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IN THE COURT OF QUEEN'S BENCH OF ALBERTA

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JUDICIAL DISTRICT OF CALGARY

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BETWEEN:

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THE SIKSIKA FIRST NATION

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Appellant

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- and -

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THE DIRECTOR SOUTHERN REGION

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(ALBERTA ENVIRONMENT), THE ALBERTA

15

ENVIRONMENTAL APPEALS BOARD and

16

THE TOWN OF STRATHMORE

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Respondents

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REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE MCINTYRE

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THE COURT: I agree with your friends'

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submission that this matter is premature and I am

23

going to explain very tersely why I think so but I

24

want to focus just on the last thing you said. In

25

my view, this application should be dismissed or I

26

can adjourn it *sine die* or I can take any other

27

process that you feel is appropriate, consonant with

1 my decision, which I know you do not agree with. I
2 just want you to be cautious about your appeal
3 rights if -- I do not know whether you will get rid
4 of your appeal rights if I simply adjourn this *sine*
5 *die* or stay my decision or whatever --

6 MR. ANDRYCHUK: You mean the appeal to the
7 Board?

8 THE COURT: Well, maybe I misunderstood
9 what you were saying. No, I am talking about an
10 appeal from this decision. All I am saying is that
11 I know you do not agree with the decision that I
12 just very briefly announced and I do not want to
13 affect your appeal rights from my decision, so you
14 might want to think about that a little bit and I
15 can -- I will give you a time to think while I --

16 MR. ANDRYCHUK: Yes.

17 THE COURT: -- very briefly articulate my
18 reasons for agreeing with your friends.

19 MR. ANDRYCHUK: And you're talking --

20 THE COURT: Do you want to have that
21 opportunity?

22 MR. ANDRYCHUK: You're talking about written
23 reasons from yourself or just now?

24 THE COURT: No, I am going to give you
25 oral reasons right now.

26 MR. ANDRYCHUK: Okay. We'll think about what
27 might be the appropriate -- the appropriate remedy

1 --

2 THE COURT: All right.

3 MR. ANDRYCHUK: -- if ...

4 THE COURT: All right. Well, thank you
5 very much, counsel. This judicial review relates to
6 a decision by the Director of Alberta Environment to
7 approve a pipeline which will ultimately, if
8 everything goes according to the applicant
9 Strathmore's hopes, discharge waste water into the
10 Bow River.

11 Now, the Director approved the pipeline and his
12 decision can be and has been appealed to the Alberta
13 Environmental Appeal Board. In the context of this
14 particular process, there can now be a *de novo*
15 hearing before the Environmental Appeal Board, with
16 more evidence presented to the EAB than was
17 presented to the Director.

18 Counsel can lead evidence from witnesses,
19 cross-examine and file the additional reports that I
20 have learned have become available since the
21 Director made the approval in the first place. The
22 EAB then makes, or must make, a written report with
23 recommendations to the Minister of Environment, who
24 has the right to reverse, confirm or vary the
25 original decision of the Director.

26 The process then is not complete. The Minister
27 may decide in this case to reverse the decision of

1 the Director. I am not in a position to assess the
2 likelihood or unlikelihood of that. The fact
3 remains and counsel agrees that that is a
4 possibility. Because that is a possibility, that is
5 to say that the Director's approval may be reversed,
6 I consider this matter to be moot now. I consider
7 it to be premature. In my view, it should not be
8 dealt with.

9 Counsel on behalf of Siksika argues that the
10 duty to consult is a separate question, different
11 than the kinds of questions that we often see in
12 administrative cases that deal with mootness,
13 prematurity and exhaustion of remedies; that the EAB
14 itself does not have the ability to assess the
15 constitutional validity of any consultations; and
16 that that is only for the Court; and that now is the
17 time for the Court to set out guidelines, to make a
18 declaration, to make it clear what obligations there
19 are in relation to consultation with this First
20 Nation and other First Nations.

