

SUPREME COURT OF NOVA SCOTIA

Citation: *Geophysical Service Inc. v. Canada-Nova Scotia Offshore Petroleum Board*,
2013 NSSC 220

Date: 20130709

Docket: Hfx No. 410874

Registry: Halifax

Between:

Geophysical Service Incorporated

Applicant

v.

Canada-Nova Scotia Offshore Petroleum Board, the Attorney General of Nova
Scotia and the Attorney General of Canada.

Respondents

Revised Decision: The text of the original decision has been corrected
according to the attached erratum dated July 16, 2013.

Judge: The Honourable Justice M. Heather Robertson

Heard: May 15, 2013, in Halifax, Nova Scotia

Decision: July 9, 2013

Counsel: Scott R. Campbell, for Geophysical Service Incorporated

Daniel Watt, for Canada-NS Offshore Petroleum Board

Edward A. Gores, Q.C., for the Attorney General of
Nova Scotia

Corinne Bedford, for the Attorney General of Canada

Robertson, J.:

[1] The Attorney General of Canada (“AGC”) brought a motion:

- (a) Separating question of law from other issues in this proceeding and providing for its determination before the hearing of the merits of this application proceeding, pursuant to Rule 12.02 of the *Nova Scotia Civil Procedure Rules*;
- (b) Declaring the answer to the following preliminary question of law, as directed by the Honourable Justice John D. Murphy in Chambers on February 11, 2013 and by Order issued on February 13, 2013:

Whether the issues on the application proceeding should be determined by Application or by Judicial Review (the “Preliminary Issue”)?

- (c) Granting the AGC, the moving party, its costs on this motion; and
- (d) Providing such further and other relief as counsel may advise and this Honourable Court deems just.

[2] The applicant, Geophysical Service Incorporated (“GSI”), asserts that certain provisions of the regulations by which they have been required to provide various seismic data reports to the Canada Nova Scotia Offshore Petroleum Board (the “Respondent Board”), are *ultra vires* the enabling statutes.

[3] The specific regulations challenged were clause 25(1)(j) and subsection 26(3) of the *Federal Geophysical Regulations*, SOR/95-144 and clause 25(1)(j) and subsection 26(3) of the *Nova Scotia Geophysical Regulations*, NS Reg 191/95.

[4] The statutes involved are the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1988 c. 28 as amended (the “*Federal Act*”) and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, SNS 1987 c. 3 as amended (the “*Nova Scotia Act*”).

[5] GSI seeks declaratory relief pursuant to *Civil Procedure Rule 5*, that the regulations are *ultra vires*, that the demands for the seismic data are unlawful and seeks an injunction preventing the Respondent Board from disclosing any of the seismic material collected from the applicant, to third parties, as well as requiring the Respondent Board to disclose and identify any third parties who may have already had access to GSI's seismic data information. They further seek the return of the information and the right to pursue in separate proceedings any other orders or remedies including monetary remedies.

[6] It is the AGC's position supported by the AGNS, that the appropriate way to proceed, given the nature of the pleadings is by judicial review pursuant to *Rule 7*, as opposed to GSI's preferred course pursuant to *Rule 5*. The latter course might bear some advantage to the applicant and be less restrictive, with respect to potential limitation periods and the requirement that an extensive record to produced. Indeed, GSI says the determination whether the regulations are *ultra vires* can occur as a preliminary question, that stands apart from the record of the Respondent Board's actions and decisions.

[7] The respondents, AGC and AGNS, also asked the court to further determine that if the matter should appropriately be heard under *Rule 7*, was the matter barred by the limitation's limitation period provided in the *Rule*.

[8] Some discussion ensued as to whether this question is a true *Rule 12* question of law, or a matter of direction from the court pursuant to the *Civil Procedure Rule*. But in any event both parties agreed to proceed under *Rule 12*.

Scope of Rule 12

- 12.01 (1) A party may, in limited circumstances, seek the determination of a question of law before the rest of the issues in a proceeding are determined, even though the parties disagree about facts relevant to the question.
- (2) A party may seek to have a question of law determined before the trial of an action or the hearing of an application, in accordance with this Rule.

