

SUPREME COURT OF NOVA SCOTIA

Citation: 3076525 Nova Scotia Ltd. v. Nova Scotia (Environment),
2014 NSSC 85

Date: 20140224

Docket: Halifax No. 340840

Registry: Halifax

Between:

3076525 Nova Scotia Limited

Appellant

v.

Minister of the Environment Representing
Her Majesty the Queen in right of the Province
of Nova Scotia

Respondent

and

Melissa King, Jonathan Andrews and Marlene Brown

Intervenors

Judge: The Honourable Justice Allan P. Boudreau

Heard: February 24, 2014, in Halifax, Nova Scotia

Counsel: Robert Grant, for the Appellant

Darlene Willcott, for the Respondent

Jillian Angrove and Sara White as the Intervenors

By the Court:

Introduction:

[1] This proceeding involves a very polluted site located at 1275 Old Sambro Road, Harrietsfield, NS (“the Site”). The pollution is having very adverse effects on the neighbouring residents by contaminating their water supplies, and affecting them, not only environmentally, but also psychologically. It is very stressful for them.

[2] The Nova Scotia Department of Environment, (“NSE”) issued a Ministerial Order (“the Order”) dated November 5, 2010 naming 3076525 Nova Scotia Limited, (“the Appellant”) and others to comply with numerous terms and conditions of the Order. The Appellant appealed the Order in December of 2010 claiming it should not have been made subject to its terms. The Notice of Appeal states five grounds for the appeal.

[3] The Intervenors are owners or occupiers of neighbouring properties and were added to these proceedings in November of 2013.

[4] The appeal is set to be heard on April 22, and 23, 2014. Both the Appellant and the Intervenors have filed motions to present new or additional evidence for

the hearing of the appeal. They claim the Record put forward by the Minister and which was placed before him by NSE is incomplete.

Background

[5] The Site had been formerly operated by the present owner of the lands as a construction and demolition (“C & D”) recycling facility. This operation had gone on from about 1997 to November of 2005, when the Appellant acquired the operation, but only leased the lands. Prior to 2005, somewhere between 2000 and 2003, it was becoming a concern that the large amounts of construction materials stored on the site were having adverse environmental effects. Nevertheless, the former C & D operation had been consistently denied a license or permit to dispose of the stored materials.

[6] In 2003, the owner of the land and former operator of the C & D facility was approved for disposal of some 120,000 tons of materials on site by constructing a containment cell (“the Cell”) to house the materials. NSE specified that the Cell construction and its use to house the materials should be inspected by a person with a particular professional expertise and designation; however, the inspection or inspections were not conducted by a person with the specified qualifications.

[7] Nevertheless, in November of 2005 the Appellant commenced its own C & D recycling facility with the approval of NSE. Around 2010, the pollution to the neighbours' water supplies was worsening. The source or sources of that pollution have not been clearly identified, except that they appear to be coming from the Site in question.

[8] The appellant claims that NSE did not place all of the facts and information at its disposal before the Minister. It alleges that this becomes evident when one looks at the briefing notes provided for the Minister to make his decision.

[9] The Appellant also claims that the decision was made in violation of the fundamental principles of fairness and natural justice.

[10] The Appellant contends that it is necessary to permit the introduction of additional evidence by way of the affidavits of Brian Dubblestyne, the principal of the Appellant, and Andrew Blackner, an expert, in order for it to be able to effectively argue its grounds of appeal.

[11] The Intervenor claim that it is necessary to permit the introduction of additional evidence by way of their affidavits in order for the Court, on Appeal, to have a full picture of the impact the pollution is having on their properties and on their lives.

Guiding Law and Principles:

[12] It is agreed that the Minister has a wide discretion when issuing orders for the protection of the environment. Courts, when reviewing such orders, must give great deference to such decisions. It is not the Courts' function to second guess or substitute their decisions for that of the Minister and it is not a retrial of the environmental issues raised in the matter. It is also not the function of the courts to adjudicate on responsibility or liability for the pollution on an appeal such as this one. For the above reasons, courts, on appeal, have consistently refused to admit expert or opinion evidence which was not part of the Record of the Ministerial decision.

[13] Having said that, Ministerial decisions and resulting orders must still be arrived at judiciously, based on all the evidence or facts before them and their Department. Therefore, in order to admit additional evidence on appeal, it must be to show that the Ministerial Order was the result of something other than a complete or good faith decision making process.

Analysis

[14] The Appellant claims that the briefing notes provided to the Minister do not adequately explain the origin, construction and inspection of the containment Cell, all under NSE's supervision. It also points to Appendix "A" – Section 129 checklist, item 3, referring to Section 129 (1)(a), which deals with the presence of pollution and the Appellant's knowledge, which states as follows:

“... and they were aware of the initial release and contamination. (Referring of course to 3076525 Nova Scotia Limited). It is believed they have caused a further release.”

[15] There is no explanation for that belief. The Appellant, although this is not alleged in the grounds of appeal, now contends that this passage is disingenuous, partly because it omits any reference to NSE's involvement in the initial release or in the construction and approval of the containment Cell.

[16] The Appellant also contends that it was denied any semblance of natural justice before the Order was issued. It says that, as the occupier and operator on the Site, it was not given any opportunity whatsoever to participate in the decision-making process before the Order was made.

[17] The Appellant, while not specifically setting it out as a ground of appeal, suspects and invites the Court to infer that NSE may have acted in the way it did in order to deflect attention from its involvement in the origins, construction and

inspection of the containment Cell; however, that is not to be decided on this motion. The Appellant contends that the Affidavit evidence tendered is necessary for it to effectively argue its grounds of appeal, particularly No.'s 4 and 5.

Conclusion:

[18] I find that the affidavit of Andrew Blackner, although it recites many historical facts, is in essence a new expert report and it contains many opinions. Based on the jurisprudence, it is not admissible as fresh or additional evidence on the appeal of the Ministerial Order dated November 5, 2010. That would in effect result in a retrial of the matter.

[19] I find that the affidavit of Brian Dubblestyne is necessary for the Appellant to be able to effectively argue some of its grounds of appeal, in particular, grounds 4 and 5. It may also be relevant to the issue of the reasonableness of the Order, should the Court, on appeal, be so inclined. Although the affidavit may contain some inadmissible opinions or arguments, the Judge on appeal will be able to ignore those.

[20] I therefore grant the Appellant's motion to have the Dubblestyne affidavit placed in evidence before the Court, on appeal.

[21] With regard to the Intervenors, although I have great sympathy for the plight of the owners or occupiers of neighbouring properties, the affidavits proposed by the Intervenors do not contain any evidence relevant to the issues raised on appeal which will be heard on April 22 and 23, 2014.

[22] I therefore dismiss the Intervenor's motion to have those affidavits admitted into evidence.

[23] There will be no award of costs.

Boudreau, J.