Alberta Court of Queen's Bench
Kostuch v. Alberta (Director, Air & Water Approvals Divisions, Environmental Protection)
Date: 1996-03-28

J. J. Klimek, for Martha Kostuch.

D. P. Jones, Q.C., for Alberta Environmental Appeal Board.

R. C. Secord, for Alberta Cement Corp.

W. A. McDonald, for Director of Air & Water Approvals Division.

(Edmonton 9503-19741)

March 28, 1996.

Summary

[1] MARCEAU J.: – The Applicant seeks to quash a decision of the Environmental Appeal Board ("E.A.B.") dated August 23, 1995.

[2] On September 1, 1993 the *Environmental Protection and Enhancement Act,* c. E-13.3, (the new Act) was proclaimed in force. Its transitional provisions provided:

(a) that if a complete application was being considered under Acts repealed by the new Act such as the *Clean Air Act,* R.S.A. 1980 c. C-12 and the *Clean Water Act,* R.S.A. 1980 c. C-13, the approval process would continue under those Acts as though they had not been repealed (the new Act s. 243(1) and s. 247).

(b) once approved, the approval is deemed to be an approval under the new Act.

[3] Approval for the construction of a cement plant in a wilderness area about 35 miles from Rocky Mountain House was granted to Alberta Cement Corporation ("Cement Co.") on December 13, 1993. The approvals were pursuant to the repealed *Clean Air Act* and *Clean Water Act* and were deemed approvals under the new Act. That approval required commencement of construction prior to November 1, 1994.

[4] On August 26, 1994 Cement Co. applied for an extension of the date by which construction was to commence from November 1, 1994 to November 1, 1995. It is common ground that this request was to be dealt with under the new Act. The extension to November 1, 1995 to commence construction of the cement plant was granted by the Director of Air and Water Approvals Division, ("the Director"). The Applicant filed the necessary documents to bring herself before the E.A.B.

[5] The E.A.B. had before it two issues:

(a) did the Applicant have standing

(b) the merits of the appeal.

[6] The merits of the appeal had a further legal problem. If the Cement Co. application for construction was to be considered under the new Act, an environmental impact assessment would be required. The Applicant says the application for an extension is in effect a new application and requires an environmental impact assessment. Cement Co. says the only issue before the Director is the narrow issue of the extension and an environmental impact assessment is not required.

[7] The E.A.B. ruled that the Applicant had no standing before it and declined to consider the merits of the appeal. I have concluded the E.A.B. was correct in their interpretation of the new Act with respect to standing and the application of the facts to the new Act was a matter within their jurisdiction.

[8] In any event, had I concluded the E.A.B. was wrong on the issue of the Applicant's standing before it, I would have reversed only that part of the E.A.B.'s order and would have left the E.A.B. to consider the merits of the appeal as well as the question of law as to whether the application for an extension required an environmental impact assessment.

Issue

[9] The only issue left to be considered is whether the decision of the E.A.B. that the Applicant had no standing before it should be judicially reviewed and quashed.

Standard of Review

[10] E.A.B. reached its decision by a two-step process.

[11] The new Act gives standing to the Applicant only if she can show that she is "directly affected" by the Director's decision. The relevant parts of the new Act read as follows:

> **84(1)** A notice of objection may be submitted to the Board by the following persons in the following circumstances:
>
> (*a*) where the Director
>
> (i) …

(ii) makes an amendment, addition or deletion pursuant to an application under section 67(1)(*a*), or

(iii) …

a notice of objection may be submitted

(iv) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 70 and is directly affected by the Director's decision, in a case where notice of the application or proposed changes was provided under section 69(1) or (2), or

(v) by the approval holder or by any person who is directly affected by the Director's decision, in a case where no notice of the application or proposed changes was provided by reason of the operation of section 69(3).

[12] The Applicant had filed a statement of concern.

[13] The term "directly affected" has been judicially considered in two recent cases in the Court of Queen's Bench and the appeals from these decisions were upheld by the Court of Appeal of Alberta, by Memoranda of Judgment both dated January 24, 1996.

[14] In each case the Court of Appeal pointed out that there is no privative clause shielding decisions of the Public Health Advisory & Appeal Board ("P.H.A.A.B.") from judicial review and requiring judicial deference.

[15] In each case the *Public Health Act,* S.A. 1984, c. P-27.1 provides that a person who is directly affected by the decision of a local board may appeal the decision.

[16] The Court of Appeal decisions are *C.U.P.E., Local 30 v. WMI Waste Management of Canada Inc.,* Edmonton Appeal #9403-0228-A.C., 24 January 1996 [reported at (1996), 34 Admin. L.R. (2d) 172]. I will refer to this as the *"WMI Waste Management* decision". And *Friends of the Athabasca Environment Assn. v. Alberta (Public Health Advisory & Appeal Board),* 24 January 1996 [reported at (1996), 34 Admin. L.R. (2d) 167]. I will refer to this as the *"F.O.T.A.* decision".

[17] At p. 8 of the *WMI Waste Management* decision the Court said:

In our view, the inclusion of the word 'directly' signals a legislative intent to further circumscribe a right of appeal. When considered in the context of the regulatory scheme, it is apparent that the right of appeal is confined to persons having a personal rather than a community interest in the matter.

