2001

Date: 20020123
Docket: S.H. No. 171917

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Nova Scotia Woodlot Owners and Operators Association v. Kimberly-Clark Nova Scotia, 2002 NSSC 11

BETWEEN:

THE NOVA SCOTIA WOODLOT OWNERS AND OPERATORS ASSOCIATION - CENTRAL WOOD SUPPLIERS DIVISION

APPLICANT

-and-

KIMBERLY-CLARK NOVA SCOTIA

RESPONDENT

DECISION

HEARD BEFORE: The Honourable Justice Robert W. Wright at Halifax, Nova Scotia on January 8, 2002

ORAL DECISION: January 10, 2002

WRITTEN RELEASE OF DECISION: January 23, 2002

COUNSEL: For the Applicant - Joseph MacDonell

For the Respondent - Thomas Hart

Wright J. (Orally)

INTRODUCTION

[1] This application has been brought by the Nova Scotia Woodlot Owners and Operators Association - Central Wood Suppliers Division (the "Association") for an Order in the nature of *certiorari*, seeking to quash the decision of the Nova Scotia Primary Forest Products Marketing Board (the Board") dated February 22, 2001 in which it ruled that a bargaining situation did not then exist as between the Association and Kimberly-Clark Nova Scotia.

[2] Kimberly-Clark operates a kraft pulp mill at Abercrombie, Nova Scotia and the Association acts as the bargaining agent for all producers of pulpwood in seven named counties of Nova Scotia who sell pulpwood to Kimberly-Clark.

BACKGROUND

[3] In its decision, the Board set out its essential findings of fact outlining the background of these proceedings which are reproduced as follows:

> 1. On August 31, 1981, the Board issued a Certificate of Registration to NSWOOA to act as a bargaining agent for its members with Scott Maritimes Limited. The Certificate reads as follows:
>
> This is to certify that the Nova Scotia Pulpwood Marketing Board, under the authority of the *Pulpwood Marketing Act* (Chapter 15 of the Statutes of Nova Scotia 1972) registered
>
> NOVA SCOTIA WOODLOT OWNERS' & OPERATORS' ASSOCIATION
>
> as the Bargaining Agent for all producers of pulpwood within the Counties of Antigonish, Guysborough, Pictou, Hants, Halifax, Cumberland and Colchester who sell pulpwood to Scott Maritimes Limited, excepting and excluding:
>
> > (a) all producers of pulpwood who are members of the Wood Product Manufacturers Association, from time to time, who sell pulpwood to Scott Maritimes Limited; and
> >
> > (b) all producers of pulpwood who are principally engaged in the manufacture of wood products beyond the cutting and delivering of round wood, who sell pulpwood to Scott Maritimes Limited, other than those members, from time to time, of the Nova Scotia Woodlot Owners' & Operators' Association; and
>
> 2. The Certificate of Registration was amended on November 21, 1986 to exclude producers who supply in excess of 3,000 cords per year.

> 3. In 1995, Kimberly-Clark amalgamated with Scott Maritimes Limited ("Scott") and assumed Scott's responsibility under the Certificate of Registration.
>
> 4. The Certificate of Registration does not authorize NSWOOA to bargain for sawmill chips. The definition of pulpwood that applies to the Certificate, as found by the Board in its March, 1998 decision, is the definition from the 1976 Act which states:
>
> "Pulpwood means wood other than sawmill chips..."
>
> The application of this definition was confirmed in the decisions of both the Supreme Court and the Court of Appeal.
>
> 5. The parties entered into collective agreements from 1981 until 1995. The last collective agreement expired on December 31, 1995 and no negotiations respecting a new collective agreement have taken place.
>
> 6. In June, 1994 Scott advised NSWOOA of its plans to close the wood room at its Abercrombie Mill and to increase its use of chips. By letter dated April 25, 1995, Kimberly-Clark advised NSWOOA that it would be shutting down its wood room effective July, 1995 and converting from roundwood to chips as the raw material for production at its Mill.
>
> 7. Kimberly-Clark no longer purchases softwood pulpwood chips. It buys only sawmill chips and is not part of the market for softwood pulpwood chips. In addition to sawmill chips, Kimberly-Clark utilizes a small percentage of hardwood chips which it produces from its own lands.
>
> 8. As a result of the growth of the sawmill industry, the market for primary forest products has improved since 1995.

