SUPREME COURT OF NOVA SCOTIA
Citation: Willis v. Halifax (Regional Municipality), 2009 NSSC 244

Date: 20090814
Docket: Hfx. No. 264670
Registry: Halifax

Between:

Allison Willis

Plaintiff

- and -

Halifax Regional Municipality

Defendant

DECISION

Judge: The Honourable Justice Gerald R.P. Moir

Heard: May 4 and 5, 2009, in Halifax, Nova Scotia

Counsel: David A. Grant, for the plaintiff
Karen E. MacDonald, for the defendant

By the Court:

[1] Mr. Allison Willis is a seventy year old gentleman who always lived on the same farm in North Preston. He was born there, he obtained title from his brother, he built two homes there, he raised a family there, and he planned for his youngest daughter to build her home there.

[2] A sewage treatment plant was built next to Mr. Willis' farm in 1988. Within a couple years, Mr. Willis was disturbed by odours. He sued the Municipality for nuisance.

[3] The plant was replaced last year because it was causing excessive amounts of potassium in Winder Lake, into which the effluent discharged. The new plant does not cause odours and the lake is clearing.

[4] There is no question that the plant was a source of odours, some of which would be called stenches. Very much in issue is Mr. Willis' testimony about the intensity and duration of the odours.

Odours of the Former North Preston Sewage Treatment Plant

[5] Mr. Willis says that odours were first detected about nine months after the plant opened. In a further two years the smell had become wretched. He could not do some kinds of work around the property or have barbeques on his patio. He had to keep bedroom windows closed.

[6] The odour was worse in some conditions than others. For example, it was worse in fog. But, it was always present to some degree until the plant was replaced.

[7] Mr. Willis keeps cattle and for a few years he raised chickens. They did not produce such a bad odour, as far as Mr. Willis was concerned, and the odour he found wretched did not come from them. He knows the difference.

[8] Mr. Noel Willis testified for his brother. He lived about a two minute walk from the family property, until he moved to Dartmouth. He found the smell nauseating. It was present most days. It was worse in rain, or certain winds, and during the summer.

[9] Mr. Allison Willis' friend, Ms. Doreen Brown, also testified. She started coming to the property in 2005. She described a "strong sewage smell", a mixture of the smells of sour milk and excrement. Windows and doors had to be kept shut. In warm and humid conditions, it was horrible.

[10] Ms. Jacqueline LaValee worked for the provincial Department of the Environment. She had responsibilities for sewage treatment plants, and she received a complaint from Mr. Willis about the North Preston plant in 2004.

[11] Ms. LaValee visited the plant with Mr. Willis. The plant discharged into a creek and, from there, into Winder Lake. The creek contained suspended solids and gave off a "slight" odour. She said that the plant also had a digester to deal with overflows because it was not designed for the volumes it was sometimes getting. (It is true that these were overflows, but the plant did not have a digestor. Ms. LaValee must have been referring to a tank in which sewage first settled.)

[12] Ms. LaValee understood the digester had to be pumped out twice a month, and this was the main source of odour. Opening the digester would produce a strong odour.

[13] On other visits, Ms. LaValee noted no odour, and, she detected only a slight odour at Winder Lake. She allowed that she could not say what smells there were at the Willis property.

[14] The municipality called Mr. Allan Brady, a biochemist with waste water qualifications. He is the Manager of Waste Water Management for the municipality.

[15] Mr. Brady explained that the 1988 plant replaced, and improved on, one that appeared to have been built in the 1960s. He was personally involved with the construction. He visited the sight every few months. There was no odour. Only Mr. Willis complained.

[16] Mr. Len Vantol also testified for the municipality. He supervises eleven sewage treatment plants, among other things. He attends at the North Preston plant once to three times a week. His visits last from fifteen minutes to an hour.

[17] Mr. Vantol said that there would be odour from the 1988 plant whenever the municipality cleared the primary or secondary tank. That happened once or twice a week and it lasted for fifteen to forty minutes, according to Mr. Vantol. Mr. Brady says it lasted thirty minutes to an hour.

