SUPREME COURT OF NOVA SCOTIA

Citation: *GF Construction Limited v. His Majesty the King*, 2024 NSSC 167

Date: 20240523
Docket: 525087
Registry: Kentville

G.F. Construction Limited & Gerald Fulton

Appellants

v.

His Majesty the King

Respondent

SUMMARY CONVICTION APPEAL DECISION

Judge:	The Honourable Justice Jeffrey R. Hunt
Heard:	Kentville, Nova Scotia
Hearing Date:	May 3, 2024
Decision Date:	May 23, 2024
Counsel:	G. Bernard Conway, Solicitor for the Appellants Brian Cox, Solicitor for the Respondent

By the Court (orally):

Background

[1] Gerald Fulton and G.F. Construction Limited were tried in Nova Scotia Provincial Court on a two count Information alleging violations of Sections 50(2) and 158 (ha) of the *Environment Act*, S.N.S 1994-95, c. 1. The decision of van der Hoek, P.C.J. (as she then was), in which she convicted both accused, is reported as *R. v. G.F. Construction Limited*, 2023 NSPC 1.

[2] In short, it was alleged that the now Appellants engaged in the removal of topsoil on a site within Kings County, Nova Scotia, in a fashion that violated provisions of the *Environment Act* and Regulations.

[3] The details of the alleged violations were explored in the reasons of the Learned Trial Judge.

[4] Among other determinations, the trial court concluded:

1. The activity being carried out by the Appellants constituted a "designated activity" under the provisions of the statute and regulations;

2. A departmental inspector had directed the Appellants to seek and obtain Ministerial approval for the activity;

3. The Appellants failed to seek or obtain approval;

4. The Appellants engaged in the practice of topsoil removal, to a prohibited degree, without approval.

[5] In the course of her decision, the trial judge indicated that G.F. Construction and Mr. Fulton were asserting the defence of due diligence to these regulatory offences.

[6] The position of the Appellants is that the trial judge erred in multiple ways. A core submission of the Appellants is that she erred in her interpretation of the legislative provisions and failed to give real effect to the due diligence defence.

[7] With respect to the appeal against conviction, the Appellants say they are seeking an order registering an outright acquittal or, alternatively, granting a new trial.

[8] The Notice of Appeal includes an appeal against sentence. During the course of oral submissions, the Appellants confirmed they were not pursuing this aspect of their Notice. Accordingly, the appeal against sentence is dismissed. These reasons will focus exclusively on the challenge to conviction.

[9] The Respondent Crown argues that the decision under appeal discloses no material error. They submit the trial judge ran an entirely fair process and engaged in a clear exercise of fact finding and legal interpretation. Her dismissal of the due diligence ground was well founded. They argue that a purposive reading of the reasons, as a whole, reveals that she unequivocally dismissed all grounds which could have underpinned a due diligence defence.

[10] In essence, the argument of the Crown is that the Appellants were gravely disappointed in the outcome of the trial and are simply seeking a do-over of the process. This they submit is not permissible. They ask that the appeal be dismissed in its entirety.

[11] Before embarking on my reasons, I want to comment on the quality of the written and oral submissions advanced by both parties. This was notable and appreciated by the Court. I am obliged to both counsel for this assistance.

Issues

[12] The issues for resolution are as follows:

1. Did the Learned Trial Judge err in law by incorrectly interpreting and applying the relevant sections of the *Environment Act* and Regulations?
2. Did the Learned Trial Judge err by failing to give sufficient and detailed reasons rationalizing her decision to reject the Appellant's due diligence defence under s. 160(2) of the *Environment Act*?

Law and Analysis

Standards of Review

[13] The Nova Scotia Court of Appeal has repeatedly provided direction as to the applicable standard of review to be applied within the context of a summary conviction appeal.

[14] In *R. v. C.J.,* 2011 NSCA 77, Fichaud, J.A. addressed the point in these terms:

> 19 Questions of law are reviewed for correctness. Factual issues are reviewed for palpable and overriding error. The judge's application of the law to the facts is reviewed as a question of fact unless there is an extricable legal error.

