NOVA SCOTIA COURT OF APPEAL
Citation: ***Cape Breton Explorations Ltd. v. Nova Scotia (Attorney General)***, 2013 NSCA 116

Date: 20131015
Docket: CA 416544
Registry: Halifax

Between:

Cape Breton Explorations Ltd.

Appellant

v.

The Attorney General of Nova Scotia, Nova Scotia Power Incorporated, and The Nova Scotia Utility and Review Board

Respondents

Judge: The Honourable Justice David P.S. Farrar

Motion Heard: October 10, 2013, in Halifax, Nova Scotia, in Telechambers

Held: **Motion for severance and abridgement of record denied**

Counsel:

Richard Stephenson, for the appellant
Edward Gores, Q.C., for the respondent Attorney General of Nova Scotia
Daniel M. Campbell, Q.C., for the respondent, Nova Scotia Power Incorporated
Richard Melanson, for the respondent, Nova Scotia Utility and Review Board

Decision:

[1] Nova Scotia Power Inc. ("NSPI") moves for an Order severing the appellant's, Cape Breton Explorations Ltd. ("CBEx"), first three grounds of appeal from its fourth ground of appeal and to abridge the record on appeal pursuant to Rules 37.01 and 37.05.

Background

[2] By way of background, CBEx appealed from the Order of the Nova Scotia Utility and Review Board ("UARB") dated April 30, 2013 which approved a capital expenditure by NSPI of approximately $93,000,000 for a project known as the South Canoe Wind Project.

[3] CBEx, an unsuccessful bidder on the project, was an intervenor in the proceedings before the UARB and appeals the UARB's order citing the following grounds of appeal:

> 1. The Board erred in law in finding that s. 35 of the *Public Utilities Act* gave the Board jurisdiction to require the ratepaying pubic to pay for, and guarantee the profits of, Nova Scotia Power Incorporated's ("NSPI") minority financial investment in a renewable electricity project to be controlled and operated by third party independent power producers (the "South Canoe Wind Project");
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> 2. The Board erred in law in finding no conflict between the inclusion of the costs in the rate base of NSPI's investment in the South Canoe Wind Project and the process established by the *Electricity Act* for procurement of renewable electricity by the Renewable Electricity Administrator and payment for the procured electricity;
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> 3. The Board erred in law in finding that NSPI was legally permitted to directly own some of the assets of the South Canoe Wind Project;
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> 4. The Board erred in law in agreeing to treat as confidential from the public a large volume of documents submitted by NSPI to support its application requesting that the ratepaying public pay for its investment and profits in the South Canoe Wind Project; and
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> 5. Such further and other grounds as may be permitted by the Court.

[4] On June 19th, 2013, at a telechambers motion to set the hearing dates an issue arose with respect to the confidentiality of the documents to be included in the appeal book. The matter was adjourned to July 17, 2013 for further submissions on the contents of the appeal book. On July 18, 2013, I ordered that the issue of the confidentiality of the appeal book would be scheduled for September 20, 2013, for a hearing before a panel of this Court. I also ordered two separate Appeal Books to be filed by July 31, 2013; one with the confidential information redacted and an unredacted version to remain confidential.

[5] On August 23, 2013, NSPI filed a motion seeking an order for confidentiality of the appeal book returnable on September 20, 2013.

[6] To round out the proceedings Oxford Frozen Foods (“Oxford”) and Minas Basin Pulp and Paper Company Limited (“Minas Basin”), on September 9, 2013 filed a motion to allow it to present evidence and participate in the September 20, 2013 confidentiality motion.

[7] The confidentiality motion proceeded as scheduled on September 20, 2013 with the Court provisionally accepting the evidence of Oxford and Minas Basin.

[8] At the conclusion of argument the panel reserved its decision on the confidentiality motion and the acceptance of the evidence sought to be introduced by Oxford and Minas Basin.

[9] The panel also requested the parties to make supplementary written submissions on the possibility that the Court may remit the confidentiality issue to the UARB. NSPI and CBEx filed supplementary submissions on September 25, 2013. The decision on the confidentiality motion remains on reserve.

[10] NSPI filed this motion for severance on October 3, 2013 and it was heard on October 10, 2013 in telechambers.

