

**IN THE SUPREME Court OF NOVA SCOTIA**

**Citation:** John Ross & Sons Ltd. v. Truro (Town), 2011 NSSC 409

**Date:** 20111107

**Docket:** S. T. 349261

**Registry:** Truro

**Between:**

John Ross and Sons Limited, a body corporate

Applicant

v.

The Town of Truro, a municipal body corporate

Respondent

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**DECISION**

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**Judge:** The Honourable Justice J. E. Scanlan

**Heard:** July 29, 2011 at Truro, Nova Scotia

**Counsel:** Robert H. Pineo, Solicitor for the Applicant  
John T. Rafferty, Q.C., Solicitor for the Respondent

**By the Court:**

- [1] John Ross and Sons Limited (John Ross) and the Town of Truro (the Town) are in the midst of a dispute in relation to the operation of a scrap yard in the downtown area of Truro. There are a number of competing applications which can be summarized as the Town asking the Court to prohibit John Ross from entering upon Town lands. John Ross asks that the Court prohibit the erection of a fence that would prevent John Ross from entering upon Town lands.
- [2] By way of background, I describe three aspects of the John Ross business.
- (a) The retail aspect that involves customers taking small amounts of scrap and bottles into a warehouse;
  - (b) The storage of a rather huge pile of scrap on the lands owned by John Ross. That pile has to be separated, and perhaps processed, before being loaded into box cars and shipped as scrap to be recycled;
  - ( c ) Scrap metal that arrives on trucks and is relatively clean. It is loaded directly from the truck on to rail cars (hot loaded) for shipment.
- [3] It is the way the last category of recycling mentioned is handled which gives rise to the issues now before the Court. That material is trucked around to the north side of a CN spur line adjacent to the John Ross lands. The trucks

park parallel to the spur line and John Ross loaders then reach across the spur line, into the trucks and load the metal directly into box cars on the spur line. In order to get to the north side of the spur line the trucks travel on a gravel road that the Town says in some places crosses over Town lands. This is land the Town says it acquired from CN in 2002. The Town has served notice that it now intends to fence that small piece of land thus preventing the trucks from gaining access to the spur line.

- [4] If the fence is erected it may effectively shut down the loading of metal directly from trucks into the CN rail cars. The loading of trucks in that method has continued so long as anyone can remember, perhaps in excess of 60 years. Prior to the conveyance of lands to the Town from CN in 2002 the trucks would have passed over CN lands to get to the area in question.
- [5] The area in question was the subject of earlier Court proceedings resolved by consent order. On its face that order would prevent (John Ross) from trespassing on any town lands in the area in dispute. The matter has again come to the Court because John Ross suggests that only after the order became effective did John Ross become aware the wording of the order may effectively shut down their operations by preventing access over the Town lands.

- [6] I have reviewed the materials related to that earlier order. It is clear that the parties were wrestling with the difficulties surrounding the operation of the John Ross business. There appeared to have been a recurring difficulty with scrap and debris escaping from the recycling piles on to the Town lands. The encroachment was so extensive it could be suggested John Ross was operating the recycling business by in part using Town lands. After the order was signed John Ross took remedial steps such as placing large concrete barriers along the boundary of their lot to prevent overflow onto the Town lands. In the order John Ross also agreed not to enter upon the Town lands.
- [7] It is this last aspect of that consent order the Town is now relying upon to ask this Court to prevent John Ross from crossing any Town lands, even if it is to gain access to the siding they use to hot load the box cars with clean metals.
- [8] As I reviewed the materials related to those earlier proceedings there was nothing which suggested to me there was any concern at the time it was negotiated, other than the escape of materials from the scrap yard onto Town lands and the incidental use of the Town lands by John Ross to store materials on Town lands. That problem, for the most part, appears to have

been resolved by the earlier order and by the remedial steps taken by John Ross. I am not convinced that either party, especially John Ross, had it in their mind that the earlier order would have prevented John Ross from continuing the hot loading of box cars. I am satisfied that to summarily allow the Town to rely on that order and prevent John Ross from having this matter fully dealt with on its merits would be contrary to the spirit and intent of the earlier negotiations and the proper administration of justice. Counsel have referred to numerous cases dealing with unilateral mistake in agreements or Court orders. In reviewing those cases, I simply say that based on the limited materials before me, both of the parties may have misunderstood the import of the consent order. I am convinced beyond all doubt John Ross did not appreciate the full extent of the order. I am not prepared to rule that the Town can now rely upon that order to prevent John Ross from using an access way they have used for perhaps as long as 60 years.

