

NOVA SCOTIA COURT OF APPEAL

Citation: *Higgins v. Nova Scotia (Attorney General)*, 2013 NSCA 106

Date: 20130924

Docket: CA 415194

Registry: Halifax

Between:

Forrest C. Higgins Jr.

Appellant

v.

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

Respondents

Judges: MacDonald, C.J.N.S., Hamilton and Fichaud, J.J.A.

Appeal Heard: September 13, 2013, in Halifax, Nova Scotia

Held: Appeal is dismissed, per reasons for judgment of
Hamilton, J.A., MacDonald, C.J.N.S. and Fichaud, J.A.
concurring

Counsel: Robert Pineo and Jeremy Smith, for the appellant
Darlene Willcott, for the respondent, The Attorney
General of Nova Scotia
John Keith, Jack Townsend and Jeffrey Flinn, for the
respondent, D.D.V. Gold Limited

Reasons for judgment:

[1] D.D.V. Gold Limited (hereinafter “DDV”) tried over a period of years to buy a parcel of approximately seven acres of land from the appellant, Forrest C. Higgins, in connection with its plan to develop an open pit gold mine in the Province. Mr. Higgins told DDV he was not interested in selling this land. Pursuant to s. 70 of the **Mineral Resources Act**, (“MRA”) S.N.S. 1990, c. 18, DDV applied to the Minister of Natural Resources for the Province for a vesting order transferring to it fee simple ownership of Mr. Higgins’ land, together with fee simple ownership of other parcels of land with title problems. Notice of DDV’s application was published. As a result, many people wrote to the Minister, some in favour and some against the proposed vesting order.

[2] The Minister also specifically notified Mr. Higgins of the application because of his ownership interest, invited him to respond in writing with information he would like the Minister to take into account with respect to the application and later met with him to discuss his objections to the granting of the vesting order. Among other things, Mr. Higgins made it clear he was not prepared to sell his land and suggested the mine could proceed without it.

[3] Without informing Mr. Higgins, the Minister then requested DDV to provide him with a copy of its formal offers to purchase Mr. Higgins’ land and to indicate if it could proceed with the development of the gold mine without it. DDV provided this information, indicating Mr. Higgins’ land was critical. It indicated failure to acquire Mr. Higgins’ land would result in a revenue loss of about USD\$100 million and would create a “geotechnically weak corner, likely resulting in unintended wall failure and encroachment of the pit crest into Mr. Higgin’s(sic) property.” DDV was not given Mr. Higgins’ submissions. Mr. Higgins was not given DDV’s original application materials or its response. Nothing further was requested from Mr. Higgins or DDV before the Minister granted the vesting order.

[4] Mr. Higgins appealed the Minister’s decision to the Nova Scotia Supreme Court. By Order dated May 3, 2013, Justice J. E. Scanlan, dismissed his appeal. Mr. Higgins appealed from that Order to this Court. We indicated at the hearing of his appeal that his appeal was dismissed, with reasons to follow. These are our reasons.

[5] The judge's reasons (2013 NSSC 138) indicate he understood the material that was before the Minister and the process the Minister followed in reaching his decision. They also show he applied the correct standard of review and guiding legal principles.

[6] The judge referred to the information that was before the Minister. This included the business and personal attachment Mr. Higgins has to the land. His family once lived in the house located on the land. It has not been occupied for years and has no electricity. He used the land in connection with his nearby Christmas tree business. He was not prepared to sell the land. The information before the Minister also indicated that the mine would employ up to 300 people during construction and 150 people once the mine was in operation. It indicated the gross annual payroll of the mine was expected to exceed \$13 million, without taking into account the economic spinoff to the local area. It indicated the other 71 parcels of land DDV needed for its development had now been acquired by it. It indicated that Mr. Higgins' land contained high concentrations of gold, would form part of the open pit itself and that the exclusion of this land from the mine was neither safe nor financially rational.

