Cite as: Town and Country Co-op Ltd. v. Nova Scotia (Public Utilities), 1990 NSCA 89

S.C.A. No. 02364

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

BETWEEN:

TOWN AND COUNTRY CO-OP LIMITED Petitioner - and - THE BOARD OF COMMISSIONERS OF PUBLIC UTILITIES, IRVING OIL LIMITED, ATTORNEY GENERAL OF NOVA SCOTIA, THE RETAIL GASOLINE DEALERS ASSOCIATION OF NOVA SCOTIA, PAUL ZWICKER, CHRISTOPHER PRINCE, RONA KERRY, JOHN HAUGHN, RONALD GRAVELL and WADE ST. CLAIR CARVER Respondents	John T. Rafferty for the Petitioner Alexander S. Beveridge for the Respondent, Irving Oil Limited Wm. Munro Wilson for the Respondent, Attorney General of Nova Scotia and the Public Utilities Board Application Heard: November 8, 1990 Decision Delivered: November 30, 1990

BEFORE THE HONOURABLE MR. JUSTICE A.L. MACDONALD IN CHAMBERS

MACDONALD, J.A.:

This is a petition of Town and Country Co-op Limited (the Co-operative) brought pursuant to s. 48(1) of the Gasoline and Fuel Oil Licensing Act, R.S.N.S., 1989, c.184, as amended (the Act) for permission to appeal from the decision of the Board of Commissioners of Public Utilities (the Board) and the order based thereon, dismissing the application of Town and Country Limited for a retailer's license (gasoline) at its proposed outlet at 433 York Street, Bridgewater, Nova Scotia.

The Co-operative society consists of 1,056 member families. The members want the Co-operative to operate a gas bar for their convenience at the named location. The Co-operative proposed to build a gas bar facility and sell gasoline to all members of the public at a price competitive with that of other local dealers. However, sales of gasoline to members of the Co-operative would be made on Co-operative principles, so that the members would receive a periodic rebate based on the profits generated by the gasoline sales. These rebates would be in proportion to the individual member's volume of purchases. The evidence given on behalf of the Co-operative indicated that 90% of its gasoline sales would be to its members.

There was evidence before the Board as to the proposed site, ownership of the property, its zoning, the proposed structure, growth in the area, anticipated market share of the Co-operative and supply information. During the course of its decision, the Board said (p. 3):

> " The facility proposed is a forty foot pump island with a 19' by 8' kiosk of brick, steel or glass. There will be two washrooms. There will be blender pumps and it is intended to sell a mid-grade gasoline produced by blending a premium gasoline or super blend with a regular unleaded blend. Three grades of unleaded gasoline will be offered. This type of outlet could cost from $200,000 to $250,000.
>
> There will be available lubricating oils and greases, windshield wiper fluids and the usual products sold at retail gasoline outlets.
>
> The arrangement as to leasing is for Co-op Atlantic to lease the gas bar area with rights to and from the facility and then to lease back the bar and facility to the local Co-op.

Co-op Atlantic supplies 35 retail outlets, 32 of which are gas bars and the remaining 3 are service stations."

Later at pp. 4 and 5, the following statements appear:

" The present membership of the co-operative is 1056 and is expected to be in the 1200 range by May 25, 1991.

Members of the co-operative are obligated to pay share capital of $700 with a minimum requirement of $20 down and $1 per week until the share capital is fully paid.

There is also a weekly $3.50 service fee for members under the age of sixty-five, with those members sixty-five or over paying a $1.75 fee. If a member leaves the co-operative for any reason the share capital is refundable. Members would be entitled to a rebate on gasoline purchases based on the volume of their purchases and the rebate would be awarded periodically.

There was little evidence as to traffic volume past the proposed site. Mr. Rafferty said that there was no traffic count available to the Applicant but due to the co-operative's own growth and the growth of business in the industrial park, traffic 'appears to be increasing in volume'.

The Applicant anticipates that when Wentzell Road is entirely paved townspeople will be living in the area and it would be a viable road for people travelling to and from the industrial park through York Street. He said that there is no other available retail fuel service in the industrial park particularly.

Mr. Power gave evidence of statistics which have been gathered for the Applicant which indicated a 4% increase in population in Lunenburg County over the period 1986-1992.

