2017 Hfx No. 466745

Supreme Court of Nova Scotia

Between:

LYDIA SORFLATEN, FRED BLOIS, JIM HARPELL, KENDALL McCULLOCH and ALLAN SORFLATEN

Applicants

and

NOVA SCOTIA MINISTER OF ENVIRONMENT, THE ATTORNEY GENERAL OF NOVA SCOTIA REPRESENTING HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NOVA SCOTIA, and LAFARGE CANADA INC., a body corporate

Respondents

REPLY BRIEF SUBMITTED ON BEHALF OF THE APPLICANTS IN SUPPORT OF THEIR MOTION TO INTRODUCE EVIDENCE BEYOND THE RECORD

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Introduction

1. Please accept this reply submission in relation to the Applicants' motion for permission to introduce evidence beyond the record on the judicial review.

2. In response to the arguments raised by the Respondents, the Applicants submit that:

   (i) The Proposed Evidence falls within the *Keeprite* exception
   (ii) The Proposed Evidence is necessary to argue the grounds of judicial review
   (iii) The Proposed Evidence facilitates the reviewing court's task
   (iv) Expert evidence is necessary and there is precedent for the admission of expert evidence in judicial review proceedings

3. In the circumstances, the Applicants therefore submit that the expert report of Dr. Doug Hallett (the "Proposed Evidence") should be allowed.

(i) The Proposed Evidence falls within the Keeprite exception

4. As previously submitted, the *Keeprite* exception provides that a Court may admit affidavit evidence on judicial review where the evidence is received to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding (Applicants' Brief at paras 25 and 28, citing *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright),* 2012 FCA 22, *Canadian National Railway v. Teamsters Canada Rail,* 2017 NSSC 10 *and Keeprite Workers' Independent Union v. Keeprite Products Ltd.,* 1980 CanLii 1877 (ONCA)).

5. The Respondent, Lafarge Canada Inc. argues that this exception only applies to instances "where there is no transcript or verbatim record of the administrative hearing" and that it "cannot be used to tender evidence (including expert evidence) that goes to the merits of the decision under review, or which invites the Court to re-weigh or re-consider the wisdom of that decision" (Respondent, Lafarge Canada Inc.'s Brief at p. 24).

6. Respectfully, the case law does not support limiting the *Keeprite* exception in this way.

7. In *Bernard v. Canada (Revenue Agency),* 2015 FCA 263 [Tab 1], the Federal Court of Appeal provided useful commentary on the use of the *Keeprite* exception noting that it specifically applies to Affidavit evidence which is being used to tell the reviewing court not what is in the record, but rather what cannot be found in the record. The Court specifically states that the exception may be useful where the party alleges that an administrative decision is unreasonable because it rests upon a key finding of fact unsupported by any evidence:

> **24** The second recognized exception is really just a particular species of the first. Sometimes a party will file an affidavit disclosing the complete absence of evidence on a certain subject-matter. In other words, **the affidavit tells the reviewing court not what is in the record--which is the first exception--but**

> **rather what cannot be found in the record**: see *Keeprite Workers' Independent Union v. Keeprite Products Ltd.*(1980), 29 O.R. (2d) 513 (C.A.) and *Access Copyright*, above at paragraph 20. **This can be useful where the party alleges that an administrative decision is unreasonable because it rests upon a key finding of fact unsupported by any evidence at all.** This too is entirely consistent with the rationale behind the general rule and administrative law values more generally, for the reasons discussed in the preceding paragraph.
>
> [emphasis added]

8. As noted in the quote above, the *Keeprite* exception is consistent with the general rule (that evidence that was not before the administrative decision-maker is not admissible before the reviewing court), and administrative law values more generally.

9. It is to be noted that the *Keeprite* exception, properly applied, does not involve a reweighing of evidence, nor does it represent a trial de novo. The *Keeprite* exception represents a principled basis for the reviewing Court to assess the admission of additional evidence to demonstrate what is not found in the record.

10. Each of the ten issues that Dr. Hallett will address in the Proposed Evidence relates to the complete absence of evidence on essential points before the Minister. The Proposed Evidence falls squarely within the *Keeprite* framework.

11. The Applicants therefore submit that the Proposed Evidence should be admitted because it is necessary to highlight the complete absence of evidence on essential points before the Minister when he approved the Tire Burning Undertaking.

(ii) The Proposed Evidence is necessary to argue the grounds of judicial review

12. Broadly, the Applicants seek review of the Minister's Decision on the following grounds:

    i) The Decision is contrary to the purposes and goals of the *Environment Act*, SNS 1994-95, c.1 (the "*Act*").

    ii) The Decision was determined without proper consideration of the requirements and factors outlined in the *Environment Assessment Regulations* made under Section 49 of the *Act* (the "*Regulations*").

    iii) The Minister unreasonably determined that there are no adverse effects or significant environmental effects which may be caused by the Tire Burning Undertaking or that such effects are mitigable.

    iv) The Minister unreasonably issued a decision with terms and conditions that are inadequate to prevent significant environmental harm.

