IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Nova Scotia Turkey Producer's Marketing Board
v. Nova Scotia (Attorney General), 2008 NSSC 18

Date: January 15, 2008
Docket: S.K. No. 276502 & 277508
Registry: Kentville

Between:

Nova Scotia Turkey Producer's Marketing Board
Respondent/Plaintiff

v.

Attorney General of Nova Scotia
and
Nova Scotia Natural Products Marketing Council
and
John Merks and Andre Merks
Applicants/Defendants

Judge:	The Honourable Justice Charles E. Haliburton
Heard:	January 15, 2008, in Kentville, Nova Scotia
Written Decision:	January 21, 2008
Counsel:	Byron G. Balcom, for the Respondent/Plaintiff, Nova Scotia Turkey Producer's Marketing Board Dale A. Darling, for the Applicants/Defendants, Attorney General of Nova Scotia and Natural Products Marketing Council Andrew N. Montgomery for the Applicants/Defendants, John Merks and Andre Merks

By the Court:

[1] This application Inter Partes is brought by The Attorney General of Nova Scotia pursuant to an Interlocutory Notice, filed January 11th , 2008 seeking,

> ". . . an order pursuant to Civil Procedure Rules 14.25(1) and 38.11 to strike the affidavits of Ms. Sonya Lorette, dated January 22nd , 2007 and February 9th, 2007."

[2] The issue is procedural, it is being argued that the reception of the two affidavits into evidence would be inappropriate and contrary to case precedent.

[3] This is the second Interlocutory Application seeking to have these affidavits struck. The earlier application taken by Andre and John Merks was dismissed by Warner, J. , by order dated August 8th, 2007. I understand the focus of that inquiry was the relevance and general propriety of the drafting of the content of the affidavits and evidentiary issues of the nature raised in **Waverley (Village Commissioners) et al v. Nova Scotia (Minister of Municipal Affairs)** [1993], 123 N.S.R. (2d) 46 (SC).

[4] Perhaps a brief history of this proceeding would be helpful in placing this application and the issues in context. The dispute between the parties has arisen under the **Natural Products Marketing Act**, chapter 308, R.S.N.S. 1989 and its regulations and its administration. This Statute which authorizes the regulating of production and marketing of particular natural products in Nova

Scotia is administered by the Natural Products Marketing **Council**, one of the Respondents, represented on this interlocutory matter by The Attorney General. The Plaintiff, The Nova Scotia Turkey Producers' Marketing **Board**, is one of the "commodity boards" constituted under the plan. While the "Council" is charged with the general oversight and administration of matters governing the production of various products pursuant to the **Act**, certain authority is delegated to the various boards, specifically, The Turkey Marketing Board.

[5] It appears that the "Board" had made a decision that the "license" of the Merks brothers to produce turkeys had been contravened and that their license should be suspended. The Board requested the Council to hold a "show cause" hearing. After making that request there was a procedural breakdown between the Board and the Council with respect to how that hearing would proceed, with the Board seeking and being denied, an adjournment. The hearing then was held as scheduled, without the participation of the Board, with the result that the Merks license was not suspended.

[6] Flowing from that decision and the differing conceptions of the Board and the Council regarding their respective roles and or jurisdiction in the process, the Board initiated this proceeding. In its original application (S.K. No. 276502) the Board sought a declaratory judgment raising these questions:

1. Does the Natural Products Marketing Council have jurisdiction to hold a "show cause hearing" pursuant to section 10 of the **Natural Products Act**, R.S.N.S. 1989, c. 308, as amended between the parties, having already delegated to The Turkey Producers Marketing Board the power to issue, refuse, revoke or suspend licenses pursuant to section 9 of the **Natural Products Act**, R.S.N.S. 1989, c. 308, as amended, and regulations 9(1)(b) and (e) and (4) and further under sub-regulation 12(4)?

2. If the answer to question (1) above is in the affirmative, does Section 10 of the **Natural Products Act**, R.S.N.S. 1989, c. 308, as amended, confine the jurisdiction of the Natural Products Marketing Council to that of an Appellant function?

3. Who is the applicant as defined under section 10 of the **Natural Products Act**, R.S.N.S. 1989, c. 308, as amended?

[7] The Board made a further application Inter Partes (S.K. 277508) seeking writs of *certiorari* and *mandamus* requiring the Council to hold a new hearing.

[8] In support of its applications the Board filed two affidavits of Ms. Sonya Lorette which provide some detail and background to the reasoning of the Board for its failure to attend the hearing before the Council and for their differing positions regarding their respective roles in the application of the management plan.

[9] The Attorney General, in its brief, describes the current application in these terms . . .

(it) is being made by The Attorney General and the Council. The Applicants seek to have the affidavits of Sonya Lorette, dated January 22nd, 2007 (in aid of SK 276502) and February 9th, 2007 (in aid of SK 277508), struck out as an attempt to put evidence to the Court on matters not in or forming part of the Record of the Council Panel in its adjudicative setting.

