

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Le Chameau Exploration Ltd. v. Nova Scotia (Attorney General), 2007 NSSC 386

Date: (2007/12/11)

Docket: S. Sn. No. 277337

Registry: Sydney

IN THE MATTER OF: An application by the Applicants for an Order in the nature of Certiorari to quash the decision of the Executive Director of the Nova Scotia Museum to refuse to issue a Category B Heritage Research Permit to the Applicant Le Chameau Explorations Limited

AND

IN THE MATTER OF: An application by the Applicants for an Order for Mandamus to compel the Minister of Tourism, Heritage and Culture for the Province of Nova Scotia, or his authorized representative, to issue a Category B Heritage Research Permit to the Applicants

Between:

Le Chameau Exploration Limited, a body corporate incorporated pursuant to the laws of the Province of Nova Scotia, **3185716 Nova Scotia Limited**, a body corporate incorporated pursuant to the laws of the Province of Nova Scotia, **Soverign Exploration Associates International Inc.**, a body corporate, incorporated pursuant to the laws of the State of Utah

Applicants

v.

The Attorney General of Nova Scotia representing Her Majesty The Queen in the right of the Province of Nova Scotia, **The Honourable Len Goucher** Minister of Tourism, Culture and Heritage, and **Bill Greenlaw**, in his capacity as Executive Director of the Nova Scotia Tourism

Respondents

Judge: Justice A. David MacAdam

Heard: December 11, 2007, in Sydney, Nova Scotia (Orally)

Written Decision: March 28, 2008

Counsel: Gary J. Corsano for the Applicants
Dale A. Darling for the Respondents

By the Court:

[1] Le Chameau Exploration Limited (“Le Chameau”) seeks an Order in the nature of Certiorari quashing the decision of the Executive Director (“the Director”) of the Nova Scotia Museum to deny a Category B Research Permit pursuant to the *Special Places Protection Act*, R.S.N.S. 1989, c. 438. The Applicant also seeks mandamus, in order to compel the Director to issue the permit sought.

[2] 3185716 Nova Scotia Limited and Sovereign Exploration Associates International Inc. have withdrawn as applicants in this matter.

[3] The Applicant alleges the Director acted in excess of jurisdiction and erred in law by determining the ownership of the wreck of the Royal Navy sloop HMS *Fantome*. In the alternative, the Applicant submits the Director breached the rules of natural justice and procedural fairness by denying the Applicant the opportunity to be heard with respect to the claim of ownership of the vessel asserted by the government of the United Kingdom.

Background

[4] This Application involves Le Chameau's attempts to explore an area off the Nova Scotia coast that is believed to contain the wreck of the sloop *Fantome*. The French-built *Fantome* was captured by the Royal Navy and taken into British service and transferred to the North American Station at Halifax in 1812. The sloop subsequently saw action in the War with the United States that had begun in 1812. The *Fantome's* duties included blockade duty, commence raiding and supporting army landing parties along the American coast during 1812 and 1813.

[5] In the spring of 1814, the *Fantome*, under the command of Lt. Thomas Sykes was dispatched from Halifax to intercept American shipping along the mid-Atlantic and Northeast coasts. The *Fantome* captured the American brig *Dantzig* on 4 May and the Spanish brig *Cidade de Leira* on 26 July. In August and September, 1814, the *Fantome* operated as the dispatch vessel between the flagships of the British Chesapeake and Penobscot flotillas and the North American Station at Halifax. In late August, British forces burned most of the public buildings in Washington, including the White House and the Treasury, which, it is believed, were first looted.

[6] On 29 September 1814, the *Fantome* sailed from the Chesapeake with several prize vessels captured by the British fleet. This convoy arrived at Castine, Maine, in early October, where additional captures were apparently loaded, then proceeded to St. John, where the *Fantome* left most of the vessels that had come north. The *Fantome* then sailed for Halifax, escorting four other vessels. The *Fantome* and three of these ships were lost aground near Prospect, Nova Scotia.

[7] While there is no manifest for the *Fantome* and the other vessels in the convoy, the Applicant believes the ships were carrying plunder from Washington, Alexandria and Castine.

[8] Le Chameau and its principal, Robert MacKinnon, have been involved in exploring and recovering artifacts from wrecks on the coast of Nova Scotia. The Applicant acknowledges that;

The potential connection of the *Fantome* with the burning of the Whitehouse is an intriguing tale, yet one that has never been confirmed; neither, in fact, has the final resting place of the *Fantome*.

