IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R v. Bennett, 2008 NSPC 40

Date: 20080702
Docket: 1654245, 1654246
Registry: Bridgewater

Between:

R.

v.

Kimber Bennett, Jr.

Judge:	The Honourable Judge Anne E. Crawford
Heard:	July 2, 2008, in Bridgewater, Nova Scotia
Charge:	158(C) EVA, 158(b) EVA
Counsel:	Peter Craig, for the Crown David Hirtle, for the Defence

By the Court:

[1] Kimber Bennett Jr. faces two charges under the Nova Scotia *Environment Act*, viz., failing to provide information contrary to s. 158 (c), and providing false or misleading information under s. 158 (b).

[2] To avoid duplication the charges were heard in a single trial although each refers to a different property. They will be dealt with in this decision in the order in which they arose.

Environment Act s. 158 (c): Camperdown property

Facts

[3] On December 10, 2004 the defendant, a Qualified Person Level 2 (QP 2) under the *Environment Act* On-Site Sewage Disposal Regulations, submitted an application for approval on behalf of then property owner London Life Insurance Company for the installation of an on-site sewage disposal system on property at 545 Camperdown Road, Lunenburg County, N.S., identified by Property Identification Number 60294402.

[4] The Crown alleges that in that application the defendant failed to disclose the location of a well or wells on an adjacent property.

[5] The alleged failure to disclose came to light when a later application in regard to the same property was submitted by Peter Berrigan on behalf of the new owner, Michele Gohier. This application showed a dug well on the adjacent property.

[6] This discrepancy, among others which are by agreement no longer relevant for this decision, commenced an investigation by Departmental personnel. A field inspection report dated February 26, 2007 shows that, by triangulation, the distance from the well to the defendant's proposed location for the septic tank is 25.7 m.

Relevant legislation

[7] Section 158 c of the Nova Scotia *Environment Act* states:

> 158 A person who . . .
>
> (c) does not provide information as required pursuant to this Act; . . .
>
> is guilty of an offence.

[8] Section 12(1)(d) of the On-site Sewage Disposal Systems Regulations as they read at the relevant time stated:

> 12 (1) Subject to subsection (6) and Section 29, no person shall construct or install a system or cause the same to be done unless the clearance distances from the system are greater than . . .
>
> (D) 30.5 m from a dug well or any other water supply;

[9] Disclosure of the existence of a well closer than that minimum distance was obviously crucial to proper placement of the septic system. Failure to disclose could have resulted in contamination of the neighbour's well.

[10] This is a regulatory offence and one of strict liability. Section 160 of the *Environment Act* provides a defence of due diligence:

> 160 Unless otherwise provided in this Act, no person shall be convicted of an offence under this Act if the person establishes that the person
>
> (a) exercised all due diligence to prevent the commission of the offence; or
>
> (b) reasonably and honestly believed in the existence of facts that, if true, would render the conduct of that person innocent.

Issues

[11] The defendant admits that he failed to include the location of the well in his application, but says that he did so because :

> (1) he could not determine its location in relation to the property boundaries without a survey, which his client was not required to obtain and was not prepared to pay for; and
> (2) he discussed this problem with Danny Shannon, then an inspector with the Department's Bridgewater office.

Defence of officially induced error

[12] As to the second issue above, which raises the defence of officially induced error, the defendant testified that Shannon told him he could omit the well on the application, design the system based on soil conditions, and then show the well on the location certificate which would be required when and if the system was actually installed. He said that he confirmed these instructions in a letter dated December 8, 2004 which he submitted as a cover letter with the application.

[13] It is conceded by the defence that Mr. Shannon has no recollection of speaking with the defendant prior to December 8, 2004 or of any such discussion with the defendant.

[14] Steven Conway, the informant on behalf of the Department of Environment and Labour, testified that he had conducted a thorough review of the Department file on this application and there was no evidence that Mr. Shannon had had any involvement in it. It was initially reviewed by another inspector. The December 8, 2004 letter was not part of the Departmental file on this application and there is no evidence that it was ever received by the Department. It first came to light when the defendant testified in this matter.

[15] The relevant portion of the letter reads as follows:

> There is no wetland or bodies of water near the property. The separation distances can be met without any variations. The survey markers as well as the drilled well, located at the front of the property, are below the ground. Before installation of a system I will insist on their locations be [sic] verified.

[16] There is no mention in the letter of a well on the neighbouring property, and the letter gives assurance that "separation distances" can all be met. This letter, if received, would not alert the reader in any way to the problem of the neighbouring well. The only problem mentioned is that the drilled well on the property was not

visible and that its location as well as the locations of survey markers would have to be “verified” before installation.

[17] From this letter the reader would be left with the impression that the writer knew where the markers and well were located with sufficient precision to locate the system on the property without any variations to the separation distances, but that exact locations for these elements would be confirmed before installation.

