Bengston v. Alberta (Natural Resources Conservation Board), 2003 ABCA 173

Date: 20030529
Docket: 0303-0014-AC

IN THE COURT OF APPEAL OF ALBERTA

REASONS FOR DECISION OF
THE HONOURABLE MADAM JUSTICE RUSSELL

IN THE MATTER OF PART 2 AND SECTION 27 OF THE *AGRICULTURAL OPERATION PRACTICES ACT*, R.S.A. 2000, C. A-7, AS AMENDED;

AND IN THE MATTER OF THE DECISION OF THE NATURAL RESOURCES CONSERVATION BOARD DATED DECEMBER 20, 2002.

BETWEEN:

GARNET R. BENGSTON, BRUCE A. BENGSTON, LORI E. FIPKE, LAWRENCE H. FIPKE, CHRISTOPHER N. ROSSITER, ERNEST L. MICIAK, ROCKYLANE C. HORNUNG, GERALDINE M. CHRISTMAN, ARNOLD R. GREENWOOD, CARIANN E. DAVISON, ROBERT E. MULLER, STAN J. CARLSON, CLIFFORD H. GRAVILLE, THE SOCIETY FOR THE PRESERVATION OF MUSKEG CREEK

Applicants

- and -

THE NATURAL RESOURCES CONSERVATION BOARD

Respondent

- and -

JAN VAN HAAREN

Not a Party to the Appeal

- and -

THE COUNTY OF WETASKIWIN

Not a Party to the Appeal

APPLICATION FOR LEAVE TO APPEAL

COUNSEL:

N.A. JEWELL
For the Applicants

W.Y. KENNEDY
For the Respondent

T.D. MARRIOTT
For The County of Wetaskiwin, Not a Party to the Appeal (no appearance)

Jan van Haaren, Not a Party to the Appeal (no appearance)

REASONS FOR DECISION OF
THE HONOURABLE MADAM JUSTICE RUSSELL

[1] In a decision dated December 20, 2002, the Natural Resources Conservation Board (the "Board") denied a request of the County of Wetaskiwin (the "County") to review a decision granting Jan van Haaren ("van Haaren") a registration to develop a confined feeding operation ("CFO") involving a 240 sow farrow-to-finish facility. Neither the County nor van Haaren are parties to this application. Rather, this is an application by owners of properties in the vicinity of the proposed facility for leave to appeal the Board's decision, even though none of them were parties in the proceedings before the Board.

[2] The applicant Ernest L. Miciak ("Miciak") deposes that the proposed development will adversely affect the operation of a commercial retreat and campground on his land which is within the prescribed minimum distance separation ("MDS") from the proposed CFO. The applicants Garnet R. Bengston, Bruce A. Bengston ("Bengston"), Lori E. Fipke ("Fipke"), Lawrence H. Fipke and Christopher R. Rossiter own land adjacent to the proposed facility but outside the MDS. The other applicants reside within two miles of the proposed site. All of the applicants are members of the Society for the Preservation of Muskeg Creek (the "Society"), which was incorporated on January 10, 2003 with objects to protect and preserve the watershed of a creek near the proposed site.

[3] The proposed grounds for appeal are that the Board erred in law or in jurisdiction in:

> (a) disregarding the County's notice that the registration would not comply with MDS requirements in Schedule 1 of the ***Standards and Administration Regulation***, Alta. Reg. 267/2001 (the *"Standards Regulation*");
>
> (b) granting registration even though van Haaren's application did not contain a nutrient management plan and determination of the land base as required by the ***Board Administrative Procedures Regulation***, Alta. Reg. 268/2001 (the "*Board Regulation*"); and
>
> (c) granting registration without requiring van Haaren to install a system of secondary containment of liquid manure in accordance with the *Standards Regulation*.

Background

[4] Miciak and his wife established the retreat on their property adjacent to the site in question in the summer of 2001. Miciak did not file an application for a permit to develop that

retreat until September 6, 2002, and submitted the requisite fee in the form of a post-dated cheque dated September 30, 2002.

