

McCain Foods (Canada) et al v. Alberta Environmental Appeal Board et al, 2001 ABQB

Date: 20010807
Action No. 0101-01249

**IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY**

BETWEEN:

**McCAIN FOODS (CANADA),
A DIVISION OF McCAIN FOODS LIMITED**

Applicant

- and -

**ALBERTA ENVIRONMENTAL APPEAL BOARD
and Halvar Johnson,
MINISTER OF THE ENVIRONMENT**

Respondents

**REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE L.D. WILKINS**

APPEARANCES:

**E. Bruce Mellett and April D. Grosse
for the Applicant**

**Andrew Sims, Q.C.
for the Respondent, Alberta Environmental Appeal Board**

**Donald J. Wilson and Jeremy D. Schick
for the Respondent, Minister of the Environment**

**Martin Chamberlain
for the Director, Prairie Region, Environmental Service, Alberta Environment**

[1] McCain Foods (Canada), a Division of McCain Foods Limited ("McCain") seeks a judicial review of the decision of the Minister of the Environment of the Province of Alberta ("Minister") made upon recommendation of the Alberta Environmental Appeal Board ("Board") which recommendation confirmed the jurisdiction of the Director, Prairie Region Alberta Environmental Protection ("Director") to impose a general condition relating to air emissions as part of an approval granted for a McCains vegetable processing plant near Lethbridge, Alberta.

[2] McCain challenges the imposition of that condition as being an improper exercise of the discretion given to the Director by the *Environmental Protection Enhancement Act* (the "Act") and an excess of his jurisdiction. Accordingly, McCain seeks to quash the decision of the Board and its confirmation by the Minister which upheld the imposition of that condition.

ISSUES

1. What is the standard of review for this Court in consideration of the decision of the Minister on recommendation of the Board?
2. Should this Court disturb the decision of the Minister on recommendation of the Board which affirms the imposition of that condition by the Director?

BACKGROUND FACTS

[3] In June of 1999 the Director issued an approval to McCain for the construction, operation and reclamation of a vegetable processing plant in the County of Lethbridge. That plant has since been built and is presently operational.

[4] The approval contained a number of terms and conditions. Condition 4.2.10 related to permitted levels of specific particulates and oxides of nitrogen. Conditions 4.2.6 and 4.2.7 require consideration and provide as follows:

- 4.2.6 Except as expressly provided for by the Director in writing, the approval holder shall control fugitive emissions and any source not specified in 4.2.2 in accordance with 4.2.7 of this approval.
- 4.2.7 The approval holder shall not emit an air contaminant or cause to be emitted an air contaminant that causes or may cause any of the following:
 - (a) the impairment, degradation or alteration of the quality of natural resources; or
 - (b) material discomfort, harm or adversely affect the well being or health of a person; or

(c) harm to property or to plant or animal life.

[5] McCain appealed to the Board arguing the Director was without jurisdiction to impose condition 4.2.7. Preliminary to the Board hearing, the Director challenged the jurisdiction of the Board to review any exercise of the Director's discretion. In its preliminary decision the Board determined that it had such a jurisdiction and would proceed to the hearing.

[6] The Director appealed that decision to the Court of Queen's Bench. In *Alberta (Environment) v. McCain Foods (Canada) Ltd.* [2000] A.J. No. 469 Murray J. determined that the Board did have the jurisdiction to interpret the statutory powers of the Director pursuant to the provisions of the *Act*.

[7] On July 20, 2000 the Board issued its Report and Recommendation to the Minister upholding the Director's decision to impose this condition. That report was confirmed by the Minister on August 31, 2000.

[8] McCain has now applied for a judicial review of that decision taken by the Minister on the recommendation of the Board.

STATUTORY PROVISIONS UNDER CONSIDERATION

[9] Relevant provisions of the *Environmental Protection and Enhancement Act* read as follows:

- 2 The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:
- (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
 - (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
 - (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
 - (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;

- (e) the need for Government leadership in areas of environmental research, technology and protection standards;
- (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
- (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;
- (h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;
- (i) the responsibility of polluters to pay for the costs of their actions;
- (j) the important role of comprehensive and responsive action in administering this Act.

58 No person shall knowingly commence or continue any activity designated by the regulations as requiring an approval or registration unless that person holds the required approval or registration.

59 No person shall commence or continue any activity designated by the regulations as requiring an approval or registration unless that person holds the required approval or registration.

