In the Court of Appeal of Alberta

Citation: Gift Lake Métis Settlement v. Métis Settlements Appeal Tribunal (Land Access Panel), 2009 ABCA 143

Date: 20090417
Docket: 0703-0139-AC
Registry: Edmonton

Between:

Gift Lake Métis Settlement

Appellant (Applicant)

- and -

The Land Access Panel of the Métis Settlements Appeal Tribunal

Respondent (Respondent)

- and -

Devon Canada Corporation

Respondent (Affected Party)

- and -

Métis Settlements General Council,
Kenneth Russell Shaw and Conrad Patrick Shaw

Not Parties to the Appeal
(Affected Parties)

The Court:

The Honourable Madam Justice Ellen Picard
The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Peter Costigan

Memorandum of Judgment

Appeal from the Decision by
Métis Settlements Appeal Tribunal
Dated the 12th day of April, 2007

Memorandum of Judgment

The Court:

[1] The appellant, Gift Lake Métis Settlement ("GLMS"), was granted leave to appeal the following question:

> 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?

Gift Lake Métis Settlement v. Métis Settlements Appeal Tribunal (Land Access Panel), 2008 ABCA 43 at para. 15.

[2] For the purposes of the appeal, GLMS divided this question into two parts:

1. Did the tribunal err in its interpretation of "cumulative effect"?
2. Did the tribunal err by requiring certain evidence to prove cumulative effect?

[3] The appeal is dismissed.

Background and Tribunal Decision

[4] The appeal concerns a decision of the Land Access Panel ("LAP") of the Métis Settlements Appeal Tribunal ("Tribunal") about a review of compensation payable to GLMS as a result of oil and gas activity on its lands by the respondent, Devon Canada Corporation ("Devon"). It concerns LAP's interpretation of section 118(1)(c)(iii) of the *Métis Settlements Act*, R.S.A. 2000, c. M-14 ("*MSA*") (emphasis added):

> 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 ...

[5] Section 187.1 of the *MSA* obliges the Tribunal to fulfill its responsibilities "with a view to preserving and enhancing Métis culture and identity and furthering the attainment of self-government by Métis settlements".

[6] Oil and gas activity has occurred in the Gift Lake area for many decades. GLMS's application to LAP concerned a review of compensation payable in relation to 43 wells and related facilities, many of which have been in place since before 1990. The relevant review period was five years, beginning between 2000 and 2002 depending on the particular surface lease.

[7] These activities are located primarily in the Sandy Bay area, acknowledged to be of high value to GLMS from a wildlife and overall cultural point of view. Everyone concerned also accepts that oil and gas activities have had negative impacts on the wildlife and vegetation of Sandy Bay.

[8] The hearing occurred over several days. LAP described the testimony of GLMS's elders as being useful and informative. GLMS and Devon both presented expert reports and testimony. GLMS's expert report was prepared by EcoPlan International ("EPI"), represented primarily by Trousdale at the hearing. Devon's expert report was prepared jointly by Dallas E. Maynard & Associates Inc. and McNally Land Services Ltd. ("M+T").

[9] In its decision, LAP reviewed the evidence in great detail. It gave more weight to the M+T report for several reasons. It considered that the starting point for Trousdale's calculations was flawed; the EPI report concentrated on the impacts of oil and gas activity generally and not specifically on effects caused by Devon; the EPI report relied almost entirely on the perceptions of and values of GLMS's members with no attempt to confirm these through objective studies or data (which Trousdale acknowledged would have been useful); and it had concerns about the objectivity of the EPI study.

[10] In contrast, LAP expressed the view that the M+T report acknowledged that Devon's operations had a negative impact in the Sandy Bay area from a cultural point of view but contained more evidence about Devon's impacts than did the EPI report. Although the M+T report, like the EPI report, was based on GLMS's oral history, it also relied on information from Devon and a literature search. In addition to the fact that it contained corroboration, the M+T report derived its valuation by employing more than one method.