[10] The Applicants put forth the proposition that it is improper to introduce "facts" by way of affidavit evidence in a "judicial review" proceeding (*certiorari*). It is argued that the Court ought to restrict itself to considering the record as produced by the tribunal. It is further submitted that surrounding circumstances and background facts are not to be admitted if not contained in "the Record". Similarly with the application involving the interpretation of the law (The Statutes and Regulations) the positions taken by the parties over the past number of years (an issue raised in the imputed affidavits) are said to be irrelevant.

[11] All this material was before Warner, J. when he made his decision on May 10th, 2007. He seems to have accepted the information contained in the affidavits as factual. It seems apparent that the essential accuracy of the contents were not challenged on that application and he made findings of fact about the past relationship of the two bodies.

[12] Warner, J., presumably reviewed all the materials in the file including the imputed affidavits as well as, I would assume, affidavits of Merks, also in the file and not having been raised as an issue. He reviewed various factors supporting his conclusion that the applications by the Board should not be struck on the alleged basis that no cause of action had been disclosed. At page 178 of his decision,

> "I recognize that in order for the Court to undertake an application, as application 1 is which deals solely with the request for a determination of rights, that there must in fact be a real dispute. And to my mind, the Council's record shows an ongoing and clear dispute with respect to the authority of the Board to suspend and deal with licenses, and the authority of the Council to be the exclusive administrative body to cancel or revoke or suspend licenses....from looking at Tab 7 of the Council's record, (there appears to be) a clear ongoing running dispute... it's not a hypothetical issue. It is a real issue."

At page 179, (the questions relating to),

> "declaratory relief deal directly with the issue of the right of the Board pursuant to Section 10 of the **Act** to have exclusive or sole authority to suspend and revoke producers' licenses and the procedure and definition contained in paragraph 10 of what the procedure is, if they do have that authority."

At page 180,

> "It's clear that the Council has told the (Turkey) Board on prior occasions that the Council has the sole authority to suspend". (with respect to the timing of the dispute vis a vis the decision the Board sought to challenge) The application for declaration...was obviously prepared before January 22nd...prepared in response to a January 18th conference call...(when the Board) was refused the adjournment."

At page 182,

> "The fact that there was a real dispute, a dispute that apparently is a repetitive dispute in terms that it's not the only time that the Board and the Council have clashed, gives it more credibility and credence and more reason for a Court to intervene."

Page 188, quoting from a letter attached to one of the imputed affidavits,

> "The Council has made clear on previous correspondence that the authority to cancel or revoke licenses rests solely with the Council...that is not a true voluntary waiver of any claim to dispute jurisdiction."
>
> "It's clear as a matter of common sense, if not on the record itself, that on January 18th when the Board asked for an adjournment and were refused that they reverted to their position."

And page 192, (The affidavits),

> "were setting out matters of fact and not of opinion. They were setting out as matters of fact the positions of the respective parties contained in letters attached to the affidavit, sworn to by the manager of the Board who either wrote or received as part of her duties as general manager the documents of which she spoke...it's just simply saying that the two parties respectively said (what) their positions were over a period of time, and I agree with that characterization."

[13] The issue, as reflected in the quote in the brief of The Attorney General, noted above, question whether or not it is appropriate to introduce evidence by way of affidavit on "judicial review" and or, in an application for *certiorari*.

[14] Briefly, it seems to me that reason and fairness in the present circumstances militate against ruling the affidavits inadmissible. As mentioned above, there is an affidavit filed by Andre Merks, which has not been challenged. Both the affidavit of Merks and the affidavits of Lorette provide some historical background and in particular, the circumstances leading up to the request for an adjournment by the Board and the materials which were placed before the Council at the hearing of January 22nd. Furthermore, and I think it somewhat important, that the record does not disclose any indication whatsoever that evidence was either taken before the Council or considered by them, with respect to the suspension of license which had been the reason for convening the hearing. Indeed, the first reason appearing in the record for their decision and arguably the Council's primary consideration, reads as follows:

> "Without the presence of The Turkey Marketing Board at the oral hearing, the panel was unable to assess the recommendations of The Turkey Board regarding action on the licenses of John and Andre Merks."

It seems evident that The Turkey Board having refused to appear at the hearing because their request for adjournment had been denied, left council with no decision to make. The merits of the case and the reasons for holding the "show cause" were apparently never before the Council.

The Law:

[15] The Applicant proposes a highly restrictive view of what the Court may take into consideration on the two applications brought by the Board. It is argued that affidavit evidence is only admissible if the record does not provide enough information regarding the issues in dispute.

[16] I frankly have some difficulty with the exact characterization of the Board's two applications and whether they raise jurisdictional issues or whether they complain of an error in law. Circumstances surrounding the initial application, S.K. 277502, are obviously not reflected in the "Record" because the application was commenced before the hearing. The application made subsequent to the hearing raised questions of jurisdiction.