65(1) The Director may issue or refuse to issue an approval or registration.

(2) The Director may issue an approval subject to any terms and conditions the Director considers appropriate.

(3) The terms and conditions of an approval may be more stringent, but may not be less stringent, than applicable terms and conditions provided for in the regulations.

(4) In making a decision under this section the Director

- (a) shall, in addition to any criteria that the Director is required by the regulations to consider, consider any applicable written decision of the Energy Resources Conservation Board or the Natural Resources Conservation Board in respect of the subject-matter of the approval or registration, and

- (b) may consider any evidence that was before the Energy Resources Conservation Board or the Natural Resources Conservation Board in relation to that written decision.

(5) The Director may issue an approval or registration for a specified period.

92.2 Where this Part empowers or compels the Minister or the Board to do anything, the Minister or the Board has exclusive and final jurisdiction to do that thing and no decision, order, direction, ruling, proceeding, report or recommendation of the Minister or the Board shall be questioned or reviewed in any court, and no order shall be made or process entered or proceedings taken in any court to question, review, prohibit or restrain the Minister or the Board or any of its proceedings.

Division 1 Releases of Substances Generally

97(1) No person shall knowingly release or permit the release of a substance into the environment in an amount, concentration or level or at a rate of release that is in excess of that expressly prescribed by an approval or the regulations.

(2) No person shall release or permit the release of a substance into the environment in an amount, concentration or level or at a rate of release that is in excess of that expressly prescribed by an approval or the regulations.

(3) For the purposes of this section, if there is a conflict between an approval and the regulations as to an amount, concentration, level or rate of release of a substance, the most stringent requirement prevails.

98(1) No person shall knowingly release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect.

(2) No person shall release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect.

(3) Subsections (1) and (2) apply only where the amount, concentration, level or rate of release of the substance is not authorized by an approval or the regulations.

(4) No person may be convicted of an offence under this section in that person establishes that the release was authorized by another enactment of Alberta or Canada.

McCain's ARGUMENT

[10] In its essence, the argument of McCain is that condition 4.2.7 which imposes a general prohibition on the emission of air contaminants and one that is more stringent than the provision in the *Act* that expressly addresses such general emissions is beyond the jurisdiction of the Director to impose in the case of an approval under the *Act*.

[11] In section 98 the legislation prohibits the release of emissions which cause or may cause a "significant adverse effect." McCain argues that by imposing that standard, the Legislature has fully occupied the field in relation to emissions for which no approval or regulation exists. Therefore, it is beyond the jurisdiction of the Director to impose as a condition of approval of the McCain plant, a stricter standard prohibiting the release of general emissions which cause or may cause an adverse effect.

[12] McCain argues this is solely a question of interpretation of statute, a question of law. No deference to the decision of the Board and Minister is appropriate as the Court has significantly more expertise than the Board in determining matters of law. McCain submits "that the appropriate standard of review for this matter is at the correctness end of the spectrum. At highest, the decision of the EAB and Director must meet the reasonableness simpliciter standard in order to survive this Court's review".

[13] In expanding its challenge to the Board decision, McCain argued that the Board failed to recognize that condition 4.2.7 purports to permit the emission of any contaminate which "causes or may cause harm to the quality of natural resources, persons, property or plant and animal life". On its face that condition is unreasonable, impractical and impossible to enforce. There is no qualifier on the level of contaminate necessary to trigger the prohibition. As the Director has indicated that this condition is contemplated to apply to all large facilities in Alberta, it will create a situation in which operators such as McCain are constantly in potential violation of approvals granted.

[14] McCain argued the Board erred in dismissing its argument for a more definable standard prohibiting a "significant adverse effect" as being only an issue of semantics.

[15] McCain argued that that the Court should undertake an assessment based on the scheme and purposes of the *Act*, the role of the Director, the expertise of the Director and the nature of the question he was considering, to conclude that a determination of limits on the general emission of air contaminants was not a matter which the Legislature intended the Director to decide. While the discretion granted to the Director in section 65 of the *Act* is broad, the provisions of section 98 dealing with the release of general air contaminants not otherwise

specifically addressed in an approval or regulation, fully occupy this field, leaving no room for the exercise of the discretion by the Director.

