NOVA SCOTIA COURT OF APPEAL
Citation: ***Higgins v. Nova Scotia (Attorney General)***, 2013 NSCA 118

Date: 20131009
Docket: CA 415194
Registry: Halifax

Between:

Forrest C. Higgins, Jr.

Applicant/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

Judge:	The Honourable Justice David P.S. Farrar
Motion Heard:	October 4, 2013, in Halifax, Nova Scotia, in Chambers
Held:	**Motion for a stay dismissed.**
Counsel:	Robert H. Pineo, Alison Morgan and Jeremy Smith, for the applicant/appellant Darlene Willcott, for the respondent Attorney General of Nova Scotia John Keith, Jack Townsend and Jeffrey Flinn, for the respondent D.D.V. Gold Limited Geoffrey Saunders, for the respondent Mining Association of Nova Scotia not participating Henry Vissers, for the respondent, Nova Scotia Federation of Agriculture not participating

Decision:

[1] The applicant sought an order staying a Vesting Order issued by the Minister of Natural Resources pending the hearing of his application for leave to appeal to the Supreme Court of Canada from a decision of this Court (2013 NSCA 106). The Vesting Order would transfer ownership of a parcel of land owned by the applicant to the respondent, D.D.V. Gold Limited. For further background I refer to this Court's reasons in dismissing the applicant's appeal.

[2] At the conclusion of argument on October 4, 2013, I provided the parties with a short oral decision dismissing the applicant's motion for a stay. At that time I indicated I would provide further written reasons in due course. What follows are my reasons.

[3] Both parties are in agreement that the applicable test for granting a stay in the context of an application for leave to appeal is summarized by Justice Beveridge in **T.G. v. Nova Scotia (Community Services)**, 2012 NSCA 71. The first question is whether there is an arguable issue of public importance, an important issue of law or mixed law and fact, or the matter is otherwise of such a nature and significance as to warrant a decision by the Supreme Court of Canada as required for leave to appeal.

[4] If the applicant is able to satisfy the first part of the test the question becomes whether it will suffer irreparable harm if the relief is not granted. If successful on that branch of the test, the third inquiry is whether the applicant would suffer greater harm if the relief is denied than if the respondent would suffer if the relief is granted (the balance of convenience). **RJR-MacDonald Inc. v. Canada (Attorney General)**, [1994] 1 S.C.R. 311.

[5] If the moving party fails on any part of the test, relief may still be granted in exceptional circumstances.

Arguable Issue

[6] The appellant, in its Notice of Application for Leave to Appeal to the Supreme Court of Canada, seeks leave on the following grounds:

1. That the Honourable Appeal Judge and Honourable Court of Appeal erred at law in determining the availability and content of procedural fairness to be granted by the Minister to an individual landowner who is in the "shadow of expropriation" in the context of an order vesting land in a third party expropriation authority.
2. That the issue of procedural fairness in such a context reaches the level of public importance.

[7] Although the application for relief references the "availability and content of procedural fairness" it does not appear to me that the "availability" of a procedural fairness has ever been an issue in this case. The real dispute between the parties – and the issue before the Supreme Court below, and this Court – has been with respect to the content of the duty in these circumstances.

[8] The content of the duty of procedural fairness in a given situation is determined through the application of the well-established framework articulated by the Supreme Court of Canada in **Baker v. Canada (Minister of Citizenship and Immigration)**, [1999] 2 S.C.R. 817.

[9] The arguable issue test is a low threshold to meet, however, it is nevertheless a threshold. In my view, this is one of those cases where the applicant has failed to meet the threshold. Mr. Higgins, Jr. has not shown in the materials he has filed nor the submissions that have been made that there is an arguable issue let alone one that is of public importance. Simply stating that an issue is arguable and that it is of national importance does not make it so.

[10] There is nothing that has been filed to suggest that there are conflicting decisions regarding the content of the duty of fairness, that there is conflicting legislation in other jurisdictions or that the **Baker** test is not appropriate in these circumstances.

[11] The issue on the proposed appeal is the content of the duty of fairness to be owed to a person in the position of Mr. Higgins when his land is sought to be expropriated. The duty of fairness owed to him has been determined by the application of the **Baker** test by the Supreme Court and the Nova Scotia Court of Appeal. There is no arguable issue raised that the **Baker** test is not the proper test or should be modified.

Irreparable harm

[12] Even if I were convinced that the first part of the test had been met, the motion also fails on the irreparable harm aspect of the test. Again, I am not satisfied on the materials and submissions presented that Mr. Higgins would suffer irreparable harm if a stay were not granted. Bold statements that a party will suffer irreparable harm are not enough; cogent evidence must be presented to support the assertion. The applicant's argument on irreparable harm is two-fold:

1. If the open pit mine is allowed to proceed, the land upon which he grows Christmas trees will be destroyed; and
2. The ancestral home on the property, although dilapidated and not having any services to it for a number of years, has sentimental value.

[13] With respect, this does not establish that the loss of this piece of land would amount to irreparable harm.

[14] In **M. R. Martin Construction Inc. v. Doaktown Transport Ltd.**, [2006] N.B. J. No. 93 (C.A.), Richard, J.A. succinctly summarized the law with respect to uniqueness of the land in circumstances analogous to this:

> 12 In **Canadian Western Trust Co. v. Robson**, [2003] A.J. No. 236 (C.A.)(QL), Côté J.A., in refusing a stay of execution, commented as follows at para. 11:
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> > The fourth point is that though we may have assumed at one time that all land is unique so that loss of any piece of land would be irreparable harm, the Supreme Court of Canada a few years ago (in a case on specific performance) said that that is not so. Therefore, we cannot presume it, and would need evidence to show that a given piece of land is unique. There is no such evidence here, so there would be no irreparable harm by allowing the order of the Master to be enforced. Nor does the affidavit in support of this motion show other evidence of irreparable harm.
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> 13 The decision of the Supreme Court of Canada to which Côté J.A. was referring is undoubtedly **Semelhago v. Paramadevan**, [1996] 2 S.C.R. 415, in which the majority of the Court held that specific performance should not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available.

> 14 In the present case, I have not been persuaded that the land in question is sufficiently unique that it should be immune from seizure on the basis that Doaktown could not be adequately compensated with damages in the event that it is successful in appealing the underlying action. Doaktown has not adduced any evidence to prove that it would suffer irreparable harm if M R Martin enforces its lien. (Emphasis mine)

[15] Likewise, I have not been persuaded that this land is sufficiently unique that its loss would amount to irreparable harm. No evidence was presented to suggest this land was such that it could not be replaced nor valued in monetary terms.

[16] Nor am I persuaded that the loss of the house with "sentimental value" gives rise to irreparable harm. No authority was presented in support of this argument and I know of none.

[17] In my view, the evidence presented falls far short of establishing irreparable harm.

[18] As a result of my findings on the first two parts of the test, the third part, balance of convenience, need not be addressed.

[19] Finally, I am not satisfied nor was it argued by the applicant that this case was within the exceptional circumstances exception such that the relief should be granted even though the first three parts of the test have not been met.

[20] One other issue arose on the hearing of this motion. At the commencement of the hearing the applicant objected to the introduction of the affidavits of Martin John Hall and Walter R. Buchnell filed by D.D.V. in response to the motion. As is apparent from these reasons, it is not necessary for me to address the admissibility of the affidavits of Messrs. Buchnell and Hall as I have not relied on them.

[21] The motion for a stay is dismissed. D.D.V. shall be entitled to costs on the motion of $2,500 inclusive of disbursements.

Farrar, J.A.