Court of Queen's Bench of Alberta

Citation: Cymbaluk v. Alberta (Surface Rights Board), 2009 ABQB 263

Date: 20090430
Docket: 0803 16469
Registry: Edmonton

In the Matter of Decision 2008/0117 of the Surface Rights Board dated June 2, 2008
And in the Matter of the *Surface Rights Act*, R.S.A. 2000, Chapter S-24
And in the Matter of the Southeast Quarter of Section 34, Township 51,
Range 4, West of the 5th Meridian ("SE 34")

Between:

Philip Cymbaluk, Ferne Cymbaluk and David Cymbaluk

Applicants

- and -

The Alberta Surface Rights Board and TransAlta Utilities Corporation

Respondents

Reasons for Judgment
of the
Honourable Madam Justice M.B. Bielby

Decision:

[1] The standard of review of reasonableness is to be applied to a decision of the Surface Rights Board ("SRB") in which it declined to reconsider for a second time its refusal to award additional compensation to the Applicant landowners. The SRB was found to have acted reasonably in coming to that decision. The compensation was sought on account of the operator of a strip mine's failure to stockpile soil removed from their lands so that it would be available in the future for use in the ultimate reclamation of those lands.

[2] Without deciding whether s. 16(1) of the *Surface Rights Act*, R.S.A. 2000, c. S-24 ("*SRA*") permits the SRB to issue a Right of Entry Order which allows a mine operator to use salvaged topsoil for reclamation efforts on land outside of the land disturbed by the mining operation, the SRB was in error in interpreting the Right of Entry Order in question to accord that right in this case; it is simply not wide enough on its terms to do so. Similarly, the SRB was unreasonable in concluding that the soils management plan which bound the mine operator permitted such activities. However, this application is premature, at best, because the mine operator's obligation to reclaim the landowner's land can be satisfied anytime prior to the expiration of its license in 2021. It is not possible to determine, at this time, whether it will fail to do so and that the landowners will then suffer a resulting loss.

[3] Therefore, had it been necessary to address the errors in the SRB's decision, judicial review would not issue at this time.

Facts:

[4] The Applicants have applied for judicial review of Decision 2008/0117 of the SRB seeking an order in the nature of *certiorari* quashing that decision and remitting the matter back to the SRB for reconsideration. They are seeking compensation for the value of topsoil which was taken from land they own to facilitate permitted mining operations by TransAlta Utilities Corporation ("TransAlta") and used to repair adjacent land rather than being stockpiled for eventual use in reclamation of their own land.

[5] The Applicants own a piece of land located near Lake Wabamun in the Province of Alberta. TransAlta operates the Highvale Coal Mine, a strip mine, adjacent to their land. The Applicants purchased their land in 2002 knowing that the land would ultimately be required by the mine.

[6] TransAlta subsequently entered into discussions with them in respect to obtaining access to their land to expand its mine. When those discussions did not result in a resolution it applied for and obtained a Right of Entry ("ROE") pursuant to the provisions of s. 15 of the *SRA* from the SRB.

[7] The result of this ROE was that the Applicants lost the use of their lands until 2021. At that time the land, having been used for mining and then reclaimed, will be returned to them.

[8] On June 1, 2006 the SRB held a hearing to determine the compensation to be paid to the Applicants as a result of the granting of this ROE. On March 6, 2007 it issued a compensation order. That order provided the Applicants with compensation approximately equal to half the market value of their land plus interest to reflect their deprivation of its use until 2021.

[9] Before the compensation order was granted, the EUB granted a further licence to TransAlta to permit it to expand the Highvale Coal Mine. Immediately prior to that license being

granted, TransAlta received Approval No. 11187-02-00 issued pursuant to the *Environmental Protection and Enhancement Act* which included a soils management plan which imposed and detailed TransAlta's obligations to reclaim the lands prior to their restoration to the Applicants.

[10] On March 12, 2007 the Applicants brought an application under s. 30 of the *SRA* seeking, among other things, an order requiring the Respondent to keep track of the amount of soil removed from their land and where that soil was stored. The SRB refused that application, stating:

> The Board finds Mr. Secord's assertion that the Operator has acted in "excess" of the right of entry order to be unsubstantiated. ...the Board finds that the Operator is acting in accordance with its rights as vested under the right of entry order.
>
> ... The Board also finds acceptable the Operator's submitted explanation of its practices surrounding the stripping and storage/use of the topsoil. Section 16 is explicit in setting out an Operator's right to excavate or otherwise disturb and minerals within, or under the land without permission or compensation, if such actions are necessary for its operation. In the present case, the Board finds that the stripping and removing topsoil is integral to the nature of the Operator's mining activities....
>
> The Board is persuaded that the Operator is acting in a manner that is consistent with the Alberta Energy and Utilities Board's licensing requirements and within its rights as conferred by the Order.

