

Court of Queen's Bench of Alberta

Citation: Unland v Natural Resources Conservation Board, 2012 ABQB 501

Date: 20120801
Docket: 0901 01611
Registry: Calgary

Between:

Philip Unland, Maureen Unland, Archie Lee Anderson and Sally K. Anderson

Applicants

- and -

Natural Resources Conservation Board ('NRCB') and Rocky Butte Ranches Ltd.

Respondents

**Memorandum of Decision
of the
Honourable Mr. Justice R. J. Hall**

[1] This is a Judicial Review of a decision or decisions made by the Natural Resources Conservation Board in relation to the *Agricultural Operation Practices Act*, RSA 200, c. A-7 ("AOPA").

[2] AOPA came into force on January 2, 2002. Section 18.1(1) of the Act states:

18.1(1) If a confined feeding operation or manure storage facility

- (a) existed on January 1, 2002 with respect to which a licence, permit or other approval was not issued pursuant to the Public Health Act or with respect to which a development permit was not issued . . .

the owner of operator of the confined feeding operation or manure storage facility is deemed to have been issued an approval, registration or authorization under this Act.

[3] The term “confined feeding operations” is defined in section 1(b.6) of AOPA as follows:

“Confined feeding operation” means fenced or enclosed land or buildings where livestock are confined for the purpose of growing, sustaining, finishing or breeding by means other than grazing and any other building or structure directly related to that purpose but does not include residences, livestock seasonal feeding and bedding sites, equestrian stables, auction markets, race tracks or exhibition grounds.”

The term “seasonal feeding and bedding site” is defined in section 1(i) of AOPA as:

“Seasonal feeding and bedding site” means an overwintering site where livestock are fed and sheltered.

[4] The Applicants are adjacent property owners and residents to the ranch of the respondent Rocky Butte Ranches Ltd., who have lived there since well before January 1, 2002. They live on the escarpment of a broad coulee and the operation in question is located below their properties in the valley. It is their contention that no confined feeding operation existed in the valley below them until 2006. They contend that prior to 2006 the Respondent carried out a ranching operation in which cattle were grazed during the spring to fall. They contend that pregnant cows were brought into corrals in the winter and for calving in the spring and that the cows and calves would then be turned out to the pastures again come spring. In short, the Applicants contend that the operation in the valley below them was a seasonal feeding and bedding site associated with a cow/calf operation, and was not a confined feeding operation.

[5] The Applicants took their complaint to the NRCB, the body that regulates AOPA and confined feeding operations in Alberta. They complained that a confined feeding operation had been constructed adjacent to their properties with no notice to them and no apparent authorization.

[6] The NRCB issued a decision on October 15, 2007 that it had concluded that the confined feeding operation had been in existence on January 1, 2002. This followed an investigation that only took one day and consisted of one visit to the operation, a discussion with the operator and a review of an aerial Goggle photo. Nobody else was interviewed at this time, not even the complainants. No documents were reviewed other than the aerial photo.

[7] Not satisfied, the Applicants and their neighbours continued to complain and the NRCB undertook a review of their October 15, 2007 decision. On August 8, 2008 the NRCB issued a decision in which it confirmed its earlier decision. These decisions are now challenged by the Applicants in this Judicial Review.

[8] The Applicants say that the NRCB failed to conduct a neutral and thorough investigation, and instead sided with the Respondent. They say that information provided by them and their neighbours, as well as from two former employees of the Respondent, was completely disregarded by the NRCB. They say that the process followed by the NRCB was procedurally unfair, that the Board was biased, and that the resulting decisions were unreasonable.

[9] In this application I allowed not only the Respondent Rocky Butte Ranches Ltd. to make submissions, but also the Respondent the Natural Resources Conservation Board. See my Memorandum of Decision dated February 1, 2012.

[10] The Applicants have deposed that, starting in 2006, what had previously been a ranching operation or a “cow/calf” operation with seasonal confined feeding of cattle in the winter only, became a confined feeding operation or what they call a “feed lot”. In July 2006 the Respondent constructed approximately 2200 feet of concrete feeding pens. In July and August of 2007 the “foot print” of the pre-existing operation was expanded by the addition of four feeding pens to the west. In the spring and summer of 2007 the Applicants witnessed increased activity levels in the operation in the valley below their homes.

[11] The NRCB assigned the file initially to an NRCB Inspector, Ms. Hazelton. Ms. Hazelton confirmed that the operation, as it presently stood, was a confined feeding operation. She also explained that if a CFO was in existence as of January 1, 2002 it would be grandfathered. On October 1, 2007 the file was turned over by Ms. Hazelton to another NRCB Inspector, Mr. Tim Jespersen.

