IN THE PROVINCIAL COURT OF NOVA SCOTIA

Cite as: R. v. Loomis, 2006 NSPC 14

Date: 2006/03/31
Docket: 1544078
Registry: Halifax

Her Majesty the Queen

v.

Gordon Frederick Loomis

DECISION

Judge:	The Honourable Judge Castor H. Williams
Heard:	January 26, 2006, in Halifax, Nova Scotia
Oral decision:	March 31, 2006
Charge:	38 (1) (c) Crown Lands Act
Counsel:	Peter Craig, for Her Majesty the Queen (Crown) Don Schewfelt, for Gordon Frederick Loomis (Defence)

By the Court:

Introduction

[1] The defendant, Gordon Loomis, applied to and received from the Department of Natural Resources a permit that allowed him, "to construct, place, repair, maintain and use a wharf/boat ramp/ mooring on submerged Crown land (not including bodies of fresh water)." The proposed project would have created a wharf that would project from his waterfront property, at Seabright, into Woodens Cove, which is located in the Halifax Regional Municipality. This permit also authorized that the wharf may be supported by a crib that would have concrete ties below the ordinary high water mark. However, any seawall activity was to be conducted at or above the ordinary high water mark.

[2] Receiving complaints from his neighbours concerning the building of a structure on the landward side of the defendant's property, officials from the Department, after an investigation, determined that, prima facie, this structure, a seawall or landward crib for the wharf, did encroach below the ordinary high water mark and was thus a non-permitted use of Crown lands. Consequently, they charged him with dumping or depositing materials on or over Crown lands.

[3] This case therefore raises the issue of whether the defendant has in fact encroached on Crown lands without permission, and, if so, is it open to him, in the circumstances, to rely on the defence of due diligence.

Summary of Evidence

(a) for the Crown

[4] On November 29, 2004, James O'Melia, a conservation officer with the Department of Natural Resources, received a complaint that the defendant was conducting some infilling operation on the seaward side of his property which is located at Seabright in the Halifax Regional Municipality. Two weeks after receiving this complaint, and being aware that the defendant had a permit, tendered as Exhibit 1, but not its details, to do some work, O'Melia and a colleague Mike Kew visited the defendant's premises to determine whether or not he, the defendant, had committed any violations.

[5] Seeing what they believed to be some recent work on the seaward side of the defendant's property, Kew took photographs of this structure which were tendered as Exhibit 2. Additionally, O'Melia received from the defendant, at some point of his investigation, Exhibit 3, a picture showing the same location before the present construction. During the course of his investigation O'Melia also received from one of the defendant's neighbours, Exhibit 4, a photograph of an undetermined date that purported to depict a historical use of the Cove.

[6] Utilizing recent aerial photographs and file copies of photographs of the area and his own observations, O'Melia concluded that, prima facie, the defendant had built a stone structure that jutted out into the water below the ordinary high water mark. He then interviewed the defendant on December17, 2004 and served him with a stop work order. Further, as there was some discussion concerning land ownership, he requested that the defendant provide him with documentation to prove that there was a pre-existing rock outcropping on which the defendant had erected his present structure. As a result, the defendant submitted a location certificate Exhibit 6, and a survey plan, Exhibit 7. O 'Melia also received a certified true copy of the property deed, tendered as Exhibit 8. However, after requesting and receiving the requested documentation, O'Melia took the view that it was not his job to interpret plans. Consequently, the documentation presented and plans attached to the permit did not persuade him that the defendant had not committed a violation. The neighbours wanted the rock structure removed.

[7] Michael Kew was the Forestry Technician who, at the Department of Natural Resources, prepared the defendant's permit documentation. Exhibit 1 is his cover letter and the permits that he issued. He generated Schedule "B" (2) that is appended to the permit. He also visited the premises and explained the conditions of the permit specifically that there should be no infilling. Although he gave no authorization to build a rock outcropping, he was unable to say where the ordinary high water mark was located on the defendant's property.

