

Alberta Environment v. Environmental Appeal Board, 2000 ABQB

Date: 20000420  
Action No. 9903-23265

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

BETWEEN:

DIRECTOR, PRAIRIE REGION, ENVIRONMENTAL SERVICE, ALBERTA  
ENVIRONMENT

Applicant

- and -

ALBERTA ENVIRONMENTAL APPEAL BOARD

Respondent

- and -

MCCAIN FOODS (CANADA) LTD.

Respondent

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REASONS FOR JUDGMENT  
of the  
HONOURABLE MR. JUSTICE A. T. MURRAY

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APPEARANCES:

J. A. Smart  
for the Applicant

A. C. L. Sims, Q.C.  
For the Respondent, Board

R. B. Low, Q.C.  
for the Respondent, McCain

HISTORY:

[1] The Director, Prairie Region ("Director") received an application pursuant to s. 63 of the *Environmental Protection and Enhancement Act* ("the Act") from McCain Foods (Canada) Ltd. ("McCain") for the operation of a potato processing plant to be built near Chin, Alberta, a short distance east of Lethbridge.

[2] The Director discharged his obligations under Parts 2 and 2.1 of the Act and on June 5, 1999 issued Approval No. 72062-00-00 ("the Approval"). This is an extensive document consisting of 35 pages of terms and conditions addressing many facets of the undertaking including a condition that McCain would not emit any effluent streams into the atmosphere except as provided in the Approval. It then went on to set out ten physical sources in the plant from which such effluent streams might be emitted and specifically limited the amount of air contamination permitted from three of those sources, the Fryer stack, the Dryer stack, and the Boiler stack.

[3] The Approval contains Condition 4.2.7 ("the Condition") which reads as follows:

4.2.7 The approval holder shall not emit an air contaminant or cause to be emitted an air contaminant that causes or may cause any of the following:

- (a) the impairment, degradation or alteration of the quality of natural resources; or
- (b) material discomfort, harm or adversely affect the well being or health of a person; or
- (c) harm to property or to plant or animal life.

[4] By reason of s. 98(3) of the Act, since the approval is silent as to the other sources of emissions, the provisions of s. 98(1) and (2) apply. These read as follows:

98(1) No person shall knowingly release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect.

(2) No person shall release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect.

[5] On June 30, 1999, McCain appealed Condition 4.2.7 of the Director's Approval to the Board. The grounds for appeal are:

By imposing condition 4.2.7, the Director is acting outside his jurisdiction provided by the *Environmental Protection and Enhancement Act*. Condition 4.2.7 is inconsistent with the Act, purports to amend the Act and is an exercise of AEP's discretion beyond the scope of the enabling legislation. In condition 4.2.7, the Director has unilaterally changed the generic standard contemplated by section 98 of the Act for unregulated releases from a "significant adverse effect" to an "adverse effect". Condition 4.2.7 creates a new offence, contrary to the Act, for a release which causes an "adverse effect". The violation of condition 4.2.7 brings with it a sanction including

imprisonment and therefore creates a binding obligation. AEP is not provided with this rule-making authority, and therefore condition 4.2.7 is an unauthorized attempt by AEP at legislating. A regulator may not create offences without express statutory authority. Therefore, the Director has gone beyond his authority under the Act by imposing condition 4.2.7.

The relief claimed is:

McCain requests that condition 4.2.7 be deleted from the Approval No. 72062-00-00.

[6] The sole ground for appeal is that the Director exceeded his jurisdiction for the reasons stated. On July 2<sup>nd</sup>, the Board acknowledged receipt of the Notice of Appeal.

[7] On October 8, 1999 the Director raised a preliminary issue, taking the position that the Board did not have the jurisdiction to make a determination as to whether the Director had the legal authority to insert the Condition in the Approval, and on November 9<sup>th</sup> filed with the Board a written submission setting out the basis for his position and requesting that the Board "exercise its discretion to dismiss the appeal pursuant to s. 87(5)(a)(1.2)". Section 87(5)(a)(1.2) provides:

(5) The Board

(a) May dismiss a notice of appeal if:

(1.2) for any other reason the Board considers that the notice of appeal is not properly before it.

The reasons given are:

The powers of review of the Board are limited to the mandate and scope of review granted to the Director.

The Board does not have jurisdiction to hear this appeal as it relates solely to a question of law.

