IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Douglas Projects International,
2008 NSPC 76

Date: 20081008
Docket:1765990 - 1765995,
1766000 - 1766005
Registry: Bridgewater

Between:

R.

v.

Douglas Projects International and Robert W. B. Douglas

Judge:	The Honourable Judge James H. Burrill
Heard:	October 8, in Bridgewater, Nova Scotia
Written decision:	December 4, 2008
Charge:	67(2)EVA, 71(A)(I) EVA, 71(A)(II) EVA, 71(B) EVA X 2, 71 EVA,
Counsel:	Paul Scovil, for the Crown Self-Represented Defendant

Orally, by the Court:

[1] This was the trial of Douglas Projects International Incorporated of Mahone Bay, Lunenburg County, Nova Scotia and Robert Douglas personally on six charges before the court.

[2] The charges are as follows, in summary. The first charge alleged against both the individual and the corporation, were the releasing of a substance into the environment which causes or may cause significant adverse effects. The second charge is failure to take all reasonable measures to prevent, reduce and remedy the adverse affects of the release. The third charge is to fail to take reasonable measures to remove or otherwise dispose of the substance to minimize the adverse effects. The fourth charge is failure to take measures required by an inspector on March 30th. The fifth charge, failure to take measures required by the inspector on April 27th. And the last charge is failure to rehabilitate the environment to a standard adopted or prescribed by the Department of Environment.

[3] All the events are essentially alleged to have occurred between March 26, 2007 and May the 1st of that year. And the incident was first brought to light as a

result of an arson that occurred at the property, that for the purposes of this decision, I'll call the Douglas property. It's a property that was owned by Douglas Projects International Incorporated, and a property, or a corporation of which Mr. Douglas was a director and chief shareholder, if I can term it as that.

[4] On March 26 there was a structure fire at that building that was located on the Fire Hall Road in New Germany. It was a building that Mr. Douglas and his company had purchased at a tax sale hoping that it would provide an economic benefit to he and the company, undoubtedly, hoping that he could do something with it, hoping that he undoubtedly could make some money. Well, that wish turned out to be anything other than that because after the fire it became clear to the fire officials that were on the scene that day as they checked out the building that there was a problem with an oil tank in the basement of that building. The fire is described as a small fire on the main floor and the fire department responded rather quickly to that blaze, they were alerted to it by neighbours, Mr. Sanford, came quickly, put it out. As to exactly the extent of that fire, it wasn't clear from the evidence, but one of the fire officials described it as being involving a plate and a candle some distance away in the middle of the floor on the main level of the building.

[5] As prudent firemen, they went and searched the building to see whether or not there were further difficulties and that's when they found the smell of fuel oil around the area of the tank in the basement. It's clear that the tank was in the location of a brick wall that had fallen in on the barrel, and we know from the evidence of Mr. Douglas that he had made attempts to secure that falling, that fallen-in foundation by putting skirting around but his efforts had always failed because vandals always had removed it and always had crawled in. When he was there a few weeks prior to the fire, the wall was in a little bit better shape than it was on the date that the firemen found it because when Mr. Douglas went to the scene thereafter he saw that it was fallen in even more.

[6] The fire officials then went out to the area. They could smell oil in and around a catch basin, in and around the area of the ditch as it exited across the road, and to a brook near the edge of the Sanford, or near the Sanford property or on the Sanford property across the road. And the Department of Environment was alerted to this issue who in turn alerted Mr. Douglas to the issue.

[7] Now it's very clear from all of the testimony that has been given that there was no free product found by anyone in the basement area nor was there any free product noted anywhere other than in the ditch, although there was a sheen on some of the water in the catch basin.

[8] After alerting Mr. Douglas to the issue, Mr. Douglas arrived at the scene and surveyed the situation himself, it is clear, and placed some absorbent pads in the area of the catch basin and the ditch to try to soak up the oil that had been leaked in that area. And it's clear that over time Mr. Douglas was required to do certain things by the Department of Environment. It was made clear to him, I'm satisfied, through oral conversation with Inspector Murray, and written correspondence that he was being ordered to do certain things. And in a letter dated March 28, which is exhibit #20 before this court, it was clear that he was ordered under section 71 of the Environment Act to hire an environmental site professional and to start environmental cleanup. The order indicates that "...currently the product in the ditch is a matter that must be addressed first and foremost, it is requested that measures be taken to contain the product in the ditch to ensure it does not migrate to the LaHave River, no later than 12 pm on March 30th ."

[9] Further on April 23rd, it was made clear in a letter which forms exhibit #22 before the Court, that the accused was being ordered to hire a site professional and have that site professional send a letter to the department confirming that they had been hired to complete re-mediation and submit a remedial action plan to the Bridgewater district office no later than Friday, April 27, 2007.

[10] The theory of the Crown in this case is clear. The theory of the Crown is that the oil that was spilling onto the area of the brook and the lowlands below Fire Hall Road was a substance that caused or may cause significant adverse affects to the environment. And that Mr. Douglas and his company did not take reasonable measures to reduce and remedy those adverse effects, nor did they comply with the direction of the inspector's given.

