Court of King's Bench of Alberta

Citation: Chemtrade Logistics Inc v Fort Saskatchewan(City), 2023 ABKB 434

Date:
Docket: 2303 07440
Registry: Edmonton

Between:

Chemtrade Logistics Inc.

Applicant

- and -

City of Fort Saskatchewan, Fort Industrial Estates Ltd., 2394515 Alberta Ltd., Tag Developments Ltd., Heartland Centre II Ltd., Alberta Energy Regulator, and His Majesty the King in Right of Alberta as represented by The Minister of Justice

Respondents

Reasons for Decision
of the
Honourable Justice L.M. Angotti

I. Introduction

[1] Chemtrade Logistics Inc. ("Chemtrade") filed a Judicial Review Application with respect to two development permits granted by the Development Authority of the City of Fort Saskatchewan (the "City"). Fort Industrial Estates Ltd., Heartland Centre II Ltd., and Tag

Developments Ltd. (the "Fort Industrial Applicants"), applied together for summary dismissal of the Judicial Review Application as it relates to both development permits. 2394515 Alberta Ltd. ("2394515") seeks summary dismissal of the Judicial Review Application with respect only to the first development permit. Reference to the Applicants, is a reference collectively to the Fort Industrial Applicants and 2394515. At the hearing, the Applicants confirmed that the only basis upon which they were pursuing summary dismissal at the Special Chambers hearing on June 23, 2023 was the existence of an adequate alternative remedy in the absence of extraordinary circumstances, submitting that I should exercise my discretion to dismiss the Judicial Review Application rather than allow it to proceed. All parties were clear that the merits of the Judicial Review Application were not yet before the Court and were not to be considered.

[2] The Alberta Energy Regulator ("AER") did not participate in the Summary Dismissal Applications. While the City filed a written brief addressing the statutory scheme, background to the issuance of the development permits, and the procedural history, it remained within its appropriate limited role and did not take an advocacy position, nor make any oral submissions at the hearing.

II. Procedural Review

[3] Chemtrade owns lands within the City, upon which it operates a sour gas pipeline. The pipeline is subject to specific permit conditions under its operational license issued by the AER, including a mandatory 500 m setback for urban centres or public facilities (the "Setback"). Sour gas is hydrogen sulphide, exposure to which poses significant danger to human health and life.

[4] Fort Industrial Estates Ltd. applied for subdivision of lands it owns within the City, to create industrial parcels. The Fort Industrial lands are in proximity to the Chemtrade lands. Some of the proposed industrial parcels are located within the Setback. On July 20, 2022, the City's Subdivision Authority conditionally approved the subdivision application. Chemtrade appealed this subdivision approval to the Land and Property Rights Tribunal ("LPRT"), taking the position that the subdivision plan did not comply with the Setback. The LPRT dismissed the appeal on September 14, 2022, on the basis that Chemtrade did not have standing to bring the appeal. Chemtrade did not seek judicial review of this LPRT decision.

[5] 2394515 Alberta Ltd. applied for a development permit to build an agricultural dealership on some of the Fort Industrial lands within the subdivision. The application included the erection of buildings within the Setback. Prior to the approval of this development permit, the City and Chemtrade met to discuss various concerns with respect to the Setback and the proposed development. On October 27, 2022, the City's Development Authority issued a development permit to 2394515 (Development Permit #1).

[6] On February 13, 2023, Chemtrade appealed Development Permit #1 to the LPRT. Pursuant to the findings of the LPRT, the City mailed out the notice of Development Permit #1 on October 27, 2022, but Chemtrade did not receive a copy of the permit until February 8, 2023. On April 4, 2023, the LPRT concluded that 1) notice had been provided in accordance with the applicable Land Use Bylaw when the City mailed out the notice in October, 2) the appeal had been filed out of time (more than 21 days from the date of notice), and 3) the LPRT did not have jurisdiction to hear the appeal. Chemtrade filed an Application for Permission to Appeal the LPRT decision to the Court of Appeal. That application is scheduled to be heard on August 16, 2023.

[7] Heartland also owns lands in proximity to Chemtrade. On April 13, 2023, the City's Development Authority granted a development permit for the Heartland lands (Development Permit #2) to Space Studio Inc. to occupy existing building(s) for the purposes of a business support service. These lands and buildings that are the subject of Development Permit #2 are also located within the Setback. Chemtrade did not file an appeal of Development Permit #2.

