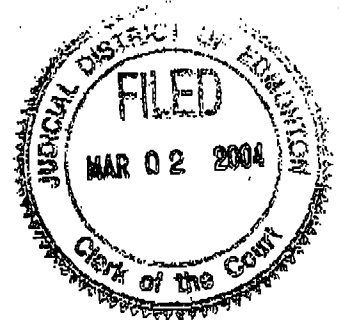


Court of Queen's Bench of Alberta

Citation: Alberta (Minister of Environment) v. Verbeek, 2004 ABQB 153



Date: 20040302
Docket: 0303 17609
Registry: Edmonton

Between:

Her Majesty the Queen In Right of Alberta
as Represented by the Minister of Environment

Applicant

- and -

Calvin Verbeek and 742333 Alberta Ltd. Operating As Verbeek Sand and Gravel

Respondents

Memorandum of Decision
of the
Honourable Mr. Justice J.B. Veit

Summary

[1] Alberta Environment's application to declare Calvin Verbeek and 742333 Alberta Ltd. to be in civil contempt for failing to comply with an order, issued under the *Environmental Protection and Enhancement Act* and subsequently registered as a judgment of this court, which prevented them from operating a gravel pit without permission and required them to reclaim the gravel pit is allowed: the evidence establishes that, after having received notice of the Ministerial Order preventing the operation of the gravel pit and requiring reclamation of the disturbed land, the respondents continued to operate the pit and failed to carry through on the reclamation plan which had been approved by Alberta Environment.

[2] Assuming for the purposes of this application that, in addition to acts that breach an order, a mental element of wilfulness must also be established before an alleged contemnor is declared in contempt, I find that any necessary mental element of contempt has also been established. The respondents are not impecunious. Although Mr. Verbeek and his wife have recently suffered from serious health problems, the persistent failure to comply with environmental concerns predates the health concerns. Moreover, even if his health problems compromised his ability to act personally in this matter, Mr. Verbeek could have achieved compliance with environmental orders through the use of an agent.

[3] Although the court accepts that it will cost a minimum of \$50,000 to reclaim the disturbed land owned and operated by the respondents, there does not appear any statutory authority for the court to make an order with respect to those costs in this proceeding.

[4] Because of the poor health of Ms. Verbeek, imprisonment is not an appropriate sanction for contempt of the Ministerial Order. Rather, fines are imposed in the amount of \$1,000 against Mr. Verbeek and \$10,000 against the numbered company.

Cases and authority cited

[5] By the applicant: *Alberta Dental Association v Unrau* [2001] A.J. No. 509 (Q.B.)

1. Background

[6] Alberta Environment contends that, in 2002, Calvin Verbeek and Verbeek Sand and Gravel were operating a gravel pit without approval in Sturgeon County, Alberta; the respondents had previously had a license to operate the gravel pit, but that approval expired in 1997. The respondents were put on notice of the governmental concerns. The respondents did not, however, respond to those concerns.

[7] On September 26, 2002, Alberta Environment issued an Enforcement Order to Mr. Verbeek and the numbered company for a contravention of sections 60 and 61 of the *Environmental Protection and Enhancement Act*. Those sections read as follows:

Prohibition

60 No person shall knowingly commence or continue any activity that is designated by the regulations as requiring an approval or registration unless that person holds the required approval or registration.

Prohibition

61 No person shall commence or continue any activity that is designated by the regulations as requiring an approval or registration unless that person holds the required approval or registration.

[8] In October, 2002, Mr. Verbeek and the numbered company appealed the Enforcement Order to the Alberta Environmental Appeal Board. After a hearing, at which Mr. Verbeek advanced submissions concerning his and his wife's health and their impecuniosity, the Board recommended to the Minister of Environment that the Enforcement Order be confirmed, subject to an extension of the date for compliance.

[9] On January 21, 2003, the Minister of Environment issued Ministerial Order 33/2003 which confirmed the Enforcement Order, with the variations recommended by the Board. The Ministerial Order required Mr. Verbeek and the numbered company to:

- immediately cease operation of the gravel pit on their land;
- submit, by March 15, 2003, a written reclamation plan including certain minimum requirements - prepared and signed by a qualified professional reclamation consultant - for the disturbed area, including the gravel pit
- provide status reports commencing February 15, 2003, and every 30 days thereafter, or as required, by the Compliance Manager.

