IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON



Citation: Ultramar v. PNB - 2006 NBQB 040

Date: 20060203

Docket: F/M/47/04

BETWEEN:

**ULTRAMAR LTÉE / ULTRAMAR LTD.,**

**Applicant;**

**- and -**

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEW BRUNSWICK as represented by the MINISTER OF THE ENVIRONMENT AND LOCAL GOVERNMENT,**

**Respondent.**

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| Date of Hearing: | February 24, 2005 |
| Date of Decision: | February 3, 2006 |
| Before: | Madam Justice Paulette C. Garnett |

Appearances:

James K. O'Connell, Esq., for the Applicant.

Richard Williams, Esq., for the Respondent.

## DECISION

**GARNETT, J.**

[1] This is an Application for Judicial Review under Rule 69 of the *Rules of Court*.

[2] The Applicant, Ultramar Ltd., asks the Court to quash a decision of the Minister of Environment and Local Government (the Minister) in which the Minister ordered Ultramar to submit an Environmental Site Assessment and Remedial Action Plan and to implement the plan.



**BACKGROUND**

[3] Beginning in 1996, property owners in an area located on the Hanwell Road near Fredericton detected petroleum products in their water. Since that time various environmental assessments have determined that the groundwater has levels of petroleum hydrocarbons which exceed the Provincial guidelines for a Level 1 site. A number of the property owners have commenced actions against Ultramar and others. The Defendants, including Ultramar, have denied liability.

[4] Ultramar is a federally-incorporated company engaged in the business of selling petroleum products. From November 4, 1995 to May 1, 2002, Ultramar delivered petroleum products to a gas bar located at 1847 Route 640, Hanwell (the site). From approximately 1978 to September 1995, Shell Canada Products Limited (Shell) delivered petroleum products to the site. During the 6½ years in which Ultramar delivered petroleum, the site was owned by 500022 N.B. Ltd. (N.B. Ltd.). N.B. Ltd. acquired the

property in May 1995. Before that date, the site was used as a gas bar by various owners and operators.

[5] In November 1995, when Ultramar first became the supplier to the site, it commissioned an environmental assessment from MGI Limited. Their report indicated that there were petroleum hydrocarbons in the soil and groundwater that exceeded the Provincial guidelines for a Level 1 site (Exhibit C, Hiltz Affidavit, pages 53-83 of the Record). Ultramar sent a copy of the report to N.B. Ltd. with a suggestion that it be filed with the New Brunswick Department of Environment (the Department). Neither N.B. Ltd. nor Ultramar reported MGI's findings to the Department. Ultramar conducted various tests on the equipment at the gas bar and installed additional equipment designed to prevent contamination. As stated above, it continued to supply petroleum products to the site until May 1, 2002 when the gas bar ceased operations by Order of the Minister (Exhibit B-6, Mather Affidavit).

[6] Between March 2000 and November 2002, the Minister served various orders on N.B. Ltd. regarding measures required to alleviate the problems present on neighboring properties (Exhibits B-1, B-8, Mather Affidavit).

[7] In November 2003, Shell entered a voluntary remediation agreement with the Minister (Exhibit A, Mather Affidavit).

[8] In December 2003, the Minister ordered Ultramar to submit a Site Evaluation Report and a Remedial Action Plan for the site. The order was appealed and subsequently withdrawn by the Minister.

[9] On April 22, 2004, the Minister ordered Ultramar to submit an Environmental Site Assessment and Remedial Plan with respect to the properties affected by the migration of petroleum products from the site and to implement the Remedial Plan (Exhibit K, Hiltz Affidavit).

[10] Ultramar appealed the Order pursuant to Regulation 84-179 of the *Clean Environment Act*, R.S.N.B. 1973, c. C-6. On June 21, 2004, the Minister confirmed the April Order (Exhibit N, Hiltz Affidavit). On September 20, 2004, Ultramar issued the Notice of Application for Judicial Review.

