NOVA SCOTIA COURT OF APPEAL

Citation: *Linden Leas Limited v. Nova Scotia (Farm Loan Board)*, 2019 NSCA 15

Date: 20190228
Docket: CA 485266
Registry: Halifax

Between:

Linden Leas Limited

Appellant

v.

The Nova Scotia Farm Loan Board

Respondent

Judge:	Bourgeois, J.A.
Motion Heard:	February 28, 2019, in Halifax, Nova Scotia in Chambers
Written Release:	March 8, 2019
Held:	Preliminary issue regarding the scope of appeal determined
Counsel:	Robert H. Pineo and Heather M. Wyse, for the appellant Sean Foreman, Q.C. and Tanisha Blackmore, Articled Clerk, for the respondent

Decision:

[1] The appellant, Linden Leas Limited, seeks to appeal a decision of Justice Gregory Warner. The decision in question was made pursuant to the *Overholding Tenants Act*, R.S.N.S. 1989, c. 329 (the "*Act*"). The parties have raised as a preliminary issue the scope of this Court's role on appeal and, in particular, the proper interpretation of s. 18 of the *Act*.

[2] On February 28, 2019, I heard the parties in chambers. After having heard their respective arguments, I provided an oral decision, with written reasons to follow. These are those reasons.

Background

[3] I do not have the benefit of Justice Warner's oral decision, or the record before him. I understand, however, that this appeal arises by virtue of an application/complaint filed under the *Act* by the Nova Scotia Farm Loan Board (the "Board"). In making its complaint, the Board was seeking an order of possession over lands owned by it, and occupied by Linden Leas. The lands in question had been subject to a lease between the parties that had terminated on September 28, 2018.

[4] The Board's complaint was brought pursuant to s. 3(1) of the *Act* which provides:

> 3(1) If a tenant, after his tenancy or right of occupation has expired or been determined, does not go out of possession of the land held by him, the landlord or his agent may, without any demand upon the tenant, file a complaint under oath in Form A in the Schedule to this Act, or to the like effect, with a judge having jurisdiction in the place where the land is situate.

In the *Act*, "judge" is defined as a judge of the Supreme Court (s. 2(a)).

[5] The complaint was filed on December 13, 2018 and came for hearing before Justice Warner on February 1, 2019. In advance of the hearing, the parties filed evidence by way of affidavits and provided written submissions. Linden Leas, in support of its request to have the complaint dismissed and remain in possession of the lands, relied upon the affidavit evidence of Ms. Jillian Foster. The Board filed an affidavit from a representative with knowledge of the status of the lease.

[6] After considering the evidence and submissions of the parties, Justice Warner gave an oral decision on February 1st, with an order following on February 15th. It provided that Linden Leas deliver vacant possession of the occupied lands on March 31, 2019.

[7] The *Act* gives a landlord or tenant a right to appeal to the Court of Appeal (s. 10). The appeal may be heard by a single judge of the Court in chambers (s. 17). The *Act* further contains a number of provisions which strongly signal that appeals should be dealt with expeditiously. The relevant provisions provide:

> 14(1) The appellant shall, within ten days after the decision or order of the judge has been made, apply to the Court of Appeal to fix a time and place to hear the appeal.
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> (2) The application shall be supported by the affidavit of the appellant, or his agent, setting forth the principal grounds of appeal and that the appeal is not being made for the purpose of delay.
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> 15 The Court of Appeal shall appoint a time to hear the appeal which shall be not later than the fourteenth day after the date of the application.

[8] On February 15, 2019, Linden Leas filed a Notice of Appeal. In a supporting affidavit of counsel, it sets out its grounds of appeal as follows:

> 9. Linden Leas Limited is appealing the February 1, 2019 decision of Justice Warner on the following grounds:
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> (a) That the Learned Hearing Judge erred in law by failing to properly apply the principles of equity in determining that the Appellant was not entitled to relief from forfeiture;
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> (b) That the Learned Hearing Judge erred in law by determining that the timber harvest plan of the Appellant was not ecologically sustainable, by holding that it involved clearcutting without evidence to establish:
>
> (i) That the plan called for clearcutting; and,
>
> (ii) That the use of clearcutting constitutes an ecologically unsustainable plan;
>
> (c) That the Learned Hearing Judge erred in law by relying upon the decision of Justice Rosinski in another matter in determining that the Appellant should have liquidated a portion of its beef herd.

[9] Upon review of the Notice of Appeal, and given the time frames contemplated in the *Act*, I undertook a telephone conference with the parties on February 22, 2019. At that time, a motion for date and directions was scheduled to

be heard on February 28, 2019. Further, I requested the parties' views on the proper interpretation of s. 18 of the *Act*. That section reads:

> 18. Every appeal shall be heard *de novo* and the Court of Appeal shall give such judgment or make such order as the law and the evidence require, whether such judgment or order confirms, reverses or varies the decision appealed from, and the Court of Appeal may hear and determine the complaint whether the decision appealed from purports to be final or not.