[8] Samuel Smith is a licenced surveyor employed by the Department. In December 2004 he did field work that resulted in a plot plan, Exhibit 9, showing the location of the alleged infill

conducted by the defendant. He opined that the ordinary highwater mark could be determined by the physical evidence of distinct vegetation, colouration, markings on the land and that he took note of the location of the ordinary high water mark on the defendant's property. In his view, the photographs in Exhibit 2 show the same area as depicted in Exhibit 9 and he estimated that the rock outcropping was about five metres. When he viewed photograph "D" of Exhibit 2, he opined that the ordinary high water mark was where he placed an "X."

[9] While Exhibit 10 is a combination of a survey plan generated by a private surveyor and his plot plan Exhibit 9, Exhibit 11 is a survey of the defendant's property prepared by a private surveyor. Nonetheless, all the survey plans, Exhibits, 1, 10 and11, have bearings to show the legal description of the defendant's premises. Furthermore, to assist in demarcating the property his highlighting on Exhibit 10 shows its boundaries as stated in the registered deed that was submitted as Exhibit 8. However, as he was not asked to do so he did not outline the ordinary high water mark as he did not observe it whilst on the plans prepared by the private surveyor, he, the private surveyor, has indicated the location of the ordinary high water mark.

(b) for the defendant

[10] When the defendant purchased the property it was forested land except for a jutting into the water that was used for boating purposes by a neighbour. In the Summer of 2000 shortly after the purchase and long before any construction activities, he had taken a photograph of the

disputed location that is submitted and included in Exhibit 12. Photograph "A" of Exhibit 12 shows the property with a stone outcropping that has a part below the ordinary high water mark. The picture shows his wife sitting on the outcropping. Moreover, he took the other photographs of Exhibit 12, mainly for comparative purposes, after the Department had charged him.

[11] On purchasing the property and in order to determine the property lines, he ordered a survey plan that he submitted as Exhibit 11. This plan, drawn in 2003, depicted the property with the surveyor mapping and including the rocky outcropping as a constituent part of it. This outcropping is the same as shown in Exhibit 12, photograph "A." It is also the same outcropping that is shown in the documents approved by the Department in Exhibit 1, Appendix "B" (1).

[12] Furthermore, as he wanted to wall the property and crib which the first permit did not allow, he applied for and received another permit that he understood allowed him to build and repair a wharf, put in a crib and a seawall that were not below the ordinary high water mark. Schedule "B" (2) of Exhibit 1, which was drawn by Kew of the Department, represented the outcrop of land, Schedule "B" (2), Exhibit 1, with the float to be built off the jut of land. The schedule "A" of Exhibit 1 was not in the first permit and he wanted the seawall activity to be included and was aware that he had to follow the ordinary high water mark.

[13] As no Departmental personnel came on the scene, it appeared that they left the determination of the location of the ordinary high water mark for him and his contractor, who was experienced in the constructing of seawalls. They did. Additionally, he completed the work

by October 21, 2004. However, during the construction phase, the surveyor was present at a high tide to ensure that the work did not go below the ordinary high water mark. Besides, he used the footprint of the existing wharf with the existing rocks as the base rocks. Additionally, he made sure that the construction was back two feet from the base rocks and he also narrowed the structure to ensure that when it settled no rocks would fall unto Crown lands.

The Law

(a) The legislation

The Crown Lands Act, R.S.N.S. (1989) c.114, s.38 (1) (c) states:

> 38(1) A person who without legal justification or without the permission of the Minister or a person authorized by the Minister, the proof of which rests upon the person asserting justification or permission,
>
> (c) dumps or deposits materials on or over Crown lands or causes, suffers or permits material to be dumped on or over Crown lands,
>
> is guilty of an offence.

(***b) Case authorities***

[14] First, neither parties raised nor debated, during the course of the trial, the issues of whether:

> (a) Woodens Cove is or is not a body of fresh water so as to fall within or outside the scope of the permit; or
>
> (b) Woodens Cove is "land" that falls under the jurisdiction of the Minister, pursuant to the provisions of the ***Crown Lands Act***, R.S.N.S.(1989) c. 114, s.2 (c).

