19981028 Docket: CA146478

NOVA SCOTIA COURT OF APPEAL

Cite as: Halifax (Regional Municipality) v. Irving Oil Ltd., 1998 NSCA 169

Roscoe, Pugsley and Bateman, JJ.A.

BETWEEN:

HALIFAX REGIONAL MUNICIPALITY	)	Gerald J. Goneau
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Alan G. Hayman, Q.C. and
	)	Gwendolyn M. Fountain
	)	for the Respondent
IRVING OIL LIMITED	)	
	)	
Respondent	)	Appeal Heard:
	)	September 16, 1998
	)	
	)	
	)	Judgment Delivered:
	)	October 28, 1998
	)	
	)	
	)	

THE COURT: The appeal is dismissed per reasons for judgment of Pugsley, J.A.; Roscoe and Bateman, JJ.A., concurring.

PUGSLEY, J.A.:

The discrete issue in this appeal is whether the Nova Scotia Utility & Review Board erred in law in determining that the respondent's (Irving) claim for compensation for injurious affection fulfilled the requirements of s. 31(1) of the **Expropriation Act**, R.S.N.S. 1989, c. 156.

That section provides:

> **Procedure for Claim for Injurious Affection**
>
> **31 (1)** Subject to subsection (2), a claim for compensation for injurious affection shall be made by the person suffering the damage or loss in writing with particulars of the claim within one year after the damage was sustained or after it became known to him, and, if not so made, the right to compensation is forever barred.

The submission of the appellant Municipality is that, in order to satisfy the requirements of s. 31(1) of the **Act,** a claimant must file with the Board and serve on the expropriating authority, a notice of hearing and statement of claim, in the forms prescribed by the regulations to the **Act.**

The appellant further submits that a letter from the claimant within the time limit prescribed in s. 31(1) of the **Act**, which provided the details of the claim for injurious affection set out in a report from an expert appraiser, does not meet the standard imposed.

This submission, counsel submits, is consistent with recent interpretations of the section by the Board, as well as this Court, in the cases of **Summit Realty Ltd., v. County of Halifax** (1990), 44 L.C.R. 121 (N. S. Exp. Comp. Bd.), and **Nova Scotia v. Research Island A. G.** (1993), 52 L.C.R. 146 (N.S.Util. Rev. Bd.), (1994), 132 N.S.R. 156 (N.S.C.A.).

Background:

To assist in the construction of improvements to the Herring Cove Road, the City of Halifax (now the Halifax Regional Municipality) filed documents in the office of the Registrar of Deeds, on May 28th, 1980, expropriating a strip of land, approximately 2400 square feet in total area, owned by Irving.

The net effect of the expropriation was to effectively eliminate the use of two, of the four, double pump islands used by Irving to operate the service station located at the site since 1976.

By letter of June 3rd, 1980, the City offered $13,985.00 as full compensation for the lands taken, in accordance with a report prepared by John Walker, a real estate appraiser. Mr. Walker wrote that he did not consider that Irving had suffered any injurious affection to its remaining lands.

On June 30, 1981, Irving's solicitor wrote the City rejecting the offer and advised that it was having appraisals made in order to advance its claim for the expropriated property, as well as for injurious affection.

On August 18th, 1981, Irving's counsel wrote again:

> I am instructed by Irving Oil Limited to claim the following for the above referenced expropriation and this letter is given in compliance with s. 31(1) of the Expropriation Act . . .
>
> With respect to injurious affection suffered by Irving Oil Limited by reason of the partial taking of land Irving Oil claims $94,800.00.
>
> . . .
>
> Particulars of the claim for land taken and injurious affection due to partial taking are set out in the enclosed appraisal of compensation payable prepared by Charles J. L. Hardy ...

On January 21st, 1982, the City's solicitor responded seeking additional information, requesting that discovery examinations be held prior to any hearing.

Counsel for Irving replied on February 9, 1982, stating in part:

> ....At the time you wrote your letter, apparently you had not received our appraisals and a form of claim, you have them now and are considering them.
>
> I will be in touch with you when I receive some instructions from my client.