13. The Proposed Evidence should be admitted because it is necessary to effectively argue the grounds of judicial review and to demonstrate the issue of reasonableness of the Minister's Decision.

14. Specifically, the Proposed Evidence is necessary to identify and demonstrate the factual errors in the Minister's Decision.

15. In the Grounds for Review the Applicants have set out very specific challenges to the reasonableness of the Minister's Order. The Proposed Evidence is required for the Applicants to effectively place their position before the reviewing Court.

16. The Proposed Evidence identifies ten issues, each of those issues falls within one of the four Grounds of Review:

I. The Decision was determined without proper consideration of the requirements and factors outlined in the *Regulations:*

- *Does the Record reasonably present the fact that when tires are burned, they emit the cancer causing chemical NDMA (N-Nitrosodimethylamine)?*
- *Does the Record contain air dispersion modelling of the current and proposed emissions at the Lafarge Plant?*
- *Does the Record disclose a complete analysis of NDMA, other priority pollutants, and toxic metal oxides from the disposal of ash residuals from the kiln or electrostatic precipitator and those materials that are emitted to the local environment when the kiln is in start-up or not in steady state operation?*
- *Does the record disclose adequate consideration of the local residents and their uses of the area?*

II. The Minister unreasonably determined that there are no adverse effects or significant environmental effects which may be cause by the Tire Burning Undertaking or that such effects are mitigable:

- *Is the conclusion that the project can be established and operated without adverse effects or significant environmental effects based on commonly accepted science or empirical evidence?*
- *Has the Record accurately considered the realities of cement kiln production, including conditions on start-up, shut down and during "upset" conditions?*
- *What information is available in the Record regarding the operational reliability of the plant, including:*

a. *Data to establish the frequency of upsets during the 52-year operational history;*
b. *Data related to the environmental impact of the current plant or future operations proposed;*
c. *Data regarding the current toxic chemical impact of the plant;*
d. *Consideration as to whether the current toxic chemical impact, and the anticipated toxic chemical impact from TDF are compliant with the Canadian Environmental Protection Act; and*
e. *If the above information is not available in the Record, is there a reasonable basis to conclude that the project can operate without adverse effects or significant environmental effects?*

- *Does the proposal, as approved by the Minister adequately distinguish how tires will be introduced into the Lafarge Brookfield kiln?*
- *Does the Record disclose consultations with Environment Canada?*

III. The Minister unreasonably issued a decision with terms and conditions that are inadequate to prevent significant environmental harm:

- *Can the areas identified by Dr. Hallett be adequately considered as part of a highly conditioned test period?*

17. The Proposed Evidence is closely aligned with the Grounds of Review advanced in this matter. Further, the Proposed Evidence is required to properly assess both the existence and consequence of the errors the Minister is alleged to have made.

(iii) The Proposed Evidence facilitates the reviewing court's task

18. In the event this Honourable Court finds that the Proposed Evidence does not fall within one of the already recognized exceptions, the Applicants submit that the Proposed Evidence should be admitted as it will facilitate the reviewing court's task on the judicial review.

19. The case law is clear that the list of exceptions with respect to admitting evidence beyond the record on a judicial review is not closed.

20. Reviewing courts have received affidavit evidence that facilitates their reviewing task and have held that such evidence does not invade the administrative decision-maker's role as fact-finder and merits-decider (*Bernard,* para 28):

> **28 The list of exceptions is not closed. In some cases, reviewing courts have received affidavit evidence that facilitates their reviewing task and does not invade the administrative decision-maker's role as fact-finder and merits-decider:** *Hartwig v. Saskatchewan (Commissioner of Inquiry)*, 2007 SKCA 74, 284 D.L.R. (4th) 268 at paragraph 24. For example, in one case the applicant wished to submit that the administrative decision-maker's decision was

> unreasonable because it wrongly construed certain submissions made by counsel as admissions. But counsel's submissions to the administrative decision-maker were not in the record filed with reviewing court. The reviewing court admitted evidence of counsel's submissions so that it could assess whether the decision was unreasonable: *Ontario Shores Centre for Mental Health v. O.P.S.E.U.*, 2011 ONSC 358. In another case, a reviewing court admitted a partial transcript of proceedings before an administrative decision-maker. The transcript was prepared by one of the parties, not by the administrative decision-maker. In the circumstances, the reviewing court was satisfied that the partial transcript was reliable, did not work unfairness or prejudice, and was necessary to allow it to review the administrative decision: *SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611*, 2011 BCCA 353, 336 D.L.R. (4th) 577.
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> [emphasis added]

21. The Proposed Evidence will offer objective expert opinion that will assist the reviewing Court. For instance, the Proposed evidence will help the Court to understand what is not in the record, and how the absence of particular information represents an error. Further, the Proposed Evidence will assist in determining whether the absence of certain information from the record renders the decision unreasonable.