[17] In this context the following quotation from **R. v. Northumberland Compensation Appeal Tribunal** [1952] 1 All E.R. 122, page 131, a Decision of Lord Denning is not all that helpful, to the Applicant. It is quoted as authority at page four of the Crown's brief,

> "The next question that arises is whether affidavit evidence is admissible on an application for *certiorari*. When *certiorari* is granted on the ground of want of jurisdiction, or bias, or fraud, affidavit evidence is not only admissible, but it is, as a rule, necessary. When it is granted on the ground of error of law on the face of the record, affidavit evidence is not, as a rule, admissible, for the simple reason that the error must appear on the face of the record.

> [authority omitted] Affidavits were, however, always admissible to show that the record was incomplete, as for instance, that a conviction omitted the evidence of one of the witnesses . . ."

[18] If I review this present application as a jurisdictional dispute (which seems to be the position of all parties). This quotation does not form authority for denying the parties the use of affidavits. On the other hand, if it is to be denied on the basis of error of law on the face of the record, then in my view the affidavits are admissable to complete the records. The fairness of doing so is underscored by the fact that on the hearing of the Board's application the court will have before it the affidavit of Merks which is to much the same effect.

[19] Our rules of Court do not preclude the admission of affidavits on an "application". As described in Rule 37, all parties are entitled to prosecute an application with the aid of affidavits. Obviously, the extent of affidavit evidence which will be admissible is, in any event, governed by the Court which will hear the matter. Let me return to **R. v. Northumberland Compensation Appeal Tribunal** [1952] 1 All E.R. 122, the head note relating to the Denning decision, says:

> "Affidavit evidence is admissible on an application for *certiorari* to show that the record is incomplete. When *certiorari* is granted on the ground of want of **jurisdiction** or bias or fraud, affidavit evidence is not only admissible but **it is as a rule, necessary**." (my emphasis)

Lord Denning, in his decision, reviewed the authority of the Court of King's Bench to review decisions made by tribunals noting that they,

> "are often made the judges of both fact and law with no appeal to the High Court". . .The Court of King's Bench (as with the Supreme Court of Nova Scotia) has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal, which on the face of it, offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as the Court of Appeal would do. It leaves it to the tribunal to hear the case again and in a proper case, may command it to do so."

later, quoting Chitty, "GENERAL PRACTICE",

> "As an essential mode of exercising a control over all inferior courts, (this Court) has a most extensive power to bring before it their proceedings, and fully to inform itself upon every subject essential to decide upon the propriety of the proceedings below. This is effected by a writ called *certiorari*. . . The writ issues in civil as well as criminal cases. . ."

In his Decision following the paragraph quoted by The Attorney General, Lord Denning observed at page 131, tab 1, Attorney General's submissions;

> "Affidavits were, however, always admissible to show that the record was incomplete, as for instance, that a conviction omitted the evidence of one of the witnesses."

And later he observed, affidavits were likewise always admissible by agreement of the parties and "treated by consent as if they were part of the record"...it is often a very nice question whether an error which does not appear on the record is one that goes to jurisdiction or is only an error of law within the jurisdiction. If it goes to jurisdiction, affidavits are admissible but otherwise not. Continuing to refer specifically to the case, then before his Court, he concludes,

> "we have here a simple case of error of law by a tribunal...so long as the erroneous decision stands (the Applicant cannot be paid the money to which he is entitled) it would be quite intolerable if in such a case there were no means of correcting the error."

[20] I will not inquire further into the law. It is the duty of this Court to strive, to ensure that fairness and equity prevail in the proceedings before any tribunal or other authority over which we may be privileged to have the power of review. The issues which to my mind arise, in the present circumstance, with respect The Marketing Council and The Turkey Board may also arise in the context of the Council and other commodity boards. The Council is charged with enabling and authorizing a system for controlling and limiting the production of various natural products. The Board is charged with the responsibility to see that fairness and equity prevail among the various licensed producers of that commodity. The contest represented by the application here is not a contest between the Merks brothers and The Turkey Board as such, it

is a contest between the Merks brothers as turkey producers and all the other licensed producers in The Province of Nova Scotia who are represented by the Board. A marketing scheme as intended by the Legislature cannot survive without the assurance that fairness and equity will prevail among the producers and that the rules which are set in place will be applied to all producers equitably.

[21] As all parties have observed, this is not an appeal process. The result of these proceedings, will be that the decision taken by the Council will be validated, or the decision will be quashed and a new hearing will be ordered. All the relevant materials with respect to the statute and regulations, the practices of the Council and the Board, will assist in determining the jurisdictional questions, likewise the circumstances relating to procedural fairness demand adjudication. It is to be hoped that the decision of this Court, when made will assist these two bodies in understanding their respective roles, their respective authority and assuring the rules of natural justice, with respect to adjournments or otherwise, are honoured.

[22] The application to strike the two affidavits is denied for all the above reasons.