Court of Queen's Bench of Alberta

Citation: Alberta Wilderness Association v Alberta (Environmental Appeal Board), 2013 ABQB 44

Date:
Docket: 1201 07570
Registry: Calgary

Between:

Alberta Wilderness Association, Trout Unlimited Canada and Water Matters Society of Alberta

Applicants

- and -

The Environmental Appeals Board, Director, Southern Region, Alberta Environment and Sustainable Resource Development, Bow River Irrigation District, Western Irrigation District and the Minister of Justice and Attorney General for Alberta

Respondents

Reasons for Judgment
of the
Honourable Mr. Justice R. J. Hall

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[1] This matter comes before me for Judicial Review of a decision of the Alberta Environmental Appeals Board (the "Board") of June 2, 2012, wherein the Board issued a decision denying public interest standing to the Applicants in a series of appeals which the Applicants wished to file. The Applicants wished to appeal the decision of the Director of Alberta Environment and Sustainable Resource Development ("AESRD") wherein he approved amendments to water licences held by the Respondents Western Irrigation District ("WID") and the Bow River Irrigation District ("BRID").

[2] Applications were made to AESRD by BRID and WID to amend certain water licences. The Applicants filed Statements of Concern with respect to those applications, and did so in a

timely manner. The Director of AESRD gave notice to the Applicants that he did not consider them to be directly affected by the applications and that their submissions filed would not be considered as a Statement of Concern under the *Water Act*.

[3] The Director of AESRD approved the applications to amend the BRID and WID water licences. The Applicants then each filed Notices of Appeal with the Board, appealing the Director's approval of those applications.

[4] The Board invited submissions from the parties on the preliminary question of whether the Applicants were directed affected by the licence amendments. In their submissions on the preliminary questions, the Applicants argued that they were directly affected by the licence amendments. In the alternative, they argued that they should be granted public interest standing to bring the appeals.

[5] The Board determined that the Applicants were not directly affected by the licence amendments. In this Judicial Review, the Applicants have not attacked that decision, and that issue is not before me.

[6] The Board also determined that it did not have jurisdiction to grant public interest standing, stating in its decision at paragraphs 134 and 135:

> 134 . . . The Board's enabling legislation does not provide it with the powers to determine public interest standing. In order for the Board to have jurisdiction to hear an appeal, the legislation requires the appeal to be filed by someone who has filed a Statement of Concern and is directly affected by the Director's decision. This is a preliminary matter that the Board must determine before it can proceed to a substantive hearing, but it does not give the Board the ability to determine if an Appellant should be granted pubic interest standing.
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> 141 The Board cannot and will not grant public interest standing to the Appellants in these circumstances. Granting public interest standing is not within the Board's jurisdiction.

[7] It is this determination by the Board, that it does not have jurisdiction to grant public interest standing, that is the subject of this Judicial Review.

[8] If, in this Judicial Review, my findings accord with that of the Board, then that ends this review. If, however, I decide contrary to the Board, then I must thereafter determine whether, in these circumstances, public interest standing should have been granted by the Board, or alternatively direct the matter back to the Board for its consideration of whether public interest standing should be granted in these particular matters.

Standard of Review

[9] The Applicants urge upon me that, with respect to the question of the Board's jurisdiction, the standard of review should be correctness. With respect to the Board's decision that public interest standing should not be granted in this matter, the standard of review should be reasonableness.

[10] The Respondents argue that, in respect of each of the two issues, the standard of review should be reasonableness. They argue, in respect of the first issue, that the Board is called upon time-and-time again to make decisions as to whether an appellant has standing to bring an appeal. They note that the Board is constituted pursuant to the *Environmental Protect Enhancement Act*, and that section 102 of that *Act* is a full privative clause. They argue that this Court should show great deference to the decision of the Board in respect to the first stated issue, as well as in regard to the second stated issue.

[11] True questions of jurisdiction or *vires* attract the correctness standard of review. The Supreme Court of Canada in *Dunsmuir v New Brunswick (Board of Management)* 2008 SCC 9, [2008] 1 SCR 190 tells us, at paragraph 59:

> "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory granted power gives it the authority to decide the particular matter.

