

Federal Court



Cour fédérale

Date: 20110301

Docket: T-905-10

Citation: 2011 FC 240

Ottawa, Ontario, March 1, 2011

PRESENT: The Honourable Mr. Justice O'Keefe
BETWEEN:

**SASKATCHEWAN WATERSHED
AUTHORITY**

**Applicant
(Respondent to
Motion)**

and

ATTORNEY GENERAL OF CANADA

**Respondent
(Respondent to
Motion)**

REASONS FOR ORDER AND ORDER

[1] This is a motion by the Town of St. Brieux, the R. M. of Lake Lenore No. 399, the Village of Lake Lenore, St. Brieux Realty Inc., the Lakeview Property Owners Association Ltd., Lake Lenore Wildlife Federation and the St. Brieux Regional Park (the appellants) made pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106, for an order allowing the appeal and setting aside the order of Prothonotary Roger Lafrenière dated August 20, 2010 for and an order granting the

appellants' intervenor status pursuant to Rule 109 of the *Federal Courts Rules*. The appellants are not appealing the order with respect to being added as parties respondents.

[2] The appellants made a motion to Prothonotary Lafrenière to be added as respondents in the judicial review application commenced by the Saskatchewan Watershed Authority against the Attorney General of Canada (Court file T-905-10).

[3] The underlying judicial review application by the Saskatchewan Watershed Authority (SWA) brought into question the validity of an Inspector's Direction made under the authority of subsection 38(6) of the *Fisheries Act*, R.S., 1985, c. F-14. The Direction purports to direct SWA et al to "immediately take all reasonable measures consistent with safety and with the conservation of fish and fish habitat." In other words, preventing the saline water from flowing into Lenore Lake.

Brief Statement of Factual Background

[4] Basin Lake Watershed is a closed basin with no natural outlets for water to flow out of the watershed. In the last number of years, heavy levels of precipitation have caused flooding problems in the basin.

[5] The Basin Lake Watershed has a number of lakes, some of which are saline and some fresh. Water flows naturally from one lake to another, depending on the amount of precipitation. As one of the issues in this motion is the flow of water into Lenore Lake from elsewhere, it should be noted that one of the natural paths water flows through is between Houghton Lake and Lenore Lake. It is

accepted that the water of Lake Houghton is saline while Lake Lenore is much less so. It is suggested that the more saline water of Houghton Lake would be injurious to the fish of Lenore Lake. These fish in question are not fish natural to Lenore Lake but are raised artificially in a rearing pond. Lake Lenore is then stocked with these fish.

[6] Crossing the path of natural water flow between Houghton Lake and Lenore Lake is grid road #777. It is a gravel raised-bed roadway and is part of the infrastructure of the province of Saskatchewan.

[7] There are two culverts installed under grid road #777 in the area/path where water flows naturally between the lakes. The culverts were installed under grid road #777 so that the natural flow of water would continue and so that lands upstream of the culverts would not be flooded.

[8] On May 10, 2010, the Inspector's Direction was issued, pursuant to subsection 38(6) of the *Fisheries Act*, to SWA; Ms. Quarshie, chairperson of the board of directors of SWA; and Mr. Dybvig, acting president of SWA, read in part with respect to remedies or measures to be taken as follows:

MEASURES TO BE TAKEN

Under the authority given to me pursuant to subsection 38(6) of the *Fisheries Act*, I hereby direct the Saskatchewan Watershed Authority and Ms. Elizabeth Quarshie in her capacity as Chairperson of the Board of Directors for the Saskatchewan Watershed Authority and Mr. Wayne Dibvig in his capacity as Acting President of Saskatchewan Watershed Authority, named above to immediately take all reasonable measures consistent with safety and with the conservation of fish and fish habitat to prevent the above mentioned occurrence or to counteract, mitigate, or remedy, any adverse effects

that have resulted or may reasonably be expected to result from the above mentioned occurrence, including