The determination of the Director's jurisdiction to insert clause 4.2.7 is not the mandate of the Board. The Board's role is to resolve appeals relating to administrative decisions regarding environmental matters made under the Act.

The Board would not be able to adequately resolve this matter as the Board only makes recommendations to the Minister with respect to the approval. The Minister is also limited (section 92(1)) to confirm, reverse or vary the decision and make any decision with the Director could have made.

McCain would have available the alternative forum for resolution, that being the Alberta Court of Queen's Bench via Judicial Review.

[8] Submissions by the Director and McCain were heard by the Board and on November 24, 1999 the Board advised the parties that it had concluded that it had jurisdiction to consider the merits of the appeal, denied the Director's motion and directed the parties to get on with the appeal. The Board further said that it would provide its reasons for this denial as part of its final decision when it made its recommendations to the Minister respecting McCain's appeal.

[9] The Director then requested reasons for the Board's preliminary decision and received in response a letter dated December 17, 1999 stating:

"...the Board refers the Director to the reasons provided by McCain Foods, in its counsels' November 16, 1999 Submissions to the Board. The Board substantially adopts those reasons, while reserving the right to provide its own reasons at a later date."

The Director by an amended Originating Notice of Motion dated March 21, 2000, applied to this Court for an order of certiorari quashing the Board's decision, an order that the Board erred in determining that it had jurisdiction to consider McCain's appeal, and an order prohibiting the Board from further considering the appeal, all pursuant to R. 753.13 of the Alberta Rules of Court.

ISSUES:

[10] This is a unique application. Two creatures of the same statute, the Director and the Board, both of whom serve the same function, namely those purposes enunciated in s. 2 of the Act, are fighting over who has jurisdiction to do what.

[11] The issues as identified by counsel for the Director are:

- (a) Did the EAB act without jurisdiction, exceed its jurisdiction or err in law when it decided that it has the jurisdiction to determine whether the Director exceeded his legal authority under the Act? In other words, does the EAB have a supervisory jurisdiction with respect to the Director similar to that of a Superior Court of Record?
- (b) Did the Board err in law in failing to provide written reasons for its decision?

LEGISLATION:

The relevant sections of the Act are:

83(2) The Board shall hear appeals as provided for in this Act or any other enactment.

One such source are decisions of various Directors.

84(1) A notice of appeal may be submitted to the Board by the following persons in the following circumstances:

- (a) where the Director
  - (i) issues an approval...

a notice of appeal may be submitted

- (iv) by an approval holder...

The approval holder in this case is McCain.

86(1) On receipt of a notice of appeal under this Act...the Board shall conduct a hearing of the appeal.

87(1) The Board has all the powers of a commissioner under the Public Inquiries Act.

(5) The Board

- (a) may dismiss a notice of appeal if

(i.2) for any other reason the Board considers that the notice of appeal is not properly before it...

91(1) In the case of notice of appeal referred to in section 84(1)(a) to (j) of this Act...the Board shall within 30 days after the completion of the hearing of the appeal submit a report to the Minister, including its recommendations and the representations or a summary of the representations that were made to it.

In this case the Board's role is to advise the Minister.

92(1) On receiving the report of the Board the Minister may, by order,

- (a) confirm, reverse or vary the decision appealed *and make any decision that the person whose decision was appeal could make....*, and
- (c) make any further order that the Minister considers necessary for the purpose of carrying out the decision.

Thus, the Minister may make any decision that the Director could make, including determining the appropriate terms and conditions of the McCain approval.

(2) The Minister shall immediately give notice of any decision made under this section to the Board and the Board shall, immediately on receipt of notice of the decision, give notice of the decision to all persons who submitted notices of appeal or made representations or written submissions to the Board and to all other persons who the Board considers should receive notice of the decision.

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.

Strong privative protection is provided to the Minister and the Board.

