Cabre Exploration Ltd. v. E.A.B., 2001 ABQB 293

Date: 20010409
Action No. 0001-11527

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

BETWEEN:

CABRE EXPLORATION LTD.

Applicant

- and -

THE ENVIRONMENTAL APPEAL BOARD and HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA as represented by THE DEPARTMENT OF ENVIRONMENT

Respondents

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE FRASER

APPEARANCES:

Colleen N. Sinclair
for the Applicant

Andrew C.L. Sims, Q.C.
for the Respondent Environmental Appeal Board

Charlene Graham
for the Respondent Department of Environment

[1] Cabre Exploration Ltd. applies for judicial review of a decision of the Environmental Appeal Board (the "Board"). In that decision, the Board denied Cabre's application for costs related to Cabre's successful appeal from a decision of an officer of the Alberta Department of Environment (the "Department"). I deny the judicial review application, for the following reasons.

FACTUAL BACKGROUND

[2] Cabre drilled a well on land owned by Mr. Darrel Dzurko. Once its drilling operations ended, Cabre took steps to reclaim the land for future use. In July of 1995, Cabre sought a reclamation certificate from the Department, as required under the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 (the "Act").

[3] The Department's Conservation and Reclamation Officer refused to issue a certificate, and instead issued a deficiency notice. Cabre made several unsuccessful attempts to comply with this and other deficiency notices. Cabre eventually applied to the Board, requesting an appeal of the officer's refusal to grant the reclamation certificate.

[4] During the hearing before the Board, on 18 August and 3 September 1999, Cabre applied to have its costs paid by the Department. Cabre claims that the costs of its appeal before the Board amounted to some $60 000.

[5] On 29 October 1999, the Board issued its Report and Recommendations.[1] It recommended that the appeal be allowed and that a certificate be granted. The Board stated that its decision on costs would follow in due course. The Minister accepted the Board's recommendations, and issued a certificate.

THE DECISION UNDER REVIEW

[6] On 26 January 2000, the Board issued a decision denying Cabre's application for costs[2]. The Board reviewed the relevant statutory provisions on costs, including s. 88 of the Act and s. 20 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the "Regulation"). Section 88 of the Act reads as follows:

> The Board may award costs of and incidental to any proceedings before it on a final or interim basis and may, in accordance with the regulations, direct by whom and to whom any costs are to be paid.

Section 20 of the Regulation reads, in part:

> 20(2) In deciding whether to grant an application for an award of final costs in whole or in part, the Board may consider the following: . . .
>
> (d) whether the application for costs was filed with the appropriate information;
>
> (e) whether the party applying for costs required financial resources to make an adequate submission;

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[1] Reported as *Cabre Exploration Ltd. v. Conservation and Reclamation Officer, Alberta Environmental Protection* (29 October 1999), Appeal No. 98-251 (Alberta Environmental Appeal Board).

[2] Reported as *Cost Decision re: Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (Alberta Environmental Appeal Board).

(f) whether the submission of the party made a substantial contribution to the appeal;

(g) whether the costs were directly related to the matters contained in the notice of objection and the preparation and presentation of the party's submission;

(h) any further criteria the Board considers appropriate.

[7] In its decision on costs, the Board states, at para. 6:

Section 88 of the Act, and section 20 of the Regulation, give the Board the ability to award costs in a variety of situations that may exceed the common law restrictions imposed by the courts. Since hearings before the Board do not produce judicial winners and losers, the Board is not bound by the general principle that the loser pays [citing *Reese v. Alberta (Ministry of Forests, Lands and Wildlife)* (1992), 5 Alta. L.R. (3d) 40 (Q.B.)].

[8] In applying the law to the facts before it, the Board states, at para. 17:

The Party requesting costs did contribute to the goals found in section 2(a) of the Act by addressing important issues involving reclamation certification. The hearing resulted in a better understanding of the importance of controls in the reclamation assessment and necessity [*sic*] for Parties to agree on controls.

[9] However, the Board concludes:

[18] The legislation protects departmental officials from claims of damages for all acts done by them in good faith in carrying out their statutory duties. While a claim for costs is not the same as a claim of damages, this provision emphasizes how the legislation views the role of the Department differently than the role of those proposing projects. Where, on the facts of this case, the Department has carried out its mandate, but has been found on appeal to be in error, then in the absence of special circumstances, this should not attract an award of costs.

[19] This is not a case where there are exceptional circumstances to justify making an award of costs against the Department. Cabre has not sought costs against the landowner. Thus, the costs appropriately remain Cabre's own responsibility, and not [*sic*] be borne by the public purse through the Board or the Department. The costs of the appeal in circumstances such as this are properly part of the cost of operation for the party that benefits from the lease and carries the burden of reclamation....

[20] No costs will be awarded in this appeal.

ISSUES

[10] There are only two issues in this judicial review. First, I must decide the appropriate standard of review. Second, I must apply that standard to the Board's decision.