[5] In June 2002 van Haaren first applied to the Board to register the CFO. That application was withdrawn and in substitution the first of a two-part application was filed with the Board on September 20, 2002. That document, which is entitled "Disclosure", states in part:

> … The Disclosure portion of the Application allows the applicant to register notice of their intent to submit an application to the NRCB as outlined in the Agricultural Operation Practices Act. The applicant will have up to six months from the date the Application Disclosure is received by the NRCB to file a completed application. Failure to meet this time line could render the applicant's Disclosure null and void. This Application Disclosure will serve the purpose of setting the date on which the minimum distance separation (MDS) is determined. …

[6] Although the Disclosure provides a "Legal Land Description Where Development Is To Be Located", it does not describe the proposed site of the development on the land in question. Nor does the form for the Disclosure require that detail. In a letter dated September 20, 2002, the Board's approval officer sent a copy of the Disclosure to the County and advised that September 20, 2002 was considered the date of receipt of the "application" and would be used to determine the MDS. The second part of van Haaren's application was filed on October 8, 2002 and was deemed complete by the approval officer on October 10, 2002. On October 28, 2002 the County sent a letter to the Board opposing van Haaren's application.

[7] On November 6, 2002 the County approved the Miciak application for a development permit and advised him that his application was complete as of September 30, 2002. While the County did not explain the rationale for selecting that date, I infer it was because the requisite fee was submitted on that date. The County also notified Miciak that the Board had received an application for a CFO and manure storage facility, and intended to use the date of September 20, 2002 to determine the MDS, which might affect Miciak's ability to develop his parcel in the future.

[8] On November 7, 2002 the County advised the Board that it had approved, or was in the process of approving, developments which could potentially affect the MDS requirements involving van Haaren's application. On November 8, 2002 the County again wrote to the Board advising that the Miciak application should be considered under category 2 of the *Standards Regulation* for the purpose of determining the MDS. That category would require an MDS of 666 metres, which would encompass the van Haaren property and potentially preclude the CFO.

[9] On November 18, 2002 the van Haaren application for registration to construct and operate the CFO was approved by the Board's approval officer, without requiring that he submit a nutrient management plan described in ss. 3(1)(i) and 4(4) of the *Board Regulation*. Nor did the approval officer or Board require that van Haaren install a secondary containment for liquid manure pursuant to s. 11(2) of the *Standards Regulation*.

[10] On November 28, 2002 the County applied to the Board to review the decision to approve the van Haaren registration. That application was denied on December 20, 2002. In its decision, the Board calculated and applied the MDS as of the date of September 20, 2002, when the first part of the van Haaren application was filed. It declined to consider any applications for residential development filed after that date, and noted that the Miciak application for a development permit was filed on September 30, 2002. Further, it held that the Fipke application for a development permit concerned construction of a residence outside the required MDS, and that the Bengston subdivision application could be satisfied by a requirement that the earthen manure facility be moved a couple of metres. Finally, it concluded that the land use designation must reflect the land use at the time the van Haaren application was filed, at which time the complete Miciak application had not been filed. While the Board acknowledged that a CFO may affect land use decisions, in its view it was not appropriate to characterize such effect as "sterilizing" further development of adjacent lands.

[11] The applicants maintain that the Board's legislative interpretation is not harmonious with the purpose of the legislation and fails to provide certainty for either the producer or the rural community.

Test for Leave

[12] Section 27 of the ***Agricultural Operations Practices Act***, R.S.A. 2000, c. A-7 (the "AOPA") provides:

> 27(1) Subject to subsection (3), an appeal lies from a decision of the Board under section 25 to the Court of Appeal only on a question of jurisdiction or on a question of law.
> (2) An application for leave to appeal pursuant to subsection (1) must be filed and served within 30 days after the decision of the Board is made.
> (3) Leave to appeal must be obtained from a judge of the Court of Appeal within one month after the application for leave being filed and served under subsection (2).

[13] The AOPA was substantially amended by the *Agricultural Operation Practices Amendment Act*, S.A. 2001, c. 16, at which time the section permitting appeals was added. There are as yet no reported cases concerning the test for leave under it. However, its leave

provisions are similar to those relating to decisions of the Energy and Utilities Board under s. 26 of the ***Alberta Energy and Utilities Board Act***, R.S.A. 2000, c. A-17. The test for leave to appeal under that Act "is whether, having regard to the standard of review, the issues engaged raise serious arguable points of law … To determine whether the test is satisfied, regard must be had to the merits of the appeal, but the test does not require an ultimate determination of the merits": ***Atco Electric Ltd. v. Alberta (Energy and Utilities Board)***, 2002 ABCA 245 at paras. 6 and 7.

[14] Given the similarity of the legislative schemes, I will apply that same test in this case. The determination of whether there are serious arguable points of law will be governed by the merits of the appeal, bearing in mind the curial deference that might be shown if leave is granted, having regard to the legislative purpose, nature of the problem, and expertise of the Board. For the purpose of this application, I assume that the decision of the Board relating to what I consider an interpretation of its governing legislation will be measured on the standard of reasonableness: ***Nycan Energy Corp. v. Alberta Energy and Utilities Board*** (2001), 277 A.R. 391 at 394, 2001 ABCA 31 at para. 4.