[12] On October 2, 2007 Mr. Jespersen commenced his investigation into the Applicants’ complaint. He attempted to contact one of the Applicants, Mr. Unland, by telephone but he was not at home. He left a message and then attended at the site to carry out a site inspection where he met with Mr. Locke, President and CEO of the Respondent Rocky Butte. Mr. Jespersen’s notes indicate that “based on the site inspection and in comparison with photos available by google earth it supports the foot print of this feed lot having existed prior to January 1, 2002”.

[13] Mr. Jespersen attempt to contact Mr. Unland but he was not at home. Mr. Jespersen’s file notes then indicate “file will be concluded at this time . . . No followup required at this point of time.”

[14] On October 15, 2007 Mr. Unland telephoned Mr. Jespersen seeking results of the investigation. Thereafter, on the same day, Mr. Jespersen sent Mr. Unland a letter that stated in part:

Please be advised that on October 2nd I attended the location of the Locke confined feeding operation and conducted a site assessment. After viewing the site and discussing

the issues with Charlie Locke, I am satisfied that there has been no unauthorized construction or expansion of this operation. . . .

From discussion with the MD of Rockyview, I am under the impression that there was not a permit issued to this operation prior to 2002 . . . As such, this grandfathered operation is now deemed to have received a permit with the capacity to hold the amount of animals it could have held on January 1, 2002.

[15] Mr. Jespersen's involvement continued and he set the capacity for the confined feeding operation at being 5,400 animals.

[16] However, after meeting with a feed lot specialist from Alberta Agriculture, Mr. Jespersen revised his estimate of the capacity to 3,142 animals.

[17] At the request of the Applicants and their neighbours, Mr. Jespersen met with Mr. Unland, several of his neighbours, the Reeve and two county councillors and the county's agricultural field man at the Unlands' home on January 17, 2008. At that meeting Mr. Unland and his neighbours advised Mr. Jespersen that they had all lived next to the Rocky Butte Ranches operation for many years and knew for a fact that there was no confined feeding operation in the valley prior to 2006. Mr. Unland advised Mr. Jespersen that, among other things, he had spoken with a past employee of Rocky Butte Ranches who had assured him that there was no feed lot in existence in January of 2002. Mr. Jespersen justified his decision by referring to a google earth aerial photo dated May 14, 2002 which he maintained confirmed the existence of the confined feed lot operation in 2002. I pause to say that the aerial photograph appears to be far from conclusive on the point.

[18] As a result of this meeting, Mr. Jespersen became concerned, not that there had been a confined feeding operation on the location on January 1 2002, but there had been an unauthorized addition to its footprint in 2006. He became convinced that Rocky Butte Ranches had expanded the footprint without permits or authorization. On January 31, 2008 Mr. Jespersen attended at the confined feeding operation to discuss with Mr. Locke the issue of the unauthorized pens constructed on the west end of the site. Thereafter he determined that the capacity of the grandfathered confined feeding operation be reduced to 2,967 head. He advised Rocky Butte of that decision on February 1, 2008. In his file notes for that day he noted that he believed the concerns of the Applicants "had been fully addressed" and therefore his file "concluded at this point in time".

[19] However, discussions continued between Mr. Jespersen and the Applicants. On January 29, 2008 some of the Applicants submitted a "Request for a Board Review" of Mr. Jespersen's October 15, 2007 decision. On February 5, 2008, however, the manager of board reviews for the NRCB wrote a letter to one of the Applicants, Mr. Anderson, stating:

Essentially, your request relates to the operation's grandfathered status, for which there is no reviewable decision for the Board to consider. Although your submission is filed on a Request for Board Review form, in the absence of a reviewable decision, I will not be providing your request to the Board.

[20] Notwithstanding that position taken on behalf of the Board, the Board continued to be engaged in discussions with the Applicants. On February 25, 2008 Mr. Anderson forwarded to counsel for the Board a letter from a Mr. Pete Ottens, who was employed by Mr. Locke at the site in question from 1998 to 2004. In that letter Mr. Ottens stated:

It is my belief that this operation was always a cow/calf operation. Until the fall of 1998 when Charlie Locke purchased a few hundred 3-400WT grass calves (backgrounders) and kept them over at the Ramsey place for the winter . . . which is three miles east of the home ranch. Then in May 1999 trucked them to pasture, and sold them come fall.

