

Appeal #16947

IN THE COURT OF APPEAL OF ALBERTA

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THE COURT:

THE HONOURABLE MADAM JUSTICE PICARD  
THE HONOURABLE MADAM JUSTICE HUNT  
THE HONOURABLE MR. JUSTICE BERGER

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BETWEEN:

CHEM-SECURITY (ALBERTA) LTD

Appellant

- and -

THE LESSER SLAVE LAKE INDIAN REGIONAL COUNCIL  
and  
ENVIRONMENTAL APPEAL BOARD (ALBERTA)

Respondents

APPEAL FROM THE JUDGMENT OF  
THE HONOURABLE MR. JUSTICE J. MEDHURST  
Dated November 5, 1996

**REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE BERGER  
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE PICARD  
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE HUNT**

**COUNSEL:**

**B.J. Roth  
R.A. Neufeld  
for the Appellant**

**K.R. Buss (The Lesser Slave Lake Indian Regional Council)**

**T.L. Meadows  
A.R. Lucas (Environmental Appeal Board (Alberta))**

**for the Respondents**

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REASONS FOR JUDGMENT OF  
THE HONOURABLE MR. JUSTICE BERGER

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**THE COURT:**

The issue on this appeal is whether section 87(5)(b) of the *Environmental Protection and Enhancement Act*, R.S.A. C.E-13.3 is, on the facts of this case, a jurisdictional bar. At the material time, section 87(5)(b) read as follows (it was amended on September 6, 1996):

"The Board. . . shall dismiss a notice of objection if in the Board's opinion

- (i) the person submitting the notice of objection received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under the *Natural Resources Conservation Board Act* or any Act administered by the Energy Resources Conservation Board at which all of the matters included in the notice of objection were considered, or ...."

The sub-section requires the Board to dismiss a notice of objection in

certain circumstances. Does the failure to do so go to jurisdiction? And is the Appellant entitled to relief by way of judicial review in such circumstances?

Chem-Security (Alberta) Ltd. ("Chem-Security") appeals from the decision of Medhurst, J. dated November 5, 1996, dismissing its application to judicially review the decision of the Environmental Appeal Board ("EAB") dated June 28, 1996. The EAB determined that it had jurisdiction to hear an appeal of an environmental approval that had been issued to Chem-Security by Alberta Environmental Protection ("AEP") pursuant to the *Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3 ("EPEA").

Chem-Security is the operator of the Alberta Special Waste Treatment Centre located near the Town of Swan Hills, Alberta. The Centre was originally constructed during the years 1985 through 1987 by Bovar Inc., a private Alberta company, and the Alberta Special Waste Management Corporation, an Alberta Crown corporation constituted under the *Special Waste Management Corporation Act*, S.A. 1982, c.S-21.5.

The purpose and major responsibilities of the Centre include waste

acceptance and related control, waste preparation and storage, incineration, physical and chemical treatment, stabilization of residues, deep well injection and maintenance of landfill cells.

On July 15, 1991, Chem-Security applied to the *Natural Resources Conservation Board* ("NRCB") pursuant to the *Natural Resources Conservation Board Act*, S.A. 1990, c. N-5.5 ("NRCS Act") for approval to expand the incineration capacity of the Centre by 40,000 tonnes per year. Only Alberta waste was to be treated at the Centre.

After a lengthy pre-hearing and environmental assessment process, the NRCB conducted a public hearing of the Expansion Application in November, 1991 and March, 1992. On May 8, 1992, the NRCB released its Reasons for Decision approving the Expansion Application. On March 15, 1994, Chem-Security applied to the NRCB for permission to import waste from other Canadian jurisdictions. After a lengthy pre-hearing process, the NRCB held a public hearing on the Importation Application which took place at Swan Hills, Calgary and Edmonton in June and July 1994. On November 22, 1994, the NRCB released its decision approving the Importation Application.