## STANDARD OF REVIEW

[11] The Parties agree that the applicable standard of review is that of "patently unreasonable". I agree for the reasons which follow.

[12] In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] S.C.J. No. 46 (S.C.C.), Justice Bastarache listed four factors to consider in determining the applicable standard of review:

(1) whether the legislation contains a privative clause;

(2) the expertise of the tribunal under review;

(3) the purpose of the legislation;

(4) the "nature of the problem", is it a question of law or fact?

*(1) Privative Clause*

[13] The Minister was exercising authority provided by the *Clean Environment Act*, R.S.N.B. 1973, c. C-6 (the *Act*). The *Act* does not contain a privative clause, that is, a clause which seeks to shield the actors from judicial intervention. While the presence of a privative clause indicates a high degree of deference, the lack of a privative clause "does not imply a high standard of scrutiny" (*Pushpanathan*, supra). In *Dr. Q. v. College of Physicians and Surgeons of British Columbia* [2003] S.C.J. No. 18, Chief Justice McLachlin described the effect of the absence of a privative clause as being neutral — "silence is neutral".

*(2) The Relative Expertise of the Minister*

[14] In *Mr. Shredding Waste Management v. New Brunswick (Minister of Environment and Local Government)* [2004] N.B.J. No. 353, Justice Deschênes said the following in relation to the expertise of the Minister in administering the provisions of the *Act* and those of the *Clean Air Act*, S.N.B. 1997, c. C-5.2:

> ¶49 As in Suresh and Baker, the fact that the formal decision-maker is the Minister militates in favor of deference. There is no question that, in this Province, the Minister has been designated by the Legislature to have responsibility for the assessment of facilities that could have a negative impact on the environment. The Minister is supported by experts and advisors on environment issues and has been specifically entrusted by the Legislature to make decisions to protect citizens against the harmful effects of contaminants. The relevant provisions of the CAA and the CEA authorize the Minister to do what the Minister considers to be appropriate to manage and protect the environment with the help and advice of specialized personnel. In making the important decisions pertaining to the granting of a license to operate an undertaking such as MSWM, including the type of conditions and terms under which it should operate, the Minister is confronted with

> competing technical and policy considerations. As the reviewing judge aptly put it at para. 32, the decision-making process "...involves the balancing of multiple sets of interests or considerations." There is no question that the Minister brings a considerable degree of expertise to bear on her or his decision and that such expertise was engaged in this case. Compared to the Minister's special expertise regarding environmental issues, along with the type of socio-economic considerations that form part of the decision-making process, the courts are at a disadvantage. This militates in favor of more deference.



[15] Although the Minister was operating under different provisions in the case at bar, Justice Deschênes' remarks regarding the availability of experts on environmental issues and regarding socio-economic considerations also apply to the circumstances here. The Minister has greater expertise in this matter than the Court and is entitled to deference.

*(3) <u>The Purpose of the Legislation</u>*

[16] The Minister issued her order pursuant to Section 5(1)(g) of the *Act*. New Brunswick Regulation 87-97, the *Petroleum Product Storage and Handling Regulation - Clean Environment Act* (the Petroleum Regulation), deals more specifically with situations involving petroleum products. A reading of the legislation and the Regulation reveals that their purpose is to protect the "environment" from "contaminants". Part IV of the Regulation relates to the enforcement of the *Act* and the Regulation. Section 46 of the Regulation reads:

> 46 Where, in the opinion of the Minister, a person has violated any provision of the Act or this Regulation, the Minister may issue an order directing that person to carry out, in accordance with directions set out in the order, such clean-up, site rehabilitation or other remedial action or other action as the Minister considers necessary, including

> the provision of water by means of the installation of a water-supply system or other means.

[17] This provision gives the Minister wide discretion in determining whether "a person" has violated the *Act.* As was stated in *Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R., language of this kind — "in the opinion of the Minister" — suggests a standard of deference.



