IN THE SUPREME COURT OF NOVA SCOTIA
Citation: NS Power Inc. v. Heston Croft, 2003 NSSC 177

Date: 20030915
Docket: SH 192719A
Registry: Halifax

Between:

Nova Scotia Power Incorporated

Appellant

v.

Heston Croft

Respondent

Judge: The Honourable Justice Arthur J. LeBlanc

Heard: March 14, 2003, in Halifax, Nova Scotia

Counsel: D. Kevin Burke, for the Appellant
Byron Balcom, for the Respondent

By the Court:

[1] The respondent, Heston Croft, fishes professionally for gaspereau on the Gaspereau River in Kings County. The Appellant, Nova Scotia Power (NSP), controls the flow of water on the river through a system of dams and reservoirs designed for producing hydroelectric power. Mr. Croft claimed in Small Claims Court for damages after fishing equipment located on his land was damaged when

the water level rose suddenly as a result of the flow through the Defendant's dam and reservoir system. He was successful in Small Claims Court and was awarded $5,769.29. NSP has appealed to this Court.

FACTS

[2] Mr. Croft testified that at about 6:30 a.m. on May 15, 2001, the water level rose from a depth of five feet to nine feet. It is not disputed that the water rose because the appellant released water from its reservoir system. As a result of the increased flow of water and the rise in water level, Mr. Croft's fishing gear was damaged.

[3] Mr. Croft said he received no warning from NSP about the rising water level, although he said in the past a manager with NSP (who is now retired) would call fishermen when the water was going to rise. He said this has been little or no communication from NSP about water levels since the company went private in the early 1990s.

[4] Counsel agreed to file a diagram showing the details of the Black River Hydro System because this had not been filed as an exhibit at the hearing before the adjudicator.

STANDARD OF REVIEW

[5] The standard of review to be applied when hearing an appeal of a decision of the Small Claims Court is set out in *Brett Motor Leasing Ltd. v. Welsford* (1999), 181 N.S.R. (2d) 76 (S.C.), where Saunders J. (as he then was) stated, at para. 14:

> [T]he jurisdiction of this court is confined to questions of law which must rest upon findings of fact as found by the adjudicator. I do not have the authority to go outside the facts as found by the adjudicator and determine from the evidence my own findings of fact. “Error of law” is not defined but precedent offers useful guidance as to where a superior court will intervene to redress reversible error. Examples would include where a statute has been misinterpreted; or where a party has been denied the benefit of statutory provisions under legislation pertaining to the case; or where there has been a clear error on the part of the adjudicator in the interpretation of documents or other evidence; or where the adjudicator has failed to appreciate a valid legal defence; or where there is no evidence to support the conclusions reached; or where the adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result; or where the adjudicator has failed to apply the appropriate legal principles to the proven facts. In such instances this court has intervened either to overturn the decision or to impose some other remedy, such as remitting the case for further consideration.

GROUNDS OF APPEAL

Insufficient Reasons

[6] As its first ground of appeal the appellant says the adjudicator failed to articulate and analyze a basis in law for finding the appellant liable to the respondent. The appellant claims that the only suggestion of legal analysis in the adjudicator's decision is the statement that the duty on the power company to "manage a delicate and highly dangerous resource" was "a high one". This, the appellant claims, was insufficient to address the theories of liability advanced by the respondent.

[7] In support of this position, the appellant cites *Bingley v. Sable Offshore Energy Inc.*, [2003] N.S.J. No. 33 (S.C.). In that appeal, from a Small Claims Court decision on negligence I concluded that the claimant had not established a duty, standard or breach of the standard, and thus that the adjudicator had erred in allowing the claim. It was impossible to infer such findings from the evidence. The appellant suggests that the case at bar is analogous and refers to the following passage in *Bingley*:

> At no point in the Decision or the Report of Findings of the adjudicator, did the adjudicator measure the actions of the Appellant against an individual who is taking care. Once a duty is established, the defendant must still be found to have fallen below

> an applicable standard of care before a negligent act can be found to have occurred.

[8] The respondent argues that the adjudicator did indeed turn his mind to the applicable law, and that the basis for his decision can be found in his reasons.

[9] The respondent argued at the hearing that the rule in *Rylands v. Fletcher*, [1866] 1 L.R. 265 (Exch.), provided a basis for it to recover. *Rylands*, of course, provides, in the words of Blackburn J. at 279, "that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape."

[10] The effect of *Rylands* was the subject of argument at the Small Claims hearing and on this appeal. The respondent argues that the adjudicator made his reasons adequately, if not ideally, clear by noting that both parties had presented case law supporting their positions, by finding that NSP's duty "to carefully manage a delicate and highly dangerous resource is a high one" and by concluding that the appellant had "failed to adequately protect the Claimant from damage...."