Standing

[15] Section 21(1) of AOPA requires notification of affected municipalities of applications for registration, and s. 21(2) provides:

> 21(2) The only directly affected parties of an application under subsection (1) are the applicant and the municipalities that are affected persons.

Sections 19 and 20 of the Act, which govern applications for approval, establish a scheme whereby any person may apply to be designated under that section as a directly affected party. However, ss. 21 and 22, which govern applications for registration, do not invoke a similar scheme.

[16] The distinction between applications for approval and for registration is wholly related to the number of animals of particular categories of livestock that will be allowed in a confined feeding operation. Those numbers are governed by Schedule 2 of the ***Agricultural Operations, Part 2 Matters Regulation***, Alta. Reg. 257/2001.

[17] The rationale for omitting a scheme whereby persons could be designated as directly affected persons with respect to applications for registration is apparently based on the supposition that smaller operations will not have the same impact on neighbours as larger operations. However, counsel for the Board fairly conceded that the demarcation, in terms of prescribing the number of animals to be involved in an operation before anyone may apply to be designated as a person directly affected by that operation, was entirely arbitrary.

[18] As van Haaren's application for registration is related to a smaller operation, the Board argues that the only parties to the Board's decision are van Haaren and the County, and consequently they are the only parties with *locus standi* to seek leave to appeal. Put simply, if the legislation does not allow the applicants to participate directly in the Board's registration application process, they should not be permitted to participate in an appeal.

[19] The applicants submit that they qualify as "aggrieved parties" under the common law test. They cite the decision of ***Civil Service Assn. of Alberta v. Farran*** (1976), 68 D.L.R. (3d) 338 at 341, [1976] A.J. No. 357 at para. 13 and 15 (QL) (Alta. S.C.A.D.) ("***Farran***"), where persons aggrieved were noted to be those who "have a peculiar grievance of their own beyond some grievance suffered by them in common with the rest of the public" or "who have a real interest in the decision". Here, Miciak claims to be aggrieved because his business will be adversely affected if the CFO is allowed in contravention of the proper MDS. Other applicants are said to be aggrieved because they rely on a creek in the vicinity for recreation purposes, which may be contaminated due to its proximity to the CFO.

[20] However, the Board notes that in ***Farran***, both Sinclair and Haddad JJ.A. emphasized that they granted the applicant standing as an aggrieved party only because of an allegation of bias, which provided it with a special interest not shared by the general public. In this case, with the exception of Miciak, there is nothing unique in the circumstances, other than proximity, to establish a comparable special interest with respect to the applicants which would distinguish them from other members of the public.

[21] Although the applicant Society was established on January 10, 2003 to "protect and preserve, as far as possible, the watershed of Muskeg Creek" and presumably to assert the applicants' reliance on the creek for recreation and enjoyment, there was no evidence before the Board to that effect. The only evidence before me is a statement in Miciak's affidavit that van Haaren's application "will cause irreparable harm to my business and to Muskeg Creek".

[22] Absent evidence of environmental or other damage to the creek as a result of the CFO, and without evidence that the applicants have unique or exclusive access to the creek which makes their grievance different from that shared by the rest of the public, I do not consider them to have standing as aggrieved parties on the basis of reduced enjoyment of the creek.

[23] All of the applicants assert alternatively that they have public interest standing on the basis that the issues are justiciable and serious, that they have a genuine interest in the case, and that there are no other means to address the Court: ***Urban Development Institute v. Rocky View (Municipal District No. 44)*** (2002), [2003] 2 W.W.R. 140 at 150, 2002 ABQB 651 at para. 33 ("***Urban Development Institute***"). They rely on ***Friends of the Old Man River Society v. Assn. of Professional Engineers*** (1997), 208 A.R. 28 at para. 69, 55 Alta. L.R. (3d) 373 at 401-2 (Q.B.), rev'd on other grounds (2001), 277 A.R. 378, 93 Alta. L.R. (3d) 27

(C.A.), leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 366 (QL), to support their position that a justiciable and serious issue arises when a statutory body acts in a way which may exceed its jurisdiction. They further argue that a matter is justiciable if "it has a sufficient legal component to warrant the intervention of the judicial branch": ***Reference Re Canada Assistance Plan (B.C.)***, [1991] 2 S.C.R. 525 at para. 26, 83 D.L.R. (4th) 297 at 310.

[24] The applicants claim that they have a genuine interest in the proceedings as citizens, that there are no better persons than themselves to bring the issues before the Court, and that the interpretation of the statute will have significant impact on rights of landowners throughout Alberta.

