SUPREME COURT OF NOVA SCOTIA

Citation: Higgins v. Nova Scotia (Attorney General) , 2013 NSSC 186

Date:20130619
Docket: TRU403759
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

Respondents

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

Intervenors

DECISION ON COSTS

Judge: The Honourable Justice J. E. Scanlan

Heard: Written submissions received from the parties on May 13 & May 31, 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] On April 29, 2013 this Court dismissed an appeal by Forrest C. Higgins, Jr., pursuant to Section 173 of **The Mineral Resources Act,** SNS, 1990. The Court asked the parties to provide the Court with written submissions on costs.

[2] The parties agree the chronology of the events are appropriately set out in the brief as filed by D.D.V. Gold Limited as follows:

1. The Appellant was the owner of 6 Moose River Gold Mines Road, Moose River Gold Mines, Nova Scotia, an approximate 7.23 acre lot bearing PID Number 00643073 (‘6 Moose River”). 6 Moose River forms part of the open-pit mine where actual gold-mining will occur. Beneath the surface of 6 Moose River are high concentrations of gold which DDV plans to mine.

2. DDV unsuccessfully spent almost seven years (from 2004-2011) negotiating with the Appellant in an effort to reach an agreement to purchase 6 Moose River.

3. As a last resort, on December 19, 2011, DDV submitted an application to the Department of Natural Resources requesting vesting orders pursuant to Section 70 of the **Mineral Resources Act,** SNS, 1990, for the 14 remaining properties needed to develop the Touquoy Gold Project, including the Appellant’s property located at 6 Moose River.

4. On June 12, 2012 the Minister granted the vesting orders and vested 6 Moose River to DDV.

5. On July 12, 2012 the Appellant filed a Notice of Appeal. The Appellant was the only affected landowner to file a Notice of Appeal and oppose the gold-mining project.

6. A motion for date and directions was held on September 4, 2012.

7. The Appellant filed a motion for a stay of any actions to be taken upon the 6 Moose River land, along with a motion to determine whether the mode of the appeal should be by way of hearing de novo or by way of review. The motions were scheduled to be heard on November 19, 2012 along with any motion for any person or organizations wishing to move for intervenor status.

8. The statutory appeal of this matter was originally scheduled to be heard on February 25-27, 2013.

9. The Attorney General of Nova Scotia produced and filed an Appeal Record with the Court on September 28, 2012.

10. In October 2012, the Mining Association of Nova Scotia ("MANS"): Moose River Resources Inc.; the Lunenburg County Christmas Tree Producers' Association, the Northeastern Christmas Tree Association and the Nova Scotia Federation of Agriculture ("NSFA"), filed motions for intervenor status.

11. On October 22, 2012 the parties consented to the motion concerning the mode of trial being adjourned to January 3, 2013. The appeal was postponed from February 25-27, 2013 to April 24, 2013 in order to accommodate the four days of hearing needed for a potential trial de novo.

12. On November 5, 2012 the motion brought by the Appellant for a stay was resolved on consent.

13. On November 16, 2012 the two Christmas tree producers associations withdrew their motions for intervenor status on the basis that they fell

under the umbrella of the Nova Scotia Federation of Agriculture. The two Christmas tree producers associations confirmed their withdrawal through the Appellant's counsel.

14. The motions for intervenor status were heard on November 19, 2012. The Court granted intervenor status to the Nova Scotia Federation of Agriculture and Mining Association of Nova Scotia.

15. It is significant to note that, once again, the Nova Scotia Federation of Agriculture was represented by the Appellant's counsel at this motion for intervenor status - at least the Appellant's counsel spoke on behalf of the Nova Scotia Federation of Agriculture. The Nova Scotia Federation of Agriculture did not make any independent submissions.

16. The Appellant's motion to determine whether the appeal of the vesting order should be heard as a traditional statutory appeal or as a trial de novo was heard and dismissed by the Court on January 3, 2013 with costs to be determined in the cause.

17. The appeal was heard on the morning of April 24, 2013 and dismissed by the Court on April 29, 2013.

18. On May 6, 2013 the Appellant filed a Notice of Appeal with the Nova Scotia Court of Appeal.

Appropriate Quantum of Costs

[3] I turn first to a consideration as to what the appropriate amount for costs should be in this case. In most cases the law is quite clear on the issue of costs. The rules provide that the Courts retain substantial discretion in the awarding of

costs. In **Landymore v. Hardy** (1992), 112 NSR (2d) 410, the Court reviewed the underlying principles by which costs ought to be measured and stated:

> The recovery of costs should represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity.

[4] Rule 77 in the **Civil Procedure Rules** outlines the rules on costs; specifically Rule 77.06(3) which sets out tariff C. The parties agree that notwithstanding tariff C, the Court has the discretion to award costs that are just and appropriate in the circumstances, based on the consideration of factors set out in Rule 77.07. These factors include:

(a) the complexity of the matter;

(b) the importance of the matter to the parties;

(c) the amount of effort involved in preparing for and conducting the application.

[5] The Court accepts that this was a complex matter. The complexity for DDV Gold Limited was not in any way reduced by the actions of the Appellant, Mr. Higgins. For example, there were six original sub-grounds of appeal. This was reduced to two sub-grounds for appeal at the last moment. I accept the submission of DDV Gold Limited's counsel that even though a number of the grounds for

appeal were withdrawn, much of the work was already done in preparing to address those grounds. A more timely amendment to the grounds for appeal or at least notice to the Respondents would have resulted in increased savings.

[6] The issues are certainly important to the parties. The Court had repeatedly stated during the hearing and decision that this matter involved ownership of land and, as such, substantial protection is to be accorded to the Appellant. The matter was extremely important to DDV Gold Limited in that the company had invested millions of dollars in developing the Touquoy Gold Project. A total investment of approximately eight hundred million dollars was potentially in jeopardy, or at least on hold, until the issue of this appeal could be resolved.