ANALYSIS

Issue 1: What standard of review should be applied to the Board's decision on costs?

[11] In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, Justice Bastarache summarized the recent case-law on standards of judicial review. He stated, at p. 1004, para. 26:

> The central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed. More specifically, the reviewing court must ask: "[W]as the question which the provision raises one that was intended by the legislators to be left to the exclusive decision of the Board?" [case citation omitted]

[12] Four factors must be considered in determining the standard of judicial review. None of the factors is dispositive, and each provides an indication of the proper level of deference to the decision of the tribunal, ranging from the more-deferential "patent unreasonableness" to the more-exacting "correctness": *Pushpanathan* at pp. 1004-05, para. 27. The four factors are:

1) the presence or absence of a privative clause;

2) the tribunal's expertise relative to the court;

3) the purpose of the act as a whole and of the provision in particular; and,

4) the nature of the problem considered by the tribunal.

[13] I note that Alberta Courts have generally given wide deference to decisions of the Environmental Appeal Board, where the Board has been acting within its jurisdiction.[3]

[14] In *Legal Oil and Gas Ltd. v. Alberta (Minister of Environment)* (2000), 265 A.R. 341, Justice Clackson adopted a standard of patent unreasonableness in reviewing an order of the Alberta Minister of Environment. The Minister's order adopted the Board's recommendation, and confirmed an environmental protection order issued by the Department.

[15] Similarly, Justice J.S. Moore has recently applied a standard of patent unreasonableness to an (unreported) judicial review of a costs decision of the Board: *Wayne Penson and Laurel Penson v. Environmental Appeal Board, David Lloyd and Talisman Energy Inc.* (18 June 1999), Grande Prairie 9904 00198 (Alta. Q.B.).

[16] I will now go through each of the four factors from *Pushpanathan*.

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[3] See *Slauenwhite v. Alberta (Environmental Appeal Board)*, [1995] A.J. No. 826 (QL) (Q.B.) as an example of a judicial review where the Board was found to be acting outside of its jurisdiction - although note that this decision was made prior to the 1996 amendments to the Act, which included the addition of the strong privative clause in s. 92.2.

1) The presence or absence of a privative clause

[17] Section 92.2 of the Act 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, 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.

This is a strong privative clause, very close to the "full" privative clause described in *Pushpanathan* at p. 1006, para. 30. I conclude that this Court ought to show deference to the Board's decision, unless the other factors strongly indicate the contrary.

2) The tribunal's expertise relative to the court

[18] In *Pushpanathan*, Justice Bastarache held, at p. 1007, para. 32, that more deference should be shown to a tribunal that "has been constituted with a particular expertise with respect to achieving the aims of an Act, whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act...". Nevertheless, a tribunal's lack of relative expertise on the particular issue before it may be a ground for refusing deference: see *Pushpanathan* at p. 1007, para. 33.

[19] On the face of it, it would seem that the Board has no greater expertise in awarding costs than do the courts. This, however, would be to ignore the special role of the Board in managing disputes between and on behalf of several different constituencies. Courts tend to manage disputes between clearly defined parties, and, as the Board notes in its decision, their processes produce judicial "winners" and "losers". The Board, on the other hand, manages disputes amongst several (often ill-defined and unrepresented) constituencies. These include the parties to an appeal, the public interest, broad economic interests, and, not least, the various ecosystems in the Province. The Board tries to arrange a compromise between the interests of the parties and those of unrepresented constituencies. This delicate balancing extends to the Board's decisions on costs.

[20] The members of the Board have particular expertise with respect to achieving the ends of the Act, and they are well-versed in the policy considerations underlying the Act. I conclude that the Board has an expertise greater than that of the Court in allocating the costs of administrative appeals amongst the various parties and constituencies described above. This factor also suggests that the Court should give deference to the Board's decision.

3) The purpose of the Act as a whole and of the provision in particular

[21] Justice Bastarache held in *Pushpanathan* at p. 1008, para. 36:

> 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.

[22] In the present case, s. 2 of the Act confirms that the Board must attempt a delicate balancing between different constituencies (my comments under the second factor, above, apply equally to this third factor). The Board's decision shows that it was considering several legislative purposes and competing interests. For example, the Board considered the public interest in protecting the "public purse", Cabre's role as the party benefiting from the lease and carrying the burden of reclamation, and the Department's role as a statutory decision-maker.

[23] Furthermore, under the framework established by the Act, the Board makes recommendations to the Minister of Environment on the substantive disposition of an appeal, which the Minister may follow at his or her discretion. Under s. 88 of the Act, however, the Board has final jurisdiction to order costs "of and incidental to any proceedings before it...". The legislation gives the Board broad discretion in deciding whether and how to award costs. These are further indications that the Legislature intended decisions on costs to be left to the Board alone.

[24] I conclude that the third factor suggests a high level of deference to the Board's decision.

4) The nature of the problem considered by the tribunal

[25] As Justice Bastarache held in *Pushpanathan* at p. 1010, para. 37: "... 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 intention..."

