ACTION NO. 9601-12061

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

BETWEEN:

CHEM-SECURITY (ALBERTA) LTD.

Applicant

-and-

ENVIRONMENTAL APPEAL BOARD (ALBERTA)

Respondent

MEMORANDUM OF DECISION BY

THE HONOURABLE MR. JUSTICE D.H. MEDHURST

FACTS

Chem-Security (Alberta) Ltd. ("Chem-Security") applied to this Court for judicial review of the decision of the Environmental Appeal Board ("EAB") dated June 28, 1996 (the "EAB Decision").

Chem-Security operates the Alberta Special Waste Treatment Centre located near the Town of Swan Hills, Alberta (the "Centre"). The Centre is located within the traditional hunting, trapping and gathering lands of First Nation's people who belong to the Lesser

Slave Lake Indian Regional Council ("LSLIRC"). The Centre was originally built during the years 1985 to 1987 by Bovar Inc., a private Alberta company, and the Alberta Special Waste Management Corporation, an Alberta Crown corporation. The Centre accepts, prepares and disposes of special waste, including polychlorinated biphenyls ("PCBs"). One method of disposal utilized by the Centre is incineration.

The initial incineration capacity of the Centre was 13,500 tonnes per year. On July 15, 1991, Chem-Security applied to the National Resources Conservation Board ("NRCB") pursuant to the ***Natural Resources Conservation Board Act***, S.A. 1990, c. N-5.5 to obtain approval to expand the incineration capacity of the Centre (the "Expansion Application"). On May 8, 1992, following a pre-hearing and environmental assessment process and a public hearing (the "Expansion Hearing"), the NRCB approved the expansion and released its Reasons for Decision (the "Expansion Decision").

Included in the Expansion Decision are references to the issue of fugitive emissions of PCBs. In the Expansion Decision, the NRCB noted that fugitive emissions from the Centre were estimated to amount to 15 kilograms per year in 1991. However, the NRCB after noting that Chem-Security had developed a remedial program to address fugitive emissions states that Chem-Security "projects a decrease of fugitive emissions of PCBs from 15 kg to 1.3 kg per year on completion of these [remedial] measures.": Return, Vol. 3, Tab D.4, Tab 11 at 587.

On March 15, 1994, Chem-Security applied to the NRCB for approval to import hazardous waste from jurisdictions outside of Alberta (the "Importation Application"). On November 22, 1994, after a pre-hearing process and public hearing (the "Importation Hearing"), the NRCB approved the Importation Application and released its decision (the "Importation Decision"). Fugitive emissions were again considered at the Importation Hearing and in the Importation Decision. Specifically, the NRCB noted that it was Chem-Security's position that its 1991 estimates of 1.3 kg of PCB emissions remained unchanged.

Chem-Security's environmental approvals were due to expire on July 1, 1995. Prior to applying for a long-term renewal of these environmental approvals Chem-Security applied to Alberta Environmental Protection ("AEP") pursuant to the ***Environmental Protection and Enhancement Act***, S.A. 1992, c. E-13.3 ("EPEA") for an extension of its existing approvals. AEP granted Chem-Security an extension to its existing environmental approvals. The appellant, LSLIRC, attempted to appeal this extension to the EAB (the "prior appeal"). Among the matters raised by LSLIRC in its appeal was fugitive emissions of PCBs. The EAB dismissed the prior appeal on the grounds that it did not have jurisdiction to hear the appeal as the matters raised had already been considered by the NRCB at both the Expansion Hearing and the Importation Hearing.

In July 1995, Chem-Security applied to AEP for consolidation and long-term renewal (10 years) of its environmental approvals (the "Operating Approval"). As part of the

application package, Chem-Security provided further information concerning fugitive emissions, including a calculation of fugitive emissions from all potential sources at the Centre, and procedures to be implemented to reduce potential emissions. The calculation provided by Chem-Security indicated that PCB fugitive emissions may increase to approximately 34.01 kg per year.

