SUPREME COURT OF NOVA SCOTIA

Citation: *Rudderham v. Nova Scotia (Environment)*, 2018 NSSC 172

Date: 20180523
Docket: Hfx No. 471414
Registry: Halifax

Between:

Stacey Lee Rudderham, Dwight Ira Isenor, Shubenacadie Watershed Environmental Protection Society, and Bill Horne

Appellants

v.

Nova Scotia (Minister of Environment) and Scotian Materials Limited

Respondents

DECISION

Judge:	The Honourable Justice Suzanne Hood
Heard:	May 22, 2018, in Halifax, Nova Scotia
Oral Decision:	May 23, 2018
Written Release of Oral Decision:	July 12, 2018
Counsel:	Paul B. Miller, for the Applicants Alison W. Campbell, for the Respondent, Nova Scotia (Minister of Environment) Peter M. Rogers, Q.C., for the Respondent, Scotian Materials Limited

By the Court:

[1] Industrial Approval for a quarry, subject to a series of terms and conditions, was granted by the Administrator, Lori Skaine. The approval was dated June 19, 2017 and arose from an application submitted January 26, 2016. The granting of the approval was appealed to the Minister by three parties. The Minister dismissed the appeals and the parties appealed further to the Nova Scotia Supreme Court. The appeals have been consolidated.

[2] The 15 grounds of appeal are set out in the Notice of Appeal and the court is asked to allow the appeal and quash the Industrial Approval. A Motion for Directions was held on January 16, 2018 and thereafter the Minister filed a five-volume record in February 2018.

[3] In December 2017, as a result of a FOIPOP application, the Applicants received approximately 2,835 pages of material which were the contents of the Department of Environment file with respect to the Approval. After cross-referencing the Department of Environment file with the record which had been filed by that time, the Appellants brought this motion to add to the record and allow an amendment to their Notice of Appeal to add as a ground of appeal that the material before the Minister when he made his decision was incomplete.

[4] Briefs and authorities were submitted by the Appellants and the Minister. Scotian filed its brief saying it agreed with the submissions of the Minister and took no position on the Motion to amend the Notice of Appeal.

[5] The *Environment Act* provides for a statutory appeal to the Nova Scotia Supreme Court; however, the courts in Nova Scotia have treated these appeals as judicial reviews of the decisions of the Minister, not trials *de novo*. In *Sipekne'katik v. Nova Scotia (Minister of Environment)*, 2017 NSSC 23, this court said the reasonableness standard has been applied to decisions pursuant to section 138 of the *Environment Act*. This was done after the court reviewed the previous case law on the subject of review of an administrative decision. In such a case, the court is not to substitute its view for that of the Minister. The court must instead focus on the reasonableness of the Minister's decision.

The Decision-maker

[6] The first issue is who is the decision maker. The Applicants say that the decision maker is the Administrator. She is the delegate of the Minister pursunt to section 17 of the *Environment Act*. Section 56 of the *Environment Act* gives the Administrator, as the Minister's delegate, the power to grant an approval. There is an appeal available from that decision to the Minister, pursuant to section 137 of

the *Act*. According to section 137(4) the Minister may dismiss the appeal, allow the appeal, or make any decision or order the Administrator could have made. The Minister dismissed the appeal.

[7] There is a further appeal from the decision of the Minister pursuant to section 138 of the *Act*. The Appellants in this case filed a Notice of Appeal from the decision of Minister Glavine pursuant to that section. The notice of appeal states that the decision appealed from is dated November 16, 2017 and that the appeal is from the decision of the Minister.

[8] From the Notice of Appeal I conclude that it is clear that the decision appealed from, and therefore the decision before the Supreme Court, is the decision of the Minister. The Notice of Appeal uses words such as "the Minister failed" or "the Minister erred".

[9] The Appellants say that the reviewer, Glen Warner, is the *de facto* delegate of the Minister and therefore everything that was before him, when he prepared his report to the Minister, must be added to the record. The Appeal Review Report is at Volume I, Tab 3 of the record. Also included in the record are materials called "Appeal Review Report Background and Chronology". Throughout the record this

material is cross-referenced to pages of the Appeal Review Report and there are many such cross-references.

[10] The Appellants take exception to Warner's "editing" (as they call it) of the material he reviewed but did not send to the Minister. However, I conclude that the role of the reviewer is an important one in the workings of the Department of Environment. The Minister, at para. 28 of its brief, refers to *IMP Group International Inc. v. Nova Scotia (Attorney General)*, 2013 NSSC 332, where Justice Stewart, in para. 13 of her decision, referred to briefing material put before the Minister in that case. She said she had no objection to that briefing material. She also said the briefing material "does not include the entirety of the Department's file". She continued, "It is not disputed that there were other materials in the Department's hands ….”

