IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Milligan, 2004 NSPC 42

Date: 20040726
Docket: 1260474
Registry: Kentville

Between:

Her Majesty the Queen

v.

Scott Milligan

Judge:	The Honourable Judge Alan T. Tufts
Heard:	October 22-23, 2003 and January 7, 2004 and March 4, 2004 at Kentville, Nova Scotia
(Oral) Decision:	July 26, 2004
Charge:	50(2) Environment Act of Nova Scotia
Counsel:	Lloyd Lombard for the Crown Robert Stewart, Q.C. for the Defendant

By the Court (orally):

[1] Scott Milligan was convicted under s. 50(2) of the **Environment Act**. This offence involved the removal of approximately 10 hectares of topsoil from his land at New Road, near Aylesford, Kings County, Nova Scotia. The complete details of the facts surrounding the offence were included in the Court's previous decision regarding Mr. Milligan's conviction, which has been filed and published.

[2] To summarize, Mr. Milligan was removing topsoil to sell to the County of Kings to cover its closed landfill near Meadowview, Kings County, Nova Scotia. Mr. Milligan received approximately $ 43,000.00 for the topsoil. While Mr. Milligan made inquiries of the Department of Environment he never received approval. When approached by the Department officials during the material times he refused to cooperate with their requests or to allow them to enter his land. He was told to stop the topsoil removal activity but refused. Eventually the Department entered the property the following spring and this proceeding was commenced thereafter.

[3] Mr. Milligan's property is situate adjacent to the 101 Highway. It is zoned R-4 or R-6 under the County of Kings Land Use By-law, which allows country residential dwellings on larger lots. A 200' strip next to the New Road is already developed as residential property in a related residential zone.

[4] Topsoil removal is allowed by the County of Kings in residential zones such as the land owned by Mr. Milligan. It is only in agricultural zones which is where topsoil removal is not allowed, and in particular the A-1 zone.

[5] It is not clear, however, whether Mr. Milligan could have eventually received approval by the Department for topsoil removal in this case. The Crown, however, maintains that this consideration is irrelevant. I will address this point later.

[6] The Court heard the evidence of Jack VanRoestal, an agricultural expert with particular knowledge of soil quality and topsoil. He described the importance of topsoil to crop growth and how the removal affects drainage and crop production. He testified the Valley floor has some of the best topsoil accumulation in Eastern Canada and explained how valuable it is to agriculture production in this

area. It is clear, in my opinion, that agriculture is a significant economic activity in this area and critical to the area's long-term economic stability.

[7] The Crown seeks a minimum fine of $ 80,000.00, although in oral argument it was suggested by the Crown that a fine in excess of $ 100,000.00 would not be inappropriate. Although it is not exactly clear on what basis this figure was suggested, it appears to be linked to the approximately $ 43,000.00 which Mr. Milligan received for the soil. The Crown emphasises that deterrence is the primary objective.

[8] The general principles of sentencing for environmental offences are reviewed in the text The Prosecution and Defence of Environmental Offences, by Stanley David Berger, Chapter 7. In particular, the case of **R.** v. **United Keno Hill Mines Ltd.** which is reported at [1980] Y.J. No. 10, appears to be the seminal case which courts rely on for the factors to be considered, and those factors are as follows:

1. The nature of the environment affected;
2. The extent of the damage inflicted;
3. The deliberateness of the offence, and
4. The attitude of the accused.

For corporations additional factors are considered,

5. The size, wealth, nature of the operation and the power of the corporation;
6. The extent of attempts to comply;
7. Remorse;
8. Profits realized by the offence, and finally
9. Criminal record or other evidence of good character.

[9] Given the commercial nature of this operation I believe that the factors which I related relative to corporations should also be taken into account. In my opinion, the law requires the court to consider the nature of the environment affected and the extent of the damage. Regrettably it is not clear how deep the topsoil was which was removed nor how much topsoil remains. Also, in my opinion, whether the defendant could have received approval and upon what conditions is very important, if not critical, to the disposition of this matter. It is

only with this knowledge that the court can adequately determine the extent of the environmental damage, if any, and the fragility of the environment, which is one of the primary considerations and factors that the court must take into account.

[10] I do find it significant that the County of Kings has zoned this area residential and not agricultural and that the area may eventually be consumed entirely with residential dwellings and sideyards. The fact that it is now partially an agricultural use is only marginally significant. Also, topsoil removal is an allowable use in this area, if environmental approval is obtained. It is simply not known whether the approval may have been granted and whether conditions regarding topsoil levels may or could have been imposed. There was no attempt by the Department to determine this.

[11] Clearly the defendant was deliberate in his actions and showed little regard for the Department officials or the approval process. Mr. Milligan is of relatively modest means. His annual income presently is approximately $ 30,000.00. While the Court considered his prior inquiries with the Department fell short of due diligence he did make some attempt to get approval. Also, since the offence occurred Mr. Milligan has taken some remedial measures and although the extent and quality of the reparations is not clear the value of the reformation was $ 6,325.21 based on the receipts provided by the defendant to the Court, although these were not subject to cross-examination.

[12] The approval process does not require a fee but does oblige the landowner to post a maintenance or performance bond to ensure the activity is carried out in accordance with the terms of any approval conditions. In this case a bond of approximately $ 45 - 60,000.00 could have been required. I am told the cost of obtaining such a bond would be approximately $ 4,500.00. I do not consider necessarily that the approximate $ 43,000.00 which Mr. Milligan realized from the sale of the topsoil to be determinative. It is quite possible he may have been approved to remove the topsoil and realized this profit in any event.

[13] Mr. Milligan has no record and I can only conclude he is otherwise of good character and a contributing member of the community.

[14] There appears to be no authorities for sentences of similar offences. Most of the sentencing precedents included in the aforementioned text involved the release of pollutants or other forms of contamination or non-approval where

environmental harm was occasioned. For those cases where the offences related to non-compliance of regulations or regulatory requirements which appear not to involve environmental harm, the range of sentence is much lower than those involving release of pollutants or other contaminants into the environment.

[15] In my opinion this case is largely concerned with Mr. Milligan's failure to respect the approval process, because I cannot fully determine the environmental effect, if any, of his actions, for the reasons stated above.

[16] Fines for such cases need to emphasise deterrence and must be such that they cannot be considered a “license fee” to thwart the law either to do environmental harm, or as in this case, ignore the approval process. At the same time the Court must consider the modest circumstances of the defendant and the fact that there was some remedial work done by the defendant.

[17] The Crown recommendations of $ 80 - 100,000.00 is, with respect, not appropriate. Had this topsoil removal taken place in an A-1 zone where removal is not allowed and involved complete removal of topsoil or was determined by the Department that the removal was not possible and consequential environmental harm occasioned, a much larger fine, perhaps in the range recommended, may be appropriate.

[18] In my opinion a fine of $ 8,500.00 together with victim surcharge is an appropriate disposition, which totals $ 9,775.00 and that fine and surcharge is imposed.

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ALAN T. TUFTS, J.P.C.