

CANADA / JUDGMENT

Sparwood (District) v. Teck Coal Limited

2023 BCCA 353

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 353 Sparwood (District) v. Teck Coal Limited

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Sparwood (District) v. Teck Coal Limited,

2023 BCCA 353

Date: 20230906

Docket: CA48743

Between:

District of Sparwood and District of Elkford

Appellants

(Respondents)

And

Teck Coal Limited and Assessor of Area #22 - East Kootenay

Respondents

(Applicants)

And

Property Assessment Appeal Board

Respondent

(Respondent)

Before:

The Honourable Madam Justice MacKenzie

The Honourable Madam Justice Stromberg-Stein

The Honourable Justice Marchand

On an application to vary: An order of the Court of Appeal for British Columbia
dated March 28, 2023 (Sparwood (District) v. Teck Coal Limited,
Vancouver Docket CA48743).

Oral Reasons for Judgment

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Place and Date of Hearing:

Vancouver, British Columbia

September 6, 2023

Place and Date of Judgment:

Vancouver, British Columbia

September 6, 2023

Summary:

The Districts of Sparwood and Elkford apply under s. 29 of the Court of Appeal Act to vary the order of a single justice in chambers dismissing their application for leave to appeal. The decision from which appeal is sought is a chambers decision on a stated case from the Property Assessment Appeal Board, involving the classification for tax purposes of water treatment facilities operated by Teck Coal Limited. The Districts allege the single justice who dismissed their leave application applied the wrong test for leave and failed to address significant questions such that her reasons were insufficient. Held: Application dismissed. The justice applied the correct test for leave and her reasons were sufficient in the context of the case and in light of the

record.

MACKENZIE J.A.:

Introduction

- [1] The Districts of Sparwood and Elkford ("the Districts") apply to vary Justice Dickson's order in chambers dated March 28, 2023, dismissing their application for leave to appeal the decision of Justice Giaschi. The decision relates to the classification of water treatment facilities (the "WTFs") operated by Teck Coal Limited ("Teck") at its coal mining facilities located within the two Districts. The WTFs are intended to remove selenium from runoff water flowing through the mining facilities.
- [2] The matter came before Giaschi J. as a stated case pursuant to s. 65(1) of the Assessment Act, R.S.B.C. 1996, c. 20 [Act]. A stated case under s. 65 is one in which a person affected by a decision of the Property Assessment Appeal Board ("Board") requires the Board to refer stated questions of law to the Supreme Court. The Supreme Court is restricted to the facts set out in the Board's decision.
- [3] The Districts then brought their application for leave to appeal pursuant to s. 65(9) of the Act, which provides for an appeal on a question of law from a decision of the Supreme Court with leave of a justice of this Court.
- [4] In her decision dismissing leave, Dickson J.A. set out the question of law before the Board and the chambers judge as being whether the WTFs were "industrial improvements" within the meaning of s. 20(1)(b) of the Act and whether they should be classified as "Class 4--major industry". Whether the WTFs are classified as "major industry" affects the valuation methodology and the applicable tax rate. In the course of the proceedings, the Districts argued they should instead be classified as either "Class 6-- business and other" or "Class 5-- light industry". These latter classifications would result in a significant increase in municipal tax revenues to the Districts.
- [5] The classification question has now undergone four decision-making processes. As Dickson J.A. explained, the respondent Assessor of Area No. 22 - East Kootenay (the "Assessor") first classified the WTFs as Class 4, but the Board concluded that the WTFs were not properly classified as Class 4. In the stated case, the chambers judge found that the Board had erred in its interpretation and application of s. 20(1)(b), and the Assessor had properly classified the WTFs as Class 4.
- [6] The Districts sought leave to appeal on the basis that the judge erred in his interpretation of s. 20(1)(b) and of the term "mining", and erroneously substituted his own findings of fact for those set out in the stated case and made by the Board.

