SUPREME COURT OF NOVA SCOTIA

Citation: Higgins v. Nova Scotia (Attorney General), 2013 NSSC 138

Date: 20130429
Docket: TRU No. 403759
Registry: Truro

Between:

Forrest C. Higgins, Jr.

Appellant

- and -

The Attorney General of Nova Scotia representing
Her Majesty The Queen in right of the Province of
Nova Scotia and D.D.V. Gold Limited, a body corporate

- and -

Respondents

The Mining Association of Nova Scotia and Nova
Scotia Federation of Agriculture

Intervenors

DECISION

Judge: **The Honourable Justice J. E. Scanlan**

Heard: **April 24, 2013, in Truro, Nova Scotia**

Written Decision: **April 29, 2013**

Counsel: **Mr. Robert Pineo/Mr. Jeremy Smith, Solicitors for Forrest Higgins, Jr.**
Mr. John Keith/Mr. Jeffrey Flinn, Solicitors for D.D.V. Gold Limited
Ms. Darlene Willcott, Solicitor for the Attorney General of Nova Scotia
Mr. Geoffrey Saunders, Solicitor for Mining Association of Nova Scotia
Mr. Henry Vissers, Executive Director, Nova Scotia Federation of Agriculture

By the Court:

[1] The Court in this case is dealing with an appeal of a decision by the Minister of Natural Resources granting a vesting order pursuant to section 70 of the **Mineral Resources Act** SNS 1990, c. 18. The appeal is pursuant to section 173 of the **Act**.

[2] The thrust of the appeal is based on the argument that the Minister failed to treat the **Act** as an expropriation statute resulting in a failure to apply the **Act** in a manner required when exercising expropriation powers under such a statute. To put a finer point on the appeal, the Appellant suggests the procedure as implemented by the Minister failed to provide the procedure fairness due the Appellant and the decision was arbitrary, bias and politically motivated.

BACKGROUND

[3] The facts are set out in the respective briefs. Many of the facts are not in dispute. I repeat various portions of the parties briefs in reciting the major facts.

1. The Respondent, D.D.V. Gold Limited ("DDV"), seeks to develop a gold mine in Moose River Gold Mines, Nova Scotia. The proposed mine is called the "Touquoy Gold Project".

2. DDV estimates that the Touquoy Gold Project will employ up to 300 people during construction and 150 people once the mine is in operation. The gross annual payroll is expected to exceed $13 million. This does not include the significant economic spinoff associated with an operating gold mine in Moose River Gold Mines.

3. The Touquoy Gold Project encompasses 72 individual parcels of land totalling 1,432 acres. Of the 72 parcels required for the project, title to only one is currently in dispute: an approximately 7.23-acre lot bearing PID Number 00643073 and located at 6 Moose River Gold Mines Road ("6 Moose River"). That 7.23 acre parcel was owned by the Appellant, Ernest C. Higgins Jr. It is the historical home of the Appellant's family.

4. DDV proposes to extract the gold reserve through open-pit mining. Six Moose River forms part of the open pit where actual gold-mining will

occur. Beneath the surface of 6 Moose River, there are high concentrations of gold which DDV plans to mine. DDV submitted to the Minister that excluding 6 Moose River from the Touquoy Gold Project is neither safe nor financially rational.

5. In the recent past, 6 Moose River was used by the Appellant primarily as a place to store agricultural equipment. Otherwise, it contains an old farmhouse which has no electrical service. There is no evidence of recent habitation. There is evidence of some use of the property by the Appellant in association with his otherwise substantial Christmas tree operations. In spite of the Appellant's submissions, it is not at all clear how substantial or crucial this 7.2 acre parcel of land was to the Appellant's Christmas tree operations. Aside from the old farm house, the 7.2 acres is a partially wooded area. The Respondent suggests the Appellant owns hundreds of acres of land. The Appellant argues that this parcel of land is, at best, a very small part of the Appellant's business and extensive land holdings.

6. DDV spent almost seven years (from 2004-2011) negotiating with the Appellant in an effort to reach a mutually acceptable resolution. On July 10,

2011, DDV offered $300,000 for 6 Moose River. The Appellant is unwilling to sell his property.

