

NOVA SCOTIA COURT OF APPEAL

Citation: *AMCI Export Corporation v. Nova Scotia Power Inc.*,
2008 NSCA 2

Date: 20080111
Docket: CA 282847
Registry: Halifax

Between:

AMCI Export Corporation

Appellant/Cross Respondent

v.

Nova Scotia Power Incorporated

Respondent/Cross Appellant

Judge: The Honourable Justice M. Jill Hamilton

Appeal Heard: December 6, 2007

Subject: **Summary judgment re liability for breach of contract**

Summary: NSPI sued AMCI for breach of an agreement whereby AMCI was to provide up to 400,000 tonnes of low sulphur South American coal to NSPI during 2004. Only 41,365.01 tonnes of coal were provided. NSPI brought an application for summary judgment with respect to 3 of 4 quarters in 2004. The issue regarding Q2 was whether NSPI had provided timely written notice to AMCI that it was exercising its right to buy 100,000 tonnes in Q2. The issue with respect to Q3 and Q4 was whether the *force majeure* clause in the agreement provided AMCI with a valid defence. The chambers judge found in NSPI's favour with respect to Q2 and against NSPI for Q3 and Q4. AMCI appealed the Chambers judge's decision relating to Q2 and NSPI cross-appealed the Chambers judge's decision for Q4 and Q4.

Issue: With respect to Q2, did the judge err in finding there was no

genuine issue of material fact to be tried and granting summary judgment? For Q3 and Q4, did the judge err in refusing to grant summary judgment on the basis there was a genuine issue for trial concerning the defence of *force majeure*?

Result:

Appeal and cross-appeal allowed. With respect to Q2, the judge erred in finding there was no genuine issue of material fact to be tried. The parties agreed there was no conclusive evidence properly before the judge that NSPI gave written notice to AMCI that it was exercising its Q2 option as required by the agreement. Thus, there is a genuine issue of material fact for trial. For Q3 and Q4, the only evidence relating to *force majeure* before the judge was that there was a rock slide on one road that restricted delivery of coal from one mining area in Colombia to one port in Venezuela. The agreement allowed AMCI to provide South American coal to a South American port of its choice. The discovery evidence indicated there were many sources of such coal available at the time and that AMCI made no efforts to access that coal to fulfill its contractual obligations. The judge erred by fundamentally misunderstanding the evidence when he found there was a factual dispute concerning *force majeure*.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 10 pages.