[4] None of this factual chronology is contentious between the parties other than it having been pointed out by counsel for Kimberly-Clark that the company has never purchased softwood pulpwood chips as implied in paragraph 7 quoted above.

[5] The Board also set out the more recent background of this matter in the first four paragraphs of its decision which again read as follows:

> By letter dated April 22, 1996, Nova Scotia Woodlot Owners' and Operators' Association - Central Wood Suppliers Division ("NSWOOA") requested that the Primary Forest Products Marketing Board ("the Board") clarify the meaning of the term "pulpwood" as contained in the Certificate of Registration issued to NSWOOA by the Board in 1981.
>
> By subsequent letter dated November 21, 1996 NSWOOA requested that the Board declare that a bargaining situation exists between the NSWOOA and Kimberly-Clark Nova Scotia ("Kimberly-Clark") pursuant to Section 15 of the *Primary Forest Products Marketing Act* ("the Act"). By consent of the parties, it was agreed that the Board would deal first with the clarification of the term "pulpwood" and then with the issue of whether a bargaining situation exists, if necessary.
>
> By decision dated March 23, 1998, the Board found that the term "pulpwood", as found in the 1981 Certificate of Registration, included chips. This decision was subsequently appealed to the Supreme Court of Nova Scotia and to the Court of Appeal and by decisions dated December 19, 1998 and February 2, 2000, respectively, the Board's decision was upheld. In addition, an application for leave to appeal to the Supreme Court of Canada from the Court of Appeal decision

> was denied.
>
> Prior to the Court of Appeal decision, the NSWOOA again wrote to the Board requesting that it determine whether a bargaining situation exists. The Board adjourned hearing this issue until after the Court of Appeal decision was rendered.

[6] The Court of Appeal decision referred to provides a useful review of the history and purpose of the legislation which is the subject of these proceedings, namely, the *Primary Forest Products Marketing Act*, formerly known as the *Pulpwood Marketing Act*. The decision can be read at (2000)182 N.S.R. (2d) 288 and it need not be reproduced at length here. I do refer, however, to paragraph 18 of that decision which highlights the provision in the legislation that permits the Association, being registered as a bargaining agent, to make an application to the Board for a declaration that a bargaining situation exists between itself and another person or persons. The Board is empowered to make such a declaration following which collective bargaining must begin between the parties.

[7] The unique workings of the Act were succinctly described by Chief Justice MacKeigan in *N.S. Forest Industries v. N.S. Pulpwood Marketing Board* (1975) 12 N.S.R. (2d) 91. After observing that certain collective bargaining principles have been imported into the Act, he went on to denote how the Act differs from the Trade Union Act in terms of the effect of a Certificate of Registration. He said (at p. 127):

> The registration of an association, unlike the certification of a union under the *Trade Union Act* (Statutes of 1972, c. 19), does not automatically compel collective bargaining to begin between the association and the buyer or buyers with which it proposes to bargain. The association has to obtain, under s. 9, a declaration from the Board that "a bargaining situation exists [between] itself and another person or persons or another bargaining agent". Registration merely establishes the applicant as a bargaining agent at large for its group of producers but with no specific bargaining rights.

[8] As recited earlier, the Association made an application for such a declaration back in 1996 following Kimberly-Clark's unilateral decision to cease purchasing pulpwood from the Association members in favour of using pulpwood chips as the raw material for production at its mill. The next three years or so were taken up in litigating the preliminary question of whether the term "pulpwood" as contained in the Certificate of Registration included pulpwood chips. With the determination of that question having been finalized at the Court of Appeal level, the Association's application for a

declaration that a bargaining situation exists between it and Kimberly-Clark went forward and was heard by the Board over a six day period during November and December of 2000.

THE BOARD'S DECISION

[9] The Board framed the question to be decided by it as follows: Does a bargaining situation exist between Kimberly-Clark and the Association pursuant to s. 15 of the Act? The Board answered this question in the negative and then proceeded to outline the reasons for its decision.

