IN THE SUPREME COURT OF NOVA SCOTIA
Citation: DRL Environmental Services v. AGNS, 2004 NSSC 245

Date: (20041126)
Docket: SAM 208903
Registry: Amherst

Between:

DRL Environmental Services, Demolition Resources Limited

Appellant

v.

Attorney General of Nova Scotia

Respondent

Judge:	The Honourable Justice Charles E. Haliburton
Heard:	March 18, 2004, in Amherst, Nova Scotia
Written Decision:	November 26, 2004
Counsel:	Bernard F. Miller, for the Appellant Stephen T. McGrath, for the Respondent

By the Court:

[1] This is an appeal from the decision of the Minister of the Environment and Labour (The Minister) made under the authority of the ***Environment Act*** R.S.N.S., 1994 - 1995 C.1 hereinafter referred to as "The Act".

BACKGROUND FACTS:

[2] At all times relevant to this matter Amherst Sod Limited (Amherst Sod) was the holder of a permit to apply "stabilized sewage" on the Amherst Marsh in Cumberland County. This residue or "sludge" was applied on land used in growing sod. The permit was specific in that it permitted the application of material from "the Greater Moncton Sewage Commission".

[3] In 2001 the appellant, Demolition Resources Limited (DRL) obtained a contract to remove similar sewer sludge material from the Aerotech Industrial Park in Halifax. As a result of an arrangement between Amherst Sod and DRL the former applied to have their permit amended so as to permit the spreading of this material. Approval upon certain conditions was granted and material was spread during the years 2000 and 2001. In July of 2002 DRL applied sewage sludge to the property without prior approval and was charged with a Summary Offence under the ***Environment Act*** as a result. Monitoring of the material appears to have taken place over the entire

period and from time to time adjustments were made to the process in response to the results. The relevant criteria was that the material have a "minimum pH of 12 after two hours of vigorous mixing". Consultants were engaged in this enterprise with the object of improving pH levels as the agreed method of treatment to meet that requirement and to limit the resulting odour.

[4] DRL obtained a further contract for removal of sludge from the Aerotech authority covering the years 2003 and 2004. Accordingly a further approval was requested by Amherst Sod. Such authorization was ultimately obtained on July 3, 2003.

[5] The "record" of the ministry renders it undeniable that the officials of the Department of Environment fully understood that DRL was party to a contract with the Halifax Aerotech Industrial Park to remove sewage sludges from that source and as in the previous two years intended to spread or apply that sludge to the Amherst Marsh under the existing approvals held by Amherst Sod.

[6] By a letter dated July 11, 2003 Carl Ripley, Inspector, on behalf of the Department, confirmed to Robert Arseneau of Amherst Sod that the Department "has no objection to commencing the proposed land application

of these sludges". Referring to "Phase III Aerotec Sludge Disposal Proposed Land Application on Lands of Amherst Sod" at Tab 37 in the List of Documents, there were as in earlier approvals certain stipulations to be met. Those expressed in this letter of approval were that;

1. sludges shall not be stock piled and;
2. The rate of application may not exceed 35 dry tons per hectare.

[7] In fact the spreading of material had commenced on July 7 with the knowledge and acquiescence of departmental officials although without formal approval. Then as we might say in the vernacular, "The (....) hit the fan". Even before the approval was given, complaints and concerns were being expressed by the local community. The concerns expressed were related to odours and contaminated ground water, together with concern about unknown foreign materials, metals or objects finding their way into the sludge and hence being spread on the soil. It was election time in Nova Scotia. Over the next few days a number of politicians and their constituents made their objections known to department officials. In this context on July 16 Mr. Ripley, the inspector filed a Field Inspection Report indicating that the approved spreading was "occurring as scheduled" and that "minimum odour was observed".