[11] LAP described the methodology employed in the EPI report as representing "an important attempt to place a monetary value on cultural losses, based on the perspective of the community.": A.B. F64. It added that Trousdale had made a genuine effort to create a workable and useful framework to assist in evaluating "essentially intangible matters.": *ibid.* Ultimately, however, it was not persuaded that EPI's was the most reliable valuation method for this case.

[12] Despite its preference for the M+T report, LAP did not adopt it in its entirety. Noting that the task before it was complex and difficult, it stated that the LAP had "applied the valuation that was best supported by the evidence and that dealt best with impacts caused specifically by Devon

in the relevant review periods.": A.B. F65. It said that GLMS had not met its onus of providing "sufficient evidence to establish exactly what losses in the review periods in question would be attributable to Devon's activities": *ibid.* Accordingly, it accepted M+T's compensation valuations with some modifications: *ibid.*

[13] LAP specifically noted Sandy Bay's past and present cultural value. There was insufficient evidence, however, to determine what negative impacts of oil and gas activity resulted from Devon's operations and whether there was actual contamination of wildlife, air or water. It also concluded that some of the negative impacts (such as reduced participation in traditional activities and diet changes) were attributable to general societal changes such as television and refrigeration.

[14] Under the title "Cumulative Effects", LAP said:

> 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. LAP heard very little evidence of specific cumulative effects, as characterized above, that affected the Sandy Bay area as a result of the combined effect of Devon's operations with other oil and gas activity in the area. LAP finds the M+T Report did give consideration to cumulative effects by including a 2% increase to the compensation to account for cumulative effects. Based on the evidence presented in this application, LAP finds that is sufficient to account for cumulative effects established in relation to Devon's operations and the Sandy Bay area.
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> A.B. F67.

This paragraph, placed into the overall context of the decision, is central to the appeal.

Standard of Review

[15] The standard of review is informed by *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12. If existing jurisprudence does not determine what standard of review applies, the following approach governs:

> Factors then to be considered include: (1) the presence or absence of a privative clause; (2) the purpose of the [Tribunal] determined by its enabling legislation; (3) the nature of the question at issue before the [Tribunal]; and (4) the expertise of the [Tribunal] ... (*Dunsmuir*, at para. 64). Those factors have to be considered as a whole, bearing in mind that not all factors will necessarily be relevant for every single case. A contextualized approach is required. Factors should not be taken as items on a check list of criteria that need to be individually analysed, categorized and balanced in each case to determine whether deference is appropriate or not. What is required is an overall evaluation.
>
> *Khosa* at para. 54.

[16] In *Fishing Lake Metis Settlement v. Metis Settlements Appeal Tribunal Land Access Panel*, 2003 ABCA 143, 330 A.R. 101, this Court applied the correctness and patently unreasonable standards of review to issues arising from a decision of LAP. However, *Fishing Lake* is not determinative of the standard of review applicable in this case. First, it was pre-*Dunsmuir*. Second, the issues there were quite different than those presented here. Accordingly, we must conduct a fresh standard of review analysis.

[17] The parties agree that the reasonableness standard of review applies to the second question set out at para. 2. We agree. The fact-intensive nature of a tribunal's views as to what evidence discharges an applicant's onus of proof suggests that, generally, the correctness standard would be inapplicable to such matters.

[18] On the first question, GLMS argues for the correctness standard while Devon says reasonableness applies.

[19] The *MSA* contains the following privative clause:

> 208 Except as otherwise provided,
>
> > (a) every decision of the Appeal Tribunal is final, and
> > (b) no decision of the Appeal Tribunal may be questioned, reviewed, restrained or removed by prohibition, injunction, certiorari or any other process or proceeding in a court.

[20] It also contemplates an appeal to this Court on a matter of law or jurisdiction, with leave: section 204(1). The same situation obtained in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140. At paras. 24-25 the Supreme Court said that the presence of a privative clause and right to appeal "are not decisive", with the result that it is necessary to look at the nature of the question to be examined and the tribunal's relative expertise. Although *ATCO* pre-dated *Dunsmuir*, there is no reason to deviate from its approach in this regard.

