

SUPREME COURT OF NOVA SCOTIA
Citation: *Nauss v. Waalderbos*, 2014 NSSC 245

Date: 20140718
Docket: Amh No. 301680
Registry: Amherst

Between:

John Nauss and Linda Nauss

Plaintiffs

v.

John Waalderbos and Viking Crest Farm Ltd., a body corporate

Respondents

Judge: The Honourable Justice John D. Murphy

Heard: March 5, 2014, in Truro, Nova Scotia

Final Written Submissions: March 31, 2014

Written Decision July 18, 2014

Counsel: Plaintiffs, self represented
Lisa M. Wight, for defendants

By the Court:

[1] This decision addresses two motions that were heard together:

1. The plaintiffs ask the Court to lift a stay of proceedings and allow an action to continue;
2. The defendants request that the stay be lifted and the claim dismissed.

Background -- Facts and Proceedings to Date

[2] The plaintiffs, Mr. and Mrs. Nauss, resided at their organic farm in Shinimicas, Nova Scotia, across the road from a field farmed by the defendants. The plaintiffs allege that on May 15, 2007 the defendant Mr. Waalderbos sprayed his lands with herbicide which drifted onto their property, causing them loss and damage. In particular, the plaintiffs allege that Mrs. Nauss suffered significant health issues, their crops were damaged and four horses miscarried as a result of exposure to herbicide "overspray." The plaintiffs also claim that the defendants' ditching activities led to contaminated run-off that caused them loss and damage.

[3] Documents filed by the defendants indicate that Mr. Nauss contacted the Nova Scotia Department of Environment concerning Mr. Waalderbos' activities, and was advised that he and his wife could bring their concerns before the Farm Practices Board (the "Board"), a statutory body established under the *Farm Practices Act*, S.N.S. 2000, c.3 (the "Act"). Mr. and Mrs. Nauss did not pursue that avenue and instead commenced this proceeding during September 2008, alleging negligence by the defendants.

[4] The defendants denied they were negligent and pled the provisions of the Act, stating that their farming activities were conducted in accordance with "normal farm practice" as that expression is understood in the legislation, and in accordance with required certification and government regulations.

[5] During discovery examinations in April 2009, the defendants learned that the plaintiffs had not filed a complaint with the Board, and they subsequently made a motion for an order dismissing, or in the alternative, staying the plaintiffs' claim on the basis that section 10(1) of the Act ruled out commencement of a civil action in negligence in the circumstances of this case. The defendants' argument was that the activities which the plaintiffs allege occurred (spraying and ditching) could not,

pursuant to section 10(1) of the Act, be the subject of a civil action unless the Board made a determination under section 10(2) that an agricultural operation did not comply with normal farm practices, or that a farmer failed to comply with an order of the Board. The relevant sections of the Act provide as follows:

Purpose of Act

- 2** The purpose of this Act is to
- (a) provide a mechanism for the establishment of normal farm practices; and
 - (b) protect farmers who are following normal farm practices from civil action in nuisance or negligence. 2000.c. 3, s. 2.

Interpretation

- 3** In this Act,
- (a) "agricultural operation" means an activity that is carried on for the purpose of the production of agricultural products or services for gain or reward and includes, but is not limited to,
 - ...
 - (vi) the clearing, draining, leveling, irrigating or cultivating of land,
 - (vii) the application of fertilizers, soil conditions, pest control products or other agricultural inputs,
 - (g) "normal farm practice" means a practice that is conducted as part of an agricultural operation
 - (i) in accordance with an approved code of practice,
 - (ii) in accordance with a directive, guideline or policy statement set by the Minister with respect to an agricultural operation or normal farm practice, or
 - (iii) in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances, including the use of innovative technology used with advanced management practices;

...

Function of Board

9 (1) Any person may apply, in writing, to the Board for a determination as to whether or not an odour, noise, dust, vibration, light, smoke or other disturbance results from a normal farm practice.

...

(3) The Board, on receipt of an application, shall determine if the farm practice being carried on by the farmer is consistent with the code of practice or, in the absence of a code of practice, with a directive, guideline or policy statement or with proper and accepted customs and standards of similar agricultural operations.