- [7] Justice Dickson dismissed the application primarily on the basis that the appeal did not meet the merits criteria. She found that the chambers judge was correct in holding that the Board clearly erred in interpreting the legislation. She further found the judge did not err in his approach to the facts of the stated case.
- [8] On this application, the Districts allege Dickson J.A. misapplied the test for leave, and gave insufficient reasons for judgment. They seek that her order be varied by a division of the Court so that leave to appeal is granted. The respondents Teck and the Assessor oppose the application.
- [9] The scope of an application to vary or discharge the order of a single justice under s. 29 of the Court of Appeal Act, S.B.C. 2021, c. 6, is narrow. It is not a fresh hearing or a rehearing of the original application. The test for review is whether the single justice in chambers was wrong in law, wrong in principle, or misconceived the facts. Otherwise, the Court will not interfere with the exercise of discretion by the chambers judge: *Clock Holdings v. Braich*, 2009 BCCA 437 at para. 20; *DeFehr v. DeFehr*, 2002 BCCA 139 at para. 6.

Decision of the Board

- [10] Justice Dickson carefully reviewed the factual history, the decision of the Board, and the stated case (2022 BCSC 2013). As to the facts and the decision of the Board, she said this:
- [4] Teck owns a number of coal mines in the Elk Valley. It built two WTFs to deal with selenium contamination flowing from the local watercourses that were adversely affecting the aquatic health and biosystem. One of the WTFs in question is located within the Line Creek Mine area in the District of Sparwood. The other is located in the area of the Fording River Mine in the District of Elkford.
- [5] Teck is required to have and operate the WTFs under the terms of a BC Environment Permit. In particular, it is obliged to keep the WTFs operational until the contamination is fully dealt with, which is expected to be beyond the cessation of active mining at either mine.
- [6] Classification of WTFs affects the applicable valuation methodology and tax rate. The Prescribed Classes of Property Regulation, B.C. Reg. 438/81 [Regulation] classifies property under nine classifications, including major industry (Class 4), light industry (Class 5), or Class 6 (business and other). Section 4 of the Regulation describes Class 4 as follows:

Class 4 property shall include only the property referred to in section 20 of the Assessment Act, that is to say,

- (a) land used in conjunction with the operation of industrial improvements, and
- (b) industrial improvements.

[7] Pursuant to the Regulation, the Assessor classified the WTFs as Class 4--major industry--on the basis that they were part of the coal mines. Before the Board, the Districts argued the WTFs were not part of the mines, and therefore they should be classified as either Class 6 - business and other or Class 5 - light industry.

[8] Section 20(1)(b) of the Act defines "industrial improvement":

"industrial improvement", subject to subsection (2), means an improvement that is part of a plant, whether or not the plant can be operated as a going concern or is temporarily or permanently unprofitable, if the plant is designed and built for the purpose of one or more of the following:

(b) mining, breaking, washing, grading or beneficiating of coal;

[9] The issue before the Board was the proper classification of the WTFs under the Regulation. The question was whether the WTFs were "industrial improvements" as set out in s. 20(1)(b) of the Act and whether they were properly classified as Class 4 - major industry.

Decision of the Board

[10] The Board found the WTFs were not functionally and operationally integrated with their respective coal mines. Accordingly, it held, they were not part of an "industrial development" as defined in the Act and as used in the Regulation, and the WTFs were not properly classified as Class 4 - major industry (at para. 96).

[11] In reaching this conclusion, the Board found that the WTFs were not used in the mining of coal in the narrow sense of extraction of coal from the coal seam and were not involved in the breaking, washing, or grading of coal. It stated that for the WTFs to qualify as "industrial improvements" it would have to find they were involved in "beneficiating" the coal. However, the expert evidence suggested this term was not well-known and did not have a well-accepted meaning in the coal mining industry. Looking at its ordinary meaning, the Board stated that a reasonable and correct interpretation of "beneficiating" is a physical process that somehow enhances or improves the actual coal that has been extracted, broken, washed, and graded (at para. 88).