[15] The Court of Appeal provided further commentary in *R. v. Taylor*, 2008 NSCA 5:

> 35 Appeals restricted to questions of law alone generally engage a standard of correctness.
>
> 36 The interpretation of a legal standard has always been considered a question of law. The application of a legal standard to the facts, while a question of law for jurisdictional purposes, is treated as a mixed question of law and fact for standard of review purposes.
>
> 37 A question of mixed fact and law may, upon further reflection, constitute a pure error of law subject to the correctness standard. (citations omitted)

[16] In *R. v. Pottie*, 2013 NSCA 68, Justice Farrar commented on the task of the summary conviction appeal judge in assessing findings at trial:

> 16 The standard of review for the SCAC judge when reviewing the trial judge's decision, absent an error of law or miscarriage of justice, is whether the trial judge's findings are reasonable or cannot be supported by the evidence. In undertaking this analysis, the SCAC court is entitled to review the evidence at trial, re-examine it and re-weigh it, but only for the purposes of determining whether it is reasonably capable of supporting the trial judge's conclusions. The SCAC is not entitled to substitute its view of the evidence for that of the trial judge.

[17] On the issue of how a Summary Conviction Appeal Court ought to review a trial court's conclusions on matters of due diligence, the Nova Scotia Court of Appeal in *R. v. Croft*, 2003 NSCA 109 stated as follows:

> 9 A trial judge's finding with respect to whether a defendant has established a due diligence defence under the terms of s. 78.6 of the Act is a finding of fact. R. v. Starvish (1987), 79 N.S.R. (2d) 136 (N.S. C.A.) and R. v. Harris (1997), 121 C.C.C. (3d) 64 (N.S. C.A.). An appellate court has no jurisdiction to interfere with a trial judge's finding with respect to due diligence unless such a finding is patently unreasonable and unsupported by the evidence…

[18] In submissions I raised with counsel these comments from Justice Saunders. I inquired as to whether either side questioned that this continued to be good law. Neither party questioned its continued application.

Legislation

[19] The statute and regulations relevant to this prosecution were the *Environment Act*, SNS 1994-95, c. 1, and the *Activities Designation Regulations*, N.S. Reg 47/1995 created pursuant to the Act.

[20] Section 66(1)(b) of the statute authorized the creation of regulations designating certain activities that would consequently require approval of the Minister.

[21] Of relevance to this prosecution is Section 13(g) of the Regulations which provides as follows:

> 13(g) …the construction, reclamation, or operation of a …topsoil removal operation where a ground disturbance or excavation greater than 1 ha [hectare] is made for the purpose of removing topsoil…is designated as an activity [requiring ministerial approval].

[22] Section 50(2) of the Act prohibits the commencement or continuation, without approval, of any designated activity. Section 122A(1) authorizes an inspector to issue directives to any person engaged in a designated activity. Finally, section 158(ha) makes it an offence to contravene such a direction.

[23] These were the provisions which the trial judge was required to correctly interpret and apply.

[24] One further relevant provision of the legislation was section 160. As a regulatory offence, it was open to the Appellants to mount a defence of due diligence. This defence is codified within the Act in the following terms:

> **Due diligence defence**
>
> 160 Unless otherwise provided in this Act, no person shall be convicted of an offence under this Act if the person establishes that the person
>
> > (a) exercised all due diligence to prevent the commission of the offence; or
> >
> > (b) reasonably and honestly believed in the existence of facts that, if true, would render the conduct of that person innocent. 1994-95, c. 1, s. 160.

ISSUE 1: Did the Learned Trial Judge err in law by incorrectly interpreting and applying the relevant sections of the *Environment Act* and Regulations?

