In the Court of Appeal of Alberta

Citation: Sarg Oils Ltd. v. Environmental Appeal Board, 2007 ABCA 215

Date: 20070629
Docket: 0501-0291-AC
0501-0292-AC
Registry: Calgary

Between: **Docket: 0501-0291-AC**

Sarg Oils Ltd. and Sergius Mankow

Respondents (Applicants)

- and -

The Minister of Environmental Protection,
The Attorney General for the Province of Alberta

Appellants (Respondents)

- and -

Environmental Appeal Board

Respondent (Respondent)

- and -

The Director of Land Reclamation

Not a Party to the Appeal (Respondent)

Between: **Docket: 0501-0292-AC**

Sarg Oils Ltd. and Sergius Mankow

Respondents (Applicants)

- and -

Environmental Appeal Board, The Director of Land Reclamation,
The Minister of Environment and The Attorney General for the Province of Alberta

Appellants (Respondents)

The Court:

The Honourable Mr. Justice Peter Costigan
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Douglas Sirrs

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice J.H. Langston
Dated the 18th day of July, 2005
Filed on the 20th day of September, 2005
(2005 ABQB 553, Docket: 9706-00570)

Memorandum of Judgment

The Court:

[1] Sarg Oils owned a number of oil wells that were at the end of their useful life. In 1988 Sarg Oils sold the oil wells to Sundial Oil & Gas Ltd. Unknown to Sarg Oils, Sundial intended to immediately transfer the oil wells to 3D Enterprises.

[2] Although Sundial paid the purchase price to Sarg Oils, the well licenses were never transferred to Sundial. This was apparently because the Energy Resources Conservation Board was not satisfied that 3D was a suitable licensee. Sarg Oils realized quite early that the licenses had not been transferred, but it alleges it did not know why.

[3] Under the statutory regime then in place in Alberta, the ERCB was responsible for the abandonment of wells, and once the wells were abandoned Alberta Environment was responsible for ensuring that reclamation of the site took place.

[4] Sarg Oils has throughout been resisting the suggestion that it has any responsibility for the wells, or any obligation to clean them up. It takes the view that it transferred the wells to Sundial, and that Sundial should be the one responsible. In the alternative, it suggests that responsibility for the wells should at least be shared by Sundial, and a number of predecessors in title to Sarg Oils who actually operated the wells over the years.

[5] It is undisputed that Sarg Oils did become the official licensees of the wells in question. The well licenses were properly transferred from the predecessors in title to Sarg Oils. It is also undisputed that the well licenses were never transferred from Sarg Oils to Sundial. Sarg Oils remained the official licensee of the wells at all times. As far as the ERCB was concerned, Sarg Oils was therefore responsible for the wells.

[6] In 1991 the ERCB issued orders to Sarg Oils to abandon the wells. When Sarg Oils did not do so, the ERCB did so at its own expense. In October of 1994 the ERCB sued Sarg Oils for the cost of the cleanup, approximately $226,000. The ERCB eventually obtained judgment against Sarg Oils for the cost of the abandonment: ***Alberta (Energy Resources Conservation Board) v. Sarg Oils Ltd.***, 2002 ABCA 174, 5 Alta. L.R. (4th) 19, 312 A.R. 79, reversing ***Alberta (Energy Resources Conservation Board) v. Sarg Oils Ltd.***, 1998 ABQB 804, [2000] 1 W.W.R. 16, 67 Alta. L.R. (3d) 296, 236 A.R. 298.

[7] In September of 1994 Alberta Environment issued Environmental Protection Orders against Sarg Oils as "operator" of the wells, ordering it to clean up the well sites. Sarg Oils appealed the Environmental Protection Orders to the Environmental Appeal Board. Appeals to the Environmental

Appeal Board are provided for in Part 3 of the *Environmental Protection and Enhancement Act*, S.A. 1992, Chapter E 13.3. The statute establishes the Board, and identifies the persons who have a right to appeal. The Board is then granted the usual powers and authorities given to an appellate tribunal, although its decisions are only recommendations to the Minister of the Environment. The Board recommended dismissal of the appeal (Appeal No. 94-011). The Minister accepted that recommendation. Sarg Oils applied for judicial review of both decisions. The chambers judge quashed both of the decisions and ordered a new hearing: ***Sarg Oils Ltd. v. Environmental Appeal Board***, 2005 ABQB 553, 16 C.E.L.R. (3d) 213. The Minister of the Environment and the Environmental Appeal Board now appeal that decision.

[8] The Board identified and resolved the following issues on the appeal before it:

(a) Were Sarg Oils and Mankow operators under section 119 of the *Act* when the EPOs for the sixteen properties were issued in 1994? The Board concluded that Sarg Oils and Mankow were operators because they had engaged in specified activities on the sites, even though in the case of six sites the only activity was cutting weeds. This finding did not depend on the ruling by the ERCB that Sarg Oils was still the licensee of record.

(b) (i) If Sarg Oils and Mankow were operators did the Inspector use reasonable judgment in deciding to issue the EPOs to them jointly? The Board concluded that Mankow was the agent of Sarg Oils, and so was himself an operator, although the Board found this result to be oppressive.

(ii) Was the Inspector correct and reasonable in not naming previous operators in the EPOs? The Board accepted the evidence that there was a well accepted industry practice that the last operator was responsible for reclamation, and that a departure from that rule would cause "chaos in the industry, logjams, and extensive litigation". The allocation of reclamation costs among a series of operators over several decades of operations would be very difficult. Further, only the last operator has any right to enter the land, and therefore any legal ability to do the reclamation.