He also addressed the *Rylands* duty in his comments about the "man-made" nature of the water storage system and the appellant's failure to "tell us what the flow would be before man's intervention."

[11] As to negligence, the respondent says the adjudicator did turn his mind to the duty, standard and breach required to find liability in negligence. He referred to the appellant's permit (the "Terms and Conditions of an Approval for Withdrawal and/or Storage of Water"). The respondent says the permit establishes both a duty to downstream users of the resource and the standard expected of the appellant. He argues that the adjudicator was relying upon provisions such as that in Schedule B of the permit, requiring the permit holder not to "use the water or watercourse so as to ... b) suffer or permit any damage to adjoining and nearby land and ... not [to] cause or permit any nuisance to adjacent or nearby properties...". The respondent repeats that the adjudicator found that the power company "failed to adequately protect the [Respondent] from damage". This, the respondent says, also amounts to a finding of fact on causation. Finally, he says, the adjudicator quantified damages, thus addressing all the elements of a negligence action.

[12] I underline that *Bingley, supra,* does not require an exhaustive analysis, only that the findings can be inferred from the adjudicator's decision or from the evidence before him. At para. 19 I stated:

> In the case at bar, it does not appear that the parties nor the adjudicator turned their minds to this issue. There was no discussion of duty in any of the evidence before the adjudicator, nor any implication of such findings in the decision being appealed....

[13] I am satisfied that the adjudicator turned his mind to the arguments on the applicability of *Rylands v. Fletcher*. I note his statement that "[c]ase law was presented supporting the position of both parties." From this I infer that he considered the submissions of the Parties, and I am able to conclude that he turned his mind to the necessary issues.

THE EXPERT'S REPORT

[14] At the hearing before the Small Claims Court adjudicator, the defendant submitted an expert's report prepared by Mark Orton, a professional engineer. The objectives stated in the report were "[t]o determine the flood hydrograph below White Rock powerplant between 14-17 May 2001"; and "[t]o determine what the

magnitude of this flood hydrograph would have been without the existence of any of the dams in the Black River Hydro System, i.e. under natural conditions." The report goes on to describe the Black River Hydro System and then to model the flood that would have occurred "under natural conditions", using data on rainfall, lake levels, hourly generation and gate operation and stoplog installation and removal. Mr. Orton used the data to design hydrologic models of the hydro system, and of the Gaspereau River Basin without dams. Mr. Orton concluded:

> The Black River Hydro system was designed to store runoff during the spring freshet and fall and winter rains and release water smoothly throughout the year to generate hydroelectric power. To do this, two large storage reservoirs Gaspereau Lake and Black River Lake and three smaller storage reservoirs Aylesford Lake, Salmontail Lake and Dean Chapter Lake were created, as well as several diversion dams and hydropower dams.
>
> These dams and storage developments will always attenuate flood peaks downstream. The degree of attenuation will depend on the water levels in each reservoir at the time of the flood; the lower the water levels the greater the reduction in the flood peak downstream, **However, even with all the reservoirs full and spilling the downstream flood peak can never reach the natural flood peak level because floods from the Black River basin above Black River Dam will spill out of the Black River Hydro system into the Avon River basin via Forks Dam spillway.**
>
> **At the time of the May 15 2001 flood in the Gaspereau River below White Rock Dam Gaspereau Lake was one foot below full supply level, so there was no outflow via Lanes Mills spillway, and thus more than one third of the Gaspereau River basin did not contribute at all to the flood.**

> **Finally, it is concluded that the peak of the May 15 2001 flood below White Rock Dam reached 2040 cfs, but the natural flood peak would have been 4919 cfs without the Black River Hydro system in place.** [emphasis added]

[15] After reviewing the report, listening to Mr. Orton's testimony and putting his own questions to the expert, the adjudicator said in his decision:

> The Power Company relies on its expert, Mr. Mark Orton; a professional engineer, who prepared a report on the Gaspereau River Flood of May 2001. The purpose and scope was to show "what the magnitude of this flood hydrograph would have been without the existence of any of the dams in the Black River Hydro System, i.e. under natural conditions"....
>
> [NSP's] assertion that the flood damage would have been worse without the existence of its dams fails to recognize that most of the relevant water storage area in the system is also man-made. To say that removing the man-made dam structures would make the situation worse without addressing the question of what the original historical flow of water was before other man-made changes to the system (such as increased containment areas, canals and the like) fails to tell us what the flow would be before mans' [*sic*] intervention. [Emphasis in original.]

