NOVA SCOTIA COURT OF APPEAL

Citation: ***Chase v. Northern Construction Enterprises Inc.***,
2012 NSCA 123

Date: 20121211
Docket: CA 408526
Registry: Halifax

Between:

Darrell Chase, Sheri Chase, Lionel Clark, Margaret Clark, Angela Dicker, Deborah Fleet, Ward Fleet, Graham Hayward, Larry Head, Sherry Head, Tim Hilton, Dwight Isenor, Judy Isenor, Elizabeth Miller, Jason Miller, Carol Parsons, Les Parsons, Bob Robichaud, Richard Rudderham, Stacey Rudderham, Gerald Sheehan, Jeannette Smith, Stephen Smith, Aaron Tucker, Jonathan White, Rachel White, Shannon Wright

Applicants/Appellants

v.

Northern Construction Enterprises Inc., Halifax Regional Municipality, Attorney General of Nova Scotia, The Nova Scotia Utility and Review Board

Respondents

and

Lakeview-Windsor Junction-Fall River (LWF) Ratepayers Association, Tim Hilton, Wayne Griffith, Shawna Warner, Trent Harris, Karen Harris, John Van Oosten, Keith Landra, Joyce Clarke, Hollie Farrell, Brian Farrell, John Tillman, Deonne Garry, Claude Garry, Todd MacLeod, Keith Pare, Kim Pare, Jamie Apa, Phil Apa, Deborah Dickson, Jonannes Biderman, Toby Humphries, Stan Humphries, Darren Budd, Cathy Chaisson, Stephen Chaisson, Wade Marchard, Zelda Marchand, David Green, Heather Huggard, Mike Fralick, Vineeta Fralick, Jason Lahey, Mona Lahey, Blaine Patriquin, Brittany Smith, Selena Grcic, Andrew Grcic, Sabrina Rhindress, Mark Doyle, Melanie Doyle, Richard Stephens, Kaylee Stephens, Pam Clark, Loralie Clark, Colin Clark, Leslie Orme-Wheatley, Emma Doucette

Respondents

Judge: The Honourable Justice David P.S. Farrar

Motion Heard: November 1, 2012, in Halifax, Nova Scotia, in Chambers

Held: Motion for stay dismissed.

Counsel:
Paul B. Miller, for the applicants/appellants
Jane O'Neill and Matthew T. Hayes, for the respondent Northern Construction Enterprises Limited
Edward A. Gores, Q.C., for the respondent Attorney General of Nova Scotia (not participating)
E. Roxanne MacLaurin, for the respondent Halifax Regional Municipality (Watching Brief Only)
Bruce Outhouse, Q.C., for the respondent Nova Scotia Utility and Review Board (not participating)

Decision:

Background

[1] The appellants are 27 of approximately 80 residents residing in the Fall River-Wellington and Miller Lake West areas of Halifax Regional Municipality ("HRM"). The 80 residents sought intervenor status at the Nova Scotia Utility and Review Board (UARB) to participate in an appeal by the respondent Northern Construction Enterprises Inc. ("Northern Construction") from a refusal by HRM to grant Northern Construction a development permit to develop a quarry. By decision dated October 5, 2012, the UARB denied the application for intervenor status. The appellants appealed the UARB decision and sought a stay pending the appeal.

[2] The motion for a stay was heard before me on November 1, 2012. At the conclusion of the hearing I dismissed the appellants' motion with reasons to follow. These are my reasons.

Facts

[3] Northern Construction proposes to develop a 3.9 hectare quarry in Goffs, Nova Scotia adjacent to the Aerotech Business Park, in an existing clay pit and former quarry.

[4] On April 3, 2012, it applied for a development permit. The permit was denied by a HRM development officer in a letter dated April 20, 2012. Northern Construction filed an appeal of that refusal to the UARB on April 26, 2012.

[5] Mr. Miller, counsel on this appeal, on behalf of the Lakeview-Windsor Junction-Fall River Ratepayers Association and numerous individuals, filed an application before the UARB on May 3rd, 2012, seeking intervenor status on Northern Construction's appeal. As noted earlier, 27 of the approximately 80 individuals who sought intervenor status are named as appellants to this appeal. The remainder are named as respondents. There were a number of delays in the hearing of the residents' application for intervenor status. The reasons for the delay are not germaine to this motion. The hearing before the UARB to determine

the appellants' intervenor status took place on September 12, 2012, with the UARB rendering its decision on October 5, 2012, denying the application.

[6] Northern Construction's appeal was scheduled to be heard commencing on Monday, November 5th, 2012. The appellants filed their Notice of Appeal to this Court from the UARB decision on October 26th, 2012, and filed their materials for the motion for a stay on October 29th, 2012. A stay would have delayed the hearing of Northern Construction's UARB appeal until this Court rendered its decision on this appeal.

Issue

[7] Should the UARB's decision be stayed?