[25] The parties do not seriously disagree as to the applicable principles of statutory interpretation. Accordingly, I will set these out here in summary fashion:

- Courts are to take a pragmatic approach to statutory interpretation that is both purposive and contextual: Sparks v. Nova Scotia (Income Assistance Board), 2017 NSCA 82;

- The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: Bell ExpressVu Ltd. Partnership v. Rex, 2002 SCC 42;

- This modern approach to statutory interpretation is consistent with the Nova Scotia Interpretation Act, RSNS 1989, c. 235 which provides that every enactment shall be deemed to be remedial and interpreted to ensure the attainment of its objectives: see Section 9(5);

- A provision will be truly ambiguous only when, after a contextual and purposive analysis, we are left with two plausible meanings, both equally consistent with the legislation's intention. Only then may the court resort to other interpretive aids: Bell Expressvu Ltd. Partnership v. Rex, supra.;

- With respect to the interpretation of regulations, the usual rules of statutory construction apply with the addition that the regulatory language must be read in the context of its enabling Act and in light of the consideration that regulations are normally made to complete and implement the statutory scheme, that scheme therefore constitutes a necessary context within which the interpretation must take place: Bristol-Myers Squibb Co. v. Canada (Attorney General), 2005 SCC 26.

[26] In their written argument the Appellants essentially accept this law and then point to the following paragraphs of the trial decision, arguing they reveal the trial judge's flawed approach to the interpretative exercise.

[27] The paragraphs pointed to as problematic read as follows:

> [45] Having found these facts, I must determine if the legislation captures them such that the defendants have been proven to have committed the offences.
>
> [46] Addressing first whether a proponent's stated purpose is the guiding factor for determining whether it operated a "topsoil removal operation where the ground disturbance or excavation greater than 1 ha is made for the *purpose* of removing topsoil", I note the words are not defined in the Act or the regulations and so must be read in their grammatical and ordinary sense. I agree with the Crown, these words do not appear to have been judicially considered, yet in relying on *Twin Mountain*, which considered the need for an approval for a pit that exceeds 2 ha, the defence was incorrect to conclude that court reached an interpretation favorable to the defendants in the instant case. It was not wrong for the defence to seek to rely on *Twin Mountain*, but, having reviewed the decision carefully, I found no in-depth analysis of the legislative purpose of the Act and the regulations, such that the decision supports the interpretation sought by the defendants. That almost decades old decision also focused its consideration on the then applicable *Pit and Quarry Guidelines*, which seemed to affect the decision such that pit mining for the purpose of development was excluded from the requirement for an approval. The evidence in that case established that the landowner gave over the land to the defendant for flattening to construct a building. There is no comparator with regard to the topsoil removal operation provisions related to purpose, and it would create a legislative absurdity to read it in, such that an operation could occur without regulatory oversight given the objectives of the Act to "support and promote the protection, enhancement and prudent use of the environment". Without regulatory approvals topsoil would be stripped near waterways resulting in water contamination by mineral soils. That cannot have been the purpose of this environmental legislation.
>
> [47] A contextual and purposive reading does not support exemption based on stated purpose, and to interpret the legislation in such a manner would render regulation of topsoil operations all but unenforceable. Instead, I agree an interpretation consistent with the purpose of the Act and the intent of the legislator, remediates the effects on the environment of business operations and ensures appropriate approvals are obtained before work is engaged. As such, I accept the Crown's position that the proponent's particular purpose for removing

> topsoil is not relevant to the application or interpretation of the legislation. Such an interpretation undermines the purpose of this legislation.in any event, the defendants' evidence of purpose was not accepted by the Court.

[28] The submission of the Appellants pertaining to these paragraphs was set out in paragraph 7 of their factum:

> 7 … the Learned Trial Judge's discussion of the relevant legislation in the passage above creates an interpretation that is overbroad as it captures any operation, regardless of purpose or intent, involving topsoil removal where more than one hectare of land is disturbed. It is the Appellants' position that this cannot have been the intent of the legislator when creating the Environment Act as it casts far too wide of a net and creates uncertainty for consistent application of the legislation.

[29] In further submissions Appellant counsel expanded on their argument. The Court was invited to consider certain news reports attributing remarks to the Nova Scotia Minister of Environment where he was said to be commenting on the need for consistent application of environment regulations.

[30] A core argument advanced by the Appellant was that if the trial court's interpretation of regulation 13(g) were allowed to stand it could wrongly capture topsoil operations that should not fall within the regulations "…because the total area of ground disturbance may not be linked to topsoil removal".