#### ANALYSIS:

[12] The purpose of the Act is to support and promote the protection, enhancement and wise use of the environment while recognizing a number of factors including that the protection of the environment is essential to the integrity of ecosystems, human health and the well-being of society as well as the need of Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earlier stages of planning. The Act and regulations made thereunder set out a comprehensive scheme for attempting to attain its purposes. The Minister is the person ultimately responsible for seeing that the purposes of the Act are realized. An integral part of the process is the work that various Directors do. These people are appointed pursuant to the



provisions of the Act and the ambit of their responsibilities is set out in the Act, including the approval of proposed developments within the Province. The Director's mandate regarding approvals is found in the Approvals and Registrations Procedure Regulation, A.R. 113/93. Section 6(2) outlines eight matters that might be addressed by the Director in reviewing an application for an approval. These include proposed methods of minimizing release of substances into the environment, conservation and reclamation and site suitability, all matters of environmental concern. The Act goes on to deal with appeals from decisions of Directors respecting such approvals and, except in certain specific cases, the Board is fixed with the responsibility of conducting a hearing of an appeal and preparing a written report for the Minister, which includes its recommendations and the representations or summary of the representations made to it by the parties to the appeal. The Board brings to bear upon its decisions a considerable degree of expertise.

1. What is the standard of review of this preliminary decision of the Board?

[13] As set out in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* (1998), 160 D.L.R. (4<sup>th</sup>) 193 (S.C.C.), the Court must consider four factors to determine the appropriate standard of review:

(i) the presence or absence of a privative clause;

(ii) the expertise of the tribunal;

(iii) the purpose of the Act as a whole and the provision in particular; and

(iv) the "nature of the problem".

[14] The first three have been discussed. As to the fourth, if the problem is as seen by McCain, it is purely jurisdictional. The Board was asked: "Does the Board have jurisdiction to determine the limits of the jurisdiction of the Director?" This is a bare question of jurisdiction which contains no factual particularity.

[15] As will be discussed, the question may not be as straightforward as it appears. However, assuming it is solely a question of jurisdiction, then in taking all these factors into account, the appropriate standard of review is correctness or close to correctness.

2. Did the Board err when it decided that it had jurisdiction to determine whether the Director exceeded his legal authority under the Act?

[16] The Director takes the position that the Board is a purely advisory board, which is limited to making recommendations to the Minister regarding environmental considerations. The Act does not give the Board the jurisdiction to determine whether the Director has acted outside his jurisdiction, which is purely a question of law. The Director submits that the scope of the Board's review of an approval by a Director is set out in s. 6 of the *Approvals and Registrations Procedure Regulation*, A.R. 113/93. Since this regulation applies to a Director

when issuing an approval, the Director argues that it would also apply to the Board since the scope of consideration on review would be similarly limited. The considerations set out in s. 6 are all environmental considerations such as design plans, site suitability, monitoring programs, methods of storage, availability of water, conservation, and past performance of the applicant in ensuring environmental protection in respect of the activity. The Director argues that the Board does not have the jurisdiction to consider questions of law, and therefore has no jurisdiction to determine the jurisdiction to the Director. His position is that the jurisdiction of the Director must be determined by the Court of Queen's Bench as part of a judicial review application.

[17] In my view, the Director's position is, as submitted by the Respondents, inconsistent with the provisions of the Act, and prior case authority.

[18] As set out in *Union des employes de service Loc. 298 v. Bibeault* [1988] 2 S.C.R. 1048, the Court must undertake a pragmatic and functional analysis to determine the jurisdiction of the tribunal. This is essentially the same analysis that is now conducted to determine the appropriate standard of review. The factors to be considered are: (i) the wording of the enactment conferring jurisdiction on the administrative tribunal, (ii) the purpose of the statute creating the tribunal, (iii) the reason for its existence, (iv) the area of expertise of its members, and (v) the nature of the problem before the tribunal. Factors (ii), (iii), (iv) and (v) have been reviewed above.

[19] As to the first factor, there are no limitations placed on the scope of the appeal. The matter came before the Board by a notice of appeal filed by McCain under s. 84(1)(a)(iv). On receipt of a notice of appeal the Board must conduct a hearing of the appeal (s. 86), unless it determines that the appeal is not properly before it (s. 87(5)(a)(i.2)). The Board is authorized to determine which matters it will include in the hearing of the appeal (s. 87(2)). The Board is vested with all the powers of a commissioner under the *Public Inquiries Act* (s. 87), and may stay a Director's decision pending an appeal (s. 89(2)). The Board, after completion of the hearing of the appeal, must issue a report containing recommendations to the Minister of the Environment (s. 91). On receiving the report of the Board, the Minister may make any decision that the Director could make, and make any further order necessary for the purpose of carrying out the decision (s. 92).