Discussion

[8] As is usually the case, the parties do not dispute the test to be applied is set out in **Fulton Insurance Agencies Ltd. v. Purdy**, [1990] N.S.J. No. 361 at p. 6 where Hallett, J.A. held:

> In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either
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> (1) satisfy the Court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, and (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience.
>
> OR

> (2) failing to meet the primary test, satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

Arguable Issue

[9] The appellants allege that the UARB erred in a number of respects, including failing to properly consider the rules under the **Municipal Government Act**, S.N.S. 1998, c. 18, as amended, and the **Utility and Review Board Act**, S.N.S. 1992, c. 11. These errors, they say, resulted in the UARB's refusal to grant them intevenor status.

[10] I will assume that the appellants proposed grounds of appeal raise arguable issues. I will limit my analysis to whether the appellants demonstrated, in these circumstances, that they would suffer irreparable harm.

Irreparable Harm

[11] The appellants filed two affidavits in support of their motion. The first, sworn by their solicitor Paul Miller, quite properly, does not contain any factual basis for the irreparable harm. It simply sets forth the dates of the hearing of Northern Construction's appeal and attaches a copy of the UARB decision.

[12] The second affidavit is a joint affidavit of two of the appellants, Stacey Rudderham and Jeannette Smith. In addressing the irreparable harm and the balance of convenience the affiants say the following:

> 6. The Appellants are concerned that this appeal will be moot if the stay is not granted.
>
> 7. The Appellants believe they will suffer irreparable harm if the intervenor standing issue is not heard and decided by this Honourable Court before the NSUARB hearing takes place.
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> 8. The Appellants believe that the balance of convenience favours the granting of a stay of the NSUARB hearing until the issue of intervenor standing is heard by this Honourable Court.

[13] Mr. Miller, in oral argument, flushed this out somewhat and said that they would "bring a different perspective to the appeal" and suggested that they may call evidence which would not otherwise be heard by the UARB. With all due respect, the affidavit and the submissions of counsel do not provide any basis upon which the appellants would suffer irreparable harm. There is no evidence upon which I could conclude the perspective and/or the evidence the appellants propose to put forward before the UARB would in any way impact the determinations that the UARB has to make on Northern Construction's appeal. There is nothing before me upon which to support the bald assertions contained in the affidavit and in the submissions of counsel.

[14] In its brief, and before me, the appellants cite **G.W. Holmes Trucking (1990) Ltd. (Re)**, 2005 NSCA 132 to support its argument that if the motion for a stay is not granted its ultimate appeal would be rendered moot. In **G.W. Holmes Trucking**, Oland, J.A. applied the "exceptional circumstances" part of the test and found that if a stay was not granted, the appeal would be rendered moot. Since **G.W. Holmes Trucking**, a number of other cases have considered the mootness argument in determining irreparable harm. In **Alamentary Services Ltd. (Re)**, 2009 NSCA 61, MacDonald, C.J.N.S. was considering a situation where the UARB suspended the Split Crow Pub's liquor license for two days as a result of regulatory infractions. In that case, Chief Justice MacDonald looked at the mootness issue and held:

> 7 In this motion, I conclude that irreparable harm will result without a stay. I say this because of the cumulative effect of the following two factors.
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> 8 Firstly, I am satisfied that without a liquor license, the Pub will close its doors for the duration of the suspension. Its losses, while not impossible, would be difficult to calculate. Furthermore, should the appeal be allowed, it is unclear from whom if anyone these losses could be recovered.
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> 9 Secondly, without the stay, the suspension will have been served by the time the appeal is heard. This would effectively deny the Pub its right to appeal.

[15] A similar conclusion was reached by me in **Dixon v. Nova Scotia (Director of Public Safety)**, 2011 NSCA 15. In **Dixon**, I found that it was the cumulative effect of a number of factors which led me to conclude that irreparable harm would result without a stay. (See ¶10-12) However, as noted by the Chief Justice in **Alementary Services Ltd.** and by me in **Dixon**, the mootness of the appeal was but one factor taken into account in determining irreparable harm.

[16] In **Canglobe Financial Group v. Johnson**, 2010 NSCA 46, the Chief Justice made it very clear that mootness does not automatically constitute irreparable harm. At ¶13:

> 13 Let me now turn to the appellants' assertion that without a stay, their appeal will be rendered moot. I realize that this may occur and in fact stays have been granted for this very reason. See **O'Connor**, *supra* and **Pelot v. Prudential of America General Insurance Co. (Canada) et al** (1995), 143 N.S.R. (2d) 367. However, that does not end the analysis. First of all, it remains to be seen whether the appeal would be rendered moot. Furthermore, the risk of a moot appeal does not automatically constitute irreparable harm. For example, I refer to **La Ferme D'Acadie v. ACOA**, 2009 NSCA 5, at paras. 16 and 17.

[17] In this case, the appellants offer no details as to how their inability to participate in the hearing before the UARB would be harmful to them aside from the bald assertion that it would cause irreparable harm. As in **Canglobe**, it remains to be seen whether the appeal will be rendered moot, even if it is, in the circumstances of this case, it is not enough to constitute irreparable harm.

Conclusion

[18] For these reasons, the motion for a stay was dismissed. I awarded costs to the respondents in the amount of $1,000 payable forthwith in any event of the cause.

Farrar, J.A.