[9] The legal regime under which Le Chameau conducts its activities is governed by the *Treasure Trove Act*, R.S.N.S. 1989, c. 477, and the aforementioned *Special*

Places Protection Act. A license under the *Treasure Trove Act* relates to a geographical area, not a specific wreck or site. The *Treasure Trove Act* provides, at sections 3, 7 and 8:

Grant of licence

3 The Governor in Council may from time to time by licence under the hand of the Minister grant to any person the right to search in any part of the Province specified in the license for precious stones or metals in a state other than their natural state and to recover and retain the same upon the payment to the Minister of a royalty thereon at such rate as the Governor in Council may prescribe.

Retention of treasure upon payment of royalty

7 The Minister may upon payment of a royalty at the rate prescribed by a license confirm to the holder of a licence the right to retain for his own use and benefit any precious metals or stones in a state other than their natural state and any treasure and treasure trove discovered and recovered by him within the area covered by his licence.

Right of entry and search upon Crown lands

8 The holder of a licence issued under this Act may in accordance with the terms and conditions of his license enter and search upon Crown lands within the area covered by the licence.

[10] In this case, Le Chameau sought and was issued Treasure Trove License # 150 (“the License”), which was issued by the Minister of Natural Resources. The

License covered a tract of underwater land near Prospect, including an area known as “Phantom Cove”. In order to perform explorations or excavations, it is also necessary to obtain a Heritage Research Permit (“a Permit”) pursuant to the *Special Places Protection Act*, which provides in sections 8 and 9:

Heritage research permit

8 (1) No person shall carry out explorations or make excavations on any land in the Province, including land covered with water, for the purpose of seeking heritage objects, without a heritage research permit.

(2) The Minister, or a person authorized by the Minister, may issue heritage research permits authorizing archaeological, historical, or palaeontological explorations and excavations in the Province.

(3) A heritage research permit shall be subject to the following:

- (a) the application must be made on a form approved by the Minister;
- (b) the applicant must be competent to conduct heritage research as proposed on the form provided;
- (c) the permit holder must submit a report on the work done to the Minister within the time specified on the permit and in such detail as the Minister requires; and
- (d) the permit holder must deliver possession of all heritage objects recovered, while excavating pursuant to the heritage research permit, to the Museum or to

any other public institution which the Minister may designate, which objects become the property of the Province.

(4) Notwithstanding clause (d) of subsection (3), the Museum or other public institution designated by the Minister pursuant to said clause (d) may return any heritage object received to the person who recovered it, subject to such conditions as to the care and disposition of the object as the Museum or other institution, as the case may be, determines.

[11] The Applicant had obtained Permits for the area covered by the License for a number of years between 1996 and 2004, although little was accomplished in that time. In May 2005, Le Chameau received a Category A (archaeological reconnaissance) Permit for the License area. Le Chameau intended to work with Sovereign Exploration Associates International who were to finance the exploration, which was to be carried out by professionals approved by the Nova Scotia Museum. They subsequently obtained a Category C Permit, pursuant to which they completed an Archaeological Resource Impact Assessment. This was followed by an application for a Category B Permit, on September 19, 2005, which, if issued, would authorize archaeological research.

[12] On March 1, 2006, the British High Commission sent a note to the Department of Foreign Affairs, Canada, respecting “the decision by the Province of Nova Scotia to award treasure trove licenses for the wrecks of two British warships.

HMS *Fantome* and HMS *Tilbury*. The *Tilbury* is not of concern on this

Application. The note continued:

Both these wrecks were Royal Navy warships which sunk in the 18th and 19th centuries off the coast of Nova Scotia and lie in the Canadian territorial sea. In response to a request for information from the High Commission, the Department of Natural Resources of Nova Scotia (Mr. Rick Ratcliffe) has confirmed that it has issued licenses for both wrecks under the Nova Scotia Treasure Trove Act. We understand that the licenses have been issued to a US company to carry out salvage operations and that the company intends to start work later this year. Under the licensing agreement the provincial government of Nova Scotia will receive 10% royalty on any property recovered and the remaining property will belong to the company.

