SUPREME COURT OF NOVA SCOTIA
Citation: *Alton Natural Gas Storage Inc. v. Poulette,* 2019 NSSC 94

Date: 20190318
Docket: Hfx No. 485349
Registry: Halifax

Between:

Alton Natural Gas Storage Inc.

Applicant

v.

Dale Poulette and Rachael Greenland-Smith

Respondents

Decision

Judge:	The Honourable Justice Gerald R.P. Moir
Heard:	March 12, 2019, in Halifax, Nova Scotia
Decided:	March 18, 2019
Transcribed and edited:	March 20, 2019
Counsel:	Robert Grant and Daniela Bassan, for the Applicant James Gunvaldsen-Klassen, for the Respondents

Moir, J. (orally):

Introduction

[1] Alton Natural Gas Storage Inc. seeks a permanent injunction against Dale Poulette, Rachael Greenland-Smith, and unnamed third parties who support their efforts against Alton's plan to use hydro technology to construct a large underground cavern system and to discharge construction water into the Sipekne'katik River, also called the Shebenacadi River.

[2] Alton acquired over 40 acres on Riverside Road in Fort Ellis, Colchester County and over 200 acres on Brentwood Road, in Brentwood, Colchester County.

[3] The Sipekne'katik First Nation comprises several communities including Indian Brook, which is not far from Fort Ellis and Brentwood.

[4] The 40 acre tract borders the Sipekne'katik River, on the East side. Indian Brook is a few kilometers to the west of the river.

[5] As everyone knows the Sipekne'katik River is part of the Shebenacadi Canal System, a pre-confederation inland waterway linking Halifax Harbour all the way to the north end of the Minas Basin.

[6] The same route has been used by the Mi'kmaq people for over 4,000 years. The river is the largest part of the route. It opens onto the Minas Basin at Maitland, not far from Truro. The Basin, in turn, opens onto the Bay of Fundy.

[7] The Sipekne'katik First Nation, and other First Nations, take close interest in the river.

Proposed Natural Gas Storage

[8] Alton proposes to construct a system of caverns under the Brentwood land and store natural gas in it. This is something Alton's parent or related companies have done in other places.

[9] There is a large salt deposit below the surface of the Brentwood tract. Alton plans to create the caverns by solution mining. Water would be pumped from the river and forced into the salt deposit. Salt would be dissolved, and the brine would be pumped to a mixing channel on the Fort Ellis acreage. Mr. Rob Turner, a manager with Alton, swears "The brine will be returned to a mixing channel located adjacent the River where it will be diffused, diluted in the channel and ultimately returned to the River at a salinity level within the range that naturally occurs in the River due to its tidal nature."

Sipekne'katik's Efforts

[10] If Mr. Turner was making a statement of certain fact, rather than a prediction, there would likely be no controversy. However, fears that the construction brine will pollute the river lead to various efforts by First Nations people.

[11] Mr. Turner swears,

> In developing the Project, Alton has overseen a complex engagement process with local indigenous communities, including the Sipekne'katik First Nation. There is ongoing engagement with these communities.

Also, Sipekne'katik closely followed and participated in regulatory proceedings. For example, it sought information from the Minister of Environment, and opportunities to make submissions, when the Department dealt with Alton's request for an Industrial Approval on the brine storage pool. Indeed, the First Nation appealed the Minister's approval successfully and secured better disclosure and consultation. See Justice Hood's decision in *Sipekne'katik First Nation v. Nova Scotia (Environment)*, 2017 NSSC 254.

[12] For another example, the Sipekne'katik First Nation participated in hearings before the Public Utility and Review Board concerning renewal of an approval to construct the cavern system at Brentwood. It unsuccessfully opposed renewal.

[13] There will be much provincial regulatory oversight, and possibly federal environmental investigation, before construction of the cavern system, and during and afterwards if the construction is permitted. It is evident that Sipekne'katik First Nation will be involved with the further oversight and investigation.

[14] Those various efforts on behalf of the First Nation are sponsored by the government of Sipekne'katik, principally the Chief, the Council, and their lawyers. A separate effort lead to the application for an injunction.