[8] Chemtrade filed an Originating Application for Judicial Review of Development Permit #1 on April 26, 2023. An amended application was filed on May 23, 2023, adding Development Permit #2.

III. Is Summary Dismissal Appropriate for Judicial Review?

[9] Rule 7.3(1)(b) permits the Court to dismiss an action, where there is no merit to the action. The parties were clear that they were not seeking a decision on the merits of the Judicial Review Application, but rather the merits of the threshold question: should the Court exercise its discretion to allow the Judicial Review Application to proceed based on the test of an adequate alternative remedy and exceptional circumstances.

[10] The first step in a summary judgment application (including dismissal) is to determine whether summary disposition is appropriate: ***Weir-Jones Technical Services Inc v Purolator Courier Ltd.***, 2019 ABCA 49 at para 47.

[11] Chemtrade submits that a summary dismissal application is not appropriate in the case of judicial review, as it involves a review of the merits of an application and that would simply be engaging in the judicial review itself. Rather, to consider summary dismissal, there must be a showstopper, also described as a fatal flaw, within the judicial review application, and the mere existence of a right of appeal is not such a showstopper.

[12] The Applicants submitted that summary dismissal is appropriate for a judicial review application, where the focus is on the initial test of applying discretion to whether a judicial review should proceed when an adequate alternative remedy is said to exist. They cite ***Morris Morris v 1934809 Alberta Ltd***, 2018 ABQB 299 and ***Boll v Woodlands Boll v Woodlands***, 2021 ABQB 406 as two such examples. Thus, the summary dismissal is a more expeditious process, as compared to dealing with a longer hearing on the substantive merits of the Judicial Review Application.

[13] In ***Bergman v Innisfree,*** 2020 ABQB 661, Justice Feth addressed the appropriateness of summary dismissal of a judicial review application and concluded at para 98-99:

> If summary dismissal of an application for judicial review requires a merits review, the application to dismiss is duplicative of the judicial review proceeding itself and generally does not promote a more expeditious and less expensive means to achieve a just result. Summary dismissal is therefore rarely available in judicial review proceedings.
>
> Summary dismissal of a judicial review proceeding may be appropriate in some limited situations, particularly where a fatal flaw strikes at the foundation of the Court's authority to hear the application.

[14] He discusses ***Morris*** and identifies that case as an example of a "fatal flaw" that strikes at the Court's authority to hear the judicial review. The Applicants before me base their Summary

Dismissal Applications on a similar fatal flaw argument – the presence of an adequate alternative remedy and the absence of any exceptional circumstances. As expressed, the parties were clear that they were not seeking a merits review of the judicial review itself, but rather are focused upon whether it is appropriate in the circumstances to permit the judicial review to proceed on its merits. Given the basis upon which the Summary Dismissal Applications have been brought, summary disposition is appropriate to consider in this case.

IV. Does the statutory appeal mechanism in the MGA provide an adequate alternative remedy in this particular case?

[15] The Applicants submit that, where there is a statutory right of appeal, a court should be reluctant to exercise its discretion to conduct judicial review on the basis that the statutory right of appeal is an adequate alternative remedy.

[16] Part 17 of the ***Municipal Government Act***, RSA 2000, c M-26 ("MGA") and the ***Matters Relating to Subdivision and Development Regulation***, AR 84/2022 ("Subdivision Regulation") provide the framework for the subdivision and development of land in Alberta. Under ss 685(2) and 685(3) of the MGA, "any person affected by …[a] development permit made or issued by a development authority" has a statutory right of appeal from a decision made by a development authority, but only if "...the provisions of the land use bylaw were relaxed, varied or misinterpreted...". There are specified timelines to bring such an appeal, which in the case of these development permits would be appeals to the LPRT. A further appeal from the LPRT can be made under s 688 to the Court of Appeal on a question of law or jurisdiction.

[17] Chemtrade is pursuing an appeal under s 688 to the Court of Appeal from the April decision of the LPRT. Much of Chemtrade's submissions on adequate alternative remedy focused on the appeal to the Court of Appeal, including the process, the limited basis for such an appeal, and the limited potential outcomes. Chemtrade argued that this statutory appeal was not an adequate alternative remedy. However, as submitted by the Applicants, this is not the appropriate appeal remedy to focus upon. Chemtrade does not seek judicial review of the LPRT decision; it seeks judicial review of the Development Authority's decisions to issue the two development permits. This requires consideration as to whether the statutory appeal under s 685 is an adequate alternative remedy to judicial review, as s 685 is the appeal of the development permit decisions.