[18] In *Dr. Q.* (supra), Chief Justice McLachlin said the following at paragraph 30:

> A statutory purpose that requires a tribunal to select from a range of remedial choices or administrative responses, is concerned with the protection of the public, engages policy issues, or involves the balancing of multiple sets of interests or considerations will demand greater deference from a reviewing court: see Pezim, supra, and Southam, supra. In Mount Sinai, supra, at para. 57, Binnie J. recognized that the express language of a statute may help to identify such a purpose. For example, provisions that require the decision-maker to "have regard to all such circumstances as it considers relevant" or confer a broad discretionary power upon a decision-maker will generally suggest policy-laden purposes and, consequently, a less searching standard of review (see also Baker, supra, at para. 56) [...] A legislative purpose that deviates substantially from the normal role of the courts suggests that the legislature intended to leave the issue to the discretion of the administrative decision-maker and, therefore, militates in favour of greater deference.

*(4) <u>The Nature of the Problem</u>*

[19] The Minister had to determine what "person" or "persons" should be required to clean up properties belonging to people unconnected with the site. Here, as in *Suresh and Baker* (supra), "the inquiry is highly fact-based and contextual" and "is not

one which involves the application or interpretation of definitive legal rules" (*Suresh,* supra).

[20] As stated above, I find that the factors discussed above indicate that the applicable standard of review is that of patent unreasonableness.



**POSITION OF THE PARTIES**

[21] Ultramar asks the Court to set aside the Decision of the Minister on the following grounds:

> (a) the Decision and the Ministerial Order are unduly onerous and patently unreasonable;
>
> (b) the Decision and the Ministerial Order are vague and lack specificity;
>
> (c) the Minister failed to give adequate reasons and exceeded her jurisdiction when she issued the Decision and the Ministerial Order;
>
> (d) the Minister failed to take into consideration relevant information known to the Department of the Environment and Local Government and did not consider the appropriate factors; and
>
> (e) the Decision and the Ministerial Order cannot be supported by the facts.

[22] The Minister says her decision meets the applicable standard of review. In her decision dated June 21, 2004, the Minister stated the following beginning at page 2:

> The Ministerial Order was issued against Ultramar based on the following facts:
>
> (1) Ultramar was responsible for filling the system with petroleum products between October 1, 1995 and May 2002, and was responsible for the regular

inspection and review of delivery and sales records to ensure the equipment was in good working order.

(2) Ultramar was aware of the presence of petroleum products in the soil and groundwater on the property before it commenced supplying petroleum products to 500022 on October 1, 1995, as evidence (sic) in the attached borehole investigation dated December 14, 1994 and correspondence of September 22, 1995, Exhibit A.

(3) Ultramar did not notify DELG of the presence of petroleum products in the soil and groundwater on the property after receiving the December 14, 1994 borehole investigation.

(4) Ultramar did not do any soil or groundwater assessment or testing of the tanks and lines until November 1995, after it started delivering product to the site.

(5) In November 1995, site assessments performed by MGI Limited on behalf of Ultramar (Exhibit "C" Appellant' Submission) indicated the soil and groundwater on the property was contaminated with petroleum products.

(6) Despite MGI's report, after weighing the environmental impacts, its own liability risks and the monetary benefits associated with the 500022 account, Ultramar decided to continue to supply petroleum products to 500022 as evidenced in the attached email correspondence, Exhibit B.

(7) Ultramar did not notify DELG of the presence of petroleum products in the soil and groundwater and did not ever provide DELG with copy of the MGI report as was required pursuant to section 43 of N.B Reg. 87-97, *Petroleum Product Storage and Handling Regulation – Clean Environment Act.*

(8) Ultramar acknowledges in its Appeal Submission that there were problems with the system, and repairs were effected by Fabcon Ltd. in January 1996, on Ultramar's behalf following testing of the system by

Tanknology Corporation International on January 16, 1996.