On November 30, 1995, AEP approved Chem-Security's long-term renewal application and granted Chem-Security a ten-year Operating Approval. This AEP Operating Approval was appealed to the EAB by LSLIRC and others. Specifically, the LSLIRC and others submitted notices of objection to the EAB pursuant to the ***EPEA***. These notices of objection concerned some of the terms and conditions which were attached to the Operating Approval. These terms and conditions related to, *inter alia*, the regulation of fugitive emissions. The primary concern of LSLIRC was that Chem-Security's fugitive emission control program is not adequate in light of the information Chem-Security included in its Operating Approval application indicating a possible increase in PCB emissions to 34.01 kg per year. LSLIRC and the others had all participated in the previous Expansion and Importation Hearings.

On May 7 and 8, 1996 the EAB held a preliminary meeting in order to deal with the issue of its jurisdiction, under s. 87 of the ***EPEA***, to hear the matters raised by the appellants. Specifically, the issue was the proper interpretation of section 87(5)(b)(i) which limits the EAB's jurisdiction in respect of matters previously considered at hearings or reviews of

the NRCB or the Energy Resources Conservation Board ("ERCB"). LSLIRC and others made submissions to the EAB that the dramatic increase in the amount of PCB fugitive emissions being projected by Chem-Security was a "new matter" not previously considered by the NRCB and therefore properly within the jurisdiction of the EAB. The EAB was required to determine whether fugitive emissions from the Centre was a matter that had been considered by the NRCB.

The EAB found that the new estimates of fugitive emissions contained in Chem-Security's long-term renewal application constituted new information and "this new information could potentially lead to conclusions and recommendations different from those reached by the NRCB. Fugitive emissions of PCBs is therefore a new matter that may be considered in this appeal.": Return, Vol.4, Tab L at 023.

In response to the EAB's decision, Chem-Security applied to the Court of Queen's Bench for a *certiorari* order quashing the decision of the EAB.

ISSUES

The issues in this case are the following:

1. What is the standard of review applicable to the Environmental Appeal Board's decision?

2. Did the EAB, in deciding that the evidence before it with respect to fugitive emissions constituted a "new matter" that had not been considered, exceed its jurisdiction?

ARGUMENTS

Issue 1: What is the standard of review applicable to the Environmental Appeal Board's decision?

The first step in the judicial review of an administrative tribunal's decision is to determine the appropriate standard of review: *C.B.C. v. Canada (Labour Relations Board)* (1995), 121 D.L.R. (4th) 385 at 396 (S.C.C.).

This matter was addressed by counsel in their written and oral submissions before the court. It is the position of Chem-Security that this court has jurisdiction to review decisions of the Environmental Appeal Board (the "EAB"). In support of its position Chem-Security cites the recent decision of Mr. Justice Wilkins, ***Slauenwhite v. Alberta (Environmental Appeal Board)*** (1995), 175 A.R. 42 (Q.B.). Wilkins J. compared the case before him and the ***CBC*** case as follows, at p. 46:

> Unlike the *CBC* case in which a broad privative clause limiting judicial review was present, there is no such clause in the [*EPEA*] which might otherwise attempt to limit or preclude access to the court in review.

However, recent amendments to the ***EPEA*** may serve to reduce the authority of Wilkins J.'s decision in the ***Slauenwhite*** case. Effective September 1, 1996 the ***EPEA*** has been amended so that the Act now contains a broad privative clause limiting judicial review. However, regardless of whether a statute contains a built-in statutory limit such as a privative clause, there is a strong tradition of courts showing curial deference to administrative bodies which possess a high degree of expertise.

In ***Pezim v. British Columbia (Superintendent of Brokers)*** (1994), 22 Admin. L.R. (2d) 1, Iacobucci J. at p. 29 stated:

> . . . where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise. This point was reaffirmed in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, where Sopinka J., writing for the majority stated the following at p.335:
>
> > . . . the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause. Even where the tribunal's enabling statute provides explicitly or appellate review, as was the case in *Bell Canada*[[1989] 1 S.C.R. 1722] it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.

