

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE C.M. CONRAD
THE HONOURABLE MADAM JUSTICE A.H. RUSSELL
THE HONOURABLE MR. JUSTICE A.B. SULATYCKY

BETWEEN:

CHARLIE CHALIFOUX

Respondent
(Applicant)

- and -

ENVIRONMENT APPEAL BOARD (ALBERTA)

Not a Party to the Appeal
(Respondent)

- and -

CHEM-SECURITY (ALBERTA) LTD.

Appellant
(Party Directly Affected)

APPEAL FROM THE HONOURABLE MR. JUSTICE W.E. WILSON

MEMORANDUM OF JUDGMENT

COUNSEL:

B. J. ROTH

For the Appellant

R. C. SECORD and K.E. BUSS

For the Respondent

A. C. L. SIMS, Q.C.

For the Environment Appeal Board

MEMORANDUM OF JUDGMENT

THE COURT:

[1] This is an appeal from an order quashing an interlocutory decision of the Environmental Appeal Board (the Board) on the grounds that the Board lost jurisdiction for its failure to provide procedural fairness or natural justice.

[2] We conclude that, the chambers judge made no reversible error and we dismiss the appeal.

Background

[3] Chem-Security (Alberta) Ltd. (Chem-Security) operates a hazardous waste plant, the Alberta Special Waste Treatment Centre (ASWTC) near the Town of Swan Hills, Alberta.

[4] Charlie Chalifoux is an elected Headman of the Swan River First Nation and was found by the Board to be representative of the aboriginal persons who hunt, fish, and trap in the Swan Hills, and to be directly affected by the operations of the ASWTC.

[5] In 1992, the Natural Resources Conservation Board issued a decision approving a major expansion of the ASWTC to burn PCBs and other hazardous waste. That approval was subsequently extended to include importation and disposal of PCB and other hazardous waste from outside of Alberta. In 1995 Chem-Security was issued a ten year approval by Alberta Environmental Protection (AEP) for its operation.

[6] In December 1995, the Lesser Slave Lake Indian Regional Council and others filed Notices of Objection (appeal) to the Director's decision to grant the operating approval. That appeal related to the terms, conditions, and requirements of the approval in its

entirety. In particular the grounds of appeal related to the alleged inadequate regulation and protection of the environment of the hazardous waste facility, identifying as potential problems the fugitive emissions of PCBs and other volatiles, emergency vent stack emissions and other sources of the release of chemicals into the environment. A preliminary hearing was held in which the Board determined that only the issues of PCB fugitive emissions and off- site discharge of surface water would be the subject of the appeal to the Board. An application for judicial review of the decision was dismissed and that dismissal was upheld by this court.

[7] A hearing was eventually scheduled for June and then adjourned to September at the request of the Respondent Chalifoux. On July 24, 1997 the Respondent applied to the Board for a reconsideration of its decision concerning the scope of the hearing. The application set out a brief summary of the facts and argument upon which he wished to rely. The application alleged that significant new evidence has been discovered since the preliminary determination of issues. It is clear that the application did not contain all of the detail of the newly discovered facts.

[8] On July 25, 1997 Chem-Security wrote to the Board and requested procedural direction from the Board as to how it intended to deal with the review application. On July 30, 1997 the Board wrote to AEP and Chem-Security inviting a response to the review and variance application.

[9] On August 1, 1997 Chem-Security and AEP filed their respective responses. Those responses did not touch upon the new evidence. Rather, they made submissions on how they wished the Board to deal with the new application of the Respondent. Without providing an opportunity to reply to those responses, or to expand upon his application (as it was obvious he intended), the Board by letter dated August 6, 1997 denied the review and variance application and confirmed that the hearing would be restricted to the two issues that it had identified in its earlier decision.

Judicial Review

[10] An application for judicial review was made to the Court of Queen's Bench. The chambers judge found that there was procedural unfairness. He refused to determine the

scope and procedure they should have followed, but he was satisfied that the way they did proceed was unfair in that he was not afforded an opportunity to reply to the submissions made by Chem-Security.