[18] The Applicants rely upon ***Morris*** and ***Boll*** as cases establishing that the appeal process under s 685(2) provides an adequate alternative remedy. However, those cases dealt with the s 688 appeal process from a decision of the Subdivision and Development Appeal Board (a parallel body to the LPRT) to the Court of Appeal on questions of law or jurisdiction. As stated, that is not the appeal process to consider in the Judicial Review Application. Further, the Court in ***Boll*** did not permit judicial review with respect to either the Municipal Planning Commission or the SDAB, as the decision being judicially reviewed was not a decision that either entity did or even could make. Therefore, these cases are only of assistance in respect of the general principles regarding summary dismissal of judicial review applications on the basis of an adequate alternative remedy.

[19] Chemtrade exercised its right of appeal with respect to Development Permit #1, which appeal was dismissed as being brought out of time. The LPRT found that Chemtrade had not actually received a copy of Development Permit #1 until February 8, 2023. However, the actual

receipt of the development permit did not determine notice, which was governed by the Land Use Bylaw. The LPRT found that notice had been given in accordance with the applicable Land Use Bylaw, by the City mailing out the development permit to adjacent landowners on October 27, 2022. That date triggered the 21 day appeal period, which ended prior to Chemtrade actually becoming aware of Development Permit #1.

[20] The Applicants submit that s 685 provides a robust and broad right of appeal. They note that such a right of appeal need not be perfect, but should be substantive and available to the affected party. They also point out that the appeal to the LPRT is on a *de novo* basis, not limited to the record before, nor constrained to the decision of, the Development Authority.

[21] Chemtrade submitted that the law with respect to the scope of availability of judicial review in the face of a statutory appeal provision is currently "deeply uncertain" and not an appropriate issue for summary judgment. I disagree that this is the current state of the law in Alberta, as the principles of exercising discretion to allow or disallow a judicial review application have been well established for a significant period of time.

[22] Where there is a statutory right of appeal as an adequate administrative remedy, the general rule is that such a remedy must be exhausted before pursuing judicial review, unless the Court exercises its discretion notwithstanding the alternate remedy. The Court should be reluctant to exercise its discretion to hear a judicial review application, unless there are special or exceptional circumstances: ***Gateway Charters Ltd (Sky Shuttle) v Edmonton (City)***, 2012 ABCA 93 at para 13; ***Spruce Grove Gun Club v Parkland (County)***, 2018 ABQB 427 at para 43-44; ***Morris*** at para 5. There are many identified factors to consider in assessing whether an adequate alternative remedy exists: ***KCP Innovative Services Inc. v. Alberta (Securities Commission)***, 2009 ABCA 102 at para 10; ; ***Strickland v Canada (Attorney General***), 2015 SCC 37 at para 42. However, the category of factors is not closed, as the Court must engage the relevant factors in a balancing exercise in the context of the particular case and the purposes and policy considerations of the applicable legislative scheme: ***Strickland***, at para 43-44.

[23] The statutory appeal scheme provides for a de novo hearing to the LPRT, with significant remedial powers. The LPRT can consider the validity of the development permit and cancel the permit, if appropriate; the LPRT would have relative expertise in dealing with development permits, as it is established for the purpose of dealing with issues on land use planning and development. It is an expeditious process, meant to keep such matters out of the courts, and thus promotes the economical use of judicial resources. This accords with the policy considerations under Part 17 of the MGA, to create an efficient and expeditious scheme for development and planning decisions that are done in a time sensitive manner.

[24] For Development Permit #1, s 685 provides an adequate alternative remedy. The next step is then to consider whether there are exceptional or special circumstances to consider.

[25] Development Permit #2 involved a change in the occupancy of an existing building, but no change in the permitted use under the Land Use Bylaw. Chemtrade did not appeal Development Permit #2. Chemtrade submitted that it did not have a right to appeal under s 685, as the provisions of the applicable Land Use Bylaw were not relaxed, varied, or misinterpreted as the development permit involved a permitted use. Therefore, Chemtrade submits that there was no adequate alternative remedy to judicial review, as there was no statutory right of appeal.

[26] The Fort Applicants submit that Chemtrade's argument arises from a superficial reading of s 685(3) and that the correct procedure would have been for Chemtrade to pursue the appeal, allowing the appeal body to make a substantive decision as to whether the threshold of s 685(3) had been met. The Fort Applicants do not argue or submit that the development permit resulted in the applicable Land Use Bylaw being relaxed or varied. Not surprisingly, they also do not submit that the Land Use Bylaw was misinterpreted, as that would be fatal to the development permit.