We did this a couple more times during my employment there but kept the calves over at the home ranch. Other than the transition period after purchasing the calves, the calves were never confined and always put out on large plots of land (pasture) where they were fed a high roughage diet with the intent to put them out to grass in the spring, so the term grass calves.

To my knowledge the calves purchased were no heavier than 500 wt. We referred to them as dinks. To put calves on a high-energy diet for fattening, feedlots like to see them around that 800 wt. So that was our goal to get them to the desired weight as cheap as possible for the feedlots to purchase them.

The definition the NRCB describes for a confined feeding operation (CFO) in my opinion does not fall under the operation of Charlie Locke. All cattle were housed at the home ranch for winter feeding only. . . . Charlie Locke has extensive grazing pastures and all cattle were put out to pasture in the spring of each year. That was Charlie Locke's sole intent for getting into the grass cattle business to utilize the pastures. We as employees did not refer to the ranch as a feedlot nor did we ever have the appropriate feed to take cattle to finish.

It is common ground between the Applicants and the Respondents that Mr. Jespersen did not contact Mr. Peter Ottens to discuss his letter or the assertions in it. The letter was not forwarded to Mr. Jespersen until April 18 2008.

[21] Mr. Jespersen did continue in his investigation of the matter. On March 10, 2008 he attended at the site and obtained records of transactions. He concluded that records from 1998 of Locke purchasing calves, purchases of cattle feed for 2001 and sales of cattle for 2000 indicated

that the operation was more than a cow/calf operation as reported by the complainants living in the area.

[22] On April 18, 2008 Mr. Jespersen attended at the site to meet with Mr. Locke. According to his file notes they “discussed the issues at hand and the problem I am encountering in verifying the footprint”. Mr. Jespersen reported to the NRCB that he had met with Mr. Locke and discussed the problem he was having in defending the original footprint. His note indicates he explained that he was comfortable in defending the original five smaller pens depicted in the photo, but the larger area created concerns as it appeared to have been used to manage his cow/calf operation that makes up part of his herd, and that the area was being used seasonally (over winter)”. He notes that Mr. Locke disagreed and committed to supplying additional records.

[23] On May 19, 2008 Peter and Pamela Clark complained about seeing a dead cow in one of the feedlot pens. Mr. Jespersen arranged to meet with them on May 22, 2008. His file notes indicate that he advised Mr. Clark that a decision (on the grandfathering) will be made after reviewing documents supplied by Locke, added with photos of the area to support his claim.

[24] Further correspondence took place between Mr. Jespersen and the Clarks’ respecting their complaints.

[25] Mr. Anderson had further discussion with Mr. Jespersen in May of 2008 about discussions Mr. Anderson had had with Rocky Butte’s former farm manager, Bob Gruenwald, wherein Mr. Gruenwald had provided information to Mr. Anderson relevant to the issue as to whether a confined feeding operation existed in January of 2002. Mr. Jespersen responded that he would speak with Mr. Gruenwald, and he did so on May 30, 2008.

[26] Mr. Jespersen’s file notes of that discussion indicated that he felt supported by Mr. Gruenwald in his conclusion. However, in the actual statement Mr. Jespersen took from Mr. Gruenwald, Mr. Gruenwald had indicated that the animals that were confined in the “U” within the site in question were cows waiting to calf. They were not described as being feeder cattle.

[27] A number of representations were made in writing to Mr. Jespersen over the next couple of months. In addition, Mr. Jespersen obtained further documentation from Mr. Locke in respect to the operations conducted in the 1999 - 2000 time frame. After receiving those documents Mr. Jespersen emailed Mr. Locke asking for any records available for 2001 that would “assist your position”. No further material was supplied by Mr. Locke.

[28] On June 18, 2008 Mr. Unland emailed Mr. Jespersen requesting that the final decision on the review of the grandfathering be provided to him in writing and include a complete and thorough explanation of the reasons for the decision. On June 23, 2008 an email from Mr. Jespersen indicated that he was reviewing the decision to grant the operation the grandfathered status as set out in the legislation. On July 10, 2008 Mr. Jespersen indicated in a letter to Mrs.

Locke that the decision to confirm, rescind or vary the previous decision to grandfather the feedlot would be made by the NRCB's CEO Peter Woloshyn.

[29] On August 7, 2008 Mr. Jespersen's note to file states "Lengthy discussion held with CEO about the final decision regarding the review of the grandfathering status. It has been agreed that this will be confirmed as a grandfathered CFO with the capacity of 2,967 head."

