

**In the Court of Appeal of Alberta**

**Citation: Pembina Institute for Appropriate Development v. Alberta (Utilities Commission)  
2011 ABCA 302**

**Date: 20111021  
Docket: 1101-0193-AC  
Registry: Calgary**

**Between:**

**Pembina Institute for Appropriate Development**

Applicant

- and -

**Alberta Utilities Commission and Maxim Power Corp.**

Respondents

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**Reasons for Decision of  
The Honourable Madam Justice Patricia Rowbotham**

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Application for Leave to Appeal  
Decision No. 2011-290  
Dated the 30<sup>th</sup> day of June, 2011

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**Reasons for Decision of  
The Honourable Madam Justice Patricia Rowbotham**

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[1] This is an application for leave to appeal from an interim decision of the Alberta Utilities Commission, granting approval to Maxim Power Corp. for the construction of a new 500 megawatt coal power plant in the Grande Cache, Alberta area: Decision 2011-290 (Interim Decision). The applicant is Pembina Institute for Appropriate Development, a non-profit, non-government organization concerned with sustainable energy practices and policies in Alberta. Pembina was not an intervener before the Commission and, hence, this application raises an issue of Pembina's standing to seek leave to appeal. The Commission rendered its final decision approving the plant on August 10, 2011: Decision 2011-337 (Final Decision). In light of the Final Decision, the respondents submit that the issues upon which leave is sought are moot.

**I. FACTS**

[2] On February 3, 2009 Maxim filed its request for approval of the power plant. On March 4, 2011, following a number of information requests in 2010 and 2011, the Commission deemed Maxim's application to be complete. Among other things, the application included an environmental impact assessment filed with Alberta Environment on February 2, 2009 which, following a number of information requests, was deemed to be complete on November 24, 2010. The Commission issued a notice of application on March 4, 2011 and indicated that it would process the application without a hearing if there were no parties found to be "directly and adversely affected" pursuant to the provisions of the *Alberta Utilities Commission Act*, SA 2007, c A-37.2 (*AUCA*).

[3] The Commission received several submissions in response to Maxim's application, including submissions from the applicant. However, on May 27, 2011 the Commission ruled that none of the parties would be directly and adversely affected by its decision regarding the application, and therefore none of the parties had standing. Pembina asked the Commission to reconsider its ruling as to its standing and on June 16, 2011 the Commission confirmed its original decision. Pembina did not seek leave to appeal that decision.

[4] In a letter dated May 27, 2011 the Commission indicated that although there were no interveners, it was considering whether to convene a public hearing in any event. It suggested that it had the jurisdiction to do so under section 9 of the *AUCA*. On June 7, 2011 Maxim responded that it did not believe the Commission had such jurisdiction and that it was unaware of the Commission having proceeded this way in the past. Maxim requested the Commission to process its application expeditiously and asked for a decision by June 30, 2011. Maxim submitted that a decision was required urgently in order to (i) ensure that Alberta has sufficient electric energy generation, (ii) meet the expectations of private investors in the predictability of the regulatory process, and (iii) address the potential impact of pending federal carbon regulations.

[5] The Commission issued the Interim Decision on June 30, 2011, granting interim approval to Maxim for the construction of its power plant, noting at paragraph 8 that:

The Commission has given consideration to whether the construction and operation of the power plant is in the public interest pursuant to Section 17 of the *Alberta Utilities Commission Act*. Based upon the evidence provided to it, the Commission considers that the construction and operation of the power plant is in the public interest and is prepared to provide interim approval of the power plant. If, upon further review of the evidence submitted by Maxim or any other evidence that is pertinent to this application, the Commission determines that additional conditions are warranted, the power plant approval will be contingent upon those conditions.

[6] The Commission indicated that it would issue final approval with reasons and any necessary conditions in due course. It did so on August 10, 2011. Pembina has not sought leave to appeal the Final Decision.

## **II. GROUNDS FOR LEAVE TO APPEAL**

[7] On June 23, 2010 the federal Minister of the Environment announced that the Government of Canada would be drafting regulations to reduce greenhouse gas emissions from coal-fired electricity generation. The pending regulations require all new coal-fired electricity generation units to meet the emissions performance of equivalent high-efficiency natural gas generation. The pending regulations will apply to coal-fired generating plants which come into operation on or after July 1, 2015. This was one of the matters prompting Maxim's request to the Commission to deal with the application prior to June 30, 2011. The thrust of Pembina's application is its concern with the Commission's interim approval of the power plant in the face of the impending federal regulations regarding greenhouse gas emissions.

