

## A Closer Look at Leave to Appeal Requirements Under the *Municipal Government Act* (Alberta)

**By:** Shaun Fluker

**Case Commented On:** *Arctos & Bird Management Ltd v Banff (Town)*, [2017 ABCA 300 \(CanLII\)](#)

This is a decision by Justice Barbara Veldhuis to deny the applicant leave to appeal an approval for development of lands in the Town of Banff. Statutory leave to appeal decisions such as this rarely attract legal commentary because no substantive law is decided. These decisions result from an application before a justice in chambers from a person who seeks permission to proceed with a substantive appeal of an administrative decision. Nonetheless, I have been studying these leave to appeal decisions to better understand the basis upon which superior courts decide whether to hear an appeal from an administrative decision. *Arctos & Bird Management* provides me with an opportunity to add to the findings Drew Yewchuk and I previously disseminated on ABlawg in [“Seeking Leave to Appeal a Statutory Tribunal Decision: What Principles Apply?”](#) (“Seeking Leave”).

The development in question concerns a proposal to renovate [Melissa's](#) Steakhouse and redevelop the adjacent [Homestead Inn](#) on Lynx Street in Banff. Melissa’s is a well-known restaurant in Banff and it is likely some readers have either dined there or participated in the [run](#) sponsored by Melissa’s. The redevelopment of the Inn – into a 71 room hotel with 3 floors and including 2 apartment units – is opposed by an adjacent landowner and was the subject of a [hearing](#) before the municipal planning commission during January 2017. The planning commission upheld the approval for development issued by Banff, and it is this decision which *Arctos & Bird Management* sought leave to appeal.

An application for leave to appeal a municipal planning decision in Alberta falls under the planning and development provisions contained in Part 17 of the *Municipal Government Act*, [RSA 2000, c M-26](#). Section 683 provides that no person may commence a municipal development unless the person has been issued a permit under the relevant land use bylaw. A person who feels they are affected by a development permit may appeal the issuance of that permit before an development appeal board – in this case the planning commission noted above. Section 688 provides that an appeal from a development appeal board decision lies to the Court of Appeal on a question of law or jurisdiction, with leave of the court.

Section 688(3) constrains the discretion of a justice hearing the leave application by stating the justice may grant leave if they are of the opinion (1) that the appeal involves a question of law of sufficient importance to merit a further appeal to the Court and (2) the appeal has a reasonable chance of success. As discussed in “Seeking Leave”, these two criteria make up the conventional test to be met by an applicant seeking leave to appeal in most statutory frameworks across

Canadian jurisdictions. These criteria are widely used even in cases where the legislation is silent on criteria for a leave justice to consider. However, there is significant variation in how these considerations of significance and merit are applied by justices hearing leave applications. “Seeking Leave” provides an overview of these differences, and I will focus more directly on this point here.

Statutes have included appeal provisions from administrative decisions to the courts since the early days of the administrative state. However, deliberation on the rationale for, and purpose of, a statutory appeal is hard to locate in the literature before the mid-twentieth century. The first publication of substance is likely the 1957 Franks Report to the Parliament of Great Britain on the workings of statutory tribunals (*Report of the Committee on Administrative Tribunals and Enquiries* (London: Her Majesty’s Stationery Office, 1957) (Chair: Sir Oliver Franks)).

The Franks Report set out a firm opinion that statutory tribunal decisions must be subject to review, and moreover that these decisions must be subject to review by the courts on points of law. The report noted this review could be administered either by a statutory appeal provision in the tribunal’s governing legislation or via the inherent jurisdiction of a superior court to engage in judicial review, but the report advocated more strongly for the statutory appeal over judicial review because: (1) the basis of the statutory appeal could be wider in scope and in remedies than judicial review; (2) the statutory appeal mechanism could be crafted to the unique characteristics of the impugned tribunal and direct the appeal to a particular level of court; and (3) the appeal would be less costly and more expeditious than judicial review. Judicial review would remain available for questions of jurisdiction and for those instances where legislation did not provide for a statutory appeal to the courts.

The Franks Report was replicated in Alberta several years later. A committee was struck in 1965 to review how the powers of statutory tribunals in Alberta may implicate individual rights and liberties and to make recommendations on procedural measures to ensure such powers are exercised in accordance with natural justice. The 1965 Clement Report to the Legislative Assembly of Alberta disseminated the findings of this review (Legislative Assembly, *Report of the Special Committee on Boards and Tribunals* (Chair: Carlton W. Clement)). The Clement Report repeats the strong opinion that was set out in the Franks Report on the need for a statutory appeal to the courts:

The Committee is unanimously and firmly of the view that in every case there should be a right of appeal to the Supreme Court of Alberta on a question of jurisdiction and a question of law. No legitimate reason can be put forward why a tribunal to whom the Legislature has delegated certain defined authority should be permitted with impunity to transgress the bounds of the jurisdiction that it was intended it should exercise. Similarly, there should be no excuse for a tribunal misapplying the law, or ignoring law, to which all citizens of the Province are subject, in favour of its own views as to what should be applicable to the persons that are affected by its decisions. No leave should be required for such an appeal, and simple and expeditious procedures should be provided. By this stroke there would be cut away the privative clauses still remaining in some statutes whereby the Legislature seeks to protect its tribunals from the disciplines of the Rule of Law; and in place of the old and difficult

prerogative writs persons who felt themselves aggrieved by excesses of jurisdiction or misapplication of law would have a simple and easy access to the Courts to determine the point. (at 74-75, emphasis added)

Again, we see the suggestion that, relative to judicial review, a statutory appeal would offer a simpler, less costly and more expedient process for reviewing tribunal decisions – although unlike the Franks Report, the Clement Report seems to suggest a statutory appeal could do away with judicial review altogether by encompassing jurisdictional questions. The recommendation against requiring a prospective appellant to obtain leave of the court is of course most noteworthy here.

In March 2012 the Law Reform Commission of Saskatchewan published its report on statutory appeals (Saskatchewan, *Appeals from the Exercise of Statutory Powers of Decision*). Consistent with these earlier reports, the Commission strongly favoured statutory appeals over judicial review as a simpler mechanism for legal oversight that can be calibrated to address the particularities of statutory tribunal decisions, and recommended that legislation contain a right of appeal on questions of law (and in certain instances on questions of fact) to the courts from the exercise of statutory power with only a few exceptions. The report summarizes much of what has already been stated above and the findings of the Commission are surprisingly consistent with those made 50 years earlier by the Clement Report in Alberta, including a recommendation that there should generally be no requirement for a prospective appellant to obtain leave from the court to exercise a right of appeal except in cases where there is a genuine concern for frivolous appeals.

Legislatures have not responded to the calls for abandoning a leave requirement in statutory appeals. “Seeking Leave” provides some discussion on the apparent absence of principled decision-making in these leave decisions, but to this I would add that in many instances the leave requirement places an overly high onus on the applicant. The requirement to demonstrate a question of law of sufficient importance can be satisfied by establishing that the resolution of the question has general implications for the legal system or the community at large. Query how one accomplishes this when the court limits its own review to some of the materials that were placed before the tribunal in question? It seems unlikely the tribunal itself heard or considered submissions or evidence on the general implications. It is indeed a difficult onus to meet, which is why I think leave decisions sometimes provide very sparse reasons on the point or accept a more subjective assessment of relative importance on the issue (i.e. the matter is of significant importance to the parties). Likewise, on the second requirement of having to establish that the appeal has a reasonable chance of success. Too often it seems like having to meet this onus requires an applicant to convince the court of the ultimate merits of its appeal, without having the full tribunal record before the court and with a constrained opportunity to make arguments on that record.

In *Arctos & Bird*, the applicant sought leave to appeal on two questions of law: (1) the Board erred by failing to require a subdivision approval on the lots before development could proceed; and (2) the Board erred by failing to take into consideration the population cap of 8000 residents for the Town of Banff set out in the Banff Park Management Plan. Justice Veldhuis states both questions are of significant importance without citing evidence to substantiate her conclusion (at

paras 22, 23). However, the applicant fails on the second criterion, as Justice Veldhuis rules there is no reasonable prospect of success on either question.

Justice Veldhuis finds the question of whether the planning commission erred by failing to require a subdivision approval turns on principles of statutory interpretation concerning a reading of the land use bylaw and the Town of Banff incorporation agreement between Alberta and Canada. I think a glance at paragraphs 27 to 38 of this decision illustrates my point above about an applicant having to effectively establish the merits of its substantive appeal in the leave process, as Justice Veldhuis runs through some interpretation of the relevant provisions to conclude there is no reasonable prospect of success on this question. Likewise, paragraphs 39 to 45 rule that the question of whether the Board erred in how it addressed the population cap has no reasonable prospect of success. Yet Justice Veldhuis does seem to acknowledge there is an arguable point on whether the 8000 resident threshold is merely an aspirational target or a hard cap (at para 41) but then goes on to more or less crunch the numbers and conclude this development project is not going to push Banff over 8000 permanent residents and therefore this issue has no chance of success on appeal (at paras 42-44). But this sort of reasoning just seems to avoid the question(s) raised here which may be of general significance: (1) what is the law on Banff's maximum population (i.e. are the provisions in the management plan mandatory and binding)? And (2) what does that law require of persons responsible for approving new development in Banff? Given how close the Town's population is to the prescribed threshold in the Plan, surely there was at least some prospect for success here?

Perhaps the only thing we can take from this analysis is that if I were the justice hearing this application, I would have granted leave to appeal in this case. But my larger point is that I would have granted leave not on some objective sense of general importance or because there is a principled basis for concluding there is some prospect for success here, but rather because I see merit in having more legal deliberation over provisions in the Banff Park Management Plan. Placing an onus on the applicant to substantiate the general importance of their issues in the context of their particular claim seems like a lot to ask of them, and moreover the assessment by a justice in chambers on what constitutes a question of general importance or one with a reasonable prospect of success seems like a very subjective assessment from my review of decisions in this area.

