Fenske v. Mar, 2000 ABQB 664

Date: 20000921
Action No. 0003-02502

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

IN THE MATTER OF the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3, Part 3

AND IN THE MATTER OF Approval No. 20754-00-01 issued on May 29, 1998 by Director W. Inkpen to Beaver Regional Waste Management Services Commission;

AND IN THE MATTER OF the Ministerial Order of Gary Mar, Minister of Environment dated August 25, 1999

BETWEEN:

MARILYNN FENSKE, LEE FENSKE, WALTER GLOMBICK, FRIEDA GLOMBICK and ADELHART GLOMBICK operating as GLOMBICK FARMS, GERTRUDE MIZERA, RUDY MIZERA, MARK GARSTAD and FAYE GARSTAD

Applicants

- and -

GARY MAR, MINISTER OF ENVIRONMENT and HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

Respondents

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE E. S. LEFSRUD

APPEARANCES:

for the Applicants
Karin E. Buss

for the Honourable Gary Mar, the Minister of the Environment
Donald J. Wilson

for the Director, Northeast Boreal and Parklands Regions
Grant D. Sprague

for Beaver Regional Waste Management Services Commission
Sheila C. McNaughtan

for the Environmental Appeal Board
No Appearance

INTRODUCTION:

[1] The Applicants, families living on small farms or acreages surrounding a landfill site near Ryley, Alberta, seek an Order setting aside a decision by the Minister of Environment (the "Minister"). His decision responded to a report and recommendations made by the Environmental Appeal Board (the "Board") relating to several appeals of a decision made by the Director, Northeast Boreal and Parklands Regions (the "Director") to approve a large expansion of the landfill. The Minister, with some modifications, upheld the Approval of the Director, and apparently failed to address many of the recommendations of the Board.

FACTS:

[2] The Beaver Regional Waste Management Services Commission (the "Commission") originally obtained approval for a small landfill near the village of Ryley in the Province of Alberta and at the outset it served the village and the surrounding area in the County of Beaver. Thereafter, the Commission applied to expand the landfill to provide a disposal site with capacity sufficient to handle waste from the City of Edmonton, the surrounding region and other cities such as Vancouver, British Columbia. It was contemplated that upon completion, the expanded landfill site would encompass three quarter sections of land with the landfill itself occupying approximately one quarter section of land, the vertical extent of which, above and below surface level, would be equivalent to a nine-storey building.

[3] The Amending Approval was issued by the Director on May 29, 1998, after which the Applicants appealed the decision to the Board.

[4] As a result, the Board conducted a three-day hearing in May of 1999 and after hearing evidence from the Applicants, the Director and the Commission, it, pursuant to s. 91 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 (the "*Act*"), submitted its report and recommendations to the Minister on July 13, 1999.

[5] In its report, the Board expressed its view that at a very early point in the evaluation process the Director had to make a fundamental decision on the need to conduct an environmental impact assessment, but that he chose not to do so on the basis that it was really just an extension to an existing facility, as a result of which the costly and difficult appeal process for everyone concerned became a reality.

[6] The Board stated (para. 188):

> Without an EIA the proponent and those broadly or directly impacted lost an array of valuable tools designed to assist in making informed decisions. So the Director using a procedure to approve or not to approve lost the ability to apply a transparent and readily discernible process for evaluation and decision. It did not evaluate the site relative to other options; it did not consider cumulative impacts of other similar projects in the immediate area; it did not assess impacts to adjacent landowners as the project grew in size, it did not deal with the real and obvious economic impacts to adjacent land owners, it did not conduct a proper financial analysis to identify the real costs and benefits, and finally it did not develop appropriate mitigative measures to ameliorate adverse impacts. In fact the decision was at the very worst an abuse of process and at the very least a quantum leap backward in a standard to which Albertans have become accustomed to and demand.