[10] After reciting sections 2 and 15 of the Act, and Chief Justice MacKeigan's comments above quoted on the effect of registration as a bargaining agent, the Board found that in order for a bargaining situation to exist, three specific factors must be present which the applicant bears the burden of establishing. Those factors were identified as follows:

> (1) an available market - a present (not potential) market for the product for which the seller is certified to bargain;
>
> (2) a willing seller - an organization certified to bargain for the sale of a product that it is capable of producing; and
>
> (3) a willing buyer - a person or organization wanting to purchase a product for which the bargaining agent has been certified to bargain.

[11] The Board further ruled that all three of these factors must be present in order to establish that a bargaining situation exists. Based on the evidence presented before it, the Board ruled that none of the three criteria were met by the Association.

[12] The fundamental finding of the Board was its acceptance of what it referred to as uncontradicted testimony that Kimberly-Clark is no longer an available market for pulpwood chips. Rather, it is an available market for sawmill chips in respect of which the Association is not certified to bargain under its Certificate of Registration. The Board accepted Kimberly-Clark's position that it did not have jurisdiction to require Kimberly-Clark to purchase a product for which it has no use. The Board opined that its

mandate is not to create markets, but rather to assist woodlot owners to sell their product at a fair price in an existing market.

[13] For those same reasons, the Board further concluded that there is no willing buyer for the product for which the bargaining agent has been certified to bargain. It again observed that Kimberly-Clark is no longer a buyer of pulpwood chips but rather is a buyer only of sawmill chips.

[14] In dealing with the third factor, the Board found that there was insufficient evidence placed before it to draw a reasonable conclusion that the seller was capable of producing pulpwood chips at the present time. It was pulpwood chips, of course, in respect of which the Association had given notice to Kimberly-Clark as an issue it wished to negotiate.

[15] Having found that the requisite criteria had not been proven, the Board concluded that it was unable, under s. 15 of the Act, to declare that a bargaining situation exists between the Association and Kimberly-Clark.

POSITIONS OF THE PARTIES

[16] There is no question but that the issue decided by the Board in this case is one that falls squarely within its core jurisdiction. Nor has any argument been made out that the Board breached the rules of natural justice in any fashion in reaching its decision. Rather, the Board's decision is challenged by the Association on the basis that it committed reviewable errors of law.

[17] The main thrust of the argument put forward by counsel for the Association is that the Board focused on the wrong question and erred in determining the appropriate factors to be considered in deciding whether a bargaining situation exists. It is argued that the essential question that the Board should have addressed is whether or not the Association can produce and sell "pulpwood" to Kimberly-Clark. The Association says that it can and that the form of the wood to be supplied is a subject for negotiation. The

Association essentially asked the Board, and now asks this court on judicial review, to get the Association to the bargaining table to negotiate the quotas and form of wood to be supplied as raw material to the Kimberly-Clark mill. It is emphasized that the Association has been certified as bargaining agent for the sale of pulpwood as the basic product and that the form of the wood to be supplied is a matter for negotiation. The Association acknowledges that the form of the product has changed (from pulpwood to chips) but argues that the raw material to be supplied remains the same, i.e., pulpwood.

[18] Both counsel agree that the distinction between pulpwood chips (which has been found to be included in the Association's Certificate of Registration as bargaining agent) and sawmill chips (in respect of which the Association is not certified as bargaining agent) emanates from the source where the product is produced. Pulpwood chips are those produced by a chipper at a place other than a sawmill. Sawmill chips, to affirm the obvious, are produced by sawmillers and so the distinction goes to their origin. Counsel for the Association points out, however, that all the raw material ends up in the Kimberly-Clark mill for purposes of making kraft pulp.

[19] Counsel for the Association also takes issue with the Board's application of the requirement of an available market as a criterion for finding that a bargaining situation exists. It has been argued that even if this is an appropriate criterion to be considered, it should be applied in the context of looking at the product that Kimberly-Clark is using (i.e., pulpwood) rather than one that Kimberly-Clark is willing to buy.