[10] Given the above provision, and Linden Leas' view that any appeal before this Court should be a trial *de novo*, the parties were requested to be prepared to address on February 28th the proper interpretation of s. 18 and the resulting scope of this Court's role on appeal.

Position of the parties

[11] Both parties have provided authorities in support of their respective positions. In its written submissions, Linden Leas reiterates its view that s. 18 should be properly interpreted as affording it a trial *de novo*. Counsel wrote:

> The Appellant submits that the above authorities are clear in their interpretation of the concept of a trial *de novo*; that is a "*de novo* review is a review in which an entirely fresh record is developed and no regard at all is had to a prior decision" … . There is nothing in the Act that limits or alters this interpretation. Section 18 clearly provides the Appellant with the right to enter new evidence and call new witnesses.

[12] Linden Leas advises it wants to call 12 witnesses at the *de novo* hearing before this Court.

[13] The Board takes a very different view, submitting that the *Act*, read in its entirety, does not contemplate a new trial being undertaken on appeal. Rather, it submits the appeal should proceed on the basis of the record from the court below, with Linden Leas having no right to call new evidence, unless permitted by way of a successful motion to adduce fresh evidence. The Board submits the use of "*de novo*" in the context of an appeal does not mean a trial *de novo*, but signifies the appeal court is not required to show deference to findings made by the court of first instance.

[14] The Board argues the context of the legislation supports its view, as does the definition of "appeal *de novo*". In its written submissions, the Board argues:

> If the intent of the appeal process within the Act was to simply require a completely fresh "trial de novo" of all issues, then there would be no requirement for any Record, or the submission of grounds of appeal. It would simply be a new trial.
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> There are ample authorities that support this conclusion. The 9th and later editions of Black's Law Dictionary define "appeal de novo" as:
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> > "An appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings".

[15] It does not appear s. 18 and, in particular, the scope of this Court's role on appeal, has been judicially considered. The case authorities provided by the parties consider different statutory provisions governing appeals in a variety of different contexts. Many involve the scope of appeals or judicial reviews from administrative bodies or tribunals. All are distinguishable factually and statutorily from the matter before me.

[16] I am satisfied, however, that one consistent principle does emerge from the authorities—the meaning of "*de novo*" and, in particular, an appeal heard "*de novo*", necessarily finds the intended scope of appellate function in the words of the individual statute and the context of the statutory regime in question.

[17] The variety of possible interpretations of an appeal *de novo* was recognized in *Transglobal Communications Group Inc. (Re)*, 2009 ABQB 195. There, the Alberta Court of Queen's Bench considered a provision of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, which afforded a creditor the right to appeal a trustee's valuation decision. The issue was whether the appeal was confined to the record, or could proceed on a *de novo* basis. In interpreting the provision in question, Justice Yamauchi observed:

> [37] It is important, at the outset, for this Court to provide a guidepost in its use of the phrase appeal "*de novo*." Courts have described appeals *de novo* in many different ways, including:
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> > (a) new evidence or cross-examination is possible, ***Ross v. McRoberts*** (1999), 237 A.R. 344 (C.A.); ***Taylor v. Alberta (Workers' Compensation Board)***, [2005] A.J. No. 968 (Q.B.); ***Dickey v. Pep Homes Ltd.***, 2006 ABCA 402
> >
> > (b) new grounds may be raised, ***678667 Alta. Ltd. v. Allendale Bingo Corporation***, [2001] A.J. No. 1303 (Q.B.)

> (c) consideration by the reviewing judge afresh in which the court may substitute its opinion, judicially reasoned, for that of the lower court, ***Primrose Drilling Ventures Ltd. v. Carter***, 2008 ABQB 605 at para. 14
>
> (d) an entirely new case is presented, independent of the original case, ***Minister of Human Resources Development v. Landry*** (2005), 31 Admin. L.R. (4th) 13 at para. 10 (F.C.A.)
>
> (e) an appeal heard on the basis of the case originally presented to the tribunal, with the addition of new facts that the tribunal accepted when it revised its decision, ***Landry*** at para. 10.
>
> [38] In ***Newterm Ltd. v. St. John's (City)*** (1991), 93 Nfld. & P.E.I.R. 49 at para. 13 (Nfld. S.C.T.D.), the court made the very important statement that:
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> > The appeal before this Court is a civil proceeding and one must look to the particular statute giving the appeal (de novo) to determine the procedure, powers and jurisdiction to be exercised by the appellate court.
>
> In other words, one cannot ignore the foundational statute on which the appeal is based to determine the type of appeal *de novo* with which one is dealing.

