

**Fenske v. Alberta (Minister of Environment), 2002 ABCA 135**

Date: 20020625  
Docket: 0003-0519-AC

IN THE COURT OF APPEAL OF ALBERTA

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THE COURT:

THE HONOURABLE MR. JUSTICE BERGER  
THE HONOURABLE MR. JUSTICE COSTIGAN  
THE HONOURABLE MADAM JUSTICE PAPERNY

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IN THE MATTER OF the *Environmental Protection and Enhancement Act*,  
S.A. 1992, c. E-13.3, Part 3;

AND IN THE MATTER OF Approval No. 20754-00-01 issued on May 29, 1998  
by Director W. Inkpen to Beaver Regional Waste Management Services Commission;

AND IN THE MATTER OF the Ministerial Order of Gary Mar,  
Minister of Environment dated August 25, 1999

BETWEEN:

MARILYNN FENSKE, LEE FENSKE, WALTER GLOMBICK, FRIEDA GLOMBICK,  
and ADELHART GLOMBICK operating as GLOMBICK FARMS, GERTRUDE MIZERA,  
RUDY MIZERA, MARK GARSTAD and FAYE GARSTAD

Respondents  
(Applicants)

- and -

GARY MAR, MINISTER OF ALBERTA ENVIRONMENT AND  
HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

Appellants  
(Respondents)

Appeal from the Judgment of  
THE HONOURABLE MR. JUSTICE E. S. LEFSRUD  
Dated the 8<sup>th</sup> day of September, 2000  
Filed on the 14<sup>th</sup> day of November, 2000

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REASONS FOR JUDGMENT

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REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE COSTIGAN  
CONCURRED IN BY THE HONOURABLE MR. JUSTICE BERGER  
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE PAPERNY

**COUNSEL:**

K. E. Buss  
For the Respondents (Applicants)

D. J. Wilson  
J. D. Schick  
For the Appellants (Respondents)

G. D. Sprague  
For the Director, Northeast Boreal and Parkland Regions

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REASONS FOR JUDGMENT OF THE  
HONOURABLE MR. JUSTICE COSTIGAN

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[1] At issue in this appeal is the standard of review applicable to an order of the Appellant, Minister of Alberta Environment, pursuant to s. 92 of the *Environmental Protection and Enhancement Act* (the "EPEA") S.A. 1992 c. E-13.3 and whether procedural fairness requires reasons for that order in the circumstances of this appeal.

[2] In his decision reported at [2001] 1 W.W.R. 648, the chambers judge found that the standard of review was reasonableness, that the Appellant's order was not reasonable and that the Appellant's failure to give reasons violated the rules of procedural fairness.

[3] I conclude that the appeal should be allowed. The standard of review is patent unreasonableness, the Appellant's order is not patently unreasonable and the Appellant is not required to give reasons in the circumstances of this appeal.

#### BACKGROUND

[4] The Beaver Regional Waste Management Services Commission (the "Commission") operates a landfill site near Ryley, Alberta. The Commission applied to the Director, Northeast Boreal and Parkland Regions (the "Director") for an amendment to its landfill approval in order to expand the landfill. The Director approved the expansion and issued an amending approval.

[5] The Respondents, who are affected landowners, appealed the amending approval to the Environmental Appeal Board (the "Board").

[6] Pursuant to s. 91 *EPEA*, the Board's jurisdiction is limited to submitting a report with recommendations to the Appellant.

[7] The Board held hearings and submitted a report to the Appellant containing recommendations to the effect that the Commission should submit further information to the Director relating to the environmental impact of the landfill expansion.

[8] The Board recommended that the Commission should resubmit an application to the Director containing the further information by a date certain, or the approval should be terminated. The Board also recommended that all parties to the appeal should have a meaningful opportunity to comment on the further information.

[9] The Board expressed the opinion that the Director's decision was "at the very worst an abuse of process and at the very least a quantum leap backward in a standard to which Albertans have become accustomed to and demand."