[7] The judge understood Mr. Higgins' arguments. He accepted the importance of Mr. Higgins' rights as a landowner. He referred to the Crown's ownership of all minerals in or on the lands in the Province and its interest in working and removing them as set out in the **MRA**:

- 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.

...

- 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.

[8] The judge understood the procedure followed by the Minister. He noted that, unlike some statutes, the **MRA** does not set out a process that must be followed by the Minister in considering applications for vesting orders. He recognized the Minister's responsibility to encourage, promote and facilitate mineral development and the public interest at stake. He found that the legislative scheme set out in the **MRA** did not raise the process to a judicial or quasi-judicial level. Rather, he found the Minister's decision was a discretionary policy one requiring fairness by the Minister. He considered the law set out in **Baker v. Canada (Minister of Citizenship and Immigration)**, [1999] 2 S.C.R. 817 and noted that the concept of procedural fairness is variable, "... to be decided in the specific context of each case".

[9] Applying the **Baker** principles, the judge rejected Mr. Higgins' argument that the Minister was required to provide him with greater procedural fairness than he did. He found Mr. Higgins was not entitled to be last in presenting his position to the Minister or to be present during all submissions to the Minister. He found the Minister had an open mind when considering whether to grant the vesting order and had met his duty of procedural fairness to Mr. Higgins.

[10] The basis of Mr. Higgins' appeal is that the judge erred (1) in determining that the procedure followed by the Minister in granting the vesting order was fair and (2) by improperly considering inappropriate factors in reaching his decision, i.e., the effect the proposed gold mine would have on the local economy and the mining industry in the Province.

[11] The issues before us, as before Scanlan, J., relate to procedural fairness. The standard of review this Court applies to the judge's decision is that of correctness; did he apply the principles of procedural fairness correctly to the process followed by the Minister; **Nova Scotia (Community Services) v. N.N.M.**, 2008 NSCA 69, para 46. In determining whether the judge was correct we must consider the

Minister's decision in light of the five non-exhaustive factors that a court must consider under **Baker**:

1. the nature of the decision being made and the process followed in making it;
2. the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates;"
3. the importance of the decision to the individual or individuals affected;
4. the legitimate expectations of the person challenging the decision; and
5. the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances.

[12] I will consider the first and second factors together. The first factor in **Baker** is the nature of the decision being made and the process followed in making it. Here the decision made by the Minister was whether the land should be transferred from Mr. Higgins to DDV to allow it to develop an open pit gold mine. Once that decision was made, the Minister would no longer be involved as, pursuant to ss. 70 and 71 of the **MRA**, the process for determining the compensation to be paid to Mr. Higgins is to be determined subsequently under the **Expropriation Act**, R.S.N.S. 1989, c. 156. The second **Baker** factor is the nature of the statutory scheme and the terms of the statute pursuant to which the Minister, in this case, operates. Here the purpose of the **MRA** which authorizes the Minister's decision is as set out in paragraph 7 above, which includes the encouragement, promotion and facilitation of mineral exploration, development and production in the Province.

[13] Section 70(3) of the **MRA** gives the Minister discretion to make this decision:

Upon application, the Minister may, by a vesting order, vest in the lessee the property right claimed by the lessee or such other right as the Minister may determine.

[14] The **MRA** does not prescribe any procedure for the Minister to follow in granting vesting orders, leaving this to the Minister to determine. The Minister is not required to decide issues of fact or apply law in making his decision. His decision is a policy decision, that must take into account the public interest and for which he is only answerable to the Legislature; **Calgary Power Ltd. and Halmrast v. Copithorne**, [1959] SCR 24. As a discretionary decision based on policy considerations, the Minister's decision is not similar to an adjudicative one. The trial-like procedures urged by Mr. Higgins: documentary disclosure, an oral hearing and an opportunity to cross-examine DDV's representatives and to test their evidence before the decision is made, are not required; Sara Blake, **Administrative Law in Canada**, 5th ed (Markham, Ontario: LexisNexis Canada Inc., 2011) at p. 13.