[20] The result of the pragmatic and functional analysis leads to the conclusion that the Board does have the jurisdiction to consider and recommend to the Minister whether or not the Director acted within his jurisdiction in including the Condition in the approval. The Act gives the Board broad powers on appeal which are not specifically limited. The Board is an expert tribunal established to consider appeals from environmental approvals. The Legislature has signalled its intention for the Board and the Minister to deal with these issues through the strong privative clause. There is no reason why the Board should not be able to decide the preliminary question of jurisdiction to hear such an appeal.

[21] The comments of Madam Justice L'Heureux-Dubé in *R. v. Consolidated Maybrun Mines Ltd* [1998] 1 S.C.R. 706, at p. 733, after reviewing the administrative appeal process in Ontario's equivalent to the Act in question here, are apropos:

In establishing this process, the legislature clearly intended to set up a complete procedure, independent of any right to apply to a superior court for review, in order to ensure that there would be a rapid and effective means to resolve any disputes that might arise between the Director and the persons to whom an order is directed. The decision to establish a specialized tribunal reflects the complex and technical nature of questions that might be raised regarding the nature and extent of contamination and the appropriate action to take. In this respect, the Board plays a role that is essential if the system is to be effective, while at the same time ensuring a balance between the conflicting interests involved in environmental protection.

[22] Prior case authority also indicates that the Board has jurisdiction to determine this preliminary question. In *Gulf Canada Resources Ltd. v. Alberta (Minister of Environmental Protection)*, [1996] A.J. No. 1240 (Alta. Q.B.), Madam Justice Kenny held, on a judicial review of the Board's determination on a notice of objection, that the Board was not limited to a review of whether or not the decision of a reclamation inspector was reasonable in light of the reclamation criteria and whether or not that criteria was satisfied. Rather, when deciding an appeal, Her Ladyship held that the Board may review the matter and determine that the Reclamation Certificate should not have been issued at all. Furthermore, in *Chem-Security (Alberta) Ltd. v. Alberta (Environmental Appeal Board)* [1997] A.J. No. 738 (Alta. Q.B.) and *Kostuch v. Alberta Environmental Appeal Board*, [1996] A.J. No. 311 (Alta. Q.B.), it was held that the Board does have jurisdiction to decide questions of law.

[23] These authorities support the position of the Respondents that the Board has the jurisdiction to determine if it has jurisdiction to hear an appeal of this nature and further has jurisdiction to consider whether or not the Director had jurisdiction to insert the Condition in the approval and then to make its recommendations to the Minister.

#### ADDITIONAL CONSIDERATIONS

[24] The wording of the Condition may not bear the same interpretation as McCain has placed upon it. McCain's application is to strike out the Condition from the Approval on the basis that the Director did not have jurisdiction to impose the Condition which, it is argued, has the effect of eliminating from s. 98(1) and (2) the word "significant". One might argue that the three categories of results from emission of an air contaminant which are prohibited by the Condition could each be considered as a "significant adverse effect" i.e., that should any of the three results enumerated in the Condition occur, then that would cause or may cause a "significant adverse effect" upon the environment. The Board would consider questions such as this in deciding whether or not the Director acted beyond his statutory powers in stipulating the Condition. Those questions, unlike the one posed by McCain, involve mixed fact and law.

[25] In my view, questions of interpretation such as the one posed above, and others which the Board members may perceive, require a considerable degree of expertise, certainly beyond the knowledge of this Court. The Board, with its expertise, is the proper body to interpret the Condition and make recommendations to the Minister who will make the final decision. The Minister's decision may or may not be open to judicial review.

[26] Until the overall process has been concluded and the decision made by the Minister it is inappropriate that this Court be asked to interfere.

[27] Further, counsel for the Director takes the position that the Director correctly inserted the Condition in the approval. Thus, he is implicitly acknowledging that he believed he had authority to do so and that in making the approval subject to the condition he had discharged his statutory duties properly. In coming to this decision the Director's position must be and is that based upon his interpretation of the Act and Regulations it was lawful for him to do so.

[28] Since the Minister has the same powers as the Director insofar as this matter is concerned, it follows that he must also be able to consider what the Director's jurisdiction is in dealing with this question. The Board's role is one of reporting and making recommendations and in doing so it must deal with the same questions as the Minister will, including the question of whether or not the Director in fact had the jurisdiction to insert the condition in the approval. It seems incongruous that one might say that the Minister who has the same powers as the Director insofar as these matters are concerned, should be deprived of the Board's recommendations when giving his decision as required by the Act.