21 For me, this argument is not of assistance
22 because it suggests that there is a duty to consult
23 at large, no matter what the result of the
24 Minister's decision may be. In other words, even
25 though the Minister may overturn the decision of the
26 Director, there still has been a breach of the duty
27 to consult; a breach, it is said, of the honour of

1 the Crown.

2 I do not agree with the concept that this duty
3 to consult can be looked at independently of a
4 result. We do not have the result yet - the final
5 result - and we will not have it for some period of
6 time. So, even though the decision may be said to
7 be a final decision of the Director, it is subject
8 to appeal, as I say, and it has been appealed.

9 Further, there are other questions that arise.
10 There is obviously a factual argument about whether
11 there has been consultation or not, or adequate
12 consultation. Counsel on behalf of Siksika invited
13 me to listen to the substance of the argument
14 relating to the question of consultation. That
15 question is a factual question that has both legal
16 and factual ramifications.

17 One of the legal issues is whether this duty to
18 consult is fixed in time; that is to say, did the
19 consultation have to be adequate in relation to and
20 only up to the time of the Director's decision? Or
21 can, for example, a failure to consult be cured by
22 subsequent actions, subsequent meetings, subsequent
23 discussions?

24 In fact, the EAB itself, although it does not
25 have the jurisdiction to decide issues relating to
26 consultation, can, it seems to be, and counsel have
27 argued to me, order that there be consultation. So

1 there may well be issues about whether any failure,
2 if there was one, to consult, can be cured.

3 I am also concerned that this application can
4 result in serial litigation of the kind that was
5 referred to in *Robertson v. Edmonton (City) Police*
6 *Service*, which is cited at tab 7 of the Director's
7 authorities, which is 2003 ABCA 279.

8 I appreciate that this case is not on all fours
9 with *Robertson* but I think there is much to be said
10 by reference to the quote at paragraphs 16, 17 and
11 19, cited by counsel for the Director:

12
13 Therefore, this appeal (to the Court
14 of Appeal) may well be, or become
15 moot. It is a waste of judicial
16 resources to decide it at this early
17 stage before anything has occurred.

18 One may ask why the Court of
19 Appeal does not decide the appeal
20 anyway, now that it has been argued.
21 There are three answers. First, it
22 takes significant resources to
23 research and write a decision on the
24 merits. Second, academic legal
25 decisions based on hypothetical facts
26 pervert precedent and cause mischief
27 in later cases. Third, if the Court

1 of Appeal criticizes premature
2 appeals with its lips, but rewards
3 them with its acts, then it will
4 encourage future litigants to appeal
5 prematurely ...

6 All Alberta courts have adopted a
7 strong policy against litigation in
8 instalments, of which this is a bad
9 example. One of the many problems
10 with trying preliminary issues is
11 that after the decision, the party
12 losing the issue never admits that it
13 ends any part of the case.

14
15 I also refer to the decision of *Canadian Pacific*
16 *Ltd. v. Matsqui Indian Band*, [1995] Carswell 264, at
17 paragraph 34:

18
19 It is a long-standing general
20 principle that the relief granted by
21 way of judicial review is, in
22 essence, discretionary. This
23 principle flows from the fact that
24 the prerogative writs are
25 extraordinary remedies.

26
27 In conclusion, we do not know what, at the end of

1 the day, will be the final decision with respect to
2 the pipeline proposed by Strathmore. Until we do
3 know the final decision, we will not know the
4 impact, if any. I consider the matter to be moot
5 and premature and I therefore exercise my discretion
6 in refusing the application for judicial review for
7 the reasons I have just given.

8 Now, those are my reasons, counsel. I
9 addressed with you the question as to what form a
10 remedy is that you would prefer to have on behalf of
11 Siksika: that is to say, an outright dismissal or a
12 dismissal with leave to reapply when and if a
13 decision is granted, or some other form of remedy.
14 I will hear you on that.

15 MR. ANDRYCHUK: And the issue here, My Lord,
16 you have put your finger on it, is to not undermine
17 a right of appeal to the Court of Appeal, nor our
18 ability to come back here if the underlying
19 circumstances that you have discussed change.