[8] In its notice of motion for leave to appeal, the applicant sets out six grounds upon which it makes its application, consolidated as follows:

- (i) Did the Commission commit an error of jurisdiction in deciding that the power plant is in the public interest before completing its review of the application?
- (ii) Did the Commission commit an error of jurisdiction in failing to have regard to its statutory obligations in reviewing the application?
- (iii) Did the Commission err in law in failing to give reasons for its decision that the construction and operation of the power plant is in the public interest?

### III. TEST FOR LEAVE TO APPEAL

[9] Section 29(1) of the *AUCA* provides: “Subject to subsection (2), an appeal lies from a decision or order of the Commission to the Court of Appeal on a question of jurisdiction or on a question of law.” In order to succeed, the applicant must demonstrate that the question of law or jurisdiction raises a “serious, arguable point”: *Chevron Standard Ltd v Energy Resources Conservation Board* (1983), 26 Alta LR (2d) 10 at 13. The court will consider five factors in determining whether the applicant has satisfied this test:

- (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;
- (4) whether the appeal will unduly hinder the progress of the action; and
- (5) the standard of appellate review that would be applied if leave were granted.

*Atco Electric Limited v Energy and Utilities Board (Alberta)*, 2003 ABCA 44 at para 17

### IV. STANDARD OF REVIEW

[10] Questions of jurisdiction and questions of law not involving the Commission’s knowledge and expertise are reviewed for correctness. Questions of law involving the Commission’s knowledge and expertise are reviewed on the standard of reasonableness: *ATCO Gas and Pipelines Ltd v Alberta (Energy and Utilities Board)*, 2008 ABCA 200 at para 16, 433 AR 183; *Kelly v Alberta (Energy and Utilities Board)*, 2008 ABCA 52 at para 3.

### V. ANALYSIS

[11] This application for leave raises two preliminary issues: First, whether the applicant has standing to appeal the Interim Decision; and second, whether the arguments the applicant raises were rendered moot when the Commission issued the Final Decision.

#### A. Standing

[12] The test for standing before the Commission is whether a party may be “directly and adversely affected” by a decision of the board: *AUCA*, section 9(2). The Commission determined that the applicant did not satisfy this test, and indeed, before this court the applicant conceded that

it did not meet this test. The provision setting out the right to appeal a decision of the Commission to this court, however, does not provide any specific test for standing. Section 29(1) of the *AUCA* reads: “Subject to subsection (2), an appeal lies from a decision or order of the Commission to the Court of Appeal on a question of jurisdiction or on a question of law.” The applicant argues that there is no requirement that a person bringing an appeal from a decision of the Commission to this court be directly and adversely affected by that decision.

[13] Maxim and the Commission argue that having been denied standing by the Commission and having not appealed this ruling the applicant should not be granted standing in this court. They submit that to do so would permit the applicant to bypass the requirements of section 9 of the *AUCA* and would render meaningless the Commission’s initial determination regarding standing. Maxim submits that the applicant’s submissions amount to an abuse of process as a “collateral attack on the Commission’s earlier decisions on standing and refusal to hold a hearing.”

[14] Pembina submits that the test for standing before the Commission is different than the test for standing to appeal the Commission’s decision to this court. It contends that if only those parties found to be directly and adversely affected by the Commission’s decision have standing on appeal, then once a determination has been made that no such party exists, the Commission would be immune from any oversight in its decision-making; the Commission would essentially be able to act with impunity in such circumstances. The applicant submits this cannot have been the intention behind the *AUCA*.

[15] The issues upon which the applicant seeks leave, namely, that the Commission erred in jurisdiction in granting the Interim Decision for the alleged reason of assisting Maxim’s avoidance of forthcoming federal greenhouse gas regulations, is different than any of the issues which were raised, or that could have been raised during a hearing before the Commission. However, the applicant says that now that the alleged error has occurred, there must be some means of holding the Commission accountable for its decision. At this point, accountability is only possible if a party, like the applicant, is permitted standing to apply for leave to appeal.