The British High Commission wishes to draw the to the Department's attention that both HMS *Fantome* and HMS *Tilbury* enjoy sovereign immunity as warships. These wrecks retain sovereign immunity after sinking, unless they were captured by another State prior to sinking or the United Kingdom, as the flag State, has expressly relinquished its rights. The wrecks were not captured before sinking and the United Kingdom has not relinquished its rights. The rights of the United Kingdom are not lost merely by the passage of time. Canada (including the Province of Nova Scotia) does not acquire any right to ownership to the wrecks by reason of the fact that they are lying in the Canadian territorial sea. Although Canada, as the relevant coastal State, can control access to the wrecks, the wrecks and their cargo remain the property of the British Government. No person or State may salvage or attempt to salvage these sovereign immune wrecks without the express consent of the United Kingdom.

[13] On March 31, 2006, Robert Ogilvie, Manager, Special Places, in the Department of Tourism, Culture and Heritage, issued a Heritage Research Permit to the Applicant, authorizing archaeological reconnaissance of Phantom Cove,

although the letter refers to a “Heritage Research Permit ... for an Archaeological Reconnaissance,” which would suggest a Category A permit.

[14] In early April, 2006, the British note was forwarded by the Department of Foreign Affairs to Daryl Eisan, the Regional Director of Intergovernmental Affairs for Nova Scotia. On May 2, the Applicant submitted an application for a Category B Heritage research permit, which would allow it to carry out archaeological research. On May 17, Louis Simard, the Director of the Oceans and Environmental Law Section at the Department of Foreign Affairs, Canada, wrote to Mr. Eisan, noting the position of the British government that the wreck of the *Fantome* enjoyed sovereign immunity. He went on to state that “no salvage operation should be conducted without the consent of the United Kingdom.” After discussing the legal arrangements for dealing with the matter, he added, “as a matter of international law, Canada should ensure that these wrecks are not disturbed without the consent of the state that owns the vessels.” He asked to be informed of “what actions Nova Scotia intends to take regarding the two wrecks, in light of the formal British claim to ownership and sovereign immunity.”

[15] On May 29, 2006, Mr. Ogilvie evaluated the Heritage Research Permit application filed on May 2, and made his recommendations:

Recent ownership claim British High Commissioner needs to be sorted out before this can be issued. Complications with Treasure Trove License and past work are problematic as well.... Do not approve until jurisdictional & ownership issues clarified.

[16] On July 20, 2006, Mr. MacKinnon wrote to Rick Ratcliffe, Registrar of Petroleum and Mineral Titles at the Department of Natural Resources, stating, [w]e are aware that Britain has expressed an ownership interest in the ‘Ship’ Fantome....” He went on to refer to physical evidence arising from previous investigations in the area that, he alleged, suggested “that we are not presently dealing with the ship Fantome in our investigations inside the claim covered by the appropriate NS Treasure Trove License” but rather the wreck of some other British naval vessel. He went on to express concern about the lack of reply to the Class B application, and to request an immediate determination with respect to the British claim in the event that the Fantome were to be located.

[17] The decision to refuse approval – apparently arising from the comments of Mr. Ogilvie respecting the application – was not communicated to the Applicant

until August 31, 2006, when, in response to an inquiry by counsel, the Applicant received a letter dated August 9, 2006, from Bill Greenlaw, Executive Director of the Heritage Division at the Department of Tourism, Culture & Heritage. Mr. Greenlaw wrote to James Sinclair, the Primary Investigator for Le Chameau:

I regret to inform you that the application can not be approved at this time. The United Kingdom has advised Foreign Affairs Canada that sunken British military vessels remain the property of the United Kingdom and, as such, retain sovereign immunity. We are not in a position to issue a permit that would authorize disturbance of another sovereign state's unsundered sunken military vessel without its express consent.

You may wish to seek information from the United Kingdom on conditions under which consent might be obtained to investigate the particular British government property which remains within the Phantom Cove area. If you or Le Chameau Explorations are able to obtain permission directly from the United Kingdom, we would be willing to consider a future application.

Law

[18] The Applicant is of the view that the *Special Places Protection Act* and the *Treasure Trove Act* do not permit the Director to determine ownership of a vessel or artifact purportedly lying in an area covered by a treasure trove license. It says both statutes imply that the Province of Nova Scotia owns cultural and heritage property. It appears, however, from the correspondence noted above, that the

director accepted the British claim of ownership. If there are other laws that are relevant to heritage and cultural property, over which the province claims constitutional jurisdiction, these determinations should be made in a proper forum, according to the Applicant.