[11] On December 7, 2007 the Applicants applied to have both the ROE and compensation order reviewed again pursuant to the provisions of s. 29(b) of the *SRA*. The SRB dismissed the application on June 2, 2008 giving the following reasons for that dismissal:

> The Landowners have failed to convince the Board that either Right of Entry Order No. 1649/2005 or Compensation Order No. 0209/2007 is in error. The facts and arguments included in the Landowners' current Application are the same as or substantially similar to those raised when the Landowners opposed the Right of Entry Order, presented their claim for compensation related to the rights taken and made a Section 30 Application for damages caused by the Operator related to its entry.
>
> The Board granted the Right of Entry on the basis that the Operator's application was consistent with Permit No. C88-8 dated July 18, 1988, and License No. C2003 - 5 dated June 11, 2003, issued by the EUB. The Board acted in accordance with Section 15(6)(b) of the Act. The Operator's application for a mining license was supported by a reclamation plan which addressed how topsoil and subsoil will be salvaged, stockpiled and replaced. The Landowners obviously take issue with the principles of the soils management plan. However, those

concerns are outside the scope of the Board's jurisdiction to address and should be directed to those other agencies which have the mandate to license and regulate mining and reclamation activities.

The Board does not agree that the Operator is contravening Section 16(1)(a)(ii) of the Act. This argument was also raised by the Landowners in their Section 30 Application and the Board clearly ruled against the Landowners' position at that time. Nothing has been presented to the Board under the current Application which would persuade the Board that the Operator is not properly exercising its right under Section 16(1)(a) of the Act. The Operator is simply carrying out it soils management plan as stipulated in its License application.

The Landowners' request that the Board either review the Compensation Order or hold a rehearing on compensation is premature. Any damages resulting from the mining operation as well as impacts on the reversionary value of their land cannot be properly determined and valued until the mining has been completed and the lands reclaimed.

[12] The Applicants now seek judicial review of this June 2, 2008 decision of the SRB.

Issues:

1. What is the standard of review to be applied to the decision under review?

2. Did the Board properly exercise a discretion not to exercise its power of reconsideration?

3. Did the SRB make a reviewable error in:

    (a) concluding that the ROE in question permitted TransAlta to remove topsoil and use it for purposes other than for eventually restoring the very land from which it was removed?

    (b) concluding that s. 16(1)(a) of the *SRA* permitted the SRB to issue ROE's which included the power to remove soil from a site to be mined and use it for purposes other than eventually restoring the very land from which it was removed?

    (c) misusing the soils management plan as an aid to interpretation of the scope of the ROE?

    (d) concluding that the request for additional compensation is premature?

Analysis:

1. What is the standard of review to be applied to the decision under review?

[13] The parties agree that the steps to be followed in determining the appropriate standard of review of the SRB's June 2, 2008 decision are those set out by the Supreme Court of Canada in ***Dunsmuir v. New Brunswick*** 2008 SCC 9, in which it described the two alternate standards of judicial those of correctness and of reasonableness. A reviewing court is more likely to intervene in the face of an error made by a tribunal where correctness is the standard to be applied than where it is reasonableness.

[14] To determine the standard of review in a particular case the Supreme Court instructed that the following steps are to be followed in relation to each matter in issue. First, the Court can attempt to ascertain whether jurisprudence has already determined the degree of deference to be accorded to a particular type of question. If this inquiry proves unfruitful, it is then to proceed to a "standard of review" analysis. That analysis is contextual and looks to four factors: 1) presence of a privative clause, 2) purpose of the tribunal as determined by its legislation, 3) nature of the question at issue, and 4) expertise of the tribunal.

2. Did the Board properly exercise a discretion not to exercise its power of reconsideration?

[15] The Respondent argues that the jurisprudence has determined that the standard of review with respect to the SRB's decision whether or not to reconsider has been determined to be that of reasonableness. In ***ATCO Electric v. Alberta (Surface Rights Board)*** 2001 CarswellAlta 1235 Lefsrud, J. of this Court determined the standard to be that of patent unreasonableness, the most deferential standard available at that time. As a result he declined to review an earlier compensation order made pursuant to s. 32, now s. 29, of the *SRA* which is the very section under which the SRB made the decision currently under review.

