In the Court of Appeal of Alberta

Citation: Siksika First Nation *v.* Alberta (Director Southern Region Environment), 2007 ABCA 402

Date: 20071212
Docket: 0601-0319-AC
Registry: Calgary

Between:

The Siksika First Nation

Appellant
(Applicant)

- and -

The Director Southern Region (Alberta Environment), the Alberta Environmental Appeals Board and The Town of Strathmore

Respondents
(Respondents)

Corrected Judgment: A corrigendum was issued on December 28, 2007; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Madam Justice Elizabeth McFadyen
The Honourable Mr. Justice Keith Ritter
The Honourable Mr. Justice Jack Watson

Reasons for Judgment Reserved of The Honourable Mr. Justice Watson
Concurred in by The Honourable Madam Justice McFadyen
Concurred in by The Honourable Mr. Justice Ritter

Appeal from the Order by
The Honourable Mr. Justice P.J. McIntyre
Dated the 6th day of September, 2006
Filed on the 6th day of November, 2006
(Docket: 0601-06100)

Reasons for Judgment Reserved of
The Honourable Mr. Justice Watson

[1] The appellant Siksika First Nation challenges the chambers judge's decision dated September 6, 2006, declining to make a judicial review order against a decision of the respondent Director of the Southern Region of Alberta Environment ("Director"), made under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (*EPEA*).

[2] In November, 2005, the Director approved an application by the respondent Town of Strathmore ("Strathmore") for a pipeline that would discharge waste water into the Bow River, which passes through the appellant's reserve. The chambers judge concluded that the motion for judicial review of the Director's decision was moot as, according to the review process established under the *EPEA*, that decision was subject to further appeal to the Alberta Environmental Appeals Board ("EAB"), and ultimately subject to a decision of the Minister of Environment ("Minister"). Given his determination of mootness based on the prematurity of the appellant's application, the chambers judge did not exercise any discretion he may have had to consider the merits of the appellant's challenge to the Director's decision. In failing to do so, he erred.

[3] The appellant not only sought judicial review of the Director's decision, but also sought declaratory relief. That motion for declaratory relief was not rendered premature or otherwise moot by reason of there being an internal appeal available from the Director's decision.

[4] The appellant challenged the entire process, from the Director through to the Minister, as being an insufficient form of legal consultation for addressing what are, in the appellant's view, its "interests and existing and claimed Treaty 7 and Aboriginal rights". The appellant sought declarations as to the extent of the duty owed, and as to whether the statutory system was sufficient to meet that duty. The appellant contended that the rights claimed were not confined by the legislative scheme. The chambers judge effectively accepted the Director's position that the declaratory relief sought by the appellant should be regarded as merely ancillary to, or adjectival of, the grounds for objection to a specific decision of the Director. In doing so, the chambers judge set aside the appellant's broader challenge that the entire statutory appeal process was not a legally adequate form of Crown consultation.

[5] The chambers judge opined that the legislated review process about pipeline approval was not "complete" (A.B.D., F7/26). In his view, it was premature to decide the question of consultation because the later steps in the process might adequately address the appellant's concerns, either by providing a form of consultation legally sufficient to meet the appellant's contentions, or by providing a conclusion as effective as if there had been consultation legally sufficient to meet the appellant's contentions. He was also concerned about the ramifications of litigation by instalments. He was not persuaded that it was in the litigants' or the public's interest to offer an opinion on the subject of consultation on the record before him, and divorced that issue from the appellant's substantive complaints about the handling of Strathmore's waste water.

[6] Nonetheless, the chambers judge did offer an opinion about significant points. Not only did he consider judicial review of the Director's decision prematurely moot, and suggest that any consultation defect existing *prior* to a Director's decision might be cured through *later* procedural steps, if allowed, under the overall *EPEA* process, he also ruled as follows:

> Counsel on behalf of Siksika argues that the duty to consult is a separate question, different than the kinds of questions that we often see in administrative cases that deal with mootness, prematurity and exhaustion of remedies; that the EAB itself does not have the ability to assess the constitutional validity of any consultations; and that that is only for the Court; and that now is the time for the Court to set out guidelines, to make a declaration, to make it clear what obligations there are in relation to consultation with this First Nation and other First Nations.
>
> For me, this argument is not of assistance because it suggests that there is a duty to consult at large, no matter what the result of the Minister's decision may be. In other words, even though the Minister may overturn the decision of the Director, there still has been a breach of the duty to consult; a breach, it is said, of the honour of the Crown.
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> *I do not agree with the concept that this duty to consult can be looked at independently of a result.* We do not have the result yet – the final result – and we will not have it for some period of time. So, even though the decision may be said to be a final decision of the Director, it is subject to appeal, as I say, and it has been appealed. (A.B.D., F8/9-F9/8) [Emphasis added]

[7] The chambers judge described the consultation issue as a factual question, with both factual and legal ramifications. He later added the following:

> One of the legal issues is whether this duty to consult is fixed in time; that is to say, did the consultation have to be adequate in relation to and only up to the time of the Director's decision? Or can, for example, a failure to consult be cured by subsequent actions, subsequent meetings, subsequent discussions?
>
> In fact, the EAB itself, although it does not have the jurisdiction to decide issues relating to consultation, can, it seems to me, and counsel have argued to me, order that there be consultation. *So there may well be issues about whether any failure, if there was one, to consult, can be cured.* (A.B.D., F9/17-F10/2) [Emphasis added]

[8] The chambers judge was correct that there was further activity to come in the statutory process. Subsequent to his decision, the EAB heard the appellant's appeal in February, 2007 and issued a Report and Recommendations to the Minister on April 18, 2007. On May 18, 2007, the Minister issued Ministerial Order No. 11/2007, which amended the Director's order largely in accordance with the EAB's Report and Recommendations. The respondent Town of Strathmore then

filed an Operational Plan which, according to the appellant, still failed to adequately address its concerns about discharge.

[9] Were this case exclusively within the boundary of the Director's original decision, there would be merit in the submission that the present appeal is moot. However, as noted above, the appellant's motion to the chambers judge sought declarations as to the extent of the duty to consult and whether or not that duty could be met by the legislative scheme under the *EPEA*.

[10] For the appellant, these questions did not rest solely on the terms of the Director's decision, nor the terms of any decisions by the EAB or the Minister. In light of ss. 11 and 16 of the *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3, the Director and the EAB did not have jurisdiction to decide a "question of constitutional law". They could not therefore state constitutional law nor transcend the jurisdiction given to them by the *EPEA*. Moreover, the Minister was unlikely to do more than presuppose the constitutionality of his decision.

[11] It was for the chambers judge to consider whether the process followed by the Director, the EAB, or the Minister, or a remedy issued by any of them, might be relevant to consultation or might meet the requisites of consultation. Neither following the process nor granting a remedy amounts to a declaration respecting the scope of the duty to consult, nor a declaration that the duty to consult could or could not be met by following the procedural steps set out in the *EPEA*. The formal order of the chambers judge [F19-F20] sets out that he made no decision on these contentions as to consultation. In addition to addressing the appellant's contentions, it was open to the chambers judge to decide that it was not possible to fairly evaluate the consultative capacity of the statutory process at the stage it had reached. However, had he done so, that would amount to a dismissal of the appellant's argument that such a decision could be made on the face of the statutory structure, not a finding that the appellant's arguments were premature.

[12] It follows that the appellant's motion for declarations, as argued, was not dependent upon the stage of the legislative process. The appellant contended that the duty to consult in this context was comparable to the duty to consult recognized in the "taking up" cases of ***Haida Nation v. British Columbia (Minister of Forests)***, 2004 SCC 73, [2004] 3 S.C.R. 511 and ***Mikisew Cree First Nation v. Canada***, 2005 SCC 69, [2005] 3 S.C.R. 388 at paras. 63 to 69, where the Supreme Court held that "[t]he determination of the content of the duty to consult will, as ***Haida*** suggests, be governed by the context."

[13] In allowing the appeal and returning the matter to the Court of Queen's Bench, we are not ruling on any of the merits of the appellant's position in this regard. We are, however, persuaded that the appellant's contentions raised live and significant issues, independent of the procedural stage governed by the legislation. They were therefore within the chambers judge's jurisdiction to determine one way or another.

[14] By the time the matter reached us, the appellant had applied for judicial review of the Minister's decision. We will therefore refrain from re-invigorating the current motion as a *separate*

motion for judicial review of the Director's decision, and instead direct that the current motion be revived but consolidated, for hearing purposes, with the motion for judicial review of the Minister's decision. The appellant is therefore at liberty to make the contentions referred to in these reasons by way of challenge to the decisions of the Director, the EAB and the Minister.

Appeal heard on October 12, 2007

Reasons filed at Calgary, Alberta
this 12th day of December, 2007

Watson J.A.

I concur:

Authorized to sign for: McFadyen J.A.

I concur:

Ritter J.A.

Appearances:

L.D. Andrychuk, Q.C. and R.G. Jeerakathil
for the Appellant

J. Moore and S. Folkins
for the Respondent, Alberta Environment

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

S. Shawa
for the Respondent, The Town of Strathmore

Corrigendum of the Reasons for Judgment Reserved of The Honourable Mr. Justice Watson

Paragraph 14 of the judgment has been replaced with the following:

[14] Following the submissions of counsel at the hearing of the appeal, the Court expected that the appellant would seek judicial review of the Minister's decision before release of these reasons. The Court in allowing this appeal and in returning the matter to the Court of Queen's Bench therefore made a direction to consolidate the revived earlier motion to that Court with what was expected to be an extant motion for judicial review of the Minister's decision. Subsequent to the reasons of the Court being released, counsel for all the parties advised the Court that the appellant had not applied for judicial review of the Minister's decision. Under those circumstances, the matter is simply returned to the Court of Queen's Bench for disposition on the basis of the reasons herein set out.