[10] On February 4, 2003, Mr. Verbeek wrote to the Compliance Manager of Alberta Environment, stating that he would begin working on the required reclamation plan.

[11] On May 15, 2003, the Compliance Manager informed Mr. Verbeek and the numbered company that the reclamation plan they had submitted was acceptable.

[12] On September 26, 2003, the Ministerial Order was filed with this Court; the effect of the filing is that the Ministerial Order is enforceable as a Judgment of the Court of Queen's Bench: s. 104 *Environmental Protection and Enhancement Act*.

[13] Alberta Environment alleges the following breaches of the Ministerial Order:

- Mr. Verbeek and the numbered company did not complete the reclamation according to the reclamation plan;
- Mr. Verbeek and the numbered company did not file a final written report as required
- Mr. Verbeek and the numbered company did not submit monthly status reports as required

Mr. Verbeek and the numbered company operated the gravel pit as indicated in the report of an investigator who described the following:

5. On July 18th, 22nd, September 12th, October 10th, 16th, 29th and November 6th, 10th and 18th 2003, I attended the sand and gravel pit owned and operated by Mr. Calvin Verbeek and 742333 Alberta Ltd. located on the West 1/2 of Section 11, Township 54, Range 27, W4M (the "lands") to conduct routine inspections. On each of these inspections I observed activities being conducted by the Respondents that constitute operating of the sand and gravel pit.
6. At approximately 9:35 a.m. on July 18th, 2003 I observed a front-end loader on the lands depositing material from a material stockpile on the lands into a large truck bearing license number S337-02. The truck was further identified with door markings as "Sims". The Sims truck left the lands with the stockpile material in it. I followed the Sims truck and observed it entering a commercial site in Acheson Industrial Park located west of Edmonton. I returned to the lands. Later, I observed this Sims truck return to the lands empty of material.
7. At approximately 10:23 a.m. on July 18th, 2003, I observed a large white truck carrying license number USD 298 departing the weigh scales located on the lands and leaving the lands. I observed that the truck was loaded with aggregate material.
8. At approximately 10:42 a.m. on July 18th, 2003, I observed a third large gravel truck departing the weigh scales located on the lands and then leaving the lands. I observed that the truck was loaded with aggregate material and bore door markings of "Ranger Distributing".
9. At approximately 10:45 a.m. on July 18th, 2003, I met with Mr. Calvin Verbeek on the lands and advised him of my observations. I also advised Mr. Calvin Verbeek that he was not authorized to operate the sand and gravel pit without an approval issued pursuant to the *Environment Protection and Enhancement Act* and that such activities were contrary to the Enforcement Order. Mr. Calvin Verbeek became confrontational. He told me he needed to eat and pay employees. I then accompanied Mr. Calvin Verbeek to the south area of the lands and observed a front-end loader placing gravel in yet another truck. I again advised Mr. Calvin that the activity required an approval and continuing constituted a contravention of the Enforcement Order.
10. At approximately 11:00 a.m. on July 18th, 2003, I observed another gravel truck on the weigh scales located on the lands being weighted prior to being loaded. I then observed this truck traveling to a gravel stockpile on the lands and being loaded with gravel from the stockpile by a front-end loader. This truck bore door markings of "Manchero's Trucking and Contracting".