- [9] Normally a Court does not have the power to vary a consent order but as noted in **Monarch Construction Ltd. V. Buldevco Ltd. Et al** (1988), 26 C.P.C. (2d) 164 a consent order may be varied when it does not express the real intention of the parties.

[10] As noted in **Chitel v. Robart et al** (1987), 19 C.P.C. (2d) 48, there are some limitations upon the ability to amend when it is a unilateral mistake. In the present case, I am satisfied beyond any doubt John Ross made a mistake and the Town either made the same mistake or should have known that John Ross made a mistake as to the extent and potential impact of the order. I am not prepared to enforce the order at this time so as to prevent John Ross from using the roadway as they have for so many years. Also implied in that ruling, I am preventing the Town from erecting a fence around it's lands which would have the same effect of preventing John Ross from continuing its business.

[11] In making this ruling I am aware of the fact the Town ostensibly has title to the lands in dispute. The Town has asked the Court to simply direct that John Ross respect their boundaries and not use the Town lands. I am not convinced at this juncture that the issue is as simple as that. In the consent order John Ross had agreed not to trespass on Town lands. It did not realize that in doing so they would lose access to a loading area they utilized as an integral part of their operations for over 60 years. In order to unload the trucks they must circle down a public street, "Railway Street", over a CN easement then on a gravel road and then back up to CN lands adjacent to the

John Ross facility. The survey plan as submitted to the Court suggest much of that gravel road is located on lands identified as having been conveyed to the Town by CN in 2002.

[12] The parties agreed that I should visit the site before rendering my decision. An onsite inspection of the site reveals not much more than a large gravel road or area surrounding rail sidings. The gravel roadway appears to have been in use or existence for a long, long time. While the rail sidings were no doubt an integral part of the Town's economy at one time, at first glance the sidings appear to have largely fallen into disuse. It is not clear whether the sidings are still in use by anyone other than the John Ross operation and perhaps the local feed mill. The gravel roadways in the area are extensive. The only apparent improvement in the area other than the gravel road beds and rail sidings is one small strip of asphalt that appears to provide a means for pedestrian access from one part of town to the other.

[13] I am satisfied that this matter deserves a full inquiry as to the extent of public roads or ways in the area, including the lands the Town acquired from CN in 2002. This is of special concern to the Court when, for example, it was only during the hearing on this application that the Town was prepared to concede that "Railway Street" as depicted on the plan was in fact a public

way and they could not block access over “Railway Street”. Given the extent of gravel roads in the area it is not clear to the Court as to where that street begins or ends, or if perhaps the network of roads surrounding the siding were in fact public ways. It is not clear to me as to why the Town would concede that John Ross was entitled to gain access through one part of the gravel roads but not others.

[14] In the context of the arguments raised by John Ross, the Court is forced to ask if there could be any other purpose served by fencing the area the Town proposes to fence other than to shut down the John Ross operation. John Ross suggests that in fact the actions of the Town are tortuous in that the Town has improperly singled out that entity for improper treatment. The briefs and materials suggest that at least one Counsellor may have made it something of a mission for her to have the John Ross operation closed and/or moved. The Court has in fact been told of earlier discussion as between the parties to negotiate shutting down the operation and having it moved to another location. Those negotiations are no longer continuing as I understand it.

[15] By all accounts the John Ross recycling facility is operating in accordance with all provincial and municipal regulations. It appears the Town had



testing done on the lands adjacent to the John Ross lot on pretext it may disclose an environmental problem. John Ross also had testing done on its own property and as I understand it there are no undue risks of contamination detected. The parties seem to agree the operation, with its small mountain of scrap, is not aesthetically pleasing. When I was at the site the noise from the loading and crushing of metal was quite noticeable with loud thumping as the huge magnet loaded the box cars and then dropped repeatedly into the load in an apparent attempt to crush it. The site was a beehive of activity with many employees working throughout the premises.

[16] When jobs were at a premium and this was the part of the industrial hub of the town, one might suppose the noise and small mountain of scrap were a welcome addition to the area. It may well be that one or more counsellors now feel the recycling operation is no longer a positive asset for the town. What is of concern to the Court is that the Town may well have specifically targeted this operation, and singled it out for closure.

[17] The Court would be concerned if the attempts to close the facility are based on nothing more than the political mission of one or more of the counsellors. At least at first blush, it appears the public treasury of the Town is being used to finance acquisition of lands and law suits aimed solely at shutting

down a legitimate business operation. It is not clear if this is only because it has become distasteful in the eyes of one or more counsellors. For other citizens of the Town, they may well be concerned that perhaps next time the Town may decide they do not like some other corporate or private citizens, or their operations. If a government body, at any level is able to target a business to be shut down using any means possible, including use of the public treasury, simply because that business is no longer in vogue, it should be of concern to any resident in that jurisdiction. It is at least of concern to this Court.

