

NOVA SCOTIA COURT OF APPEAL

Citation: *Sackville Trenching Ltd. v. Nova Scotia
(Occupational Health and Safety Appeal Panel)*, 2012 NSCA 39

Date: 20120416

Docket: CA 345260

Registry: Halifax

Between:

Sackville Trenching Limited

Appellant

v.

Occupational Health and Safety Appeal Panel of
Nova Scotia, Jim LeBlanc as Director of Occupational
Health and Safety and The Attorney General of Nova Scotia

Respondents

Judges: MacDonald, C.J.N.S.; Farrar and Bryson, JJ.A.

Appeal Heard: January 24, 2012, in Halifax, Nova Scotia

Held: Leave to appeal is granted and the appeal is allowed per reasons
for judgment of Farrar, J.A.; MacDonald, C.J.N.S. and Bryson,
J.A. concurring.

Counsel: Andrew Taillon, for the appellant
Ryan T. Brothers, for the respondent Occupational Health and
Safety Appeal Panel of Nova Scotia
Alison Campbell, for the respondent Jim LeBlanc, as the
Director of Occupational Health and Safety

Reasons for judgment:

Facts

[1] On April 22, 2010, an Occupational Health and Safety Officer (OH&S Officer) attended at a worksite in front of the Westin Hotel on Hollis Street in Halifax where employees of the appellant, Sackville Trenching, were digging a trench. The OH&S Officer prepared a report of Workplace Inspection. In the report of Workplace Inspection, the OHS officer made the following findings:

Sackville Trenching company is completing trench work in front of the Westin Hotel on Hollis Street. It was observed that 3 employees were working down in a trench approximately 7 to 8 feet deep with no trench cage. The wall on one side was almost vertical. The trench was not sloped at 45 degrees from the sides to a depth of 4 feet from the floor of the excavation. A trench cage was located on site but was not being used at the time of observation. The employees were asked to exit from the trench and not to enter the trench unless a trench cage is used or the walls are sloped to 45 degrees to a depth of 4 feet from the bottom of the trench.

[2] As a result of his findings, the OH&S Officer issued a Compliance Order requiring Sackville Trenching to comply with the *Occupational Safety General Regulations* (“*General Regulations*”), s. 166-1 Excavations and Trenches. The Compliance Order provided:

In order to be in compliance with this section, you must:

The employer shall ensure that a trench cage is used where the wall of the trench is greater than 4 feet in height or the area is sloped to within 1.2 m of the bottom of the trench and the slope does not exceed 3 feet of vertical rise to each 3 feet of horizontal run. (45 degrees).

This order must be complied with by April 22, 1010.

[3] By the time the OH&S Officer returned with the Compliance Order the trench was no longer in use. Accordingly, whatever needed to be done to comply with the Order was actually done before it was issued. Sackville Trenching did not appeal the Compliance Order.

[4] On July 8, 2010, an Administrator with the OH&S Division issued a Notice of an Administrative Penalty to Sackville Trenching pursuant to s. 4(1) of the *Occupational Health and Safety Administrative Penalties Regulations*. Under that section, an administrative penalty may be levied on “a person who has contravened a provision of the Act or its Regulations.”

[5] The amount of the administrative penalty was \$1,000.00 for the contravention of the *General Regulations* relating to excavation in trenches. The date of the alleged contravention is April 22nd, 2010, the same date the Report of a Workplace Inspection and the Compliance Order were issued.

[6] On July 26, 2010, Sackville Trenching exercised its statutory right of appeal to appeal the penalty to an Occupational Health & Safety Appeal Panel. The appeal proceeded by way of written submissions. Sackville Trenching’s submissions accompanied its Notice of Appeal, the Director of Occupational Health & Safety responded to the appeal on August 30, 2010; and, Sackville Trenching responded to the Director’s submissions on October 22, 2010. On February 3rd, 2011, the Panel made its decision on the appeal upholding the penalty but reducing it from \$1,000.00 to \$800.00 (2011 NSOHSAP 17).

[7] A decision of a Panel is reviewable by this Court with leave. On March 11, 2011, Sackville Trenching filed a Notice of Appeal and Leave Application alleging a number of errors by the Panel, including breaches of procedural fairness and natural justice as well as a failure by the Administrator to comply with the provisions of the *Regulations* in issuing the penalty.

[8] Following the filing of the facta on this appeal, it became known that there were documents that had been provided to the Panel that had not been disclosed to Sackville Trenching. The documents consist of two File Activity Reports.

[9] It is not disputed that Sackville Trenching did not receive copies of these reports nor is it disputed that facts contained in the File Activity Reports are referred to in the Panel’s decision. After it became known that the Panel had documents in its possession which were not disclosed to Sackville Trenching, Sackville Trenching amended its Notice of Appeal and Leave Application alleging:

The Appeal Panel erred in law and exceeded its jurisdiction when it violated the Appellant’s rights to procedural fairness and natural justice by relying on

evidence that had been provided by the Respondent to the Appeal Panel but not to the Appellant.

[10] It is only necessary to address the ground of appeal added in the Amended Notice of Appeal. For the reasons which I will develop, I would grant leave to appeal and allow the appeal, without costs, and remit the matter to a newly constituted Panel for rehearing.

Issues

[11] I would restate the issue as follows:

Did the Appeal Panel breach its duty of procedural fairness to Sackville Trenching by failing to provide it with the File Activity Reports received by it from the Director?