[11] Similarly, in *Waverley (Village) v. Nova Scotia (Acting Minister of Municipal Affairs)*, [1993] N.S.J. No. 238 (N.S.S.C.), Chief Justice Glube said, at para. 16, "I find that the Acting Minister was entitled to receive advice from staff members." She referred to *Attorney General of Canada v. Inuit Tapirisat of Canada et al*., [1980] 2 S.C.R. 735 where the court said at p. 753:

> The executive branch cannot be deprived of a right to resort to its staff,

> to departmental personnel concerned with the subject matter, and above all to the comments and advice of ministerial members of the Council who are by virtue of their office concerned with the policy issues arising by reason of the petition whether those policies be economic, political, commercial or of some other nature.

[12] I therefore conclude that it is appropriate that the Minister receive information from the reviewer. I conclude that it is unnecessary that the Minister be given all the material reviewed by Glen Warner, the reviewer.

[13] The material provided to the Minister is included in the record. As the Minister points out, the Minister's responsibilities under the *Environment Act* are extensive. Putting the entire Department of Environment file before him or unedited material reviewed by the reviewer would make the system of appeals unworkable, especially since the Minister's decision, pursuant to section 137, is to be made within 60 days of receipt of the Notice of Appeal.

[14] I conclude the decision maker is the Minister. This court does not have the authority to deal with an appeal from the decision of the administrator. That appeal is a statutory appeal pursuant to section 137 of the *Act* to the Minister -- not to this court. It is only the Minister's decision which can be appealed to the Supreme Court.

The Record

[15] Civil Procedure Rule 7 deals with the record on a judicial review. It gives the court the power to decide what should be in the record. That is referred to in Rule 7.10 the power to settle the record. There is no definition of "record" in the Civil Procedure Rules. Rule 7.09 simply says it must be complete.

[16] Rule 7.28 provides that if the intent is to supplement the record, an Affidavit must be filed. In this case, we have the Affidavit of Stacey Rudderham (one of the Appellants) who says there are a number of documents which should be included in the record. She says, in para. 8 of her Affidavit, when referring to the FOIPOP materials:

> I … believe they contain a number of documents which are relevant to this proceeding that were not reproduced in the record filed by the Minister of Environment.

[17] She then attaches Exhibits "A" to "Q" to her Affidavit. There is no dispute that these documents were not before the Minister. I note that there were some exceptions. Exhibits "P" and "Q" are in the record -- Volume 1, Tab 20 and Volume 2, Tab 34, Pages 1-4 respectively. Exhibits "T" and "U" are also in the record -- Volume 1, Tab 25 and Volume 3, Tab 7 respectively.

[18] The Appellants say the record filed by the Minister in this case is not complete without these documents.

[19] The Appellants say that these exhibits are relevant to this proceeding, although not before the Minister. The question for the court is what should be before this court on a review of the Minister's decision for reasonableness. I may settle the record for the purposes of the judicial review pursuant to Rule 7.10.

[20] What should the reviewing court consider? The Minister says I should consider only what was before the decision maker, the Minister, at the time he made his decision. The Minister says to do otherwise would falsify and misrepresent the material on which the decision was based.

[21] Although "record" has not been defined, there is case authority about what should be in the record. For example, I refer to the *Waverley* decision.

[22] In *Sorflaten v. Nova Scotia (Environment)*, 2018 NSSC 7, Justice Boudreau dealt with a request by the Applicants in that case to introduce expert opinion evidence. She said, in para. 5, "This decision is the subject of the Applicants' application for judicial review." She then said, in para. 9:

> Generally speaking, courts have not permitted the introduction of new evidence beyond the record on an application for judicial review. This is because since the new evidence was not before the Minister when his decision was made, it cannot

> assist in determining whether he made a reasonable decision on the evidence before him.

She also quoted from Blake: *Administrative Law In Canada*, 5th ed. as follows:

> Only material that was considered by the tribunal in coming to its decision is relevant on judicial review because it is not the role of the court to decide the matter anew. The court simply conducts a review of the tribunal decision. For this reason, the only evidence that is admissible before the court is the record that was before the tribunal. Evidence that was not before the tribunal is not admissible without leave of the court.

Boudreau, J. also referred, in para.10, to *Alberta Liquor Store Assoc. v. Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904, on the role of the court on a judicial review.