[8] Because of a delay caused by an equipment breakdown the spreading of the sludge continued over a longer period of time than had been anticipated and the complaints continued to be lodged with the Premier, the Minister of the Environment and departmental staff. The nature of these complaints and the persons involved is illustrated at Paragraph 12 of the Appellants Factum:

> On July 23, 2003, Brad Skinner, Amherst District Manager of NSDOEL, noted a communication he received from Mr. Ernie Fage, MLA, as follows:
> "Call received: call from Ernie Fage - MLA. Ernie called to say that he was quite upset that the spreading of sludge would take an additional week because one of the DRL Environmental's trucks had broken down. He said he is constantly getting calls complaining about the odour - apparently there was a senior's camping event at the (illegible) Park on Friday July 18th and the odour from the sludge spreading was extremely strong - Mr. Fage said that people were quite upset at the odour - he also received a call from Ben Griffin of the Fort Laurence Heritage Association complaining about the odour. Mr. Fage indicated he was going to call our Minister to ask him to have the spreading stopped as DRL Environmental was being too slow getting the material delivered to Amherst Sod and the odour was too strong."

[9] The permit to spread sludge was suspended on July 25th. Mr. Skinner had been sampling the material and the suspension was due to a laboratory analysis of one of the samples which indicated that the pH level of the material was below that permitted. There followed discussions or negotiations about the source of the sample in question and a proposed

modification in the way in which the material was processed. DRL retained consultants and on July 28th, John C. Lamb, P. Eng. writing on behalf of ABL Environmental Consultants Limited outlined a modified process which would permit DRL to continue with spreading the material under the Amherst Sod License. In addition to describing a revised method of handling the material in transport it proposed sampling the material upon it's arrival at destination and the spreading of additional lime while applying the material to the soil. In order to accommodate the sampling "DRL will advise your department of the timing of this operation to coordinate the sampling and testing efforts". Two days later Mr. Lamb wrote again revising the proposal to add that before departing from the Aerotech site the material would be tested to ensure a pH value greater than 12. The arrangement to sample and test appears to have been altered after communication between the Department and the consultants with the understanding that random tests would be conducted before transportation and that the Department would continue it's testing program.

[10] On August 6th the local manager, Mr. Skinner, put in writing the result of discussions between the Department and ABL Environmental Consultants Limited "who had been hired by DRL Environmental Services". The result

was that “the suspension of the application of stabilized bio-solids from HRM has been lifted”. The Approval was to be upon the same conditions as earlier authorized but with the addition that the July 30th proposal from ABL “must be followed”. It stipulated that the random testing before transportation “must be undertaken at least twice daily by a qualified independent person”. The sludge was to be applied on “sod fields located as far as possible from residences and businesses”. And cautioned that because of the complaints of odour, if the complaints continued “spreading may be revoked”.

[11] Exactly when the lifting of suspension signified by Mr. Skinner’s letter of August 6th was to be effective is a little unclear. Some of the background information relevant to the lifting of suspension was contained in the letter from Strum Engineering, not dated until August 8th. Meanwhile Carl Ripley of the department was communicating by phone with Amherst Sod on August 11th to say that the work could now proceed in accordance with the August 6th letter; but on August 12th he again cautioned Mr. Arseneau that “we still hadn’t received the authorization from Halifax”.

[12] On the 12th of August Brad Skinner of the Department received from Bill Casey M.P. a fax message attaching five letters from four area residents

either congratulating Mr. Casey for taking a stand against the spreading of "human waste" on the marsh, or protesting the odour and environmental degradation of the area by this practice. By the suspension letter dated August 14th Mr. Skinner suspended the Approval of all sewage application to the lands in question. His letter said:

> "As you are most likely aware the department has received several complaints and concerns regarding adverse effects relating to human health and the environment from the application of sewage sludge to your sod fields. Also there is the matter of the default under the Approval which we are dealing with. As a result, pursuant to Section 58(2)(b) of the Environment Act the above noted approval is hereby suspended. The department will be investigating these matters and will be in contact with you as soon as possible with respect to the status of your Approval."