[15] The third **Baker** factor is the importance of the decision to the individuals affected. This is the factor Mr. Higgins stressed. He pointed out the importance of the Minister's decision to him. It divested him of this parcel of land that is of great importance to him. It must be remembered, however, that the Minister's decision was also important to DDV. Based on the material before the Minister, DDV would suffer a revenue loss of USD\$100 million and face safety issues, if it went ahead with the mine without this land. The Minister's decision is also important to other people in Nova Scotia, as evidenced by the many letters for and against the vesting order that the Minister received in response to the published notice of the application. The recognized importance of the Minister's decision to Mr. Higgins alone, does not trump the other **Baker** factors that suggest fewer, rather than more, procedural protections.

[16] The fourth **Baker** factor is legitimate expectations. This was the first time a vesting order was sought under s. 70 of the **MRA**, so no procedure had been set by precedent that gave rise to any expectation by Mr. Higgins for greater procedural protections than he received. Similarly, there were no regular practices, promises or representations on the part of the Minister or his staff that gave rise to a legitimate expectation of greater procedural protections. Mr. Higgins was notified of the application. He was informed that he could provide the Minister with information that he would like the Minister to take into account with respect to the application. Mr. Higgins provided this information and the Minister considered it and subsequently met with him. The Minister also followed up with DDV on the question raised by Mr. Higgins about DDV's need for this land in order to proceed

with the gold mine. All of this indicates Mr. Higgins did not have any legitimate expectation that the Minister would provide him with more procedural protections than he did.

[17] The fifth and final **Baker** factor is respect for the procedural choices of the administrative decision-maker, the Minister in this case. The **MRA** leaves to the Minister the process to be followed. The process he chose is entitled to some deference. As long as that procedure treats those who are affected by his decision fairly, the court should not intervene; **Administrative Law in Canada** at p. 23.

[18] Considering (1) the policy decision the Minister was required to make under the **MRA**, to choose the best course of action, from the standpoint of the public interest, in order to achieve the objectives of the **MRA**, (2) the purpose of the **MRA** to encourage, promote and facilitate mineral exploration, development and production for the economic advantage of the Province, (3) the **MRA** leaves the process to be followed up to the Minister, (4) the importance of the decision to Mr. Higgins, DDV and the people of Nova Scotia, (5) the legitimate expectations of Mr. Higgins in the process that would be followed by the Minister and (6) the process the Minister followed, we are satisfied the judge was correct in finding the Minister acted fairly and was not required to provide Mr. Higgins with more procedural protections than he did. We dismiss this ground of appeal.

[19] With respect to Mr. Higgins' second ground of appeal, that the judge erred by improperly considering inappropriate factors in reaching his decision, i.e., the effect the proposed gold mine would have on the local economy and the mining industry in the Province, we also dismiss this ground of appeal.

[20] The judge's reference to the many jobs that would be created by the mine, the positive economic impact it would have on the economy, the revenue the Province would earn through royalties and taxes and the effect the Minister's decision would have on the mining industry in Nova Scotia, are not an indication that he considered inappropriate factors. Rather, these are relevant considerations under the first and second **Baker** factors, the nature of the decision being made, a policy one, and the **MRA**'s statutory scheme to encourage, promote and facilitate mineral exploration, development and production for the economic advantage of the Province. Thus the judge was correct to consider them.

[21] Accordingly, we dismissed the appeal.

[22] The respondents sought costs of this appeal. We declined to decide what costs, if any, should be paid with respect to this appeal until the hearing of Mr. Higgins' appeal from the judge's costs decision, scheduled to be heard on November 22, 2013. We directed that entitlement to costs on this appeal be dealt with as part of the costs appeal, with the parties to include this as an issue in their facts.

Hamilton, J.A.

Concurred in:

MacDonald, C.J.N.S.

Fichaud, J.A.