NOVA SCOTIA COURT OF APPEAL
Citation: ***Northern Construction Enterprises Inc. v. Halifax (Regional Municipality)***, 2014 NSCA 88

Date: 20140930
Docket: CA 412729
Registry: Halifax

Between:

Northern Construction Enterprises Inc.

Appellant

v.

The Halifax Regional Municipality, The Nova Scotia Utility and Review Board and The Attorney General of Nova Scotia

Respondents

Docket: CA 428571
Registry: Halifax

Between:

Northern Construction Enterprises Inc.

Appellant

v.

The Halifax Regional Municipality, Dwight Ira Isenor and Stacylee Rudderham

Respondents

Judge:	The Honourable Justice Cindy A. Bourgeois
Motion Heard:	September 25, 2014, in Halifax, Nova Scotia, In Chambers
Written Decision:	September 30, 2014
Held:	Motion of the appellant partially granted; Motion of the respondent dismissed
Counsel:	Peter M. Rogers, Q.C. and Mercy Motey, for the appellant E. Roxanne MacLaurin, for the respondent Halifax Regional Municipality Paul B. Miller, for the intervenors Isenor and Rudderham Edward A. Gores, Q.C. for the respondent Attorney General of Nova Scotia (not participating)

Decision:

[1] On September 25, 2014, the Court heard a contested motion for consolidation brought by the appellant, and a motion for a stay brought by the respondent the Halifax Regional Municipality ("HRM").

Background:

[2] The appellant owns property in Goffs, near the Halifax Stanfield International Airport, and wishes to develop an aggregate quarry at that site. It made application to the respondent HRM for a development permit in April of 2012. Later that month, the municipal development officer refused the application, based upon his review and interpretation of relevant portions of the municipal Land Use By-law.

[3] The appellant appealed the development officer's decision to the Utility and Review Board ("UARB"). Following two days of evidence, and after considering oral and written submissions, the UARB dismissed the appeal by way of order dated January 28, 2013. In essence, the UARB concluded after reviewing provisions of the *Environment Act*, S.N.S. 1994-95, c.1, as amended, the *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39, as amended, the Land Use By-law, and the Municipal Planning Strategy, the decision of the development officer fell within a reasonable interpretation of the Land Use By-law. In addition, as a preliminary matter, the UARB determined that it did not have the jurisdiction to determine whether the Land Use By-law was *ultra vires*, as had been argued by the appellant.

[4] The appellant filed a Notice of Appeal challenging the decision of the UARB on February 25, 2013.

[5] The appellant's concern with respect to the legality of the Land Use By-law was advanced in another forum. On February 25, 2013, the appellant also filed a Notice of Application in the Supreme Court of Nova Scotia for an order declaring that s. 2.29 of the Land Use By-law, made pursuant to the *Halifax Regional Municipality Charter*, was *ultra vires*, and of no force and effect. The particular provision being challenged was the same as that relied upon by the development

officer in considering and declining the earlier application for a development permit.

[6] The Application in Court was heard and after considering an Agreed Statement of Facts provided by the parties, Justice Murphy proceeded to consider the relevant "statutory framework". This involved a consideration of the interplay between the *Environment Act*, the *Halifax Regional Municipality Charter*, and the by-law in question. The Court concluded that the by-law was *intra vires*, dismissing the appellant's application for a declaration of invalidity. An order issued on May 14, 2014 and on June 18th, the appellant filed a Notice of Appeal in relation thereto.

Issues:

[7] The appellant seeks to consolidate the two appeals, or in the alternative have them scheduled sequentially before the same panel of the Court.

[8] The respondent HRM opposes a consolidation, or having the appeals heard sequentially. Rather, a stay of the "UARB" appeal is sought, pending the outcome of the "*Vires*" appeal. The intervenors Isenor and Rudderham did not file written materials, but did indicate through their legal counsel at the hearing that they supported the position of the respondent HRM in relation to both motions.

[9] The issues before me can be articulated as follows:

1. Should the two appeals be consolidated, or in the alternative heard sequentially by the same panel?
2. Should the "UARB" appeal (CA No. 412729) be stayed pending the determination of the "*Vires*" appeal (CA No. 428571)?

Analysis:

[10] In my view, the two issues can be considered together, as the rationale for each, at least as argued by the parties, certainly overlap.

[11] There is no dispute that the Court has the ability to consolidate the two appeals. *Civil Procedure Rule* 7.26 provides:

> **7.26(1)** A judge may order two or more proceedings for judicial review or appeal to be consolidated, or heard together.

[12] Further guidance is found in Rule 37.02 which reads:

> **37.02** A judge may order consolidation of proceedings if the proceedings to be consolidated are of the same kind, that is to say, actions, applications, applications for judicial review, or appeals, and one of the following conditions is met:
>
> (a) a common question of law or fact arises in the proceedings;
>
> (b) a same ground of judicial review or appeal is advanced in the applications for judicial review or appeals and the ground involves the same or similar decision-makers;
>
> (c) claims, grounds, or defences in the actions or applications involve the same transaction, occurrence, or series of transactions or occurrences;
>
> (d) consolidation is, otherwise, in the interests of the parties.