[13] The suspension of the Approval was not appealed by Amherst Sod. It was appealed however, by DRL under section 137 of the act which permits an appeal from a decision of an administrator to the Minister.

[14] The Minister ultimately responded to the appeal on September 19th in the following matter:

> "It is the Department's position that your client, DRL Environmental Services, is not an aggrieved person within the context of section 137 of the ***Environment Act***. Therefore, pursuant to section 137(4) of the Act, I hereby dismiss your appeal. Please note that pursuant to section 138 of the Act, your client may, within 30 days of this letter, appeal this decision of the Supreme Court."

ISSUES:

[15] 1. What is the appropriate standard of review?

2. Is the Appellant a "person aggrieved"?

3. Did the Minister commit an error in failing to overturn the suspension of the approval?

4. Are the administrative fees charged by the Minister valid?

DISCUSSION

[16] The ***Environment Act*** in Part I defines the objects to be pursued by the Minister and the Department under the heading "Purpose of Act". The following sections are relevant in the present context:

> Section 2
>
> The purpose of this act is to support and promote the protection, enhancement and prudent use of the environment, while recognizing the following goals:
>
> > a) maintaining environmental protection as essential to the integrity of ecosystems, human health and the socio-economic well-being of society;
> >
> > e) government having a catalyst role in the areas of environmental education, environmental emergencies, environmental research and the development of the policies standards, objectives and guidelines and other measures to protect the environment.
> >
> > f) encouraging the development and use of environmental technologies, innovations and industries.

[17] The department had granted approval for the spreading of this material upon certain conditions known to all parties. There does seem to be some issue as to whether the approval to proceed, which was authorized in the field, had in fact been confirmed by more senior authorities "in Halifax". It is clear that there is a process of delegation within the department and I take it that when Mr. Brad Skinner wrote that the suspension of the permit had been lifted and that the spreading could recommence, he did so as the agent of, and with the authority of the Minister. When Mr. Skinner, as the delegate of the Minister subsequently suspended the permit again it was done under the authority of Section 58 of the ***Environment Act***. The applicable wording from that section is:

> Section 58(2)
>
> The Minister may
>
> > b) cancel or suspend an approval for breach or default of the approval, or if new or corrected information respecting an adverse effect has been brought to the attention of the Minister.

[18] The clear wording of this section could be said to accord "draconian" powers to the Minister. It makes it clear that "an approval holder" is to be kept on a very short leash.

[19] The activity here being considered required an approval before it was permitted. The significance of the approval is defined by Section 50 of the act:

> Section 50
>
> (1) No person shall knowingly commence or continue any activity designated by the regulation as requiring an approval unless that person holds the appropriate approval.
>
> (2) No person shall commence or continue any activity designated by the regulation as requiring an approval unless that person holds the appropriate approval.

[20] This is an appeal from the decision of the Minister suspending the approval and it is taken under Section 137 of the act:

> Section 137
>
> (1) **A person who is aggrieved** by a decision or order of an administrator or person delegated authority pursuant to section 17 **may appeal** by notice in writing stating concisely the reasons for the appeal **to the Minister**.
>
> Section 138
>
> (1) Subject to subsection (2) a person aggrieved by
>
> > f) a decision of the Minister respecting the cancellation or suspension of a certificate or an approval or
> >
> > g) an order
> >
> > may, within 30 days of the decision or order, appeal on a question of law or on a question of fact, or on a question of law and fact, to a Judge of the Supreme Court, and the decision of

> that court is final and binding on the Minister and the Appellant, and the Minister and the Appellant shall take such action as may be necessary to implement the decision.