The matter was apparently forgotten by both counsel as the next communication between the parties was a letter to the Regional Municipality on January 15th, 1997, from Irving's new counsel, setting forth a claim of approximately $200,000, supported by a revised report from Mr. Hardy dated March 15th, 1996.

On September 11th, 1997, Irving filed a Notice of Hearing and Statement of Claim with the Board, and with the Municipality, presumably in accordance with the Regulations made pursuant to the **Act**.

Section 10 of the Regulations provides:

> Proceedings before the Board for a determination of compensation shall be commenced by a notice of hearing which shall be served upon all known parties affected by the determination sought and shall be filed with the Board.

Section 11 (1) provides:

> A notice of hearing served by a claimant for compensation shall be in Form 3.

The Notice of Hearing and Statement of Claim filed by Irving were in accordance with Form 3 and claimed damages for the value of the land taken, for injurious affection to the remaining lands, as well as for interest and costs, both legal and expert.

The Municipality's reply of September 26, 1997, joined issue and also pleaded *laches*, claiming the delay by Irving had prejudiced the Municipality as the relevant legal and real estate files had been lost or misplaced in the interim.

The Municipality filed an amended Reply February 19th, 1998, to add the following:

> The [Municipality] pleads and will argue that the Claimant is not entitled to compensation for any injurious affection claimed by the Claimant by reason of s. 31(1) of the **Expropriation Act** in that the Claimant received an appraisal report prepared by Charles J.L. Hardy, ... dated 30 July, 1981 containing full particulars and reasons for injurious affection and the Claimant did not make claim for compensation for injurious affection until September 11, 1997.

During a pre-hearing conference held on March 3, 1998, before David Almon, the Board member selected to hear the matter, the Municipality requested that Mr. Almon decide the preliminary point of law raised in the amended Reply.

After considering written memoranda filed by both counsel, Mr. Almon determined:

> In this case the Board finds that the Claimant did fulfil the requirements of s. 31(1) of the **Expropriation Act** by providing written notice, with particulars, to the Respondent, within three weeks of receiving the Charles Hardy report, which advised that it had suffered such damage and loss through the City's partial taking. The defence of a statutory bar to Irving's claim of injurious affection is disallowed.

The Municipality appeals to this Court pursuant to the provisions of s. 30 of the **Utility and Review Board Act**, 1992, c. 11 which provides:

> An appeal lies to the Appeal Division of the Supreme Court from an Order of the Board upon any question as to its jurisdiction or upon any question of law, upon filing with the Court a Notice of Appeal within thirty days after the issuance of the Order.

ANALYSIS

For the purposes of this appeal, and without expressing any opinion on this issue, I will proceed as if the Municipality's appeal raises a question of law within the provisions of s. 30 of the **Utility and Review Board Act**.

I am satisfied that neither the Board's decision in **Summit** or **Research Island**, or this Court's conclusions in **Research Island**, assist the appellant.

The question before the Board in **Summi**t, as well as **Research Island**, was whether the claimant had "knowledge of loss or damage to (its) remaining lands upon becoming aware of the taking" by the expropriating authority. In considering this question, the Board concluded that the claimant, in both cases, had filed a Notice of Hearing and Statement of Claim within the one-year period mandated by s. 31(1). The Board was not required to, and did not consider, in either case the subsidiary question of whether the delivery to the Municipality by the claimant of its claim for injurious affection, supported by an expert opinion report, complied with s. 31(1).

The issue in this case, therefore, was never considered in **Summit** or in **Research Island**.

The comments of Justice Freeman, on behalf of the Court, in **Research Island** are germane. He stated at p. 160:

> Like all enactments, s. 31(1) must be considered remedial and construed liberally. However, its effect is to protect an expropriating authority from the necessity of meeting claims on their merits when an owner whose land has been taken fails to respond aggressively enough. For that reason any doubts which arise in the interpretation of the section should be resolved in the favour of the expropriated owner. Similarly, the burden of proving the existence of knowledge of the owner sufficient to justify a defence based upon the s. 31(1) limitation period must fall upon the expropriating authority.

A review of the scheme of the **Act**, and in particular, s. 31(1), does not support the appellant's position.