[20] The Association also takes issue with the Board's treatment of the other two criteria which it applied in answering the question before it. First, the question is asked rhetorically how there could ever be said to be a willing buyer when Kimberly-Clark simply doesn't want to buy any raw material from the Association, a business decision which thwarts the intent of the legislation. Secondly, it is argued that the requirement of sufficient evidence that the Association was capable of producing pulpwood chips to satisfy the willing buyer criterion is contrary to the reference in its earlier decision in

1998 that the form of the wood to be supplied is a matter for negotiation.

[21] All of these arguments are lodged in support of the Association's overall position that Kimberly-Clark has an obligation to purchase from the Association a portion of the raw material used in the making of pulp, the quantities, quality and form of which ought to be determined at the bargaining table.

[22] All of these arguments are refuted by Kimberly-Clark whose counsel reviewed at some length the history of the subject legislation and the dramatic changes in the industry that have taken place in recent years both in terms of technology and market conditions. Those changes have led to business decisions by Kimberly-Clark, first to cease purchasing roundwood pulp in favour of pulpwood chips, and then ceasing to purchase the latter in favour of sawmill chips. In the result, Kimberly-Clark has not purchased "pulpwood" as defined in the Act from anyone since 1995. It is pointed out that the statutory definition of "pulpwood" found in the 1976 amendments (which specifically excludes sawmill chips) has been confirmed by both this court and the Nova Scotia Court of Appeal as having application to the Association's Certificate of Registration.

[23] The argument follows that since Kimberly-Clark no longer buys pulpwood in any form, and since the Association is not certified to bargain for the sale of sawmill chips, there is no available market in existence upon which a bargaining relationship could be founded between these parties. It is argued that the Board, with its specialized knowledge of the industry, well understood that and properly concluded that no bargaining situation could be found to exist between the parties. Hence, the argument concludes, there is no basis upon which this court can interfere with the Board's decision, whether the appropriate standard of review be that of reasonableness *simpliciter* or patently unreasonable.

LEGAL ANALYSIS AND CONCLUSIONS

[24] The first step to be taken in a judicial review analysis is the determination of the appropriate standard of review. There was not a great deal of argument on this subject before me, undoubtedly in light of the earlier decision of Justice MacAdam of this court which can be read at (1999) 175 N.S.R. (2d) 34. The narrow issue before the court on judicial review on that occasion, as earlier referred to, was whether the Board had erred in finding that the term “pulpwood” as used in the Association’s Certificate of Registration included pulpwood chips. In dealing with that issue, Justice MacAdam found that the appropriate standard of review was that of reasonableness *simpliciter*, after applying the pragmatic and functional analysis now developed in the Supreme Court of Canada jurisprudence. The Nova Scotia Court of Appeal found it unnecessary to deal with that issue to dispose of the question before it, although it did observe that the Board is probably one to which deference is owed in the interpretation of its own statute and Certificate of Registration.

[25] The nature of the question raised under the pertinent legislative provisions in the case before me is not of such a different character as to warrant the application of a different standard of review. In the interest of judicial comity, I likewise find that the appropriate standard of review here is one of reasonableness *simpliciter*.

[26] What constitutes an unreasonable decision was recently described by Justice Iacobucci in *Canada (Director of Investigation and Research) v. Southam Inc.* [1997] 1 S.C.R. 748 as follows (at p. 776):

> An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it.

[27] Justice Iacobucci went on later in that decision to elaborate on the nature of the reasonableness *simpliciter* standard and how it is to be applied. He stated (at p. 778):

> The standard of reasonableness *simpliciter* is also closely akin to the standard

> that this Court has said should be applied in reviewing findings of fact by trial judges. In *Stein v. "Kathy K" (The Ship)*, [1976] 2 S.C.R. 802, at p. 806, Ritchie J. described the standard in the following terms:
>
> ... the accepted approach of a court of appeal is to test the findings [of fact] made at trial on the basis of whether or not they were clearly wrong rather than whether they accorded with that court's view of the balance of probability. [Emphasis added]
>
> Even as a matter of semantics, the closeness of the "clearly wrong" test to the standard of reasonableness *simpliciter* is obvious. It is true that many things are wrong that are not unreasonable; but when "clearly" is added to "wrong", the meaning is brought much nearer to that of "unreasonable". Consequently, the clearly wrong test represents a striking out from the correctness test in the direction of deference. But the clearly wrong test does not go so far as the standard of patent unreasonableness. For if many things are wrong that are not unreasonable, then many things are clearly wrong that are not patently unreasonable (on the assumption that "clearly" and "patently" are close synonyms). It follows, then, that the clearly wrong test, like the standard of reasonableness *simpliciter*, falls on the *continuum* between correctness and the standard of patent unreasonableness. Because the clearly wrong test is familiar to Canadian judges, it may serve as a guide to them in applying the standard of reasonableness *simpliciter*.