[16] This court noted in *Big Loop Cattle Co v Alberta (Energy Resources Conservation Board)*, 2010 ABCA 328, 490 AR 246, that “[n]ormally an applicant for leave was a party or intervener before the Board”; however, the court recognized that “there may be limited circumstances where someone else may apply for leave”: para 51. The applicant relies on *Big Loop*, as well as *Bengston v Alberta (Natural Resources Conservation Board)*, 2003 ABCA 173, 330 AR 81, for authority that in certain circumstances a party that did not have standing before an administrative body may still apply for leave to appeal that body’s decision. In *Bengston*, standing was granted on appeal to a party that did not have standing before the Natural Resources Conservation Board. In that case, the grounds on which leave to appeal was sought all involved issues that would have been raised before the Board if the party had been afforded standing below, but the party lacked the necessary standing to raise those issues because the *Agricultural Operation Practices Amendment Act*, SA 2001, c 16, expressly limited standing to “the applicant and the municipalities that are affected persons”: section 21(2). Given the party’s interest in the outcome of the proceedings, the court noted that the fact that

the party did not have standing under the terms of the governing legislation “[did] not preclude him from obtaining standing on an alternate basis for the purpose of judicial review”: para 28. The reasons for allowing standing in *Bengston* are distinguishable from the facts of this case, where the applicant sought and was denied standing below but now raises a novel issue that could not have arisen before the Commission. As such, *Bengston* is not directly applicable.

[17] In *Big Loop*, leave was granted to a number of parties. These parties were interveners before the Energy Resources Conservation Board, and they were granted leave on an issue that was argued below. Therefore, the facts of *Big Loop* are also distinguishable and, like *Bengston*, the case is not directly applicable. However, another party, Lefthand, who was not an intervener before the Board, also sought leave on a number of other issues including a question involving section 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. The *Charter* issue was not addressed in the proceedings before the Board. The court noted *in obiter* that “[t]he addition of Lefthand as an applicant was an attempt to ensure that there was an individual before the court in order that section 15(1) might be engaged ... Had I granted leave on the *Charter* issue, it might have been necessary for an individual to apply to intervene in the appeal”: para 51. These comments suggest that the “limited circumstances” where it may be appropriate to grant standing on appeal to a party that lacked standing before the administrative tribunal may include a circumstance where an issue is advanced before this court that did not and could not exist in the initial proceedings.

[18] The applicant also bases its claim for standing on the broader principles of public interest. The notion of public interest standing was addressed by the Supreme Court of Canada in a trilogy of cases, *Thorson v Canada (Attorney General)*, [1975] 1 SCR 138, 43 DLR (3d) 1; *Nova Scotia (Board of Censors) v McNeil*, [1976] 2 SCR 265, 55 DLR (3d) 632; and *Canada (Minister of Justice) v Borowski*, [1981] 2 SCR 575, 130 DLR (3d) 588. In all three cases public interest standing was sought by a private party for the purpose of challenging the constitutional validity of legislation. The Supreme Court of Canada in the subsequent decision of *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607, 23 DLR (4th) 321 extended the principles in the trilogy to “a non-constitutional challenge by an action for a declaration to the statutory authority for ... administrative action”: 630. The court noted that “the same value is to be assigned to the public interest in the maintenance of respect for the limits of administrative authority as was assigned by this court in *Thorson*, *McNeil* and *Borowski* to the public interest in the maintenance of respect for the limits of legislative authority”: 631.

[19] Pembina raises a concern regarding the administrative authority of the Commission which falls within the principle set out in *Finlay*. In *Reese v Alberta (Minister of Forestry, Lands & Wildlife)* (1992), 123 AR 241, 87 DLR (4th) 1 (QB), the court, relying on *Finlay*, stated the test for public interest standing as follows:

If the issue were (a) justiciable and (b) serious in that there was a serious issue as to whether the administrative act was illegal (i.e., not authorized by the statute pursuant to which it purported to be made), and (d) if there were

no other reasonable and effective means of bringing the issue before the court, in my view it would be open to the court to recognize (c) that the applicant has a “genuine interest” in the issue even if the applicant cannot show that he has a direct, personal interest in the sense that the administrative act operates to his personal disadvantage. Obviously that “genuine interest” will be more readily inferred if the statute clearly contemplates that the applicant has a role in the process leading up to the administrative act. However, in a fit case, “genuine interest” may be found to exist even when such a role is not contemplated by the statute, so long as to recognize such a “genuine interest” would not be inconsistent with the inherent nature of the statutory process: para 26.