7. On December 19, 2011, DDV made an application to the Minister for the Vesting Order pursuant to section 70 of the **Mineral Resources Act**. The Minister provided an undated notice to the Appellant advising that DDV had made a Vesting Order Application. On February 17, 2012, The Appellant responded, in writing, to the Notice. On April 4, 2012 the Appellant attended a meeting with the Minister and others to express concerns about the mine and to explain his position in relation to the 7.23 acre lot in question.

8. After that April 4th meeting DDV continued to provide documents to the Minister: Email from Walter Bucknell dated April 4, 2012 **[Record, Volume 2, Tab 4-3, pages 24-41]** and email thread between Walter Bucknell and David James dated April 17, 2012 concerning the redesign of the proposed mine **[Record, Volume 2, Tab4-8, pages 104-105].** The record reveals additional discussions as between the Minister and DDV representations on April 30, 2012 **[Record, Volume 2, page 27]**

9. After April 4th the Minister did not provide any of DDV's documents or submissions to the Appellant. The Minister did not advise the Appellant of those communications nor was any of the additional information as provided by DDV to the Minister disclosed to the Appellant prior to the commencement of these appeal proceedings. The Minister did not request any further information from the Appellant.

10. On June 12, 2012, the Province issued a Vesting Order pursuant to section 70 of the **Mineral Resources Act**, vesting the fee simple interest of the subject property in DDV. The decision to issue the Vesting Order was communicated to the Appellant by letter of Charlie Parker, Minister of Natural Resources dated June 13, 2012 ("the Decision") **[Record, Volume 2, Tab 9, pages 106-111]**.

11. On July 12, 2012, Mr. Higgins filed a Notice of Appeal. The Attorney General of Nova Scotia and DDV were named as Respondents. Subsequently, on December 10, 2012, the Court granted intervenor status to

The Nova Scotia Federation of Agriculture and The Mining Association of Nova Scotia.

12. Prior to the hearing of the Appeal on April 24, 2013 there were several procedural motions. The Appellant advises that only two grounds of appeal remain. First, that the process used by the Minister results in a denial of natural justice and fairness. Second, that the Minister erred at law by rendering a decision that was arbitrary and politically motivated. In the Appellant's brief this latter ground is cited as the basis for the allegation of bias. The Appellant further submits that the Ministers decision was bias to the extent that if the Appeal succeeds the matter should not be remitted back to the Minister for reconsideration.

THE APPELLANT'S POSITION

[4] In summary the Appellant's position is that the Court, and before that the Minister, must take into account the fundamental aspect of the right to land ownership in this country. The right to own lands is subject only to the states right to expropriate. Expropriation is a severe intrusion on a fundamental right and

requires great care and fairness in the exercise of expropriation authority. Perhaps the main plank in the Appellant's brief relates to the apparent interaction between DDV and the Minister after the Appellant's final submissions. Although the record would not appear to be complete, it does suggest DDV had discussions of some sort with the Minister after that April 4th date. The record is clear in indicating that DDV provided additional information to the Minister after that April 4th date. There is no suggestion the Appellant was ever apprised of the additional discussions, or made aware as to the contents of the additional materials as provided to the Minister, prior to the Minister making the Vesting Order. The Appellant asserts that by not advising the Appellant of those further representations and by not affording him the opportunity to respond to that information, the process was unfair, resulting in a denial of natural justice.

[5] The Appellant further asserts that the Minister was bias in his decision in that the Minister wanted the mine project to proceed for political and economic reasons. That assertion suggests that for those economic and political reasons the Minister failed to have due regard for the fundamentally important rights of the landowner in this case.

THE RESPONDENTS POSITION

[6] DDV and The Attorney General take the position that the **Act** does not set out any specific process to be used during the expropriation under the **Act.** They both assert that the process used in the present case was fair and did not result in a denial of natural justice for the Appellant. On the issue of bias the Appellant asserts that the Minister is authorized and empowered to make the ultimate decision as to expropriation. Under the **Act** the Minister must take a number of factors into account. There is no doubt that in the end economic and political considerations are part of those factors which influence the final decision. Those things are however valid influencing factors. The nature of those influencing factors do not make it impossible for the Minister to render an unbiased decision.

[7] The Mining Association position closely mirrors the position of the Respondents. The Nova Scotia Federation of Agriculture notes the importance of private land holdings for farmers. It goes without saying, no land, no farming. I understand the Federation to be saying that it is important in any expropriation proceeding that the Minister take into account the competing interests of private entities who are relying on the same resource; land. The Federation urges care in

the process, and urges the Minister to respect the rights and interests of the affected parties.