[30] On August 8, 2008 the decision of the NRCB was set out by Mr. Jespersen as follows:

At the conclusion of this review, the NRCB is satisfied that on January 1, 2002 the site was being operated as a confined feeding operation, and confirms the earlier decision to consider the site a grandfathered confined feeding operation as defined by legislation.

[31] This decision was confirmed by Mr. Jespersen to Mr. Unland on August 11, 2008. Mr. Jespersen indicated that the review process was now complete.

[32] There follows further correspondence. One matter of note is an email on October 2, 2008 from Mr. Bob Gruenwald to Mr. Jespersen in which he stated:

I was invited for coffee on September 22nd with Lee Anderson and Phil Unland. We talked about the operation I ran for Mr. Locke over the years and they showed me the information Phil had gotten from your files about Locke's feedlot.

I read the statement I gave you and your May 30 note about that in your files. I said that the U held pregnant cows waiting to calf not backgrounders or feeders as you state. Is this deliberate on your part or an honest mistake?

[33] Mr. Jespersen and Mr. Gruenwald spoke the evening of October 2, 2008, following which Mr. Jespersen sent an email to Mr. Gruenwald that stated in part:

As promised during our conversation late yesterday, I am sending you an update as to what you are prepared to say regarding the operation of the Charlie Locke feedlot.

You will confirm for me that cow/calves, pregnant cows, unbred cows and feeders were confined in pens as this site. You advised that the feeders were only in the pens for a short period of time after purchase . . . for vaccination etc. . . . and this time frame can be between three to seven days in length. You advised this practice occurred only during the calving season normally in the February to April time frames, with the feeders being in the 250 to 500 lb. Range. You have clarified that the "U" was used only for calving and that the perimeter was initially a barbed wire fence with a two strand electric fence used on the inside of the "U" to keep the cattle off the feeding fence.

[34] After they received the August 2008 compliance decision Mr. Unland and Mr. Anderson requested a meeting with the NRCB, and a meeting was scheduled for October 9, 2008.

[35] On October 6, 2008 Mr. Woloshyn emailed Mr. Anderson and Mr. Unland with regard to that upcoming meeting. That email indicated that from the NRCB's perspective "we have no reason to alter or change the decision made by Inspector Tim Mr. Jespersen." He goes on to state:

I would like to summarize the basis of our determination as follows:

1. Written, signed statement from Mr. Locke describing the activity of the site in question.
2. Signed declaration by Mr. Locke to Revenue Canada in 1999 stating the activity of Locke operations as both cow/calf and feed lot.
3. Aerial images showing intensive feeding activity and infrastructure, as of 2002.
4. Purchase and sales records for feeder animals and feed supplies dating back to pre-2002.

[36] The Applicants commenced this Judicial Review application on February 10, 2009. The Applicants maintain that the decision of Mr. Jespersen, and therefore the NRCB, is incorrect, i.e. that there was no confined feeding operation on the site as of January 1, 2002. Alternatively, the Applicants complain that the investigation conducted by Mr. Jespersen was either unfairly done or biased.

[37] Both Respondents maintain that the investigation conducted by Mr. Jespersen was reasonable, neutral, and complete. For various reasons, which I will discuss later, they maintain that the Court should not interfere with the decision reached.

Standard of Review

1. Limitation Argument

[38] This is not an appeal matter. The issue put forth is to be determined by the Court.

2. Procedural Fairness

[39] The matter that has been determined by the Board, that the site in issue constituted a Confined Feeding Operation as defined by AOPA, is a question of law as it relates to applying the definition, and a question of fact as to what existed at the site on January 1, 2002. Some deference should be afforded to the Board and its inspectors as to what constitutes a CFO, as they have expertise in that area, and where grey areas exist their expertise is called into play.

[40] The main question in this appeal is whether the investigation met the requirements of procedural fairness to the competing interests of the applicant and the respondent Rocky Butte Ranches. In *Alberta (Information and Privacy Commissioner) v. Alberta (Freedom of Information and Protection of Privacy Act Adjudication)*, 2011 ABCA 36 at para. 38, the Alberta Court of Appeal stated:

. . . The standard of review for procedural fairness issues is whether the proceedings complained about meet the level of fairness required by law. In assessing fairness, both errors of fact and errors of law may contribute to an unfair hearing.

[41] I take that to mean that when this court looks at issues of Procedural fairness, it is not looking at whether the decision itself was correct or reasonable; it is looking to determine whether procedural fairness had, in fact, occurred.

