

Date: 20011206
Docket No.: CA 168248

NOVA SCOTIA COURT OF APPEAL

Cite as: Collins v. Nova Scotia (Assessment), 2001 NSCA 178

Glube, C.J.N.S.; Cromwell and Oland, J.J.A.

BETWEEN:

EMILIA M. COLLINS

Appellant

- and -

DIRECTOR OF ASSESSMENT

Respondent

REASONS FOR JUDGMENT

Counsel: Emilia M. Collins, for the appellant, not represented by
counsel
Randall R. Duplak, Q.C. for the respondent
S. Bruce Outhouse, Q.C. for the Nova Scotia Utility and
Review Board

Appeal Heard: October 15, 2001

Judgment Delivered: December 6, 2001

THE COURT: Appeal allowed per reasons for judgment of Oland, J.A.;
Glube, C.J.N.S. and Cromwell, J.A. concurring.

OLAND, J.A.:

[1] In its interim decision dated October 22, 2001, this court reserved decision on the issue of whether the appellant, Emilia M. Collins, was notified of the hearing of

her assessment appeal by the Nova Scotia Utility and Review Board (NSURB) on October 3, 2000. As permitted by that interim decision, the appellant has submitted affidavit evidence on that issue. No further evidence was filed by the respondent, the Director of Assessment.

[2] The **Assessment Act**, R.S.N.S. 1989, c. 23 as amended (the **Act**) requires the NSURB to serve an appellant with notice of the time and place of the hearing of the appeal: see Rules 11 and 12 of the **Assessment Appeal Rules**, N.S. Reg. 287/92. In its decision of November 17, 2000 the NSURB was careful to review what efforts had been made to effect service, before proceeding in the absence of the appellant under s. 80 of the Act. In this appeal, the Director has conceded that if the appellant did not have notice of the October 3, 2000 assessment appeal hearing, the NSURB exceeded its jurisdiction.

[3] The record on the issue of notice includes four affidavits: (a) two sworn by Elaine Wagner, Appeals Officer/Clerk of the NSURB, the first dated January 16, 2001 and the second October 4, 2001; (b) one sworn by the appellant on November 1, 2001; and (c) one by the appellant's husband, Richard Collins, also dated November 1, 2001.

[4] The Wagner affidavits are detailed. Ms. Wagner deposed that she sent a letter dated July 18, 2000 to the appellant by fax and to the solicitor for the Director. It suggested several dates for the hearing of the appellant's assessment appeal and stated that, failing agreement or a response by July 21, 2000, the NSURB would schedule a hearing date. Attached to Ms. Wagner's October 4, 2001 affidavit is a fax transmission sheet confirming that the letter had been successfully transmitted to the appellant's fax number as shown on that letter. It appears that the NSURB used the correct fax number as, less than three weeks previously, it had faxed the appellant at that number a June 29, 2000 letter indicating that Ms. Wagner would be contacting her to canvass hearing dates and Richard Collins had responded to that letter. Furthermore, the appellant had given the NSURB that number in her July 1999 correspondence, the NSURB consistently used it thereafter, and there is no indication that she ever notified the NSURB of any change.

[5] In a letter dated August 10, 2000, Ms. Wagner wrote that the NSURB had not received a response to its July 18, 2000 letter and enclosed a Notice of Hearing confirming October 3, 2000 as the hearing date. She deposed that she arranged for a copy of that letter to be sent by Priority Post to the appellant on August 10, 2000. The copy of Bill of Lading NC 257 218 969 CA attached to her affidavit bears that

date and shows the appellant at an address in Dayton, Ohio as the intended receiver. The copy of the Delivery Confirmation attached to her affidavit indicated that on August 14, 2000 item number NC 257 218 969 CA “has been successfully delivered to the customer” and that the item was signed for by “LD FD”.

[6] The Wagner affidavits were the subject of successful applications by the Director and the NSURB for their introduction as fresh evidence at the first hearing of this appeal on October 15, 2001. Although the appellant had copies of them, she did not address the notice particulars contained in those affidavits. The appellant’s affidavit on the issue of notice consists of five paragraphs, three of which pertain to notice. The first two state simply:

2. THAT I did not receive advance notification of any sort of the finally imposed date of the appeal hearing scheduled unilaterally by the NSURB for October 2000 in Halifax, Nova Scotia, Canada.

3. THAT I learned of that hearing only upon receiving the mailed decision rendered in November 2000 after the hearing was held in my absence by the NSURB

[7] It is to be noted that although she denies “advance notification of any sort”, the appellant did not specify that she did not receive the July 18, 2000 letter the NSURB sent to her fax number, even though Ms. Wagner’s affidavit included confirmation of its transmittal and even though in paragraph 12 of our interim decision, this court indicated that it appeared that the appellant knew that the NSURB intended to set a date for the hearing. Moreover, the appellant did not dispute any of the information on the Delivery Confirmation by, for example, deposing that the address was incorrect or that she knows no one with the initials “LD FD”.

[8] The third paragraph in the appellant’s affidavit pertaining to notice sets out her belief based on “official documents” that “the U.S. Postal Service claims of return to the sender in Nova Scotia of that notification are true and properly documented in the U.S. Postal records.” The records to which she refers are photocopies of two documents contained in the appeal book. One purports to be a page from a register of the main office in Dayton, Ohio which includes a notation “RT 168440 635 Return to Nova Scotia” and the second purports to be a confirmation by someone who describes himself as a T-6 clerk that that item was returned to the sender in Halifax, Nova Scotia on September 23, 2000.

[9] In his affidavit, Richard Collins attached a copy of his November 29, 2000 letter addressed to a person with the Claims and Inquiry section of the U.S. Postal Service at Dayton, Ohio. In that letter, he noted that the photocopy of the return of item RT 168440 635 provided him earlier did not bear the name of either the appellant as addressee nor the sender in Nova Scotia, indicated that the person to whom he directed his letter had stated that the records contained that information, and asked that it be sent to him. His affidavit did not contain any reply to this letter or refer to any subsequent conversation with anyone at the U.S. Postal Service.

[10] Even if the unsworn photocopies put forth by the appellant could be accepted on their face, it cannot be said that the item returned by the Dayton, Ohio post office was the August 10, 2000 letter from the NSURB. The item numbers do not correspond. Neither the sender nor the addressee is identified. Finally, as previously noted, there is evidence by way of Delivery Confirmation attached to Ms. Wagner's affidavit that item number NC 257 218 969 CA was delivered and no evidence that it was returned to the NSURB.

[11] It is the responsibility of NSURB to effect service of the notice of the assessment appeal hearing. Having carefully considered the record, I am not persuaded that the appellant received notice of the NSURB hearing despite the efforts made by the NSURB. The appellant and counsel for the Director agreed that the issue to be determined was not whether notice was served, but rather whether notice was received. As is apparent from the review of the evidence above, the affidavits of the appellant and of Richard Collins are less than satisfactory in that they do not deal with the particulars in the Wagner affidavits and their wording could be interpreted several ways. However, their sworn affidavit evidence does include an unambiguous statement that they learned of the appeal hearing only upon receiving in the mail the decision which issued following that hearing. It is my view then, that whatever she may have known about the NSURB's intention to set a date, the appellant did not have notice of the October 3, 2000 assessment appeal hearing. The NSURB exceeded its jurisdiction when it heard the appellant's appeal in her absence.

[12] The appeal is allowed and the matter is remitted to the NSURB for a new hearing. There will be no award of costs.

Oland, J.A.

Concurred in:

Glube, C.J.N.S.

Cromwell, J.A.