ANALYSIS

[8] The grounds of appeal now advanced do not require a “standard of review analysis” as set out by the Supreme Court of Canada in **Dunsmuir v. New Brunswick,** 2008 SCC 9. The only issues before the Court relate to the procedural fairness and bias.

[9] All of the parties and intervenors would appear to concede the fundamental importance of land ownership. The Respondent points to other land holdings of the Appellant and alleges minimal use of the lands in question by the Appellant. In spite of those points as made by the Respondent the Court starts from the position that the ownership of land is something of a fundamental right afforded substantial protection in our society and under the laws of this and all other provinces. The use of the lands as asserted by the Appellant can be assumed to be accurate in this case and it does not, based on the facts of this case, change the outcome. I start by simply recognizing the considerable importance of the lands for the Appellant.

[10] The Appellant's historical homestead remains on the property. Although this house appears not to have been occupied for many years, it no doubt retains a huge sentimental value. There has been some ongoing use of the lands and buildings for the Appellant's Christmas tree operations. It is not clear, based on the materials, as to what impact the loss of the lands for that purpose will have on the Appellant's other Christmas tree operations. The Appellant may have to relocate some of those operations. In the end, the Court simply approaches this case keeping in mind that the decision is very important to the lives, perhaps in this case even more so, to the values of the Appellant.

[11] There can be little doubt that in expropriations under this **Act** the decision of the Minister must take into account the fundamental importance of land for land owners as a primary consideration. In this case the Minister gave the formal notice to the Appellant as regards the application for the Vesting Order. This satisfied the minimum requirement as noted by Justice Burchell in **Young v. Municipality of Cape Breton** 77 N.S.R. 389. Although Justice Burchell did not attempt to enumerate everything that was required when exercising expropriation powers, in **Young** he made it clear that as a minimum the landowner is at least

entitled to be made aware of the process. As I will discuss later, the Minister in this case went well beyond merely giving notice to the landowner.

[12] This case highlights the fact that while land may be owned by individuals, the Crown retains ownership of the minerals beneath the surface. For most residents this does not present a problem as the vast majority of underground resources are never accessed. Once a decision is made by mining interests to extract minerals it may be difficult, impractical, or perhaps on occasion even impossible to extract the minerals without affecting the lands above the minerals. In this case DDV was able to convince the Minister to exercise his powers under the **Act** and have the Minister issue a vesting order expropriating the Appellant's lands.

[13] The Appellant argues that the failure of the Minister to provide the Appellant with the information received after April 4, 2012, denied him of the opportunity to test or challenge the assertion that the mine was not viable or practical without the Vesting Order. Those materials suggested that there is a substantial amount of gold under the 7.23 acres in question.

[14] In considering the merits of this case it is important to take into account the reference to the stated purpose of the **Mineral Resources Act**. Section 1A states as follows:

> 1A The purpose of this Act is to support and promote responsible mineral resource management consistent with sustainable development while recognizing the following goals:
>
> (a) providing a framework for efficient and effective mineral rights administration;
>
> (b) encouraging, promoting and facilitating mineral exploration, development and production;
>
> (c) providing a fair royalty regime, and
>
> (d) improving the knowledge of mineral resources in the Province.

[15] Section 4(1) makes it clear the Crown not only owns the minerals but has the right to remove them.

> 4(1) All minerals are reserved to the Crown and the Crown owns all minerals in or upon land in the Province and the right to explore for, work and remove those minerals.

[16] Although **Section 70** of the **Act** sets out a number of procedures related to expropriation, it does not establish a process that dictates how the Minister shall make the final decision. The lack of procedures in the empowering statutes limits the relevance of **Dell Holdings Ltd. v. Toronto Area Transit Operating Authority**, [1997] 1 SCR 32. **Dell Holdings** was a case about the principles of statutory interpretation but the applicable provision of the **Mineral Resources Act** and the **Expropriation Act**, SNS 1989, c 156, do not identify any procedural rights surrounding the process leading to the decision to expropriate. The Appellant urges the Court to impose a process that is akin to a judicial process wherein the Appellant is entitled to a right to receive all information presented to the Minister and afforded an opportunity to respond or even challenge that information. I am not convinced the Appellant is correct in his assertions as to the appropriate process under the **Act**.