STANDARD OF REVIEW:

[21] What is the appropriate standard of review? The Supreme Court of Canada has determined that a court reviewing an administrative decision ought accord a degree of deference to the decision maker which deference will be greater or lesser depending on an interpretation of the legislative intent of the statute, the degree of expertise employed by the decision maker and a number of subsidiary issues. The three standards as presently defined are correctness, reasonableness and patently unreasonable, in that order, with the latter standard most deferential to the decision maker. That is to say where the legislative scheme mandates it, and the administrative decision maker possesses a high level of expertise, then the reviewing court would not interfere, unless it can be shown that the decision which it is sought to overturn was for some articulate reason "patently unreasonable".

[22] On the present application there were, notionally, two decisions to be made by the Minister. The first decision was whether the applicant, DRL was a "person aggrieved". I have concluded that the lowest level of deference applies to that decision and that "correctness" is the test. The relationship

existing between the “person” and decision; the impact of that decision upon the person; the effect of the decision upon contractual obligations which might be affected by the decision are not matters in which the Minister or his professional staff have any apparent expertise or special knowledge.

[23] The more vital question for the Appellant is the decision of the Minister on the substantive issue, that is whether there was reason to cancel the permit. In the context of the ***Environment Act***, I find that totally different considerations apply and the standard of review with respect to that question would be one of “patent unreasonableness”. My comments with respect to this second question of what the Minister will or might do upon dealing with the merits of the appeal is perhaps gratuitous comment on my part since the Minister dismissed the appeal without dealing with the merits and that question is not properly before me. This is a procedural highly technical objection which is raised on behalf of the minister. He declined to deal with the appeal, on the basis that the appellant lacked status. He now argues that there can be no appeal on the substantive issue. While it may be gratuitous, I intend to deal with the contents of the Skinner letter of August 14, 2003 as if that decision had been confirmed by the Minister on the appeal. Fairness,

at this stage, entitles the appellant to have its issue considered.

[24] Perhaps the most oft-quoted case on this point is *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 S.C.R. 982. Bastarashe J. in delivering the decision for the majority referred to the centrality of the "legislative intent of the statute" in considering the appropriate standard.

> "Was the question which the provision raises, one that was intended by the legislators to be left to the exclusive decision of the board?" (*Pasiechnyk v. Saskatchewan* (Workers' Compensation Board), [1977] to S.C.R. 890 at para. 18, *per* Sopinka J.).
>
> Since *U.E.S., Local 298 v. Bibeault,* [1998], 2 S.C.R.1048, this court has determined that **the task of statutory interpretation requires a weighing of several different factors, none of which are alone dispositive, and each of which provides an indication falling on a spectrum of the proper level of deference to be shown the decision in question. This has been dubbed the "pragmatic and functual" approach.**"

[25] Iacobucci J. speaking for the court in *Canada (Director of Investigation and Research) v. Southam Inc.,* [1997] 1 S.C.R. 748 (para. 54) accorded a high level of deference to the competition tribunal but his comments include the following:

> "other considerations counsel a more exacting form of review: the existence of an unfettered statutory right of appeal from the decisions of the tribunal and the presence of Judges on the tribunal . . .

> . . . An unreasonable decision is one that, in the main, is **not supported by any reasons that can stand up to a somewhat probing examination**.. . .
>
> . . . The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect . . .
>
> . . . 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] to 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. . .
>
> . . . In the final result, the standard of reasonableness simply instructs reviewing Courts to accord considerable weight to the views of tribunals about matters with respect to which they have significant expertise. While a policy of deference to expertise may take the form of a particular standard of review, **at bottom the issue is the weight that should be accorded to expert opinions** . . .
>
> . . . I wish to observe, by way of concluding my discussion of this issue, that **a reviewer, and even one who has embarked upon review on a standard of reasonableness simpliciter, will often be tempted to find some way to intervene when the reviewer him-or-herself would have come to a conclusion opposite to the tribunal's. Appellate courts must resist such temptations** . . ."

[26] A further useful comment can be found in the decision of Iacobucci J. in

Law Society of New Brunswick v. Ryan [2003] 1 S.C.R. 247 (para. 24 - 26):

> ". . . I emphasize that, as presently developed, there are only three standards. Thus a reviewing court must not interfere unless it can explain how the administrative action is incorrect, unreasonable, or patently unreasonable, depending on the appropriate standard."