[11] In its motion, as noted earlier, NSPI sought to sever the first three issues on appeal from the fourth and to abridge the record such that it would only include Part 1, Volume 1 of the Appeal Book which, in essence, contains the Notice of Appeal of CBEx and the decision and order of the UARB.

Issues

1. Should the issues on appeal be severed?
2. If so, should the record be abridged to include only Volume 1, Part I of the Appeal Book?

Analysis

[12] I am satisfied that this Court, and in particular a judge in Chambers, has the power, in the appropriate circumstances to sever issues on appeal.

[13] Rule 90.37(2) of the *Civil Procedure Rules* provides:

> **90.37** (2) A judge of the Court of Appeal has and may exercise any power necessary to deal with a motion made to the judge under this Rule 90.37 or any other Rule, or other legislation.

[14] NSPI makes this motion pursuant to Rule 37.01 and 37.05:

> **37.01** A judge may consolidate proceedings, trials, or hearings or may separate or sever parts of a proceeding, in accordance with this Rule.
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> ...
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> **37.05** A judge may separate parts of a proceeding for any of the following reasons:
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> (a) a party joined a party or claim inappropriately;
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> (b) although appropriately joined in the first place, it is no longer appropriate for the party or claim to be joined with the rest of the parties and claims in the proceeding;
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> (c) the benefit of separating the party or claim from another party or claim outweighs the advantage of leaving them joined.

[15] Both of these Rules refer to a "proceeding". Proceeding is defined in Rule 94.10:

> "proceeding" means the entire process by which a claim is started in, and determined by, the court such as an action, application, judicial review or appeal.

[16] Thus, CBEx's appeal is a proceeding to which Rules 37.01 and 37.05 apply by virtue of Rule 90.02(1) which provides that the Rules, unless inconsistent with Rule 90, apply to proceedings in the Court of Appeal. I see no inconsistency between Rules 37.01 and 37.05 and Rule 90, nor has any inconsistency been suggested by the parties.

[17] The parties have only been able to find one reported case where the issues on appeal were severed. In *Baert v. Graham*, 2009 SKCA 72, the Saskatchewan Court of Appeal ordered, in a medical malpractice case, that the issues of liability and damages be heard in two stages.

[18] Although it is the only case where the issues on appeal have been severed, it supports my conclusion that, in the appropriate circumstances, an appeal may be heard in stages.

The Test for Severance

[19] Justice Pugsley in *Rajkhowa v. Watson*, 2000 NSCA 50, although dealing with a severance at the trial level, adopted the "just and convenient" test expressed by Lord Denning in *Coenen v. Payne*, [1974] 2 All E.R. 1109. In determining what is just and convenient in any case a court must consider the effect of severance on the parties and the court system (*Rajkhowa, supra*, ¶53).

[20] Whether addressing the issue at trial or on an appeal, in my view, the test is the same: the court must consider what is just and convenient having regard to all of the circumstances. This is consistent with the object of our Rules, which provides:

> **1.01** These Rules are for the just, speedy, and inexpensive determination of every Proceeding

Just and Convenient

[21] I will now turn to whether it is just and convenient to order severance of the issues on this appeal.

[22] In support of its argument NSPI says the first three grounds of appeal are all questions of law or jurisdiction for which regard need only be had to the

UARB's decision and its conclusions on the facts. It says the evidence before the Tribunal below is not necessary or relevant to this Court.

[23] With respect, I cannot agree. The UARB, in its decision, recognizes the importance of the confidential agreements in making its decision:

> 28 All of these Agreements were filed in confidence pursuant to Board Regulatory Rule 12. As the matter of confidentiality was raised by CBEx in its closing submissions, the Board will comment on that issue elsewhere in this Decision. However, the Board considers that it must make reference to certain provisions of a number of these agreements in order to make its Decision in this matter. The Board has done so in a manner to restrict the disclosure of confidential material. (My emphasis)

[24] It would be difficult, if not impossible, to determine at this stage of the proceedings that the entire record other than the decision of the UARB is irrelevant for the determination of the legal issues in this appeal.