[21] In *Fishing Lake*, this Court examined the background to the *MSA*, pointing out that in 1990 jurisdiction over Métis Settlement lands was transferred to the Tribunal (of which LAP is a part). The purpose of the legislation is to promote self-determination for Métis people.

[22] The Tribunal became responsible for issuing new right of entry orders and for conducting compensation reviews on right of entry orders previously granted, thereby taking over functions previously handled by the Surface Rights Board. A key difference between the Surface Rights Board's authority and that of the Tribunal is that the *MSA* authorizes compensation to be made taking account both of the cultural value of land for preserving a traditional Métis way of life and the cumulative effect of related projects. Although the *MSA* does not specify the qualifications of Tribunal members, it is logical to assume from this overall context that LAP members will develop expertise in determining compensation on the lands subject to its jurisdiction.

[23] These factors all suggest that deference is owed to LAP.

[24] The parties agree that LAP's treatment of cumulative effect involves statutory interpretation. Although such an issue of law may be reviewable on the correctness standard, in the context of this case we conclude that LAP is entitled to deference for two additional reasons.

[25] First, section 118 gives LAP considerable latitude in determining what matters to consider in setting compensation. This requires that account be taken of any relevant development agreement, but the section takes a permissive approach ("may") to a series of other factors, including cumulative effect. It is apparent that the Legislature intended to give LAP discretion over those matters. In the words of *Khosa* at para. 17, the Legislature "saw fit to confide that particular decision to" LAP, not to appellate judges.

[26] Second, although GLMS's claim required LAP to engage in statutory interpretation (where courts generally have a greater expertise than tribunals), its interpretation concerned its constitutive statute. This suggests deference: *Khosa* at para. 25.

[27] As a result, the first issue is also reviewable on a standard of reasonableness. This Court's function is to determine whether the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect to the facts and the law": *Dunsmuir* at para. 47.

Analysis

1. Did LAP err in its interpretation of "cumulative effect"?

[28] In its submissions to LAP, GLMS took the position that compensation could and should be awarded for past review periods. On appeal, it does not complain about the fact that LAP rejected this argument.

[29] Instead, it says that LAP erred in refusing to consider the successive or accumulated impacts of oil and gas activity over time and as a result took an overly narrow view of cumulative effect. It relies on definitions of "cumulative" used in other statutes or by government agencies to support its position that cumulative effect must include past and continuing effects. It also contends that LAP erred in treating compensation for cumulative effect as though it was retroactive compensation.

[30] As this Court observed at para. 36 in *Fishing Lake*, the provisions of the *MSA* should be interpreted in a broad and purposive manner.

[31] The following statement provides a helpful way of approaching cumulative effect:

> Implicit in a cumulative effects assessment ... are effects from both the project as scoped and other projects or activities ... 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 .... It is not illogical to think that the accumulation of a series of insignificant effects might at some point result in significant effects. ... [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.

Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage), [2001] 2 F.C. 461, 266 N.R. 169 at para. 46.

[32] Similarly, "the destruction of any ecosystem or environment is a gradual process, effected by cumulative acts—a death by a thousand cuts ..." per Bourassa J. in *R. v. Panarctic Oils Ltd.* (1983), 43 A.R. 199 (NWT T.C.) at para. 22.

[33] While such statements are most applicable in their own statutory and factual contexts, they underscore the special nature of cumulative effect and its importance in situations where environmental degradation has occurred. The Legislature obviously recognized the particular significance of cumulative effect for communities such as GLMS, whose profound attachment to lands and waters is central to the culture and tradition that the *MSA* is intended to protect.

[34] That said, does the LAP's approach to cumulative effect in the passage reproduced above at para. 14 exhibit a misunderstanding or misinterpretation of the concept of cumulative effect? We are not persuaded that it does.