[7] The Court accepts that the strict application of tariff C would result in approximately $3,000.00 in costs, as the minimum amount payable to DDV Gold Limited by the Appellant.

[8] This is an appropriate case to add a multiplier and I would increase costs payable by the Appellant to $6,000.00 plus disbursements. I have reviewed the affidavit of disbursements as put forth by the Respondent, DDV Gold Limited.

The disbursements as claimed appear reasonable and the Court orders disbursements in the amount of $10,136.07. This is added to the $6,000.00 costs award for a total of $16,136.07.

[9] Neither DDV Gold Limited nor the Attorney General of Nova Scotia are requesting costs against the Mining Association of Nova Scotia and the Nova Scotia Federation of Agriculture. I accept their position on that.

[10] The Attorney General of Nova Scotia has asked for costs in the amount of $2,000.00 as against the Appellant. In view of the award to DDV Gold Limited, the Court accepts that the amount of $2,000.00 is an appropriate amount to award the Attorney General of Nova Scotia.

Should the Appellant be immune from paying costs on the grounds that this case involves an expropriation?

[11] This Court rendered a decision on the issue of the validity of the vesting order on April 29, 2013. On May 6, 2013 the Appellant filed a Notice of Appeal, related to the April 29th decision, with the Nova Scotia Court of Appeal.

[12] In its brief on the issue of costs the Appellant argues that this is an expropriation matter even though it arose pursuant to the **Mineral Resources Act,** SNS, 1990. The Appellant's position is that neither the **Mineral Resources Act**, SNS, 1990, or the **Expropriation Act**, RSNS 1989, makes provision for costs as against the owner of the expropriated land. They rely heavily on **Hill v. Nova Scotia** (1997) 1 SCR 69, in arguing that the Appellant should not be ordered to pay costs and that the Appellant is entitled to be paid costs on a solicitor/client basis. In **Hill**, the Applicant Mr. Hill was alleging that the Province of Nova Scotia expropriated lands by way of denial of access under a Trans Canada when the highway was twinned. The Respondent denied there was any expropriation. The matter eventually went before the Supreme Court of Canada which determined that in fact there had been an expropriation of an equitable interest as retained by Mr. Hill. Subsequent to that decision the Supreme Court of Canada made an order on costs as against the Province which required the Province to pay solicitor/client costs in proceedings at all levels. There is a glaring distinction as between the **Hill** case and the matter now before the Court. In **Hill** the Province was denying that any expropriation had occurred. The Applicant, Mr. Hill, was forced to resort to the Courts in order to obtain relief as against what was, in the end, determined to be an expropriation. The solicitor/client fees expended in the

Hill case clearly fell within the amounts of Section 52(2) of the **Expropriation Act**, RSNS, 1989, as reasonable costs necessarily incurred by the owner for the purpose of asserting their claim for compensation.

[13] The Appellant, Mr Higgins now argues that Section 173 of the **Mineral Resources Act** SNS, 1990, is silent on the issue of costs and that because the present case is an appeal of a decision to expropriate the Appellant's land, the costs provisions under the **Expropriation Act,** RSNS, 1989, govern the present case. Not the cost provisions under the **Nova Scotia Civil Procedure Rules**.

[14] The provisions under the **Expropriation Act,** RSNS, 1989, dealing with costs are set out in Section 2(1), and 52(1) through (8). As I review the provisions of the **Expropriation Act**, RSNS, 1989, Section 52(2), it notes that, subject to subsection 5:

> an owner whose interest in land is expropriated or injuriously affected is entitled to be paid the reasonable costs necessarily incurred by the owner for the purpose of asserting their claim for compensation.

[15] In the present case the Appellant is not asserting a claim for compensation. The Appellant is asserting that the Minister either had no authority or improperly exercised his authority in making a decision to expropriate the Appellant's lands. This challenge to the exercise of Ministerial authority is distinct from the issue of appropriate compensation. In fact, if the Appellant had succeeded there would be no further discussion on the issue of compensation. The Appellant would simply have the issue of costs determined and that would be the end of the matter.

[16] The issue on power or the exercise of the power to expropriate is distinct from the issue of compensation. There is a process that will allow for a proper determination as to the amount the Appellant should receive as compensation for his lands. That is separate and apart from the process wherein the Appellant challenges the expropriation itself. While the Appellant may be entitled to all costs reasonably incurred for determining the appropriate amount of compensation, that does not rule out the possibility of the Appellant being held liable for costs pursuant to the **Civil Procedure Rules** for challenging the expropriation itself. The Appellant and others should be mindful of the fact that a baseless challenge of the process is not made without risk. To rule otherwise would ignore the wording in the applicable legislation and encourage ill conceived

challenges to the process. Applicants should not be lead to expect they will be awarded a cost amount, and have their costs paid for in cases where there are not proper grounds to challenge an expropriation.

[17] I am satisfied that the appropriate disposition in the present case is for this Court to determine the appropriate amount of costs payable by the Appellant. In view of the outstanding appeal of the Court's decision of April 29, 2013, I am not prepared to make an order which requires payment of the costs forthwith. The ruling on the issue of costs is perhaps something that will also go to the Court of Appeal. In the meantime the Court is not ordering immediate payment of costs by the Appellant to the Respondents. The amount is fixed as noted above. Unless that direction to pay costs is set aside by the Court of Appeal, costs in the amount of $16,136.07 will be payable to D.D.V. Gold Limited by the Appellants and costs of $2,000.00 will be payable to the Attorney General. Those amounts are due upon the matter being dealt with by the Court of Appeal, or upon an abandonment of the Appeal by the Appellant.

J.

06/19/2013