Alton Facilities at Present

[15] A long roadway leads from the Old Truro Road to a pump building and a control building near the river. There is a guard house at the entry.

[16] The pump building is massive. Two pumps are set subsurface. Above the pumps rise two large pipelines, with valves, couplings, and so on. One leads to the river for extraction of its water and discharge of the desalinated construction fluid. The other leads to the Brentwood lands.

[17] These facilities cost about $3 million dollars to construct. They were built in compliance with regulatory approvals.

Mr. Poulette's Protest

[18] There is no suggestion that Mr. Poulette speaks for the Sipekne'katik First Nation, or its Chief, or its Council. He asserts what may be an ancient authority, requests from elders of the community, primarily an organization of grandmothers.

[19] In 2015, Mr. Poulette learned about "the Alton Gas project to build salt caverns and its plan to discharge brine into the Sipekne'katik River". The following year the grandmother elders solemnly asked Mr. Poulette to protect the river. He became Sma'knis or a Water Protector.

[20] He regularly made use of the Fort Ellis land, harvesting shellfish, collecting eagle feathers, digging a kind of tuberous root which is a traditional food, and fishing. His ultimate purpose was to draw attention to the dangers of Alton's plan.

[21] In 2017, Mr. Poulette and his supporters built a camp near the front entrance and the guard house. It is made of straw bales and lime and mud plaster. Alton says it prevents heavy equipment, needed for the pump system, from reaching the pump and control buildings. Mr. Poulette disputes this.

[22] Mr. Poulette's purpose in occupying part of the front entryway was "to raise my concerns directly with Alton Gas employees." He stays there full time. His life partner, Ms. Greenland-Smith, helped build the straw and plaster camp. She too is very vocal in her opposition to the Alton plan and is often at the camp or on the surrounding lands.

Recent Altercations

[23] Protesters have impeded Alton's access to the Fort Ellis property at various times since 2016. However, recent incidents particularly motivate the application for a permanent injunction.

[24] On March 25, 2018, Alton's agents served Mr. Poulette with a *Protection of Property Act* notice. Using violently obscene language, Mr. Poulette told Alton to get an injunction, he ordered Alton's people off the property, and he made threats of violence. He said, "I hope you guys have first aid training", "when people get here and they're pissed off… and I don't know what they're bringing", and "Alton, Rob Turner, Tim Church go f*** themselves… we know that f***ing Rob lives in PEI… and we know you live in Stewiacke".

[25] We can use quotation marks because Mr. Poulette made a video recording of the encounter and posted it on YouTube.

[26] In January, the control and pump buildings lost power. The Power Corporation now refuses to enter the facilities unless Alton provides safe and clear access. On February 11, 2019, a month ago, Mr. Turner went on the property to assess damage to the expensive equipment and plan repairs. He was accompanied by an electrician, a security guard, a contractor, and two RCMP officers.

[27] The pumps and related equipment below the surface were covered with eight feet of water. Also, electrical problems were apparent in the control building. Mr. Turner went to the straw and plaster camp to explain that contractors would be coming to the site to do repairs and maintenance.

[28] Mr. Poulette maintains a Facebook page. It is evident that he has several followers. In the past, he posted photographs of supporters armed with machetes. We know what was said between Mr. Poulette and Mr. Turner on February 11, because Mr. Poulette video recorded the encounter and posted it to his Facebook page. The recording is in evidence.

[29] Throughout, Mr. Turner attempted to be diplomatic and Mr. Poulette's tone and words were menacing and obscene.

[30] Mr. Turner had to speak through the door because Mr. Poulette would not open it. Mr. Turner advised that they would be coming back, using the roadway, to

repair electrical damage. Mr. Poulette responded "No, I don't think so." Mr. Turner reiterated his advise, but Mr. Poulette said "Well, you'll have to get a court injunction to get through us."

[31] After Mr. Turner left the doorway, Mr. Poulette made a short speech for his audience. It included, "This is what failed democracy looks like. They have to… bully their way… to get in through the gate. He can't get in here without a court injunction and these guys won't hinder my treaty rights because they know we'll beat them in a court of law." He closed his remarks by saying "I am going [to] make another video cause I don't know what this guy's up to."