[25] In response, the Board argues that in ***Reese v. Alberta (Minister of Forestry, Lands and Wildlife)*** (1992), 123 A.R. 241, 85 Alta. L.R. (2d) 153 (Q.B.), McDonald J. found that the applicants had public interest standing primarily because there was no directly affected party. However, in this case, the County is an affected party that could challenge the Board's decision, but has not seen fit to do so. Further, the Board argues that although Kenny J. granted public interest standing to an umbrella group in ***Urban Development Institute****, supra,* she did so only because it represented parties who were directly affected by the outcome. Moreover, she held that the applicant had a genuine interest as a citizen in ascertaining the rights and obligation of the parties in the future. In the absence of any status of any of its members as directly affected parties, the Board argues that the applicant Society does not merit standing.

[26] In this case, the public's interest might be better represented by the County, which is a public body, than by private individuals. But while the County conveyed concerns of interested citizens to the Board during the initial application and request for review of the Board's decision, it expressly indicated that it did not share those concerns, and it has not chosen to be party to a further appeal.

[27] However, even assuming without deciding that the County is not better able to represent the public interest in these circumstances, it is necessary to consider whether the applicant Miciak has standing to challenge the Board's decision as an aggrieved party, and as such, represent the public interest. If so, it may not be necessary to grant standing to the other applicants on the basis that the matter could not otherwise be addressed.

[28] I agree that the position of Miciak is unique. Even though he had not obtained the necessary permit to do so, it is not disputed that he was already operating a commercial retreat on his land which could be adversely affected by the CFO. While he is not a "directly affected party" under s. 21(2) of the AOPA for the purpose of participating in an application for a registration before the Board, this does not preclude him from obtaining standing on an alternate basis for the purpose of judicial review: ***Alberta v. Canadian Wheat Board*** (1997),

[1998] 2 F.C. 156 at para. 26, 2 Admin. L.R. (3d) 187 at 197 (T.D.), aff'd (1998), 234 N.R. 74, 13 Admin. L.R. (3d) 4 (C.A.); ***Friends of the Island Inc. v. Canada (Minister of Public Works)***, [1993] 2 F.C. 229 at para. 80, 102 D.L.R. (4th) 696 at 736-7 (T.D.), varied on other grounds (1995), 191 N.R. 241, 131 D.L.R. (4th) 285 (F.C.A.), leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 80 (Q.L.). Given his special grievance as a result of his operation of a retreat in proximity to the CFO, I conclude that he has standing to seek leave to appeal the Board's decision.

[29] Further, because he shares the same concerns as the other applicants, in addition to his own special concerns, I am satisfied that he is able to represent those other concerns as well. Thus, I deny the other applicants standing.

Proposed Grounds of Appeal

(a) Failing to ensure compliance with MDS requirements

[30] Section 3(1) of the *Standards Regulation, supra,* provides:

> 3(1) An approval officer and the Board must not issue an approval or registration for a confined feeding operation or an authorization for a manure storage facility unless the minimum distance separation for the operation or facility on the date the application is received by the Board complies with this section.

The interpretation of a bylaw is a question of law: ***500630 Alberta Ltd. v. Sandy Beach (Summer Village)*** (1996), 181 A.R. 154 at para. 10, 31 M.P.L.R. (2d) 306 at 309 (C.A.). So too is the interpretation of a Regulation.

[31] The applicants argue that the Board should have interpreted the phrase "the date the application is received by the board" within the *Standards Regulation* to mean that the MDS requirement was only triggered when the application was complete. However, the Regulation prescribes a scheme whereby the date on which the application is received by the Board is the date on which the relevant development must meet the required MDS. The intent of that section is to provide certainty.

[32] The impugned clause in this Regulation is not analogous to the clause at issue in ***Love v. Flagstaff (County of) Subdivision and Development Appeal Board*** (2002), 8 Alta. L.R. (4th) 52, 2002 ABCA 292. There, s. 6.1.7.3 of the Flagstaff County Land Use Bylaw No. 03/00 provided:

> 6.1.7.3 For the siting of a dwelling in close proximity to an intensive animal operation (existing or proposed), if a permitted use, must be located at least the minimum distance prescribed in the Code of Practice [emphasis added].

The issue in that case turned on the reference to the word "proposed", which governed the relevant date for deciding whether a residential permitted use was situated the required distance from an intensive livestock operation. The question was whether it was the date of filing the application or some later date.

