In the Court of Appeal of Alberta

Citation: Gift Lake Métis Settlement v. Métis Settlements Appeal Tribunal (Land Access Panel), 2008 ABCA 43

Date: 20080206
Docket: 0703-0139-AC
Registry: Edmonton

Between:

Gift Lake Métis Settlement

Applicant

- and -

The Land Access Panel of the Métis Settlements Appeal Tribunal

Respondent

- and -

Devon Canada Corporation, Métis Settlements General Council, Kenneth Russell Shaw and Conrad Patrick Shaw

Affected Parties

Reasons for Decision of The Honourable Mr. Justice Ronald Berger

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Application for Leave to Appeal the Decision of the Land Access Panel of the Métis Settlements Appeal Tribunal

Reasons for Decision of
The Honourable Mr. Justice Ronald Berger

[1] This is an application for leave to appeal from a decision of the Land Access Panel of the Métis Settlements Appeal Tribunal (LAP/MSAT). LAP conducted a review of the compensation owed by Devon Canada Corporation ("Devon") for 43 oil wells and related access roads on the Gift Lake Métis Settlement in an area called Sandy Bay.

[2] Devon is the largest oil and gas operator on the Gift Lake Métis Settlement. Its operations are concentrated in the Sandy Bay area where 74 percent of all wells drilled in the Gift Lake Métis Settlement are located. Devon, or its predecessors, are responsible for about 75 percent of wells drilled historically at Gift Lake and owns 84 percent of producing wells. It has 43 sites on the Gift Lake Settlement and 44 sites adjacent to the Settlement.

[3] Section 204 of the ***Métis Settlements Act***, RSA 2000, c. M-14 (the "Act") provides that an appeal from a decision of the MSAT must raise a question of law or a question of jurisdiction. An application for leave to appeal pursuant to s. 204 of the Act must also establish that the questions are arguable and raise issues that will be of interest or use to MSAT or the general public in the future: ***Martineau v. Métis Settlement Appeal Tribunal***, 2004 ABCA 63 at paras. 3 and 6; and ***Paramount Resources Ltd. v. Métis Settlements Appeal Tribunal (ELLAP)***, 1999 ABCA 348 at para. 4. Findings of fact by MSAT are owed a high level of deference.

[4] The central argument of the Applicant flows from s. 118(1)(c)(iii) of the Act which requires MSAT to consider the impact of the lease or project on other areas including "other specific matters, such as the cumulative effect of related projects." [emphasis added]

[5] The Applicant submits that the Tribunal erred in its interpretation of "cumulative effect" by limiting the relevant impacts to those occurring during the current review period, deciding that past and continuing effects are not cumulative and by requiring that certain evidence be tendered to prove cumulative effects. The Applicant also argues that the Tribunal excluded off-settlement projects, seismic and other projects from its assessments, and confused compensation for cumulative effects with retroactive compensation.

[6] In ***Bow Valley Naturalists Society v. Canada***, [2001] 2 F.C. 461, the Federal Court of Appeal noted that the statute there under consideration did not define "cumulative effects". The Court noted, however, that the Canadian Environmental Assessment Agency has defined cumulative environmental effects as "the effects on the environment, over a certain period of time and distance, resulting from effects of a project when combined with those of other past, existing and imminent projects and activities."

[7] The Court quoted with approval the following observations of Rothstein, J.A. (as he then was) in ***Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans)***, [2000] 2 F.C. 263:

> "Under paragraph 16(1)(a), the responsible authority is not limited to considering environmental effects solely within the scope of a project as defined in subsection 15(1) ... Indeed, the nature of a cumulative effects assessment under paragraph 16(1)(a) would appear to expressly broaden the considerations beyond the project as scoped. It is implicit in a cumulative effects assessment that both the project as scoped and sources outside that scope are to be considered.
> (at p. 285)
>
> . . .
>
> Implicit in a cumulative effects assessment under paragraph 16(1)(a) are effects from both the project as scoped and other projects or activities. Sunpine argued that if there were no adverse environmental effects from the project as scoped, there could be no cumulative effects as envisaged by that paragraph. While on its face this argument is compelling, I am not sure it is possible to rule out that a federal project, while creating no adverse effects itself, could exacerbate adverse effects of other projects. In any event, a finding of insignificant effects as was made here still implies some effects from the bridge projects themselves. It is not illogical to think that the accumulation of a series of insignificant effects might at some point result in significant effects. I do not say that is the case here. I only observe that a finding of insignificant effects of the scoped projects is sufficient to open the possibility of cumulative significant environmental effects when other projects are taken into account. For this reason, I do not think the insignificant effects finding precludes the application of the cumulative effects portion of paragraph 16(1)(a) or subsection 16(3) in this case." (at pp. 287-288)

[8] The Applicant maintains that the Tribunal erred by arbitrarily accepting an increase to the compensation of 2 percent (per leased acre) for cumulative effects as urged by the Respondent Devon, and by imposing "an impossible burden of proof on Gift Lake" by holding that Gift Lake was required to give evidence of "specific cumulative effects" and "specific on-going impacts caused by Devon's specific operations during each [five year] review period.": MSAT Order 176, pp. 45, 63 and 67.

