Court of Queen's Bench of Alberta

Citation: Grande Prairie Free Range Bison Co. Ltd. v. Natural Resources Conservation Board, 2003 ABQB 1019

Date: 20031219
Docket: 0301 03582
Registry: Calgary

Between:

Grande Prairie Free Range Bison Co. Ltd.

Applicant

- and -

Natural Resources Conservation Board

Respondent

- and -

Action No.: 0301 05324

In the Matter of the Agricultural Operations Practices Act RSA 2000 c.A-7

Robert Ringle, Barbara Ringle, Dean Robertson, and Rose Robertson

Applicants

- and -

Natural Resources Conservation Board

Respondent

Reasons for Judgment
of the
Honourable Madam Justice K.M. Horner

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[1] This is an application for Judicial Review of a decision of the Natural Resources Conservation Board ("NRCB") by Grande Prairie Free Range Bison Co. Ltd. ("GPFRB") of the NRCB's decision rendered December 4, 2002. This Judicial Review is brought pursuant to Part 56.1 of the ***Alberta Rules of Court***. The NRCB reviewed enforcement order no. 02-31 issued by its field officer on October 10th, 2002 against the Applicant, GPFRB in a hearing held on October 31, 2002. The NRCB rendered its decision with reasons on December 4, 2002. The Respondent, the NRCB, is a board created by and designated to exercise regulatory powers and authorities under the ***Agricultural Operation Practices Act*** ("the "AOPA") RSA 2000 c. A-7 and under the regulations promulgated pursuant thereto. The ***Agricultural Operation Practices Amendment Act*** ("*Amendment Act*")was passed into law on November 29, 2001 and came into force on January 1, 2002. Sections 10 through 12 of the ***Amendment Act*** provide transitional rules for the application of the AOPA to existing agricultural operations. The interpretation of these transitional rules for existing agricultural operations and related sections of the AOPA and its regulations was the subject matter of the NRCB's December 4, 2002 reasons.

[2] In 1998 a bison feed lot was constructed on the subject lands and was subject to the land use bylaw then in effect in the municipal district of Greenview. Land use in the municipal district of Greenview after June 1, 2001 was governed by the 2001 land use bylaw. The relevant animal density applicable to the Applicant under the 2001 bylaw was: "one head per 968.4 square feet. This meant that the Applicant's feed lot could hold between 4600 and 5600 animals based on the size of the subject lands. Under the June 1, 2001 land use bylaw 3 criteria were established to determine if an agricultural concern would be treated as a intensive livestock operation, these criteria were:

1. Threshold number of animals;
2. Density; and
3. Length of confinement.

If all three criteria were met then an operation was deemed an intensive livestock operation and therefore subject to regulation. Otherwise, an agricultural operation (including a feed lot) was not subject to regulation and did not require an approval or development permit. The standards in the bylaw tracked exactly those set by the Government of Alberta, Department of Agriculture in the 2000 "Code of Practice for Responsible Livestock Development and the Manure Management". The feed lot, as constructed in 1998 had a physical capacity to hold 4100 head of bison which was well below the relevant animal density to classify the feed lot as an intensive livestock operation. As the Applicant's feed lot could hold a minimum of 4600 animals before reaching the threshold of an

intensive livestock operation under the said bylaw it therefore was not subject to regulation and did not require any approval or development permit.

[3] The feed lot commenced commercial operations for third party clients in September, 2001 and as of December 31, 2001 accommodated between 2300 to 2700 bison. No additional construction of facilities was made after December 31, 2001.

[4] Between December 31, 2001 and April, 2002, the number of bison at the feed lot increased to 2887. In April, 2002 there were runoff problems that caused neighbours to complain to the NRCB. At that time a board field officer inspected the feed lot and issued an order, pursuant to s. 39 of AOPA that provided 4 directives, the relevant one of which was to document the number of bison on site prior to January 1, 2002 and the number of animals on site as at the date of the order, that being April 25, 2002.

