

In the Court of Appeal of Alberta

Citation: Paul First Nation v. Parkland (County), 2006 ABCA 128

Date: 20060419

Docket: 0503-0363-AC

Registry: Edmonton

Between:

**Chief Daniel Paul, Councillor Casey Bird,
Councillor Calvin Bird, Councillor Simon House,
Councillor Everette House and
Councillor Percival Rain for and on behalf of
the Paul First Nation**

Applicants

- and -

**Parkland County and the Subdivision and Development Appeal
Board of Parkland County and Her Majesty The Queen in
Right of the Province of Alberta**

Respondents

**Reasons for Decision of
The Honourable Mr. Justice Keith Ritter**

Application for Leave to Appeal the Decision of the Subdivision
and Development Appeal Board of Parkland County dated October 24, 2005
In respect of Permit #05-D-057 and Permit #05-D-058

**Reasons for Decision of
The Honourable Mr. Justice Keith Ritter**

[1] The applicants, Chief Daniel Paul, Councillor Casey Bird, Councillor Calvin Bird, Councillor Simon House, Councillor Everette House, and Councillor Percival Rain for and on behalf of the Paul First Nation (“Paul Band”) apply for leave to appeal the decision of the Subdivision and Development Appeal Board of Parkland County (“SDAB”) approving the development of a gravel pit by Burnco Rock Products Ltd. (“Burnco”). The Paul Band asks that leave be given with respect to the following three grounds:

- (1) Did the SDAB err in law and lose jurisdiction by failing to properly notify the Paul Band prior to the decision to grant Burnco Permit #05-D-057 and Permit #05-D-058 (“Permits”)?
- (2) Did the SDAB err in law and lose jurisdiction by issuing the Permits to Burnco in the face of uncontradicted evidence that the Crown did not consult with the Paul Band?
- (3) Did the SDAB make a patently unreasonable finding of fact or fail to consider relevant factors when it found the Aboriginal and Treaty rights of the Paul Band and its members to practice cultural traditions, or other permitted purposes, should not be infringed by the decision to grant Burnco the Permits?

Background

[2] On October 24, 2005, the SDAB held a public hearing for the purpose of considering two appeals of the Parkland County Development Authority’s decision to issue the Permits authorizing Burnco to extract and process gravel from the N½ 22-53-3-W5M and SE 16-53-3 W5M, respectively.

[3] The SDAB sent notice of the appeal hearing to Burnco and adjacent land owners on October 11, 2005 and advertised additional notice of hearing in the local newspaper three days later. These steps comply with the SDAB’s statutory obligations for notice of appeals of this nature under s. 686(3) of the *Municipal Government Act*, R.S.A. 2000, c. M-26 (“MGA”).

[4] The Paul Band’s evidence is that it first learned of the hearing earlier on the day it was held. Dennis Paul appeared at the hearing at the request of the Chief of the Paul Band and made representations on behalf of the Paul Band opposing the issuance of the Permits. Many nearby residents and landowners also opposed the issuance of the Permits. Dennis Paul did not request an adjournment.

[5] Following the public hearing, the SDAB denied the appeals and issued the Permits, subject to a variance of the conditions previously imposed by the Parkland County Development Authority.

Standard of Review

[6] Leave to appeal a SDAB decision may be granted on questions of law or jurisdiction if they are of sufficient importance to merit further appeal and if the appeal has a reasonable chance of success: MGA, s.688(3), *Seabolt Watershed Association v. Yellowhead (County)*, 2002 ABCA 124, 303 A.R. 347, at para. 9. If the applicant is unable to establish a reasonable prospect that the decision may be reversed using the least deferential standard of the Pushpanathan analysis (correctness), leave should not be granted: *R & S Resource Services Ltd. v. Red Deer (County)*, 2004 ABCA 354, 3 M.P.L.R. (4th) 212, para.12.

Analysis

1. Notice

[7] The SDAB complied with the provisions of s 686(3) of the MGA. At the hearing, Dennis Paul did not ask for an adjournment. While there may be cases where it should be obvious that an adjournment should be granted even though it is not requested, this is not one of them. The Paul Band is unable to show anything on the record that should have alerted the SDAB that the Paul Band received inadequate notice of the hearing. However, the Paul Band argues that the SDAB owed it a broader obligation of notice under the Crown's alleged duty to consult with it. Since this issue is intertwined with the issue of the duty to consult with the Paul Band, I will deal with it in conjunction with the next issue.

Duty To Consult

[8] The Paul Band argues that the Crown was required to consult with the Band before issuing the Permits and the SDAB should have ensured that consultation occurred.