[25] CBEx, in its brief, sets out how the agreements may be relevant to its grounds of appeal:

> 18. CBEx's position is that the complete record is potentially relevant to all four grounds of appeal, and that there are no reasons to depart from the presumption in the *Civil Procedure Rules* that all documentary evidence should be included in the Appeal Book. This is a case of first instance: it involves a combination of statutory and regulatory provisions which this Court has not been called upon to consider previously. Unlike a civil trial of a tort claim (for example), it is simply not possible a *priori* to determine what facts this Court will find important or of assistance on the hearing of the severed portions of this appeal. Most importantly, many of the confidential documents may be relevant to the hearing of the first three grounds of appeal, making it necessary for this Court to determine whether they should remain sealed in any event. NSPI is incorrect to suggest that none of the confidential documents are relevant to Grounds 1-3 in the Notice of Appeal. CBEx has set out a few examples below.
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> **Ground 1: No Jurisdiction**
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> 19. CBEx submits that the UARB had no jurisdiction to permit NSPI to include the assets in question in ratebase under s. 35 of the *Public Utilities Act*. Under s. 35(2)(f)(iii) a "service" (which limits the types of assets that can be put in ratebase) is limited to new construction, improvements or betterments used "by a public utility". CBEx submits that the assets in question do not qualify. This

position is based upon the provisions of the Project Construction and Operating Agreement which define and limit the role that NSPI can have with respect to the assets for points in time. This document was sealed in its entirety.

Ground 2: If the UARB had jurisdiction, then its decision to permit NSPI to include the assets in question in ratebase was erroneous in law because it conflicts with and undermines procurements under the *Electricity Act*

20. CBEx submits that even if the UARB had jurisdiction to consider whether to permit NSPI to include the assets in question in ratebase, it erred in law in permitting NSPI to do so because that result is totally inconsistent with, and undermines the policy and scheme of the *Electricity Act*. Essentially, the competitive wind procurement process under the *Electricity Act* was intended to, and was designed to operate on a "level playing field". To permit one participant (NSPI) to subsidize its role in a competitive process by allowing inclusion of its investment in its regulated ratebase fundamentally defeats the policy and scheme of the *Electricity Act*.

21. In support of this submission, CBEx relies, *inter alia*, on the Project Construction and Operating Agreement. CBEx submits this agreement violates the Administrator's express requirement that the terms of a Power Purchase Agreement ("PPA") (under the *Electricity Act*) not be subject to change so as to maintain a consistent risk profile for all bidders. This document was sealed in its entirety.

Ground 3: If the UARB had jurisdiction, then it erred in law in finding that NSPI was legally permitted to own some of the assets in the South Canoe Wind Project

22. CBEx also submits that even if the UARB had jurisdiction to consider whether to permit NSPI to include the assets in question in ratebase, it erred in law in finding that NSPI was legally permitted to own certain assets in the South Canoe Wind Project. This submission turns on the conflict between the PPA and the Project Construction and Operating Agreement.

23. CBEx submits that the PPA and the Project Construction and Operating Agreement conflict in two key areas: land tenure and ownership of project assets. Under the Project Construction and Operating Agreement, in the event of any inconsistency with the PPA, the provisions of the PPA prevail. CBEx submits that, properly interpreted, the combined effect of the PPA and the Project Construction and Operating Agreement is that NSPI sought to have included in

> ratebase assets that it is not legally permitted to own. In order to determine the issue, the Court will need to reconcile the provisions of the PPA and the Project Construction and Operating Agreement, both of which are under seal.

[26] CBEx makes a compelling argument for why consideration of the confidential information is necessary when considering its grounds of appeal. Whether CBEx is correct in its position is a matter to be determined on the appeal proper. To preclude CBEx from pursuing these arguments based on an abridged record would neither be just nor convenient having regard to the position of the parties in these circumstances.

[27] I would add that although NSPI makes its motion for abridgement separately from its motion for severance, the two issues are intertwined. Severance of the first three issues without an abridgement of the record would have no practical benefit. The confidentiality motion would have to be determined before the appeal on the first three issues could proceed, if the record is not abridged.

[28] For these reasons the motion for severance and abridgement of the record is denied. CBEx will have its costs of the motion in the amount of $1,250 inclusive of disbursements.

Farrar, J.A.