[5] On May 23, 2002 the Applicant provided the required numbers as of the two dates those being 2708 bison prior to January 1, 2002 and 2887 bison as at April 25, 2002. On October 10, 2002 the field officer of the NRCB issued enforcement order 02-31 against the Applicant. The order required the Applicant to reduce and restrict the number of animals within the feed lot to 2300. The operative part of the order stated, after reciting s. 11(1) of the *Amendment Act* and s. 13(1) of the AOPA:

> As the number of bison on site between January and October, 2002 had variously been reported by the applicant to be 2500, 2644, 2887 and 3000 animals, and all of these numbers exceed the 2300 animal level established above, it is the opinion of this inspector that this represents an unauthorized expansion of the Grande Prairie Free Range Co. Ltd. feed lot at Northwest 30-71-26 West of the 5th Meridian W5M. Therefore I, Kelly Ross, field inspector, Natural Resources Conservation Board, pursuant to s. 39(1) of the Agricultural Operation Practices Act do hereby direct that Grande Prairie Free Range Bison Co. Ltd. and Mr. Chad Moore and Mr. Bjorn Nordman Owner/Operator (of a bison feed lot located on the northwest quarter of Section 30, Township 71, Range 26, west of the 5th Meridian shall immediately take all reasonable measures to reduce the number of bison currently in the feed lot to 2300 animals. . . [Emphasis added.]

[6] The Applicant sought a review of the enforcement order issued October 10, 2002 by a panel of the Board pursuant to s. 41 of the AOPA. At issue before the Board was the correct interpretation of the transitional provisions of the *Amendment Act*, namely section 11, and how this related to the Applicant. In particular, the issue before the Board was the definition of the use of the term "expanded" in s. 11(2) of the *Amendment Act* and "expansion" in s.13(1) of the AOPA. Sections 11(1), (2) and (3) of the *Amendment Act* and s. 13(1) of the AOPA read as follows:

> *Amendment Act*:
> 11(1) If on January 1, 2002 a confined feeding operation or manure storage facility exists with respect to which a municipal development permit was not issued, the Act

> and the regulations apply to the confined feeding operation and manure storage facility, and the owner or operator must ensure that the confined feeding operation and manure storage facility meet the requirements of this Act and the regulations.
>
> (2) Subsection (1) does not apply to a building or structure that exists on January 1, 2002 and is directly related to the confined feeding operation or manure storage facility referred to in subsection (1), until the building or structure is expanded.
>
> (3) Despite this section, the Board may, if in the opinion of the Board there is a risk to the environment or an inappropriate disturbance, issue an enforcement order with respect to the confined feeding operation or manure storage facility and any building or structure that is directly related to either of them.
>
> AOPA:
> 13(1) No person shall commence construction or expansion of a confined feeding operation for which an approval or registration is required pursuant to the regulations unless that person holds an approval or registration. [Emphasis added.]

[7] The Board agreed with its enforcement officer that the increase in the number of bison after the coming into force of the Amendment Act on January 1, 2002 was an "expansion" of the Applicant's confined feeding operation within the meaning of s. 11(2) of the *Amendment Act* and s.13(1) of the AOPA. The enforcement officer essentially held that the feedlot had been expanded and therefore the exemption in s. 11(2) of the Amendment Act was lost and as the applicant did not have approval or registration s.13(1) of the AOPA had been breached and therefore the number of bison had to be reduced to the most conservative estimate of the number of bison which existed as at January 1, 2002, which he found to be 2300 animals.

[8] The Applicant is seeking judicial review of the decision of the Board, claiming that the Board was in error in its interpretation of the transitional provisions of the *Amendment Act* and the AOPA.

[9] The issues on this application are:

1. What is the standard of review applicable to the decision of the Board;
2. Having determined the standard of review was the decision of the Board appropriate when tested against that standard of review; and
3. What is the appropriate remedy if the Board's decision is found to be in error.

[10] The parties have agreed that the question before the Board was one of law involving the interpretation of its governing statutes and regulations. The position of the Applicant is that the appropriate standard of review is correctness and that the Board was not correct in its decision. The position of the Board is that the appropriate standard of review is one of reasonableness, and that its decision was reasonably made, or in the alternative if the standard of review is correctness then the decision is correct.