(iv) Expert evidence is necessary and there is precedent supporting the admissibility of expert evidence in judicial review proceedings

22. Due to the highly scientific nature of the Tire Burning Undertaking and associated environmental impacts, the Applicants submit that an expert is necessary to fill the gaps in the Record and assist the reviewing Court.

23. While the Respondent, the Minister of Environment, has taken the position that allowing expert evidence on a judicial review is a novel idea, the Applicants submit that there is precedent for allowing expert evidence on a judicial review.

24. Courts have admitted expert evidence where the legal issues and scientific issues are linked. In *Apotex Inc. v. Canada (Minister of Health),* 2013 FC 1217 [Tab 2], Justice Kane admitted expert evidence noting that the Court may benefit from expert affidavits which were not before the decision maker in order to provide important context and knowledge not otherwise in the Court's knowledge or on the record (para 60):

> **60** I agree that in appropriate circumstances on judicial review, such as in this case, where the legal issues and scientific issues are linked, the Court may benefit from expert affidavits which were not before the decision maker in order to provide important context and knowledge not otherwise in the Court's knowledge or on the record.

25. See also *Abbott Laboratories Ltd. v. Canada (Attorney General),* 2008 FC 700 [Tab 3], which provides precedent for the admission of expert evidence in judicial review proceedings relating to matters of a scientific nature (para 16):

16 It appears from a review of authorities such as *GlaxoSmithKline* that the Court's attention had not been drawn to the admissibility of new evidence. In any event, the point taken by that Court in referring to that evidence is with respect to patent construction. **The parties agree that patent construction is a matter of law, to be done by the Court, assisted by experts if necessary to explain the meaning of words, terms, science and background.** However, this is not to be construed as an invitation to present masses of expert evidence or shift the focus of construction to a battle of experts. As I said in *Pfizer Canada Inc. v. Canada (Minister of Health)*, [2008] F.C.J. No. 3, 2008 FC 11 at paragraph 47:

> *47* Construction of the disclosure of the patent, as well as construction of the claims, is the task of the Court, not experts or the inventor(s). ***The Court may be informed by experts as to the meaning of words, terms and the science and background that are pertinent,*** but the Court must be careful not to let the experts supplant the role of the Court. Construction does not become a battle of experts; it is a duty of the Court. As I said in *Eli Lilly Canada v. Novopharm Ltd.*, [2007] F.C.J. No. 800, 2007 FC 596 (appeal dismissed as moot, [2007] F.C.J. No. 1498, 2007 FCA 359) at paragraphs 103 and 104:
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> > [103] A patent decision should, begin with a construction of the patent *(Whirlpool Inc. v. Camco Inc.* [2000] 2 S.C.R. 1067 at para. 43). This applies not only to the claims but to the whole of the patent as well when required *(Burton Parsons Chemicals Inc. v. Hewlett-Packard (Canada) Inc.* [1976] 1 S.C.R. 555 at page 563; *Western Electric Co. v. Baldwin International Radio of Canada*, [1934] S.C.R. 570 at page 572).
> >
> > [104] Construction is a task for the Court alone *(Whirlpool supra; Burton Parsons supra.)* **the role of an expert, if required, is limited to assisting the Court in putting the Court in the position of a person skilled in the art of the relevant time** *(Halford v. Seed Hawk Inc.*, [2006] F.C.J. No. 1205, 2006 FCA 275 at para 11). In *Dableh v. Ontario Hydro* [1996] 3 F.C. 751 at paragraph 33 the Federal Court of Appeal stated what the role of the expert is:
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> > > It is a matter of accepted law that the task of constructing a patent's claim lies within the exclusive domain of the trial judge. **In strict legal theory it is the role of expert witnesses that is those skilled in the art, to provide the judge with the**

> **technical knowledge necessary to construe a patent as though he or she were so skilled.** Where the experts disagree, it is incumbent on the trial judge to make a binding determination.
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> [emphasis added]

26. In this case, the Proposed Evidence will provide the reviewing Court with the technical knowledge necessary to assess the existence of clear gaps in the record and the consequences of those gaps. In addition, the Proposed Evidence will assist the reviewing Court in its assessment of the Applicants' assertion that there are multiple instances where the Minister has based his decision on a total absence of evidence.

Conclusion

27. The Proposed Evidence is <u>not</u> being presented in an effort to have the reviewing Court reweigh or reassess the decision made by the Minister.

28. The Proposed Evidence is being presented to assist the reviewing Court with its understanding of the technical aspects inherent with the Grounds of Review asserted by the Applicants.

29. In the circumstances, this is an appropriate case for this Court to exercise its discretion and permit the record to be supplemented with the addition of the Proposed Evidence.

30. All of which is respectfully submitted.

DATED at Halifax, Nova Scotia, this 8th day of December, 2017.

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