[7] The Ministerial Order did not substantially address the Board's report and recommendations. In particular, the Order did not require a new application nor a new decision to be made by the Director with respect to the landfill. However, the Minister did halt construction and required the Commission to, and it did, on or before the stated deadline of August 1, 2000, file five supplemental reports dealing with land conservation, gas management, ground water monitoring, and soil management plans, as well as closure and post-closure plans. The Minister also required that said reports be made public, and that the Commission hold a public meeting in order that interested persons might obtain information in connection with same.

[8] However, as already stated, the Minister failed to address the major problem identified by the Board, namely that the project had been approved by the Director in the absence of vital information of the type which would be contained in an environmental impact assessment.

[9] The Board had also emphasized the importance of public input and consultation with health and local officials prior to the Director making the decision to approve the expansion.

Finally, the Board's recommendations with respect to a buffer zone to deal with the problems of litter, noise, odor, and health effects raised by the Applicants were not addressed by the Minister.

[10] Suffice it to say, that for the most part, the Minister ignored the recommendations of the Board and simply directed implementation of the Director's decision with the requirement of certain reports and a public meeting, while failing to provide any written reasons for the decision he reached.

ISSUES:

[11] This application raises the following issues:

1. What is the appropriate standard of review?

2. How should the Board's recommendations be characterized in light of the Minister's Order?

3. Is the Minister's decision unreasonable because it is contrary to the facts and recommendations of the Board?

4. Can the Minister ignore the recommendations of the Board which are based on a finding that the Director failed to comply with his statutory duties and acted contrary to law?

5. Can the Minister substantially disregard the report and recommendations of the Board without reasons?

6. What is the appropriate form of relief?

ANALYSIS:

Appeal Procedure

[12] There are two different types of appeal procedures set out in the *Act*, either of which may apply depending on what sort of decision is being appealed. In some appeals, the Board is the final decision-maker, and may confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make (s. 90).

[13] In other appeals, the Board's role is limited to conducting the hearing and providing a report to the Minister including its recommendations and the representations or a summary of the representations that were made to it (s. 91). In those appeals, the Minister is the final decision-maker and may confirm, reverse or vary the decision appealed and make any decision

that the person whose decision was appealed could make (s. 92). It is for this reason that the privative clause provides that the Minister *or* the Board has exclusive and final jurisdiction (s. 92.2).

[14] In this case, the latter appeal procedure applies. Accordingly, the Board was required to conduct a hearing and provide a report to the Minister, following which it became the obligation of the Minister to make the final decision.

What is the appropriate standard of review?

[15] The standard of review is to be determined on the basis of the pragmatic and functional approach as set out in ***Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)*** (1998), 160 D.L.R. (4th) 193 (S.C.C.) and applied to discretionary decisions in ***Baker* v. *Canada*** (1999), 174 D.L.R. (4th) 193 (S.C.C.).

[16] Four factors must be considered in determining the appropriate standard of review for an administrative tribunal's decision. These are:

(a) the presence of a privative clause,

(b) the expertise of the tribunal,

(c) the purpose of the legislation, and

(d) the nature of the decision being reviewed.

[17] None are determinative: all four must be weighed in order to determine the standard of review. There are various standards of review on a spectrum, from correctness, the least deferential standard, to reasonableness *simpliciter*, a middle ground, to patent unreasonableness, the most deferential standard.

(a) The presence of a privative clause:

[18] Section 92.2 of the *Act* contains a strong privative clause protecting the Minister's decisions from review and directing a high degree of curial deference. It states:

> 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, proceedings, 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 of any of its proceedings.

(b) The expertise of the tribunal:

[19] In deciding how much curial deference should be given, a Court must look at the issue of its expertise in contrast to that of the tribunal whose decision is being challenged.

