Nova Scotia exploration well approval case

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Decision commented on: *Margaree Environmental Association v Nova Scotia (Environment)*, 2012 NSSC 296.

In this case Justice MacAdam of the Nova Scotia Supreme Court denied a statutory appeal from a decision of the Nova Scotia Department of the Environment to grant an approval to drill an exploration well on a 383,000 acre block in the area around Lake Ainslie. There is nothing particularly remarkable about the case but I blog it here for these reasons: (1) it's an oil and gas case and there are surprisingly few oil and gas cases involving judicial review or statutory appeals from decisions to issue (or not issue) a well licence or equivalent; (2) it's a decision from a non-traditional oil and gas jurisdiction, Nova Scotia.

The facts

PetroWorth had a Crown exploration agreement and a surface lease and proposed to drill a test well. The operation and reclamation of an exploration well is a designated activity under Nova Scotia's environmental legislation and regulations and hence required an environmental approval. Following a review by Departmental officials the approval was granted. The Margaree Environmental Association (MEA) appealed that approval to the Minister as allowed under section 137 of the *Environment Act*, SNS 1994-1995, c 1. The Minister had another official review the matter and on the basis of that review denied the appeal whereupon the appellant exercised a further statutory right of appeal to the Court alleging a breach of a duty of procedural fairness and an error of law insofar as the approval had been granted notwithstanding that the well site was close to a water well, a surface watercourse and a number of residences.

The Decision

Justice MacAdam dismissed the appeal holding that the government owed MEA a duty of procedural fairness at both the application for approval stage and at the ministerial appeal stage although the content of the duty varied as between the two cases (at para 51). In reaching this conclusion the Court evidently rejected the Department's contention (at para 15) to the effect that at the application for approval stage any such procedural obligations were owed solely to PetroWorth.

The content of the duty of procedural fairness at the application for approval stage was not prescribed by the legislation and was at the low end of the scale (at para 17). The duty to local residents was met by affording them the opportunity to participate in two public meetings and through correspondence and phone calls between Departmental officials and residents (at paras 17 – 18). The Crown also met its duty at the ministerial appeal level. MEA had the opportunity to file both a notice of appeal and the written submissions of counsel. There was nothing in the record to suggest that MEA was denied

the opportunity to make additional submissions and the Minister had no obligation to conduct a formal hearing analogous to a trial (at para 26)

The standard of review for all of the substantive issues was reasonableness. The questions posed did not involve questions of constitutional law or general law but involved questions pertaining to the interpretation of the Minister's enabling or home statute and issues of fact, discretion and policy and intertwined legal and factual issues (at para 52). The Act does not preclude granting oil well drilling approvals and the decision to grant an approval is primarily one of balancing interests; and in doing so the Minister is entitled to deference (at para. 81). The Minister's decisions were all reasonable and he had addressed some concerns through terms and conditions; the legislation does not afford the Court the power to make these determinations (at para 80).

Observations

As I said at the outset there is nothing very remarkable about this case. It is a straightforward application of *Baker* on the procedural fairness issues (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817) and *Dunsmuir* on the standard of review issues (*New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9). What is perhaps more remarkable from the perspective an Alberta lawyer is the breadth of both the ministerial and judicial appeal provisions of the Nova Scotia legislation. Thus an appeal to the Minister may be launched (s 137) by "a person … aggrieved" (and no party questioned MEA's standing) on apparently any ground and the Minister has the authority to make any decision that the official might have made. More remarkable still is the breadth of the statutory appeal to the Court. Section 138 allows an appeal "on a question of law or on a question of fact or on a question of law and fact." Furthermore, the appeal has the potential to be a de novo hearing since "the judge on the hearing of an appeal may consider and hear evidence as to whether or not the matter that aggrieves the appellant is necessary to provide for the preservation and protection of the environment."

One other feature of the decision that is perhaps worth drawing attention to is the discussion of the precautionary principle (incorporated in s 2(b)(ii) of the *Act*). MEA had evidently argued that the Minister and his delegate had failed to take account of the principle. The Department responded by suggesting that this was not a case of scientific uncertainty since the technology for drilling conventional wells was well understood globally, and furthermore there had been 7 or 8 wells already drilled in this same area. The Court seem to be satisfied with this response (at para 68).