[11] The pragmatic and functional approach, set out in ***Pushpanathan*** v. ***Canada (Minister of Citizenship and Immigration)***, [1998] S.C.J. No. 46, indicates that under this approach there are four factors to be taken into account and they are:

1. The existence of a privative clause;
2. The expertise of the tribunal appealed from;
3. The purpose of the Act as a whole and the provision in particular; and
4. The nature of the problem.

The parties have agreed the nature of the problem in this case is an interpretation of a statute which is an issue of law.

[12] In balancing these four factors I will consider each in turn. Firstly there is no privative clause in the AOPA legislation therefore there is no indication from the legislation that the decision from the Board is to be given any particular deference. The lack of a privative clause on its own is a neutral factor.

[13] It is agreed between counsel as a fact that no member of the AOPA panel which rendered the decision in this matter has a legal background but rather each of the members have scientific or technical expertise in the animal husbandry or environmental assessment areas. While it is true that the panel was interpreting legislation that they have been exclusively designated to enforce, at the time of the hearing, being October 31, 2002, the panel had only been in effect for a period of, at best, one year. While a tribunal may have high relative expertise arising from repeated application of its authority over a particular matter, which may give rise to a superior capacity to draw inferences from the facts and to assess the impact of a decision on the effected parties, as a result of the relative youth of the NRCB I find the panel had not achieved the required level of expertise in interpreting its enabling legislation prior to their decision in this matter in order for this court to accord the panel any deference based on their expertise.

[14] Where the purpose of the statute is to facilitate a balancing of the rights and interests of numerous parties, the court should show more deference (***Pushpanathan, supra***). The legislation and the particular provisions under consideration in this case are concerned with the protection of the public, engages policy issues and involves a balancing of multiple sets of interests or considerations. It is likely therefore that a greater degree of deference by the courts is required with respect to the Board's function and purpose of the legislation. The parties agree that the nature of the problem is the application of the *Amendment Act* transitional legislation (s. 11) and the AOPA (s.13(1)) to the operations of the Applicant. The purpose, however of grandfather clauses such as s.11(2) of the *Amendment Act*, is to protect reasonable expectations about the present law. ***Boykiw v. The City of Calgary***, [1992] A.J. No. 344 (Alta. C.A.). An issue of pure law indicates less deference by the reviewing court. ***Dr. Q. v. College of Physicians and Surgeons of British Columbia,*** [2003] S.C.J. No. 18. Where the decision will be one of general importance or great precedential value the court should show less deference to the decision of the tribunal. ***Chiew v. Canada (Minister of Citizenship and Immigration),*** [2002] 1 S.C.R. 84. Where the issue is a pure question of law that requires the application of principles of statutory interpretation and where there

is no evidence that the tribunal has particular expertise in respect of these matters, the appropriate standard of review is correctness. ***Canada (Deputy Minister of National Revenue - MNR)*** v. ***Mattel Canada Inc.***, [2001] 2 S.C.R. 100.

[15] I am satisfied that in weighing all four factors based on the above analysis that the standard of review to be applied to the Board's decision is that of correctness. The Board only needed to determine the definition of the phrase "until the building or structure is expanded" in s. 11(2) of the *Amendment Act* and the definition of the phrase"construction or expansion" in s. 13(1) of the AOPA to determine if the enforcement order under review was valid. It is clear from the enforcement order under review by the Board that the enforcement officer focused on a "unauthorized expansion" in contravention of s. 13(1) of the AOPA of the Applicant's feedlot in issuing the enforcement order. The enforcement officer interpreted expansion in s. 13(1) of the AOPA to include increased animal count. It does not appear from the decision of the enforcement officer that he even considered the Applicant's exemption from provision s. 13(1) of AOPA contained in s. 11(2) of the *Amendment Act*. Unless and until the Applicant lost the exemption protection contained in s. 11(2) of the *Amendment Act*, or the exemption did not apply, s. 13(1) of the AOPA, cited by the enforcement officer in the aforesaid order, is not operative. The Board, rather than confining itself to the narrow definition of the phrases in each section and whether the Applicant was exempt from s. 13(1) or not instead embarked upon a consideration of the policy of the legislation disguised as legislative intent. There is no actual attempt in the Board's decision of December 4, 2002 to define the relevant words in s. 11(2) and s. 13(1). Rather the Board took a very broad view.

