

NOVA SCOTIA COURT OF APPEAL

**Citation: *Higgins v. Nova Scotia (Attorney General)*,
2013 NSCA 155**

Date: 20131220

Docket: CA 417846

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
Nova Scotia Federation of Agriculture

Respondents

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

Appeal Heard: November 22, 2013, in Halifax, Nova Scotia

Held: Leave to appeal granted, but the costs appeal dismissed,
per reasons of judgment of Hamilton, J.A.; MacDonald,
C.J.N.S. and Fichaud, J.A.

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

Reasons for judgment:

[1] The issue in this appeal is whether the judge at first instance erred in ordering the landowner to pay party and party costs to D.D.V. Gold Limited (DDV), deemed to be the expropriating authority, and to the Attorney General of Nova Scotia (AGNS) when he dismissed the landowner's appeal challenging the validity of the expropriation of his land.

[2] The appellant, Forrest C. Higgins, Jr., owned a parcel of land. The Nova Scotia Minister of Natural Resources granted a vesting order pursuant to s. 70 of the **Mineral Resources Act**, S.N.S. 1990, c. 18 (**MRA**) vesting Mr. Higgins' land in DDV, one of the respondents. Mr. Higgins appealed the Minister's order to the Supreme Court of Nova Scotia. J.E. Scanlan, J., as he then was, found the vesting order was validly granted, dismissed his appeal and sought written submissions from the parties on costs (2013 NSSC 138).

[3] Before costs were determined, Mr. Higgins appealed the judge's decision on the merits to this Court ("merits appeal"). The "merits appeal" was heard and dismissed by this Court (2013 NSCA 106), with this Court reserving its consideration of and decision on costs to be awarded in connection with the "merits appeal" until the hearing of the present appeal, Mr. Higgins' appeal of the judge's costs order. These reasons deal with Mr. Higgins' costs appeal and with the costs to be paid in connection with his "merits appeal".

[4] The judge's costs decision is reported at 2013 NSSC 186. He found that the matter before him was an attack on the validity of the expropriation and as such was distinct from an assertion of a claim for compensation by Mr. Higgins, so that the costs provisions of the **Expropriation Act**, R.S.N.S. 1989, c. 156 (**EA**) did not apply:

[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.

[Emphasis added]

[5] Accordingly, he awarded costs in accordance with the **Civil Procedure Rules**. He noted the principle that successful parties are generally entitled to their costs. He referred to his discretion to award costs that are just and appropriate in the circumstances. He considered the factors set out in Rule 77.07, including the complexity of the matter, the importance of the matter to the parties and the amount of effort involved in preparing for and conducting the appeal before him. He applied Tariff C, applied a multiplier of two, and ordered Mr. Higgins to pay costs of \$6,000 plus disbursements of \$10,136.07 to DDV and awarded costs inclusive of disbursements of \$2,000 to the AGNS.

[6] With respect to his costs appeal, Mr. Higgins argues the judge erred in ordering him to pay costs because (1) his entitlement to and assessment of costs are governed by the **EA**, (2) the **EA** does not provide for the payment of costs by the landowner to the expropriating authority or the AGNS, (3) the **EA** provides that he is entitled to costs in connection with “asserting a claim for compensation”, (4) this provision of the **EA** should be interpreted broadly to include his challenge to the validity of the expropriation of his land as being “incidental” to his intended assertion of a claim for compensation and (5) it was premature for the judge to award costs because once he asserts his claim for compensation pursuant to the **EA**, if he and DDV do not agree on the amount of costs to be paid to him in connection with his claim, his costs will be determined by the Nova Scotia Utility and Review Board.

[7] His arguments with respect to the costs to be paid in connection with his “merits appeal” are similar.

[8] He argues that the standard of review we are to apply is correctness because the judge erred in interpreting the costs provision of the **EA**, but agrees that if the judge was correct in finding that the challenge to the validity of the expropriation was not incidental to his intended assertion of a claim for compensation, that such costs awards are discretionary and this Court is not to intervene unless the judge applied incorrect legal principles or the decision is so clearly wrong as to amount to a manifest injustice; **Drum Head Estates Ltd. v. Chapin Estate**, 2013 NSCA 132, para. 3; **DRL Coachlines Ltd. v. GE Canada Equipment Financing G.P.**, 2011 NSCA 23 at para. 10; **Awan v. Cumberland Health Authority**, 2010 NSCA 50.

[9] The entitlement to and assessment of costs in land expropriation cases are governed by statute; Mark M. Orkin, *The Law of Costs*, 2d ed (Toronto: Thomson Reuters, 2013) at 2-336.11.

[10] The relevant provisions of the **EA** state:

52 (2) 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 a claim for compensation.