The result of the Applicant's calculations as to anticipated volume was a projection of an annual volume of 1,870,000 litres, or a share of 2% of the Bridgewater market.

Dale H. Mader, who is Executive Director of the Retailer's Gasoline Dealers Association of Nova Scotia gave evidence in opposition to the application. He stated that it doesn't matter who the Applicant is, whether or not it is a co-operative, what really matters is whether or not the Board is satisfied that an additional retail gasoline outlet is required by the motoring public in Bridgewater at this time.

He pointed out that although there has been a noticeable reduction in the number of retail gasoline outlets in Nova Scotia since 1978, the industry still suffers from too many outlets. The average volume per outlet in Nova Scotia is well below what is generally considered to be the level of sales required to ensure economic viability. The fact that the Applicant is a co-operative should have no bearing whatsoever on the outcome of the application.

56 out of the 66 outlets in Lunenburg County, or roughly 85% have volumes below the generally accepted economic viability figure of 1,500,000 litres (350,000 gallons).

Most of the outlets in the county are capable of selling more gasoline than they do at present. There is in Lunenburg County one service station for every 704 persons. Growth in gasoline sales has not recovered to the point it had reached 10 years ago. There are presently 13 stations within the Bridgewater trading area. Six individual retail gasoline dealers in the area gave evidence opposing the application. They submitted that they are quite capable of supplying the service required in the area and that they are capable of providing a larger gasoline volume than their present volume of sales."

At pp. 7 and 8 of its decision, the Board said:

" Thomas Sydney Davis is the area supervisor for the South Shore for Irving Oil Limited and he gave evidence in opposition to the application. He has been area representative for 30 years and his office is at Shelburne. He is familiar with the proposed site. He says that traffic is low at that site. There is a very light traffic flow in the area. He spent quite a bit of time around there in the past week or so and there doesn't seem to be too much traffic.

The 1981 population for Lunenburg County, obtained from Stats Canada, was 45,746 and in 1986 it was 46,483. Bridgewater population was 6,672 in 1981 and 6,617 in 1986. He produced an Irving Oil Limited exhibit book, which included 1989 figures which were obtained from the Public Utilities Board and he checked all the figures against Board figures and found them correct.

He went to the Department of Highways in an attempt to obtain traffic counts for York Street, but there was nothing on record. He gave evidence as to the locations of other area stations in relation to the proposed outlet.

He believed that the Applicant's estimate of potential gallonage of the proposed station as being 1.8 million litres was a fair estimate. In his opinion at least 20% of this gallonage would come from non co-op members as opposed to the co-op estimate of 10%.

He believes that the proposed station would have an impact on three of the present stations in particular, Zwickers in Wileville, 1.8 kilometers distant, Wade Carver's at Lower Branch, 3.2 kilometers distant and Jim Prince's, 3.1 kilometers distant, also Fairway Chev and Olds, which is only 1.3 kilometers distant."

Still later, at pp. 10, 11 and 12, the Board concluded by saying:

" The Legislature has not incorporated in the Act any definition of the phrase 'public interest, convenience and necessity' but has

left this entirely to the judgment of the Board in each application that comes before it.

No exact definition of the phrase can well be given, because of the impossibility of drawing up rules which will fit every situation.

The Board considers the 'public' used in Section 38 (1) to be 'that public which uses or may use the particular service or facilities for which the application is made.'

It would therefore necessarily include **all** segments of the public which uses or may use the proposed outlet and is not restricted to members of the Co-operative.

The proposed location is not on a heavily travelled route. The evidence as to traffic flow which was not supported by any statistics or analysis does not establish that there is any substantial flow of traffic in the area of the proposed location.

The type of building proposed is small and the services proposed to be supplied are minimal, consisting principally of a gas bar. The Applicant does not propose to offer oil changes, grease jobs, tire changes, fan belt or seal beam installation or to carry out automotive repairs.

There is no evidence before the Board which would satisfy it that any substantial growth in the area could be expected in the near future.

The Bridgewater area is now served by 12 outlets, 5 of which are within the town limits and the other 7 within a short distance. All are within 2 1/2 miles of the proposed site. Two of these operate on a 24 hour basis and several others operate on extended hours. Three sell diesel fuel. Ten provide normal mechanical services, all five of the stations within the Town boundaries and the other five within the immediate area.