Separation

- 12.02 A judge may separate a question of law from other issues in a proceeding and provide for its determination before the trial or hearing of the proceeding, if all of the following apply:
- (a) the facts necessary to determine the question can be found without the trial or hearing;
 - (b) the determination will reduce the length of the proceeding, duration of the trial or hearing, or expense of the proceeding;
 - (c) no facts to be found in order to answer the question will remain in issue after the determination.

Determination

- 12.03 (1) A judge who orders separation must do either of the following:
- (a) proceed to determine the question of law;
 - (b) appoint a time, date, and place for another hearing at which the question is to be determined.
- (2) A judge who appoints a time, date, and place for a separated question to be determined may give directions on any of the following:
- (a) whether the hearing will be held in chambers or court;
 - (b) the wording of the question to be determined;
 - (c) dates for filing a further affidavit, statement of agreed facts, or brief;
 - (d) cross-examination on an affidavit;
 - (e) any other direction to organize the hearing.

DISCUSSION: *Rule 5 v. Rule 7*

[9] The law governing *Rule 12* motion is well established and counsel agree I should be guided by the principals set out in *Mahoney v. Cumis Life Insurance Co.*, 2011 NSCA 31:

18 So the first step with Rule 12 is to identify the pure legal question to be determined. Rule 12.01(1) permits a motion for determination of "a question of law". Rule 12.03(1) permits the judge either to determine "the question of law" or appoint a time to determine that question of law. The Rule does not authorize a determination of a question of fact or mixed fact and law, excepting only those facts that scaffold the point of pure law under Rule 12.02(a) as I have discussed.

[10] It is the position of AGC that the applicant's challenge to the regulations as a challenge to the decisions of the Respondent Board to request, retain and potentially release documents (seismic data) provided by GSI to the Respondent Board. They say therefore this can only proceed by judicial review. GSI says the real issue is much simpler "did the Governor in Council and the Lieutenant Governors-in-Council have the statutory authority to pass the impugned provisions of the regulations?" They agree that the relief they seek may relate back to certain demands of the Respondent Board and that the remedies they seek could also be granted by the court on judicial review. However, they argue their question as to *ultra vires* is the preliminary question.

[11] Rosinski, J. recently confirmed this point in *Burgess v. Yellow Pages Group Co.*, 2012 NSSC 390 at paras. 59, 63, and 65:

59 In a motion under *CPR 12* the burden to present all the necessary facts that scaffold a pure question of law is on the moving party. YPG is also likely in the best position to put the relevant terms of employment into evidence for the Court. In this respect *CPR 12* differs from the summary judgment on evidence motion -- *Mahoney* at para. 21 per Fichaud, J.A.

63 However, insofar as one wishes to examine the question whether the terms of the employment contract, expressly or inferentially, intended to permit "double recovery," the "terms" of the employment contract, and more importantly whether Mr. Burgess was provided any basis under the contract to be entitled to "double recovery" is not ascertainable by this Court. Those terms have not sufficiently been placed before the Court such that the Court can determine if the necessary scaffolding facts are in dispute.

65 In my opinion this Rule should be given a liberal interpretation so as not to unduly and prematurely defeat a cause of action.

[12] It may well be that the applicant could proceed by either *Rule 5* or *Rule 7*.

[13] This Court has by its inherent jurisdiction the ability to govern its own processes. The court has general judicial discretion as set out in *CPR 2.03*:

2.03 (1) A judge has the discretions, which are limited by these Rules only as provided in Rules 2.03(2) and (3), to do any of the following:

- (a) give directions for the conduct of a proceeding before the trial or hearing;
- (b) when sitting as the presiding judge, direct the conduct of the trial or hearing;
- (c) excuse compliance with a Rule, including to shorten or lengthen a period provided in a Rule and to dispense with notice to a party.

(2) A judge who exercises the general discretion to excuse compliance with a Rule must consider doing each of the following:

- (a) order a new period in which a person must do something, if the person is excused from doing the thing within a period set by a Rule;
- (b) require an excused person to do anything in substitution for compliance;
- (c) order an excused person to indemnify another person for expenses that result from a failure to comply with a Rule.

(3) The general discretions do not override any of the following kinds of provisions in these Rules:

- (a) a mandatory provision requiring a judge to do, or not do, something;

- (b) a limitation in a permissive Rule that limits the circumstances in which a discretion may be exercised;
- (c) a requirement in a Rule establishing a discretion that the judge exercising the discretion take into account stated considerations.

