1996 CanLII 10564 (AB QB)

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF EDMONTON

IN THE MATTER OF PART II OF THE *ENVIRONMENTAL PROTECTION AND ENHANCEMENT ACT*, S.A. 1992, C. E-13.3 AS AMENDED;

IN THE MATTER OF THE *CLEAN WATER ACT*, R.S.A. 1980, c.13;

IN THE MATTER OF THE *CLEAN AIR ACT*, R.S.A. 1980, C.12;

IN THE MATTER OF PERMIT TO CONSTRUCT 93-AP-099 AND PERMIT TO CONSTRUCT 93-20=042, AS AMENDED.

BETWEEN:

ALBERTA CEMENT CORPORATION

Applicant

- and -

HER MAJESTY THE QUEEN IN THE RIGHT OF ALBERTA, AS REPRESENTED BY DAVID SPINK, THE DIRECTOR, AIR & WATER APPROVALS DIVISION, ALBERTA ENVIRONMENTAL PROTECTION

Respondent

MEMORANDUM OF JUDGMENT
of the
HONOURABLE MADAM JUSTICE JOANNE B. VEIT
Hearing: May 14, 1996
Issued: July 5, 1996

Summary

[1] Alberta Cement obtained permits for the construction of a cement plant near Rocky Mountain House; the permits were subsequently amended by the Director. In their amended form, the permits required Alberta Cement to commence construction by November 1, 1995.

[2] It is accepted that Alberta Cement had cleared the site of the cement plant, commenced excavation, and poured the cement floor for one of the buildings by November 1, 1995.

[3] On January 11, 1996, the Director concluded that construction had not commenced and decided that the permits had expired by effluxion of time.

[4] Alberta Cement asks for judicial review of the Director's decision.

[5] Judicial review is granted.

[6] Even if the the standard for review here is the "patently unreasonable" test, the Director's decision fails that test. It is "patently unreasonable" to exclude land clearing, excavation, and floor pouring from the concept of "construction" and to impose a degree of completion qualifier to the word.

CASES AND AUTHORITY CITED

BY THE APPLICANT: Examination on Affidavit of Aage Tottrup, filed February 15; **Pezim v. British Columbia** (Superintendent of Brokers) (1994), 22 Admin. L.R. (2d) 1 (S.C.C.); **CBC v. Canada,** [1995] S.C.J. No. 4; **Blanchard v. Control Data Canada** (1984), 14 D.L.R. (4th) 289 (S.C.C.); *Alberta Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3, as amended, s. 2; *Alberta Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3, as amended, s. 84; **Quebec v. Canada (NEB)** (1994), 112 D.L.R. (4th) 129 (S.C.C.); **Associated Provincial Picture Houses v. Wednesbury Corporation,** [1948] 1 K.B. 223 (C.A.); **Oakwood Developments v. Saint Francis Xavier** (1985), 18 Admin. L.R. 59 (S.C.C.); **Construcion in Canada** 1991-1993, Statistics Canada; **Board of Trustees of Calgary School District No. 19 v. Canada** [1991] 1 C.T.C. 217 (F.C.T.D.); **Clarke v. MNR,** [1994] G.S.T.C. 19 (CITT); **Farr v. Groat** (1913), 6 Alta L.R. 259 (S.C.); **B.C. Tel v. Shaw Cable Systems (B.C.) Ltd.** [1995] 2 S.C.R. 739; **R. v. ASL Paving Ltd.** (1995) 28 Alta. L.R. (3d) 38 (C.A.); *Environmental Protection and Enhancement Act*, Regulation 113/95.

1. Background

[7] In December 1993, Alberta Environment issued to Alberta Cement a permit to construct pursuant to the *Clean Air Act* and a permit to construct pursuant to the *Clean Water Act*. The permits stated that they would expire on November 1, 1994 if construction did not commence by that date. On October 31, 1994, the Director issued amendments to the permits, extending the date for commencement of construction of the cement plant until November 1, 1995.

[8] Prior to November 1, 1995, Alberta Cement had, among other activities:

- cleared the site by the removal of approximately 5,000 tonnes of free coverage and 10,000 cubic meters of soil;
- commenced excavation of the site;
- fabricated 300 tonnes of steel for a building it had contracted at a cost of $850,000;
- poured 8 cubic meters of concrete for an administration building;
- entered into a contract for the installation of all concrete with a local concrete supplier;
- secured financing for the construction of the cement plant.