[15] Nonetheless, the Crown, relying on the decision of Crawford, J.P.C., in ***R.v. Buckley*** [1994], N.S.J. No. 387, did submit, in argument, that Woodens Cove was not a "public harbour" within the meaning of the ***Constitution Act,*** 1867, 30 & 31 Victoria, c.3 (U.K.), s. 108 and, as a result, it is Provincial Crown lands. The defendant did not contest this submission. I therefore conclude that these are settled issues that the parties are agreed upon and, as a result, are not salient or determinative factors concerning the issue that I must decide.

[16] Second, I think that the expression, "the proof of which rests upon the person . . . " reveals the Legislature's intention that the defendant's guilt is not established merely upon the automatic breach of the statute but rather upon the prosecution establishing the *actus reus*,

beyond a reasonable doubt, and subject to the defence of due diligence. See***: R. v. Canadian Dredge & Dock Co. Ltd.*** (1985), 19 D.L.R. (4th) 314, (S.C.C.) at paras. 49-50.

[17] Therefore, I think and I conclude, considering the terminology used by our Legislature, and upon a review of the Supreme Court's decision in ***R.v. Sault Ste. Marie (City)*** (1978), 40 C.C.C. (2d) 353, 1978 Carswell Ont 24 (S.C.C.), that offences under the provincial statutes and regulations governing Crown lands are strict liability offences as opposed to absolute liability offences. Thus, having made that finding, I further conclude that it is open to a defendant to advance the defence of due diligence in response to all offences under this legislation.

[18] Several cases have dealt with the issue of due diligence and its applicability. Even so, in ***R.v. Canada Brick Ltd.,*** [2005] O.J. No.2978, (Ont. S.C.J.), at paras. 129 through 153, C. Hill J., presented a review of the salient cases which is of great assistance. Put succinctly, the defence of due diligence as was established in ***Sault Ste. Marie (City),*** at para. 60 and 61 (C.C.C. pp. 373- 374) contains two branches, namely, " if the accused reasonably believed in a set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event."

[19] In summary, the authorities aver that due diligence is a question of fact depending on each particular set of circumstances. Further, it is a determination of whether the act was reasonable with regard to the alleged prohibited act and not some other broad notion of reasonableness**.** Moreover, the Crown must prove beyond a reasonable doubt the *actus reus* of

the alleged offence and then it is open to the defendant to show, on the balance of probabilities that he believed in either a set of facts that if true would render his act or commission innocent or that he took all reasonable steps to avoid the particular event. See: ***R.v. Coyle***, 2003 NSPC 31, 216 N.S.R. (2d) 170, 680 A.P.R.170 reversed on other grounds [2004] N.S.J. No. 471, 2004 NSSC 253, ***R.v. Kelly***, [1997] N.S.J. No. 579 (Prov.Ct.), ***R. v. Henneberry***, [2001] N.S.J. 398 (Prov. Ct.), ***R. v. Wholesale Travel Group Inc***., [1991] 3 S.C.R. 154 at pp.205- 6, 248.

Findings and Analysis

[20] I think that the defendant, in executing the terms of the permit should quite properly be sanctioned if he diverted from its authorization. In my opinion, the Legislative sanctions are intended to induce him, as a permit holder, to be conscientious in implementing its terms and conditions. On the other hand, if he has acted as a reasonable person and has taken all normal and reasonable precautions necessary in building the seawall, at or above the ordinary high water mark and without dumping or depositing any materials on or over crown land, in my view, it cannot be said that he was derelict in his duty of care and had not discharged all the obligations that he could reasonably have been expected to do. Moreover, I think that the defence of due diligence if it succeeds goes to the specific contravention as charged, that is dumping or depositing materials on or over Crown lands, in the first instance, and any further dumping or depositing as the impugned conduct continues or is continuing.

[21] A work stop order was issued but it is not in evidence. Thus, the exact nature of the contravention of the Act and the concerns expressed by the Minister or a person authorized by the Minister is not before me to be read together with the other evidence.