[27] In reviewing the Judicial Review Application with respect to Development Permit #2, Chemtrade pleads that it was not afforded procedural fairness. This is not a ground for appeal under s 685(3). It also pleads that the Development Authority erred in approving Development Permit #2 contrary to s 12 of the Subdivision Regulation, AER Bulletin 1213-03, and/or the Setback. It is possible, but unknown, if these arguments are based upon alleged misinterpretation of the Land Use Bylaw, which incorporates the MGA by reference. The provisions of s 685 are not to be considered as jurisdictional provisions, as determined in ***Rau v City of Edmonton***, 2015 ABCA 136, nor do I interpret them in that manner. Rather, I must consider whether, as a result of s 685(3), there is still an adequate alternative remedy. I was not provided with enough information to determine whether Chemtrade would have an appeal dismissed, due to s 685(3). If such an appeal were dismissed because there is no relaxation, variation, or misinterpretation of the Land Use Bylaw, this may result in a lack of consideration of the Subdivision Regulation, the Setback, or the AER Bulletins and Directives, which would not be an adequate alternative remedy. The onus is upon the Fort Applicants to establish that there is an adequate alternative remedy. It is unclear whether, as a result of s 685(3), that Chemtrade had an adequate alternative remedy by appealing Development Permit #2 under s 685 and therefore, that onus has not been met. Even if I am wrong in that regard and there is an adequate alternative remedy, I must still consider whether there are exceptional circumstances to warrant permitting the Judicial Review Application to proceed.

V. Are there exceptional circumstances, such that the Court should exercise its discretion even if there is an adequate alternative remedy?

[28] The Applicants further submit that, where there is an adequate alternative remedy, the Court should only exercise its discretion to proceed with judicial review in exceptional circumstances.

[29] The Fort Industrial Applicants argued that the Land Use Bylaw provides that it is consistent with the MGA. By implication, this would also mean that the Land Use Bylaw would not permit the issuance of a development permit that contravenes s 12 of the Subdivision Regulation. In essence, their argument asks the Court to simply accept the development permit as valid, because the Land Use Bylaw does not permit an invalid permit and the development permit was granted under the Land Use Bylaw. On this basis, the Fort Industrial Applicants should be permitted to rely upon the permit in conducting their business and not have to face a situation where the development permit may now be rendered invalid, to their detriment because there are no exceptional circumstances.

[30] The Applicants submit that any prejudice to Chemtrade does not arise from the process or procedure under the MGA. Rather, the prejudice arises either from Chemtrade's failure to bring

the LPRT appeal within the proper time limit (Development Permit #1) or failure to bring an appeal at all (Development Permit #2).

[31] In ***Gateway Charters Ltd (Sky Shuttle)***, at para 13-15, the Court stated that inherent limitations in legal remedies do not necessarily make a remedy inadequate. Further, using judicial review as an attempt to subvert a procedural limitation, such as a need to obtain leave to appeal or the time limit for bringing an appeal, or where judicial review has the effect of transferring the proceedings from an administrative appellate tribunal to a superior court, are sound reasons for the Court to refuse to allow a judicial review to proceed.

[32] In ***Edmonton (Development Appeal Board) v. North American Montessori Academy Ltd.***, 1977 ALTASCAD 235, the Court found that it was inappropriate to exercise discretion to hear a judicial review, where the applicant had an effective right of appeal that the applicant did not take advantage of and which had expired, unless there were special circumstances. The Court also determined, on the facts of that particular case, that failing to apply for leave to appeal in the required time frame was not a special circumstance, even though such failure could be attributed to the time limit being reduced by the Christmas season, legal advice not to take legal proceedings, and unsuccessful attempts to find other counsel to take such proceedings. The perceived serious harm accruing to the teachers and pupils of the school by it being shut down in the middle of the school year was also not a sufficient special circumstance.

[33] In ***Morris***, it was determined that receiving improper legal advice as to an appeal under s 688 and thus failing to take the necessary steps to follow the appeal process did not constitute a special circumstance. Justice Kubik explained that special circumstances are rare and are found to be present when prejudice to the judicial review applicant arises from the appeal process or procedure, rather than from the decisions, omissions, or actions of the applicant themselves.