The scheme of the **Act** is to promote negotiation between the parties leading to settlement without resort to a hearing before the Board.

Section 13 requires the expropriating authority, within 90 days after the deposit of the expropriating document, and before taking possession of the land, to serve upon the registered owner certain materials, including an appraisal report supporting an offer of an amount in full compensation.

Part IV provides a statutory incentive to the parties to enter into negotiations for settlement. Where a claim is made of injurious affection, such a recourse is only available after the claimant has satisfied the requirements of s. 31(1), that is, provided particulars of the claim for compensation.

If the claimant and the statutory authority both agree to dispense with the negotiation proceedings, or are unable to agree to a negotiator, then s. 36(1)(b) provides that:

> . . . the statutory authority or the owner may serve notice upon the other of them or upon the Board, to have the compensation determined by the Board.

This provision providing for the Notice of Hearing and Statement of Claim only comes into effect, therefore, sometime after particulars of the claim pursuant to s. 31(1) have been delivered by the claimant.

This provision is additional support, if any were needed, to convince me that the claim for compensation under s. 31(1) is a distinct issue from the Notice of Hearing and Statement of Claim provided by the Regulations.

The opening words of Regulation 10 further lead to the conclusion that the Statement of Claim and the Notice of Hearing are only required when negotiated settlement has broken down and the parties have to resort to "proceedings before the Board".

It is relevant that s.31(1) does not stipulate that a claim for compensation for injurious affection is to be made in any particular form or manner. It only provides that the claim be made "in writing with particulars".

The letter from Irving's counsel of August 18th, 1981, states that it was given:

> ...in compliance with s. 31(1) of the **Expropriation Act**.

The claim for injurious affection, set out in the letter, is stated to be $94,800.00, and the particulars of the claim for injurious affection are detailed in eleven pages in the attached report of an accredited real estate appraisal.

The information forwarded, in my opinion, complies in all respects with the provisions of s. 31(1) of the **Act**.

Counsel for the Municipality raises a number of additional issues, as follows:

- ...the Board failed to address the main point raised in argument relating to the fact that sixteen years had elapsed before [Irving] filed its Statement of Claim. The [Municipality] suggests that the Board's conclusion is patently unreasonable and should be overturned on appeal because the issue of delay was not addressed.

- Rather than advancing its claim [Irving] did nothing to further their claim for sixteen years while critical records requested by the [Municipality] disappeared....

- ...the [Municipality] has suffered and would continue to suffer significant prejudice in attempting to respond to a sixteen year old claim where the relevant records are conceded by the Respondent to be lost.

While the Municipality raised these issues in its pre-hearing Memorandum filed with the Board, it is clear that they were not issues that the parties had agreed to be raised, nor that the Board had stipulated would form part of the issue to be submitted to it. The Board did not consider these issues because it was not requested to do so. I understand from the

oral submission advanced by Irving's counsel that they are matters to be considered by the Board at its later hearing. It is also of significance that none of these subsidiary issues were raised by the Municipality in its notice of appeal to this Court.

The Municipality could have taken steps, after it received the letter from Irving's counsel in August of 1981, to obtain any additional information it required by making application to the Board pursuant to Regulation 26.

Further, the Municipality had the option to serve notice upon Irving, as well as the Board, to have the compensation determined by the Board at any time pursuant to the provisions of s. 36 of the **Expropriation Act**, if the Municipality was of the opinion that it was being prejudiced by the delay.

CONCLUSIONS:

In my view, the Board was justified, and committed no error of law, in finding on the facts presented to it that Irving fulfilled its requirements under s. 31(1) of the **Expropriation Act.**

I would dismiss the appeal with costs of $1,500.00 together with disbursements.

Pugsley, J.A.

Concurred in:

Roscoe, J.A.

Bateman, J.A.

C.A. No.146478

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HALIFAX REGIONAL MUNICIPALITY	)	
	)	
Appellant	)	
	)	
- and -	)	REASONS FOR
	)	JUDGMENT BY:
IRVING OIL LIMITED	)	
	)	PUGSLEY, J.A.
	)	
Respondent	)	
	)	
	)	
	)	
	)	
	)	
	)	