[16] The appellant claims the adjudicator misinterpreted the expert's report. NSP submits that he contradicts himself by recognizing "that Mr. Orton's report compares the state of the river flow under natural conditions (without the hydro system) and that of the river under a man-made system. But in the next paragraph

he finds that the report fails to show what the flow would have been before mans' [*sic*] intervention." With respect, any possible contradiction disappears when one considers that the adjudicator was directly quoting Mr. Orton's statement of purpose. This did not mean he adopted Mr. Orton's words or accepted that this stated purpose had been achieved; clearly the adjudicator concluded it had not been.

[17] The Supreme Court of Canada considered the law on the admissibility of expert evidence in *R. v. Mohan* (1994), 89 C.C.C. (3d) 402. Sopinka J., writing for the Court, said (at 411) that the admissibility of expert evidence depends on four criteria: "(a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; (d) a properly qualified expert."

[18] While there has been no objection to the admission of the expert's report, I nevertheless find the Court's comments in *Mohan* instructive when considering the purposes and attributes of expert evidence. The first threshold the expert evidence must cross is "logical relevance"; that is, it must be "so related to a fact in issue that it tends to establish it." This must be established before the court goes on to consider the costs and benefits of admitting or not admitting the report (p. 412).

Justice Sopinka quoted *R. v. Melaragni* (1992), 73 C.C.C. (3d) 348 (Ont. Ct. (Gen. Div.)), where Moldaver J. noted two factors that should be considered in assessing the reliability of new scientific techniques or knowledge:

> (1) Is the evidence likely to assist the jury in its fact-finding mission, or is it likely to confuse and confound the jury?
>
> (2) Is the jury likely to be overwhelmed by the "mystic infallibility" of the evidence, or will the jury be able to keep an open mind and objectively assess the worth of the evidence?

[19] At page 413, Justice Sopinka quoted the following comments of Dickson J. (as he then was) in *R. v. Abbey* (1982), 68 C.C.C. (2d) 394 (S.C.C.) on the second criterion, necessity to assist the trier of fact. Justice Dickson said, at 409:

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of the judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary": (*R. v. Turner* (1974), 60 Cr. App. R. 80 at p. 83, per Lawton L.J.

[20] In this case, the report's compliance with the *Mohan* guidelines is questionable; as such, I cannot conclude that the adjudicator erred in not adopting the inference it suggested. After several close readings of the report, I cannot conclude that it tends to establish a fact in issue; furthermore, it would tend to

confuse a trier of fact who relied upon it, rather than clarifying a technical issue. In reaching this conclusion, I take guidance from *Mohan,* as well the requirement of Civil Procedure Rule 31.08 that an expert's report contain "the full opinion of an expert, including the essential facts on which the opinion is based, a summary of his qualifications and a summary of the grounds for each opinion expressed...".

[21] The report is not clear on its face as to what is meant by "natural conditions", and the author employs several different phrases to describe the theoretical model. The conclusion refers to the reservoirs that were created as part of the hydro systems; but the objectives refer to "natural conditions" as being the situation that would occur "without the existence of any of the dams" in the system. The "Discussion of Results" describes a comparison between the "natural flood peak" and "the flood peak with the Black River Hydro System dams in place." The graphs at figures 4 and 5 portray the Gaspereau River below White Rock Dam between 14 and 17 May, 2001 "with dams" and with "no dams".

[22] As the adjudicator points out, the constructed water storage area is also an artificial element that must be removed in order to establish the "flood hydrograph" under "natural" conditions. Without the dams, there would be no reservoirs.

Perhaps the expert addressed this crucial point, but if so it is not clear from the report. The report does not clearly set out what portion of the water passing through the system would not have been there if the system did not exist. It is not sufficient to simply remove the dams from the equation, as we know was done. The report on its own is not clear enough on this point to enable a non-expert to divine a “ready-made inference” from it.

[23] The appellant submits that Mr.Orton’s findings as to the magnitude of the “flood hydrograph” under “natural conditions” were not contradicted by any expert evidence adduced by the respondent. But there is no requirement for expert evidence to be so contradicted by contrary expert evidence in order to be found wanting.

[24] The adjudicator had the expert before him and had the opportunity to ask questions. It is not for this court to speculate on appeal about the findings of an expert’s report or to second-guess the interpretation placed upon it by the adjudicator who heard the evidence. It is sufficient that there has been no “clear error” in the interpretation of the report.

[25] To find for the appellant would result in the appellate court reversing findings of facts made by the adjudicator. It is also evident that there was no clear error in the interpretation of the expert report. In view of these two findings and the deference which I am required to extend to the adjudicator, I am in fact applying the principles of appellate review enunciated in *Brett, supra*.

[26] I, therefore, dismiss the Appeal with costs to the Respondent.

J.