[20] In this case the Minister's decision is being challenged. The Minister is charged with the overall administration and application of the *Act* (s. 16). He makes decisions on appeals like this one, and would be aware of the various policy considerations involved. The Applicants took the position that the Minister had no expertise because he is a lawyer by training and made this decision a very short time after his appointment as Minister. While I do not think it is particularly appropriate to determine the expertise of a particular minister by looking at his personal background, I do think it is appropriate to look at the legislation for an indication of the expertise of the Minister.

[21] The legislation specifically provides that the Board conduct the hearing and provide a report and recommendations to assist the Minister. This at least suggests that the Minister may not have the expertise required to determine these issues on his own, and would be aided by the assistance of experts in various areas of environmental matters.

[22] It is clear that the Board has more expertise than the Minister. It also seems clear that, while the Minister does not have the same sort of expertise as the Board, he obviously has more expertise than the Court. His decision involved the weighing of various policy considerations. It did not involve issues of statutory interpretation. The Court does not have the same level of expertise in identifying the competing policy considerations, and finding alternatives to accommodate the various constituencies.

[23] Therefore, the relative expertise of the Minister militates in favour of curial deference being accorded to his decision.

(c) The purpose of the legislation:

[24] The purpose of the *Act* is the protection of the environment in the context of other policy concerns, including economic growth and prosperity. Section 2 of the *Act* indicates the policy concerns involved in environmental matters:

> The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:
>
> (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
>
> (b) the need for Alberta's economic growth and prosperity in an

environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;

(c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;

(d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;

(e) the need for Government leadership in areas of environmental research, technology and protection standards;

(f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;

(g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;

(h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;

(i) the responsibility of polluters to pay for the costs of their actions;

(j) the important role of comprehensive and responsive action in administering the Act.

It is clear that the balancing of such diverse and sometimes conflicting interests is an activity best undertaken by the Minister who is responsible for the administration of the *Act*, rather than a Court.

(d) The nature of the decision being reviewed:

[25] This factor has already been addressed in the consideration of the relative expertise of the Board. The problem involves issues of fact and policy, including competing interests of different groups. It is not simply an issue of adjudicating between two different parties.

[26] As such, this factor also leads to the Court giving a high level of deference to the decision of the Minister.

(e) Conclusion on standard of review:

[27] In this case, each of the four factors suggests that the Court must give a high level of deference to the decision of the Minister. Therefore, on the basis of the pragmatic and functional analysis, it would seem that the appropriate standard is one of patent unreasonableness.

[28] In ***Legal Oil and Gas Ltd.*** **v.** ***Alberta (Minister of Environment)***, [2000] A.J. No. 684 (Alta. Q.B.) Clackson, J. applied the pragmatic and functional analysis and came to the same conclusion.

[29] However, the argument of the Applicants is persuasive that, because of the circumstances in this case, the level of deference owed to the Minister is lower. In this case, the only reasoning before the Court is that of the Board which, in significant respects, was not followed by the Minister. The Court has no way of knowing the reasons for the Minister's departure from the recommendations of the Board. While he does have expertise, and while the decision required balancing of various policy concerns, neither is apparent for the Court to consider.

[30] The Court may refuse to grant deference to a decision of a tribunal on the basis of expertise if the Court cannot determine how or if the expertise was in fact utilized. As stated by Kerans, J.A. in *Standards of Review Employed by Appellate Courts (Juriliber, 1994),* cited with approval in ***Canada*** **v.** ***Southam Inc.***, [1997] 1 S.C.R. 748, at para. 62:

> Experts, in our society are called that precisely because they can arrive at well-informed and rational conclusions. If that is so, they should be able to explain, to a fair-minded but less well-informed observer, the reasons for their conclusion. If they cannot, they are not very expert. If something is worth knowing and relying upon, it is worth telling. Expertise commands deference only when the expert is coherent. Expertise loses a right to deference when it is not defensible.

[31] Accordingly, resulting from the failure of the Minister to indicate why he departed from the recommendations of the Board, I am satisfied that the standard of review should be reasonableness *simpliciter*. Having reached that conclusion, I have found it necessary to more critically review the Minister's decision, while bearing in mind that if the decision is reasonable, then I should not interfere.

