In the Court of Appeal of Alberta

Citation: Lone Pine (Committee) v. Alberta (Natural Resources Conservation Board), 2004 ABCA 404

Date: 20041213
Docket: 0301-0121-AC
Registry: Calgary

Between:

Committee for Lone Pine

Appellant

- and -

Natural Resources Conservation Board

Respondent

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Peter Costigan

Memorandum of Judgment
Delivered from the Bench

Appeal from the Decision by
Natural Resources Conservation Board
Dated the 26th day of March, 2003

Memorandum of Judgment
Delivered from the Bench

Fraser C.J.A. (For the Court):

[1] The Natural Resources Conservation Board approved the application by AAA Cattle Company Ltd. (AAA) to expand capacity at its existing feedlot to 18,200 head of cattle. A group of interested landowners, the Committee for Lone Pine (Lone Pine), appealed the Board's decision to this Court under s.27 of the *Agricultural Operation Practices Act*, R.S.A. 2000, c.A-7, as amended (*AOPA*). A chambers justice granted leave to appeal on this 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?

[2] A number of issues emerged on appeal. Three in particular were the focus of oral submissions. First, which section of the *Agricultural Operation Practices Amendment Act, 2001*, S.A. 2001, c.16 (*2001 Amendments*) applied to AAA's application and did the Board properly consider the applicable section? Second, did the Board make a reviewable error by failing to find that the transitional provisions of the *2001 Amendments* required the retrofitting of AAA's existing facilities? Third, are these issues now moot given legislative amendments made in 2004: *Agricultural Operation Practices Amendment Act*, *2004*, S.A. 2004, c.14 (*2004 Amendments*)?

[3] To better understand these issues, a short review of the facts is necessary. On December 19, 2000, Mountain View County issued a development permit allowing AAA to operate a 2,500 head feedlot. By November 1, 2001, the facility was handling 6,000 head in contravention of the development permit. On January 4, 2002, despite the fact that it was not abiding by the conditions of its original permit, AAA applied to the Board for approval to expand its operation to accommodate 18,200 head of cattle. The Board had been given the authority to hear applications of this kind under the *2001 Amendments* which came into effect January 1, 2002. Responsibility for considering the application in the first instance fell to a Board "approval officer": s.18 of *AOPA.*

[4] On March 21, 2002, a Board enforcement officer issued an order requiring AAA to take immediate steps to reduce the number of cattle being housed in its feedlot. The order gave AAA until August 31, 2002 to comply with the development permit.

[5] On July 29, 2002, Lone Pine filed a written submission with the Board opposing AAA's application on a variety of environmental grounds. On November 1, 2002, the Board approval officer issued a decision denying AAA's application to expand the feedlot on the basis that insufficient information had been provided to show that "the proposed liners for the manure storage area and the runoff control catch basin meet the requirements of Section 9 of the *Standards and Administration Regulation*." Under s.25 of *AOPA*, AAA, Lone Pine, and interested parties Ross and

Judy Warner all asked the Board to review the approval officer's decision.

[6] At the Board hearing, Lone Pine contended that AAA's application was deficient because AAA had failed to address the retrofitting of its existing feedlot. According to Lone Pine, the need to retrofit those existing facilities to make them compliant with *AOPA* arose under the transitional provisions in s.12(1) of the *2001 Amendments*. Those transitional provisions set out how existing facilities, operating under municipal development permits, were to be treated when the *2001 Amendments* came into force. Under s.12(1), existing operations were grandfathered, meaning that the terms and conditions of an existing development permit were to apply and prevail over the new legislation "until" the occurrence of certain events. Under s.12(1)(b), the relevant subsection for purposes of this appeal, an existing development permit applied until "an approval ... is granted under this Act [*AOPA*] to expand the confined feeding operation...." [Bracketed portion added.]

[7] Lone Pine submitted that under these transitional provisions, once the Board granted an approval to expand an existing feedlot, the entire operation must then be brought into compliance with *AOPA* and the regulations passed thereunder: *Standards and Administration Regulation* AR 267/2001, *Board Administrative Procedures Regulation* AR 268/2001, and the *Agricultural Operations, Part 2 Matters Regulation* AR 257/2001 ("the *Regulations*"). Further, the Board must consider this issue in deciding whether to grant an approval. The Board disagreed. It held there was no evidence showing that the earlier standards were ineffective in protecting public health, and that 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." It is from this conclusion that Lone Pine appeals.

[8] At this point, it should be noted that AAA did not appear or take any part in these appeal proceedings despite having been served with notice of Lone Pine's application for leave to appeal. During oral argument, in response to questions from the Court, the Board made it clear that the Board was speaking only on its own behalf and not on behalf of AAA.

[9] Lone Pine argues that the Board erred in law by failing to conclude that s.12 imposed on AAA an obligation to ensure that its existing operations complied with *AOPA* and the *Regulations* once it expanded those operations. The Board challenges this interpretation. In its view, the legislation imposes no such obligation on AAA. Further, the Board contends that recent amendments to *AOPA* repealing the transitional provisions of the *2001 Amendments*, both ss. 11 and 12, have made this matter moot.

[10] We turn first to the standard of review. In our view, the standard of review that applies to the Board's decision on the interpretation of the relevant statutory provisions is correctness. *AOPA* does not contain a privative clause and the issue before the Board involves a matter of general statutory interpretation, both of which factors weigh against deference: ***Dr. Q. v. College of Physicians and Surgeons of British Columbia***, [2003] 1 S.C.R. 226, ***Alberta Union of Provincial Employees v. Lethbridge Community College***, [2004] 1 S.C.R. 727. However, even if the standard of review were reasonableness, we are satisfied that the Board's interpretation of the transitional

provisions of the *2001 Amendments* is unreasonable. There are several reasons for so concluding.