[12] The Board also stated that the WTFs were close to but not in the immediate proximity of the respective mines. It stated further that: there was some level of functional integration; the WTFs were designed specifically and exclusively to treat precipitation and run-off from mine spoils; they did not treat any other water from any other source associated with the mines; and they were intended to operate independently from the mines, including once the mines were closed and the coal seams were exhausted (at para. 89).

[13] The Board found that the coal mines had operated for years without WTFs; Teck was required to treat the selenium that occurs as a result of the precipitation and run-off through the rock spoils; the WTFs were designed and built to treat the selenium; and Teck would not have received the permits to expand its mining without complying with the environment

permit that required it to treat the selenium. It stated that the WTFs were not directly used to mine, break, wash, grade, or beneficiate coal, and concluded the WTFs did not meet the level of functional integration contemplated in the case law. It also concluded that the requirement for Teck to build and operate the WTFs was not a functional or operational requirement of coal mining as set out in s. 20(1)(b) of the Act and that the WTFs were not properly classified as Class 4.

- [11] In summary, the Board concluded that, as the WTFs were not directly used to mine, break, wash, grade or beneficiate coal as described in s. 20(1)(b), they were not sufficiently functionally integrated with the coal mines to meet the definition of "industrial improvement".

The Stated Case

- [12] Justice Dickson noted that Teck and the Assessor respectively posed twelve and ten questions to the Supreme Court of British Columbia. She summarized the decision of Giaschi J., observing that the judge reviewed the Board's decision on a standard of correctness and engaged in his own interpretation of the relevant provisions in the Act and Regulation. Based on his review of the case law, (essentially the same law referred to on this application), the judge confirmed that it is the "plant" that must be designed and built for the "mining, breaking, washing, grading or beneficiating of coal", not the improvement being evaluated or classified.
- [13] The judge declined to adopt a rigid two-part test for determining whether an improvement was "part of a plant" to qualify as an industrial improvement. Instead, he set out a number of factors to consider in assessing whether there was a sufficient degree of physical, functional, and operational integration between the improvement and the plant.
- [14] Justice Dickson noted the judge concluded the Board erred in four ways:
- [18] 1) in evaluating whether the improvement (the WTFs), as opposed to the plant, were used for one of the enumerated purposes; 2) in holding that "mining" (as used in subsection (b) of the definition of "industrial improvement") included only the actual extraction of coal from the ground; 3) in holding that a legal requirement should be excluded when considering the degree of functional and operational integration between an improvement and the plant; and 4) in failing to apply the appropriate test properly.
- [15] As Dickson J.A. said, the judge went on to apply the proper test to the circumstances, concluding the WTFs should be classified as Class 4. He stated the Board had erred in not giving proper weight to the fact the building and operation of the WTFs was necessary for the continued operation of the mines, and the fact Teck had to operate the WTFs in order to operate the mines involved a "very high level" of functional integration. He also stated there was a sufficient degree of physical, functional, and operational integration between the improvements, the WTFs, and the respective mines such that the WTFs were "part of the plant" within the meaning of the Act.

- [16] Justice Dickson set out Giaschi J.'s responses to the many questions posed in the stated case (at para. 20), which need not be rehearsed here.

Discussion

- [17] Before Dickson J.A., the Districts contended Giaschi J. made findings of fact inconsistent with the facts in the stated case and the Board's decision, which they said were errors of law. In particular, they took issue with the chambers judge's finding that the WTFs are "part of the plant" under the Act, which they said was inconsistent with the facts set out in the Notice of Stated Case and the Board's decision. They also said the judge's interpretation of "mining" conflicted with previous decisions of this Court and the Supreme Court of British Columbia.
- [18] On this application, the Districts make substantially the same arguments, in addition to alleging that Dickson J.A. misapplied the test for leave and gave insufficient reasons.