This research project has also provided me with a database of leave decisions issued in Alberta, and current up to the end of 2016, which I can filter by subject, tribunal, and the justice hearing the application. Accordingly, we can perhaps glean more here by comparing this decision with previous decisions by Justice Veldhuis concerning an applicant seeking to appeal a development approval decision under the *Municipal Government Act*. My database has 5 entries for Justice Veldhuis all issued in 2014 or later (subsequent to her appointment to the Court of Appeal). In those 5 decisions, Justice Veldhuis has granted leave to appeal in one of the applications and denied leave in the others.

In *Springfield Capital v Grande Prairie (SDAB)*, [2016 ABCA 136 \(CanLII\)](#) leave was granted to appeal a Grande Prairie development board decision upholding approval for the permit to develop a recycling depot. Justice Veldhuis granted leave on whether the board erred procedurally by failing to adequately explain its decision (*Springfield Capital* at paras 24 -31).

Justice Veldhuis' analysis suggests the applicant easily established a reasonable prospect for success, but her analysis is short on how the failure to provide reasons is otherwise of general importance to the legal system (although no doubt of significant importance to the parties involved in this dispute).

In *Spruce Grove Gun Club v Parkland (County) SDAB*, [2016 ABCA 29 \(CanLII\)](#) a gun club sought leave to appeal the denial of a permit for their range. The development of the gun range was successfully opposed by nearby residents before the development appeal board. Justice Veldhuis denied leave to appeal, holding alleged procedural errors had no reasonable prospect for success. She noted several other grounds raised by the applicant did not present a question of law.

In *Jack v Edmonton (SDAB)*, [2015 ABCA 270 \(CanLII\)](#) the applicant sought leave to appeal the denial of a permit allowing her to increase the maximum number of residents living on her property. The applicant operates an on-site care facility for the elderly. Justice Veldhuis denied leave to appeal because the grounds raised by the applicant were questions of fact and did not raise a question of law.

In *Nash Consulting v Grande Prairie (SDAB)*, [2015 ABCA 145 \(CanLII\)](#) the applicant sought leave to appeal the decision of the board to uphold a stop work order issued by the City against it. Similar to her decision in *Jack*, Justice Veldhuis ruled the applicant failed to raise questions of law. The *Nash* decision is also notable because Justice Veldhuis states her view that planning decisions should be left primarily to the local authorities (at para 7).

In *Lac La Biche v Lac La Biche (SDAB)*, [2014 ABCA 305 \(CanLII\)](#) the county sought leave to appeal a board decision upholding approval for road development, alleging the board erred by improperly fettering its discretion, sub-delegating its authority, and failing to provide adequate reasons. Justice Veldhuis denied leave to appeal on the basis that the county failed to establish a reasonable prospect of success on each alleged error of law.

What can we take from these 5 decisions? It does seem like Justice Veldhuis is reluctant to grant leave to appeal on substantive issues emanating from a development appeal – her comment in the *Nash* decision certainly supports this observation. And we might also note that leave applications under the *Municipal Government Act* before Justice Veldhuis seem to turn primarily on whether the applicant can demonstrate it has a reasonable prospect of success if the matter is heard on its merits. In light of her view that a large amount of deference is owed to development appeal boards, it seems reasonable to suggest that Justice Veldhuis requires an applicant to demonstrate a real prospect of success in order to get leave. On this, it is interesting to note that Justice Thomas Wakeling has imposed a much lower onus on applicants under section 688 of the *Municipal Government Act*. My database has 4 leave decisions issued by Justice Wakeling under section 688 between 2014 and 2016, and interestingly he has granted leave in each case interpreting the ‘reasonable chance of success’ criteria as requiring an applicant to show its case is merely arguable – as in not frivolous (See *Edmonton v Edmonton (SDAB)*, [2016 ABCA 129 \(CanLII\)](#); *Kalinski v Cold Lake*, [2015 ABCA 402 \(CanLII\)](#); *Osman Auction v Edmonton*, [2015 ABCA 135 \(CanLII\)](#); *Edmonton v Edmonton (SDAB)*, [2014 ABCA 337 \(CanLII\)](#)). This is

seemingly a much lower test to meet than that employed by Justice Veldhuis in *Arctos & Bird Management* and the other leave applications she has heard under section 688.

My intention here is not to be critical of any one particular justice hearing leave applications, and I have used decisions issued by Justice Veldhuis simply to illustrate a finding in my research. The main point is that the test for obtaining leave to appeal can be demonstrated as one which is applied with plenty of subjectivity. I think my research is ultimately going to provide support for the various calls over the years that legislatures do away with leave requirements in statutory appeals.

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