20 I do not think a stay accomplishes those
21 purposes. A dismissal with leave to reapply,
22 leaving to another judge the determination of
23 whether the circumstances are different, is probably
24 the way we would want to go, or perhaps even a
25 finding by yourself that your dismissal is not
26 intended to preclude a further application, you
27 know, should the circumstances change.

1 THE COURT: Well, subject to comments from
2 your friends, I think I can articulate that my view
3 of this is that, were you to wait for the decision
4 of the Minister, that you would have the right to
5 return for judicial review if you wanted to take
6 that approach. I suppose even that gets complicated
7 by issues relating to *res judicata*, issue estoppel
8 and so forth, but I want to make it clear that I am
9 not making a decision on the merits as to whether
10 there has been consultation or not. That is the
11 whole point of my decision, that it is premature and
12 not appropriate to decide that at this time.

13 So, I mean, I have just articulated that and so
14 I am happy to hear from your friends as to what they
15 suggest the form of the remedy should be.

16 MS. GRAHAM: Sir, as I stated in my earlier
17 submissions, there is nothing -- there will be
18 nothing stopping the Siksika Nation from filing any
19 further judicial reviews as the decision-making
20 process continues. So I would submit that this
21 could be an outright dismissal and I don't believe
22 that would prejudice them in any way from bringing a
23 judicial review application of the Minister's
24 decision or any other interim decisions because it
25 would be a judicial review of a different decision
26 by the Director versus this first decision to issue
27 the amending approval.

1 THE COURT: Thank you.

2 MR. SHAWA: Sir, I would echo my friend's
3 comments. I think it has the potential to
4 complicate things if there is something other than
5 an outright dismissal. I understand your comments a
6 moment ago and obviously we wouldn't be arguing, at
7 some point, that somehow my friends are precluded
8 from bringing an application for judicial review.
9 But I'm in your hands, sir. I suspect it's not a
10 particularly critical issue.

11 THE COURT: Thank you. In my view, I
12 should dismiss this outright but that the order
13 should reflect that I have done so on the basis that
14 the application is premature. And if you want to
15 include something in the order about the fact that I
16 have not addressed the merits of the argument, I do
17 not have any problem with that.

18 MR. ANDRYCHUK: We'll consider that, My Lord.
19 I think, you know, counsel involved here, as they've
20 stated, would all agree, on any future application,
21 that you didn't address the merits --

22 THE COURT: Yes, of course.

23 MR. ANDRYCHUK: -- so I don't see any
24 difficulty there.

25 THE COURT: Thank you very much, counsel,
26 for your arguments.

27 MR. SHAWA: Sir, I wonder if I could just

1 address the issue of costs?

2 THE COURT: Yes.

3 MR. SHAWA: In the circumstances, I would
4 submit it would be appropriate that both the -- both
5 Alberta and Strathmore be awarded a set of costs.
6 Schedule 'C' provides that column 1 is appropriate
7 when the matter is non-monetary in nature and so I
8 would simply submit that the order ought to include
9 an order for costs, one set each, to the respondents
10 under column 1.

11 THE COURT: Thank you. Do you have
12 anything to add to that?

13 MS. GRAHAM: No, sir.

14 THE COURT: Do you have anything to say
15 about that?

16 MR. ANDRYCHUK: My Lord, on the matter of
17 costs, I would simply submit this is a matter of
18 public interest litigation. I would suggest that no
19 costs ought to be awarded; all the parties ought to
20 bear their own. And I think the Town ought to
21 perhaps reconsider its position on the costs but
22 this is clearly a matter of -- and I know you didn't
23 get to the merits but we're not here on a meritless
24 application. Your decision was it was premature, a
25 point that was, you know, raised in the Crown's
26 reply to our brief.

27 But I don't know the practice here in Alberta

1 but in Saskatchewan oftentimes in situations like
2 this, when it's a matter of public interest - and
3 the application is not without merit; it's just a
4 judgment call, an exercise of discretion, as you
5 say, that it was premature - that the parties bear
6 their own costs, with no award of costs.