Test for Leave

- [19] Justice Dickson at para. 24 of her reasons noted that the parties agreed before her on the applicable test for leave to appeal as set out in s. 65(9) of the Act. Section 65(9) permits an appeal on a question of law from a decision of the Supreme Court to the Court of Appeal with leave of a justice of this Court only where all the following criteria are satisfied:
- (i) there is some prospect of the appeal succeeding on its merits;
 - (ii) the appeal is on a question of law that has not been addressed by this Court, or a question of law on which lower court decisions are in conflict;
 - (iii) the question of law affects a substantial number of assessments; and
 - (iv) the question of law can be said to admit rationally of a different answer from that given below.

Home Depot Holdings Inc. v. British Columbia (Assessor of Area #10 - North Fraser Region), 2016 BCCA 511 at para. 5 (Chambers), aff'd 2017 BCCA 135, citing Weyerhaeuser Co. v. Assessor of Area #04 - Nanaimo Cowichan, 2008 BCCA 361 at para. 12.

- [20] The Districts now contend that Dickson J.A. erred in principle by applying an "incorrect and too stringent test of considering the proposed appeal on its merits, rather than whether there was a substantial issue to be argued, as set out in Queen's Plate and Weyerhaeuser". Here the Districts appear to be taking from the criteria for leave articulated in Queens Plate Dev. Ltd. v. Vancouver Assessor, Area #09 (1987), 16 B.C.L.R. (2d) 104, 1987 CanLII 2626 (C.A.) [Queens Plate], which articulates the merits criteria as:
- (d) whether there is some prospect of the appeal succeeding on its merits; although there is no need for a justice before whom leave is argued to be convinced of the merits of the appeal, as long as there are substantial questions to be argued

[Emphasis added.]

- [21] In support of this point, the Districts cite *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)*, 2000 BCCA 591 at para. 16 [Omineca] for the principle that, "if a proposition is not wholly devoid of merit, it raises a substantial question to be argued".
- [22] The Queens Plate test sets out factors for a justice to consider in granting or refusing leave to appeal on statutory appeals generally. While these considerations may inform the Court in appeals under the Act, the four-part test in *Weyerhaeuser* has been the settled test for questions of law on statutory assessment appeals since at least 1991: *Royal Bank Realty Inc. v. Burnaby-New Westminster Assessor*, Area No. 10, [1991] B.C.J. No. 4014 (C.A.), 1991 CanLII 1854 at 6.
- [23] Justice Dickson correctly said the test for leave to appeal in such cases is strict. Not only is an appeal restricted to questions of law, but all four criteria must be met: *Trafalgar Lands Ltd. v. British Columbia (Assessor of Area #9)*, 2022 BCCA 211, at para. 47.
- [24] While Omineca no doubt continues to be relevant for leave to appeal in statutory appeals generally, both the jurisprudence and the explicit statutory test under the Act have set the bar higher for assessment appeals.
- [25] I also note that even if the "substantial question" standard from *Queens Plate* were to apply on the merits criteria for statutory assessment appeals, as the respondent Teck suggests, there is little difference between concluding that an appeal has no prospect of success and concluding that it is wholly without merit such that it raises no substantial question to be argued, per Omineca. In this case, Dickson J.A. concluded the appeal had no prospect of success; it is implicit in this finding that she was of the opinion there was no substantial question to be argued.
- [26] In my view, Dickson J.A. made no error in her application of the test for leave.
- [27] Relatedly, the Districts submit that Dickson J.A. did not consider what she ought to have considered in determining whether leave was to be granted. They say she reached her decision on the single factor of whether the appeal had any prospect of success. This appears to be connected to their argument on insufficiency of reasons.
- [28] While a judge is entitled to make their decision on a single criteria of the test, this is not the case here. While noting that the leave application turned primarily on the merits criteria, Dickson J.A. also noted at para. 39 that "the question of law at the heart of the proposed appeal cannot admit rationally of a different answer than the answer that the judge gave in his reasons", and there were no "genuinely conflicting" decisions on the point, applying the second and fourth criteria.