[35] We do not read it as taking an overly narrow approach to cumulative effect or one that undercuts the purpose of the *MSA*. LAP notes, appropriately, that cumulative effects are relevant to assessing annual compensation. It acknowledges "the background and history of a site ... may assist in establishing an ongoing impact.": A.B. F67. However, in its view, compensation for cumulative effects can be awarded only if those effects are experienced during the review period, rather than during an earlier time period.

[36] Another way of describing LAP's approach, as we understand it, is that while one must necessarily look back in time to ascertain whether there is a cumulative effect, compensation for such effects are awardable only if the affected party demonstrates that those effects occurred or will occur during the relevant review period. LAP declined to award retroactive compensation, that is, compensation for effects experienced during an earlier review period.

[37] The nuanced nature of cumulative effect and its inevitable intertwining with the past makes it a concept that is challenging to express. Nonetheless, as we interpret how LAP treated the topic, its approach was not unreasonable.

[38] Although it was not couched in terms of cumulative effect, LAP's views about cumulative effect may be partially illustrated by what it said about trapping. At A.B. F62-63 it observed that most of the trapping ended in the 1980's and thus the majority of that loss arose in a previous compensation period. LAP did not, however, foreclose the argument that the cumulative effect of the loss of trapping might be established by appropriate evidence. Rather, it said that "[i]t may be possible that the loss of trapping does have some ongoing impact on the cultural environment in some cases.": A.B. F63. However, in its view, the evidence before it was insufficient to show whether loss of trapping was caused by Devon, other oil operators or broader societal changes, or even what declines in trapping occurred over particular time frames.

[39] Our opinion about the reasonableness of LAP's view of cumulative effect on the evidence before it does not underestimate the difficulty that Métis settlements may face in garnering proof of cumulative effect in other cases. It may be that no scientifically-based data exists to demonstrate the past abundance of wildlife or the previous quality of air and water. Counsel to GLMS, however, clarified that this record did not establish the existence of such lacunae. How to approach cumulative effect in such a case is a potentially difficult problem best resolved if and when it arises.

2. Did LAP err in requiring certain evidence to prove cumulative effect?

[40] GLMS argues that LAP imposed an impossible evidentiary burden on it by requiring evidence of "specific cumulative effects", which it describes as an oxymoron. Citing *Mitchell v. Canada (Minister of National Revenue - M.N.R.)*, 2001 SCC 33, [2001] 1 S.C.R. 911 and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, it points out that the rules of evidence must be applied flexibly to aboriginal claims and that the same principles should apply to claims for cultural loss.

[41] We do not agree that LAP's approach to the evidence required for proving cumulative effect in this case was unreasonable. It acknowledged that the issues before it were complex and difficult. We were informed that this was the first time LAP has been called upon to make awards for loss of cultural value and for cumulative effect. The expert reports and testimony underscore the challenges involved in converting into monetary terms the value of loss of a traditional way of life. How many dollars, for example, will compensate for the fact that a grandparent can no longer teach youngsters

how to prepare country food, harvest wildlife or use wildlife products? What price should be attached to the stigma of eating wildlife harvested from an area that has been inundated with oil and gas development?

[42] These and doubtless many other difficult questions faced LAP. Its overall approach to the evidence was not rigid. Its criticisms of the GLMS evidence about cumulative effect related largely to the generality of that evidence (acknowledged by Trousdale) and the fact that it did not specify the extent of Devon's responsibility for cumulative impact. In general, however, it expressed its openness to considering different approaches to valuation.

[43] It would be inappropriate for this Court to second-guess LAP's preference for certain types of evidence in a particular case or to give it direction about what evidence might be appropriate in another. These matters are best left to its consideration in the context of each case.

Conclusion

[44] The appeal is dismissed.

Appeal heard on April 1, 2009

Memorandum filed at Edmonton, Alberta
this 17th day of April, 2009

Picard J.A.

Hunt J.A.

Costigan J.A.

Appearances:

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