Issues

[32] Alton has three hurdles to overcome on its motion for an interlocutory injunction, which is what I'm determining now. First, it must show its claim raises a serious issue to be determined on the hearing of the application for a final injunction. Second, it must show it will suffer irreparable harm if there is no temporary injunction before the hearing of the application. Thirdly, the balance of inconvenience must favour Alton over Mr. Poulette, Ms. Greenland-Smith, and their supporters. See *RJR MacDonald v. Canada*, [1995] 3 SCR 199.

The Merits of the Applicant's Case

[33] The applicant proved title to the Fort Ellis acreage. They proved occupation of part of the acreage by the respondents. Therefore, they established a serious issue to be tried when the application is heard.

[34] For the respondents, Mr. Gunvaldsen-Klassen lists five issues which the respondents submit must be considered in relation to the merits of the applicant's case:

> (i) Mr. Poulette and the Mi'kmaq's assertion of their Treaty and Aboriginal Right and duty to care for and protect the Sipekne'katik River, to a healthy river and estuary, and to fish therein, and to use it wisely and respectfully, without interference, and to ensure it is used by others wisely and respectfully;
>
> (ii) Risks to *Species at Risk Act* listed species, such as Inner Bay of Fundy Salmon, for which the Sipekne'katik estuary has been considered as important estuarine habitat;
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> (iii) Failure to adequately consult Sipekne'katik and the Mi'kmaq in relation to the project, as recognized by this Court;
>
> (iv) Non-compliance with the *Fisheries Act* - The only means by which deposit of a deleterious substance, like brine, into waters frequented by fish, can be authorized is via regulations made under section 36(5). ...
>
> (v) Non-compliance with Condition 2.1(b) of the Environmental Assessment approval, for which until February 13, 2019, despite many requests, the Respondents were never shown any evidence of such compliance. ... .

With respect, none of these subjects can contradict Alton's exclusive right to possession of the Fort Ellis acreage. They all concern use of the river, to which Alton has no title and, as far as I know, asserts no right as of this time.

Irreparable Harm

[35] Paragraph 59 of *RJR MacDonald* comments on the subject this way: "It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other." However, it says elsewhere "that one party may be impecunious does not automatically determine the application". Alton asserts four kinds of irreparable harm.

[36] First, damage to expensive equipment demands access for repair and maintenance to prevent further losses, which the respondents cannot compensate. The respondents say impeding access is unproven. Deference has to be given to Alton's evidence on the kind of access required. It knows the equipment, it is responsible for repair and maintenance, and it would hire contractors with needed heavy equipment. Also, the threats that were made deny access, and they are well proven.

[37] Second, Alton says that safety of its employees and contractors would be at risk if there is no injunction. The respondents say that the evidence does not establish this assertion and does not show "any actual physical risk".

[38] Thirdly, Alton argues that the trespass interferes with its business operations at the Fort Ellis site. The respondents suggest an unwritten protocol by which Alton is obliged to give notice, employ the RCMP, and leave the respondents in place. Also, the respondents argue that there are no business operations at present. Alton must await several challenging regulatory decisions. I agree with the argument about operations.

[39] Fourthly, Alton relies on court decisions that treat a blockade, occupation, or protest that impedes an owner's access as causing irreparable harm. The respondents submit that no principle along those lines has yet to be established. They point to decisions that take a softer approach to infringements of property rights.

[40] In my assessment, irreparable harm is established by the evidence of threats. And, that evidence is real in the sense that we have recordings made by Mr. Poulette himself. To refer to the need for first aid training, to say one does not know what the angry invited supporters will bring that would require first aid, and to couple those statements with references to where the persons employed by Alton live does prove "actual physical risk".

[41] Those are threats uttered to make employees fearful at their place of work and, shamefully, in their homes.

[42] To say, "I don't think so.", in answer to an Alton employee who is trying to give notice heavy equipment is needed on the site is to say "We will stop you". What else can it mean to say you need an injunction "to get through us". These prove actual physical risk also.

