

In the Court of Appeal of Alberta

Citation: Bears paw Petroleum Ltd. v. Alberta (Energy and Utilities Board), 2008 ABCA 405

Date: 20081201

Docket: 0701-0327-AC

Registry: Calgary

Between:

Bears paw Petroleum Ltd.

Applicant

- and -

Alberta Energy and Utilities Board

Respondent

**Reasons for Decision of
The Honourable Madam Justice Constance Hunt**

Application for Leave to Appeal

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[1] Pursuant to section 41 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 (“*ERCA*”), Bears paw Petroleum Limited (“Bears paw”) applied for leave to appeal four questions arising from Decision 2007-090 (“Decision”) issued by a single member of the Alberta Energy and Utilities Board (as it was then called, “Board”) following an extensive hearing. The Decision considered and rejected a number of Bears paw’s complaints respecting the Board’s enforcement actions as well as allegations that the Board’s Red Deer field office was biased against it.

[2] I dismissed orally three of Bears paw’s proposed leave questions because they did not meet the test for leave. I agreed to accept further written submissions concerning a fourth ground, with which I now deal.

[3] Section 41(1) of the *ERCA* provides for an appeal to this court on a question of jurisdiction or law. An applicant for leave must demonstrate that the question of law or jurisdiction raises a serious arguable point: *Atco Electric Limited v. Alberta (Energy and Utilities Board)*, 2002 ABCA 45, 299 A.R. 337 at para. 11. Subsumed in this test are 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 or, on the other hand, whether it is frivolous; and (4) whether the appeal will unduly hinder the progress of the action: para. 17.

Discussion

[4] One of Bears paw’s complaints concerned the so-called 6-26 odour incident. Bears paw was notified that the Board’s air monitoring unit had detected off lease hydrogen sulphide (H₂S). Bears paw did not dispute a leak but complained that the reading of 11 parts per billion (ppb) taken outside the plant gate was so low that it was unreasonable for the Board to issue an enforcement order. It also asserted that, since it owned “the entire southeast quarter section and not just the fenced area of the facility, any measurement from outside the gate did not indicate that an off-lease emission had actually occurred”: Decision at p. 10.

[5] According to the Decision, the Board had been asked to investigate some high sulfur dioxide (SO₂) readings in the area. Approaching the gate to the Bears paw facility, the air monitoring technician detected H₂S readings of 5-9 ppb and 11 ppb outside the gate and beyond the fenced area. The Board’s staff group said that Bears paw did not raise the point about its land holdings until the hearing that led to the Decision, and it did not normally examine survey plans to ascertain lease boundaries but relied on fencing as an assumed boundary: Decision at p. 10. In fact, as discussed below at paragraph 7, the matter of the land-holding was raised by Bears paw’s counsel with the Board some time before the hearing.

[6] In finding that the enforcement was appropriate the Board said at p. 10-11 of the Decision:

The Board member is also not persuaded by Bearspaw's argument that the recordings at the gate and outside the fence were not technically off lease, since Bearspaw itself was the owner of the entire quarter section. This relatively unique land holding does not excuse Bearspaw from meeting EUB requirements intended to safeguard the public and to inspire confidence that the industry can operate in proximity to other land users without placing them at risk of exposure to harmful substances.

It appears from this extract that the Board accepted that the readings were taken on property to which Bearspaw had rights, but outside its fenced site.

[7] In its original leave submissions, Bearspaw pointed to the fact that section 14.1 of Appendix 11 of Board Directive 064 defines the event of non-compliance as "H₂S emissions off lease". If the emissions were not off lease, there was no non-compliance with which to ground the enforcement order. This was the view of a Board staff member who testified at the hearing: Exhibit "S" to the Affidavit of Jirka Kaplan. He added that if a company submits information regarding the lease boundaries, such information may be taken into consideration in determining whether there were off lease emissions. In letters to the Board, counsel for Bearspaw had pointed out that Bearspaw's lease covers the entire quarter section and expressed the view that any H₂S emissions were therefore detected within the boundary of the lease: Exhibits "J" and "K" to the Affidavit of Jirka Kaplan. Bearspaw submits that the Board erred in law in concluding that this emission was off Bearspaw's lease, given that it owned the whole quarter section.

[8] During oral submissions, counsel were unable to direct my attention to anything that defined "off lease" for the purposes of Directive 064, so I agreed to receive supplementary materials on this point.

[9] The Board's supplementary submissions included a fresh affidavit attaching various documents. Bearspaw objected to this material because it went beyond what I had asked counsel to provide. Board counsel later confirmed that only one of the four documents attached to the affidavit had been presented at the hearing. I did not take account of the three other documents in deciding the leave application.

[10] Apart from the contested materials, both supplementary submissions discussed at length the possible meaning of "off lease" in Directive 064, and whether or not it is the same as "off site". Neither term is defined in the Directive. Given that Bearspaw's landholding went beyond the fenced site, the meaning of "off lease" may be critical to the validity of the enforcement. The Board seems to have accepted that the odours were detected off the battery site but on Bearspaw's property. If "off lease" has the same meaning as "off site", the Decision is likely unassailable. If not, the Decision may be subject to attack. This requires an analysis of the meaning of "off lease" in Directive 064.

[11] After carefully considering all the submissions, I am persuaded that Bearspaw has met the test for leave on this issue. Accordingly, leave to appeal is granted on the following question: Did the Board err in law in deciding that Bearspaw had contravened Directive 064 as regards the 6-26 odour incident?

Application heard on November 4, 2008

Reasons filed at Calgary, Alberta
this 1st day of December, 2008

Hunt J.A.

Appearances:

J. Gruber
for the Applicant

L.M. Berg
for the Respondent