[18] Also, there would be odour when the rotating biological circular, the active treatment part of the plant, malfunctioned and it was necessary to expose that part of the plant to open air. This was not a problem in the first years, but in later years shaft bearings failed and had to be repaired. This happened three or four times.

[19] Otherwise, there was no odour at the plant when Mr. Vantol was present. As for Winder Lake, Mr. Vantol went there “on occasion”. We will discuss what he saw later, but he says he smelled nothing.

[20] Why the apparent discrepancy between what Mr. Willis and his witnesses say they smelled consistently and what the others say they only smelled sporadically? Let us look at how the plant operated and problems from which it suffered.

[21] The 1988 plant followed a system that used a rotating biological circulator, a system that had become conventional by the 1980s and was first used by the municipality in 1982.

[22] Sewage was deposited first into a holding tank, and it received a partial cleaning there. The tank's other function was to allow for settlement. Part of the sewage was to be processed on site. However, sludge that settled in the holding tank was trucked to another facility. The plant was not designed to process solid sewage. The need to transport sludge was the reason for the stench that was released once or twice a week.

[23] What was not to be trucked away was transported to the rotating biological circulator. There, growth occurred in a rotating drum, breaking down the waste. The broken down sewage passed to a tank where it was held in a chlorine solution. The chlorine would kill whatever survived the biological treatment that could cause harm or odour.

[24] In the end, the treated sewage passed through long pipes to discharge at the bottom of Winder Lake. Although otherwise conventional, the system was unique

in this respect according to both Mr. Brady and Mr. Vantol. In other places this kind of treatment system discharges into running water or waters that flush into the ocean.

[25] Records, the testimony of Mr. Brady and Mr. Vantol, and information provided by documents introduced for the truth of their contents show that the 1989 North Preston sewage treatment plant ran beyond its capacity on numerous occasions. The main cause was the introduction of storm waters into the sanitary sewer system, from rains and spring runoffs.

[26] Mr. Brady is of the opinion that the excessive flows would seldom cause odour. The sewage would be dilute with the rain water or runoff. And, it would receive some treatment, except for the possibility that a by-pass may have been opened.

[27] Mr. Brady's opinion is not consistent with what others observed. Mr. Willis took Ms. LaValee to see "the horrible stuff" running into Winder Lake. She said she observed solids "suspended" on the lake and she smelled "a slight odour". Mr. Vantol confirmed that there was sludge at the outfall.

[28] The report of a consulting engineer retained by the municipality to make recommendations on the upgrade or expansion of the North Preston plant, which was introduced for the truth of its contents, includes this:

> Treatment plant operating staff have indicated that large amounts of floating solids and a very murky and green 'pea soup' appearance is present at certain times during the year. This can likely be attributed to solids accumulation in the lake which will tend to rise and float when dissolved oxygen conditions in the lake decrease (warm weather) and off gases attributed to anaerobic conditions as well as denitrification are present.

[29] The consulting engineer recommended that the municipality either repair the plant and increase its capacity for clarification or replace it with a new plant based on a different system. With these in mind, the engineer said this about the pea soup:

> Through the improvement of the efficient quality and the prevention of continued solids input to the lake, conditions surrounding the headwall should improve, as will conditions throughout the lake.

The report was prepared in June of 2001.

[30] Mr. Brady was a credible and helpful witness, but he did not testify as an expert and I have difficulty reaching the conclusion that Winder Lake was not a likely source of odour. Sludge in the lake and "large amounts of floating solids" show that the plant was not functioning according to its design. The pea soup, which Mr. Vantol took to be an algae bloom, the "off gases", the nature of the solids, and the odours smelled by witnesses, suggest that Winder Lake was a source of odour.

[31] I find that there were various odours coming from the North Preston sewage treatment plant between the early 1990s and the last year:

- several times a month a wretched stench was released into the air for periods of up to an hour
- during heavy rains and spring run-off musty gases from inside the plant were forced outside
- occasionally the rotating biological circulator had to be opened for repairs, and unpleasant odours were released
- more probably than not, Winder Lake, with its solids and algae bloom produced bad odours, consistently if not constantly, at least in the good weather when it most matters.