[9] On November 28, 1994, an environmentalist appealed the Director's decision to extend the date for commencement of construction. On August 23, 1995, the Environmental Appeal Board found that the environmentalist did not have standing to bring the appeal. The environmentalist then appled for judicial review of the Environmental Appeal Board decision. That motion was dismissed on March 29, 1996.

[10] Alberta Cement had a bulldozer on the site on October 30 and 31 1995; the bulldozer was clearing the land.

[11] The Director inspected the site in mid-November 1995. He determined that the site appeared to be scraped clean of organic overburden, although it continued to follow the natural contour of the the land, and that a concrete slab approximately 12' x 25' x 6" was located at the site.

[12] The overall value of the project is said to be approximately $70,000,000.00.

[13] On January 11, 1996, the Director concluded that construction had not commenced and that the permits had expired by effluxion of time.

2. Standard of review

[14] The Director made a decision of mixed fact and law. He had to determine what the word "construction" means and he had to decide if there was evidence to establish construction. The Director's decision here is not shielded by a privative clause.

[15] Alberta Cement submits that the correct standard of review here is correctness because:

- there is no privative clause in the governing legislation;
- the Director has no special expertise with respect to the question;
- the Director has no greater expertise than the court in the interpretation of documents;
- the issue - meaning of "construction" - does not relate to the primary purpose of the legislation, which is the protection of the environment.

[16] The Director says that is whether the Director's decision is "patently unreasonable".

[17] I incline to Alberta Cement's view of the standard that must be applied on an application such as this one. The definition of the word "construction" is a legal task which does not depend on evidence; moreover, the definition of the word "construction" does not come within the expertise of the Director. Therefore, the Director must be correct when he defines the word: **Shaw Cable Systems**.

[18] On a correctness basis, the Director was wrong in giving such a narrow meaning to the word. The Director must have excluded the concept of excavation in his notion of construction, and must have imported into the definition of the word some qualifier in relation to the amount of work done.

[19] However, in this case, it is not necessary for me to restrict myself to the correctness test. Even if the Director is right, and the appropriate standard is whether the decision under review is "patently unreasonable", the Director's decision does not meet the standard.

[20] In other words, I am prepared to accept, for the purposes of this motion, the Director's view that his decision can only be reviewed if it is "patently unreasonable".

3. Is the Director's decision "patently unreasonable"?

[21] The Director's decision that Alberta Cement had not started construction of the cement plant by November 1, 1995 was "patently unreasonable".

[22] In the absence of a statutory definition that would impose a different meaning on the word, "construction" must include excavation. On the other hand, "construction", by itself, cannot mean "nearly completed construction", or "plumbing in construction" or any other degree of completion of construction.

[23] The Director must have given a meaning to the word "construction" that incorporated the two errors described above.

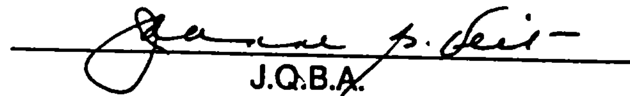
[24] Even accepting the strict meaning of the "patently unreasonable" test, and equating it - as the Supreme Court of Canada has instructed us - with the phrase "clearly irrational", I am of the view that the Director's decision here was clearly irrational.

4. Relief

[25] Having concluded that the Director's decision is clearly irrational, I allow the motion for judicial review and set aside the Director's declaration that Alberta Cement's permits are null and void.

5. Costs

[26] If the parties are not agreed on costs, I may be spoken to within 30 days of the release of this memorandum.



J.Q.B.A.

DATED at the City of Edmonton
this 5th day of July, 1996.

APPEARANCES:

Ms. P.E.S. Kennedy and
Ms. Karin Buss
for the Applicant

A.P. Hnatiuk, Esq., Q.C.
for the Respondent

Action No: 9603 03502

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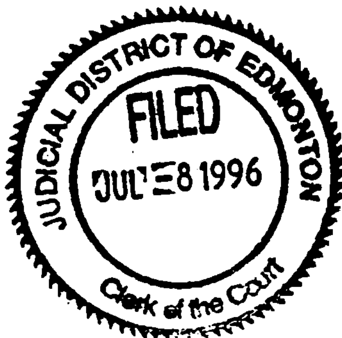

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