[18] At p. 4 of the *F.O.T.A.* decision the Court said:

The appellants urge the application of the principle in *Friends of the Island,* which held that courts have a broad discretion to grant standing to apply for judicial review. We specifically rejected that proposition in *WMI Waste Management.* The mandate of an administrative tribunal and its legal process must be construed in accordance with the legislative intent. In our view, that intent is clear. The use of the modifier 'directly'

with the word ‘affected’ indicates an intent on the part of the Legislature to distinguish between persons directly affected and indirectly affected. An interpretation that would include any person who has a genuine interest would render the word ‘directly’ meaningless, thus violating fundamental principles of statutory interpretation: *Subilomar Properties (Dundas) Ltd. v. Cloverdale Shopping Centre Ltd.* (1973) 35 D.L.R. (2d) 1 (S.C.C.) at 5. An interpretation that would import expanding concepts of judicial discretion, contrary to the intention of the Legislature, would engage the sort of interpretive exercise expressly rejected by the Supreme Court in *Canada (Attorney-General) v. Mossop* (1993) 100 D.L.R. (4th) 658 at 673.

[19] This is a reference to the Federal Court decision in *Friends of the Island v. Canada (Minister of Public Works)* (1993), 102 D.L.R. (4th) 696 (Fed. T.D.).

[20] Clearly, the Applicant had two arguments left after these decisions came out. She argues that the E.A.B. is not in the same position as the P.H.A.A.B. because there is no statement of objectives in the *Public Health Act* but there is an extended statement of same in the new Act. Particular reference was made to subparagraphs (a) and (b) but I set out the entire section:

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.

[21] It is argued that this statement of objection should be read as indicating a broader consultative process and a broader appeal process than under the *Public Health Act.* Particular reference is made to broad statements about protection of the environment,

the integrity of ecosystems, human health and to the well-being of society in subparagraph (a). Subparagraph (b) speaks of ensuring that the use of resources in the environment today does not impair prospects for their use by future generations.

[22] In fact, there is a broad scheme of consultation provided for in the new Act but it is directed to input at the level of the decisions made by the Director not the appeal process to the E.A.B. which is a tribunal independent of the environmental process of approval by the Director.

[23] I cannot apply a different meaning to the words “directly affected” as used in the *Public Health Act* from its use in the new Act particularly since it is obvious in the new Act that the wide consultation is to take place at a lower level and appeals are subject to different considerations. Therefore, I am bound by the definition of “directly affected” set out in *WMI Waste Management* and *F.O.T.A.*

[24] The next question is whether the E.A.B. applied the correct test. In fact, the E.A.B. specifically adopted the interpretation of “directly affected” set out in the judgment of Veit, J. in *F.O.T.A.* which cited with approval the decision of Agrios, J. in the *WMI Waste Management* case.

[25] At p. 13 of the *E.A.B.* decision is found the following passage:

> Two ideas emerge from this analysis about standing. First, the possibility that any given interest will suffice to confer standing diminishes as the causal connection between an approval and the effect on that interest becomes more remote. This first issue is a question of fact, i.e., the extent of the causal connection between the approval and how much it affects a person’s interest. This is an important point; the Act requires that individual appellants demonstrate a personal interest that is directly impacted by the approval granted. This would require a discernible effect, i.e., some interest other than the abstract interest of all Albertans in generalized goals of environmental protection. ‘Directly’ means the person claiming to be ‘affected’ must show causation of the harm to her particular interest by the approval challenged on appeal. As a general rule, there must be an unbroken connection between one and the other.

[26] I am satisfied the E.A.B. applied the correct test. The E.A.B. went on to discuss the particular connection between the Applicant and the cement plant. The Applicant submitted a long history of intervening, being consulted and generally caring about the environment in the Rocky Mountain House area. This history as an environmental advocate does not in my view entitle the Applicant to special status in the sense of being for that reason alone “directly affected”. The E.A.B. further considered the Applicant’s interests as a veterinarian and her use of the area adjacent to the proposed plant for

hunting and recreation and concluded the test for standing had not been met by the Applicant.

[27] I am of the view that the E.A.B. was correct in applying the facts to the law but if I disagreed with that portion of the decision I would defer to the E.A.B.'s expertise to decide the question.

[28] In the *F.O.T.A.* decision the Court of Appeal made the following comment at pp. 4 & 5:

> However it is clear that P.H.A.A.B. was not satisfied on the evidence that F.O.T.A. or its members would be directly affected by drinking water at the Pine Sands Natural Area or at Poacher's Landing. That is a question bf fact for P.H.A.A.B. to decide, with which we would not interfere.

[29] In the present case the effect on the Applicant because of proximity to the site, her interests, her hunting and recreational use of the lands are the same kind of issue that the Court of Appeal said was in the purview of the P.H.A.A.B. and it applies equally to the decision of standing in this case.

[30] There was finally a question that was argued arising from the *F.O.T.A.* decision. The P.H.A.A.B. in that case had granted status to owners of land adjoining the waste management facility. The penultimate sentence of the Court of Appeal's decision reads as follows:

> However, in our view the adjacent landowners who have been granted standing are able to sufficiently advance concerns relating to the public interest.

[31] The question arose whether the E.A.B. should more readily grant status to public interest groups where as here very few if any persons can show a direct causal connection because there are no residences within about 20 miles of the proposed cement plant. I conclude that if the Legislature had so intended they could have done so. Instead they chose to curtail the right of appeal and that is the Legislature's prerogative.

[32] I thank counsel for their extensive and complete briefs and for their able arguments.

[33] The motion for judicial review is therefore denied.

[34] If the parties cannot agree on costs they may be spoken to within 30 days of the release of these reasons.

[35] Application dismissed.

Application dismissed.