Standard of Review

[12] Issues involving procedural fairness to not engage a standard of review analysis in the traditional sense. Instead, it simply falls to us to decide if the process was fair to Sackville Trenching (**Homburg Canada Inc. v. Nova Scotia (Utility and Review Board)**, 2010 NSCA 24, para. 66).

[13] The File Activity Reports contain observations made by the OH&S Officer. They are relatively brief and I will reproduce them here:

The report and order was delivered and reviewed with Tony White of Sackville Trenching. This was delivered to the worksite. While at the worksite the company was widening and sloping one part of the trench with the use of an excavator and the narrow part a trench cage was being placed in the trench. Tony White confirmed that the cage will be used in the narrow part and for the wider part of the trench, it will sloped along its sides. The widening and sloping of the trench was observed during the delivery of the report to Tony White at the worksite.

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The site was re-visit when report and orders was delivered to Tony White. At time of visit, a trench cage was put in the trench and a section part of the trench was

being sloped to meet the regs. Order is closed based on visit and observations noted.

[14] These documents were in the possession of the Administrator when he initially assessed the penalty. The Director also had them in preparation of his response to Sackville Trenching's appeal and finally, the Panel had them prior to rendering its decision.

[15] On four occasions the panel member writing the decision makes reference to reviewing the records considered by the Administrator. For example, in paragraph 8 he says:

[8] I reviewed the records considered by the Administrator and the documents provided by the Appellant in light of the relevant provisions of the Regulations, and I am satisfied that a contravention occurred on April 22nd, 2010 and that an administrative penalty is warranted.

[16] He makes similar comments at Paragraphs 18 and 19 and 30 of the decision.

[17] It is also clear from an examination of the decision that the Panel relied on facts in the File Activity Reports in making its decision. Nowhere else on the record, other than in the first Final Activity Report, is there any evidence to support the conclusions in Paragraphs 4 and 5 of the Panel's decision that Sackville Trenching used a trench cage and excavator or that there was immediate compliance with the Compliance Order:

[4] The Appellant was issued an Order, and immediately complied. The employees used the trench cage and started to widen the narrow trench with an excavator. The Appellant noted that some sides of the trench that were not sloped were made of concrete, duct bank or thrust block. The Supervisor in charge of this construction site was trained in the regulations, and had over 10 years experience in the excavation industry. The Supervisor had a trench cage on site, but felt in light of the stability of the trench it was not in use at the time of the inspection.

[5] The Appellant had complied with the Inspector's Order, but chose not to appeal the Order. The Administrator later issued an Administrative Penalty which the Appellant is now appealing. The appeal before the Appeal Panel is simply to whether the administrative penalty is appropriate.

[18] As well, although not directly mentioned in the decision, the second File Activity Report provides, and I repeat:

... At time of visit, a trench cage was put in the trench and a section part of the trench was being sloped to meet the regs. Order is closed based on visit and observations noted.
(Underlining mine)

[19] By implication, this suggests that the *Regulations* were not being complied with prior to this activity being undertaken.

[20] In paragraph 3 of its decision the Panel concluded:

[3] ... 3 employees of Sackville Trenching Limited were working in a 7-8 foot trench without proper sloping of the worksite, or use of a trenching cage as required by the Regulations.

[21] In **Nova Scotia (Community Services) v. N.N.M.**, 2008 NSCA 69, this Court held:

[41] The duty of procedural fairness may be engaged whenever a person's rights, privileges or interests are affected by an administrative decision. ...

[22] In its original factum the respondent Director properly concedes that a duty of procedural fairness is engaged in this case as the decision of the Panel affects the pecuniary interests of Sackville Trenching.

[23] In the text, Sara Blake, *Administrative Law in Canada*, 4th ed. (Markham, Ont. LexisNexis Butterworths, 2006) at p. 36, the author explains the duty of procedural fairness as follows:

Fairness requires that a party who will be affected by a decision must first be informed of the case to be met. Without knowledge of the matters in issue one cannot effectively exercise one's right to be heard. Disclosure enables a party to review the alleged facts, to prepare to challenge them with evidence that rebuts them or reduces their impact and to prepare submissions explaining how they should be weighed and analyzed.

[24] *Administrative Law in Canada* continues at p. 37:

Relevance is an essential criterion for determining whether disclosure is required. Irrelevant information need not be disclosed. There are degrees of relevance. The more important the information is to the decision, the more likely it should be disclosed. Other criteria for determining the extent of disclosure include the extent to which the party's rights are at stake in the proceeding, the extent to which the party is entitled to call and cross-examine witnesses and the extent to which disclosure of documents is necessary for the party to exercise those rights.

[25] I have already explained above the use that was made of the documents by the Tribunal and their reliance on facts contained in those documents. They were clearly relevant to the case which Sackville Trenching had to meet and the documents should have been disclosed. Sackville Trenching was entitled to make submissions on how they should be weighed and analyzed. Failure to do so was a breach of the Panel's duty of procedural fairness to Sackville Trenching.

[26] I am satisfied that this breach is sufficient for ordering the rehearing of Sackville Trenching's appeal. As a result, it is not necessary for me to address Sackville Trenching's other grounds of appeal set out in its original notice of appeal and factum.

[27] I would grant leave to appeal, allow the appeal and remit the matter to a reconstituted appeal panel for rehearing.

[28] I would not award costs to any party.

Farrar, J.A.

Concurred in:

MacDonald, C.J.N.S.

Bryson, J.A.