[16] While the standard of patent unreasonability no longer exists, this decision indicates that the most deferential current standard of review now available should apply to an SRB decision under s. 29 of the *SRA*, that of reasonableness.

[17] While Lefsrud, J.'s decision is entitled to the most careful consideration I do not conclude that it establishes definitive jurisprudence in this area, both because it was rendered at a time prior to ***Dunsmuir*** when there were three possible standards of review and also because it is a single decision of a trial judge, absent confirmation or application by subsequent Courts.

[18] I must therefore proceed to conduct a standard of review analysis in relation to this question on my own. Turning to that analysis, I observe that, in relation to each issue, the conclusions reached in relation to the first three of the four factors to be considered are the same:

a. *privative clause* - there is no privative clause in the *SRA*. An appeal of a compensation order is described as "a new hearing" in s. 26(6) of the *SRA*. There is, therefore, no statutory implication of deference to a decision of the SRB.

b. *purpose of the tribunal as determined by its legislation* - Justice Crighton described the purpose of the *SRA* as balancing the interests of a landowner with those of an operator in ***EnCana v. Campbell***, [2008] A.W.L.D. 4432, para. 16 in which she also quotes the Alberta Court of Appeal in ***Windrift Ranches Ltd. v. Alberta (Surface Rights Board)***, [1986] A.J. No. 581 in which that Court described the role of the SRB as being ancillary and in aid of oil well activities authorised by the Energy Resources Conservation Board. It noted that s. 15(6) of the *SRA* prioritizes the existence of the well license such that the SRB cannot exercise its jurisdiction to deny entry to a well site where the ERCB has granted a license to an operator to operate that well site.

c. *expertise* - the SRB has acknowledged expertise in decision-making in relation to resource-based issues. The Alberta Court of Appeal described that expertise in ***Legal Oil and Gas Ltd. v. Alberta (Surface Rights Board)*** 2001 ABCA 160 where it stated at para. 13:

> The Legislature has entrusted decision making powers in fields of resource conservation and regulation of resource based industries to various boards. Two such boards are the Surface Rights Board and the Alberta Energy & Utilities Board, formerly the Energy Resources Conservation Board. Members of these Boards are experts who have extensive knowledge of policy, the industry and its requirements, acceptable practises in the industry, and the concerns of the land owners. The jurisdiction of this Court on a judicial review appeal is generally limited to a review of errors of law or jurisdiction of the board in question and the Chambers Judge. The Court will not generally decide the questions in the first instance.

d. *nature of the question in issue* - this must be determined in relation to each issue as it is addressed.

[19] The first three considerations in this analysis, as discussed above, suggest that I defer to the SRB in relation to its June 2, 2008 decision. Is there anything in relation to the fourth

consideration, the nature of the question, which dictates otherwise? That question is whether that Board should reconsider a second time a refusal to award compensation.

[20] I conclude not. The issue is one of an exercise of discretion. That alone suggests deference. Further, the SRB is especially well placed, given its expertise and prior experience with this matter to determine whether it should be reconsidered yet again.

[21] I therefore determine that the standard of review to be applied to this question is that of reasonableness and conclude the decision was reasonable. This alone disposes of the application for judicial review.

[22] This conclusion may appear somewhat disquieting in light of my conclusions, below, that the SRB erred in concluding that the ROE in question is broad enough to validate TransAlta's impugned conduct and, further, that it was unreasonable in concluding that the provisions of the soils management plan supported its interpretation of the scope of the ROE. If the standard of review to be applied to its June 2, 2008 decision had been that of correctness rather than reasonableness a different conclusion may have emerged. However, any concern about resulting injustice is resolved in light of my ultimate conclusion that the SRB did not err in its observation that the Applicants are nonetheless premature in launching this application as any damages are speculative at best at the moment.

3. Did the SRB make a reviewable error in:

(a) *concluding that the ROE in question permitted TransAlta to remove topsoil and use it for purposes other than eventually restoring the very land from which it was removed*?

[23] Had it been necessary to answer this question and, therefore, conduct a standard of review analysis I would have concluded that standard to be one of correctness. This question involves the interpretation of an order. That order is issued under statutory authority and affects the rights of the parties.

[24] Further, had it been necessary to answer this question I would have concluded that the terms of the ROE are not broad enough to permit TransAlta to remove topsoil and use it for purposes other than eventually restoring the Applicants' land. It was therefore acting in breach of its authority under the ROE to do otherwise. The ROE states:

> It is ordered that the Operator be and is hereby granted right of entry in respect of the surface of the land shown herein described for the removal of minerals and for or incidental to any mining operations and for the construction and operation of tanks, stations and structures for or incidental to such mining operations or the production of coal.