[12] To my mind, issue number 1 is exactly what is described in *Dunsmuir* above. Accordingly, I find that the standard of review regarding issue number 1 is correctness.

[13] The parties agree that the standard of review regarding issue number 2 is reasonableness.

Issue 1

[14] Does the Board have jurisdiction to hear an appeal from Applicants who were not directly affected by the decision of the Director, on the basis that the Applicants are to be granted public interest standing?

[15] The Director's decision is one made pursuant to the *Water Act*, of Alberta. The *Water Act* provides the circumstances under which such a decision may be appealed. Section 115(1)(c)(i) of the *Water Act* states:

> 115(1)(c)(i) A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances:

> (c) if a preliminary certificate has not been issued with respect to a licence and the Director issues or amends a licence, a notice of appeal may be submitted
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> (i) by the licensee or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision, if notice of the application or proposed changes was previously provided under section 108. . .

[16] It is to be noted that there is no provision in the *Water Act* that allows for an appeal of a Director's decision beyond the provisions of Section 115(1)(c)(i). Most importantly, there is no provision that provides that a notice of appeal may be submitted by any other person, not described in that section. There is no provision in the *Water Act* allowing the Board to permit any person not described in the section to submit a notice of appeal.

[17] The Board is constituted under the *Environmental Protection Enhancement Act* ("EPEA"). Certain powers are given to the Board under that *Act*. However, the Board's jurisdiction and authority to sit in appeal in relation to matters arising out of the *Water Act* comes not from the EPEA, but from the *Water Act*.

[18] Section 115(1)(c)(i) is very clear as to who may give notice of appeal. That person or organization must have submitted a statement of concern to the Director. In this instance, such statements of concern were submitted, and the Applicants qualify on that basis.

[19] In addition, the person wishing to submit a notice of appeal must be a person who is directly affected by the Director's decision.

[20] As stated above, the Board has determined that the Applicants herein were not directly affected by the Director's decision, the Applicants have not sought Judicial Review of that determination, and that determination stands for purposes of this Judicial Review.

[21] Accordingly, the Applicants do not qualify as persons who may submit a notice of appeal under Section 115(1)(c)(i) of the *Water Act*.

[22] The Applicants, however, argue that the Board has the power to grant public interest standing. The Applicants argue by analogy from cases where the Court has determined that, pursuant to the Court's inherent jurisdiction, the Court can grant public interest standing.

[23] While Courts have inherent jurisdiction it is clear law that administrative tribunals do not. Their jurisdiction is solely derived from the statute that provides that jurisdiction. In this case, that statute is the *Water Act*. The *Water Act* does not provide them with any jurisdiction to grant public interest standing.

[24] The Applicants argue that section 95(5) of the *EPEA* provides the discretion to the Board to grant public interest standing. Section 95(5) of the *EPEA* reads as follows:

> 95(5) The Board
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> (a) may dismiss a notice of appeal if
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> (i) it considers the notice of appeal to be frivolous or vexatious or without merit,
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> (ii) in the case of a notice of appeal submitted under section 91(1)(a)(i) or (ii), (g)(ii) or (m) or this *Act* or section 115(1)(a)(i) or (ii), (b)(i) or (ii), (c)(i) or (ii), (e) or (r) of the *Water Act*, the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation,
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> (iii) for any other reason the Board considers the notice of appeal is not properly before it,
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> (iv) the person who submitted the notice of appeal fails to comply with a written notice under section 92, or
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> (v) the person who submitted the notice of appeal fails to provide security in accordance with an order under section 97(3)(v)
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> and
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> (b) **shall** dismiss a notice of appeal if in the Board's opinion
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> (i) the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under Part II of the Agricultural Operations Practices Act, under the Natural Resources Conservation Board Act or any Act administered by the Energy Resources Conservation Board or the Alberta Utilities Commission at which all of the matters included in the notice of appeal were adequately dealt with, or
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> (ii) the government has participated in a public review under the Canadian Environmental Assessment Act (Canada) in respect of all of the matters included in the notice of appeal.
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> (emphasis added)

[25] The Applicants say that section 95(5)(a) of the *EPEA* provides the Board with discretion, in that it indicates when the Board "may" dismiss a notice of appeal. They say that is to be distinguished from the circumstances described in 95(5)(b) which sets out when the Board "shall" dismiss a notice of appeal.

