SUPREME COURT OF NOVA SCOTIA

Citation: *3266304 Nova Scotia Limited v. Nova Scotia (Minister of the Environment)*, 2019 NSSC 148

Date: 20190513
Docket: Ann No. 478608
Registry: Annapolis Royal

Between:

3266304 Nova Scotia Limited

Appellant

v.

Minister of the Environment Representing Her Majesty the Queen in Right of the Province of Nova Scotia

Respondent

Decision

Judge: The Honourable Justice Gerald R.P. Moir

Heard: January 23, 2019, in Digby, Nova Scotia

Decided: May 13, 2019

Counsel: Gregory D. Barro Q.C., for the Appellant
Sheldon Choo and Duane Eddy, for the Respondent

Moir, J.:

Introduction

[1] On June 12, 2018 the Minister of the Environment issued an order against 3266304 Nova Scotia Limited to immediately cease operating a quarry at Brooklyn Road in Annapolis County. The order also prohibited "any blasting, excavation, crushing, processing or selling of aggregate". The order gave the numbered company sixty days to apply for permission either to operate a quarry or to rehabilitate the site.

[2] The numbered company appealed the order under s.138(1) of the *Environment Act*. The grounds of appeal are summarized by the company in its brief as follows:

> 1. The Minister did not have reasonable and probable grounds to determine the appellant is operating a quarry at the site and, as such, the Appellant is not in violation of section 50(2) of the *Environment Act*.
> 2. The Minister failed to comply with the requirements of Natural Justice in two ways, by failing to give notice to the Appellant of the complaint and an opportunity to respond, and by failing to provide reasons for the decision.
> 3. The Minister should not have prohibited the sale of aggregate already removed from the ground.

Evidence Before the Minister

[3] On the last day of May 2017, two inspectors for the Department of the Environment traveled to 415 Brooklyn Road, a track of land in Annapolis County belonging to the numbered company. The company had proposed to run a quarry there, and the Department received a complaint about blasting although permission had not been given.

[4] At the site, the inspectors met an employee of the numbered company, who advised that blasting was about to begin in order to produce aggregate in performance of a contract with the Department of Transportation. Production of aggregate for public purposes is exempt from some requirements of the *Environment Act*. Further on, the inspectors encountered employees of Archibald Drilling and Blasting Ltd. who had drilled holes and marked them off across a third of the length and width of a clearing.

[5] The next day one of the inspectors issued a directive under s. 122(a)(1) of the *Environment Act* and caused it to be served on the recognized agent of the numbered company. The company was required to produce a "written formal agreement" showing "that the operation of the current quarry is utilized for a public purpose by or for the Department of Transportation and Public Works."

[6] Mr. Michael Lowe replied for his company. He wrote, "I am not completing this work for the Nova Scotia Department of Transportation but rather am completing site development for my own purposes." Three days later, blasting began.

[7] Despite Mr. Lowe's statement that blasting was for site development rather than operation of a quarry, the company had prepared an application for approval to operate a quarry at 415 Brooklyn Road. The application was dated May 18, 2017 but it was delivered on June 6, the day the blasting began.

[8] A detailed submission was included in the application. It said that the company sought an Industrial Approval. "The proposed quarry will be used to manufacture construction aggregates." It would "supply materials for [government] contracts along with private sales."

[9] About the same time as the Industrial Approval application was received, Annapolis County issued a building permit for a three-bedroom dwelling at 415 Brooklyn Road. The inspector recorded, "…it appears the activity at the site is related to the development of the road/driveway to the proposed residential building…".

[10] If it was unclear before, it became clear on June 9, 2017 that the company proposed to construct a dwelling on a cleared and blasted part of its 415 Brooklyn Road property and to operate a quarry at another clearing further inward. On that day the inspectors visited the site. The part intended for a quarry was being cleared of trees and grubbed.

[11] The department carried out regular inspections from July 2017 until October 2017. Officials met regularly with Mr. Lowe and corresponded regularly with the recognized agent. They learned about Mr. Lowe's plan to improve the roadway, including to rock in its ditches. However, in the course of the meetings and correspondence the department made it clear what the company needed to do to complete the application for Industrial Approval of the proposed quarry.