3. Prosecutorial Privilege

[42] The Board has not decided the issue of prosecutorial privilege, so with respect to this issue I am not reviewing a Board decision as to whether prosecutorial privilege should govern, I am considering that issue *de novo*. As such I need not be concerned about the standard of review.

4. Review of the Decision Itself

[43] If the court gets to the point of reviewing the decision itself, the court is here looking at an issue of mixed fact and law. As to the interpretation of “Confined Feeding Operation”, that is a question of law, and the standard of review is correctness. However, with respect to the determination of the facts applicable to the issue, the standard of review is reasonableness, with deference to the expertise of the Board

Is the Judicial Review Application Limitations Barred?

[44] Rule 3.15 of the *Alberta Rules of Court* provide:

- (2) Subject to Rule 3.16, an originating application for judicial review to set aside a decision or act of a person or body must be filed and served within six months after the date of the decision or act

[45] The Respondent Rocky Butte argues that the Originating Notice sought relief in respect of “the Decision”. It notes that the initial decision was provided to the Applicants by email on October 15, 2007, and the Originating Notice was filed on February 10, 2009. It argues, therefore, that the application is barred by virtue of not complying with the six month requirements in Rule 3.15(2). It argues that, even if the Court should overturn the subsequent decision communicated on August 11, 2008, the initial decision would still stand.

[46] I disagree. The initial decision of October 15, 2007 was almost immediately reviewed and reconsidered by the Board and its Inspector, at the urging of the Applicants. Had no further steps been taken by the Board to review that decision, this application would have to be made within six months of the decision. However, as the Board continued to gather evidence to inform itself in respect of the issue and to communicate with the Applicants, the matter clearly was not considered complete by the Board or its Inspector Mr. Jespersen. The Inspector continued to conduct his investigation, to the knowledge of the Respondent Rocky Butte, and to the knowledge of the Applicants. The decision did not become final until communicated on August 11, 2008. The Application was brought within six months thereof. Accordingly, the limitations argument put forth by the Respondents fails.

Is the Decision a Proper Subject of Judicial Review/Prosecutorial Discretion

[47] The Respondents note that the AOPA does not provide a mechanism through which the Board may review an NRCB Inspector's decision to refrain from issuing an enforcement order. Both the NRCB and Rocky Butte Ranches Ltd. argue that the decision of the Inspector is akin to a decision of a prosecutor. They argue that, just as the court grants prosecutors a prosecutorial discretion in deciding whether to require or forego enforcement, so also should such discretion be granted here to the Board's Inspector. They reference the decisions of the Alberta Court of Appeal in *Friends of the Old Man River Society v APEGGA* (2001) ABCA 107, and in *Mitten v College of Alberta Psychologists*, 2010 ABCA 195. They reference the Alberta Court of Appeal decision in *R v Nixon*, 2009 ABCA 269, para. 41:

Exercises of prosecutorial discretion are only susceptible to review in cases of "flagrant impropriety", for example, where there is proof of misconduct bordering on corruption, violation of the law, or bias against or for a particular individual or offence. ... The threshold for review of prosecutorial expression is very high, and cases of this nature will be extremely rare.

[48] In *Friends of the Old Man River*, supra, the Respondent association had determined that it would terminate an investigation into conduct of certain of its members when insufficient evidence of unprofessional conduct or unskilled practice existed. In such a situation the Court held that discretion exercised by the APEGGA council was analogous to prosecutorial discretion in the criminal process.

[49] *Mitten*, supra, was a case where a complaint was filed against a Psychologist and the Registrar of the College decided not to pursue the complaint, finding insufficient evidence of professional misconduct or unskilled practice. The Court noted its decision in the *Friends of the Old Man River*, that the Appellant may not seek judicial review of the underlying investigation, since the decision on whether to proceed with the complaint is, at that stage, akin to the exercise of prosecutorial discretion.

[50] I do not find these cases to be persuasive here. The decision to be made by the Board, through its Inspector in this case, was not whether to proceed with a prosecution or a disciplinary hearing, but rather to decide a matter of fact: did a confined feeding operation exist at the site on January 1, 2002? The complainants were not seeking to have Rocky Butte Ranches censored or prosecuted for breaching the Act. The complainants were seeking a determination as to whether a CFO existed on the date in issue. Issues of prosecutorial discretion are not attracted in such a determination. Accordingly, this argument by the Respondents fails.