(9) From the period of January 1996 to October 1996, the Ultramar daily inventory control records, as contained in Exhibit C, indicate a trend of product shortages of the supreme unleaded product.

(10) In September 1996, DELG was notified that private wells on third party properties were affected by the migration of petroleum products originating from the property.

(11) From November 1978 to September 30, 1995, while Shell Canada Products Limited (Shell) delivered petroleum products to the property, DELG was never notified that third party properties or wells were contaminated.

(12) Based on the data available to DELG, the concentration of petroleum products in the soil and groundwater increased substantially from the time Ultramar began filling the system for 500022 as evidenced by the charts prepared by DELG, Exhibit D.

(13) Other potential sources of contamination were investigated by DELG and it was determined that the only possible source of the contamination was the system on the property owned by 500022.

(14) The October 29, 1998 report of ADI Limited, contained in Exhibit D, confirms that the contamination originated from the property owned by 500022.

Based on all of the above information, I concluded that there was a release of petroleum products from the system located on the property into or upon the environment between October 1, 1995 and May 2002, and that Ultramar has caused or contributed to the above-mentioned release of petroleum products into or upon the environment.

[23] Exhibit "B", referred to at paragraph 6 above, consists of two e-mails sent by employees of Ultramar. The first, dated December 1, 1995, reads in part as follows:

> This is a former Shell account which Ultramar has negotiated an agreement with the environmental clause that the contract comes into effect pending the Environmental Policy Assessment. The Associate owns all equipment including tanks and pumps. All that we were required to supply was the signage.
>
> Based on the results of the Environmental Assessment I cannot recommend that we install our identification at this location. The hydrocarbon contamination in the water samples from the bore holes is well above the NBDOE Level 1 guidelines. Considering, according to the report that this location is surrounded with domestic wells, it would not be in our best interests to associate ourselves with a problem that may happen down the road.

[24] The second, written by another employee, dated December 19, 1995, reads in part as follows:

> Considering the annual potential profits generated by signing on this account, which would over the life of the lease-cross lease agreement have a present value in the hundreds of thousands of dollars, it is our opinion that the upside benefits greatly outweight (sic) the risks Ultramar assumes in associating itself with this location, and we should take advantage of this business opportunity. PS. It is assumed that Ultramar owns no petroleum equipment whatsoever, including pumps. This is very important.

[25] Ultramar's arguments can be boiled down to an assertion that the Minister failed to consider appropriate factors in reaching her decision. It relies on *Suresh* (supra) in which the Supreme Court of Canada held that under the review standard of patent unreasonableness, a Minister's discretion should not be set aside unless it was made:

(a) arbitrarily;

(b) in bad faith;

(c) could not be supported by the evidence; or

(d) the Minister failed to consider the appropriate factor.



[26] Before embarking on an exploration of Ultramar's arguments, it is important to recall the nature of Judicial Review. It is not a trial de novo or an appeal. In **Administrative Law in Canada,** Second Edition, by Sara Blake, the author says the following at page 163:

> A court's powers of review are narrow. It does not retry the matter that was decided by the tribunal. A reviewing court is not concerned with the merits of the case before the tribunal nor with the wisdom of the tribunal's decision. Its sole concern is whether the tribunal properly exercised powers conferred on it by statute.

[27] However, in circumstances where the Applicant alleges that the decision cannot be supported by the evidence and/or the decision-maker failed to consider the appropriate factors, it is necessary to review the evidence to determine whether the allegations have merit.

[28] Ultramar says the decision is not supported by the evidence and/or the Minister considered the wrong evidence. Its arguments can be summarized under three main headings:

A. Ultramar had conracts with N.B. Ltd. which protected it from liability;

B. The site was already contaminated and Ultramar took steps to prevent further contamination;

C. Other parties who contributed to the contamination were not ordered to clean up the surrounding properties.



A.