[22] In my opinion, there was no clear and definitive evidence of the location of the ordinary high water mark as asserted to by the Crown. Smith's observation that the ordinary high water mark could be determined by the physical evidence of distinct vegetation, colouration and markings on the land would appear to leave it open for individual subjectivism if there were any disagreement on its location. In evidence were several photographic exhibits, for example Exhibit 12, that showed distinct vegetation and markings both on the shoreline and on the rock outcropping, yet Smith's attention was not drawn to these critical photographs for his comments. However, on the photograph that he commented upon, Exhibit 2, photograph "D," on his own definition, it was indeed difficult for me, objectively, to discern any distinct vegetation or markings that would identify the ordinary high water mark

[23] Nonetheless, even if I were to assume that he is correct in that the ordinary high water mark is where he has indicated it to be. The "X" that he has placed on the photograph as the site of the high water mark gives no indication of whether the ordinary high water mark runs parallel with and at what level against the rocks depicted or, whether that rock is part of the base line rocks that pre-existed the structure placed by the defendant. Similarly, was he saying that the "X" is were the ordinary high water mark hits the structure only as shown on Exhibit 9, as he testified and, that from the "X" to the seaward end of the outcropping, the structure is below the

ordinary high water mark? In either case he neither commented nor explained the presence of rocks that pre-existed the defendant's work. Similarly, he did not comment on nor explained where the ordinary high water mark would be in relation to those rocks. From the total evidence, it would appear that the Department took it for granted that the defendant and his experienced contractor, as locals, knew the location of the local ordinary high water mark. Having done so the Department now cannot, in my view and after the fact, say subjectively and allude that the local opinion was incorrect.

[24] On the other hand, the defendant pointed to and highlighted on photographs "A" and "G" of exhibit 12, distinct vegetation, colouration and markings on the shoreline and rocks that conform with Smith's observation of where one could determine the location of the ordinary high water mark. Furthermore, the survey plan, Exhibit 11, certified by Kirk T. Nutter on April 15, 2003, clearly shows an outcropping with the notation"old infilled area." It also shows the same area as part of his survey with a line representing the ordinary high water mark on the external boundaries and enclosing it. This, I think, when combined with Exhibit 12, adds creditworthiness to the defendant's version of facts that there was a pre-existing stone outcropping into the water. I so find. The aerial photographs, Exhibit 5, in my opinion, added nothing to assist or to persuade me otherwise in this conclusion.

[25] O'Melia and Kew visited the defendant's premises after he had completed the sea wall construction. Then, O' Melia demanded that the defendant produced proof that he owned the outcropping piece of land and that there was a pre-existing rock appurtenance to the property.

The defendant presented the survey plans that are in evidence, and also Exhibit 7, to show the boundaries; a picture, Exhibit 3, to show the pre-existence of the rock outcropping; an old plan from 1994, Exhibit 6, showing a dock into the water. All these, although demanded, when presented, were rejected by O'Melia on the grounds that he was not in a position to interpret surveys. Notably, however, on the evidence, in this regard, he did not seek the help or assistance of a surveyor but apparently did so to attempt to prove a violation of the Act. I therefore conclude and find that although he demanded proofs from the defendant, O'Melia was not disposed to accept such proofs.

[26] The defendant wanted to build on the existing rock outcropping as it would save him from building a second crib in his wharf project. However, the first permit, in his view, did not allow him to perform that work. Therefore, he sought and received another permit. I note that Kew wrote as Schedule "A," among other things that, "any seawall activity is to be conducted at or above the O.H.W.M." Additionally, "no natural rock below the O.H.W.M., is to be moved." Kew also generated Schedule "B"(2) a sketch of how the defendant should build the proposed wharf. He also went to see the defendant and explained it all to him.

