

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Guysborough (District) v. PEV International Research and Development Incorporated*, 2012 NSCA 87

**Date:** 20120823

**Docket:** CA 375965

**Registry:** Halifax

**Between:**

The Municipality of the District of Guysborough

Appellant

v.

PEV International Research & Development Incorporated and  
The Attorney General of Nova Scotia and  
The Nova Scotia Utility and Review Board

Respondents

**Judges:** Saunders, Hamilton, Bryson

**Appeal Heard:** May 29, 2012, in Halifax, Nova Scotia

**Held:** Appeal dismissed with costs payable by the appellant to the respondent, PEV International Research & Development Incorporated, to be fixed in accordance with the **Expropriation Act**, R.S.N.S. 1989, c. 156, as amended, per reasons for judgment of Hamilton, J.A.; Saunders and Bryson, J.J.A. concurring.

**Counsel:** Robert H. Pineo and Jeremy P. Smith, for the appellant  
Brian P. Casey and Ian Brown, for the respondent, PEV International Research & Development Incorporated  
Edward A. Gores, Q.C., for the respondent, The Attorney General of Nova Scotia (not present)  
S. Bruce Outhouse, Q.C., for the respondent, The Nova Scotia Utility and Review Board (not present)

**Reasons for judgment:**

[1] The Municipality of the District of Guysborough (“Guysborough”) appeals the January 16, 2012 Order of the Nova Scotia Utility and Review Board (“Board”) which held that one of the respondents, PEV International Research & Development Incorporated (“PEV”), is entitled to make a claim for compensation under the **Expropriation Act**, R.S.N.S. 1989, c. 156, as amended (“**Act**”), on the basis it is the owner of an interest in land and ordered that a hearing to determine the market value, if any, of that interest should proceed.

[2] For the reasons that follow, I would dismiss the appeal.

Background

[3] The Board sets out the background in its reasons:

[1] This decision of the Nova Scotia Utility and Review Board (the “Board”) results from a preliminary hearing held on December 12, 2011. The purpose of the preliminary hearing was to determine whether PEV International Research & Development Incorporated (“PEV”) can proceed with a claim, under the *Expropriation Act*, R.S.N.S. 1989, c. 156, as amended (the “Act”), for compensation for the value of its interest in land arising from the expropriation by the Municipality of the District of Guysborough (“Guysborough”) of a parcel of land at Highway 316, in Goldboro, Nova Scotia (the “Goldboro land”).

...

[4] Guysborough issued a Certificate of Approval for Expropriation of the Goldboro land on October 26, 2005, and filed a plan of the land at the Guysborough County Registry of Deeds on February 7, 2006. The land was intended to be included in an industrial development for the regasification of liquid natural gas (“LNG”).

[5] The fee simple owner of the land was James Irving Warner (“Warner”). Warner pursued a claim for compensation under the *Act*.

[6] Warner and PEV had entered into an Agreement (the “Agreement”) on July 18, 2005, whereby they agreed to enter into a business relationship involving the development of an LNG regasification plant, a terminal, subsea pipelines,

related facilities, and electrical power generation plants on the Goldboro land (Exhibit P-5, Tab JE-2).

[7] In March, 2007, and prior to the hearing of the Warner claim, Guysborough made an application to the Supreme Court under s. 17 of the *Act* for a determination of the persons who had any ownership of the lands in question because it was uncertain who held the legal title. This uncertainty arose in the course of previous dealings between Guysborough and Warner during 2004 and 2005. A Consent Order was issued on April 27, 2007 by Justice MacLellan which provided:

IT IS ORDERED THAT:

1. Warner is an owner of lands as defined in Section 3(1) of the *Expropriation Act*, specifically, Warner is the owner of a fee simple interest in the Subject Property for the purposes of entitlement to payment under the *Expropriation Act*.
2. **PEV and Warner are owners of lands as defined in Section 3(1) of the *Expropriation Act*, specifically, PEV and Warner are owners of an interest in the Subject Property, by virtue of an agreement dated July 18, 2005 between Warner and PEV, for the purposes of entitlement to payment under the *Expropriation Act*.** [Exhibit P-5, Tab JE-9] [Emphasis added]

[4] In September 2009 PEV filed a Notice of Hearing and Statement of Claim with the Board under the provisions of the **Act** seeking compensation, which it amended in August 2011. There are different bases on which an owner can claim compensation under the **Act**. PEV's present claim for compensation mirrors the wording of the Consent Order, it claims PEV is the owner of an interest in the Goldboro land. It previously claimed compensation based on a business loss, loss of a specific economic advantage and expenses, and losses arising out of disturbance, but withdrew those claims prior to the hearing before the Board.

