NOVA SCOTIA COURT OF APPEAL
Citation: *Nova Scotia v. Johnson*, 2005 NSCA 99

Date: 20050624
Docket: CA 217598
Registry: Halifax

Between:

Her Majesty The Queen in Right of the Province of Nova Scotia

Appellant

v.

George Johnson and Carolyn Johnson

Respondents

Judge: Justice Linda Lee Oland

Appeal Heard: October 13 and 14, 2004

Subject: **Expropriation - Market Value - Injurious Affection - Business Loss - Noise Disturbance - Owners' Time - Loss of Pension Benefits**

Summary: The Province's expropriation for the Cobequid Pass highway included four parcels (parcels A, B, C, and D) owned by the respondents. When taken, one parcel was pastureland and the other three largely woodland. The lands are located in Cumberland and Colchester counties, renown as habitat for the wild lowbush blueberry plant which must be managed and developed into producing fields. The respondent owners have grown and harvested wild blueberries for years.

The Province appealed the Nova Scotia Utility and Review Board's award of compensation to the owners.

Issue: Whether the Board erred in

(a) determining the market value of the expropriated lands;
(b) determining a business loss in relation to the expropriation of parcel C and the leafcutter bees;
(c) awarding compensation for devaluation of remaining lands due to traffic noise;
(d) allowing claims for access to severed lands;
(e) awarding claims for owner's time and for pension loss.

Result: Appeal allowed in part. Where the Board had not enjoyed any particular advantage by reason of having seen and heard the witnesses, the court had the entire record of the hearing before it, and the parties had urged that it do so were the appeal allowed, the court determined the compensation arising from the expropriation.

In determining market value for parcels A, B and D, the question was not that identified by the Board, namely whether the Johnsons were likely to develop their present woodlands into blueberry producing lands but rather, in accordance with the definition of market value in the expropriation legislation, what amount would have been paid for the land if, when expropriated, it had been sold on the open market by a willing seller to a willing buyer. The evidence supporting the argument that land with blueberry producing potential carries a premium came from an agrologist who testified about an appraisal which included such a premium. However that appraisal was not entered into evidence, the appraiser who prepared it did not testify, and neither the location of the lands nor other relevant information was provided. The Board had had before it another appraisal which indicated that no premium attached, provided sales comparables in the vicinity of the expropriated lands, and did not use incorrect methodology in calculating an average price per acre. Moreover the Board's statement that the valuation of fully productive blueberry lands was unchallenged was incorrect. The Board's determination of market value for parcels A, B and D was patently unreasonable.

The Board awarded compensation for a buffer zone, access difficulties and increased transportation costs as injurious affection. Its establishment of a 100 meter buffer zone adjacent to parcels A and B to protect remaining lands of the owners next to the highway from the effect of de-icing salt was not patently unreasonable. However, its finding that an existing blueberry field south of parcel D had lost its value in the face of evidence that the owner had continued to harvest it was.

The expropriation severed each of parcels A and B. The decision of the Board in making an award in relation to parcel A was not patently unreasonable. However, its decision to award the cost of constructing a new access road to reach a woodlot was patently unreasonable when the taking of parcel B did not sever any existing access. In the particular circumstances of this case and on the evidence before it, the decision of the Board to award the owners compensation for extra costs relating to the movement of equipment along another route when that previously used by them had been expropriated was patently unreasonable.

The Board awarded compensation for the loss of alfalfa leafcutter bees occasioned by the expropriation of parcel C which could supply the forage necessary for such bees. Whether it characterized their claim as business loss or injurious affection, its conclusion that the owners had had a leafcutter bee business was patently unreasonable.

Given the evidence before it, the Board's awards of compensation for devaluation, on account of traffic, to the owner's home property and to their future home property, neither of which were expropriated, cannot be said to be patently unreasonable. However one portion amounted to double compensation and the total was decreased accordingly.

The Board's award of "compliance costs" for owner's time relating to the preparation and presentation of the expropriation claim does not satisfy the standard of review of correctness. The expropriation legislation did not provide for compensation for "compliance costs". Time spent personally by the owner in

instructing counsel or in negotiations and preparation for the hearing does not come within "other costs" in s. 52(1): *Park Projects Ltd. v. City of Halifax* (1982), 25 L.C.R. 193. Nor is owner's time either disturbance damages pursuant to s. 27(3) or "personal and business damages" within the definition of injurious affection in s. 3(l)(h)(i)(B). The owners might recover their time attending before the Board which was allowed in Park Projects - that quantum is to be determined by the Board. Similarly, the Board's award for loss of pension benefits did not meet the correctness standard.