The Strength and Consistency of the Odours

[32] I emphatically reject the municipality's submission that Mr. Willis, and his witnesses, were not truthful. I found Mr. Willis to be a credible gentleman, and I think he has suffered far worse than the municipality was prepared to recognize.

[33] The attack on Mr. Willis' credibility involved several assertions that I reject. These concern delay in complaining, absence of other complainers, and presence of farm smells. I do not suppose that Mr. Willis thought he could do much about the problem caused by his municipal government until 2004, and I am not in a position to make findings about how he discovered otherwise.

[34] I do not know, one way or the other, what neighbours of Mr. Willis, other than his brother, experienced in the way of sewer odours, or what the neighbours thought they could do about it if they suffered as Mr. Willis did. I will deal with farm smells when generally discussing nuisance.

[35] The main point made by the municipality against Mr. Willis' credibility, and that of his brother and his friend, is the inconsistency between the severity and

duration of the odours in their testimony and in the testimony of the others. I think I understand the conflict, and I resolve it by reference to interest, perception, and memory.

[36] Of course, interest affects the way people honestly see and recall things. Mr. Willis and his witnesses have, not only a financial, but also a more personal interest in their experience being understood and accepted. But, the men in charge of the plant also have an interest in defending their operation of it. This sort of consideration is always at play when testimony of interested witnesses has to be assessed.

[37] I suppose that people who work around sewage treatment plants come to tolerate the odours better than those who, like Mr. Willis, do not work in that field. Also, some people have a more acute sense of smell.

[38] We must not be quick to dismiss what Mr. Willis says he smelled just because others did not detect it so frequently or so strongly.

[39] Mr. Willis, and his brother and friend, experienced the odours from a very different perspective than did the other witnesses. That goes a long way in explaining the different perceptions.

[40] Mr. Willis' home is uphill from Winder Lake. Common sense tells that smells are not necessarily worst at ground level. We do not know the habits of air movement above Winder Lake, and we should not reject out of hand the possibility that the worst is to be smelled higher up. Because we know nothing of the local weather patterns around Winder Lake, we cannot say how long the stenches and lesser odours would have remained in the air near the Willis' home, on one day or another. We can say that Mr. Willis' perception was physically different than that of the defence witnesses.

[41] The perceptions are also psychologically different. The perceptions of Ms. LaVallee, Mr. Brady, Mr. Vantol, and the staff members who spoke with the consulting engineer are informed by their knowledge of the system and the sources: That is the stench when the sludge is pumped and it will be gone in an hour or less, That is the musty scent of the insides of a sewage treatment plant invaded by storm waters, That is the usual odour one gets when the unusual

happens and the RBC is opened, That is the more or less constant, at least in warm weather, odour of a still lake with solid sewage, half treated or untreated, and algae bloom. All Mr. Willis knows is that bad smells were frequently coming from the plant or the lake.

[42] It is not just differing perceptions that explains the differing testimony. Memory is important, such as the memory of pleasant summer days in a pleasant rural environment made unpleasant by a stench. Such memories are bound to make one more of the view that the stench was a constant problem.

[43] I find that Mr. Willis, and his brother, friend, and other friends or family were disturbed by odours more or less consistently, at least during the good weather, when it most matters, and during heavy rains and spring run-offs. In short, I find that the plant was a nuisance.

Whether *Rylands* v. *Fletcher* Is Applicable?

[44] Mr. Grant argues that the rule in *Rylands* v. *Fletcher* applies, that a sewer treatment facility is not a natural use of land, and strict liability therefore arises.

[45] Ms. MacDonald referred me to *Tock* v. *St. John's Metropolitan Area Board*, [1989] S.C.J. 122 in which it was held that *Rylands* v. *Fletcher* does not apply to a storm sewer. In the opinion of Justice LaForest, at para 13:

> . . . the rule cannot be invoked where a municipality or regional authority, acting under the warrant of statute and pursuant to a planning decision taken in good faith, constructs and operates a sewer and storm drain system in a given locality.