[16] Counsel for McCain further argues:

Equally, however, it is necessary to have general environmental standards which every facility is obliged to comply with. Those standards, which necessarily involve consideration of general environmental concerns and tolerances, the economic needs of society as a whole, and the community consensus as to the appropriate legislative direction, are ones which are entirely unsuited for determination on the basis of the Director's exercise of his discretion. Instead, these are decisions which should be, and are, resolved by the will of the legislature.

[17] McCain seeks an Order of this Court quashing the decision of the Board and Minister and declaring condition 4.2.7 in the approval granted to McCain by the Director to be void and of no effect.

MINISTER'S ARGUMENT

[18] Counsel for the Minister argued that the Court should adopt as its standard of review the test of "patent unreasonableness". Even if the Court should determine that the issue before it is a pure question of law, the broad privative clause contained within the *Act* governing the decisions of the Board, indicates the intention of the Legislature that a high degree of deference is to be shown to Board decisions. The Minister also argues that the decisions of the Director as affirmed by the Board are only partially legal questions and also involve the balancing of a number of questions of policy.

[19] The Minister argues that in making its argument, McCain has misunderstood the scheme of the *Act*. The Minister asserts that the *Act* contains two separate provisions which create environmental regulatory offences for the prohibited release of substances. Section 97 of the *Act* operates where a person by obtaining approval is authorized to release substances. It creates an offence for the release of substances in excess of that which is expressly prescribed in an approval or regulations. On the other hand, section 98 operates where a person is not authorized by approval or regulation to release any substances.

[20] Accordingly, the Minister submits that both the Director and the Board have reasonably interpreted the jurisdiction of the Director to impose condition 4.2.7.

THE BOARD ARGUMENT

[21] The Board argues that the Ministerial order under review was based on its Report and Recommendation. Issues in this case are within the scope of issues assigned by the Legislature to the Minister acting on the Board recommendation.

[22] The Board argues that the assessment of the appropriate criteria for determining the standard of review to be applied in this case should point to a high level of deference, a standard of patent unreasonability.

[23] The Board argued that the issue before this Court is one of mixed law and fact, discretion and policy.

[24] The Board argues that the creation of this legislative scheme combined with a creation of a highly specialized administrative decision maker, together with the presence of a strong privative clause should compel this Court to grant expansive deference even over extremely general questions of law.

[25] The Board argues:

The issue concerning the Director's jurisdiction to impose Condition 4.2.7 is a regulatory issue that must be determined within the context and the scheme of the EPEA and with regard to the jurisprudence which has developed under it. The Court in *Pushpanathan (Pushpanathan v. Canada (Minister of Citizenship and Immigration))* (1998), 160 D.L.R. (4th) 193 11 Admin. L.R. (3d) p. 1 at p. 27-28) approved the following statement of the law,

...Specialized boards are often called upon to make difficult findings of both fact and law. In some circumstances the two are inextricably linked. Further, the "correct" interpretation of a term may be dictated by the mandate of the board and by the coherent body of jurisprudence it has developed. In some cases, even where courts might not agree with a given interpretation, the integrity of certain administrative processes may demand the deference be shown to that interpretation of law.

[26] In its Report and Recommendation the Board considered similar arguments by McCain on statutory interpretation and concluded that McCain's interpretation is in error and that section 98 of the *Act* does not preclude the Director from adopting general emission limits through the exercise of his discretion under section 65 of the *Act*. The Board concluded at para. 28 of its Report:

In sum, the Board views the Director's adoption of general emission limits as the same kind of policymaking function which the Director must exercise in setting other approval conditions. The legislators have written and passed *EPEA* with terms that plainly authorize the Director to adopt general emission limits and, for that reason, McCain's jurisdictional argument fails.

DIRECTOR'S ARGUMENT

[27] The Director urged the Court to consider the scheme of the *Act*, its purposes and the general principles declared therein.

[28] In granting an approval for any development in which emissions are anticipated, the Director is authorizing the release of substances, notwithstanding those substances may cause an adverse effect. In doing so, the Director is obliged to balance the economic and social aspects of the project under consideration with the principles of environmental protection and pollution prevention.

[29] The Director argues that the Department of the Environment has developed a series of standard clauses to be included in every approval. The basis of these clauses is that any approval should specifically regulate identified pollutants by providing specific limits for them, and should establish a scheme for the control of "fugitive" emissions, and should prevent the release of additional harmful substances for which the Director has not had an opportunity to assess cumulative effects.

