Action No. 9601 00113

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF CALGARY

BETWEEN:

GULF CANADA RESOURCES LIMITED

Applicant

- and -

THE MINISTER OF ENVIRONMENTAL PROTECTION
and ENVIRONMENTAL APPEAL BOARD

Respondents

MEMORANDUM OF JUDGMENT

Of The Honourable Madam Justice C.L. KENNY

Gulf Canada Resources Limited ("Gulf") brings an application for judicial review, in particular, an Order in the Nature of Certiorari to quash the order of the Minister of Environmental Protection ("the Minister") made on July 19, 1994.

PROCEDURAL BACKGROUND

1. On June 21, 1994, Reclamation Certificate #31843 was issued to Gulf pursuant to Section 123 of the Environmental Protection and Enhancement Act, (the "Act").

2. On November 3, 1994, Mr. Murray Williams filed a Notice of Appeal pursuant to Section 84(1)(i) of the Act.

3. On July 7, 1995, the Environmental Appeal Board (the "Board") issued its Report and Recommendations and submitted the Report to the Minister of Environmental Protection (the "Minister") pursuant to Section 91(1) of the Act.

4. On July 19, 1995, pursuant to Section 92(1) of the Act, the Minister made an order that the Recommendations of the Board be implemented.

5. The Applicant, Gulf Canada Resources Limited ("Gulf"), applied by way of Originating Notice, filed January 3, 1996, for judicial review.

BACKGROUND

Gulf constructed a wellsite on property owned by the Williams in December of 1988. The well was abandoned at the end of January, 1989 with site restoration completed by July of 1989.

In October of 1993, Gulf hired independent consultants, Endrill Resources Consultants Inc. ("Endrill") to prepare an assessment which confirmed that Gulf had satisfied the necessary requirements for the issuance of a Reclamation Certificate pursuant to the Environmental Protection and Enhancement Act, RSA, c. E-13.3 and Regulations.

Gulf applied for a Reclamation Certificate on January 24, 1994 and an inquiry was held at the wellsite on June 21, 1994 attended by two inspectors pursuant to the Act, the Williams and representatives of Gulf.

A Reclamation Certificate was issued on June 21, 1994.

On November 3, 1994 the Williams filed a Notice of Appeal of the Reclamation Certificate with the Board. The arguments set out in the Notice of Appeal which the Board felt it had jurisdiction to hear were:

a) a request for an analysis of soil samples taken by Gulf during the Reclamation process, and

b) removal or covering up of drilling mud at the surface.

The hearing was held June 9, 1995 and the report and recommendations of the Board were issued on July 7, 1995 wherein the Board made the following recommendations to the Minster:

1. That the appeal against the issuance of Reclamation Certificate #31843 be allowed and,

2. that Gulf be required to re-apply for a Reclamation Certificate with such re-application to include the following:

   a) a description of all substances present in the land as a result of the wellsite disturbance, specifically including the description of any conservation or reclamation procedures which may have resulted in calcium deposits on the surface of the soil; and

   b) particulars of the characteristics and properties of the reclaimed land specifically including a complete soils assessment of the wellsite and adjacent property including chemical analysis as contemplated by the reclamation criteria for wellsites and associated facility.

On July 19, 1995 the Minister issued an order wherein he agreed with the recommendations of the Board.

Gulf requests that the order and the report be quashed on the basis that the Board acted outside of its jurisdiction and because it has failed to provide reasons to support its decision.

ISSUES

1. What is the appropriate standard of review?

2. What is the jurisdiction of the Board and the Minister with respect to a Reclamation Certificate?

3. Do the report and Minister's order exceed the jurisdiction of the Board and the Minister?

4. Do the report and Minister's order, insofar as it is based on the report, fail to provide the reasons for the result?

ARGUMENT AND AUTHORITY

1. Standard of Review

The determination of the appropriate standard of review is as set out in the authorities referred to me by Counsel, in particular, ***Canadian Broadcasting Corp. v. Canadian Labour Relations Bd.***, [1995] 1 S.C.R. 157 and ***Pezim v. British Columbia (Superintendent of Brokers)***, [1994] 2 S.C.R. 557 (1994) 22 Admin. L.R. (2d) 1 as followed by our Court in ***Slauenwhite et al v. Alberta Environmental Appeal Board*** (1995), 175 A.R. 42 (Q.B.) and ***Bow Valley Naturalists Society v. Alberta*** (1995), 35 Alta. L.R. (3d) 285.