[12] At a meeting with Mr. Lowe late in November 2017, one of the officials from the Department of the Environment explained what further information the department required. Notes include, "Mike said he may just operate a < 2 hectare as he identified areas where he can excavate and crush aggregate without blasting". He was concerned about the cost of acquiring the required information. Restricting his company to an under two-hectare pit would come below a threshold for departmental authority.

[13] The Department also had requirements for insurance and a new survey. Mr. Lowe told the officials he found his company was being treated differently than other quarry operators. He suspected pressure from above. One of the officials said her office was operating entirely on its own, as it should.

[14] On December 11, 2017 the Department wrote to the company to advise that the application to operate a quarry was rejected. The letter provided extensive reasons under the titles "Financial Security", "Public Consultation", "Survey Plan", and "Hydrogeological assessment". No proof of financial security had been submitted. The company had attempted to rely on an outdated public consultation. The survey did not show the new roadway. A hydrogeological assessment was insufficient.

[15] Almost six months later, activity at 415 Brooklyn Road again came to the attention of the Department of the Environment. Acting on information from the Department of Transportation, Inspector Brent Jackson went to the property. He found an excavator, a loader, a crusher, and a conveyer in action producing crushed stone.

[16] Mr. Jackson headed towards the crushing operation. He questioned a worker, including "I asked if they were crushing blasted rock and he said no it is loose rock that they are excavating."

[17] Mr. Jackson continued on his way, but the worker approached him again and said that he needed safety gear. He returned to his vehicle at the foot of the driveway and put on a hard hat and a safety vest.

[18] Mr. Lowe arrived. He was angry. He challenged Mr. Jackson's right to come on the property. After a lengthy argument, Mr. Jackson decided to leave. His photographs show loose rocks being gathered and fed into the crusher and crushed stone being conveyed into a large, high stockpile.

[19] Four days later, Mr. Jackson went to the site in the company of an RCMP officer. The crusher and other heavy equipment were in operation. Mr. Jackson photographed many loose, sharply edged stones, and a detonation cable, or part of one, with a label indicating it is, or was, forty feet long.

[20] During the visits, Mr. Jackson took GPS readings along the road, at a clearing where a scale had been installed, and in the area of excavation, crushing, and stockpiling. With these readings and Google Earth, Mr. Jackson estimated the area of the operation at 2.07 hectares. (How seven one hundreds fits with "estimate" is not explained.)

[21] The foregoing summarizes the evidence that was placed before the Honourable Iain Rankin, the Minister of Environment, on June 8, 2018 in the form of inspectors' notes, correspondence, and photographs.

Briefing Note

[22] Along with the evidence and a recommendation for an order under s. 125 of the *Environment Act*, staff gave the Minister a briefing note. The appellant criticizes the note for selecting evidence indicative of a violation and leaving out evidence of alternative explanations. The briefing note reads as follows:

> CURRENT SITUATION:
>
> - 3266304 Nova Scotia Limited is currently in violation of Section 50(2) of the Environment Act for commencing or continuing an activity designated by the regulation as requiring an approval. (A quarry)
>
> BACKGROUND
>
> - May 7, 2013, an application for approval to operate a quarry at 415 Brooklyn Road was submitted to Nova Scotia Environment (NSE) by 3266304 Nova Scotia Limited. On August 6, 2015, the application was rejected as incomplete
> - May 31, 2013, NSE Inspector inspected site at 415 Brooklyn Road based on a complaint regarding activity at the property. Based on conversations with workers at the site from D.J. Lowe Paving and Construction and Archibald Drilling & Blasting Ltd. and visual observation of the activities taking place, 3266304 Nova Scotia Limited was preparing the site to blast.
> - June 1, 2017, a Building/Development permit was approved by Municipality of the County of Annapolis for a dwelling on the property at 415 Brooklyn Road. The site plan indicated the dwelling would be in the same area of the proposed quarry foot print.

