Legal Oil and Gas Ltd. v. Alberta (Minister of Environment), 2000 ABQB

Date: 20000609
Action No. 0003-01251

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

LEGAL OIL AND GAS LTD. AND CHARLES W. FORSTER

Applicants

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA AS REPRESENTED BY THE MINISTER OF ENVIRONMENT, ENVIRONMENTAL APPEAL BOARD (ALBERTA) AND THE DIRECTOR OF LAND RECLAMATION DIVISION

Respondents

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE T.D. CLACKSON

APPEARANCES:

Mr. D. Thomas, Q.C. and Mr. M. Ignasiak
Fraser Milner
for the Legal Oil & Gas and Charles W. Forster

Mr. D.J. Wilson and Mr. J. Schick (Student)
Lucas Bowker & White
for The Minister of Environment

Mr. A.C.L. Sims, Q.C.
for the Environmental Appeal Board (Alberta)

Mr. G. Sprague
Alberta Justice
for The Director of Land Reclamation Division

I. INTRODUCTION

[1] The Applicants seek judicial review of an Order issued by the Alberta Minister of Environment. The Order in question adopts the recommendation of the Environmental Appeal Board (the "Board") that an environmental protection order ("EPO") issued by the Director of the Land Reclamation Division (the "Director") under the ***Environmental Protection and Enhancement Act,*** S.A. 1992, c. E-13.3 (the "Act") be confirmed. The Applicants also ask for judicial review of the Report and Recommendations of the Board (the "Report").

II. FACTS

[2] The factual backdrop of this matter commences in 1949 when Sinclair Canada Oil Company ("Sinclair") obtained a rolled up exploration and surface access lease to the NW 13-57-25-W4M (the "Lands") from Gabriel Tieulie. The Lands are now owned by Armand and Jeanette Tieulie. Sinclair eventually constructed a road onto the Lands and in 1953 drilled a well and began producing oil from a roughly six acre well site. Two open pits also were excavated. One of the pits held brine extracted from the well. As a result of spills, overflow and possible subsurface migration, portions of the Lands surrounding the well site have been contaminated by the brine and, to a lesser extent, hydrocarbons. The Applicants have been ordered to clean up the contamination on the Lands.

[3] Legal Oil and Gas Ltd. ("Legal") acquired Sinclair's interests in the petroleum and natural gas lease and well through one of its lineal predecessors in 1961 and has had management, control and ownership of the well since that time. Charles W. Forster ("Forster") was the sole director, shareholder and decision- maker of Legal at all material times except for a brief period in the 1980's. He was aware, prior to Legal acquiring Sinclair's interest in the well, that the well in question was producing salt water which had to be disposed of.

[4] The dimensions of the off site areas affected by the contamination have grown with time. Concern in regard to the contamination ultimately led to inspection of the well site and off-site areas by Alberta Environmental Protection in 1996 and a direction to Legal to investigate, sample, set-up and implement a remediation plan.

[5] In 1997, Environmental Protection undertook an assessment of the Lands and concluded that releases of substances had occurred from the well to the off-site areas. The substances involved included hydrocarbons and brine.

[6] It was strongly suspected that Sinclair's operations were the original cause of much of the contamination as the company routinely discharged large volumes of brine into one of the pits adjacent to the well, which periodically would overflow. Sinclair's operations also are the likely source of the present hydrocarbon contamination.

[7] In 1998 the Director issued an EPO requiring Legal and Forster to remediate the brine and hydrocarbon contamination outside of the boundaries of the well site, and also to remediate the contamination within the well site to the extent necessary to prevent further off-site contamination.

[8] At present, the well is suspended but not abandoned.

[9] There are factual disputes between the parties as to whether the brine pit was located on the well site or in the off- site area of the Lands, whether Legal caused any additional release of brine and hydrocarbons either within or outside of the well site and whether any brine or hydrocarbons released by Sinclair or Legal within the well site have migrated to off-site areas of the Lands during Legal's ownership of the well.

[10] The Board noted in its Report to the Minister that the evidence was not sufficient to provide a definitive resolution of these factual issues, but expressed its view that these issues were not determinative of the appeal in any event.

[11] Forster has acknowledged that he caused or directed the Sinclair salt water pit to be reclaimed and that he built a salt water pipeline to transport salt water from the well to a disposal well.