[29] Ultramar relies on the terms of the leases and cross-leases between it and N.B. Ltd. and on the fact that it did not own the site or the equipment. While these issues may be of importance to the Court which ultimately decides who is liable to pay the cost of the cleanup, they are not relevant to the Minister's decision regarding who should be ordered to participate. Section 41(b) of the Petroleum Regulation defines "person responsible for the system" as follows:

> 41 In this Part
>
> "person responsible for the system" means
>
> (a) . . .
>
> (b) a person responsible or who at any time was responsible for the construction, installation, alteration, modification, change in the capacity, reactivation, excavation, relocation, loading, filling, emptying, disassembling, removal, disposal or operation of the system or any part of the system.

[30] In her recitation of the facts upon which she relied she notes "Ultramar was responsible for filling the system with petroleum products between October 1, 1995 and May 2002 ..." The fact that Ultramar entered various contracts with others designed to shield it from liability is not one of the factors which she was obliged to consider. She was concerned with finding a solution for third party property owners whose lives were being disrupted by activities over which they had no control. The solution had to be

found rapidly and could not await the outcome of litigation. The Regulation permitted her to look to a number of persons and Ultramar was one of them.

[31] I find, therefore, that the legal import of the various contracts and of ownership of the site were not factors which the Minister was obliged to consider.



B.

[32] There is ample evidence that the site was already contaminated when Ultramar began delivering petroleum. The Minister acknowledged this fact in point 2 of her decision quoted above. She then points out that Ultramar delivered petroleum from October 1, 1995 until sometime in January 1996 before steps were taken to prevent further leakage. She also points to inventory control records which show product shortages between January 1996 and October 1996 and to charts prepared by Department staff which show the concentration of petroleum increased “substantially” after Ultramar began supplying the site. While Ultramar disputes the accuracy of these records (Hiltz Affidavit, paragraph 28), it is not the function of this Court to reweigh the evidence which was before the Minister (*Suresh*, supra). There was evidence before the Minister upon which she could conclude that Ultramar contributed to the pollution of the third party properties.

C.

[33] Ultramar tried to persuade this Court that the Minister was unfairly singling it out, to the exclusion of others, in ordering it to clean up the surrounding properties. The Hiltz Affidavit (about which more below) was somewhat misleading in

that regard. Although it is true that only Ultramar was ordered to clean up the surrounding properties, there is no mention in the affidavit that N.B. Ltd. was the subject of several orders nor that Shell agreed to remediate the site without the necessity of an order. It is no doubt true that over the history of the site other parties contributed to the problem, however many would not have the means or the skills to correct it. Ultramar knew when it started delivering petroleum to the site that it was already contaminated and, as is illustrated from the e-mails quoted above, it understood and accepted the risk. In making her order, the Minister was weighing "competing technical and policy considerations" which were within her mandate. Of particular importance, the following were factors which she considered in ordering Ultramar to clean up the surrounding properties (as opposed to the site):

> Ultramar was responsible for filling the system with petroleum products between October 1, 1995 and May 2002, and was responsible for the regular inspection and review of delivery and sales records to ensure the equipment was in good working order.
>
> From the period of January 1996 to October 1996, the Ultramar daily inventory control records, as contained in Exhibit C, indicate a trend of product shortages of the supreme unleaded product.
>
> Based on the data available to DELG, the concentration of petroleum products in the soil and groundwater increased substantially from the time Ultramar began filling the system for 500022 as evidenced by the charts prepared by DELG, Exhibit D.

[34] In light of this evidence and the fact that Shell was voluntarily cleaning up the site, it was not unreasonable to require Ultramar to clean up the surrounding properties.

[35] I therefore find that the Minister's decision is supported by the evidence, does not fail to consider relevant factors and was not patently unreasonable. The application is therefore dismissed.



**COSTS**

[36] The Minister says that large portions of the Hiltz Affidavit filed on behalf of Ultramar are inadmissible.