Grounds of Appeal

[11] The Appellant Chem-Security argues that the chambers judge erred as follows:

1. He erred in holding that the Respondent had not been allowed "an opportunity to put forth his case on the request that had been filed with the Board."
2. He erred in holding that it was unfair not to have given the Respondent an opportunity to reply to the submissions of AEP and Chem-Security.

Decision

[12] Decisions of the Board are given privative protection by s.92.2 of the **Environmental Protection and Enhancement Act S.A. 1992 Chapter E-13.3**. The standard of review varies, depending upon whether the impugned decision is within or beyond the tribunal's jurisdiction. The standard varies from that of correctness and to that of patent unreasonableness. At the reasonableness end of the spectrum are those cases where a tribunal protected by a true privative clause is deciding matters within their jurisdiction, and where there is no right of appeal. At the correctness end of the spectrum are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction or where there is a statutory right of appeal allowing for substitution of the tribunal's opinion and where the expertise of the Board is no greater than that of the reviewing tribunal. (See; *Pezim v. British Columbia (Superintendent of Brokers)* [1994] 2 S.C.R.557)

[13] The court takes a pragmatic and functional approach to determining what constitutes jurisdictional error. (See *Canadian Broadcasting Corporation v. Canada (Labour Relations Board)* [1995] 1 S.C.R. 157.

[14] When determining whether there has been unfairness or procedural failures going to natural justice it is necessary to examine the nature of the problem before the tribunal. The question is what amounts to procedural fairness or fair appearance in the circumstances, having regard to the legislative and decision making context.

[15] AEP argues that there is a contextual difference between making a decision in the first instance and a request to invoke a discretionary power to reconsider that same decision.

[16] However, it is important to understand the facts of this case. In this case the application for review relied on some extensive and allegedly compelling new information that had been discovered since the original decision. This was not merely a request to reconsider a previous decision on the basis of the record, but a request for reconsideration on the basis of new facts that appeared to confirm the potential dangers of the operations at ASWTC. Viewing the factual context, this administrative decision deals with toxic substances with potentially dangerous consequences, and is brought by the persons who could be subject to any such harm.


[17] When viewing the issue of fairness, it is significant to note that prior to the Board's request for a response, Chem-Security had written for advice as to how the Board intended to proceed with the application. There was no direct response to that request. Rather, the Board wrote to Chem-Security and AEP giving them an opportunity to comment on the application. The comments challenged the basis of the Respondent's application. The Respondent was never given an opportunity to reply to that fundamental challenge.


[18] The legislation requires the Board to follow the principles of natural justice. The Respondent was denied an opportunity to put forth his case on the request that had been filed with the Board or to reply to the submissions of Chem-Security and AEP before the decision was made. In our view, the chambers judge was correct in concluding that there

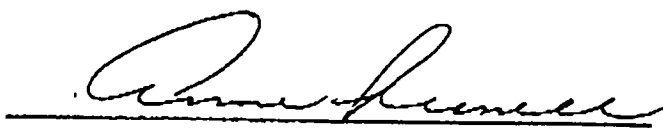
was unfairness in the circumstances of this case.

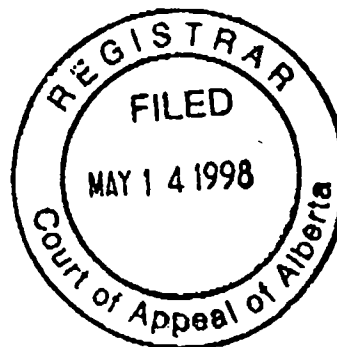
APPEAL HEARD ON MAY 8, 1998

JUDGMENT DATED at Edmonton, Alberta
this 14th Day of May
A.D. 1998

As AUTHORIZED  BY: Conrad, J.A.


Russell, J.A.

As AUTHORIZED  BY: Sulatycky, J.A.



IN THE COURT OF APPEAL OF ALBERTA

BETWEEN:

CHARLIE CHALIFOUX

Respondent
(Applicant)

- and -

ENVIRONMENT APPEAL BOARD (ALBERTA)

Not a Party to the Appeal
(Respondent)

- and -

CHEM-SECURITY (ALBERTA) LTD.

Appellant
(Party Directly Affected)

MEMORANDUM OF JUDGMENT OF THE COURT