- 1) Implementation of temporary or interim measures to as soon as reasonably possible stop the discharge of a deleterious substance, to wit waters containing total dissolved solids at or exceeding 8316 mg/L, presently being deposited into Lenore Lake, and
- 2) To ensure that these temporary measures are implemented and maintained each and every year until a more permanent solution is fully implemented, and
- 3) To develop and implement a plan for a long term and permanent solution to ensure that deleterious waters containing total dissolved solids at or exceeding 8316 mg/L are not deposited into Lenore Lake or other waters frequented by fish, and
- 4) To provide a copy of the long term plan to Environment Canada at Room 300 – 2365 Albert Street, Regina, Saskatchewan S4P 4K1 Attention Environmental Enforcement Directorate – Operations Manager, 30 days prior to implementation of any of the provisions of the plan, and
- 5) Saskatchewan Watershed Authority shall submit quarterly reports to Environment Canada at Room 300 – 2365 Albert Street, Regina, Saskatchewan S4P 4K1 Attention Environmental Enforcement Directorate – Operations Manager, no later than 30 days following each calendar quarter (Jan – March, April – June, July – Sept., Oct – Dec.) detailing all works and undertakings carried out in accordance with this Inspector's Direction. The first quarterly report shall be submitted on or by 30 July 2010, and the last quarterly report shall be submitted no later than 30 days following the full implementation date of the plan and shall state the date that the plan was fully implemented. The reports shall specify dates when each activity was carried out and completed, and
- 6) Saskatchewan Watershed Authority shall submit a Final Report upon completion of these measures to Environment Canada at Room 300 – 2365 Albert Street, Regina, Saskatchewan S4P 4K1 Attention Environmental Enforcement Directorate – Operations Manager, which shall be submitted on or before 90 days after completion of these measures and no later than 1 September 2015. This Final Report shall summarizing (sic) all works and undertakings carried out as due diligence to comply with this Inspector's Direction.

Issue

[9] Should the decision of the Prothonotary be set aside on appeal, pursuant to Rule 51 of the *Federal Courts Rules*?

Standard of Review

[10] The Federal Court of Appeal in *Merck & Co. v. Apotex Inc.*, 2003 FCA 488 set out the standard of review of a prothonotary's decision as follows at paragraph 19:

To avoid the confusion which we have seen from time to time arising from the wording used by MacGuigan J.A., I think it is appropriate to slightly reformulate the test for the standard of review. I will use the occasion to reverse the sequence of the propositions as originally set out, for the practical reason that a judge should logically determine first whether the questions are vital to the final issue: it is only when they are not that the judge effectively needs to engage in the process of determining whether the orders are clearly wrong. The test would now read:

Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:

- a) the questions raised in the motion are vital to the final issue of the case, or
- b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[11] In my opinion, the issue of whether or not the appellants should be made intervenors in the judicial review is not a question vital to the final issue of the case.

[12] As a result, I must now determine whether “the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.”

[13] In determining whether or not the appellants should have been added as intervenors to the judicial review, I make note of the remarks of Mr. Justice Simon Noël speaking for the Court in *Canadian Union of Public Employees (Airline Division). v. Canadian Airlines International Ltd.*, [2000] F.C.J. No. 220 (*C.U.P.E.*) at paragraph 8:

It is fair to assume that in order to grant the intervention the motions Judge would have considered the following factors which were advanced by both the appellants and PSAC as being relevant to her decision:

- 1) Is the proposed intervener directly affected by the outcome?
- 2) Does there exist a justiciable issue and a veritable public interest?
- 3) Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?
- 4) Is the position of the proposed intervener adequately defended by one of the parties to the case?
- 5) Are the interests of justice better served by the intervention of the proposed third party?
- 6) Can the Court hear and decide the cause on its merits without the proposed intervener?

[14] Rule 109 of the *Federal Courts Rules* deals with intervention:

109.(1) The Court may, on motion, grant leave to any person to intervene in a proceeding.

(2) Notice of a motion under subsection (1) shall

109.(1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.

(2) L’avis d’une requête présentée pour obtenir l’autorisation d’intervenir :

(a) set out the full name and address of the proposed intervenor and of any solicitor acting for the proposed intervenor; and

a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

(b) describe how the proposed intervenor wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

(3) In granting a motion under subsection (1), the Court shall give directions regarding

(3) La Cour assortit l'autorisation d'intervenir de directives concernant :

(a) the service of documents; and

a) la signification de documents;

(b) the role of the intervenor, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervenor.

b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

[15] A review of the underlying judicial review application in this matter tells us what relief the applicant is seeking:

The Applicant therefore makes application for an Order:

1. Declaring that the Respondent had no constitutional or statutory jurisdiction to make the said Inspector's Direction;
2. Declaring that the making of the Inspector's Direction was *ultra vires* the Respondent, or inapplicable to the Applicant, by intruding on areas of exclusive provincial jurisdiction, contrary to the *Constitution Act, 1867*;
3. Declaring that the making of the Inspector's Direction was *ultra vires* the statutory authority granted to the Respondent by the *Fisheries Act (Canada)*;
4. Declaring that the making of the Inspector's Direction was contrary to the principles of natural justice, in that a fair hearing and/or fair and reasonable time to make submissions was not afforded to the Applicant;
5. Declaring that the making of the Inspector's Direction was contrary to the principles of natural justice, in that:

- (a) the Federal Authorities making the Inspector's Direction were biased against the Applicant;
 - (b) in making the Inspector's Direction, the Federal Authorities were motivated by and guilty of bad faith, gross negligence and/or abuse of process; and
 - (c) the Federal Authorities knowingly exceeded their constitutional jurisdiction, and the making of the Inspector's Direction was a serious unwarranted and unauthorized incursion into a provincial power.
6. Granting the Applicant the costs of this matter, on such basis as this Honourable Court may allow; and
7. Such further and other relief as may be allowed.