3. Was the Board obliged to provide written reasons for its denial of the director's application to it?

[29] A number of cases were cited on this matter by counsel for the Board. Suffice to say that in my view, the situation we are dealing with simply involves a preliminary question in a

step toward the Board making its recommendation so the Minister can in turn make a final decision on the merits of the appeal. What the Board did was make a ruling on a preliminary point raised by the Director. When the Board said that it would provide its reasons for denying the Board's application as part of its "final decision on this appeal" clearly the Board was cognizant of the provisions of s. 90 and 91 and given that s. 90 did not apply, it would be making its recommendation to the Minister. I do not consider that the Board was in error when it used the word "decision" rather than "recommendation".

[30] In any event, the Board wrote to the Director stating "the Board substantially adopts those reasons, while reserving its right to provide its own written reasons at a later date". The reasons referred to are the reasons put forward by McCain which were comprehensive.

[31] The Court was referred to the Supreme Court of Canada decision in *Baker v. Minister of Citizenship and Immigration* (1999), 174 D.L.R. (4<sup>th</sup>) 193 wherein Madam Justice L'Heureux-Dubé dealt with an appeal by a woman who had been in Canada over eleven years, but had never been granted permanent resident status, and was ordered deported. While in Canada she had given birth to four children who were Canadian citizens. She applied under s. 114(2) of the *Immigration Act*, R.S.C. 1985 c. I-2 to be exempted from deportation and that her admission be facilitated owing to the existence of compassionate or humanitarian considerations. Under the Regulations the Minister was authorized to grant such exemption. An immigration officer informed the Applicant that there were insufficient humanitarian and compassionate grounds to grant the exemption. No reasons for the conclusion were given



though the Applicant's counsel requested and received the officer's informal notes from which the impression could be gained that the decision had been influenced by certain irrelevant factors. The Court held that because of the profound impact of the decision upon the Applicant, fairness dictated that she receive written reasons for the denial of her application. However, in that case it was found the requirement had been fulfilled by the provision of the officer's notes. The Court in the *Baker* decision took a flexible approach as to when reasons were appropriate, recognizing as an important consideration the tribunal's decision over its own processes. This was more fully considered at pp. 18-19, paragraphs 37 and 38.

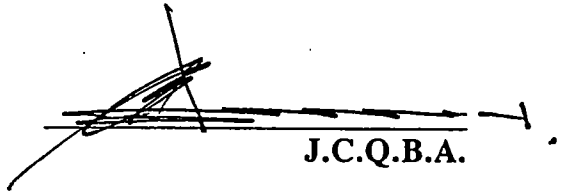
[32] None of the circumstances outlined in the *Baker* decision apply in this situation. We are concerned with a preliminary question, not a final decision on the merits. The Director has no statutory right of appeal. In any event, the reasons given by the Board in referring to the submissions of McCain were, in my opinion, sufficient and appropriate at that stage of the proceeding. The Board was correct in exercising its discretion to proceed to hear the matter on its merits rather than accede to the Director's approach. The Board acted properly in doing so since in doing so it enabled itself to view the matter in its full environmental context and so advise the Minister. Reference is made to the decision of our Court of Appeal in *Paramount Resources Ltd. v. Metis Settlements Appeal Tribunal (ELLAP)* (1999) A.B.C.A. 348 December 7, 1999 per Fruman, J.A.

DECISION:

[33] In the result, I find that the Board was correct in determining that it had jurisdiction to consider the appeal and that its reasons were appropriate at this stage of the proceedings. The Director's applications are dismissed. Unfortunately, McCain was required to participate in this dispute. In my opinion, the successful parties which includes McCain, are entitled to their costs of this application which unless special reasons are provided to the contrary will be taxed under the appropriate column of schedule "C" of the Rules of Court together with all reasonable and proper expenses as set out in R. 600.

HEARD on the 12<sup>th</sup> day of April, 2000.

DATED at Edmonton, Alberta this 20<sup>th</sup> day of April, 2000.

  
J.C.Q.B.A.

Action No:9903-23265

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SERVICE, ALBERTA ENVIRONMENT

Applicant

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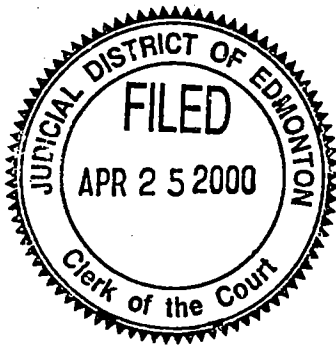
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