[31] The Respondent argued in reply that any concern about overbroad interpretation is misplaced. They submit that given the remedial scope of the Act, which includes the "…protection, enhancement and prudent use of the environment…", the court below was correct to adopt the interpretation that it did.

[32] In their factum, the Respondents argued as follows:

> 9 … A narrow interpretation that restricts the scope of "topsoil removal operation" to only those operations whose primary objective is the removal of topsoil would fail to capture activities that do not pursue, but nonetheless result in the removal of topsoil. Because removing topsoil may precipitate harm or risk of harm to the environment, it is appropriate to set the trigger for approval where topsoil is removed and not, as the Appellants advocate, where the removal is incidental to another stated purpose.

[33] It is clear that the trial court itself recognized this issue and accepted the position of the prosecution. The decision of the trial judge commented as follows:

> 49 … a contextual and purposive reading does not support exemption based on stated purpose, and to interpret the legislation in such a manner would render regulation of topsoil operations all but unenforceable.

[34] I have considered all the Appellant's arguments pertaining to this issue and specifically their submissions drawing on the decision of Justice Gruchy in the case of *Twin Mountain Construction Limited v. R.*, 2004 NSSC 101.

[35] The Appellants argue that the approach taken by the trial judge in the present case is inconsistent with the decision of Justice Gruchy in *Twin Mountain*. Judge van der Hoek dealt with the reasoning and outcome of *Twin Mountain* at paragraphs 29 through 38 of her decision. I will not quote those provisions given their length. I have considered them fully and have weighed the extensive submissions of both sides as they pertain to the findings in *Twin Mountain*.

[36] Respondent counsel points out that the *Twin Mountain* judgment dealt with the then existing wording (since amended) of a different subsection of regulation

13. The provision being interpreted was section 13(e) which addressed pit operations. Critically as well, at the time *Twin Mountain* was decided it was believed that certain departmental guidelines had the force of law, or at least could be the subject of reliance by operators. While this was later determined, in a subsequent judgment, not to be the case (see *3266304 Nova Scotia Limited v. Nova Scotia (Minister of Environment)*, 2019 NSSC 148), the guidelines were a factor at the time the *Twin Mountain* matter was determined.

[37] Accordingly, when Justice Gruchy was weighing and considering the case before him, he was operating with the assumption there was an overarching exemption in play where the underlying purpose of a pit operation was the development of land to a useable state. This issue is commented on by Justice Gruchy at paragraph 18 of his reasons.

[38] It is evident to me that consideration of this potential exemption did impact the reasoning and outcome in *Twin Mountain*. While this does not mean that the Appellant's proposed interpretation of the present regulation 13(g) is necessarily incorrect, it does mean that the use of *Twin Mountain* as a precedent on the "purpose" issue is, I believe, more limited than suggested by the Appellant. This too was clearly the view of the court below.

[39] The Respondent argues in its factum that the Appellant's concern about overbreadth of the interpretation in the judgment below is misplaced. In their factum they comment as follows:

> 10 The learned trial judge also properly applied the phrase "for the purpose of removing topsoil" in section 13(g) of the ADR to "ground disturbances or excavations" only, and not "topsoil removal operations". The resulting interpretation captures "topsoil removal operations" which fall under one hectare, but whose total ground disturbance or excavation nonetheless exceeds 1 hectare in area.
>
> 11 There are many hypothetical examples that support this interpretive construction.
>
> 12 For example, a job site featuring more than one hectare of excavation intended for underground pipeline installation, or a ground disturbance in the form of tilled farmland would <u>not</u> trigger the requirement for an approval under section 13(g). This is because these hypothetical "ground disturbances or excavations greater than one hectare" would not be "made for the purpose of removing topsoil", and therefore not raise similar concerns about harm or risk of harm to the environment.
>
> 13 By contrast, a site featuring a modest topsoil removal operation, but with ground disturbances over 1 hectare in size which are linked rationally with topsoil removal - such as roads designed for ingress/egress and/or topsoil loading and storage areas - would properly require an approval under the Act. The learned trial judge correctly found that such an interpretation is consistent with the remedial nature of the statute. A precautionary approach assumes the potential for environmental impacts at the boundary of a "ground disturbance or excavation", rather than a "topsoil removal operation itself". It guards against spillover between the areas of designated activity and areas of ground disturbance or excavation made in furtherance of that designated activity.
>
> 14 By tying the phrase "for the purpose of removing top soil" to a ground disturbance or excavation over 1 hectare, the learned trial judge properly averted [sic] to the potential harm resulting from a "ground disturbance or excavation" being directly linked to topsoil removal. This interpretation was consistent with the remedial purpose of the Act.