The question then is whether the EAB is entitled to curial deference? In making that decision it is necessary to determine whether the question in issue is a jurisdictional question or a question of law within the administrative tribunal's jurisdiction.

The method for distinguishing jurisdictional questions from questions of law within the administrative tribunal's jurisdiction was addressed by the Supreme Court of Canada in the ***CBC*** case, at p. 397:

> In distinguishing jurisdictional questions from questions of law within a tribunal's jurisdiction, this court eschewed a formalistic approach. Rather, it has endorsed a "pragmatic and functional analysis", to use the words of Beetz J. in *U.E.S. Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048...In that decision Beetz J. noted, at p. 1088, that it was relevant for the reviewing court to examine:
>
> > ... not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.
>
> The goal is to determine whether the legislature intended that the question in issue be ultimately decided by the tribunal, or rather by the courts.

Counsel for the EAB in its brief applies the factors enumerated by Beetz J.in ***Bibeault***: **Memorandum of Argument - The Environmental Appeal Board pp. 9-14.** I believe a number of these arguments support a finding that the EAB is a specialized board entitled to curial deference.

(i) Wording of the Enactment

The Environmental Appeal Board is established under s. 83 of Alberta's ***Environmental Protection and Enhancement Act***, S.A. 1992, c. E-13.3 for the purpose of hearing the appeals provided for under ***EPEA*** and for appeals arising under Schedule 5 of the ***Government Organization Act***. Part 3 of the ***EPEA*** grants the EAB broad discretion to deal with issues arising from a notice of objection filed under the ***EPEA***, including the power to hear and determine appeals on a wide variety of regulatory decisions in relation to environmental matters. The EAB is granted the power to determine which matters included in notices of objection properly before the EAB will be included in the hearing of the appeal. The legislature granted the EAB the power to determine whether, in the EAB's opinion, a notice of objection contains a new matter.

As noted by Chem-Security the EAB's jurisdiction to hear appeals is circumscribed by s. 87(5)(b) of the ***EPEA*** which states:

> **87(5)** The Board
>
> > **(b) shall dismiss a notice of objection if in the Board's opinion**

> (i) the person submitting the notice of objection received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under the *Natural Resources Conservation Board Act* or any Act administered by the Energy resources Conservation Board at which all of the matters included in the notice of objection were considered, or

However, even the limitation on the EAB's jurisdiction to hear an appeal is based on the EAB's opinion. Under s. 87(5)(b)(i) if in the EAB's opinion there have been prior hearings concerning the same environmental matters then the EAB "shall" dismiss the notice of objection.

(ii) Purpose of the ***EPEA***

The ***EPEA*** is omnibus legislation covering all aspects of environmental protection in Alberta: P.C. Wilson, ***Canadian Environmental Law Guide*** (Vancouver: Specialty Technical Publishers Inc., 1996) at A-2 AB 1. The ***EPEA*** repealed eight acts and their associated regulations, and revised and consolidated them under one act.

The purpose of the Act is set out in section 2 which states:

> 2 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 this Act.

The Alberta Court of Appeal in discussing the overall purpose of the ***EPEA*** in ***Syncrude Environmental Assessment Coalition v. Alberta (Energy Resources Conservation Board)*** (1994), 17 Alta. L. R. (3d) 368 at 372 stated: "We are aware, as is the legislature...of the need to encourage the liberal assessment of environmental concerns."

(iii) Reason for the EAB's Existence

The EAB was created in order to hear the appeals which arise pursuant to the

EPEA and *Government Organization Act*. Part 3 of the *EPEA* grants the EAB broad discretion to deal with the issues that may arise from a notice of objection filed pursuant to the *EPEA*, including the power to hear and determine appeals on a wide variety of regulatory decisions in relation to environmental matters.