[32] An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination (***Southam,*** *supra,* para. 56). The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes significant searching or testing to find the

defect, then the decision is unreasonable but not patently unreasonable (***Southam, supra,*** para. 57).

[33] A court reviewing the conclusion on the reasonableness standard must look to see whether any reasons support it (***Southam, supra***, para. 66).

How should the Board's recommendations be characterized in light of the Minister's Order?

[34] Questions arose, in the course of the hearing as to how significantly the Minister's Order differed from the recommendations of the Board. Counsel for the Respondents argued that the Board, despite its strong comments relating to the lack of an environmental impact assessment, did not recommend that the environmental impact assessment be performed. In this regard, they pointed to the Board's reference to the absence of the environmental impact assessment as a loss of an "array of valuable tools designed to assist in making informed decisions". They also argued that, to a certain extent, the five supplemental reports required by the Minister would address many of the concerns dealt with in an environmental impact assessment.

[35] They characterized the differences between the Minister's Order and the Board's recommendations as mainly procedural. In other words, whereas the Board recommended that everything be gathered up in a complete application before the Amending Approval is granted, the Minister required essentially the same things to be provided to him before construction continued.

[36] I disagree. The differences between the Board's recommendations and the Minister's Order are not simply procedural. The Board was recommending a revisitation of the decision to grant the Amending Approval in the context of issues broader than simply how the Commission was going to deal with select environmental concerns involving soil, water or air. These broader issues would have been addressed had an environmental impact assessment been conducted.

[37] In recommendation #1, the Board required that a new application be submitted to deal with all of the issues brought forward in the appeal process as well as the issues and questions previously raised by the Director, his staff and associates. The Board makes specific reference to paragraphs dealing with litter, noise, the performance of the Commission under the previous approval, the lack of an environmental impact assessment, the need for the facility, the acceptance of sewage grit from Vancouver, the suitability of the site for a larger landfill, the social and economic effects of the landfill, the contamination resulting from seagulls, the existence of a buffer zone, the lack of public consultation, the cumulative effect of the enlarged landfill along with the nearby sewage lagoon and hazardous waste landfill, the unequal burden of waste placed upon the Applicants, the value of the Applicants' homes, and the impact on human and animal health.

[38] As anticipated by s. 47 of the *Act*, many of these factors would likely be considered in an environmental impact assessment, namely:

> (a) ...an analysis of the need for the activity;
>
> (b) an analysis of the site selection procedure for the proposed activity, including a statement of the reasons why the proposed site was chosen and a consideration of alternative sites;
>
> (d) a description of potential positive and negative environmental, social, economic and cultural impacts of the proposed activity, including cumulative, regional, temporal and spatial considerations;
>
> (e) an analysis of the significance of the potential impacts identified under clause (d);
>
> (f) the plans that have been or will be developed to mitigate the potential negative impacts identified under clause (d);
>
> (g) a consideration of the alternatives to the proposed activity, including the alternative of not proceeding with the proposed activity;
>
> (l) the manner in which the proponent intends to implement a program of public consultation in respect of the undertaking of the proposed activity and to present the results of that program.

[39] Clearly, the Board's recommendations reflected its indictment of the Director's failure to require the type of information which would have been included in an environmental impact assessment. Essentially, the Board stated that, in its view, amendment approval should not be granted until the expansion is justified and the effects of such a step on the surrounding landowners, as well as the bare environmental effects, are understood and addressed.

[40] I am not satisfied that the five plans required by the Minister's Order address these issues. Accordingly, as already stated, I am of the opinion that the differences between the Board's recommendations and the Minister's Order are not merely procedural, they are substantive and significant.

Is the Minister's decision unreasonable because it is contrary to the facts and recommendations of the Board?