[13] It is further worthy of note that Rule 37.03 indicates "[a] judge may order that proceedings be tried or heard together, or in sequence".

[14] The parties have provided case authorities relating to consolidation, all of which except for one, relate to matters in the Supreme Court. Although this Court dismissed a motion for consolidation in **R. v. Cummings**, 2012 NSCA 52, the circumstances before Hamilton, J.A. in that instance are quite different than those presently before the Court.

[15] The appellant submits that not only is one of the conditions for consolidation as required by Rule 37.02 present in the circumstances, several are satisfied. It is submitted that both appeals arise from a common factual basis, namely the refusal of the municipal development officer to issue a development permit. Although it is acknowledged that some grounds of appeal are different, the appellant submits there is significant overlap. It is submitted that both matters will involve a consideration of the same statutory framework, and the same factual context in order to address whether the two decision makers erred.

[16] The appellant further argues that, whether by way of consolidation, or a sequential scheduling of the appeals, having the same panel will be in the broad interests of not only the parties, but to the efficient and timely administration of

justice. For the same reason, it is argued that a stay of the "UARB" appeal is not only unnecessary, but contrary to the overall object of the *Rules*, being the "just, speedy, and inexpensive determination of every proceeding".

[17] The respondent HRM asserts that a consolidation is not appropriate, and submits that none of the conditions outlined in Rule 37.02 are established. Concerns are raised with respect to a consolidated appeal dealing with determinations from two different decision makers, with different standards of review.

[18] The respondent further submits that the grounds of appeal do not overlap between the two matters, are incompatible with being consolidated and, in fact, are such that a stay is supported. The respondent argued the "UARB" appeal has been effectively stayed pending the outcome of the matter before Justice Murphy, and that continuing that status quo does not prejudice the appellant.

[19] The respondent's strongest argument against consolidation and in support of staying the "UARB" appeal is that the outcome of the "*Vires*" appeal, if heard first, could effectively render the second appeal moot. If such is the outcome, this would save the parties, and the Court the necessity of preparing for, hearing and considering the merits of the UARB matter.

[20] I have carefully considered the materials in support of the motions, the submissions of the parties, the Rules and case authorities presented. I have further read the decisions under appeal and considered the grounds set out in the two Notices of Appeal. Appeal books have not yet been filed in either matter. The positions advanced by the parties clearly both have merit, however, the general approach suggested by the appellant is more conducive in my view to the efficient and timely administration of justice.

[21] Some of the factors noted in Rule 37.02 are present, notably a common factual basis. I am not satisfied, without having the benefit of reviewing the appeal books and undertaking a more fulsome analysis of the full consequences of a consolidation, that granting that remedy is appropriate. I am however satisfied that it is appropriate that the matters be scheduled sequentially, to be heard by the same panel of the Court.

[22] In reaching this conclusion, I have considered in particular, the efficiencies of having the same panel hear both appeals given the common factual background, and the overlapping statutory framework which was considered by both decision makers. I considered, and rejected the proposition that the appeals could be separated in time, yet heard by the same panel. There are practical concerns with the availability of panel members to be scheduled on two appeals, split by perhaps a year or more, in addition to the inefficiency of the panel needing to "refresh" regarding factual context and statutory framework.

[23] I do acknowledge that the respondent HRM's request for the "UARB" appeal to be heard only once the outcome of the "*Vires*" appeal is determined, also may create efficiencies. Simply, if the by-law under which the development officer refused to issue a permit is found to be invalid, that will effectively rendered the "UARB" appeal moot. In such an eventuality, there would be no need for the parties or Court to expend time, energy or resources on that appeal.

[24] In response to the alleged efficiencies of a stay, I make the following observations. It is not uncommon that parties come before the Court arguing multiple grounds of appeal, some of which, despite the efforts placed in advancing them, are rendered moot by determinations on other grounds. Such is the nature of the beast. Perhaps more importantly however, is that the "UARB" appeal may not become moot based upon the Court's consideration of the "*Vires*" appeal. The "*Vires*" appeal being dismissed would result in a re-awakening of the second appeal, with the parties and the Court after a hiatus of several months or more, needing to bring it forward. The potential efficiencies the respondent HRM submit support a stay, do not in my view, outweigh the efficiencies of having both matters dealt with sequentially.

Disposition

[25] Based on the above, the motions before the Court are concluded, with an order to issue as follows:

(a) The appellant's motion for consolidation of the appeal represented by CA No. 412729 with the appeal represented by CA No. 428751 is dismissed;

(b) The respondent HRM's motion for a stay is dismissed;

(c) The appeals referenced in paragraph (a) shall be scheduled to be heard sequentially before the same panel of the Court; appeal CA No. 428571 to be heard first, followed by CA No. 412729, unless otherwise directed by the panel.

[26] The appellant had filed Motions for Direction in both matters, to be heard in conjunction with the motions addressed herein. Those motions were adjourned pending outcome of this decision. I would instruct the parties to bring those motions forward, and would ask Counsel for the appellant to take the lead in consultation with the other parties to have a date scheduled accordingly.

Bourgeois, J.A.