[18] To the extent that this letter reflects the alleged discussion with Mr. Shannon, I find that Mr. Shannon would have had no way of knowing that the actual problem was not on the subject property, but was related to the well next door. The defendant has not established a defence of officially induced error.

Due diligence defence

[19] Nor has he established a defence of due diligence. Whether or not he could establish the boundaries of the subject property, it would have been a relatively simple matter to measure the distance from the neighbouring well to the proposed location of the septic system. His failure to do so put the neighbour’s drinking water at risk and cannot be excused because of his lack of knowledge of the boundaries.

[20] I find the defendant guilty of the charge of failing to provide information required under the *Act*.

Environment Act s. 158(b): Crousetown Property

Facts

[21] On August 29, 2005 the defendant signed and filed an application for approval of an on-site sewage disposal system on behalf of Steven Brown and Christine Bouchard on land they owned at 445 Bolivar Road in Crousetown, Lunenburg County, Nova Scotia, identified by PID # 60453115. It was a large piece of land which they had recently purchased and they did not want to go to the expense of having it surveyed.

[22] The property was treed, but the defendant had a testpit dug among the trees and did the soil assessment when he visited the site with the owner on August 15, 2005.

He visited again later to check the slope with the aid of his sight level, which he had forgotten on the occasion of his first visit.

[23] Based on his assessment of the soil as 100 mm of organic material over a first layer of 762 mm of loose dry sand and a second layer of 968 mm of semicompacted dry sand, water table N/A and slope as 20%+, he selected a C1 raised system as meeting the applicable standards. He completed the application, submitted it and it was approved.

[24] In early March 2006 a contractor working on the property called the Department to relay his concerns. As a result of this call, Steve Conway, then an inspector specialist with the Department, attended the site with Barry Gillis, regional engineer, on March 9, 2006 to conduct an audit. By this time the site had been cleared of trees, and footings for the foundation of the dwelling had been installed. They found a testpit 58 feet from the edge of the footings. The field report Mr. Gillis completed on that date noted in regard to that testpit: "TP1 – 12 to 16" organics over 16 to 22" wet silty sand to water" and "estimated slope less than 5%". (By reference to a readily available internet metric conversion site (http://www.worldwidemetric.com/metcal.htm) for ease of reference I have converted these figures to 304.8 mm to 406.4 mm organics over 406.4 mm to 558.8 mm wet silty sand.) These represented large variations from what was shown in the defendant's submissions and led Mr. Gillis to wonder if the testpit they saw was in the same location as that from which the defendant had made his observations on soil and slope.

[25] Meanwhile, the same contractor had called the defendant, who testified that he went to the Department office in Bridgewater to discuss the problem. Mr. Conway said that they would have to go to look at the site to do an audit. After phone calls back and forth, they agreed on a suitable date: April 5, 2006, and the defendant arranged with the contractor to have a test pit dug.

[26] Mr. Conway stated that the observations and measurements recorded in his Field Inspection Report dated April 5, 2006 are based on the testpit the defendant showed him that day, which was in a different location from the testpit he and Mr. Gillis had seen and used in March. Mr. Conway understood that the April 5 testpit was in the same location as the pit the defendant had used the previous summer.

[27] The defendant testified that he could not tell if it was in the same location or not; as the land had been cleared and the foundation was now in. But he did testify that he told Mr. Conway where he thought the septic field should go, based on the location of the foundation.

[28] Mr. Conway's estimate of slope at that location was "5.2 ft rise in 148 ft run". On the stand Mr. Conway stated that this is equivalent to a 3.5% slope. He noted the soil characteristics as "6" organics; 12" sandy silt dark reddish brown, loose; 2.5 ft of medium to loose silty sand, light brown" with water 4 feet below the ground surface. (By reference to the same site these figures equate to 152.4 mm organics; 304.8 mm sandy silt; 762 mm silty sand.)

[29] Lester Berrigan, a Nova Scotia land surveyor and an experienced QP2 testified that he was retained by the defendant to make a new application for the sewage system on the property. On May 12, 2006 he attended the site and, using what he believed to be the same test pit the defendant had used the previous summer, he noted the testpit profile as 100 mm of organics over 200 mm of sandy silt and clay silt to the bottom. He found the water table to be at .5 meter and stated that the clay silt layer he found was impermeable to water. He measured the slope at that location to be 5%. On the stand he stated that there was no area close to the house or visible on the property from the house where the slope would be 20%. Based on the soil characteristics and slope he saw his recommendation was a C-3 contour system.

Relevant Legislation

[30] Section 158 (1) (a) states:

> 158 A person who . . .
>
> (a) knowingly provides false or misleading information pursuant to a requirement under this Act to provide information; . . .
>
> is guilty of an offence.