[33] But in this case, the *Standards Regulation* governs and it is precise. Section 3(1) clearly prescribes the relevant date as"the date the application is received by the Board". The intent of that section is reflected in a"Guide to the Application and Approval Process" published by the Board, which states at page 3:

> … The date at which the MDS is established will be the day that the producer submits a complete Application Disclosure (Part 1 of the application form).

Moreover, s. 18(2) of the AOPA provides the approval officer with discretion to determine whether an application is complete. Here, the approval officer deemed that the van Haaren application was complete on September 20, 2002.

[34] Although the second part of the application requires the production of technical information including the design for the facility, it appears that none of that information is necessary to calculate the MDS. Instead, the MDS is calculated based on the information contained in the Disclosure document in accordance with a formula prescribed in Schedule 1 of the *Standards Regulation* and tables prescribing recommended MDS.

[35] Given the clarity of the Regulation with respect to the date and means for determining the MDS, and having regard to the standard of review, I am not persuaded that this issue raises a serious arguable point of law to be tried in the proposed appeal.

(b) Failure to require a nutrient management plan and determination of land base

[36] Section 3(1)(i) of the *Board Regulation, supra,* provides:

> 3(1) An application for a registration or an amendment of a registration must be filed with the Board and contain the following
>
> …
>
> (i) a nutrient management plan as described in section 4(4).

Section 4(4) provides:

> 4(4) An application for an authorization for a nutrient management plan must be filed with the Board and contain a detailed description of how the nutrient management plan will provide the equivalent or greater protection to the water and soil than would be achieved by compliance with sections 24 and 25 of the Standards and Administration Regulation under the Act.

Section 24 of the *Standards Regulation* prescribes manure application limits and s. 25 does not apply before January 1, 2005. Section 26 of the Regulation provides:

> 26 Despite sections 24 and 25, the Board may authorize a person to apply manure to land in accordance with a nutrient management plan proposed by the person if the Board is satisfied that following the nutrient management plan will provide the equivalent or greater protection to the water and the soil.

[37] The Board maintains that s. 26 is intended to allow an operator to obtain relief from the provisions of ss. 24 and 25 where there is a land and crop management regime that would accommodate the necessary environmental protection. The Board argues that s. 26 is not applicable here, as van Haaren's proposal met the requirements of s. 24.

[38] The decision of the approval officer indicates that as part of his application van Haaren did submit a proposal to spread manure. In his application, van Haaren opted to calculate the application of manure based on the acreage tables under Schedule 3 of the *Standards Regulation*, rather than on a nutrient management plan. The approval officer determined that the operation would require a land base of 340 acres and that van Haaren had secured a land base of 498 acres.

[39] As the Board did determine the nutrient management requirements, finding the required land base to be less than the secured land base, it cannot be seriously argued that the Board failed to correctly apply that criterion in evaluating the application.

(c) Failure to require a secondary manure catch basin

[40] Section 11(2) of the *Standards Regulation* provides:

> 11(2) In addition to the requirements of subsection (1), the owner or operator of an open liquid manure storage facility must provide a system of secondary containment of the liquid manure if there is a reasonable possibility that liquid manure can be discharged into a common body of water.

[41] The applicants contend that the approval officer failed to properly apply the "reasonable possibility" test and that the Board received ample evidence of the risk of contamination to Muskeg Creek, but insufficient evidence to the contrary. In response, the Board argues that if

the phrase "reasonable possibility" engages an issue of law, it is one which is impregnated with findings of fact.

[42] I note that as part of his application, van Haaren submitted a report setting out soil and groundwater conditions in relation to the proposed site. The company that conducted the geotechnical investigation indicated that separation distances for the barns and lagoon base from groundwater table and top-of-bedrock were acceptable. The approval officer concluded that secondary containment of liquid manure was not necessary, noting that the storage facility was 400 metres from Muskeg Creek and that the proposed storage was "mostly below existing grade".

[43] In granting the registration, the Board required van Haaren to adhere to construction recommendations made by the geotechnical company as well as other conditions relating to the construction of the concrete manure storage facility and liquid earthen storage facility. Additional requirements of the Board were the installation of monitoring wells to detect contaminants and periodic reporting of the results.

[44] In these circumstances, it cannot be seriously argued that the approval officer or Board neglected to review evidence or to consider the possibility of manure discharging into a common body of water. Accordingly, the failure to require a system of secondary containment of liquid manure does not raise a serious arguable question of law.

Conclusion

[45] In the result, although I would grant Miciak standing to appeal, I deny leave to appeal on each of the three grounds of appeal.

APPLICATION HEARD on MARCH 25 and MAY 6, 2003

DECISION FILED at EDMONTON, Alberta,
this 29th day of MAY, 2003

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RUSSELL J.A.