

Justice Rowbotham cites the leading Alberta decision on public interest standing – *Reese v Alberta (Minister of Forestry, Lands & Wildlife),* (1992) 123 AR 241, 87 DLR (4th) 1 (QB) – which sets out the parameters an applicant must demonstrate to obtain legal standing to challenge an administrative decision that does not directly affect them. Namely that the issue is serious and justiciable, the applicant has a genuine interest in the matter, and there is no other means to bring the matter before the Court (I describe the public interest standing test in my ABlawg post "Lucy the Elephant v Edmonton (city)". Justice Rowbotham finds that Pembina has public interest standing in this case based on: (1) the issue of whether the AUC erred in law by issuing its interim approval is serious and justiciable; (2) Pembina has a genuine interest in the matter (having sought to oppose the Maxim application at the AUC); and (3) there is no other means by which this matter can be brought before the Court since the AUC ruled no person met the 'directly and adversely affected' statutory test to trigger a public hearing (at para 20).

Pembina successfully argued that there has to be some legal process available to hold the AUC accountable in law for its decisions – even where the AUC is of the view that no person may be directly or adversely affected by its decision. In other words where a statutory decision-maker in Alberta concludes no person is sufficiently affected by the decision to trigger a hearing under its governing legislation, the doctrine of public interest standing may apply to invite appellant review by a court.

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