[27] In *Pushpanathan*, the Supreme Court noted that the factors to be taken into account when determining the standard of review could be divided into four categories: (1) privative clauses; (2) expertise; (3) the purpose of the Act as a whole and the provision in particular; and (4) the "nature of the problem", that is, is it a question of law or fact?

Privative Clause

[28] The presence of a privative clause will heighten the degree of deference to be accorded the administrative decision maker whereas a provision specifically authorizing an appeal to the court would imply less deference need be accorded.

Expertise

[29] In terms of expertise considerable deference would apply where the authority is bestowed on a board constituted of persons presumed to be expert in that particular field. As a general rule, I would accept the proposition advanced on behalf of the Minister in this case that ministerial decisions "are based on a public mandate relating to the administration of their department to determine matters of public interest and to balance

competing public rights. By virtue of their status they are, in effect, experts on public policy. A Minister also has the benefit of specialist advice from within his-or-her department."

[30] In this (ministerial)context an interesting quote has been cited on behalf of the crown, from *Mount Sinai Hospital Centre v. Quebec (Minister of Health and Social Services)* [2001] 2 S.C.R. 280 (para. 58 - 59). In this case it comes from the minority decision:

> **"Decisions of Ministers of the Crown in the exercise of discretionary powers in the administrative context should generally receive the highest standard of deference, namely patent unreasonableness.** This case shows why. The broad regulatory purpose of the ministerial permit is to regulate the provision of health services "in the public interest". This favours a high degree of deference, as does the **expertise of the Minister and his advisors** . . . The exercise of the power turns on the Minister's **appreciation of the public interest**, which is a function of public policy in its fullest sense . . .
>
> . . . Accordingly, the appropriate standard of review in this case is patent unreasonableness."

Purpose of the Act as a Whole, and the Provision in Particular

[31] Quoting once again from *Pushpanathan v. Canada* (para. 36):

> "Where the purposes of the statute and the decision-maker are conceived not primarily in terms of establishing rights as between parties, or as entitlements, but rather as a delicate balance between different constituencies, then the appropriateness of court supervision diminishes . . . some problems require the consideration of numerous interests simultaneously, and the promulgation of solutions which

> concurrently balance benefits and costs for many different parties. Where an administrative structure more closely resembles this model, courts will exercise restraint."

[32] A similar theme was sounded by a Judge of the Alberta Court of Queen's Bench in *Legal Oil and Gas Ltd. V. Alberta (Minister of Environment)* [2000], 265 A.R. 341 (para. 33):

> "As explained earlier, this Act is about protection and remediation based upon policy concerns. The Act requires consideration of many competing interests and involves a variety of non-judicial strategies for resolution of interests. As such, it can safely be concluded that the Legislature would expect the courts to defer to the decision of those charged with effecting the purposes of the Act."

The "Nature of the Problem": A Question of Law or Fact?

[33] We have here a question of mixed law and fact. A degree of deference equivalent to an appeal from a trial decision would be appropriate. The level of expertise and the law or the application thereof by the administrative tribunal will be a factor. Findings of fact, assuming there is a reasonable basis for those findings, will be persuasive.

A Person Aggrieved

[34] The Nova Scotia Court of Appeal had occasion to deal specifically with a question of a "person aggrieved". In *Ogden Martin Systems of Nova Scotia Limited v. Nova Scotia (Minister of the Environment)* [1995], 146 N.S.R.