[12] Legal has admitted its legal responsibility to reclaim the well site and access road on abandonment of the well. However, Legal maintains that any contamination of the Lands beyond the well site occurred before it took possession and acquired ownership of the well, save for the areas contaminated by leakage from the disposal pipeline it constructed.

III. ISSUES

[13] The Applicants submit that the Board erred in concluding that:

a) Legal is a "person responsible" as defined by s. 1 (ss) of the Act;

b) Forster is a "principal" or "agent" of Legal and therefore a "person responsible" as defined in s. 1 (ss) of the Act and;

c) s. 102 of the Act was intended to have retrospective application.

IV. DECISION UNDER REVIEW

[14] The Applicants seek judicial review of both the Board's Report and the Minister's decision. However, on appeals from an EPO, the Board's only authority under the Act is to make recommendations to the Minister (ss. 84(1)(h), 91(1) of the Act). The Board itself makes no final determination on the substance of the appeal. Pursuant to s. 92(1) of the Act, it is only the Minister who is entitled to "confirm, reverse, or vary" the appealed order. As a result, judicial review is available only with respect to the Minister's decision.

V. STANDARD OF REVIEW

[15] In applications such as this, the first task for the Court is to determine the standard which is to be applied in reviewing the impugned administrative decision.

[16] The Supreme Court of Canada has offered considerable guidance on the subject culminating in ***Pushpanathan*** **v.** ***Canada (Minister of Citizenship and Immigration)*** (1998), 160 D.L.R. (4th) 193.

[17] I am instructed to employ a functional and pragmatic analysis in relation to each impugned aspect of the Board's recommendation and Minister's decision, for the purpose of determining what standard of review is appropriate to that issue. Ultimately, the approach is designed to yield an answer to the vexing problem of discovering legislative intent. In short, the analysis is meant to answer the question: "What degree of deference did the Legislature intend the Courts to show to the impugned aspects of the Minister's decision?"

[18] The Supreme Court of Canada has suggested a continuum of deference, the outer parameters of which are "correctness" and "patent unreasonableness". The latter represents a high degree of deference shown by the Court to the administrative tribunal's decision. This standard is employed when the Court concludes that the Legislature intended that the tribunal's decision would be final unless clearly irrational.

[19] A review based on the standard of correctness is a conclusion that the Legislature intended the Court to intervene whenever the tribunal's decision is wrong. In those circumstances, very little curial deference is shown.

[20] The Supreme Court of Canada also has attempted definition of the mid-point of this continuum, using the phrase "reasonableness simpliciter". I take that to mean that the Court is to defer to the decision of the tribunal if the decision is supportable upon the evidence called and the law which is applicable. In short, the Court will not intervene even if it disagrees with the decision as long as it can be shown that the decision was reasonable in fact and in law.

[21] I am of the opinion that the appropriate standard for review of the Minister's decision in the present case is that of "patent unreasonableness". That means that his decision is entitled to considerable deference. My conclusion in this regard is based upon an analysis of the various criteria outlined in ***Pushpanathan***, ***supra***, including the existence of a privative clause, the expertise of the Board and Minister, the purpose of the Act and the nature of the problems under consideration.

1. Privative Clause

[22] Section 92.2 of the Act provides that:

> 92.2 Where this Part empowers or compels the Minister or the Board to do anything, the Minister or the Board has exclusive and final jurisdiction to do that thing and no decision, order, direction, ruling, proceeding, report or recommendation of the Minister or the Board shall be questioned or reviewed in any court, and no order shall be made or process entered or proceedings taken in any court to question, review, prohibit or restrain the Minister or the Board or any of its proceedings.

[23] The existence of a full privative clause such as that contained in s. 92.2 is compelling evidence that the Legislature did not want the Courts to interfere with a decision made by the Minister under this statute, although that fact does not end the analysis.

2. Expertise

[24] Consideration of this factor requires that the Court assess the expertise of the Board and the Minister in relation to its own expertise and identify the nature of the issue before the decision-maker in terms of this expertise.

[25] The Act is broadly structured to deal with all aspects of environmental management. Section 2 sets out the purpose of the Act. It encompasses matters of sustainable development, environmental limitations on economic decisions, environmental research, public input on environmental issues, limiting pollution and assigning responsibility for pollution. Against that backdrop, the Board has been established as a final arbiter in relation to certain actions authorized by the statute and an expert advisor on other matters upon which the Minister is the final decision maker.