[16] The Prothonotary's decision reads in part as follows:

The Moving Parties consist of a number of organizations and persons from the Lake Lenore area community that claim to be directly affected by the Inspector's Direction. Their common concern is that impairment of the aquatic ecosystem of Lenore Lake would result in lost opportunity to the area in the range of millions of dollars annually, and adversely impact the way of life of the community.

Although the Moving Parties clearly have an interest in the outcome of the application, I am not satisfied that they are "directly affected" by the decision, or have any legal interest that would be affected by an order disposing of the application for judicial review. They have, at best, an economic or commercial interest. Further, any order quashing the Inspector's Direction or dismissing the application for judicial review would not directly affect their legal rights, and be binding on them.

The application for judicial review involves narrow constitutional and administrative law issues. The interests of the public at large are at issue in this proceeding, as opposed to those of the Moving Parties. In my view, those interests are properly represented by SWA and the Attorney General of Canada.

Moreover, the Respondent is in the best position to set forth what was, and what was not, considered in the decision-making process. The Moving Parties have failed to establish that they have any additional evidence that is relevant to the issues raised in the

application, or a different perspective that would assist the Court in disposing of the application.

Being substantially in agreement with the written representations filed on behalf of SWA and the Respondent, which I adopt and make mine, I conclude that the motion to be added as respondent or as an intervenor should be dismissed.

[17] I have reviewed the order of the Prothonotary and I do not find the order “clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.”

[18] The Prothonotary correctly noted that the underlying application for judicial review involved constitutional and administrative law issues.

[19] The Prothonotary noted that the appellants have an interest in the outcome of the application but he was not satisfied that they were directly affected by the decision. He also found that an order disposing of the application for judicial review would not affect any legal interests of the appellants. He concluded that the appellants had an economic or commercial interest but were not “directly affected”. He determined that an order quashing the Inspector’s Direction or dismissing the application for judicial review would not be binding on the appellants nor would such an order directly affect their legal rights. In my view, the Prothonotary did not err in making these findings.

[20] As noted earlier, the application for judicial review involves constitutional and administrative law issues and the interests of the public are at issue as opposed to those of the

appellants. The Prothonotary found that those interests are properly represented by SWA and the Attorney General of Canada. The Prothonotary did not err in this conclusion.

[21] Finally, the Prothonotary found that the respondent was in the best position to say what was and was not considered in the decision making process which resulted in the issuance of the Direction. As well, he found that the appellants have failed to show that they have any relevant additional evidence relating to the issues raised in the application for judicial review or a different perspective that would assist the Court in deciding the application. Again, the Prothonotary did not make an error in this respect.

[22] The Prothonotary has addressed the factours outlined in *C.U.P.E.* above, and has considered Rule 109 of the *Federal Courts Rules*.

[23] As a result of my findings, I am of the opinion that the Prothonotary's order was not clearly wrong, in the sense that the exercise of discretion by him was based on a wrong principle or upon a misapprehension of the facts.

[24] The appellant's motion (appeal) of the Prothonotary's order is therefore dismissed with costs to Saskatchewan Watershed Authority.

ORDER

[25] **IT IS ORDERED that** the appellants' motion (appeal) is dismissed with costs to Saskatchewan Watershed Authority.

“John A. O’Keefe”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-905-10

STYLE OF CAUSE: SASKATCHEWAN WATERSHED AUTHORITY
- and -
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Saskatoon, Saskatchewan

DATE OF HEARING: September 16, 2010

**REASONS FOR ORDER
AND ORDER OF:** O'KEEFE J.

DATED: March 1, 2011

APPEARANCES:

Richard W. Danyliuk, Q.C.	FOR THE APPLICANT
Michael Brannen	FOR THE RESPONDENT
G. Rangi Jeerakathil Michael J. Russell	FOR THE APPELLANTS

SOLICITORS OF RECORD:

McDougall Gauley LLP Saskatoon, Saskatchewan	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Saskatoon, Saskatchewan	FOR THE RESPONDENT
MacPherson Leslie & Tyerman LLP Saskatoon, Saskatchewan	FOR THE APPELLANTS