Prohibition of certain civil proceedings

10 (1) Subject to subsection (2), no person shall

(a) 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

(b) 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.

(2) Subsection (1) does not apply

(a) 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.
2000, c.3, s.10.

[6] On October 4, 2011 I heard the defendants' motion and granted a stay of proceedings in an oral decision (a transcript was provided to the parties in June 2013). An Order for Stay was issued December 16, 2011, including the following provisions:

1. The Plaintiffs action is stayed for sixty clear calendar days from the date of the motion so as to allow the plaintiffs the opportunity to apply to the Farm Practices Board for a determination pursuant to s. 9 of the *Farm Practices Act* regarding the alleged conduct of the defendants.
2. After considering the above application, should the Farm Practices Board find that the defendants' alleged conduct falls under s.10(2) of the *Farm Practices Act*, the stay granted herein is immediately lifted.
3. Should the plaintiffs not apply to the Farm Practices Board within the sixty days described in paragraph 1 above, the plaintiffs' action is dismissed.

When giving the decision granting the stay, I noted as follows:

[3] ...In my view the activities which are claimed by the Plaintiffs do constitute agricultural operations as defined in s.3(a) of the Act. As I said, the activities are best described, in reading the Statement of Claim, as spraying and ditching.

[4] Section 3(a) of the Act refers to an agricultural operation as an activity that is carried on for the purpose of production of agricultural products or services. It includes in ss.(vi), the clearing, draining, levelling, irrigating or cultivating of land. In my view, that is what ditching is.

[5] Subsection (vii) includes as agricultural operations, the application of fertilizer, soil conditioners, pest control products or other agricultural inputs. In my view, in plain reading of the language, that is what the spraying of herbicides is.

[6] Section 10(1) gives examples of disturbances which cannot be the subject of a civil action without the matter first going to the Board. They include odour, noise, dust, vibration, light and smoke, or other disturbances. In my view the sorts of problems, or the sorts of activities or disturbances which the Plaintiffs claim took place in this case, fall under "other disturbances" as referenced in subpara.10(1) of the Act. Whether they are odours, noise, dust, vibration, light, smoke or something similar to that is difficult to determine from the Statement of Claim. The intent and the purpose of the Act is to capture in s.10(1) the sorts of results which would flow from agricultural operations as defined in s.3. The Act does not purport to identify the particular damage, whether it is illness or whether it is miscarriage among animals or whether it is destruction of crops. Those sorts of damages are alleged in the Plaintiffs' Statement of Claim. I find that those types of damages are consequences consistent with odours and noise, and dust, and vibration, or other disturbances as referenced in s.10(1) of the Act.

[7] ...I find that what is alleged to have occurred is a disturbance resulting from an agricultural operation under s.10 and s.3 of the Act which, therefore, brings s.10(1) and 10(2) into play.

...

[10] Section 10 sets out the prescribed prerequisites to commencing a civil action arising from a disturbance resulting from an agricultural operation. The Plaintiffs do not under s.10 have the option to commence a civil action without

exercising their prior option to go to the Farm Practices Board. Subsection 2 of s.10 makes that clear.

[11] Section 10 is mandatory in that there is a prerequisite to go to the Board before commencing a civil action for the sort of relief claimed by the Plaintiffs.

[12] Section 9 of the Act, on the other hand, is not mandatory. It says:
Any person may apply in writing for determination to the Board....

[13] Applying is not mandatory, but as I noted during argument it is a prerequisite. Going to the Board is a prerequisite to commencing a civil proceeding. That is consistent with the intent and the spirit of the wording of the Act, which is to have a s.10(2) determination by the Board before starting a civil proceeding of the type identified in s.10, and that is what we are dealing with in this case.

[14] The Plaintiffs take the position at the conclusion of their brief that the Court should not ascribe to the legislature the intention to condone a farmer's dangerous practice to the detriment of neighbours by leaving no legal recourse to the neighbours through the courts. In my view, that is not what the legislature has done here. The legislature established a mechanism. It established a Board to address what constitutes a proper agricultural practice or a normal farm practice. That determination is made a prerequisite to commencing an action, but that does not ascribe to the legislature the intention to condone dangerous practices. Indeed, it provides a mechanism short of lawsuits to address dangerous farm practices.