[26] Because the provisions of section 95(5) are permissive, the Applicants argue that the Board has a discretion as to whether or not to dismiss an appeal; and that therefore the Board has discretion to decide whether to allow an appeal to proceed. The Applicants maintain, therefore, that section 95(5)(a) of the *EPEA* gives the Board discretion to allow an appeal to proceed (or determine not to dismiss an appeal), where the Applicants are not directly affected by the decision but represent a public interest in respect of that decision.

[27] I do not agree. With respect to an appeal of the Director's decisions to amend water licences, the Board only has the jurisdiction that was granted to it by the provisions of the *Water Act*. The *Water Act* did not grant the Board the jurisdiction to hear public interest appeals. It can only hear appeals from parties directly affected by the decisions of the Director. The Board receives its jurisdiction from the provisions of the *Water Act*. It is a legislated jurisdiction. The Board cannot exceed that jurisdiction. The Board has no inherent jurisdiction.

[28] Section 95(5)(a) of the *EPEA* gives the Board latitude with respect to dismissing appeals that have been filed for the reasons enumerated therein, including that the Applicant/Appellant was not directly affected by the decision being appealed. It is a mechanism whereby the Board may consider, as a preliminary matter, whether the Applicant/Appellant has standing, before hearing a full appeal. It does not, and cannot add jurisdiction to the Board in respect of matters arising out of the *Water Act* that was not granted to the Board by the provisions of the *Water Act*.

[29] I find that the decision of the Board as to its jurisdiction to hear the proposed appeals is correct.

[30] That being the case, issue number two is never reached and is moot.

[31] In the result, the application is denied.

Costs

[32] The Applicants submit, win or lose, that each party to this Judicial Review should bear its own costs. They refer to *Pauli v Ace Ina Insurance Company* 2004 ABCA 253 where the Court of Appeal set out four factors to be considered when deciding whether to exercise judicial discretion to depart from the normal rule that costs follow the event:

(a) Whether the case is one of public interest;

(b) Whether the case raises a novel point of law;

(c) Whether the case is a test case; and

(d) Whether awarding costs would deny access to justice.

[33] The Respondents, the Environmental Appeals Board and the Director, Southern Region, Alberta Environment and Sustainable Resource Development have not sought costs in this matter, but have argued that, if they are unsuccessful they should nevertheless not have costs awarded against them. They have been successful. They do not seek costs. No costs are awarded.

[34] The Respondent BRID and WID argue that the general rule is that costs ought to follow the event, and there is no general principle that shields the public interest litigant from costs, citing *Sierra Club of Western Canada v British Columbia (Chief Forester)*, 1995 Carswell BC 302 at paragraphs 41 - 46.

[35] The Applicants have brought a somewhat novel argument before the Court, upon which there was no direct authority. The decision in the case is one of public interest. The Applicants argue that it is a test case as to whether this Board has the power to grant public interest standing. The Applicants argue that an adverse cost award would place a relatively significant financial burden on the Applicants and "effectively punish the Applicants for seeking to uphold the principle of legality and the rule of law."

[36] I do not accept those arguments in respect to the costs of BRID and WID. While the argument put forth was a novel one, it was an attempt to find jurisdiction where none was granted under the *Water Act*. The Applicants note that WID and BRID were only named as Respondents because they requested to be so named. It is natural for WID and BRID to take the position, as it is their licence amendments that are in issue. They would have been granted status to argue in this Judicial Review had they not been named as Respondents. They were proper Respondents to the application. They have incurred costs in defending this application. They have been successful.

[37] The Respondents BRID and WID are entitled to one set of costs from the Applicants in relation to these proceedings pursuant to section 8(1) of Schedule C of the *Rules of Court*, and I set those costs in Column 5 of that Schedule.

Heard on the 8th day of January, 2013.
Dated at the City of Calgary, Alberta this 17th day of January, 2013.

R. J. Hall
J.C.Q.B.A.

Appearances:

Barry Robinson
for the Alberta Wilderness Association et al

A. Sims, Q.C.
for the Environmental Appeals Board

A. Altmiks and C. Graham
for the Director

C. R. Jones and G. M. Marinangeli
for the Western Irrigation District