[11] Mr. Douglas argues on behalf of himself personally and the company that the Crown's case must fail on two counts. One, he argues that the Crown has not established beyond a reasonable doubt that the fuel oil came from his oil tank. And secondly, he argues that even if the Crown had proven that he had done everything in his and or the company's financial means to comply with the orders that had been given and to ameliorate any effects that the oil may have had on the

environment. And in fact he argues that further, that it has not been proven beyond a reasonable doubt, scientifically, that the fuel oil caused any significant adverse effect.

[12] Dealing with the first point of where the oil came from. Mr. Douglas argues that no one saw free product in the basement. And although there was a sump or a drain in the corner of the basement, that Inspector Murray said contained a sediment that smelled of oil, Mr. Douglas argues that that evidence of that officer is unreliable because with the smell of fuel oil established in the basement, it would have been impossible for her to isolate that smell as being stronger or strong, or even present in the sediment that she pulled from the bottom of the sump pump, below the water.

[13] He argues that no one saw the fuel line coming from the tank damaged, no one saw it because it was covered by brick, and noone examined it. And, that although there was staining on the lower part of the barrel and staining on the floor, that's something that would be present in any place where there was an older oil tank. And he as well argues that after being brought to the scene, or after arriving at the scene, he ended up having two holes dug to dry to intercept any

product that came from the building and after he dug those holes, there was no evidence of any oil, this was few days later, no evidence of any oil present in any of those holes. Although it's clear that they were down slope from the building, near the building, and that if oil was still flowing from that area of the sump or the basement, that he would have expected oil to arrive there. Now, it's true that oil was in one hole, evidence of oil was in one hole, but he said that only occurred when sort of intercepted the catch basin and water from the catch basin which clearly was, had product in and about it, flowed back into that hole coming from the catch basin.

[14] It's clear from his evidence that he postulates that maybe someone maliciously poured fuel oil in the catch basin or in the ditch across the road, or that it came from some other source. But he says that the Crown's evidence and the evidence that he provides certainly should leave a doubt as to whether or not the oil came from his oil tank.

[15] Now, Mr. Beckers who is a site professional, an expert in fuel oil cleanup, the effects of fuel oil on sites, was brought to the site by Mr. Douglas on April 3rd . They travelled to the site and Mr. Douglas had expressed some concerns to him

about whether or not the fuel oil that the Department of Environment was complaining about had come from his building at all. So, they went to the site and one of the first things that he did was examine the area and he saw that on the floor around the fuel tank closest to the sump pit, there was a large quantity of peat moss that Mr. Douglas had spread there himself to help contain and absorb any free oil so that it wouldn't discharge into the sump pit. And upon inspection of the sump pit, he observed only a very thin layer of oil, but significant staining present on the walls and sides of the sump pit and surrounding the area to the south. He observed only one discharge line extending in a northwesterly direction in the sump pit, however he said that it did not appear to be the same material as the line discharging to the catch basin from Mr. Douglas's property. So he added water to the sump pit to allow water to flow through the discharge line and he did not observe that flow of water go into the catch basin. Leading him to the conclusion that the two lines were not connected.

[16] He also observed at the time that the peat moss that had been put down to absorb oil was in such a state that it needed to be replaced, although certainly it was not wringing wet with any product. And again, I hasten to add that no free product was ever seen in the basement by anyone. So then, to try and confirm as to

whether or not there would be a direct connection from the sump in the building to the catch basin and the ditch, Mr. Beckers performed a dye test. After fifteen minutes there was no evidence of any of the dye coming into either the sump or the ditch across the road, so after those 15 minutes, he added a second half-capful of dye and four more litres of water to the sump pit and then waited another 15 minutes and at that time he observed small fissures, or dye entering the catch basin from the outside via small fissures or unsealed joints. And dye-tainted water was also flowing around the catch basin, entering the culvert and discharging into the stream on the other side of the road, and there was a steady flow of dye that was observed falling into the system by the time he ended up leaving the site.

[17] His opinion was that there was a direct connection from the sump to the catch basin, or there was a connection between the sump, the catch basin and the ditch although that they were not directly connected by a pipe.

[18] It’s clear as well that the pipes were examined and there was no staining of oil, no evidence of any staining of oil on the inside of any of those pipes. In his opinion, having examined the area, was that the fuel oil had come from the fuel tank in the basement of the Douglas Projects International Incorporated building.

[19] Having listened to the evidence carefully, having considered the points raised by Mr. Douglas in defence of himself and the company, it is clear that the evidence that the Crown relies upon is circumstantial evidence as to the origin of the oil. There is no evidence that the oil could have come from any other source, and the speculation of Mr. Douglas that it could have been the result of someone perhaps pouring oil into the area of the catch basin does not make sense, in my view, on the evidence that has been called because there was no staining of oil inside any of the pipes, either the inlet pipes to the catch basin or the outlet pipes. And the only reasonable conclusion, based on the evidence that has been called before this court, is that the oil product came from the oil barrel that was in the basement of that building. Mr. Douglas thought it was empty when he bought the building at tax sale, but on the evidence he did nothing to check it. The evidence of the staining in the area of the floor, the barrel, the sump, evidence of oil, of the dye test showing the direct connection, or indirect connection through the ground to the catch basin and the ditch, proves to me beyond a reasonable doubt that that oil came from that barrel. No, there was no evidence of product entering into the holes directly from the building that Mr. Douglas made in the area after the fact, nor should there have been because the oil had already left the building by that

time and I think the Crown had used with the expert the analogy of shutting the barn doors after the cows had all left, which seems apt in the circumstances here.