...

[17] We now come to remedy. The Defendants have asked for a dismissal of the proceeding or, in the alternative, that the action be stayed in accordance with the Farm Practices Act. I am not going to dismiss the proceeding. I think that would be unfair in the circumstances. I have concluded that it is appropriate that the proceeding be stayed to allow the Plaintiffs, if the Plaintiffs choose to do so, to exercise the option under s.9 of the Act to obtain a determination from the Board.

[7] Mr. and Mrs. Nauss made an application to the Board in December 2011 and a hearing took place during June 2012. On January 30, 2013 the Board provided a written decision wherein it ruled that the defendants did not act in a manner

inconsistent with “normal farm practices.” In its decision, the Board stated that its mandate did not extend to consideration of Mrs. Nauss' health or the horses' health.

[8] In dismissing the plaintiffs’ complaint, the Board's statement of its findings included the following:

FINDINGS:

1. The Board finds, based on the evidence provided, that Mr. Waalderbos had carried out his spray activity in accordance with normal farm practice. It is agreed that there is insufficient evidence to prove, based on the balance of probabilities, that the spray had caused the alleged damage.
...
2. The Board also determines that based on the evidence presented, the modifications to the drainage ditch were made following normal farm practice, which the Board informed the parties orally at the hearing.
3. The Board finds that there is not enough evidence presented to prove that the actions of Mr. John Waalderbos are contrary to normal farm practice. Therefore, the Farm Practices Board dismisses the complaint filed by Linda and John Nauss against John Waalderbos and Viking Crest Farm Ltd.

[9] The plaintiffs appealed the Board's decision to this Court. Following a hearing July 25, 2013 Scanlan J. (as he then was) dismissed the appeal by order dated August 28th, and issued a written decision September 23, 2013.

[10] Justice Scanlan's Order directed that I address the issue of the stay that halted this action in 2011, pending the plaintiffs' obtaining a determination from the Board. His direction prompted two reciprocal motions which I heard on March 5, 2014, after a delay while matters concerning Mr. and Mrs. Nauss' legal representation were resolved, and they became self-represented.

The Motions

[11] By the current motions:

1. The plaintiffs seek to have the stay lifted and this action proceed;
2. The defendants also seek to have the stay lifted, but request dismissal of the claim pursuant to s.10(1) of the Act; and

3. Both parties request that costs be addressed.

Parties' Positions

[12] Mr. and Mrs. Nauss say the stay should be lifted and the action allowed to proceed because the Board recognized that it did not have the mandate to consider all issues that were before it, particularly the impact of the defendants' alleged activity upon Mrs. Nauss' health and the health of the horses. The thrust of the plaintiffs' position is that the Board should not have made its decision, which was upheld by Justice Scanlan, because their claim raises damages issues which are beyond the scope of the Board's mandate. Expressed differently, the plaintiffs submit that because the Board did not have jurisdiction to address every issue their claim raises, the determination it made should not prohibit a civil proceeding under s.10 of the Act.

[13] The defendants say this proceeding ought to be dismissed because civil action is precluded by the Board's determination, which Justice Scanlan upheld, that their spraying and ditching activities were carried out in accordance with normal farm practice.

Analysis and Result

[14] In his decision, Justice Scanlan endorsed the Board's comment that its jurisdiction did not extend to issues of horses' health and Mrs. Nauss' health. Those issues relate to damages, which would be adjudicated only after determination of liability in a claim based solely in negligence, as in this case. They are not part of an analysis to determine whether normal farm practices were followed.

[15] Although Justice Scanlan suggested the effect that the defendants' spraying of chemicals (which he labeled "herbicidal drift") allegedly had on the plaintiffs' property was not an "other disturbance" as referenced in sections 9 and 10 of the Act, he upheld the Board's finding that the defendants' activities were carried out as normal farm practices, and ruled the Board had jurisdiction to make that determination.