[40] I believe it is evident that this was in fact the approach taken by the trial judge. She appears to have been fully alive to the nuances of the section and its possible interpretation. The trial decision contains the following discussion:

> 48 With respect to whether the entire area of excavation or ground disturbance is assessed or only the spot from which the topsoil is removed, I also accept the Crown's arguments. The words read grammatically and in the ordinary sense result in "for the purpose of removing topsoil" modifying "where a ground disturbance or excavation greater than 1 ha is made", not "topsoil removal operation". A topsoil removal operation almost by necessity will require a ground disturbance of more than simply the spot where the topsoil is removed. It is not a backyard garden excavation for a foot path that the Act is meant address, rather it is large scale operations that exceed one hectare. At issue is the need to obtain an approval to permit the Minister to assess and determine whether to authorize the work in keeping with environmental objectives. As such it does not create an absurdity to expect that the whole of the disturbance related to topsoil removal would be included in assessing the size of the operation. I do not accept the defence argument that such a requirement unfairly stymies business operations. Instead, it serves to protect both business operations and those impacts on the environment that must be addressed for large operations.

[41] The trial judge appears to have taken a careful and considered approach to the interpretation exercise. I think a fair reading of the decision reveals that she fully turned her mind to the arguments of both sides. The decision contains a statement of the correct interpretive principles and, more importantly, a thorough application of those principles to the facts as found. I will have more to say on the factual findings themselves in my discussion of the next issue.

[42] The reasoning pathway and conclusions of the trial judge are expressed in clear language. As a reviewing court, I have absolutely no difficulty in understanding the findings, reasoning, and outcome.

[43] I can find no reversible error in the approach taken, or conclusion reached, on this first issue. I dismiss this ground of appeal.

Issue 2: Did the Learned Trial Judge err by failing to give sufficient and detailed reasons rationalizing her decision to reject the Appellant's due diligence defence under s. 160(2) of the *Environment Act*?

[44] The submission of the Appellants on this issue is that the trial decision failed to adequately address why the defence of due diligence was rejected. While the trial judge noted at the beginning of the decision that the defence was being raised, she did not explicitly reference due diligence again through the entirety of the reasons.

[45] In response, the Crown says that the trial judge engaged in a clear fact-finding exercise and reached highly negative conclusions against Mr. Fulton and his credibility.

[46] In essentially rejecting all the material evidence of Mr. Fulton (where it disagreed to any degree with the evidence of the Inspector) the trial judge made clear there was no basis on which to advance a due diligence defence.

[47] No reasonable reader of the decision would be confused, argues the Respondent, as to why the due diligence defence failed, because the trial judge roundly and explicitly rejected any and all factual underpinning for the defence.

And further, the trial judge found the same with respect to anything in the evidence generally which would have grounded the defence.

[48] Turning to the principles applicable to assessing sufficiency of reasons, the Supreme Court of Canada and Nova Scotia Court of Appeal have provided extensive guidance on how a Summary Conviction Appeal Court is to approach its task of reviewing reasons.

[49] In *R. v. Sheppard*, 2002 SCC 26 the Supreme Court commented as follows:

> 55 My reading of the cases suggests that the present state of the law on the duty of a trial judge to give reasons, viewed in the context of appellate intervention in a criminal case, can be summarized in the following propositions, which are intended to be helpful rather than exhaustive:
>
> > 1. The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.
> >
> > 2. An accused person should not be left in doubt about why a conviction has been entered. Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record. The question is whether, in all the circumstances, the functional need to know has been met.
> >
> > 3. The lawyers for the parties may require reasons to assist them in considering and advising with respect to a potential appeal. On the other hand, they may know all that is required to be known for that purpose on the basis of the rest of the record.
> >
> > 4. The statutory right of appeal, being directed to a conviction (or, in the case of the Crown, to a judgment or verdict of acquittal) rather than to the reasons for that result, not every failure or deficiency in the reasons provides a ground of appeal.