Simply put, the appropriate standard for judicial review is "correctness" with respect to jurisdictional issues and "patent unreasonability" with respect to non-jurisdictional issues. If the Board has acted outside of their authority under the Act then they have made a decision which is not within their jurisdiction and, as such, the standard of review of the Court, is to determine whether in this case the Board and the Minister acted "correctly" in complying with their statutory duty.

In the event that the Board and the Minister were acting within the authority given to them by the Act their decision is subject to judicial review only if their findings were patently unreasonable.

The applicant argues that the Board and the Minister purported to exercise jurisdiction which they did not have in coming to their decision and therefore the Board's decision should be reviewed on a "correctness" standard.

In ***U.E.S., Local 298 v. Bibeault*** [1988] 2 S.C.R. 1048, the Supreme Court of Canada stated that in determining whether an issue is jurisdictional, one must undertake a "pragmatic and functional analysis" of the provisions of the legislation including:

a) the wording the statute conferring jurisdiction on the tribunal;

b) the purpose of the statute creating the tribunal;

c) the reason for the tribunal's existence;

d) the regulatory mandate and expertise of the tribunal;

e) the nature of the problem before the tribunal.

2. What is the Jurisdiction of the Environmental Appeal Board?

There is no privative clause in the Act or the regulations which govern the Board which would protect the Board's decision and therefore, there is a right of appeal

to the Court in review.

The respondents argue that both the Board and the Minister have acted within their statutory authority and therefore within their jurisdiction pursuant to the Act and the regulations.

The statutory authority of the Board and the Minister from a "functional" point of view as it relates to this matter is as follows:

a) the Board has the power to hear and determine a notice of objection (s. 84 of the Act) with respect to a Reclamation Certificate issued by an inspector under s. 123 of the Act;

b) the Board must, within 30 days of the hearing, submit a report to the Minister which includes its recommendations and a summary of the representations that were made to it (s. 91(1) of the Act);

c) the Board may, and the Minster may on receiving the report of the Board, confirm reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make and may make any further order that the Board or Minister considers

necessary for the purpose of carrying out the decision (ss. 90(3) and 92(1) of the Act).

The statutory provisions were carried out by both the Board and the Minister and the respondents therefore argue that the decision of the Board and the recommendation to the Minister resulting in the Minister's order were within each party's jurisdiction.

The applicant argues that the Act creates a Conservation and Reclamation Council governed by an Executive (s. 131 of the Act) the duty of which is to carry out the functions and duties relating to conservation and reclamation as are assigned by regulation. The Conservation and Reclamation Regulation (Alberta Regulation 115/93) indicates that the objective of conservation and reclamation is to return the land to an "equivalent land capability" which terms are defined in the Regulation. The Regulation further indicates that the Executive may establish standards and criteria for conservation and reclamation.

The applicants argue, therefore, that the Board has no jurisdiction to amend, add or change the reclamation criteria as established and that their jurisdiction is limited simply to a review of whether or not the decision of the reclamation inspector is reasonable in light of the reclamation criteria and whether or not that criteria was satisfied. If the criteria was satisfied and the inspector issued a reclamation certificate

the applicant argues that that decision should only be interfered with where it is clearly unreasonable.

3. Do the Report and the Minister's Order Exceed the Jurisdiction of the Environmental Appeal Board and the Minister?

The Board and the Minister, pursuant to ss. 90 and 92 of the Act may make any decision that the Director could make and may confirm, reverse or vary the decision appealed. They may also make any further order that they consider necessary for the purpose of carrying out their decision. Section 123 of the Act provides a wide discretion in the Inspector.

The Director, under s. 124 of the Act, may amend, add or delete a term or condition from the Reclamation Certificate. The applicant argues that what happened here was the Board cancelled the Reclamation Certificate and s. 124 indicates that the Director may only cancel a Reclamation Certificate issued in error. The applicant therefore argues that the Board acted outside of its jurisdiction. I do not agree. The Act allows for an appeal with respect to the issuance of a Reclamation Certificate which is what the Williams did. They appealed the issuance of the certificate in the first place. That appeal was granted by the Board which, in effect, means that the Reclamation Certificate should not have been issued at all.