[27] The Schedule "B"(2) shows the wharf commencing presumably on land at the edge of the ordinary high water mark. The permit under the heading "Wharves" allowed that "the first crib must be located on the landward side of the [ordinary high water mark] or at least 3.05 metres (10) feet from, and on the seaward side of, the [ordinary high water mark]. The first crib is not permitted to straddle the [ordinary high water mark.]" This appears to conform with Kew's

diagram. From his instructions in the schedule "A," " any seawall activity is to be conducted at or above the [ordinary high water mark]" it is reasonable to conclude as "it is in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the set of circumstances as disclosed by the evidence" that Kew was aware that a sea wall was going to be constructed and that the first crib could be the seawall if it did not staddle the ordinary high water mark and was conducted at or above the ordinary high water mark. Likewise, his knowledge of the existence of a pre-existing rock appurtenance can be imputed as he also cautioned that "no natural rock below the [ordinary high water mark] is to be moved." After all, he had the survey plans and schedules attached to the defendant's application for a permit and he had actually gone to the site before any construction activities.

[27] Here, I do not think that the Crown is asserting any property ownership or title of the rock appurtenant as crown lands. What, however, it has attempted to show through undated aerial photographs; through a neighbour's testimony accompanied by a period photograph of an unknown date, is that the rock appurtenance did not exist before either the defendant purchased the property or that if it did, which they were not admitting, the defendant did not own it. Although issues of ownership of real property are not for me to determine, nonetheless, I find that the Crown's asserted position was untenable as it could not be reconciled with credible and admissible evidential proof through photographs, survey plans and reliable testimony of the existence of the rock appurtenance that, prima facie, led to the conclusion that it formed part and parcel of the property when the defendant purchased the lands. Consequently, I conclude and

find that the Crown has not proved beyond a reasonable doubt that the rock appurtenance did not exist before the defendant purchased the property.

[28] The issue however remains: Did the defendant, on the above findings of facts, deposit materials on or over Crown lands?

[29] Even though, prima facie, the defendant may have the possessory rights to the pre-existing rock appurtenance, under existing legislation, the Crown would own any part of that rock appurtenant that existed below the ordinary high water mark. However, I think that, as is evidenced by his sketch, Schedule "B"(2) of Exhibit 1 and his instructions in its Schedule "A," Kew appears to have recognized that a structure, a land-based crib, conceivably could be erected on this appurtenance. The Crown's evidence is that the ordinary high water mark hits the structure at a point not that the point where it strikes the structure was where the defendant had commenced building below that point, if at all. On the other hand, the defendant's testimony is that he followed Kew's instructions as stated in the permit. He built on top of his pre-existing rock pile where, at a high tide, he made sure of the location of the ordinary high water mark. Also, he ensured that he used the existing rocks as his base. Furthermore, he did not construct below the ordinary high water mark. The defendant's evidence stands unimpeached and uncontradicted.

[30] Thus, on the evidence that I accept, I conclude and find, considering the object and purpose of the ***Crown Lands Act***, as stated in section 2, and the ordinary use and meaning of the

word "on" (See: ***The American Heritage®)Dictionary of the English Language,*** Fourth Edition copyright ©) 2004, 2000 by Houghton Mifflin Company, Published Houghton Mifflin Company), that the Crown has failed to prove beyond a reasonable doubt that the materials that the defendant used in the construction of his sea wall/land-based crib were placed or deposited below the ordinary high water mark in the sense that the structure was supported by or in contact with or extent over, regardless of its position, the seabed that is unquestionably Crown land.

[31] On further inquiry, if he did not place any materials "on" Crown lands; Did he by his activity deposit materials "over" Crown lands? Here, I think that the phrase "on or over" combined with "dumps or deposits" as used in the ***Crown Lands Act*** contemplates a contiguous or connected conjoint activity rather than a disjointed activity. In other words, if "A" is put on "B" logically it is also "placed upon the surface" of "B." Likewise, "A" is realizably in a position "so as to cover" the surface of "B." Thus, in my opinion, bearing in mind such authorities as ***R.v. McGraw***, [1991] 3 S.C.R.72, 80, when considering the ordinary meaning of the words "on," "over," the term "on or over," in the context and the distributive association between words conveying the same ideas, as used in the ***Act***, in my opinion, would mean: upon the surface of any crown land and which, when placed, is supported by or is in contact with or extent over, regardless of its position Crown lands and, because of its position, also covers Crown lands. Thus, the prohibition would apply to any material that is put, emptied or discarded by anyone upon the surface of any crown land and which, when placed, is supported by or is in contact with or extent over, regardless of its position crown lands and, because of its position, also covers Crown lands.