Prior to seeking a long-term renewal of its environmental approvals, which were due to expire on July 1, 1995, Chem-Security applied to AEP pursuant to the EPEA and obtained an extension to its existing approvals pending its renewal application under the EPEA. The Lesser Slave Lake Indian Regional Council ("LSLIRC") attempted to appeal this extension to the EAB. The EAB dismissed the appeal, holding that it did not have jurisdiction to entertain the appeal because the matters raised, including certain evidence of fugitive emissions, had already been considered by the NRCB at the Expansion and Importation Hearings.

On July 21, 1995, Chem-Security applied to AEP for consolidation and renewal of its various environmental approvals under EPEA. On November 30, 1995, AEP approved Chem-Security's renewal application. This AEP approval was appealed to the EAB by Ed Graham, Alberta Trappers Association, the LSLIRC, and the Toxics Watch Society, all of whom had participated in the previous NRCB hearings.

In this case, the Board did not embark upon the environmental hearing contemplated by the statute. It convened a hearing on May 7 and 8, 1996, the purpose of which was to determine two questions. The first, whether those who had filed a notice of objection were "affected persons" i.e. whether they had a locus standi, was not

appealed. The second, a motion to dismiss the notice of objection on the ground that the *Natural Resources Conservation Board* (NRCB) had earlier dealt with the same issue, was refused on June 28, 1996. The position of counsel for the LSLIRC was that there was new evidence not yet considered. The Board must have accepted that submission mindful of section 87(2) of the *Act*. On November 5, 1996, Medhurst, J. dismissed Chem-Security's motion for judicial review of that decision. Chem-Security appeals.

Section 87(2) of the *Act* contemplates that, prior to the hearing of an appeal, the Board may determine which matters set out in a notice of objection will be included in the hearing of the appeal. In making that determination the Board is entitled to consider "whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made".

It follows that the hearing before the Board is a *de novo* hearing. The Board is empowered to consider evidence that was not before the Director. For example, if significant changes in p.c.b. emissions had occurred since the Director pronounced, the Board might consider that.

In my view, section 87(5) allows the Board to dismiss a notice of objection at any stage of the proceedings. Only section 87(2) is limited by the words "prior to the hearing".

The unfolding of the narrative and the evidentiary underpinnings will, arguably, determine whether the application to dismiss the notice of objection pursuant to section 87(5) will or will not finally succeed. The question of whether all of the matters included in the notice of objection were addressed by the NRCB in accordance with the requirements of section 87(5)(b) cannot be determined in a vacuum. For these reasons, the application for judicial review in Queen's Bench was premature. (I express no opinion at this time as to whether section 87(5)(b) as amended applies to the Board's further deliberations).

Moreover, the decisions of the Supreme Court of Canada in *Pezim v. British Columbia (Superintendent of Brokers)* [1994] 2 S.C.R. 557 and *Canada (Director of Investigation and Research) v. Southam Inc.* [1996] 144 D.L.R. (4th) 1 instruct superior courts conducting judicial review that the level of deference accorded will be determined, in part, by the nature of the problem before the regulatory tribunal. The application for judicial review was also premature because the nature of the problem,



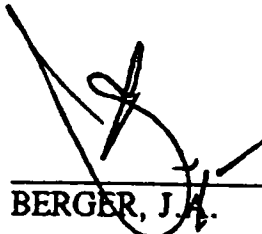
absent a more complete evidentiary matrix, cannot now be ascertained.

The most that can now be said is that the Board issued a "preliminary" ruling on an application to dismiss the notice of objection. When more or all of the evidence is in, the application could be renewed and the Board could revisit the issue. That procedure is contemplated by section 87(5).

The appeal is dismissed. The Board is directed to conduct a hearing.

APPEAL HEARD on May 16, 1997


JUDGMENT DATED at CALGARY, Alberta  
this 16th day of July,  
A.D. 1997

  
BERGER, J.A.

I concur:

  
PICARD, J.A.

I concur:

  
HUNT, J.A.