Procedural Fairness

[51] The true question before me is whether the review process was procedurally fair. The Applicants refer me to *PSAC v Canada (Treasury Board)* 2005 FC 1297 at para. 35, where the Federal Court of Canada stated:

Of course, all these requirements are premised on the fact that the evidence collected by the investigator, as well as his report, provide the Commission with the information to perform its screening function pursuant to section 44 of the CHRC. If the decision of Commission was to be based on an inadequate investigation, that decision could not be considered reasonable since its evidentiary foundation would be defective.

[52] The Court goes on to quote from *Slattery v Canada (Human Rights Commission)* 1994 2 FC 574 at 598:

In order for a fair basis to exist for the CHRC to evaluate whether a tribunal should be appointed pursuant to paragraph 44(3)(a) of the Act, I believe that the investigation conducted prior to this decision must satisfy at least two conditions: neutrality and thoroughness. (underlining added)

[53] I accept this as a correct statement of the law as it pertains to this case.

[54] The Applicants have spent significant effort in attempting to persuade me that there is a lack of neutrality exhibited by Mr. Jespersen. They argue that a perception of bias has been demonstrated.

[55] Having considered all of their submissions and the evidence upon which they rely, I am not prepared to make such a finding. The fact that Mr. Jespersen agreed with Mr. Locke's position does not make Mr. Jespersen biased.

[56] What is apparent to me, however, is that Mr. Jespersen made a very quick decision based on an inadequate investigation at the outset. Thereafter, his further investigation and fact gathering seems to have been directed toward justifying that original decision.

[57] While bias has not been proven to my satisfaction, I am convinced that Mr. Jespersen was intent on justifying his original decision, rather than conducting a thorough investigation. Therefore his neutrality appears to have been affected.

[58] It is clear that Mr. Jespersen did have some evidence that was supportive of his decision. He had the google earth photo of April 14, 2002 that demonstrated that cattle were confined on site at that time, but which did not otherwise demonstrate a feeding operation. He had information provided by the Lockes' to the Canada Revenue Agency where the Lockes had represented that their operation in 2000 was in the nature of a CFO. He had a number of invoices for the purchase of finishing cattle and feed and he had the assertions by Mr. Locke that Rocky Butte Ranches had been conducting a confined feedlot operation back in January of 2002.

[59] On the other hand, Mr. Jespersen had information provided by the Applicants and many neighbours that there was no confined feedlot operation being conducted, but rather that the confinement of the animals was restricted to cow/calf operations and to a "seasonal feeding and bedding site".

[60] The representations of Mr. Locke, and of the Applicants, could well be expected to be self-serving and not necessarily determinative of the issue.

[61] What troubles the Court is that two former employees of Rocky Butte Ranches provided information to Mr. Jespersen that a confined feeding operation was not being conducted at the site in January of 2002. Mr. Jespersen's interpretation of the statements of Mr. Gruenwald seem to be inconsistent with what in fact Mr. Gruenwald had communicated. Mr. Ottens' representations that there was no confined feeding operation at the site seemed to have been completely ignored by Mr. Jespersen. No effort was ever made by Mr. Jespersen to interview Mr. Ottens, even though Mr. Ottens was an employee of Rocky Butte Ranches at the relevant time, and would have direct personal evidence to provide.

[62] In that circumstance, I can make no other determination but that the investigation was inadequate and not thorough. The decision made by Mr. Jespersen and endorsed by the Board cannot therefore be upheld by the Court, and the Court orders that that decision is vacated.

[63] The Court is not in a position to determine whether in fact a confined feedlot operation existed at the relevant site on January 1, 2002. The matter is therefore remitted to the NRCB for further proper and thorough investigation, followed by a written, supported decision respecting the issue.

[64] I have found the allegations of bias against Mr. Jespersen to be unproven. Nevertheless, it might reasonable be perceived by the Applicants that Mr. Jespersen would be intent upon justifying his original decision were the matter to be returned to him for determination. Accordingly the Court directs that the investigation be conducted by an Inspector other than Mr. Jespersen.

[65] The Applicants will have costs of this application in the amount of \$5,000 plus reasonable disbursements. Those costs are awarded against the Respondent National Resources Conservation Board only since it is the Board's actions and decisions which I have vacated.

Heard on the 5th day of November, 2011.

Dated at the City of Calgary, Alberta this 1st day of August, 2012.

R. J. Hall
J.C.Q.B.A.

Appearances:

Gavin S. Fitch of McLennan Ross LLP
for the Applicants

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for the Respondent Natural Resources Conservation Board

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for the Respondent Rocky Butte Ranches Ltd.