(iv) Area of Expertise of EAB Members

The members of the EAB are appointed by the Lieutenant Governor in Council. Counsel for the EAB in their brief state that EAB members are appointed by virtue of their qualifications, abilities and experience and that in the course of fulfilling the EAB's environmental mandate, the members are exposed to technical and scientific matters, and consequently develop a body of expertise in the area.

(v) Nature of the Problem Before the EAB

Counsel for the EAB submits the nature of the question which was before the EAB was one of statutory interpretation. A matter within the realm of expertise of the EAB which required the EAB to analyze a question of mixed fact and law.

Given that the Supreme Court of Canada has endorsed a "pragmatic and functional approach" to determining the intention of the legislature, I believe the recent amendments to the *EPEA* which have added a broad privative clause to the Act can and must be taken into consideration when determining whether the EAB is entitled to curial

deference. Examining successive amendments to legislation often reveals the direction in which a legislative policy is evolving. An interpretation favouring that evolution is appropriately preferred over possible alternatives: R. Sullivan, ***Driedger on the Construction of Statutes***, 3d ed. (Toronto: Butterworths, 1994) at 452-453; ***Dowson v. R.*** (1983), 2 D.L.R. (4th) 507 at 516 (S.C.C.). In the ***Pezim*** case Mr. Justice Iacobucci noted at p. 27-28 that a crucial factor in determining the legislative intent in conferring jurisdiction to an administrative tribunal is whether or not the agency's decisions are protected by a privative clause. Considering the recent amendment to the ***EPEA*** which adds a privative clause it would appear that it is the evolving intention of the legislature that decisions of the EAB be protected from judicial review. This intention would support a finding that the EAB is entitled to curial deference.

I believe a pragmatic and functional analysis of the factors set out above will lead to the court concluding that the question in issue i.e. the interpretation of s. 87(5)(b)(i), is a question of law which was intended by the legislature to be ultimately decided by the EAB rather than the court. The Supreme Court of Canada in ***Pezim v. British Columbia (Superintendent of Brokers)*** (1994), 22 Admin. L.R. (2d) 1 states at p. 27-28 that:

> "there exist various standards of review with respect to the myriad of administrative agencies that exist in our country. . . The courts have developed a spectrum [of standards of review] that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause is deciding a matter within its jurisdiction, and where there is no statutory right of appeal. . . At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal

> has no greater expertise than the court on the issue in question, as for example in the area of human rights.

Accordingly, in my view the proper test to be applied to the review of the decision of the EAB is the standard of patent unreasonableness.

Issue 2: Did the EAB, in deciding that the evidence before it with respect to fugitive emissions constituted a "new matter" that had not been considered, exceed its jurisdiction?

Having concluded that the appropriate standard of review to be applied to decisions of the EAB is a standard of patent unreasonableness it follows that the EAB is entitled to curial deference. The ***EPEA*** states that the EAB shall dismiss a notice of objection if "in the Board's opinion" all of the matters in the notice of objection were considered by the NRCB. The wording of section 87(5)(b)(I) and recent amendments to the ***EPEA*** which place a broad privative clause within the Act indicates that it is the intention of the legislature that the EAB be given wide discretion to determine whether a matter which is included in a notice of objection has been previously considered. It is up to the EAB to form an opinion based on the facts which are before it.

In this case the EAB considered the technical evidence presented by Chem-Security in its application for renewal. The EAB also reviewed the evidence and findings of fact made by the NRCB in both the Expansion Hearings and Importation Hearings. The EAB then came to the conclusion that in its opinion "[f]ugitive emissions of PCBs ...is a new matter that may be considered in this appeal.": Return, Vol. 4, Tab L at 023. This

decision appears to fall within the EAB's area of expertise and as such the EAB is entitled to make the decision it did. Therefore, it would appear the EAB did not exceed its jurisdiction in deciding that the issue of fugitive emissions was a "new matter" which could be considered at the appeal.

The application is therefore dismissed.

Dated at Calgary, Alberta this 5th day of November , 1996.

J.C.Q.B.A.

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