11. At approximately 11:20 a.m. on July 18th, 2003, I observed two more gravel trucks both with door markings of "Bear Paving 962-4793" at the weigh scales located on the lands. One of these truck was departing the lands with a full load of material. The second truck was about to be weighed at the weigh scales on the lands.
12. At approximately 11:25 a.m. on July 18th, 2003, I observed a gravel truck with door markings "Ranger Distributing Unit #73" arrive at the lands and drive over to the weigh scales to be weighed.
13. At approximately 9:30 a.m. on July 22nd, 2003, I met with Mr. Calvin Verbeek and an individual who identified himself as Steve Seaman, the manager of the pit. I advised Mr. Calvin Verbeek and Mr. Seaman that no product was to be removed from the lands pursuant to the terms of the Enforcement Order and until an approval was obtained. Mr. Calvin Verbeek became agitated, started swearing and crying. I advised Mr. Calvin Verbeek that this activity requires an approval and was in contravention of the Enforcement Order.
14. At approximately 11:05 a.m. on July 22, 2003, I observed a gravel truck with door markings of "Ranger Distributing" bearing license plate number 377-86 approach the weigh scales to be weighed prior to loading. I asked Mr. Calvin Verbeek what the purpose of this truck was. Mr. Calvin Verbeek indicated to me that the truck was there to remove gravel. Again, I advised Mr. Calvin Verbeek that an approval was needed to remove any product from the pit. Mr. Calvin Verbeek indicated that he would stop and not load this truck.
15. At approximately 11:20 a.m. on July 22, 2003, I was traveling eastbound on Highway #633 when I observed the gravel truck bearing license plate number 377-86 traveling eastbound as well. I followed this vehicle to the Achson Industrial Park located west of Edmonton.
16. On July 22, 2003, I conducted an inspection of the lands to determine if the reclamation work required by the Enforcement Order had been completed. I observed very little reclamation work commenced or completed.

[14] The Compliance Manager for Alberta Environment states that the area of lands disturbed by the sand and gravel pit owned and operated by Mr. Verbeek and the numbered company totals 30.9 hectares, of which 5 hectares had been partially reclaimed. That official indicates that a conservative estimate of the reclamation cost is \$2,000.00 per hectare. That estimate is based upon a calculation that reclamation would require approximately 1500 cubic meters of reclamation material per hectare - or 15 cm of topsoil per hectare - at a cost of approximately \$1.00 per cubic meter. The official therefore estimate the costs of reclamation to be at least \$50,000.

[15] Mr. Verbeek filed an affidavit in which he swears that he does not have the funds to reclaim the property. He states that he lost 6 of his 8 sections of land in foreclosure proceedings. He also indicates that he operates a cattle ranch on the remaining land with his son and daughter and that the ranch lost a lot of money in 2003.

[16] Mr. Verbeek also states that he transferred his shares in the numbered company to his son at least 2 years prior to these events, that he did not tell his son about these proceedings, and that his son uses that company as a corporate vehicle to operate his welding business.

[17] Mr. Verbeek also indicates that in the past year he and his wife have both been diagnosed with cancer, his wife with metastatic carcinoma of the breast - breast cancer - and himself with testicular cancer. At the time of this application the medical evidence was that, after the surgical removal of the malignant tumour, there had been no progress in Mr. Verbeek's cancer or evidence of recurrence of the cancer; his physician hopes that Mr. Verbeek has been cured.

[18] Mr. Verbeek asks the court to allow him to operate the pit by removing materials that have already been stockpiled or stripped since the removal of those materials will not cause any further harm to the land.

2. Service

[19] The evidence establishes that the respondents have been adequately served with the orders.

[20] Apart from the various affidavits of service, the fact that Mr. Verbeek and the numbered company appeared at the hearing of the Alberta Environmental Appeal Board, where they were represented by an agent - Mike Ryan, establishes that the respondents were adequately notified of the concerns concerning the operation of the gravel pit and the environmental effects of that operation.

3. Is the numbered company subject to the Ministerial Order?

[21] The numbered company is subject to the Ministerial Order.

[22] On behalf both of himself and the numbered company, Calvin Verbeek appealed the Enforcement Order issued by an official of Alberta Environment. Prior to the hearing of the appeal, both Mr. Verbeek and the numbered company requested mediation of the dispute between themselves and Alberta Environment. At all the relevant times, Calvin Verbeek was a director of the numbered company. At no time in all of the proceedings before the Board, including negotiations concerning mediation, did Mr. Verbeek raise any concerns about the propriety of naming the numbered company as a respondent; his current claim that all of the shares of the numbered company are owned by his son and that his son uses the numbered

company to operate a business are not entitled to any weight. However, it is the Minister, and not Mr. Verbeek or the numbered company, which has the obligation of establishing that the company is an appropriate respondent.