[30] By imposing standard conditions such as 4.2.7 the Director and Department can regulate and control both fugitive emissions and the emissions of substances which were not anticipated or identified by the approval holder in its application. That condition prohibits any release of emissions where there is harm to natural resources, human health, property, animal or plant life.

[31] The Director argues that within the scheme of the *Act* it is more appropriate to control these emissions through the approval process rather than regulatory offence section which requires proof that a significant adverse effect has or may occur.

[32] The Director further argues that the decision of Murray J. in *Alberta (Environment) v. McCain (supra)* has already determined that the issue in this case was one of mixed fact and law and that the Board is the proper body to interpret the jurisdiction of the Director. The Director argues for a standard of review of the "greatest degree of deference" to the decision of the Minister on recommendation of the Board.

[33] The Director argues there is nothing in the scheme of the *Act* which would preclude the Director from including in an approval, a condition relating to the general release of

unspecified substances for the protection of the environment. Surely that must be part of his discretion in considering applications for approval.

[34] The Director argues that the focus of the McCain argument based on section 97 and section 98 of the *Act* ignores the remainder of the legislation. Those sections themselves established a two track approach: Section 97 deals only with persons who have approvals or "licenses to pollute". Section 98 deals with persons who have no such approvals and may otherwise engage in activities which release airborne pollutants. The latter category would include a farmer burning stubble or brush, while the former includes plant operators such as McCain.

[35] The Director argues there is no occupied field as alleged by McCain but two separate types of potential offenders; those with approvals and those without. In conclusion the Director argues that there has been no misinterpretation of the extent of the discretion afforded to the Director by section 65 to impose condition 4.2.7 as part of the approval of the McCain plant.

STANDARD OF REVIEW

[36] In their respective submissions each of the parties has urged the Court to adopt a pragmatic and functional analysis as recommended in the *Pushpanathan (supra)* decision of the Supreme Court of Canada. I accept that approach as the proper basis for any analysis of the four criteria which that authority directs this Court to consider.

1. Privative Clause

In this case the *Act* contains a strongly worded privative clause - "one that declares that decisions of the tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded." *Pushpanathan (supra)* p. 24.

On the authority of *Pushpanathan* I conclude that unless the analysis of the other factors strongly indicates to the contrary, this Court should show deference to the decision of the tribunal.

2. Expertise of the Tribunal

The significant expertise of this Board has been recognized by this Court on numerous prior occasions as indicated by the authorities cited by both the Applicant and Respondents.

That expertise certainly extends to questions of mixed fact and law as found by Murray J. in *Alberta (Environment) v. McCain (supra)* at para. 25. That expertise must also necessarily extend to any issue having an element of policy in relation to the balancing of competing interests recognized by the *Act* which the Minister is charged to implement.

Even if the matter before this Court can be seen to be a strict issue of statutory interpretation as urged by McCain, I cannot accept that this Court has such a greater degree of expertise above the Board, that would in itself, be sufficient to override the intention of the Legislature as expressed in the privative clause.

3. Purposes of the Act

The Act has previously been considered by this Court. For this hearing I adopt the statement made by Murray J. *Alberta (Environment) v. McCain (supra)* at para. 25 where he states:

In my view, questions of interpretation such as the one posed above, and others which the Board members may perceive, require a considerable degree of expertise, certainly beyond the knowledge of this Court. The Board, with its expertise, is the proper body to interpret the Condition and make recommendations to the Minister who will make the final decision. The Minister's decision may or may not be open to judicial review.

In addition the statement made by Clackson J. in *Legal Oil and Gas Ltd. v. Alberta (Minister of Environment)* (2000), 265 A.R. 341 recommends itself to me. At para. 31 he states:

As suggested by the Director, the provisions of the Act cast a broad net. Competing interests abound. The Act designates the Minister as the final decision-maker as there are policy considerations involved in determining whether to uphold an EPO. The Board's expertise and the Minister's sensitivity to policy issues militates in favour of a high degree of deference.

It is my conclusion that it was fully contemplated by the Legislature that the implementation of this Act would require a balancing of the often competing interests of business development and protection of the environment. That task seems clearly to have been delegated by the Legislature to the Minister on the advice and recommendations of the Board.