Insufficiency of Reasons

- [29] The Districts' second argument is that Dickson J.A.'s reasons failed to address key issues on the leave application. First, they say she did not address the inconsistency between the conclusions of Giaschi J. on the definition of "mining" as including "activities and processes that are related to or necessary to the extraction of coal from the ground", and previous decisions of this Court and the Supreme Court that interpret the term more narrowly.
- [30] The Districts cite *Westar Mining Ltd. v. British Columbia (Assessor of Area No. 22 - East Kootenay)*, [1990] B.C.J. No. 2751 (S.C.), 1990 CanLII 431, *British Columbia (Assessor of Area No. 6 - Courtenay) v. Quinsam Coal Corp.*, 2002 BCCA 68 [Quinsam], and *Peace River Coal Inc. v. British Columbia (Assessor of Area No. 27 - Peace River)*, 2018 BCSC 1854, pointing specifically to Quinsam which they say interpreted "mining" in s. 20(1)(b) to mean "no more than the extraction of coal from the ground".
- [31] On the substantive question, the respondents Teck and the Assessor point out that the above statement was made by the chambers judge in that decision and cited by this Court in an excerpt from the judge's reasons: Quinsam at para. 29. This Court did not specifically adopt or comment on the proposition, nor was the definition of "mining" a central question on appeal.
- [32] Teck further submits that to demonstrate an error of law on this ground, the Districts must show that when viewed in light of the entire record, the reasons do not permit meaningful appellate review. Teck maintains that Dickson J.A.'s reasons clearly permit meaningful review when read in the context of the record, including the reasons of Giaschi J. (which specifically addressed and contextualized Westar and Quinsam at paras. 57-63) and the fact that the Districts' proposed grounds of appeal largely repeated their arguments in the Supreme Court. Teck says Dickson J.A. was not required to repeat in detail the analysis performed by Giaschi J. as it is apparent from her reasons that she agreed with it. I agree with this submission.
- [33] Justice Giaschi reasoned:
- [57] The Board then considered whether the WTFs were designed and built for the "mining, breaking, washing, grading or beneficiating of coal" and determined they were not.
- [58] The Board's determination that "the WTFs are not used in the mining of coal in the narrow sense of extraction of coal from the coal seam" is based on the dicta of Finch J. in Westar that a narrow construction is to be given to the word "plant" and, more directly, on the interpretation of "mining" given by Pitfield J. in Quinsam.
- [59] It will be recalled that in Quinsam, Pitfield J. held that "mining" meant no more than the extraction of coal from the ground. However, this holding must be read in context. Pitfield J. was comparing and contrasting "mining" related functions to storage and transportation related functions. In my view, Pitfield J. used the word extraction in a general sense to differentiate extraction related activities from storage and transportation related activities.

He was not suggesting that mining could not also include other functions or activities that were necessary to the extraction of coal from the ground, such as the removal of overburden and the creation of rock spoils.