[5] Guysborough requested that the Board determine at a preliminary hearing whether PEV was entitled to claim compensation on the basis that it is the owner of an interest in the Goldboro land, as opposed to on the basis of a business loss. If PEV had no claim, a preliminary hearing would save time and the expense of introducing evidence concerning the market value of PEV's interest. As the Board noted in its reasons, it has jurisdiction to make such preliminary decisions:

[40] Under Rule 17(1)(b) of its *Regulatory Rules*, the Board “...may...hold a preliminary hearing to...consider an application for an order dismissing the application on the grounds that no application lies to the Board...” ...

[6] The parties agreed on the preliminary process to be followed and no issue is taken on appeal concerning the Board’s jurisdiction to determine this matter in a preliminary proceeding or the procedure followed.

[7] The basis of PEV’s claim, as an owner of an interest in the Goldboro land versus for a business loss, is important in this case. If PEV is restricted to claiming a business loss, it would not be entitled to compensation because at the time of expropriation it did not meet the conditions set out in s. 29 of the **Act** for compensation for a business loss.

[8] Guysborough’s position at the preliminary hearing was that PEV was restricted to claiming a business loss. It argued that because the Consent Order referred to PEV’s ownership interest arising “by virtue of [the Agreement]”, PEV’s rights under the Agreement were determinative of the basis on which PEV could make a claim for compensation. It argued that under article 10 of the Agreement PEV was restricted to only making a claim based on a business loss and was not entitled to make a claim on the basis of being the owner of an interest in the Goldboro land.

[9] Articles 9 and 10 of the Agreement provide:

**9. TERMINATION**

This agreement remains in effect until one of the following events occur:

...

b. the Warner land is expropriated; ...

**10. EXPROPRIATION**

The parties recognize that there is a possibility that the Warner Land could come under an order of expropriation by the Municipality of the District of Guysborough or the Province of Nova Scotia. In this event, the parties

have the right to compensation for business loss under the Expropriation Act (Nova Scotia), and as such the parties will make a compensation claim for a business loss equal to the present value of the projected business profit and their business development expenses, related to the proposed project and Authorized Purpose of this agreement, from the time this agreement comes into effect, to the time of the expropriation, if no remuneration, as per clause 7, has been received by the parties. The fees charged by PEV for this kind of development work amounts to a \$9,300 US per diem over a 5 day week, 50 week year, plus actual travel, communication and legal costs.

[10] There was an Agreed Statement of Facts and a two volume Joint Exhibit Book before the Board by agreement. Neither contained evidence concerning the intention of the parties to the Agreement with respect to article 10. The transcript of the March 14, 2007 Chambers appearance before Justice MacLellan, attended by Guysborough's counsel but not by PEV's, indicates the judge wanted clarification of the basis upon which PEV was claiming to be an owner of the Goldboro land. Following that appearance Guysborough followed up on this issue with PEV's counsel in his March 20, 2007 letter:

Justice MacLellan has requested that the parties participate in a telephone conference to be held at 11 a.m. on April 4, 2007. The purpose of this telephone conference will be to provide clarification of your client's ownership interest. Specifically, the Court wishes to have your client clearly state on the record that it is advancing only a business loss claim and also clearly that it is not advancing a claim for compensation as an owner of the fee simple interest in the property. I did not understand your client's position to be that it is advancing a claim for compensation for the property itself; however, I did not want to advance that position in your absence. I trust we will have an opportunity to discuss this prior to the telephone conference and reach an agreed statement that we can make to his Lordship.

[11] There is no evidence as to whether this issue was resolved. There is nothing in the record indicating there were further submissions to or appearances before the judge. Within a month of the letter the Consent Order was granted.

[12] Neither party argued before the Board that there was any conflicting evidence for the Board to consider and resolve in interpreting the Consent Order and the Agreement. The interpretation was presented to the Board as a question of law. Guysborough went so far as to state at the hearing before us that the only

evidence before the Board for the purposes of interpretation was the Consent Order, the Agreement and the fact the expropriation occurred.

[13] The Board disagreed with Guysborough's position. It found that the Consent Order finally determined, for purposes of the **Act**, that PEV was the owner of an interest in the Goldboro land for the purposes of entitlement to payment under the **Act** (¶ 34, 35). It made reference to the different bases on which compensation may be paid under the **Act** (¶ 37, 38 and 39). It concluded that the Agreement would still be in existence but for the expropriation (¶ 43), that article 10 did not preclude PEV from making the claim set out in its statement of claim, as the owner of an interest in the Goldboro land for the market value of its interest (¶ 44) and that a hearing should be held to determine the market value, if any, of PEV's interest (¶ 47).

#### Issue

[14] The issue before us is whether the Board erred in law in interpreting the Consent Order, which requires us to also determine if it erred in interpreting article 10 of the Agreement.