[34] However, in ***Canadian Industries Ltd. v Edmonton (City) Development Appeal Board*** (1969), 9 DLR (3d) 727 (ABCA) at p 732, cited in ***Morris***, it was determined that failure to receive notice until after the statutory period of appeal had expired could render the appeal process ineffective and the simple existence of a right of appeal is not enough; it must be an effective right of appeal. Similar reasoning is reflected in ***Yatar v. TD Insurance Meloche Monnex***, 2022 ONCA 446 at para 45, where judicial review was available when the adequate alternative remedies were insufficient to address the particular factual circumstances of the case. This is not a difference in the test applicable in Alberta, but is simply another means of describing the exceptional circumstances aspect of the test.

[35] At no time have the merits of the Development Permits been reviewed. For Development Permit #1, this is due to a lack of effective notice, such that Chemtrade was not actually aware of the Development Permit in time to exercise its right of appeal regardless of the Development Authority's compliance with the notice provisions in the Land Use Bylaw. I find the arguments on constructive notice inapplicable, as I am unaware of any authority that would have permitted it in place of notice as established under the relevant legislation. Thus, the prejudice to Chemtrade and, potentially, the prejudice to the safety of the public with respect to the alleged failure to comply with the Setback, arises from the procedure under the MGA, not from something that Chemtrade failed, neglected, or choose to do or not to do. For Development Permit #2, this may be due (although it remains uncertain) to the lack of an appeal as a result of s 685(3).

[36] The Fort Industrial Applicants referred to the development permits as "validly issued" and the ability of the Fort Industrial Applicants to rely upon those permits as if they were validly issued. They submitted that expediency and finality in the decision-making process support the development permits as issued, because the Land Use Bylaw does not allow the issuance of a development permit that is contrary to or inconsistent with the MGA. I do not have any basis for accepting that the Development Permits were validly issued. That is the core of the dispute between the parties, the merits of which I am not considering at this stage of the Judicial Review Application. Simply because the Land Use Bylaw does not allow for a development permit to be issued in contrary to or inconsistent with the MGA, does not mean that in practice this did not occur.

[37] Most significantly, I am satisfied that there is a significant public safety interest at stake with respect to both of these Development Permits. The Fort Industrial Applicants have submitted that a public safety concern with the development permits does not exist, as the AER has not taken any steps with respect to the development permits. However, the evidence establishes that the AER is leaving it to Chemtrade, as the license holder, to ensure that compliance with the Setback is maintained. In ***Montessori***, it was found that serious harm to teachers and students was not a sufficient exceptional circumstance. Presumably that harm would result from shutting down the school midway through the year, causing a loss of jobs and interruption to the children's education. That type of harm is not the same as the harm at issue in this matter, being potential harm to the life and health of members of the public that the Setback is meant to guard against.

[38] Chemtrade has provided material which establishes that sour gas represents significant harm, including a risk of death, if humans are exposed to it. The AER has put in place directives and conditions in or on licenses for sour gas pipelines, which establish mandatory setbacks. I accept that this was for public safety reasons. And those directives and conditions are of sufficient importance, that legislation has been established to address sour gas pipelines and those established setbacks, through s 12 of the Subdivision Regulation.

[39] 2394515 relies upon the AER leaving responsibility for compliance with the Setback to Chemtrade as suggesting that the harm is simply to be met by Chemtrade through emergency preparedness plans and otherwise. Such a proposition ignores the possibility that the development permits are contrary to the governing legislation. One of the purposes of judicial review of an administrative decision is to ensure that the substantive outcome of the process falls within the scope of outcomes permitted by the facts and applicable law: ***Bergman***, at para 20. That is the core of the Judicial Review Application, an issue which has yet to be reviewed and determined in the statutory appeal process.

[40] This prejudice has not resulted from any action or omission by Chemtrade; the evidence before me establishes that they have attempted to take steps to address this concern. However, the processes available to them prior to bringing the Judicial Review Application have failed to substantively address that issue. Thus, I find that exceptional circumstances exist, even in the presence of an adequate alternative remedy, to permit the Judicial Review Application to proceed.

VI. Conclusion

[41] The Summary Dismissal Applications are dismissed. The Judicial Review Application shall proceed. I am not seized of this matter, such that the Judicial Review Application can be scheduled in accordance with the Court's normal scheduling procedures.

Heard on the 30th day of June, 2023.
Dated at the City of Edmonton, Alberta this 19th day of July, 2023.

L.M. Angotti
J.C.K.B.A.

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