7 THE COURT: Thank you. My view is that
8 the successful parties should get their costs. Let
9 me say that I do not consider this to be a meritless
10 application on behalf of Siksika and I agree that
11 there are obvious public interest aspects to it.

12 Our Court of Appeal, in a decision which I
13 refer to as Weisgerber - that is the respondent's
14 name - has reviewed again the question of ordering
15 costs in domestic matters, where often the parties
16 were left to bear their own costs but I think it was
17 Mr. Justice Côté who went into some detail and depth
18 as to why costs should be awarded to the winning
19 party except, on my recollection of the case, in
20 very unusual circumstances.

21 Despite the merits to the application and the
22 public interest aspects of it, I do not consider
23 those to be sufficiently exceptional circumstances
24 to require the parties to bear their own costs, so I
25 will give the respondents costs -- separate sets of
26 costs each, column 1, schedule 'C'.

27 Is there anything else, counsel?

1 MR. SHAWA: Not from me, sir, thank you.
2 THE COURT: Thank you.
3 MS. GRAHAM: Thank you, sir.
4 THE COURT: Thank you very much, counsel,
5 for your arguments.

6
7 JUDGMENT CONCLUDED

8
9 Delivered orally at the Courthouse, Calgary, Alberta on
10 the 6th day of September, 2006.

11
12 L.D. Andrychuk, Q.C.
13 R.J. Jeerakathil, Esq.
14 For the Applicant

15
16 C.A. Graham, Ms.
17 S. Folkins, Ms.
18 For the Respondents

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20 S.M. Shawa, Esq.
21 C. MacDougall, Ms.
22 For the Respondent
23 Town of Strathmore

24
25 L. Stroobant Court Clerk

26
27

1 *Certificate of Record

2 I, Leslie Stroobant, certify that this recording is
3 a record of the oral evidence of proceedings in the
4 Court of Queen's Bench, held in courtroom 403, at
5 Calgary, Alberta, on the 6th day of September, 2006,
6 and that I was in charge of the sound-recording
7 machine.

8

9 PP:/smw

10 September 14, 2006

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Action No.: 0601 06100

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

BETWEEN:

THE SIKSIKA FIRST NATION

Applicant

- and -

THE DIRECTOR SOUTHERN REGION (ALBERTA ENVIRONMENT), the ALBERTA
ENVIRONMENTAL APPEALS BOARD, and THE TOWN OF STRATHMORE

Respondents

BEFORE THE HONOURABLE) At the Court House, in the City of Calgary,
MR. JUSTICE P.J. MCINTYRE) in the Province of Alberta, on
IN CHAMBERS) the 6th day of September, 2006.

ORDER

UPON the Application by the Applicant; AND UPON HEARING Counsel for the Applicant, Siksika First Nation and upon hearing counsel for the Respondent, Director (Southern Region), Alberta Environment; and counsel for the Respondent Town of Strathmore; IT IS HEREBY ORDERED THAT:

1. The Application for judicial review is dismissed on the ground that it is premature.
2. This order does not make a determination of the merits or substance of the Application.
3. One set of costs of this Application are payable by the Applicant to each of the

Respondents under Column 1 of Schedule C.

ENTERED this _____ day of, _____ 2006. J.C.C.Q.B.A.

REGISTRAR, Court of Queen's Bench of Alberta

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Per: _____

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ENTERED this _____ day of, _____ 2006. J.C.C.Q.B.A.

REGISTRAR, Court of Queen's Bench of Alberta

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Action No. 0601 06100

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

BETWEEN:

THE SIKSIKA FIRST NATION

Applicant

- and -

**THE DIRECTOR SOUTHERN REGION (ALBERTA
ENVIRONMENT), THE ALBERTA
ENVIRONMENTAL APPEALS BOARD AND THE
TOWN OF STRATHMORE**

Respondents

ORDER

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