



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Her Majesty the Queen in Right of Newfoundland and Labrador v. O.D. Holdings Limited and City Sand and Gravel Limited*, 2021 NLCA 52

Date: October 29, 2021

Docket Number: 202101H0032

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT
OF NEWFOUNDLAND AND LABRADOR

APPLICANT/
APPELLANT

AND:

O.D. HOLDINGS LIMITED and CITY
SAND AND GRAVEL LIMITED

APPLICANT/
RESPONDENT

Coram: Welsh J.A.

Court Appealed From: Newfoundland and Labrador (Board of Public Utilities)

Application Heard: October 26, 2021

Judgment Rendered: October 29, 2021

Counsel for the Applicant/Appellant: Donald E. Anthony Q.C. and Eugene Chao

Counsel for the Applicant/Respondent: Ian F. Kelly Q.C. and Daniel M. Glover

Authorities Cited:

CASES CITED: *Vey v. Newfoundland and Labrador Pharmacy Board*, 2019 NLCA 72.

STATUTES CONSIDERED: *Expropriation Act*, RSNL 1990, c. E-19, sections 32(5) and 35.

RULES CONSIDERED: *Court of Appeal Rules*, NLR 38/16, rules 42, 36, 8, 10, and 16(1).

Welsh J.A.:

[1] Following the expropriation of property owned by O.D. Holdings and City Sand and Gravel (the “Company”), Her Majesty the Queen in Right of Newfoundland and Labrador as represented by the Minister of Works, Services and Transportation (the “Province”) was ordered by a panel of the Board of Commissioners of Public Utilities (the “Board”) to pay to the Company compensation of \$10,139,196.66 for detrimental affection to their land caused by the expropriation.

[2] The Province filed a notice of appeal and, pending determination of the appeal, applies for an order staying the enforcement of the Board’s order (rule 42 of the *Court of Appeal Rules*, NLR 38/16). The Company submits that the application for a stay should be dismissed, and further, applies for an order striking out the notice of appeal (rule 36 of the *Court of Appeal Rules*).

[3] At the hearing, the Company’s application to strike out the notice of appeal was dismissed, and decision on the Province’s application to stay enforcement of the order was reserved.

Staying Enforcement of the Order

Background

[4] An order of the Board for the payment of compensation for the expropriation of land may be appealed directly to this Court. Section 32(5) of the *Expropriation Act*, RSNL 1990, c. E-19, provides:

The minister or an owner of land that has been expropriated may, within 30 days after the date of an award, give to the other party notice of an appeal to the Court of Appeal against the findings of the board upon a question of law or fact in connection with the expropriation or upon the question of the amount of compensation awarded by the board.

[5] However, filing a notice of appeal does not operate as a stay of the order. Further, section 35 of the *Act* directs the payment of compensation within six months, and provides for the payment of interest:

The minister shall pay the compensation awarded by the board within 6 months after the date on which the award was made, and, where the compensation is not paid within 30 days after the date on which the award was made, it shall after the end of the 30 days bear interest at the rate of 5% a year until it is paid.

[6] In this case, the Board's order is dated April 28, 2021. The six-month period for payment would expire on October 28, 2021. The Province has not made the payment ordered by the Board. An application to stay the enforcement of the order was filed on October 13, 2021 with the hearing scheduled for October 26.

Section 35 of the Act

[7] The Company submits that this Court has no jurisdiction to order a stay of enforcement of the order after the expiration of the six-month period for payment established by section 35 of the *Act*. It is not necessary to decide this issue given my conclusion, discussed below, denying the application for a stay.

The Test

[8] The three pronged test that applies in determining whether to order a stay is discussed in *Vey v. Newfoundland and Labrador Pharmacy Board*, 2019 NLCA 72:

[4] In determining whether to grant an application for a stay pending an appeal, a three-pronged test is applied as discussed in *Weir's Construction Ltd. v. Warford Estate*, 2016 NLCA 65, 1 C.A.N.L.R. 282:

[17] The first prong of the test is whether there is a serious issue to be argued on appeal. This requires a preliminary, but not a detailed or extensive, investigation of the merits of the appeal to ascertain whether the appeal is frivolous or vexatious. ...

[18] The second prong of the test is whether the applicant for the stay will suffer irreparable harm if the stay is not granted. It is the nature of the harm, rather than its magnitude, that must be considered. ...

[19] The third prong of the test is an assessment of the balance of inconvenience. ...

[9] Regarding the first prong of the test, I am satisfied that, based on a review of the grounds set out in the notice of appeal, the low threshold that applies at this stage of the inquiry is met. I would not characterize the appeal as frivolous or vexatious or with no arguable basis.