[28] Can the decision reached by the Board in the present case be said to have been clearly wrong or one that is not supported by any reasons that can stand up to a probing examination? My conclusion is that it cannot be so described and that the Board has not committed any reviewable error of law that would justify the intervention of this court. The Board made a number of findings of fact which I have recited earlier in this decision by way of background. Its core findings of fact are that Kimberly-Clark now buys only sawmill chips and is no longer a buyer of pulpwood chips. It matters not whether the Board dealt with the application as seeking a declaration that a bargaining situation exists in respect of pulpwood in general or pulpwood chips in particular. The essential finding of fact was that Kimberly-Clark no longer purchases pulpwood in any form, according to the statutory definition of that term which the courts have affirmed as having application to the Association's Certificate of Registration. While there is an available market through Kimberly-Clark for sawmill chips, the Association is not certified as bargaining agent to bargain for the sale of sawmill chips on behalf of its members. The Board reasonably concluded that its mandate is not to create markets, but rather to assist woodlot owners to sell their product at a fair price in an existing

market.

[29] The Board recognized in a reasoned fashion that in order for a bargaining situation to exist, there must first exist an available market. In order for an available market to exist, there must implicitly be a willing buyer and a willing seller. The Board found that there is no willing buyer for the product for which the Association has been certified to bargain for the same reason that there is no available market, namely, because Kimberly-Clark is no longer a buyer of pulpwood chips (or pulpwood in any form under its statutory definition) but rather is a buyer now only of sawmill chips. Again, the Certificate of Registration under which the Association operates in this instance does not authorize it to bargain for the sale of sawmill chips to Kimberly-Clark.

[30] As a final point, the Board was not satisfied on the evidence that there existed a willing seller, which it defined to be an organization certified to bargain for the sale of a product that it is capable of producing. The Board concluded that there was insufficient evidence placed before it to draw a reasonable conclusion that the seller Association was capable of producing pulpwood chips at the time. The Board referenced pulpwood chips presumably because that was an item for bargaining in respect of which the Association had given notice to Kimberly-Clark at the inception of this process.

[31] This conclusion is argued by counsel for the Association to be contrary to the comment contained in its 1998 decision that the form of the wood and other specifications, as well as the amount of product and price, were matters to be covered by negotiation. These comments, however, must be read in the context of the issues before the Board which it was addressing at the time. Even if they can be said to be incongruous, they provide no basis for the court's interference with the Board's decision given its other key findings and conclusions.

[32] Times change. Kimberly-Clark decided in 1995 that it no longer had a need for the product produced by the Association and for which it was certified to bargain with

Kimberly-Clark under its Certificate of Registration. Kimberly-Clark subsequently became an available market for sawmill chips but that is a market outside the Association's Certificate of Registration for bargaining purposes. The Board ultimately accepted Kimberly-Clark's position that it does not have the jurisdiction to require the company to purchase a product for which it has no use. Having found that the Association had failed to establish the existence of an available market and a willing buyer and seller, the Board concluded that it was unable, under s. 15 of the Act, to declare that a bargaining situation exists between the Association and Kimberly-Clark.

[33] Whether this court agrees or disagrees with the Board's decision has no bearing on the outcome of this application. The Association as applicant must demonstrate that the Board's decision is unreasonable in the sense of being clearly wrong through a defect either in the evidentiary foundation itself or in the logical process by which conclusions have been drawn from it. I have examined the reasons given by the Board in support of its decision and am unable to find that it committed any reviewable error of law that would justify the intervention of this court.

[34] The Association's application is accordingly dismissed with costs payable to Kimberly-Clark which I hereby fix at the sum of $1,000 plus taxable disbursements.

J.