[16] Given Justice Scanlan's observation, at the hearing of the current motions I gave the parties the opportunity to make submissions on the issue of whether herbicidal drift is an "other disturbance" – under the Act. The issue has not been addressed in any reported decision in this province. There is case law in other

provinces dealing with actions for damages caused by herbicidal drift (see **Fondrick v. Gross**, 2003 SKQB 307, **Rioux v. Reutter**, 2004 MBQB 148, **H & H Lockery Farms 1997 Ltd. v. Hayer**, 2006 OJ No. 1, and **Kacsmarik v. Demeulenaere**, 2002 PESCTD 12). However, none of those decisions considered whether herbicidal drift was an “other disturbance” contemplated by provincial right-to-farm legislation. In **Fondrick v. Gross**, *supra*, and **H & H Lockery Farms 1997 Ltd. v. Hayer**, *supra*, liability was found on the basis of the doctrine of strict liability, not nuisance or negligence. In **Rioux v. Reutter**, *supra*, the defendant conceded liability, leaving only damages to be determined. In **Kacsmarik v. Demeulenaere**, *supra*, liability was found in negligence, and the *Farm Practices Act*, RSPEI 1988, c. F-4.1, unlike the Nova Scotia legislation, protected farmers against claims in nuisance only.

[17] Absent contrary authority, I remain of the view that the activities the plaintiffs allege occurred, herbicidal overspray or drift and contaminated run-off from ditching, are “other disturbances” resulting from an agricultural operation as contemplated by section 10(1)(a) of the Act.

[18] I have concluded that the plaintiffs’ claim must be dismissed as no issues would remain for adjudication if the action were to proceed. The stay was imposed when I ruled that this civil action in negligence could not proceed until the Board determined whether the defendants’ activities were normal farm practices. The Board held a hearing and found the defendants’ activities comply with normal farm practices. On appeal to this Court, Justice Scanlan ruled that the Board acted within its mandate, that its decision deserved deference, and he confirmed the Board’s findings. In the result, regardless whether “herbicidal drift” or “contaminated run-off” are “other disturbances”, or what type of damage, if any, may have resulted from the spraying and ditching by the defendants, this civil action is prohibited under s.10(1)(a) of the Act because:

- (a) the Board has found that "Mr. Waalderbos had carried out his spray activity in accordance with normal farm practice" and "the modifications to the drainage ditch were made following normal farm practice"; and
- (b) on appeal, this Court has ruled the Board acted within its jurisdiction, and confirmed those findings.

[19] The plaintiffs’ claim, which is based entirely upon allegations of negligence during spraying and ditching, could only succeed if the defendants did not meet the

applicable standard of care. For agricultural operations, such as those in which the defendants engaged, that standard of care is determined with reference to the definition of "normal farm practice" in the Act, which states as follows:

3(g) "normal farm practice" means a practice that is conducted as part of an agricultural operation

- (i) in accordance with an approved code of practice,
- (ii) in accordance with a directive, guideline or policy statement set by the Minister with respect to an agricultural operation or normal farm practice, or
- (iii) in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances, including the use of innovative technology used with advanced management practices;

A farmer's immunity pursuant to sections 9 and 10 of the Act from a negligence or nuisance action stemming from an agricultural operation is contingent upon a finding by the Board that he or she complied with normal farm practice. This is consistent with the purpose of the legislation set out in section 2 of the Act (previously quoted in para.5).

[20] Justice Scanlan's decision confirming the Board's finding that the defendants complied with normal farm practices constitutes a determination that the defendants have met the appropriate standard of care; it should not be revisited in addressing the current motions. Accordingly, the plaintiffs' claim cannot succeed.

[21] The defendants' motion to lift the stay and dismiss the action is granted; plaintiffs' motion for an order allowing action to proceed is dismissed.

Costs

[22] The Order for Stay, issued December 16, 2011, included the following:

3. Should the plaintiffs not apply to the Farm Practices Board within the sixty days described in paragraph 1 above, the plaintiffs' action is dismissed.
4. The defendants shall have their costs in this motion in the amount of \$1000 plus their reasonable disbursements, payable at the conclusion of this matter, in the event that the defendants are successful in the cause.

...