[46] Justice Wilson said, at para. 42, "I agree with my colleague's conclusion that the rule in *Rylands* v. *Fletcher* . . . has no application to this case".

[47] There were three opinions in *Tock*, and Justice Sopinka wrote the third. He implicitly accepts that *Rylands* v. *Fletcher* does not apply. The disagreement among the three concerned restrictions or the defence of statutory authority.

[48] The reasoning in *Tock* on the subject of *Rylands v. Fletcher* applies as much to a sanitary sewer and a treatment plant as it does to storm drainage and storm sewers.

Nuisance Generally

[49] Chief Justice Wells discussed “What constitutes a nuisance?” and “When is a nuisance actionable, generally?” at para. 22 to para. 24 of *St. John’s* v. *Lake*, [2000] N.J. 268 (C.A.). Ms. MacDonald also referred me to *Pyke* v. *TriGro Enterprises Ltd.*, [1999] O.J. 3217 (S.C.J.), in which the principles of nuisance law were applied in the context of obnoxious odour.

[50] Liability in nuisance is premised on a substantial and unreasonable interference with the use and enjoyment of land. Because the law attempts to strike a balance, not always a fine balance, between conflicting rights of use, the inquiry into reasonable use involves a broad assessment of the circumstances in which various factors are considered. Chief Justice Wells referred to the factors at para. 24 of *St. John’s* v. *Lake*:

> These include factors such as the gravity of the harm, the character of the neighbourhood, abnormal sensitivity of a particular plaintiff, the utility of the defendant’s conduct and whether or not there is fault on the part of the defendant. However, as Fleming notes, “... in nuisance it is up to the defendant to exculpate himself, once a prima facie infringement has been established, for example, by proving that his own use was ‘natural’ and not unreasonable” (p. 424).

[51] These factors are commented on in Allen M. Linden and Bruce Feldhusen, *Canadian Tort Law*, 8th ed. (Butterworths, 2006) at p. 569 to 581. Prominent in this case are “Type and Severity of Harm”, “Character of Locale”, and “Utility of Defendant’s Conduct”.

[52] The interference with Mr. Willis’ use of his land was substantial. For almost twenty years he frequently, not so constantly as he remembers but frequent enough to be described as consistent, could not enjoy the out-of-doors at his home and had to close his windows.

[53] The locale weighs heavily in favour of finding the interference unreasonable. North Preston is a historic, Black, rural community. Of the three adjectives, rural is the most important here.

[54] The municipality made much of the fact that Mr. Willis keeps cattle and, for a few years, raised chickens. Farm smells are common place in pleasant rural communities. What Mr. Willis endured is most uncommon, if not unique. The stench is not to be compared with farm smells.

[55] The attraction and value of a pleasant rural home includes the sensual pleasures of sight, hearing, and, indeed, scent in the country side. Frequently, Mr. Willis could not enjoy the country side at his own farm and home.

[56] Mr. Willis' ability to share his home, and the country side, with family and friends was also compromised frequently for all those years. That would represent a great loss for most people, but especially so for a person with a long family attachment to a farm property.

[57] Without question, the defendant's operation of a sewage treatment plant at North Preston is of great public value. That factor cannot be allowed to totally eclipse Mr. Willis' rights. As will be seen in connection with the defence of statutory authority, the law of nuisance does not require that a person give up their property rights for the public good without compensation.

[58] I find that the odours from the sewage treatment plant substantially, and unreasonably, interfered with Mr. Willis' use of his home.

Statutory Authority

[59] Chief Justice Wells discussed the defence of statutory authority at para. 25 to para. 30 of *St. John's*. He points out the conflict about restricting the defence in the opinion of Justice Wilson, with whom Justices Lamer and L'Heureux-Dubé agreed, Justice LaForest, with whom Chief Justice Dixon agreed, and Justice Sopinka, who spoke for himself. And, Chief Justice Wells referred to the resolution ten years later when a unanimous court endorsed the Sopinka opinion in *Ryan* v. *Victoria*, [1999] S.C.J. 7.