[20] With regard to compliance with the orders, it's clear that Mr. Douglas admits that neither he nor his company complied with the orders within the time frames set out, especially with respect to the orders that I've reviewed on March 30th and April 27th, and it's clear the evidence indicates that there was non-compliance in that regard. All that he ever did was place up to 200 absorbent pads in the area to try to collect free product in the area of the ditch and the catch basin and place a boom there as well in the catch basin.

[21] It's clear that the Department was concerned about the migration of the oil to the LaHave River and after inaction by the accused ultimately took it upon themselves to install berms or dykes in the ditch in order to prevent the flow of free product. And it's clear on the evidence from Mr. Beckers that there was being caused a significant environmental adverse effect, and it was clear from all of the evidence that's been called at this trial that fuel oil was, and is, a substance that is capable of causing significant adverse effects to the environment.

[22] In Mr. Beckers report and the evidence is that there was a significant area of distressed vegetation in the ditch and adjacent back yard of a neighbouring property and it's clear that the company, nor Mr. Douglas took any steps to, or didn't take all reasonable steps to prevent and reduce and remedy the adverse effects of the release, nor did they rehabilitate the environment to the standard adopted or prescribed by the Department. Something that was conceded by the defence, but the defence indicates that it did not have the financial ability to do so.

[23] Having heard all of the evidence before the Court, I'm satisfied that the Crown has established the *actus reus* of the offences beyond a reasonable doubt, of all the offences both against Mr. Douglas personally and the Company. Mr. Douglas and the Company can absolve themselves from liability however, for this strict liability offence if they are able to prove on the balance of probabilities that they took all reasonable steps in the circumstances to avoid the commission of these offences.

[24] In that regard Mr. Douglas says that he did all that was within he and his company's financial means. However I reject that submission. No doubt Mr.

Douglas and his company were not well off at that particular time. But it's clear that his dealings with the inspector from the Department of Environment, Kristen Murray, indicated that he would be taking steps. He says that he had planned to all along because he thought he was going to be the beneficiary of a deal that would go through soon such as it would free up money. And he indicated to this Court, without establishing that both he and the company were bankrupt and unable to raise the funds, simply that the company was, or simply that he and the company were without free cash at that particular point in time.

[25] So with regard to the clean-up I'm satisfied that he has not established, on the balance, that he took all reasonable measures to comply with the law and the defence of due diligence, in my view, fails.

[26] With regard to the release of the substance in the environment, he argues that was an act of a third party that caused that. And that may be directly so, it may have been the vandals entering the building, for gosh knows how many times, that finally caused that barrel to fall over a little more than it had three weeks earlier than when Mr. Douglas had been there before. And that may have caused the spill within that time frame. But it's clear that Mr. Douglas had done nothing, nor his

company had done nothing to prevent such an act from occurring. He knew that vandals were coming in and out of that building and he knew that his previous efforts to secure the fallen-in foundation were not successful. He knew that the oil barrel was there yet he had never actually examined it to determine whether or not the barrel was completely empty of fuel oil, he just assumed it was so. He therefore took no reasonable action to prevent the discharge of the product in to the environment. And it would have certainly been reasonable knowing that the individuals coming in and out of the property through that area, it would have been reasonable for him to know that what steps he had taken in the past to secure the area were insufficient, and should have caused him to secure it better.

[27] At the end of the day I'm satisfied that in relation to all six charges both against the company and Douglas Projects International that the Crown has established those offences beyond a reasonable doubt and there is no applicable defence of due diligence that has been established.

[28] The question then arises as to whether or not I should find the corporation and the accused both guilty of the offences with which they are charged, and it's

clear the *Environment Act* makes liable those individuals who are persons responsible. The person responsible is defined under section 2(ak) of the Act, as

> 2(ak) (ii) the owner or occupier of the land on which the adverse effects has occurred or may occur, ...
>
> ...(iv) a person who has or has had care, management or control, including care, management and control during the generation, manufacture, treatment, sale, handling, distribution, use, storage, disposal, transportation, display or method of application of the substance or thing. ...
>
> ... (v)A person who acts as a principle or agent of a person referred to in sub clauses (i) to (v);"

[29] And it's clear that the totality of that legislation indicates that also the owner or occupier of the contaminated site, or a person who acts as a principal or agent of that person can be found guilty of the offences, and are persons responsible for the contaminated sites.

[30] Clearly in this case Douglas Projects International was the owner and occupier of the contaminated site, the place where the oil originated. And it's also clear that Mr. Douglas himself was a principal and agent of that company, and in my view, the *Environment Act of Nova Scotia* is such that the company and Mr. Douglas can both be found guilty and as a result I enter convictions on all of the charges before the Court, both against the corporation and the accused.