- June 1, 2017, an On-site sewage disposal system notification was received by NSE for the property at 415 Brooklyn Road. The site plan indicated that the dwelling would be in the same area of the proposed quarry foot print.
- June 2, 2017, Letter to NSE from 3266304 Nova Scotia Limited received indicating that blasting would be carried out and that it was for site development. As per the pit and quarry guidelines, an approval is not required when (c) *the primary purpose of aggregate removal is for development and not for aggregate production.*
- June 5, 2017, blast occurred at proposed site of quarry/site development.
- June 6, 2017, a second application for approval to operate a quarry at 415 Brooklyn Road was submitted to NSE by 3266304 Nova Scotia Limited.
- On January 26, 2018, the application was rejected as incomplete.
- May 4, 2018, NSE met with a consultant working on preparing information for another application to operate a quarry at 415 Brooklyn Road on behalf of 3266304 Nova Scotia Limited. Conversations are ongoing with NSE and consultant regarding the submission requirements for an application.
- May 15, 2018, email sent by D.J. Lowe (1980) Ltd. to Transportation and Infrastructure Renewal claiming that they are operating a <2 hectare pit at the Brooklyn Road property and that aggregate is for sale. As per the pit and quarry guidelines, an approval is not required for (a) *pit and quarry operations where the aggregate is utilized for public purposes by or for the Department of Transportation and Public Works.*
- May 28, 2018, NSE inspector inspects property at 415 Brooklyn Road. A scale and scale house are partially installed on the property. Large stockpiles of aggregate along with crushing equipment, a loader, and excavators are on site. Aggregate is being extracted from the area of the proposed quarry footprint (application submitted June 6, 2017) where the blast occurred. A loader is observed scooping coarse aggregate from a pile which contains used blasting cords and loads it into a crusher. A blasting cord is photographed and is labelled as being 12 meters. This is the same depth that the proposed quarry cut was planned in the application submitted on June 6, 2017. The cut is also located at the same approximate elevation as was proposed in the application submitted on June 6, 2017.
- There was no sign that a dwelling or an on-site sewage disposal system was being installed at the property during the site inspection on May 28, 2018.
- May 29, 2018, NSE inspector calculates approximate areas of interest based on GPS and physical measurements taken on the property at 415 Brooklyn Road. The area of the working face, stockpiled aggregate, and equipment measures 8,960 meters square. The area of the roadway

> (without ditches) measures 11,200 meters square. The scale area measures 500 meters square. The total approximate area is measured to be 20,660 meters square (2.07 hectares).

Order

[23] Minister Rankin signed an order on June 12, 2018. It referred to the applicant's operation at 415 Brooklyn Road as a quarry, not a pit. It required the company to "immediately close the operation of the quarry at the site." "This includes, but is not limited to, any blasting, excavation, crushing, processing, or selling of aggregate or other materials."

[24] The order went on to require the company to submit an application for a quarry or for site rehabilitation. The application was to be submitted within sixty days.

Legislation

[25] The legislation directly applicable to this appeal is the *Environment Act*, S.N.S. 1994-95, c.1, the *Activities Designation Regulations*, N.S. Reg. 47/1995, and the *Approval and Notification Procedures Regulations,* N.S. Reg. 17/2013.

[26] Section 50 of the *Act* prohibits commencement or continuation, without approval, of activities that are designated by regulation as requiring approval. Subsection 66(1) authorizes the Governor in Council to make regulations "(b) designating activities or classes of activities in respect of which an approval is required…".

[27] Section 13 of the *Activities Designation Regulations* designates "construction, operation or reclamation" of various things, including:

> (e) a pit that is larger than 2 ha where a ground disturbance or excavation is made for the purpose of removing aggregate without the use of explosives;
>
> (f) a quarry where a ground disturbance or excavation is made for the purpose of removing aggregate with the use of explosives;

By operation of subsection 3(1) of the regulations, these activities are designated as requiring "an approval from the Minister".

[28] A document titled "Pit and Quarry Guidelines" signed by the Deputy Minister of the Environment in 1999 defines "pit" as "an excavation made for the purpose of removing consolidated rock from the environment without the use of

[an] explosive." And, it defines "quarry" as "an excavation requiring the use of explosives, made for the purpose of removing consolidated rock from the environment." There are many provisions in the *Act*, and some in the *Approval and Notification Procedures Regulations*, that refer to guidelines, but I am unable to find anything that gives this document the force of law.