[17] As noted in this case the Minister gave notice of the application for a Vesting Order. The Appellants subsequently filed an extensive written response. I suppose that the process could have ended at that time. I say that because had the Minister said okay I have the Application, you filed the response and I am now making my decision based on what is before me , then the Appellant would have

little to complain of. His submission would be last in time. The Minister went beyond simply reviewing the Appellant's response. He met with the Appellant and others. I do not understand the Respondent, DDV, as being present to hear what the Appellant said at that meeting. It would appear that the Minister did not simply dismiss the Appellant's submission made during that meeting. This included the possibility of operating the mine without including the 7.23 acre parcel. Again, had the decision been rendered at that time, the Appellant would have little to complain about as his submission would have been last in time. Instead of rendering a decision at that juncture the Minster put the Appellant's suggestions to the Respondent. There was further submissions by DDV outlining it's position on the practicality of operating the mine without the inclusion of the Appellant's land.

[18] I agree with the Respondent that the legislative scheme in this case does not elevate the expropriation process to a judicial or quasi judicial level. What is required of the Minister is that there be fairness. As noted in **Young** that includes at a minimum, providing notice to the affected landowner. There is an additional duty on the Minister in cases such as this, not to have a closed mind. The Minister has a duty to consider the merits of the arguments on both sides. The

record would not in any way suggest that the Minister had predetermined the issue. He heard from and met with both sides. With DDV he asked that they address some possible alternatives as suggested by the Appellant. The solicitation of additional information is suggestive of the Ministers willingness to consider alternatives to expropriation. There is nothing in the record to suggest that he embarked upon the process with a closed mind. In fact, the record would suggest just the opposite. The various meetings and requests for information is suggestive of a desire to gather sufficient information to enable the Minister to make a reasoned decision, taking into account the position of all affected parties. The record shows that in addition to hearing form the Respondent and Appellant, many other individuals filed letters, both pro and con, for consideration.

[19] I refer to **Margaree Environmental Assn v. Nova Scotia (Minister of Environment)** 2012 NSSC 296 where at paragraph 26, Justice MacAdam noted:

> There is no obligation for the Minister to conduct a formal hearing analogous to a trial. Absent mandated procedures, I am satisfied that the Appellant received procedural fairness...

[20] As noted in **Baker v. Canada (Minister of Citizenship and Immigration)** [1999] 2 S.C.R. 817 the concept of procedural fairness is eminently variable, to be

decided in the context of each case. It depends on an appreciation of the context of a particular statute and the rights affected. Ultimately the concept of fairness is cloaked in the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using fair and open procedure, appropriate to the decision being made. This is within the context of the statutory framework with an opportunity for those affected to put forth their views and have them considered by the decision maker.

[21] What is being challenged in the present case is a discretionary decision of the Minister. It was made within the statutory framework that provided no guidance as to the process to be used. As noted by Justice MacAdam in the **Margaree** case clearly there is nothing within the legislative scheme to elevate the process to a judicial or quasi judicial trial process. It is an inescapable conclusion in the present case that, in the end, the decision is more political than judicial in nature. That is, it requires a balancing of the Appellant's rights as against the goals and purposes of the **Act** together with the political assessment as to the broader interests of the citizens of the province, including the mining sector as a whole. Political decisions are best left to politicians, not courts. They alone will answer at the polls. In the end politics should stay out of the court rooms and

courts should refrain from interfering in political decisions made within the confines of appropriate legislative framework.

[22] The Appellant has been afforded some protection as regards the process because he has a right of appeal, as has been exercised here. The appeal, however, is to be conducted within the framework as provided by statute and common law.

[23] I have already noted the importance of the decision as regards the interests of the Appellant in keeping his lands for both sentimental and economic reasons. The result of that important factor is, as noted in **Young**, the Appellant was at least entitled to notice. He had more than mere notice. He had an opportunity to provide his position to the Minister in advance of the decision being made. The legislative scheme does not elevate the process to one that afforded the Appellant trial procedures and protections. In other words, the Appellant was not entitled to be last to make submissions to the Minister, nor to be present during all response submissions. In addition, the fact the Appellant was not provided with the submissions of DDV after the April 4th date does not invalidate the order.

[24] In the legislative scheme established under the **Act** there is little by way of procedure set out by statute. The expectation in this case can be little more than requiring notice and having an expectation that whatever procedure the Minister adopts, he will not prejudge the issue before hearing both sides.