[18] This type of action by a public body has been described as a tort of public misfeasance. The issue of whether there has been a tort of public misfeasance is worthy of a full inquiry in the present case. There are a number of essential ingredients to establish such a tort and they have been described by the Supreme Court of Canada in **Odhavji Estate v. Woodhouse** (2003) SCC 69.

[19] **Odhavji** recognizes the tort of misfeasance in a situation where a public officer is not necessarily aware of the facts or he or she does not have the power to do what they are attempting to do. In this case it appears the Town is not alleging John Ross is doing anything illegal or contrary to any

regulations from an operations perspective. I am concerned that what may however be occurring in this case is what is referred to as a Category A situation in **Odhavji**. That is a situation where the conduct of the Town is specifically intended to injure a person or class of person (the John Ross corporate entity). **Odhavji** recognizes two elements required for such a tort to exist. However, both elements of the tort can be proven if it can be shown that the public officer has acted for the express purpose of harming a party. This is owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public.

[20] I have enough information before me at this time to suggest that it is possible that at least one member of council has made it a mission to have John Ross closed or moved from its present location. It is possible that John Ross has been the sole target of that mission, and that public monies have been expended solely to that end in spite of the fact that there has been no apparent violation of any laws or regulations. To think that a public body could expend substantial portions of precious capital on a vendetta to shut down a legitimate operation would no doubt give all citizens of any and all towns reason to be concerned.

[21] The Court would also want a full hearing on the issue of the existence of public ways including the full extent of “Railway Street” as conceded at the time of the hearing. Absent a full hearing it is impossible to ascertain the full extent of access rights John Ross may enjoy over the lands the Town now claims. In the present case the situation is perhaps even more complicated.

[22] In summary, I am concerned there is sufficient evidence to trigger a more thorough inquiry as to the issue of whether John Ross may be the victim of improper treatment by the Town. I am convinced there is at least some evidence as to the existence of a toxic mix of politics and business. With the limited materials and evidence now before me, I am not prepared to make any order that prevents John Ross from carrying on its operations as they have done for over 60 years. The consequences of such an order may well cause irreparable harm to John Ross and indeed the community at large which depends on the recycling facilities operated by John Ross. In saying that, I accept the argument of John Ross that if the company is prohibited from crossing lands they have used for in excess of 60 years the operation may be effectively shut down.

- [23] One would assume this municipal corporation, like others, endorses, or at least gives lip service to the concept of recycling. The reality may be, this municipal corporation is saying “recycle please but do it in someone else’s backyard.” That can only be determined after a more complete inquiry.
- [24] Mr. Rafferty on behalf of the Town says John Ross should have bought more land from CN if they do not have enough room to get their trucks through to the north side of the spur line. That is no longer an option as the Town has since acquired the land. He says the Town’s position is that there must be other ways to unload without using the Town’s lands to gain access. He says it’s just too bad for John Ross if they can’t squeeze their trucks between the CN main line and the Town lands. It may well turn out at the end of the day John Ross has no option other than closing its operation.
- [25] At least one of the plans submitted to the Court by the parties suggest that CN owns lands fronting on Prince Street in Truro. If that in fact is the case then it may be possible for the trucks going to the siding north of the John Ross facility could cross over other CN lands and continue to be hot loaded. That may also have a bearing on the issue of whether John Ross had a right of way over the CN lands. Clearly CN and John Ross were aware of the use John Ross had been making of the lands CN eventually conveyed to the

Town. If CN was aware of how integral that use of land was to John Ross operations it raises a question in the Courts mind as to whether CN is obliged to provide an alternative right of way. It is not at all clear how the residents of Prince Street would feel about the increased truck traffic in that area. It may be that CN is obliged to provide an alternative means of access for John Ross to get to the north side of the spur line. Alternatively, CN may have conveyed to the Town a lot of land which was in fact subject to an actual right of way. All of those issues are deserving of a more thorough inquiry. At this time CN is not even a party to these proceedings.

[26] Eventually the Town may have to choose between having a fence erected to prevent access over the existing gravel road, and having all the truck traffic, up to 35 trucks a day, perhaps more in the future, go down Prince Street into the CN lands from there.

[27] I urge the parties, including CN, to work together to see if there can be a mutually satisfactory way to resolve the issues.

J.

11/07/11