[10] The second prong of the test, irreparable harm to the Province if the stay is not granted, has not been established by the Province on a balance of probabilities. Counsel submits that there is a significant risk that, if the money is paid to the Company, and the Province is subsequently successful on the appeal, the Province will not be able to recover the money.

[11] However, the Province has provided no evidentiary basis for that submission other than that the Company has ceased the quarry operations and disposed of the related machinery and tools. However, there is no indication that the Company is insolvent. Indeed, the Company submits that compensation funds could be used in the pursuit of other ventures. Without some basis, it cannot be assumed that the Company will act irresponsibly knowing that the appeal is pending and that either party may be successful in whole or in part. I note that, to avoid further delay, the appeal has been set to be heard on January 26, 2021.

[12] In the result, I am satisfied that the Province failed to establish that it would suffer irreparable harm if a stay of enforcement of the Board's order is not granted.

[13] The third prong of the test, the balance of convenience, sometimes referred to as the balance of inconvenience, must be considered in context, and in particular, in light of the Province's delay in proceeding with the appeal and with this application. Appropriate parameters for dealing with the appeal are defined by the six-month period within which compensation was to be paid.

[14] Rule 8 of the *Court of Appeal Rules* provides that a notice of appeal shall be filed "within 30 days after the order appealed from has been filed in the court appealed from". (See also rule 10 which provides that, in an appeal involving a tribunal, the *Rules* apply with the necessary changes.) The Board's decision was

dated April 28, 2021. The notice of appeal was filed on May 28, 2021. It could have been filed earlier, rather than on the last day falling within the prescribed limitation period.

[15] A transcript, insofar as it would be required for the appeal, was available immediately since the Board provided a transcript on a continuing basis. The Province's appeal book, transcript and factum should have been filed without delay, given the six-month period prescribed in section 35 of the *Act*. In fact, the appeal book and transcript were filed on October 25, 2021, and the factum had not been filed at the time of the hearing. Without these filings, the Company was unable to file its factum.

[16] In short, the Province has not taken steps to carry forward the appeal diligently as required by rule 16(1), and in order to have the appeal heard on a timely basis to accommodate the application of section 35 of the *Act*. Further, the application for a stay was made just fifteen days, and set to be heard just two days before the six-month period for the payment of compensation would expire.

[17] The inference to be drawn from these factors is that, regardless of the limitation period specified in the statute for the payment of compensation for the expropriation, the Province, having taken no steps to have the appeal heard, was not concerned with paying out the funds before the appeal was decided. The apparent change in its position just prior to expiration of the six-month period, without further explanation, is not persuasive in establishing that the balance of convenience should weigh in its favour.

[18] Meantime, the Company regularly contacted the Province seeking compliance with the Board's order, indicating that payment of compensation on a timely basis for what the Province had expropriated was a significant, not inconsequential issue for the Company. By means of these communications, the Province had notice of the importance of proceeding with the appeal without delay.

[19] In the result, I am satisfied that the third prong of the test, the balance of convenience weighs in favour of the Company.

Summary

[20] The Province has failed to establish on a balance of probabilities that it would suffer irreparable harm if the enforcement of the Board's order is not stayed pending determination of the appeal. Further, the balance of convenience weighs in favour of refusing the stay.

Application to Strike the Notice of Appeal

[21] The Company submitted that the notice of appeal should be struck on the basis that the appeal is without merit and that the Province has delayed, and indeed, taken no steps to prosecute the appeal.

[22] As discussed above, I am not satisfied that the appeal is without merit in the sense that there is no arguable case. It cannot be said that the appeal is frivolous or vexatious.

[23] Regarding the question of delay, while the Province has not proceeded with the appeal as required in accordance with the *Rules*, the delay from filing the notice of appeal to the present is not inordinately long. That said, the Province has a responsibility to proceed with the appeal. A date has been set for the hearing with requirements for filing materials.

[24] In the circumstances, the test for striking the notice of appeal has not been met. Accordingly, at the hearing the application was dismissed.

Costs

[25] The Province was unsuccessful in its application to stay enforcement of the Board's order. Further, I am satisfied that the Company would not have brought the application to strike the notice of appeal had the Province proceeded with the appeal in a timely manner, rather than seeking a stay just days before the six-month period for the payment of compensation expired.

[26] In the result, it is appropriate that costs of both applications should be borne by the Province. However, I am not satisfied that the circumstances are such as to warrant costs at a level higher than column 3 of the scale of costs in the *Court of Appeal Rules*.

Summary and Disposition

[27] The Company's application to strike the notice of appeal was dismissed at the hearing. The Province's application for a stay of enforcement of the Board's order is dismissed. The Company shall have its costs for both applications under column 3 of the scale of costs, for one counsel.

B. G. Welsh J.A.