5. Reasons perform an important function in the appellate process. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of s. 686(1)(a) of the Criminal Code, depending on the circumstances of the case and the nature and importance of the trial decision being rendered.

6. Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record, even without being articulated.

7. Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.

8. The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.

9. While it is presumed that judges know the law with which they work day in and day out and deal competently with the issues of fact, the presumption is of limited relevance. Even learned judges can err in particular cases, and it is the correctness of the decision in a particular case that the parties are entitled to have reviewed by the appellate court.

10. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in such a case for a new trial. The error of law, if it is so found, would be cured under the s. 686(1)(b)(iii) proviso.

[50] More recently, in its judgment in *R. v. R.E.M.*, 2008 SCC 51, the Supreme Court commented as follows on the issue of assessing sufficiency of reasons:

35 In summary, the cases confirm:

(1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the

> purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *Morrissey*, at para. 28).
>
> (2) The basis for the trial judge's verdict must be "intelligible", or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent. A detailed description of the judge's process in arriving at the verdict is unnecessary.
>
> (3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial.
>
> This summary is not exhaustive, and courts of appeal might wish to refer themselves to para. 55 of *Sheppard* for a more comprehensive list of the key principles.

[51] Writing for the Nova Scotia Court of Appeal in *R. v. Laing*, 2017 NSCA 69, Justice Beveridge undertook an overview of the state of law on this point and commented, in part, as follows:

> 18 It requires a court to take a functional approach to assessing a trial judge's reasons. The reviewing court must determine if, in the circumstances, the reasons fulfilled their role: to explain to an accused why he or she has been convicted; to ensure public accountability; and, to permit meaningful appellate review.

[52] I have attempted to bring a consideration of all these principles to my review of this decision under appeal.

[53] A review of the decision under appeal reveals a series of unequivocal factual findings. These include, but are not limited to, the following:

1. The Inspector was fair and balanced in his evidence (para 39).
2. The evidence of the Inspector was precise and careful (para 39).

3. The pictures and recordings advanced through the Inspector amply supported his stated observations as to the disturbed ground and topsoil removal (para 40).

4. On October 24, 2019, there was an ongoing topsoil removal operation more than double the permissible area. The area of soil disturbance exceeded one hectare (para 41).

5. The evidence of the Inspector as to an area of ground disturbance or excavation exceeding 1 hectare, and made for the purpose of topsoil removal, was accepted (para 41).

6. There was soil differentiation constituting topsoil disturbance of over one hectare (para 42).

7. As a witness, Mr. Fulton was contradictory and confusing and not a reliable witness (para 43).

8. Mr. Fulton testified that two to three acres of topsoil was potentially removed, and it was unclear how much money the topsoil generated (para 43).

9. Mr. Fulton lacked credibility as to what the goal of his business was. At one point saying it was high bush blueberry planting and at another that his company was in the business of topsoil removal and sale (para 43).

10. The unexplained and unproven exemption claimed by Mr. Fulton was rejected (para 44).

11. In 10 to 12 years of having a supposed highbush blueberry cultivation plan, the only step carried out by the Defendant, or his business, was the topsoil removal (para 44).

12. It was available to conclude on the evidence of Mr. Fulton that the previously removed topsoil was sold for profit (para 44).

13. The intention of Mr. Fulton with respect to the lands did not include blueberry farming but rather this was an explanation

> proffered in an effort to avoid the requirement for approval (para 44).

[54] I do not say these are all the factual findings set out by the trial judge, but they are a number of the most significant conclusions reached by her. Many of these are directly relevant to the issue of the due diligence defence.

[55] The suggestion of the Crown is that, having rejected the factual basis on which the defence would have to be based, there was no reason for the trial judge to do more than she did, which was recognize that the defence was being raised by the Defendants and then proceed to weigh and resolve the grounds upon which it would have to stand.