[26] Scientific expertise clearly is required for decision making in relation to various issues dealt with under the Act. The Board has been recognized as an expert tribunal in a number of cases both pre-dating and following enactment of the s. 92.2 privitive clause (***Fern Slauenwhite v. Alberta Environmental Appeal Board*** (1995), 175 A.R. 42, [1995] A.J. No.

826; *Martha Kostuch v. The Environmental Appeal Board* (1996), 182 A.R. 384, [1996] A.J. No. 311; *Chem Security (Alberta) Ltd. v. Alberta (Environmental Appeal Board)* (1996), 46 Alta. L.R. (3d) 51, aff'd (1997) 56 Alta. L.R. (3d) 153; *Alberta (Environment) v. McCain Foods (Canada) Ltd.*, [2000] A.J. No.469).

[27] The Applicants argue, however, that scientific expertise is not essential in determining whether a lease does or does not encompass the whole of the lands.

[28] Section 102 of the Act, which requires the interpretive aid of s. 1 (ss), is designed to deal with pollution. Its scope is broad and directed toward the identification of pollution problems and rectification of those problems. Its primary concern is not ascribing fault, but rather determining an effective and efficient method of resolving a problem.

[29] In the application of s. 102 there are a number of competing interests which must be balanced, including those of the well owner, the land owner, the previous well owners and operators, and the general public. Determining the remediation necessary may require an assessment of what damage was caused by whom, how, when and in what amounts.

[30] When considering the matter on this broader basis it is clear that the expertise possessed and developed by those charged with administering the Act is fundamental to the efficient, effective and fair application of the Act. Determining whether a particular lease encompasses or does not encompass a salt water pit is only one aspect of the decision making process.

[31] As suggested by the Director, the provisions of the Act cast a broad net. Competing interests abound. The Act designates the Minister as the final decision-maker as there are policy considerations involved in determining whether to uphold an EPO. The Board's expertise and the Minister's sensitivity to policy issues militates in favour of a high degree of deference .

3. Purpose of the Act

[32] In *Pushpanathan, supra* at para. 36 the Supreme Court of Canada indicated that:

> Where the purposes of the statute and of the decision-maker are conceived not primarily in terms of establishing rights as between parties, or as entitlements, but rather as a delicate balancing between different constituencies, then the appropriateness of court supervision diminishes.

[33] As explained earlier, this Act is about protection and remediation based upon policy concerns. The Act requires consideration of many competing interests and involves a variety of non-judicial strategies for resolution of interests. As such, it can safely be concluded that the

Legislature would expect the Courts to defer to the decision of those charged with effecting the purposes of the Act.

4. Nature of the problem

[34] The Applicants suggest that the issues before the Board and Minister were purely questions of law and therefore no deference is warranted. In my view, the Board's Report and decision of the Minister involved question of mixed fact and law and the application of policy. In ***Pushpanathan, supra*** at para.37, the Supreme Court of Canada advised that even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intent. Clearly the other factors in the analysis do suggest deference.

[35] Therefore, having reviewed the various factors set out in ***Pushpanathan, supra***, I too conclude that the appropriate standard of review in relation to the Minister's Order is that of "patent unreasonableness".

VI. ANALYSIS

1. Legal as a "Person Responsible"

[36] While it accepts that it is a "person responsible" for reclamation of the well site on abandonment of the well, Legal takes the position that the Board incorrectly concluded that it falls within the definition of "person responsible" in terms of off-site areas of the Lands. Legal submits that the EPO was wrongly issued pursuant to s. 102 of the Act.

[37] Section 102(1) specifies that:

> 102(1) Subject to subsection (2), where the Director is of the opinion that
>
> (a) a release of a substance into the environment may occur, is occurring or has occurred, and
>
> (b) the release may cause, is causing or has caused an adverse effect,
>
> the Director may issue an environmental protection order to the person responsible for the substance.

[38] The term "person responsible" is defined as follows in s.1(ss):

1(ss) "person responsible", when used with reference to a substance or a thing containing a substance, means

(i) the owner and a previous owner of the substance or thing,

(ii) every person who has or has had charge, management or control of the substance or thing, including, without limitation, the manufacture, treatment, sale, handling, use, storage, disposal, transportation, display or method of application of the substance or thing,

(iii) any successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in subclause (i) or (ii), and

(iv) a person who acts as the principal or agent of a person referred to in subclause (i), (ii) or (iii).

The definition continues on to exclude certain parties. Neither of the exclusions applies in the present case.

[39] The Board based its decision on its findings that Legal was the "owner" and had "management and control" of the contaminating substances and that it was a "successor" and "assignee" of the previous owner, Sinclair.