6. In the event the stay is not lifted, the defendant shall be entitled, upon motion to the Court, to their costs of the action as taxed.

[23] The parties' pre-hearing briefs for the current motions included submissions with respect to costs. At the motion hearings, the defendants also made oral representations. The plaintiffs were not prepared to respond at that time, and I advised that they would be able to make costs submissions after receiving this decision, following which the defendants could reply.

[24] The defendants seek (in addition to the stay motion costs):

1. Substantial indemnity pursuant to *Civil Procedure Rule 88.02(1)(d)* on the basis that the plaintiffs abused court process by commencing this proceeding without first making a complaint to the Board;
2. To have their costs "of the action" taxed;
3. Motion costs on an increased scale pursuant to *Rule 77.18*, Tariff C(4), as this decision ends the proceeding.

[25] As successful parties in motions which have resulted in removal of the stay and dismissal of the proceeding, the defendants would ordinarily be entitled to recover costs.

[26] The plaintiffs need not make submissions concerning the first two bases upon which the defendants seek an award; this is not a case in which the defendants should receive substantial indemnity or costs "of the action" under Tariff A.

[27] This proceeding would have been streamlined if the plaintiffs had first made a complaint to the Board, but commencing the action without doing so does not amount to an abuse of process as contemplated by *Rule 88*. Mr. and Mrs. Nauss received counsel's advice when the proceeding was commenced, the Act has not been generally interpreted in Nova Scotia, and the plaintiffs were cooperative and respectful of the court's process at all times.

[28] Although the proceeding has been protracted and difficult for the parties, it has been concluded without trial or hearing on its merits. The appeal from the Board's decision was a separate aspect of the case for which Justice Scanlan did not award costs. After the order granting the stay, the present motions have been the only activity in this court which supports a costs award. In my view, any costs

recoverable by the defendants (in addition to the stay award as they are successful in the cause) arising from the lifting of the stay and dismissal of the proceeding should be assessed based on *Rule 77.18* Tariff C(4). The entire matter at issue in the proceeding is determined following motions to lift the stay and dismiss. The scenario contemplated by paragraphs 3 and 6 of the stay order -- dismissal without motion or lifting of the stay -- did not develop, therefore it is not necessary to tax "costs of the action."

[29] Tariff C provides as follows:

Tariff C

...

(4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following facts:

- (a) the complexity of the matter,
- (b) the importance of the matter to the parties,
- (c) The amount of effort involved in preparing for and conducting the application.

(such applications might include, but are not limited to, successful applications for Summary Judgment, judicial review of an inferior tribunal, statutory appeals and applications for some of the prerogative writs such as certiorari or a permanent injunction.)

Length of Hearing of Application	Range of Costs
Less than 1 hour	\$250 - \$500
More than 1 hour but less than ½ day	\$750 - \$1,000
More than ½ day but less than 1 day	\$1000-\$2000
1 day or more	\$2000 per full day

[30] The two motions which are the subject of this decision were heard together. When the parties attended court December 2, 2013, the matter was adjourned pending determination whether the plaintiffs would have counsel, and the merits of the motion were addressed at a hearing which lasted about one-half day on March 5, 2014.

[31] Having received the defendants' submission at the conclusion of the hearing, I invite the plaintiffs to provide in writing by August 15, 2014 any representation

they wish to make concerning costs recoverable by the defendants pursuant to Tariff C. If they choose to do so, the defendants may submit a reply in writing by August 29, 2014.

[32] Any costs allowed for these motions will be in addition to the \$1000 awarded to the defendants with respect to the stay motion.

[33] Reasonable disbursements will be part of costs awards. The defendants' submissions to date indicate the types of disbursements sought. In this case, I intend to adhere to my usual practice as follows:

1. Recoverable photocopy cost is limited to five cents per page, unless counsel for the party claiming establishes higher actual cost. (In this case defendants have sought amounts without indicating the number of pages - that information should be provided);
2. Expenses associated with fax and online research are part of overhead, and not recoverable against an opposing party;
3. When a party retains counsel outside the district where a proceeding is commenced, counsel expenses for travel to the district where the action was started, or to another court location closer to counsel's office, are not recoverable.

J.