[14] Section 41(g) of the *Judicature Act* speaks to the remedies the court may involve:

(g) the Court, in the exercise of the jurisdiction vested in it in every proceeding pending before it, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to the Court seems just, all such remedies whatsoever as any of the parties thereto appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in the proceeding so that as far as possible all matters so in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided;

[15] *Rule 3* provides for the kinds of proceedings contemplated by the parties and allows the right of a party to choose to commence the proceeding by way of action, application or judicial review.

[16] *Rule 6.01* provides:

6.01 A person may choose to start an action or an application as the person is satisfied would be appropriate, unless legislation under which the proceeding is started requires only one kind of proceeding.

[17] *Rule 5* does not specify the types of disputes it will address. *Rule 5.01(5)* states however:

5.01 (4) The application in court is for longer hearings, and it is available, in appropriate circumstances, as a flexible and speedy alternative to an action.

[18] *Rule 7* is more specific in its scope:

7.01 In this Rule,

“decision”, includes all of the following:

- (i) an action taken, or purportedly taken, under legislation,
- (ii) an omission to take action required, or purportedly required, by legislation,
- (iii) a failure to make a decision;

“decision-making authority” includes anyone who makes, neglects to make, takes, or neglects to take a decision.

- 7.02 (1) This Rule provides procedures for a judicial review by the court, or an appeal to the court.
- (2) This Rule applies to each of the following:
- (a) judicial review of a decision within the supervisory jurisdiction of the court;
 - (b) review of a decision under legislation authorizing review other than by appeal;
 - (c) *habeas corpus* for civil detention, and an application for *habeas corpus* to which the Criminal Code applies is started under Rule 64 - Prerogative Writ;
 - (d) an appeal to the court in accordance with legislation, except a summary conviction appeal is provided for in Rule 63 - Summary Conviction Appeal.
- (3) A person may seek judicial review or bring an appeal, in accordance with this Rule.

[19] I have concluded that the court may resolve this issue of the manner in which to proceed by its inherent jurisdiction and general authority under the *CPR* to determine the most appropriate course of the action, having regard to the pleadings.

[20] In this respect, I have reviewed GSI's notice of motion which also outlines the grounds for orders sought, seeking relief by way of declaration and injunctions against the Respondent Board under *Rule 5*.

LIMITATION PERIOD

[21] GSI does acknowledge that they may run afoul of the 25-day limitation period set out in *Rule 7* for commencement of judicial review, but two points arise. First, the injunctive relief sought relating to the disclosure of the seismic data to third parties, relates to events that have not yet occurred, at least to the extent confirmed by AGC's counsel, who notes that any disclosure to a third party is preceded by notice to GSI pursuant to the regulatory regime. The Federal Court also recognized that it is premature to challenge the potential disclosure (to third parties) at the time of provision and that the operator should wait until the eve or the event of disclosure to third parties, see *Geophysical Service Inc. v. Canada (National Energy Board)*, 2011 FAC 360. Second, the *Rule 7* limitation period is not absolute. The court retains a residual discretion to extend the *Rule 7* limitation period where the circumstances warrant.

[22] I do not view GSI's challenge as a way to sidestep the limitation period as the respondent AG's have suggested. Further, for me to decide whether such a limitation period under *Rule 7* should be enforced, would in my view go beyond the scope of a *Rule 12* question of law I am asked to answer, as it would be rooted in facts relating to the conduct of the Respondent Board, over a long period from 1971 - 2008, that could only be resolved by an examination of the record of Respondent Board's activity. There is a limited amount of evidence now before the court.

[23] The AGC has filed affidavit evidence that speaks in a limited way, to the regulatory scheme, contemplated by the statutes.

[24] For example, in the affidavit of Esther Ricketts, at Exhibit "B" there is a record of correspondence that speaks to various work authorizations issued to GSI whereby they were permitted to perform seismic studies on the Nova Scotia offshore and were required to submit their data to the Respondent Board pursuant to the regulations.

[25] The correspondence refers to various filing dates of the seismic data with the Respondent Board, as well as providing that GSI's seismic data results will be kept confidential by the Respondent Board for at least ten years, from the completion of the field work.