[9] The Paul Band is a recognized "First Nation" and is a "Nation" within the meaning of the *Indian Act*, R.S.C. 1985, c.I-5. The Paul Band's members are all "Indians" within the meaning of s 91(24) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App.II, No.5, and are "Aboriginal Peoples" within the meaning of s.35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. The Paul Band's reserve is located at the South end of Range Road 33. This road will also serve the proposed development. Members of the Paul Band make extensive use of Range Road 33 and are particularly concerned as to their use of this road for the purpose of a pilgrimage to Lac St. Anne located some distance North of the Paul Band's lands. The Paul Band also use this road to access adjacent lands for hunting and herb gathering. The Paul Band argue that these access rights constitute additional aboriginal rights that are, or may be, affected by the proposed developments.

[10] The Paul Band alleges that Burnco consulted all stakeholders excepting the Paul Band for up to three years before the Permits were issued. The Paul Band states that the duty to consult applies to lands for which the Crown has knowledge of the potential existence of their aboriginal rights and where conduct is being contemplated may adversely affect these rights: See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 35 (“*Haida*”). The Provincial Crown or its delegate is required to consult a First Nation, both with respect to Aboriginal rights and Treaty rights: *Haida*. In this case, the Paul Band asserts that both forms of rights should have been the subject of consultation.

[11] It is not clear as to who should have consulted with the Paul Band. Generally the obligation to consult aboriginal bands rests with either the provincial or federal governments or their designates. Under the municipal government scheme in force in Alberta, the designate of the province would seem to be the counsel for the municipal authority. It is not likely that an SDAB is equipped to deal with issues of this nature. In an earlier decision involving the same parties, the SDAB stated that it did not have the ability to consult.

[12] I conclude that there is no duty on the part of the SDAB to consult with the Paul Band, nor need the SDAB ensure that Burnco consult with the Paul Band as there is no obligation on the part of Burnco to consult with it: See *Haida*, para. 52-56. First, a SDAB does not possess the authority to decide constitutional issues. In *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585, the Supreme Court determined that inferior tribunals could decide constitutional issues provided they had the jurisdiction to decide general issues of law. However, SDABs do not have the jurisdiction to decide general issues of law: *Kappo v. SDAB (Municipal District of Greenview No. 16)*, 2003 ABCA 146, *sub nom. Sturgeon Lake Cree Nation v. Greenview (Municipal District) No. 16*, 14 Alta. L.R. (4th) 250, leave to appeal to S.C.C. refused (2004), 361 A.R. 200 (“*Kappo*”). Therefore, SDABs are precluded from deciding constitutional issues. The issues presented by the Paul Band are constitutional.

[13] Even if the reasoning in *Kappo* is incorrect, recent provincial legislation that is now in force restricts most inferior tribunals from deciding constitutional questions: *Designation of Constitutional Decision Makers Regulation*, Alta. Reg. 69/2006. SDABs are not included in the category of decision makers that enjoy the jurisdiction to decide constitutional issues. Therefore, if this matter was referred back to the SDAB, it could not entertain the issues posed by the Paul Band.

[14] The Paul Band also argues that the Supreme Court’s decisions in *Haida and Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 support its claim to a right of consultation on the part of the SDAB. However, both cases relate to Crown owned lands on which development was proposed. The reasoning behind each does not lend itself to consideration of developments on privately owned lands. There is no duty of consultation on the Crown or landowners regarding privately owned lands. While the British Columbia Supreme Court determined in *Hupacasath First Nation v. British Columbia (Minister of Forests)*, [2005] B.C.J. No. 2653, 2005 BCSC 1712 that a duty to consult can arise in some instances involving private lands, any such duty must be restricted to the facts of that case as it involved an operative

transfer of the lands into a publically funded government program followed by an attempt to transfer the lands out of that program. The extensive involvement of the government was the primary factor that precipitated the duty to consult in that instance. Here, there is no allegation that government is involved in the proposed Burnco development. Therefore, the duty to consult does not arise.

[15] Having come to this conclusion, it follows that an enhanced right of notice does not exist where aboriginal bands are affected by developments on private lands near their reserves. Therefore, leave on the first two grounds is refused.

Fact Finding Errors

[16] I need not consider whether the alleged errors can be grounds for a leave application as they are premised on the ability of the Paul Band to argue constitutional issues before the SDAB. Having concluded that leave is to be denied on the constitutional issues, the alleged failure of the SDAB to make proper fact findings is rendered moot. Leave to appeal on this ground is also denied.

Conclusion

[17] Leave to appeal on all proposed grounds having been denied this application is dismissed.

Application heard on March 28, 2006

Reasons filed at Edmonton, Alberta
this 19th day of April, 2006

Ritter J.A.

Appearances:

G.T. Laboucan
for the Applicants

T.G. Rothwell and A.L. Edgington
for the Respondent, Her Majesty The Queen In Right of the Province of Alberta

S.C. McNaughton
for the Respondent, Parkland County

A.J. Jordan, Q.C.
for Burnco Rock Products Ltd.