[16] The ordinary meaning of expand or expansion may, but does not necessarily, include an increase in herd size as well as a change in the size of the facilities. The meaning is ambiguous so it is proper to look to other interpretive aids. Neither the AOPA or the *Amendment Act* expressly define "expand" or "expansion".

[17] The *in pari materia* rule of statutory interpretation allows other legislation that covers exactly the same ground to be used as an interpretive aid, and is the most appropriate interpretive aid in this situation. The AOPA can be interpreted in the context of its regulations and the *Amendment Act*. Normally, subordinate legislation cannot be used as an interpretive aid under the *in pari materia* rule unless it is closely meshed into the overall regulatory scheme. The AOPA establishes a regulatory framework, but delegates all of the mechanics of the ***Act*** to the regulations, including the determination of the circumstances under which approval shall be issued and the conditions of those approvals. Therefore the regulations are closely meshed with its enabling legislation and can be used as an interpretive aid. ***Crupi v. Canada (Employment and Immigration Commission)***, [1986] 3F.C.3.

[18] Section 13(1) of the AOPA itself refers to the regulations as defining the circumstances for which an approval or registration is required. Additionally the Standards and Administration Regulation, Alberta Regulation 267/2001 establishes the operational practises to be followed under an approval, registration or authorization pursuant to the AOPA and therefore s. 13(1). It outlines "construct" as:

> (f) "construct" with respect to a structure, operation or facility includes reconstructing, renovating, altering or expanding but does not include general maintenance of the structure, operation or facility. [emphasis added.]

[19] The Agricultural Operations, Part 2 Matters Regulations, Alta. Reg. 257/2001 defines the circumstances under which an approval, registration or authorization shall be issued under the AOPA and consequently may be used as an interpretive aid in relation to approvals. Section 1 of the Regulation defines expansion as follows:

> (d) "expansion" means the construction of additional facilities to store manure or to accommodate more livestock; [emphasis added].

Other portions of the regulations similarly use expansion in a way that is consistent with its use in reference to an expansion of physical facilities. Since s. 1(d) of the Agricultural Operations, Part 2 Matters Regulation defines "expansion" a contrary interpretation of expansion which includes anything other than the expansion of facilities is incorrect at least for the purposes of determining whether an approval or registration is required under s. 13(1) of AOPA. This is also consistent with a plain reading of s. 13(1) where the word construction is also contained.

[20] The Standards and Administration Regulation, Alta. Reg. 267/2001 referred to above at s.3 describes criteria for the issuance of an approval or registration, which includes compliance with a "minimum distance separation" from neighbouring residences, at s. 3(3), where this distance is determined using a formula which includes a "expansion factor". This expansion factor is defined in Schedule 1 of the Regulation:

> Expansion Factor:
> This factor is determined by the Board. This factor only applies to expanding operations that are increasing the size of the facility to store more manure or to accommodate more livestock. [emphasis added.]

[21] The interpretive rule of *noscitur a sociis* demands that "expansion" be read in the context of related words. The phrase "no person shall commence construction or expansion of a [feedlot] . . ." contained in section 13(1) suggests that expansion is related to construction. This interpretation would limit expansion to some form of construction.

[22] The relevant transitional provision, s 11(2) of the Amendment Act arguably creates a right to continue operating a feed lot under the pre-existing municipal regulations. The interpretation of "expansion" must not result in giving effect to action that is inconsistent with the object of the transitional provision of the Amendment Act. (***Boykiw supra***)

[23] By looking to the AOPA, the *Amendment Act* and the regulations promulgated pursuant thereto the term expanded and expansion in s.11(2) of the *Amendment Act* and s. 13(1) of the AOPA refers to the facilities and not the herd size and as such the foundation for enforcement order 02-31 issued by the field officer on October 10, 2002 was not present. The Board's interpretation of the

applicable provisions before it, that being s. 11(2) of the *Amendment Act* and s. 13(1) of the AOPA was not correct.