[26] In deciding whether to award costs, decision-makers must consider questions of mixed fact and law based on the case before them. The decision is inherently discretionary: see e.g. *Re Green, Michaels & Associates Ltd. et al. and Public Utilities Board* (1979), 94 D.L.R. (3d) 641 (Alta. S.C.A.D.)

[27] In the present case, the problem before the Board was one of mixed fact and law, of discretion, and of policy. This factor also suggests a deferential standard of review.

Conclusion - Standard of Review

[28] In my view, the Legislature clearly intended that questions related to costs should be left exclusively to the Board. Accordingly, the proper standard of review is patent unreasonableness.

Issue 2: Was the Board's decision on costs patently unreasonable?

[29] The Board decided that the Department should not be made to bear the costs of administrative appeals absent special circumstances. The Board considered whether Cabre's submissions made a substantial contribution to the appeal, whether the Department was carrying out its mandate, and whether the party who bears the burden of reclamation or the

"public purse" should bear the costs of this type of appeal. It found that Cabre's submissions contributed to the goals of the Act. However, it found that the Department was acting within its mandate and that there were no special circumstances justifying an award of costs in the present case.

[30] Cabre argues that it was patently unreasonable for the Board to deny Cabre's application for costs after the Board found (in the substantive appeal) that the Department erred on numerous occasions and that the Department's officer should have issued a reclamation certificate. It submits that the Board has fettered its discretion by placing the Department in a separate category from other parties to an appeal, and by failing to itemize the type of special circumstances that might result in an award of costs against the Department. Cabre further submits that the Act and the Regulation do not support the Board's decision to require special circumstances before ordering costs against the Department.

[31] I note that the legislation does not limit the factors that may be considered by the Board in awarding costs. Section 88 of the Act states that the Board "*may* award costs... and *may*, in accordance with the regulations, direct by whom and to whom any costs are to be paid [emphasis added]." Section 20(2) of the Regulation sets out several factors that the Board "may" consider in deciding whether to award costs, including subsection (h), "any further criteria the Board considers appropriate."

[32] I conclude that the Legislature has given the Board a wide discretion to set its own criteria for awarding costs for or against different parties to an appeal. Further, administrative tribunals are clearly entitled to take a different approach from that of the courts in awarding costs. In *Re Green, supra,* the Alberta Court of Appeal considered a costs decision of the Public Utilities Board. The P.U.B. was applying a statutory costs provision similar to section 88 of the Act in the present case. Clement J.A., for a unanimous Court, stated, at pp. 655-56:

> In the factum of the appellants a number of cases were noted dealing with the discretion exercisable by Courts in the matter of costs of litigation, as well as statements propounded in texts on the subject. I do not find them sufficiently appropriate to warrant discussion. Such costs are influenced by Rules of Court, which in some cases provide block tarrifs [*sic*], and in any event are directed to *lis inter partes*. We are here concerned with the costs of public hearings on a matter of public interest. There is no underlying similarity between the two procedures, or their purposes, to enable the principles underlying costs in litigation between parties to be necessarily applied to public hearings on public concerns. In the latter case the whole of the circumstances are to be taken into account, not merely the position of the litigant who has incurred expense in the vindication of a right.

This passage was quoted by the Supreme Court of Canada, with apparent approval, in *Bell Canada v. Consumers' Assoc. of Canada,* [1986] 1 S.C.R. 190 at 205-206 (*per* Le Dain J.).

[33] I find that it is not patently unreasonable for the Board to place the Department in a special category; the Department's officials are the original statutory decision-makers whose decisions are being appealed to the Board. As the Board notes, the Act protects Department officials from claims for damages for all acts done in good faith in carrying out their statutory duties. The Board is entitled to conclude, based on this statutory immunity and based on the other factors mentioned in the Board's decision, that the Department should be treated differently from other parties to an appeal.

[34] The Board states in its written submission for this application:

> There is a clear rationale for treating the [Department official] whose decision is under appeal on a somewhat different footing *vis a vis* liability for costs than the other parties to an appeal before the Board. To hold a statutory decision maker liable for costs on an appeal for a reversible but non-egregious error would run the risk of distorting the decision-maker's judgment away from his or her statutory duty, making the potential for liability for costs (and its impact on departmental budgets) an operative but often inappropriate factor in deciding the substance of the matter for decision.

[35] In conclusion, the Board may legitimately require special circumstances before imposing costs on the Department. Further, the Board has not fettered its discretion. The Board's decision leaves open the possibility that costs might be ordered against the Department. The Board is not required to itemize the special circumstances that would give rise to such an order before those circumstances arise.

CONCLUSION

[36] In the result, the application for judicial review is dismissed.

COSTS

[37] The Board does not seek costs of this application and nor, it seems, does the Department. Counsel may speak to me if they are unable to agree.

HEARD on the 21st day of February, 2001.

DATED at Calgary, Alberta this 9th day of April, 2001.

J.C.Q.B.A.

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