[43] What makes the threats intolerable and incapable of retraction is the various publications of them. Social media being what it is, the physical risk echoes in time and spreads in potential incitement. To maintain a launching point on Alton lands at the place of work increases the intolerable risk.

Balance of Convenience

[44] According to the Court of Appeal at para. 61 of *Maxwell Properties Ltd. v. Mosaik Property Management Ltd.*, 2017 NSCA 76: "The balance of convenience involves determining which of the parties will suffer the greater harm from the granting or refusing of an interlocutory injunction, pending trial."

[45] The respondents rely on Justice MacPherson's decision for the Ontario Court of Appeal in *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, [2008] ONCA 534. That was not a case about granting or refusing an

injunction. Interim and interlocutory injunctions had been issued on an uncontested basis. They restrained persons from blocking access to sites where Frontenac held rights to mine uranium.

[46] The Ardoch Algonquin First Nation, its Chief, and a chief negotiator were held in contempt for disobeying the injunctions. The sole issue on appeal was whether their sentences were fit. Nevertheless, Justice MacPherson said at para. 47, "I think it is important to give judicial guidance on the role to be played by the nuanced rule of law described in *Henco* when the courts are asked to grant injunctions, the violation of which will result in aboriginal protesters facing civil or criminal contempt proceedings."

[47] That guidance, though *obiter dicta*, is found in paras. 46 and 48. They read,

> [46] Having regard to the clear line of Supreme Court jurisprudence, from Sparrow to Mikisew, where constitutionally protected aboriginal rights are asserted, injunctions sought by private parties to protect their interests should only be granted where every effort has been made by the court to encourage consultation, negotiation, accommodation and reconciliation among the competing rights and interests. Such is the case even if the affected aboriginal communities choose not to fully participate in the injunction proceedings.
>
> [48] Where a requested injunction is intended to create "a protest-free zone" for contentious private activity that affects asserted aboriginal or treaty rights, the court must be very careful to ensure that, in the context of the dispute before it, the Crown has fully and faithfully discharged its duty to consult with the affected First Nations: see Julia E. Lawn, "The John Doe Injunction in Mass Protest Cases" (1998) 56 U.T. Fac. L. Rev. 101. The court must further be satisfied that every effort has been exhausted to obtain a negotiated or legislated solution to the dispute before it. Good

> faith on both sides is required in this process: *Haida Nation*, p. 532 S.C.R.

[48] This guidance is inapplicable to the case at hand. Mr. Poulette is not an "affected aboriginal community". Consultations, including those required by Justice Hood's order, are ongoing with various First Nations representatives and Mr. Poulette is not one of them. He does not suggest he speaks for the Sipekne'katik First Nation, just that some elders asked him to protect the river.

[49] Further, Justice MacPherson's words are addressed to a case of blockage, not out and out occupation of lands belonging to another, and not a case of violent threats against employees and contractors. The latter particularly calls for a restraining order, even if consultations are pending.

[50] Further, I would want to see something more than an assertion of aboriginal or treaty rights. There needs to be a demonstrated basis. No doubt, the right to fish demonstrated by Donald Marshal Jr. extends to the Sipekne'katik River. However, I see no support for Mr. Poulette's claim about land titles.

[51] It was explained that in the time allowed for temporary relief, the best Mr. Poulette could do was to produce the study by Memertou Geometrics Consultants titled Alton Gas Storage Project in 2006. That study does not suggest a land claim.

[52] Perhaps the situation will change when the application for a final injunction is heard, but for the present motion there is no evidence to support the occupation of Fort Ellis lands by Mr. Poulette, Ms. Greenland-Smith, or others.

[53] There is no basis in law for the occupation and nothing justifies the threats of violence. Therefore the balance of convenience is with the owner.

Conclusion

[54] I will grant the order, but with some changes from the draft.

[55] Alton has offered to make a place on its lands where protesters can gather and be seen by the public. There should be a recital to that effect in the order.

[56] The main part of the injunction should be clarified to show that Mr. Poulette, Ms. Greenland-Smith, and others and their belongings are confined to the area permitted by Alton.

[57] I am not prepared to extend the injunction to Crown lands in the dyke area.

[58] Costs will be in the cause.

J.