[9] In my opinion, the proposed appellate issues reduce themselves to two matters:

1. Whether the Tribunal erred in law by misconstruing and misapplying s. 118(1)(c) of the Act.

2. Whether the Panel's assessment of evidence and preference for the evidence of Devon's experts warrants appellate interference.

[10] With respect to the former, the Respondent Devon points out that the operative provision of s. 118 is permissive. In its entirety it reads as follows:

> "118(1) In determining the amount of money payable by an existing mineral lease holder or operator to an occupant as compensation, the Existing Leases Land Access Panel or the Land Access Panel must consider any relevant development agreement and may consider the following:
>
> . . .
>
> (c) the impact of the lease or project on other areas, including
>
> (iii) other specific matters, such as the cumulative effect of related projects;
>
> . . .
>
> (e) any other factors the Panel considers appropriate."
> [emphasis added]

[11] Devon's argument is that the Panel has been given broad discretion to consider on a permissive basis specific matters such as "the cumulative effects of related projects" as well as any other factors the Panel considers appropriate. Devon submits that the award is not unreasonable and that the position advanced by the Applicant would require the Panel to issue compensation on a retroactive basis for impacts outside the review period in question and which may not even have been caused by Devon. The critical passage of the Panel's decision relative to that subject is as follows:

> "LAP finds that cumulative effects are clearly relevant in assessing appropriate annual compensation under s. 118 of the *MSA*. However, LAP finds that cumulative effects cannot be relied upon to attempt to obtain retroactive compensation or compensation for past review periods. LAP acknowledges that the background and history of a site may be relevant as, in some cases, it may assist in establishing an ongoing impact. However, that is not a cumulative effect. Rather, cumulative effects address the combined impact of the sites or operations in issue considered with the other oil and gas projects or activities in the area. It may also be relevant for a LAP Panel to consider the effect of the operations in question, taken as a whole.

> However, the cumulative effects must be impacts that occur during the review period LAP has jurisdiction over. In this case, the focus of the evidence presented by GLMS regarding cumulative effects related to their position that LAP had jurisdiction to compensate for past review periods." [emphasis added]
>
> (MSAT Order No. 176, p. 67)

[12] Devon argues that this issue has been resolved by this Court in ***Fishing Lake Métis Settlement v. Métis Settlements Appeal Tribunal Land Access Panel***, 2003 ABCA 143 at para. 43. Devon's submission is that:

> "[This Court] has very recently confirmed that the *Act* is prospective legislation with the objective of balancing interests including the need for commercial certainty. An interpretation of the *MSA* which provides for compensation for impacts outside the applicable review period would clearly be contrary to the Court's direction. The GLMS position, therefore, is without merit and does not raise an arguable ground of appeal."
>
> (*Memorandum of Devon Canada Corporation, p. 6)*

[13] In ***Fishing Lake***, ***supra***, at para. 43, the Court stated:

> "Furthermore, this [the *Métis Settlements Act*] is forward looking legislation. The purpose of an REO is to permit the development of resources. Certainty and transferability are key requirements of that industry. The Panel is responsible for balancing an assortment of interests including, but not limited to, a need for commercial certainty, and a need for consistency in its decisions."
>
> [emphasis added]

[14] In my opinion, it is far from clear that the Court's cited pronouncement is dispositive. Indeed, during oral argument counsel for Devon conceded that the Court's statement provides only an "interpretive framework" for analytic consideration of the import of s. 118(1)(c).

[15] In my view, the test for leave on the basis of this first proffered ground is made out. More precisely, I grant leave to appeal on the following ground:

> Did the Tribunal err in its interpretation of "cumulative effect" in s. 118(1)(c) of the Act by limiting the relevant impacts to those effects occurring during the current review period, by deciding that past and continuing effects are not cumulative, and by requiring that certain evidence be tendered to prove cumulative effects?

[16] Mindful of the standard of appellate review, I refuse leave on the second ground. I leave the issue of costs of this application to the panel that hears the appeal.

Application heard on January 22, 2008

Reasons filed at Edmonton, Alberta
this 6th day of February, 2008

Berger J.A.

Appearances:

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