[56] Appellant counsel argued that while the trial judge did reach negative conclusions about the evidence of Mr. Fulton there were still other possible avenues to the establishment of the due diligence defence. I accept, as I find the trial judge did, that all the evidence presented in the trial had to be assessed in the weighing of the defence. It is apparent to me that she did so.

[57] In the case of *R. v. Boyd*, 2010 NSSC 417, Bourgeois, J., (as she then was) commented on assessing the defence of due diligence in a regulatory context:

> 22 In considering a defence under section 78.6(a), it is clear that the actions raised by an accused as being "diligent", must relate to the actual elements of the charged offence. This has been articulated by Green, J.A. for the Newfoundland Court of Appeal in R. v. Alexander, [1999] N.J. No. 19 (Nfld. C.A.), as follows:

> The defence of due diligence requires the acts of diligence to relate to the external elements of the specific offence that is charged. The accused must establish on a balance of probabilities that he or she took reasonable steps to avoid committing the statutorily-barred activity. It is not sufficient simply to act reasonably in the abstract or to take care in a general sense. In R. v. Kurtzman (1991), 4 O.R. (3d) 417 (Ont. C.A.), Tarnopolsky, J.A. observed at p. 429 that "The due diligence defence must relate to the commission of the prohibited act, not some broader notion of acting reasonably".

> 23 Both prongs of section 78.6 have been considered by the Nova Scotia Court of Appeal. In R. v. Croft, 2003 NSCA 109 (N.S. C.A.), Saunders, J.A. provides the following succinct summary:

> Section 78.6(a) permits a defence of due diligence. Section 78.6(b) allows a defence based on reasonable and honest mistake of fact. This is essentially a statutory codification of the two defences to strict liability offences described in R. v. City of Sault St. Marie, (1978) 40 C.C.C. (2d) 353 (S.C.C.). Both the trial judge and the SCAC judge recognized that in order to obtain the benefit of the due diligence defence, Mr. Croft was obliged to prove on a balance of probabilities that he was duly diligent in fishing for lobster, that is that he had taken all reasonable steps to ensure that his lobster were not undersized or, put another way, that he was in no way negligent. R. v. Chapin (1979), 45 C.C.C. (2d) 333 (S.C.C.); R. v.Belliveau (1986), 76 N.S.R. (3d) 234 (N.S.S.C.,A.D.); R. v.Gerhardt (1989), 91 N.S.R. (2d) 276 (N.S. Co. Ct.). They also recognized that the question of whether the appellant took all reasonable steps to avoid violating the Regulation was a question of fact for the trial judge.

[58] A particular complaint raised by Appellant counsel was that the trial judge failed to account for the point Mr. Fulton told the Inspector that he believed other landowners in the Valley were doing the same thing he was doing. Counsel suggests that the trial judge did not turn her mind to this element of the evidence.

[59] My reading of the reasons suggests that she did address this point. The reasons, taken as a whole, indicate that she did regard this aspect of the testimony. For instance, at paragraph 39 of her reasons she commented:

> 39 Inspector Murphy was a fair and balanced witness. He was easily understood and his evidence precise and careful. He acknowledged Mr. Fulton's explanations for his actions and handily explained why they did not preclude application of the legislation. (emphasis added)

[60] In context it is evident that the trial judge was referring to Mr. Fulton having raised his argument that other farmers were engaging in this activity.

[61] In the Newfoundland Court of Appeal judgment in *R. v. Alexander*, 1999 CarswellNfld 19, the Court addressed the issue of an accused who asserts that others are not being prosecuted for the offence they are facing. The Court commented:

> 19 The fact that, as suggested by the appellant, the legislation may not have been enforced in all cases … or that it may be a common practice for outfitters to act as the appellant did cannot amount to a defence in the circumstances of this case. If the legislation, properly interpreted, applies to the facts of the case, then it must be applied unless it can be said that by proceeding against the appellant, the Crown is abusing the process of the court. There is no indication of that here.
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> 20 Nor is it open to the appellant to argue that he was mistaken as to what the legislation required or what the legal consequences of his actions would be. See R. v. Molis (1980), 55 C.C.C. (2d) 558 (S.C.C.) where Lamer, J. observed at p. 564 that to amount to a defence, the due diligence must be "in relation to the fulfillment of a duty imposed by law and not in relation to the ascertainment of the existence of a prohibition or its interpretation." The latter is nothing more than a mistake of law. See also R. v. Forster (1992), 70 C.C.C. (3d) 59 (S.C.C.) at p. 64.