[25] Counsel for the Respondent appropriately referred the Court to a text by Sara Blake in **Administrative Law in Canada**, 5th Edition, where she notes at page 13:

> Many statutes confer political decision-making powers on Cabinet, Ministers and other public officials to enable them to respond to the political, economic, and social concerns of the moment. These types of decisions do not attract a duty of fairness and are subject only to statutorily prescribed procedural requirements. These decision makers may consult anyone and are not obligated to make disclosure of the "case to be met". Even where the decision affects the interest of only one person, the duty of fairness may be met by giving notice and permitting the person to make written submissions to a lower official who must ensure that the person's position is put before the Minister or Cabinet. There is no right to an oral hearing.

[26] I am satisfied the duty of fairness in the present case was met through the dialogue as between the Minister, the Appellant and the Respondent. The Minister was acting, having due regard to the stated purposes of the **Act**. He is saddled with the goal of supporting and promoting responsible mineral resource management within the framework of **section 1A** of the **Act**. Within that

framework the Minister is burdened with the responsibility of encouraging, promoting and facilitating mineral development. Just as it is for the Minister to decide on a fair royalty regime, it is for the Minister to decide when, in the interest of furthering the goals of the **Act**, it is necessary to comply with a request for a Vesting Order.

[27] I do not accept that this case is about one private interest, the landowner verses another private interest, a mining company. In the context of mining as compared to road construction or some other public project, invariably there will be two non public parties affected unless all mineral extraction was nationalized. Even when mines are privately owned and operated there is a huge public interest at stake. In the present case the record suggests there will be many jobs and a substantial economic impact in an area that is economically disadvantaged. The Province, no doubt, will earn much needed revenue through royalties and taxes. Those taxes are used for the benefit of all Nova Scotians including, no doubt, the Appellant and his family.

[28] As it relates to this case and the process as suggested by the Appellant, if the Appellant's position were accepted, I have little doubt it would send a chill

throughout the mining industry in Nova Scotia. The process involving Vesting Orders would be elevated to trial status. The Courts would be put in a position whereby they would be required to make political decisions. Courts would in effect become legislators creating processes and rules where none are now prescribed. This would be outside the normal role of the Court and it would be clearly contrary to the legislative framework now in place for Vesting Orders.

[29] The preferred option for DDV in the present case would have been for them to negotiate a reasonable price with the Appellant. They offered $300,000 for this parcel of largely vacant rural land. Even though the Appellant's homestead was on the property and they had some residual use of the lands in the Christmas tree operation there is nothing before the Courts to suggest the refusal of the $300,000 was based on economics. Reference to the earlier decisions in this case make it clear that, at least the Appellant's son was vigorously opposed to this mine and perhaps most, if not all, mines in the world. It is not clear as to whether the Appellant shares his son's philosophical views on mining.

[30] In order to apply for a Vesting Order DDV was required to deposit $700,000 with the Minister. This more than doubled what the record suggests as a

possible fair value for the 7.23 acres. In addition, it is clear the costs related to these proceedings is substantial for DDV. This does not even attempt to take into account the impact any delays may have had on the project. In other words, there is no upside for DDV in having to go through this process.

[31] I do not accept that by the mere fact that the Province is going to gain revenue from royalties, the Minister cannot make a decision without being bias. The applicable test in this case is set out in **Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)**, [1990] 3 SCR 1170. That is the question, whether the mind of the decision maker was closed. Royalties are for the benefit of all residents of the Province including the Appellant. Finances, resources, economic activities cannot be separated from politics. The **Act** in this case specifically empowers the Minister to make the final decision. Perhaps it is a politician that has that responsibility because in the end the decision affects more than just the Appellant and Respondent. There is nothing in the record to suggest bias of any sort by the Minister. The Minister was not obligated to elevate the process to that of a trial process out of fear of being labelled as being bias. His only duty was to be fair. The legislative scheme designates the Minister as the final decision maker and it is

not for this Court to interfere with that legislative authority absent a clearly justifiable reason. No such justification exists in the present case.

[32] The Appeal pursuant to **section 173** of the **Act** stands dismissed.

[33] The Respondents have two weeks to file a brief on costs. The Appellant will have two weeks after that to file a written brief on costs. I will render my decision thereafter as soon as my schedule permits. I am not sure how costs could be claimed for or against the intervenors. Let me know if there is any such claim for or against the internvenors.

J.

04/29/13