[10] S. 92 (1) (a) *EPEA* provides:

"92(1) On receiving the report of the Board the Minister may, by order,

(a) confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make,"

[11] Following receipt of the Board's report and recommendations, the Appellant issued an order which required the Commission to submit to the Director, prior to further construction of the landfill and by a date certain, further information satisfactory to the Director including a land conservation plan, a closure and post-closure care plan, a gas management plan, a soil management program and a groundwater monitoring program.

[12] The order also required the Director to request comments from the Respondents on the further information and to hold public meetings before making a decision. However, the order did not require the Commission to resubmit an application nor did it order the termination of the approval if the further information was not provided by a date certain.

[13] The Board's report and recommendations were not released to the Respondents before the Appellant issued his order.

[14] The Respondents applied for judicial review of the Appellant's order.

#### **DECISION OF THE CHAMBERS JUDGE**

[15] The chambers judge applied the pragmatic and functional approach set out in *Pushpanathan v. Canada* (1998), 160 D.L.R. (4<sup>th</sup>) 193 and *Baker v. Canada* (1999), 174 D.L.R. (4<sup>th</sup>) 193 to ascertain the appropriate standard of review of the Appellant's order.

[16] The chambers judge concluded that s. 92.2 of the *EPEA* contained a strong privative clause; that although the Minister did not have the same sort of expertise as the Board, he had more expertise than the Court; that the purpose of the *EPEA* was the protection of the environment in the context of other policy concerns; and that the nature of the Appellant's decision involved issues of fact and policy, including competing interests of different groups.

[17] The chambers judge reached the initial conclusion that each of the four factors involved in the pragmatic and functional analysis suggested a high level of deference and that the appropriate standard of review was patent unreasonableness.

[18] However, the chambers judge lowered the standard of review to reasonableness because the Appellant did not give reasons for departing from the recommendations of the Board.

[19] The chambers judge was of the view that the Board had recommended that amendment approval should not be granted until the expansion was justified and the environmental effects understood and addressed. He concluded that in the absence of reasons, he was unable to determine what reasonable grounds existed for the Appellant's refusal to follow the Board's recommendation and, accordingly, the Appellant's order was unreasonable. In his view, because the Board had voiced strong concerns about the process followed by the Director, the Appellant should have given clear reasons to support his order.

[20] The chambers judge also concluded that the Appellant had violated the rules of procedural fairness by failing to give reasons because the approval may have a serious impact on the Respondents and because of the appearance of an abuse of process.

[21] In the result, the chambers judge granted judicial review, and remitted the matter to the Appellant for reconsideration and reasons.

#### **STANDARD OF REVIEW OF THE CHAMBERS JUDGE'S DECISION**

[22] The characterization of the applicable standard of review of the Appellant's order and the determination of whether there is a requirement to provide reasons are issues of law which must be reviewed by this Court on the standard of correctness.

#### **STANDARD OF REVIEW OF THE APPELLANT'S ORDER**

[23] The chambers judge was correct in his initial conclusion that the application of the four factors comprising the pragmatic and functional approach suggests a high level of deference consistent with the patently unreasonable standard of review. However, with respect, the chambers judge erred in reducing the standard of review to reasonableness solely because the Appellant had not provided reasons for his order.

[24] A failure to provide reasons may impact upon the assessment of the expertise factor in some cases because the Court may be unable to ascertain the level of expertise of the decision maker in the absence of reasons.

[25] However, although the expertise factor has been described by Iacobucci J. in *Canada v. Southam Inc.*, [1997] 1 S.C.R. 748 at 773 as:

"... the most important of the factors that a court must consider in settling on a standard of review..."

it is, nonetheless, only one of four factors that must be assessed and balanced. It does not trump the other three, nor does the absence of reasons weigh against a high degree of deference where the expertise of the decision maker can be ascertained by other means.

[26] In this case, the expertise of the Appellant is apparent from the scheme of the *EPEA* which vests in the Appellant and his ministry, the complex task of assessing and weighing the often competing technical and public policy considerations inherent in the protection of the environment. Indeed, the Appellant's expertise is such that he is free to confirm, reverse, or vary the recommendations of an expert Board.