[18] Similarly, the Manitoba Court of Appeal in *Brian Neil Friesen Dental Corp. v. Manitoba (Director of Companies Office)*, 2011 MBCA 20, in defining the scope of an appeal from a decision of the Director of Companies Office, noted:

- "The first point of reference is always the legislation itself. Some statutes are quite clear and identify that the review or appeal to the courts from the decision of the tribunal is to be treated as a trial *de novo*" (para. 17);
- Where the statute does not clearly identity the nature of the review, one must look to "the statute as a whole in its appropriate context" (para. 18);
- "[I]n other Manitoba statutes where the Legislature intended a hearing *de novo*, the intention was explicitly so stated or at least there was an explicit reference to the right to present further evidence" (para. 33); and
- "The nature of the decision appealed from should be examined in order to determine the nature of the appeal" (para. 34).

[19] In my view, s. 18 cannot be interpreted on its face as explicitly contemplating a trial *de novo*. To ascertain the intent of the Legislature, it is necessary to consider a much broader context. In this regard, the well-known principles of statutory interpretation must be employed.

[20] The purpose of the *Act* is to provide a landlord with a means to regain possession of premises from a tenant after the expiry of a lease. As noted earlier, various provisions of the *Act* signify the matter is intended to be dealt with expeditiously. I have already set out s. 18 above, but will do so again for ease of reference:

> 18. Every appeal shall be heard *de novo* and the Court of Appeal shall give such judgment or make such order as the law and the evidence require, whether such judgment or order confirms, reverses or varies the decision appealed from, and the Court of Appeal may hear and determine the complaint whether the decision appealed from purports to be final or not.

[21] Section 18 must be considered within the context of the entire *Act*. There are other sections relating to the conduct of an appeal that are of assistance in ascertaining this Court's intended function on appeal. In particular, ss. 13(1) and 16(1) provide:

> 13(1) As soon as the appeal bond is filed or cash deposited the judge shall forward to the Registrar of the Court of Appeal all papers in the action including the appeal bond or in the case of a cash deposit, a certificate that the cash has been so deposited, **transcript of the evidence and of the decision or order**.
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> …
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> 16(1) Notice of the time and place of **hearing the appeal**, together with a copy of the affidavit upon which the appointment was obtained, shall be served upon the respondent at least **three days before the hearing of the appeal**.
>
> (Emphasis added)

[22] It is also important in this particular instance to consider the nature of the matter under appeal. This matter does not follow the decision of an administrative decision-maker. Rather, it is an appeal arising from the decision of a superior court, where the parties had a full opportunity to present evidence, challenge that called by the opposing party, and make submissions based on the law.

[23] A broad and liberal interpretation of s. 18 within the context as noted above does not support a conclusion that the appellant is entitled to a trial *de novo* because:

- Section 18 specifically uses the word "appeal" and does not explicitly provide for a new hearing or right to call new evidence;

- The legislation contemplates an appeal to the Court of Appeal after the matter having been fully heard in the Supreme Court. There is nothing to suggest that the Legislature intended this Court to act any way other than it does normally, that is, as an appellate court;

- Given the expeditious nature of the process outlined in the *Act*, it is unlikely the Legislature contemplated an appellant tenant would be afforded the opportunity to have two full trials;

- An example of the time-sensitive nature of the proceedings under the *Act*, including the procedure for appeals, is found in s. 16(1), which only requires a respondent to be provided with three days' notice of "the hearing of the appeal". Both the words used and the shortness of notice are indicative that a trial *de novo* was not the legislative intent;

- Section 13 requires that a transcript of the evidence from the court below be provided to the Registrar of the Court of Appeal. If the Legislature intended this Court to undertake a fresh trial, the record would be unnecessary. The provision of the record from the hearing below is highly indicative that this Court is intended to function in its usual appellate role.

[24] Having concluded Linden Leas is not entitled to a trial *de novo*, my analysis is not yet complete. I am mindful the Legislature chose to describe the nature of the appeal afforded in s. 18 as being "*de novo*". The addition of those words must have been done purposefully. Having considered the wording of the section in its entirety, I agree with the Board that the use of "*de novo*" is intended to signify the standard of review to be applied to the decision under appeal.

[25] I am satisfied the statutory framework expresses an intention for this Court to undertake a review of Justice Warner's decision, unfettered by deference. In doing so, the appeal is to be undertaken on the evidentiary record from the court below, with this Court being free to make is own determinations of both law and fact.

Conclusion

[26] The matter shall proceed as an appeal on the record before a single judge in chambers.

Bourgeois, J.A.