[26] Counsel for the AGC acknowledge that on various occasions these time periods have been extended. Clearly, the correspondence does not acknowledge that GSI has any permanent proprietary interests in the seismic data.

[27] Counsel for AGC also agrees this is only a part of the record of the Respondent Board's dealings with GSI.

[28] Ms. Rickett's affidavit also references at Exhibit "C", three applications GSI has made to the Federal Court, for judicial review, relating to the release of its seismic data filed with the National Energy Board. Counsel for AGC suggest that these earlier proceedings somehow confirm that the judicial review process is the appropriate course.

[29] My consideration of this evidence for the purpose of ruling on the limitation period falls well beyond the parameters of a *Rule 12* determination on a limited question of law.

[30] I will not therefore rule on the possible effect of the limitation period on this application.

CASES CITED:

[31] The AGC relied on *Mahoney v. Cumis Life Insurance Co.*, 2011 NSCA 31, in support of the position that all facts necessary for a determination of pure law, were present here.

[32] They relied on *Canada (Fisheries and Oceans) v. Perrot*, 2009 NLTD 172, where a failed claim of negligent misrepresentation as it related to the reinstatement of the plaintiff's fishing license, was barred by the time limitation.

[33] These cases were not very helpful. No cases were offered by the AG's in support of their view that judicial review is the sole option the court should consider.

[34] The AG's did rely on a very recent decision *Sally Behn et al v. Moulton Contracting and the Attorney General of Canada et al*, 2013 SCC 26, where logging licenses granted in British Columbia to the respondent, Moulton Contracting were challenged by a number of individuals from the First Nations, who blocked the company's access to the logging site. The company brought a tort action against these members of the aboriginal community, who defended the action, saying the licenses were void having been issued in breach of a constitutional duty to consult within violation of native members' treaty rights.

[35] On a motion to strike these defences, the courts below ruled that individual members of the aboriginal community did not have standing to assert collective rights and deemed the challenge to be a collateral attack and abuse of process. The Supreme Court then ruled on whether the doctrine of abuse of process applied in the case. It determined it did, ruling:

37 The key issue in this appeal is whether the Behns' acts constitute an abuse of process. In my opinion, in the circumstances of this case, raising a breach of the duty to consult and of treaty rights as a defence was an abuse of process. If the Behns were of the view that they had standing, themselves or through the FNFN, they should have raised the issue at the appropriate time. Neither the Behns nor the FNFN had made any attempt to legally challenge the Authorizations when the British Columbia government granted them. It is common ground that the Behns did not apply for judicial review, ask for an injunction or seek any other form of judicial relief against the province or against Moulton. Nor did the FNFN make any such move.

[36] The AG's rely on this case to argue that the applicant's challenge amounts to an abuse of process as the decisions of the Respondent Board, relating to the director to provide seismic data all predated 2008, when GSI was then active on the east coast. They argue that like *Behns*, no challenge was made at the time GSI was granted the authorizations to conduct seismic work.

[37] They also say this now creates an issue for the court as to the retrospective application of the regulators. In their view the regulations must be considered on evidentiary context and having regard to *Dunsmuir*, where a judicial review would

apply a standard of review of reasonableness, with deference accorded to the Respondent Board, as opposed to a standard of correctness

[38] While it is correct that the pleadings, filed by GSI, do seek certain relief relating to past directives of the Respondent Board, with respect to seismic data collection, retention and third party distribution, the fundamental preliminary question GSI poses, is whether the regulations are *ultra vires* the enabling statutes. The impugned provisions either stand or fall, based on a judicial interpretation of the enabling statutes. This is a proper question to be raised under *Rule 5* application. This question is not anchored in a demand of decision of the Respondent Board, for which the process of judicial review is the only course, as the respondents suggest.

[39] The respondent AGC's motion is dismissed, with costs to GSI in the amount of \$1000. A new date and time will need to be scheduled for a further motion for directions on this application in court.

Justice M. Heather Robertson

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ERRATUM: **Cover Sheet: Noted in 3 areas reads: Geophysical Services**

**Cover Sheet: Should read: Geophysical Service
Paragraph [2] reads: The applicant, Geophysical Services Incorporated ("GSI"), ...**

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