

NOVA SCOTIA COURT OF APPEAL

[Cite as: Warren v. Nova Scotia (Assessment), 1999 NSCA 135]

Chipman, Roscoe and Flinn, JJ.A.

BETWEEN:

THE DIRECTOR OF ASSESSMENT	)	Randall R. Duplak, Q.C.
	)	and Gwendolyn Fountain
Appellant	)	for the Appellant
)	
- and -	)	Thomas M. Macdonald
	)	for the Board
)	
	)	Paul Warren, in person
	)	Respondent
J. PAUL WARREN and BERNADETTE)	
WARREN and the CAPE BRETON	)	Demetri Kachafanas
REGIONAL MUNICIPALITY	)	for the Respondent, Cape Breton
	)	Regional Municipality
Respondents)	
	)	Appeal Heard:
	)	November 9, 1999
)	
	)	Judgment Delivered:
	)	November 9, 1999
)	
)	

THE COURT: The appeal is dismissed, per reasons for judgment given orally by Chipman, J.A.; Roscoe and Flinn, JJ.A., concurring.

Chipman, J.A.(Orally):

[1] This is an appeal by the Director of Assessment from a decision of the Nova Scotia Utility and Review Board. An appeal to this Court lies on any question relating to the Board's jurisdiction or upon any question of law; s.30(1) of the **Nova Scotia Utility and Review Board Act**, 1992, c.11.

[2] The Regional Assessment Appeal Court made a decision respecting property in Port Morien in the respondent Cape Breton Regional Municipality. The respondent Paul Warren appealed the decision by filing a notice of appeal with the Board on October 13, 1998. He did not serve notice on the clerk of the Municipality, but the clerk of the Board forwarded the notice to the Municipality. The Director did not deny that the clerk of the Municipality received a copy of the notice of appeal within thirty days of the decision of the Regional Assessment Appeal Court. The Director did, however, take the position that the Board did not have jurisdiction to hear the appeal because Mr. Warren failed to serve notice on the clerk of the Municipality as required by s. 86(1) of the **Assessment Act**, R.S.N.S. 1989, c.23.

[3] Section 85 and s. 86(1) of the **Assessment Act** read:

85 Any person aggrieved by a decision of the assessment appeal court, including the clerk on behalf of the municipality and the Director, may appeal therefrom to the Nova Scotia Utility and Review Board .

86 (1) Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the clerk of the municipality in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the Clerk of the Nova Scotia Utility and Review Board, and not otherwise.

[4] A preliminary hearing was held by the Board to address the Directors' objection to its jurisdiction. The Director filed an affidavit by the clerk of the Municipality deposing that Warren had failed to serve him with the notice of appeal. In the affidavit he stated he received a copy of the notice from the clerk of the Board and he attached to his affidavit a letter in which he took the position that he disagreed with any attempt by the Director to deny Warren a hearing before the Board, and further took the position that the Municipality was sufficiently notified by the Board through its clerk.

[5] The Board, by decision dated May 14, 1999, dismissed the Director's preliminary motion holding that it did have jurisdiction to hear the appeal. In the Board's view, as long as the person required to be served with the notice of appeal did in fact receive it within thirty days from the decision of the Regional Assessment Appeal Court the purpose of the requirement in s. 86(1) of the **Assessment Act** was fulfilled.

[6] Before us, the Director contends that the Board erred in law in holding that it had jurisdiction because Warren simply did not comply with the provisions of the Act, and there are no provisions for extending the time or otherwise relieving from failure to comply with the service requirements.

[7] We are unanimously of the opinion that this appeal must fail because, although s. 86(1) of the **Assessment Act** was not complied with respecting service on the Municipality, that party expressly waived its right to notice required by the statute. That

a party can waive a statutory requirement of notice was recognized by the Rand, J. in **Canadian Acceptance Corporation Limited v. Fisher** (1958), 14 D.L.R. (2d) 225 (S.C.C.).

[8] The principle of waiver of a statutory requirement was applied by the Divisional Court of the Ontario High Court of Justice **In Re N.H.D. Developments Limited and Regional Assessment Commissioner, Region No. 11 et al.** (1980) 118 D.L.R. (3d) 365, 30 L.R. (2d) 689. In that case, the Ontario Municipal Board held that it had no jurisdiction to hear an assessment appeal because the taxpayer failed to comply with the service requirement of s. 63(6) of the **Assessment Act**, R.S.O. 1970, c.32, notwithstanding that the party who was not properly served waived the service requirement.

[9] Section 63(3) of the **Assessment Act**, R.S.O. 1970, c. 32, like s. 85 of the **Assessment Act, supra**, provided a right of appeal to the Ontario Municipal Board. Section 63(6) of the **Assessment Act**, R.S.O. 1970, c.32, like s. 86(1) of the **Assessment Act, supra**, set out the requirements of service of the notice of appeal.

[10] In allowing the appeal from the Board's decision Southey, J. said:

With the greatest respect to the learned member of the Board, who recognized that the problem was one of some difficulty, we are all of the view that the requirements for service contained in s. 63(6) do not go to the jurisdiction of the Board to hear an appeal from the Assessment Review Court. That jurisdiction is derived in the first instance in this case from s. 63(3).

Because the matter is not one of jurisdiction, there is no question in our minds that a party for whose benefit the provisions for service set out in s. 63(6) have been enacted can

waive compliance with those provisions. When such waiver occurs, the failure to comply with the provisions for service do not constitute a bar to the Board's hearing the appeal.

[11] We think that reasoning applies to the case before us.

[12] It is not therefore necessary to consider the other points raised in argument. The appeal is dismissed with costs to each of the respondents, Warren and the Municipality, in the amount of Five Hundred Dollars (\$500.00) plus disbursements to be paid by the appellant.

Chipman, J.A.

Concurred in:

Roscoe, J.A.

Flinn, J.A.