[40] In reaching this conclusion, the Board relied upon the original petroleum and natural gas lease pursuant to which Sinclair was granted "the right of entering upon, using and occupying the lands or so much thereof and to such an extent as may be necessary or convenient." The lands were defined in the lease as consisting of "all lands hereinbefore described or referred to...", meaning the quarter section. Sinclair was also responsible under the lease for indemnifying the landowner for any "loss, injury, damage, or obligation to compensate arising out of or connected with the work carried on by... [Sinclair] on the lands". Legal was the eventual assignee of Sinclair's interests under the lease and assumed the obligation to indemnify Sinclair from "the observance and performance of... [Sinclair's] covenants, conditions and agreements" in the lease.

[41] Legal contends that the Board erred in interpreted the original lease to Sinclair as applying to the whole quarter section. The company points out that the lease included a provision which required that the lessee designate the actual lands to be used in its operations in order to calculate the rent payable to Mr. Tieulie. Legal maintains that the actual land leased is only a small portion of the whole quarter section and that it does not encompass either the salt water pit or the affected off-site areas.

[42] The Board did not specifically refer to this clause, presumably because it did not consider it to be a limitation on the liability of the lessee and its successors and assigns under the lease. Sinclair clearly was the owner or had control and management of the substances in issue. Legal is the assignee of Sinclair.

[43] In my view, it cannot be said that the Board or the Minister had no rationale basis for the determination that Legal is a "person responsible" for purposes of s. 102(1) of the Act.

2. Forster as a "Person Responsible"

[44] The Director issued the EPO as against both Legal and Forster. The Board concluded that Forster, as an agent of Legal, was a "person responsible" as defined in s. 1 (ss) of the Act.

[45] The Board noted in its Report that Forster did not offer a definition of the terms "principal" or "agent" other than to submit legal authority for the proposition that the term "agent" does not include directors and shareholders. The Board observed, however, that Forster is also Legal's President, boss and manager, with exclusive control of the company's operations.

[46] I am of the view that the Board was not patently unreasonable in interpreting the term "principal" to mean the "chief" or "head" of a company or other organization which itself qualifies as a "person responsible". Nor do I believe that it was patently unreasonable for the Board to conclude that Mr. Forster qualifies as either a "principal" or an "agent", whether under a legal or more general definition of those terms.

3. Retrospectivity

[47] The Applicants submit that ministerial approval of the Director's order has the effect of determining that s. 102 of the Act is retrospective in its application. They argue that as the Act does not expressly state that it operates with respect to transactions which occurred prior to its enactment, the Board should have applied the presumption against retrospective application.

[48] Part of the answer to this argument lies in the fact that the Board concluded that the order of the Director was more prospective than retrospective in its nature. That determination depended upon the Board's finding that the contamination was ongoing (whether emanating from the well site or off-site).

[49] However, the Board also proceeded to interpret the Act and concluded that to the extent the EPO has a retrospective element, s. 102 of the Act is intended to operate in that fashion.

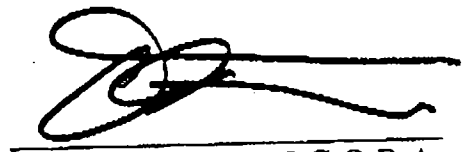
[50] I do not consider the conclusions of the Board in relation to this issue to be patently unreasonable, particularly given that the Supreme Court of Canada has recognized an exception to the presumption against retrospective application when the purpose of the provision is to protect the public rather than to punish (***Brosseau v. Alberta Securities Commission***, [1989] 1 S.C.R. 301). Section 102 of the Act certainly falls in the "protection of the public" category.

VII. CONCLUSIONS

[51] The application to set aside the Board's report and the Minister's order is denied.

[52] None of the participants asked for costs and therefore no order is made in that regard.

HEARD on the 17th day of May, 2000.
DATED at Edmonton, Alberta this 9th day of June, 2000.



J.C.Q.B.A.

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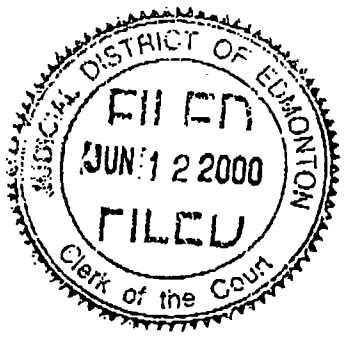

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