[23] On the basis of all of the evidence available at the hearing, I am satisfied that the Minister has established that the numbered company is correctly identified as a respondent. In coming to that conclusion, I rely, among other evidence, on the statement in the Enforcement Order to the effect that 742333 Alberta Ltd. was the current declarant of Verbeek Sand and Gravel in September 2002 when the order was issued and on the evidence of Calvin Verbeek's signature of at least two letters, one dated February 4, 2003 and one dated March 15, 2003, each on the letterhead of Verbeek Sand & Gravel, which dealt with the issues in this litigation.

4. Contempt

[24] The evidence filed on this motion on behalf of Alberta Environment establishes that both Calvin Verbeek and the numbered company are in breach of a judgment of this court: having knowledge of the Ministerial Order, and having even begun to comply with it, both respondents have repeatedly refused to comply with the reclamation plan which they themselves had proposed. The acts of breach have been established beyond a reasonable doubt: the removal of material from the gravel pit and the failure to comply with the reclamation order are the acts which constitute contempt. If an analogy were drawn to criminal proceedings - and because there is the potential imposition of a jail sentence as a sanction for contempt the analogy may be apt or even required - the acts outlined in the material constitute the *actus reus* of contempt.

[25] Assuming for the purposes of this application that, in addition to acts that breach an order, a mental element of wilfulness must also be established before an alleged contemnor is declared in contempt, I find that any necessary mental element of contempt has also been established. Mr. Verbeek's remaining property is worth approximately \$1 million; he is not impecunious; he is not without means of compliance. Although Mr. Verbeek's own health problems in early 2003, and perhaps just as importantly his wife's health problems, undoubtedly distracted Mr. Verbeek from his environmental obligations, Mr. Verbeek displayed a dogged determination not to comply with the orders concerning the gravel pit long before his health problems manifested themselves. In fact, as late as October 16, 2003, Mr. Verbeek's health problems did not prevent him from having an unpleasant altercation with Alberta Environment's inspector during the course of which he entered and operated a front-end loader in a manner that was perceived by the inspector as threatening and in a manner which, at the least, blocked the only access to the gravel pit, trapping the inspector within the pit. Moreover, although his health problems may have prevented Mr. Verbeek from attending personally to compliance with the environmental order, there is no reason why he could not have achieved compliance with the assistance of agents. The evidence establishes that Mr. Verbeek and the numbered company have not made any real effort to comply with the environmental protection orders.

[26] Alberta Environment has proved beyond a doubt that the respondents knowingly and wilfully breached the Ministerial Order that was filed as a judgment of this court.

5. Order for reclamation

[27] Although I am satisfied that the reclamation of the Verbeek Sand & Gravel pit will cost at least \$50,000, and although I would be prepared to order the payment of the cost of reclamation by the respondents or charge the land with that cost, I am not satisfied that I have the authority to order the payment of this amount into the Environmental Protection and Enhancement Fund.

[28] The only section of the Act which might apply to payments into that fund is s. 30(5). However, I cannot conclude that any of the sub-paragraphs of that section deal with the type of situation that has arisen here.

[29] I have also considered ss. 213, 214, 234 and 237 of the Act and have concluded that there is no clear jurisdiction for the court to deal with reclamation costs in this proceeding.

6. Sanction for contempt

[30] Because of Ms. Verbeek's poor health, jail is not an appropriate sanction for contempt in the circumstances here.

[31] The sanction that is imposed on Mr. Verbeek for contempt is \$1,000. The sanction imposed on the numbered company is \$10,000.

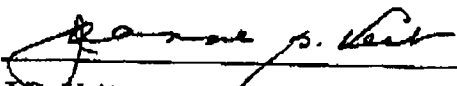
[32] There is no longer any maximum fine for contempt in the Rules of Court. Although Mr. Verbeek has no previous sanction imposed against him for an environmental offence, the fine must reflect the prolonged, deliberate, flagrant breach of the Ministerial Order by both Mr. Verbeek and the numbered company.

7. Costs

[33] If the parties are not agreed on costs, I may be spoken to within 30 days of the release of this decision.

Heard on the 15th day of January, 2004.

Dated at the City of Edmonton, Alberta this 1st day of March, 2004.



J.B. Veit
J.C.Q.B.A.

Appearances:

Michelle Williamson
Alberta Justice
for the Alberta Environment

Michael Furman
Glenora Law Office
for Calvin Verbeek and 742333 Alberta Ltd.