

IN THE COURT OF APPEAL OF ALBERTA

TRANSCRIPT OF ORAL REASONS
FOR DECISION OF
THE HONOURABLE MADAM JUSTICE FRUMAN
DELIVERED MAY 22ND, 2003
IN CHAMBERS

IN THE MATTER OF Section 27 of the *Agricultural Operation Practices Act*, R.S.A. 2000, c. A-7;

IN THE MATTER OF Decision 03-04 of the Natural Resources Conservation Board, made on March 26, 2003;

AND IN THE MATTER OF an application for leave to appeal the aforesaid Board decision by Committee for Lone Pine being named therein;

BETWEEN:

COMMITTEE FOR LONE PINE

APPLICANT

- and -

NATURAL RESOURCES CONSERVATION BOARD

RESPONDENT

COUNSEL:

Alexander G. MacWilliam
Kellie L. Johnston
For the Applicant

William Y. Kennedy
For the Respondent

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[1] The applicant, Committee for Lone Pine, seeks leave to appeal decision 03-04, dated March 26, 2003, of the respondent, Natural Resources Conservation Board. The question in issue is whether the requirements of the *Agricultural Operation Practices Act*, R.S.A. 2000, c. A-7 (the Act) apply to existing confined cattle feed facilities when they are expanded.

[2] Leave to appeal may be granted pursuant to s. 27(1) of the Act on a question of law or jurisdiction. Both parties acknowledge that the applicant must raise a serious arguable issue.

[3] The appeal arises from the Board's decision to permit AAA Cattle Company Ltd. to expand its confined feeding operation. AAA had previously been issued a development permit allowing it to operate a 2,500 head beeflot. AAA sought to expand its confined feeding operation to a maximum capacity of 18,200 head. Its application was opposed by the Committee for Lone Pine, an organization comprised of 42 "affected parties", each of whom owns or resides on lands within two miles of the existing AAA operation.

[4] At the hearing before the Board, the Committee expressed concern that AAA's application was incomplete because it did not address retrofitting AAA's existing confined feeding operation. The Committee argued that the transitional provisions in the *Agricultural Operation Practices Amendment Act, 2001*, S.A. 2001, c. 16 (the AOPAA) dictate that all AAA's facilities meet the requirements under the Act, not just the expansion facilities. Section 12(1) of the AOPAA reads in part as follows:

If on January 1, 2002 a confined feeding operation [...] exists with respect to which a development permit was issued [...] and the development permit includes terms or conditions for the operation of the confined feeding operation [...], the Act and the regulations apply to the confined feeding operation [...]but the terms and conditions of the development permit continue to apply and prevail over any provision of this Act or the regulations with which the terms and conditions are inconsistent until:

- (a) in the opinion of the Board there is a risk to the environment or an inappropriate disturbance and an enforcement order is issued under this Act with respect to the confined feeding operation,[...] or
- (b) an approval, registration or authorization is granted under this Act to expand the confined feeding operation [...].

The Committee argued that since the expansion by AAA was approved pursuant to the Act, the development permit no longer prevailed, and the whole confined feeding operation, including the existing facilities, must now comply with the Act.

[5] The Board did not accept this argument. It concluded that, although the Act “raised the bar” for new and expanded facilities, no evidence was presented to show that the earlier standards were inadequate to protect public health or the environment. Therefore, there was “little or no benefit in forcing existing operators that are proposing to expand to somehow attempt to retrofit existing facilities to meet the new standards” particularly in light of the additional costs that would be incurred. The Board indicated its views might be different if facilities are shared in common between existing and expanded operations (Board decision at 24).

[6] The Board appears to interpret the transitional provisions of the AOPAA to give it discretion to exempt existing facilities that are expanded from compliance with the Act. This raises the issue whether, on a proper statutory interpretation, the transitional provisions vest such discretion in the Board. The Board agrees that this is a question of law.

[7] I note that the statutes under consideration are relatively new and this court has not yet considered the interpretation of the transitional provisions. This issue is likely to arise in other cases and is important. I am therefore satisfied the Committee has raised a serious and arguable question of law or jurisdiction. Accordingly, I grant leave to appeal on the following question:

Did the Natural Resources Conservation Board err in law or jurisdiction in its interpretation and application of the transitional provisions in ss. 11 and 12 of the *Agricultural Operation Practices Amendment Act, 2001*, S.A. 2001, c. 16?

[8] Both counsel have expressed concern with the time deadlines set out in s. 27 of the Act and, in particular, s. 27(3). They agree that this provision should be waived and I make that order. With counsel’s consent, I also direct that materials shall be filed and the appeal set down for hearing in accordance with the rules and practices of the Court of Appeal and, to the extent s. 27 conflicts with these provisions, the Court of Appeal rules and practices shall prevail. Counsel have also noted that the record before the Board was voluminous, as the Board dealt with many technical issues about the proposed confined feeding operation. Leave was not requested with respect to the Board’s ruling on these issues. Counsel expressed a willingness to work together to cull the material and put together a record that is confined to

materials that are relevant to this appeal. They are authorized and encouraged to do so, notwithstanding s. 27(6) of the Act.

APPLICATION HEARD on May 22nd, 2003

TRANSCRIBED at CALGARY Alberta
this 2nd day of June, 2003.

FRUMAN, J.A.