(c) Should the Board, in reaching a decision, place any weight on the failure to effect a transfer of the well licenses from Sarg Oils to Sundial when the properties were sold to the latter? The Board concluded that it is the responsibility of the parties to ensure that transfers are registered, having regard to the legal duties that flow from ownership.

The Board affirmed the decision to issue the EPOs, finding that holding the respondents responsible for reclamation of the sites was consistent with the objective of the *Act* to protect the environment.

[9] The exact basis upon which the chambers judge set aside the decision of the Environmental Appeal Board is not clear. The chambers judge concluded (at para. 34) that the standard of review is patent unreasonableness. He then concluded that the respondents "did everything in their power to divest themselves of all the interests in these well sites", and that "Mr. Mankow believed that he had sold his interests and acted in accordance with that belief". The Board had however concluded that the respondents had not been diligent in closing the sale transaction and monitoring the transfer of the licenses. There was evidence to support the conclusion of the Board, and its decision cannot be said to be irrational, and therefore patently unreasonable.

[10] It was not patently unreasonable for the Board to conclude that Sarg Oils was responsible for clean-up of the well sites, even if there might have been others who were concurrently responsible. While the chambers judge identified the standard of review as patent unreasonableness, his conclusion that the decision "does not accord with any sense of equity" suggests he reviewed the decision on its merits for correctness.

[11] It is suggested the Board fettered its discretion by inflexibly applying the policy that the last owner should be liable for reclamation. The Board, however, expressly turned its mind to whether there were "extenuating circumstances" in this case.

[12] The chambers judge hinted that counsel representing the respondents before the Environmental Appeal Board was not up to the task, and left "a number of unexplored issues which call for explanations." The main issue he had in mind was the ERCB's handling of the licence transfers. The chambers judge then found:

> [42] The Board, in my view, breached the rules of natural justice by failing to make adequate inquiries in relation to the applicant's designation as licensees, in circumstances where there was clearly an issue to be investigated having regard to the potential consequences.

Based on this perceived "failure to make adequate inquiries", the chambers judge ordered a new hearing.

[13] The exact content of the duty of fairness varies depending on the nature of the decision and the decision maker, the importance of the decision to the parties, the legitimate expectations of the parties, the tribunal's own choice of procedures, and other relevant factors: ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817. The Board is an expert appellate

tribunal, established to decide polycentric fact and policy intensive issues about the protection of the environment. While its decisions are in form only recommendations to the Minister, they can have a significant effect on the rights of those before it. The Board recognized this, by affording the respondents a full *viva voce* hearing with the right to cross-examine and call witnesses. The chambers judge found that this procedure was not legally sufficient because of the failure of the Board to make independent inquiries about the transfers of the licenses.

[14] The argument that there was a breach of the rules of natural justice is unsustainable. Sarg Oils launched an appeal to the Environmental Appeal Board, and had the burden of proof: *Environmental Appeal Board Rules of Practice*, September 1994, Part K. At the appeal hearing a representative of the ERCB, Mr. John Nelson, was called at the insistence of the respondents. He was familiar with the circumstance involving the unsuccessful transfer of the Sarg Oils licenses to Sundial. The Board therefore had evidence before it about the circumstances of the failed transfers. It was open to the respondents to call additional evidence if they felt it advisable. The Board gave the respondents an opportunity to be heard, and to present their case, which is the essence of a fair procedure. The Board, sitting as an appellate tribunal, had no further obligation to go out and conduct independent investigations. Because the Board has powers to subpoena documents and witnesses does not mean it has a duty to do so on its own motion. The Board is entitled to assume that the appellant will bring forward all the necessary evidence and arguments, so that the Board can rule on the appeal. Here the chambers judge appears to have concluded that the Environmental Appeal Board should on its own motion have launched an inquiry into the way that the ERCB handled the transfers of the licenses. Alternatively, he appears to have contemplated an inquiry into the responsibility of Sundial and the predecessors in title for the environmental cleanup. The duty of fairness did not require those inquiries, which would have amounted to a collateral review of the ERCB decisions.

[15] The chambers judge also stated "Only a sophist would turn a blind eye to the fact that information came forth before Justice Lutz which may be relevant to the Applicants' case." This is a reference to the trial decision on the liability of the respondents for abandonment costs, which was eventually overturned by the Court of Appeal, *supra*. That decision set out in great detail the circumstances surrounding the failed attempts to transfer the licenses. This reference by the chambers judge is problematic for two reasons. First of all the decision of Lutz J was made approximately two years after the Board's decision. The Board's decision cannot be rendered unreasonable by referring to matters that were never put before it: ***Alberta Liquor Store Ass'n v. Alberta (Gaming and Liquor Commission)***, 2006 ABQB 904, [2007] 4 W.W.R. 131, 69 Alta. L.R. (4th) 98 at para. 43. More importantly, if there was relevant information that was put before Lutz J, it should have been brought forward before the Board by the respondents if they wanted to rely on it. It is not open to the respondents to attack the decision on the basis that the Board did not go out and seek that evidence for them.

[16] The reasons of the Board do not disclose any reviewable error. The appeal is allowed and the application for judicial review of the recommendation of the Board and the decision of the Minister is dismissed.

Appeal heard on June 15, 2007

Memorandum filed at Calgary, Alberta
this 29th day of June, 2007

Costigan J.A.

Slatter J.A.

authorized by Sirrs J.

Appearances:

R.M. Kruhlak
for the Appellants - The Minister of Environment and the Attorney General of Alberta

W. McDonald and J.W.A. Moore
for the Appellant - The Director of Land Reclamation

F.G.V. Marshall
for the Respondents - Sarg Oils Ltd. and Sergius Mankow

A.C.L. Sims, Q.C.
for the Respondent - Environmental Appeal Board