

In the Court of Appeal of Alberta

Citation: Bears paw Petroleum Ltd. v. Alberta (Energy and Utilities Board), 2009 ABCA 3

Date: 20090106

Docket: 0701-0327-AC

Registry: Calgary

Between:

Bears paw Petroleum Ltd.

Applicant

- and -

Alberta Energy and Utilities Board

Respondent

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

Application for Leave to Appeal

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[1] Bears paw Petroleum Ltd (“Bears paw”) applies for leave to appeal a decision of a single member of the Alberta Energy and Utilities Board (“Board”) who held a hearing to investigate Bears paw’s complaints about the Alberta Energy and Utilities Board’s (“AEUB”) enforcement actions and allegations of bias against it by the AEUB’s Red Deer office.

[2] The application is dismissed as regards proposed grounds of appeal one, three and four. I will deal with proposed ground two (which relates to odours off lease) in writing after I have received further written submissions about whether the applicable legislative provisions define the term “off lease”.

[3] Section 41(1) of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 provides for an appeal to this court on a question of jurisdiction or law. An applicant for leave must demonstrate that the question of jurisdiction or law raises a serious arguable point: *Atco Electric Limited v. Alberta (Energy and Utilities Board)*, 2002 ABCA 45, 299 A.R. 337 at para. 11. In my view, this test has not been met on grounds one, three and four.

[4] Bears paw’s proposed ground one is whether the Board erred in law in the interpretation of its subordinate legislation and directives when it found Bears paw in non-compliance with respect to the flame arrestor enforcement. Bears paw makes two arguments. First, it says that the Board applied the wrong test in regards to this enforcement decision because it considered whether the enforcement was reasonable rather than, as the relevant direction or regulations require, whether the flame arrestor was “workable” or “adequate”. Related to this point is the suggestion that the Board focussed on the process of enforcement at the expense of determining whether or not there had been a breach of a directive or a regulation. Second, Bears paw says the Board made a jurisdictional error in preferring an email from the flame arrestor’s supplier to other evidence, namely, Bears paw’s expert’s report and its other witness.

[5] The latter point cannot provide a basis for leave to appeal. At best it raises a question of mixed fact and law. There was evidence upon which the Board could base its preference. The Board was not required to go into minute detail about all the evidence and the reasons make it clear that it was aware of the relevant evidence.

[6] As for the first point, a careful reading of Decision 2007-090 (“Decision”) reveals that while the Board did not use the terms “workable” or “adequate”, it was concerned about the “functionality” of the flame arrestor, see especially the last paragraph on page nine of the Decision. It seems that the “functionality” of the flame arrestor was how Bears paw’s evidence had raised this issue. Given that, the Board cannot be faulted for using that term (which is another way of saying

“adequate” and which Bears paw acknowledges is part of the correct test). The Board, therefore, did not err in law by using the wrong test. Moreover, as Board counsel points out, the evidence that it relied on used, in part, the term “hazard”, which relates to the matter of adequacy and workability. The balance of the Board’s decision on this issue, in my view, concerns mixed fact and law and, therefore, leave cannot be granted.

[7] The third proposed ground of appeal is whether the Board committed a jurisdictional error when it “declined” to hear Bears paw’s rebuttal evidence. In the oral argument, counsel for Bears paw suggested that the rebuttal evidence was “curtailed”. My review of the transcript does not support the contention that Bears paw was denied the opportunity to give rebuttal evidence or that it was overly curtailed. In fact, much of the so-called evidence was argument rather than evidence, and at least one of Bears paw’s witnesses acknowledged this. As such, some of it went outside the proper parameters of rebuttal.

[8] The Board gave the witness considerable latitude despite on-going objections by Board counsel. The Board never cut the witness off. Rather, on a few occasions, it suggested that the witness should move on to a new topic, which he did. This complaint about procedural fairness is not supported by the record and would have very little prospect of success on appeal, particularly given the acknowledged power of the Board to control its process.

[9] The fourth proposed ground is whether the Board’s conclusions about the bias of the Red Deer field office were unreasonable. Here, Bears paw argues that the Board misapplied the test for bias and unreasonably concluded that no bias was shown. In part, this argument is based on the suggestion that the Board erroneously concluded that Bears paw’s principals did not understand the AEUB’s enforcement policies and procedures, and that the Board did not apply the test of the reasonable, well-informed person.

[10] As Bears paw concedes, the Board correctly stated the test for bias at page 14 of the Decision. Accordingly, the conclusion about whether bias was made out is a matter of mixed fact and law unless the Board misapplied the test. In my view, it did not misapply the test. In explaining its decision that there was no bias, the Board went into considerable detail about the evidence, focussing on a series of incidents that Bears paw claimed showed bias against it. It was at the end of the examination of these incidents that the Board added comments about the lack of knowledge of Bears paw’s principals concerning the AEUB’s enforcement mechanism.

[11] Even assuming, without deciding, that the Board mis-assessed the extent of the knowledge of Bears paw’s principals, the careful reasoning on the whole of the facts amply supports the conclusion about bias not being made out. I add, however, that there was at least some evidence to support the Board’s suggestion that Bears paw’s principals were not well informed. I refer in particular to Exhibit 17 to the Morrison Affidavit.

[12] In the result leave is denied on the three grounds discussed above. I will deal with the fourth ground after I receive further submissions (Leave to appeal on ground two granted: *Bearspaw Petroleum Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 405).

Application heard on November 4, 2008

Reasons filed at Calgary, Alberta
this 6th day of January, 2009

Hunt J.A.

Appearances:

J. Gruber
for the Applicant

L.M. Berg
for the Respondent