[20] In my view on the specific facts of this case, the issue raised by the applicant falls within the situation contemplated in *Reese*. The ultimate question on which leave to appeal is sought is whether the Commission erred in jurisdiction when it granted the Interim Decision; this is a justiciable issue. Put another way, the issue raised by Pembina is whether the Commission made a determination and granted a decision in a way that is illegal in the sense that it is not authorized by the *AUCA*. This raises a concern regarding respect for limits to administrative authority. There is no other means by which this issue could be brought before this court, as there were no parties granted standing before the Commission. Furthermore, on the unique facts of this case there was no way that this particular issue could have arisen before the Commission in any proceedings below. Accordingly, even though the *AUCA* did not contemplate a role for the applicant in its proceedings, I conclude that based upon the principles of public interest standing, the unique facts of this case, and the applicant’s genuine interest in the issue which it raises, the applicant has standing to bring this leave application.

#### **B. Are the Issues the Applicant Raises Moot?**

[21] Pembina filed its notice of motion prior to the Commission releasing the Final Decision. Maxim and the Commission submit that the issues raised in this application have been rendered moot by the Final Decision. Although the applicant recognizes that the Interim Decision from which leave to appeal is sought is not a final determination, it argues that the Interim Decision does make a final determination on the issue of whether or not the proposed power plant is in the public interest. It takes the position that an appeal from the Interim Decision is appropriate in this case.

[22] I propose to address the first and third grounds together. The first ground of appeal contends that the Commission made a decision on the public interest without taking into consideration all necessary factors. The third ground raises the failure to give adequate reasons. Occasionally, courts and tribunals by necessity must give a decision expeditiously and render the reasons later. That is precisely what the Commission did. The Interim Decision states that the Commission has concluded that the power plant is in the public interest. By June 10, 2011 the application had been before the Commission for 28 months. It had been deemed complete some three months earlier. Accordingly, the Commission had all of the evidence before it when it released the Interim Decision. The Final Decision makes it clear that all required factors were considered by the Commission in coming to

its ultimate conclusion that the power plant is in the public interest. That is the same conclusion found in the Interim Decision. Accordingly, the issues raised by these grounds of appeal are moot.

[23] Neither the Interim Decision nor the Final Decision mentions the impending regulations. The essence of the second ground of appeal is that the Commission either relied upon an irrelevant consideration (the request to expedite the decision in the face of the federal greenhouse gas emission regulations) or failed to address this thereby raising an issue of insufficient reasons. Maxim suggests that the Final Decision demonstrates that the Commission took account of all relevant considerations and did not consider irrelevant factors in reaching its ultimate ruling. Even if this particular issue is not moot, it seems to me that overall the appeal is entirely moot. If the Interim Decision is found to be in error, the Final Decision, which replaces the Interim Decision, would still stand as it has not been challenged by the applicant.

[24] Where an issue is found to be moot, it is no longer of any significance to the action itself and it cannot form a *prima facie* meritorious appeal. It follows that the test for leave is difficult to make out in such circumstances. Courts tend not to hear moot appeals unless there is a full adversarial context, it is worthwhile to allocate scarce judicial resources to the appeal, and it is appropriate given the judiciary's role in our political framework: *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, 57 DLR (4th) 231. I conclude that the issues raised in the application for leave to appeal are moot, and I decline to grant leave to appeal.

## VI. CONCLUSION

[25] If I had not concluded that the issues raised by the application are moot, I would still have dismissed the application. In oral submissions to the court, Pembina submitted that the remedy it would be seeking in the event leave was granted was a direction that the Board deem the date of the commissioning of the power plant August 10, 2015, five years from the date of the Final Decision, apparently in an attempt to have the federal regulations apply to the power plant. The court was advised that the draft regulations will apply to power plants which commence operations after July 1, 2015. There are two difficulties with this submission. The first is that the Commission has little control over when the plant will commence operations. Power Plant Approval No. U2011-255 directs that unless otherwise authorized by the Commission, construction of the power plant shall be completed by July 1, 2015, but the ultimate completion of the plant is now in Maxim's hands. More importantly, this remedy is essentially a challenge to the date of approval granted to Maxim. A decision about the date of an approval is a decision of the Commission that would be subject to a high degree of appellate deference, and accordingly, not *prima facie* meritorious.

[26] For all of these reasons, the application for leave to appeal is denied. Counsel indicated that they wished to address the issue of costs. The parties are directed to make their submissions in writing within 30 days of the date of this decision.

Application heard on October 6, 2011

Reasons filed at Calgary, Alberta  
this 21st day of October, 2011

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Rowbotham J.A.

**Appearances:**

B. Robinson  
for the Applicant

C. Wall  
for the Respondent Alberta Utilities Commission

K. Miller  
for the Respondent Maxim Power Corp.