[25] TransAlta concedes that this provision does not expressly give it the right to remove soil and utilize it elsewhere. It argues, however, that right should be implied from the phrase "right of

entry in respect to the surface of the land...and for or incidental to any mining operation". I do not draw that implication. It may be that the removal of soil is properly incidental to any strip mining operation but that reality does not import the right to reuse that soil elsewhere. If the SRB had wished to accord that right to TransAlta it would have been easy to provide it directly.

[26] TransAlta therefore operated in breach of the ROE when it used any soil removed from the Applicants' land to restore the adjacent lands. Had this application for judicial review been launched from the original s. 29 application brought in March 2007 it might have been successful on this point but nonetheless would have ultimately failed, as now, on the issue of prematurity.

(b) *concluding that s. 16(1)of the SRA permitted the SRB to issue an ROE which included the power to remove soil from a site to be mined and use it for purposes other than eventually restoring the very land from which it was removed?*

[27] Had it been necessary to answer this question and, therefore, conduct a standard of review analysis I would have concluded that standard to be one of correctness. This question involves the interpretation of legislation. The Court is in at least as equally a good position to address the rigours of statutory interpretation as is the SRB.

[28] I note that it is also not necessary to address this issue because of my decision that, whether or not s. 16(1) permits the SRB to issue ROEs which include the right to remove soil from a site to be mined and to use it for purposes other than eventually restoring the very land from which it is removed, the terms of the ROE issued here were not broad enough to do so.

[29] That said, this issue raises an interesting question of statutory interpretation. Two plausible yet opposite interpretations of s. 16(1) are possible.

[30] Section 16(1) of the *SRA* provides:

> 16(1) A right of entry order vests in the operator,
>
> (a) *unless otherwise provided in the order*, the exclusive right, title and interest in the surface of the land in respect of which the order is granted *other than*
>
> (i) the right to a certificate of title issued pursuant to the *Land Titles Act*, and
>
> (ii) the right to *carry away* from the land any sand, gravel, clay or marl or *any other substance forming part of the surface of the land,...*
>
> (emphasis added)

[31] The Applicants argue that while the words “unless otherwise provided in the order” mean that the *SRA* may impose limitations on the interest in land given to an operator in an ROE, the phrase “other than” in s. 16(1)(a) mean that those limitations cannot include the right to carry away soil from that land. In other words the phrase “other than” modifies the phrase “unless otherwise provided in the order”.

[32] TransAlta argues the reverse. It argues that the phrase “unless otherwise provided in the order” modifies “other than”. It argues that the subsection should be interpreted to mean that the SRB cannot impose any conditions in the ROE which limit the operator’s interest in the land “other than” the right to carry away soil. Absent such a condition an ROE could not authorize the carrying away of soil. With it, it could. If this interpretation is correct, my earlier conclusion that the ROE in question does not include that right is reinforced, given the failure to expressly address the right to carry away soil.

[33] As it is not necessary to address this issue I will resist the temptation to dip into the waters of statutory interpretation to venture an opinion as to which interpretation is correct.

[34] However, I will note that the arguments advanced in relation to the interpretation to be placed on the phrase “carry away” in s. 16(1)(a)(ii) are, ultimately, irrelevant at this time. That phrase as used in s. 56(4) of the *Law of Property Act* has been interpreted to include the right of full use of the material carried away; see ***Tottrup v. Clearwater (Municipal District) No. 99*** 2006 ABCA 380 at paras. 15-16. It is only if s. 16(1) were ultimately interpreted to include the ability to award a right to carry away topsoil would the interpretation of this phrase in the context of the *SRA* become necessary.

(c) *misusing the soils management plan as an aid to interpretation of the scope of the ROE?*

[35] Had it been necessary to answer this question and, therefore, conduct a standard of review analysis I would have concluded that standard to be one of reasonableness as this question arises from the SRB’s application of knowledge of other aspects of the mining application process which arises, in part, from its expertise in this area.

[36] The soil management plan in question was imposed by Approval No. 11187-02-00 issued pursuant to the *Environmental Protection and Enhancement Act*. In the Reasons for Decision under review, the SRB did not expressly identify the portion of the soil management plan to which it was referring in its conclusion: “The Operator is simply carrying out its soils management plan as stipulated in its License application.”