4. Nature of the Question - Fact, Law or Jurisdiction

In this consideration I do not accept the argument of the Director that this question has already been determined by the decision of Murray J. The passage cited in support of that argument does not compel that conclusion. It is to be noted firstly that his comments at para. 24 were clearly obiter under the heading "Additional Considerations". In addition, Murray J. distinguishes a consideration of whether the condition 4.2.7 provisions would themselves require a "significant adverse impact" upon the environment with the distinct question posed by McCain's appeal. It is the former consideration which he finds poses a mixed fact and law question unlike McCain's.

I am nevertheless satisfied that the issue for consideration in this hearing relates to the jurisdiction of the Director to impose a general emissions condition in an approval on terms which are not identical to the wording in section 98. In my opinion this is a question of law.

[37] When I assess these factors on a functional and pragmatic approach, I remain convinced that this Court should extend to the decision of the Minister on recommendation from the Board, the high degree of deference intended by the terms of the privative clause introduced in the *Act* by the Legislature.

[38] That the issue before this Court is one of law alone is not sufficient to reduce the standard of review imposed upon these Courts by the terms of the legislation.

[39] Accordingly, it is my conclusion that the appropriate standard of review in this case is one of "patent unreasonableness."

DECISION

[40] It is my conclusion that this Court cannot say that the interpretation adopted by the Minister on recommendation by the Board as to the jurisdiction of the Director is patently unreasonable.

[41] The interpretation of the provisions of section 98 advanced by the Board in its Report seems to this Court to be one that is reasonably available to the Board as a matter of law.

[42] I am particularly persuaded by the argument advanced by all of the Respondents that proper consideration of the scheme of the *Act* reasonably requires that the Director have the authority to include conditions relating to general emissions as part of any approval granted. Counsel for McCain conceded that if such a condition were imposed on the same wording as section 98 of the *Act*, McCains would not be arguing.

[43] Therefore, the only remaining issue is whether the Director is by the terms of section 98 obliged to impose a condition relating to general emissions only upon those terms, that is to require a "significant adverse effect". It is my opinion that it is open to the Board to conclude that the wording of section 98 itself does not compel any such conclusion by its terms as a matter of statutory interpretation. A reading of both offence creating sections offers support for an interpretation that each section was intended to govern a separate track; one where an approval or regulation has authorized a person to emit substances and one where no such approval or regulation exists.

[44] It is possible that this Court could conclude that there might be considerable merit in the position adopted by McCains. But it is not the only reasonable interpretation of the statutory provisions. The Legislature has intended that the Minister on recommendation of the

Board interpret the *Act* and so long as that interpretation is not patently unreasonable this Court ought not to interfere.

[45] It cannot be unreasonable on its face for the Board or the Director to conclude within the scheme of the *Act*, that the Director would have authority to control general emissions as part of the approval process.

[46] This Court cannot accept the argument advanced by McCain that the only reasonable interpretation of the discretion granted to the Director in section 65 is one which obliges him to impose a condition on general emissions only upon the precise terms of section 98 which, by its very terms, applies to polluters where no approval or regulation exists.

[47] The Board and Minister interpret section 97 and section 98 to apply respectively to development activities undertaken by a person who has or has not a license to pollute. On the other hand, McCain argues for an interpretation that those sections relate only to substances emitted which are or are not subject to approval or regulation.

[48] I cannot conclude that the interpretation taken by the Board and Minister is unreasonable on its face.


[49] If it should be determined that patently unreasonable is an incorrect standard of review to apply to this case I continue to believe the application by McCain must fail. It is my conclusion that the interpretation taken by the Board also meets the test of "reasonableness simpliciter". I conclude that it is at least equally reasonable for the Board to interpret sections 97 and 98 as applying to govern activities undertaken by any person as it is to conclude that those sections only relate to substances emitted, whether approved or not.

[50] Accordingly, there is no scope for interference by this Court with the decision of the Minister on recommendation of the Board.

[51] McCain's application for a judicial review is dismissed with costs. Each of the Respondents is entitled to recover one set of costs for their participation in this hearing. Should any issue arise as to costs, the parties are at liberty to contact my office within sixty (60) days of this decision.

HEARD on the 25th day of April, 2001.

DATED at Calgary, Alberta this 7th day of August, 2001.


J.C.Q.B.A.

Action No: 0101-01249

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

McCain Foods (Canada),
A Division of McCain Foods Limited

Applicant

- and -

ALBERTA ENVIRONMENTAL APPEAL BOARD
and Halvar Johnson,
MINISTER OF THE ENVIRONMENT

Respondents

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE L.D. WILKINS