Section 38 (1) restricts the number of service stations in Nova Scotia. The Board has no authority to issue a license to every applicant. It may issue a license only to those applicants, which, in the opinion of the Board, meet the tests of 'public interest, convenience and necessity'.

Although 'convenience and necessity' are in the public interest and must be given particular attention, many factors must be considered when deciding what is in the public interest, convenience and necessity.

It is apparent from the Board's records that all service stations in Nova Scotia may not be economically viable. Many have closed in recent years but others continue to operate, perhaps because they are profitable to their wholesale suppliers which control the premises through ownership or leasing arrangements.

It is also apparent from the Board's records that little price competition exists either at the wholesale or retail level and there was no evidence in this hearing to suggest that the present applicant could or would offer such competition.

The Board is satisfied that the stations presently in operation are able to provide and do provide reasonable and adequate service facilities to the consumers in the area and have the capacity to provide larger volumes of gasoline and additional services if required.

The evidence given by the gasoline operators indicates that any substantial volume would have an adverse effect on other stations in the area. The effect would vary but certainly, if the annual volume projections of the Applicant are correct, the loss to a new station of a volume of 1,870,000 litres annually would be of legitimate concern to existing stations.

All applications must be decided on the same basis according to Section 38 of the Act. The Board finds that it is not in the public interest to have too many service stations that cannot be properly operated because they are not making a reasonable profit. Granting this application would, in the opinion of the Board, cause deterioration in a market that is already over supplied and result in a decline of service to the public. In view of its conclusions as above, the Board is not satisfied that granting this application would be in the public interest and the application is therefore dismissed."

Sections 38(1) and 48(1) of the Act provide:

38 (1) The Board has authority to issue a license taking into consideration the public interest, convenience and necessity, and the license shall contain such privileges, terms, conditions, limitations and restrictions as are prescribed by the Board or the regulations.

. . .

48 (1) An appeal shall lie to the Appeal Division of the Supreme Court from any final decision or order of the Board upon any question as to its jurisdiction or upon any question of law, but such appeal can be taken only be permission of a judge of the said Court, given upon the petition presented to him within fifteen days after the rendering of the decision or the making of the order, and upon such terms as the judge may determine.

An appeal from the decision of the Board is restricted to questions of law or jurisdiction. The applicant here contends that the Board erred in law or jurisdiction in the present case in the following ways:

"1) The Board erred in law and/or jurisdiction by misconstruing 'the public interest, convenience and necessity' as required

by section 38 (1) of the **Gasoline and Fuel Oil Licensing Act**, R.S.N.S., 1989, 184;

2) The Board erred in law and/or jurisdiction in failing to give any or adequate consideration to the satisfaction of the public's interest, convenience and necessity by the provisions of gasoline by a co-operative organization in the Bridgewater market area;

3) The Board erred in law and/or jurisdiction by failing to give any or adequate consideration to the price competition that would result from the Petitioner's proposed price rebates to its members, ..."

In dismissing the petition of Canadian Tire Corporation Limited for permission to appeal against the Board's rejection of its application to operate a gas bar at one of its locations (S.C.A. No. 02369, decision delivered November 20, 1990 - unreported), I had occasion to say (pp. 2, 3 and 4):

" The principle that I glean from the cases to which I am now going to refer is that before permission to appeal should be granted, the applicant must show that a substantial question or questions of law or jurisdiction exist that establish that there is a reasonably arguable case for success on the appeal.

In **Union Gas Co. of Canada, Ltd. v. Sydenham Gas & Petroleum Co., Ltd.** (1957), 7 D.L.R. (2d) 65, [1957] S.C.R. 185, the Ontario Court of Appeal set aside a decision of the Ontario Fuel Board. In reversing the judgment of the Ontario Court of Appeal and restoring the decision of the Fuel Board, Kerwin, C.J.C., said (p. 68 D.L.R., p. 188 S.C.R.) that:

' The Court of Appeal apparently considered that it had power to substitute its opinion for that of the Board treating the question of public convenience and necessity as a question of fact. I am unable to agree with that view. While the Board had been newly formed and we were told that the respondent's application to it was the first to be heard since its creation, the Board was the successor, in many respects, of the jurisdiction formerly exercised by the Referee. Its members would be in a position to exercise their judgment, in view of their general knowledge, and, while provision is made for an appeal from its decision, it is, in the wording of the relevant statutory enactment, 'upon any question of law or fact'. The provision that the Court of Appeal's judgment should be final and not subject to further appeal could not, of course, affect the jurisdiction of this Court to grant leave to appeal from its decision. The Court of Appeal was confined to such particular questions of law or fact as might be set out in the order of the Judge of the Court of Appeal, as required

by s-s. (4) of s. 8 of the **Municipal Franchises Act.** It is not merely a matter of procedure; it goes to the jurisdiction of the Court of Appeal, and that jurisdiction does not include the substitution of that Court's views as to public convenience and necessity for those of the Board, but is restricted to the determination of those questions of law or fact which have been particularized by the order of the Judge of that Court.'

In the same case, Mr. Justice Rand said (p. 69 D.L.R., p. 190 S.C.R.):

' What the Court did was to exercise an administrative jurisdiction and to substitute its judgment on the application for that of the Board. In this I think it's exceeded its powers. We were referred to no precise or material issue in the appeal on any question of fact or law on which the Court was asked to or did make a finding or a ruling. It was argued, and it seems to have been the view of the Court, that the determination of public convenience and necessity was itself a question of fact, but with that I am unable to agree: it is not an objective existence to be ascertained; the determination is the formulation of an opinion, in this case, the opinion of the Board and of the Board only. In the notice of appeal references to certain findings were made, but what the present respondent sought and obtained was a judgment on the entire controversy. That remedy was, in my opinion, misconceived and the judgment likewise.'

In the later case of **Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co. et al** (1958), 13 D.L.R. (2d) 97, [1958] S.C.R. 353, Mr. Justice Abbott, speaking for the majority of the Supreme Court of Canada said (p. 101 D.L.R., p. 357 S.C.R.):

' As this Court held in the **Union Gas** case the question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding in the public interest, the need and desirability of additional cemetery facilities, and in reaching that decision the degree of need and of desirability is left to the discretion of the Commission.'

See also the judgment of the Supreme Court of Canada in Canadian Transportation Commission v. Worldways Airlines Ltd. (1975), 55 D.L.R. (3d) 389 at p. 395-6.

The principles set forth in the foregoing cases have been expressly applied by this Court. In **Re Aves and The Board of Public Utilities** (1973), 39 D.L.R. (3d) 266, 5 N.S.R. (2d) 370, the Board of Commissioners of Public Utilities refused the application of a service

station operator for a 24 hour license for the operation of his station. In rejecting a challenge to such decision, this Court said (p. 282-3 D.L.R., p. 394-5 N.S.R.):

' The final point raised by the appellant was that the Board had not properly addressed itself to the matter of public convenience and necessity. I think it's clear that this Court cannot substitute its opinion on public convenience and necessity for that of the Board - **Union Gas Co. of Canada Ltd. v. Sydenham Gas & Petroleum Co. Ltd.**, [1957] S.C.R. 185. It may intervene when the Board has clearly misdirected itself on the meaning of the words as in **Re Hamilton,** [1937] 1 D.L.R. 807.

Campbell, C.J., in **Re Allison MacLeod Ltd.** (1958), 14 D.L.R. (2d) 500, was considering an appeal from the Public Utilities Commission of Prince Edward Island. Section 2 of the **Petroleum Products Act** of that Province provided that:

> No retailer's licence shall be issued with respect to any outlet which was not being operated on March 25th, 1948, unless, in the judgment of the Commission, public convenience and necessity so require.

He referred to the **Sydenham Gas** case and concluded that in order to succeed the appellants must show "that the Commission wrongly decided some material question of law, or was manifestly wrong in making some specific finding of material fact".

It is my opinion that the reasoning of these cases applies to the situation in this appeal and that there is nothing for us to indicate that we should interfere with the conclusions of the Board on the matter of public convenience and necessity.'