(2d) 372 (C.A.), that case was apparently similar to the present, in that the commercial interests of the "person aggrieved" were significantly affected by the Minister's decision. To quote some of the words from that decision:

> ". . . given the pivotal effect that the Minister's decision had on the plaintiff's contract . . . given the role played by the plaintiff in the process leading up to the Minister's decision, the plaintiff has a direct interest in the Minister's decision giving it the right to apply for certiorari.
>
> A review of these authorities indicates that the trend of the courts has been to be more generous in according private interest standing to persons to challenge the decisions of the public authorities in court. The approach favours granting standing wherever the relationship between the plaintiff and the challenged action is direct, substantial, immediate, real, more intense or having a nexus with such action, as opposed to being a contingent or indirect connection . . .
>
> Ogden Martin had a contractual relationship which, as a result of the Minister's decision, was bound to completely disappear."

[35] I think the circumstances outlined earlier with respect to the contract for the removal of sludge between DRL and Aerotech Industrial Park, the arrangement to spread that sludge on the fields managed by Amherst Sod, the negotiations with departmental personnel and the communications flowing between the consultants retained by DRL and the department all lead irresistibly to the conclusion that departmental personnel were fully aware that DRL had in past years deposited sludge on these fields and that they sought permission to do so again. This is so notwithstanding the fact

that the application was made by Amherst Sod. It is clear that everybody concerned knew that the actual beneficiary of the extended permit was to be DRL. The evidence is to the effect that they were in effect a "co-venturer" with Amherst Sod and that they had a **direct and vital interest** in the obtaining of the permit.

DID THE MINISTER COMMIT AN ERROR IN FAILING TO OVERTURE THE SUSPENSION OF THE APPROVAL?

[36] With respect to this issue, the Minister takes the position that no decision was made on the merits of the Appeal and therefore there can be no appeal from the decision.

[37] As indicated earlier, I find that argument to be technically correct. It will be more satisfactory, however, to treat the refusal of the Minister to deal with the appeal as if it were a determination confirming the suspension imposed by the letter of August 14th. In accordance with the several cases cited earlier a high degree of deference is to be accorded this decision. Before a reviewing court could properly reverse the decision of the Minister, the court would necessarily determine that the decision was patently unreasonable. In the context of the statute, the record which is before the court and the arguments of counsel, I find it impossible to articulate an explanation as to how the Minister was wrong in doing so. First of all the statute mandates

the protection of the environment summoning a broad range of values from human health to socio-economic well-being, promoting research, establishing standards, and promoting environmental technologies and innovation. It defines "adverse effect" in such a way as to include "reasonable enjoyment of life and property". Complaints from the general public must be considered. As has been argued in this case, it is the Minister's responsibility to balance the interests of various interest groups within the public; to balance the interests of commerce against the simple community interest in clean air, and the possibility of contaminated water or air. He/she must balance the need to "dispose" of various types of waste materials, against the diminished environmental quality of a particular community.

[38] In the realm of environmental protection and the application of environmental rules the granting or withholding of various permits can obviously have serious, sometimes irreversible impact on the quality of the environment in a particular area and on the success or failure of a commercial venture. The unpredictable outcome and the trial and error approach, which seems to have prevailed in this case, is undesirable in the extreme. The stop and go history of the project, possibly prompted by

complaints from the public of an offensive odour competing against a more objective measure employed by the officials led to undesirable commercial uncertainty. It is indeed unfortunate that objective measurable standards could not have been employed.

[39] Nonetheless, the decision to suspend the permit to spread this material is one within the discretion of the Minister, to be exercised with the benefit of the advice of his department and his experts. The evidence before me does not persuade me that, in effectively rejecting this appeal on its merits, his decision was "patently unreasonable". Finding that to be the case I could not articulate any valid reason for overriding his discretion.

[40] In conclusion, I find that DRL is a "person aggrieved" by a decision or order of an administrator and that they were entitled to have the Minister review the decision of the officials on the appeal. The Minister did not do so.

[41] I find that decision was the only one made by the Minister and the only one which could technically be appealed. Accordingly the appeal is allowed in so far as is related to the status of the appellant. I would entertain representations from the parties with respect to costs, if costs are an issue.

Haliburton J.