[37] It is difficult to find a portion of that plan which would support its conclusion; indeed, the express wording of the plan suggests that the topsoil removed from the Applicant’s land should be preserved for reclamation. Even accepting TransAlta’s argument that the plan does not require soil removed from a given quarter-section to be stockpiled for ultimate reclamation of that section but rather only for reclamation of some part of the land covered by the Approval and plan, the soil

from the Applicants' land was admittedly used to restore other land in this case, land outside of the scope of the Approval and plan.

[38] The soil management plan imposes the following duties on TransAlta:

Section 3.2: Land Construction

3.2.1 The approval holder shall salvage all topsoil from disturbed land.

3.2.2 The approval holder shall conserve all topsoil for reclamation.

3.2.3 The approval holder shall salvage sufficient subsoil and suitable soil from disturbed land to meet the reclamation objectives identified in PART 6.

3.2.4 The approval holder shall direct place salvaged:
(a) subsoil; and
(b) topsoil;
on contoured portions of the disturbed land whenever possible.

3.2.5 The approval holder shall stockpile all salvaged subsoil and topsoil as follows:
(a) Topsoil and subsoil shall be stockpiled separately:
(b) Stockpiles shall be separated by at least five metres;
(c) Stockpile foundations must be stable...

Section 6.2: Land Reclamation

6.2.1 The approval holder shall reclaim land through appropriate conservation and reclamation methods to construct land having characteristics (soils, topography and drainage) that results in a return of land capability equivalent to or better than that existing prior to disturbance.

Section 6.3: Materials Placement, Backfilling and Contouring

6.3.5 The approval holder shall ensure that 1.2 metres of subsoil or suitable soil is present in the reclaimed profile in land using bottom ash, as outlined in 3.2.8, and unless otherwise directed in writing by a Conservation and Reclamation Inspector.

6.3.6 The approval holder shall replace salvaged subsoil such that a minimum of 1.0 metre of subsoil is present in the reclaimed profile on land to be returned to agricultural capability class 2 or 3.

6.3.8 The approval holder shall replace salvaged subsoil such that a minimum of 0.35 metres of subsoil will be present in the reclaimed profile on land to be returned to agricultural capability class 4, 5 or 6.

6.3.9 The approval holder may substitute soil for subsoil in areas to be returned to agricultural capability class 4, 5 or 6.

[39] While these provisions do not expressly address the issue of whether removed soil must be stockpiled and returned to the very site from which it was removed, the requirement in s. 3.2.3 that TransAlta salvage soil from the disturbed land to meet the reclamation objectives identified in Part 6, and the provision in Part 6 that TransAlta reclaim land in such a manner that "results in a return of land ... equivalent to that existing prior to disturbance" appears to impose the requirement to replace the salvaged soil on the disturbed land. Indeed, s. 6.3.6 is express in its expectation that salvaged subsoil be replaced "in the reclaimed profile of the land". The imposition of a requirement for authorization by the Director prior to substituting suitable soil for subsoil in s. 6.3.7 is a further indication of an expectation that, absent such authorization, the original soil should be returned to the disturbed site.

[40] It is therefore difficult to see how TransAlta's actions otherwise could be considered to amount to "carrying out its soils management plan" as the SRB concluded in the decision under review. There is nothing in the evidence or record to suggest that there was something else in the License or soils management plan that would justify or support TransAlta's impugned actions.

[41] Had I been required to arrive at a decision on this issue I would have found that the SRB's decision on this issue was unreasonable. That alone would not have justified granting an order of judicial review, however, in light of my following conclusion that the Cymbaluks have not yet, and may never, suffer damages as a result of TransAlta acting in excess of its rights under the ROE.

(d) *concluding that the request for additional compensation is premature*?

[42] Had it been necessary to answer this question and, therefore, conduct a standard of review analysis I would have concluded that standard of review is one of correctness and that the decision of the SRB is correct. The SRB concluded that the landowner's request for a review was premature. It observed that any damages resulting from the mining operation on their reversionary interest in the lands cannot be determined and valued until the mining has been completed and the land reclaimed. There is nothing to indicate that this is not correct. To consider otherwise is speculation at best.

[43] I would therefore have declined judicial review as the Applicants have not as yet suffered any loss as a result of TransAlta acting in excess of the powers given to it under the ROE. If TransAlta restores their lands as it is required to do by 2021 they will not suffer any losses. If it does not they may then apply for additional compensation pursuant to the provisions of s. 30 of the *SRA*.

Conclusion:

[44] This application for judicial review is dismissed. Costs may be spoken to, if necessary.

Heard on the 22nd day of April 2009.
Dated at the City of Edmonton, Alberta this 30th day of April 2009.

M.B. Bielby
J.C.Q.B.A.

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