[29] Subsection 125(1) of the *Act* applies when "the Minister believes on reasonable and probable grounds that a person has contravened or will contravene this *Act".* In such a case, the Minister may order the person to do any number of things, including "(a) cease the specified activity", "(f) undertake remedial action to control, reduce, eliminate or mitigate an adverse effect" and, "(n) restrict the sale…of a…product or other matter permanently or for such period of time as deemed necessary". Section 132 requires compliance with the order and it prescribes various enforcements.

[30] A person who is the subject of a Minister's order may appeal to this court under s.138(1). The appeal may be "on a question of law or on a question of fact, or on a question of law and fact". The subsection provides further "the decision of the court is final and binding on the Minister and the appellant". See also, s.138(6).

Issues

[31] The appellant states the issues as follows:

> Ground of Appeal #1 – did the Minister have reasonable and probable grounds to conclude that the Appellant is operating a quarry?
>
> Ground of Appeal #2 – Did the Minister violate the [principles] of Natural Justice?
>
> Ground of Appeal #3 – Did the Minister properly order that the aggregate already removed from the site could not be sold?

The first issue leads to an inquiry into either the reasonableness or the correctness of the decision, the standard being determined under *Dunsmuir v. New Brunswick*, 2008 SCC 9. The second concerns procedural fairness, which involves an inquiry into the level of fairness owed by the decision maker. The third appears to call jurisdiction into question.

Reasonable Grounds

[32] I must review the Minister of the Environment's belief "on reasonable and probable grounds" that the appellant contravened the *Environment Act* within the

meaning of s.125(1) by operating a quarry within the meaning of s.13(f). The standard of review I am to apply, the differential standard of reasonableness or the strict standard of correctness, depends firstly on jurisprudence on that question for this legislation: *Dunsmuir* para. 62.

[33] The late Justice Murphy reviewed an order under s.125(1) in *IMP Group International v. Nova Scotia*, 2014 NSSC 191. He concluded that the differential standard applies (para. 19 to 25). The order in that case was for decontamination and the issue was expressed differentially: "Are the terms of the Order unreasonable?" para. 26. Justice Gabriel followed *IMP* in *3076525 Nova Scotia Ltd. v. Nova Scotia*, 2017 NSSC 67 at para. 80.

[34] I am mindful of the meaning of reasonableness in this context as discussed in *Dunsmuir* at para 47, *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at par. 11 to 16, and *Egg Films Inc. v. Nova Scotia (Labour Board)*, 2014 NSCA 33 at para. 26.

[35] The appellant submits "The record supports the following findings" regarding events in 2017:

> 1. The Appellant's initial plans to develop the site required improvements to the road. The road would be needed to permit the logging and a residential home, consistent with the development permit and a permit for an onsite septic system which were obtained. In order to carry out the site development and road improvements, it was necessary to conduct blasting, which took place on June 5th, 2017. The numerous inspections by the Department subsequent to the blasting confirm that the aggregate removed as a result of the blasting was used to improve the road.
> 2. At the same time, the Appellant was also applying for a quarry permit at the site. The site is approximately 89.73 acres, according to Property Online (Record – page 22) and compatible for multiple uses.
> 3. Subsequent to the application for a quarry, based upon the response from the Minister, it became clear to the Appellant that it would require considerable further expense to obtain the supplemental information the Minister would require before the application could even be considered.
> 4. The Appellant decided that while he was going through the process of applying for a quarry, he would operate a pit less than 2ha, which would not require the approval of the Minister.
> 5. The Department was aware of the plans of the Appellant to operate a pit and had no concerns with the Appellant doing so. The Department closed its file that was opened with the initial citizen complaint.

In light of those findings, the appellant submits that the primary purpose of removing aggregate in 2018 was "for development and not for aggregate production".

[36] A reasonable assessment of the evidence did not compel the Minister of the Environment to make these findings. The evidence was clear that Mr. Lowe planned blasting in May of 2017. Three explanations were offered on three different occasions in this period.

[37] First, the Department was advised that the appellant planned to blast aggregate to supply the Department of Transportation. When proof was demanded, the appellant advised the blasting was not for suppling the Department of Transportation. It was for "completing site development for my own purposes". Thirdly, an application for approval of a quarry was delivered on the very day that blasting began.

[38] Findings that the appellant had operated a quarry and that the product was not exclusively for site development were well within the range of reasonable outcomes based on the evidence. Put another way, it is well within the realm of reason to conclude from the evidence that the first two explanations were given to mislead the Department.

