

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Re: Bezig Construction Ltd. v. Her Majesty the Queen in Right of Ontario as represented
by the Minister of Transportation

Before: Métivier R.S.J., Gravelly and Swinton JJ.

Counsel: Roger T. Beaman for the Applicant Bezig Construction Ltd.
D. Thomas H. Bell and Stephen F. McNamee for the Respondent Minister

Heard at Toronto: January 19, 2006

ENDORSEMENT

[1] This is an application for judicial review alleging breaches of the duty of procedural fairness by an Inquiry Officer appointed under s. 6 of the *Expropriations Act*, R.S.O. 1990, c. E.26 ("the Act") to conduct an inquiry as to whether a proposed taking of land by expropriation was "fair, sound and reasonably necessary" in the achievement of the objectives of the expropriating authority, the Minister of Transportation.

[2] In particular, the applicant argued that the Inquiry Officer breached a duty of procedural fairness by denying an adjournment of the hearing and by permitting certain conduct during the hearing by opposing counsel and Ministry staff and by refusing to admit a document in evidence.

The jurisdiction of this Court

[3] The respondent argued that this Court has no jurisdiction to hear the application for judicial review because the Inquiry Officer was not exercising a statutory power or a statutory power of decision as defined in s. 1 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1. In the alternative, the respondent argued that the decision of the Inquiry Officer with respect to the adjournment was reasonable and the inquiry was conducted in accordance with the duty of procedural fairness.

[4] An application for judicial review may be brought where relief could have been sought in proceedings by way of an application for certiorari (s. 2(1).1, *JRPA*). Dickson J. (as he then was) stated in *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602 at 608,

Certiorari is available as a general remedy of supervision of the machinery of government decision-making. The order may go to any public body with the

power to decide any matter affecting the rights, interests, property, privileges or liberty of any person.”

[5] This Court held that it had jurisdiction to review a decision of an Inquiry Officer in *Karn v. Ontario Hydro* (1977), 11 L.C.R. 1 at 6, rev'd on other grounds 11 L.C.R. 9 (Ont. C.A.). There, the issue was whether the Inquiry Officer had an obligation to consider alternative routes for a proposed power transmission corridor.

[6] The relief sought here is in the nature of certiorari, as the applicant seeks to quash the Inquiry Officer's report because of a denial of procedural fairness. We are satisfied that we have jurisdiction to hear this application. The duty of the Inquiry Officer is to write a report in which she makes findings of fact and gives her opinion on the fairness, soundness and reasonable necessity of the taking (s.7(5) and (6)). It is true that the ultimate decision to expropriate is made by the approving authority. Nevertheless, the hearing before the Inquiry Officer is the only chance for the property owner to challenge the plan to expropriate, and the report must be considered by the approving authority before the final decision is made to expropriate (s. 8(1)). Therefore, the report is an important step in the expropriation procedure, which affects the interests of the property owner.

[7] Moreover, the Act contemplates a hearing and certain procedural rights for the property owner during the inquiry process (ss. 7(4) and 7(9)(b)). In these circumstances, an application for judicial review is available to challenge actions taken by an Inquiry Officer that do not comply with the duty of procedural fairness.

The issue of procedural fairness

[8] In cases where it is alleged that a tribunal has denied procedural fairness, it is not necessary for the reviewing court to determine the standard of review in accordance with the pragmatic and functional approach. As stated by this Court in *Kalin v. Ontario College of Teachers* (2005), 75 O.R. (3d) 523, “Decisions which do not comply with the rules of procedural fairness and natural justice cannot stand” (at para. 9).

[9] In general, deference is accorded to the decisions of administrative tribunals dealing with procedural matters and requests for adjournments. However, as noted by this Court in *Kalin*, a tribunal which denies a request for an adjournment must give reasons which show that it has considered the reasons for the request, the impact on the party requesting it, and the competing interests.

[10] In this case, junior counsel for the applicant requested that the hearing be adjourned so that the applicant could proceed with a request under the *Freedom of Information and Privacy Act*, which it had made April 25, 2005, two days before the April 27 hearing. The Inquiry Officer gave detailed reasons explaining why the request was denied, including the fact that the applicant had a “long and intimate knowledge of this project” and the applicant had been given the disclosure from the Minister required by the Act. In her view, the requested information was not relevant and necessary for the

hearing. She characterized it as general in nature and the request for it in the nature of a "fishing expedition".

[11] Junior counsel participated in the hearing and cross-examined the Ministry witness for several hours. Although the date for the hearing had been agreed upon well in advance, he did not have witnesses prepared to participate. Although he was offered an opportunity by the Inquiry Officer to proceed with his witnesses the next day or to reconvene the hearing, if necessary, no further hearing occurred.

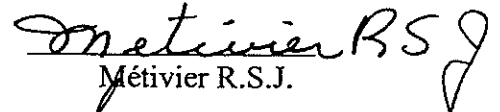
[12] In our view, there was no denial of procedural fairness by the Inquiry Officer when she rejected the request for an adjournment.

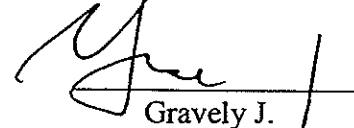
[13] Moreover, there was no denial of procedural fairness in the conduct of the inquiry. While the applicant objected to the comments of Ministry counsel to the witness during cross-examination, the Inquiry Officer commented on the impropriety of the conduct. There is no indication that the applicant was prejudiced by this conduct.

[14] As well, the Inquiry Officer dealt with the interventions by other Ministry staff and commented that they may have assisted the applicant. Counsel did not seek to cross-examine them, nor is it apparent that he tried to file the document which he had at the hearing.

[15] In our view, there was no denial of procedural fairness in the conduct of the hearing. Therefore, the application for judicial review is dismissed. The applicant having undertaken to this Court that he would surrender possession of the land forthwith, no declaration that the respondent shall be entitled to take possession of the land immediately is required.

[16] If the parties cannot agree on costs, the respondent may make brief written submissions within 21 days of the release of this decision, and the applicant may make responding submissions within 14 days thereafter.


Métivier R.S.J.


Gravely J.


Swinton J.

DIVISIONAL COURT

BEFORE MÉTIVIER R.S.J., GRAVELY J., SWINTON J.

DATE JANUARY 26, 06

DISPOSITION - THIS APPEAL

APPLICATION IS *dismissed for reasons set
out in the enclosurement
attached hereto.*

Métivier R.S.J.

ONTARIO

SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

Proceeding Commenced at Toronto

APPLICATION RECORD

THOMSON, ROGERS
Barristers and Solicitors
Suite 3100
390 Bay Street
Toronto, Ontario
M5H 1W2

ROGER T. BEAMAN
L.S.U.C. No. 14079T
416-868-3157
Fax No. 416-868-3134

Solicitors for the Appellant

(050534 RTB/jlb)