#### Standard of review

[15] **The Utilities And Review Board Act**, R.S.N.S. 1992, c. 7, as amended, provides for the creation of the Board. Section 30(1) provides for a limited scope of appeal to this Court from a decision of the Board. We can only consider issues of jurisdiction or law. The position of both parties is that the Board's interpretation of the Consent Order is a question of law giving the Court jurisdiction. I agree. As the Board's interpretation of the Agreement is an integral part of its interpretation of the Consent Order, we have jurisdiction to deal with it as well.

[16] This Court in **Nova Scotia (Assessment) v. van Driel**, 2010 NSCA 87, considered the standard of review to be applied to a Board's decision involving an assessment decision:

[13] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶ 54, 57, 62, Justices Bastarache and LeBel, for five justices, said that if existing jurisprudence has established the standard of review, the analysis may be abridged.

[14] In *Wolfson*, ¶ 11-17, this court analyzed the court's standard of review, under *Dunsmuir's* principles, to an assessment decision of the Utility and Review Board. Following *Nova Scotia (Director of Assessment) v. Knickle*, 2007 NSCA 104, ¶ 9-12, the court held that correctness applied to the Board's rulings on general issues of law outside the Board's core expertise, including whether the Board misdefined the burden of proof. Also attracting correctness are true jurisdictional issues, defined by *Dunsmuir* (¶ 59) as implicating jurisdiction "in the narrow sense of whether the tribunal had the authority to make the inquiry". Reasonableness governs the Board's use of its institutional expertise to apply and administer its home statutes, including the *Assessment Act*.

[15] This court must also respect the limited scope of appeal permitted by s. 30(1) of the *UARB Act*. The court may consider only issues of jurisdiction or law. See *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶ 18, 36, 51 and *Young v. WCAT*, 2009 NSCA 35, ¶ 19-20 for the relationship between statutory grounds of appeal and the standard of review.

[17] While this appeal concerns expropriation rather than assessment, the same standard applies.

[18] Both parties say we ought to apply a standard of review of correctness. It is not necessary for me to determine whether the standard of correctness or reasonableness applies in this case, because I am satisfied the Board's decision is correct.

### Analysis

[19] The Board correctly found that the Consent Order was clear in stating that PEV is the "owner of an interest in the [Goldboro land], by virtue of [the Agreement], for the purposes of entitlement to payment under the [Act]." The Consent Order does not state that PEV's entitlement to payment is limited to a claim for business loss as referred to in article 10. If that had been intended, such a restriction could have easily been included in the Consent Order. The Consent Order was not appealed.

[20] The Board was correct in concluding that the Consent Order was not appealed and that under s.17(4) of the **Act** the finding that PEV is an owner:

17 (4) ...shall be deemed to be a final judgment of the Court and, subject to variation on appeal, if any, shall finally determine for all purposes of this Act what persons had any right, estate or interest in the land expropriated and the nature and extent thereof.

[21] The Board's interpretation of article 10 was also correct, that it does not restrict PEV to only claiming for compensation based on a business loss, but permits it to claim compensation on the basis it has, that it is the owner of an interest in the Goldboro land.

[22] Article 10 states that "the parties have the right to compensation under the [Act]". This is not something they have the power to decide, it being determined instead by the provisions of the Act. Article 10 also states "the parties will make a compensation claim for a business loss" and then sets out some bases on which such a claim will be quantified. There is nothing in article 10 that states PEV cannot claim compensation on the other bases permitted under the Act, such as the claim it has made as an owner of an interest in the Goldboro land. To interpret article 10 as preventing PEV from seeking compensation that it would otherwise be entitled to claim under the Act, would require much more specific wording than this.

[23] The parties had the Agreement before them at the time they consented to the Consent Order. They knew its terms. In paragraph 7 of its brief to the Board, Guysborough states that it consented to the Consent Order as a result of the provisions contained in the Agreement. It is unlikely the parties would have consented to the wording in the Consent Order, which specifically states that PEV is the owner of an interest in the Goldboro land for the purpose of entitlement to payment under the Act, if it was their understanding at that time that article 10 precluded PEV from making a claim on that basis.

[24] During argument before us, Guysborough suggested for the first time that we should assume that prior to the Consent Order being granted, there was an agreement between itself and PEV to the effect that PEV would only make a claim for business loss, not as the owner of an interest in the Goldboro land. Each of the parties referred us to certain documents in the record which they suggest support or dispute the existence of such an agreement. The clear wording of the Consent Order, the evident ambiguity of the evidence we were referred to, its



incompleteness and the manner in which this suggestion was made, satisfy me that it would be unsafe to make this assumption. I decline to do so.

### Conclusion

[25] The Board's decision exhibits no error of law or jurisdiction within s. 30(1) of the **Act** and is correct in its interpretation of the Consent Order and Agreement. Accordingly, I would dismiss the appeal with costs to PEV to be fixed in accordance with the **Act**.

Hamilton, J.A.

Concurred in:

Saunders, J.A.

Bryson, J.A.