The Board then indicated that the applicant must reapply for a Reclamation Certificate and provided some information that would be required on that new application.

I am satisfied, therefore, that the Board and the Minister had the jurisdiction to make the direction and order that they did and, therefore, since they were acting within their jurisdiction, the test is whether their decision was patently unreasonable such that it would cause the Court to interfere.

There are two time periods, in my view, which are relevant. The first is the period of time up to the issuance of the Reclamation Certificate. I am satisfied that the inspectors followed the criteria set down by the Act and the regulation, that they determined that a soil sample was not required under the regulation in the circumstances and they also took into consideration the concerns of the Williams at that time. It was difficult, however not impossible, to assess the vegetation, as the land which had been reclaimed, as well as the surrounding land, had been overgrazed. The inspectors did not delay the issuance of the Reclamation Certificate to determine if there was a difference in growth once the reclaimed land had been isolated. They had no obligation to do so and I am satisfied that they acted appropriately. Were that the end of the matter, I would be satisfied that the Reclamation Certificate was properly issued and there was no basis for the Board to interfere.

The second stage, however, involves new information which came to light subsequent to the issuance of the Reclamation Certificate. The Act in s. 87(2)(d) allows the Board to accept new information that would be relevant to their decision which information was not available to the person who made the decision at the time.

It appears that subsequent to the issuance of the Reclamation Certificate the Williams isolated the wellsite land so that it was not grazed. They provided evidence before the Board that there was a substantial difference in the growth pattern between the wellsite land and the surrounding land once the grazing had stopped and that, in fact, there was still very little, if any, vegetation as well as some bare patches on the wellsite land.

Also subsequent to the issuance of the Reclamation Certificate, there appeared on the surface of the wellsite property pockets of a white substance which was unknown at the time but could possibly be calcium.

This new information which came before the Board was properly before the Board pursuant to the Act. The applicant argues that to consider this information was contrary to the criteria set up by the Act. I disagree. In my view, the Board was following the same criteria and undertaking the same process which the inspectors and the director would have followed. Had this information been available at the time to the inspectors about the discernable growth problem and the pockets of white substance on

the surface of the soil, I am satisfied that the inspectors would have come to a different conclusion and would have likely directed, as the Board did, that the applicant provide additional information to deal with these issues with its application for a Reclamation Certificate.

In summary, the Board and the Minister were entitled to consider new information before them, the information was relevant and caused the Board to consider whether, in fact, the land had been properly reclaimed. The appeal of the issuance of the Reclamation Certificate was therefore properly granted with additional requirements inserted for the applicant upon reapplication.

The applicant asserts that certainty is required in the industry with respect to reclamation criteria. I appreciate their position and as I have indicated, had there not been the new information which, in my view, bears directly on the criteria which must be looked at in determining whether reclamation has taken place, this matter would not have proceeded further. The legislation, however, provides a long period for appeal and also provides for the introduction of new evidence that was not available at the time the original decision was made. Given these legislative provisions, there are bound to be occasions when matters arise which will have a bearing on whether or not a Reclamation Certificate should have been issued.

4. Failure to Provide Reasons

The applicant argues that the Board and the Minister's Order should be quashed for their failure to provide reasons for their decision.

On reviewing the Board's decision and their recommendation to the Minister, I am satisfied that, read as a whole, the Board has set out the reasons for their decision and recommendation as well as their concerns. Although the decision was not as clearly formatted as it could have been, in reading the decision as a whole it is clear that the Board was concerned with the new information about a lack of growth of vegetation on the wellsite once isolated and the deposits of a white substance. For that reason they required further information prior to issuance of a new Reclamation Certificate. I am satisfied that the decision provides the requisite information to Gulf as to the concerns of the Board.

DECISION

I find, therefore, that the Board and the Minister had jurisdiction to make the decisions which they made and that such decisions were not patently unreasonable in the circumstances. The motion by the applicant for an Order in the Nature of Certiorari to quash the Order of the Minister of Environmental Protection is dismissed.

COSTS

The parties may speak to me within 30 days, if necessary, with respect to the issue of costs.

DATED at Calgary, Alberta
this 25 day of April, 1996.

J. C.Q.B.A.

Counsel:

John S. Osler
for the Applicant

Garry Appelt
for the Respondent
the Minister of Environmental Protection

Alastair R. Lucas
for the Respondent
the Environmental Appeal Board

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