[41] The Applicants submit that the Minister's decision was unreasonable because he failed to take into account the recommendations of and information provided by the Board, which was the only information before the Minister. They argued that he ignored the concerns of the

Board in relation to the fact that the Amending Approval was issued without sufficient information, particularly the type of information that would be contained in an environmental assessment, and as to the necessity for a buffer zone surrounding the landfill to protect those living nearby.

[42] The Respondents submit that the Applicants are essentially arguing that the Minister is bound by the recommendations of the Board. The Respondents' position is that the legislation is plain, the Board is not the final decision maker, and its recommendations are just that: recommendations. They contend that the Minister must be free to disagree with those recommendations as the final decision maker.

[43] The Commission argued that reasonable persons, looking at complex issues of fact and policy, can differ as to the conclusions reached and the final solution to be adopted. The Respondents also point out that the Minister did not wholly reject the recommendations of the Board, and argue that this demonstrates that the Minister reviewed the facts and policy issues carefully and diligently.

[44] It may be, as the Commission argued, that reasonable persons, looking at the complex issues of fact and policy in this case, can differ as to the conclusions reached and the final solution to be adopted. However, in this case, the Court has only been presented with the reasoning of the Board. What I do not have is any indication as to what reasoning the Minister used in refusing to follow the recommendations of the Board.

[45] These particular circumstances are most difficult, particularly when I am of the view that the Board has more expertise than the Minister in relation to the complex issues of fact and policy surrounding this situation. The Board consisted of a soil expert, an engineer and a doctor and gave extensive reasons for its recommendations. I am not in a position, without the expertise of the Minister or the Board, to determine what reasonable grounds exist to refuse to follow the recommendations. As a result, I am faced with the question of whether I must simply assume that the Minister had reasonable grounds for rejecting the recommendations.

[46] It is recalled that the Board made the strong statement that the way in which the Director proceeded was "at the very worst an abuse of process and at the very least a quantum leap backward in a standard to which Albertans have become accustomed to and demand" and, with respect to the Minister, his failure to provide reasons for his decision has left me with no alternative but to agree.

[47] In the final analysis, I am satisfied that the Order granted by the Minister was unreasonable.

[48] The appeal procedure set up in the Act clearly envisions the Board and the Minister playing a joint role in decision-making. While the recommendations of the Board do not bind the Minister, surely the Minister cannot disregard the recommendations of the Board as mere

opinion with which he disagrees. Presumably, the legislature did not set up the appeal procedure before the Board without a valid purpose. If the Board raises serious concerns about the environmental ramifications of a project, I am of the view that the Minister must take the Board's recommendations seriously. This does not mean that the Board is able to bind the Minister; however, it certainly suggests that the Minister should give clear reasons for proceeding in a situation where strong concerns have been clearly voiced by the Board.

Can the Minister ignore the recommendations of the Board which are based on a finding that the Director failed to comply with his statutory duties and acted contrary to law?

[49] The Applicants state that the original Amending Approval of the Director was illegal and that this illegality was not rectified by the Minister's Order. They submit that the Amending Approval was illegal because the application to the Director did not contain the required information. Section 3(1) of the *Approvals and Registrations Procedure Regulation* A.R. 113/93 sets out a list of 19 items which must accompany an application. Section 4(1) of the regulation states that the Director shall not review an application for the purpose of making a decision until it is a complete application.

[50] The Respondents point to s. 3(2) of A.R. 113/93 which provides:

> 3(2) The Director may waive any of the requirements of subsection (1)(a) to (q) if the Director is satisfied that a requirement is not relevant to a particular application or that it is appropriate for other reasons to waive the requirement.

[51] Pursuant to s. 92(1) of the *Act*, the Minister may make any decision that the person whose decision was appealed could make; accordingly, the Minister has the same discretion to waive the requirements.

