

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Nauss v. Nova Scotia (Farm Practice Board), 2013 NSSC 295

Date: 20130725

Docket: SAM-412957

Registry: Amherst

Between:

John P. Nauss, Linda P. Nauss

Plaintiff

v.

Farm Practice Board, John Waalderbos, Viking Crest Farm Ltd.

Defendant

Judge: The Honourable Justice J. Edward Scanlan

Heard: 25 July, 2013 in Amherst, Nova Scotia

Written Decision: September 23, 2013

Counsel: John P. Nauss & Linda P. Nauss, self-represented
Darlene Willcott, for the Farm Practices Board
Lisa Wight, for John Waalderbos & Viking Crest Farm Ltd.

BY THE COURT:

[1] This is an Appeal from the decision of the Farm Practices Board that was dated January 20, 2013. The matter arose as a result of two instances where John Waalderbos sprayed a field directly across the road from the Nauss property with what I understand to have been a herbicide. The Appellants argue this was done at a time when the wind speed and direction caused an overspray to spread onto their property, allegedly damaging raspberry canes and allegedly causing personal injury to both Mrs. Nauss and to her horses. In addition, the Appellants complain about the impact of ditch excavation, as carried out by Mr. Waalderbos, and as to the placement of bales of hay or straw in the ditch, the escape of organic materials onto their property together with the impact or the potential impact that might have had on their well water. I emphasize repeatedly the word “allegedly.” The Appellants also allege, as I noted, that the herbicide impacted the health of their horses, specifically mares in foal. They say the mares were impacted and perhaps may have aborted as a result of the overspray. They allege, as I understand it, although I'm not reviewing in any great detail the allegations in the statement of claim, that it was not just the existing pregnancies that were impacted but the fertility of the mares on a go forward basis.

[2] Those are issues that are dealt with in the decision of Justice Murphy on the stay. They are issues that would be revisited in a trial on those issues. I say as an aside; Mr. and Mrs. Nauss had better come prepared with good evidence before they take up their time and the time of the parties on those issues. In other words, trials are not decided based on anecdotal evidence, trials are decided upon evidence.

[3] The referral to the Farm Practices Board first arose in the context of litigation, where the Nausses were suing to recover damages for the alleged impact of the overspray and the ditching. The litigation was stayed by order of Justice Murphy. Unfortunately I do not have a copy of his decision giving rise to that stay, nor have the parties requested a lifting of the stay on today's date. This is the decision on the appeal of the Board's decision only. I suggest that the best person to deal with the issue of lifting the stay is Justice Murphy. I say that mainly because I do not have the benefit of his decision on the stay and he best knows why he granted the stay in the first place.

[4] I note that the Board at page 3 of his decision pointed out at the hearing held on June 22nd, 2012, Chairperson Betty-Lou Scott introduced the presiding members of the Farm Practices Board and provided a brief review of the matter.

She also summarized the stated purposes of the *Farm Practices Act* in the role of the Board and upholding the *Act*. Additionally she pointed out and I emphasize:

The issues of the horses' health and Mrs. Nauss's health were beyond the scope of the Farm Practices Board mandate. Therefore, these components of the complaint were not considered during the hearing.

[5] I say that with emphasis because had the Board attempted to deal with those issues, I'm satisfied I'd be dealing with this matter on the basis of jurisdiction and asking whether or not the Board had exceeded its jurisdiction. It is in the context of the limited review as conducted by the Board that I deal with this appeal. It is within that context that I suggest the parties to the original action revisit the issue of the stay and see if they can reach an agreement on it.

[6] I begin my analysis of the appeal by referring to the *Farm Practices Act* itself, chapter 3 of the Acts of 2000. Section 2 of the *Act* says:

The purpose of this Act is to (a) provide a mechanism for the establishment of normal farm practices and (b) to protect farmers who are following normal farm practices from civil actions, action rather, in nuisance or negligence.

[7] The *Act* goes on in Section 10 to prohibit certain civil actions. Section (1) says:

Subject to subsection (2), no person shall commence a civil action in nuisance, negligence or otherwise for any odour, noise, dust, vibration, light, smoke or other disturbance resulting from an agricultural operation; or apply for an injunction or other order of a court preventing or restricting the carrying on of an agricultural operation because it causes any odour, noise, dust, vibration, light, smoke or other disturbance.

[8] Subsection 2 says:

Subsection 1 does not apply to an agricultural operation that is found by the Board not to comply with normal farm practices; or (b) where a farmer fails to comply with an order of the Board.

[9] There was no order of the Board in this case, so they had no order to comply with. There was an issue before the Board as to whether or not the farmer in this case was complying with normal farm practices. The Board had the authority to deal with those issues that were before it and which it identified or at least did not exclude. They were correct in excluding the issues that they identified in page 3 of the decision as I've already mentioned. (see para 4)

[10] The *Act* does not address the potential impact of chemical use or misuse, including the impact on neighbouring properties. This case allegedly resulted from the use or application of chemicals or runoff. The Board and this Court on appeal therefore does not address those issues. The *Act* is a very powerful

instrument, obviously aimed at limiting the types of actions that may be launched against farmers. Farmers feed people. We all need food. As the populations grow, more and more people about or are in close proximity to farm operations. What was once a simple application of fertilizer for a farmer spreading manure suddenly becomes a foul odour for the newly built home and home owner.

[11] For farmers to continue to exist, the legislation recognizes farms must be afforded certain protections for some activities but not necessarily for all activities. Odours, noise, dust; those things the legislation deals with, provides authority to grant stays and prohibit civil proceedings. Section 11 of the *Act* makes it clear that if the Farm Practices Board renders a decision, that decision may be appealed to this Court on the question of law. The parties agree that the standard of review in this case is reasonableness within the context of *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9. That is the standard I apply here.

[12] Although the Appellants attempted to introduce new evidence, for this appeal the evidence is best left for a trial, if there is to be one. It is not evidence that could be properly admitted or considered on this appeal.

[13] The Board is charged with the responsibility of determining normal farm practices. If a farmer does not adhere to normal farm practices, then pursuant to section 10(2) a prohibition is not available for the things enumerated in section 10(1). In this case the Board determined that the Respondent's activities were carried out as normal farm practices. There are no Nova Scotia cases in this area. In *Hill and Hill Farms Ltd. v. The Municipality of Bluewater*, 2006 CanLii 31802 (ON CA), the Ontario Courts noted that the expertise that the Board members bring to the table affords them a certain degree of deference.

[14] I am satisfied the Board in this case is deserving of deference in its decision, in regard to the things that were within its mandate. The record suggests that there was evidence to support the Board's conclusion and perhaps more importantly, there was a lack of evidence to suggest that the farmer was unreasonable in terms of normal farm practices. The Board did not exceed its jurisdiction. As I have noted already, in page 3 of the decision, the Board specifically identified the issues that they would not deal with. I am satisfied that the findings of the Board as set out in page 5 of the decision should be and are confirmed.

J.