- [60] Moreover, equating mining to a narrow view of extraction of coal from the ground is not consistent with the words used in the Act. It will be recalled that item (a) of the definition of industrial improvement is "mining, extracting, beneficiating or milling of metallic or non-metallic ore". The inclusion of both mining and extracting in item (a) indicates that the Legislature made a distinction between mining and extracting. Surprisingly, "extracting" is not specifically listed in item (b) but that does not detract from the conclusion that the Legislature intended mining to mean something other than, and more than, the activity of extracting.
- [61] I am reinforced in this conclusion by the definitions given to "mine" and "mining activity" in the Mines Act, RSBC 1996, c 293 [Mines Act]. The definition of "mine" includes "all activities including exploratory drilling, excavation, processing, concentrating, waste disposal and site reclamation" and "all cleared areas for use in servicing [or] in connection with a mine". The term "mining activity" is defined as "any activity related to the exploration or development of coal" or "the production of coal". These definitions suggest that the Legislature intended that mining, even if narrowly construed as extracting, includes related activities.
- [62] The dicta of Finch J. in *Westar* also does not support the overly narrow interpretation given to mining by the Board. Finch J. was addressing the meaning of "plant" and held that a "plant" meant "the structure or edifice in the nature of a factory". Contrary to paras. 62 and 85 of the Board's decision, Finch J. did not state that mining means only the extraction of coal from the ground.
- [63] Thus, I conclude that the Board erred in its interpretation of the term mining. In my view, mining includes not only the actual process of extracting of coal from the mine but also the activities and processes that are related to or necessary to the extraction of coal from the ground. More particularly, in the circumstances of this case, mining includes the removal of the overburden, the creation of rock spoils and the treatment of those rock spoils.
- [84] The courts have also directed that the tests in weighing if a building, structure or thing qualifies include the location or physical proximity, whether the building, structure or thing was designed as part of the plants, requires a special valuation technique, or can be operated independently from the plants. Simple ownership and use by the item as part of a business operation, like a coal mining company for its mining purposes, is not enough to qualify.
- [85] In particular, the courts have narrowly interpreted the words "mining" to mean only the extraction of coal from the ground, not a broader interpretation to include the broader mining business.

- [86] Applying then, as directed by the courts, a narrow interpretation to the words of the section and to the specific word "mining", and applying the tests to the uncontroverted evidence, I find the WTFs are not used in the mining of coal in the narrow sense of extraction of coal from the coal seam.
- [87] I further find, and no party suggested otherwise, the WTFs are not involved in the breaking, washing, or grading of coal.
- [34] We are unable to say Giaschi J.'s reasons were insufficient. I agree with Teck's submission. There was no need for Dickson J.A. to repeat the substantial analysis already undertaken by the chambers judge. It is clear from the record and from her reasons that she agreed Giaschi J. had resolved any alleged inconsistency arising from Quinsam and this question was not one on which lower courts were genuinely in conflict to meet the second criterion for leave.
- [35] The second way in which the Districts say Dickson J.A.'s reasons were inadequate is by not finding error in Giaschi J.'s findings of fact, which they say were not permitted on a stated case. The Districts point to what they say was a factual finding by the Board that since the time Teck's BC Environment Permit was approved, "other methods to treat selenium have been developed that are acceptable to the Ministry of Environment as an alternative to the WTFs", and that this is at odds with Giaschi J.'s finding that, "in any practical sense Teck could not continue to operate the mines without the WTFs": Chambers decision at para. 70.
- [36] This argument is without merit, both in its allegation of a conflicting factual finding and in terms of any error of Dickson J.A. Giaschi J. made no error in observing that the WTFs met the criteria for the Permit and that, practically speaking, they were necessary and fundamental to the continued operation of the mines. This is entirely consistent with the Board's findings that the WTFs were "the best available alternative at the time" the Permit was issued.
- [37] Further, as the respondent Teck submits, while Dickson J.A. did not address this specific alleged deviation from the stated case, she clearly had the legal requirements of the Permit in mind (at para. 5) and rejected any arguments regarding factual conclusions (at para. 40).
- [38] Overall, employing the functional and contextual approach, Dickson J.A.'s reasons were sufficient in the context of the case for which they were given: *R. v. G.F.*, 2021 SCC 20, at para. 68.

Disposition

- [39] I agree with the respondents that Dickson J.A. made none of the errors alleged. The Districts have failed to show that she erred in law, in principle or misconceived the facts. Therefore, they have not met the test under s. 29 of the Court of Appeal Act to vary or discharge the order of a single justice.
- [40] I would dismiss the application to vary the order of Dickson J.A.

[41] STROMBERG-STEIN J.A.: I agree.

[42] MARCHAND J.A.: I agree.

[43] MACKENZIE J.A.: The appeal is dismissed.

"The Honourable Madam Justice MacKenzie"

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