[27] In these circumstances, the expertise of the Appellant can be ascertained in the absence of reasons. Therefore, the chambers judge erred in reducing the standard of review from patent unreasonableness to reasonableness, solely because the Appellant had failed to provide reasons for his order.

### **IS THE APPELLANT'S ORDER PATENTLY UNREASONABLE?**

[28] A patently unreasonable decision is one that is clearly irrational (*Canada v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941). In this case, the rationality of the Appellant's order must be measured in the context of the *EPEA*, the proceedings before the Board, and the Board's report.

[29] The Appellant has a broad discretion to confirm, reverse or vary the Board's recommendations. The Board recommended that the Commission resubmit its application along with further information and that the Respondents have an opportunity to review and comment on the further information. The Board also recommended that the approval should be terminated if the further information was not received by a date certain.

[30] The Appellant chose to vary the Director's decision. He ordered the Commission to provide most of the further information recommended by the Board. He ordered the Director to solicit comments from the Respondents and ordered public meetings.

[31] He also ordered a halt to construction. However, he chose not to require the Commission to resubmit the application, and he chose not to provide a mechanism for termination of the approval.

[32] Viewed in context, the Appellant's order is not clearly irrational. It works a compromise between the decision taken by the Director and the recommendations made by the Board. It provides a clear and coherent mechanism for the submission, review and discussion of further information, and it freezes construction in the interval.

[33] Nor is the Appellant's order patently unreasonable simply because it omits some information recommended by the Board and chooses not to provide for termination of approval.

[34] I conclude that the Appellant's order is not patently unreasonable.

## PROCEDURAL FAIRNESS

[35] In *Baker v. Canada, supra*, the Court said this at para. 43:

"... it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, where there is the statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere."

[36] In *Cook v. Alberta (Environmental Protection)*, 2001 ABCA 276, 293 A.R. 237, this Court considered *Baker* and concluded that, in the circumstances present in *Cook*, the failure to provide reasons breached procedural fairness. The Court said this at para. 53:

"The requirement to give reasons in the unique circumstances of this case will increase the burden on the Minister and his staff. But not every case will require reasons. Indeed, cases that require the provision of reasons will be the rare exception. As noted in *Baker*, the requirements of fairness are context-driven and fact-specific. And, as illustrated by *Baker* itself, a reasons requirement can be met in a variety of ways."

[37] The circumstances of this appeal do not bring it within one of the rare exceptions in which the failure to provide reasons amounts to a breach of procedural fairness.

[38] In *Cook*, the Appellants were led to expect that the Minister would follow the decision of the Appeal Committee which had been favourable to the Appellant's position. The Minister's decision did not meet the Appellant's expectations, and no reasons were given for the Minister's departure from those expectations.

[39] Although the Minister's order in this appeal has important significance for the Respondents, there is nothing in the circumstances of the appeal that could have led the Respondents reasonably to expect that the Appellant would issue an order favourable to their position or that he would follow the Board's recommendations.

[40] The provisions of the *EPEA*, which grant the Minister a broad discretion to confirm, vary or reverse the Director's decision, could not have led the Respondents to expect the Appellant to issue an order favourable to their position. Nor could the Board's report have formed the basis for any such expectations because the report was not released to the Respondents before the Appellant's order.

[41] The chambers judge concluded that the Board's comments concerning an abuse of process by the Director mandated reasons from the Appellant. With respect, I do not agree.

[42] The abuse of process identified by the Board lay in the Director's approval of the application in the face of incomplete and conflicting information. The Minister's order, on its face, addressed that abuse by ordering the Commission to provide further information to the Director.

[43] In those circumstances, the duty of procedural fairness was not breached by the Appellant's failure to provide reasons for his order.

**CONCLUSION**

[44] In the result, I allow the appeal, dismiss the application for judicial review and set aside the order of the chambers judge. The Minister's order is restored.

APPEAL HEARD on May 6, 2002

REASONS FILED at Edmonton, Alberta,  
this 25th day of June, 2002

  
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COSTIGAN, J.A.

I concur:   
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Authorized to sign for: BERGER, J.A.

I concur:   
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Authorized to sign for: PAPERNY, J.A.





APPEAL #0003-0519-AC

A.D. 2002

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