[39] As discussed, Mr. Lowe suggested he might operate a pit under two hectares when he met with officials at the end of 2017. The appellant argues that the evidence from 2018 is consistent with operation of a pit rather than a quarry. Central to this submission is that the loose stones that were being crushed were not the result of the 2017 blasting.

[40] If the large amount of loose stones was not the result of blasting, nothing in the evidence explains their source. If the large stockpiles of crushed stone did not result from blasted stones, nothing in the evidence explains the source of the crushed stone. On the other hand, the so-called pit is in the same place where the unauthorized blasting had been done.

[41] The appellant relies on *Twin Mountain Construction Limited v. R.,* 2004 NSSC 101 and *R. v. AJL Janssen Landscaping Ltd.*, 2016 ONCJ 496, cases in which the subjective intent of the owner or contractor charged with illegally harvesting aggregate determined whether it was removed for site development or to produce aggregate. Those cases do not support that the determination is made on the

owner's say so. In the case at hand, Mr. Lowe had produced differing documents at different times inconsistently.

[42] The evidence allows for a finding that the appellant blasted a quarry in 2017 and a finding that the appellant was caught processing the product of the quarry in 2018. These findings are implicit in the order, read in the context supplied by the record. They may, or may not, be correct. However, they are reasonable.

Procedural Fairness

[43] The appellant makes two arguments on this subject. Firstly:

> The first is to be notified of the complaint and given the opportunity to submit evidence before a decision is made. When a complaint was made in 2017, a process was followed. The Appellant had an opportunity to explain what he was doing, the Department investigated, and the file was closed. This did not happen in 2018, even though the same activities were taking place at the site as in 2017 (with the notable exception of no blasting). The Briefing note does not mention that the investigation in 2017 was closed with no action taken. The Briefing note does not mention the information gathered by the Department that the excavation was taking place without blasting. These issues could have been clarified by the Appellant if it was contacted before the Order was made.

And, secondly:

> The second area is the lack of reasons supplied when the decision was made. The Ministerial Order provided no clarification as to why the Appellant was found to be operating a quarry. As the classification of a quarry requires blasting to occur, one would reasonable suspect that blasting must have occurred in 2018. A review of the record shows no indication of blasting taking place in 2018 and the actual report only refers to blasting in 2017, but that report was not provided to the Appellant at the time the Order was made.

[44] The content of the duty of procedural fairness owed by the Minister to the appellant cannot be determined by separating the facts of 2017 from those of 2018. The legislation does not call for judicial resolution of distinct complaints. It requires compliance and authorizes enforcement.

[45] The essential facts underlying the Minister's order of June 12, 2018 are these:

1. The Department caught the appellant unlawfully blasting a quarry.
2. The quarrying was stopped by a lawful directive.
3. The appellant applied for an approval.

4. The Department explained what was required and gave the appellant opportunities to present the required information.
5. The Department rejected the application and gave detailed reasons for doing so.
6. Less that six months later, the Department found the appellant crushing and stockpiling loose rocks from the blasted area.

With the legislation and the essential facts in mind, what was the content of the duty of procedural fairness owed by the Minister when he considered the order recommended in the spring of 2018?

[46] It is well established that there is a duty of procedural fairness on every public authority making an administrative decision that is not legislative and that affects the rights, privileges, or interests of an individual. See the references to decisions of the Supreme Court of Canada in *Sipekne'katik v. Nova Scotia (Environment)* 2017 NSSC 23 at para. 36.

[47] As Justice Fichaud said in *Halifax v. Tarrant*, 2019 NSCA 27 at para. 24, the leading authority on the approach to procedural fairness in Nova Scotia is *Kelly v. Nova Scotia Police Commission*, 2006 NSCA 27. The review is in two steps, one to address the content of the decision maker's duty of fairness and the other to decide whether the decision maker breached the duty: para. 20 of *Kelly*. At paragraph 21 Justice Cromwell wrote:

> The first step – determining the content of the tribunal's duty of fairness - must pay careful attention to the context of the particular proceeding and show appropriate deference to the tribunal's discretion to set up its own procedures. The second step – assessing whether the Board lived up to its duty – assesses whether the tribunal met the standard of fairness defined at the first step. The court is to intervene if of the opinion the tribunal's procedures were unfair. In that sense, the court reviews for correctness. But this review must be conducted in light of the standard established at the first step and not simply by comparing the tribunal's procedure with the court's own views about what an appropriate procedure would have been. Fairness is often in the eye of the beholder and the tribunal's perspective and the whole context of the proceeding should be taken into account. Court procedures are not necessarily the gold standard for this review.