[37] Rule 39 of the *Rules of Court* governs the evidence which may be used in motions and applications. Rule 39.01(5) deals specifically with affidavits used in applications. It reads:

> An affidavit for use on an application shall be confined to facts within the personal knowledge of the deponent; but the affidavit may contain statements as to the information and belief of the deponent with respect to facts which are not contentious, if the source of his information and his belief therein are specified in the affidavit.

[38] The Hiltz Affidavit contains 33 paragraphs with 439 pages attached. Paragraphs 6-22, 24 and 27-32 contain opinions, conclusions and arguments. In many cases the opinions and conclusions masquerade as facts. In the case of *Smith v. New Brunswick (Human Rights Commission)* [1999] N.B.J. No. 392, Chief Justice Drapeau said the following at paragraph 19:

> … Experience has shown that respect for the jurisdictional framework created by the Rules of Court and compliance with its procedural dictates serve the best interests of justice. Indeed, conformity with the Rules of Court invariably produces a winnowing of the chaff from the grain and, in turn, helpful clarity is brought to the questions submitted to the court for resolution. Focused and

> insightful decisions invariably follow. The end product is better justice for all.

[39] The Hiltz Affidavit has not brought "helpful clarity", in fact, in some respects it is misleading. The following paragraphs illustrate how far the affidavit strays from the letter and the spirit of the *Rules*:



> 28. The Minister's Decision dated June 21, 2004 (attached hereto as Exhibit "N") regarding Ultramar's Appeal Submission provides the only real explanation as to why the Minister "has reason to believe" the findings set out in the Ministerial Order. In paragraph 9 of the Minister's Decision dated June 21, 2004 (attached hereto as Exhibit "N"), the Minister refers to the Ultramar daily inventory control records that indicated a trend of product shortages of the supreme unleaded product. These are not Ultramar's records. These records belong to 500022 N.B. Ltd. and are attached to the Minister's Decision as Exhibit "C". They contain the results of the dips that were taken by the employees of 500022 N.B. Ltd. on a daily basis. Gerald Fiot, Director of Engineering and Purchasing with Ultramar, has reviewed these daily inventory control records and has informed me and I do verily belief that the credibility of these records is very questionable and, as such, they should not be relied upon to support any conclusion that the tanks or lines were leaking. On a very cursory review of 500022 N.B.'s inventory records, Mr. Fiot has informed me and I do verily believe that calculation errors were made on the entries of January 31st, July 4th, and July 5th for the Supreme. These calculation errors on their own account for a presumed shortage 14,176 litres. There are also large swings or variances from one day to the next in these records that would suggest that the employees of 500022 N.B. Ltd. were not taking the dips properly (dip stick in poor condition, inaccurate use or readings of the dip stick, timing errors in taking the dips before or after deliveries, etc.) along with the effect of the summer season where warmer product from the truck is delivered into colder underground tanks causing the product to contract.
>
> 29. According to Ultramar's recalculation of these records, which is attached as Exhibit "EE", for the Regular

> grade of gasoline, there was a normal, acceptable shortage of -3075 litres for the period covered by Exhibit "C" of the Minister's Decision. For Supreme, there was a slightly higher, yet moderate shortage. Since the tanks and lines were tested in January of 1996, in August 1998, July 1999 and again on August 27, 2001 and on all four occasions found to be tight, this provides clear evidence that no product escaped into the ground from January 1996 to at least August 27, 2001. This means that the normal and moderate shortages referred to above were probably the result of poorly calibrated pump meters and/or the summer temperatures and the shrinkage that takes place when warmer product is delivered into colder underground storage tanks and/or delivery discrepancies, such as the physical delivery of a lesser volume of product than what was shown on the delivery slip.

[40] The affidavit has made the task of the Court and the Respondent more difficult and for that reason I am awarding $5000.00 in costs.

[41] The Application for Judicial Review is dismissed with $5000.00 payable to the Respondent.

Paulette C. Garnett, J.C.Q.B.