[60] At para. 54 of *Ryan*, Justice Major writes for the court:

> Statutory authority provides, at best, a narrow defence to nuisance. The traditional rule is that liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance is the "inevitable result" or consequence of exercising that authority.

[61] The court in *Ryan* (para. 55) adopted Justice Sopinka's statement of the defence at para. 94 of *Tock*:

> The defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negative negligence. The standard is a higher one. While the defence gives rise

> to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.

[62] Ms. MacDonald directed me to s.74(g) and s.78 of the *Municipal Act*, R.S.N.S. 1989, c.295 as the statutory authority for the construction of the North Preston sewage treatment plant and its operation until the *Municipal Government Act*, S.N.S. 1998, c.18 came into effect. The authorization in the new statute is found in s.47(5) and s.65.

[63] To succeed on this defence, the municipality had to prove, on a balance of probabilities, that "it was practically impossible to avoid the nuisance". The standard is so high because "the courts strain against a conclusion that private rights are intended to be sacrificed for the common good.": *Tock*, para. 94.

[64] The defendant proved that the system used at North Preston had become conventional by the 1980s. It did not prove that a system that avoided the kinds of odours to which Mr. Willis was subjected did not exist, or was practically impossible to install. Therefore, the defence of statutory authority must fail.

Statutory Immunity

[65] The *Municipal Government Act* contains a specific provision on municipal liability for nuisance. Of course, a provision for immunity from any liability for nuisance would be a bar: *Baveles* v. *Copley*, [2001] B.C.J. 387 (C.A.).

[66] Unlike the British Columbia legislation, our legislation does not provide an absolute bar. Subsection 515(2) of the *Municipal Government Act* reads:

> A municipality or village is not liable for nuisance as a result of the construction or operation of a work, if the nuisance could not be avoided by any other practically feasible method of carrying out the work.

According to some, the defences of statutory authority and statutory immunity are sometimes confused. In this case, the latter is reduced to the former.

[67] It is interesting that the Legislative Assembly chose to mirror the established approach to statutory authority one year before the Supreme Court of Canada adopted the Sopinka opinion in *Tock*. It can be said that in Nova Scotia both the courts and the legislature strain against expropriation without compensation of private rights for the common good.

[68] For the same reasons given in connection with the defence of statutory authority, the defence based on s.515(2) must fail.

Negligence

[69] Negligence was argued on Mr. Willis' behalf but it was never pleaded. (Ms. MacDonald also submitted that nuisance was not pleaded, but it is clear to me that the statement of claim gave the municipality notice of a claim that the 1988 plant was a nuisance.)

[70] Not only was negligence not pleaded, there is no proof of carelessness. The system chosen in 1988 was conventional, and the plant appears to have been operated carefully. The fact that it sometimes overflowed, and the fact that it frequently caused odours, are insufficient to establish negligence.

Damages

[71] Counsel could not refer me to authorities that provided damage awards in similar circumstances, and I have found none either. This is not surprising. An injunction is the usual remedy for a nuisance.

[72] Mr. Willis' damages must attempt to restore him to the position he would have enjoyed had the tort not been committed, extremely difficult though it is to convert an intangible loss to money. He is entitled to an amount that would somehow allow him to purchase something that would give him a reward similar to the happiness of which he was deprived.

[73] Ms. MacDonald suggests a nominal $5,000 with pre-judgment interest at 2.5% over the period of the nuisance, but that is premised on my rejection of Mr. Willis' evidence about the intensity and duration of odours.

[74] Mr. Grant suggests $3,120 a year for a total of $53,040. While I do not agree with the method he follows, I do think that the result approximates fair restoration.

[75] Mr. Willis will have judgment against the municipality for $55,000 plus simple interest over nineteen years at 2.5% a year, 5% halved to allow for the evenly accommodating loss. The total is $81,125.

[76] Counsel may make submissions in writing on costs.

J.