fogler rubinoff

Energy & Environmental Law

January 26, 2018

INTRODUCING AN ENVIRONMENTAL EXPERT'S OPINION ON JUDICIAL REVIEW

By Stanley D. Berger

On January 18, 2018 the *Nova Scotia Supreme Court in Sorflaten v. Nova Scotia (Environment)* (2018) NSSC 7 refused to admit the expert opinion of Dr. Douglas J. Hallett, a toxicologist, relating to certain environmental aspects of a Ministerial approved pilot project for burning recycled tires as fuel at a cement plant owned by Lafarge Canada.

Grounds for Introduction

The Court reiterated the general rule that the introduction of evidence extraneous to the record in a judicial review was exceptional and confined to four categories: lack of jurisdiction, bias, breach of procedural fairness and natural justice and fraud.

Applicants Arguments

The Applicants contended that the evidence of Dr. Hallett was admissible because the project approved by the Minister, i.e. introducing whole tires into the middle of the kiln, was not the project put before the Minister i.e. introducing crumbled tires at the fuel entry point. The Court rejected this argument on the basis that if the Applicants were correct the difference would be apparent in the record and the Applicants could argue that the Minister's decision was therefore unreasonable . Second the Applicants, relying on the Ontario Court of Appeal decision in *Keeprite Workers Independent Union v. Keeprite Products Ltd.* (1980) CanLII 1877, submitted that Dr. Hallett should be entitled to show that there was a complete absence of evidence on material findings of fact made by the Minister. For example, Dr. Hallett pointed out that the Record did not present the facts that when tires are burned they emitted the carcinogenic chemical NDMA, that other priority pollutants and toxic metal oxides were present from the disposal of ash residuals from the kiln or electrostatic precipitator and when the kiln was in start-up or not in a steady state of operation. The Court distinguished the *Keeprite* case as intending to correct on judicial review evidence before the decision-maker, which was unclear or absent. In *Keeprite* there had been no record before the arbitrator. In the case before the Court there was no need for clarification of the record. The Court further noted that if issues were not addressed in the Record "that does not make them issues that were 'before' the Minister, or issues that were in any


Stanley D. Berger
Partner

t: 416.864.7626
sberger@foglers.com


Tom Brett
Partner

t: 416.941.8861
tbrett@foglers.com


Jack D. Coop
Partner

t: 416.864.7610
jcoop@foglers.com


Albert M. Engel
Partner

t: 416.864.7602
aengel@foglers.com


Yadira Flores
Associate

t: 416.365.3744
yflores@foglers.com

way material to the Minister's decision. The Minister's decision was to approve a pilot project based on the information he had before him. The issues raised by Dr. Hallett are not the subject of any 'findings' by the Minister, therefore it cannot be said that there was an 'absence of evidence' before the Minister in respect of any such findings."(par.28) The Court clarified that its task was to assess the reasonableness of the Minister's decision not its scientific correctness. The Court was mindful that the admission of the expert evidence would inevitably trigger an application by the respondents to tender opposing scientific evidence -a "battle of the experts" and effectively a full re-hearing before the Minister.(par.31)

What this Case Tells Us

This case should remind those considering judicial review that the record itself provides the best evidence that a decision-maker acted unreasonably and that the expert can best be employed on judicial review in advising counsel how the findings of the decision-maker, based on that record were unreasonable.