[52] As already discussed, the Respondents have taken the position that this issue is simply one of procedure. However, this approach fails to address the Board's recommendations and does not consider the extent to which they differ from the Minister's Order. The Board recommended that all information be obtained before the granting of approval for the purpose of determining whether approval should be granted. It was clearly of the opinion that approval should not have been granted on the basis of the material that was before the Director. The Board did not view this as a mere procedural issue as to the completeness of the Commission's application because it had questions as to the necessity, viability and environmental ramifications which were not addressed in the application.

[53] Effectively, the Board stated that the Director could not waive these requirements. However, the Minister obviously disagreed and decided that the Director could waive those requirements. Again, the Court is not privy to the reasoning of the Minister in coming to this conclusion and is faced with the same problem as discussed above. The result is the same.

Can the Minister substantially disregard the report and recommendations of the Board without reasons?

[54] The Minister is not required by the *Act* to provide reasons for his decision (s. 92). Unless required by the enabling legislation, tribunals are generally not under a common-law duty to provide reasons for their decisions (***Baker* v. *Canada*** (1999), 174 D.L.R. (4th) 193, at para. 37 (S.C.C.)).

[55] However, the Applicants submit that, in the circumstances of this case, the duty of fairness required that the Minister give reasons. They cite the following passage from ***Baker***, *supra*, at para. 43:

> ...it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, where there is a statutory right of appeal, or in other circumstances, some form of reasons should be required.

[56] The Applicants argue that the Applicants' participation in the appeal process before the Board created a legitimate expectation that the Minister would take into account the report and recommendations of the Board.

[57] In my view, it was a violation of the rules of fairness when the Minister failed to give reasons. As the Board's report indicates, the Minister's Order has a serious impact on the Applicants' lives. The Approval may have a serious impact on the value of their homes, their enjoyment of daily life in those homes, and most importantly, their health.

[58] However, an even more significant consideration is the appearance of an abuse of process. In this case, the only reasons available to anyone outside the Minister's office are those of the Board. Those reasons contain a strongly worded sentence suggesting a possible abuse of process. The Board made recommendations based on those reasons, not the least of which was a recommendation that the Amending Approval should not be granted before issues such as necessity, viability and the effect on the Applicants are addressed, and the Applicants and other interested members of the public have a chance to respond. The Minister, after reviewing the report and recommendations, disregarded that recommendation without any reasons. Under the circumstances, such an approach is clearly unreasonable and is of necessity rejected.

[59] Suffice it to say that hearings before the Board are fundamentally important and as a result the Minister should provide reasons when he chooses to disregard the recommendations of doctors, scientists and other experts specifically selected for their expertise in environmental matters.

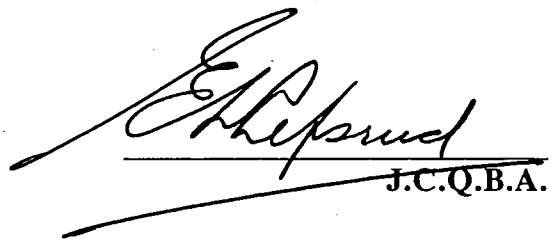
What is the appropriate form of relief?

[60] The Applicants request that the Minister's decision be quashed and that the recommendations of the Board stand in place of the Minister's decision. They cite in support, ***Alberta Provincial Judges Assn.*** **v.** ***Alberta***, [1999] A.J. No. 863, in which the Court of Appeal declined to submit the matter back for re-decision to the government.

[61] In this regard I am of the view that it would be both incorrect and inappropriate to direct that the Board's decision be implemented. Clearly, in these circumstances, the Board is not authorized as a final decision maker, as its only authority is to provide recommendations.

[62] While recognizing that I do not have the authority to direct the Minister as to his decision, I of course do have the authority to, and hereby remit the matter to him with the strong recommendation that he reconsider the matter, giving full consideration to the recommendations of the Board and that in the end result, regardless of the decision which he makes, he provides written reasons.

HEARD on the 8th day of September 2000.
DATED at Edmonton, Alberta this 21st day of September 2000.



J.C.Q.B.A.

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