[23] In Blake, *Administrative Law in Canada supra*, the author says, in para. 7.85:

> On judicial review there is no right to discovery of everything in possession of the tribunal. Only the record that was the basis of the tribunal's decision may be before the court.

She continued in section 7.91 of the text:

> Evidence that was not before the tribunal is not admissible without leave of the court because the role of the court is to review the tribunal decision, not to decide the matter anew. For this reason the only evidence that is admissible before the court is the record that was before the tribunal. The tribunal's findings of fact may not be challenged with evidence that was not before the Tribunal. Evidence challenging the wisdom of the decision is not admissible.

[24] In *IMP Group* Justice Stewart said in para. 21:

> The Civil Procedure Rules do not define the "record" but the decision-making authority is required to produce it… A judge hearing a motion for directions may make certain determinations about the content of the record. This provides no guidance as to how such a determination should be made.

She then quoted from the *Blake* text, *supra*, at pp. 202-203:

> The record that was before the tribunal is the evidence on which a court bases its review of the tribunal's action or decision. … The record must include the document that initiated the proceedings before the tribunal and the tribunal order or decision. If relevant to the issues raised in the application for judicial review, the record may include the tribunal's reasons … interim rulings made by the tribunal [and] the exhibits filed with the tribunal. The record does not include communications for the purpose of settlement nor documents protected by deliberative secrecy or privilege such as drafts of the tribunal decision. The tribunal is not obliged to create new documents as the record contains only existing documents in the possession of the tribunal that were used in making the decision.

[25] The Appellants say that in statutory appeals the record can be broader than in judicial review; however, Guy Régimbald, *Canadian Administrative Law* (2nd ed., LexisNexis Canada, 2015), said this is related to the remedy sought. He also says the court may have broader jurisdiction on a statutory appeal; however, as I have said, the courts in Nova Scotia have treated appeals pursuant to the *Environment Act* as judicial reviews.

[26] In *Bell Canada v. 726259 Canada Ltd.*, 2016 FCA 123,, additional material was sought to be admitted in a hearing with respect to a CRTC decision. The court, in that case, referred to polycentric decision makers. Justice Stratas said, in para. 14:

> . . . but some administrative decision-makers, like the CRTC in this case, operate in an ongoing regulatory context where multiple issues, often more general and polycentric, interrelate and evolve over time. Administrative decision makers such as these continually see many of the same parties on issues that relate to or intersect with past issues. In making decisions, these administrative decision-makers will focus on evidence placed before them in the specific matter but, subject to any obligations of procedural fairness and disclosure owed to the particular parties before them, they may go further and draw upon broader industrial, economic, regulatory or technological insights they have gathered from past proceedings and regulatory experience.

[27] In Nova Scotia, in *Parker Mountain Aggregates Ltd. v. Nova Scotia (Minister of Environment)*, 2011 NSSC 134, Justice Robertson, in para. 70, referred to *Elmsdale Landscaping Ltd. v. Nova Scotia (Minister of Environment)*, 2009 NSSC 358, where Justice Duncan quoted from *Fairmont Developments Inc. v. Nova Scotia (Minister of Environment)*, 2004 NSSC 126 about the purpose of the *Environment Act*, using the word "polycentric".

[28] In this case, there is no ongoing regulatory context as there is with respect to the CRTC, for example, where current issues are informed by past proceedings. I therefore do not conclude the *Bell* decision is helpful in this case.

[29] I conclude that material that was not before the Minister should not form part of the record for the court to consider in determining if the Minister's decision was reasonable. The record is complete when the material the Minister had, when making his decision, has been provided.

[30] The motion to add all or some of the material at Exhibits "A" to "O" to the Rudderham affidavit to this record is therefore dismissed. For that reason it is unnecessary to refer to each exhibit to that affidavit.

Fresh Evidence

[31] The alternate argument of the Appellants is that the material should be added to the record as fresh evidence. Rule 7.27 provides for the filing of an Affidavit proposing to introduce evidence beyond that in the record. The Affidavit is to set out the evidence in support of introducing that additional evidence.

[32] Scotian Materials submits I should not consider the alternate argument of the Appellants since no motion was brought pursuant to Rule 23; however, I conclude that the issue is covered by Rule 7.27, so no separate motion in Chambers is actually required.

[33] There are limits on the introduction of fresh evidence. In *IMP* Justice Stewart, at para. 23, referred to *Judicial Review of Administrative Action in Canada*. The authors said that there are limited circumstances when affidavit evidence will be permitted to supplement the record. They then refer to bias or fraud, error of jurisdiction, and procedural unfairness.