(3) Subject to subsection (5), where an expropriating authority and an owner agree on the amount of compensation, but do not agree on the amount of costs to be paid, the costs to be paid to the owner shall be determined by the Board.

(4) Where the compensation awarded to an owner by the Board is greater than the amount offered in the offer to settle, the expropriating authority shall pay to the owner costs as determined by the Board.

(5) Where the compensation awarded to an owner by the Board is equal to or less than the amount offered in the offer to settle, the owner is entitled to costs, as determined by the Board, to the date of service of the offer to settle but the owner shall bear the owner's own costs that are incurred after that date.

[Emphasis added]

[11] Similar provisions in the Manitoba **Expropriation Act**, C.C.S.M., c. E190, were considered in **Fouillard v. Ellice (Rural Municipality)**, 2007 MBCA 108; leave to appeal to SCC dismissed, [2007] S.C.C.A. No. 555. There the court held that “there is a clear distinction between compensation proceedings where there is a statutory scheme providing for payment of costs to the land owner, and court proceedings to challenge the validity of the expropriation itself”.

[12] In that case the judge at first instance ordered that solicitor client costs be paid to the unsuccessful appellants who challenged the expropriation of a portion of their land. The Court of Appeal overturned that order stating:

53 Concerning the solicitor and client costs, I am of the opinion that the award of costs to the appellants cannot stand. With all due respect to the decision in *Costello*, there is a clear distinction between compensation proceedings where there is a statutory scheme providing for payment of costs to the land owner, and court proceedings to challenge the validity of the expropriation itself. In the former, the only issue is compensation and it is fit and proper that the land owner who is being deprived of his/her property should be compensated in such circumstances. In the latter, it is an ordinary court proceeding to quash an order in the Court of Queen's Bench. The rationales with respect to costs are decidedly different, a distinction recognized in the *Act* itself. Sec. 15(6) of the *Act* mandates that the authority pay reasonable costs incurred by the owner in determining compensation; on the other hand, s. 20(7) enables the authority, with leave of the judge who granted the order, to recover costs in the event it is necessary to proceed to court to obtain an order for possession of the expropriated property.

54 I agree with counsel for the municipality that, as a matter of policy, challenges to expropriation orders should not be encouraged by the courts by providing litigants with financial support regardless of outcome.

[13] See also: **Luitkevicuis v. Sydney Mines (Town)**, 1990 CarswellNS 265 (a decision of the Nova Scotia Expropriations Board) and **Parks Projects Limited v. Halifax, City of** (1983), 54 N.S.R. (2d) 116 (S.C.A.D.).

[14] Mr. Higgins argued that **Manitoba v. Russell Inns Ltd.**, 2013 MBCA 46, **Smith v. Alliance Pipeline Ltd.**, 2011 SCC 7, and **Hill v. Nova Scotia (Attorney General)**, [1997] 1 S.C.R. 69 support his position that costs should be awarded to him. I disagree. They each relate to a situation where a landowner was asserting a claim for compensation for the expropriation of their land, not disputing the validity of the expropriation as was the case in **Fouillard** and is the case in this appeal.

[15] I agree with the distinction made in **Fouillard** and by the judge in this case. Challenging the validity of an expropriation is distinct from, and is not incidental to, the assertion of a claim for compensation under the **EA**. Hence the costs provisions of the **EA** are not applicable to Mr. Higgins' appeal to the judge or to this Court. As the provisions of the **EA** do not apply, the judge did not err in applying the **Civil Procedure Rules** in determining the costs to be paid. Nor did he err in exercising his discretion in setting costs under the **Civil Procedure Rules**. He did not apply an incorrect legal principle and his decision is not so clearly wrong as to amount to a manifest injustice.

[16] I would grant leave to appeal, but dismiss the costs appeal. With respect to the costs appeal, I would order Mr. Higgins to pay costs in the amount of \$500 inclusive of disbursements to each of DDV and the AGNS, payable at the time he receives compensation for his expropriated land.

[17] With respect to the costs of the "merits appeal" that this Court previously dismissed, I would order Mr. Higgins to pay costs to each of DDV and the AGNS in the amount of \$1,000 inclusive of disbursements, again payable at the time he receives compensation for his expropriated land.

[18] The costs I would order Mr. Higgins to pay on both of his appeals to this Court are less than this Court's ordinary costs. My reasons for this are two-fold. First, this was among the first, if not the first, vesting order issued by the Minister under the **MRA** so there were no precedents available to provide guidance to Mr. Higgins on the procedure the Minister was to follow. Second, s. 173 of the **MRA** provides for an appeal of the Minister's decision to the Supreme Court of Nova

Scotia without indicating the scope of that appeal, making it difficult for Mr. Higgins to determine whether or not to appeal.

Hamilton, J.A.

Concurred in:

MacDonald, C.J.N.S.

Fichaud, J.A.