[48] At para. 30 of *Halifax v. Tarrant*, Justice Fichaud refers to "non-exclusive criteria" established by the Supreme Court of Canada to apply on the first step, determination of the content of the duty of fairness:

> (1) The nature of the decision being made and the process followed in making it, (2) the statutory scheme that governs the tribunal, (3) the importance of the decision to those affected, (4) the legitimate expectations of those challenging the decision and (5) the choices of procedure made by the tribunal, particularly when the statute leaves the tribunal with procedural discretion, or when the tribunal has expertise in determining the appropriate procedures.

[49] This has nothing to do with the *Dunsmuir/Newfoundland and Labrador Nurses Union* approach to reviewing substantive decisions. See Justice Denise Boudreau's decision in *Brown v. Nova Scotia (Minister of Environment)*, 2016 NSSC 319 at para. 24 to 26, Justice Hood's decision in *Sipekne'katik v. Nova Scotia (Environment)* 2017 NSSC 23 at para. 40 to 44, and Justice Gabriel's decision in *3076525 Nova Scotia Limited v. Nova Scotia (Minister of the Environment)*, 2017 NSSC 67 at para. 39 to 44. These authorities make it clear that a deferential stance on content of the duty may result from the applicable factors or from an emerging approach which demands flexibility. No deference is appropriate on the second step.

[50] *Nature of the Decision and Process.* As I said, the process followed in 2017 cannot be separated from the events of 2018. The process involved the six essential facts I stated at para. 46: blasting a quarry, stopping it, applying for an approval, numerous opportunities for evidence and submissions, rejection of the application, and processing aggregate from the blasted stone.

[51] The nature of the decision was enforcement. The appellant operated an unlawful quarry by blasting stone. After much process, it tried to harvest the quarried aggregate.

[52] *The Statutory Scheme.* I discussed this in detail at para. 25 to 31. The essential elements for present purposes are restriction of activities that may harm the environment, opportunities to obtain permission for some of these activities, and enforcement. The appellant had failed in the second stage and had resumed operations at the location of the unlawful quarry. The order under review was made in the enforcement stage.

[53] *Importance of the Decision.* The importance to the appellant was in being prevented from processing aggregate from the site of the unlawful quarry, and selling it.

[54] *Legitimate Expectations*. In my assessment, no expectation to harvest the quarry in the guise of a pit could be legitimate after the application for permission

to operate a quarry was refused. (Again, procedural fairness was extended to the appellant when its application was considered and decided.)

[55] *Choice of Procedure*. The Minister had broad discretion throughout. See, *Brown* at para. 40.

[56] With those factors in mind, I turn to the content of the duty owed by the Minister. The Minister was enforcing the statute after dealing with the appellant for a year. Further, the appellant had the opportunity to explain itself when the officer came on the site and witnessed loose rock from the blasted site being processed in large quantities. Instead of receiving any explanation, the officer was accosted and had to return with police assistance to do his job.

[57] At this enforcement stage, after numerous opportunities to be heard, the requirement for procedural fairness was low. It was enough that Department staff be open to dialogue. The opportunity arose to explain how the operation could be seen as a pit rather than resumption of the quarry.

[58] The appellant's complaint that the briefing note does not include anything about its intentions is fully answered in three points. Firstly, the evidence seems clear, and the appellant offered the Department no evidence otherwise: the rocks being crushed came from blasting. By legislative definition, they were rocks from a quarry and not a pit.

[59] Secondly, the evidence seems clear, and the appellant offered the Department no evidence otherwise: the crushed stone was for commercial sale. Furthermore, there is nothing fair about requiring the Department to engage in more process before stopping the appellant's further violations.

Jurisdiction

[60] The Minister clearly had the power to restrict the sale of the unlawful aggregate: s.125(1)(n).

Conclusion

[61] The appeal is dismissed. The parties may address costs by correspondence.

J.