[24] In measuring the Board's decision against the standard of review of correctness I find that the Board's interpretation of the grandfathering provisions and their application to the Applicant to be incorrect. Under the circumstances it was incorrect of the Board to uphold the enforcement officer's order of October 10, 2002 on the basis that the grandfathering provisions in s. 11(2) were lost when the bison herd was increased after January 1, 2002.

[25] I believe the correct interpretation of the phrase "until the building or structure is expanded"in s.11(2) of the Amendment Act means unless and until the confined feeding operation's physical facilities were to be expanded or enlarged the Applicant continues to operate its confined feeding operation under the pre-existing municipal regulations and can enlarge its herd size to 4600 animals.

[26] Contrary to the Board's view that such a restrictive interpretation of the grandfathering provisions would give rise to substantial potential for unregulated expansion of livestock and that this is not what the legislature intended, this cannot be derived from the legislation and its regulations. As the Board noted itself there are several provisions in the legislation and its regulations that discuss herd size. It would have been very simple for the legislature to include herd size or livestock numbers in the grandfathering provisions were that to give rise to the loss of the exemption contained in s. 11(2). As noted by the Applicant the Board has the authority in s. 11(3) to issue an enforcement order with respect to the confined feeding operation should, in the opinion of the Board, there be a risk to the environment or an inappropriate disturbance. See also s. 39 of the AOPA which authorizes the Board to issue an enforcement order specifying measures to be taken to effect compliance with, inter alia, the Act if in its opinion the person is creating a risk to the environment or an inappropriate disturbance. If an increase in the bison herd as contemplated or achieved by the Applicant results in a risk to the environment or an inappropriate disturbance then the Board is free to issue an enforcement order, presumably along the lines that the enforcement officer issued in this case. However, the Applicant is entitled to a determination that the increased herd size does give rise to an environmental risk or an inappropriate disturbance first before such an order can be issued and enforced. Such an assessment was not undertaken here.

[27] I therefore quash the decision of the Board and vacate NRCB enforcement order no. 02-31 dated October 10, 2002.

[28] At the same time as I heard the GPFRB application for judicial review I also heard the application of Robert Ringle, Barbara Ringle, Dean Robertson and Rose Robertson. The applicants are owners of land adjoining the subject lands where the confined feeding operation of GPFRB is situate and their lands are within approximately 600 metres of the confined feeding operation itself. The applicants became aware of enforcement order no. 02-31 which had been issued to GPFRB on October 10th, 2002 and that GPFRB had applied to the NRCB for a review of that Order and a review hearing had been scheduled to be held in accordance with s. 41 of the AOPA. It was the evidence of the applicant, William Dean Robertson, that he was advised by Kelly Ross, a field inspector for

the NRCB, prior to the hearing date of October 31st, 2002, that he and the other applicants were allowed to attend the NRCB review committee proceedings in this matter as observers only and that they could not participate or make submissions at the hearings. As a consequence of this advice it is the evidence of the applicants that they did not seek standing before the NRCB at the hearing on October 31st, 2002.

[29] The nature of their application is to have the decision of the Board set aside essentially on the grounds that they were not afforded natural justice as they did not have an opportunity to make submissions and be heard at the review hearing held October 31st, 2002.

[30] As a result of my finding in the application for judicial review by GPFRB I find it unnecessary to deal with the application of the applicants and therefore dismiss same. The parties may seek additional direction from me with respect to costs, of both applications, if necessary.

Heard on the 3rd day of May, 2003.
Dated at the City of Calgary, Alberta this 19th day of December, 2003.

K.M. Horner
J.C.Q.B.A.

Appearances:

Gary A. Befus, Walslh Wilkins Creighton LLP
for the Applicant

Kurt W. Stilwell, Natural Resources Conservation Board
for the Respondent

David F. Reay, Sharek Reay LLP
for the Applicants