[32] Here, the defendant's testimony was that not only did he use the pre-existing rocks as the footpath of his structure, but he also set back his structure at least two feet from the base rock formation. Additionally, as a further precaution, he narrowed the structure to ensure that when it settled no rocks would fall onto crown lands. There is no evidence that any materials that the defendant used ever fell into the water.

[33] Even so, without any evidence of whether the rock outcropping was a natural occurrence or a man-made event, the prosecution's theory also appears to rest on the premise that as the whole rock formation rested on the seabed, it was on or over crown lands. Therefore, any placement of materials upon it would also be on crown lands. The difficulty here, however, is that the Crown could not and did not establish any possessory rights or interests in or over the rock outcropping which might have lent some efficacy to its contention.

[34] Consequently, on the evidence that I accept, I conclude and find that what the defendant constructed was not placed on the seabed or built up from the seabed. Furthermore, it was not supported by or in contact with the seabed and it did not cover the seabed. As a result, I further conclude and find that the construction of the seawall/ land-based crib was at or above the ordinary high water mark as allowed by the permit. Also, I find that it was constructed on the surface, that was above the ordinary high water mark, of the pre-existing rock outcropping.

[35] Therefore, I conclude and find that the Crown has not proved beyond a reasonable doubt that the defendant deposited any materials on or over crown lands.

[36] Even if an opinion could prevail negatively concerning the defendant's ownership of the rock outcropping, on the evidence before me and having heard all the witnesses and assessing their testimonies with the total evidence, I am satisfied, on the evidence that I accept, that the defendant could avail himself to the defence of due diligence. In my opinion he has established that he believed honestly that he owned the rock outcropping and acted accordingly. Moreover, in my view, he has established that he took all reasonable steps to ascertain the actual location line of the ordinary high water mark and took all reasonable steps to ensure that he built at or above its mark.

Conclusion

[37] The Crown's approach has been either to deny the pre-existence of the rock outcropping or to deny, however obliquely, the defendant's ownership. There is no evidence that the rock outcropping was a natural or man-made event which at some time in the past encroached unto crown land that is below the ordinary high water mark. Be as it may, I do not doubt that there is a rock appurtenant that is claimed by the defendant and that the Crown puts no claim to this piece of land. All the survey plans, presented in evidence, show and delineate this outcropping. The Crown disputes that is in the legal description of the property but adds nothing more by way of comments or otherwise. All the same, here, I cannot and do not decide rights in rem, but, based on the evidence before me it is reasonable to conclude that, prima facie, ownership of the rock outcropping rests in the defendant.

[38] On the other hand, before they issued a permit, the Department's officials had assessed and reviewed all the documents that the defendant submitted, which showed the rock outcropping, To ensure that the defendant followed the permit's conditions Kew visited the property and then drew a plan Schedule (B) (1) to show where the wharf should start from the landward side. This sketch shows that it should start from the ordinary high water mark line. I find that the defendant followed the permit. He repaired the wharf and readied the property for stage two of the project. Finally, there was no evidence that any materials that he used, fell into the water and unto crown lands that was below the ordinary high water mark.

[39] I am therefore satisfied that on the total evidence and that which I accept and, on the analysis that I have made, the Crown has failed to prove beyond a reasonable doubt that the defendant deposited materials on or over crown lands. Further, as I posited and concluded and found, that even if the Crown could have established a possessory right or interest to the rock outcropping, which on the evidence before me it did not, the defendant can avail himself to the defence of due diligence as he believed honestly that he owned it and acted accordingly. What is more, in my opinion, he took all reasonable steps, in the circumstances, to ensure that he determined the line location of the ordinary high water mark and also took all reasonable steps to make sure that what he built was at or above it as the issued and amended permit directed. I therefore find him not guilty as charged and will enter an acquittal on the record.