Finally, in **Nova Enterprises Limited v. The Attorney General** of Nova Scotia et al (S.C.A. No. 01833, decision delivered October 23, 1987, unreported) Mr. Justice Hart denied an application for permission to appeal a decision of the Board denying an application to operate a retail gasoline outlet on a 24 hour basis. During the course of his decision, Hart, J.A. said (pp. 10 and 11):

' ... When deciding what is in the 'public interest, convenience and necessity', many factors must be considered including not only the desire of the applicant to place certain facilities at the disposal of the public but, also, the effect that any new license will have upon the existing licensees. There would be no purpose in this type of controlling legislation if it were not so. The Board apparently considered these as well as many other factors and reached the conclusion that the area was adequately served and an additional license was unnecessary at the present time. To grant leave to appeal on the first ground would simply be to permit a rehearing on the issue and leave will therefore be refused.' "

Counsel for the petitioner contends that "the public" in the context of this proceeding means the members of the Co-operative. The Board did consider the public interest, convenience and necessity in relation to this application but did not agree with the restrictive interpretation of "the public" as contended for by counsel for the Co-operative, rather the Board concluded that the public (in s. 38(1)) meant "that public which uses or may use the particular service or facilities for which the application is made". In so stating, the Board was aware of course that the applicant was a Co-operative and that the large percentage of its gasoline sales would be to members of the Co-operative. In deciding what constituted the public, the Board was exercising the wide administrative discretion granted to it by the Legislature. In my opinion, it did not commit any reversible error of law or jurisdiction in reaching the conclusion that it did.

With respect to the second issue raised by the petitioner, it appears clear to me from the Board's decision that it was aware that the applicant was a Co-operative and how it was structured and operated. The Board also made special reference to the rebate program of the Co-operative. As pointed out by this Court in Re Aves and the Board of Public Utilities, supra, it is not for this Court to substitute its opinion for that of the Board as to public interest, convenience and necessity. In the present case, the Board did address the issue of public interest, convenience and necessity as it related to this application and obviously considered the unique status of the Co-operative and all other relevant matters. I, therefore, find no merit in this issue.

The third issue raised is that the Board failed to give any or adequate consideration to the price competition that would result from the Co-operative's proposed price rebates to its members. It is the position of the petitioner that such price rebates ought to have been considered by the Board as providing price competition.

The matter of rebates was before the Board as was the evidence that the pump price for gasoline would be about the same as that charged by other dealers in the area. On this issue, counsel for the Attorney General makes the following interesting observation in its factum, namely:

> "... the Board did consider the arguments raised by the Petitioner under this ground, but were not swayed to the point of granting the license. It is difficult, however, aside from this, to understand how this would be relevant consideration to be taken into account by the Board. The argument could extent [sic] to any operation who trades their shares in the public market and provides dividends, the benefit received by its shareholders from sale of gasoline at its outlets would be distributed by way of dividend back to the shareholders. They would benefit by reduced prices through dividend payments through purchase at the gasoline stations operated by their company."

Although the Board may not have specifically referred to whether the rebates would in fact amount to price competition, it seems clear to me from the Board's decision that it was aware of the position of the Co-operative on this point.

Relevant to this issue and also to the proceeding one, is the case of Woolaston et al. v. Minister of Manpower and Immigration, [1973] S.C.R. 102, 28 D.L.R. (3d) 489. In that case, the argument was advanced that the Immigration Board erred in law in reaching its decision on an application for permanent admission to this country by failing to take into consideration certain evidence. As to such argument, Laskin, J., said (p. 492-3):

> " I am unable to conclude that the Board ignored that evidence and thereby committed an error of law to be redressed in this Court. The fact that it was not mentioned in the Board's reasons is not fatal to its decision. It was in the record to be weighed as to its reliability and cogency along with the other evidence in the case, and it was open to the Board to discount it or to disbelieve it.
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> I am satisfied upon a review of the entire record that what has been presented as an error of law is properly a matter of fact upon which no appeal lies to this Court. It follows that the appeal of the wife must be dismissed, and in consequence that of the husband as well."

I have read the transcript of the evidence that was before the Board and have considered the decision of the Board against such evidence and in light of the legal principles to which I have referred. In my opinion, the petitioner has not demonstrated that the Board committed any error of law or jurisdiction in the exercise of its wide discretionary powers. In other words, the Co-operative has not shown that a substantial question or questions of law or jurisdiction exist that indicate that there is a reasonably arguable case for success on the appeal.

I would therefore dismiss, without costs, this petition for permission to appeal the decision of the Board herein.

Angus L. Macdonald.

J.A.