[62] It is clear to me that the trial judge turned her mind to the justification being presented by the Appellants and raised with the Inspector and the Court. There is no doubt she resolved the matter in favour of the prosecution. It is apparent why she did so. I cannot conclude, as urged by the Appellants, that she did not address

the point, or that her reasoning is unclear. I have no difficulty following her thought process. Parenthetically I note there was no issue of officially induced error raised in this case, and this is understandable on the facts.

[63] As to how the Learned Trial Judge wrapped up the issue of due diligence, I agree with the Appellants that it would have been better for her to have explicitly stated, at the end of the factual findings and analysis which robustly rejected the evidence of Mr. Fulton, that the defence of due diligence had not been made out. While this is implicit in her conclusions and disposition, I agree she did not explicitly return to this point.

[64] In his oral submissions Appellant counsel commented that only one or two additional lines from the judge on this issue would have been required and there would have been no issue. I took this to mean that if the trial judge had added one or two sentences tying together her analysis rejecting the defence, the complaint of the Appellants on this point could have been alleviated.

[65] I appreciate that the Appellants were concerned by the trial judge's failure to explicitly return to the due diligence issue. However, I can understand why this may have occurred. The trial decision made clear factual findings that meant the defence could not succeed. That the defence had failed was evident and unmistakable even without specific reference.

[66] I note that in the recent Nova Scotia Court of Appeal decision in *R. v. Kitch*, 2023 NSCA 33 the Court considered and commented on the issue of assessing reasons:

> 30 R. v. Ramos, 2020 MBCA 111, aff'd 2021 SCC 15 offers a note of caution about confusing sufficiency of reasons with other errors. There, the issue concerned the trial judge's reasons in relation to how credibility concerns were resolved on the way to convictions for sexual assault and sexual interference. The Manitoba Court of Appeal reminds appellate courts about the distinct nature of sufficiency of reasons as a ground of appeal:
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>> [51] If the reasons are objectively inadequate, they may nevertheless not be inscrutable for the purpose of appellate review if the "basis of the trial judge's conclusion is apparent from the record, even without being articulated" (*Sheppard* at para 55; see also *Dinardo* at para 32).
>> [52] In deciding whether reasons are "sufficiently amenable to appellate review", the appellate court should not confuse the need for sufficient reasons with the examination of the sufficiency of the evidence which raises the separate issue of the reasonableness of the verdict (*Gagnon* at para 16).
>> [53] The net effect of these legal principles is that the role of the appellate court in deciding a claim of insufficient reasons, while important, is also limited in its scope.

[67] I particularly note the reference in this passage to the ability of reviewing courts to assess determinations within judgments, which are apparent and supportable on the record, even if imperfectly articulated.

[68] I refer to this portion of the *Kitch* decision not because I particularly view the reasons below as inadequate. I do so simply to highlight the point that where the reasons for a trial judge’s conclusion are clearly discernible this is obviously relevant to the weighing of a complaint of inadequate reasons.

[69] Given that a holistic reading of the decision reveals the trial judge made every necessary factual finding required to reject the defences advanced by the Appellants, and her reasons for doing so were evident, I cannot give effect to this ground of appeal.

[70] The reasoning pathway of the trial judge was clear. The reasons themselves were intelligible and entirely capable of appellate review.

Conclusion and Disposition

[71] With greatest respect for the arguments advanced by the Appellants, I cannot find that the conclusions reached by the Learned Trial Judge were in error. I thank both parties for their effective advocacy and helpful submissions but dismiss the appeal and affirm the dispositions of the court below.

[72] Crown will prepare the order.

Hunt, J.