[31] This also is a regulatory offence and one of strict liability. Section 160 of the *Environment Act* is therefore also relevant here:

> 160 Unless otherwise provided in this Act, no person shall be convicted of an offence under this Act if the person establishes that the person
>
> (a) exercised all due diligence to prevent the commission of the offence; or
>
> (b) reasonably and honestly believed in the existence of facts that, if true, would render the conduct of that person innocent.

Issues

[32] There are four issues in regard to this charge:
(1) Were the defendant's rights under sections 7, 8 or 10(b) of the *Charter of Rights and Freedoms* breached in the course of the investigation?
(2) If so, what is the appropriate remedy under s. 24(2) of the *Charter*?
(3) Has the Crown established beyond reasonable doubt that the defendant knowingly provided false or misleading information?
(4) If so, has the defendant established a defence of due diligence or mistake of fact?

(3) Knowingly providing false or misleading information – Soil Conditions

[33] The Crown's initial position was that the defendant provided false or misleading information as to both soil conditions and slope. Obviously, both assessments are crucial to a correct determination of the type of sewage disposal system required.

[34] As the evidence of the various witnesses was received in regard to soil type and depth, it became clear that there was significant variation among the Crown witnesses – all of whom were more experienced than the defendant in assessing soil characteristics – and that this type of assessment is much more an art than a science. Comparing the Crown witnesses' assessments with the defendant's, I cannot conclude that the Crown has established beyond reasonable doubt that defendant knowingly

provided false or misleading information in this regard. Nor, indeed, did the Crown so argue in final submissions.

4. Mistake of Fact – Slope

[35] In regard to the large and clear error in measurement of the slope, the defendant admitted that he immediately saw the error when he returned to the property with Mr. Conway in April. But he raises a defence of mistake of fact under s. 160 (b) of the *Environment Act*, *supra.*

[36] On direct examination he produced as Exhibit 10 the sight level which he used to measure the slope of the land in the area of his original testpit. He said that this was one of three types of instrument he was taught to use in the QP2 course run by the Department of Environment in 1999. He said he found it easier to use this than a clinometer or transit because the instrument attached to the side allowed him to read the percentage of slope directly without having to calculate it from rise over run. He said that he had used this instrument consistently on all of his applications and had never had problems with it before.

[37] He described visiting the site a few days after his inspection of the test pit on the way to the beach with his daughters. He said he had his daughter hold a tape measure at the 68" mark (his eye level) and he sighted in on that point with his level. The reading showed a 20% slope, as recorded in the application he submitted on August 29, 2005.

[38] He testified that he was not aware of the error until he visited the property again after it was cleared. It was then obvious to him that the slope was not anywhere near 20%. He said that when he realized this, he immediately concluded that his sight level was inaccurate and threw it in his truck where it was damaged by someone stepping on it.

[39] In order to establish a mistake of fact defence, the defendant must show on a balance of probabilities that he “reasonably and honestly believed in the existence of facts that, if true, would render” his conduct innocent. Here, he states that he relied

in error on the accuracy of his instrument and that he could not visually detect the error because of the trees and brush on the land.

[40] His belief may be honest, but is it reasonable?

[41] First, there is no evidence to support his allegation that the instrument was the source of his error. He had used it previously without problem and he said that he tested it afterward on his home property and it seemed accurate, but he replaced it anyway and allowed it to become so damaged that subsequent testing was impossible.

[42] Second, would a reasonable person in his position have been unable to tell the large difference between a 20% slope and a 5% slope, even if the land was treed? Surely as he walked down a relatively gentle slope he could tell the difference between that and what would have been a steep hill, to a sufficient degree to call in question immediately the accuracy of the reading he obtained.

[43] There are other equally if not more plausible explanations for his error, including the possibility that, in their haste to get to the beach, either his daughter held the measuring tape at the wrong height or he misread the reading on the instrument.

[44] I conclude that the defendant has not established that his belief in the inaccurate reading of his instrument was reasonable.

[45] Although it was not argued by either Crown or defence, I have also considered whether or not the defendant's reliance on his allegedly inaccurate level could raise a reasonable doubt as to whether or not the defendant "knowingly" provided false or misleading information. For the same reasons given above I have concluded that it does not. If the defendant did not, in fact, know that the reading was false and misleading, he should have known.

[46] I find the defendant guilty of knowingly providing false and misleading information as charged.

(1) and (2) Charter issues

[47] Having found above that the Crown has not established beyond reasonable doubt that the defendant knowingly provided false or misleading information as to the soil conditions, I find it unnecessary to consider the defendant's *Charter* arguments which were limited to this issue.

Conclusion

[48] As stated above, I find that the defendant is guilty on both charges before the Court.