[11] First, this case engages s.11 of the *2001 Amendments*. The Board failed to consider s.11 and, in this context, that failure by itself constitutes reviewable error. It is important to understand that s.11 deals with the situation where no development permit has been issued for a confined feeding operation or manure storage facility. In that event, s.11(1) requires that operations which are not the subject of an existing development permit comply with *AOPA* and the *Regulations*. In turn, s.11(2) then relieves owners of this obligation in respect of existing buildings and structures, but only until the building or structure is expanded.

[12] We have concluded that based on the facts of this case, as found by the Board, s.11 governs. Why is this so? AAA expanded its operations by an additional 3,500 head of cattle without first securing the necessary approvals. Indeed, the Board acknowledged at p. 24 of its decision that "AAA has clearly built facilities well in excess of its original development permit": Materials Filed in Lieu of Appeal Books, Tab B. Accordingly, at the time of AAA's application, its confined livestock operation, which then included approximately 6,000 head of cattle, constituted one operation for which no valid permit existed given both the number of cattle involved and the additional facilities AAA had constructed to accommodate them. In other words, at the relevant time, AAA's feedlot operations fell within, and were governed by, s.11, and not s.12 of the *2001 Amendments*.

[13] Under s.11, once AAA proposed, as it did, to expand its existing buildings or structures to accommodate an 18,200 head cattle operation, its existing operations lost the "grandfather" protection conferred under s.11. AAA was then required to comply with *AOPA* and the *Regulations* in respect of its entire confined feeding operation and manure storage facilities.

[14] Even if s.12 of the *2001 Amendments* applied, in whole or in part, the same result would follow. As with s.11, the textual wording of s.12(1)(b) is clear and unambiguous. Compliance with *AOPA* and the *Regulations* is required when the Board approves an expansion of the confined feeding operation. Once that occurs, the entire operation must be compliant. The Board's conclusion to the contrary is incorrect.

[15] Moreover, even if we were in error in our interpretation of ss.11 and 12, we have concluded that, in deciding whether to approve an 18,200 head cattle operation, the Board, at a minimum, ought to have taken into account the effect which the existing operations would have on the integrity of the larger cattle operation. The Board declined to do so. This, too, constitutes reviewable error. Even if AAA had no obligation to bring its existing operations into compliance, those operations in their present form should have been factored into the risk assessment and analysis which the Board undertook. They were not. And yet, that might well have affected the Board's assessment of whether it was appropriate to approve an 18,200 head cattle operation on these lands with the facilities and structures the Board chose to approve.

[16] The Board then argues that even if it made an error, the issue is now moot due to the *2004*

Amendments. Those amendments repealed both ss. 11 and 12 of the *2001 Amendments*. In turn, s. 20(1.2) was enacted. That section provides in relevant part as follows:

> 20(1.2) In considering whether an application for an amendment to an approval meets the requirements of the regulations, an approval officer
>
> (a) shall not consider whether the existing buildings and structures meet the requirements of the regulations unless in the opinion of the approval officer the existing buildings and structures may cause a risk to the environment ....

[17] We do not agree that this section makes the matter before this Court moot. First, we are dealing with a separate, distinct issue on which leave was granted. It was this: Did the Board err in interpreting the transitional provisions? We have concluded it did.

[18] Second, we are not satisfied that these amendments would apply to AAA's application in any event. There can be no argument of mootness unless the new legislation is applicable. Whether the *2004 Amendments* apply to applications predating the effective date of the 2004 Amendments may raise issues of retrospective and retroactive legislation not yet canvassed. Moreover, even if the 2004 Amendments do so apply, another point arises. That point – namely whether AAA's application to expand existing operations constitutes, in these circumstances, an "amendment to an approval" within the scope of s.20(1.2) or alternatively, a new application in its own right – remains outstanding. It has not been properly put before this Court.

[19] Third, even assuming the new legislation applied to AAA's application, there has been no proper assessment of the risk to the environment here. This section is directed to protection of the environment and the larger public interest. In order to assess risk, someone must assume responsibility for doing so. That responsibility – along with the investigation it entails – rests squarely in the first instance on the Board's approval officer. While an applicant may be required to provide certain information to the approval officer, the existence of that requirement together with the information received, in no way relieves the approval officer of his or her due diligence obligations in assessing the risk to the environment. Nor does this section entitle the approval officer or, for that matter, the Board, to assume that because those opposing an application under *AOPA* have not proven an adverse impact on the environment from existing operations, it follows that there is no risk to the environment. This section contemplates an independent analysis of two aspects of environmental risk: first, whether the existing operations themselves may cause a risk to the environment; and second, whether those existing operations may cause a risk when considered in the context of the proposed expanded operations.

[20] It is apparent from this record that no such risk assessment for the existing operations was undertaken by the approval officer. Indeed, the only assessment undertaken by the approval officer

related to the expansion itself which the approval officer declined to approve.

[21] For these reasons, it follows that the issue is not moot.

[22] Therefore, this appeal must be allowed. That takes us to the issue of remedy. We quash the Board's decision and any decisions resulting therefrom. Lone Pine requests that we not refer the matter for a new hearing. AAA has chosen not to participate or appear in these proceedings and we are entitled to draw the inference – and do so – that AAA has no interest in this matter. Were this otherwise, AAA would no doubt have chosen to take part in these proceedings and expose itself to costs. It has not done so. Accordingly, we decline to order a rehearing.

Appeal heard on November 08, 2004

Memorandum filed at Calgary, Alberta
this 13th day of December, 2004

Fraser C.J.A.

Appearances:

A.G. MacWilliam
for the Appellant

W.Y. Kennedy
for the Respondent