[19] The Applicant also says the Director failed to observe the rules of natural justice and procedural fairness in deciding not to issue the requested permit. An administrative decision-maker has a duty of procedural fairness, including an obligation to give a party who will be affected by the decision an opportunity to put forward their views.

Existence of a Duty of Procedural Fairness

[20] The existence of a common law duty of procedural fairness has long been recognized and in *Real Cardinal and Eric Oswald and Director of Kent Institution*, [1985] 2 S.C.R. 643, Le Dain, J. in delivering the judgment of the Court, at p. 653, stated:

This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative

decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual: ...

Here the decision of the Director was an “administrative decision, not of a legislative nature, that affected the “rights, privileges or interests” of the Applicants.

Scope and Conduct of the Duty

[21] L’Heureux-Dube J. reviewed several factors relevant to determining the content of the duty of procedural fairness in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; [1999] S.C.J. No. 39(QL):

22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is 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 a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

23 Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In [*Knight v. Indian*

Head School Division No. 19, [1990] 1 S.C.R. 653] at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness....

24 A second factor is the nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates': [*Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*], [1990] 3 S.C.R. 1170] at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted....

25 A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated....

26 Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: ... As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: ... Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: ... Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the 'circumstances' affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be

unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

27 Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect 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: ... While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: ...

28 I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[22] The Applicant notes the Director did not inform it that it was in receipt of the British Diplomatic Note or the correspondence from the Department of Foreign Affairs, and says it had no opportunity to respond to any competing ownership claim before its application for the Heritage Research Permit was rejected. The Applicant also references the delay in relaying the decision, which may have been made as early as May 29, 2006, when Mr. Ogilvie completed the evaluation, but was not conveyed until the end of August.

[23] As to the procedural fairness factors reviewed in *Baker*, the Applicant says the decision was an administrative one, based on established policies and procedures governing the issuance of Heritage Research Permits. The Applicant says if the Director was entitled to consider the British claim, he was required to afford the Applicant an opportunity to be heard on this point. As to the importance of the decision, the Applicant says the effect of the decision has been to “totally suspend the operations of the Applicant *on the entire treasure trove claim* and has had the effect of completely stalling its operations” [emphasis by Applicant.] The Applicant says it had a legitimate expectation the Permit would be issued based on established policy and procedures. Ultimately, the Applicant claims, it was “denied any procedural fairness in the consideration of its application for a heritage research permit.”

[24] The Applicant had a legitimate expectation that the Director would consider and decide this administrative question issue according to the standard procedures set out in the legislation, and according to the principles of natural justice and procedural fairness. The Applicant had a significant interest in having the Permit issued.

Conclusion

[25] The issue on this judicial review application is not the merits of the decision made by the Director, but rather the matter of procedural fairness. In reviewing the procedure used by a decision-maker, it is not the Court's role to substitute its own decision for that of the decision-maker. The Court's role is to determine whether the decision-maker accorded procedural fairness.

[26] I am satisfied that an order in nature of certiorari is appropriate here. The Applicant was denied the opportunity to make submissions on the legal claim to ownership of the wreck of the *Fantome*, even though this claim was precisely the basis upon which the Applicant was denied a Heritage Research Permit. Regardless of the merits of the British claim, it was a fundamental error for the Director to accept it, without question, and without allowing the Applicant an opportunity to be heard. The fact the Applicant appears to have been aware of the British claim before it was informed of the denial of its application (as demonstrated by Mr. MacKinnon's letter of July 20, 2006) does not displace the denial of procedural fairness. As such, the decision is quashed.

[27] Given that the grant of certiorari is based upon the denial of procedural fairness, it would not be appropriate to grant mandamus, as sought by the Applicant. I have not determined whether the Applicant was entitled to have the permit issued, only that it was provided insufficient opportunity to be heard on the issue. In the limited circumstance of this decision, I also make no finding on the Applicant's assertion it was not for the Director to decide ownership of the *HMS Fantome*. I also make no determination on the respondent's request that the affidavit of Mr. MacKinnon be struck. Finally, I make no decision on the standard of review applicable to the Director's decision, given that the basis for the present decision is the absence of procedural fairness. All of these, at least initially, are matters for determination by the persons authorized by the relevant legislative enactments, after first providing all parties who may be affected by their decision a full and fair opportunity to present their positions.

[28] Judgment accordingly.

J.