[34] *Canada Life Assurance Co. v. Nova Scotia (Minister of Municipal Affairs)*, [1996] N.S.J. No. 194 (C.A.), which was cited by Justice Stewart at para. 42 of her decision, she referred to *White v. Alberta (Workers' Compensation board Appeal Commission)*, 2006 ABQB 359, where Slatter, J., as he then was, said, in para. 35:

> The use of Affidavits on judicial review is exceptional. They can be introduced when they are needed to establish the grounds for the application, but not when they are intended to alter or supplement the factual record used by the tribunal to decide the issue on the merits. … Affidavits are allowed on judicial review to show bias, or some defect in the way the hearing was conducted or sometimes that the decision was patently unreasonable (where that is not apparent from the record), or to show other types of reviewable error. Affidavits are not permitted just to show that a different decision would have been better than the one made.

[35] In *R. v. Wolkins*, 2005 NSCA 2, Cromwell, J.A. said at para. 58:

> Fresh evidence tends to be of two main types: first, evidence directed to an issue decided at trial; and second, evidence directed to other matters that go to the regularity of the process or to a request for an original remedy in the appellate court.

[36] The test in *R. v.* Palmer, [1980] 1 S.C.R. 759, relates to the first category. In *Scotian Materials Ltd. v. Nova Scotia (Minister of Environment)*, 2016 NSSC 62, the court referred to *G.(T) v. Nova Scotia (Minister of Community Services)*, 2012 NSCA 43, at para. 23 where it said:

> Admission is governed by four factors: (1) whether there was due diligence in the effort to adduce the evidence at trial; (2) relevance to the issue at trial; (3) credibility of the new evidence; (4) whether the evidence could reasonably have affected the result.

[37] The Appellants say the documents pre-date the approval and were in the possession of the Department of Environment. They say, therefore, that there was little else the Appellants could have done to bring them to the attention of the Administrator before she made her decision. I have dealt above with the fact that it is not the decision of the Administrator that is before the court on the judicial review.

[38] Similarly, relevance is not the test for the hearing judge on a judicial review. The role of the hearing judge is to determine if the decision of the Minister was reasonable. Credibility of the evidence is, for the same reason, not the issue for the reviewing court. It is not for the reviewing court to substitute its decision for that of the Minister. As Sara Blake said in her text, at section 7.91 in the last sentence, "The one exception allows evidence to prove that the tribunal had no evidence to support a finding of fact." She also said, in the earlier part of that section: “Evidence challenging the wisdom of the decision is not admissible.”

[39] In my view, it is only the latter category of the two to which Justice Cromwell referred, which could be relevant here, that is the regularity of the process. Yet, no procedural irregularities in the Minister's decision are pleaded, nor is there any allegation of bias, fraud, excess of jurisdiction or use of a statutory power for an improper purpose (again referring to the *Blake* text at section 7.92).

There is also no allegation that there was no evidence to support the Minister's decision.

[40] I therefore conclude that the Appellants have not satisfied me that the test for admission of fresh evidence has been met. I therefore dismiss that argument on the motion as well.

Amendment to Notice of Appeal

[41] The second matter that the Appellants mentioned in their Notice of Motion was a requested amendment to the Notice of Appeal. The Appellants made that motion to allow the Notice of Appeal to be amended to add as a ground of appeal "that the full contents of the record considered by the Administrator was not placed before the Minister when he considered the appeal and therefore the Minister was not able to make a full and proper decision."

[42] The court has the authority to allow amendments to Notices of Appeal, pursuant to Rule 83.03. I am satisfied that the test for the amendment has been met. There is no evidence of bad faith on the part of the Appellants or any serious prejudice which cannot be compensated by costs. The Minister and Scotian take no position on that amendment. That amendment is therefore granted.

Conclusion

[43] The motion to add to the record is not granted. The motion to amend the pleadings is granted.

Costs

[44] Each party has sought its costs. The Minister and Scotian have been successful in defending the motion to add to the record. They are entitled to their costs. Scotian, however, filed only a half page submission and its counsel made only very brief submissions. It is entitled, therefore, to costs based upon its counsel attending for only the full day hearing.

[45] If the Appellants and the Minister and Scotian cannot agree on costs, I will accept brief written submissions by July 12. Since I will be out of the office on leave effective on June 8 except for that date, that would be the date by which I would expect there would be written submissions if necessary.

Hood, J.